To: City Attorney, Craig E. Leen
From: Bridgette N. Thornton Richard & Yaneris Figueroa
RE: Explanation of Takings Jurisprudence In the Context of Historic Preservation, Due Process Considerations, and the Bert J. Harris Act
Date: December 19, 2012

Ultimately, the initial decision as to whether to issue a Special Certificate of Appropriateness for demolition of a property is for the Historic Preservation Board (the "Board") to make after a public hearing on the matter. Therefore, the City Attorney's Office takes no position on the merits of the issuance of a Special Certificate of Appropriateness in any particular case. This memo, however, will provide an overview of takings jurisprudence as it applies in the historic preservation context. And, more specifically, this memo will provide an overview of the law governing "undue economic hardship" as that legal term of art relates to historically designated properties. Additionally, this memo will address Due Process considerations as well as the Bert J. Harris Act.

The term "undue economic hardship" is defined in Article 8 of the City of Coral Gables' Zoning Code as "an exceptional financial burden that would amount to the taking of property without just compensation, or failure to achieve a feasible economic return in the case of income producing properties." Coral Gables Zoning Code, Article 8. This definition, through its use of and reliance upon the constitutional terms "taking" and "just compensation," necessarily implicates constitutional takings jurisprudence. As a result, to appropriately explain this definition, a discussion of takings jurisprudence is required.

I. Takings Jurisprudence

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides that private property shall not 'be taken for public use, without just compensation.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897) and *quoting* U.S. Const., Am. V). The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." 482 U.S. 304, 314. Accordingly, to determine if just compensation is required the adjudicating body must first determine whether a taking has occurred. There are three standards that courts use when inquiring into whether private property has been taken in contravention of the Takings Clause. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). The

first standard, as set out by *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is applied when the government has required an owner to suffer a permanent physical invasion of his or her property, no matter how limited in size or scope. The second standard, as delineated by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is applied when a regulation completely deprives an owner of all economically beneficial use of his or her property. The last standard, as explained by *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), is applied for all other regulatory takings challenges. The *Loretto* and *Lucas* standards are applicable in very few instances while the *Penn Central* standard is more generally applicable to takings cases.

In *Loretto v. Teleprompter Manhattan CATV Corp*, the Supreme Court of the United States determined whether a physical occupation of property by a third party, as a result of governmental regulation, constituted a taking under the Fifth Amendment of the United States Constitution. There, the State of New York enacted a statute providing:

> [T]hat a landlord [could] not 'interfere with the installation of cable television facilities upon his property or premises,' and may not demand payment from any tenant for permitting CATV[1], or demand payment from any CATV company 'in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable.' The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation...the State Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled.

Loretto, at 423-24.

Appellant, who purchased the building at issue with no knowledge that these cables had been installed, challenged the validity of the New York statute, claiming that the statute constituted a taking without just compensation, in violation of the United States' Constitution. The Supreme Court of the United States held that "when the 'character of the government action,' is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 419-20.

In deciding this case, the U.S. Supreme Court reasoned that property rights include the rights to "possess, use and dispose of [the property]." *Id.* at 435. Any permanent occupation of

---

1 CATV refers to cable television.

physical property by the government, or through government action, "effectively destroys each of these rights." *Id.* The court noted that because these private property rights were constitutionally protected, and the government effectively destroyed these rights through the passage of the New York statute, the Appellant had suffered a taking and was entitled to just compensation.

In *Lucas v. South Carolina Coastal Council*, the Supreme Court of the United States was asked to determine whether a taking occurred when a government regulation rendered a property economically idle. There, South Carolina began managing development in the coastal zones of the state in 1977 as a response to Congressional legislation. "In its original form, the South Carolina Act required owners of coastal zone land that qualified as a 'critical area...' to obtain a permit from the newly created South Carolina Coastal Council...prior to committing the land to a 'use other than the use the critical area was devoted to on September 28, 1977'." *Lucas*, at 1007-08. In 1988, South Carolina passed the "Beachfront Management Act" which effectively barred the erection of any permanent habitable structure on the property at issue.

At the time the property at issue in *Lucas* was purchased, 1986, it was zoned for single-family residential construction and there were no restrictions imposed based on that use. *Id.* at 1009. The property owner purchased the property with the intent to erect single-family residences and even commissioned architectural drawings for that purpose. *Id.* at 1008. However, the Beachfront Property Management Act barred the erection of the single-family residences.

