1995) ("Therefore, when the instant complaint was filed, which was after the Dade trial court ruled in Carnival's favor but before the appellate court's addressed the issue, Carnival possessed a good faith, soundly-based and unaddressed argument that Florida's public policy had changed." (Emphasis in original.)); see also CJC Holdings, Inc. v. Wright & Lato, Inc. 989 F.2d 791, 794 (5th Cir. 1993) ("misapplication of Rule 11 can chill counsel's 'enthusiasm and stifle the creativity of litigants in pursuing novel factual or legal theories,' contrary to the intent of its framers. For this reason, a trial court should not impose Rule 11 sanctions for advocacy of a plausible legal theory, particularly where, as here, the law is arguably unclear." (citation and footnote omitted)); Neighborhood Research Institute v. Campus Partners for Community Urban Development 212 F.R.D. 374, 379 (S.D. Ohio 2002); ("This Court will not impose sanctions on the Plaintiffs for asserting claims contrary to existing law when the only existing law comes from jurisdictions whose precedent is not binding on the Court. No precedent, either from the Sixth Circuit or the Supreme Court, clearly establishes that the Plaintiffs have no private right of action under MAHRA."); Vanover v. Cook 77 F.Supp. 2d 1176, 1177 (D. Kan. 1999) ("Where the law is arguably unclear, Rule 11 sanctions should not be imposed.") No appellate opinion had interpreted the pertinent terms of the statute at the time Rainbow River filed its complaint. No opinion to date

supports the City's argued interpretation of the statute. Therefore, it cannot be said that Rainbow River's position was frivolous.

In addition to the absence of reported opinions addressing the interpretation of the statutory terms in question, the Court should consider the relative uncertainty in the body of law at issue. Cf. Scott v. Busch, 907 So. 2d 662, 665-666 (Fla. 5th DCA 2005) (on review of a dismissal and section 57.105 motion, observing uncertainties, contradictions, and controversies in the field of defamation law). As noted by commentators on the Bert Harris Act, the relative ambiguity of terms in the Bert Harris Act was part of a deliberate effort to afford broad discretion to the judiciary in a case-by-case interpretation of the statute. D. Powell, A Measured Step to Protect Private Property Rights, 23 Fla. St. U. L. Rev. 255, 265 (1995) ("[P]recisely because Harris Act claims were expected to be 'ad hoc, factual inquiries,' as those in takings cases, the working group which prepared the legislation favored an approach under which the full import of the Harris Act ultimately would be determined by judicial construction and application. In other words, judicial interpretation on a case-by-case basis was considered inevitable, necessary, and desirable."(Footnote omitted)); J. Stroud, Florida's Private Property Rights Act, 20 Nova L. Rev. 683, 686 (1996) ("[T]he broad scope of the Act, the discretion left to the courts under vaguely defined concepts, and the prospect of significant monetary consequences, create a strong incentive for government to

compromise its regulatory authority for case by case settlements with complaining property owners."); see also Travarthean, supra, 78 Fla. B.J. 61. The Legislature designed the statute so that courts could interpret uncertain terms on a case by case basis, and Rainbow River took a reasonable approach based upon the specific facts of the case.

In its motion for attorney's fees, the City argued that Rainbow River filed a lawsuit prematurely and in doing so, took a frivolous position on the timing of the lawsuit. The City's argument is erroneous for the two reasons set out above. When the City claims that the statute unambiguously leads to its position it took in the circuit court, it refers to language that does not appear in the statute. Furthermore, the City overlooks language in subsection 70.001(5)(a) which indicates that Rainbow River did not file its action prematurely. Far from demonstrating an abuse of discretion on the denial of its motion for fees, the City has not presented a convincing argument that its position on the motion to dismiss was meritorious.

2. Under the plain language of the Bert Harris Act, Rainbow River's claim was ripe as a matter of law.

In the second subsection of its first argument, the City argues that Rainbow River's claim was not ripe. The statute, by its terms, requires a property owner to submit a written claim to the governmental entity. § 70.001(4)(a), Fla. Stat. Again as alleged in the Complaint, Rainbow River presented a written claim to the City, with a bona fide appraisal; the City did not respond within 180 days. Under the

plain language of the statute, the omission to respond to that claim meant that the matter "shall be deemed ripe" at that time. § 70.001(5)(a), Fla. Stat. There can be no serious issue of ripeness.

