**IN THE DISTRICT COURT OF APPEAL**
**FIFTH DISTRICT, STATE OF FLORIDA**

**CITY OF DUNNELLON, FLORIDA,**

**Appellant,**

**vs.**

**RAINBOW RIVER RANCH, LLC,**

**Appellee.**

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**Case No.: 5D09-2004**
**Lower Tribunal Case No. 08-5202-CA**

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# ANSWER BRIEF OF APPELLEE, RAINBOW RIVER RANCH, LLC

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## PRELIMINARY STATEMENT ON CITATIONS

As cited herein, citations to the record will follow the format [R. X at y], with X referring to the volume number and y referring to the page number. Paragraph numbers will be included when appropriate.

The Appellant, the City of Dunnellon, will be referred to as the "City." The Appellee, Rainbow River Ranch, LLC, will be referred to as "Rainbow River."

## STATEMENT OF THE FACTS AND OF THE CASE

On October 2, 2008, Rainbow River filed its Complaint in the action below. [R. I at 1]. In that Complaint, Rainbow River alleged that it owned certain property (the Property) that, prior to the comprehensive plan amendment at issue in this case, was divided into three separate designations on the future land use map in the City's comprehensive plan. [R. I at 2 ¶ 5]. Rainbow River alleged that under those designations, it would have been able to develop a mixed use project with multi-family and commercial development, totaling 420 residential units and 125,000 square feet of commercial space. [R. I at 2 ¶ 5].

Also according to the allegations of the Complaint, on November 13, 2007, the City voted on first reading to approve Ordinance No. 2007-25. [R. I at 2 ¶ 7]. By that same vote, the City approved the transmittal of a proposed comprehensive plan amendment to the Florida Department of Community Affairs (DCA). [R. I at 2-3 ¶ 7, 9; R. I at 61 (Complaint, Exhibit C)]. As of that vote on first reading, proposed Ordinance No. 2007-25 (attached as an exhibit to the Complaint) stated that it would take effect after DCA entered a final order finding the amendment in compliance with Section 163.3184(1)(B), F.S. [R. I at 12]. By letter dated November 19, 2007, the City transmitted the plan amendment to DCA, advising DCA: "The City Council held its public hearing on November 13, 2007, and voted unanimously to transmit the proposed plan amendment to DCA." [R. I at 61]. The

letter also advised: "The City . . . anticipates that adoption of the proposed amendment will occur in approximately April 2008." [R. I at 62].

Rainbow River alleged that as a result of the City's actions, it could not market, develop, or finance the development of its property as a mixed use development; and that the Property would be converted to an agricultural designation. [R. I at 3 ¶ 9]. Under an agricultural designation, as alleged by Rainbow River, the highest and best use of the Property would be for low density residential development at a maximum density of one residential unit per ten acres. [R. I at 3 ¶ 9]. As alleged and as supported by an appraisal report (also attached to the complaint), the City's actions reduced the value of the Property from $8,370,000 to $3,030,000, a decrease of $5,340,000. [R. I at 3 ¶ 10].

After the City transmitted the comprehensive plan amendment to DCA for review, Rainbow River sent the City a written claim under the Bert Harris Act, with a "bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the Property." [R. I at 3 ¶ 12]. The appraisal report provided an opinion reflecting the loss in value as described above. [R. I at 64, 66]. That appraisal report stated the following, in section labeled "Assumptions and Limiting Conditions:"

> According to the [City's] Ordinance 01-02, the subject property includes a mixture of Medium-Density Residential, Conservation, and Commercial future land use designations. The Partial Stipulated Settlement Agreement limits the total number of residential units to be

