IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 5D12-1982

THE TOWN OF PONCE INLET, a Florida municipality,

Appellant,

v.

PACETTA, LLC., a Florida limited liability company, DOWN THE HATCH, INC., a Florida corporation, and MAR-TIM, INC., a Florida corporation,

Appellees.

INITIAL BRIEF OF APPELLANT THE TOWN OF PONCE INLET

ON APPEAL FROM A NON-FINAL ORDER ENTERED IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

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INTRODUCTION

Arrogating powers exclusively conferred by the Florida Legislature on municipal governments and state agencies, the trial court constituted itself as a "super land-use agency" and – in the guise of finding liability under the Bert J. Harris Act (the Harris Act) – fashioned amendments to the state-approved Comprehensive Plan adopted by the Town of Ponce Inlet (the Town). It is undisputed that appellees Pacetta, LLC, Down the Hatch, Inc. and Mar-Tim, Inc. (collectively, Pacetta) *never* applied to the Town for either Comprehensive Plan amendments or rezonings. But the trial court nonetheless ruled that the Town's unremarkable lawful decision, during a statutorily required plan-review process, *not* to adopt Comprehensive Plan amendments but instead to maintain the *status quo* somehow inordinately burdened Pacetta's property.

The trial court's keystone finding is that Pacetta has a judicially created "right," through equitable estoppel, to develop its property in a manner that is expressly *forbidden* by the state-approved Comprehensive Plan – and which, for that matter, has been forbidden by the Town since *before* Pacetta purchased its first parcel. As Pacetta's principal testified, "[e]verything is the same" – meaning development rights and limitations – as it was at the time of the first acquisition. Nonetheless, based almost entirely on purported statements by Town employees during off-the-record meetings with Pacetta's principals, as well as actions of private citizens, the trial court created Pacetta's development "rights" and decreed that the Comprehensive Plan is *de facto* amended to accommodate Pacetta. Such a judicial usurpation of powers statutorily conferred on the State and its political

subdivisions is even more egregious than that which this Court redressed in *Citrus County v. Halls River Dev., Inc.*, 8 So. 3d 413 (Fla. 5th DCA 2009).

In *Halls River*, the Court reversed a Harris Act liability finding, although the local government repeatedly had misinformed the developer regarding allowable uses, because a developer "cannot utilize the doctrine of equitable estoppel to compel the County to issue the necessary approvals for the project" when the developer "never had a lawful right to the proposed use" in the first instance. 8 So. 3d at 422. Here, Pacetta never identified *any* new law, rule, regulation, or ordinance that, "as applied, unfairly affect[ed]" an existing right to develop its property, as is required for a Harris Act claim, § 70.001(1), Fla. Stat. (2012), yet nonetheless prevailed on the trial court to find the Town liable under the Harris Act. That unsustainable finding must be reversed.

STATEMENT OF THE CASE AND FACTS

I. PACETTA'S ACQUISITIONS OF PROPERTY IN PONCE INLET.

A. The Existing Land Use Plan and Regulations.

Beginning in 2002, the Town undertook a "Visioning Process" to establish future development goals. (A:7387, 7390, 7409-25). The visioning report states that the Town "is and will be a residential haven," offering "a small town lifestyle," and featuring "high quality" development of "appropriate scale." (A:5814-43). The Town Council first adopted that vision in its proposed 2002 amendments to the Town's Comprehensive Plan (and it has remained in the plan since that time). (A:7390, 7409).

Following review of the amendments by the Florida Department of

Community Affairs (DCA), the Town adopted Ordinance No. 2002-35 (the 2003 Comprehensive Plan). (A:7278-327, 7383-428, 7429-31, 7931-40). In pertinent part, the 2003 Comprehensive Plan: (i) prohibited new marinas or the expansion of existing marinas; and (ii) adopted a "Riverfront Commercial" land use category, in which, under Policy 1.2.2.(g), commercial development is limited to "35 feet in height and building floor area not to exceed 5,000 square feet." (A:7297-312). The plan was approved by DCA and went into effect. (A:7432-35, 7926-27, 10738).

On January 7, 2004, the Town Council amended the Town's Land Use Development Code (LUDC) to include Riverfront Commercial (B-2) zoning, *i.e.,* "an area that is characterized by small-scale retail outlets" and "those elements of the water-oriented commercial activity that can be integrated into a small town fishing village concept." (A:1263). "Boat storage" was expressly deleted as a "permitted principal use." (A:1264). The Council also created the Riverfront Overlay District (ROD), which imposes extensive regulatory limitations on riverfront development. (A:1263). The only reference to boat storage is as a "Permitted Special Exception[]," and only in "B-2 Districts that are not covered by the [ROD]." (A:1266).

B. The Acquisitions.

Between June 2004 and May 2006, Pacetta acquired 10 parcels on the Town's waterfront. (A:2116).[1] All properties are zoned Riverfront Commercial

[1] This Court has previously held that the properties were intended to be developed (continued . . .)

and are within the ROD, with the exception of Parcel 10 (which is within the ROD, but zoned for multi-family use) and Parcels 2 and 7 (which are outside of the ROD). (A:10283, 1036, 2116).

Lyder Johnson, Pacetta's principal, who portrays himself as an expert real estate developer, first purchased Parcels 1 and 2 (the Sailfish Property) for $4.1 million in June 2004. (A:8736-40, 8743-45, 8751-54, 9650-51, 2116, 2146-59, 2160). His initial plan was to build a home for himself and his wife, the cost of which would be offset by developing single-family residences. (A:9651).

Johnson was aware before he purchased the Sailfish Property that Parcel 1 is zoned Riverfront Commercial and is within the ROD (A:1263-66, 8746-49, 8760-61), such that the 2003 Comprehensive Plan's 5,000 square-foot limitation and its prohibition on new or expanded marinas, as well as the ROD's prohibition on dry boat storage facilities applied to the Sailfish Property, and that there was no mixed-use category for properties of less than 80 acres. (A:9341-50, 9351-56, 9359-60, 10193-95). Parcel 2 is zoned for medium-density residential, which also does not permit boat storage facilities. (A:1251-52). The Johnsons understood that both a comprehensive plan amendment and rezoning would be required for residential development on Parcel 1, but sought neither. (A:652-53, 9660-61).[2]

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as one parcel. *Town of Ponce Inlet v. Pacetta, LLC*, 63 So. 3d 840, 841-42 (Fla. 5th DCA 2011), *review denied*, 86 So. 3d 1115 (Fla. 2012). See Part II.B.2., *infra*.

[2] In July 2004, Johnson spoke with Don Sikorski, a consultant hired by the Town to assist in modifying the Comprehensive Plan, who "invite[d] us into the [amendment] process," suggesting "we could all ... put all of our plans together." (A:8755-56). Although the Town Council had granted an abutting landowner's
(continued . . .)

Johnson purchased Parcels 3-4 (the Docksider Property) in March 2005 for $1.7 million. (A:8814-15, 9341-42).[3] At a joint Town Council/Planning Commission Workshop on January 25, 2006, Johnson explained his "vision" of a 100-slip marina and "boat slippage facility." (A:1989-2013, 2015-17).

Johnson purchased Parcels 5-9 (the Mar-Tim Property/Sea Love Boat Works and the Down the Hatch Property) for $7 million in March 2006. (A:2116, 8960-62, 9059-60, 9341-42).[4] In May 2006, Johnson purchased the Old Florida Club (OFC or Parcel 10), which was zoned for multi-family use and had development permit for 19 townhomes plus an equivalent number of boat slips, for $8 million. (A:8824-30, 8987, 9387-88, 1725-26, 1816-28, 1829-41, 2169-85, 2186-97, 2198-201, 2202-05).[5] Johnson then commissioned plans for a different residential

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application for a small-scale amendment and rezoning to allow residential development shortly after Johnson's closing (A:1341-45, 1346-50), Johnson elected not to apply for an small-scale amendment at a cost of approximately $65,000, because "we were getting it done free." (A:8756, 10196-98, 10213).

[3] Johnson attended a November 2005 workshop meeting on the Town's "working waterfronts" initiative, based on which he believed "[t]he ROD was to be replaced." (A:8964-65). The Town had first addressed the initiative in May 2005, based on the "Waterfronts Florida Program" adopted by the Legislature. (A:1780-81). The November 2005 workshop covered a wide range of topics on "working waterfronts." (A:1904-15).

[4] It was undisputed at trial that the boatyard and Down the Hatch continue to operate and produce revenue. (A:8600, 9309, 9841-42, 10593, 10864-65, 11129).

[5] Johnson's architect, Roman Yurkiewicz, testified that he had attended a meeting in "late 2005," during which Town representatives encouraged Johnson to purchase OFC and adjacent properties. (A:9923-25). The Johnsons testified that they had purchased the OFC "based on the [Town's] actions." (A:9465-66, 9673). Pacetta's planner testified that the Town had encouraged Johnson "to acquire the additional properties" because the Town wanted "public access to the riverfront," a riverwalk, and a "sunset pier." (A:10147-50).

project and allowed the existing permit to expire, three months after he closed on the OFC, without seeking an extension of or amendment to that permit. (A:9924-26, 9929-31, 6137). Pacetta's site planner, Paul Momberger, thereafter undertook the design of a 28-unit townhome project, with a "300-slip dry storage" facility, 100 wet slips, and a 20,000 square foot commercial area for a restaurant and retail stores. (A:10154).[6]

II. THE TOWN'S 2006-2008 LAND-USE PLANNING.

A. The Zoning-in-Progress Resolution.

On July 19, 2006, the Town Council passed a resolution announcing its intent to adopt a "slip aggregation" method for allocating boat slips, in accordance with the Florida Manatee Protection Plan (MPP). (A:2045-47). On January 17, 2007, the Town Council approved a zoning-in-progress resolution with respect to the allocation methodology of boat slips and other aspects of the code. (A:2231-33, 7616-28, 7629-76). The resolution prohibits issuance of permits that "would

[6] Momberger understood that the dry boat storage facility was barred under the Comprehensive Plan in effect at the time Pacetta purchased the property, as well as by the existing B-2 zoning on the Sailfish Property. (A:10207-10). To Momberger, however, the Town had "embrac[ed] this plan," although the Town Council "[n]ever reviewed ... [and] didn't approve" it. (A:10158, 10161). Momberger testified that "[t]here seemed to be … movement to promote the development of a commercial working waterfront" in the Town, because Town officials "asked that we master plan the whole property," and the Town Planner had reviewed the design in a "collaborative" relationship. (A:10147, 10150-51, 10213). Pacetta's architect testified that he had met with the Town Planner to discuss plans and that he had incorporated some suggested changes. (A:9931-32). Momberger acknowledged that Pacetta could have applied for a Comprehensive Plan amendment between 2005-2007. (A:10197-99, 10213).

result in a non-conforming and/or unlawful use of the property should the Town adopt any proposed changes to the [LUDC] … and the allocation methodology of boat slips." (A:2231).[7] On October 17, 2007, the Town adopted its allocation methodology. (A:2868-85, 2886-904).

