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

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

THE TOWN OF PONCE INLET,
A FLORIDA MUNICIPALITY,

Appellant,

v. Case No. 5D14-4520

PACETTA, LLC, A FLORIDA LIMITED
LIABILITY COMPANY, DOWN THE
HATCH, INC., A FLORIDA CORPORATION,
AND MAR-TIM, INC., A FLORIDA
CORPORATION,
Appellees.

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Opinion filed June 16, 2017

Appeal from the Circuit Court
for Volusia County,
Terence R. Perkins, Judge.

Elliot H. Scherker and Brigid F. Cech
Samole, of Greenberg, Traurig, P.A.,
Miami, and Kimberly S. Mello, of Greenberg
Traurig, P.A., Tampa, and Clifford B.
Shepard, of Shepard, Smith & Cassady,
P.A., Maitland, and Noah C. McKinnon, Jr.,
and Abraham C. McKinnon, of McKinnon &
McKinnon, P.A., Ormond Beach, for
Appellant.

Amy Brigham Boulris, Kenneth B. Bell and Lauren L. Purdy, of Gunster, Yoakley & Stewart, P.A., Miami, and Peter B. Heebner and John N. Upchurch, of Heebner, Baggett, Upchurch & Garthe, P.L., Daytona Beach, for Appellees.

Nancy E. Stroud, Counsel for American Planning Association, Boca Raton, Amicus Curiae for Appellant.

Mark Miller and Christina M. Martin, of Pacific Legal Foundation, Palm Beach Gardens, Amicus Curiae for Appellees.

LAMBERT, J.

The parties in this case make their third appearance before this court. In this appeal, the Town of Ponce Inlet ("Town") appeals a multi-million-dollar second amended final judgment entered following a jury trial on damages arising from an inverse condemnation claim as well as an earlier order resulting from a bench trial on liability ("liability order") that found in favor of the Appellees: Pacetta, LLC; Down the Hatch, Inc.; and Mar-Tim, Inc. (collectively "Pacetta"). To explain our decision today, we first chronologically discuss the factual and procedural history involving these parties as well as the significance and intertwinement of our two earlier opinions regarding these parties.

The Town of Ponce Inlet is a small, mostly residential community in Volusia County, located on the southern tip of a peninsula south of Daytona Beach. The main peninsula of the town is bordered to the west by the Halifax River, to the east by the

Atlantic Ocean, and to the south by the Ponce Inlet, connecting the river to the ocean. There is very little commercial development in the town, other than as described by the trial court as "some limited retail establishments." The primary commercial developments in the town are three riverfront enterprises, with Pacetta's property being the middle of the three riverfront enterprises.

The origin of the dispute between the parties began in 2003. That year, Town adopted a Comprehensive Land-Use Plan, which was accepted and approved by the State of Florida. The plan created a "riverfront commercial" land-use category that placed limits on both the height and square footage of commercial buildings, and it also prohibited the construction of new marinas and the expansion of existing marinas. In January 2004, Town enacted a Riverfront Overlay District ("ROD"), which limited the use of dry stack boat storage facilities.

In June 2004, Pacetta, through its two controlling principals, Lyder and Simone Johnson, purchased the first two parcels of property at issue, with parcel 1 being situated in the riverfront commercial zoned area and parcel 2 being located in an area zoned medium-density residential. The original intent for this purchase was to build a "dream home," along with some possible other residential development.

The following year, Pacetta, with encouragement from Town, decided to broaden its development into what the trial court described in its liability order as a "delightful mixed-use planned waterfront development." However, to do so required the acquisition of additional properties. To that end,

in August 2005, Pacetta purchased parcels 3 and 4, and in March 2006, it purchased parcels 5–9, on which were situated the commercial establishments Sea Love Boat Works and the Down the Hatch restaurant. Finally, in May 2006, Pacetta purchased parcel 10, which was zoned multi-family and permitted for nineteen townhouses and an equivalent number of boat slips. As a result of these purchases, Pacetta's ten parcels were contiguous to each other and encompassed sixteen acres of land.

Pacetta then began to prepare a plan to develop all ten parcels as a waterfront project to be known as the Villages of Ponce Park. As found by the trial court, Pacetta anticipated that "it would be entitled to build and sell a series of townhomes on the south end of the acreage, would be able to continue to run and expand the restaurant," Down the Hatch, "and would be able to build and operate a dry slip stacked storage facility on the north end of the property in an area historically dedicated to boat building, maintenance and repair." However, Pacetta's proposed development was not consistent with, and in fact was forbidden by, the Town's 2003 Comprehensive Land-Use Plan and the 2004 ROD. This was significant because "[a] local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality." *Citrus Cty. v. Halls River Dev., Inc.*, 8 So. 3d 413, 420 (Fla. 5th DCA 2009) (citing § 163.3167(1), Fla Stat. (2005); *Machado v. Musgrove*, 519 So. 2d 629, 631–32 (Fla. 3d DCA 1987)). The plan is similar to a constitution for all future development within the government boundary. *Id.* at 420-21 (citing *Machado*, 519 So. 2d at 632). Where, as here, a Comprehensive Land-Use Plan has been adopted, "'all

development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan' must be consistent with that plan." *Id.* at 421 (quoting § 163.3194(1)(a), Fla. Stat. (2005)).

Therefore, in order to proceed with its planned waterfront development, Pacetta needed Town to amend its Comprehensive Land-Use Plan and to essentially relax the existing ROD zoning. Town began taking necessary steps to amend its plan to accommodate Pacetta's development project. In return, Town had certain requirements of Pacetta for the project, which were amenable to Pacetta. Pacetta invested significant time, effort, and money in its attempt to implement the project. As found by the trial court, "between June of 2004 and 2008, there does not appear to be any meaningful dispute that [Pacetta] and the Town had a harmonious convivial relationship that might even be described as pacesetting. While some cracks began to form in late 2007, the cooperation between [Pacetta] and the Town [toward developing this project] was unprecedented."

What occurred in 2007 was the result of a growing movement by some of Town's officials and other citizens opposing Pacetta's project. In August 2007, Town passed an ordinance proposing an amendment to its town charter to allow "citizens' initiatives . . . in conjunction with land actions." On October 17, 2007, Town then passed a year-long moratorium on any building. Despite the foregoing, in March 2008, Town's council approved an amendment to its Comprehensive Land-Use Plan that deleted the square foot limits on commercial buildings and allowed both wet and dry boat storage in the riverfront

commercial area, two requirements essential for Pacetta to proceed with the waterfront project. As it was required to do, Town submitted the Comprehensive Land-Use Plan amendment to the State of Florida Department of Community Affairs ("DCA") for review.[1] The DCA thereafter provided Town with its objections, recommendations, and comments. After the plan was modified to address the DCA's objections, it was submitted back to the town council for a second reading and for final approval of the amendment to the Comprehensive Land-Use Plan.

In the meantime, during the fall of 2008, an election for town council seats was held. The ballot also included a referendum resulting from a citizens' initiative petition to amend the town charter so that land-use restrictions already in place would be elevated to the status of an immutable charter provision that, in this case, would effectively bar or restrict Pacetta's effort to construct and operate dry boat storage facilities on its property. This prohibition was significant to Pacetta because the operation of a large dry stack boat storage facility on portions of its

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[1] At the time, there was a two-stage process for amending a omprehensive Land-Use Plan under chapter 163, Florida Statutes. *Martin Cty. v. Yusem*, 690 So. 2d 1288, 1294 (Fla. 1997). First, the local government determines whether to transmit the proposed amendment for further review. *Id.* citing § 163.3184(3), Fla. Stat. (1989)). If transmitted to the DCA, the DCA, after receiving the amendment, provides the local government with its objections, recommendations for modifications, and comments from any other regional agencies. *Id.* (citing § 163.3184(4), Fla. Stat. (1989)). The local government then has three options: (1) adopt the amendment; (2) adopt the amendment with changes; or (3) not adopt the amendment. *Id.* (citing § 163.3184(7), Fla. Stat. (1989)). Amendments to comprehensive plans are legislative policy decisions. *Id.* at 1293–94.

property made the entire project economically feasible. Pending the results of the referendum vote, on October 15, 2008, the Town adopted a second year-long moratorium on building.

The referendum passed by a 62–38% vote. Additionally, three citizens who were opposed to the Pacetta project were elected to the town council. The outgoing town council rejected, on its second reading, the previously acceptable amendment to the Comprehensive Land-Use Plan. Thereafter, pursuant to the aforementioned vote, Town adopted a revised plan and conforming ordinance that incorporated the charter amendment from the citizens' initiative, effectively prohibiting Pacetta's development project.

Pacetta sued Town to invalidate the town charter amendment and the ordinance that amended the Comprehensive Land-Use Plan to include these restrictions. Pacetta argued that the charter amendment and the conforming ordinance affected only its singular sixteen-acre parcel of property and, thus, violated section 163.3167(12), Florida Statutes (2008), which, at that time, prohibited local initiatives or referenda in regard to development orders or comprehensive plan amendments affecting five or fewer "parcels," as that term is defined by section 163.3164(16). *See Preserve Palm Beach Political Action Comm. v. Town of Palm Beach*, 50 So. 3d 1176, 1179 (Fla. 4th DCA 2010) ("Section 163.3167(12) rightfully protects the small landowner from having to submit her development plans to the general public and ensures that those plans will be approved or not, instead, by the elected officials of the municipality in a quasi-judicial process."). The trial court granted summary judgment in favor of Pacetta, invalidating

the town charter amendment and conforming ordinance because it improperly affected five or fewer parcels of property.

In *Town of Ponce Inlet v. Pacetta, LLC*, 63 So. 3d 840 (Fla. 5th DCA 2011) ("*Pacetta I*"), this court affirmed the final summary judgment. We first addressed whether Pacetta's sixteen acres of land were properly considered as ten separate parcels or one parcel. *Pacetta I*, 63 So. 3d at 840–42. Section 163.3164(16), Florida Statutes (2008), defined a "parcel of land" as:

> any quantity of land capable of being described with such definiteness that its locations and boundaries may be established, which is designated by its owner or developer as land to be used, or developed as, a unit or which has been used or developed as a unit.

Pacetta took the position that although it purchased ten separate tracts or parcels of property, its combined property constituted one unit or one parcel of land. *Pacetta I*, 63 So. 3d at 840–41.

In affirming the summary judgment, we held that although Pacetta had purchased the various tracts of land from the prior owners, the summary judgment evidence filed clearly showed that this was a contiguous sixteen-acre parcel of land that had been designated by Pacetta as land to be used or developed as a single unit. *Id.* at 841. Therefore, we concluded that "[b]ecause the evidence was uncontroverted that the citizens' initiative referendum affected five or fewer parcels, the trial court correctly determined that the referendum violated section 163.3167(12), and

declared it invalid." *Id.* at 842 (footnote omitted). As a result, the ordinance conforming the Comprehensive Land-Use Plan to the referendum was also invalidated. *Id.*

In May 2010, Pacetta filed the instant suit. In its operative amended complaint filed against Town, Pacetta sought compensation for an "unconstitutional 'taking'/inverse condemnation" in violation of the United States Constitution and the Florida Constitution (count I), a denial of substantive due process and equal protection under both constitutions (count II),[2] a denial of procedural due process under both constitutions (count III), and for statutory damages for the "inordinate burdening" of its real property by Town's regulations pursuant to the Bert J. Harris, Jr., Private Property Rights Protection Act ("Harris Act"), as codified in section 70.001, Florida Statutes (2010) (count IV). In January 2012, the case proceeded to a non-jury trial on the issue of liability, and following twelve days of testimony and argument, the court entered the aforementioned liability order.

The trial court first determined that the four causes of action asserted by Pacetta proceeded on the single assumption that Pacetta "had a vested interest in the option or obligation to construct and operate the mixed use planned waterfront development that had been discussed and submitted in concept form to the Town." The trial court acknowledged, and neither party disputes, that Pacetta's proposed development was absolutely prohibited under Town's 2003 Comprehensive Land-Use Plan and the 2004 ROD. The court related that the threshold issue that it had

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[2] Pacetta's equal protection claim under state law was dismissed prior to trial and is not contested in this appeal.

to decide was essentially whether Pacetta had established "a vested right in [its] favor based on the concept of equitable estoppel, to nevertheless construct and build this mixed use planned waterfront development." Stated differently, the trial court believed the dispositive issue before it was whether Pacetta had proved that it had the vested right under the doctrine of equitable estoppel to require Town to amend its Comprehensive Land-Use Plan and the ROD to allow it to build its proposed waterfront development. As the trial court explained, the doctrine of equitable estoppel precludes a municipality from exercising its zoning power where the "property owner (1) [relying] in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15–16 (Fla. 1976) (quoting *City of Hollywood v. Hollywood Beach Hotel Co.,* 283 So. 2d 867, 869 (Fla. 4th DCA 1973)).

The trial court found in Pacetta's favor, with minor exceptions, on all four counts. As to the regulatory taking/inverse condemnation claim, the court divided the sixteen acres into the ten separate parcels that Pacetta originally purchased and evaluated whether there had been a "taking" as to each individual parcel. The court found that there had been a "taking" as to parcels 1, 3, 4, and 10, but concluded that there had been no "taking" as to parcels 2, 5, 6, 7, 8, and 9. As to these latter parcels, the court found that under counts II and III, Pacetta was entitled to damages based on Town's equal protection violation and the violation of Pacetta's

substantive and procedural due process rights. Lastly, the court found that Pacetta had clearly established that the actions of Town had inordinately burdened Pacetta's property under the Harris Act.

Pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(viii), Town appealed that portion of the non-final liability order finding liability under the Harris Act. In *Town of Ponce Inlet v. Pacetta, LLC*, 120 So. 3d 27 (Fla. 5th DCA 2013) ("*Pacetta II*"), Town argued that the trial court erred as a matter of law in finding that Pacetta had established by equitable estoppel a vested right to essentially require Town to amend its 2003 Comprehensive Land-Use Plan so that Pacetta could develop its sixteen acres consistent with the proposed 2008 amendment to the plan, which initially had been approved on first reading but was later rejected on the second reading. *Pacetta II*, 120 So. 3d at 29.

This court reversed the liability order finding Town liable to Pacetta under the Harris Act. *Id*. at 29–31. We explained that

> equitable estoppel can be invoked only when a property owner relies in good faith upon some government action. No such good faith reliance was established in this case. At the time Pacetta purchased its properties, [Town's] Comprehensive Land-Use Plan expressly prohibited the type of development which Pacetta proposed for its properties. Any assurances by town officials that the Comprehensive Plan would be amended so as to authorize Pacetta's development plans could not be

> relied upon in good faith by Pacetta, since town officials lacked the authority to unilaterally amend the Comprehensive Land-Use Plan. *See* §163.3184(4), (15), Fla. Stat. (2009) (requiring any proposed change to Comprehensive Plans to be subject to approval by various government agencies). Recognition of a vested right based on assurances from town officials to amend the Comprehensive Land-Use Plan would also be in violation of public policy, in light of the public hearings and other government approvals required for Comprehensive Plan amendments.

Id. at 30–31.

Upon remand from *Pacetta II*, Town moved the trial court to reconsider its liability order as to the remaining counts. Town argued that the trial court's findings of liability against it on all counts were solely predicated on the court's threshold finding that Pacetta established a vested right to build its project in violation of the 2003 plan based upon the equitable estoppel doctrine and that, as a result of *Pacetta II*, this avenue was no longer viable. The trial court, while acknowledging that its liability order was no longer sustainable based upon the equitable estoppel theory that was now contrary to the "law of the case," nevertheless denied the motion, concluding in an unelaborated order that its remaining findings in the liability order provided "sound support" for Pacetta on the three remaining counts.

The jury trial on the issue of damages occurred in September 2014. At the close of Pacetta's case-in-

chief, Town moved for a directed verdict on counts II and III, arguing that Pacetta failed to produce any evidence of damages based on the alleged due process or equal protection violations. In response, Pacetta requested that, if the court was inclined to grant the motion, it dismiss counts II and III without prejudice, rather than directing a verdict in Town's favor. The trial court declined Pacetta's request and granted Town's motion for directed verdict on both counts without qualification. The jury thereafter returned its verdict on the "taking" count, finding the relevant fair market value of parcels 1 and 10 to be $18 million and the relevant fair market value of parcels 3 and 4 to be $1.85 million.[3] After computing prejudgment interest, the court entered final judgment in favor of Pacetta in the amount of $30,775,248.29. As to counts II and III, the court receded from its earlier directed verdict ruling and entered an amended final judgment finding in favor of Town on Pacetta's state constitution claims but keeping intact Pacetta's federal constitutional due process and equal protection causes of action. This appeal followed.

Pacetta's Regulatory Taking/Inverse Condemnation Claim

The Fifth Amendment to the United States Constitution prohibits the government from taking private property "for public use without just compensation."[4] The typical taking is accomplished

[3] The jury's determination of the parcels' fair market values was based upon the fair market values as of January 17, 2007, the date on which the trial court found that the taking had occurred.

[4] The Federal Takings Clause applies to the states through the Fourteenth Amendment. *St. Johns River Water Mgmt. Dist. v.*

through an eminent domain action, which provides for a "direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Here, there has been no physical invasion of Pacetta's property by Town. Instead, Pacetta asserted that Town's actions resulted in an inverse condemnation of its properties, which is defined as "a cause of action by a property owner to recover the value of property that has been *de facto* taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken." *Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 471 (Fla. 5th DCA 2014) (quoting *Osceola Cty. v. Best Diversified, Inc.*, 936 So. 2d 55, 59-60 (Fla. 5th DCA 2006)). A regulatory taking can be either total or partial. In a "total" or "per se" taking, the government's regulations effectively deny *all* economically beneficial or productive use of the property. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)). In a "partial" or "as-applied" taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the court must evaluate: "(1) the economic impact of the regulation on [the property owner]; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[5] *Id.* (quoting *Leon Cty. v.*

Koontz, 77 So. 3d 220, 1226 (Fla. 2011), *rev'd on other grounds*, 133 S. Ct. 2586 (2013); *see also* Art. X, § 6(a), Fla. Const.

[5] There is also a fourth type of "taking," referred to as a "land-use exaction" taking,that is not applicable here. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 1987).

Gluesenkamp, 873 So. 2d 460, 467 (Fla. 1st DCA 2004)).

The first step for a court in analyzing whether there has been a taking under *Lucas* or *Penn Central* is to "define what constitutes the relevant parcel before [it] can evaluate the regulation's effect on that parcel." *Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999). Stated differently, the subject of the alleged taking must first be determined. *Ocean Palm*, 139 So. 3d at 468 n.7. Town argues that the proper analysis is to treat the sixteen acres as one whole parcel. Pacetta urges that the trial court correctly treated the property as ten separate parcels, as the properties were purchased as separate and distinct lots. Based upon the doctrine of judicial estoppel, we hold that the trial court erred in not treating Pacetta's land as one parcel.

Judicial estoppel provides that "[o]ne who assumes a particular position or theory in a case," and secures court action thereby, "is judicially estopped in a later phase of that same case, *or in another case*, from asserting any . . . inconsistent position toward the same parties and subject matter." *In re Adoption of D.P.P.*, 158 So. 3d 633, 639 (Fla. 5th DCA 2014) (emphasis added) (citing *Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So. 2d 38, 41-42 (Fla. 1st DCA 1970)). As previously discussed, in *Pacetta I*, Pacetta took the position that its entire sixteen-acre property constituted one parcel of land to be developed as a single unit. Having successfully defeated the citizens' initiative referendum in that case based upon its position that its property was one parcel or unit, Pacetta is estopped from taking the diametrically opposite position here. Additionally, in the operative

complaint, Pacetta specifically alleged that it "is seeking development of the parcels as a single parcel and is thus directly impacted by [Town's] regulations of all the parcels." "When a 'developer treats several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel.'" *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) (quoting *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)). Having determined that the subject of the alleged taking is one parcel, we next address whether there has been a "total" or "partial" taking of this parcel of property.

"Total" Taking

In its complaint, Pacetta alleged that Town's actions have deprived Pacetta of all "economically viable beneficial use of its property since 2004," which, pursuant to *Lucas*, Pacetta must prove for a "total" regulatory taking. *See* 505 U.S. at 1015. This standard applies to the relevant parcel as a whole because "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Cent.*, 438 U.S. at 130. Here, the trial court found that six of the ten individual parcels maintained economically beneficial uses. The trial evidence established that Pacetta paid significant sums of money for these six parcels and that whatever were the permissible uses under the 2003 Comprehensive Land-Use Plan for these properties at the time of purchase remain intact. Because these six individual parcels with economic value must be considered as part of the larger parcel, we conclude that there has been no deprivation of *all*

economically beneficial uses of the parcel, and therefore, we find that no total taking under *Lucas* has been established.

