IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

In Re: LEE COUNTY, FLORIDA
and CORKSCREW GROVE LIMITED
PARTNERSHIP, a limited liability company,
Joint Petitioners **CASE NO.: 22-CA-002743**

v.

KEVIN HILL and JEFFREY KLEEGER,
Intervenors
_____/

INTERVENORS' POST-HEARING PROPOSED FINDINGS AND LEGAL MEMORANDUM

Intervenors Kevin Hill and Jeffrey Kleeger, file the following proposed findings of fact and conclusions of law in this matter.

Findings of Fact

1. This action was filed jointly by Lee County and Corkscrew Grove Limited Partnership, as required by §70.001(4)(d)(2), Fla. Stat. to obtain judicial validation of a settlement of a Harris Act claim.
2. The Settlement Agreement purports to utilize the authority of § 70.001 (4)(d)1 of the Harris Act to allow the County to grant to Corkscrew "a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property…."
3. Under the *Harris Act*, this settlement must be submitted to a circuit court judge "for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to

prevent the governmental regulatory effort from inordinately burdening the real property." §70.001 (4) (d)2, Fla. Stat. and otherwise meet the standards established in the Act.

4. A County Hearing Examiner had reviewed the Settlement Agreement for compliance with the County's Comprehensive Plan and Land Development Code, and her findings, included in a document referred to as the "HEX Report", regarding multiple inconsistencies are described below. (Jt. Petitioners' Ex. 15)
5. The HEX Report explains that a determination of whether "the relief [granted by the Settlement Agreement] is necessary to prevent an inordinate burden to the property owner from the regulation" is "outside the scope of the Hearing Examiner's authority." (Jt. Petitioners' Ex. 15: Ex. 2, p. 3, footnote 11).
6. Whether the Settlement Agreement complies with the standards established in the *Harris Act* for the granting of relief from the application of comprehensive plan and land development regulations as necessary to avoid a violation of the Act is now squarely before this Court by way of the Joint Petition to Approve Settlement Agreement filed in this matter by Lee County, Florida and Corkscrew Grove Limited Partnership on July 23, 2022.

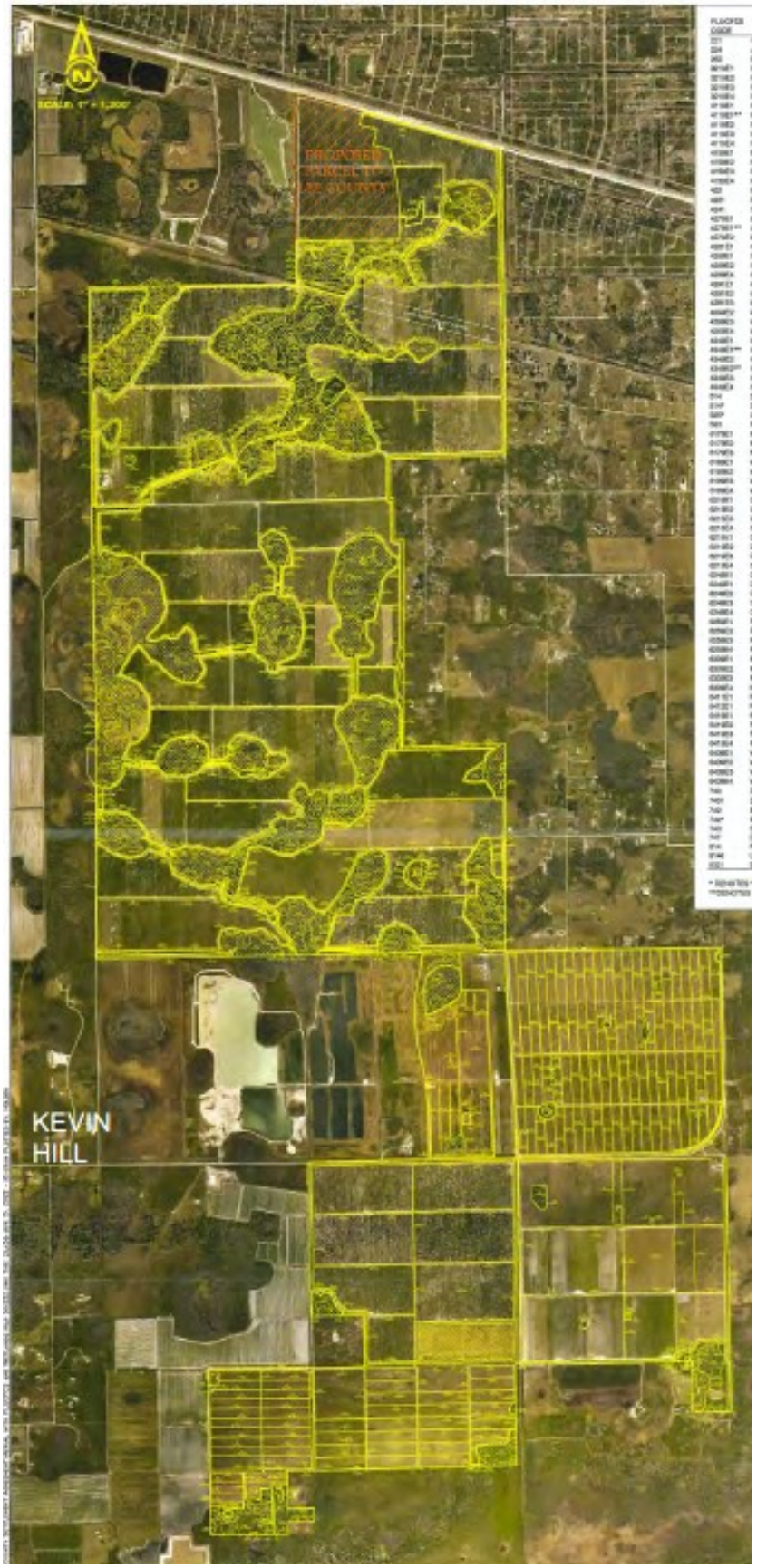
The Intervenors' Interests[1]

7. The Intervenors, Jeffrey Kleeger and Kevin Hill, own property which is near and proximate to the subject property that is the subject of the Settlement Agreement.
8. The Settlement Agreement would adversely affect Intervenors' rural and agricultural way of life, and their use and enjoyment of their homes and property, and increase safety and traffic problems they would experience regularly, because it would allow a substantial

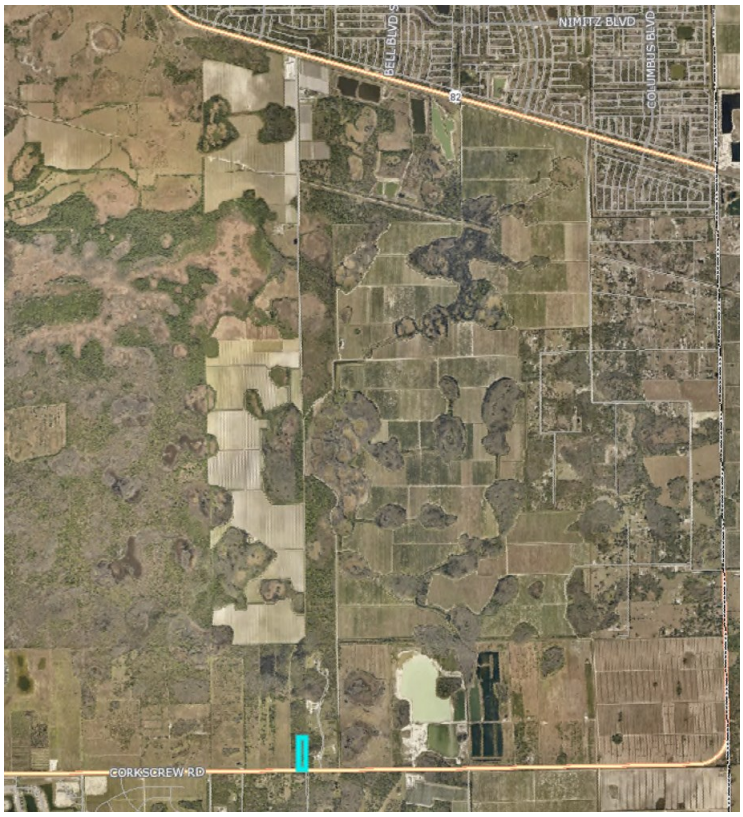
[1] All parties stipulated to the following facts, as alleged in the Petition to Intervene The stipulation by the Joint Petitioners was for the purposes of standing to intervene only, and not for the purposes of rulings on the merits. (Tr., 8.31.22, Pg7 Lines 5-10).

increase in the amount of urban or suburban development that would be allowed on 6,676 acres of land proximate to their homes and property, in violation of the development limits and standards that would otherwise apply in the absence of the Settlement Agreement.

