THE WOLF IN SHEEP'S CLOTHING: HOW HISTORICAL AND BLIGHT DESIGNATIONS IN THE ABSENCE OF CONSTITUTIONAL SAFEGUARDS CAN RENDER PROPERTY RIGHTS ILLUSORY

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I. INTRODUCTION

Property rights are synonymous with human rights.[3] They are sacred. They are essential to the foundation of our democratic system.[4] The freedom to think, speak, write, or the ability to provide for one's own material subsistence (e.g., procurement of food, clothing, and shelter) are all dependent on the use of property to effectuate those desired ends. After all, if the right to self-ownership means anything, it must include the physical things that one acquires over their lifetime in exchange for the product of their labor. Understood in these terms, property rights are civil rights. They are more than mere abstractions. They are an integral component of fulfilling the ideal of maximal respect for individual human dignity.

It is undeniable that, on occasion, this sacred right must be infringed upon for the greater good, including the need for infrastructure and to make available essential government facilities and services. The right to

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[3] Murray N. Rothbard, *Property Rights and "Human Rights"*, MISES WIRE (June 13, 2016), https://mises.org/wire/property-rights-and-human-rights#:~:text=Property%20rights%20are%20human%20rights,are%20separable%20from%20property%20rights.

[4] *See* Corn v. State, 3332 So. 2d 4, 7 (Fla. 1976).

exercise the governmental authority of eminent domain over private property is perhaps the most well-known and most obvious form of property rights infringement. Though, other less overt forms of infringement have been increasingly exercised with less oversight and procedural requirements in place to ensure that constitutional safeguards are respected. For purposes of this article, the authors are most concerned with that more subtle type of infringement.

This article summarily analyzes those more subtle forms of property rights infringement, including historical designations and blight designations, and it critiques laws in place that purport to grant local government the authority to assert such designations. This article also provides a summary of the causes of action owners aggrieved by unjust designations could bring in response, and critiques the flaws in those elective safeguards, which are prevalent even in property rights friendly jurisdictions such as Florida. It then proposes high-level solutions to enact legislation to limit fee exposure for property owners who bring inverse condemnation actions and Bert J. Harris claims, and to impose new procedural requirements calling for appraisal reports and payment of full compensation for properties burdened by certain governmental designations.

At times, the taking of a property right can be much more nuanced and complex than outright physical appropriation. To recognize when a taking has occurred, one must recognize "the severity of the burden that government imposes upon private property rights."[5] The burden being imposed is not always as obvious, particularly to those who have been perpetually and historically disenfranchised by their government. As always, there are ways to make access to the law in this context more prevalent. It starts with making owners aware of their rights and advocating for changes in the law that make owners more likely to stand up for those rights.

II. BACKGROUND

A. Bundle of Sticks – Property Rights in Theory

The "bundle of sticks" or "bundle of rights" analogy is one of the first conceptual frameworks that many law students across the United States learn in property class. According to this framework, property rights can be thought of as an aggregation of legal rights whereby the fee simple owner (i.e., the owner with the highest and most valid legal claim to the

[5] Lingle v. Chevron USA, Inc., 544 U.S. 528, 539 (2005).

disposition of the property) arranges their use of the property in a manner that they deem most beneficial to themselves.

Some of the classic "sticks" in the bundle are the rights to use the property, to set the parameters of others' use of the property, to exclude others from it, and to convey title or some other property interest to others. However, a property owner chooses to arrange the "sticks" the overarching purpose of property rights in theory is to create the conditions for stable ownership because such a system provides the most social benefit and utility as well as the most just outcomes for individuals in a world of scarce resources.[6]

The stable ownership that inures from property rights leads to a myriad of social and societal benefits.[7] Among other benefits, strong property rights protections are essential to incentivize urban development and redevelopment, as well as ensuring environmental protections, which are crucial for private sector development, job creation and to help "keep the peace."[8] Applying this theory to real world situations involves the application of these principles through the law.

B. Theory in Practice – The Law and Its Varying Protections Across Jurisdictions

The parameters of the legal application of the theory of property rights are derived from three sources: the common law, statutes, and the Constitution.[9] The common law relies on precedent derived from courts examining the competing interest in real life situations. The courts in a given sovereign jurisdiction attempt to arrive at the most just conclusions, while considering the facts and issues of each case. At times, this can appear to be a messy process, but over a long enough timeframe, the legal rules governing property rights provide certainty regarding the rights and privileges of property ownership to the citizens of the society to which the rules apply. This certainty meaningfully contributes to

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[6] *See generally* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, FACULTY SCHOLARSHIP AT PENN CAREY LAW 9 (2005) (proposing a unified theory of property predicated on the insight that property law is organized around creating and defending the value inherent in stable ownership).

[7] *See* Laura Tuck & Wael Zakout, *7 Reasons for Land and Property Rights to be at the Top of the Global Agenda*, WORLD BANK BLOGS (March 25, 2019), https://blogs.worldbank.org/voices/7-reasons-land-and-property-rights-be-top-global-agenda#:~:text=They%20give%20confidence%20to%20individuals,infrastructure%20and%20services%20to%20citizens.

[8] Id.

[9] See generally Denise R. Johnson, Reflections on the Bundle of Rights, VOL. 32:247 VERMONT L. REV. 248 (2007).

societal progress because it provides to owners (and would-be owners) a barometer by which to judge the likelihood of obtaining their future goals by virtue of their investment in property.

Individual state's statutes supplement and, in some cases, override and sculpt the legal principles crafted through the common law process. Accordingly, these laws can vary dramatically by jurisdiction as to the level of property rights protections afforded. In some cases, they can drastically upend the common law rule; in other cases, they can supplement with additional protections (a proxy for certainty) the common law rule governing one of the "sticks" in the bundle. Whether a given statute overturns a long-held common law principle of property law or adds further protection to the principle, the overarching goal remains the same: provide certainty and stability to property ownership in order to enhance the likelihood of societal progress.