"Partial" Taking

In its liability order, the trial court referred to the criteria enunciated in *Penn Central* that must be analyzed in determining whether a "partial" regulatory taking occurred: specifically, "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Ocean Palm*, 139 So. 3d at 473 (quoting *Gluesenkamp*, 873 So. 2d at 467). As previously discussed, following *Pacetta II*, Town moved the trial court to reconsider its liability order because the equitable estoppel predicate upon which recovery for each count was based, including the taking claim in count I, was determined to be inapplicable. Following a hearing, the court entered an order denying the motion. The court made no additional factual findings in its written order regarding the partial taking, determining that there were sufficient findings in its liability order to support finding in favor of Pacetta on this count.

We have carefully reviewed the transcript from the hearing on Town's motion for reconsideration. At no point during the hearing was an analysis of the three-pronged standard for finding a "partial" taking under *Penn Central* ever discussed. Moreover, in its liability order, the trial court repeatedly addressed whether there had been a "total" taking, with no mention of a partial taking. Additionally, the court's analysis focused on whether there was a total taking

of each individual parcel and misapplied the *Penn Central* standard in determining whether there was a partial or as-applied taking. "In an as-applied claim, the landowner challenges the regulation in the context of a concrete controversy specifically regarding the impact of the regulation on a particular parcel of property." *Collins v. Monroe Cty.*, 999 So. 2d 709, 713 (Fla. 3d DCA 2008) (citing *Taylor v. Vill. of N. Palm Beach*, 659 So. 2d 1167, 1167 (Fla. 4th DCA 1995)). In that we have now determined that the entire sixteen acres of land is to be considered as one parcel and that there is no "total" taking under *Lucas*, we find it necessary to reverse the liability order and to remand for a new trial on whether there has been a "partial" taking under the *Penn Central* criteria as applied to this one sixteen-acre parcel of land. Moreover, because the jury verdict awarding damages for the "taking" of separate parcels is premised upon the evaluation of individual parcels and the misapplication of the *Penn Central* standard, we reverse the second amended final judgment awarding damages.

On remand, the court shall address two other issues regarding Pacetta's partial taking claim. First, the court must more specifically address whether the claim is ripe. "[A] takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)). "A final decision by the responsible state agency informs the constitutional determination whether a regulation has . . . defeated the reasonable

investment-backed expectations of the landowner to the extent that a [partial] taking has occurred." *Id.*

Town argues that the "partial" taking claim is not ripe because Pacetta failed to submit at least one meaningful application for developmental approval specifying its proposed uses for the property. *See Taylor*, 659 So. 2d at 1172–74. This application provides the land-use authority, i.e. Town, the ability "to exercise its discretion in considering development plans, 'including the opportunity to grant any variances or waivers allowed by law.'" *Collins*, 999 So. 2d at 716 (quoting *Palazzolo*, 533 U.S. at 620–21). We conclude that the trial court's findings of fact in its liability order were unclear as to whether Pacetta had in fact submitted an application for development. Because the government "must arrive at a 'final, definitive position' on the 'nature and extent' of permitted development before a court may adjudicate the 'constitutionality of the regulations that purport to limit it,'" *Martin Cty. v. Section 28 P'ship, Ltd.*, 676 So. 2d 532, 538 (Fla. 4th DCA 1996) (citations omitted) (quoting *Taylor*, 659 So. 2d at 1173), on remand, the trial court shall make a specific factual determination as to whether Pacetta's partial taking claim is ripe for adjudication by having submitted the requisite meaningful application.

Finally, if the court finds that Pacetta did not file this application for development, the trial court must also address whether the "futility" exception to the ripeness doctrine applies. Under certain circumstances, "where the governmental agency effectively concedes that any other development would be impermissible, this can negate the requirement of pursuing further administrative remedies and the

governmental action is effectively treated as a final decision." *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 263 (Fla. 4th DCA 2001) (quoting *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1181 (Fla. 4th DCA 1995)). Accordingly, the trial court on remand should determine whether Town has effectively determined that any other development of Pacetta's property would be impermissible, thus causing any application by Pacetta for development or for an amendment to the plan to be futile.[6]

Pacetta's Federal Due Process/Equal Protection Claims

Town argues that the trial court erred when it did not enter judgment on Pacetta's due process and equal protection claims asserted under the Federal Constitution but only entered judgment in Town's favor on Pacetta's claims for substantive and procedural due process violations under the Florida Constitution. Town contends that Pacetta pursued both its state and federal constitutional claims in this state court action and that when Pacetta failed to present at trial any evidence of damages on either count, the trial court erred post-trial when it entered final judgment only on the state constitutional claims,

[6] The trial judge who presided over the liability trial, received all of the evidence during that twelve-day trial, and entered the liability order also subsequently granted a motion to disqualify himself in April 2014, which was after he denied Town's motion to reconsider the liability order upon remand from *Pacetta II* but before the jury trial on damages (which was consequently held before Judge Perkins). Therefore, because the first judge is not available to enter an amended liability order based upon his recollection of the evidence and the law of the case provided in this opinion, a new trial on the single claim that a "partial" taking has occurred is necessary.

despite having granted Town's motion for directed verdict at trial. We agree.

In count II of its operative complaint, Pacetta alleged that the various actions of Town denied it substantive due process and equal protection in violation of article I, section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. In count III, Pacetta asserted that the same actions of Town violated Pacetta's rights to procedural due process under the same provision of the Florida Constitution as well as the Fourteenth Amendment and title 42, section 1983, United States Code. Pacetta did not seek injunctive relief on either of these two counts; instead, it demanded judgment for damages and a jury trial. When a party is challenging "a regulation, statute or land use plan as a denial of substantive or procedural due process, the focus is on whether there has been an invalid exercise of police power. If proven, the remedy is monetary damages." *Taylor*, 659 So. 2d at 1170.

Following the bench trial on liability, the court entered the now challenged liability order in which, among other things, it found in favor of Pacetta on its constitutional claims asserted in counts II and III, but only as to parcels 2, 5, 6, 7, 8, and 9. The court specifically found that Town had violated Pacetta's constitutional rights by: (1) colluding with citizens' groups in creating an "illegal charter amendment"; (2) committing a "series of illegal acts," including the "illegal referendum and amendment of the Town charter to interfere with Pacetta" and "other conduct" involving only the Pacetta property; and (3) "refusing to accept applications for building projects since

2004."[7] The court concluded this portion of the liability order by stating that damages, if any, on these two counts would be determined by a jury.

At the jury trial, at the conclusion of Pacetta's case-in-chief, Town moved for an unqualified directed verdict on both counts. The trial court inquired of Pacetta's counsel why the motion should not be granted when there was no evidence presented as to any separate or independent damages for either count. Counsel responded that the court could grant Town's motion but requested that the court do so as a "dismiss[al]" "without prejudice," rather than a directed verdict, to preserve Pacetta's ability to proceed in an action "unrelated to what's going on [in the present trial]." The court granted Town's motion without any of the qualifications sought by Pacetta.

Pacetta then argued post-trial that the trial court could not adjudicate its federal constitutional claims because it reserved its right to assert its federal constitutional claims in federal court with the following allegation in its complaint:

> Reservation of Federal Rights
>
> 89. Pacetta, by pursuing the claims herein in the State of Florida court, reserves its right to the disposition of the entire case by the state court, and

[7] The trial court found in favor of Town on these two counts regarding Pacetta's allegations in its complaint that Town had violated Pacetta's due process and equal protection rights by "creating an ROD that impacted only Pacetta properties and by using serial building moratoria to deprive Pacetta of its investment-backed expectations."

> preserves its access to a federal forum to assert its federal constitutional rights.

This pleading is typically referred to as an "*England* reservation." *See England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 421–22 (1964) (holding that a party may inform the state courts that he or she is exposing the federal claims there only for the purpose of complying with *Government and Civic Employees Organizing Committee, CIO v. Windsor*, 353 U.S. 364 (1957), and that he or she intends, should the state courts hold against him or her on the question of state law, to return to the district court for disposition of his or her federal contentions). Nevertheless, this reservation is not absolute and is dependent upon the party making the reservation and not thereafter asking the state court to resolve the federal issue or issues that had previously been reserved. *San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 344-46 (2005).

Here, Pacetta pursued both its state and federal due process claims and its federal equal protection claim and received an unqualified finding in its favor in the liability order on both counts, with the court specifically stating that the issue of damages on the claims would be determined by the jury. At the hearing held during trial on Town's motion for directed verdict, Pacetta's counsel did not argue that it had established monetary damages on either count and notably made no argument that a directed verdict should not be entered on its federal due process and equal protection constitutional claims based on its "*England* reservation." Under these circumstances, the failure of such proof of damages requires the granting of a directed verdict on all claims asserted in

both counts. *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1131 (Fla. 4th DCA 2007).

We recognize, as agreed by both parties in their briefs, that the federal court will make its own determination on whether Pacetta effectively preserved its right to pursue its federal due process and equal protections claims in federal court. Nevertheless, we conclude that the trial court erred in not entering final judgment in favor of Town on the federal constitutional claims asserted by Pacetta in counts II and III. On remand, the trial court is directed to enter an amended final judgment in favor of Town on those two counts, unqualified and not restricted to Pacetta's state law claims, consistent with this opinion.

Accordingly, for the reasons expressed herein, we reverse the liability order and the final judgment for damages in favor of Pacetta. We remand this case for a new trial on liability and, if thereafter appropriate, damages on count I, limited to determining whether a "partial" or "as-applied" taking has occurred in reference to the single relevant parcel, including the preliminary determination of whether such a claim is ripe in this case pursuant to Pacetta's sufficient application for development or the applicability of the "futility" exception. We also remand for the entry of an amended final judgment in favor of Town on counts II and III.[8]

[8] Based on our ruling, we decline to address any issues raised by Town regarding the jury trial on damages.

REVERSED and REMANDED, with directions.

SAWAYA and EVANDER, JJ., concur.

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 2010-31696-CICI

PACETTA, LLC., a Florida limited Liability company, DOWN THE HATCH, INC., a Florida corporation; and MAR-TIM, INC., a Florida corporation,

Plaintiffs,

vs.

THE TOWN OF PONCE INLET, a Florida municipality,
Defendant.
_____/

ORDER PARTIALLY FINDING IN FAVOR OF THE PLAINTIFFS, PACETTA LLC, DOWN THE HATCH, INC., AND MAR-TIM, INC. AND AGAINST THE TOWN OF PONCE INLET ON THE ISSUES OF LIABILITY AND RESERVING FOR JURY TRIAL THE APPROPRIATE DETERMINATION OF ANY SUMS DUE AS A RESULT THEREOF

THIS CAUSE came before the court for a non-jury trial on claims made by the plaintiffs in their First Amended Complaint as well as those defenses raised by the defendant thereto. The court conducted an extensive 12 day non-jury trial which included the submission of testimony from one witness by video deposition which was reviewed by the court outside the presence of the parties and which also included an on-site visit and view of the property which is the

subject of this dispute. The court conducted a rigorous evaluation of the evidence, the extensive exhibits produced during the course of the trial, has reviewed the extensive and comprehensive briefing done by each of the parties, has heard their final summations and has asked for and received submissions by counsel regarding proposed findings of fact and conclusions of law in regard to the claims and defenses asserted herein. The following represents the court's findings of fact and conclusions of law in regard to what the court has judged to be the issues necessary to be decided in conjunction with these non-jury claims at this time. The court is required to make findings by case law and to facilitate the Town's option of taking an interlocutory appeal which is a potential option available under the Bert Harris Act. Brevard County v. Stack, 932 So2d 1258 (Fla. 5th DCA 2006) and Florida Statutes, Section 70.001(6)(a).

DEFINITION OF THE LEGAL CLAIMS MADE BY THE PLAINTIFFS

The plaintiffs have filed a First Amended Complaint consisting of four counts. Count I is a claim for damages for unconstitutional taking and inverse condemnation in violation of both the federal and state constitutions. Count II is a claim for damages for the denial of substantive due process and equal protection rights in conjunction with the plaintiffs' property. Count III is a claim for damages based on the denial of procedural due process in regard to the plaintiffs' property and Count IV seeks damages under the Bert J. Harris, Jr. Act, Section 70.001,

Florida Statutes. The defendant has asserted various defenses to each of the claims.[1]

LEGAL ANALYSIS OF THE THRESHOLD LEGAL ISSUE WHICH MUST PRECEDE ANY DETAILED AND COMPREHENSIVE FACTUAL FINDINGS AND FACTUAL ANALYSIS OF THE CASE

The threshold issue in this case is whether the Plaintiffs, on any facts, can legally proceed with their claim. If the answer is no, the case is over. On the contrary, if the answer is yes, a detailed factual and legal analysis must follow.

The plaintiffs have assembled a piece of riverfront real property on the shores of the Halifax River in Ponce Inlet, Florida, consisting of approximately 16 acres. The congruent waterfront property and two small adjoining residential parcels were acquired by Pacetta LLC, Down the Hatch Inc., and Mar-Tim, Inc., between June 14, 2004 and May 10, 2006. The property will be referred to as the Pacetta Property since Mr. and Mrs. Johnson own controlling stakes in all three legal entities. The plaintiffs' claims assert that between June, 2004 and November 18, 2008, there had developed a beneficial relationship with the Town, its council, its planning department and, for the most part, with its citizens.

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[1] The plaintiffs will be referred to as the Pacetta Group, the Pacetta entities, the Johnsons or Mr. and Mrs. Johnson. The Johnsons own a majority of the interest in each entity and control all the plaintiffs by virtue of their ownership. The Town of Ponce Inlet will be referred to by its formal name or as the Town or, alternatively, as Ponce Inlet.

In short summary, as a result of the communications and representations by and between the parties, a casual observer might conclude that a delightful mixed use planned waterfront development was to be approved by the Town sometimes referred to as the Villages of Ponce Park. During the trial the evolution of both that relationship and the design of the proposed mixed use water front development were presented in both all its glory and excruciating detail. The anticipated quid pro quo for the Pacetta Group was that it would be entitled to build and sell a series of town homes on the south end of the acreage, would be able to continue to run and expand the restaurant, which is part of the parcel known as Down the Hatch, and would be able to build and operate a dry slip stacked storage facility on the north end of the property in an area historically dedicated to boat building, maintenance and repair.

The features operating in favor of the Pacetta Group were balanced by insistence from the Town that they obtain substantial concessions from the developer. Those concessions included a sunset pier, a public river walk of 1300 feet, the construction of limited retail space, a turnabout and somewhat of a public square which the Town envisioned as a meeting place and facility for its citizens and visitors. The entire project was complimented by a large fountain at or near the center of the facility and extensive public parking was required to serve not only the business needs but the interests of the Ponce Inlet citizens. The plan that had been developed in conjunction with and at the insistence of the Town also had a nature walk and extensive tree preservation as well as tree canopy preservation. Along the way the Town, out of concern for the safety

of any dry slip stacked storage facility, demanded that any such facility be appropriately enclosed with reliable fire suppression which would likely isolate any noise or odors as boats were moved from time to time.

In order to accomplish the mixed use planned waterfront development, the Town was required to pay attention to working waterfront legislation as well as the manatee protection plan obligations and legislation which seemed to make this development a natural fit. It also recognized building restrictions of the high hazard flood area. Nonetheless, approval for the project did require appropriate changes in the Comprehensive Land-Use Plan and land use development code regulations consistent with the discussions that the parties had over that long period of time.

In order to be able to accomplish what the parties had been discussing, it was necessary for the Pacetta Group to assemble the property under common ownership which they did. It was also necessary for them to defer any development of the southern portions of the property to keep those portions available for the mixed use development that the parties reasonably anticipated.

Although a detailed analysis will follow, the Comprehensive Land-Use Plan was in its renewal cycle and submitted to the State for approval in early 2008. All of the extensive planning was done, approved, submitted and agreed to by the State subject to its objections, recommendations and comments. The approval of the Comprehensive Land-Use Plan would be the first step in any land

development changes to allow for the mixed use that the parties had come to desire. The new comprehensive plan was amended to address the objections by the State so it was in a form that, upon final reading and approval, would have essentially been approved by the State and become final which was until 2008, the apparent intention of all concerned.

In 2008, there was a referendum passed motivated by opposition to the project and the three commissioners were elected who had announced opposition to the project. In November of 2008, when the plan was up for its final approval, the plan as originally expected by the Pacetta Group was defeated based on a vote of the outgoing council. The Town, in an apparent attempt to sabotage the understandings and expectations that had developed over the years, elevated into its Charter and Comprehensive Land-Use Plan restrictions that would essentially destroy all of the efforts that had been undertaken by both the Town and Mr. and Mrs. Johnson and the Pacetta Group. More detail will follow.

The four theories that the plaintiffs assert proceed on the assumption that the Pacetta Group had a vested interest in the option or obligation to construct and operate the mixed use planned waterfront development project that had been discussed and submitted in concept form to the Town of Ponce Inlet. Since it was in the earliest stages of development, no formal development application had been filed for development orders and/or permits. In fact the city attorney told the Plaintiffs not to submit plans while the Comprehensive Plan was under consideration.

In the context of the situation presented by the plaintiffs, before any right to compensation on their theories of recovery, the court must evaluate and decide whether any set of facts could support a conclusion that a vested right had been established on behalf of Mr. and Mrs. Johnson and the Pacetta Group. The threshold issue is, therefore, as follows:

HAVE THE PLAINTIFFS ESTABLISHED A VESTED RIGHT IN THEIR FAVOR BASED ON THE CONCEPT OF EQUITABLE ESTOPPEL AGAINST THE TOWN OF PONCE INLET FOR THE RIGHT AND/OR OBLIGATION TO CONSTRUCT AND BUILD A MIXED USE PLANNED WATERFRONT DEVELOPMENT PROJECT THAT INCLUDES AN ENCLOSED, FIRE PROTECTED, DRY SLIP STACKED BOAT STORAGE FACILITY AND OTHER PROPOSED AMENITIES CONSISTENT WITH CORRESPONDING LAND USE CODES AND PLANNED WATERFRONT DEVELOPMENT CODES APPROPRIATE THERETO?

The analysis required deals with the common law inverse condemnation claims as well as the statutory Bert Harris claim. The Bert J. Harris, Jr. Act, found at Florida Statutes, Section 70.001, provides for relief, or payment of compensation, when a new law, rule, regulation or ordinance of the state or a political entity in the state, as applied, unfairly affects real property. The language of the statute

provides that when a specific action of a government entity has inordinately burdened an existing use of the real property or a vested right to the specific use of real property, the property owner of that real property is entitled to relief. The act recognizes a remedy for "as applied" challenges but does not allow a remedy for facial challenges. The mere passage of a general police power ordinance or regulation does not give rise to a Bert Harris claim. Generally informal discussions with government, without more, don't create a remedy. M. H. Profit v. City of Panama City, 28 So3d 71 (Fla. 1st DCA 2010).

The Bert Harris act has pre-suit requirements which will be dealt with later but the availability of a remedy under the act in this case requires a finding that there is a vested right to the specific use of the real property in the same way that the common law requires it for the unconstitutional inverse condemnation claim.

EQUITABLE ESTOPPEL

The doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where the property owner (1) in good faith, (2) relying upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired. Hollywood Beach Hotel Company v. City of Hollywood, 329 So.2d 10 (Fla. 1976); Salkowsky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963). "The mere purchase of land does not create a right to rely on existing zoning." Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (Fla. 2nd DCA 1975).

"All that one who plans to use his property in accordance with existing zoning laws is entitled to assume is that such regulation will not be altered to his detriment, unless the change bears a substantial relation to the health, morals, welfare and safety of the public." City of Miami Beach v. 8701 Collins Ave., Inc., 77 So.2d 428 (Fla. 1955).

There is no requirement, however, that the landowner must have either obtained a building permit or made any physical changes to the land in reliance on existing zoning in order for the doctrine of equitable estoppel to apply. Town of Largo, 309 So.2d 571. "Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto the welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of the zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds." See also Pasco County v. Tampa Development Corp., 364 So.2d 850 (Fla. 2nd DCA 1978).

The general rule is that "the doctrine of equitable estoppel may be invoked against a municipality as if it were an individual." Hollywood Beach Hotel v. City of Hollywood, id. Although it is well-settled under Florida law that the doctrine of equitable estoppel may be invoked against a government body under the appropriate circumstances, these circumstances are rare and exceptional. See Dolphin Outdoor Advertising v.

Department of Transportation, 582 So.2d 709 (Fla. 1st DCA 1991); Reed Creek Improvement District v. State Department of Environmental Regulation, 486 So.2d 642 (Fla. 1st DCA 1986) (cite taken from Lyon v. Lake County, 765 So.2d 785 (5th DCA 2000). Further limiting the availability of the concept of equitable estoppel against a government, the court is instructed to keep in mind that we are dealing with an exercise of police power of the government in planning and zoning the future use of property and the use of equitable estopped to interdict such government action should be cautiously invoked. City of Parkland v. Septimus, 428 So.2d 681 (4th DCA 1983). As the court said in Jones v. First Virginia Manufacturing and Real Estate, Inc., 399 So.2d 1068 (Fla. 2nd DCA 1981):

> "It is true that sometimes the harsh consequences of an exercise of police power can be avoided by application of the doctrine of equitable estoppel, but the conditions which will trigger such relief are tightly circumscribed, unless an 'unwise restraint [be placed] upon the police power of the government'.