B. The Comprehensive Plan Amendment Process.

In early 2007, the Town commenced an evaluation of its Comprehensive Plan. (A:2236-61, 2279-84, 2289, 2316-27, 2328-44, 2487-97, 2498-504, 2519-33, 2564-603, 6192-451). Johnson and other Pacetta representatives met with Town officials and participated in public hearings during the evaluation process. (A:2234-35, 2236-61, 2279-84, 2290-93, 2316-27, 2372-74, 2483-86, 2487-97, 2564-603, 2749-50, 2751-61, 2838-39, 4041-79, 4507-09, 4562-87, 5027-29, 5030-70, 5071-127, 5203, 5204-07). Johnson testified that Town representatives had "provided us multiple assurances," but "did not directly guarantee me anything," and that the Town Council only "gave me [the] direction" in which they "would go" or "stated what [they] wanted to see." (A:9367, 9369-71).

1. The Town's initial consideration of amendments.

In January 2007, Pacetta first presented a proposal – which Johnson described as "a rough conceptual [plan] and … not a formal request for approvals [or] permits" – to Town staff. (A:2066-96, 2234-35, 6137-72).[8] Johnson's counsel

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[7] Johnson acknowledged that the zoning in progress resolution did not affect Pacetta's properties. (A:9075, 9078, 9378).

[8] Johnson testified that the Town Attorney and staff had suggested that it would be unwise to present Pacetta's plans for approval during the comprehensive plan review process. (A:8960, 9475, 9686-88). According to Pacetta's planner, the (continued . . .)

then presented a "concept plan" to the Planning Commission on January 22, 2007, for "100 residential units" and a facility for "300-350 dry slips," to be housed in a 60,000 square-foot facility. (A:2241, 9065-69). Counsel told the Commission that the Comprehensive Plan "would need to be tweaked," especially with respect to the 5,000 square foot limitation in the Riverfront Commercial district. (A:2241). The Town Planner advised the Commission that "dry stacks are not allowed in the ROD," which "would … need to be amended for [Johnson's] proposal to be viable." (A:2242).[9] At a May 23, 2007 Council meeting, noticed as first reading of the Comprehensive Plan amendments, Pacetta's counsel acknowledged that, even after transmittal to and approval of the amendments by DCA, the Town Council would have the power to revise the Comprehensive Plan amendments if Pacetta's plans were "not agreeable" to the Council. (A:2490).

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plans had not been presented because of "some requirement for not letting everybody know [Pacetta] controlled it yet," (A:10156-57), although the plans were kept on display at Down the Hatch. (A:10154). In a May 9, 2007, letter to the Mayor, Johnson asserted that "it is not sound business practice" to prepare plans because marinas, dry boat storage facilities and mixed-use development remained prohibited under the Comprehensive Plan. (A:2372).

[9] Following that meeting, Johnson believed that "the ROD was going to be removed," which "was absolutely everything we needed" (A:9088-89, 9095), although in subsequent hearings and in correspondence, Johnson continued to urge the Town to amend the floor-area limitation and allow mixed uses in the ROD. (A:2279-84, 2289, 2300-08). According to Johnson, his conceptual plan had "always included a minimum of fifty thousand square feet dry boat stack." (A:9534-35). Johnson described the concept plan as "evolving," based on "input we shared back and forth" with the Town staff. (A:9069-70). He believed he had "made clear to the town staff … that the dry stack storage was a necessary engine" of the project, and agreed to amenities requested by the Town. (A:9069-71, 9177, 9623-24).

On June 25, 2007, the Council approved adding a Planned Waterfront Development (PWD) provision to the Comprehensive Plan. (A:2522-23). On July 30, 2007, the Council directed the Town's staff to modify the Comprehensive Plan to exempt PWDs from the 5,000 square-foot limitation and to allow "multi-family residential as part of a mixed-use project" in a PWD. (A:2566-2567).[10] Pending a final decision on whether to adopt amendments for dry boat storage facilities or additional square footage in the ROD, the Council adopted a second zoning moratorium on October 7, 2007. (A:2755).[11]

On March 19, 2008, the Town Council voted 4-1, on first reading, to transmit to DCA the Comprehensive Plan amendments to the Riverfront Commercial designation, allowing "[w]et and dry boat storage" as "representative uses" and deleting the 5,000 square-foot limit on retail buildings. (A:4635-38, 7257-61). After an initial review, DCA recommended that the Town "provide mixed use standards" in the amendments. (A:4555, 7213-61).

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[10] The Council constituted itself as the "local planning agency," § 163.3174(1), Fla. Stat. (2012), going forward because the Planning Commission members had "spoken amongst themselves about this," such that the Council could not "send this back … without … a Sunshine Law violation." (A:2535, 7268-77, 8899).

[11] The ordinance established a vested-rights process (A:2757-58), which Pacetta never invoked. (A:9567-71, 7342, 7343, 7344, 7345, 7346, 7347, 7348, 7349, 7350, 7351, 7352, 7353, 8019-114, 8115-25). In an October 16, 2007 letter, Johnson requested the Council to "recognize our current vested rights" to "our intended uses of our properties." (A:7335). In an e-mail to Council members on the next day, however, Johnson stated: "We clearly understand that we'll be facing a number of processes relating to the dry stack multi-family mixed use and other land development challenges." (A:7334-36, 9541-44).

2. The Charter Amendment.

Spurred by the transmittal of the proposed amendments to DCA, opponents of dry boat storage facilities succeeded in placing a proposed Charter amendment on the November 2008 ballot, that would "limit commercial dry boat storage facilities to 5,000 square feet of floor area and to allow dry boat storage to be permitted only by special exception, except in the [ROD] where dry boat storages are prohibited." (A:4890-96, 7580-97, 4569-70, 10806-07) (the Charter Amendment).[12] On October 14, 2008, several weeks before the election, Pacetta presented a conceptual plan – which included a 50,000 square-foot dry boat storage facility – to the Town Council. (A:5071, 5128).[13]

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[12] James McCormick, a former Council member, testified that the Charter Amendment referendum was "one-sided," because "[t]he people who were for it," including Council and Commission members, "were very emotionally involved." (A:10030-31). He believed that "[t]here were a lot of mixed signals given to everybody …, but specifically to Pacetta." (A:10015). Gary Comfort, a former Commission and Council member, who was named as having supported the Charter Amendment (A:10030-31, 10353-54), denied having "conspire[d]" to "thwart the effort of the Johnsons to develop their property." (A:8937). A former Planning Commission member, Thomas O'Shaughnessy, testified that Comfort "manipulated" the Town during the Comprehensive Plan amendment process. (A:10100-17). John Sturno, another Council member (who later ran unsuccessfully for Mayor) testified that Comfort had said he was resigning from the Council because "he could get more done off Council without violating the Sunshine Law." (A:10050, 10053). According to Sturno, an "investment group" was interested in purchasing the Pacetta properties in a bankruptcy sale, which he believed "was an underlying motive" for the Town's decisions. (A:10049, 10070).

[13] The plan did not reflect the proposed facility's square footage. (A:9899-900). The Johnsons revealed their proposal for a 60,000 square-foot structure, which included both 50,000 square feet of boat storage and commercial uses, at the meeting. (A:9901). Mrs. Johnson described the proposal as "a preliminary engineering plan," for which "all state, county and town approvals" would have to be obtained. (A:5072). Momberger, Johnson's planner, testified that the presentation "was not a formal application," but was "nothing more than a

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Pacetta's counsel informed the Council that "he cannot and will not promise that the Johnsons are committed to that plan," but "reserve[d] their right to develop their property as is permitted." (A:5076). The Council continued the hearing until after the election. (A:5076-77).[14]

The Town's voters adopted the Charter Amendment by a 62%-38% margin. (A:5210). According to Johnson, "our project was history." (A:9193).[15]

C. The Current Comprehensive Plan.

1. The adoption of the 2008 Comprehensive Plan.

In the November 2008 election, the Town's voters elected Council members who opposed dry boat storage facilities on the riverfront. (A:9720-21, 9742, 10358-59, 10785-86, 10837-38).[16] On November 18, 2008, the Town Council

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concept." (A:10223).

[14] On the following day, October 15, 2008, the Town adopted a second moratorium ordinance. (A:8174-83). Pacetta did not seek a vested-rights determination under the ordinance. (A:9579).

[15] Johnson requested the Town Manager to "poll the Town Council" on whether the Council would approve residential construction, and testified the manager reported that the Mayor had said, "not only no, but hell no." (A:9202).

[16] The prior Mayor ran for a seat on the Volusia County Council (A:10358), and Vice-Mayor Goudie, who had campaigned, along with other Council candidates, against dry boat storage facilities, was elected Mayor. (A:9720-21, 9742, 10358-59, 10785-86, 10837-38). Edward Jackson, who had served on the Planning Commission, testified that Mayor Goudie had stated to him, immediately before a joint Town Council/Planning Commission in 2010, that "we're going to end up owning that property." (A:10038-40). When Jackson responded that "[t]his doesn't fall under eminent domain," Goudie stated: "No, we have other ways to get this property." (A:10039-40). Goudie denied making that statement. (A:10812-14). Mrs. Johnson testified that the Town Planner advised the Johnsons to "[h]ang in there two more years and this Council will be gone." (A:9753-54).

adopted a revised Comprehensive Plan (A:5204-07, 5370-743) (the 2008 Comprehensive Plan), consistent with the Charter Amendment (A:5375-79), which elevated the existing prohibition on dry boat storage facilities in the ROD into the Comprehensive Plan, pursuant to Policy 4.1.5 ("[d]ry boat storage facilities shall be prohibited within this overlay district") (A:5461). On February 3, 2009, DCA informed the Town of its intent to find the 2008 Comprehensive Plan in compliance with statutory requirements. (A:6085-87).

