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Via email

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Re: Proposed *Harris Act* settlement for Corkscrew Grove Limited Partnership

Dear Chairman Pendergrass and members of the County Commission,

I write on behalf of County Resident Patty Duncan, to object to this proposed settlement, which appears to be unauthorized by and a gross misuse of the Harris Act.

The Hearing Examiner's Report **does not support the approval of the Settlement Agreement under the Harris because the HE was not asked to and did not review the settlement for all of the *Harris Act* requirements.** The HE's recommendation makes clear that:

> "[t]*he scope of review* ***is limited to a determination of whether the Agreement protects the public interest served by the County's land development regulations***."

The HEX report was explicit that the requirement in the *Harris Act* that "the relief is necessary to prevent an inordinate burden to the property owner from the regulation ***is outside the scope of the Hearing Examiner's authority***. This finding must be made by the Board.".

Under the *Harris Act*, the HEX Report is not nearly enough to authorize to authorize a violation of the code or comprehensive plan.   Under the Act, any settlement agreement that waives compliance with a code or comprehensive plan provision must also:

- Be necessary to resolve a *bona fide* claim and prevent a demonstrated violation of statutory property rights; and
- Be limited to the property that is the subject of the Harris Act claim; and
- Be narrowly limited to allow a waiver of the code or comprehensive plan no greater than necessary to prevent the property rights violation.

If the County approves this settlement agreement, the agreement would have to 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.

It is hard to see how this agreement could be approved by a judge.

Initially, we question whether this settlement **would settle a *Harris Act* claim which is indeed meritorious.** We suggest that the Board request and received a written legal analysis from its counsel that explains how it is that the landowner, and not the County, is likely to prevail in this claim.

Among the necessary facts to be proven are:

- How does the owner's purchase price and actual investment in the property compare to the fair market value as regulated by the County decision that is the subject of the *Harris Act* claim?
- How does that compare to the fair market value if the settlement agreement is approved?
- How do the uses that would be allowed by the settlement agreement compare to those allowed by the Comprehensive Plan when the applicant sought its mining approval?
  - Are they the same?
  - Are they greater? That would obviously go beyond the *Harris Act's* protection for "vested rights" to "existing uses" §70.001(3) (a) and (b), Fla. Stat.

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)

Whatever the merit of the *Harris Act* claim, the key concern with this settlement agreement is the exorbitant "relief" it would grant the landowner. Section §70.001 (4) (d)1, Fla. Stat. requires both 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**.

Even acknowledging that the "inordinate burden" standard in the *Harris Act* is not bound by the same judicial precedent that has interpreted the federal and Florida constitutional "property rights" protections, the development allowances in this Agreement appear to be off the charts compared to anything the courts have found to violate private property rights. The 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 allowing only one home to a value of $200,000. *Id.* at 616, 631, 121 S. Ct. 2448.

In Florida, the 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 recent 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. 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.

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. Even given the undefined lower threshold for a property rights violation under Florida's *Harris Act* **is difficult to imagine how approval of something less than a massive 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" on the landowner under the Act.** The code and comprehensive plan waivers granted by the *Harris Act* must ne "necessary" to avoid a violation. They cannot go gratuitously beyond that.

Next, and to compound this problem dramatically, regardless of the potential merit of the *Harris Act* claim as it relates to the land for which the mining approval was sought, **the settlement agreement would grant development rights in violate of the code and comprehensive plan for 2,474 acres of property that are not even the subject of the *Harris Act* claim.** The HEX Recommendation did not discuss the issue of granting development rights in violation of the code or comprehensive plan for 2,476 acres beyond the 4,200 acres that were the subject of the rezoning denial that became the subject of the *Harris Act* claim. **A *Harris Act* 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* does not authorize waiving the rules for the subject property **and for additional property not part of the claim. The Act authorizes relief to a landowner** (subject to the other statutory restrictions) **for:**

> **"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.[1]

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 clause in the *Harris Act* which authorizes deviations from the plan or code only to the extent the conditions explained above are proven. In my opinion, a *Harris Act* settlement that waives the rules for additional property not subject to the action that was allegedly "inordinately burdened" violates the law.

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[1] Section 70.001 (3) (g), Fla. Stat. says, unambiguously, that "[t]he term "real property" means 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.**

The parallels between this proposed settlement and the case of *Chisholm v City of Miami Beach*, 830 So.2d 842 (Fla. 3rd DCA 2002) cannot be overlooked. In that case, the court reversed a settlement of a *Harris Act* claim purporting to approve a specific 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).

The *Harris Act* cannot be used as a mechanism to avoid the mandatory statutory prohibition on the approval of development orders that violation a County's comprehensive plan or code. Courts are aware of the potential that the Act can be mis-used to allow what is otherwise prohibited. The Act exists to protect landowners in those rare cases when government action truly creates a burden on a single landowner that is "inordinate". It allows limited waivers of existing comprehensive plan and code requirements, but it may not be used to grant a windfall to a landowner.

In closing, this proposed settlement seems highly questionable and raises very concerning issues. We urge the Commission to reject it and, on behalf of the public, require a complete explanation of the many issues raised above.

Sincerely,

Richard Grosso, Esq.

cc:

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Cecil Pendergrass, District 2, Lee County Commissioner
Ray Sandelli, District 3, Lee County Commissioner Brian Hamman,
District 4, Lee County Commissioner Frank Mann,
District 5, Lee County Brandon Dunn, Lee County
Michael Jacob, Asst. Lee County Attorney