This court has done a careful search for cases both inside and outside Florida where the concept of equitable estoppel has been used to create a vested right to the enactment of a comprehensive development plan as to a specific property which has failed to reveal any cases that either allow or prohibit the use of the doctrine for that purpose.

As pointed out in Citrus County v. Halls River Development, Inc., 8 So.3rd 413 (5th DCA 2009), "and,

most importantly, the doctrine of estoppel does not generally apply to transactions that are forbidden by law or [which are] contrary to public policy."

The defendant relies heavily on Citrus County v. Halls River Development, id. which appears to emanate from a harsh set of facts but a different result. In that case both parties thought the requested use was permissible when in fact it was illegal based on the comprehensive plan. The court pointed out that a local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality, Section 163.167, Florida Statutes. The comprehensive plan is similar to a constitution for all future development within the governmental boundary, Mishado v. Musgrove, 519 So.2d 629 (Fla. 3rd DCA 1987). Zoning for a land use development code is a means by which the Plan is implemented. See City of Jacksonville v. Grubbs, 461 So.2d (Fla. 1st DCA 1984). The zoning action that is not according to the comprehensive plan is unlawful. Mishasdo, id.

In essence, the Citrus County case seems to conclude that equitable estoppel will not lie for a permit issued contrary to law as a result of a mutual mistake of fact. Nelson Richard Advertising v. Department of Transportation, 513 So.2d 181 (Fla. 1st DCA 1997). The defendant also cites Morgan Co. Inc. v. Orange County, 818 So2d 640 (Fla. 5th DCA 2002). In that case the county entered into a "Developers Agreement" providing that the county would adopt an amendment for its comprehensive policy plan and would "support and expeditiously process Morgan's rezoning application in exchange for Morgan's agreement to donate 50 acres to the county for use as

a park once the rezoning was accomplished." The Fifth District pointed out that contract zoning has long been disapproved in Florida in cases such as Harnette v. Austin, 93 So.2d 86 (1956) and others. In Morgan v. Orange County, id., the court also points out that the appropriate rule is that estoppel cannot be applied against a government entity to accomplish an illegal result. In the Pacetta Group case the facts do not indicate that there was any contract per se, other than an outline of what concessions would be necessary for the Town to be in a position to consider an amendment to its Comprehensive Land-Use Plan regarding the Plaintiffs' property.

This court has concluded that the outcome of the threshold issue does not appear to be controlled by the Citrus County case or any later constraint on contract zoning. The assertion in this case is that the developer, the Pacetta Group, is entitled to consideration of the doctrine of equitable estoppel applicable to local government exercising its zoning power when the owner (1) was relying in good faith (2) upon some act or omission of government and (3) has made such a substantial change of position or incurred such substantial obligations and expenses that it would be highly inequitable and unjust to destroy the right he has acquired.

In addition to the circumspection required in any analysis to employ the doctrine of equitable estoppel against a municipality, the court has concluded that the proof of equitable estoppel needs to be more substantial than by the greater weight of the evidence. Based on Watson Clinic LLP v. Verzosa, 816 so.2d 832 (Fla. 2nd DCA 2002), the court has

concluded the party raising estoppel must prove the required elements by clear and convincing evidence.

As a result of the foregoing, the court has concluded that it has the ability, in the appropriate case and upon the appropriate factual findings, to allow the concept of equitable estoppel to be employed for the purpose sought in this case to recognize a vested right, if one exists.

ANALYSIS OF EQUITABLE ESTOPPEL AND VESTED RIGHT

The Plaintiffs claims begin with an analysis of whether there has been a regulatory taking or, in the alternative, the imposition of an "inordinate burden" on some or all of the plaintiffs' property. The Bert J Harris, Jr. Act, Section 70.001, Florida Statutes is the most logical starting point.

The Harris Act, enacted in 1995, created a new cause of action allowing property owners who suffer inordinate regulatory burdens to existing or reasonably foreseeable land uses to be compensated by the government entity creating the burden. Section 70.001(1),(2),(5)(a), Florida Statutes (2005). The law focuses on protecting real property owners' rights to existing uses and vested rights to specific uses of their property. (Emphasis supplied) It creates a statutory remedy "when a new law, rule, regulation or ordinance ..., as applied, unfairly affects real property" by inordinately burdening an existing use or a vested right to use real property. § 70.001(1), Fla. Stat. (2005).The inordinate burden must be to such an extent that the property owner is permanently unable to attain the reasonable investment-backed expectations for the existing use (or vested right) of

the property as a whole. Section 70.001(3) (e), Florida Statutes (2005); Palm Beach Polo Inc. v. Village of Wellington, 918 So.2d 988, 995 (Fla. 4th DCA 2006).

"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." Section 70.001(5)(1), Florida Statutes (2005). If the governmental entity maintains its earlier decision, the property owner may file a claim for damages in the trial court. Section 70.001(5)(b), Florida Statutes (2005). Upon compliance with the procedural requirements of the Harris Act, the court must determine whether an existing or vested use exists and whether the regulation has "inordinately burdened" the real property. If the court so finds, a jury determines the amount of damages suffered by the property owner. Section 70.001(6), Florida Statutes (2005).

Before proceeding further, an understanding of the relationship between a comprehensive land use plan and zoning regulations is important. A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. § 163.3167(1), Fla. Stat. (2005); Machado v. Musgrove, 519 So.2d 629, 631-32 (Fla. 3d DCA 1987). The comprehensive plan is similar to a constitution for all future development within the governmental boundary. Machado, 519 So.2d at 632. Zoning is the means by which the plan is implemented. *See* City of Jacksonville v. Grubbs, 461 So.2d 160 (Fla. 1st DCA 1984). Zoning involves the

exercise of discretionary powers within limits imposed by the comprehensive plan. A zoning action that is not in accordance with the comprehensive plan is unlawful. Machado, 519 So.2d at 632. Once a comprehensive plan has been adopted pursuant to Chapter 163, Part II, "all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan" must be consistent with that plan. §163.3194(1)(a), Fla. Stat. (2005); *see also* §163.3164(7), Fla. Stat. (2005).

The terms "inordinate burden" or "inordinately burdened" are defined in the Harris Act to mean a specific action by a governmental entity that directly restricts or limits the use of real property. To be actionable, the "inordinate burden" must be 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. A property owner is also "inordinately burdened" if the property owner is left with existing or vested uses that are unreasonable, so that the property owner permanently bears a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. Section 70.001(3)(3), Florida Statutes (2005). The existence of a "vested right" is determined by applying the principles of equitable estoppel and substantive due process under statutory or common law. Section 70.001(3)(a), Florida Statutes (2005). (Emphasis added)

As a result the factual question, constrained though it may be, is whether the plaintiffs had come

into possession of a vested right to specific uses through the remedy of equitable estoppel and substantive due process.

The story begins in 2003. The City of Ponce Inlet had passed its 2003 Comprehensive Land-Use Plan pursuant to Florida Statutes and the plan had been accepted and approved by the state. The plan itself dealt with the densities and intensities of land-use in conjunction with the property to be later purchased by the plaintiffs, the Pacetta Group. The Johnsons purchased the Pacetta LLC parcel and what is known as the Sailfish property on June 14, 2004. Mr. and Mrs. Johnson originally intended to construct their dream home on this property and to perhaps use it for some corresponding residential development to help offset the price of purchase. They began by reviewing the Land Use Development Code from the Town for that purpose.

It is interesting to note that Mr. and Mrs. Johnson had discovered the property while on a boat ride sometime earlier. The court visited the property as part of a view in conjunction with understanding the issues in the case. This property has been long known to the court and each of the parties as well as their attorneys. Ponce Inlet is a small community on the southern tip of what is sometimes called the peninsula south of Daytona Beach. It is found by proceeding south of the eastern Port Orange causeway on A-1-A. After leaving Port Orange, there is a section of unincorporated county land known as Wilbur-by-the-Sea. South of Wilbur lies the Town of Ponce Inlet. Ponce Inlet is surrounded by water on three sides and has no through roads. It's eastern side borders the Atlantic Ocean and has absolutely gorgeous beaches.

It's south side borders Ponce Inlet which is a inlet that allows the tidal estuary known as the Halifax River to be supplied with clean salt water during tidal changes. It is a navigable waterway for relatively small vessels in the range 60 to perhaps a maximum of 80 feet. The bridge clearances to the north and south are 65 feet and vessels with a draft of more that 10 feet would be unable to navigate the intracoastal waterway. (AtlanticSailors.com)

The Town of Ponce Inlet, for the most part, is a residential community. It's eastern Atlantic Ocean shore is lined with a substantial number of multi-story condominiums. It's western shore has one very substantial condominium development. The waterfronts throughout the rest of the town are lined with substantial private residences, many gated, involving very substantial multimillion dollar homes. Because of it's structure, the full time residents, which make up the voter rolls, are a narrow fraction of those invested in the Town.

There is very little commercial development in Ponce Inlet. It has some limited retail establishments. It's primary commercial developments are three riverfront enterprises. The northernmost project is known as Inlet Harbor. It is a mixed use project to the extent that it has dry boat stack storage, a wet slip marina and a full-service restaurant serving food in the restaurant and on an outside deck, as well as ancillary uses.

About a mile south of Inlet Harbor is the Pacetta Group property. South of the Pacetta property and closer to the actual inlet is a property known as Lighthouse Boatyard. Lighthouse Boatyard has wet

slips and dry boat storage and service. It doesn't have a separate restaurant and is more limited in scope.

The Pacetta Group property is the middle piece of commercial development located on the rivers edge on the eastern shore of the Halifax River. The property Mr. and Mrs. Johnson have assembled is approximately 16 acres. It is a beautiful piece of property. The Pacetta Group property is relatively high and very well positioned in regard to the river so that passing river traffic has the advantage of relatively deep water access.

All three enterprises, Inlet Harbor, Down the Hatch (the Pacetta Group property) and Lighthouse Boatyard are on a branch of the Halifax River which is a tidal estuary. The buoyed navigable branch which is marked by the Coast Guard for intracoastal traffic, actually passes to the west of those enterprises. The eastern split of the intracoastal channel passes by Inlet Harbor, the Pacetta Group property and eventually close by Lighthouse Boatyard. Because of pre-existing manatee zones all three properties are located in no wake and slow speed zones which present certain advantages. (50 CFR 17.108) The property also has the advantages of some very nice landscaping. The Pacetta Group acreage has very mature tree growth for Ponce Inlet compared with other properties in Ponce Inlet which appear to have a more baron feel.

The Pacetta property, including Down the Hatch Restaurant, have a common history with the other major commercial properties. Prior to the advent of the interstate system and fiberglass boats those properties were essentially old Florida fish

camps and wooden boat building facilities where people would charter small boats to fish both in the river and offshore. Over time restaurants grew up around the fishing activity and the boating and boat service grew from that.

In that setting the court gets the impression that Mr. and Mrs. Johnson felt they had found an ideal location to live and to develop a later in life enterprise. Mr. Johnson is a seasoned developer who has been very successful in his development enterprises and big box commercial projects. The couple was living in New Smyrna Beach and had just finished a successful development there.

The original purchase in Ponce Inlet was not designed for substantial development at all. It was designed to be a dream home located on a pristine and prime piece of Florida real estate that would be hard to match anywhere in the country. Right off the bank at the river's edge you have deep water access for boats of all kinds. The property is a stone's throw away from Disappearing Island which is a large sandbar that is the center of attention on weekends in the Daytona Beach boating world. (Areal photos)

In that setting, between June of 2004 and 2008, there does not appear to be any meaningful dispute that Mr. and Mrs. Johnson and the Town of Ponce Inlet had a harmonious convivial relationship that might even be described as pacesetting. While some cracks began to form in late 2007, the cooperation between developer and the Town was unprecedented. The evidence and information presented at trial is quite voluminous but can be outlined in segments.

Assembly of the Pacetta Group Property

Parcels one and two were acquired by Mr. and Mrs. Johnson through Pacetta LLC on June 14, 2004. (Those were zoned respectively B-2 and R3)[2] Having received encouragement from the planning board, Mayor Epps and the Town Council, as well as general positive and constructive input from a large number of citizens, the Johnsons recognized that any meaningful mixed-use development would require a larger piece of land to meet all of the needs that they might have as well as those that would be demanded by the Town. After meeting with the responsible town leaders, the Pacetta Group acquired parcels three and four in August 10, 2005 (Docksider property). They acquired parcels five, six and seven on March 3, 2006 (Mar-Tim, Inc and a residential piece). At the same time they acquired parcels eight and nine (Down the Hatch property). Shortly thereafter, on May 10, 2006, they acquired parcel ten (The Old Florida Club

[2] Attached as an Appendix to this judgment are a series of diagrams drawn from the trial exhibits which may help the reader visualize some of the issues and descriptions used by the court. One attachment is taken from the power point presentation of Tracy Crowe which most clearly lists detail for parcels 1 through 10. The visual power point display does not show the numbers but when printed the numbers appear in a way that virtually duplicates defendant's Exhibit 35. The appendix also includes the Plaintiffs' Exhibit 239 as well as other graphic exhibits to more easily allow some visualization of the property. A list of Legislative Actions by the Town is included for reference and to verify the many dates referred to in the body of this opinion.

property) completing the assembly of the property under unified ownership.[3]

With the land assemblage complete, Mr. and Mrs. Johnson and their legal entities were in control of all of the parcels that were part of the B-2 and MF-2 zoning that had been used for the historical purposes of the fish camp, the boat building and restoration, as well as what is known as Down the Hatch Restaurant and the Sea Love Marina. They now found themselves in a unique position of having control of property that had a number of unique possibilities associated with a mixed use and not only a cooperative Town, but a Town which was actively encouraging and directing the development.

WHAT HAD TO BE DONE TO MAKE THE PROPERTY USABLE?

While there is some controversy as to whether the 2003 Comprehensive Land-Use Plan prohibited the use of dry stack boat storage facilities, there is no question that the ROD (Riverfront Overlay Development) passed by the Town in 2004 applied to most of the parcels that the Johnsons had assembled.

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[3] At trial Mr. and Mrs. Johnson established by clear and convincing evidence that the property was under common ownership by the fact that they either owned or controlled each entity and could clearly bind themselves to a course of action for all the plaintiffs. It also appears that issue had been earlier challenged in Town of Ponce Inlet v. Pacetta, LLC, 63 So.3d 840 (Fla. 5th DCA 2011) where the controlling interest was recognized under Section 163.3164(16), Florida Statutes (2008) so that the Town is estopped to raise that issue based on the principal of res judicata and collateral estoppel. A Petition for Certiorari was filed with the Florida Supreme Court and denied. (Fla. 2012)

The ROD covered all of the parcels except parcel two, a small piece of residential real estate and parcel seven, a parcel contemplated to house a portion of the dry boat stack storage facility. The ROD appears to have been legislation specifically designed to try and eliminate the potential for any use of dry stack boat storage on the property now owned by the Pacetta Group. It limited the use of dry stack storage, the size of a storage facility and the height of buildings in such a way that no mistake could be made that it was designed to ban any viable dry stack storage facilities on that property.

There is an open legal question as to whether or not the ROD would be enforceable if challenged as being inconsistent with the 2003 Comprehensive Land-Use Plan. This court is inclined to conclude that the ROD was inconsistent with the land use plan and would not have stood a legal challenge based on Machando v Musgrove, 519 So2d 629 (Fla. 3rd DCA 1987). Nevertheless, the ROD has not been challenged by this litigation. It has, however, been recognized in testimony that the attorneys for the Pacetta Group and the Town attorneys were aware that the ROD was vulnerable to a successful challenge and that it should be a factor to be considered in the give and take of any future planning.

The Plaintiffs' trial presentation, witness by witness and exhibit by exhibit, comprehensively detailed all the time, effort, energy and money put into the project by Mr. and Mrs. Johnson and their team through November 18, 2008. Exhibit 6 is a memo to the planning commission concerning changes to the Town's future land-use map. Exhibit 9 is a copy of the ordinance allowing adjoining southerly lots to be

quickly moved from commercial (B-2) to residential (R-3) for homeowners to build estate homes. Those are referred to as the Larry Fornari and Robyn Hurd properties. (Parties pretrial compliance)

Exhibit 12 shows an October 11, 2004 Riverfront Development Permit for what is referred to as the Old Florida Club. Exhibit 13 involves a comprehensive presentation by Mayor Nancy Epps on February 15, 2005, that dealt with the preservation of working waterfronts. In 2005, in addition to working waterfronts, the town dealt with the county's Manatee Protection Plan. Through the rest of the 2005, demonstrated by the plaintiffs' exhibits, the Working Waterfront Legislation, the Manatee Protection Plan and the interrelationship of these imposed requirements were front and center between the Town and the Johnsons. The common planning allowed the implementation of those requirements into the comprehensive plan in a way that was consistent with the spirit and letter of that legislation and which dovetailed into the plan being developed by the parties. Along the way, the Old Florida Club final development order was issued in mid 2005. In late 2005, in an analysis of the Working Waterfront Legislation and the Manatee Protection Plan, the Town had to make a decision as to how it would determine and assign slips consistent with those imposed obligations. They began working on the slip aggregation decision in late 2005, which was project critical to the Pacetta Group.

While there have been many iterations of conceptual plans submitted by Mr. and Mrs. Johnson, a presentation was made for the assembled 16 acre parcel as a mixed use PWD (Planned Waterfront

Development) in early 2006. The early part of 2006 was also focused on a survey and finalization of plans for the Old Florida Club which resulted in a development order. In mid-2006, the Town actually passed a resolution adopting the aggregate methodology of slip assignment which was absolutely critical to any reasonable use of the property for the expected mixed use. By that means, the Pacetta Group could use slips that would otherwise only be available by parcel number and use them in a single location. As Alan Watts, attorney for the Pacetta Group, reports in his deposition which is part of this trial, that decision was a "win-win" situation. The slips could be used in the most cogent fashion to minimize impact, meet the goals of the Manatee Protection Plan, and develop the property in a way that was consistent with the mandate regarding Working Waterfronts

In mid-2006, all of the detailed Comprehensive Land-Use Plan meetings were underway and with the aggregation of the boat slip assignments, the stage was set so the Johnsons presented a rendering known as Villages of Ponce Park with the use of the subject property envisioned by the Johnsons. In late 2006, there was a joint Planning Board and Town Council meeting dealing with the Manatee Protection Plan and boat slip allocation. In early 2007, there actually was a tax deferral program put in place under the Working Waterfront Legislation for those properties involved in adaptation of the working waterfronts. The working waterfront concept was implemented in 2007, and a review of the concept plans presented by the Johnsons was undertaken in mid-2007. The Planning Board was in the process of developing a Comprehensive Land-Use Plan consistent with and

which would facilitate the conceptual approach the Johnsons had taken throughout the undertaking. Through mid to late 2007, progress was being made regarding revisions to the Comprehensive Land-Use Plan that would allow a PWD and that which essentially would relax existing ROD zoning if certain stringent conditions for a mixed use property were met.

The Town made it clear that it had a laundry list of stringent conditions that it demanded before any PWD could happen. The submission, which is plaintiffs' exhibit number two, was presented October 14, 2008, was actually the last iteration of the Johnsons' concept presentation. (Exhibit in Appendix)

At that time the Town had already authorized the Pacetta Group to build and operate a marina with 130 wet slips and 213 dry slips based on the announced slip allocation. This was confirmed by letter which is Plaintiffs' Exhibit 124 from the town manager on October 31, 2007. That date is a very important date because that right was communicated to the Johnsons and was a substantial instrument of their reliance.

The testimony was extensive as to the time and energy that was spent in developing the concept and a great deal of attention is paid to the fact that there were no formal applications short of the Old Florida Club.[4] In actuality, the Pacetta Group had put on hold everything else it wanted or even that it considered during that period of time that would be inconsistent

[4] The Town attorney had actually told the Pacetta Group not to submit plans so as not to delay the progress of the Comp. Plan.

with the mixed-use that was hoped would someday occupy the Pacetta Group property. They were later allowed to go forward with some expansion of the wet slips in the Marina adjacent to Down the Hatch Restaurant which was another indication that was totally consistent with the Comprehensive Land-Use Plan being developed by the Town and the later opportunity to develop the PWD mixed use project. It would make no sense any other way.

The essence of what happened through 2008 is that the Town and the Johnsons essentially got to know each other, had a chance to listen to each other extensively, and worked out what each understood was in their best interest in terms of a mixed-use plan or PWD mixed-use project. In order for that to happen, the Town would have to pass the Comprehensive Land-Use Plan that would allow those changes to be implemented which each party knew was the only way that could be done. The ROD, if legal, was so restrictive that none of the plans that all the parties were making could ever be used with it in place. That fact becomes important later on. These concessions were made overtly by Town officials.

Having completed the rather extensive analysis and preparation and evaluation, the Town approved and transmitted the Comprehensive Land–Use Plan on March 26, 2008, to the DCA (Department of Community Affairs) in Tallahassee. On June 18, 2008, the Evaluation and Appraisal Report (EAR Report) was adopted. That was transmitted to the DCA on June 30, 2008. Up to this point, things appear to be going fine for all parties.

