

## ARTICLES

# UNDERSTANDING THE FLORIDA LAND USE AND ENVIRONMENTAL DISPUTE RESOLUTION ACT

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### I. INTRODUCTION

As a result of negotiations during the 1995 legislative session involving environmentalists, agricultural interests, state and local governments, land owners, lobbyists, and legislators, the Florida Legislature enacted a two-part property-rights initiative consisting of both the Bert J. Harris, Jr. Private Property Rights Protection Act (Harris Act) and the Florida Land Use and Environmental Dispute Resolution Act (Dispute Resolution Act or Act).<sup>1</sup>

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1. Fla. Stat. § 70.001(1) (2006) (codifying the Harris Act); *id.* at § 70.51 (codifying the Dispute Resolution Act); 1995 Fla. Laws ch. 95-181 (enacting both the Harris and Dispute Resolution Acts); see Julian Conrad Juergensmeyer, *Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?* 48 Fla. L. Rev. 695, 699 (1996) (noting that the Act was the result of a "carefully crafted compromise"); David A. Powell, Robert M. Rhodes & Dan R. Stengle, *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U. L. Rev. 255, 257-259 (1996) (explaining that the Act constitutes a "new cause of action providing judicial relief to landowners who suffer inordinate burdens on the use of their land"); David Spohr, *Florida's Takings Law: A Bark Worse Than Its Bite*, 16 Va. Env'tl. L.J. 313, 328-329 (1997) (noting that the "ad hoc working group" charged with drafting the Act consisted of representatives from various interest groups); Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 Fla. St. U. L. Rev. 315, 318-319, 327-329 (1995) (referring to the Act as a "brilliant[t] . . . political feat"); Ronald L. Weaver & Joni Armstrong Coffey, *Private*

Although these two acts were enacted simultaneously under the same bill,<sup>2</sup> the Legislature did not intend for these Acts to be construed *in pari materia*, but to operate independently, stating that these Acts would “have separate and distinct bases, objectives, applications, and processes.”<sup>3</sup> Notwithstanding this express provision, these Acts express the Legislature’s fundamental concern that private property rights in the state of Florida should not be subject to unfair decisions, unreasonable burdens, or inordinate burdens.<sup>4</sup>

The focus of this landmark legislation was on the Harris Act, which created a new statutory cause of action for private landowners.<sup>5</sup> The Harris Act is intended to provide a property owner with compensation or relief resulting from the application of laws, regulations, or ordinances when such application does not necessarily rise to the level of an unlawful taking under either the Florida or United States Constitutions.<sup>6</sup> Specifically, the Legislature expressly intended to create “a separate and distinct cause of action from the law of takings” and to provide “for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or political entity . . . as applied, unfairly affects real property.”<sup>7</sup> Additionally, similar to a Florida eminent-domain or inverse-condemnation trial, the Harris Act provides for a jury to

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*Property Rights Protection Legislation: Statutory Claims for Relief from Governmental Regulation* (Feb. 2001) (copy on file with *Stetson Law Review*); Kent Wetherell, *Private Property Rights Legislation: The “Midnight Version” and Beyond*, 22 Fla. St. U. L. Rev. 525, 544–546 (1994) (noting that the Governor’s study commission was comprised of an “environmentally sensitive membership”).

2. 1995 Fla. Laws at ch. 95-181; Martin R. Dix, Richard P. Lee & Alicia M. Santana, *Land Use and Environmental Dispute Resolution: The Special Master*, 69 Fla. B.J. 63, 63 (Nov. 1995).

3. Fla. Stat. § 70.80; Spohr, *supra* n. 1, at 328–329.

4. See e.g. Fla. Stat. § 70.001(1) (applying to government actions that “unfairly [affect] real property”); *id.* at § 70.001(3)(e) (defining the term “inordinate burden”); *id.* at § 70.51(3) (allowing a petitioner thirty days to contest unreasonable or unfair “enforcement actions”); *id.* at § 70.51(18) (listing the factors used in determining whether an “enforcement action” is unreasonable or unfairly burdens the use of real property).

5. *Id.* at § 70.001(1); Dix et al., *supra* n. 2, at 63; see Powell et al., *supra* n. 1, at 264–265 (noting that the Harris Act is intended to protect either an existing use of real property or a vested right to a specific use of real property). Interestingly, as opposed to other similar laws, the Harris Act does not require a specific monetary reduction in property value. Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, 52 Land Use L. & Zoning Dig. 3, 3 (July 2000).

6. Fla. Stat. §§ 70.001(1), (9).

7. *Id.* at § 70.001(1).

ultimately determine the total compensation due the property owner resulting from diminution of their property's fair market value.<sup>8</sup> Notably, the Harris Act does not provide for facial challenges to new laws, but provides for challenges to only the *application* of laws that are adopted or noticed to be adopted subsequent to May 11, 1995.<sup>9</sup>

The Harris Act's less-publicized companion, the Dispute Resolution Act, does not create a statutory cause of action.<sup>10</sup> Rather, the Dispute Resolution Act is intended to provide an informal, expedited procedure for private landowners to seek relief through an impartial mediation hearing relating to disputes among those landowners and state, regional, and local governments.<sup>11</sup> These disputes generally arise from governmental decisions denying permit applications through a "development order" or a government's initiation of an "enforcement action."<sup>12</sup> Although the Dispute Resolution Act applies to development orders issued, modified, or amended, and enforcement actions initiated on or after October 1, 1995,<sup>13</sup> these decisions or actions may have been enacted prior to the applicable date of the Harris Act, which is May 11, 1995.<sup>14</sup>

The Dispute Resolution Act originated from a recommendation of Governor Lawton Chiles's 1993 Private Property Rights Study Commission (Commission Report).<sup>15</sup> The Act provides a number of factors for a special magistrate to consider when evaluating whether a local government's decision regarding a development permit or an enforcement action was unreasonable or

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8. *Id.* at §§ 70.001(6)(b), 73.071(1). Unlike in an inverse-condemnation proceeding, the Harris Act contains explicit instructions regarding how the jury must calculate compensation. *Id.* at § 70.001(6)(b).

9. *Id.* at §§ 70.001(1), (12); Powell et al., *supra* n. 1, at 289 (emphasizing that the Harris Act authorizes compensation only for as-applied challenges).

10. Fla. Stat. § 70.51(24).

11. *Id.* at §§ 70.51(3), (17)(b); Dix et al., *supra* n. 2, at 63–64; Weaver & Coffey, *supra* n. 1, at 27.

12. *Id.* at §§ 70.51(3), (17)(b).

13. *Id.* at § 70.51(30).

14. *Id.* at § 70.001(12).