The City now offers three unrelated arguments to support the argument that Rainbow River's pre-suit written claim was premature. First, the City offers an interpretation of terms within subsection 70.001(2) which would supposedly support that argument. Second, the City refers to obiter dictum in the footnote of a reported opinion that had nothing to do with pre-suit requirements. Third, the City misquotes the statute in arguing that the absence of a "direct action" would indicate that there could be no "inordinate burden." None of those arguments offers substantial support for the City's position on statutory basis, and none suggests a basis to suggest that the circuit court abused its discretion in denying a motion for attorney's fees.

The City quotes language in Section 70.001(2) which provides that relief may include compensation for loss of fair market value "caused by action of government." That subsection does not address pre-suit requirements, which are set out in subsections (4) and (5) of the statute. Subsection (2) thus does not, as the City argues, require the owner to meet any "requirements" before providing a written claim as part of pre-suit procedures.

Next, the City quotes from a footnote in Osceola County v. Best Diversified, Inc., 936 So. 2d 55, 58 n.3 (Fla. 5th DCA 2006), which describes the Bert Harris Act in general and includes a reference to "government regulation." Neither that case nor Holmes v. Marion County, 960 So. 2d 828 (Fla. 5th DCA 2007) address the type of "government regulation" that will give rise to a Bert Harris claim. Even if the dicta from the footnote were of any significance to the issues at dispute in these proceedings (which they are not), the City misinterprets the language of that sentence. Based on the omission of the definite article "the" and the indefinite article "a," the reference in that sentence is to "government regulation" as an action, not to an identifiable "regulation," or rule. (See The American Heritage Dictionary of the English Language 386 (4th ed. 2000) (providing definition of regulation as (among other things) "The act of regulating or the state of being regulated.") That footnote does not support the City's position on the merits, much less resolve the issue in such a way as to support a Section 57.105 motion.

Finally, in the indented quotation at page 26 of the Amended Initial Brief, the City misquotes the statute by inserting the phrase "direct government action" at the beginning of the quotation. Again, while the phrase "action" appears within that definition, it is not modified by the adjective "direct." Even if the City had bracketed the phrase to indicate the substitution of words within the quotation, the inserted language would still be inappropriate because it would change the context

and meaning of terms within the statute. Again, there is a crucial distinction between defining the character of the government action and the effect of the action. The definition of "inordinate burden" addresses only the question of effect, not the character of the action. The City's argument on that point, and the rhetorical question included within that argument, should be disregarded because they rely on a materially erroneous quotation.

The effect of the government's action, for the purpose of a Bert Harris claim, is defined by the City's ripeness decision. § 70.001(5)(a) Fla. Stat. Again, because the City did not respond to the written claim, its "prior action" (its stated position when it transmitted the plan amendment to DCA) was "ripen[ed]." Id. The plan amendment, which was deemed ripe when the City failed to respond to the claim, drastically reduced the allowable density of the Property. It is more than reasonable to say that a ripe governmental action, which converts mixed use land to an agricultural designation with an allowable density of one residential unit per ten acres, directly "limits" and "restricts" the use of property within the statutory definition of "inordinate burden."

3. The operational terms in the Bert Harris Act are ambiguous.

The third subsection of the Amended Initial Brief appears to argue that certain terms within the Bert Harris Act are unambiguous. The City offers the argument that a hypothetical interpretation of the term "direct action" would render

other, supposedly unambiguous terms meaningless. (Supposedly, according to the City, Rainbow River has argued the interpretation of that term). However, again, the term "direct action" does not appear in the statute, and thus, a hypothetical interpretation of that term would not appear germane to the issues on appeal.