2. Pacetta's challenges to the 2008 Comprehensive Plan.

On February 27, 2009, Pacetta filed an administrative petition, challenging the Comprehensive Plan's prohibition on dry boat storage facilities. (A:11200-09). Pacetta also sued the Town, challenging the Charter Amendment and the prohibition on dry boat storage facilities in both the Comprehensive Plan and the ROD. (A:2923-51).[17] On November 4, 2009, Pacetta served its Harris Act claim, which was based on the Charter Amendment and the moratoria. (A:2953-3080).[18]

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[17] The administrative proceedings were held in abeyance, pending disposition of the Charter Amendment litigation. (A:11230). On October 26, 2009, the Town Council imposed a 12-month moratorium, due to the pendency of Pacetta's challenge. (A:3081-91). Pacetta did not seek a vested-rights determination under that ordinance, nor did it file any development applications once the moratorium expired in October 2010. (A:9583-84, 9595-96).

[18] In its response to the Harris Act claim, the Town explained that the construction of dry boat facilities is prohibited in the ROD, which was established before Pacetta had acquired any interest in the properties and which "remains in effect up to the present time." (A:6134). The Town also rejected Pacetta's claim because Pacetta had never applied "for the development and construction of dry boat storage facilities," such that "[t]here is no existing use … that has been inordinately burdened by any specific action of the Town" and Pacetta's "dry boat storage facilities concept does not rise to the level of a vested right." (A:6134-35).

Pacetta secured a summary judgment on its challenge to the Charter Amendment on March 18, 2010. (A:3092-96). The circuit court ruled that the Charter Amendment (and thus Comprehensive Plan Policy 4.1.5) was invalid because only five or fewer parcels were affected, in violation of the then-applicable statutory provision for such amendments. (A:3095). The circuit court denied summary judgment on Pacetta's challenge to the ROD, because the ROD "was not the affirmation of a charter amendment, and it was adopted prior to Pacetta's acquiring this property." (A:3095).[19]

3. The Town Council's re-adoption of Policy 4.1.5.

On June 18, 2010, the Town Council addressed the Comprehensive Plan amendments in light of the summary judgment. (A:6460-67, 6468-571). Pacetta's counsel and Mrs. Johnson argued that the Town had encouraged Pacetta to assemble the properties. (A:6487, 6535-40). The Town Attorney noted that "every single piece of property" had been "purchased … after the ROD was created." (A:6500-01).[20] The Council unanimously voted to transmit the dry boat

[19] This Court affirmed the summary judgment on the Charter Amendment, holding that, because Section 163.3167(12), Florida Statutes (2010), "prohibits local initiatives or referenda in regard to development orders or comprehensive amendments affecting five or fewer 'parcels,'" and "the evidence was uncontroverted that the citizens' initiative referendum affected five or fewer parcels, the trial court correctly determined that the referendum violated section 163.3167(12), and declared it invalid." *Pacetta*, 63 So. 3d at 841-42.

[20] In response to Council members' concerns that Pacetta had never presented a development plan, Pacetta's counsel asserted that Johnson was "ready, willing and able to sit down and … create … a successful planned waterfront district." (A:6505-09, 6523-24). Counsel suggested that "it might be … we could show you 60,000 square feet doesn't look bad and maybe we couldn't." (A:6529-31).

storage prohibition to DCA. (A:6467, 6568-69).

On October 21, 2010, the Council adopted the ordinance on second reading and again transmitted it to the DCA. (A:3101-02).[21] DCA issued its Notice of Intent, finding the Comprehensive Plan amendment in compliance with governing statutes, on November 19, 2010. (A:7928).[22]

D. The Resolution of Pacetta's Challenges to the 2008 and 2010 Comprehensive Plan Amendments.

After conducting a hearing, the Administrative Law Judge (the ALJ) issued his recommended order on Pacetta's challenge to the Comprehensive Plan amendments on March 12, 2012. (A:11229-53). The ALJ first rejected Pacetta's claim that the Policy 4.1.5's prohibition on dry boat storage facilities in the ROD is inconsistent with the MPP. (A:11237-38).

The ALJ further found that "[t]he prohibition against dry boat storage facilities in the ROD is supported by data and analysis that shows that the noise,

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[21] Pursuant to the Volusia County Home Rule Charter, the Town also submitted its Comprehensive Plan to the Volusia Growth Management Commission (VGMC) for review and approval. (A:11212-15, 11216-26). On February 23, 2011, the VGMC issued Resolution No. 2011-02, finding that the proposed Comprehensive Plan amendments, including Policy 4.1.5, are consistent with the County's Comprehensive Plan. (A:11218-24). Pacetta filed a certiorari petition in the circuit court to challenge the VGMC's ruling, which petition was denied October 23, 2011, upon a ruling that the VGMC's decision was supported by competent substantial evidence. (A:11212-15).

[22] On March 10, 2011, Pacetta's counsel supplemented his original Harris Act claim, asserting that, "no economically viable use of Pacetta's property can be designed in accordance" with LUDC regulations. (A:3263-64). In response, the Town noted that the LUDC "provides for numerous uses of property" and that Pacetta "had not submitted any application for development." (A:3265-55).

fumes, traffic, scale, and appearance of dry boat storage facilities is incompatible with residential uses and with scenic, historic, and natural resources nearby." (A:11237-39). The ALJ accordingly ruled that Pacetta had "failed to prove": (i) "beyond fair debate that the Plan Amendments are inconsistent with any goal, objective or policy of the Town Plan"; (ii) "the Plan Amendments are not based on relevant and appropriate data and an analysis by the Town"; and (iii) "beyond fair debate that the [amendments] are not in compliance." (A:11249-51).

Turning to Policy 1.2.2(g), the ALJ ruled that Pacetta could not challenge the 5,000 square-foot limitation in the Riverfront Commercial area because that limitation had been adopted in the 2003 Comprehensive Plan. (A:11247). Moreover, "[t]here is no current use of [Pacetta's] property that is prohibited" by the limitation. (A:11244-45).[23]

III. THE TRIAL COURT'S RULINGS.

A. Pacetta's Alleged Losses.

Pacetta's land-planning expert, Benjamin Dickens, testified that a dry boat storage facility is "a reasonable, compatible use of this property." (A:10498-99). Pacetta also presented two appraisers: (i) H. Lynwood Gilbert, Jr., testified that a dry boat storage facility would be the property's "highest and best use" (A:10238-41, 10244-45, 10247-48, 10251-52); and (ii) Paul M. Roper testified that the "highest and best use" of the Sailfish Property and the two residential parcels (Parcels 1, 2, and 10, a total of eight acres), is "[m]ulti-family residential" – which

[23] See Part IV, *infra,* for the final administrative ruling.

"can easily stand alone" – and that the land value of $7.08 million would increase to $12.48 million with 106 boat slips. (A:10282-83, 10306-07, 10316, 10329-31, 2116).

Pacetta's site planner testified that "a very diminished development opportunity exists" in the absence of dry boat storage facilities as "an engine," but that Pacetta never had rights to "a dry boat storage facility of 5,000 square feet." (A:10176, 10226, 10230). Johnson agreed that "[e]verything is the same since I bought the property." (A:9614).

Johnson testified that he had invested $12.7 million and borrowed $10.5 million. (A:9326-28). He believes that "all economic value … [has] been taken" from the properties. (A:9326). Henry Fishkind, an economist, testified that "[t]here is virtually no retail/commercial use" without a dry boat storage facility. (A:10549-57, 10561-62).[24]

B. The Order.

1. The equitable estoppel finding.

The court relied on meetings between Pacetta's principals and Town representatives "from 2004 through 2007," in which Comprehensive Plan amendments "that would relieve the property of the ROD and allow a PWD to be

[24] Although acknowledging "a market feasibility" for single-family and multi-family uses on the Sailfish Property and OFC – Fishkind believes that the ROD and other regulations "would make it extraordinarily difficult, if not impossible, to … have a feasible residential development." (A:10588-89). He also testified that a dry boat storage facility would not "generate enough additional incremental demand for commercial/retail activity." (A:10591-92).

implemented so that mixed-use could be used" were discussed, to invoke equitable estoppel. (A:19). The court found that "[t]he driving force was always a suitable dry stack storage facility." *Id.* According to the court, "[t]he earth figuratively shifted" in January 2007, with the adoption of the zoning-in-progress resolution. *Id.*[25]

The court ruled that, as of the transmittal of the 2008 Comprehensive Plan amendments, following the first reading in March 2008, "and well before," Pacetta "had achieved a vested interest by operation of the elements of equitable estoppel." (A:20-21, 27). Although "[t]he ROD was passed in 2004 and was in place" before Pacetta acquired his first parcel, the court ruled that Pacetta had "relied upon the government in all of its acts and conduct." (A:27).[26]

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[25] Although the subsequently adopted moratoria "facially seem to comply" with zoning requirements, the court found that the moratoria were "a patently obvious series of arbitrary and capricious acts, engaged in bad faith, aimed at only the Pacetta … property," and intended to prevent Pacetta "from … any meaningful effort to develop the property." (A:20, 32). The court also suggested that "the long delays" in resolving the administrative proceedings illustrated bad faith (A:33), although the administrative record shows that the parties jointly agreed to continue the proceedings pending the Comprehensive Plan amendments, Pacetta's challenges to the Charter Amendment, and attempts to resolve the parties' disputes. (A:11231). Ultimately, legislative amendments required resubmission of Pacetta's administrative challenge, and it was the Town that then moved for an expedited administrative hearing. (A:11231-32).