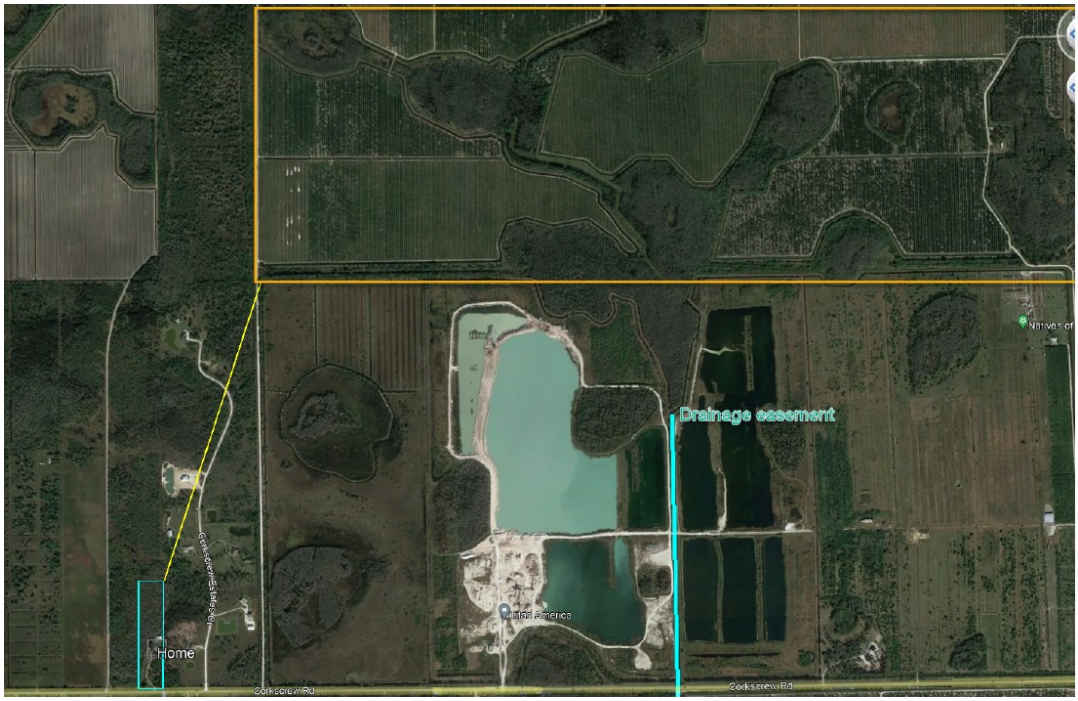
9. The proposed settlement would allow development of the real property (called "Kingston") in the area shown in the aerial below as the area within the yellow boundaries (with wetlands depicted), and KEVIN HILL's property is shown in the area where his name is typed in white font:


KEVIN
HILL

10. Intervenor KEVIN HILL owns property at 20731 CORKSCREW RD, which is within the area that will be impacted and affected by the proposed approval of development of the property that is the subject of the Settlement Agreement, because the increased density and intensity of development approved in the Settlement Agreement will adversely affect his rural and agricultural way of life, and increase address safety and traffic problems that he would experience regularly. He will thus be adversely affected by the Settlement Agreement, which authorizes the County to grant development approvals to Corkscrew that violate the County's Comprehensive Plan and Land Development Regulations to an extent greater than is authorized by statute to avoid violating a landowner's *Harris Act* rights.



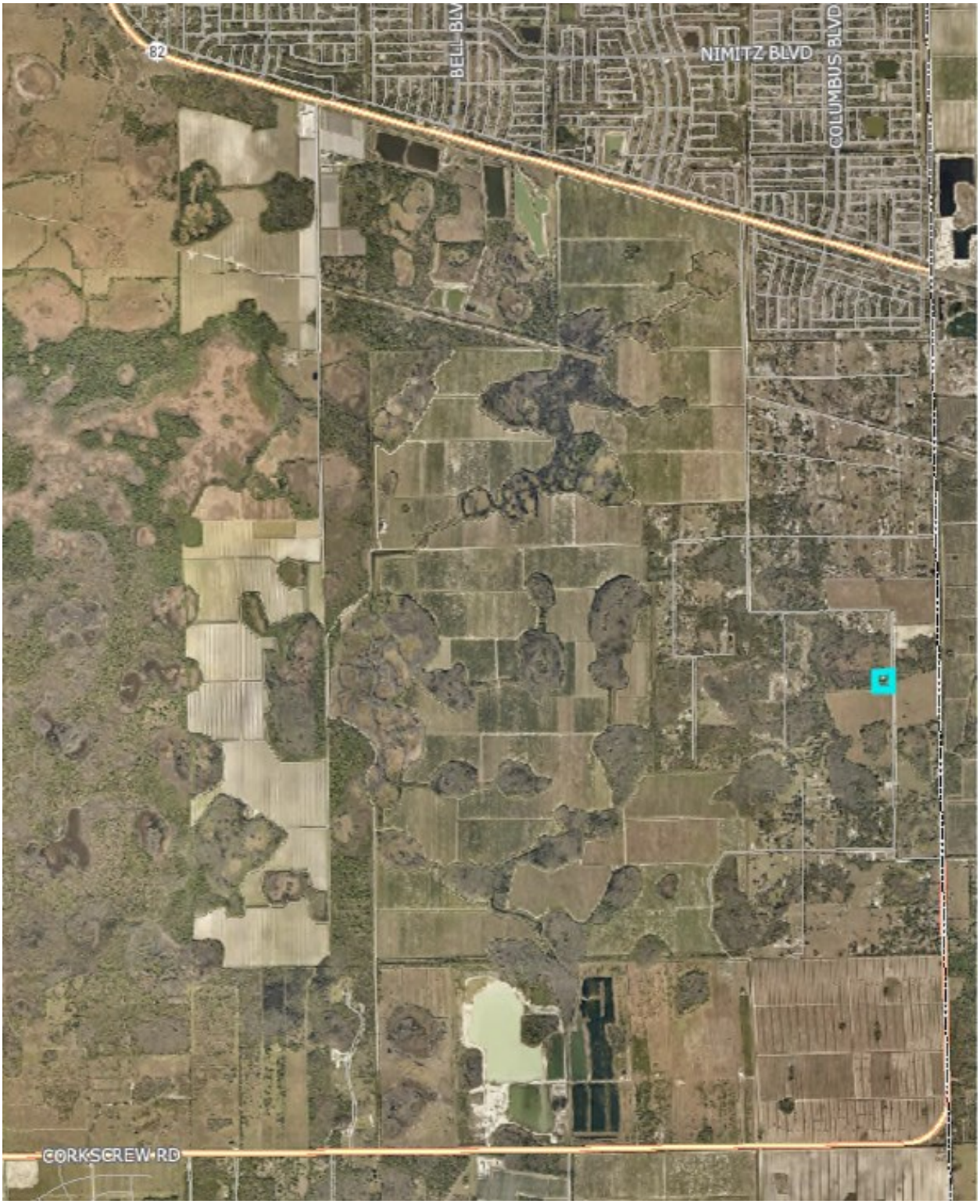
Kevin Hill property location



Kevin Hill property shown in blue rectangle on left lower side of photo

(with line drawn to closest portion of the proposed development area)

11. Intervenor JEFFREY KLEEGER lives, owns property and raises livestock, at 17680 WILDCAT DRIVE, which is within the area that will be impacted and affected by the proposed approval of development of the property that is the subject of the Bert Harris Act Settlement Agreement, because the increase in density exceeds that allowed by the Lee County Comprehensive Plan and Land Development Code and the increased density and intensity of development approved in the Settlement Agreement will adversely affect his rural and agricultural way of life, and increase address safety and traffic problems that he would experience regularly. He will thus be adversely affected by the Settlement Agreement, which authorizes the County to grant development approvals to Corkscrew that violate the County's Comprehensive Plan and Land Development Regulations to an extent greater than is authorized by statute to avoid violating a landowner's *Harris Act* rights.
12. Jeffrey Kleeger's property location is also near and proximate to the proposed new development of Kingston shown at the highlighted square on rights side of image below:


82
BELL BLVD
NIMITZ BLVD
COLUMBUS BLVD
CORKSCREW RD

The Underlying Harris Act Claim

13. Through a letter dated September 11, 2020, Corkscrew served upon the County a pre-suit claim under the Harris Act based upon the County's denial of a rezoning application and a General Mining Permit for 4,202.3 acres of land. This rezoning application and Harris Act claim concerned, as alleged in the Jt. Petition, "a portion of" the property to which the Settlement Agreement grants development rights in excess of those authorized by law and the Lee County Comprehensive Plan. (Jt. Petition, ¶3; Hutchcraft, Tr., 11.8.22, Pg. 210 Ln. 13-19).
14. Corkscrew's *Harris Act* pre-claim claimed damages in the amount of $63 million as a result of the County's denial of a mining zoning application. (Hutchcraft, Tr. 11.8.22, Pg. 211 Ln. 11-16; Jt. Petitioners Ex. 9).
15. The *Harris Act* Settlement Agreement however, grants development rights in excess of what is currently authorized by the Lee County Land Development Regulations and Comprehensive Plan to the landowner for 6,676 acres, thus **including 2,473 acres that were not included in the *Harris Act* claim.** (Jt. Petition, ¶ 6; Tr. 8.31.22, Jacob, Pg. 59, Lines 5-13)
16. After it was negotiated with the County, Corkscrew held public meetings to allow members of the public to voice their opinions about the proposed agreement, but no changes were made to the Agreement based on the public comments or opposition. (Blacksmith, Tr. 11.8.22, Pg. 200, Line 2 – Pg. 201, Line 3)
17. Lee County held a public hearing at which it adopted the Agreement, but made no changes to the then – proposed Agreement based on public input and objections. (DeLisi, 11.8.22 Tr., Pg. 46, Lines 20-25; Page 46, Lines 15-18)

The Land Impacted by the Proposed Settlement

18. The proposed Settlement Agreement applies to 6,676 acres on land within the rural, environmentally sensitive Density Reduction/Groundwater Resource (DR/GR) land use category in southeast Lee County, along Corkscrew Road. (Jt. Petitioners' Ex. 5; Tr. 8.31.22, Pg. 12, Lines 9-25; Tr. 8.31.22, Jacob, Pg. 60, Line 12 – Pg. 61, Line 11)
19. The Agreement purports to grant development rights to 4,202.3 acres of land north of Corkscrew Road that were the subject of the *Harris Act* pre-claim and also to 2,473 acres of land south of Corkscrew Road that were not included in the *Harris Act* claim. (Jt. Petitioners' Ex. 5; Tr. 8.31.22, Pg. 12, Lines 9-25)
20. The purposes of the DR/GR use and intensity restrictions is to protect and recharge groundwater resources, **protect wildlife from the impacts of urban development**, and to remedy a prior problem of an over-allocation of density rights in the County. (11.8.22 Tr., Brown, pg. 152 Ln. 25 – pg. 153 Ln. 12; DeLisi, 8.31.22 Tr. Pg. 73, Line 12 – Pg. 74, Line 2; DeLisi, Tr. 11.8.22, Pg. 42, Lines 15-20).
21. Mining is among the allowable uses in the DR/GR land use category. (Tr. 11.8.22, Pg. 14, Lines 10-14) (8.31.22 Tr., DeLisi, Pg. 80, Line 16 – Pg. 82, Line 9)
22. It is not a goal of the DR/GR provisions of the Comprehensive Plan to have residential development as high as one and one-half unit per acre on this land. Sweigert, Tr. 11.8.22, Pg. 262, Lines 10- 15).
23. Just to the south of the southern 2,473 acres added to the Settlement Agreement is the Corkscrew Swamp Sanctuary (Corkscrew Regional Ecosystem Watershed), an important ecosystem in this region of Florida, made up of environmental preservation and conservation lands, and surrounding preservation lands owned by either Lee County or the

South Florida Water Management District. (Petitioners' Ex. 5; Jacobs Tr. 8.31.22, Pg. 62, Ln. 24— Pg. 63, Ln. 6; 8.31.22 Tr., DeLisi, Pg. 82, Line 20- Pg. 83, Line 15; DeLisi, Tr. 11.8.22, Pg. 42, Line 25- Pg. 43, Line 2).