Proceeding to the terms cited in the third point of the Amended Initial Brief, none of the cited subsections suggest that the trial court abused its discretion in denying the City's Section 57.105 motion. Selectively quoting from the statute,[5] the City notes the statute's reference to an "as applied" action. However, again, based upon the holding of this Court in Citrus County v. Halls River Dev., 8 So. 3d 413, 422-423 (Fla. 5th DCA 2009), it cannot be said that the reference to "as applied" actions would support the City's arguments. (As quoted above, the court in Halls River Dev. expressly rejected the argument that the Bert Harris Act applies only to as-applied actions). It can be said, however, that the City's argued interpretation of that term is inconsistent with the single reported opinion to address the issue. Halls River Dev. at 422-423.

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[5] Again, the reference to an "as applied" action in Subsection (1) of the statute appears in a sentence where the statute sets out the "intent of the Legislature." The quotation in this portion of the Amended Initial Brief again omits the full context of that sentence.

4. Rainbow River complied with all pre-suit requirements under the Bert Harris Act, and the controversy regarding pre-suit requirements would not have supported a Section 57.105 award.

In the fourth subsection of the first argument in the Amended Initial Brief, the City first argues that based upon Sosa v. City of West Palm Beach, 762 So. 2d 981 (Fla. 4th DCA 2000), Rainbow River had not met the pre-suit requirements of the Bert Harris Act. The City also argues that a failure to meet pre-suit requirements, standing alone, is sufficient to support a Section 57.105 award. Sosa does not support the City's arguments. The record shows that Rainbow River had met the pre-suit requirements. For the reasons argued above, Rainbow River's position on the timing of the lawsuit was reasonable. Furthermore, the order on appeal can be affirmed on alternate grounds. Even if Rainbow River's position were erroneous, the controversy over compliance with pre-suit requirements in this case cannot serve as a basis for a Section 57.105 award.

The Amended Initial Brief appears to quote Sosa v. City of West Palm Beach, 762 So. 2d 981 (Fla. 4th DCA 2000). However, the indented quotation attributed to the court in Sosa (see Amended Initial Brief at 28) does not appear in the reported opinion. In Sosa, the court affirmed the dismissal of a complaint under the Bert Harris Act because owner presented his written claim less than 180 days before he filed the lawsuit, and because the owner did not present any appraisal supporting the claim before he filed suit. Sosa, 762 So. 2d at 982. In the

present case, there is no dispute that Rainbow River provided its written claim more than 180 days before it filed the lawsuit, and there is no legitimate dispute that Rainbow River submitted a bona fide, valid appraisal with its written claim. Neither the holding in Sosa nor any of the reasoning in that opinion addresses the character of the governmental "action" or the statutory term "action of a governmental entity." Neither the holding nor any of part of the opinion in Sosa supports the City's position on appeal.

In this portion of the Amended Initial Brief, the City attempts to refute alternative grounds for affirming the order on appeal. At the time the complaint was filed, a Section 57.105 sanction would have been inappropriate because Rainbow River was not presumed to know, before filing its complaint, whether the City would waive or raise the issue of compliance with pre-suit requirements. Shahan v. Little, 703 So. 3d 1090, 1091-1092 (Fla. 2d DCA 1997); Solimando v. Aloha Medical Center, 594 So. 2d 850, 852 (Fla. 2d DCA 1992). Theoretically, if there was an absence of a justiciable issue on timeliness, the City could argue that Rainbow River had an obligation to dismiss the complaint when the City raised the question of timeliness in its motion to dismiss. However, at the time the City served its motion to dismiss, the City had already adopted the ordinance on second reading. The issue was already moot when the City first raised it. Furthermore, the record reflects that while the City's motion to dismiss was pending before the

circuit court, DCA's review of the ordinance was complete, the time to file an administrative challenge had expired, and the comprehensive plan amendment at issue had taken full effect. The City did not serve its motion for attorney's fees until after the comprehensive plan amendment had become final. Rainbow River could have, at that time, simply filed an amended complaint to clarify that the amendment had taken effect. In light of the record, for those additional reasons, the City cannot demonstrate an abuse of discretion in the circuit court's denial of its Section 57.105 motion.

The City's position also over-states the consequences of disputed issues on pre-suit requirements. If there were any lingering doubt as to whether this suit was premature, abatement of the action rather than dismissal would be appropriate. Bierman v. Miller, 639 So. 2d 627 (Fla. 3d DCA 1994) ("the proper remedy for premature litigation 'is an abatement or stay of the claim for the period necessary for its maturation under the law.'" (Citations omitted)). Even if the circuit court had fully accepted the City's position on the interpretation of the statute, the appropriate remedy for the asserted defect would have been the temporary abatement of the action.