15. *Report of the Governor's Property Rights Study Commission II*, Fla. Exec. Order 93-150 (June 4, 1993) [hereinafter *Commission Report*]; Dix et al., *supra* n. 2, at 63 (noting that the Commission initially proposed creating a system in which an "intermediator" could recommend compensation for landowners); Spohr, *supra* n. 1, at 328 (noting that the commission included representatives from "state agencies, regional entities, local governments, environmental interests, developmental interests, and landowning interests").

imposed an unfair burden on use of the owner's property.<sup>16</sup> These factors, which were published in the Commission Report, were taken directly from the inverse-condemnation case of *Reahard v. Lee County*.<sup>17</sup>

Invoking the Act is not a prerequisite to initiate judicial proceedings to contest the denial of a development permit or to challenge an enforcement action.<sup>18</sup> Nor does it waive an owner's right to seek judicial or administrative remedies that would otherwise be available.<sup>19</sup> However, if a property owner initiates judicial or administrative proceedings prior to filing a request for relief under the Act, the owner waives its opportunity to later seek relief under the Act.<sup>20</sup>

Numerous articles and studies thoroughly discussing the substantive and procedural aspects of this innovative law have been published since the adoption of the Dispute Resolution Act.<sup>21</sup> Therefore, the primary purpose of this Article is not to discuss the framework of the Act, but to discuss its application for the benefit

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16. Fla. Stat. § 70.51(18). The list of factors includes the property's history, the owner's expectations, and the public purpose behind the government's decision regarding the development order or enforcement action. *Dix et al.*, *supra* n. 2, at 64.

17. 968 F.2d 1131, 1136 (11th Cir. 1992); *see Weaver & Coffey, supra* n. 1, at 30 (discussing how the Commission Report employed the *Reahard* factors in its initial proposal). Of course, the right to receive just compensation for a government taking derives from Articles V and XIV, section 1 of the United States Constitution and Article X, section 6(a) of the Florida Constitution.

18. *See* Fla. Stat. § 70.51(3) (stating that "[a]ny owner . . . may apply" for relief under the Act).

19. *See id.* at § 70.51(23) (stating that a "final decision" is ripe for "subsequent judicial proceedings"); *Dix et al.*, *supra* n. 2, at 64 (noting that initiating proceedings under the Act does not preclude subsequent judicial or administrative proceedings).

20. Fla. Stat. § 70.51(10)(a)–(b); *Dix et al.*, *supra* n. 2, at 64. The only exception to this waiver provision is when an owner initiates proceedings under Florida's Administrative Procedure Act prior to invoking the Dispute Resolution Act. Fla. Stat. § 70.51(10)(b). In such a situation, the Act remains a viable option only if the government agrees to allow the dispute to be processed under the Act. *Id.* (explaining that the owner waives its right to a special magistrate proceeding unless all parties consent).

21. *E.g.* John N. Conrad & William B. Smith, *Special Master Proceedings for Regulatory Disputes—Pitfalls and Practical Considerations*, Fla. B. Env'tl. & Land Use L. Sec. Rptr. (Apr. 2002) (available at [http://www.eluls.org/reporter-april2002/apr2002\\_conrad&smith.html](http://www.eluls.org/reporter-april2002/apr2002_conrad&smith.html)); *Dix et al.*, *supra* n. 2; Powell et al., *supra* n. 1; H. Hamilton Rice & Ricinda H. Perry, Seminar, *Special Magistrates and Persons Called a Mediator—Magnificent Monikers? Or Just Toothless Tigers (What's in a Name?)* (Bonita Springs, Fla., May 12–13, 2006) (copy on file with *Stetson Law Review*); Vargas, *supra* n. 1; Weaver & Coffey, *supra* n. 1; White, *supra* n. 5; Fla. Conflict Res. Consortium, *A Guide to the Use of the Property Rights Special Master Process*, <http://consensus.fsu.edu/mediation/specmas.html> (accessed Apr. 11, 2008) [hereinafter *FCRC Guide*].

of those who may be considering invoking proceedings under the Act and to highlight some of the Act's ambiguities and undefined key terms. This Article will also examine the few reported appellate cases that have arisen under the Act.<sup>22</sup> In addition to recommending some modifications to the Act to reduce the parties' costs, in the very least, this Article aims to provide a better understanding of the Act's procedures in hopes of motivating property owners to invest the time and resources required to successfully complete proceedings under the Act.

## II. OVERVIEW OF THE DISPUTE RESOLUTION ACT

In enacting the Dispute Resolution Act, the Legislature left many procedural and substantive questions unanswered.<sup>23</sup> One commentator suggested that because the Dispute Resolution Act was part of a momentous property-rights movement, the scope of the Act was intentionally made very broad, as it was "likely that the [L]egislature was purposely vague in order to include as many government actions as possible."<sup>24</sup> In 1998, the Florida Conflict Resolution Consortium commissioned an extensive study that evaluated the extent of the Act's implementation and assessed how effective the Act had been so far in resolving land-use disputes (FCRC Study).<sup>25</sup> The results of the FCRC Study revealed that very few local governments used or were even aware of the Act and suggested both actions to improve public awareness and statutory amendments to improve the special magistrate process.<sup>26</sup> Notwithstanding these recommendations, the Act has not

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22. Four reported appellate cases have made reference to the Dispute Resolution Act. *Hanna v. Envtl. Protect. Commn.*, 735 So. 2d 544 (Fla. 2d Dist. App. 1999); *Scott v. Polk Co.*, 793 So. 2d 85 (Fla. 2d Dist. App. 2001); *St. Johns/St. Augustine Comm. for Conserv. and Recreation, Inc. v. City of St. Augustine*, 909 So. 2d 575 (Fla. 5th Dist. App. 2005); *Peninsular Properties Braden River, LLC v. City of Bradenton*, 965 So. 2d 160 (Fla. 2d Dist. App. 2007), *review denied* (Fla. Jan. 10, 2008).

23. Conrad & Smith, *supra* n. 21; Dix et al., *supra* n. 2, at 65–68; Powell et al., *supra* n. 1, at 297–313; Spohr, *supra* n. 1, at 340–344.

24. Dix et al., *supra* n. 2, at 66.

25. Fla. Conflict Res. Consortium, *Evaluation of the Special Master Program* (unpublished study, Apr. 23, 1998) (copy on file with *Stetson Law Review*) [hereinafter *FCRC Study*]. The Study assessed the implementation of the Dispute Resolution Act after its first eighteen months, discussed problems associated with the Act, and made recommendations to improve the Act although the Florida Legislature appears never to have acted on any of these recommendations.

26. The majority of governmental entities responding to the FCRC's survey (ninety-six

substantively changed since its enactment in 1995.<sup>27</sup> In fact, the Act's numerous deficiencies have not only limited its use, but have also reduced confidence in its effectiveness<sup>28</sup> and have spawned litigation that will be discussed later in this Article.