> developed on the Medium-Density Residential and Conservation lands to 420 units and limits the total developable retail building area on the Commercial property to 125,000 SF. This represents the "before" valuation of the subject property. . . . On November 13, 2007, the [City] voted to transmit to [DCA] Ordinance No. 2007-025, which will change the land use of the of the subject property to Agriculture, which will reduce the maximum development density to one dwelling unit per ten acres. This represents the "after" valuation of the subject property. It is a reasonable hypothetical assumption made within this report that Ordinance No. 2007-25 will be ratified by both the [City] and DCA.
>
> . . . In April 2007, a moratorium on new development was enacted by the [City] until May 1, 2008. On November 13, 2007, the [City] voted to transmit to [DCA] a proposed land Future Land Use Amendment (Ordinance 2007-25) that will change the future land use designation of the subject property from Medium-Density Residential, Conservation, and Commercial to Agriculture. Therefore, it is an assumption made within this report that the effective date of valuation should coincide with the date the [City] voted to transmit Ordinance No. 2007-25, on November 13, 2007.

[R. I at 76 (page 13 of appraisal report)]. As alleged in the Complaint, the City received the written claim and appraisal, and 180 days had passed since the City's receipt; the City had not sent a written ripeness decision or written settlement offer in response. [R. I at 4 ¶ 13].

The City filed an initial motion to dismiss, and served an amended motion to dismiss on December 9, 2008. [R. I at 85, 141]. As noted in the amended motion to dismiss, the City had adopted Ordinance No. 2007-25 on second reading on October 10, 2008. [R. I at 141]. The City argued that Ordinance 2007-25 was not a "finally adopted regulation," because DCA had until December 8, 2009 (that is, the

day before the date of service of the amended motion) to "perfect their final review." [R. I at 141]. Rainbow River served a responsive memorandum on December 22, 2008. [R. I at 167], followed by a "Supplemental Response" on January 6, 2009. [R. II at 331]. The Supplemental Response represented that DCA had issued a notice that the proposed amendment was "in compliance," and published notice to that effect on December 4, 2008. Id. The Supplemental Response included a representation, based on information from DCA, that the twenty-one day deadline for an administrative petition in response to that notice had passed. Id. As a result, the Supplemental Response alleged, "[t]he ordinance which is the basis of this claim is now fully adopted and in effect." [R. II at 332].

After the deadline for a petition in response to DCA's notice (and almost three months after the second reading of Ordinance No. 2007-25), the City initially served its motion for attorney's fees. [R. II at 342]. The City filed the motion for attorney's fees on January 27, 2009. [R. II at 338]. Approximately one month after the City filed its motion for attorney's fees, the Court entered an order granting the motion to dismiss but affording Rainbow River leave to file an amended complaint. [R. III at 431]. The Court did not elaborate upon the grounds for the dismissal or the reasons for providing leave to file an amended complaint. Rainbow River did not file an amended complaint but instead filed a notice of voluntary dismissal, without prejudice. [R. III at 490]. The record on appeal does

not address subsequent efforts by Rainbow River to pursue remedies under the Bert Harris Act.

The circuit court conducted a hearing on the City's motion for attorney's fees on April 15, 2009. [R. III at 507]. The record on appeal does not include a transcript of that hearing. The circuit court issued an Order Denying Defendant's Motion for Attorney's Fees Pursuant [to] § 57.105, Fla. Stat., on April 23, 2009. [R. III at 505]. The Court denied the motion, with the closing paragraph stating:

> While the Defendant, in its memorandum of law in support, submits that the improper, premature filing of its complaint is "blatantly obvious to even the most casual observer," this Court, when considering the intent of § 57.105, *Fla. Stat.*, the relative lack of reported cases on this specific *Bert Harris* issue and the interpretation of Chapter 70, the lack of sufficient evidence as to the alleged intent of Plaintiff's counsel to harass or injure the city, simply by the bringing of the lawsuit, and because the Court is not convinced that the Plaintiff's suit, as initially filed, was so completely devoid of merit as to render it frivolous as a matter of law, it is ORDERED [the motion is denied].

[R. III at 508].