[26] The court rejected testimony by the Town's planning expert, Tracy L. Crowe, with respect to "data and analysis prohibiting dry boat storage." (A:34). The trial court characterized Crowe's testimony as having been "virtually made up … out of whole cloth." (A:34-35). The court acknowledged that the ALJ – before whom Crowe also testified – had found that the Town's prohibition on dry boat storage facilities "is supported by data and analysis that shows that the noise, fumes, traffic, scale, and appearance of dry boat storage facilities is incompatible with residential uses and with scenic, historic, natural resources nearby." (A:11237-39).

(continued . . .)

Because Pacetta had incurred the cost of purchasing real estate and "soft costs" of between $5-7 million, the court ruled that Pacetta had made a "substantial change in position" in reliance on the Town's supposed representations (A:28-30), such that Pacetta had acquired vested rights through equitable estoppel:

> It would be grossly inequitable as well as unjust, even in the limited use of equitable estoppel available against a municipal government, not to recognize the vested rights that the Town provided. The Plaintiffs have established by equitable estoppel a vested right to have the Town include in [its] Comprehensive Land-Use Plan dealing with 16 acre Pacetta Group property with terms originally approved upon first reading. They have also established the opportunity to apply for and reasonably obtain, subject to reasonable constraints, a mixed use PWD free of square footage faculty [sic] constraints and ROD constraints that would allow a dry stack boat storage facility for up to 213 dry slips, all by overwhelming clear and convincing evidence.

(A:30). The court further found that "the Town officially engaged in an illegal effort to essentially spot zone the Pacetta property," and that "the evidence suggests" the Town was "used as a vehicle of vengeance or as a mechanism of destruction by [its] agents," *i.e.*, that there was "a Town mob" operating against Pacetta and "[t]he preponderance of the evidence points to intentional corporate [sic] action." (A:38-39). Ultimately, the court ruled that "the greater weight of the

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(. . . continued)
Although characterizing Crowe's analysis as "a mockery of serious land planning," the court suggested that its findings "intend no criticism of [the ALJ] and the exercise of his very different responsibility." *Id.* The court acknowledged that it "is without jurisdiction to rule on that issue," but nonetheless continued: "if the Town hires a consultant, pays her merely $5,000 to do an analysis that originally took years, all for the purpose of providing some made up data, those are facts that … appear to support [Pacetta's] thesis." (A:35).

evidence indicates a direct and intentional set of acts and conduct to limit the use" of Pacetta's property to foster acquisition "by or on behalf of the Town." (A:40).

2. The rulings on Pacetta's claims.

Pacetta brought four claims: Count I – inverse condemnation; Count II – denial of substantive due process and equal protection; Count III – denial of procedural due process; Count IV – Harris Act claim. (A:73-84). On Count I, the court ruled that there had been an unconstitutional taking as to four parcels only, because the remaining parcels are being used profitably or are zoned for residential use and "presumably ha[ve] value for purely residential construction." (A:43-44). On Counts II-III, the court ruled that these "ancillary claims" were established by: (i) the Town's "collu[sion] with citizen groups and essentially creating an illegal charter amendment"; (ii) "the Town's series of illegal acts including the illegal referendum and amendment of the Town Charter to interfere with the Pacetta Group and other conduct only involving the Pacetta property"; and (iii) "refusing to accept applications for building projects since 2004." (A:49).

On the Harris Act claim, the court ruled:

> [T]he property has been inordinately burdened in that the now permitted uses are a mere small shadow of those that would have been available based on the plaintiffs' established vested right[s]. Even though delay by the moratorium might not inordinately burden the property, the fact that the Town wrongfully used the serial moratoria and delay as a tool to stop development by the Pacetta Group and impede all use of the property, coupled with the announcement that the Town would not approve development, under any circumstance, for in excess of 30 months, clearly has the net effect of adding to the inordinate burden.

(A:45). Pacetta's damages are to be determined by a jury. (A:50).

IV. THE FINAL ADMINISTRATIVE DECISION.

A. The Department of Economic Opportunity's Final Order.

On June 19, 2012, after this appeal was taken, the Department of Economic Opportunity (DEO) issued its order approving the 2008 and 2010 Comprehensive Plans. (A:11257-66) (the DEO Order). The DEO rejected Pacetta's argument that "the ALJ was in error in concluding that the prohibition against dry storage facilities" in the ROD is inconsistent with the MPP, and approved the ALJ's findings that the prohibition against dry boat storage facilities in the ROD will serve the MPP's objectives as "supported by competent, substantial evidence." (A:11261-62).

The DEO Order also rejects Pacetta's argument that the prohibition against dry storage facilities in Policy 4.1.5 is inconsistent with Coastal Management Policy 1.66, under which "upland/dry slip development shall be balanced against other community policies." (A:11262-64). The DEO relied on "the consideration that went into the decision to prohibit dry boat storage in the ROD, as well as support documents … and information on the Town's vision statement," which "provide competent substantial evidence" to support the Town's "community policy" of prohibiting dry boat storage facilities in the ROD. (A:11262-63). Based on these rulings, the DEO determined that the Comprehensive Plan amendments are "in compliance," under Section 163.3184(1)(b), Florida Statutes (2012). (A:11264). Pacetta did not appeal the June 19, 2012 DEO Order.

B. The Trial Court's Ruling on the Town's Motion for Reconsideration.

Pursuant to this Court's July 20, 2012 relinquishment of jurisdiction, the Town moved the trial court to reconsider its Order because the DEO's approval of the Comprehensive Plan establishes that all development in the Town must be consistent with the Comprehensive Plan, such that the court could not award inconsistent development rights. (A:11358-67). In response, Pacetta argued that the court could address the DEO Order in this action and, moreover, could not be "restricted by a comprehensive plan where … strict adherence to the [plan] proves to be unreasonable, arbitrary and/or confiscatory." (A:11270) (citation and quotation omitted).

At the hearing on the motion, the court acknowledged its lack of authority to instruct the Town on "what they have to do or what they have to allow." (A:11298, 11300, 11317, 11336). Pacetta's counsel argued that the DEO Order was "the final nail in Pacetta's coffin" and "the best piece of evidence … of the intentions of the Town." (A:11331). The trial court ruled that the DEO Order did not "change[] any of my analysis and thinking," and denied the Town's motion. (A:11351, 11355-57).

SUMMARY OF ARGUMENT

It takes both a truly exceptional case of justifiable reliance on a local government's act or omission *and* the destruction of actual rights before a court may invoke equitable estoppel against a governmental entity. That onerous burden was not satisfied here, as a matter of law, for several reasons.

First, the trial court's keystone finding that Pacetta is entitled, by virtue of

equitable estoppel, to develop its property with uses expressly *prohibited* by the Town's approved Comprehensive Plan cannot stand, regardless of whether there is any basis for invoking equitable estoppel in the first instance. The most fundamental limitation on employing equitable estoppel against a governmental entity is that courts cannot compel *unlawful* governmental action. This is particularly so in the context of a local government's planning and zoning functions. Here, with the advent of the DEO Order, all development in the Town must – by statutory mandate – comply with the adopted and approved Comprehensive Plan. The courts have *no* authority to create development rights that are irreconcilable with an adopted Comprehensive Plan, under whatever guise.

Second, even without the DEO Order, the trial court erred as matter of law in using equitable estoppel to *create* previously *unconferred* development rights. Equitable estoppel applies, in the context of governmental action, only to *prevent* a governmental entity from taking otherwise-lawful action that would strip an individual or entity of previously bestowed *and* vested rights. The courts cannot invoke the doctrine to create rights out of whole cloth. But that is precisely what the trial court did here by *de facto* amending the Comprehensive Plan.

Third, there was no dispute at trial that Pacetta *never* had vested rights to develop its property other than under the Comprehensive Plan provisions and zoning regulations in existence *at the time Pacetta purchased the properties*. That is, the plan and zoning regulations forbade dry boat storage facilities and the expansion of existing marinas on Pacetta's properties *before* Pacetta's first purchase in 2004, and now, at the conclusion of the Town's amendment process,

the same prohibitions remain in place. So too, the prohibition on retail buildings in the ROD in excess of 5,000 square feet was in effect then, and remains in effect now. As Johnson himself testified, "[e]verything is the same" as it was at the time of his acquisition.

Nonetheless, the trial court, in a truly unprecedented ruling, used equitable estoppel to *create* a right to an *unadopted* Comprehensive Plan amendment, an amendment that the Town Council, in complete compliance with governing state statutes, initially considered – and then *rejected*. Pacetta cannot sustain that ruling.

The statutory comprehensive-plan framework establishes an extensive and rigorous process for adopting Comprehensive Plan amendments. That process requires, most notably, *public participation* to the fullest extent possible in the local government's consideration of plan amendments. The Town, of course, fully complied with that process, as is established beyond question by the DEO Order. But the trial court's extra-statutory process would allow a property owner, based on purported off-the-record conversations with municipal employees or officials, to self-create a "vested right," based on which a local government can be *compelled* to adopt a Comprehensive Plan amendment. Under the trial court's rationale, a property owner could engage in secret meetings and conversations with municipal employees, claim to have secured promises of development rights, and then leverage that claim into a purported "right" to develop property in direct violation of an adopted and binding comprehensive plan. No more wholesale violation of the constitutional and statutory guarantees of public access and public hearings could be concocted.

But that is, for all practical purposes, exactly what the trial court has condoned. Although the court eschewed any intention to compel the Town to allow development on Pacetta's properties – because "the Town can do whatever the Town wants to do," despite the "consequences to [its] actions" – it is the purported "right" to a *forbidden* development that is at the core of the trial court's determination of Harris Act liability. The Town has essentially been ordered to *buy* Pacetta's self-created development rights. Absent the unlawfully conferred "right," Pacetta's Harris Act claim disappears, as indeed it must.