One of the Act's major deficiencies lies in its failure to define its own key terms. For example, the Act uses the terms "unreasonable" or "unfairly burdens" but defines neither. This failure causes a great deal of confusion, but also provides great latitude for both the parties and the special magistrate to establish what governmental actions would actually rise to the levels of "unrea-

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percent) stated that they had not used the Act. *FCRC Study, supra* n. 25, at 17. Further, 41 out of 290 cities or counties (approximately fourteen percent) either asked for more information or responded in such a way that suggested they knew nothing about the Act. *Id.*; White, *supra* n. 5, at 5–6. It is also significant that although the Act expressly provides for each governmental entity to establish guidelines and procedures governing the conduct of proceedings under the Act, the Author's research reveals that only 11 out of a combined 479 cities and counties (less than one percent of respondents) have enacted ordinances providing for procedures to be used for proceedings under the Act as of October 4, 2007. Broward Co. Code (Fla.) § 5-571-5-586 (2007); Coral Gables City Code (Fla.) §§ 101-89-101-100 (2007); Charlotte Co. Code Ls. & Ordin. (Fla.) §§ 3-3.8-1-3-3.8-11 (2007); Escambia Co. Code Ordin. (Fla.) §§ 78-211-78-220 (2007); Highlands Co. Code Ordin. (Fla.) §§ 2-220-2-230 (2007); Hillsborough Co. Land Dev. Code (Fla.) §§ 11.05.00-11.05.05 (2007); Holmes Beach City Code Ordin. (Fla.) §§ 67-1-67-18 (2007); Lake Co. Code (Fla.) §§ 14.17.01-14-17-24 (2007); Manatee Co. Code Ordin. (Fla.) §§ 2-25-30-2-25-44 (2007); Marion Co. Code (Fla.) §§ 14.5-21-14.5-31 (2007); Pinellas Park Code Ordin. § 2-1701-2-1702 (2007).

27. The only changes to the Act since its adoption in 1995 have been nonsubstantive. *See e.g.* 1996 Fla. Laws ch. 96-410 (adding Section 120.569 proceedings to the Act's tolling provision); 1997 Fla. Laws ch. 97-96 (making existing references to the owner or magistrate in the Act gender neutral); 2004 Fla. Laws ch. 2004-11 (changing the term "master" to "magistrate"). Apparently, the change from "special master" to "special magistrate" was made in response to the Florida Supreme Court's amendments to Rules 1.490, 12.492, and 5.687 of the Florida Rules of Appellate Procedure, which changed all references from "master" to "magistrate." *In re Amends. Fla. R.*, 887 So. 2d 1090, 1090 (Fla. 2004); *see* Howard R. Marsee, *Utilizing "Special Masters" in Florida: Unanswered Questions, Practical Considerations, and the Order of Appointment*, 81 Fla. B. J. 13, 13 (Oct. 2007) (stating that the changes have been "essentially administrative and cosmetic").

28. *See FCRC Study, supra* n. 25, at 28–35 (listing various concerns about the Act's costs, the role of the special master, the openness of the public hearing, and the overall usefulness of the process); Conrad & Smith, *supra* n. 21, at ¶¶ 5–6 (suggesting that the Act's failure to address certain county administrative requirements may create an adversarial atmosphere, counteracting the Act's intention to foster mediation); Dix et al., *supra* n. 2, at 67–68 (noting the "potential for bias and manipulation of the process by the more powerful party"); Spohr, *supra* n. 1, at 341 (expressing concern that the public could be excluded from at least part of the proceedings); Rice & Perry, *supra* n. 21, at 3–8 (listing several real life situations in which parties under the Act encountered several unanswered questions).

sonable” or “unfair.”<sup>29</sup> In contrast, the Harris Act offers some guidance to participants by defining its key terms.<sup>30</sup> The Dispute Resolution Act also fails to define “enforcement action”—the critical term triggering application of the Act—thereby calling into question exactly which government actions may give rise to proceedings under the Act.<sup>31</sup>

The Act provides for a fairly expedited process that cannot exceed 165 days in length<sup>32</sup> and affords an opportunity to save considerable costs by avoiding litigation.<sup>33</sup> In fact, Florida was the first state to pass legislation that provided mediation as an option for property owners who were dissatisfied with the result of a land-use decision.<sup>34</sup> Additionally, Florida’s enactment of this type of dispute-resolution procedure indicates an increasing nationwide trend toward resolving land-use disputes through alternative dispute resolution (ADR).<sup>35</sup> ADR has been very effective in resolving land-use disputes concerning both technical and political issues and involving many participants with diverse and competing interests.<sup>36</sup> A relatively recent report evaluating the effectiveness of ADR in resolving land-use disputes in seven states concluded that “the use of ADR continues to increase in land-use matters” and that “local citizen, government, and development

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29. See e.g. Dix et al., *supra* n. 2, at 67 (emphasizing the special magistrate’s flexibility under the Act); Spohr, *supra* n. 1, at 339–340 (noting uncertainty as to whether the special magistrate proceedings fall under the purview of Florida’s Sunshine Law).

30. Fla. Stat. § 70.001(3)(e).

31. *Id.* at § 70.51(2); *but see* Powell et al., *supra* n. 1, at 299 (suggesting that the term should include actions by state, regional, and local governments and their agencies to enforce not only development orders, but also environmental-protection and growth-management laws).

32. Fla. Stat. § 70.51(23).

33. See Dix et al., *supra* n. 2, at 67 (noting that proponents of dispute resolution argue that it saves money, time, and judicial resources); *but see FCRC Study*, *supra* n. 25, at 28–30 (reporting the sentiment among survey respondents that the Act is costly and may result in an “unnecessary expense to the taxpayers”).

34. *FCRC Study*, *supra* n. 25, at 2.

35. *Id.* at 11–12; Jonathan M. Davidson & Susan L. Trevarthen, *Land Use Mediation: Another Smart Growth Alternative*, 33 *Urb. Law.* 705, 707, 712 (2001); see White, *supra* n. 5, at 3 (noting that state legislatures adopted property-rights laws during the 1990s at a “frenzied pace”).

36. See Davidson & Trevarthen, *supra* n. 35, at 705 (noting that the “best local land-use decisions” may stem from cases in which competing interests all agree upon a solution).

interests may also consider mediation and related techniques as time and cost saving alternatives for achieving smarter growth.”<sup>37</sup>

The Dispute Resolution Act is intended to allow a property owner and a local government the opportunity to first resolve their dispute through a public-mediation process.<sup>38</sup> The goal of the mediation “is to focus attention on the impact of the governmental action giving rise to the request for relief and to explore alternatives to the development order or enforcement action . . . .”<sup>39</sup> Should mediation result in an impasse, the special magistrate then initiates an information-gathering phase and conducts a hearing (similar to an arbitration hearing) to take evidence and testimony and ultimately makes a recommendation to the governmental entity whether the government’s action was “unreasonable” or “unfairly burdens the real property.”<sup>40</sup>

Notably, once an owner invokes the Act, the government is not only required to participate in the process, but it must also assume the obligation to share equally in the cost of the proceedings.<sup>41</sup> Because of the Act’s voluntary nature, the property owner has the sole discretion to initiate the special magistrate process and also effectively controls the length of the process because the owner may withdraw his or her request for relief at any point in the process and pursue other remedies.<sup>42</sup> The property owner must also approve of any recommendation prepared by the special magistrate prior to presenting it to the governmental entity, and if the owner disagrees with the recommendation, the proceedings are then considered concluded.<sup>43</sup> Furthermore, in the event the special magistrate should conduct an information-gathering hearing and determine that the contested government action was not unreasonable or did not unfairly burden the use of the owner’s property, the special magistrate must then issue a recommendation back to the governmental entity that its development order

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37. *Id.* at 712.

38. The special magistrate’s first responsibility is “to facilitate a resolution of the conflict between the owner and governmental entities.” Fla. Stat. § 70.51(17)(a); see Powell et al., *supra* n. 1, at 305 (recognizing that the first phase of the dispute-resolution process is mediation).

39. Fla. Stat. § 70.51(17).

40. *Id.* at § 70.51(17)(b).