The property owner challenged the Act, claiming that a taking had occurred given the "complete extinguishment of his property's value." *Id.* The Supreme Court of the United States noted that "the Fifth Amendment is violated when land-use regulation...denies an owner economically viable use of his land." *Id.* at 1016. The Court reasoned that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017. The Supreme Court of the United States agreed that a taking had occurred and ruled that the property owner was entitled to just compensation.

In *Penn Central Transp. Co. v. New York City*, the Supreme Court of the United States was asked to determine whether the historic designation of Grand Central Terminal "constituted a taking of the property without just compensation." *Penn Central*, at 104. In *Penn Central*, New

York City applied its landmarks preservation law to Grand Central Terminal.[2] The designation required the owners of Grand Central Station to keep the exterior of the building "in good repair," and to approve any proposal to alter the exterior of the building with the Commission. When the Commission refused to approve the owners' proposal for a 55-story office tower above the train station, the owners of Grand Central challenged the validity of the designation, claiming that it amounted to a taking.

In examining the case the court noted that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon 'the particular circumstances in that case.'" *Id.* at 124. The court then identified factors that have "particular significance" when "engaging in these essentially ad hoc, factual inquiries." *Id.* The factors to consider are "the economic impact of the regulation on the claimant...the extent to which the regulation has interfered with distinct investment backed expectations...[and] the character of the governmental action." *Id.* The court importantly noted that "the proposition that diminution in property value, standing alone, can constitute a taking" *Id.* at 131, has been uniformly rejected in other land-use regulation decisions.

The Supreme Court then held that a taking, requiring just compensation, had not occurred when examining the various factors outlined above. More specifically, the court found that the character of the governmental action was a valid exercise of the government's police power because "the restrictions imposed [were] substantially related to the promotion of the general welfare." *Id.* at 138. Furthermore, in determining the general impact to the property owner, the Court found that the regulation "not only permit[ted] reasonable beneficial use of the landmark site but also afford[ed] [property owners] opportunities further to enhance not only the Terminal site proper but also other properties." *Id.* Lastly, the court examined the interference with

---

[2] Notably, the *Penn Central* court stated "[b]ecause this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." 438 U.S. at 129 (citing *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9–10 (1974); *Berman v. Parker*, 348 U.S. 26, 33, 7 (1954); *Welch v. Swasey*, 214 U.S. 91, 108 (1909). Thus, in *Penn Central*, the U.S. Supreme Court expressly recognized and cited to its plethora of case law that establishes that enacting land use regulations to preserve historic structures and other aesthetic features is a permissible governmental objective.

investment backed expectations of the property owners. The court emphasized that Grand Central had been purchased as a railroad station and had been used as a railroad station for 65 years, and noted that "the New Yorks City law [did] not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that [the property owners] may continue to use the property precisely as it has been used for the 65 years: as a railroad terminal containing office space and concessions." *Id.* at 136. Because the property had always been used as a railroad station, the court reasoned that there could have been no other investment backed expectations than to use the property as a railroad station. Therefore, there was no interference with the property owner's investment backed expectations.

In the realm of takings jurisprudence, the standard that has been utilized in the context of historically designated properties is the *Penn Central* standard.[3] Furthermore, *Penn Central* and its progeny have emphasized that the mere fact that a diminution in property value has occurred is not conclusive evidence to support the finding of a taking, which would justify issuance of a special certificate of appropriateness for demolition. *Penn Central*, 438 U.S. at 131 ("Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' *see Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)* (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5 % diminution in value); *cf. Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 666, 674 n. 8, and that the 'taking' issue in these contexts

---

[3] Even though the *Penn Central* decision was issued in 1978 it remains good law. Indeed, the *Penn Central* standard was expressly affirmed in the U.S. Supreme Court's 2005 *Lingle v. Chevron U.S.A. Inc.* decision. And, importantly, while *Lingle*, abrogates the court's prior decision of *Agins v. City of Tiburn*, 447 U.S. 255 (1980), it explicitly affirms that outside of the scenarios presented in *Loretto* (where a government regulation causes physical invasion of private property), *Lucas* (where a government regulation deprives an owner of all economically beneficial use of her property), and the special context of land-use exactions (where development permits are conditioned upon a property owner providing an easement or paying an impact fee to the government), "regulatory takings challenges are governed by *Penn Central Transp. Corp. v. New York City*." *Lingle*, 544 U.S. at 528; *see also id.* at 548 ("we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above-by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central taking*, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."). Thus, not only is *Penn Central* good law, but the U.S. Supreme Court still considers it to be the quintessential standard for much of its regulatory takings jurisprudence.

