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November 25, 2025

Senator Jonathan Martin
315 Senate Building
404 South Monroe Street
Tallahassee, Florida 32399-1100

Dear Senator Martin:

This office received your letter requesting an opinion on the legality of certain “Rural Boundary” land-use restrictions in the county charters of Seminole and Orange Counties.¹ Specifically, you ask whether the designation of certain lands within Seminole and Orange Counties as “rural” and thereby prohibiting development of these properties without a vote of the counties’ commissioners: (1) constitutes a taking in violation of the Federal and Florida Constitutions; or (2) imposes a per se “inordinate burden” under the Bert J. Harris, Jr., Private Property Rights Protection Act (the “BHA”).²

In short, my answer to your first question is yes, depending upon specific facts. The blanket property restrictions on rural landowners in Seminole and Orange Counties could very well constitute a regulatory taking under the Federal and Florida Constitutions. My answer to your second question is yes. Seminole and Orange Counties’ charter amendments likely constitute an “inordinate burden” and therefore violate the BHA.

BACKGROUND³

In 2004, Seminole County voters amended the county’s charter to establish a new “Rural Boundary.”⁴ Under this provision, all lands within the Rural Boundary are deemed “Rural Lands.”⁵ Similarly, in 2024, Orange County voters amended the

¹ See Letter from Jonathan Martin, Fla. Senate, to James Uthmeier, Att’y Gen. of Fla., (on file with the Office of the Florida Attorney General).

² As for your question concerning annexation, more detail and a separate memorandum of law is needed to answer that question.

³ As provided in the Senator’s letter.

⁴ See Seminole Cnty., Fla., Home Rule Charter. Art. V, § 5.2 A.

⁵ *Id.*

county's charter, establishing a "Rural Boundary" very similar to the boundary enacted in Seminole County.⁶ And, under this provision, all the land within the Rural Boundary falls within this new "Rural Area."⁷

Importantly, on top of establishing these new boundaries, the counties' charter amendments established similar restrictions on the land within these boundaries. In Seminole County, it takes a "supermajority vote of the Board of County Commissioners" (4 out of 5) to remove any property from the Rural Lands.⁸ Likewise, in Orange County, it takes "a majority plus one vote" by the county commissioners (5 out of 7) to: (1) increase Rural Area density or intensity increase; or (2) remove lands from the rural area.⁹

REGULATORY TAKINGS UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS

In the United States, the "protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'"¹⁰ "The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: '[N]or shall private property be taken for public use, without just compensation.'"¹¹ "When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies."¹² "[T]he [Supreme] Court established the proposition that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"¹³ Regulations that go "too far" are commonly referred to as "regulatory takings."¹⁴ To determine whether a regulation effects a regulatory taking, courts use "the flexible test developed in *Penn Central*, balancing factors such as [1] the economic impact of the regulation, [2] its interference with reasonable investment-backed expectations, and [3] the character of the government action."¹⁵

Similarly, the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid."¹⁶ Because the Fifth Amendment's Takings Clause and the Florida Constitution's Takings Clause are interpreted coextensively, Florida's takings clause may be properly analyzed with cases interpreting the Federal Takings Clause.¹⁷

⁶ See Orange Cnty., Fla., Charter, Art. V, § 506 A.

⁷ *Id.*

⁸ Seminole Cnty., Fla., Home Rule Charter, Art. V, § 5.2 B.

⁹ Orange Cnty., Fla., Charter., Art. V, § 506 B. (1)-(2).

¹⁰ *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021) (quoting *Murr v. Wisconsin*, 582 U. S. 383, 394 (2017)).

¹¹ *Id.* (quoting Amend. V, U.S. Const.).

¹² *Id.* at 148 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321-22 (2002)).

¹³ *Id.* (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

¹⁴ *Id.* at 149 (citing *Horne v. Dep't of Agric.*, 576 U. S. 350, 360 (2015)).

¹⁵ *Id.* at 148 (*Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

¹⁶ Art. X, § 6(a), Fla. Const.