41. *Id.* at § 70.51(28).

42. *Id.* at § 70.51(19)(b), (23).

43. *Id.* at § 70.51(19)(b).

or enforcement action remains undisturbed.<sup>44</sup> The proceedings would then be concluded, thereby providing the owner the option to pursue its original remedies.<sup>45</sup>

The Act also requires that the special magistrate send a copy of the recommendation to the State Department of Legal Affairs (SDLA), also known as the Office of the Attorney General (OAG).<sup>46</sup> The governmental entity must also provide the SDLA with written evidence of any action taken on a development order within fifteen days of its decision.<sup>47</sup> The SDLA monitors case activity under both the Harris and Dispute Resolution Acts. However, in a 2000 article evaluating the effectiveness of the Act, one commentator noted that it was difficult to determine the exact number of petitions that had been filed.<sup>48</sup> This uncertainty was partially attributable to the fact that the Act does not require any information to be filed with the SDLA until the special magistrate has actually issued a recommendation back to the governmental entity.<sup>49</sup> Although the Act requires notification within fifteen days after governmental action on the magistrate's recommendation,<sup>50</sup> most local governments fail to provide results of its actions to the SDLA, thereby making it difficult to ascertain both the actual number of claims filed as well as those claims that are ultimately acted upon by local governments.<sup>51</sup> The most recent information concerning petitions filed under the Act provided by the OAG indicates that eighty-two active recommendations have been filed and seventy-seven previous recommendations have been settled.<sup>52</sup>

In an effort to assist local governments in understanding and implementing the Act, the FCRC's Special Master Implementation Project promulgated model procedural guidelines for special

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44. *Id.* at § 70.51(19)(a).

45. *Id.*

46. *Id.* at § 70.51(27); *see also id.* at § 20.11 (creating the Department of Legal Affairs and designating the Florida Attorney General as its head); § 16.015 (providing the Attorney General with authority to act on behalf of the Department of Legal Affairs).

47. *Id.* at § 70.51(27).

48. White, *supra* n. 5, at 5.

49. *Id.*; Fla. Stat. § 70.51(27).

50. *Id.*

51. White, *supra* n. 5, at 5; Telephone Interview with Sheila Hall, Admin. Asst., Off. Atty. Gen. (Sept. 21, 2007) (indicating that statistics relating to monitoring activities under the Act are questionable because of lack of diligence in local government reporting).

52. *Id.*

master proceedings (FCRC Model Guidelines).<sup>53</sup> Although the FCRC provided more than five hundred local governments with its Model Guidelines in 1996,<sup>54</sup> as of October 4, 2007, only eight out of sixty-seven counties and three out of four hundred twelve cities have adopted procedures to implement the Act.<sup>55</sup>

The Act's apparently limited use since its enactment may be attributable to many variables, including the following: a lack of awareness of the relatively new law's existence;<sup>56</sup> the requirement that proceedings be "informal and open to the public";<sup>57</sup> governmental reluctance to use and publicize the Act as an option;<sup>58</sup> procedural difficulties abiding by the Act's unrealistic time frames;<sup>59</sup> changes in the legal framework of land use laws;<sup>60</sup> limited success and confidence in employing the Act;<sup>61</sup> concern about the legality of local governments' authority to waive statutes, rules, or ordinances in approving a settlement;<sup>62</sup> and the location of the gov-

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53. Fla. Conflict Res. Consortium, *Model Procedural Guidelines for Special Master Proceedings* (Sept. 19, 1995) [hereinafter *FCRC Model Guidelines*]. The FCRC Model Guidelines were provided to over five hundred governmental entities in late 1996. *FCRC Study, supra* n. 25, at 14. The FCRC assists local, regional, and governments by providing information to create a directory of special magistrates and aids in the selection and training of special magistrates. *Id.*

54. *FCRC Study, supra* n. 25, at 14.

55. See generally *FCRC Study, supra* n. 25 (discussing local governments' failure to use the Act). Additionally, the statistics are the result of an October 4, 2007 Municode search by the Author. See *supra* note 26 for a listing of local governments that have enacted ordinances implementing Florida Statutes § 70.51. However, as Dr. Thomas Taylor indicated, "it is hard to predict which local governments actually followed the guidelines and how many adopted ordinances dealing with this issue." Telephone Interview with Thomas Taylor, Assoc. Dir., FCRC (Oct. 10, 2007).

56. Spohr, *supra* n. 1, at 22 (noting that the Dispute Resolution Act has not been widely advertised to the public).

57. Fla. Stat. § 70.51(17); see *FCRC Study, supra* n. 25, at 20 (stating that the requirement of opening the special magistrate process to the public may result in lengthy delays because all interested parties must be given the opportunity to be heard); Spohr, *supra* n. 1, at 340 (noting that there is some uncertainty as to whether special magistrate proceedings qualify as "official acts" under Florida's Sunshine Law).

58. *Supra* n. 57.

59. See *FCRC Study, supra* n. 25, at 19 (suggesting that many landowners cannot afford to wait the required six months to engage the special magistrate process).

60. *Id.* at 22 (explaining that several land use attorneys feel that the Dispute Resolution Act unnecessarily burdens both attorneys and clients).

61. *Id.* at 21 (suggesting that most citizens would be unable to invoke the Dispute Resolution Act without the guidance of a land use attorney).

62. Fla. Stat. § 70.51(25) (stating that a special master's recommendation in favor of the petitioner "may serve as an indication of sufficient hardship to support modification, variances, or special exceptions to the application of statutes, rules, regulations, or ordinances . . .") (emphasis added); see *FCRC Study, supra* n. 25, at 21 (noting that more

ernmental entity.<sup>63</sup> For example, if a Lake County development order is denied, Lake County will apprise a defeated petitioner that the Dispute Resolution Act is an available remedy.<sup>64</sup> In contrast, most local governments will not be forthcoming in suggesting the Act as an option with the owner's only perceived recourse being to resolve the denial of its development order through either administrative or judicial proceedings.<sup>65</sup>

### III. KEY PROVISIONS OF THE DISPUTE RESOLUTION ACT

#### A. Definitions of Development Order, Development Permit, and Enforcement Action

A development order is considered the end result of a property owner's application for a development permit and includes not only orders denying a development permit but also orders approving or conditionally approving a development permit.<sup>66</sup> The Legislature intended for the term "development permit" to be broadly construed as it includes

any building permit, zoning permit, subdivision approval, certification, special exception, variance, or any other similar action of local government, as well as any permit authorized to be issued under state law by state, regional, or local government. . . .<sup>67</sup>

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petitioners might seek redress under the Dispute Resolution Act if the special magistrate's ability to waive statutes were more certain).

63. White noted that as of 2000, forty-six out of the total sixty-five claims filed under the Dispute Resolution Act happened in Lake County. White, *supra* n. 5, at 5. However, this high percentage may be attributed to the fact that Lake County has been extraordinarily forthcoming in releasing information about its pending claims. *Id.* All of these conclusions are consistent with the Author's perspective based on his experience participating in proceedings under with the Dispute Resolution Act since 1997.

64. White, *supra* n. 5, at 5. Lake County is also one of only seven counties in Florida that have enacted an ordinance to implement the Act. *Id.*; *but see FCRC Study, supra* n. 25, at 17–18 (noting that petitioners were advised of the special master option in only seven jurisdictions).