By outlining the nature of the relationship between government and citizen, Constitutions serve as the third source of property law. Generally, Constitutions (at least in the Western conceptualization of their utility) are meant to operate negatively in the context of government. They describe the limits of government power to intrude upon rights that the individual citizen has regardless of government. The best example of this in the context of property are the Fifth and Fourteenth Amendments to the U.S. Constitution (collectively, the Due Process Clause). Under the Due Process Clause, the government has the authority to intrude on a property owner's rights and take property for a public purpose without the owner's consent, but in so doing a taking occurs whereby the government must pay the owner "just compensation"[10] for the property taken.

i.Incentivizing Owner Representation through Fee Statutes

Individual state constitutions[11] and statutes provide property owners with varying degrees of protection from government overreach. Florida is a uniquely favorable jurisdiction for property rights, particularly in the area of eminent domain law. One tried and true method to ensure robust protection of owners' rights is by incentivizing property rights lawyers to represent those owners through owner-friendly fee statutes. For

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[10] The Florida Constitution requires payment of "full compensation." Fla. Const. Art. X § 6 (a).

[11] For example, the Florida Constitution provides more robust safeguards against eminent domain abuse by the government than does the U.S. Constitution. *See* Fla. Const. Art. X § 6 (c) (stating that "[p]rivate property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.").

example, Sections 73.091 and 73.092 of the Florida Statutes require the condemnor to pay the condemnee's attorneys' fees separately, *and in addition to*, what the condemnee receives as its award for the taking.[12]

By contrast, many states, including Texas, impose a prevailing party statute by which the condemnee must win its defense to recoup its fees and costs.[13] An owner can prevail by successfully arguing for dismissal of the condemnation suit or by obtaining an award in excess of the government's offer. Texas's statute purports to impose a 'two-way street' for costs, stating that "[s]pecial commissioners may adjudge the costs of an eminent domain proceeding against any party."[14]

In Montana, the legislature imposed a one-way street fee statute wherein the condemnee must prevail but only fee awards in favor of condemnees are contemplated,[15] ostensibly limiting exposure for a condemnee who is unhappy with the government's offer of compensation and wishes to push back by fighting the taking or demanding more compensation. While those statutes only contemplate fee awards in the event condemnees prevail, they also do not cap the amount of fees that may be reimbursed. In Pennsylvania, however, most owners defending against eminent domain actions are capped at only $4,000 in recoverable attorneys' fees per case involving a fee simple taking, and $1,000 for those involving easement takings.[16] Such statutory schemes do little to incentivize members of the Pennsylvania Bar to take on owners' cases, unless they are for the benefit of substantial commercial clients who have the means and property at stake valuable enough to make representation a worthwhile endeavor for both client and attorney. Such a statutory scheme does little to empower residential owners of limited means with any tools to protect their rights.

While it is clear that property rights protection laws vary by jurisdiction, the intended constitutional principle underlying each remains the same: to describe the limits of government's ability to intrude on a property owner's rights. Again, as with the first two sources of property law,

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[12] *See* § 73.091, Fla. Stat. (2022); § 73.092, Fla. Stat. (2022).
[13] *See* Tex. Prop. Code Ann. §§ 21.047, 21.019 and 21.0195.
[14] *See* Tex. Prop. Code Ann. § 21.047(a).
[15] *See* Mont. Code Ann. § 70-30-305; City of Missoula v. Mt. Water Co., 427 P.3d 1018, 1020 (Mont. 2018) (Montana eminent domain statutes contemplate awarding attorney's fees only to an owner or a condemnee.").
[16] *See* Pennsylvania Statutes Title 26 Pa. C.S.A. Eminent Domain § 710.

the primary goal is to provide property owners with certainty in their rights vis-à-vis their property.

Suchlike the source of a given property law rule, the goal is stability by way of certainty. Stable property ownership increases harmony and social cohesion, thereby bringing about the best possible conditions for peaceful, voluntary cooperation which is the lynchpin of human and social progress. When property owners have certainty in their ownership rights, they are better able to make long-term investment decisions concerning the property in order to obtain the benefit of their investment-backed expectations. This incentivizes the owners to initially purchase the property (if it was not inherited), to expend capital in maintaining the property, and/or to expend capital improving the property. This desired certainty is congruent with the traditional notions of American capitalism. But without the stability provided by the theory and legal practice of property law, long-term investment in property is less likely, and to that degree so too is societal progress limited. These disincentives can lead to actual blight and, even worse, vacant properties, which are often considered the most visible outward signs of a community's reversing fortunes.[17]

Accordingly, there are many important reasons for states to enact and enforce laws with strong protections for property rights. Some already have. Though, as this article posits, even the more robust property rights laws – such as Florida's – could be bolstered to offer more protections to owners than what is currently provided.

C. Historical & Blight Designations

Two ways that government can regulate property or, in some cases, infringe on property rights and sidestep the requisite procedure for traditional takings is by passing legislation that in some way limits a property's use, utility or development potential. These local ordinances or resolutions include, among many other types of governmental acts, historical designations and blight designations. When the local governments resort to either of these designation schemes, they sometimes do so as a work-around to property rights protections afforded to Florida owners to achieve the governmental goals or political ends, regardless of

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[17] *See Vacant and Abandoned Properties: Turning Liabilities Into Assets*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH ("PD&R") (April 30, 2023), https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html

the property owners' objections. At times, such designations are assigned to property found in disadvantaged areas.[18]

Perhaps nowhere in Florida is the historical designation related controversy more prevalent than in the Miami neighborhood of Coconut Grove.[19] Bahamians settled in the Grove in the 19th Century and, since then, the West Grove has in large part maintained its culturally rich Bahamian identity, despite the very real and looming threat of widespread gentrification.[20] The Grove is home to some of the oldest continuously standing structures in Miami-Dade County. Some of those unique structures, such as the Grove's many wooden bungalows or "shotgun homes" and the Coconut Grove Playhouse[21] are more than 100 years old.

The historical value of these structures can't be denied, but neither can the rights of the owners – many with families who have held title to Grove property for generations. Some have understandable concerns that the neighborhood's rich and vibrant culture will vanish by way of gentrification.[22] Others only wish to recognize the maximum value of what they rightfully own. It is a passionate bout of tug-of-war with earnest motivations pulling hard at both ends of the rope.