IMPORTANT MEETINGS

There was a very important meeting that occurred on April 4, 2005, involving the Town attorney, planners and other decision-makers with discussions involving the meaningful mixed-use of the subject property. The conceptual plan was presented for all 16 acres. There was new access recommended by the town manager and planner through 143 Beach St. in Ponce Inlet. The Town was informed at that time that the assemblage of the property was being undertaken confidentially. The town indicated that a mixed-use could only be available under unified ownership.

On June 2, 2005, there was a meeting regarding the Manatee Protection Plan. It was noted that wet and dry storage is a regional need and that the boat launching and access is a high priority for Volusia County. It was pointed out that clusters of boats would be best sited near the inlet so as to minimize the traveling distance over more restricted manatee habitat. It's interesting to note that dry boat storage is considered less threatening to manatees and therefore more protective and helpful. The theory seems to be that the boats are not used that often and when not in use are high and dry. The boats using wet slips are always in the water and represent a greater threat.

There was another meeting on the July 1, 2005, with Mayor Epps and Vice Mayor Robertson, to discuss the master plan and the need for the feasibility of the other components of the mixed-use. Follow up meetings happened in September of 2005, at attorney Ted Doran's office, at which time the

concept plan for the mixed-use on 16 acres was discussed and what Comprehensive Land-use Plan resolutions were being undertaken. The confidentiality of the unification of these properties was preserved so as not to interfere with acquisition efforts and price. The discussions dealt with townhomes, wet and dry slips, public access, a sunset fishing pier, modifications to parking, and aggregation of wet and dry slips for the marina which everyone understood was to be the economic engine to make the project work and support the concessions demanded by the Town.

The mixed-use was again discussed on September 1 and September 16, 2005, with the town planner. The discussions dealt with the dry and wet slip marina, 28 townhomes, 10,000 square feet of retail stores, boatels and mixed-use as well as expansion of Down the Hatch Restaurant. These were all critical features to the mixed-use project and the meeting was almost universally unique in that the town planner, Pete Grigas, went to the office of the Johnsons' planner, Zev Cohen, so they could work on the plan. That almost never happens and certainly was a strong sign on the side of encouragement which was hard to miss.

The Town planner points out that there were meetings held on the site with town officials from and during the period from 2004 through 2007, all dealing with Comprehensive Land-use Plan that would relieve the property of the ROD and allow a PWD to be implemented so that mixed-use could be used. The driving force was always a suitable dry stack storage facility that would be able to generate the income necessary to allow all of the other concessions that the

Town demanded. Almost all responsible leaders of the Town Council, Planning Board, town planner, building department people, town managers and those in the utilities department met and had input, at one time or another, into the project.

The site concept plans were always posted at the Down the Hatch Restaurant, which is frequented by large number of people who live in Ponce Inlet. As the Plaintiffs point out, there were 160 hours of meetings between 2004 and 2008 dealing with the subject matter.

BEGINNINGS OF A SHIFT OCCURRED ON JANUARY 17, 2007

The earth figuratively shifted on January 17, 2007, when there was a rezoning in progress resolution which essentially acts as a moratorium. In March of that year, there were allegations of a sunshine law violation by the Planning Board which seemed to this court to be quite odd. There was a movement in mid 2007, to establish constraints on the democracy by requiring that a super majority would be necessary to rezone property or amend the Comprehensive Land-Use Plan by which a vote of four of five commissioners must concur in most settings. Because of concerns that the Planning Board was tainted, the Town Council terminated them and appointed itself as a land planning authority. Coincident with this activity, there was an ordinance passed that proposed a charter amendment establishing a provision that allows citizens initiatives, much like the propositions in the State of California, in conjunction with the land actions which was a shift in attitude. The Town was put into slow

motion as to the Pacetta property by the use of a highly unusual series of moratoria to be discussed below.

MORATORIA

The evidence shows that from January 17, 2007, there was a zoning in progress ordinance passed which essentially acted as a moratorium for the Plaintiffs' property. On October 17, 2007, there was a moratorium ordinance passed for what supposedly was to be one year. On October 15, 2008, another moratorium was enacted for one year. On October 26, 2009, another moratorium was enacted for one year. As the Plaintiffs point out, the net effect of these series of moratoria was that the Plaintiffs could not build on or develop it's land for a total of 46 months and nine days. The impact will be discussed further in greater detail in this opinion.

STATUS OF COMPREHENSIVE LAND-USE PLAN IN NOVEMBER 2008

Prior to November 18, 2008, based on the prior harmonious discussions with the Town, the amendment to the Comprehensive Land-Use Plan had been extensively reviewed, amended and passed by the Town Council on first reading. The Plan, after passage, was sent to the State DCA. Thereafter, the EAR was approved and forwarded to the State. The State approved the submissions subject to objections, recommendations and comments (ORC). The last official act necessary to finally approve the Comp Plan was the passage on second reading, since the state's objections had been addressed. From there, the Plan would go to the state and would be virtually certain to be approved and eventually become legally effective.

Up to that point the Pacetta Group had invested the money necessary to accomplish unified ownership, a requirement the town insisted on for consideration of the changed Comp Plan. The discussions with the Town were extensive. The Pacetta Group sought to develop a first quality project. The Town essentially got everything that it wanted from this land project consistent with its obligation to in good faith implement the Working Waterfront Legislation and to honor and be responsible to the Manatee Protection Plan.

The Town got a beautifully designed project in concept. They got a preservation of the trees on the property with canopy coverage that is extraordinary[5]. The Town got the inclusion of a public sunset peer that was to be built at the developers' expense for the benefit of the Town's citizens. The Town got a walkway of 1,300 linear feet which would be open to the public. The Town got a nature walk along the south side of the property of 500 linear feet. The Town got a setback over the archaeological midden mounds which is a series of oyster shell deposits on the south west corner of the property that would allow public access for that purpose. The Town got a preservation of that formation. The Town also got an expansive commitment to public parking that would service relatively small retail areas that would unlikely be profitable to the developer. The high hazard flood constraints were also addressed.

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[5] A tree expert for the plaintiffs, Gary Dickens, indicated that the tree ordinance was so restrictive that he would rank it as an 8.5 on a scale of 10 with a 10 being no building possible.

Near the retail areas, the Town insisted on a turnabout with a community fountain. There was extensive public access and essentially the Town was able to persuade the developer that all of those features were important enough to be conceded in the plan. All these public features were to be at the developers' cost with no cost to be born by the Town.

The developers' source of income was the restaurant, which could be responsibly expanded, and income from the marina in regard to wet slips and the dry stack storage facility. There was some possibly of revenue from the retail although that seemed dubious. The Plaintiffs' expert, Dr. Fishkind, said that the area would not support the proposed retail. The Planned Waterfront Development was to be a mixed-use that also would incorporate at one time multi-family which later changed to single-family residences to be built with river views. All of the uses that were contemplated by the Villages of Ponce Park were consistent with the historical use of the property. Any rational person looking at the proposal, as planned and if done by a quality developer, would conclude that the Town had made very heavy demands for any qualifying PWD.

At this point and well before, Mr. and Mrs. Johnson had achieved a vested interest by operation of the elements of equitable estoppel. The elements of equitable estoppel have been established by clear and convincing evidence on the analysis to follow.

The Town argues that the politics of the Town allows it to change it's "official mind" and that finality can not occur until the final approval passes. The law appears to be to the contrary. In, 411So2d1008 (Fla.

5th DCA 1982), the county had preliminarily approved the subdivision plan, including use of a package sewage treatment plant. In reliance on this approval, substantial expenditures were made in good faith to construct the plant and service lines. The Court recognized equitable estoppel with the following analysis:

> "The fact that the expenditures were made upon preliminary approval, rather than final approval, would likewise not affect the application of estoppel. In Sakolsky, the [Florida] Supreme Court approved the application of estoppel where expenditures had been made upon tentative approval of preliminary plans. Furthermore, in Town of Largo v. Imperial Homes, estoppel was applied even though no building permit had been issued and no physical changes had been made on the property. Application of equitable estoppel does not depend on absolute, binding, final approval from the governmental body. Town of Largo v. Imperial Homes, 309 So.2d at 573 (2nd DCA 1975)…
>
> Several courts have held, in connection with the doctrine of equitable estoppel, that a landowner is entitled to proceed in good faith on a preliminary approval by a governmental body and is not required to take into account the fact that the "official mind" might change pending the issuance of final approval. Sakolsky v. City of Coral Gables, 151 So.2d at 435;

> Jones v. First Virginia Mortgage and Real Estate Investment Trust, 399 So.2d at 1074; Andover Development Corp. v. City of New Smyrna Beach, 328 So.2d 231 (Fla. 1st DCA 1976)."

The Town also has suggested that the Pacetta Group should be denied estoppel because there was known opposition to the planned project and there was a chance of passage, first of the referendum, and later, the election of new councilpersons who opposed the Pacetta Group's project. There are a number of cases that point out that a pending change in the "official mind" does not defeat the Plaintiffs' claims. In A. H. Sakolsky v. City of Coral Gables, 151 So2d 433 (Fla. 1963) the court noted:

> 'To deny application of the doctrine[of equitable estoppel] to the facts of this case on the ground of circumstantial notice that the 'official mind' might change amounts, in our opinion, to a rejection of the quoted ruling and creates an irreconcilable conflict of principle. The basic concepts of equitable estoppel, held by the prior cited case to be applicable to municipalities as to individuals, preclude the notion of such instability in municipal action merely because its business is conducted through a body whose membership is subject to change."

(Emphasis supplied)

Similar results were reached in The Florida Companies v. Orange County, 411so2d 1008 (Fla. 5th CDA 1982); Reedy Creek Improvement District v. State of Florida Department of Environmental Regulation, 486 So2d 642 (Fla. 1st DCA 1986); City of Gainesville v. Bishop, 174 So2d 100 (Fla. 1st DCA 1965) and City of Winter Springs v. Florida Land Company, 413 So2d 84 (Fla. 5th DCA 1982).

ELEMENTS OF EQUITABLE ESTOPPEL

We must now turn to the elements that the plaintiffs must establish to be entitled to a vested right based on equitable estoppel. In the above cited case of the Town of Largo v. Imperial Homes Corporation, 309 So2d 571 (Fla. 2nd DCA 1975) the necessary elements were clearly articulated as follows:

> "The doctrine of equitable estoppel is applicable to a local government exercising its zoning power when the property owner (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired. City of Hollywood v. Hollywood Beach Hotel Company, 283So2d 867 (Fla. 4th DCA 1973); Texas Co. v. Town of Miami Springs, 44 So2d 808 (Fla. 1950); City of Naples v Crans, 292 So2d 58 (Fla. 2nd DCA 1974); City of

Gainesville v. Bishop, 174 So2d 100 (Fla. 1st DCA 1965)"

The more recent case of Major League Baseball v. Morsani, 790 so2d 1071 (Fla. 2001) dealing with estoppel was decided in 2001. In that case it was noted that the doctrine of estoppel is applicable in all cases where one, by word, act, or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on his belief injuriously to himself, or to alter his own previous condition to his injury. "Equitable estoppel" is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property or of contract, or of remedy, as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, or of contract or of remedy. The Major League court further points out that "equitable estoppel" is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position. The prime purpose of the doctrine of equitable estoppel is to prevent a party from profiting from his or her wrongdoing. Major League, id.

In an excellent opinion dealing with a Bert Harris Act claim from the Federal District Court in Tampa styled *Bloomingdale Development, LLC v. Hernando County*, 2009 WL 337786 (M.D. Fla. 2009) Judge James S. Moody, Jr. wrote:

EQUITABLE ESTOPPEL

"The doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where a property owner (1) in good faith (2) relying upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired. *See* Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10, 15 (Fla.1976), see also Salkolsky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963). "The mere purchase of land does not create a right to rely on existing zoning." Town of Largo v. Imperial Homes Corp., 309 So.2d 571, 573 (Fla. 2d DCA 1975). "All that one who plans to use his property in accordance with existing zoning regulations is entitled to assume is that such regulations will not be altered to his detriment, unless the change bears a substantial relation to the health, morals, welfare or safety of the public." City of Miami Beach v. 8701 Collins Ave., Inc., 77 So.2d 428, 430 (Fla. 1955). "It is well settled that a zoning ordinance to be valid must bear a substantial relation to the public health, safety, morals or general welfare." *Id.*

There is no requirement, however, that the landowner must have either obtained

building permits or made any physical changes to the land in reliance on existing zoning in order for the doctrine of equitable estoppel to apply. Town of Largo, 309 So.2d 571, 573. "**Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds.**" *Id.; see also* Pasco County v. Tampa Development Corporation, 364 So.2d 850, 852-853 (Fla. 2d DCA 1978)."
(Emphasis added by this court)

The Element of Good Faith

The conduct of Mr. and Mrs. Johnson, along with all of the investor members and professionals who worked with the Pacetta Group, can only be described as the exercise of inexhaustible good faith. Having observed Mr. and Mrs. Johnson on the stand and listened to them for days on end, sometimes under rigorous cross-examination, the court has concluded that they were motivated by a sincere desire to build

a first-class project in Ponce Inlet that was even superior to the extensive requirements the Town was looking for. They were always gracious and receptive to all who had an interest in the project which makes it obvious as to why they had been successful in life, up to that point.

It must be noted that these events occurred during a very difficult time in our history. Coastal Florida and for that matter, the greater Florida area, had been hit by three hurricanes in the late summer and fall of 2004. Those hurricanes, although mild in wind speed, were devastating in terms of the destruction of local property and very damaging to the local economy. Ponce Inlet was not spared from that damage. The Pacetta Group had substantial damage as well.

After the hurricanes, in late 2007, and very abruptly in August of 2008, our country faced a financial crisis where the existence of the entire banking system was at risk, and there had been substantial financial failures throughout the world, including money market accounts where many people held their savings and investments. Shortly thereafter, the Lehman Brothers failure in New York City set off a string of events that has been described as the worst financial event with corresponding recession since the depression in the 1930's. Despite these catastrophic events occurring during the ownership of the property, Mr. and Mrs. Johnson continued to act in good faith toward all members of the town, even those hostile to them.

On the contrary, there are only two events brought to the court's attention to suggest even uncivil

conduct by Mr. Johnson. The first one was his reluctance to move a construction trailer that he thought had a useful purpose on his property and which was not interfering with anyone. The building official, as building officials do, insisted on strict adherence to the letter of the governing law. That was worked out without litigation. There was one other difficult situation where Mr. Johnson had the waterway adjacent to his docks dredged so that the visiting boats would have adequate hull clearance. He had put the wet and soggy dredge spoil on an upland portion of his property to essentially dry it out. His plan at time was to use that spoil to build up the property for several of the multi-family units that he was planning, thereby avoiding having it trucked out and then later back on to the property.

The Town, evidently based on a complaint by Barbara Davis, was concerned that there could be some poisonous material in the spoil. One needs to stretch their imagination substantially to reach a conclusion that the mud at the bottom of our waterways is poisonous. That was obviously a contrived exercise by Barbara Davis, using the power of her status as a citizen lawyer, to demand what was essentially retaliation by the building department. Unfortunately, the Town accommodated her and that resulted in a code enforcement proceeding and the imposition of a fine of $90,000. While not critical to the outcome in this case it's hard not to conclude that a fine that size was a little overdone. In any case, the matter was resolved by the goodwill of Mr. Johnson in agreeing to take the fill off the property with a quid pro quo by the Town of dropping the penalty.

It's very hard to defend strident disobedience of reasonable regulations. It is very easy to understand reasonable resistance to unreasonable regulations which both incidents appear to be. As it turns out these events foreshadowed things to come which will be discussed further in this opinion.

Those observations having been made, the evidence is overwhelming that all the conduct undertaken by the Plaintiffs, as well as Mr. and Mrs. Johnson, and all the members of their team, were done in good faith and in a sense of cooperation that might be explained as inexhaustible. Clearly good faith has been established by clear and convincing evidence as an element of estoppel.

The Element of Reliance on Government Action

The second element of estoppel is the reliance on some act or omission of the government. In this case, the property was purchased with the 2003 Comprehensive Land-Use Plan in place. The ROD was passed in 2004 and was in place at the time that the Pacetta Group took title to all of the properties as they assembled them at the behest of the Town. From 2004 through November 18, 2008, the Pacetta Group relied upon the government in all of its acts and conduct that was designed to modify and which did preliminarily cause a vote to modify the Comprehensive Land-Use Plan by the Town as to the 16 acres that the Pacetta Group had assembled. That change, as initially proposed, would allow the Pacetta Group the opportunity to apply for and have granted a mixed use PWD consistent with the concept plan that that had been developed jointly with the Town and subject to

the requirements outlined as well as any corresponding reasonable regulations.

The key components involved the opportunity to apply for a mixed-use PWD which would allow a dry boat stack facility appropriately styled to blend into the community and not be limited by the 5000 square foot constraints for retail space that existed and which was free of the suggested prohibition in the ROD for the Pacetta Group property. The detail in regard to all of the acts and conduct by the government have been articulated and again that element of estoppel has been established by clear and convincing evidence. The only position that the defendant has is that the Town didn't pass the proposal on second reading. Every other act required under the Town's representations was undertaken including the assignment of the necessary dry and wet storage slips by the aggregation method, which was known as a critical piece of the development from the Pacetta Group's standpoint.

Change in Position by Plaintiffs

The third element involves a question of whether the Pacetta Group has made a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to remove the vested right acquired. All of the cases that have been reviewed by this court pale in comparison as to the substantial change in position undertaken by the Pacetta Group and Mr. & Mrs. Johnson.

The plaintiffs spent a total of $20,850,000 for the purchase of the real estate. The Sailfish property consisting of about 6 acres cost $4,100,000. The

Docksider property which was the restaurant that was torn down cost $1,750,000. The Timmons property which was Down the Hatch and the Sea Love boat yard cost $7,000,000 and the Old Florida Club cost $8,000,000. Arguably the first purchase should be backed out from the total because that was not part of the assembled land. Mr. and Mrs. Johnson bought it to build their own house and the multifamily structures. The land purchase costs for the Pacetta Group designed to accomplish the mixed use PWD project therefore involved a total of $16,750,000. In addition, because of the protracted time period involved, there were substantial development costs proven at trial. Below is a list of those claimed:

Soft Costs	$308,817.00
Architectural/Engineer	$384,094.00
Interest	$5,312,311.00
Taxes/Insurance	$514,400.00
Legal/Consultants	$1,839,201.00
Improvements	$396,459.00
Wet Slips	$666,891.00
Sea Walls	$454,217.00
Total Claimed	**$9,876,385.00**

It should be noted that this court recognizes that the Pacetta Group purchases occurred at a time when the real estate market was overheated and that the purchase prices, in the view of sober hindsight, appear substantially inflated. Nevertheless, that was the market and a seller didn't have to be particularly

clever to figure out that a developer was trying to assemble a workable parcel.

In the same vein, the court has not analyzed the soft costs listed above in great detail. As a starting point the interest carrying charges for the Sailfish property would logically be backed out. Some portion of those expenses might be more appropriately charged against the income of the existing restaurant and boat repair and marina business. However, the majority of the so called "soft costs" were in fact incurred and had to be incurred to have been able to bring the project to this point. There is direct record evidence supporting substantial legal and consulting fees as well as engineering and architect fees. The court therefore concludes that, in addition to the real estate purchases of $16,750,000, the Pacetta Group appears to have incurred soft costs in the $5,000,000 to $7,000,000 range.

As was established at trial, Mr. and Mrs. Johnson arranged for a note and mortgage with Colonial Bank in the original face amount of $11,000,000.00 and Mr. Johnson guaranteed payment personally in addition to securing the property, rents and income. (Plaintiffs exhibit 259-attachment L and letter agreement) That loan is in default and in foreclosure. As a result, these are real numbers which measure the true financial detriment to the Plaintiffs and Mr. Johnson personally.

Virtually everything that the Pacetta Group did from 2004 through November 18, 2008, was designed to facilitate the opportunity to develop the mixed-use plan under the PWD consistent with the Manatee Protection Plan and in such a way to be loyal to the

intent of the Working Waterfront legislation. The Pacetta Group did extensive surveying on their property. They investigated the historical background of the Indians who shucked oysters on the property and created mounds called midden mounds. Those activities included an archeological phase I study done by Robert Johnson along with a phase II study done at a cost of $100,000.00. Other studies were done.

Test pits were dug to learn about the midden mounds which all designs attempted to protect. Efforts were made whereby those features could be preserved not only for owners of the mixed-use property but also for the public. In addition, the Johnsons conducted historical surveys. They conducted appraisals. They conducted a geological survey. They discovered a graveyard that fallen into disrepair and repaired it. They improved the restaurant facility, Down the Hatch, which was to be part of the mixed-use undertaking. They added, at substantial expense, additional docks adjacent to the restaurant that only made sense when used as part of the mixed-use facility. It would be hard to justify those expenses for boaters stopping by to have a fish sandwich on Sunday afternoon.