is resolved by focusing on the uses the regulations permit."). This is especially true where there is a reasonable alternative economic use for the property. Indeed, relying on *Penn Central*, the District of Colombia Court of Appeals held that "if there is a reasonable alternative economic use for the property after the imposition of the restriction on that property, there is no taking, and hence no unreasonable economic hardship to the owners, no matter how diminished the property may be in cash value and no matter if 'higher' or 'more beneficial' uses of the property have been proscribed." *900 G. St. Associates v. Dep't of Hous. & Cmty. Dev.*, 430 A.2d 1387, 1390 (D.C. 1981). Thus, in resolving the undue economic hardship issue, the *900 G. St.* court analyzed whether there were any other reasonable economic uses for the buildings, and because the record demonstrated that the building could be rented in the same condition, could be renovated, and could even be sold "as-is," the court found that there were other reasonable economic uses for the building. As such, the court concluded that there was no undue economic hardship and, therefore, no unconstitutional taking.

The Pennsylvania Supreme Court reached a similar conclusion in *City of Pittsburgh v. Weinberg*, 676 A.2d 207 (1996), where in reliance upon *Penn Central* the court concluded that despite a diminution in value from $800,000 to a range of $200,000 to $300,000, a taking had not occurred because the property owners could "conceivably realize a profit if they sold the property" *Id.* at 213.

To summarize, when evaluating whether a historic designation causes an undue economic hardship such that a certificate of appropriateness for demolition should be issued the claimed hardship should be evaluated under the *Penn Central* standard. The *Penn Central* standard requires the adjudicating body to evaluate: "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," *Penn Central Transp. Corp.*, 438 U.S. at 124, as well as the "'character of the governmental action'-for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'" *Lingle*, 544 U.S. at 539. Moreover, the adjudicating body should bear in mind the U.S. Supreme Court's admonition that a "taking' may more readily be found when the interference with property can be characterized as a physical

invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Supra*, 438 U.S. at 124.[4]

II. Due Process Considerations

As discussed above, the power of local governments to designate historic areas or properties has been recognized by the U.S. Supreme Court. Indeed, in *Penn Central Transp. Corp.*, the U.S. Supreme Court recognized that local governments may designate whole districts and/or single parcels as historical, and there the court explicitly stated that, "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Central*, at 108-09. Likewise, the Third District, the governing state appellate court in Miami-Dade County, has also upheld local governments' authority to designate properties as historic. *Metropolitan Dade County v. P.J. Birds, Inc*, 654 So. 2d 170 (Fla. 3d. DCA 1995) (upholding Miami-Dade County's historic designation of a tourist attraction). Therefore, it is quite apparent that local governments have the authority to enact historic preservation laws as part of their police powers.

Nonetheless, a claimant may be able to establish a substantive due process claim if she can demonstrate that the legislature acted in an arbitrary and irrational manner. Meaning, that the

---

[4] It should be noted that the standard "highest and best use" is a term of art applicable to the valuation process utilized in scenarios such as where a court is attempting to determine the value of real or tangible property for tax purposes. *See, e.g., Mazourek v. Wal-Mart Stores, Inc.*, 831 So. 2d 85 (Fla. 2002) (recognizing that in accordance with Florida Statutes § 193.011 property appraisers should consider, amongst other factors, the highest and best use of property when determining just valuation of that property for ad valorem tax purposes); *Gilreath v. West Daytona, Ltd.*, 871 So. 2d 961 (Fla. 5th DCA 2004) (following *Mazourek*). The "highest and best use" standard is also used where a court is attempting to determine just compensation ***after*** it has determined that a taking has occurred. *See, e.g., State Road Dep't. v. Chicone*, 158 So. 2d 753, 758 (Fla. 1963) (stating, in relevant part, "value, as the measure of compensation, should be based on the highest and best use to which the property is being, or might reasonably be, put. Only by observing this rule is the property owner made pecuniarily whole by being fairly compensated for that which is taken from him."); *U.S. v. 480 Acres of Land*, 557 F.3d 1297, 1307 (11th Cir. 2009) (stating "[j]ust compensation is not limited to the value of the property as it is presently used but also includes any additional market value it may command because of the prospects for developing it to the 'highest and best use' for which it is suitable." (citing *U.S. v. 320 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979)). The "highest and best use" standard, however, is not applicable when determining whether a land-use restriction creates and undue economic hardship so as to constitute a regulatory taking. As previously discussed, the applicable standard there is that set forth in *Penn Central Transp. Corp.* and reaffirmed in *Lingle*. *See supra* pp. 3-7.