65. *Id.* The FCRC Study noted that out of two-hundred ninety responding cities and counties, only seven indicated that they provide information to owners of the existence of the Dispute Resolution Act in their notices of rights at the conclusion of the development permit process. *Id.* at 17–18; *see* White, *supra* n. 5, at 5 (noting Lake County's unusual willingness to provide such information).

66. Fla. Stat. § 70.51(2)(a).

67. *Id.* at § 70.51(2)(b); *see* Dix et al., *supra* n. 2, at 66 (arguing that such language

This definition is based on the definition of “development permit” as set forth in Section 163.3164(8) of the Florida Statutes, but the Dispute Resolution Act expands it to include permits issued by both state *and* local governments.<sup>68</sup> A development permit, however, must relate to the actual development of real property.<sup>69</sup> Notably, the Act specifically excludes actions by either state or local governments concerning comprehensive plan amendments<sup>70</sup> and mediation of disputes involving these matters is provided for in other statutory processes.<sup>71</sup>

The Act also provides an opportunity for a landowner to seek relief “from an enforcement action of a governmental entity.”<sup>72</sup> The Act’s definition of “owner” for purposes of disputing the propriety of a local government’s development order requires a petitioner to be “a person with a legal or equitable interest in the real property[.]”<sup>73</sup> A “person” might include a natural person, firm, association, joint venture, partnership, estate, business trust, fiduciaries, corporation, trust, or other groups or a combination thereof.<sup>74</sup> In contrast, the definition of “owner” under the Harris Act specifically excludes governmental entities.<sup>75</sup> However, the definition of “owner” under the Act would also allow a governmental entity that owned real property to initiate proceedings.<sup>76</sup>

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renders the Dispute Resolution Act “extraordinarily broad”).

68. Compare Fla. Stat. § 163.3164(8) (2006) (limiting the term “development permit” to those permits issued by local governments) with Fla. Stat. § 70.51(2)(b) (expanding the definition to include permits issued by state and regional agencies).

69. *Id.* at §§ 70.51(2) (defining a “development permit” as a permit affecting real property), 70.51(3) (extending relief to landowners whose real property is negatively affected by government action).

70. *Id.* at § 70.51(2)(a).

71. For example, Florida Statutes Section 163.3181(4) provides for the right to mediation for a landowner if the government denies the landowner’s request for a land-use plan amendment. Additionally, the Florida Statutes provide a local government with a right to pre-hearing mediation when the State Department of Community Affairs finds a plan amendment to not be in compliance with other laws. *Id.* at § 163.3184(10)(c).

72. *Id.* at §§ 70.51(3).

73. *Id.* at § 70.51(2)(d).

74. *Id.* at § 1.01 (2006).

75. *Id.* at § 70.001(3)(f).

76. See e.g. Powell et al., *supra* n. 1, at 299 (suggesting, for example, that a school board could request proceedings under the Dispute Resolution Act to contest a land-use decision by another governmental entity); see Weaver & Coffey, *supra* n. 1, at 29 (noting that the Private Property Rights Act excludes governmental entities, but the Dispute Resolution Act does not).

Moreover, the Act restricts its use as a tool for disputing an enforcement action solely by limiting its relief only to those who hold “legal title” to real property.<sup>77</sup> For example, a tenant business operator that may have triggered the violation giving rise to the enforcement action does not possess legal title and may not utilize the Act to resolve the conflict. The Act does not define the term “enforcement action,” thereby allowing an aggrieved property owner to employ the Act to mediate any dispute involving an enforcement action that affects the development or use of real property.<sup>78</sup> As a matter of law, an enforcement action would include virtually *any* enforcement action taken by a state, regional, or local government that would affect an owner’s use of its real property, such as the following: city or county code enforcement proceedings pursuant to the Local Government Code Enforcement Boards Act;<sup>79</sup> revocation of a driveway connection permit by the Florida Department of Transportation pursuant to chapter 14-96 of the Florida Administrative Code;<sup>80</sup> Florida Department of Environmental Protection enforcement of an environmental resource permit pursuant to chapter 373 of the Florida Statutes;<sup>81</sup> and a multitude of other similar government enforcement processes. Furthermore, because the term “enforcement action” does not expressly exclude governments with the delegated authority to implement federal mandates, an action by a government agency enforcing a federally delegated program could also conceivably take advantage of special magistrate proceedings under the Act.<sup>82</sup>

A recent special magistrate proceeding in the City of Tampa in 2006 involved a dispute concerning whether a request for relief was properly filed as the result of a development order or an en-

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77. Fla. Stat. § 70.51(2)(d).

78. The Florida Statutes require that the enforcement action must relate to real property, which the Florida Statutes define simply as “land,” including any appurtenances and improvements to the land. *Id.* at § 70.51(2)(d), (g).

79. *Id.* at ch. 162.

80. Fla. Admin. Code ch. 14-96 (2006) (allowing the Department of Transportation to initiate revocation proceedings); Fla. Stat. § 335.182 (establishing the Department of Transportation’s rulemaking authority); § 335.187 (providing authority to close a driveway).

81. The Florida Department of Environmental Protection has the authority to issue environmental resource permits for construction activities that would, *inter alia*, affect wetlands, alter surface water flows, and authorize mining projects. *Id.* at §§ 373.046(4), 373.044 (providing the Department with enforcement authority).

82. Powell et al., *supra* n. 1, at 299–300.

forcement action.<sup>83</sup> In this case, the Tampa City Council passed ordinances designating the facades of a property owner's buildings, which were situated in downtown Tampa, as local landmarks, effectively prohibiting the buildings' demolition.<sup>84</sup> The buildings were in extreme disrepair, and their demolition had actually been authorized by a condemnation order issued by the City's code-enforcement officials.<sup>85</sup> The owner had agreed to preserve the buildings' façades in its redevelopment plans as a condition of a 2005 rezoning approval. However, he objected to the City's landmark designation because changes to a landmarked building's façades are required to meet stringent architectural design guidelines established by the City's Historic Preservation Commission.<sup>86</sup> The owner asserted that application of these preservation standards was unreasonable, duplicative, time-consuming, and completely subjective.<sup>87</sup>

The landmarking process set forth by the City's historic-preservation ordinance was based on a unique statutory scheme wherein the City was considered the applicant seeking landmark status and the owner was not even considered a party to the proceeding.<sup>88</sup> Essentially, the statute rendered the owner a virtual spectator to the proceedings. Under the City's code, the owner had no way to dispute the City's landmark designations.<sup>89</sup> In fact, other than providing the owner with direct notice of the public hearings for the landmark process, the City's ordinance recognized the owner as having no greater status than any other interested third party at a public hearing at which third parties were limited to a three-minute time limit to speak.<sup>90</sup>

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83. Pet.'s Req. for Relief, *Doran Jason Group of Tampa, Inc. v. City of Tampa* (filed Mar. 22, 2006).

84. *Id.* at ¶¶ 4–5; Tampa, Fla., Ordin. 2006-67 (Mar. 15, 2006) (designating the façade of the J. J. Newberry Building as a local landmark); Tampa, Fla., Ordin. 2006-68 (Mar. 15, 2006) (designating the façade of the F. W. Woolworth Building as a local landmark).