Proponents of using historical designations to protect these properties from destruction or remodeling view the designations as a means of preserving the history of the Grove. However, opponents of the use of historical designations argue that the current owners, some of whom have expressed desire to sell or convert their property to its highest and best use, have adopted the equally noble position that they should be able to

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[18] Ilya Somin, *Blight Sweet Blight*, 33 LEGAL TIMES VOL. XXIX (2006) ("In the 1950s and 1960s, blight condemnations so often targeted black neighborhoods that many referred to urban renewal as 'Negro removal.' Overt racism is far less common today, but the political weakness of poor African-Americans ensures that they remain disproportionately victimized by both development and blight condemnations.").

[19] *See* Rebekah Monson, *The Struggle for "Old Florida" in Coconut Grove*, THE NEW TROPIC (May 10, 2016), https://thenewtropic.com/historic-preservation-coconut-grove/; Tom Falco, *More on the Park Avenue House*, COCONUT GROVE GRAPEVINE (Apr. 26, 2016), https://coconutgrovegrapevine.blogspot.com/2016/04/more-on-park-avenue-house.html

[20] Oswald Brown, An Area in Miami's Coconut Grove Is Now Official "Little Bahamas," Bahamas Chronicle, (Aug. 22, 2022) https://bahamaschronicle.com/an-area-in-miamis-coconut-grove-is-now-officially-little-bahamas/

[21] *Help Us Save the Coconut Grove Playhouse: Why Miami-Dade County's Plan for the Coconut Grove Playhouse*
Jeopardizes its Historic Designation, SAVE OUR PLAYHOUSE (Jan. 21, 2023), https://www.savethecoconutgroveplayhouse.com/about-historic-designation.html

[22] Andres Viglucci, *Gentrification wiping out Miami's 130-year-old, historically Black West Coconut Grove*, MIAMI HERALD (Aug. 22, 2022), https://www.miamiherald.com/news/business/article263468688.html

transact or redevelop their property free from unwelcomed governmental restrictions.[23]

While blight designations may lack the conceptually noble goal of preserving history, the underlying goal is the same: to limit use through governmental restriction and, in many instances, the very occupation of the property. While the designation can, at times, be warranted, very real impacts that a blight designation can have on the property values of the residents living in impacted areas urge caution in applying the designation.[24]

Moreover, not all "blight" warrants the same governmental reaction. Some areas may truly pose dangers to public health and safety due to decades of neglect, disinvestment, and decay. Other areas can also receive the designation due to the overinclusive language in statutes and local ordinances, which, if drafted broadly enough, could arguably render many buildings across the country "blighted."[25] Such was the case in Jupiter, Florida and Riviera Beach, Florida where entire neighborhoods were declared blighted and where the City of Daytona Beach condemned three thriving businesses based on an outdated, 20-year-old blight study.[26]

Political pressure can also lead to unwarranted designations.[27] Unfortunately, it is all too often the "historically Black and low-income neighborhoods" that are made to suffer from the government's deliberate infrastructure related plans.[28] Since the implementation of the Interstate

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[23] *See generally* Adam A. Millsap, *Historic Designations Are Ruining Cities*, FORBES (Dec. 23, 2019), https://www.forbes.com/sites/adammillsap/2019/12/23/historic-designations-are-ruining-cities/?sh=4586ec7157af.

[24] Ilya Somin, *New York's Ultra-Broad Definition of "Blight" Continues to Enable Eminent Domain Abuse*, Reason (Dec. 30, 2022), https://reason.com/volokh/2022/12/30/new-yorks-ultra-broad-definition-of-blight-continues-to-enable-eminent-domain-abuse/. ("In addition to harming local property owners, such condemnations often actually destroy more economic value than they create.").

[25] Castle Coalition, *How Cities Can Declare Nice Homes & Businesses "Blighted"*, CASTLE COALITION, http://castlecoalition.org/legislative-reform-is-the-only-remaining-solution.

[26] Castle Coalition, *How Cities Can Declare Nice Homes & Businesses "Blighted"*, CASTLE COALITION, http://castlecoalition.org/legislative-reform-is-the-only-remaining-solution.

[27] *See generally* Castle Coalition, *How Cities Can Declare Nice Homes & Businesses "Blighted"*, CASTLE COALITION, http://castlecoalition.org/legislative-reform-is-the-only-remaining-solution.

[28] Joseph R. Biden Jr., *Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies*, THE WHITE HOUSE (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/.

Highway System in 20th Century, residents of Black neighborhoods have been perpetually displaced and disenfranchised.[29] For example, in Miami, the expansion of Interstate 95 displaced the majority of residents from their homes in the once vibrant community of Overtown in the late-1950's.[30]

While physical displacement that comes with the construction of highways is a glaringly obvious example of government abuse, the designation of property as "historic" is more subtle but arguably as insidious. The historical labels applied to property can concurrently function to lock in single family zoning designations, overburden property owners and preclude vertical development schemes. This, in turn, stunts the development of affordable housing. Indeed, President Biden has railed against exclusionary zoning laws that favor single family homes.[31]

These are issues that cross party lines and shape the future of American neighborhoods. Despite its paradoxical significance to progress, the cause of property rights has been, by some, unfairly categorized as anti-progressive. But to pigeonhole property rights as a cause reserved exclusively for conservatives is to ignore the very real damage that government overreach has on societal advancement, as well as the historically negative impact of property rights abuses on disenfranchised populations over time.

D. Florida Causes of Action: Inverse Condemnation & the Bert J. Harris Act

Inverse condemnation law in Florida is far more complex and nuanced than traditional eminent domain law and, for the sake of brevity, this section barely skims the surface of this complex and interesting area.[32] Inverse condemnation also requires owners who bravely opt to assert their rights to take on risks that are simply not at play in traditional takings cases, especially in Florida. At bottom, inverse condemnation applies when property is taken without payment of just compensation.[33]

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[29] *See id*.

[30] *See* Farrell Evans, *How Interstate Highways Gutted Communities – and Reinforced Segregation*, HISTORY.COM (Oct. 20, 2021), https://www.history.com/news/interstate-highway-system-infrastructure-construction-segregation.