It is the amount of time, energy and money that was spent consistent with the welcome mat that had been laid out by the Town for Mr. and Mrs. Johnson that is hard to imagine. The undertaking by the Pacetta Group and Mr. and Mrs. Johnson is dramatically more substantial than any case this court could find based on the detrimental reliance element of the estoppel issue. In addition, Mr. and Mrs. Johnson invested their hearts and souls in the

property to make it a first-class undertaking which would certainly benefit

them if that translates into profit, but is evidently consistent with the way they have operated their development company.[6]

Developers by definition have to deal with petty people. The Johnsons invested substantially in terms of time, energy and money. They also leveraged their future by a multimillion dollar mortgage to complete the land purchases and proposed construction. The Pacetta Group also delayed the otherwise permissible use of the land it had acquired in favor of the chance to develop a mixed use PWD on the property. The third element of estoppel has been established by clear and convincing evidence.

It would be grossly inequitable as well as unjust, even in the limited use of equitable estoppel available against a municipal government, not to recognize the vested right that the Town provided. The Plaintiffs have established by equitable estoppel a vested right to have the Town include in it's Comprehensive Land-Use Plan dealing with the 16 acre Pacetta Group property the terms originally approved upon first reading. They have also established the opportunity to apply for and reasonably obtain, subject to reasonable constraints, a mixed use PWD free of square footage faculty

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[6] It should be noted that at the trial's beginning a feature of concern was also the Town's desire to have the Pacetta Group disengage with a floating casino operated by Sun Cruz which when in port was tied to it's dock and which generated a good deal of vehicular traffic and income. Along the way that use had been discontinued, but by the end of the trial was no longer a major issue.

constraints and ROD constraints that would allow a dry stack boat storage facility for up to 213 dry slips, all by overwhelming clear and convincing evidence.

Analysis of Whether There Has Been a Regulatory Taking

The next question is has the Town by new law, rule, regulation or ordinance, as applied, unfairly burdened and/or taken the property. The analysis involves a fairly substantial array of events by which the Town has changed it's corporate mind and engaged in a number of acts to attempt to neuter any development options available to the Pacetta Group. Whether there was a taking, either a Bert Harris inordinate burdening of the property or an unconstitutional taking, appears to be one of degree as to the property as a whole or sub-parts thereof.

Apparently in 2007, there were some signs, now appreciated, that forces were being mounted against the Pacetta Group. On January 17, 2007, a Zoning in Progress Resolution was passed which had the effect of a short term moratorium on the Pacetta Group property. Shortly thereafter in March of 2007, allegations surfaced of potential sunshine law violations by a member or members of the Planning Board. Efforts were made on July 18, 2007, to require a super majority vote of the Town Council for any zoning change and any amendment to the Comprehensive Land-Use Plan with an effort to elevate those changes to Town Charter status. Next the Town Council appointed itself as the Local Planning Authority which was perfectly legal, but somewhat odd. That was followed with an ordinance passed on August 15, 2007, proposing a Charter

Amendment establishing a provision to allow citizen initiative much like the various propositions allowed under the Constitution in California.

The next series of events involved a number of conjoined moratoria. From January 17, 2007, there was the implementation of the Zoning in Progress which was followed by the following legislative acts:

10-17-2007 Moratorium Ordinance 2007-26

10-15-2008 Moratorium Ordinance 2008-12

10-26-2009 Moratorium Ordinance 2009-13

As a result, the Pacetta Group was deprived of the opportunity to develop or build on any of its land for over 46 months. There are obviously legitimate and lawful reasons to impose moratoria. In fact, the then town attorney outlined those grounds in a memorandum introduced at trial which detailed the legal requirements which seems sound.

The requirements listed in the "The Memorandum of Law drafted by Town of Ponce Inlet Attorneys" states that a properly drafted moratorium ordinance must generally meet the following criteria: (1) The ordinance must be adopted in good faith; (2) The ordinance must not be discriminatory; (3) The ordinance must be for a limited duration; (4) The ordinance must be appropriate to the development of a comprehensive plan or revision in a zoning or land development regulation; and (5) The Town Council must act promptly to adopt the plan or revise zoning or land development regulation."

The evidence shows that from January 17, 2007, there was a zoning in progress ordinance passed

which essentially acted as a moratorium for the Pacetta Group property. On October 17, 2007, there was a moratorium ordinance passed for one year. On October 15, 2008, another moratorium was enacted for one year. On October 26, 2009, another moratorium was enacted for one year.[7]

Very interestingly, a trial exhibit was a memorandum from the then Town Attorney to the Land Acquisition Committee dated June 7, 2002, discussing "Reasons for Imposing Moratoria". It points out that the use of a moratorium to stop a particular project is generally viewed as improper. The elements of a proper moratorium need to: (1) engage in comprehensive or major plan revision; (2) make changes in its zoning or development regulations or (3) deal with crisis condition such as lack of ability to treat sewage.

The ordinances facially seem to comply. For perhaps a short time, the Town might be able to justify some delay. To line them up as they did, this court finds that they are a patently obvious series of arbitrary and capricious acts, engaged in bad faith, aimed at only the Pacetta Group property. The Town tried to keep the Pacetta Group from engaging in any meaningful effort to develop the property. There are indicia which will be discussed below which suggest

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[7] During that time a feature of the trial was an assertion by the Pacetta Group that the town refused to accept an application to build with a complete series of rolled plans containing the design submissions necessary for permitting. The Town witness claimed no submission was ever made. A big box containing the detailed plans came into evidence. This court clearly finds that the plans and application were submitted and wrongfully refused by the Town which was consistent with the theme of denying the Pacetta Group any effort to improve it's property.

that the conduct was part of a retaliatory effort to destroy the Pacetta Group so the property could be acquired by the Town at a fraction of it's cost and worth. While temporary taking may not be adequate alone for an unconstitutional taking, it can clearly help support a Bert Harris Act claim and be an indicia for an unconstitutional taking.

A Town Council meeting took place on November 18, 2008, at which time it placed the ROD into the Town Charter which elevated a zoning law passed in 2004 as part of the Land Use Development Code. Prior to that date, the 2004 ROD was subject to a challenge of being inconsistent with the 2003 Comprehensive Land-Use Plan, and thereafter, was superior to the Comp Plan. The ROD applied to property zoned B-2 but all the other B-2 property in the Town was built out so that the net effect of the Town's action was to spot zone the Pacetta Group property, where it was obviously aimed. Spot Zoning is usually constitutionally prohibited.

In mid 2008, a Citizen's Group formed which was called Citizens for Property Rights. Apparently the leaders were Barbara Davis, a citizen lawyer, Kriss Derr, and Kimberly Comfort, the daughter of Dr. Gary Comfort, who had been actively involved in Town affairs and opposed the Pacetta Group property. They were successful candidates for Council in the fall of 2008 that led the referendum effort, which passed resulting in a charter amendment and supported an addition to the Comprehensive Land-Use Plan to include the following language: *"Dry Boat Storage Facilities shall be prohibited within this overlay [ROD] district. In no event shall dry boat storage buildings exceed 5,000 square feet of floor area"*

The Pacetta Group challenged the conduct by an action in circuit court assigned to Judge Richard Graham. On March 18, 2010, Judge Graham entered a Summary Judgment against the Town having concluded that the action was clearly an illegal act. The Judgment was appealed to the Fifth District Court of Appeal and affirmed with a very strong opinion. Town of Ponce Inlet v. Pacetta, 63 So3d 840 (Fla. 5th DCA 2011), Pet. cert. denied, 2012 WL 888244 (Fla. 2012).

There are reasons to suspect impropitious handling of the this matter by the Town attorneys in first, not clearly recognizing the futility of resisting the challenge, secondly, in attempting removal to Federal Court without grounds and now, thirdly, seeking Certiorari Review. While each act is legally permissible, when these features are assessed, side by side, with serial moratoria and the long delays in the Division of Administrative Hearing (DOAH) challenge by the Pacetta Group, with full knowledge of the distress the Plaintiffs were under with the failed investment and active foreclosure, you don't have to travel very far to find strong indicia that there is an effort underway to financially break the developer and disabuse him of his adventure. This is not to imply a conspiracy but to note an apparent lack of sound independent judgment or an election by the attorneys to become a mischievous tool of their client.

With those opposing the Pacetta Group project in control of the Town Council, there had been no work done toward the Land Use Development Code or toward the implementation of a PWD. On October 21, 2010, Ordinance 2010-09 was passed which eliminated the data and analysis in conflict with the

2008 EAR and arranged for a consultant who testified at trial concerning data and analysis prohibiting dry boat storage on only the Pacetta Group land. The ROD was elevated to the Comp Plan and the policy that Judge Graham ruled against was reestablished. The legal basis by way of supporting data for these changes was supported by Tracy L. Crowe, the Town's land use planning expert. At trial she testified that she virtually made up the conclusions about traffic impact and historical significance out of whole cloth. It was an embarrassing display.

Ms. Crowe was hired to do data analysis. She concluded that the enclosed dry stack storage facility proposed would result in a higher density and intensity of traffic. She never saw or measured the earlier traffic. She apparently wasn't aware that the same road was traveled by all the restaurant goers and wayward gamblers as they made their way to the Down the Hatch Restaurant and the Sun Cruz casino boat all those dozens of years. Her assumption was that the dry stack facility would be a depot for "large trucks" hauling boats to the site. While she clearly is an expert on the paper side of the analysis she knows little of stack storage facilities, especially one with as few as 213 spaces. It strikes this court as preposterous to conclude that boats would arrive, except on rare occasions, by other than water which destroys her premise.[8]

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[8] It should be noted that a careful view of the areal photos in evidence shows a public boat launch ramp just east of Lighthouse Boatyard and south of the Pacetta properties. Across the street from the launch ramp is a trailer parking lot for those launching in the shadow of the Lighthouse. The most logical route for boat launchers is to pass by the right turn to Down the Hatch and

Ms. Crowe next describes risk of insult to the "extreme historical significance" near the property. She apparently didn't check that out either. Throughout the trial this court learned that there is little or no significant historical significance to this area other than perhaps the "Hasty House" which the Town was willing to suggest be raised to allow a second road access to the Pacetta property when things were going well.

She also suggested that noise, odor and fire hazard were all risks subject to data analysis. To the contrary, the trial evidence indicated that there were no such complaints even from those complaint prone citizens in all these years.

The insertion of the new data generated by Ms. Crowe, without foundation, makes a mockery of serious land planning. This court is without jurisdiction to rule on that issue which has now been decided in favor of the Town by Administrative Judge Bram D. E. Carter as to the 2008 and 2010 changes to the Comprehensive Land-use Plan.[9] Nevertheless, if the Town hires a consultant, pays her merely $5,000 to do an analysis that originally took years, all for the

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continue along the scenic route to the water. It also appears to the court that any honest analysis of uses of dry stack storage would suggest that some users use their boats rarely and only a small number use their boats often. Even that use is likely seasonal, an analysis patently missing from Ms. Crowe's findings.

[9] This court's factual findings intend no criticism of Judge Carter and the exercise of his very different responsibility.

purpose of providing some made up data, those are facts that reflect on the acts and conduct that affect the Pacetta Group property and appear to support the Plaintiffs' thesis.

After all this, the new Land Use Development Code was passed on October 21, 2010. It contains the long awaited PWD option which the Pacetta Group hoped would allow some reasonable use of it's property. There are additional permitted uses in the B-2 zoning classification. They are family owned restaurant, boat sales, boat services, fishing charter boat dockage, sailing equipment, bicycle rentals, boat rentals, chandleries, boat construction and boat repair. However, none of those additional uses offer options that are viable from an investment-backed analysis and are practically unworkable.

Some uses are actually comical when viewed from the standpoint of an investor who had over $20,000,000.00 in the project. The PWD recognized by the Town is a small shadow of the PWD that was originally contemplated and later approved by the Town. The PWD did not modify or relax the existing ROD as indicated. The potential for a mixed use option with any viable economic driver to balance the substantial surrender of property to the public access requirements of the Town has been eliminated. Any PWD would be required to be 60% residential and 40% commercial. In these enactments there has been no retreat from the concern that all of the actions between November 18, 2008, and October 21, 2010, have had a single focus on the Pacetta Group Property and no meaningful impact on any other property

because those with B-2 zoning properties were built out.[10]

In addition, through all the years of discussions and conversations, it was recognized that the ROD would be modified, withdrawn or relaxed in conjunction with a mixed use development under the new LUDC by the implementation of the PWD which was to be an alternative device to allow reasonable negotiation of the final project dimensions.[11] The Plaintiffs argue that the PWD with the ROD in place as well is the PWD "on steroids". The Court is not inclined to borrow that exact characterization but has concluded that the measure of the two enactments together has accomplished the Town's goal and has removed any remaining doubt that existed in late 2008 that the property has no viable economic use. Perhaps a better description would be that the 2010 enactment was the "final nail in the coffin" to make

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[10] The only logical way such a large number of dry slips could be reasonably accommodated would be in an enclosed facility allowing stacks up to 35 feet with adequate room to maneuver a fork lift with an accommodation for 20' to 30' boats which would logically have beams of 6' to 8'. The concept plans seemed to be consistent with the slips assigned to the Pacetta Group from a size standpoint. No square footage suggested by the possible PWD after 2010 could come anywhere near being able to house 213 boats when measured along with the use of an appropriately sized and counter balanced fork lift. While a crumb was thrown by the Town in it's 2010 enactment, it was clear that the vested right could not be rescued from that approach.

[11] The Johnsons were told by the Town's planning official, Pete Grigas, who was very much a hands on planner, that the ROD would go away. By that he apparently meant that the PWD would replace it as to the Pacetta property which was clearly the expectation that had been discussed and communicated to the Pacetta Group throughout most of the years of discussion.

sure the property can not be developed in any recognized rational way, other than as a park, which in turn reduces the value of this property for later governmental acquisition.

Was the conduct of the Town an intentional and planned regulatory taking?

The burden of proof required to establish the claim of equitable estoppel requires proof by clear and convincing evidence. The balance of the issues in this case require proof by a preponderance of the evidence. In this case, there are a series of facts that standing alone could never reach the level of clear and convincing evidence, but when strung together, allows a pattern to emerge which has been suggested by the Plaintiffs. The theme begins with the establishment of a Land Acquisition Advisory Commission on April 17, 2002. The Court has carefully reviewed the minutes of the meetings on 6/5/2002, 6/26/2002, 7/3/2002, 8/7/2002, 2/5/2003, 3/5/2003, 6/4/2003 and 8/11/2003. The minutes articulate an active desire on the part of the Town to acquire land and, in some cases, the committee laments the unavailability of funds to address those perceived needs. The focus then, and from 2004 to 2010, was aimed at acquisition of much of the Pacetta Group property.

There was some testimony that during these meetings there were presentations and discussions as to how the Town might restrict land uses by regulation and avoid the cost associated with official condemnation. Many committee members appear to be common with those officials leading the charge against the Pacetta Group efforts in later years, consistent with the use of regulation as a weapon.

There was one contested fact at trial that stands out brightly. Mr. Ed Jackson, a former planning board member, testified in the strongest terms that the Mayor Goudie told him in no uncertain terms that he need not worry about the need to compensate the Pacetta Group for their loss since they had other ways to get the property. The Court had his testimony transcribed and the exact language is set forth below:

"Mr. Goudie and I were outside in front before the meeting and we had been discussing several items, and I said, well – it had to do with the Pacetta property.

And he made a statement that 'Well, we're going to end up owning that property.'

And I looked at him point blank and I said, This doesn't fall under eminent domain.

He says, 'We have other ways to get this property.'"

Former Mayor Goudie testified at trial and denied that the conversation ever happened. One of them is not telling the truth. The court finds Mr. Jackson more credible. It is in this background that we have the mischievous conduct of Barbara Davis, the citizen lawyer. Initially, she complained about the Johnsons clearing the scrub brush on the first parcel acquired which had to be addressed. Later, she initiated or was behind commotion regarding a small several person cemetery on the property. A distant heir issued a quit claim deed that was filed attempting to dispossess the Johnsons of their fee simple title to the property, which is the definition of a spite claim.

That conduct had no effect. In fact, the Johnsons were quite respectful to the site, cleaned it up and protected it. There was also a suggestion that the quit claim deed was designed to require the creation of a separate tax parcel to defeat the referendum challenge filed before Judge Graham. The trial court and appellate court easily saw through the charade and the Fifth District Court dismissed that basis for the challenge out of hand. Town of Ponce Inlet v. Pacetta LLC, id.

Barbara Davis and her associates ran for office when Mayor Epps resigned to run for County Council. In conjunction therewith, she was the force behind the now illegal citizen referendum that tried to put a prohibition of dry boat storage facilities in the Town Charter. Once elected, she lead the Council in the activities to further restrict the land use by the Pacetta Group. As it turns out, the Town officially engaged in the an illegal effort to essentially spot zone the Pacetta property, which was summarily rejected by Judge Graham and now affirmed by the Fifth District Court of Appeal and the Florida Supreme Court.

During trial, there was a description of the citizen boycott of the Down the Hatch Restaurant with some attribution to Barbara Davis and the other Pacetta Group antagonists. The fact that she made a baseless claim that the spoil on the Pacetta Group property was poisonous was confirmed by the Town building official. There was evidence that suggested that Mrs. Davis may have tried to use improper influence by virtue of her husband's employment with the State Attorney's office to influence the state attorney's evaluation of the alleged violation of the

open meetings laws by the planning board. The evidence is instructive but inconclusive on that point.

What citizens do politically, while not in office or otherwise acting for the Town, is not actionable and is the free exercise of speech. The law of torts exists to address such civil wrongs if they exist. On the other hand, if the evidence suggests that the Town is being used as a vehicle of vengeance or as a mechanism of destruction by it's agents, servants or employees, that is another matter. There was testimony from Mr. Watts about a Town mob and from Jack Sturno and Michael O'Shaughnessy suggesting that the Town had been high-jacked by the conduct described. These observations while seemingly extreme, fit concisely into the Plaintiff's thesis of the case. Mr. Sturno, a councilperson and founder of Lab Corp., testified that the government plan was for an investment group to "take over in bankruptcy" from the plaintiffs. He was an extremely credible witness.

There is testimony that the Town, through it's Land Acquisition Commission, had been schooled in ways to hamper development by regulatory action rather than constitutional acquisition in exchange for just compensation. There was the statement made by Mr. Jackson who indicated that the Mayor, Mr. Goudie, indicated the land could be acquired without payment. Those factors are linked by what clearly looks like an unrelenting effort to keep the Pacetta Group from any resolved outcome of this matter.

We have the endless series of moratoria and prolong delays in finalizing the Comprehensive Land-Use Plan at the state level before DOAH. Add to that a legal strategy of delay that is hard to appreciate on

any theory other than delay for it's own sake. These factors are then coupled with an open hostility fostered by the slate of council candidates insisting on patently illegal acts to get their way against an obviously struggling developer. On top of that, there is the restaurant boycott of Down the Hatch Restaurant although that boycott does not appear to be directly overt government action.

At first blush, even with these indicators, it's hard to believe that a government would act in such a way. However, when you add to these facts all the findings outlined above, it seems much more likely than not that the elimination of all virtual uses on the Pacetta Group property was long planned and has been effectively executed by the Town expecting the practical immunity that would come from a financially troubled developer who could not respond. The preponderance of the evidence points to intentional corporate action by the Town.

When state and city officials employ every means available to restrict the private development of a capital center in order to keep it's acquisition prices low for eminent domain, there is a taking. Board of Commissioners of State Institution v. Tallahassee Bank and Trust Company, 108 So2d 74 (Fla. 1st DCA 1958). Similarly, when the City of Miami resisted zoning changes while at the same time publically announcing it's intention to acquire the property, there is a taking. City of Miami v. Silver, 257 So2d 563 (Fla. 3rd DCA 1972). The Pacetta property had been long targeted for acquisition since 2002 and 2003, and no other than Mayor Goudie confessed to official efforts to acquire or have an announced investment group acquire the property upon the developers

failure. Those are official acts. "Every citizen has a right to expect that he will be dealt with fairly by his government". *Hollywood Beach Hotel C. v. City of Hollywood*, id. That has not happened here.

It should further be noted that the Pacetta Group antagonists are very bright and accomplished people. Barbara Davis is a lawyer and member of the Florida Bar. Dr. Comfort is a graduate of the Naval Academy with a doctoral degree from the Massachusetts Institute of Technology with extensive work experience as an Air Force senior analyst and with private sector experience with Pratt and Whitney, now part of United Technologies.[12] Presumably, Robin Hurd and the others are equally capable. It is unlikely that their conduct was naive or misinformed.

In this court's judgment, it does not matter to the Plaintiffs what the motives of the wrongdoers were. The damage, whatever that is, is done whether the conduct is misinformed and naive or intentional. Clearly the greater weight of the evidence indicates a direct and intentional set of acts and conduct to limit the use and value of the Pacetta Group property so that it could later be acquired by or on behalf of the Town, just as Mayor Goudie reported to Mr. Jackson. The preponderance of the evidence demonstrates that the conduct and actions of the Town violates the U.S.