85. Pet.'s Req. for Relief at ¶¶ 6–7, *Doran Jason Group*.

86. *Id.* at ¶¶ 8–9.

87. *Id.*

88. Tampa, Fla., Ordin. 27-231 (2006). This ordinance was later substantially modified by an update to the Tampa City Council's Rules of Procedure. Tampa, Fla., Ordin. 2007-156 (July 26, 2007).

89. Tampa, Fla., Ordin. 27-231.

90. *Id.*; *id.* at 2007-890 (Sept. 20, 2007).

Subsequent to the landmark designation, the owner then filed its request for relief under the Act.<sup>91</sup> In response, the City filed a motion with the special magistrate seeking, inter alia, dismissal of the owner's request as provided for in the Act.<sup>92</sup> The City argued that its landmark ordinances did not meet the Act's definitions of either "development order," nor did it result from an "enforcement action."<sup>93</sup>

In evaluating the City's motion, the special magistrate noted that, pursuant to its own terms, the Act is to be "liberally construed to effect fully its obvious purposes and intent . . . ."<sup>94</sup> The special magistrate also noted that under the City's historic preservation land-use scheme, the City's action was unilaterally imposed against the owner's will, not only effectively eliminating the owner's right to demolish the buildings but also limiting the owner's right to seek a writ of certiorari by depriving the owner of party status during the public hearing.<sup>95</sup> The special magistrate noted also that the City's application of its historic preservation ordinance to the buildings at issue was aimed at protecting the public's interest and was also the direct result of the City's own condemnation order.<sup>96</sup> Accordingly, the magistrate ruled that the City's actions qualified as an enforcement action and denied the City's motion.<sup>97</sup>

The owner and City then eventually agreed to adopt the special magistrate's recommendation, which incorporated a mediated settlement agreement between the parties.<sup>98</sup> The settlement not only ensured that the building façades would be protected in the redevelopment process, but retracted the façades' local landmark status.<sup>99</sup> Notably, the agreement between the parties was ap-

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91. Pet.'s Req. for Relief at ¶ 9, *Doran Jason Group*.

92. Def.'s Response to Pet.'s Req. for Relief at ¶ 13, *Doran Jason Group* (filed Apr. 13, 2006); Spec. Magistrate Hrg. Transcr. 6:2–3 (July 7, 2006). The Act does provide for a special magistrate to rule on a motion to dismiss for failure to include the minimum information required by the Act. Fla. Stat. § 70.51(8).

93. Spec. Magistrate Hrg. Transcr. 6:18–7:7.

94. Fla. Stat. § 70.51(29); Spec. Magistrate Hrg. Transcr. 20:13–16.

95. Spec. Magistrate Hrg. Transcr. 22: 7–15.

96. Spec. Magistrate Hrg. Transcr. 21:24–22:3, 22:22–25.

97. Spec. Magistrate Hrg. Transcr. 23:16, 25:9–17.

98. See Recommendation of the Special Magistrate at 5, *Doran Jason Group* (discussing the terms of the mediated settlement agreement).

99. See *id.* (noting that the settlement would initiate the landmark-rescission process for the subject façades while assuring the City that the façades will be protected).

proved by a resolution of the Tampa City Council at an advertised public meeting.<sup>100</sup>

Although the Act specifically excludes comprehensive plan amendments from the definition of a development order,<sup>101</sup> the Act does state that a special magistrate's recommendation shall be considered data in support of a comprehensive plan or an amendment to an existing plan.<sup>102</sup> This provision is particularly significant because development orders often require a plan amendment to facilitate relief under the Act. The Act also waives the twice-per-year limitation on plan amendments as set forth in Florida's Local Government Planning and Land Development Regulation Act.<sup>103</sup> Interestingly, under the same legislative enactment as the Harris and Dispute Resolution Acts, the Legislature created Section 163.3184, which provided processes for dispute mediation between a local government and a property owner resulting from the denial of an owner's request for a comprehensive-plan amendment.<sup>104</sup> The bill also created Section 163.3184(10)(c), which provides for a dispute-resolution process among the Department of Community Affairs, the local government, and any other affected party in cases concerning a comprehensive plan or an amendment to an existing plan.<sup>105</sup>

To date, the only reported case interpreting the term "development order" under the Act is *Hanna v. Environmental Protection Commission*,<sup>106</sup> discussed herein, in which the Second District Court of Appeal held that a letter summarizing a field report from a scientist employed by the Hillsborough County's Environmental Protection Commission ("EPC") that was sent to a property owner did not constitute a development order entitling the owner to invoke proceedings under the Act.<sup>107</sup>

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100. Tampa, Fla., Ordin. 2006-978 (Aug. 3, 2006).

101. Fla. Stat. § 70.51(2)(a).

102. *Id.* at § 70.51(26).

103. *Id.* at §§ 70.51(26), 163.3187(1).

104. 1995 Fla. Laws at ch. 95-181(4).

105. *Id.* at ch. 95-181(5).

106. 735 So. 2d 544 (Fla. 2d Dist. App. 1999).

107. *Id.* at 545.

### B. Ripeness and Exhaustion of Administrative Remedies

The Act was intended to provide a quick, inexpensive, and simple problem solving process to allow the opportunity for non-judicial settlement of private property disputes.<sup>108</sup> The Legislature emphasized that the Act was an effort to expedite resolution of land-use disputes by stating that “governmental entities shall direct all available resources and authorities to effect fully the obvious purposes and intent of [the Act] in resolving disputes. Governmental entities are encouraged to expedite notice and time-related provisions to implement resolution of disputes under this section.”<sup>109</sup> The Act expedites the dispute-resolution process by imposing a 165-day limit upon its completion.<sup>110</sup> The process may not extend past that time frame unless the parties mutually agree to extend it.<sup>111</sup> The Act also minimizes the time required for an owner to exhaust administrative remedies by providing that a failed development-permit application is ripe for action when either: (1) nonjudicial local administrative appeals are exhausted; or (2) within four months after issuance of the development order, even if nonjudicial appeals have not been exhausted.<sup>112</sup> However, the Act is silent concerning how issues such as whether a petition was timely filed or whether local administrative appeals were exhausted are to be resolved in the event of a dispute.<sup>113</sup>

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108. *FCRC Model Guidelines*, *supra* n. 53, at 1; *see* Dix et al., *supra* n. 2, at 67 (noting that proponents of the Dispute Resolution Act argue that it “saves time, money, and judicial resources”); Powell et al., *supra* n. 1, at 296–297 (noting that the Dispute Resolution Act establishes an “informal, nonjudicial settlement and expedited hearing procedure”); *but see FCRC Study*, *supra* n. 25, at 22–33, 35 (providing information from survey respondents critiquing substantive and procedural aspects of the Act and concluding that, overall, “the experience of participants in specific cases that have completed the Special [Magistrate] Process to date has been more negative than positive”); Conrad & Smith, *supra* n. 21, at ¶¶ 5–8 (criticizing the Dispute Resolution Act and suggesting changes to improve its effectiveness as a dispute-resolution tool).

109. Fla. Stat. § 70.51(29).

110. *Id.* at § 70.51(23).