[31] Romnina Ruiz-Goriena, *Biden's infrastructure plan calls for cities to limit single-family zoning and instead build affordable housing*, USA TODAY (Apr. 14, 2021) https://www.usatoday.com/in-depth/news/nation/2021/04/14/zoning-biden-infrastructure-bill-would-curb-single-family-housing/7097434002/.

[32] The topic of inverse condemnation in Florida is beyond worthy of its own standalone article.

[33] *Florida Eminent Domain Practice and Procedure*, §13 *Inverse Condemnation*, THE FLORIDA BAR, 12th ed. (2021).

This means that, rather than the government following the proper procedure and acknowledging that it is taking private property, which is presumably necessary for a public use, the onus lies with the owner to assert their property rights and to prove that a taking without just compensation has occurred.

Unlike traditional eminent domain cases, the petitioner in inverse condemnation cases is not the government. Rather, the petitioner or plaintiff is the aggrieved owner, because the government, despite its infringement, has failed to acknowledge that a taking of any property rights has occurred. This effects, in many cases, an unconstitutional burden-flip: that is, placing the burden with the owner, instead of the government, to prove necessity and compensation, or a constitutional violation. Aggrieved owners in inverse condemnation suits may suffer from physical misappropriation of their property or from regulatory takings, such as a downzoning of their property.[34]

The key problem with inverse condemnation is that, in order for aggrieved owners to seek shelter under the state's favorable fees and costs statutes, they have to successfully prove that a taking has occurred. Section 73.092 of the Florida Statutes isn't triggered until the owner, and in this context, the plaintiff, has prevailed. This leaves it up to the owner who has suffered injustice at the hands of the government to invest time and resources in the action with the hopes that justice will be done. Plenty of owners – especially those with limited means and resources – are reticent to assume such risk.

In this same vein, Florida's Bert J. Harris Act is another mechanism intended to protect property rights in Florida:[35]

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. (emphasis added).

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[34] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 105 (1978).
[35] § 70.001(2), Fla. Stat. (2022).

The Bert J. Harris Act also provides a useful tool for owners who are inordinately burdened by government action. Unfortunately, for many owners who may have viable inverse condemnation or Bert J. Harris actions to bring in court, they are deterred from pursuing litigation from the outset and opt not to fight the government that has taken, or infringed upon, their property rights. This may be attributable to flaws in the current state of the law.

For example, owners who bring claims of inverse condemnation could be on the hook for the government's costs if they lose.[36] Even worse, unsuccessful claimants who bring actions under the Bert J. Harris Act could get stuck with paying the governments' costs *and* attorneys' fees.[37]

The legislature should keep these principles in mind when implementing new laws or amending the existing ones. The importance of ensuring and enforcing property rights protections for all, regardless of economic disparity and lack of resources, cannot be understated. It is critical not only for the society-wide benefits derived from stable, consistent property rights protections but also to the individual owners themselves.

III. ANALYSIS

A. Even the Laws of Property-Rights-Friendly Florida Fall Short of Affording Owners with Fulsome Protection Against Government Overreach.

Florida is an undeniable leader in property rights protections when compared to other states. For example, after the nationwide backlash that followed in the wake of the now-infamous *Kelo v. City of New London*[38] Supreme Court case, Florida legislators acted swiftly to prevent eminent domain abuse. Less than a year after *Kelo*, on May 4, 2006, the Florida legislature passed a statute to prohibit – or significantly restrict – the type of public-private takings the Supreme Court found to be constitutionally permissible.[39] On May 11, 2006, then-Governor Jeb Bush signed House

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[36] *See* Caribbean Condo. v. City of Flagler Beach, 178 So. 3d 426, 427 (Fla. 5th DCA 2015).
[37] *See* § 70.001(6)(c)(1) and (2), Fla. Stat. (2022).
[38] 545 U.S. 469 (2005).
[39] The *Kelo* Court found that the U.S. Constitution allowed for the taking of property for private economic development. *See* Kelo v. City of New London, 545 U.S. 469, 488-89 (2005).

Bill 1560, which amended Chapter 73 of the Florida Statutes.[40] For many, this signaled a clear win for property rights advocates in Florida.[41]

However, in many instances, Florida's protections on paper amount to little or nothing in the real world when local government burdens property by act, law, or regulation. Part of the problem that creates such an uncertain situation for property owners is a result of vague or overinclusive statutes or local ordinances that aim to clarify the limits of government power to take one's property.

For example, Florida's Bert J. Harris Act seemingly provides robust protections for private property in Florida[42] for those owners who have been "inordinately burdened" by governmental action. However, the questions of what constitutes an "inordinate burden" has caused head scratching in courts across the state.[43] The language in the applicable statute reduces the impact of the term "inordinately burden" and, in the process, strips various would-be plaintiffs of standing:[44]

> (e) The terms "inordinate burden" and "inordinately burdened":
>
> 2. Do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.

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[40] Janet Bowman, *Eminent Domain Reform in the 2006 Legislative Session: Florida's Explosive Reaction to the Kelo Decision*, HOUSING NEWS NETWORK chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://flhousing.org/wp-content/uploads/2012/12/Eminent-Domain-Reform-in-the-2006-Legislative-Session.pdf

[41] *See generally* Ann Marie Cavazos, *Beware of Wooden Nickels: The Paradox of Florida's Legislative Overreaction in the Wake of Kelo*, 13 U. PA. J. BUS. L. 685 (2010) (arguing that Florida's attempt to prevent eminent domain abuse post-*Kelo* went too far and unnecessarily hampered local governments' ability to address various property-related issues).

[42] § 70.001(2), Fla. Stat. (2021).

[43] *See generally* Amber L. Ketterer & Rafael E. Suarez-Rivas, *The Bert J. Harris, Jr., Private Property Rights Protection Act: An Overview, Recent Developments, And What The Future May Hold*, THE FLORIDA BAR JOURNAL (Sep./Oct. 2015), https://www.floridabar.org/the-florida-bar-journal/the-bert-j-harris-jr-private-property-rights-protection-act-an-overview-recent-developments-and-what-the-future-may-hold/ (stating that "despite the amendments and various court opinions regarding the act, there appears to be a great deal of ambiguity as to what is protected under the act, how it should be applied, and what exactly constitutes a vested right, an existing use, or an inordinate burden.").