24. The property that is the subject of the Settlement Agreement currently has limited urban services. (Dunn, Tr. 11.8.22, Pg. 246, Lines 9-18).

What the Proposed Settlement Agreement Allows on the Property

25. The Settlement Agreement allows Corkscrew to develop up to 10,000 dwelling units, 700,000 s.f. of commercial development, 240 hotels rooms and other uses on the property that it either owns or is being granted by the County. (Jt. Petition, ¶ 11; DeLisi Tr. 11.8.22, Pg. 66 Ln. 4-10, Hutchcraft Tr. 11.8.22, Pg. 222 Ln. 23- pg. 223 Ln. 4-13).
26. Allowing 10,000 homes on this land would establish a population of more than 20,000 people, exceeding the size of some cities existing in Lee County. (DeLisi, Tr. 11.8.22 pg. 65, Ln. 14-19 – pg. 66, Ln. 11-22).
27. Were the County to follow the procedures required under Florida Law to allow development currently unauthorized by its comprehensive plan, it would be required to submit a proposed comprehensive plan amendment, along with supporting data and analysis, to the state land planning agency and myriad other state and regional agencies with expertise relative to the issues, for formal comments and objections based on the governing statutory criteria governing changes to comprehensive plans. (Jacobs Tr. 8.31.22, Pg. 64, Ln. 20 - Pg. 65, Ln. 5; Dunn, 11.8.22 Tr., Pg. 247, Line 15- Pg. 249, Line 2).[2]

[2] See Ch. 163, Part II, Fla. Sta. *(Community Planning Act*)

28. Among those requirements are that the land uses allowed by consistent with the Comprehensive Plan. (Dunn, 11.8.22 Tr., Pg. 249, Lines 13-21)

29. Under the *Harris Act* process used in this case, that review process has not been undertaken for the changes to the allowed land uses authorized by the Settlement Agreement. (Jacobs Tr. 8.31.22, Pg. 65, Ln. 6 – 14; DeLisi, 11.8.22 Tr., Pg. 87, Lines 3-13; Dunn, 11.8.22 Tr., Pg. 249, Lines 2 -5).

The Comprehensive Plan and Land Development Code Violations Authorized by the Settlement Agreement

30. As explained in the Lee County Hearing Examiner's (HEX) Report concerning the proposed Settlement Agreement, dated 5.26.22, the Proposed Settlement Agreement "is not consistent with the Lee Plan because the property does not lie within Environmental Enhancement and Preservation Communities Overlay. Development proposed along SR 82 exceeds development parameters established for commercial uses within Southeast Lee County's Mixed Use Communities." (Jt. Petitioners' Ex. 15: HEX Report, p. 5.)

31. The HEX Report found the "The Agreement confers development rights greater than those permitted in the Environmental Enhancement and Preservation Communities Overlay." (Jt. Petitioners' Ex. 15: HEX Report, p. 3.)

32. As a result, the Settlement allows development that contravenes Comprehensive Plan Policies 33.2.4 and 33.2.4.1. (Jt. Petitioners' Ex. 15: HEX Report, p. 3.)

33. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policy 33.2.4.2, because it allows development authorized only in a Planned Development zoning category, but the property is not within that zoning category. (Jt. Petitioners' Ex. 15: HEX Report, p. 6)

34. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policy 33.2.4.2(e), because it requires Conservation Easements for less than the 55% of the property, as required by the Policy. (Jt. Petitioners' Ex. 15: HEX Report, p. 6)

35. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policy 33.2.4.2 (i), because the development approval will not require the elimination of agricultural irrigation and fertilizer use at the time of the first development order approval. (Jt. Petitioners' Ex. 15: HEX Report, p. 7)

36. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policy 33.2.4.3 (c), because it allows the construction of residential densities that greatly exceed those allowed by the Comprehensive Plan. (Jt. Petitioners' Ex. 15: HEX Report, p. 8)

37. Because the current DR/GR land use restrictions on the property limit homes to one unit per ten acres[3], the **Settlement Agreement authorizes a 15 times increase in residential density.** (DeLisi, 11.8.22 Tr. Pg. 42, Lines 4-11; Pg. 44, Lines 18-22; Johnson Tr. 11.8.22, Pg. 123 Ln. 10-13; Dunn, 11.8.22 Tr., Pg. 250, Line 22 – Pg. 251, Line 1).

38. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policies 33.2.4.4.d, 33.2.4.e and 33.2.5 because the amount of commercial and other non- residential development it allows 700,000 s.f. of commercial

[3] For lands within the Environmental Enhancement and Preservation Communities Overlay, where certain environmental restoration conditions are met, Comprehensive Plan Land Use Policy 33.3.4 allows residential density in certain locations up to a maximum of one home per three acres. (See Hutchcraft, 11.8.22 Tr., Pg. 218, Lines 5-20; The County Hearing Examiner's Report had found that the land that is the subject of the Settlement Agreement was not within that Overlay, and thus the Settlement Agreement was inconsistent with the Comprehensive Plan for that reason. (Jt. Petitioners' Ex. 15: HEX Report, p. 5.)

development on the site, **which exceeds the Plan's limitation of 300,000 s.f. of commercial development.** (Jt. Petitioners' Ex. 15: HEX Report, p. 8)

39. The HEX Report also identified eight "deviations" from the Land Development Code, including LDC Section 10-296(e)(3), Section 10-329(d)(3)a.2, Section 10-416(a), Section 10-291(3), Section 10-416(d)(1), Section 10-384(c)(1), Section 10-285. (Jt. Petitioners' Ex. 15: HEX Report, pp. 10-12)
40. As explained in the HEX Report, the approval of development that is inconsistent with the Lee County Comprehensive Plan is inconsistent with §§163.3161(5), 163.3161(6), 163.3194(1) & (3), and §163.3215, Fla. Stat. (Jt. Petitioners' Ex. 15: HEX Report, p. 12; Tr. 8.31.22, Jacob, Pg. 45, Line 13 – Pg. 46, Line 9)

Public Interest Factors DO Not Favor the Settlement Agreement

41. The County and the landowner rely heavily, as support for the proposed development on a 2008 study by the planning firm Dover Kohl. (8.31.22 Tr., DeLisi, Pg. 74, Line 7 -1Pg. 79, Line 3; Jt. Pet. Ex. 22)
42. That study however, did not recommend development such as that approved by the Settlement Agreement in this region of the County. (DeLisi, 11.8.22 Tr., Pg. 63 Ln. 4-8)
43. The development such as that approved by the Settlement Agreement will include 10,000 homes, major commercial uses, a 240 room hotel and other supporting uses. (Hutchcraft Tr. 11.8.22, Pg. 220 Ln. 24 — Pg. 223 Ln. 13).
44. The 4,202.3 acres north of Corkscrew Rd that are the subject of the Settlement Agreement is predominantly rural farmland, but also includes wetlands. (DeLisi, 8.31.22 Tr., Pg. 79, Lines 4-22; DeLisi Tr. 11.8.22, Pg. 66 Ln 4 — Pg. 67 Ln. 3).

45. The lands surrounding the subject property that are not currently in their natural state are generally used for mining, not development. (8.31.22 Tr., DeLisi, Pg. 80, Line 16 – Pg. 82, Line 9)

46. The property, and surrounding lands, includes both primary and secondary habitat (meaning it is among the most important lands available to panthers) for the critically endangered Florida Panther, which do use this land. (DeLisi, Tr. 11.8.22, Pg. 43, Lines 3-10; Johnson, 11.8.22 Tr., Pg. 124, Lines 14-18; Pg. 129, Line 24 – Page 130, Line 5; Sweigert Tr. 11.8.22, Pg. 260 Ln. 12-16).

47. The Panther is one of the most critically endangered species in North America. (Johnson, 11.8.22 Tr., Pg. 128, Lines 21-24)

48. There is no science to support a claim that replacing the existing farming uses with suburban development has benefitted Florida panthers. (Johnson Tr. 11.8.22, Pg. 125 Ln. 23 - Pg. 226 Ln. 2; Dunn, Tr. 11.8.22, Pg. 246, Line 25- Pg. 247, Line 4).

49. The Florida Panthers is in peril due primarily to habitat loss. (Johnson Tr. 11.8.22, Pg. 124 Ln. 23 - 25).

50. Florida panthers, a secretive animal, do not like to be in the vicinity of suburban development or human activity and such interactions may have adverse impacts on the panther's ecology. (Johnson Tr. 11.8.22, Pg. 127 Ln. 12-23; Sweigert, Tr. 11.8.22, Pg. 261, Lines 12-18).

