

City of Miami, Florida

MARC D. SARNOFF
COMMISSIONER - DISTRICT 2



CITY HALL
3500 PAN AMERICAN DRIVE
MIAMI, FLORIDA 33133
305 250-5333
FAX 305 579-3334

This Communication is not Intended to Solicit a Response^{1/}.

September 1, 2009

To: Mr. Chair and Fellow Commissioners

Re: Miami 21

In this most unusual of economic times, we are all concerned about and wish to avoid exposing the City's coffers to claims under the Bert Harris Act or any other provision of law. As Miami 21 has evolved over the many months, this has been a constant concern for our staff, consultants and each of us as elected officials ultimately responsible for the welfare of our citizens and the City of Miami as a whole. The addition of reasonable height limitations along Biscayne Boulevard and Coral Way has done nothing to increase our exposure to any claims under the Bert Harris Act or other provisions of law.

When this matter was raised at a recent hearing on Miami 21, it caused me to go back and review this matter anew to ensure that I was not overlooking something. Here's a summary of what we've found

¹ The City Attorney has advised pursuant to the Attorney General's Opinion AGO 2001-21 there is no violation of Sunshine Law for Commissioner to prepare and circulate their own position paper to afford discussion and debate at the scheduled hearing on September 4, 2009.

Bilzen Sumberg has argued Miami 21 requires “its clients” to pay {“*millions of dollars*”} for public benefits to obtain height and density – presently achievable under Zoning Code 11000. Bilzin has warned the Commission Miami 21 will result in millions of dollars in Bert Harris claims for the cost of acquiring the heights and density that it perceives to enjoy under Zoning Code 11000.

The requirement to purchase public benefits to gain height and density is/has been a main feature of Miami 21 since its inception. Thus, any new concerns are merely concerns that should have existed since the inception of Miami 21. District 2 as a matter of policy has determined that significant height adjacent to neighborhoods are not in the best interests of the residential neighborhood. How high is too high is a fair debate by the Commission – debating the facts and policy versus unsubstantiated fears. I suspect that is why there are five Commissioners, needing three to create law.

The height reductions and Transfer Development Rights afforded under District 2’s plan will eliminate the speculation stagnation found over the past decade on the Boulevard. This is an important City of Miami Historic District that exists on an FDOT related “F”^{2/} Roadway. The added density and often intensity of T5 or T6^{3/} planned for sections of this historic road will only cause a collapse in a system that has seen its mass transit funding diverted by the County.

The claims by owners, speculators or developers that Bert Harris’ claims or constitutional taking claims are forthcoming is legal posturing by attorneys who represent clients who’s basis in the property far exceeds its value, and according to the Kiplinger Report of August 7, 2009, will remain depressed for 15-20 years. Fear should never govern our actions. Well thought out debate and policy decisions should prevail as a governing body based on fact and historic merit.

A point of intellectual honesty is necessary. Whether the alleged ‘inordinate burden’ argument from Bert Harris or a Constitutional Taking argument, these claims are unsubstantiated over the 14-year history of the Bert Harris Act, and are in reality mere legal posturing and threats by land speculators and developers who are finding property values are 25% of their basis in the property.

² “F” is the lowest rating FDOT provides to an arterial that is clogged with traffic.

³ Which can produce a building of 100-ft. to 120-ft. adjacent to residential neighborhoods.

II. Law

The mere purchase of land without more does not create a right to rely on existing zoning. City of Miami Beach v. 8701 Collins Avenue, Inc., 77 So.2d 428 (Fla. 1954), cited with approval in Monroe County v. Ambrose, 866 So.2d 707 (Fla. 3d DCA 2003). A subjective expectation that land can be developed is no more than an expectancy and does not translate into a vested right to develop the property, Namon v. Dept. Environmental Reg., 558 So.2d 504 (Fla. 3d DCA 1990). If the landowner did not start development prior to the enactment of these land regulations, they acted at their own peril in relying on the absence of zoning ordinances changes. It would be inconceivable to allow the landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in the furtherance of developing their land. Shands v. Marathon City Council, 999 So.2d 718 (Fla. 3d DCA 2009). In Shands, the court's determination that no facial taking occurred, was in part the City of Marathon's granting of Transfer Development Rights ["TDR's"]^{4/} to effected property owners, refuting the owner's claim that he has been denied all or a substantial portion of the beneficial use of the property.