¹⁷ *E.g.*, *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011) ("This Court has previously interpreted the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively."), *rev'd on other grounds*, 570 U.S. 595 (2013); see also *Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 949 (11th Cir. 2018) ("Because

Here, the land use restrictions on the rural property owners in Orange and Seminole Counties may rise to the level of a regulatory taking. Analyzing the factors in *Penn Central* first involves examining the economic impact of the restrictions on development. This inquiry is fact intensive and specific to each parcel of land affected.¹⁸ As outlined in your request, it appears that there has been economic harm to many of the affected landowners from the rural designation in the county charters. The second factor is the interference of the regulation with reasonable investment-backed expectations. Again, this is a factual inquiry specific to each parcel of affected land. However, reasonable investment-backed expectations of the landowners have been frustrated and interfered with by the amendments to the county charters.

The third and final factor is the character of the government action. The government's actions here are zoning regulations that condition property rights on whether owners can persuade a supermajority of county commissioners. And these rural regulations could be irreversible if the supermajority of commissioners never approves rezoning of an area. Consequently, application of the *Penn Central* factors suggests that the land use restrictions on the rural property owners in Orange and Seminole Counties may constitute a regulatory taking.

THE BERT HARRIS ACT

The BHA recognizes that “some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution.”¹⁹ As a result, the BHA provides a distinct cause of action for property owners to obtain compensation “[w]hen 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.”²⁰ The term “inordinately burden” means the government action “has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole.”²¹ The term “inordinately burden” can also mean that “the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.”²²

If an action of a governmental entity violates the BHA, the affected property owners may petition a court for “compensation for the actual loss to the fair market value of the real property caused by the action of government.”²³ “The legislative intent of the [BHA] is evident from the first section of the act, which clearly provides

Florida follows federal takings law, we can look to cases brought under the Fifth Amendment to inform our analysis.”).

¹⁸ *Penn Cent.*, 438 U.S. at 124 (describing the factors as “factual inquiries”).

¹⁹ § 70.001(1), Fla. Stat.

²⁰ § 70.001(2), Fla. Stat.

²¹ § 70.001(3)(e)1., Fla. Stat.

²² *Id.*

²³ § 70.001(2), Fla. Stat.

that the statute was intended to protect private property interests against ‘inordinately burdensome’ governmental regulations that do not necessarily amount to a constitutional taking.”²⁴

Here, the property owners in Orange and Seminole County whose property is subject to the Rural Boundary may have a cause of action under the BHA. In Orange County, the 2024 amendment to the charter qualifies as a “specific action of a governmental entity” that may be actionable. Further, the amendment may be found to “inordinately burden, restrict, or limit” the property rights of rural landowners in Orange County. The development of private land in the Rural Boundary is completely dependent on a majority plus one vote by the County Commissioners. Therefore, Orange County may be found to have “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.”²⁵ Additionally, if Orange County is forcing the rural landowners to bear a “disproportionate share of a burden imposed for the good of the public” on their rural land, then this also could constitute an “inordinate burden” on their use of real property and violate the BHA.²⁶ Therefore, the rights of the rural property owners to use and develop their land, even if not a constitutional taking, are likely “inordinately burdened” and therefore actionable under the BHA.

Similarly, the property owners in Seminole County whose property is subject to the Rural Boundary may also have a cause of action under the BHA. The requirement of a supermajority vote of the Seminole County Commissioners to allow development of any land subject to the rural designation may be an “inordinate burden” on the rights of the rural property owners. As described above, if Seminole County is forcing the rural landowners to bear a disproportionate “share of a burden imposed for the good of the public” on their rural land, then this also likely constitutes an “inordinate burden” on their use of real property and violate the BHA.

CONCLUSION

The following conclusions depend upon the specific facts regarding the properties subject to the rural land use designations. The property restrictions on rural landowners in Seminole and Orange Counties could very well constitute a regulatory taking under the Federal and Florida Constitutions. In addition, it is the opinion of this office that the charter amendments of Seminole County and Orange County in designating certain large portions of land as rural likely violate the Bert Harris Act.

Sincerely,



Greg Slemp
General Counsel

²⁴ Op. Att’y Gen. Fla. 06-31. (2006).

²⁵ § 70.001(3)(e)1., Fla. Stat.

²⁶ *Id.*