[44] § 70.001(3)(e)(2.), Fla. Stat. (2022).

How long is "temporary?" What is a "noxious use" of private property, according to the government officials who mean to regulate or burden the property in the first instance?

The same problem exists in the statutes dealing with blight designations. Florida Statutes Section 163.340(8)[45] outlines what constitutes blight:

> Blighted area" means an area in which there are a substantial number of deteriorated or deteriorating structures; in which conditions, as indicated by government-maintained statistics or other studies, endanger life or property or are leading to economic distress; and in which *two or more of the following factors are present*:
>
> (a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities.
>
> (b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions.
>
> (c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness.
>
> (d) Unsanitary or unsafe conditions.
>
> (e) Deterioration of site or other improvements.
>
> (f) Inadequate and outdated building density patterns.
>
> (g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality.
>
> (h) Tax or special assessment delinquency exceeding the fair value of the land.
>
> (i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality.
>
> (j) Incidence of crime in the area higher than in the remainder of the county or municipality.
>
> (k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or

[45] § 163.340(8)(a)-(o), Fla. Stat. (2022).

municipality.

(l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality.

(m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area.

(n) Governmentally owned property with adverse environmental conditions caused by a public or private entity.

(o) A substantial number or percentage of properties damaged by sinkhole activity which have not been adequately repaired or stabilized.

In other words, a "blighted area" can be found just about anywhere an enthusiastic or politically motivated official wants to find one. Blight could be found where government has failed in its promise to provide sufficient infrastructure (Section 163.340(8)(a)); its subjective preferences are not met regarding lot layout, adequacy, or usefulness (Section 163.340(8)(c)); "deterioration" of an unspecified type or amount is found (Section 163.340(8)(e)); too many people have moved away recently for the government's liking (Section 163.340(8)(i)); there are too many building code violations (as determined by the officials who may aim to designate the area blighted in the first place) (Section 163.340(8)(l)); or too many people own individual properties (Section 163.340(8)(m)). Any *two* of these factors is enough for a local government to designate an area blighted and legally take the property of the citizens who find themselves unfortunate enough to live there.

Exceptions that swallow the property rights protection rules notwithstanding, the governments threat of action can result in substantial reductions in property value that rise to the level of a de facto taking – even before the government acts with finality. This is known as "condemnation blight" or colloquially, the "cloud of condemnation." Condemnation blight is the deterioration in the physical and economic value of private property that results when a government announces that it intends to condemn property.[46] In this gray area between an almost-taking and an actual taking, "[t]he question then becomes whether courts will recognize condemnation blight as a rule of appropriation (i.e., a de facto taking

[46] The Florida Bar Journal, *Condemnation Blight Under Florida Law: A Rule of Appropriation or the Scope of the Project Rule in D*, THE FLORIDA BAR JOURNAL (Aug. 1998), https://www.floridabar.org/the-florida-bar-journal/condemnation-blight-under-florida-law-a-rule-of-appropriation-or-the-scope-of-the-project-rule-in-d/.

absent a physical invasion or the imposition of some direct legal restraint) or a rule of evidence applicable to valuation proceedings."[47]

The uncertainty these conflicting sources of property rights law in Florida creates an almost insurmountable obstacle to access to the courts in the pursuit of vindicating one's property rights. As if the intimidation-based barrier to the courts that many citizens already feel exists (e.g., 'you can't fight city hall') was not enough to dissuade them from pursuing legal vindication of their rights, the uncertainty and exceptions created by well-intended property rights statutes run the risk of giving the impression that complexity in the law is designed to keep them from the courthouse. In fact, in some extreme circumstances, governments have been alleged to have caused the very blight they later so designated by imposing a cloud of condemnation. A veritable parade of possibilities spring from the foregoing statutes to help the government reach out and take one's property, even if government does it the "right" way (i.e., in accordance with the law it has enacted).

In effect, the foregoing statutes arguably dangle the legal equivalent of the Sword of Damocles over the heads of every property owner unfortunate enough to own property that their local officials have deemed ripe for the taking.

B. Historical & Blight Designations Can Result in Politically Motivated Takings.

As we have analyzed, even when government tries to follow the rules to avoid unjust takings of private property there are still many opportunities for it to circumvent the intended protections. However, local governments can, and sometimes do, go much further outside legislatively imposed boundaries designed to protect property rights when political expediency takes precedence over respecting the rights of owners.

i.Historical Designations

Historical designation is, at times, a tool used by local governments seeking to curtail the property rights of citizens in the name of historic preservation. Not only do such designations infringe on homeowners' property rights, but they can also contribute to the dearth of affordable housing.[48] In the context of designating historical districts, effectively

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[47] *Id.*

[48] Kriston Capps, *Why Historic Preservation Districts Should Be a Thing of the Past*, BLOOMBERG, (JAN. 29, 2016), https://www.bloomberg.com/news/articles/2016-01-29/michigan-and-wisconsin-state-republicans-are-crusading-against-historic-preservation-districts.

locking a neighborhood into its zoning category of single-family homes, makes it all but impossible for such areas to include nearby affordable housing.[49]

In addition to locking in single-family zoning designations and skirting around the constitutionally mandated payment of full compensation, the designations often come packaged with robust support from many constituents who are not directly affected by the designation. Miami-Dade County says this about the purpose of historical designations: "Historic Preservation is a critical county function that *helps communities maintain a higher quality of life by preserving its cultural heritage and historic resources for future generations*; establishing a context for future development; *encouraging green building practices and sustainable growth*; and *providing economic development through heritage tourism*."[50] (emphasis added).

After all, what kind of misanthrope is not in favor of preserving the "cultural heritage and historic resources for future generations" of a local community? Although the debate around historical designations is framed as a "No True Scotsman" fallacy (i.e., no good citizen would oppose the government telling private property owners what to do with their property because to do so means the objector opposes the noble goal of preserving local cultural heritage and history), a peel back of the surface layer sometimes exposes a scheme to circumvent property rights protections through the use of politically palatable rhetoric.