The City closes with the argument that for some reason, it did not have the opportunity to evaluate Rainbow River's claim or to provide a settlement offer and ripeness decision under the Bert Harris Act. See § 70.001 (5)(a), Fla. Stat. The

record demonstrates otherwise. The plan amendment was the result of a lengthy deliberative process with ample opportunity for the City to respond to Rainbow River's claim. Furthermore, as argued above, the timing of the claim promoted administrative efficiency by allowing the City to consider the written claim before the administrative process was complete and the plan amendment was final.

The record shows that following public workshops, the City's Planning Commission, its "local planning agency" (see § 163.3174, Fla. Stat.) conducted a hearing to recommend transmittal of the proposed plan amendment [R. I at 43, 61]. The Planning Commission voted unanimously to recommend transmittal of the proposed amendment [R. I at 61 (Exhibit C to Complaint)]. Based on the unanimous vote of its city council, the City made a formal decision to transmit the proposed plan amendment to DCA. Id. After those actions, Rainbow River provided its written claim and appraisal to the City. [I at 63 (Exhibit D to Complaint)].

After receiving Rainbow River's claim and appraisal, the City had the opportunity and statutory duty to provide a ripeness decision and settlement offer. During the 180-day claim period, the City had every legal opportunity and indeed, the statutory duty, to consider its plan amendment and provide a settlement offer and ripeness decision if it believed that some compromise or "mitigation" was appropriate. § 70.001 (5)(a), Fla. Stat. (the governmental entity "shall issue a

ripeness decision . . . ." (emphasis supplied)). There is no factual or legal basis to support the argument that the City was somehow deprived of the opportunity to respond to Rainbow River's written claim. The City should not be heard to express surprise that its final decision to amend its comprehensive plan amendment was any different from its initial decision when it transmitted the amendment to DCA. The City, having breached its statutory duty to respond to Rainbow River's written claim, should not be heard to complain of the resulting ripening of that claim.

5. The circuit court did not abuse its discretion in finding that the "factual recitals" in the Complaint were sufficient to create a justiciable issue.

In its fifth sub-argument, aside from repetition of earlier points, the City raises four unrelated arguments. First the City elaborates on the argument that it had not, at the time the Complaint was filed, held a second hearing for final adoption of the comprehensive plan amendment. Second, the City appears to argue that Rainbow River had not complied with pre-suit requirements because its appraisal was supposedly not "bona fide." Third, the City raises the argument that the Complaint was frivolous because "[n]o plans or permits had been denied." Finally, the City cites unrelated cases for the inscrutable proposition that this appeal presents a "failure of a case" rather than the "failure of proof." None of those unrelated arguments provides a basis to conclude that the circuit court abused its discretion by denying the Section 57.105 motion.

The City restates and elaborates upon its argument that Rainbow River's action was premature because the City had not, when the Complaint was filed, given its final approval to Ordinance No. 2007-25 on second reading.[6] As argued above, the City overlooks the practical effect of the City's preliminary action (its transmittal of the plan amendment to DCA) on the value of the Property. The City also overlooks its failure to respond to Rainbow River's written claim and the resulting "ripen[ing]" of its "prior action." For the reasons discussed in part I.A.1 of its Answer Brief, Rainbow River's argument on the operative statutory interpretation is more reasonable.