Finally, and all else aside, the trial court erred in ruling that Pacetta could bring a Harris Act claim. Pacetta's notice failed to satisfy the statutory requirements, as it only identified *temporary* "inordinate burdens." Also, Pacetta's appraisal: (i) did not cover all parcels; (ii) relied on incorrect assumptions; and (iii) failed to project a loss in market value after a "new" regulation was applied to Pacetta's properties. Accordingly, the appraisal fails to establish a bona fide loss in fair market value, which compelled the trial court to dispense with the Harris Act claim as a matter of law.

ARGUMENT

I. THE TRIAL COURT ERRED IN USING EQUITABLE ESTOPPEL TO CONFER ON PACETTA A PREVIOUSLY NON-EXISTENT RIGHT TO DEVELOP PROPERTY.

A. Standard of Review.

"Equitable estoppel must be applied with great caution, and the party raising estoppel must prove its elements by clear and convincing evidence." *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1098, 1103 (Fla. 5th DCA 2006). As on

any appeal from a bench ruling, *see, e.g.*, *Blackhawk Quarry Co. of Fla., Inc. v. Hewitt Contracting Co., Inc.*, 931 So. 2d 197, 199 (Fla. 5th DCA 2006); *W. Surety Co. v. Fla. Pools of Cent. Fla., Inc.*, 740 So. 2d 1223 (Fla. 5th DCA 1999), a trial court's factfinding on equitable estoppel is treated as presumptively correct on appeal. *Sun Cruz Casinos, L.L.C. v. City of Hollywood*, 844 So. 2d 681, 684-85 (Fla. 4th DCA 2003). But "[a] finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion." *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *accord Vietinghoff v. Miami Beach Fed. Credit Union*, 657 So. 2d 1208, 1209 (Fla. 3d DCA 1995); *L.D. Bradley v. Waldrop*, 611 So. 2d 31, 32 (Fla. 1st DCA 1992). A reviewing court is "not bound by the trial court's legal conclusions where those conclusions conflict with established law." *Bush v. Ayer*, 728 So. 2d 799, 801 (Fla. 4th DCA 1999).

"[W]here a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is *de novo*." *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008); *accord Jasser v. Saadeh*, 91 So. 3d 883, 884 (Fla. 4th DCA 2012); *Reed v. Honoshofsky*, 76 So. 3d 948, 951 (Fla. 4th DCA 2011). Here, the trial court's penchant for pejorative characterizations notwithstanding, the pertinent facts are not in dispute and never were. The questions presented address whether the trial court's *legal* conclusion – that the Town is deemed, by virtue of equitable estoppel, to have granted Pacetta a vested right to develop as it wishes – can be sustained.

B. The Trial Court Erred in Creating For Pacetta a Purported "Vested Right" to Develop Its Property in Violation of the Town's Adopted Comprehensive Plan.

The trial court's key finding – that is, the finding that made it possible for the court to apply the Harris Act, § 70.001(3)(a), Fla. Stat. (2012) ("[t]he 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") – is that Pacetta "established by equitable estoppel a vested right to have the Town include in [its] Comprehensive Land Use Plan" two provisions that the Town expressly *rejected* in the 2008 and 2010 Comprehensive Plans. (A:30, 3099-172, 5370-743, 6085-87, 6460-571, 7928).[27] The trial court ruled that Pacetta has a "vested right" to "a mixed use [project] free of square footage facil[ity] constraints and ROD constraints that would allow a dry stack boat storage facility for up to 213 dry slips." (A:30).

Pacetta now concedes (A:11270, 11278), as it must, that the development rights created by the trial court through invocation of equitable estoppel are irreconcilable with the Town's adopted Comprehensive Plan, which was approved in the DEO Order. (A:11256-66). Pacetta declined to challenge the DEO Order under the exclusive Administrative Procedures Act (APA) review procedures. § 120.68(7)-(8), Fla. Stat. (2012).[28] Pacetta thus has been granted, by judicial fiat,

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[27] That finding also underpins the trial court's rulings for Pacetta on the takings claim and the two "ancillary claims" of constitutional violations. (A:40-50).

[28] Although Pacetta when confronted with the undeniable reality of the DEO Order attempted to fold that order into the trial court's ruling (A:11270), the APA appellate-review provision is the *exclusive* means by which the DEO Order could have been reviewed. *State Farm Mut. Auto. v. Gibbons*, 860 So. 2d 1050, 1052 (continued . . .)

something that no other Florida citizen or entity has ever secured: a "vested right" to develop property with uses that are absolutely *forbidden* by the adopted comprehensive plan.

1. An adopted comprehensive plan is the "constitution" for all development.

"After a comprehensive plan … has been adopted in conformity with [Chapter 163], all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan … *shall be consistent* with such plan … as adopted." § 163.3194(1)(a), Fla. Stat. (2012) (emphasis added). A local government's comprehensive plan "is a statutorily mandated legislative plan to control and direct the use and development of property," and is appropriately "likened to a constitution for all future development." *Save Homosassa River Alliance v. Citrus Cnty.*, 2 So. 3d 329, 336 (Fla. 5th DCA 2008) (quoting *Machado v. Musgrove*, 519 So. 2d 629, 631-32 (Fla. 3d DCA 1987)). "The statute is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State." *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 198 (Fla. 4th DCA 2001).

"[C]ompliance with the comprehensive plan by government agencies regarding issuance of development orders … is mandatory." *Lake Rosa v. Bd. of*

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(Fla. 5th DCA 2003) (party cannot evade direct judicial review of final administrative action under APA by filing original actions circuit court). The trial court appears to have recognized as much. (A:11305-06).

Cnty. Comm'rs, 911 So. 2d 206, 209 (Fla. 5th DCA 2005); *accord Bay Cnty. v. Harrison*, 13 So. 3d 115, 118 (Fla. 1st DCA 2009) ("a local government may not authorize any development that would be inconsistent with the applicable comprehensive plan"). "[A] zoning action that is not in accordance with the comprehensive plan *is unlawful*." *Halls River*, 8 So. 3d at 421 (emphasis added); *accord Vill. of Pinecrest v. GREC Pinecrest, LLC*, 47 So. 3d 948, 950 (Fla. 3d DCA 2010); *Baker v. Metro. Dade Cnty.*, 774 So. 2d 14, 17-18 (Fla. 3d DCA 2000); *Vill. of Key Biscayne v. Tesaurus Holdings, Inc.*, 761 So. 2d 397, 398 (Fla. 3d DCA 2000).

2. The trial court had no authority to create an illegal "vested right."

"[E]stoppel cannot be applied against a governmental entity to accomplish an illegal result." *Morgran Co., Inc. v. Orange Cnty.*, 818 So. 2d 640, 644 (Fla. 5th DCA 2002); *accord Branca v. City of Miramar*, 634 So. 2d 604, 607 (Fla. 1994); *Martin Cnty. v. Indiantown Enters., Inc.*, 658 So. 2d 1144, 1146 (Fla. 4th DCA 1995); *Corona Props. of Fla., Inc. v. Monroe Cnty.*, 485 So. 2d 1314, 1317 (Fla. 3d DCA 1986). This Court's decision in *Halls River* is dispositive of Pacetta's attempt to do exactly that and of the trial court's approval of that attempt.

In *Halls River*, county employees and agents "consistently and unequivocally" stated to the developer that a condominium project was permitted on its property, although the comprehensive plan had been amended years earlier to change the property's classification. 8 So. 3d at 416, 419. The county believed it could "continue to approve development at higher densities in the areas

reclassified," a "mistaken belief [that] would be the basis for the difficulties that would later ensnare the parties." *Id.* In reliance on the representations, the developer "purchased the property, hired an engineer and surveyor, drew plans and altered plans at the County's insistence." *Id.* The county commission, after initially approving an application for the condominium project, later withdrew the approval after litigation by objectors to the project revealed the county's prior reclassification of the property. *Id.* at 417-19.

This Court reaffirmed that "[a] local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality," and "is similar to a constitution for all future development." *Id.* at 420-21. Addressing whether the developer had a "vested right" to the promised – and *approved* – condominium development, the Court held that the developer "failed to establish a vested right to its intended use of the property based on a theory of equitable estoppel despite the County's erroneous advice about the property's permitted uses." *Id.* at 421.

The Court relied on the established principle that "the doctrine of estoppel does not generally apply to transactions that are forbidden by law or contrary to public policy," and held that – although "[t]here is no doubt that Halls River was misled to its detriment by the County's unintentional misadvice," *id.* at 422-23 – the developer could not invoke equitable estoppel to compel the county to approve its unlawful project:

> [T]he Plan, which enjoys legal primacy regarding allowable land uses, prohibited the property's use as a multifamily condominium.

> … Because the Plan as amended, prohibited construction of multifamily dwellings on the property, Halls River cannot utilize the doctrine of equitable estoppel to compel the County to issue the necessary approvals for the project….

Id. at 422.

Halls River is controlling. There, the trial court created a "vested right" to develop as the county initially had told the developer the property could be developed, and accordingly granted Harris Act relief. Because estoppel may not be invoked to compel an unlawful governmental act, and because the developer therefore could not compel the approvals, there was – as a matter of law – *no* basis for a Harris Act claim. For the same reasons there is no basis here.

C. Regardless of the Illegality of the "Vested Right," Equitable Estoppel Cannot Be Invoked to Create an Otherwise-Nonexistent "Right" to Use or Develop Property.