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[12] Dr. Comfort served on the Planning Commission for 10 months and was a councilman from November of 2005 to November of 2007. In his testimony he insisted he was originally receptive to the Pacetta Group project but most of the evidence received was to the contrary indicating he became a leading antagonist, opposing even clearly legally approved uses of the property.

Constitution, The Florida Constitution and the Bert J. Harris, Jr. Act.

What Property Has Been Taken or Inordinately Burdened?

Evaluation of Unconstitutional Taking

Count I

Subject to an analysis of whether there has been an appropriate pre-suit compliance under Florida Statutes, Section 70.001 of the Bert J. Harris Jr., Act, the next logical question is whether there has been an unconstitutional regulatory taking of some or all of the Pacetta Group's property and whether there has been regulatory action that has inordinately burdened some or all of the Pacetta Group's property.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. Palazzolo v. Rhode Island, 533 U.S. 606 (2001). The purpose behind the takings doctrine is to prevent the government from forcing an individual to bear the burdens that should be carried by the public as a whole. Armstrong v. United Sates, 364 U.S. 40 (1960).

The federal regulatory taking criteria is articulated in the landmark case of Penn Central Transportation C. v City of New York, 438 U.S. 104 (1978) and the case of Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005). They are as follows:

1. The economic impact of the regulation on the claimant;

2. The extent to which the regulation has interfered with distinct investment-back expectations;

3. The character of the governmental action.

In like fashion, the criteria to be considered in a regulatory taking under Florida law are articulated in Graham v. Estuary Properties, Inc. 339 So2d 1374 (Fla. 1981) as follows:

1. Whether there is a physical invasion of the property.

2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.

3. Whether the regulation confers a public benefit (taking) or prevents a public harm (non-compensable).

4. Whether the regulation promotes the health, safety, welfare, or morals of the public.

5. Whether the regulation is arbitrarily and capriciously applied.

6. The extent to which the regulation curtails investment-backed expectations.

In addition to the constitutional standard, Florida Statutes, Section 163.3194(4)(a), provides that "private property shall not be taken without due process of law and payment of just compensation". For there to be an unconstitutional taking, the plaintiffs must establish that the government action was confiscatory and that it deprived the owner of all beneficial use of the land. Bailey v City of St.

Augustine, 538 So2d 50 (Fla. 5th DCA 1989) and Florida Department of Environmental Protection v. Burgess, 667 So2d 267 (Fla. 1st DCA 1995). The taking occurs when the government, by regulation, denies the owner of all economically beneficial or productive use of the land. Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 640 So2d 54 (Fla. 1994) and CNL Resort Hotel, L.P. v. City of Doral, 991 So2d 417 (Fla. 3rd DCA 2008). Usually a temporary moratorium on development does not amount to a categorical taking if it does not result in the deprivation of all the value or use of the property. Bradford Phipps Limited Partnership v. Leon County, 804 So2d 464 (Fla. 1st DCA 2001).

The thread of the case law for an unconstitutional regulatory taking seems to require, in essence, a total taking of the property. Lucas v. South Carolina Coastal Council, 505 U. S. 1003 (1992). The regulation in 2008 and 2010, as well as the apparently planned delay by serial moratoria, all detailed above, have clearly damaged any use or value of most of the property. These factors together with statements by Councilman Gary Comfort to the effect that the Pacetta Group was not going to get a development order until "hell froze over" were reported by Walter Gilfedder. This court finds him credible. As stated above, Mayor Goudie was executing a plan while in office to get the property away from Mr. and Mrs. Johnson, according to Mr. Jackson who this court also finds credible. Barbara Davis, a councilwoman after November of 2008, was reported by Jack Sturno to have said she was going to have an ice cream shop in the new development after they took over from the Pacetta Group. The pattern is clear.

The overwhelming evidence indicates that by law and regulation as well as by acts and conduct, the Town was determined to and did neuter any meaningful development of the property. The Plaintiffs called a land development expert by the name of Paul Momberger, who works for Zev Cohen and Associates. He testified that based on the current state of affairs, he could not predict or design any feasible development on the Pacetta Group's property with either straight zoning or the use of the PWD. He reports that the new tree ordinance is so severely restrictive that almost nothing productive can be designed and developed. That ordinance would only apply to the Pacetta property. Another expert, Gary Dickens of Community Design Associates, concurred by concluding that all the land regulations enacted after November 2008, were clearly to prohibit reasonable use by the Pacetta Group. He testified that the ROD, new tree ordinance and restrictive design requirement burdened only the Pacetta property. In his opinion the only viable use for the property was a park.

Experts Lindwood Gilbert, Paul Roper and Dr. Hank Fishkind testified as to the economics of the claimed loss to support the mechanics of the taking and inordinate burden and were very credible. The evidence clearly indicates that there has been a taking.

The question then becomes can any of the portions of the property be removed from that conclusion because there remains some beneficial use of the land. There are ten parcels under consideration. Only two properties are currently productive. Those involve parcels eight and nine which is the Down the

Hatch Restaurant, including the attached marina and accompanying parking lot dedicated to the restaurant. Mrs. Johnson indicated that the restaurant has grossed three million in sales, despite the boycott, although the record fails to disclose whether and to what extent the restaurant is profitable.

In addition, the Mar-Tim, Inc. property, consisting of parcels five and six is now a dry boat storage facility where repairs and service are provided. There is a good size travel lift to move the vessels to and from the water across a public street based on a 1991 franchise agreement. The evidence indicated that that property was marginally productive, perhaps breaking even. Despite some doubt as to the current productivity there is no question that the new regulation has not grandfathered the current uses which can be a taking. Lee County v. Sunbelt Equities, II, Limited Partnership, 619 So2d 996 (Fla. 2nd DCA 1993) points out that "[land use codes] cannot be so intrusive as to deprive the landowner of reasonable economic use of the property, nor should previously permissible or 'grandfathered' uses be incautiously rescinded". Nonetheless there is some value and productivity to these parcels.

Parcels two and seven are residential and each is outside the ROD enacted in 2004. With some reluctance the court concludes that each presumably has value for purely residential construction, even in the hostile environment described.

This court therefore concludes that the unconstitutional regulatory taking applies only to Parcels one, three, four and ten. Said another way, the

court finds that the appropriate plaintiffs have prevailed on the Pacetta LLC property, the Old Florida Club property and the Docksider property.

Evaluation of Burt J. Harris, Jr., Act claim involving property "inordinately burdened"

Count IV

The next logical step is to analysis whether some or all of the Pacetta Group parcels have been inordinately burdened. The act provides:

"Section 70.001(3) (b) states:

The term "existing use" means an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, non-speculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

The vested right established by the exercise of the concept of equitable estoppel has established a base line as a result of the acts and conduct of the Town and it's agents, servants and employees as noted extensively above. The next question under the act is whether some or all of the property has been "inordinately burdened". Section 70.001(3)(e) provides:

"The terms 'inordinate burden' or 'inordinately burdened' mean that an action of one or more

governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property, or 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.

The court, for all the reasons previously articulated, has concluded that the property has been inordinately burdened in that the now permitted uses are a mere small shadow of those that would have been available based on the plaintiffs' established vested right. Even though delay by moratoria might not inordinately burden the property, the fact that the Town has wrongfully used the serial moratoria and delay as a tool to stop development by Pacetta Group and impede all use of the property, coupled with the announcement that the Town would not approve development, under any circumstance, for in excess of 30 months, clearly has the net effect of adding to the inordinate burden.

The overwhelming evidence clearly shows that the plaintiffs have shown that all the plaintiffs' property has been inordinately burdened. The exceptions recognized for the unconstitutional taking have no application because each and every parcel has been inordinately burdened and the aggregate of all the parcels, the Pacetta property, has been inordinately burdened.

Having found an inordinate burden have the Plaintiffs met the pre-suit requirements of the Bert J. Harris, Jr. Act?

Section 70.001 (4)(a) of the act requires pre-suit notice which requires the property owner, within 150 days of filing suit, to present the claim in writing. The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property. Thereafter, the government is faced with a number of reporting and notification requirements under subsection (4)(b). Subsection (4)(c) then requires the government to make a written settlement offer dealing with one or more of eleven conditions articulated in the act.

The claim was submitted by way of a letter from attorney Alan Watts, representing the Pacetta Group to Mayor Tony Goudie dated November 4, 2009. The letter was quite detailed with attached exhibits. Exhibit A was a list of 10 parcel numbers and a listing of which plaintiff owned which parcel. Exhibit B was the letter from the Town manager dated October 31, 2007 assigning the wet and dry slips. Exhibit C was the appraisal report from Lindwood Gilbert then of Urban Realty Solutions. By statute a response was required from the Town within 150 days. Section 70.001(4)(c) A response was emailed from Michael Roper, the town's attorney, to Alan Watts and Peter Heebner, the Pacetta Group's trial attorney. Of the eleven options, the town selected option eleven which essentially dismissed the claim out of hand.

On March 10, 2011, Mr. Heebner sent a letter to Clifford Sheppard, the town's trial attorney,

notifying the Town of a continuing violation as well as the fact that he thought the ripeness issue had been waived as a result of the Town's obligations under subsections (4)(a) and (4)(b) of the act. Mr. Roper acknowledged the letter and again dismissed the claim out of hand in his letter to Mr. Heebner dated April 1, 2011.

The court again returns to the language of Bloomingdale Development, LLC v. Hernando County, id., which provides:

"[The] Bert J. Harris, Jr. Act. On May 18, 1995, Governor Chiles signed the Bert J. Harris, Jr. Private Property Rights Act into law. Fla. Stat. Chapter 70 (1995). The Bert J. Harris Act creates a new cause of action to provide compensation to a landowner when the actions of a governmental entity impose an "inordinate burden" on the owner's property, without rising to the level of a regulatory taking. *See* Sections 70.001(1),(2) and (9), Florida Statutes (2006). The Bert J. Harris Act provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property. *See* Section 70.001(1), Florida Statutes. When a specific action of a government 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. *See* Section 70.001(2), Florida Statutes. (Emphasis supplied)

The Bert J. Harris Act provides that an owner must send the appropriate governmental entity a notice of claim accompanied by a valid, bona fide appraisal in support of its damages no less than 150 days prior to filing an action against a governmental entity. *See* Section 70.001(4)(a), Florida Statutes. Under the Act, the governmental entity must respond with a written settlement offer within 150 days. *See* Section 70.001(4)(c), Florida Statutes. Additionally, unless the settlement offer is accepted by the property owner, the governmental entity is required to issue a ripeness decision identifying the allowable uses to which the subject property may be put. *See* Section 70.001(5)(a), Florida Statutes. "The failure of the governmental entity to issue a ripeness decision during the applicable 150 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 the section, notwithstanding the availability of other administrative remedies." *Id.*

The Act directs the circuit court to 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." Section 70.001(6)(a), Florida Statutes. Once the court has made a determination as to the landowner's existing use or vested right to specific use of the property and whether such use has been inordinately burdened by the law, rule, regulation, or

ordinance of the governmental entity, then the court is directed to impanel a jury to determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property. *See* Section 70.001(6)(b), Florida Statutes."

In this case, it appears that any defense as to ripeness has been waived. Nevertheless ripeness requires that before a taking can be declared the government must have reached a final decision regarding the application of the regulations to the property. In 2008, the Town acted finally in regard to one set of regulations and then again in 2010. Both sets of decisions were final as to the Pacetta property and entitled the plaintiffs to proceed as to both the taking and inordinate burden claims. There is no doubt that by 2010, the government had made it clear by legislation, acts and conduct, all recited above, that by a reasonable degree of certainty, that the property could not be used as vested and the matter was legally ripe for a challenge. McCole v. City of Marathon, 36 So3d 750 (Fla. 3rd DCA 2010).

The detail above is resubmitted to show that the Bert J. Harris Act was designed to be remedial and create an environment to avoid exactly what the court now has before it. The Town, with excellent lawyers who know the law, basically told Mr. and Mrs. Johnson to "pound sand". That approach presents even more evidence of the Town using it's resources to further delay and obstruct the Pacetta Group. To demonstrate audaciousness the town now claims that the appraisal wasn't complete and therefore the claim should fail. That feature was apparently never mentioned before the litigation within the 150 days.

The statute requires that information be shared to allow a pre-suit warning of an impending claim. It allows a good faith time to respond and demands, by it's language, a serious response. In this case everyone knew all about the property. They had been studying the various alternatives along with boat slips, tax abatement, development options, the town's need for public spaces and a Town center. It appears the Town knew a great deal about this property. It was assembled by the Pacetta Group at the suggestion of the Town and was on the Town's tax rolls which lists it's likely value. They knew all about the two other like properties of Inlet Harbor and Lighthouse Boatyard. The part they didn't know was the difference between the project as established, based on the plaintiffs' theory, of the vested right, and the existing value. The Town was advised of that by the bona fide appraisal. It seems a little far fetched to now suggest that if the appraisal called for another million dollars, the outcome would have been different.

The statute prescribes the pre-suit conditions precedent. The evidence shows the plaintiffs have complied with those conditions prior to filing suit. The statute does not limit or constrain, in either direction, what can and cannot be submitted as evidence at trial. The court therefore finds that the plaintiffs have met the pre-suit requirements of the Bert J. Harris Act regarding both the claim letters.

Disposition of Counts II and III

The Plaintiffs have brought claims in Counts II and III for damages. Count II seeks damages for denial of substantive due process and equal protection. Count III seeks damages for denial of

procedural due process. These appear to be ancillary claims in the sense that virtually all the attention in the case was focused on Counts I and IV.[13] Nonetheless the liability portion of those claims is before the court. The claims advance different theories in the pleadings but ground the claims on identical allegations which are:

1. By the Town creating an ROD impacting only the Pacetta property.

2. By the town colluding with citizen groups in essentially creating an illegal Charter amendment.

3. By employing the zoning in progress and serial moratoria to deprive the Pacetta Group of it's investment backed expectations.

4. By the Town's series of illegal acts including the illegal referendum and amendment of the Town Charter to interfere with the Pacetta Group and other conduct involving only the Pacetta property.

5. By refusing to accept applications for building projects since 2004.

Claim one involves the ROD in existence since 2004, well before the Pacetta Group purchased any of the property. If the Town had merely said we have an ROD which substantially limits use of the covered

[13] The Plaintiffs may be required to make an election of remedies as between Counts I and IV at some time in this action since the Plaintiffs' remedies may constitute a duplication of damages. The Plaintiffs concede that to the extent there is an unconstitutional taking the court need not rule on Counts II and III. Therefore the disposition of Counts II and III apply only to those properties found not to have been taken under the Count I analysis.

property and no changes will be made, the Pacetta Group would likely be without remedy as to that issue. That act, standing alone, predated this dispute and cannot, on it's own, support the Plaintiffs' claim.

Claim two suggests legitimate government activity which is constitutionally protected is somehow wrong. This court has found that the Town and it's officers, servants and agents have conducted themselves wrongfully and those findings are adopted. Citizens can boycott, protest, sign petitions and express themselves by howling at the moon and at their elected officials. It is part of our cherished constitutional liberty. It is the elected officials, who by virtue of their oaths, are supposed to be the adults in the room. Not only did that not happen here but the government on it's own became lawless when it openly attempted to take by regulation the Pacetta Group property. It appears that they can and did do that. The only real dispute is does the Town have to pay for what it did and this court has found that it does, if the jury finds damages are due. Claim two as stated, however, is not well supported and can not stand alone.

The assertions in Claims three and four are sound and have been clearly established with the exception of the passage of the referendum. That act, without more, is not illegal. It was the act of the council, elevating the language into the charter with the recommendation of the Town attorneys that was the wrongful act that Judge Graham corrected. Usurping the Planning Board's power was not in and of itself illegal, but as the court has earlier found, was an indicia of a pattern of activity to destroy the value of the Pacetta property so that it could be acquired by the Town.

Claim five has been dealt with in the body of this opinion. On contested facts a single application for plan review was delivered to the appropriate authority and refused. The plans are extensive and are in evidence. They are complete, were obviously expensive to prepare in such detail, and were wrongfully rejected, partly because this court has found that the serial moratoria were a sham. However, the claim implies a greater degree of protracted conduct. The court found that there was a single submission by the general contractor and nothing more.

Based on the foregoing, as well as the findings and analysis in the body of this opinion, the court finds for the plaintiffs on Claims 2, 4 and 5. The court finds for the defendant on Claims 1 and 3. In Pacetta group's post-trial submission the plaintiffs concede these counts will not apply to the parcels for which an unconstitutional taking has been found and that concession is accepted so that these findings so apply. The damages, if any, will be determined by a jury upon appropriate instruction.

What remains to be decided in this case?

The court is the fact finder for the question of whether there has been an unconstitutional taking and whether there has been conduct that unlawfully inordinately burdens property under the Bert J. Harris, Jr. Act**.** Once decided, a jury is impaneled to decide the damages, if any, that the Plaintiffs are entitled to recover.[14]

---

[14] The court, in the body of this opinion, has disposed of the affirmative defenses raised by the Defendant in it's answer.

CONCLUSION

In summary, while the establishment of a vested interest against a municipality is very constrained and limited, such a right, upon proper supporting facts, can be considered and there does not appear to be a legal prohibition against such an analysis. Based on the analysis found in the body of this opinion, the court has found competent, substantial evidence supporting facts to establish, by clear and convincing evidence, a vested right in favor of the plaintiffs which has been unconstitutionally taken from the plaintiffs in violation of both the federal and state constitutions. In addition, the Pacetta Group property has been inordinately burdened by the Town's conduct in violation of the Bert J. Harris, Jr. Act.

Therefore, the court finds for the plaintiffs in Count I as to parcels 1, 3, 4 and 10. The court finds for the Plaintiffs on Count IV as to parcels 1 through 10. The court also finds in favor of the plaintiffs on Counts

---

Defenses 1 through 4 are not affirmative defenses and are denied. The Fifth Affirmative Defense claiming the statute of limitations is without merit. The taking occurred after the vested right had seasoned in early to mid 2008 and the claim was filed within four years. City of Pompano v. Yardam, 641 So2d 1377 (Fla. 4th DCA 1994). Affirmative Defense 6 claiming failure to comply with Harris Act pre-suit is denied on the grounds stated herein. Affirmative Defense 7 is denied based on the court's finding that this is not a facial claim. The Eighth Affirmative Defense is without merit because it is not an affirmative Defense but merely a denial and based on the factual findings made in the body of this opinion. The Ninth Affirmative defense is unavailable as having been waived or based on the court's specific findings herein. Affirmative Defense 10 is denied as inappropriate and based on direct findings by the court. Affirmative Defense 11 is denied as being without merit.

II and III as stated above. The court finds for the defendant in Count IV as to parcels 2, 5, 6, 7, 8 and 9.

This court specifically reserves jurisdiction to have a jury determine the pecuniary damages due the plaintiffs, if any, as a result of these findings.

The court reserves jurisdiction to assess and impose attorneys' fees and costs as appropriate.

The jury trial will be set for early fall by separate order.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this 20th day of April, 2012.