The City also requests a finding that the appraisal submitted by Rainbow River was not "bona fide," as required by the Bert Harris Act. In support of that request, the City mischaracterizes the record. The City represents in page 31 its Amended Initial Brief "In previous pleadings, [Rainbow River] [R. Volume I (167-176) . . . par. 18 also admitted its failure to provide a 'bona Fide' [sic] appraisal with its notice of claim, which admission it subsequently backed away from." The

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[6] In this part of the Amended Initial Brief, the City attributes the phrase "action of a governmental entity which affects real property" to the opinion in Sosa v. City of West Palm Beach, 762 So. 2d 981 (Fla. 4th DCA 2000). This term is in Section 70.001(3)(d) F.S., and is neither used nor explained in Sosa. At page 31 of the Amended Initial Brief, for unexplained reasons, the City inserts into that quotation the term "as applied." The term "as applied" does not appear within subsection 70.001(3)(d).

language of the cited paragraph, contained in a memorandum of law served by Rainbow River in the action below, provides in full:

> The Complaint clearly alleges that the City's "action" "inordinately burdened" the Plaintiff's property so as to qualify for a claim under this Act. The allegations in the Complaint must be taken as true on this motion. The Complaint alleges the City has caused the loss of almost 65% of the property's fair market value. Thus, as a matter of law for this purpose, the City has taken a "specific action" which has burdened this parcel to the extent that the owners are entitled to relief. Perhaps it could be argued or testimony elicited at trial that the Plaintiff's appraisal is not correct, that there is no actual devaluation until the Amendment to the Comprehensive Plan formally goes into effect. However, that is an issue of fact. The Complaint and the appraisal assert the opposite: Unless the City withdraws its decision to adopt this ordinance, the damage has already occurred. On a motion to dismiss, the Court must consider the four corners of a Complaint, including the attachments, to be true. Coriat v. Global Assur. Group, Inc., 862 So. 2d 743 (Fla. 3rd DCA 2003).

[R. I at 173 ¶ 18]. At most, in the cited paragraph Rainbow River acknowledged that at the pleading stage there was an issue of fact on whether the appraisal "is not correct." The cited language does not support the proposition that Rainbow River had, at any time, admitted the lack of a bona fide appraisal in the context of Section 70.001(4)(a), F.S. There is simply no legal basis to substitute the findings of the circuit court on the intent of counsel, and the record citations offered by the City do not support the findings it is now suggesting. There is no basis for the City to argue that the appraisal was less than "bona fide," or to request a substituted finding of fact on this point.

Finally, the City restates the argument that Rainbow River's claim was premature because the City had not yet denied any "plans or permits." For the reasons stated in section I.A.1 of this answer brief, the City's argument is not supported by the language of the statute. This argument flies in the face of the holding of this district in Halls River Dev. and the reasoning of that opinion as quoted at length above in this brief.

Finally, the City posits that there is a pertinent distinction between "failure of a case" and "failure of proof," and cites three cases to support that proposition. If there is such a distinction, and if that distinction has any bearing on the issues on appeal, the cited cases bear no similarity to the case on appeal and do not even support the proposition cited.

B. THE COMPLAINT WAS NOT FRIVOLOUS, AND THE RECORD DOES NOT SUPPORT A BASIS TO SET ASIDE THE CIRCUIT COURT'S FINDING REGARDING THE INTENT OF COUNSEL.

Section I.B of the Amended Initial Brief includes a series of citations regarding the standard that the circuit court should apply when considering a Section 57.105 motion when the moving party claims that a complaint was frivolous when filed. The pertinent standard is accurately stated in the order on appeal: in order to find that a complaint was frivolous, the court must find a complete absence of a justiciable issue. Mahaney v. Sumter, 732 So. 2d 373 (Fla. 5th DCA 1999). For the reasons stated above, the lower court did not abuse its

discretion in applying that standard and finding that the complaint was not frivolous. Far from demonstrating an absence of justiciable issues, the Amended Initial Brief tends to emphasize the complexity of the justiciable issues that the lower court could have considered when it granted the City's motion to dismiss, without prejudice. If the question of statutory interpretation is so complex that the City must mischaracterize the record, mis-quote the statute, and argue the meaning of terms that do not appear in the statute, the issue before the circuit court cannot be deemed clear-cut.

Aside from the standard described in Maheny v. Sumter, the City is now suggesting that Rainbow River's purpose was to "harass or maliciously injure" the City. However, the City has not provided any legal authority to set aside the findings of the circuit court, which expressly found that the City had not presented sufficient proof of such malicious intent. Furthermore, the record does not support the City's representations regarding supposed "admissions" by counsel regarding the sufficiency of Rainbow River's appraisal and the ripeness of the claims.