## SUMMARY OF ARGUMENT

The central controversy in this appeal is whether Rainbow River took a frivolous position on the timing of its lawsuit under the Bert Harris Act. The City complains that certain events should have taken place before Rainbow River filed its complaint. There is no dispute that those events occurred while the City's motion to dismiss was pending, and before the City served or filed its motion for fees in the circuit court. Rainbow River took a reasonable position on the timing

of its complaint, based on a reasonable interpretation of the statute. At the time the complaint was filed, no reported opinion had addressed the merits of Rainbow River's argument on whether a cause of action has accrued. Shortly after the court granted the City's initial motion to dismiss, this District issued a reported opinion, Citrus County v. Halls River Dev., 8 So. 3d 413 (Fla. 5th DCA 2009), which supports Rainbow River's position on the timing of its lawsuit. Rainbow River's initial position, when it filed the complaint, was more reasonable than the position now taken by the City. Any controversy over the timing of the lawsuit was moot before the City filed its motion for attorney's fees. There is no basis to conclude that the circuit court abused its discretion in finding that Rainbow River's complaint was not frivolous.

In this case, the City began the formal process of amending its comprehensive plan in such a manner as to reduce the permitted density of Rainbow River's Property. The City, through its city council, voted to approve the proposed amendment on first reading and approved its transmittal to the Department of Community Affairs for review. At that time, Rainbow River submitted its "written claim" and supporting appraisal to the City, as authorized by the Bert Harris Act.

The City's arguments presume, without analysis, that a property owner cannot submit an effective pre-suit claim under the Bert Harris Act until a local

government's action is final. The Bert Harris Act does not expressly require final action before a property owner submits such a written claim. The statute as a whole strongly implies that an owner is authorized to provide its written claim and begin the pre-suit requirements after a government entity takes preliminary, non-final action that would inordinately burden property. This procedure allows the governmental entity the flexibility and administrative convenience of accounting for the claim before it takes final action, rather than taking final action and undoing it by a subsequent agreement. Rainbow River followed the plain language of the statute by presenting its written claim after the City took the actions described in the complaint.

The City failed to submit a written ripeness decision or settlement offer within 180 days after receipt of that written claim. Applying the plain language of the statute, the City's failure to respond to that claim is deemed to "ripen" the City's "prior action," and operates as a ripeness decision rejected by the property owner. § 70.001(5)(a), Fla. Stat. This "ripeness decision," under the plain language of the statute, is the last prerequisite to judicial review. Id. Rainbow River followed the plain language of the statute by filing its lawsuit after the "ripeness decision" had taken effect by operation of law as provided in the statute.

Based on the sequence of events and regardless of statutory interpretation issues, the City could not present a valid basis for a Section 57.105 award. When

Rainbow River filed the initial complaint, the City could have waived its position on compliance with pre-suit requirements. By the time the City asserted that position in its motion to dismiss, the City had mooted the issue by adopting Ordinance No. 2007-25 on second reading. While the City's motion to dismiss was pending and before the City served its motion for attorney's fees, the Ordinance had taken effect. The City's position on its motion for attorney's fees was predicated on issues that were hypothetical when the lawsuit was filed, moot when the court entered its order dismissing the initial complaint (with leave to amend), and moot when the City filed its motion for attorney's fees.

Because Rainbow River made a reasonable interpretation of an ambiguous statute, and because no reported opinion supported a contrary interpretation at the time of filing, Rainbow River's complaint cannot be deemed frivolous. The merits of Rainbow River's prior argument are supported by this District's recent opinion in Citrus County v. Halls River Dev., 8 So. 3d 413 (Fla. 5th DCA 2009). At all times during the lower proceedings, Rainbow River took a reasonable position on the timing of the lawsuit. There is no basis to conclude that the circuit court abused its discretion in rejecting the City's position and denying its motion for fees under Section 57.105, F.S.

## ARGUMENT

### I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT RAINBOW RIVER'S COMPLAINT DID NOT JUSTIFY SANCTIONS UNDER SECTION 57.105, F.S.

In the Amended Initial Brief, the City argues a number of theories regarding the supposed frivolity of the complaint in the proceedings below. Applying the appropriate standard of review, the Amended Initial Brief falls far short of demonstrating an abuse of discretion on the part of the circuit court.