"The doctrine of equitable estoppel may be invoked against a governmental body when a property owner (1) relying in good faith; (2) upon some act or omission of the government; (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly unequitable and unjust to destroy the rights that the owner has acquired." *Halls River*, 8 So. 3d at 421-22; *accord Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15-16 (Fla. 1976); *Lyon v. Lake Cnty.*, 765 So. 2d 785, 791 (Fla. 5th DCA 2000). Because "estoppel should be invoked against the government only in exceptional circumstances," *Halls River*, 8 So. 3d at 422, the small handful of cases in which estoppel has been found turn on the unfairness of *rescinding* or otherwise negating a *previously granted* right. *Sakolsky v. City of*

Coral Gables, 151 So. 2d 433, 435 (Fla. 1963) (municipality rescinded previously granted permit, upon which property owner relied; "[t]he basic concepts of equitable estoppel … preclude the notion of such instability in municipal action merely because its business is conducted through a body whose membership is subject to change"); *Texas Co. v. Town of Miami Springs*, 44 So. 2d 808, 809-10 (Fla. 1950) (municipality issued permits for two service stations in close proximity and thereafter adopted ordinance prohibiting stations within such proximity; "[h]aving allowed [owner] to proceed, the city should now be estopped from" applying ordinance "to the injury of one who recognized the city's authority and proceeded only after getting its sanction"); *Castro v. Miami-Dade Cnty. Code Enforcement*, 967 So. 2d 230, 233-34 (Fla. 3d DCA 2007) (county "initially issued permits for the construction of [a] family room addition, and subsequently issued additional permits for the improvement and maintenance of the family room addition" over 25 years, "with the knowledge that [owners] were incurring a substantial investment of time and money in reliance that the building permits were properly issued"; county could not enforce newly adopted setback ordinance "to repudiate its prior conduct and require [owners] to demolish their family room addition"); *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573-74 (Fla. 2d DCA 1975) (town rezoned property to allow multiple-family development, with knowledge that developer "planned a multiple-family high-rise development and that the purchase of the land … was contingent upon obtaining multiple-family zoning;" town thereafter rezoned property for single-family use and court held that town was estopped from rezoning).

Thus, in language erroneously found by the trial court to be appropriate here (A:24-25), courts invoking equitable estoppel speak of not permitting a local government "to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon." *Castro*, 967 So. 2d at 234 (quoting *Imperial Homes*, 309 So. 2d at 573). The "welcome mat" of which the courts speak, however, is – invariably – an *actual permit or approval*. *City of Jacksonville v. Coffield*, 18 So. 3d 589, 597 (Fla. 1st DCA 2009) ("a necessary precondition for equitable estoppel against the government is a governmental act or omission that invites a citizen 'onto a welcome mat'").[29]

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[29] In rare instances, a preliminary approval of a property owner's development plans can constitute a "welcome mat" on which the owner may stand, but only where plans are actually *approved* by the governmental body and the owner acts in reliance upon the *approval*. *Fla. Cos. v. Orange Cnty.*, 411 So. 2d 1008, 1009-12 (Fla. 5th DCA 1982) (county preliminarily approved subdivision plan, subject to final plans being submitted within one year, under ordinance empowering county to rescind approval "if substantial work has not been accomplished" within the one-year period, and developer accordingly went forward, incurring "substantial expenses" in reliance on preliminary approval; held that county was "equitably estopped from denying approval of the subdivision plan after the developer made substantial expenditures in reliance upon the county's preliminary approval" and that "[a]pplication of equitable estoppel does not depend on absolute, binding and final approval from the governmental body"); *accord Hernando Cnty. Bd. of Cnty. Comm'rs v. S.A. Williams Corp.*, 630 So. 2d 1155, 1156-57 (Fla. 5th DCA 1993). Here, of course, Pacetta *never* submitted *any* plans for approval – preliminary or otherwise – by the Town (A:8756, 10196-98, 10213), and would have been required to do so, with no guarantee of approval, even if the Comprehensive Plan had been amended to its liking. Perhaps more to the point, Pacetta acquired *all* of its properties by May 2006, *long before* the Town Council's March 2008 vote to transmit on first reading, an amendment on dry boat storage in the 2008 Comprehensive Plan (A:2116, 2146-64, 2169-2205, 8960-62), and the trial court ruled that Pacetta's purported "vested right" had been created "well *before*" that

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To follow the analogy to its appropriate end, equitable estoppel may *not* be invoked to compel a local government to put out a "welcome mat" in the first instance. *Monroe Cnty. v. Carter*, 41 So. 3d 954, 957 (Fla. 3d DCA 2010) (distinguishing *Castro*, 967 So. 2d at 233, because property owner could not invoke equitable estoppel against county to require allowance of ground-floor apartment for which owner "never received a permit or certificate of occupancy"); *Sun Cruz Casinos*, 844 So. 2d at 683-85 (cruise operator, although entitled to invoke equitable estoppel to prevent revocation of permits for gambling ships, could not invoke doctrine to allow operation of third ship, for which no permit had been issued); *Monroe Cnty. v. Hemisphere Equity Realty, Inc.*, 634 So. 2d 745, 747-48 (Fla. 3d DCA 1994) (property owner "did not acquire any 'vested' right" to develop after expiration of permits' completion period because property "was already restricted by the … ordinance that required projects to be completed within two years" and "there was no zoning change" upon which owner could have

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vote. (A:20-21, 27). Pacetta simply never acted in reliance on the Council's vote on first reading, making it of no consequence. *Lyon*, 765 So. 2d at 790-91 (even if property owner relied on acts of governmental officials, equitable estoppel cannot be invoked absent a "substantial change in position or the incurring of excessive obligations" in *actual reliance* on the identified acts). And, of course, Pacetta had good reason for not relying on the initial vote. As will be set forth in Point I.D.1., *infra,* the statutory framework for comprehensive plan amendments fully empowers a local government to reconsider a draft amendment after state-agency review. *See, e.g., Reedy Creek Improvement Dist. v. State, Dep't of Envtl. Reg.*, 486 So. 2d 642, 646 (Fla. 1st DCA 1986) (preliminary approval can support equitable estoppel only "so long as the affected party has no reason to believe 'the official mind would change'").

relied); *Circle K Gen., Inc. v. Hillsborough Cnty.*, 524 So. 2d 1143, 1144 (Fla. 2d DCA 1988) (no equitable estoppel against county where "site plan approval remain[s] subject to county permitting requirements" and property owner "had not applied for or received" required permit; "[t]he mere approval of the site plan was not a guarantee" that county would issue permits); *Dade Cnty. v. United Res., Inc.*, 374 So. 2d 1046, 1050-51 (Fla. 3d DCA 1979) (no equitable estoppel where property owners "were never granted zoning on their property … and were constantly apprised of their need to secure any zoning approval change"; ultimate denial of zoning change was "legitimate exercise of … police power" that precluded application of equitable estoppel). These precepts are fully applicable to the trial court's invocation of equitable estoppel on Pacetta's Harris Act claim.

As Johnson admitted – and as is unquestionably established – "[e]verything is the same" since his first purchase in 2004. (A:9614). Pacetta's own planning expert testified that Pacetta *never* had a right to build a 50,000 square-foot dry boat storage facility on its property. (A:10226). In 2004, Pacetta's properties were subject to Comprehensive Plan and zoning restrictions that prohibited dry boat storage facilities and the expansion of existing marinas on Pacetta's property and limited retail buildings to 5,000 square feet. (A:7297, 7299-300, 7307, 7312-13, 1263, 1266). At the conclusion of the Comprehensive Plan process in 2010, the same restrictions remained in place. (A:6467, 6568-69). Pacetta thus never acquired any rights that it could invoke equitable estoppel to protect.

The lack of any basis for invoking equitable estoppel dooms Pacetta's Harris Act claim. Because the Harris Act "imports an important body of case law …

when it provides that 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," *Coffield*, 18 So. 3d at 595 (quoting § 70.001(3)(a), Fla. Stat. (2006)) (quotations omitted), "equitable estoppel" under the Harris Act *is* common-law equitable estoppel. *E.g.*, *Smith v. State*, 85 So. 911, 912 (Fla. 1920) (where term has "obtained a fixed and definite meaning, it will be presumed, in the absence of any definition in the statute, that words employed were intended to be used in that sense"); *Vargas v. Enter. Leasing Co.*, 993 So. 2d 614, 618 (Fla. 4th DCA 2008) (where "term of art" is used in statute, legislature "presumptively adopts the meaning and cluster of ideas that the term has accumulated over time") (internal quotations omitted); *San Martin v. DaimlerChrysler Corp.*, 983 So. 2d 620, 623 (Fla. 3d DCA 2008) ("legal term of art" carries with it "all of the specialized meaning that the use of such a term connotes" when employed in the statute); *Jackson v. State*, 736 So. 2d 77, 83 (Fla. 4th DCA 1999) ("words and phrases having well-defined meanings in the common law are interpreted as having the same meanings when used in statutes dealing with the same or similar subject matter"). The First District accordingly applied common-law principles in rejecting a similar attempt by a property owner to create a nonexistent "right" to support a Harris Act claim in *Coffield*.

In that case, the property owner asserted that his purported "vested right to develop the property into eight single-family lots" had been inordinately burdened when the municipality closed an adjacent public road, which limited development to no more than two residences. *Coffield*, 18 So. 3d at 591-97. Although the

municipality issued a concurrency determination for the project and had informed the developer that, "[a]t this time driveway connection permits" could "be issued with proper applications, bonds, and associated fees," an application for road closure by a neighboring homeowners' association was pending at the time the developer closed on a contract to purchase the property. *Id.* at 592. Because "no driveway connection permit was ever issued – or even applied for," there was "no act or omission on the part of the City upon which [the developer] could reasonably rely" to invoke equitable estoppel. *Id.* at 598. The developer "learned of the application to close the roadway" before the concurrency determination, before the letter on driveway connections, "and long before closing on the real estate transaction." *Id.* at 599. The court held that "equitable estoppel principles do nothing to bolster [the property owner's] … claim to a vested right to develop the property." *Id.*

Absent such a vested right, there was no basis for the Harris Act claim. *Id.* The same is true here. Nothing the Town did "amount[s], even metaphorically, to 'a welcome mat.'" *Id.* at 597.

Moreover, Pacetta never submitted *any* applications to the Town for development on its properties before the new Comprehensive Plan was adopted, although it could have done so. (A:10196-98, 10213). As Johnson freely admitted, he chose not to prepare the required plans until the Town adopted a Comprehensive Plan that was to his liking, having no wish to undertake the cost of seeking a small-scale amendment when he was "getting it done free." (A:8756, 10196-98, 10213, 2372-74). The trial court thus erred in creating development

rights for Pacetta under the rubric of equitable estoppel, when those rights were never conferred in the first instance. *Halls River*, 8 So. 3d at 422 (developer "never had a lawful right to the proposed use for multifamily dwelling" and therefore could not "utilize the doctrine of equitable estoppel" to compel issuance of "necessary approvals for the project").