111. *Id.*

112. *Id.* at § 70.51(10)(a).

113. The lack of an enforcement mechanism to ensure the parties’ compliance with the Act is problematic and is noted as a reason why owners do not utilize the Act to resolve their disputes. *FCRC Study*, *supra* n. 25, at 21, 29–30, 34.

### C. Jurisdictional Deadline and Tolling Provision

The Dispute Resolution Act provides that the owner must file its request for relief within thirty days after receipt of the order or notice of governmental action.<sup>114</sup> The Act contemplates that the owner will receive a written development order within thirty days but does not explicitly require the governmental entity to reduce its development order or enforcement action to writing.<sup>115</sup> Accordingly, many local government ordinances either do not require that final action on a development order be reduced to writing to be considered “rendered” or allow more than thirty days for publication.<sup>116</sup> Unfortunately, Florida caselaw does not provide a black-letter rule for determining when a development order is considered “rendered.” In some cases, an oral action by a governmental entity is considered the date of rendering,<sup>117</sup> while other cases consider the date of rendering to be the date of issuance and transmittal of the development order<sup>118</sup> or the date the order is forwarded to the appellate court.<sup>119</sup>

Many of the development orders processed under the Act are the result of quasi-judicial processes involving land-use matters such as rezonings, plat approvals, site-plan approvals, special exceptions, and variances.<sup>120</sup> The general time frame for challenging such land-use decisions under Rule 9.100(c) of the Florida Rules of Appellate Procedure is thirty days from the rendering of an order.<sup>121</sup> Under Rule 9.020, an order is considered to be “a deci-

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114. Fla. Stat. § 70.51(3).

115. *Id.*

116. Fla. R. App. P. 9.100(c) (requiring that a petition for writ of certiorari seeking review of a local government’s quasi-judicial decision must be filed within thirty days from the date a decision was rendered pursuant to Fla. R. App. P. 9.020(h)).

117. See e.g. *Lewis v. Howanitz*, 378 So. 2d 310, 312 (Fla. 3d Dist. App. 1979) (holding that the date of “rendering” was the date on which the board of county commissioners “refused” the petitioner’s application for rescission).

118. See e.g. *Fox v. S. Fla. Regl. Plan. Council*, 327 So. 2d 56, 58 (Fla. 1st Dist. App. 1976) (asserting that Florida Statutes § 380.07(2) implicitly, but clearly, defines “rendering” as “issuance and transmittal of the development order”).

119. E.g. *Windley Key, Ltd. v. Fla. Dept. of Community Affairs*, 456 So. 2d 489, 490 (Fla. 3d Dist. App. 1984); see also *Colonnades, Inc. v. Fla. Dept. of Commerce, Div. of Empl. Sec.*, 357 So. 2d 238, 241 (Fla. 1st Dist. App. 1978) (holding that the date of mailing must be established by a preponderance of the evidence for a party to assert that the opposition’s appeal was untimely filed).

120. See Fla. Stat. § 70.51(2)(b) (defining the term “development permit”). This conclusion is also based on the experiences of the Author.

121. Fla. R. App. P. 9.100(c) (providing for review of a petition for certiorari to be filed

sion, order, judgment, decree, or rule of a lower tribunal, excluding minutes and minute book entries” and is considered rendered when a signed, written order is filed with the clerk of the lower tribunal.<sup>122</sup> “Orders” also include final agency actions reviewable under the APA and quasi-judicial decisions by boards, commissions, and agencies not reviewable under the APA.<sup>123</sup>

In 2006, the Legislature provided clarification concerning what constitutes “rendition” of a decision relating to a development permit by a local government. Specifically, the Legislature created Section 166.041 (pertaining to cities) and Section 125.022 (pertaining to counties) that requires the local government to provide written notice to an applicant whose development-permit application is denied.<sup>124</sup> These new laws also require that a city or county include within their notice a citation to the applicable portion of the law that serves as the basis for the denial of the permit.<sup>125</sup> The intent of these laws was apparently to streamline the permitting process, as identification of the legal authority that is the basis for the denial of a permit could expedite compliance by applicants.<sup>126</sup> Notably, these statutes cross-reference the definition of “development permit” that is contained in Section 163.3164 of the state’s Growth Management Act.<sup>127</sup> This definition is the very same definition utilized in the Dispute Resolution Act, with the only difference being that the Act not only includes development permits issued by a city or county, but expands its coverage to include development permits issued by state and regional gov-

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within thirty days of rendition of the order to be reviewed). The Rule also applies to quasi-judicial decisions of agencies, boards, and commissions of local governments along with petitions to review non-final agency actions under the Administrative Procedure Act. *Id.*

122. *Id.* at 9.020.

123. *Id.* at 9.020(f).

124. Fla. Stat. §§ 125.022, 166.033.

125. *Id.*

126. See Fla. Stat. § 125.022 (discussing procedures for when a county denies a development permit application); *id.* at § 166.041 (establishing procedures for the adoption of ordinances and resolutions); 2006 Fla. Laws s.1, ch. 2006-88 (counties) (creating Florida Statutes Section 125.022); 2006 Fla. Laws, s.2, ch. 2006-88 (cities) (creating Florida Statutes Section 166.033); see also Senate Staff Analysis and Economic Impact Statement, CS/CS/SB 1112, s.V9B (Mar. 22, 2006) (discussing the impact of Bill 1112, which creates Florida Statutes Sections 125.022 and 166.033); *supra* n. 68 (referencing “development permit” under the “Local Government Comprehensive Planning and Land Development Regulation Act”).

127. Fla. Stat. § 163.3164 (2006).

ernments.<sup>128</sup> Unfortunately, the Legislature failed to clarify whether the required written notice under these statutes would constitute “rendition” for purposes of invoking appellate review and whether the written notice is rendered for purposes of Rule 9.020(h) upon either publication or receipt of the written notice.<sup>129</sup>

Adding to the confusion, the Act is silent concerning how much time an owner has to initiate judicial proceedings once the special magistrate proceedings have concluded. For example, if a request for relief resulting from the denial of a permit sought under a quasi-judicial proceeding is filed on the twenty-ninth day after the rendition of a development order, and the local government rejects the special magistrate’s recommendation, would the total time for filing an appeal recommence, or is the owner simply limited to one day to comply with Rule 9.020? Or would Rule 9.020 treat the filing of a request for relief as a motion, which, if filed within thirty days of rendering, would consider the order not rendered, thereby allowing an additional thirty days to file an appeal once the motion is disposed of?<sup>130</sup>

In a 1997 special magistrate proceeding in Hillsborough County, Florida, a county attorney filed a motion to dismiss a request for relief because the owner failed to attach a copy of the Board of County Commissioner’s (the Board) development order, as the Act requires.<sup>131</sup> The Board denied the owner’s application for a development permit by passing a resolution;<sup>132</sup> however, because it was common practice for the County not to publish its resolutions for several weeks after a Board decision, and because the resolution was not published within thirty days of the Board’s denial, the special magistrate denied the County’s motion as frivolous.<sup>133</sup>

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128. *Id.* at § 70.51(2)(b).