Standard of Review

On review of an order denying a motion for attorney's fees under Section 57.105, F.S., the lower court's order must be affirmed unless the appellant can demonstrate an abuse of discretion. Gallagher v. DuPont, 918 So. 2d 342 (Fla. 5th DCA 2005). Because no transcript of the motion hearing has been provided, it should be presumed that findings of fact in the order on appeal are correct. Chirino v. Chirino, 710 So. 2d 696 (Fla. 2d DCA 1998); D.W. v. Dep't of Children and Families, 898 So. 2d 991.

A. ARGUMENT ON MERITS

1. The City errs in arguing that a "direct action" or a "final action" is required by the Bert Harris Act, or that the Complaint was frivolous.

In the first subsection of its first argument, the City argues that the complaint was frivolous because Rainbow River did not present evidence of "direct action"

under the Bert Harris Act. To begin, this argument refers to the wrong words. The statute on its face does not require or even refer to a "direct action." The statute also does not require or refer an alternate term offered by the City, a "final action." The statute refers only to an "action of a governmental entity," a type of "specific action." § 70.001(3)(d), Fla. Stat. The statutory definition is vague and broad. At the time the lawsuit was filed, no reported opinion had provided an interpretation of that term. The weight of existing authority, at that time and at the present time, tends to support Rainbow River's argued interpretation. Therefore, Rainbow River's argued interpretation of that crucial term cannot be deemed frivolous.

The gravamen of Rainbow River's complaint was that the City inordinately burdened the Property by voting to approve the ordinance on first reading, and transmitting a comprehensive plan amendment to DCA. This theory operated on the reasonable presumption, proven correct shortly after the action was commenced, that the City's final action would be consistent with its preliminary action. Because Rainbow River provided the City with a written claim and appraisal under the Bert Harris Act and the City failed to respond by the statutory deadline, the City's actions were deemed final and ripe for purposes of the Bert Harris Act.

Based on the allegations of the Complaint, the City's decision to transmit the amendment to DCA, in and of itself, severely devalued the Property. As alleged in

the Complaint, as a result of the City's action in transmitting a comprehensive plan amendment to DCA, Rainbow River could not market, develop, or finance the Property as a mixed use development. [R. I at 3 ¶ 9]. Under existing law, when the City transmitted the plan amendment to DCA, Rainbow River could not reasonably undertake any additional efforts to market or build a mixed use development on the Property in reliance on the existing planning designation for the Property. See Smith v. Clearwater, 383 So. 2d 681, 688-689 (Fla. 2d DCA 1980) (addressing the effect of pending zoning changes on vesting and potential retroactivity of zoning amendments). Thus, as a result of the actions described in Rainbow River's complaint, a reasonable person in Rainbow River's position would not develop the property and a reasonable purchaser would not buy the property in reliance on the existing planning designation.

Rainbow River responded to the City's actions by providing the City with a claim letter, together with an appraisal report opining that the City's actions had reduced the value of the Property by $5,240,000, approximately a 64% reduction in value. As alleged by Rainbow River in its Complaint, the City failed to respond to its written claim within 180 days. Under the Bert Harris Act, the City's failure to respond leads to the following consequences:

> The failure of the governmental entity to issue a written ripeness decision during the applicable 90-day-notice period or 180-day-notice period shall be deemed to ripen the prior action of the governmental entity, and shall operate as a ripeness decision that has been rejected

> by the property owner. The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

§ 70.001(5)(a), Fla. Stat. As detailed elsewhere in this brief, the Bert Harris Act includes ambiguities regarding the types of activities that could trigger a cause of action. The consequence of the City's failure to respond to the written claim, however, is unambiguous. Under the plain language of the statute, when an owner files a written claim in response to a government action, and the government fails to respond by the 180-day deadline, the failure to respond is a "ripeness decision" that will trigger a cause of action. Id. The City's failure to respond, by operation of law, "ripen[ed]" the "prior action," that is, the preliminary approval of the ordinance and the proposed amendment as transmitted to DCA, Id.