_____

WILLIAM A. PARSONS,
CIRCUIT JUDGE

Copy to:

Noah C. McKinnon, Jr., Esquire
595 W. Granada Blvd., Suite A
Ormond Beach, Florida 32174

Clifford B. Shepard, Esquire
2300 Maitland Circle Parkway
Suite 100
Maitland, Florida 32751

Peter B. Heebner, Esquire
John Upchurch, Esquire
523 North Halifax Avenue
Daytona Beach, Florida 32118

Appendix

1. Map of the Town of Ponce Inlet

2. Summary of Legislative Action by the Town of Ponce Inlet with evidence numbers prepared by Plaintiffs

3. Map drawn from power point presentation made by defendant's expert, Tracy Crowe, which corresponds to Defendant's Exhibit 35

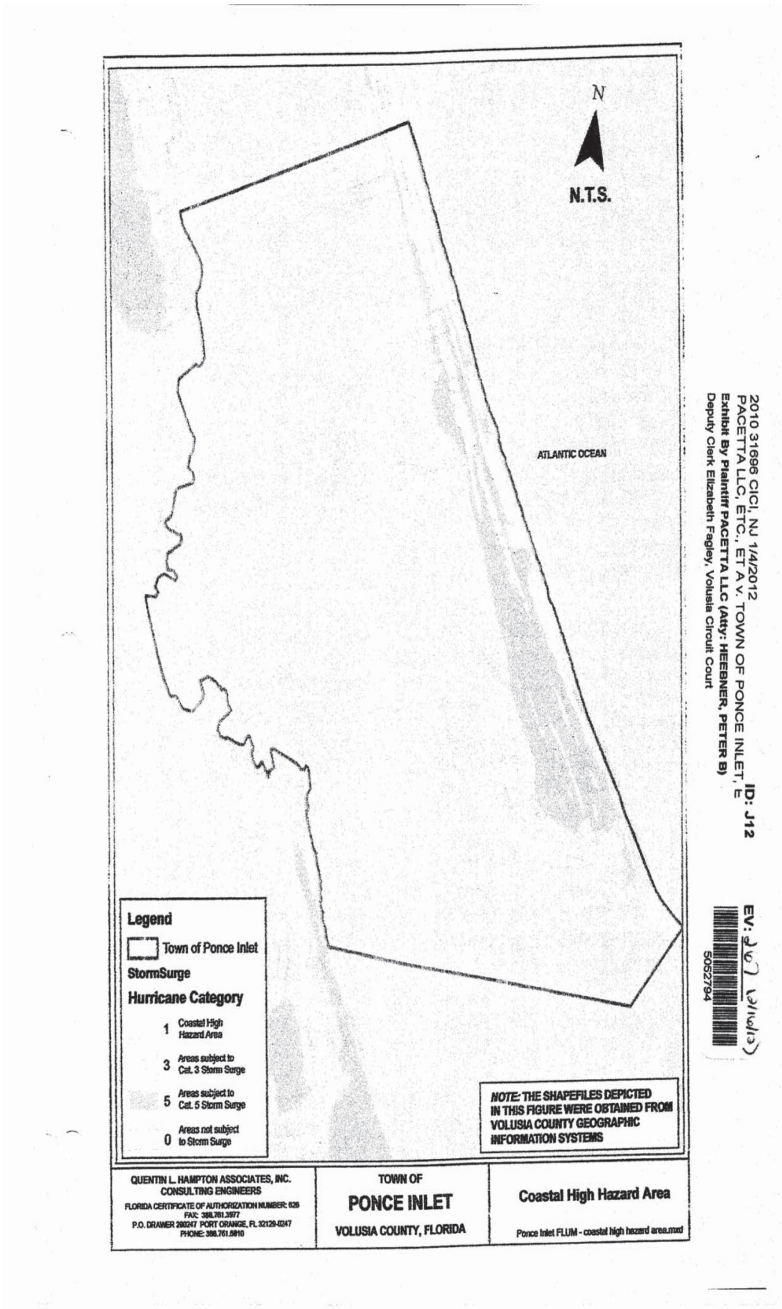
4. Ownership Map with dates of purchase (Plaintiffs' Exhibit 236)

5. Ownership Map with purchase dates and zoning designations (Plaintiffs; Exhibit 61)

6. Riverfront Overlay District Map (Plaintiffs' Exhibit 262)

7. Villages of Ponce Park Conceptual Site Plan (Plaintiffs' Exhibit 51)

8. Villages of Ponce Park earlier Conceptual Site Plan


N
N.T.S.
ATLANTIC OCEAN
Legend
Town of Ponce Inlet
StormSurge
Hurricane Category
1 Coastal High Hazard Area
3 Areas subject to Cat. 3 Storm Surge
5 Areas subject to Cat. 5 Storm Surge
0 Areas not subject to Storm Surge
NOTE: THE SHAPEFILES DEPICTED IN THIS FIGURE WERE OBTAINED FROM VOLUSIA COUNTY GEOGRAPHIC INFORMATION SYSTEMS
QUENTIN L. HAMPTON ASSOCIATES, INC.
CONSULTING ENGINEERS
FLORIDA CERTIFICATE OF AUTHORIZATION NUMBER: 626
FAX: 386.761.3977
P.O. DRAWER 290247 PORT ORANGE, FL 32129-0247
PHONE: 386.761.5910
TOWN OF
PONCE INLET
VOLUSIA COUNTY, FLORIDA
Coastal High Hazard Area
Ponce Inlet FLUM - coastal high hazard area.mxd
2010 31696 CICI, NJ 1/4/2012
PACETTA LLC, ETC., ET A v. TOWN OF PONCE INLET, E
ID: J12
Exhibit By Plaintiff PACETTA LLC (Atty: HEEBNER, PIETER B)
Deputy Clerk Elizabeth Fagley, Volusia Circuit Court
EV: (illegible)
5452794

Legislative Action by the Town of Ponce Inlet

2003 Comp Plan before amendments (Evid 208; PI 37)

4-9-03 Ord 2002-35 (Comp Plan Amend) (Evid 1;PI 43)

1-7-04 Ord 2003-16 (ROD) (Evid 3; PI 5O)

1-7-04 Ord 2003-17 (B-2 Regs) (PI 52)

5-19-04 Ord 2004-07 (B-2) (Evid 4; PI 57)

7-21-04 Ord 2004-16 (Amend LUDC/Hurd) (Evid 9; PI 62)

7-21-04 Ord 2004-17 (Amend Comp Plan/LUDC/ Fornami) (Evid 10; PI 63)

3-23-05 Res. 2005-10 (Adopt § 342.07, Fla. Stat., public access) (Evid 16, PI 69)

10-19-05 Res. 2005-23 (approve Phase II MPP Boat Facility siting) (Evid 29; PI 85)

7-19-06 Res. 2006-14 (slip aggregation method) (Evid 56; PI 111)

1-3-07 Ord 2007-01(tax deferral working waterfront; imp § 197.303, Fla. Stat.) (Evid 77; PI 124)

1-17-07 Res. 2006-25 (zoning in progress) (Evid 78; PI 125)

4-18-07 Ord 2007-11(allocating off street parking) (Evid 91; PI 141)

10-17-07 Ord 2007-26 (moratorium) (Evid 121; PI 180)

10-17-07 Ord 2007-28 (slip allocation) (Evid 122; PI 181)

1-30-08 Ord 2007-34 (creates super majority) (Evid 158; PI 186)

3-26-08 Amend for 2008 - Comp Plan 2007-15 [2008-01] to DCA (Evid 275; PI 326)

6-18-08 Res. 2008-08 (Adopt EAR) (Evid 166; PI 198)

6-26-08 Letter to DCA transmitting EAR (Evid 169; PI 199)

-14821-

6-30-08 DCA recv'd and accepted EAR (Evid170; PI 203)

7-16-08 Ord 2008-08 (Charter Amend) (Evid 171; PI 204)

10-15-08 Ord 2008-12 (moratorium ext) (Evid 125; PI 221)

11-18-08 Ord 2008-01(Formerly 2007-15; elevate ROD into Comp Plan) (Evid 190; PI 229)

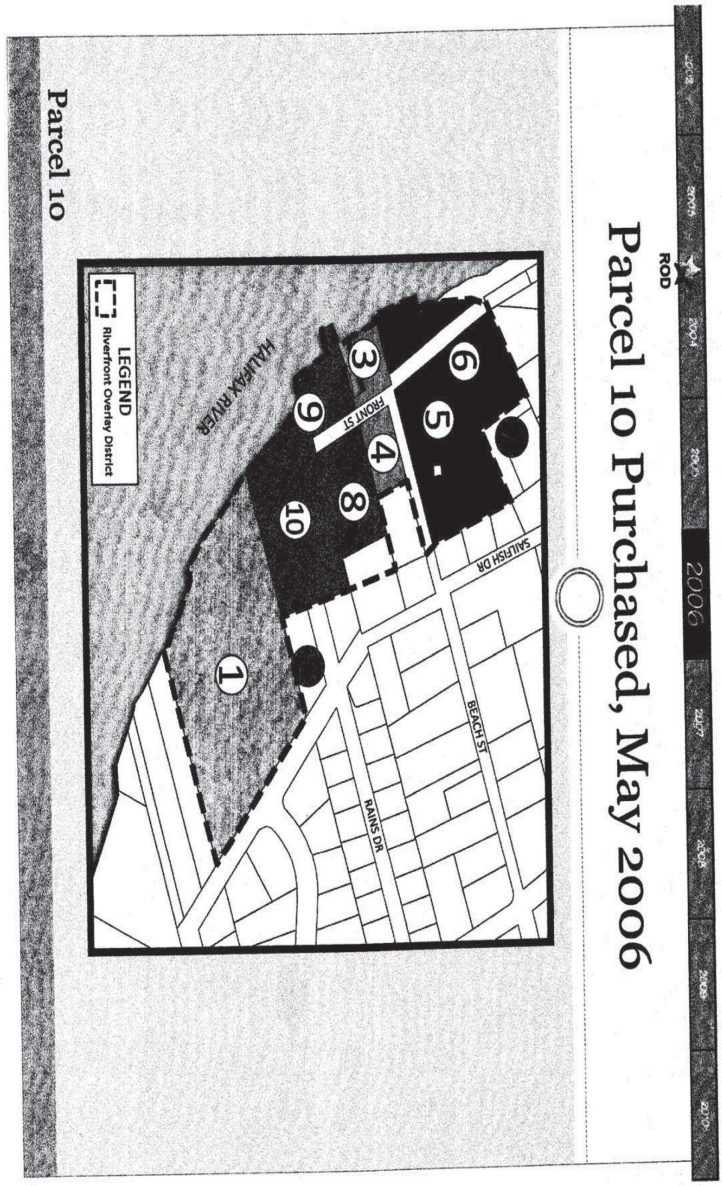
10-26-09 Ord 2009-13 (moratorium) (Evid 131; PI 248)

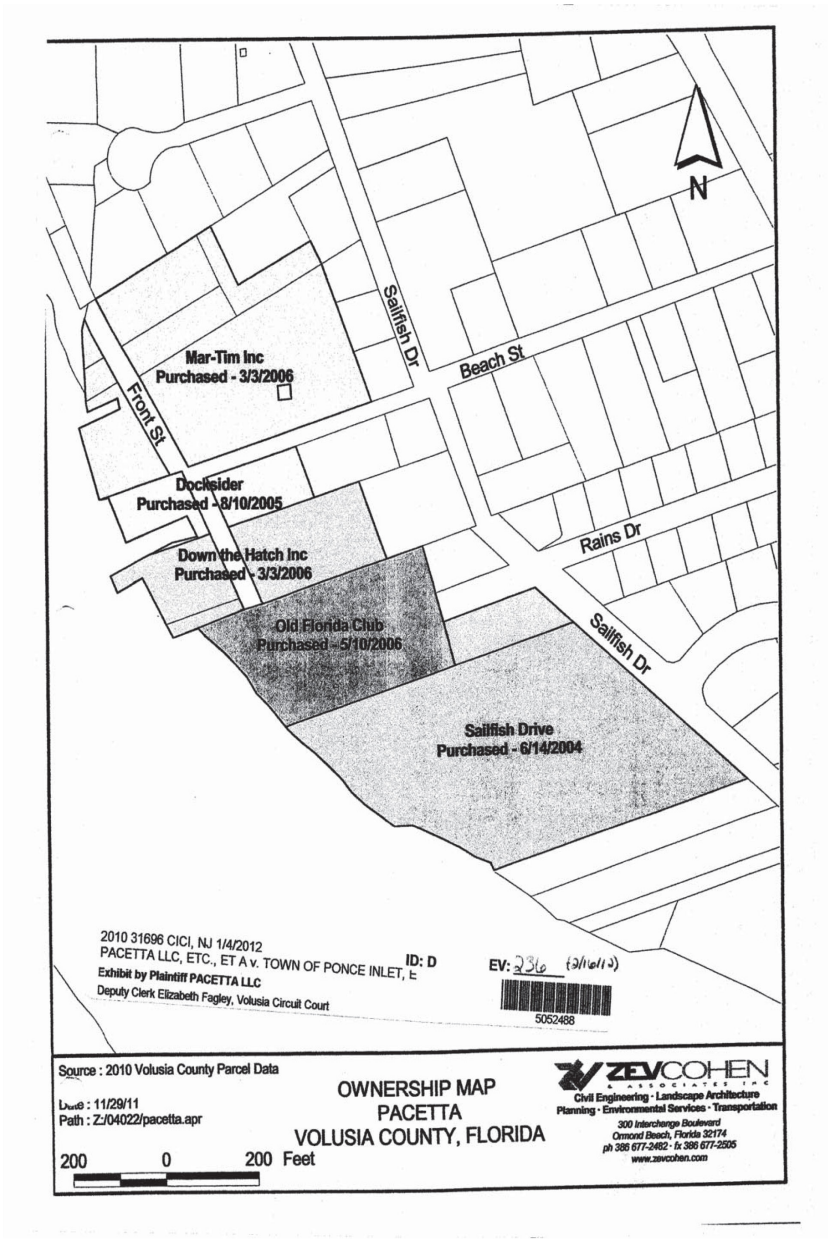
10-21-10 Ord 2010-09 (2010 Comp Plan) (Evid 134; PI 267)

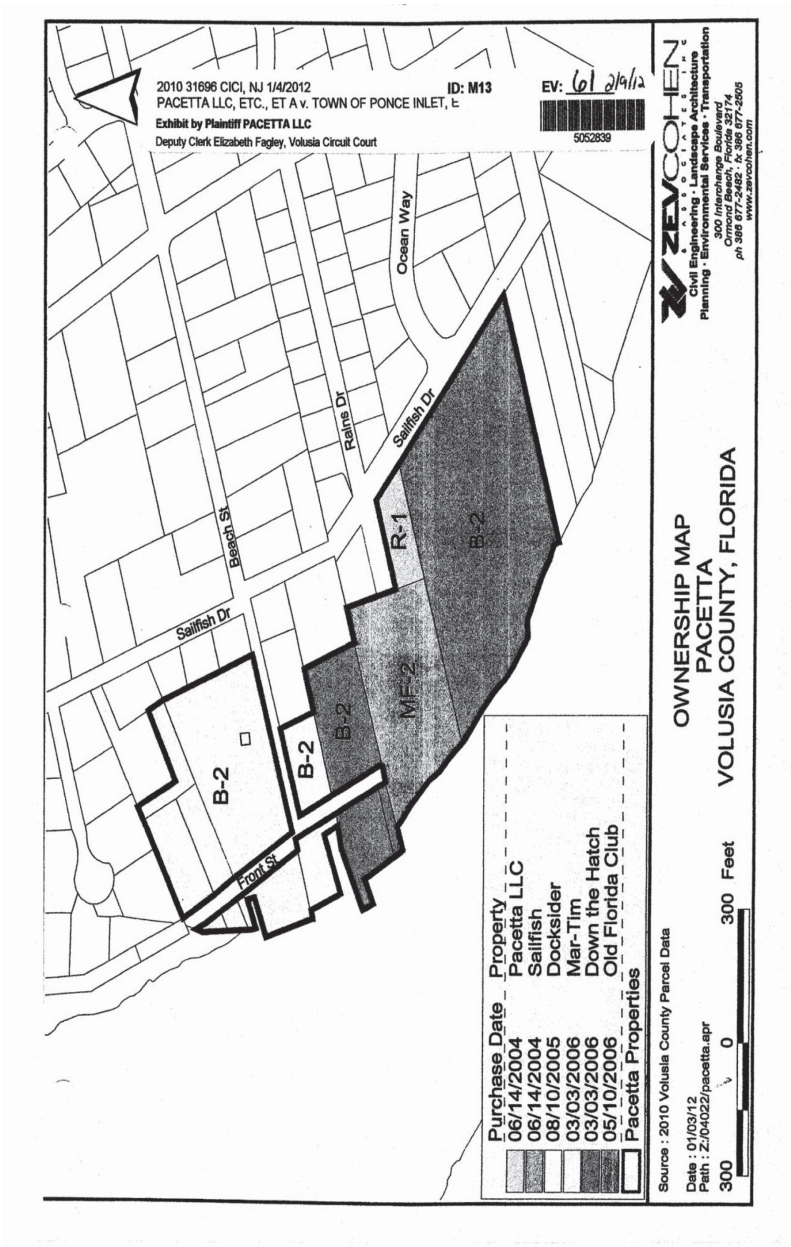
10-21-10 Ord 2010-15 (LUDC additions) (Evid 135; PI 268)

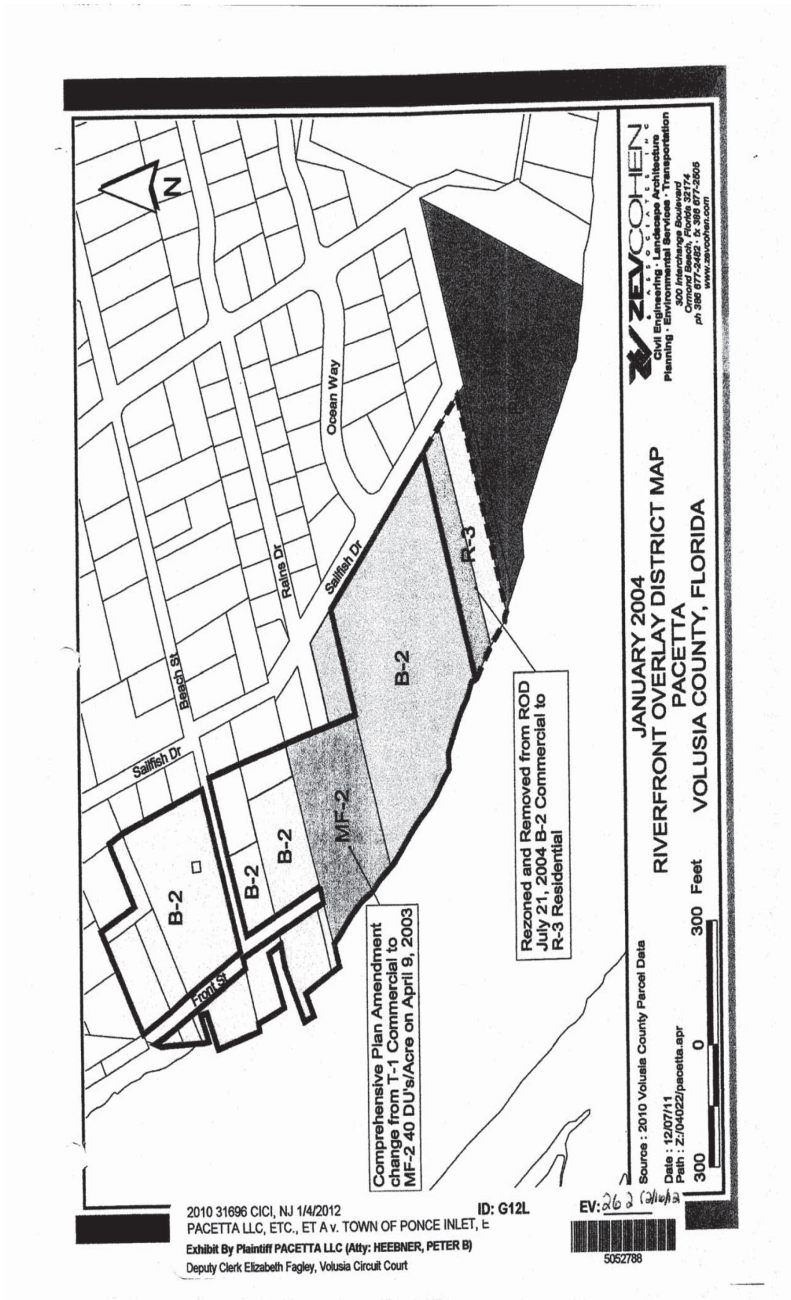
3-10-11 Continuing BJH Claim letter (Evid 136;PI 278)