A. *The Bert Harris Act*

Bert Harris Act was enacted in 1995 and creates a cause of action for a property owner who is aggrieved by a government action that "**inordinately burdens**" the owner's property. §70.001 Fla.Stat.(1995). The Bert Harris Act provides statutory relief that is supplemental, but independent from constitutional "takings" protection. §70.001, Fla. Stat. (2009). The Act does not grant property owners significantly more rights than they currently enjoy under the Constitution. The Act provides in pertinent part:

"When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of the government..."
§70.001(2), Fla. Stat. (2009).

⁴ See Ch. 107, City of Marathon Code Ordinances (2007).

1. ***Inordinate Burden***^{5/}

The Bert Harris Act defines inordinate burden as:

“a[n] action of one or more governmental entities [that] has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the *existing use* of the real property or a *vested right* to a specific use of the real property with respect to the real property as a whole, or that the property owners are left with existing or vested uses that are unreasonable such that the property owner bears permanently a *disproportionate share of a burden* imposed for the good the public, which in fairness should be borne by the public at large.” Fla. Stat. §70.001(3)(e)[emphasis added].

Local government action to “down-zone” or “down plan” a particular area, or reduce height limits, is the most difficult element for a landowner to prove that he or she was “inordinately burdened” by such a decision to down-zone. Regulatory actions have been upheld against takings claims even where they dramatically diminished the value of the property, including impacts potentially as great as 95%. Susan Trevarthen, Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims, 78 Fla. B.J.61, 61 (2004); see Hadacheck v. Sebastian, 239 U.S. 394 (1915)(90% reduction of value, not a taking); Graham v. Estuary Properties, 399 So.2d 1374 (Fla. 1981) at 1382. (75% reduction of value not a taking); Penn Central Co. v. New York City, 438 U.S. 104 (1978) at 124.

In Florida, so long as the approved zoning allows some economically viable use, a landowner is not entitled to more favorable or economically valuable zoning. Lee County v. Morales, 557 So.2d 652, 655 (Fla. 2d DCA 1990), *rev.den.*, 564 So.2d 1086 (Fla. 1990), where the Court rejected a takings claim against a “down-zoning” because the resulting densities were economically viable and the reductions were not made arbitrarily, but for valid planning reasons.

2. ***Existing or Vested Uses***

⁵ The Bert Harris/Taking portion of this memorandum was drafted in part by Everglades Law Center, Inc., “Defending Florida’s Ecosystem and Community,” as well as the City Attorney for the City of Miami in previous legal briefs and LSR’s concerning Bert Harris claims, which all Commissioners should be privy to.

Under Federal and State taking's law, the scope of the court's inquiry into whether a landowner has "reasonable, investment backed expectations," is to see if the landowner has actually taken specific, concrete steps in investing in and developing his or her property. See Penn central Transportation, 438 U.S. at 124; Graham, 399 So.2d at 1380; Namon v. Der, 558 So.2d 504 (Fla. 3d DCA 1990). A subjective expectation that the land could be developed is not sufficient. See Namon at 505. Speculating by the mere purchase of property without undergoing the process of development is not a reasonable investment backed expectation and does not create a right under a taking or Bert Harris claim.

We are experiencing unprecedented loss of value of real estate in Miami. The Kiplinger Report has just projected the California, Arizona and Florida markets will not see a return to pre-recession levels for 15-20 years^{6/}. We are now defining the new "normal"; expectations formed three years ago are no longer valid. If there ever was a time to face the threat of lawyers that there will be a legal challenge – now is that time. Property values thought to be marketable at \$350-\$500 per square foot are now facing \$100 to \$125 per square foot sales^{7/}.

Under the Bert Harris Act, the property owner would have to further prove that he or she has an "existing use" which is inordinately burdened by the down-zoning decision. Such a use must either be a lawful present use or reasonably foreseeable, nonspeculative future use which is suitable for the property that is compatible with adjacent land uses and which have created an existing fair market value in the property. §70.001(3)(b), Fla. Stat.