As described above and in reference to quotations from the record, the record does not support the allegation that Rainbow River admitted "that they did not submit a bona fide appraisal." [Amended Initial Brief at 37] Similarly, the City alleges that Rainbow River admitted "that their claim really wasn't ripe" [Amended Initial Brief at 37], citing paragraph 9 of a memorandum of law

submitted by Rainbow River. Again, quoting the paragraph in full, the record does not support the City's representation.

> The statute only requires the "specific action" of a governmental entity which has the effect of substantially devaluing a parcel of real property to trigger the assertion of a claim. That term is not given a restrictive definition in S. 70.001(3)(d). The definition is sufficiently broad to include any action of a governmental agency "which affects real property." The allegations in the Complaint clearly describe and properly allege that the City has done just that to the Plaintiff's property. Clearly, the plain words of the Bert Harris Act do not require a claim to be based solely and exclusively on a formal final adoption of an ordinance. The Act specifically states that liability can arise from any specific action of a governmental entity, including, for example: an action on an application or a permit (S. 70.001(3)(d) F.S.).

[R. I at 171 ¶ 9]. This paragraph does not reflect or even imply an admission that the claim was not ripe. The record simply does not support the City's representation that Rainbow River had made the admissions described in the Amended Initial Brief.

The circuit court explicitly considered, and rejected, the City's factual allegation that Rainbow River had acted with the intent to harass or injure the City. The City has offered no legal basis to set aside that finding of fact and has no basis to do so, particularly in the absence of a transcript of proceedings.[7] See Chirino v.

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[7] While a court reporter was present for the hearing on the motion for fees, neither party requested a transcript. Rainbow River does not believe that the transcript of the proceedings, which did not include the presentation of testimony, would provide additional support for Appellant's position.

Chirino, 710 So. 2d 696 (Fla. 2d DCA 1998); D.W. v. Dep't of Children and Families, 898 So. 2d 991.

Engaging in an extended ad hominem attack, the City appears to argue that Rainbow River's counsel acted in bad faith by presenting "cavalier" arguments in light of their "expertise in this area." Rainbow River's position was not cavalier, and the lower court rejected the factual theory that Rainbow River acted in bad faith. There is simply no basis in law or in the record to substitute the findings of the lower court and find that Rainbow River or its attorney acted in bad faith.

C. *Halls River* supports Rainbow River's position.

Finally, the City attempts to interpret the holding in Citrus County v. Halls River Dev., 8 So. 3d 413 (Fla. 5th DCA 2009) in a way that could conceivably support its position. That opinion was not available when the circuit court was considering the City's Motion to Dismiss. As argued by Rainbow River, the opinion in Halls River Dev. dispels the notion that the Bert Harris Act, on its face, creates a bright line to determine when a cause of action accrues. The Halls River Dev. opinion also supports the position, at least indirectly,[8] that the operative terms

[8] In candor, the opinion does not specifically address the weight that should be attributed to the statement of intent in subsection (1), other than by reference to a Florida Bar Journal article that presented an analysis contrary to the Court's holding. The holding in that case would appear inconsistent with the proposition that the phrase "as applied" in subsection (1) limits the scope of the Act.

in the Bert Harris Act are not limited by the statement of intent in subsection 70.001(1).

As a threshold matter, it is difficult to conclude that the Halls River opinion could support the City's position on a motion for attorney's fees. The statutory award must be based upon the application of "then-existing law." § 57.105(1)(b), Fla. Stat. The opinion in Halls River Dev. was filed on March 20, 2009, and thus was not "existing law" until after the City filed its motion for fees. However, for the reasons discussed above, the reasoning in Halls River Dev. is much closer to the statutory interpretation argued by Rainbow River than the one offered by the City.