D. Equitable Estoppel Cannot Lawfully Create an Amendment to an Adopted Comprehensive Plan.

1. The trial court's creation of development rights violates constitutional and statutory mandates.

The trial court's ruling jettisons a carefully created and long-standing legislative scheme. The court essentially constituted itself as the Town's land planning agency, the Town Council, the state administrative agencies responsible for reviewing and approving comprehensive plans and, for that matter, a district court of appeal empowered to address legal challenges to an adopted plan – all in aid of creating a development "right" to *rejected* plan amendments. Pacetta is the only person or entity in the State of Florida with a purported "vested right" to develop in plain – and admitted – *violation* of an adopted and approved Comprehensive Plan.

a. The trial court had no authority to create development rights in violation of the statutory land-planning process.

Florida's Community Planning Act (formerly the Growth Management Act), § 163.3161(1), Fla. Stat. (2012), was adopted "to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and

implementation of comprehensive planning programs to guide and manage future development consistent with the proper role of local government." § 163.3161(2), Fla. Stat. (2012). As the Legislature declared: "It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans … prepared and adopted *in conformity with this act*." § 163.3161(6), Fla. Stat. (2012) (emphasis added). The Legislature also declared its intent that "the activities of units of local government in the preparation and adoption of comprehensive plans … shall be conducted in conformity with this act." § 163.3161(7), Fla. Stat. (2012). Municipalities and counties "shall have power and responsibility" to, among other things, "plan for their future development and growth," and "adopt and amend comprehensive plans … to guide their future development and growth." § 163.3167(1)(a)-(b), Fla. Stat. (2012).

Under the Act, "[a]mendments to comprehensive plans are evaluated on several levels of government to ensure consistency with the Act and to provide ordered development." *Martin Cnty. v. Yusem*, 690 So. 2d 1288, 1294 (Fla. 1997). First, a proposed amendment must be presented at two public hearings before the local governmental body, or first at the "transmittal stage," and then at the "adoption stage." § 163.3184(11)(a)-(b), Fla. Stat. (2012). Local procedures must effectuate the legislative intent that "the public participate in the comprehensive planning process *to the fullest extent possible*." § 163.3181(1), Fla. Stat. (2012)

(emphasis added).[30] Upon approval at the first hearing, the local governmental body "shall transmit … amendments and appropriate supporting data and analyses" to DEO, as well as any other appropriate agencies, which shall provide comments to the local governmental body. § 163.3184(3)(b)1.-2., Fla. Stat. (2012).

After receipt of comments, "[t]he local government shall hold its second public hearing, which shall be a hearing *on whether to adopt* … comprehensive plan amendments." § 163.3184(3)(c)1., Fla. Stat. (2012) (emphasis added). "At this point, the local government has three options: (1) adopt the amendment; (2) adopt the amendment with changes; or (3) *not* adopt the amendment." *Yusem*, 690 So. 2d at 1294 (emphasis added). Upon adoption, the comprehensive plan amendment is again transmitted to DEO for review and final approval. § 163.3184(3)(c)2.-4., Fla. Stat. (2012). And, as previously noted, once a comprehensive plan or amendment "has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders, by governmental agencies 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. (2012). See Point I.B.1, *supra*. The sole mechanism for review of DEO approval is an appeal to the district court of appeal under the APA. See Point I.B. *supra.*

[30] The "minimum requirements" require local governments to establish procedures "for broad dissemination of the proposals and alternatives, opportunity for written comments, public hearings …, provisions for open discussion, communications programs, information services, and consideration of and response to public comments." § 163.3181(2), Fla. Stat. (2012).

The underlying rationale for this extensive process is that comprehensive plan amendments require a local government "to engage in policy reformulation of its comprehensive plan" and "to evaluate the likely impact … amendment[s] would have on … local services, capital expenditures, and [the] overall plan for growth and future development of the surrounding area." *Yusem*, 690 So. 2d at 1294. Such determinations are quintessentially "legislative in nature," because "[t]he strict oversight on the several levels of government to further the goals of the Act is evidence that when a local government is amending its comprehensive plan, it is engaging in a policy decision." *Id.* Fundamental separation-of-powers principles are thus offended if a property owner may "create" a comprehensive plan amendment – which is *exactly* what the trial court ruled Pacetta has done. (A:30) (Pacetta "established by equitable estoppel a vested right to have … terms originally approved upon first reading" by Council).[31]

This is precisely the sort of "promiscuous intervention in agency affairs" by the judiciary that Florida courts have long condemned. *Gulf Pines Mem. Park, Inc. v. Oaklawn Mem. Park, Inc.*, 361 So. 2d 695, 698 (Fla. 1978); *accord Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001); *S. Lake Worth Inlet Dist. v. Town of Ocean Ridge*, 633 So. 2d 79, 87 (Fla. 4th DCA 1994). "Judicial intervention in the decision-making function of the executive branch must be restrained in order to

[31] One of the many ironies of the trial court's ruling is that, if Pacetta had sought a small-scale amendment to the Comprehensive Plan and been rebuffed, that ruling would have been subject to the highly deferential fairly-debatable review standard in an original action challenging the denial. *Yusem*, 690 So. 2d at 1295. Pacetta avoided the entire review scheme by never requesting an amendment.

support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government." *Key Haven Assoc. Enters. Inc. v. Bd. of Trs. of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982). The judiciary "must be … careful to respect the constitutional authority of the other branches" and accordingly "should be loath to intrude on the powers and prerogatives of the other branches of government." *Whiley v. Scott*, 79 So. 3d 702, 709 (Fla. 2011). The trial court's intrusion into the legislatively created land-planning process must be interdicted.

b. The trial court unlawfully created a "vested right" to a comprehensive plan amendment based on purported off-the-record commitments to Pacetta's desired amendments.

The trial court created Pacetta's purported "vested right" from meetings between Pacetta's principals and Town officials or elected representatives between 2004 and 2008. (A:17-19, 27). The Order thus allows the creation of a purported "vested right," based entirely on off-the-record conversations, with the trial court electing to believe Pacetta's version of those conversations – although, as Johnson readily admitted in his trial testimony, *no* Town official *ever* "guarantee[ed] me anything." (A:9367, 9370-72). The self-creation of development rights that are inconsistent with an adopted comprehensive plan violates constitutional, statutory, and common-law protections against secret deals in land-use decisions.

The Legislature's strongly worded command that the public be involved at every stage of the comprehensive plan process has been set forth in the previous section. But the Florida Constitution itself speaks to the primacy of public

participation in governmental decision-making. Art. I, § 24, Fla. Const. ("[a]ll meetings of any collegial public body … at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public"). The Sunshine Law similarly commands that such meetings be public, and further that "no resolution, rule, or formal action shall be considered binding except as taken or made" at an open public meeting. § 286.011(1), Fla. Stat. (2012).[32] Secret decisions are void *ab initio*. *E.g.*, *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974); *Monroe Cnty. v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d DCA 1994).

Leveraging off-the-record discussions and secret meetings into a comprehensive plan amendment under the rubric of equitable estoppel is just as pernicious as obtaining a comprehensive plan amendment in a secret meeting, and perhaps even more so. Under the trial court's view, a property owner could engage potentially sympathetic government officials or employees in private conversations and then, without even applying for a permit, claim to have been promised a plan amendment. Encouraging that sort of conduct is antithetical to the constitutional and statutory protections for open meetings. And it would elevate prohibited "contract zoning" into a mechanism by which a "vested right" can be *created*.

As this Court has stated in the strongest possible terms, a local government's agreement to grant a land-use permit, or even to *support* a request for such a

[32] A violation of Section 286.011(1) is a noncriminal infraction, punishable by a fine, and knowingly "attending a meeting not held in accordance" with the statute is a second-degree misdemeanor. § 286.011(3)(a)-(b), Fla. Stat. (2012).

permit, amounts to "invalidly contract[ing] away its discretionary legislative power as the final decisionmaking authority." *Morgran*, 818 So. 2d at 643; *accord Cnty. of Volusia v. City of Deltona*, 925 So. 2d 340, 345-46 (Fla. 5th DCA 2006); *Chung v. Sarasota Cnty.*, 686 So. 2d 1358, 1359 (Fla. 2d DCA 1996). In *Morgran*, the Court invoked the principle that "estoppel cannot be applied against a governmental entity to accomplish an illegal result" to hold that "estoppel cannot be used by a landowner to enforce a contract which constitutes contract zoning." 818 So. 2d at 644 (internal quotations omitted).

Yet that is precisely what Pacetta accomplished before the trial court. Pacetta prevailed, via equitable estoppel, on a theory that the courts may create a "vested right," from discussions in the shadows and outside of public hearings, to a *de facto* comprehensive plan amendment, the *nonexistence* of which somehow entitles Pacetta to recover Harris Act damages. That is illegal "contract zoning" – albeit carried to a hitherto-unknown level of illegality.

2. The trial court should not have awarded Pacetta a self-created expectation of development rights.

As noted above, *no one* associated with the Town promised Pacetta *anything*. Leaving aside the trial court's pejorative depiction of the Town's purported *misconduct* – which, inherently, could not constitute promises of *entitlement* – the court relied on purported scattered favorable remarks with respect to developing Pacetta's property. (A:20-21). But Johnson knew, from the day he purchased his first parcel in 2004 until the day he purchased his last parcel in 2006, that governing plan provisions and zoning regulations forbade the type of

development that he believed was the only viable "engine" for his aspirations. (A:8749, 8760-61, 9069-71, 9177, 9341-9356, 9359-60, 9652-53, 9660-61, 10191-99, 10207-14). Although Chapter 163 is the exclusive process for amending comprehensive plans, Johnson convinced the trial court that his purported reliance on encouraging words was enough to create a *de facto* amendment.

As this Court cautioned in *Morgran*, "a party cannot reasonably rely upon a promise, the enforcement of which would be contrary to established public policy." 818 So. 2d at 644. And "[a] subjective expectation that the land could be developed is no more than an expectancy and does not translate into a vested right to develop." *Namon v. State Dep't of Envtl. Reg.*, 558 So. 2d 504, 505 (Fla. 3d DCA 1990).