The appraiser's opinions support Rainbow River's decision to begin the claims process at the time the City transmitted the plan amendment to DCA. The real estate appraisal provided a valuation opinion using the date of City's preliminary action in describing the value before and after the plan amendment, with the assumption that the City would ultimately adopt the plan amendment. This approach is appropriate because real estate valuations may be based not only on existing land development regulations, but also on future changes to regulations that are deemed "reasonably probable." Broward County v. Patel, 641 So.2d 40,

43 (Fla. 1994); Board of Com'rs of State Institutions v. Tallahassee Bank & Trust Co., 100 So.2d 67, 69 (Fla. 1st DCA1958); see generally Florida Eminent Domain Practice and Procedure § 9.64 at 9-72, 73 (Sixth Ed. 2003). In this case, the appraisal report described the ultimate "ratif[ication]" of the Comprehensive Plan Amendment as a "reasonable hypothetical assumption." [R. I at 76]. The act of transmitting the comprehensive plan amendment to DCA, per se, was more than sufficient to trigger the Bert Harris claim process.

Assuming that Rainbow River's pre-trial written claim was not premature or defective, its claim was "ripe" under the plain language of the statute. § 70.001(5)(a), Fla. Stat. The City's motion to dismiss in the circuit court presumed, without analysis, that a property owner may not submit a written claim until the governmental entity has taken a final action. The Bert Harris Act is silent on that issue, and no reported case has resolved it. Subsection 4(a) of the statute addresses the pre-suit claim process, the submission of written claims, and the requirement that local governments provide "ripeness decisions" in response to written claims. This subsection does not require or imply that the written claim must be based upon a final action. Rather, the statute implies that a written claim may be submitted before a governmental entity makes a final decision.

Subsection 5(a) of the statute, quoted above in part, shows that in some circumstances a claim can be deemed ripe before final action. A ripeness decision

is effective "notwithstanding the availability of other administrative remedies." § 70.001(5)(a), Fla. Stat. By definition, if other administrative remedies are available, the local government's action is not final. See Griffin v. St. Johns Water Mgmt. Dist., 409 So. 2d 208, 210 (Fla. 5th DCA 1982). Therefore, in interpreting the statute, it is reasonable to conclude that an owner may begin the pre-suit claim process by submitting a written claim before the local government takes a final action that would inordinately burden property.

It would be less reasonable to interpret the statute to require a final action before the owner is authorized to provide a written claim. If an owner provides a written claim when the government's action is preliminary and subject to administrative remedies, the governmental entity is afforded the administrative convenience of settling claims, and amending its preliminary action, before it

becomes final.[1] Applying the plain language of the statute and in the absence of case law which would require a different approach, Rainbow River reasonably began the claims process by filing a written claim when the City voted on first reading to approve the plan amendment, and decided to transmit the amendment to DCA. Rainbow River reasonably filed the lawsuit when the City failed to respond to Rainbow River's written claim by the statutory deadline and thus, as a matter of law, had "ripen[ed]" its "prior action." § 70.001(5)(a), Fla. Stat. Beginning with the actual terms in the statute and ending with a reasonable interpretation of those terms, Rainbow River took a reasonable position on the timing of the lawsuit in the circuit court.

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[1] When a government entity enters into a settlement agreement which may be inconsistent with state laws or local laws, additional procedural and substantive requirements apply. § 70.001(4)(d), Fla. Stat. Those hurdles can be avoided if the local government can resolve the claim with all interested parties before it takes final action, and simply account for any changes in its final action. Such a procedure also would avoid potential conflicts with notice and public participation requirements that otherwise may apply when a government enters into a settlement agreement with a property owner outside of an existing administrative process. See Weaver and Coffey, Private Property Rights Protection Legislation: Statutory Claims For Relieve from Governmental Regulation, Fla. Env'tl and Land Use Law Treatise (June 2007) § 30.3-22 ("What becomes of other statutory or local regulatory obligations that mandate public notice and hearing, including requirements of Chapters 125, 163 and 166, Florida Statutes? The Act does not expressly override these processes." (Citation omitted)).