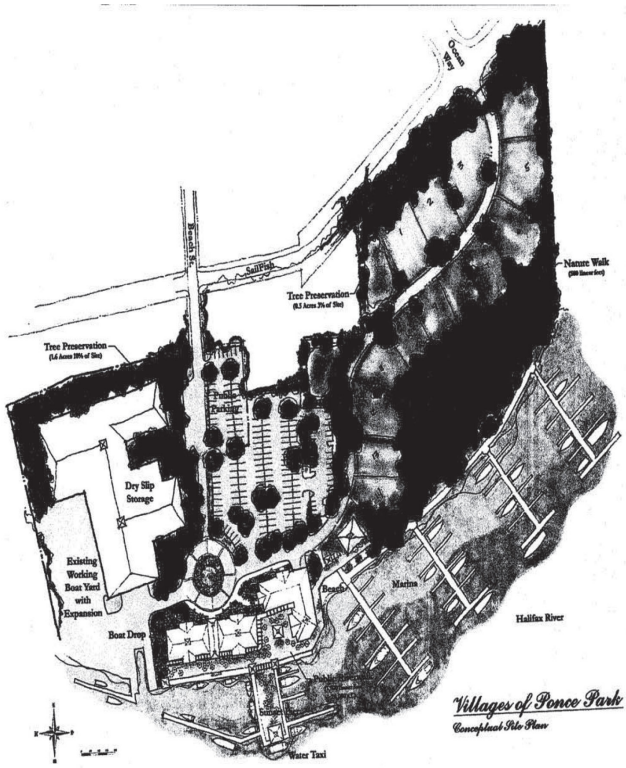
-14822-

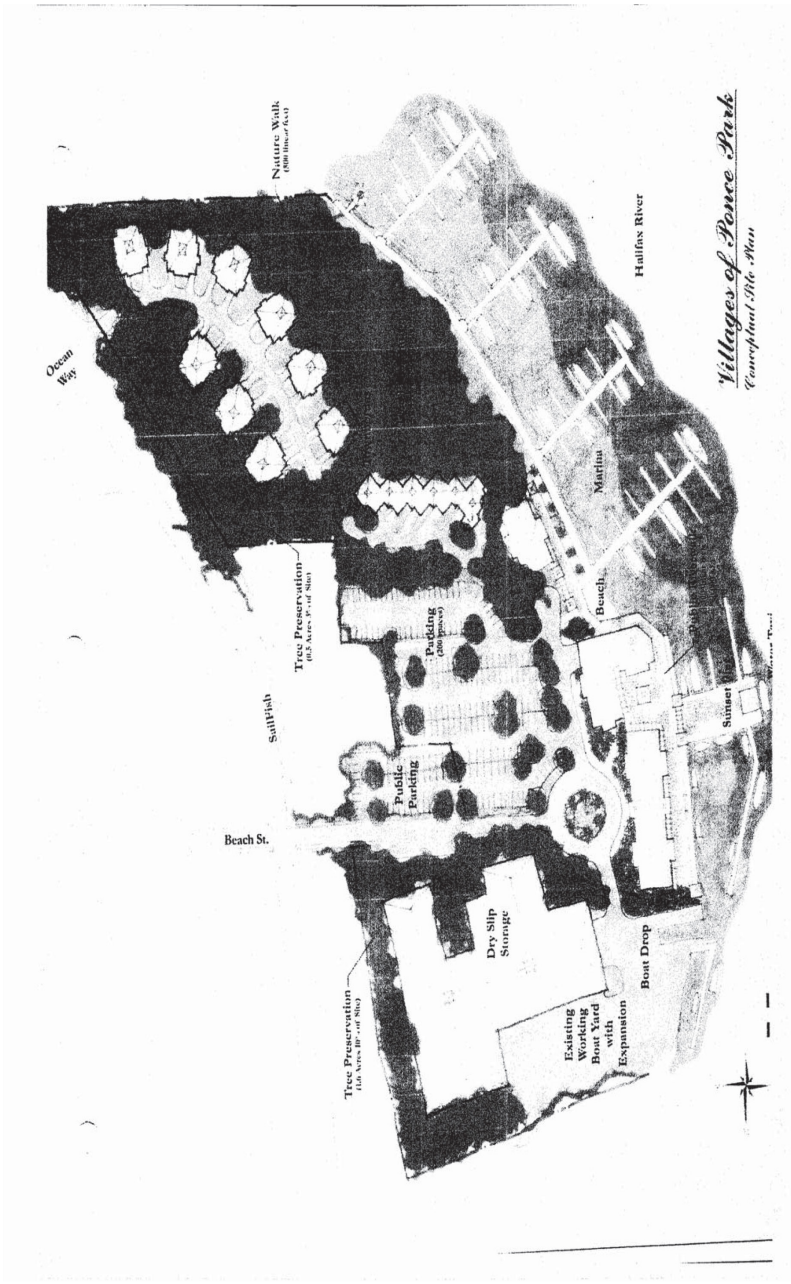

2003
2004
2005
2006
2007
2008
2009
2010
ROD
Parcel 10 Purchased, May 2006
HALIFAX RIVER
FRONT ST
SAILFISH DR
BEACH ST
RAINS DR
LEGEND
Riverfront Overlay District
1
3
4
5
6
8
9
10
Parcel 10


N
Sailfish Dr
Beach St
Front St
Mar-Tim Inc
Purchased - 3/3/2006
Docksider
Purchased - 8/10/2005
Down the Hatch Inc
Purchased - 3/3/2006
Old Florida Club
Purchased - 5/10/2006
Rains Dr
Sailfish Dr
Sailfish Drive
Purchased - 6/14/2004
2010 31696 CICI, NJ 1/4/2012
PACETTA LLC, ETC., ET A v. TOWN OF PONCE INLET, E
ID: D
EV: 236 (3/16/12)
Exhibit by Plaintiff PACETTA LLC
Deputy Clerk Elizabeth Fagley, Volusia Circuit Court
5052488
Source : 2010 Volusia County Parcel Data
Date : 11/29/11
Path : Z:/04022/pacetta.apr
OWNERSHIP MAP
PACETTA
VOLUSIA COUNTY, FLORIDA
200 0 200 Feet
ZEVCOHEN & ASSOCIATES INC
Civil Engineering · Landscape Architecture
Planning · Environmental Services · Transportation
300 Interchange Boulevard
Ormond Beach, Florida 32174
ph 386 677-2482 · fx 386 677-2505
www.zevcohen.com


2010 31696 CICI, NJ 1/4/2012
ID: M13
PACETTA LLC, ETC., ET A v. TOWN OF PONCE INLET, E
Exhibit by Plaintiff PACETTA LLC
Deputy Clerk Elizabeth Fagley, Volusia Circuit Court
EV: 61 2/9/12
5052839
Ocean Way
Sailfish Dr
Raine Dr
Beach St
Sailfish Dr
Front St
B-2
B-2
B-2
MF-2
R-1
B-2
Purchase Date
Property
06/14/2004
Pacetta LLC
06/14/2004
Sailfish
08/10/2005
Docksider
03/03/2006
Mar-Tim
03/03/2006
Down the Hatch
05/10/2006
Old Florida Club
Pacetta Properties
Source : 2010 Volusia County Parcel Data
Date : 01/03/12
Path : Z:/04022/pacetta.apr
300
0
300 Feet
OWNERSHIP MAP
PACETTA
VOLUSIA COUNTY, FLORIDA
ZEVCOHEN
Civil Engineering • Landscape • Infrastructure
Planning • Environmental Services • Transportation
300 Interchange Boulevard
Ormond Beach, Florida 32174
ph 386 677-2482 · fx 386 677-2806
www.zevcohen.com


N
Ocean Way
Raine Dr
Sailfish Dr
Beach St
Sailfish Dr
Front St
B-2
B-2
B-2
MF-2
B-2
R-3
Comprehensive Plan Amendment change from T-1 Commercial to MF-2 40 DU's/Acre on April 9, 2003
Rezoned and Removed from ROD July 21, 2004 B-2 Commercial to R-3 Residential
JANUARY 2004
RIVERFRONT OVERLAY DISTRICT MAP
PACETTA
VOLUSIA COUNTY, FLORIDA
ZEVCOHEN ASSOCIATES, INC.
Civil Engineering - Landscape Architecture
Planning - Environmental Services - Transportation
Source : 2010 Volusia County Parcel Data
Date : 12/07/11
Path : Z:/04022/pacetta.apr
300 0 300 Feet
2010 31696 CICI, NJ 1/4/2012
PACETTA LLC, ETC., ET A v. TOWN OF PONCE INLET, E
Exhibit By Plaintiff PACETTA LLC (Atty: HEEBNER, PETER B)
Deputy Clerk Elizabeth Fagley, Volusia Circuit Court
ID: G12L
EV: 26
5052788




Villages of Ponce Park
Conceptual Site Plan
Ocean Way
Nature Walk
Halifax River
Marina
Beach
Sunset
Tree Preservation
Parking
Public Parking
Sailfish
Beach St.
Dry Slip Storage
Existing Working Boat Yard with Expansion
Boat Drop
Tree Preservation

2013 WL 8114486 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Seventh Judicial Circuit
Volusia County

PACETTA LLC, Etc., et al, Plaintiff,

v.

TOWN OF PONCE INLET, Etc., Defendant,

v.

Branch Banking & Trust Company, Third-Party Defendant.

No. 2010 31696 CICI.
December 2, 2013.

***Amended* Order Regarding Matters Heard by the Court on November 7, 2013**

Noah C Mckinnon Jr, 595 W Granada Blvd, Suite A, Ormond Beach FL 32174.

Clifford Shepard, 2300 Maitland Circle, Suite 100, Maitland, FL 32751.

Peter B Heebner, 523 N Halifax Ave, Daytona Beach FL 32118.

Elliot Scherker, 333 Se 2nd Ave., Miami, FL 33131.

Thomas P Wert, 420 S Orange Ave 7th FL, Orlando FL 32801.

William A. Parsons, Circuit Judge.

*1 DIVISION 32

THIS CAUSE came before the court upon the Motion to Comply with Mandate and the Defendant's Motion for Reconsideration of Order Partially Finding in Favor of the Plaintiffs, Pacetta LLC, Down the Hatch, Inc., and Mar- Tim, Inc., and Against the Town of Ponce Inlet on the Issues of Liability and Reserving for Jury Trial the Appropriate Determination of any Sums Due as a Result Thereof and for Entry of Final Judgment on Counts, I, II and III of the Plaintiffs' Amended Complaint in Accordance with the Fifth District Court of Appeal's Decision and Mandate, both filed by the Defendant, The Town of Ponce Inlet. In addition, the matter was set for a Case Management hearing by the Plaintiffs as to further activity in the case. The court has considered said motions, has heard the argument of counsel, has reviewed the papers and case authorities submitted by the attorneys for the parties, has reviewed the original decision rendered by this trial court in this cause, as well as the appellate decision recently rendered by the Fifth District Court of Appeal. That opinion specifically found that this court's order finding Ponce Inlet liable to Pacetta under the Harris Act was reversed, that being Count IV of the Plaintiffs complaint. The court must, and does, dismiss the Harris Act claim which is Count IV of the Plaintiffs claim against the Town of Ponce Inlet. In addition, the decision of the Fifth District Court of Appeal controls all further proceedings based on the doctrine of the law of the case which provides that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent

stages of this proceeding. *Spectrum Interiors, Inc. v. Exterior Walls, Inc.*, 65 So.3d 543 (Fla. 5th DCA 2011).

This court, pursuant thereto, has examined its Order finding for the Plaintiffs on Counts I, II and III. In so doing the court recognizes that the finding of equitable estoppel to establish a vested interest is not an available theory and would be contrary to the now established law of the case. Nevertheless, the findings that remain are comprehensive, thorough and clearly establish sound support for the counts finding in favor of the Plaintiff on the remaining counts, those being Counts I, II and III. It is, therefore

ORDERED AND ADJUDGED as follows:

1. The Motion to Comply with Mandate filed by The Town of Ponce Inlet be in the same is hereby GRANTED to the extent that this court dismisses Count IV of the Plaintiffs' Complaint against The Town of Ponce Inlet, as required by the appellate decision and as conceded by the Plaintiffs, subject only to review regarding any matters now pending before The Supreme Court of Florida. This court reserves jurisdiction to evaluate and impose attorney's fees and costs, should such matters be sought and should there be an entitlement to same. In addition, based on the persuasive argument of the attorney for The Town of Ponce Inlet the court will set this matter for trial as soon as practicable and will not await any decision by the Florida Supreme Court before proceeding accordingly. A separate trial order will be issued coincident with this order.

*2 2. The Defendant's Motion for Reconsideration of the Order Partially Finding in Favor of the Plaintiffs,

Pacetta LLC, Down the Hatch, Inc., and Mar-Tim, Inc., and Against the Town of Ponce Inlet on the Issues of Liability and Reserving for Jury Trial the Appropriate Determination of any Sums Due as a Result Thereof and for Entry of Final Judgment on Counts, I, II and III of the Plaintiffs' Amended Complaint in Accordance with the Fifth District Court of Appeal's Decision and Mandate be in the same is hereby DENIED.

3. The court is prepared to conduct a Case Management Conference and/or Pre-Trial Conference at a time convenient for the parties and will schedule a trial by separate order.

DONE AND ORDERED in Chambers, Daytonar Beach, Volusia County, Florida this 27th day of November, 2013.

<<signature>>

WILLIAM A. PARSONS

CIRCUIT JUDGE

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

Case No. 1010-31696-CICI
Division: 31 (J. Perkins)

PACETTA, LLC,
a limited liability company,
DOWN THE HATCH, INC.,
a Florida corporation; and
MAR-TIM, INC., a
Florida corporation,

Plaintiffs,

v.

THE TOWN OF PONCE INLET, a
Florida municipality,

Defendant,

v.

BLUE WATER REALTY ADVISORS,
LLC, a Florida limited liability company,

Third-Party Defendant
_____/

SECONDED AMENDED FINAL JUDGMENT

This cause having come before this Court for jury trial on September 15, 2014, and the jury having been impaneled and sworn to try what full compensation shall be made to the Plaintiffs, PACETTA, LLC, and MAR-TIM, INC., for the taking of their property, having considered the testimony of witnesses, having viewed the property, having heard the evidence and the charges of the Court and having rendered its verdict on September 19, 2014 which is attached and incorporated herein as Exhibit "A", it is

ORDERED AND ADJUDGED as follows:

1. That consistent with the verdict rendered herein, the Plaintiff, PACETTA, LLC, 4877 Front Street, Ponce Inlet, Florida 32127 recover from Defendant, THE TOWN OF PONCE INLET, 4300 South Atlantic Avenue, Ponce Inlet, Florida 32127, the sum of Eighteen Million and No/100 Dollars ($18,000,000) for parcels 1 & 10, as more fully described in the legal descriptions on the verdict attached hereto and MAR-TIME, INC., 4877 Front Street, Ponce Inlet, Florida 32127, recover from Defendant, THE TOWN OF PONCE INLET, 4300 South Atlantic Avenue, Ponce Inlet, Florida 32127, the sum of One Million Eight Hundred Fifty Thousand and No/100 Dollars ($1,850,000) for parcels 3 & 4, as more fully described in the legal descriptions on the verdict attached hereto, for a total due to Plaintiffs, PACETTA, LLC, and MAR-TIM, INC., of Nineteen Million Eight Hundred Fifty Thousand and No/100 Dollars ($19,850,000), plus statutory interest as fill compensation.

2. As additional compensation required by Article X, Section 6, Fla. Const. Plaintiff, PACETTA, LLC, shall also receive from Defendant, THE TOWN OF PONCE INLET, prejudgment interest (at the statutory rate set forth in § 55.03 Fla. Stat.) in the amount of Nine Million Nine Hundred Seven Thousand Twenty-Nine and 57/100 Dollars ($9,907,029.57), for the period of January 17, 2007 through November 5, 2014. As additional compensation required by Article X, Section 6, Fla. Const., Plaintiff, MAR-TIM, INC., shall additionally receive from Defendant THE TOWN OF PONCE INLET, prejudgment interest (at the statutory rate set forth in § 55.03 Fla. Stat.) for the period of January 17, 2007 through November 5, 2014 in the sum of One Million Eight Hundred Thousand Two Hundred Nineteen and 72/100 Dollars

($1,018,219.72). Plaintiffs, PACETTA, LLC and MAR-TIM, INC., respectively, are also entitled to post-judgment interest on the sums awarded to them under this paragraph and paragraph one, above, at the rates annually determined under § 55.03 Fla. Stat. (2014), and post judgment interest in the annually adjusted amount is hereby awarded to Plaintiffs, respectively.

3. This Court reserves jurisdiction to tax all costs and attorney's fees against Defendant, THE TOWN OF PONCE INLET, upon appropriate motion and notice and to issue any other further Orders and Decrees that may be necessary and proper.

4. That within twenty (20) days of entry of this Final Judgment, the Defendant, THE TOWN OF PONCE INLET, shall pay into the registry of the Court the total sum of Thirty Million Seven Hundred Seventy-Five Thousand Two Hundred Forty Nine and 29/100 Dollars ($30,775,249.29), pus the aforesaid per diem interest.

5. Upon deposit of the funds, this Court will set an apportionment hearing to determine the amounts owed to any lienors of the property, provide payment from the fluids deposited with the Court, and order the clerk to issue a deed for the properties described in the verdict to the Defendant, THE TOWN OF PONCE INLET.

6. As to Counts II and III of the Amended Complaint, which raised state law due process and equal protection claims, the Court directed a verdict in favor of Defendant and hereby enters judgment accordingly.

7. As to Count IV of the Complaint, that count had previously been dismissed by the previous court's Order dated November 21, 2013.

8. The Court reserves jurisdiction to award attorneys' fees and costs upon appropriate motion.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida this 29 day of Dec, 2014.

_____
Terence R. Perkins
Circuit Court Judge

Conformed copies to:

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John Upchurch, Esquire
Heebner, Baggett, Upchurch & Garthe, P.L.
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Attorney for Plaintiff

EXHIBIT A

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA
Filed in the Office of the
Clerk of the Circuit Court, Volusia County, Florida
September 19, 2014

Case No. 1010-31696-CICI
Division: 31 (J. Perkins)

PACETTA, LLC,
a limited liability company,
DOWN THE HATCH, INC.,
a Florida corporation; and
MAR-TIM, INC., a
Florida corporation,

Plaintiffs,

v.

THE TOWN OF PONCE INLET, a
Florida municipality,

Defendant,

v.

BLUE WATER REALTY ADVISORS,
LLC, a Florida limited liability company,

Third-Party Defendant
_____/

VERIDICT FORM – PARCELS 1 & 10 AND 3 & 4

We, the jury, find as follows:

FIRST: That an accurate description of the properties taken herein are the following:

See Exhibit "A" attached hereto. Yes

SECOND: That the compensation to be paid by the Defendant, THE TOWN OF PONCE INLET, to PACETTA, LLC for **Parcels 1 & 10** is as follows:

Fair Market Value as of January 17, 2007 $18 million

THIRD: That the compensation to be paid by the Defendant, THE TOWN OF PONCE INLET, to MAR-TIM, INC. for Parcels 3 & 4 is as follows:

Fair Market Value as of January 17, 2007 $1.85 million

So say we all this 19 day of September, 2014.

s/s Eric A. Rowan
FOREPERSON

Exhibit "A"

Parcel Number: 1
Owner: PACETTA LLC
Tax ID: 6437-03-00-0040

LOTS 4, 5, 6, 7, AND 8, PONCE DELEON PARK, ACCORDING TO THE PLAT THEREOF AS RECORDED IN MAP BOOK 19, PAGE(S) 27, OF THE PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA; TOGETHER WITH ANY AND ALL RIPARIAN OR LITTORAL RIGHTS APPERTAINING THERETO

Parcel Number: 10
Owner: PACETTA LLC
Tax ID: 6437-03-00-0010

Lots, 1, 2 and 3, PONCE de LEON PARK SUBDIVISION, according to the plat thereof as recorded in Map Book 19, Page(s) 27, of the Public Records of Volusia County, Florida, EXCEPT that part thereof lying Easterly of a line which intersects the North line of said Lot 1 at a point 100 feet Westerly of the Northeast corner of said Lot 1, and which intersects the South line of said Lot 3 at a point 260.83 feet West of the Southeast corner thereof. TOGETHER with the perpetual right of ingress and egress over and through a 50 foot private roadway measured 25 feet, at right angles on each side of the center line of said Lot 2, and extending from Sailfish Avenue Westerly to the premises herein conveyed.

Parcel Number: 3
Owner: MAR-TIM, INC.
Tax ID: 6430-03-01-0040

LOTS 4 AND 5, BLOCK 1, AND LOT A, LYING BETWEEN BLOCKS 1 AND 2, PONCE PARK,

ACCORDING TO THE MAP OR PLAT THEREOF AS RECORDED IN PLAT BOOK 1, PAGE 150, PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA; TOGETHER WITH ANY AND ALL RIPARIAN RIGHTS APPERTAINING THERETO.

Parcel Number: 4
Owner: MAR-TIM, INC.
Tax ID: 6430-03-04-0050

THE WESTERLY 200 FEET OF LOTS 4 & 5 BLOCK 4, PONCE PARK, ACCORDING TO THE MAP OR PLAT THEREFOR AS RECORDED IN PLAT BOOK 1, PAGE 150, PER PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA

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

TOWN OF PONCE INLET
(THE TOWN),

Appellant/Cross-Appellee,

v. CASE NO. 5D14-4520

PACETTA, LLC, ETC., ET AL.,

Appellees/Cross-Appellant.
_____/

DATE: September 25, 2017

BY ORDER OF THE COURT:

ORDERED that Appellees/Cross-Appellants' Motion For Rehearing, Clarification and Rehearing En Banc, filed July 3, 2017, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

[*signature*]
JOANNE P. SIMMONS, CLERK [*Seal*]

Panel: Judges Sawaya, Evander, and Lambert
(acting on panel-directed motion(s)) En Banc Court (acting on en banc motion)
Judge Palmer recused from en banc consideration

cc:

Noah C McKinnon, Jr
Clifford B Shepard
Brigid F Cech Samole
Mark Miller
Christina M. Martin
Peter B Heebner
Amy Brigham Boulris
Abraham C McKinnon
Jay A Yagoda
Lauren V Purdy
Elliot H Scherker
Kimberly S Mello
Nancy E. Stroud
Kenneth B Bell
Katherine M. Clemente

Supreme Court of Florida

TUESDAY, JANUARY 23, 2018

CASE NO.: SC17-1897

Lower Tribunal No(s).: 5D14-4520;
642010CA031696XXXXCI

PACETTA, LLC, ETC., ET AL.	vs.	TOWN OF PONCE INLET, ETC.
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

PARIENTE, QUINCE, POLSTON, and LAWSON, JJ., concur.

LEWIS, J., would grant oral argument.

A True Copy Test:

[*signature*]
John A. Tomasino, Clerk
Supreme Court

[Court Seal]