51. The development that would be approved by the Settlement Agreement is suburban development. (Dunn Tr. 11.8.22, Pg. 251 Ln. 19-25).

52. Increased interaction with suburban human population is not beneficial to the panther species. (Johnson Tr. 11.8.22, Pg. 128 Ln. 8 - 20).

53. Nevertheless, the proposed "wildlife corridors" contemplated by the Settlement Agreement would be located in between and adjacent to the developed areas. (Johnson, Tr. 11.8.22, Pg. 130, Line 10 – Pg. 131, Line 3; Sweigert, Tr. 11.8.22, Pg. 260, Line 23- Pg. 261, Line 5)

54. Another primary cause of peril to the Panther is mortality due to vehicular collisions. (Johnson Tr. 11.8.22, Pg. 125 Ln. 1 - 5).

55. The vehicular traffic allowed by the development allowed by the Settlement Agreement creates the potential for increased vehicular mortality for panthers. (Johnson Tr. 11.8.22, Pg. 131 Lines 14-23).

56. The development will increase traffic on Corkscrew Rd. (DeLisi, Tr., 11.8.22, Pg. 60, Lines 4-6)

57. Traffic from the approved development would access the property from Corkscrew Rd., which has only two lanes, is already congested, and is not the subject of any adopted and funded plan for expansion in the foreseeable future. (DeLisi Tr., 11.8.22: Tr. Pg. 59 Ln. 5 — Pg. 60 Ln. 12).

58. The "spine road" that would be built within the developed parcel, touted by the Joint Petitioners as a public benefit, would be necessary primarily to serve the new development authorized by the Settlement Agreement. (Johnson, Tr. 11.8.22, Pg. 202, Line 25- Pg. 203, Line 2)

59. Nevertheless, once built, Lee County taxpayers will be responsible for maintaining the spine road. (Johnson, Tr. 11.8.22, Pg. 203, Lines 3-11)

60. While the Jt. Petitioner's claim that public benefits will accrue from the environmental restoration features for portions of the southern parcel to be developed under the Settlement

Agreement in the form of restored water flows into the Corkscrew Swamp south of the subject property, the record does not demonstrate that the Audubon Society, owner of that land, supports the Settlement Agreement. (DeLisi, 11.8.22 Tr., Pg. 48, Lines 16-21; Blacksmith Tr. 11.8.22, Pg. 189 Ln. 9-14)

61. Also, other mechanisms exist to restore and preserve sensitive lands on the southern 2,473 acres to be developed under the Settlement Agreement, such as Lee County's environmentally sensitive land acquisition program. (DeLisi, Tr., 11.8.22. Pg. 58, Line 20 – Pg. 59, Line 4)

62. The Joint Petitioners claim that a public benefit of the Settlement Agreement's replacement of agricultural use on the property with suburban development will come in the form of the removal of agricultural pollution in the area. However, the property is not in violation of any federal or state water quality standards as a result of its current use. (DeLisi, 11.8.22 Tr., Pg. 53, Line 24- pg. 54 Line 2)

63. The Joint Petitioners claim that a public benefit of the Settlement Agreement's replacement of agricultural use on the property with suburban development will come in the form of a reduction in water use, and suggested that the current agricultural use of water on the property is a concern. However, the landowner is not currently in violation of the water withdrawal limits required by state law and its water withdrawal permits. (DeLisi, 11.8.22 Tr., 54 Lines 3-6)

64. Also, the claimed reduction in water use was based on permitted water use, not actual use, which is significantly lower. (Johnson, Tr. 11.8.22, Pg.160, Line 25- Pg. 161, Line 16)

65. Under Florida law, those permits could not have been issued had the issuing agency, the South Florida Water Management District, determined that the water withdraw amounts

requested by the applicant were not sustainable or would harm regional water resources. (Johnson, Tr. 11.8.22, Pg. 157, Line 8 – Pg. 158 Line 15; Pg. 160, Lines 1-24)

The Landowner's Investment and the County Actions Giving Rise to this Proceeding

66. The County action that led to the Harris Act pre-claim was the 2007 refusal to accept (due to a moratorium) an application by a company known as "Old Corkscrew" for a rezoning and a mining permit. (Jacob Tr. 8.31.22, Pg. 43, Lines 8-24; 8.31.22 Tr., DeLisi, Pg. 89, Line 15-Pg. 91, Line 3).

67. Old Corkscrew brought suit against the County to challenge the moratorium, and received a declaratory judgment in its favor by Circuit Judge Fuller. (Tr. 11.8.22, Pg. 15, Line 1 – Pg. 15, Line 20; Jt. Petitioners' Ex. 6; Tr. 8.31.22, Jacob Tr. 8.31.22, Pg. 43, Lines 8-16; DeLisi Tr.11.8.22, Pg. 82 Ln. 9 — Pg. 83 Ln. 21).

68. Judge Fuller ordered the county to process an application for mining approval based on the rules that were in place as of the 2007 date of the application (DeLisi Tr. 11.8.22, Pg. 82, Ln. 16-21; Jt. Petitioners' Ex. 6).

69. That ruling was upheld on appeal by the Second District. (DeLisi, 8.31.22 Tr. Pg. 91, Line 14 – 20; DeLisi, Tr. 11.8.22, Pg. 82 Ln. 25 — Pg. 83 Ln. 3).

70. Due to the recession of 2008 – 2013 however, Old Corkscrew chose not to re-apply for the mining approval contemplated by Judge Fuller's ruling until 2012. (DeLisi, 8.31.22 Tr. Pg. 92, Line 11 –16;Tr. 11.8.22, Pg. 15, Line 21 – Pg. 16, Line 16)

71. Soon thereafter, however, Old Corkscrew filed for bankruptcy, and the present owner, Corkscrew Grove Lmt., purchased the property and its mining rights in 2016. (DeLisi, 8.31.22 Tr. Pg. 92, Line 17 – Pg. 93, Line 1; Hutchcraft Tr. 11.8.22, Pg. 206, Line 1 – 25).

72. Corkscrew Grove Lmt. was aware of the Comprehensive Plan and zoning restrictions governing and limiting development and use of the property when it bought the land in 2016. (Hutchcraft, Tr. 11.8.22, Pg. 206 Ln. 3-4; Pg. 218-220 Ln. 24-8; Pg. 232 Ln. 1-25).

73. Finally, in 2017, "King Ranch, the parent company of Corkscrew Grove Lmt., submitted a mining application to the County. (Hutchcraft Tr. 11.8.22, Pg. 207 Ln. 4 — Pg. 208, Ln. 1).

74. In 2019, that application was denied, and the company initiated litigation against the County. (DeLisi, Tr. 8.31.22, Pg. 93, Line 2 – Pg. 94, Line 4; Lines 16-24; DeLisi Tr. 11.8.22, Pg. 70, Lines 2-12; Jt. Petitioners' Ex. 8; Tr. 8.31.22, Jacob Tr. 8.31.22, Pg. 43, Lines 18-21).

75. In addition to that litigation, the Company filed a *Harris Act* pre-suit claim against the County. (Tr. 11.8.22, Pg. 17, Lines 13-15; Jt. Petitioners' Ex. 8)

76. Lee County Circuit Judge Fuller, again presiding over this litigation, granted Summary Judgment in favor of Corkscrew, and ordered the County to process another mining application under the rules in existence as of 2007. (DeLisi Tr. 8.31.22, Pg. 95, Line 1-19; DeLisi Tr. 11.8.22, Pg. 45, Ln. 12 — Pg. 46 Ln. 4; Jt. Petitioners' Ex. 10; Tr. 8.31.22, Jacobs Tr. 8.31.22, Pg. 51, Ln. 11— Pg. 52, Ln. 5; Pg. 65, Line 15- Pg. 66, Line 14).

77. Corkscrew has chosen not to exercise the rights it was granted by Judge Fuller to file an application for consideration of a mine based on the 2007 Comprehensive Plan provisions. (DeLisi, Tr. 11.8.22, Pg. 45, Line 23 – Pg. 46, Line 5; Hutchcraft, 11.8.22 Tr., Pg. 232, Line 7 – 24)

78. It made this decision even though it continues to believe mining to be the highest and best use of the property. (Hutchcraft, 11.8.22 Tr., Pg. 209, Line 18 – Pg. 210, Line 3)

79. Judge Fuller's ruling did not require the County to grant development approval, such as is authorized by the proposed Settlement Agreement. (Jacobs, Tr. 8.31.22, Pg. 66, Line 15 - Pg. 67, Line 3).

80. Corkscrew chose not to continue to seek approval to mine the land when developer Joseph Cameratta offered to purchase the property. (DeLisi, Tr. 11.8.22, Pg. 17, Line 23 – page 18, Line 4.; Hutchcraft, 11.8.22 Tr., Pg.213, Lines 15 -22)

81. Mr. Cameratta, the contract purchaser, then took part in the negotiations that resulted in the Settlement Agreement between the County and Corkscrew Grove that is at issue in this proceeding. (Hutchcraft Tr. 11.8.22, Pg. 213 Ln. 11 — Pg. 214 Ln. 7).

82. That Settlement is also the Settlement Agreement submitted to this Court in this proceeding as the proposed settlement of the landowner's Harris Act pre-claim. (DeLisi, Tr. 11.8.22, Pg. 46 Ln. 21 – Pg. 47 Ln. 14).

83. The type and amount of development allowed by the Settlement Agreement was modelled after other developments Mr. Cameratta had built in southeast Lee County, known as *The Place* and *Verdana Village*, that, unlike the development that would be authorized by the Settlement Agreement on the subject land, fully complied with the Comprehensive Plan's development standards applicable to those properties. (DeLisi Tr. 11.8.22, Pg. 49 Ln. 5 – Pg. 50 Ln. 21).