The City's position on appeal, however, does not begin with actual terms in of the statute. The Amended Initial Brief mis-states the appearance and location of terms within the statute. ("What constitutes 'direct action' by the government is at issue because that term is found in the definition of 'inordinate burden,'" Amended Initial Brief at 23). The term "direct action" is not found within that statutory definition. § 70.001(3)(e), Fla. Stat. The adverb "directly" is included to modify the terms "restricted" or "limited" within the definition of "inordinate burden" (§ 70.001(3)(e), Fla. Stat.)[2], but the adjective "direct" does not appear within the definition of "action of a governmental entity" (§ 70.001(3)(d), Fla. Stat.) or, for that matter, anywhere in the statute. The statute does not limit the character of the government action as argued by the City. Additionally, for unexplained reasons, the City complains that Rainbow River did not prove a "final action." This term does not appear in the statute. In sum, the first sub-argument in the Amended Initial Brief debates the interpretation of terms that do not appear in the statute.

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[2] The distinction between adjectives and adverbs is significant because the phrase "inordinate burden" is applied in the context of the government's action as expressed in its ripeness decision and settlement offer, as discussed below. § 70.001(6)(a), Fla. Stat. The measurement of an "inordinate burden" is defined by the ripeness decision. Id. As discussed below, based on the legal effect of the ripeness decision in this case, it is more than reasonable to say that the City's action "directly restricts" and "directly limits" Rainbow River's uses on the Property.

The City is correct that Rainbow River did not attempt to plead or prove a "direct action" or a "final action." However, the question is whether Rainbow River presented a non-frivolous claim regarding an "action of a government entity," the actual term that appears in the statute. The trial court did not abuse its discretion in finding that Rainbow River's position was not frivolous. In considering the order on appeal, it is appropriate to review the actual terms within the statute, lingering uncertainties in the interpretation of the Bert Harris Act, and the appropriate standard for a circuit court's ruling on a Section 57.105 motion.

The central controversy presented to the lower court is whether a local government undertakes an "action of a governmental entity" under the Bert Harris Act when it takes preliminary action to approve a plan amendment and transmits a comprehensive plan amendment to DCA for review. The statutory definition of "action of a governmental entity" is open-ended. It must be specific; it must affect real property; and the term includes, but is not expressly limited to, an "action on an application or permit." § 70.001(3)(d), Fla. Stat. The definition does not refer to finality, and it does not explicitly limit its scope to actions on applications. Id. Rainbow River took the reasonable position that the City Council vote, with the formal decision to transmit the amendment to DCA, were "action[s] of a governmental entity."

The City also characterizes the statement of legislative intent in subsection 70.001, which refers to actions "as applied," as creating requirements for a cause of action.[3] While statements of intent offer evidence of legislative intent, they do not override operative terms of the statute. Johnson v. State 6 So.3d 1262, 1266 (Fla. 4th DCA 2009) ("General statements of legislative intent have little power to change substantive directives stated plainly in the same statute which may seem at odds with the general intent."); see State v. Curtin, 764 So. 2d 645, 647 (Fla. 1st DCA 2000) (rejecting argument that statutory definitions should be modified by statements of legislative intent); In re: J.A., 561 So. 2d 356, 359-360 (Fla. 3d DCA 1990) (distinguishing between legislative statement of intent and "a code of rules"); St. Joe Paper Co. v. Dep't of Cmty. Affairs, 657 So. 2d 27, 28 (Fla. 1st DCA 1995) (rejecting argument that statement of legislative intent would prevail over specific standing requirements); accord, Turcoffe v. State, 617 So. 2d 1164, 1165 (Fla. 5th DCA 1993); Rogers v. Cooper, 575 So. 2d 266, 267 (Fla. 1st DCA 1991). The operative terms of the statute do not support the City's argument.