regulation at issue is not rationally related to a legitimate state interest or police power. *Nebbia v. People of State of New York*, 54 S.Ct. 505, 534 (1934) (stating "[s]o far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . .If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*."); *see also U.S. v. Plummer*, 221 F.3d 1298, 1308-09 (11th Cir. 2000) (Under our substantive due process jurisprudence, a statute or regulation will be upheld so long as it is rationally related to a lawful governmental purpose and is not unlawfully arbitrary or discriminatory. *See, e.g., TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir.1995) (stating "'[a]s we have explained, '[t]he rational basis test is not a rigorous standard.... The test is generally easily met.... The task is to determine if any set of facts may be reasonably conceived to justify [the regulation]. Even if the court is convinced that the political branch has made an improvident, ill-advised or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate government purpose.'") (citing *TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995)).

Additionally, while it is a settled principle that a regulation may rise to the level of unconstitutionality if it were so "arbitrary or irrational as to violate due process," *Lingle*, at 548, "[i]t is [also] by now well established that Legislative Acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Procedural due process rights are satisfied where the parties whose rights are to be affected are provided ample notice and hearing on the matter at issue. In fact, the U.S. Supreme Court has recognized that "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

III. The Bert J. Harris Act

Importantly, even where governmental action or regulation does not amount to a taking under the U.S. Constitution, a property owner may still be entitled to compensation under Florida law. Indeed, the Bert J. Harris Act requires just compensation for property owners when regulations prove to be an "inordinate burden" yet fail to reach the level of a taking.[5] It appears that the Act was designed to apply in inverse condemnation proceedings. *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So.2d 988, 994 (Fla. 4th DCA 2006). In fact, in *Village of Wellington*, the Fourth District Court of Appeal found that the Bert J. Harris, Jr. Private Property Rights Protection Act "creates a cause of action where a law, regulation, or ordinance, as applied inordinately burdens, restricts or limits use of property without amounting to a taking." *Id.* at 994. In pertinent part, the Act states as follows:

> 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 government, as provided in this section.

Fla. Stat. Ann. §§ 70.001. Accordingly, in order to prevail under a Bert J. Harris claim, the property owner must show that there has been an inordinate burden on the existing use of the property or on a vested right to a specific use of the property.

Additionally, the Act defines inordinate burden as:

> [A]n action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or

---

[5] There is very limited substantive case law analyzing the Bert J. Harris Act. It seems that the Florida courts routinely dismiss many of the cases raising claims under the Act due to procedural errors such as the parties' failure to comply with the Act's pre-suit notice requirements or because the claims were filed before they were ripe. *See, e.g., Sosa v. City of West Palm Beach,* 762 So. 2d 981 (Fla. 4th DCA 2000) (dismissing case for failure to comply with pre-suit notice requirements); *M&H Profit, Inc., v. City of Panama City*, 28 So. 3d 71 (Fla. 1st DCA 2009) (dismissing case for lack of ripeness). Additionally, it seems logical that many of the potential cases may settle through the pre-suit settlement offers that are required under the Act, which may in turn result in fewer cases being filed under the Act. *See* Fla. Stat. Ann. §70.001(4)(c) (requiring that governmental entities present written settlement offers to potential claimants during pre-suit notice periods). Nonetheless, this memo will attempt to explain the contours of the Act based upon the scant case law located.

> vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

Fla. Stat. Ann. § 70.001(e)(1). The Act defines existing use as:

> [A]n actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

Fla. Stat. § 70.001(3)(b). Finally, the Act states that 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."[6] Fla. Stat. § 70.001(a). A vested right is created through equitable estoppel where the evidence shows: (1) a property owner's good faith reliance (2) on an act or omission of the government and (3) a substantial change in position or the incurring of excessive obligations and expenses so that it would be highly inequitable and unjust to destroy the right the property owner acquired. *City of Jacksonville v. Coffield*, 18 So. 3d 589, 597 (Fla. 1st DCA 2009).

Based upon the above definitions, it would appear that a Bert J. Harris claim may be actionable where a governmental entity 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 an actual, present use or activity on the real property or such reasonably foreseeable, non-speculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property. Likewise, such a claim may be actionable through principles of equitable estoppel (i.e. based upon a vested right), where the government restricts the use of real property and the evidence demonstrates that the property owner relied in good faith on the government's actions and/or omissions such that the property owner made a substantial change in position or incurred

---

[6] After exhaustive research, no case law, outside the context of equitable estoppel, could be located to further define or elaborate upon the term "vested right."

excessive obligations and expenses, which would make it highly inequitable and unjust to destroy the right the property owner acquired.