84. Those projects were not approved under the Harris Act as the minimum development necessary to avoid violating the owner's rights. (DeLisi Tr. 11.8.22, Pg. 50 Ln. 9-15).

85. They were approved because the development uses, density and intensity complied with the County's Comprehensive Plan. (DeLisi, 11.8.22 Tr. Pg. 49 Ln. 22- Pg. 50, Line 8**)**

86. In fact, the amount of residential density the Settlement Agreement allows here is **higher than that allowed for the *The Place* and *Verdana Village* developments.** (DeLisi Tr. 11.8.22, Pg. 49 Ln. 10-21)

87. The County land use planner who testified in this proceeding was not consulted to provide an opinion on whether the amount of development proposed in the Settlement Agreement was appropriate. (Dunn, Tr. 11.8.22, Pg. 247, Lines 5 – 9)

88. The Settlement Agreement was a negotiated deal that allowed substantially more development than is authorized by the Lee County Comprehensive Plan on this property, unsupported by any evidence that it was the least amount of development necessary to avoid a violation of Corkscrew's *Harris Act* protections. The amount of development it authorizes is based on the position of the Board of Directors of Corkscrew/ King Ranch that it would accept nothing less to settle its claims. (Hutchcraft Tr. 11.8.22, Pg. 215 Ln 20 — Pg. 216 Ln. 1-3)

89. The property was acquired by Corkscrew/ King Ranch in 2016, for $29.75 million. (Hutchcraft Tr. 11.8.22, Pg. 206 Ln. 1-4; Pg. 217 Ln. 20-23).

90. Corkscrew's representative speculated that its total investment to date is approximately **$55 million**, including the purchase price, funds spent seeking entitlements, and other costs, but was unable to produce a written analysis of "hard number" for that amount. (Hutchcraft Tr. 11.8.22, Pg. 223 Ln. 25 — Pg. 224 Ln. 14; Hutchcraft Tr. 11.8.22, Pg. 228 Ln. 4 — Pg. 229 Ln. 23).

91. The value of the land under the proposed Settlement Agreement is approximately **$105 million. (**Hutchcraft Tr. 11.8.22, Pg. 229 Ln. 11-15).

92. These figures apply to the 4,202.3 acres north of Corkscrew Rd that were the subject of the Harris Act pre-claim, and some of the land in the land south of Corkscrew Rd. Corkscrew's representative was unable to produce any acquisition cost figures or fair market value figures resulting from the Settlement Agreement for 967 acres of the 2,473 acres south of Corkscrew Road that were being granted development rights that exceed what is allowed by the Comprehensive Plan despite not being subject to the County action that gave rise to Harris Act pre-claim. That land is owned by another company that is not party to this proceeding. **(**Hutchcraft Tr. 11.8.22, Pg. 229 Ln. 21- Pg. 230, Line 4; Pg. 229- Line 24 – Pg. 230, Line 25).

93. Thus, the Settlement Agreement will allow the owner to more than double its investment in the property. (Tr. Pg. 229 Ln. 16-23)

94. If the Settlement Agreement is approved, the current landowner, Corkscrew Grove Limited Partnership, has a contract to sell the land to a company owned by builder Joseph Cameratta. (Hutchcraft Tr. 11.8.22, Pg. 213 Ln. 11 — Pg. 214 Ln. 2; Blacksmith, Tr. 11.8.22, Page 192, Lines 4-7).

95. The Cameratta company's analysis demonstrates that it expects to make a profit from the purchase of the land and the subsequent sale of the finished lots to developers. (Blacksmith, Tr. 11.8.22, Pg. 197, Line 7 – Pg. 199, Line 15)

No Inordinate Burden Analysis

96. No written legal analysis has ever been prepared by any counsel for or on behalf of Lee County assessing the potential merit of Corkscrew's *Harris Act* pre-claim, and, thus, no

written analysis concluding that a *Harris Act* suit by Corkscrew would have a likelihood of success. (Tr. 8.31.22, Jacob, Pg. 56, Lines 1-6)

97. At no time did the County perform or commission its own appraisal of the impact on the fair market value of the property resulting from its actions that gave rise to Corkscrew's *Harris Act* pre-claim of $63 million in damages. (Tr. 8.31.22, Jacob, Pg. 56, Lines 17-25; Page 58, Lines 10-13).

98. The County witness who testified about Corkscrew's claim of $63 million in damages admitted that "we havent't agreed with that number at all" and "it could be" "overly generous to the landowner's claim." (Tr. 8.31.22, Jacob, Pg. 57, Lines 1-9).

99. The County conducted no independent analysis of the financial impact on the landowner of its denial of the prior mining permit applications; it simply accepted at face value the applicant's damages claim. (DeLisi, Tr. 11.8.22, Tr. Pg. 89 Ln. 7-18)

100. No written analysis was performed demonstrating that the development rights granted by the Settlement Agreement are the minimum necessary to avoid an undue burden on Corkscrew's property rights. (Tr. 8.31.22, Jacob, Pg. 57, Lines 17-21; Pg. 58, Lines 14-20)

101. There has never been any financial analysis demonstrating that granting less development rights than the settlement agreement grants would be an "inordinate burden" on the landowner. (DeLisi Tr. 11.8.22, Pg. 89 Ln. 5-18)

102. No appraisals have been conducted to identify the resulting fair market value the property would enjoy if granted an amount of development rights less then those allowed by the Settlement Agreement. (Hutchcraft, 11.8.22 Tr., Pg. 222, Line 19- Pg. 223, Line 213)

103. No appraisals have been conducted to identify the resulting fair market value the property would enjoy if granted an amount of development rights that are consistent with the current

limits in the Lee County Comprehensive Plan. (Hutchcraft, 11.8.22 Tr., Pg. 222, Line 19-Pg. 223, Line 4)

104. The amount of development rights granted by the Settlement Agreement are not based upon any inordinate burden analysis. (DeLisi Tr. 11.8.22, Pg. 89 Ln. 7-18).

105. At no point did the County require Corkscrew to disclose financial information necessary to determine whether the development approvals granted by the Settlement Agreement are the minimum necessary to prevent it from incurring an "inordinate burden" under the terms of the *Harris Act*. (Hutchcraft, 11.8.22 Tr., Pg. 219, Line 18 – Pg. 223, Line 213)

106. The first time any information about the economic impact of the Settlement Agreement relative to Corkscrew's total reasonable investment was in open Court in this case on November 8, 2020, when Corkscrew's witness, Mr. Hutchcraft, was directed to do so by the Court. His response revealed that the Settlement Agreement will result in Corkscrew at least doubling, and likely more, its total investment in the property.

Conclusions of Law

1. The Intervenors are Proper Parties[4]

Florida Rule of Civil Procedure 1.230 provides that "[a]nyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." In other words, as confirmed by the Author's Comment to the Rule, "the court has full discretion over intervention, including the extent thereof." The Author's Comment to the Rule provides that "*[t]he intervener becomes a*

[4] As acknowledged by Assistant Lee County Attorney Michael Jacobs, who testified about certain legal aspects of the Settlement Agreement, it is not a prerequisite to party status in this proceeding that an Intervenor have appears before the County Commission when it considered approving the Agreement. (Tr. 8.31.22, Jacobs, Pg. 55, Lines 14-18)

party to the action; he has *the right to litigate on the merits the claim or defense for which he intervenes*. In view of the aim of the rules to allow liberal joinder of parties and claims, the intervener should be permitted to counter-claim, cross-claim, and implead third parties . . . " (emphasis supplied).

An intervenor "may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties." *Williams v. Nussbaum*, 419 So.2d 715, 717 n.1 (Fla. 1st DCA 1982). In that sense, "an intervenor is a party for all purposes with the same rights of other parties to the cause." *Greenhut Const. Co. v. Henry A. Knott, Inc.*, 247 So. 2d 517, 519–20 (Fla. 1st DCA 1971). The intervention rule should be liberally construed. *Grimes v. Walton County*, 591 So. 2d 1091, 1093–94 (Fla. 1st DCA 1992).

A person is *entitled* to intervene when such person has an interest in the litigation that is of "such a direct and immediate character that the Intervener will either gain or lose by the direct legal operation and effect of the judgment." *Morgareidge v. Howey*, 78 So. 14, 15 (Fla. 1918); *Harbor Specialty Ins. Co. v. Schwartz*, 932 So. 2d 383, 386 (Fla. 2d DCA 2006).

When a party seeks declaratory relief, "all persons may be made parties who have or claim any interest which would be affected by the declaration," and "no declaration shall prejudice the rights of persons not parties to the proceedings." § 86.091, Fla. Stat.

Florida Rule of Civil Procedure 1.210(a) provides, "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and *any person may be made a defendant who has or claims an interest adverse to the plaintiff*. *Any person may at any time be made a party if that person's presence is necessary or proper to a complete*

determination of the cause" (emphasis supplied). The Court has broad discretion in adding parties to the case to ensure parties' interests are protected and a complete adjudication of the action.

As landowners proximate to the subject property, the Intervenors would have legal standing to challenge any development orders issue by Lee County for the subject property on the basis that they violate the Lee County Comprehensive Plan. § 163.3215 (3), Fla. Stat. The statutory cause of action authorizes any aggrieved person to challenge the validity of development orders that are not consistent with comprehensive plans:

> "Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order … which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part."

§ 163.3215 (3), Fla. Stat.