The substantive parts of the statute do not explicitly limit claims to "as applied" scenarios and do not explicitly require the final adoption of a law or

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[3] As in other parts of the brief, in quoting the last sentence in subsection 70.001(1), F.S., the City in part I.A.I of the Amended Initial Brief omits the phrase "It is the intent of the Legislature . . . ."

ordinance. In defining "action of a governmental entity," the Legislature did not craft the definition to require an application or to limit that term to actions on an application. § 70.001(3)(d), Fla. Stat. A court could reasonably infer from this statutory scheme that if the Legislature intended to limit the statute to "as applied" claims, it would have expressly done so within the operative terms of the statute, specifically, within the definition of "action of a governmental entity." The substantive language in the statute suggests more than one possible interpretation, and the statute as a whole supports Rainbow River's position.

Prior to the filing of Rainbow River's complaint, no reported appellate opinion had addressed the definition of an "action of a governmental entity," or clarified the types of an action that may trigger a claim. The most persuasive authority at that time supported the argument that the statute was not limited to as-applied claims. In 2006, the Florida Attorney General issued an opinion concluding "that an amendment to a town charter proposed and approved pursuant to section 166.031(1), Florida Statutes, does constitute 'action of a governmental entity' as that term is defined and used in the Bert J. Harris, Jr., Private Property Rights Protection Act." Op. Att'y Gen. Fla. 2006-31 (July 20, 2006). Attorney General opinions are regarded as highly persuasive. State v. Family Bank, 623 So. 2d 474, 478 (Fla. 1993). Applying the reasoning from that opinion, the statutory cause of action is not narrowly limited to as-applied actions. By implication, the

statement of intent in subsection (1) is not an absolute limit on the definitional and substantive parts of the statute. It was more than reasonable for a party in Rainbow River's position to take the position that the term "action of a governmental entity" could be broadly interpreted to include any official action that creates an inordinate burden.

After the filing of the Complaint at issue on appeal, the Fifth District issued an opinion supporting Rainbow River's argument on the question of whether the Bert Harris Act is limited to as-applied challenges. In Citrus County v. Halls River Dev., 8 So. 3d 413 (Fla. 5th DCA 2009), a local government amended its Comprehensive Plan in 1997. Following a lengthy application history and the ultimate denial of a development plan, a property owner submitted a Bert Harris claim in 2003. The Fifth District explicitly held that the owner's claim was untimely, rejecting the owner's argument that the Bert Harris claim did not accrue under the owner submitted a development plan to the local government. As this Court reasoned:

> With some persuasive force, Halls River argues that since the Harris Act only allows as applied challenges, the mere enactment of a statute, ordinance or plan of general application such as the Plan and the EAR amendments, should not trigger the accrual of a Harris Act claim. See generally Susan L. Trevarthean, Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation, 78 Fla. B.J. 61 (2004). If correct, Halls River's claim might be timely, as a Harris Act claim can be asserted within one year from the time the new law, rule, or plan is first applied to the property.

> Halls River argues that until an actual development plan is submitted, the impact of a governmental regulation cannot be determined. We agree that there may be some instances when the impact of a governmental regulation cannot be determined prior to the submission of an actual development plan. For example, if a comprehensive plan contains a clear height limit, the impact on a given parcel of property can immediately be determined. On the other hand, the impact of a generally applicable development standard discouraging urban sprawl may not be as readily apparent. But here, the impact of the CL designation of the property was readily ascertainable in 1997, i.e., one housing unit per twenty acres of land.

Citrus County v. Halls River Dev., 8 So. 3d 413, 422-423 (Fla. 5th DCA 2009). [4] This holding and the reasoning of that opinion is at odds with the position taken by the City on its motion to dismiss and in this appeal.