Alternatively, a landowner could be entitled to relief if a "vested right" is inordinately burdened. However, in order to establish a vested right, the landowner would have to prove that its due process rights were violated or the landowner made a substantial change in position or incurred substantial obligations or expenses and relied in good faith on some act or omission of the local government, such that it would be unjust to deprive the landowner of his interest in developing his or her property in a manner now prohibited by the down-zoning. See §70.001(3)(a), Fla. Stat. (applying the principles of equitable estoppel or substantive due process to determine the existence of a vested right.) As you know, M-21 has unprecedented levels of protection for

⁶ A copy of the August 7, 2009 Kiplinger Report is attached; loss of 45% of value for California, Arizona and Florida, the bottom has not been found.

⁷ Significantly below the cost of construction, this bottom may be challenged by the bankruptcy of the Everglades in downtown. If you recall in 2007, District 2 predicted sales of \$125 to \$150 per square foot in Miami.

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establishing and protecting vested rights for those developers who made efforts at developing their land (under Zoning Code 11000), commencing the process of procuring permits, prior to the protracted intended enactment of Miami 21.

State property rights law does not guarantee a landowner the maximum densities or intensities permitted by a local comprehensive plan or zoning code. Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993). Many comprehensive plans have explicit policies describing how maximum densities are not guaranteed and establish ceilings – not floors or entitlements – and are subject to consistency with all provisions of the Plan or Code, including those related to issues such as neighborhood compatibility, and height and other intensity restrictions. The City of Miami's Zoning Code 11000 at Section 2301 clearly provides these regulations are maximums, not entitlements.

3. *Bearing a Disproportionate Share of the Public Burden*

The courts have chastised the City of Miami Beach for finding property rights where none exist. In *The Chisholm Properties v. City of Miami Beach*, 8 FL.L.Weekly Supp. 689 (Fla. 11th Cir.Ct. August 9, 2001). The Ritz Carlton Hotel filed an application for a 15 story addition to its beachfront property. Before the application had been approved, a zoning regulation was passed that prohibited new additions in the historic district taller than 5 stories. The Ritz subsequently filed three actions against the City, one of which was a Harris Act claim. Before these three cases were decided, the Ritz and City entered into a settlement agreement whereby the City stipulated that it would recommend in favor of voting for the variances needed by the Ritz. The Ritz then sought its necessary variances from the Board of Adjustment, which approved them under threat that the denial of these rights would subject the city to Bert Harris Act liability.

A third party – Chisolm Properties – then challenged the Board of Adjustment's decision to grant variances. While that suit was pending, the Ritz and the City entered into another settlement agreement where the City agreed to grant the same two variances in order to settle the Bert Harris Act claim.

The Circuit Court ruled that the City had violated its ordinances in granting the variances and that the settlement agreement under the Harris Act did not justify the violation because (1) the granting of the variances did not protect the public interest served by the zoning restriction, and (2) the

variances were not necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

The court found the argument that the settlement of the Bert Harris Act claim was necessary simply to allow a local government to avoid a pending Harris Act lawsuit, was “an illogical application” of the statute that rendered the Act meaningless. The Ritz’s inability to build during the pendency of the appeal of the underlying variance approval did not rise to the level of “necessary” as meant under the Act. In fact, the court found that this settlement was entered into for the mere purpose of taking away the court’s jurisdiction to review the legality of the variance approvals.

The Ritz appealed to the Third District Court of Appeal, which unanimously denied the appeal. A concurring opinion by Judge Fletcher went so far as to describe the variances as “*totally unjustified and illegal*” and referred to the settlement agreement as a “*sweetheart settlement*” of a “*spurious action*” by the hotel owner against the city, City of Miami Beach v. Chisholm Properties, 830 So.2d 842 (Fla. 3d DCA 2002). Judge Fletcher suggested that the appeal was “so clearly – indeed at best – frivolous that sanctions should be imposed” against Ritz and the City of Miami Beach.

The same appeals court has jurisdiction over the City of Miami and thus, the opinion is binding authority. The opinion is a strong warning to owners who might hope to force a local government into an ill-advised financial settlement or developmental approval.