For example, as with the Florida Statutes discussed in Section III.A.1. above, Miami-Dade County's historical preservation ordinances[51] tend to say one thing (in terms of protecting the property rights of owners) but, at the same time, seem to allow the opposite. For

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[49] *See id.*

[50] About Historic Preservation, MIAMI-DADE OFFICE OF HISTORIC PRESERVATION (Jan. 20, 2023), https://www.miamidade.gov/global/economy/historic-preservation/about.page. The statement focuses on the noble intent associated with historic preservation measures but neglects to mention the resulting onerous bureaucratic restrictions owners of designated properties must often endure. It's fair to say many 100-year-old buildings were not built with "green building practices" or "sustainable growth" in mind, so what could these objectives have to do with "preserving [a locality's] cultural heritage and historic resources for future generations?" Likewise, "providing economic development through heritage tourism" does not typically, in and of itself, preserve cultural heritage and historic resources. However, these designations can also burden the owner by imposing layers of bureaucratic hurdles associated with almost any type of project, from minor renovations to full rebuilds.

[51] Chapter 16-A: Historic Preservation (Jan. 20, 2023), https://library.municode.com/fl/miami_-_dade_county/codes/code_of_ordinances?nodeId=PTIIICOOR_CH16AHIPR&wdLOR=c3550F730-7415-4AB0-87FA-6B263C14EE69.

example, the Code provides the following "minimum standards" for historical designation:[52]

> To comply with the minimum standards for historic preservation ordinances, a municipal ordinance shall contain provisions:
>
> (iv) *That protect property owners* by procedures (1) to de-designate properties and (2) to vary or *modify historic regulation based upon economic hardship pursuant to due notice to affected parties*, legally-enforceable standards, quasi-judicial public hearings, and appeals to courts;
>
> (v) *That provide economic incentives for preservation*

(emphasis added). However, this is promptly followed up by a caveat to the foregoing so all-encompassing it renders the foregoing little more than empty rhetoric: "It is a violation of the minimum standards of this section for a municipal historic preservation ordinance: (i) To exempt an otherwise historic property from historic regulation or designation *on the basis that the owner did not consent to the regulation or designation*." (emphasis added). Therefore, the minimum standards for historical designation in Miami-Dade County are to protect your property rights or at least give you economic incentive to comply, but failing that, should you continue to refuse, one interpretation suggests the minimum standards are violated if the County considers an owner's objection as a basis for deferring a designation.

Subsection 16-A10(1) provides a laundry list of subjective criteria that effectively grants the County license to designate private property as it sees fit. Subsection 16-A10(1) states:[53]

> In deciding whether to exercise its discretion to designate a proposed individual site, district, or archaeological or paleontological zone, *the Board shall consider the objective criteria set forth in subsection (1) below*, as well as the factors and considerations required to be addressed in staff's designation report pursuant to subsection (3) below, along with the evidence and testimony presented at the public hearing and any other

[52] Minimum Standards for Historical Designation – Sec. 16A-3.1(4)(a)(iv)-(v)
[53] Designation Process and Procedure – Sec. 16A-10(1)(a)-(e)

information the Board deems relevant to its determination.

(1) *Criteria.* The Board shall have the authority to designate areas, places, buildings, structures, landscape features, archaeological and paleontological sites, and other improvements or physical features, as individual sites, districts, or archaeological or paleontological zones that are significant in Miami-Dade County's history, architecture, paleontology, archaeology or culture. Sites, districts, or zones considered for designation shall possess an integrity of location, design, setting, materials, workmanship, or association, and shall:

(a) Be associated with distinctive elements of the *cultural, social, political, economic*, scientific, *religious*, prehistoric, paleontological, or architectural history *that have contributed to the pattern of history in the community, Miami-Dade County, south Florida, the State or the nation*; or

(b) Be associated with the lives of *persons significant* in our past; or

(c) Embody the distinctive characteristics of a type, period, style or method of construction or work of a master; or *possess high artistic value*; or represent a distinguishable entity whose components may lack individual distinction; or

(d) Have yielded, or are *likely to yield information in history* or prehistory; or

(e) Be listed in the National Register of Historic Places.

(emphasis added). With the exception of Subsection 16A-10(1)(e), none of these are truly "objective" criteria. If "cultural, social, political, economic, [and] religious" history that has "contributed to the pattern of history in the community, Miami-Dade County, south Florida, the State or the nation" (16A-10(1)(a)) were objective criteria on which there was no reasonable subjective debate, then we would truly have peace on earth. Which persons were "significant" in Miami-Dade County's local

history is a highly subjective determination (16A-10(1)(b)). "Artistic value" is the epitome of subjectivity (16A-10(1)(c)).

The procedural aspects of the ordinance don't fare any better. Under Section 16A-10(5)(f)(1):[54]

> Owners of record or other parties having an interest in the proposed designated properties, if known, *shall be notified* of the public hearing by U.S. mail to the last known address of the party being served *at least 15 days prior to the public hearing*; however, *failure to receive such notice shall not invalidate the same as such notice shall also be perfected by publishing a copy thereof in a newspaper of general circulation at least 10 days prior to the hearing*. Owners shall be given an opportunity at the public hearing to object to the proposed designation.

(emphasis added). The ordinance appears to dispense with – or, at least, make optional – the actual notice required to afford directly impacted owners an opportunity to be heard at a quasi-judicial hearing, which raises concerns over the potential for due process violations. The lack of actual protection this procedural process provides is made glaringly apparent a couple Subsections later, under Section 16A-12 regarding undue economic hardship. Claiming undue economic hardship as a result of a historical designation is one way a property owner can defeat the designation. It can be claimed if the designation will:[55]

> [D]irectly restrict or limit the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public.