The owner in Halls River Dev., like the City in the case below, argued that the cause of action accrued at the time it was denied a development order. This Court explicitly reasoned that the cause of action accrued when the effect of the ordinance was "readily ascertainable." Under the facts of that case, the effect was "readily ascertainable" when the ordinance was adopted. The facts in Halls River Dev. are similar to the case on appeal in several material aspects. Both cases address the effect of a comprehensive plan amendment which reduces the allowable development density of property, in the absence of a discrete "application" for development approval by the property owner. Rainbow River submits that the City's position was crystallized and "readily ascertainable", at the

latest, when the City failed to respond to its written claim under the Bert Harris Act, and the City's position had "ripened" as a matter of law. Applying the standard in Halls River Dev., the effect of the City's action was "readily ascertainable," at the latest, after the City had failed to respond to the written claim by the statutory deadline. Thus, under Halls River Dev., Rainbow River's claim was not premature.

The present case is distinguishable from Halls River Dev. in that Rainbow River began the pre-suit process by submitting a written claim when the City transmitted the proposed amendment to DCA and voted on the first reading of Ordinance No. 2007-25. Again, the lower court did not have the benefit of that opinion when it dismissed the initial complaint, without prejudice. If a court were to consider the Halls River Dev. opinion under the facts of the case, Rainbow River submits that the same reasoning should apply. There is no bright line under the statute: a cause of action accrues when the effect of a local government's action is "readily ascertainable." Applying the pragmatic holding in Halls River Dev., Rainbow River's claim was not premature.

According to the City, the Court in Halls River Dev. interpreted the statutory term "as applied" to mean the same as "adopted." [Amended Initial Brief at 41]. If that were the specific reasoning of the Court, it was not clearly expressed in the language of the opinion. Rather, the opinion suggests a case by case analysis to

determine when the effect of an action is "readily ascertainable," or when a new regulation is "applied." See Halls River Dev., 8 So. 2d at 423 ("[B]y its express terms, the Harris Act requires the court to determine when the new law or regulation, as first applied, unfairly affected the property and requires a claim to be asserted within one year thereafter. On the facts presented in this case, it is clear that the adverse impact was caused in 1997 when the Plan changed the MXU designation to CL.") (emphasis supplied).

Finally, the City appears to rely upon Halls River Dev. for the new theory that the statute requires a government to "permanently affect" the real property. The City did not raise the question of "permanence" in the case below, and should not be heard to argue that point for the first time on appeal. In any case, Halls River Dev. does not directly support that proposition, as the question of "permanence" was not at issue in Halls River Dev. While the adverb "permanently" appears within the definition of inordinate burden, the apparent effect of that adverb is to exclude consideration of temporary measures, such as moratoria, from the scope of the Act. See § 70.001(3)(e), Fla. Stat.

To the extent that a question of "permanence" may have been at issue, again, the statute provides that the City's action was ripened by its failure to respond to Rainbow River's written claim. The ordinance was not, by its terms, an interim measure or a moratorium. The City never contended that the plan amendment was

temporary in nature, or that the City had a secret plan to repeal the amendment at some point in the future. Conceivably, there could be an issue of fact on whether the plan amendment had a permanent effect on the property. However, even if the City had made that allegation in the case below, there was at minimum a justiciable issue of whether a comprehensive plan amendment is permanent in nature. In this argument, as in the multitude of arguments presented in the Amended Initial Brief, the City has not presented a basis to conclude that the circuit court abused its discretion in denying the Section 57.105 motion.

The City cannot argue that the statute unambiguously supported the position it took during motion practice in the lower court. The City presents, at best, the position that a reported opinion, rendered after the case had concluded, could have provided indirect support for a statutory interpretation argument that the City did not present in the lower court. This state of affairs does not suggest a lack of justiciable issues when the initial complaint was filed.

CONCLUSION

For the foregoing reasons, the City has not demonstrated an abuse of discretion. Indeed, the City's underlying arguments in support of dismissal are contrary to a reasoned interpretation of the statute at issue. It cannot be said that Rainbow River's position failed to present a justiciable issue. Rainbow River respectfully requests that the order on appeal be affirmed.

SERVED this 23rd day of November, 2009.

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CERTIFICATE OF FONT STYLE

This answer brief has been prepared using Times New Roman 14-point font in Word as required by Rule 9.210(a), Florida Rules of Appellate Procedure.

ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S Mail to Marsha Segal-George, Esq., Fowler & O'Quinn, P.A., 28 W. Central Boulevard, Suite 400, Orlando, Florida 32801, on this 23rd day of November, 2009.

ATTORNEY

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