Based upon Halls River Dev., it cannot be said that the text of the Bert Harris Act provides a bright line for determining when an "action of a governmental entity" has taken place. Furthermore, by implication, the statement of legislative intent in subsection (1) does not modify the definitional terms in the

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[4] In the Florida Bar Journal cited in the quotation from Halls River Dev. above, the author addresses confusion regarding terminology in the Bert Harris Act: "This confusion has been the supreme challenge with the Harris Act, and could explain why there is not more precedent construing it. Regulators and property owners alike have thought twice before proceeding with litigation, because the outcome is highly uncertain and there are loads of threshold interpretation issues that have yet to be resolved by the courts." 78 Fla. B. J. at 63

statute. The resulting standard is a judicial interpretation of the statute that would support the position taken by Rainbow River in the circuit court. Applying the reasoning from that opinion, for certain comprehensive plan amendments (such as the reduction of allowable density at issue in Halls River Dev. and in the present case), a Bert Harris claim arises when the effect of a plan amendment is "readily ascertainable."

The circuit court did not have the benefit of the opinion in Halls River Dev. at the time it ruled on the initial motion to dismiss. However, a logical application of that opinion would suggest that the effect of the pending comprehensive plan amendment was "readily ascertainable" when the City voted to transmit the amendment to DCA for review. Furthermore, the effect of the amendment was "readily ascertainable" when the City failed to respond to Rainbow River's written claim under the Bert Harris Act by the statutory deadline, and thus had "ripen[ed]"its "prior action" by operation of law. § 70.001(5)(a), Fla. Stat. Based upon the ambiguity in the statute, the practical effect of the pending comprehensive plan change, and the City's failure to respond to Rainbow River's written claim, it cannot be said that Rainbow River's position on an "action of a governmental entity" was unreasonable. It cannot be said that Rainbow River's position was frivolous.

The City also appears to suggest, in a series of rhetorical questions, that there could be no "inordinate burden" on the Property when the Complaint was filed. However, the City's argument regarding the alleged lack of an "inordinate burden" is misplaced because the question of an "inordinate burden" is determined based upon the City's written responses to the owner's written claim.

> The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and ripeness decision, the governmental entity or entities have inordinately burdened the real property.

§ 70.001(6)(a), Fla. Stat. (Emphasis supplied). There is no dispute that the City failed to issue a written ripeness decision or settlement offer within 180 days of Rainbow River's claim letter. As a matter of law, then, the City's failure to respond "shall be deemed to ripen the prior actions of the governmental entity," and "operate[d] as a ripeness decision that has been rejected by the property owner." § 70.001(5)(a), Fla. Stat. Id.

Based on the language of the statute, the question of inordinate burden is not determined by the City's administrative process, but by its response to the written claim -- or in this case, its failure to respond. Id. Because the City did not respond to Rainbow River's written claim within the statutory deadline, its "prior action" (its initial vote and the transmittal of the comprehensive plan amendment) was the yardstick by which the question of "inordinate burden" was to be measured. Id.

Assuming the allegations of the Complaint to be true, based upon the practical effect of converting a property from a mixed use designation to a rural designation at a density of one unit per ten acres, Rainbow River took a reasonable position on the issue of "inordinate burden."

In considering the supposed frivolity of Rainbow River's theory, it would be appropriate to consider the state of the law at the time the Complaint was filed. No appellate court had provided an interpretation of the term "action of a governmental entity," and no appellate opinion had created a bright line on when such an action has taken place. Furthermore, there is little guidance on compliance with pre-suit requirements and no opinions addressing the point in time when an owner is authorized to provide a written claim to a governmental entity. In the absence of a definitive statutory interpretation by an appellate court, it is exceptionally difficult to conclude that a legal argument on an issue of statutory interpretation is frivolous. Vasquez v. Provincial South, Inc. 795 So.2d 216, 218-219 (Fla. 4th DCA 2001) ("Regarding the Appellant's good faith attempt to advance a novel question of law, the Appellant's claim and his supporting argument were based upon alleged inconsistencies among definitions within the section which, if Appellant's interpretation were adopted, would have allowed recovery notwithstanding his successful pursuit of a worker's compensation claim."); Carnival Leisure Industries, Ltd. v. Holzman 660 So.2d 410, 413 (Fla. 4th DCA