In *Halls River*, it was enough for this Court that, although the county staff "misinformed Halls River regarding the allowable uses of the property, Halls River … *should have known* that the property's … designation" prohibited its proposed development. 8 So. 3d at 421 (emphasis added). Here, Johnson *actually* knew that the property could *not* be developed in the manner in which he wished to develop it. Either way, the legal consequences are the same: where, as here, the property owner "never had a lawful right to the proposed use," even "misstatements of law" by the local government's representatives and even when a property owner is "misled to its detriment by the … unintentional misadvice," equitable estoppel may not be invoked to compel the creation of development rights. *Id.* at 421-23.

The Comprehensive Plan amendments merely readopted restrictions that *always* applied to Pacetta's property. Pacetta thus never acquired a right that could

or should be protected under the Harris Act. § 70.001(3)(e), Fla. Stat. (2012) (governmental *action* must have "directly restricted or limited the use of" the owner's land). The Harris Act only compensates for property rights that are taken away due to the enactment of a new rule, and does not authorize compensation for an *aspirational* right that never came into existence. *Palm Beach Polo, Inc. v. Vill. of Wellington*, 918 So. 2d 988, 995 (Fla. 4th DCA 2006) (Harris Act claim found "frivolous" because claimant failed to establish entitlement to build on the property at any time); *accord Coffield*, 18 So. 3d at 596 (property owner's "misapprehensions conferred no legal rights").

II. THE TRIAL COURT ERRED IN RULING THAT PACETTA HAS A REMEDY UNDER THE HARRIS ACT.

A. Standard of Review.

The legal question whether a property owner can bring a claim under the Harris Act is reviewed *de novo* by this Court. *E.g., Coffield*, 18 So. 3d at 594.

B. Pacetta's Notice Failed to Satisfy the Harris Act.

1. Pacetta identified only temporary "inordinate burdens."

Pacetta's statutorily required Harris Act notice identified in pertinent part, two purported actions that Pacetta claimed had inordinately burdened its property: (i) the 2008 Charter Amendment, in which the Town's voters adopted the prohibition on dry boat storage facilities in the ROD; and (ii) the Town's 2009 extension of its previously adopted moratorium (the 2009 Moratorium). (A:88-90). Neither can support a Harris Act claim, as a matter of law.

Property is inordinately burdened only when a government action "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." § 70.001(3)(e)(1), Fla. Stat. (2012) (emphasis added). An inordinate burden does "not include *temporary* impacts to real property." § 70.001(3)(e)(2) (emphasis added). But that is all Pacetta asserted in its notice.

First, the 2009 Moratorium created a *one-year* moratorium on certain building activities in the Riverfront Commercial district, which included the ROD, to allow for a continuation of the Comprehensive Plan amendment process. (A:2907-19). Because the 2009 Moratorium – by its terms – expired 365 days after its effective date (*id.*), the moratorium could not have rendered Pacetta "*permanently* unable to attain the reasonable, investment-backed expectation for the existing use of the real property." § 70.00(3)(e)(1), Fla. Stat. (2012) (emphasis added).[33]

Second, the Charter Amendment cannot be treated as permanent, because it ultimately was invalidated. *Pacetta*, 36 So. 3d at 841-42. Moreover, because the Charter Amendment was subjected to a legal challenge before it was even submitted to the electorate and was thereafter struck down as invalid, it was never

[33] The trial court acknowledged as much when it stated that "delay by moratoria might not inordinately burden the property," but nonetheless sought to justify its finding based on "the fact that the Town has wrongfully used the *serial* moratoria and delay as a tool to stop development by Pacetta Group and impede all use of the property … clearly has the net effect of adding to the inordinate burden." (A:45) (emphasis added). The Harris Act notice, however, confined the trial court to the 2009 Moratorium only. § 70.001(4), Fla. Stat. (2012).

actually *applied* to Pacetta's properties. A Harris Act claim can only exist if a new law, rule, regulation or ordinance "*as applied*" unfairly affects private property, § 70.001(1), Fla. Stat. (2012) (emphasis added), which bar facial attacks on government action. *M & H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 75-76 (Fla. 1st DCA 2009).

2. Pacetta's appraisal relied on incorrect assumptions.

The Harris Act mandates, as a condition precedent, that "a bona fide, valid appraisal" be provided with the claimant's written notice, which appraisal must demonstrate a "loss in fair market value" caused by a specific governmental action that, as applied, created a permanent inordinate burden to the property. § 70.001(4)(a), Fla. Stat. (2012). Pacetta's appraisal, prepared by H. Linwood Gilbert, Jr. (the Appraisal), only covered less than half of Pacetta's property and was premised on the flawed assumption that the Town had permitted dry boat storage facilities to be built on Pacetta's property *until* the 2008 adoption of the Charter Amendment. (A:10260-61). Gilbert was *unaware* that the prohibition on boat storage facilities had been added to the LUDC in January 2004, six months before Johnson first purchased property in the Town, and four years before the Charter Amendment reinforced that ban. (A:10256-58, 10260-61). Nor did the Appraisal acknowledge that the *2003* Comprehensive Plan had limited riverfront commercial buildings to no more than 35 feet in height and 5,000 square feet (A:7460), well *before* Pacetta had acquired any property in the Town.

The Appraisal is premised on a dry boat storage facility with 49,350 square feet of boat storage area, plus 10,000 square feet in the sales and service/retail

areas – neither of which has *ever* been permitted in the ROD. The Appraisal thus erroneously concludes that the Charter Amendment effected a substantial change in the available land uses, which caused a loss in fair market value for Pacetta's properties, when in actuality it did not, and could not have.

The purported lost value of a fully constructed 60,000 square foot facility and other improvements, which is at the heart of the Appraisal, fails to project the loss in market value after a "new" regulation was applied to Pacetta's properties, and contemplates a hypothetical use that never was permitted on the properties. The Appraisal accordingly failed to establish a bona fide valid loss in fair market value, which alone should have compelled the trial court to dispense with the Harris Act claim as a matter of law. *Sosa v. City of W. Palm Beach*, 762 So. 2d 981, 982 (Fla. 4th DCA 2000).

C. The Trial Court Erred in Finding the Town Liable Under the Harris Act Based on Pacetta's "Continuing" Violation Theory.

In an effort to remedy its deficient Harris Act claim, Pacetta filed its Amended Complaint in June 2011 – approximately two months after presenting the Town Attorney with correspondence asserting a "continuing" Harris Act claim – alleging additional purported inordinate burdens that do not appear in Pacetta's original Harris Act notice. (A:83-84).[34] Central to Pacetta's amended claim was its

[34] In March 2011, while this litigation was pending and approximately 16 months after Pacetta submitted its Harris Act notice, Pacetta's counsel sent correspondence to the Town Attorney stating that "the Town of Ponce Inlet 'inordinately burdened' Pacetta's use of its real property by virtue of its [ROD], its [LUDC], its refusal to accept any permits for development of the land, and the imposition of a moratorium in October of 2007." (A:3263-64). Counsel further stated that the (continued . . .)

theory that the Town's creation of the ROD in 2004 and the Town's refusal to change existing land use restrictions during the 2008 and 2010 plan-amendment process established liability under the Harris Act. *Id.* Even if those actions had been included in the original Harris Act notice, the purported claims fall outside the Harris Act's one-year notice period. § 70.001(11), Fla. Stat. (2012).[35]

The Town contemplated, but *never adopted*, an amendment to its Comprehensive Plan that would have allowed the dry boat storage facilities that Pacetta desired for its project. Instead, the Town adopted Policy 4.1.5, which continued the *existing* restrictions, which had been in place since 2004, including: (i) the prohibition of dry boat storage facilities in the ROD; and (ii) the existing zoning restrictions that limited commercial buildings to 5,000 square feet. (5370-43). Policy 4.1.5, however, was *not* included in Pacetta's 2009 Harris Act notice and, indeed, that policy never became final because it was held to be based on the invalid Charter Amendments. *Pacetta*, 36 So. 3d at 841-42. Therefore, despite amending its complaint to include Policy 4.1.5 as a basis for its Harris Act claim,

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(. . . continued)
"LUDC, which was approved in November of 2010" has, left "no economically viable use" of the property and is a "continuing violation of the already filed Bert J. Harris, Jr. Act claim." *Id.* In response, the Town stated that the LUDC "provides for numerous uses of the property … and … [Pacetta] ha[s] not submitted any application for development … to date." (A:3265-66).

[35] Pacetta's reason for attempting to bootstrap post-notice actions into his claim are transparent even if the 2009 Moratorium was of no effect and even if the Charter Amendment had never been adopted by the Town's voters it would have been barred by the pre-existing Comprehensive Plan and zoning regulations from putting a dry boat storage facility on its Property.

Pacetta cannot convert Policy 4.1.5 into a "new regulation" upon which Pacetta's "continuing" Harris Act claim could be based. § 163.3189(2)(a), Fla. Stat. (2010) (adopted plan amendments do not go into effect until DCA issues final order determining adopted amendment to be "in compliance").[36]

As to the Town's re-adoption of Policy 4.1.5 in the 2010 Comprehensive Plan, that also was not included in Pacetta's Harris Act notice, and it did not become effective until the June 19, 2012 DEO Order, which rejected Pacetta's legal challenges and approved the Town's amendments to the 2010 Comprehensive Plan. (A:11257-66). The trial court nonetheless premised liability under the Harris Act on the Town's 2010 re-adoption of Policy 4.1.5, which came about almost one year *after* the Harris Act notice was submitted, and long *before* the policy ever went into effect. But that policy cannot be a basis for a Harris Act claim, because it is not a "new regulation," first applied by the Town within the year *prior* to the Harris Act notice. § 70.001(11), Fla. Stat. (2012).

CONCLUSION

Based on the foregoing, the Town requests the Court to reverse the Order and to remand for entry of an order finding no liability under the Harris Act, and for such other and further relief as the Court shall deem appropriate.

[36] Section 163.3189 was repealed by 2011-139, § 19, Laws of Fla., but remains in force and effect in Fla. Admin. R. 9J-11.011(9).

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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