4. *Whether the Height Limitation of Biscayne Boulevard Property Invokes the Bert J. Harris Private Property Rights Protection Act, F.S. §70.001 (2006)*

The Commission has the discretion to reduce the height of a project from the maximum height permitted by the zoning ordinance. There is no entitlement as a matter of right to the maximum heights. The 4th DCA has held it is appropriate to restrict the height of a project to make it compatible with the existing adjacent neighborhood. Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So.2d 308, 313-314 (Fla. 4th DCA 1999). *See also* Battaglia Properties v. Florida Land and Water Adjudicatory Commission, 629 So.2d 161 (Fla. 5th DCA 1993)(recognizing that 35 feet is an appropriate height for a development sited in a primarily residential neighborhood). As you know, directly adjacent to the Boulevard are residential neighborhoods, and, while you have demonstrated a policy in District 3 to erode height restrictions in residential neighborhoods in favor of high rises, District 2 does not share that

vision. We simply have a difference of policy regarding how height of building affects the quality of life for neighborhoods.

Moreover, the plain statutory language establishing the maximum height limitation of 95 feet in Section 609.8.1 makes clear that it is a maximum and not a minimum entitlement under the City of Miami Zoning Ordinance.

This maximum limitation does not grant developers *carte blanche* to build to the maximum on every piece of property. Since a permit application must satisfy all other relevant requirements of the zoning ordinance as well, this Commission is entitled to determine, based on the evidence before it, that in order to meet the requirements of Section 1305 of the Zoning Ordinance, reduction in the height of buildings is a proper use of its zoning designation. In addition to the height limitations, building plans must comply with all other zoning codes and restrictions, City Council of the City of North Miami Beach v. Trebor Construction Corp., 277 So.2d 852 (Fla. 3d DCA 1973). Furthermore, Article 23 §2301 of the Zoning Ordinance specifically provides that: “In their interpretation and application, the provisions of this zoning ordinance shall be held to minimum requirements or *maximum limitations*, as the case may be, adopted for the promotion of the public health, safety, morals or general welfare.” The meaning of maximum height restriction as defined in Ballentine’s Law Dictionary, is “[a] limitation in linear measurement or by a stated number of stories, placed upon the height of buildings within a definite area by restrictive covenant.” 20 Am.Jur. 2d Covenants §263 (2008). Additionally, the burden of proving compliance with the Section 1305 design criteria standards rests with the developer. In order for the developer’s application to be approved, it [is] necessary for the developer to demonstrate compliance with the new version of Section 1305. Hernandez-Canton v. Miami City Commission, 971 So.2d 829 (Fla. 3d DCA 2007).

II. Conclusion

The Bert J. Harris Act has little or no practical applicability for property owners. As of yet, no awards have been sustained under any action brought under this statute⁸. To be successful, a developer must prove a governmental action that limits the use of real property so as to amount to a permanent deprivation of any reasonable, investment-backed expectation for the existing use or a vested right to a specific use. The establishment and

⁸ The Circuit Court was recently reversed for finding an inordinate burden. Citrus County v. Halls River, 8 So.2d 413 (Fla. 5th DCA 2009).

granting of transferrable development will help dislodge speculation, stagnation and effectively stave-off any argument by the developer of negative economic impact on the owners of lands who claim its development rights are restricted or reduced.

To be clear, there is no legal justification to propose that any Commissioner is against Miami 21 due to the incorrect fear the City will face "*millions of dollars*" in lawsuits. The establishment of Miami 21 is a policy decision to be made by the Commission, the amendments are based upon neighborhood compatibility, inadequate mass transportation (diminishing under the County's new budget) to facilitate the apparent up zoning of some properties in Miami 21, and consideration to historic areas deserving of our protection. If any Commissioner disagrees with height limitations (achieved though Chapter 23, not through the proposed Miami 21 Code), then the Commissioner should champion the legal opinions of Bilzin Sumberg et al and vote "*No*" to Miami 21.

If a height limit imposed on an existing Historic District draws the objection of any Commissioner, then certainly that Commissioner would oppose property owners having to pay a fee (public benefits) to achieve height and density they currently claim to enjoy, a requirement of Miami 21 from its inception.

Let's debate the facts, not the fears.

Yours very truly,

Marc David Sarnoff
Commissioner-District 2
City of Miami