However, in order to claim the hardship, the property owner must submit an affidavit establishing the hardship "*at least 15 days prior to the public hearing*,"[56] which failure to do so constitutes waiver or forfeiture of the claim.[57] Therefore, it can be interpreted that the last date a

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[54] Designation Process and Procedure – Sec. 16A-10(5)(f)(1).
[55] Undue Economic Hardship – Sec. 16A-12(2).
[56] Undue Economic Hardship – Sec. 16A-12(4).
[57] Undue Economic Hardship – Sec. 16A-12(3).

property owner has to submit their affidavit of undue economic hardship, which requires twelve categories of information,[58] is the same day the Historic Preservation Board has to give the owner notice of hearing on the designation.[59] Worse still, if by some miracle a property owner is able to jump through all these procedural hoops to challenge the designation, the Board can still consider seven criteria on which to go ahead with the designation notwithstanding the property owner's affidavit.[60]

Simply put, if Miami-Dade County, or a local municipality that has an ordinance that meets the County's minimum requirements, wants to historically designate property, there is little an owner can do to challenge it, based on the applicable ordinances. Further, just before a property owner gets across the finish line and into court to challenge the designation, they must purportedly exhaust all administrative remedies (including appealing to the very board(s) that denied the owner's initial requests) before doing so.[61] By then, it is anyone's guess how long the threat of designation has been hanging over one's property, reducing their ability to maintain or renovate their property, sell it to a third-party that wishes to develop or redevelop it, or do anything else with the property that falls outside what the County has deemed permissible. By the time a property owner can even cross the courthouse threshold, they may have missed many opportunities to sell and receive fair market value for their property.

Miami-Dade County currently oversees 135 individually designated historic sites, 45 archaeological sites and zones, and eight historic districts.[62] There are two currently pending sites for historical designation.[63] Next in line for a designation is a Surfside home known as the "Fisher-Sapero residence" which is said to be "historically significant for its association with the continued development in the Town of Surfside through the Altos Del Mar subdivision, originally platted during the 1920s."[64] These and any future owners of properties subject to potential historical designation should, at the very least, be afforded with actual

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[58] Undue Economic Hardship – Sec. 16A-12(4)(a)(i)-(xii).
[59] *See* Designation Process and Procedure – Sec. 16A-10(5)(f)(1).
[60] Undue Economic Hardship – Sec. 16A-12(6).
[61] Appeals – Sec. 16A-15(9).
[62] Historic Sites (Jan. 20, 2023), https://www.miamidade.gov/global/economy/historic-preservation/historic-sites.page.
[63] *Id.*
[64] Richard Battin, *Surfside Home Next in Historic Designation Line*, MIAMI TODAY (Dec. 27, 2022), https://www.miamitodaynews.com/2022/12/27/surfside-home-next-in-historic-designation-line/.

notice and a meaningful opportunity to be heard. And those due process rights should appear in the ordinances governing this important process.

While not as direct as payment of full compensation to owners, one way to mitigate the negative impact often associated with historical designations is to enact ordinances that effectively establish a private market that allows owners of such properties to sell their unused, transferable development rights. The City of Miami, for example, has taken this initiative by implementing a Transfer of Development Rights (TDR) program.[65] The City offers the following example to illustrate how its TDR programs works in practice with its zoning code, Miami21:

> An owner of a *designated* historic property owns a two-story building located in a T4-O transect zone. If the property were developed to its maximum intensity, the owner would be able to build a larger building. In exchange for preserving the historic property, the TDRs allow the owner to permanently sell its unused development rights to another property in a T6 transect zone. The zoning administrator calculates the unused capacity as the difference between the existing square footage in the historic building against the potential square footage that would be available to the building in a full build-out scenario.[66]

While this program is a step in the right direction, it doesn't appear to offer any benefit to owners of historically designated property who are already capped at their allowable intensity under the zoning code. Even so, it is a commendable set of laws and could serve as a model for other municipalities who wish to assist owners in preserving their property rights in the face of historic designations.

If stability in property rights is not only an individual right but also a social good, should the protection of those rights simply come down to the whims of politics or the luck of geography? We posit that it should not. Certainty comes from clear rules with minimal exceptions. Unfortunately, with its ambiguities and lack of due process, some historical

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[65] Ch. 23, Miami City Code, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.historicpreservationmiami.com/pdfs/HPO2.pdf

[66] Miami21 Frequently Asked Questions, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.miami21.org/PDFs/FAQ-HistoricPreservation080228.pdf

designation procedures offer anything but certainty and, therefore, stand to undermine the constitutionally protected rights of owners.

i.Blight Designations

Local governments also use blight designations to impact private property rights without payment of compensation. As discussed in Section III, *supra*, the statutory definition of blighted areas, and when or how a local government may find blight, is arguably broad enough to apply to nearly any property or community. In addition to that broad definition, the use of well-intentioned Community Redevelopment Agencies ("CRAs") can also allow local governments to effectively exercise their authority to infringe on the rights of private property owners without calling it that.

Florida statutes governing CRAs state that the powers delegated to local governments for blight designations "*are for public uses and purposes* for which public money may be expended and police power exercised."[67] (emphasis added). Yet, just four subsections later, it states that "the prevention or elimination of a slum area or blighted area as defined in this part and the preservation or enhancement of the tax base *are not public uses or purposes for which private property may be taken by eminent domain*."[68] (emphasis added). So then, by summarily labeling the determination of what is considered "slum" or "blight" as an exercise of the governments' police powers, the state can safely keep such designations from the purview of constitutional protections. The line is often thin between the exercise of "police powers" and eminent domain.