An "aggrieved or adversely affected party" is defined as:

> "any person or local government that will suffer an **adverse effect** to **an interest protected or furthered by the local government comprehensive plan**, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The **alleged adverse interest may be shared in common with other members of the community at large** but must **exceed in degree the general interest in community good shared by all persons.** The term includes the owner, developer, or applicant for a development order." §163.3215(2), Fla. Stat. (emphasis added)

Section 163.3215 grants **"significantly enhanced standing to challenge the consistency of development decisions with the Comprehensive Plan" compared with prior standing law.** *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. 1st DCA 2001) (emphasis added). "As a remedial statute, section 163.3215, Florida Statutes, should be **liberally construed** to ensure standing for a party with a protected interest under the comprehensive plan who will be adversely affected by the local government's actions." *Bay County v. Harrison*, 13 So.3d 115 (Fla. 1st DCA

2009) (emphasis added). "There is no doubt that the purpose of the adoption of section 163.3215 was to **liberalize standing** in this context." *Save the Homosassa River Alliance, Inc., et al v. Citrus County,* 2 So.3d 329 (5th DCA 2008) (citing *City of Ft. Myers v. Splitt*, 988 So. 2d 28 (Fla. 2d DCA 2008)) (emphasis added).

The Court in *Save the Homosassa River Alliance, Inc., et al v. Citrus County,* 2 So.3d 329 (5th DCA 2008) explained:

> "**The statute is not designed to redress damage to particular plaintiffs. To engraft such a 'unique harm' limitation onto the statute would make it impossible in most cases to establish standing and would leave counties free to ignore the plan** because each violation of the plan in isolation usually does not uniquely harm the individual plaintiff. **Rather, the statute simply requires a citizen/plaintiff to have a particularized *interest* of the kind contemplated by the statute**, not a legally protectable right." 2 So.3d at 340 (emphasis added).

The Intervenors are proper parties as their rights will be affected by the Court's ruling in this proceeding because judicial approval of the Settlement Agreement would entitle Corkscrew to received approval of the development right granted by the Agreement, notwithstanding their lack of consistency with the Lee County Comprehensive Plan and Land Development Code. Under the authority of the *Harris* Act provisions explained below, the rights the Intervenors would otherwise possess to enforce the County's Comprehensive Plan (and its Land Development Code) would be foreclosed.

Finally, the unique nature of this proceeding supports full party status to the Intervenors. Unlike most cases, the only two parties currently before the Court are not adverse to each other but have jointly sought the Court's approval of a Settlement Agreement which both support. The grant of full party status to the Intervenors is appropriate to ensure that there is a party in the proceeding to present to the Court the points and arguments in opposition to the judicial approval requested by the Jt. Petitioners.

Judicial Review of Harris Act Settlements

The Legislature did not extend the rebuttable statutory presumption that the substance of a Settlement Agreement is in the public interest[5] to the issues of whether a Settlement Agreement meets the requirements that (1) it be limited to the real property affected by the challenged government action; and (2) it grant a remedy only to the extent necessary to avoid an undue burden on the landowner. §70.001 (4)(d)(2), Fla. Stat.

As to those issues, the Joint Petitioners' as the proponent of the affirmative, bear the burden of proof. *Balino v. Dept. of Health and Rehab. Services*, 348 So. 2d 349 (Fla. 1st DCA 1977); *Hess v. Philip Morris USA*, *Inc.*, 175 So. 3d 687, 695 (Fla. 2015); *See Custer Med. Center v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1093, 1097 (Fla. 2010).

Florida caselaw encouraging settlement of litigation are of limited applicability here. Settlement agreements under the *Harris Act* are specifically governed by the terms of the Act, which, as it exists in derogation of common law sovereign immunity, must be read narrowly. The Bert Harris Act contains a very narrow waiver of sovereign immunity, see § 70.001(13), and such waiver statutes are strictly construed, *see Spangler v. Fla. State Turnpike Auth.,* 106 So.2d 421, 424 (Fla.1958). *Blair v. City of Clearwater*, 196 So. 3d 577, 581 (Fla. 2nd DCA 2016); *Tampa Hillsborough County Expressway Authority v. K.E. Morris Alignment Serv*., Inc., 444 So. 2d 926, 928 (Fla. 1984).

What's more, the Act established strict criteria for its allowance of such settlement agreements when they seek to authorize violations of statute and a local government's comprehensive plan or zoning code.

[5] 70.001 (4)(d)1, Fla. Stat.

The case of *City of Homestead v. United* States, 346 So3d 1205 (Fla. 3d DCA 2022) does not support approval of this settlement agreement. That decision resolved issues tangential to a proposed *Harris Act* settlement agreement, but specifically noted that the "settlement agreement is presently without effect because it contravenes the Homestead Airport Zoning Ordinance … and the **parties have not yet jointly filed an action in the circuit court for approval** of the settlement agreement, as mandated by the Harris Act:" The short opinion rules simply that the City was not required to hold an evidentiary hearing before entering into a Harris Act settlement[6], and that the proper forum for a challenge to such a settlement is action in circuit court for declaratory or injunctive relief. *City of Homestead v. United States*, 346 So. 3d 1205, 1206.[7]

The Comprehensive Plan Consistency Law for Which the Settlement Agreement Grants Multiple Waivers

To understand the significance of the violations of the County's Comprehensive Plan the Settlement Agreement could authorize, it is important to review the statutory prohibition on the approval of development that is inconsistent with an adopted Comprehensive Plan.

The *Community Planning Act* (Chapter 163, Part II, Fla. Stat.) ("Act") mandates that all local governments adopt and maintain a comprehensive plan which guides future land development. § 163.3167(1)(b)[8]; § 163.3167(2).[9]

The Act strictly prohibits the approval of a development order that is inconsistent with its Comprehensive Plan. §§163.3161(5), 163.3194(1) & (3), and §163.3215, Fla. Stat. Under the Act

[6] The Intervenors do not contend otherwise.
[7] Which is the type of proceeding now before the Court.
[8] Under the Act, cities and counties "shall have power and responsibility … [t]o adopt and amend comprehensive plans, or elements or portions thereof, to guide their future development and growth. § 163.3167(1)(b), Fla. Stat.
[9] "Each local government shall maintain a comprehensive plan of the type and in the manner set out in this part …." § 163.3167(2), Fla. Stat.

"**no public or private development shall be permitted except in conformity with comprehensive plans**, or elements or portions thereof…." § 163.3161(6), Fla. Stat. (emphasis added). The statute states that:

> "After a comprehensive plan, or element or portion thereof, has been adopted …, all development undertaken by, and all actions taken in regard to development orders … in regard to land covered by such plan or element shall be consistent with such plan or element as adopted."

§ 163.3194(1)(a), Fla. Stat.

Once a comprehensive plan is adopted, all land development regulations (such as zoning codes) must also be consistent with the plan. §§163.3201, §163.3213, Fla. Stat.

"The comprehensive plan is similar to a constitution for all future development within the governmental boundary." *Citrus Cty. v. Halls River Dev., Inc.*, 8 So.3d 413, 420–21 (Fla. 5th DCA 2009); *Machado v. Musgrove*, 519 So.2d 629, 631 (Fla. 3d DCA 1987) ("A comprehensive plan is … a constitution for all future development ….").

The Act's "clear legislative intent to mandate intelligent, uniform growth management…." *Southwest Ranches Homeowners Association, Inc. v. Broward Co., Florida*, 502 So.2d 931, 936 (Fla. 4th DCA 1987)

Section 163.3194(3) defines what it means for a development order to be consistent with a comprehensive plan:

> (a) A development order …shall be consistent with the comprehensive plan if the **land uses, densities or intensities**, and other aspects of development permitted … are **compatible with and further** the objectives, policies, land uses, and densities or intensities in the … plan …..
>
> (b) A development approved … shall be consistent with the comprehensive plan if the land uses, densities or intensities, **capacity or size**, timing, and **other aspects**

of the development are **compatible with and further the objectives, policies, land uses, and densities or intensities in the … plan** …." (emphasis added).

To enforce the consistency requirement, the Legislature enacted §163.3215(3) to provide for "liberalized "standing by adversely affected citizens to challenge inconsistent development orders in a de novo circuit court proceeding where declaratory and injunctive relief are available. *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. 4th DCA 2001); *Bay County v. Harrison*, 13 So.3d 115 (Fla. 1st DCA 2009); *Edgewater Beach Owners Association, Inc. v. Walton County*, 833 So. 2d 215 (Fla. 1st DCA 2002); *Save the Homosassa River Alliance, Inc., et al v. Citrus County,* 2 So.3d 329 (5th DCA 2008); *Parker v. Leon County*, 627 So. 2d 476, 479 (Fla. 1993); *City of Ft. Myers v. Splitt*, 988 So. 2d 28 (Fla. 2d DCA 2008); *Education Development Center, Inc. v. Palm Beach County, et al.*, 751 So.2d 621 (Fla. 4th DCA 1999); *Nassau Cty. v. Willis*, 41 So. 3d 270, 276 (Fla. 1st DCA 2010); *Southwest Ranches Homeowners Association, Inc. v. Broward Co., Florida*, 502 So.2d 931, 935 (Fla. 4th DCA 1987); *Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So.2d 427, 433 (4th DCA 2007); *Dunlap v. Orange County, Florida*, 971 So.2d 171, 174 (Fla. 5th DCA 2007); *Payne v. City of Miami*, 927 So.2d 904, 907 (Fla. 3d DCA 2005)

In cases under §163.3215, Fla. Stat., **the burden is on the Defendants** (the proponents of the development order) to prove that **it conforms strictly** to the comprehensive plan. *United States Sugar Corp. v. 1000 Friends of Fla*., 134 So. 3d 1052 (Fla. 4th DCA 2013); *Village of Key Biscayne v. Dade County*, 627 So.2d 1180 (Fla. 3d DCA 1993) ("[t]his court has recognized that developments challenged as contrary to master plans must be strictly construed and that the burden is on the developer to show by competent and substantial evidence that the development conforms strictly to the master plan, its elements, and objectives."); *Machado v. Musgrove*, 519 So. 2d 629 (Fla. 3d DCA 1987), *rev. den.*, 529 So. 2d 693; *White v. Metropolitan Dade County*, 563 So. 2d

117, 128 (Fla. 3d DCA 1990); *Snyder v. Board of County Commissioners of Brevard County*, 627 So. 2d 469 (Fla. 1993).

Based on the Act's strict prohibition of development that is inconsistent with a comprehensive plan, and establishment of a liberal cause of action to enforce that prohibition, the Florida Supreme Court established a "strict scrutiny" standard of judicial review of development order approvals. *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469, 475-476 (Fla. 1993). *Snyder* adopted the Third District's *Machado v. Musgrove*[10] decision as the law throughout Florida. *Snyder* at 475-476. *Machado* held that:

> "The term strict scrutiny arises from the *necessity of strict compliance with the comprehensive plan*, and the standard is a process whereby a court makes a detailed examination of a[n]... or order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the *antithesis of a deferential review*." Id. at 632 (emphasis added).
>
> The Court explained that:
>
> "Strict implies rigid exactness or precision. A thing scrutinized has been subjected to minute investigation. Strict scrutiny is thus the process whereby a court makes a *detailed examination* of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm." 519 So.2d at 632 (internal citations omitted) (emphasis added).

Machado explained that strict scrutiny arises from the necessity of strict compliance with the comprehensive plan:

> Not a vest pocket tool, for making individual zoning changes based on political vagary. Instead it is a broad statement of a legislative objective to protect human, environmental, social and economical resources and to maintain through orderly growth and development the character and stability of present and future land use and development in this state." 519 So. 2d at 635. (emphasis added).
>
> The First District held, in *Dixon v. City of Jacksonville*, citing *Machado, that:*

[10] 519 So.2d 629 at 632, rev. den. 529 So.2d 693 (Fla. 1988).

> "we apply … strict scrutiny … a **process which involves a *detailed examination of the development order* for *exact compliance* with, or adherence to, the comprehensive plan**." 774 So.2d 763, 765 (Fla. 1st DCA 2000)(emphasis added).

The Act's strict prohibition on the approval of a development order that is inconsistent with an adopted plan is exemplified in *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 197 (Fla. 4th DCA 2001), *review denied*, 821 So. 2d 300 (Fla. 2002), which ruled that the statute **required the demolition** of removal of apartment buildings built during the pendency of litigation under s. 163.3215, Fla. Stat. and found to violate the comprehensive plan in that case.

A key aspect of *de novo* strict scrutiny is that no deference is given to the construction or interpretation of the comprehensive plan by the local government. *Dixon v. City of Jacksonville,* 774 So. 2d 763, 765 (Fla. 1st DCA 2000) rev. dismissed, 831 So. 2d 861 (Fla. 2002); *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 467, 475 (Fla. 1993); *Johnson v. Gulf County*, 26 So.3d 33 (Fla. 1st DCA 2009); *Pinecrest Lakes v. Shidel*, *795 So.2d 191* (Fla. 4th DCA 2001) review denied, 821 So. 2d. 300 (Fla. 2002).[11]

While the proceeding now before the Court is brought under Ch. 70, Fla. Stat. – the *Harris Act* - and not Chapter 163, **the discussion above emphasizes the need for Court's to strictly limit any comprehensive plan violations that would be authorized by a *Harris Act* settlement to ensure the does not authorize comprehensive plan violations to any extent greater than is necessary to avoid an undue burden to the landowner.**

[11] This is in stark contrast to the much more deferential and limited judicial review that applies in challenges to zoning decisions based on grounds other than inconsistency with a comprehensive plan. In a certiorari case challenging a development order as inconsistent with a zoning code, a local government's interpretation of its own code cannot be overruled unless it is clearly erroneous. *Las Olas Tower v. City of Ft. Lauderdale*, 742 So. 2d 308 (Fla. 4th DCA 1999).

In this case, the deviations from the comprehensive plan the Settlement agreement would authorize are great. Because the DR/GR land use restrictions on the property limits homes to one unit per ten acres[12], the Settlement Agreement authorizes a 15 times increase in residential density. The HEX Report found the Settlement allows development that contravenes Comprehensive Plan Policies 33.2.4.4.d, 33.2.4.e and 33.2.5 because the amount of commercial and other non-residential development it allows 700,000 s.f. of commercial development on the site, which exceeds the Plan's limitation of 300,000 s.f. of commercial development.

The proposed Settlement Agreement improperly purports to grant waivers from development restrictions to property that was not the subject of the Harris Act claim.

The Settlement Agreement purports to utilize the authority of § 70.001 (4)(d)1 of the Harris Act to allow the County to grant to Corkscrew "a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property…."

The proposed Settlement Agreement, however, impermissibly includes 2,474 acres land beyond the "real property" that was the subject of the Harris Act claim, A *Harris Act* settlement cannot go beyond restoring any property rights that have been allegedly burdened by the subject government action to development rights and waivers of otherwise applicable development restrictions for additional property that was not the subject of the *Harris Act* claim. A *Harris Act*

[12] For lands within the Environmental Enhancement and Preservation Communities Overlay, where certain environmental restoration conditions are met, Comprehensive Plan Land Use Policy 33.3.4 allows residential density in certain locations up to a maximum of one home per three acres. (See Hutchcraft, 11.8.22 Tr., Pg. 218, Lines 5-20; The County Hearing Examiner's Report had found that the land that is the subject of the Settlement Agreement was not within that Overlay, and thus the Settlement Agreement was inconsistent with the Comprehensive Plan for that reason. (Jt. Petitioners' Ex. 15: HEX Report, p. 5.)

settlement cannot go beyond restoring any property rights that have been burdened and used as an excuse to grant more development rights than had ever existed on the property.

The Harris Act authorizes relief to a landowner "[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property …." §70.001 (2), Fla. Stat. In turn, the statute defines the term "real property" to mean:

> "land and includes any surface, subsurface, or mineral estates and any appurtenances and improvements to the land, including any other relevant interest in the real property in which the property owner has a relevant interest. **The term includes only parcels that are the subject of and directly impacted by the action of a governmental entity.**

§70.001 (3) (g), Fla. Stat. See also §70.001 (2), Fla. Stat. (emphasis added)

The authorization for settlement agreements in §70.001 (4)(c), Fla. Stat. does not expand the limitations of the Act's waiver of law to "only parcels that are the subject of and directly impacted by the action of a governmental entity." §70.001 (3) (g), Fla. Stat. See also §§70.001 (2), 70.001 (4)(d)1 and §70.001 (4) (d)2, Fla. Stat. Section 70.001 (4)(c), Fla. Stat. authorizes settlements to effectuate:

"1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.

2. Increases or modifications in the density, intensity, or use of areas of development.

3. The transfer of development 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, a special exception, or any other extraordinary relief.

10. Purchase of the real property, or an interest therein, by an appropriate governmental entity or payment of compensation.

11. No changes to the action of the governmental entity."

Nothing about these options, which must be read *in pari materia* with the rest of the Act[13], and, as explained above, be read narrowly, expands the limitations of the Act's waiver of law to "only parcels that are the subject of and directly impacted by the action of a governmental entity.". To the extent that "land swaps or exchanges" might contemplate transferring title to land not subject to the *Harris Act* claim to the landowner to be developed, that can only contemplate the transfer of title of the affected real property to the government agency for preservation – not to allow the owner to keep the land and develop it. Also, that allowance can only be read, consistent with the rest of the statute, to mean that the non-Harris Act affected land to be transferred to the landowner be land that may be developed appropriately under existing statutes and local regulations. There is no way to read the Act to allow the same waivers from statutory and local restrictions for land other than the real property directly affected by the government action giving rise to the *Harris Act* claim being settled.

[13] *E.A.R. v. State*, 4 So.3d 614, 629 (Fla. 2009); *McDonald v. State*, 957 So.2d 605, 610 (Fla. 2007); *Zold v. Zold*, 911 So.2d 1222, 1229-30 (Fla. 2005); *Edgewater Beach Owners Ass'n, Inc. v. Walton County*, 833 So.2d 215 (Fla. 1st DCA 2002); *State v. Fuchs*, 769 So.2d 1006 (Fla.2000); *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So.2d 981 (Fla.1981).

The Settlement Agreement here would improperly authorize relief in the form of waivers from compliance with County regulations and comprehensive plan limitations for over 2,473 acres of land that were not the subject of and directly impacted by the government action that gave rise to the *Harris Act* claim.

For this reason, the Court cannot approve the Settlement Agreement.

The "relief" granted by the County to Corkscrew under the Settlement Agreement exceeds that which is necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

Under Florida law, a local government may not violate its land development code or comprehensive plan based on a conclusion that the resulting approval will be in the public interest. Instead, they must deny applications that violate the code or the plan. *Realty Assocs. Fund v. Town of Cutler Bay*, 208 So.3d 735 (Fla. 3d DCA 2016). The only exception is the section of the *Harris Act* which authorizes deviations from the plan or code only to the extent the Act's standards are shown to have been met.

In this case, the "relief" the Settlement would grant Corkscrew violates §70.001 (4) (d)1, Fla. Stat, which requires that "the relief granted shall protect the public interest served by the regulations at issue **and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."** (emphasis added). The "relief" the Settlement would grant Corkscrew violates §70.001 (4) (d)1 and 2, Fla. Stat. because the relief granted exceeds the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

The Act allows limited waivers of existing comprehensive plan and code requirements, but only to the extent necessary to avoid an "inordinate burden" on the landowner, as defined in the Act, which defines the terms "inordinate burden" and "inordinately burdened" to 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)

The development rights the Settlement Agreement purports to grant Corkscrew exceed the *Harris Act's* protection of "vested rights" to "existing uses" §70.001(3) (a) and (b), Fla. Stat.