For starters, the CRA "[e]ncourage[s] public-private partnership" to accomplish its redevelopment goals.[69] This language flirts with the very concept that caused an uproar around the country after the *Kelo* decision and prompted the Florida electorate to lead the way in making attempts to curtail these types of eminent domain abuses by, among other things, voting for Amendment 8 to the Florida Constitution. Further, to make the "workable programs" that a community establishes under the CRA more attractive to these would-be private investors, communities are encouraged to use the full force of their local ordinances to clear the path for both public and private investment.[70] Counties and municipalities are

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[67] § 163.335(3), Fla. Stat. (2021).
[68] § 163.335(7), Fla. Stat. (2021).
[69] § 163.345, Fla. Stat. (2021).
[70] *See* § 163.350, Fla. Stat. (2021) (encouraging communities to use tools such as "diligent enforcement of housing, zoning, and occupancy controls and standards; the rehabilitation or conservation of slum and blighted areas or portions thereof by replanning, removing congestion, providing parks,

encouraged to do this despite the fact that they "may not exercise the power of eminent domain for the purpose of preventing or eliminating a slum area or blighted area as defined in this part."[71]

Miami-Dade County currently has four existing or proposed Community Redevelopment Agencies: Naranja Lakes CRA; NW 7th Avenue Corridor CRA; NW 79th Street Corridor CRA; West Perrine CRA.[72] Unlike historical designations, these areas can and do cover entire communities.[73] Whether one's specific property is subject to the direct impacts of these Miami-Dade CRA's (e.g., having compelled renovation imposed on the property, land use limitations, or, in some cases, an outright taking) the designation itself can effectively operate as a taking. Understandably, the market for properties in areas that have been designated "blighted," is severely reduced from the potential market for a property just outside a CRA zone. Therefore, even if an individual property does not suffer the same "blight" defects of its neighbors' properties, once the designation is in place and applies to that well-maintained property, the "fair market value" that the government would have to offer to satisfy a takings analysis is likely greatly reduced from what it may have had to offer before the designation was made.

This is more than mere worst-case scenario speculation. It has been done all over the United States.[74] Homes in Ohio have been taken under local blight statutes for being "obsolescent" because they lacked three bedrooms, two full baths, and a two-car garage.[75] A home was designated blighted in San Jose, California because wet leaves were on a private tennis court.[76] Ardmore, Pennsylvania city officials declared its downtown business district blighted even though the city had designated it a "historic district."[77] New York City reportedly cleared out a

playgrounds, and other public improvements, encouraging voluntary rehabilitation, and compelling the repair and rehabilitation of deteriorated or deteriorating structures; the development of affordable housing; the implementation of community policing innovations; and the clearance and redevelopment of slum and blighted areas or portions thereof.").

[71] § 163.370(1), Fla. Stat. (2021).

[72] *Community Redevelopment Agencies*, MIAMI-DADE COUNTY (Jan. 21, 2023). https://www.miamidade.gov/global/service.page?Mduid_service=ser1530127262045658

[73] See *id*., for maps and reports on the existing and proposed CRAs in Miami-Dade County.

[74] Castle Coalition, *How Cities Can Declare Nice Homes & Businesses "Blighted,"* CASTLE COALITION, http://castlecoalition.org/legislative-reform-is-the-only-remaining-solution.

[75] *Id.*

[76] *Id.*

[77] *Id.*

dormitory and offices in Times Square, using blight as the excuse, to make way for the New York Times' new headquarters.[78]

Entire neighborhoods have been declared "blighted" in places like Grand Terrace and Alhambra, California; Jupiter and Riviera Beach, Florida; and Sunset Hills, Missouri, in addition to many others.[79] In Florida, cities and municipalities are using CRAs to target the remaining affordable coastal communities for redevelopment.[80]

The authors posit that local governments should approach historic designations and blight designations with the same care and gravitas they would if they were outright taking property through the traditional eminent domain process. One way to ensure this is to shield private owners with statutes that allow them to pursue their claims without assuming the risk of having to pay the government's fees and costs. Simply because there may be rationales, on which reasonable minds could differ, that favor malleable and nebulous property rights regimes like historical or blight designations, does not mean that the invasion of those rights by local officials is justifiable.

If a respect for property rights, and by extension, human dignity, is both a valid moral position in terms of the individual, but also has immense social benefits, then no matter how flowery the rhetoric or noble the ideals are in favor of such regimes, they must offer clearer rules with fewer exceptions that provide to property owners the certainty they need to make sound investment decisions for their benefit and for the benefit of their communities.

IV. CONCLUSION

Of course, combating injustice sometimes requires seeking redress in the courts. For owners who face blight or historical designations and wish to challenge same, inverse condemnation and Bert J. Harris Act violation claims can present as a viable claim those owners could bring in court. But after the full exposure of pursuing such an action is assessed and appreciated, aggrieved owners may understandably forgo fighting the government. After all, they could be on the hook for reimbursing the government for its attorneys' fees and costs in the event they lose,

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[78] *Id.*
[79] *Id.*
[80] *Id.*

depending on the causes of action pursued. In that event, not only is the property right (or, in some extreme cases, the property itself) taken in violation of the Constitution, the losing owners are on the hook for paying the legal fees of that same government that may have violated the Constitution. The same risks apply in other litigation, including erroneous judicial decisions (in some egregious cases, decisions amounting to judicial takings), juries delivering erroneous verdicts, and lawyers who miss the mark. As always, a strong case doesn't guarantee a win.

Considering that Bert Harris and inverse condemnation claims carry an inordinate amount of risk for property and business owners, and their lawyers who litigate them, the Florida Legislature should enact legislation expressly providing that, in addition to the fees provided to condemnees in Sections 73.092 (inverse) and 70.001(6)(c)(1) (Bert Harris) of the Florida Statutes, prevailing parties in inverse condemnation or Bert Harris actions should be entitled to attorneys' fees multipliers depending on the complexity of the case, not unlike those provided for in other Florida Statutes outside of Chapters 70, 73 and 74. As for the possibility of the government's ability to collect fees from the owner-claimants, that entitlement should only be reserved for cases that are deemed by the court to be utterly meritless. To be clear, the government should only be entitled to fees and costs awards against plaintiffs in the rare instances when a court – subject to appellate review – has deemed the plaintiff's action to be frivolous, so as to avoid the existing chilling effect that plagues would-be inverse condemnation and Bert J. Harris litigants.

Ordinances purporting to authorize historical and blight designations must, at a bare minimum, provide targeted owners with actual notice well in advance of a quasi-judicial hearing. At this hearing, the owner should absolutely be afforded an opportunity to cross examine witnesses, offer her testimony, and offer the testimony of others. If the government still finds cause to impose the designation, it should be required to commission the analysis and official report of an appraiser to assess the diminution in value attributable to the designation, if any. That loss, which should be subject to challenge by the owner, should be offered to the owner in good faith concurrently with the designation.

These steps, while still leaving plenty of problems for another day, may help preserve a few sticks in that sacred bundle.