Even in consideration of "inordinate burden" standard notwithstanding judicial precedent interpreting federal and Florida constitutional "property rights" protections and "takings" claims, the "Agreement" and Stipulated Settlement Agreement exceed what the known precedent would support as the minimal waiver of law to prevent an undue burden. The *Harris Act's* definition of "inordinate burden" is similar to case law interpreting the takings clause, which requires compensation when regulation (1) prevents an owner from attaining her "reasonable, investment - backed expectation",[14] (2) limits a vested right,[15] or (3) has such an adverse impact on the landowner that "justness and fairness require the burden to be borne by the public at large."[16] Thus, while the express legislative intent is to "provide more protection," the statutory definitions and decision factors track closely those used by courts under the "takings" clause. For this reason, the Act is likely to be interpreted as granting rights not greatly in excess of those given by the

[14] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).
[15] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *also see Monroe County v. Ambrose*, 866 So. 2d 707 (Fla. 3d D.C.A. 2003) (the purchase of land is a subjective expectation and not a vested right to develop property).
[16] *Penn Central*, 438 U.S. at 124; *see also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal*., 482 U.S. 304, 319 (1987); *Dolan v. City of Tigard*, 512 US 374 (1994); *Nollan et ux v. California Coastal Commission*, 483 U.S. 825 (1987).

Constitution. Because the Act uses the same terms of art as federal takings case law to flesh out the meaning of "inordinate burden"

Courts have rejected "takings" claims against regulations that have substantially reduced the value of property. Susan Trevarthen, "Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims," 78 Fla. Bar J.61, 61 (2004). See e.g., *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 538 (2005); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), at 1019); *Hodel v. Virginia Surface Mining and Reclamation Act*, 452 U.S. 264 (1981; *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 830 F.2d 977 (9th Cir.1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)(in some cases regulations may result in a 95% loss without justifying compensation as a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (reducing property value by over 90%). In *Palazzolo v. Rhode Island,* 533 U.S. 606, 630–631, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001), the U.S. 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." 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 to a value of $200,000. *Id.* at 616, 631, 121 S. Ct. 2448.

In Florida, leading cases are *Graham v. Estuary Properties, Inc.,* 399 So.2d 1374 (Fla. 1981) (holding 75% reduction of value not a taking), *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. 1st D.C.A. 1990), *rev. den*., 570 So.2d (Fla. 1990), and *Lee County v. Morales*, 557 So.2d 652, 655 (Fla. 2d D.C.A. 1990), *rev. den*., 564 So.2d 1086 (Fla. 1990) (which found a very substantial reduction in property value based on a Lee County regulation was not a taking). A Florida Keys case, of *Beyer v. City of Marathon*, 197 So.3d 563 (Fla. 3rd DCA 2016) and all

'takings' decisions, held that, absent extreme circumstances, any remaining reasonable economic use of the property will preclude a 'takings' claim.

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. An "inordinate" burden is required. Not just any "burden" requires compensation or justifies relief int eh forma of the waiver of otherwise applicable development standards. **Even given the undefined lower threshold for a property rights violation under Florida's *Harris Act*, the County and Corkscrew have not demonstrated that granting approval for less than a development of up to 10,000 dwelling units, 700,000 s.f. of commercial development, 240 hotels rooms and other uses would be an "inordinate burden" upon Corkscrew.** The code and comprehensive plan waivers granted by the Settlement Agreement are not "necessary" to avoid a violation. They go gratuitously beyond that would exceed the *Harris Act's* protection of "vested rights" to "existing uses" §70.001(3) (a) and (b), Fla. Stat.

A meritorious claim requires "the relief granted shall protect the public interest served by the regulations at issue" and be the appropriate relief to prevent the governmental regulatory effort from inordinately burdening the real property. The Joint Petitioners have not shown that the relief granted by the "Agreement" and Stipulated Settlement" does not exceed what is "necessary" and appropriate.

The Settlement Agreement Grants Development Rights Beyond What is Necessary to Prevent an Inordinate Burden Upon Corkscrew

The facts of this case do not support a conclusion that the extent of the development rights granted by the Settlement Agreement do not exceed what is necessary to prevent an "inordinate burden" upon Corkscrew. The amount of development rights granted by the Settlement Agreement

are not based upon any inordinate burden analysis whatsoever. At no point did the County require Corkscrew to disclose the amount of its purchase price the property, total investment beyond the purchase price, or any other financial information relevant to determine the issue of "inordinate burden", which is based, per the terms of the *Harris Act*, on economic factors.

Indeed, the first time any information about the economic impact of the Settlement Agreement relative to Corkscrew's total reasonable investment was in open Court in this case on November 8, 2020, when Corkscrew's witness was directed to do so by the Court. His response revealed that the Settlement Agreement will result in Corkscrew at least doubling, and likely more, its total investment in the property. No undue burden analysis was performed by either of the Jt. Petitioners. No appraisal was done to demonstrate whether a level of development consistent with the Comprehensive Plan, or which violated the Plan to a much lesser degree would result in fair market value that avoided an "inordinate burden" on Corkscrew.

Based on the factors established in the *Harris Act*, it cannot be reasonably concluded that the amount of development authorized by the Settlement Agreement, and the resulting land value to be enjoyed by Corkscrew, is the minimum necessary to avoid an undue burden on the company.

More evidence that the extent of development allowed by the Settlement Agreement has no relationship to any undue burden economic analysis is found in the fact that, instead of pursuing a mining application under the 2007 Comprehensive Plan provisions Judge Fuller had determined the company was vested under, it instead negotiated to sell the land to a developer. That developer, Mr. Cameratta, who had no prior involvement in the property and was not a party to the litigation and events that had led to Corkscrew's *Harris Act* pre-claim, then was allowed to take part in the negotiations that resulted in this Settlement Agreement. The resulting amount of development allowed was not based at all on documented economic undue burden factors, but was instead

modelled after other developments Mr. Cameratta had built in southeast Lee County that, unlike the subject land, fully complied with the Comprehensive Plan's development standards applicable to those properties. In fact, t**he Settlement Agreement allows Corkscrew to build at higher densities that were allowed by those other projects that did comply with the Comprehensive Plan.** The Settlement terms also reflected the least amount of development the Board of Directors of Corkscrew would accept. **It was a negotiated deal, completely un-tethered disassociated from the restriction of the *Harris Act,* that allowed substantially more development than is authorized by the Lee County Comprehensive Plan on this property, unsupported by any evidence that it was the lest amount of development necessary to avoid a violation of Corkscrew's *Harris Act* protections.**

Conclusion

The Court must ensure that the Settlement Agreement is not a misuse of the *Harris Act,* which allows a local government to agree to contravene its comprehensive plan and land development regulations only to the extent i) necessary to resolve a *bona fide* claim and prevent demonstrated violation of statutory property rights; and ii) that is limited to the property that is the subject of the *Harris Act* claim; and iii) and that is narrowly limited to allow a waiver of the code or comprehensive plan no greater than necessary to prevent the property rights violation.

In this regard, the case of *Chisholm v City of Miami Beach*, 830 So.2d 842 (Fla. 3rd DCA 2002) is relevant. In *Chisolm*, the court reversed a settlement of a *Harris Act* claim purporting to approve a development project without meeting City Code requirements as "unjustified and illegal". A concurring opinion by Judge Schwartz noted that the trial judge in the case "rejected an attempt by a hotel owner and the City of Miami Beach to grant totally unjustified and illegal height variances through the device of a 'sweetheart settlement' of a spurious action by the hotel

owner against the City under the [Harris Act]. (citing *Chisholm Properties South Beach, Inc. v. City of Miami Beach*, 8 Fla. L. Weekly Supp. 689 (Fla. 11th Cir. Ct. August 9, 2001).

In this case here at issue, the County and Corkscrew have not shown that the Settlement Agreement grants waivers of statutory and County Comprehensive Plan requirements only for the "real property" that was directly affected by the County actions giving rise the Harris Act pre-claim, or that the deviations granted from those legal standards are limited to those necessary to avoid an "undue burden" on Corkscrew. Neither have they demonstrated that the Settlement Agreement is in the public interest.

Instead, the Settlement Agreement represents the kind of case by case ad hoc development decision the adoption of Florida's comprehensive planning law was adopted to prevent. In . *Dixon v. City of Jacksonville,* 774 So. 2d 763, 765 (Fla. 1st DCA 2000), the Court, commenting on the need for strict judicial review of local government development decisions, lamented that, if not strictly required to comply with comprehensive plans as leaving such decisions at:

> "**the discretion of whoever composes the membership of the governmental body's planning department at any given time, and the goal of certainty and order in future land-use decision-making would be circumvented.**" *Dixon* at 765. (emphasis added).

The *Machado v. Musgrove*[17] decision, adopted as the governing law throughout Florida by *Snyder v. Board of County Commissioners of Brevard County*, 627 So. 2d 469 (Fla. 1993) explained that a comprehensive plan:

> "Not a vest pocket tool, for making individual zoning changes based on political vagary. Instead it is a broad statement of a legislative objective to protect human, environmental, social and economical resources and to maintain through orderly

[17] 519 So.2d 629 at 632, rev. den. 529 So.2d 693 (Fla. 1988).

> growth and development the character and stability of present and future land use and development in this state." 519 So. 2d at 635. (emphasis added).

A Settlement Agreement purporting to authorize any, let alone, substantial violations of a local government comprehensive plan, such as in this case that would transform 6,676 acres of rural, agricultural land into a small city, must be strictly limited to the strict limitations on such deviations authorized by the *Act.* The Settlement Agreement before the Court in this matter is devoid of the factual support, including in particular, the relevant financial information, required to demonstrate that it complies with those limitations.

The Settlement Agreement should be denied.

Respectfully submitted this 8th day of December, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy hereof has been filed electronically with the Clerk of Court using the E – filing portal system which will send a notice of electronic filing on this 8th day of December 2022 to the following counsel of record:

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