129. Fla. R. App. P. 9.020(h).

130. *Id.* at 9.020(h)(1) (explaining that a final order is not “rendered” until the filing of an order disposing of any post-verdict motions); see e.g. *Dept. of Corrections v. Career Serv. Commn.*, 429 So. 2d 1244, 1245 (Fla. 1st Dist. App. 1983) (holding that a timely motion for rehearing tolled the rendition date of a final order until the motion was disposed of).

131. Petr.’s Req. for Relief at ¶ 1, *In re Fletcher Ave. Property Owners’ Group* (filed Mar. 12, 1997). After the petitioners survived the County’s motion to dismiss, the special magistrate recommended a settlement that was ultimately rejected by the Board of County Commissioners. *Id.*

132. *Id.*

133. Although there was no written order issued by the court, the Author was present at the verbal denial of the petitioner’s order.

Although the Legislature intended the Dispute Resolution Act to be construed liberally to fully effect the Act's purposes and intent,<sup>134</sup> in light of conflicting jurisdictional deadlines, the best course of action is to file the request for relief within thirty days of the governmental authority's oral decision. Landowners should also file a motion to supplement the record upon receipt of the published development order or documentation relating to the enforcement action.

The Act provides that initiation of the special magistrate proceeding tolls the time for seeking administrative or judicial review of a local governmental development order.<sup>135</sup> In addition, the Act states that the government's decision describing available uses of the owner's property "constitutes the last prerequisite to judicial action and the matter is ripe for judicial proceedings[.]"<sup>136</sup> Accordingly, it can be argued that the denial of a development permit is not "rendered" because judicial proceedings are not available until the special magistrate proceedings are entirely completed. However, at what point would an owner's opportunity to seek judicial review become "stale" or subject to the doctrine of laches if the parties mutually extend the proceeding far in excess of the 165-day limit?

The City of Bradenton recently challenged the Act's tolling provision as being an unconstitutional infringement on the Florida Supreme Court's exclusive rulemaking authority, as provided by the Florida Constitution.<sup>137</sup> In this case, a property owner sought relief under the Act for the denial of its Planned Development (PD) site-plan application.<sup>138</sup> However, during the special magistrate proceedings, the owner elected to file suit against the City outside of the thirty-day jurisdictional time period.<sup>139</sup> The City then filed a motion to dismiss the owner's petition alleging that (1) the court did not have jurisdiction as the owner's petition

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134. Fla. Stat. § 70.51(29).

135. *Id.* at § 70.51(10)(a). The tolling period ends when the special magistrate issues a recommendation to the governmental entity. *Id.*

136. *Id.* at § 70.51(23).

137. *Peninsular Properties*, 965 So. 2d at 161; *but see* Weaver & Coffey, *supra* n. 1, at 34 (suggesting that the applicability of the tolling provision should not be a concern because the Florida Legislature, not the Supreme Court, establishes deadlines under the Administrative Procedure Act).

138. *Peninsular Properties*, 965 So. 2d at 161.

139. *Id.*

was filed subsequent to the thirty-day jurisdictional time frame, and (2) that the Act's tolling provision unconstitutionally infringed upon the Florida Supreme Court's exclusive rulemaking authority.<sup>140</sup> The trial court dismissed the case and the owner appealed.<sup>141</sup> The Second District Court of Appeal reversed and held that because the Act's procedural tolling provision was so intertwined with the Act's substantive provisions, the tolling provision was not unconstitutional.<sup>142</sup>

#### D. Required Jurisdictional Contents of a Request for Relief

The Dispute Resolution Act requires that the owner's request for relief must be filed "with the elected or appointed head of the governmental entity that issued the development order . . . or initiated the enforcement action" within thirty days after receipt of the order or notice of the government's enforcement action.<sup>143</sup> However, the Act specifies only the "bare[-]bones information" that must be included in the owner's request, specifically, the following:

- (1) a brief statement of the owner's proposed use of the property;
- (2) a summary of the development order or description of the enforcement action;
- (3) a copy of the development order or the documentation of an enforcement action at issue;
- (4) a brief statement of the impact of the development order or enforcement action on the owner[s] ability to achieve [his or her] proposed use of the property;
- (5) a certificate of service [listing all] the parties, including the governmental entity [that was] served.<sup>144</sup>

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140. *Id.*; see generally Or. on Respt.'s Mot. to Dismiss Pet. for Writ of Cert. 1–3, *Peninsular Properties*, No. 2005-CA-006018 (Oct. 11, 2006) (on file with the *Stetson Law Review*).

141. *Peninsular Properties*, 965 So. 2d at 161.

142. *Id.* at 162 (rehearing denied Oct. 5, 2007).

143. Fla. Stat. § 70.51(4).

144. *Id.* at § 70.51(6)(a)–(d).

The Act also allows the special magistrate to request additional information from the parties to assist the magistrate in “gaining a complete understanding of the request for relief.”<sup>145</sup> Oftentimes, local governments either do not issue development orders or, if they do, issue them only after conclusion of the hearing or meeting during which the government action occurred.<sup>146</sup> As stated above, if these documents are not available at the time of filing a request for relief, the owner should consider filing a motion seeking additional time to supplement its request for relief upon receipt of the published development order. The Dispute Resolution Act does not require that the request for relief actually describe *why* the owner considers the development order or enforcement action to be unreasonable or to unfairly burden the use of its property. However, the owner should provide such an explanation, along with carefully selected information showing how the governmental action is unreasonable or unfairly burdens the property because these are the ultimate issues the special magistrate must determine.<sup>147</sup>

It is also important that the special magistrate have a full and complete understanding of the issues at the initial mediation stage because substantive testimony and evidence is generally not provided or considered until the hearing stage is invoked.<sup>148</sup> Therefore, to enhance the opportunity for success at the mediation stage, many owners provide the special magistrate with extensive information in advance of the mediation, including applications, exhibits, reports, transcripts, staff recommendations, or DVDs of the original hearings.<sup>149</sup>

Attorneys appear to play a significant role in proceedings under the Act. The FCRC Study concluded that in the reported case it had analyzed, all of the owners and local governments were represented by legal counsel to assist in maneuvering through the Act's unchartered waters.<sup>150</sup> In fact, the special magistrate is fre-

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145. Fla. Stat. § 70.51(7).

146. This conclusion is based on the Author's own experiences.

147. Powell et al., *supra* n. 1, at 302. This conclusion also is based on the Author's own experiences.

148. See Powell et al., *supra* n. 1, at 306 (outlining the special magistrate's involvement in the stages of the proceeding). The importance of the magistrate's complete understanding is based on the Author's own experiences.

149. This conclusion is based on the Author's own experiences.

150. *FCRC Study*, *supra* n. 25, at 33–34. The Study also noted that “it may be naive to

quently an attorney specializing in land-use or governmental law.<sup>151</sup> Therefore, as a practical matter and notwithstanding the statute's minimal filing requirements, many owners ensure that the request for relief provides a thorough analysis of the facts and the law applicable to the owner's underlying permit application to demonstrate how the government's action was unreasonable or unfairly burdens the use of the owner's property. Providing a very complete legal and factual analysis in the owner's petition will not only enlighten the special magistrate, but may also impress upon the local government the seriousness of an owner's position and provide the impression that judicial proceedings may be initiated should the matter not resolve satisfactorily.

A significant number of special magistrate cases arise from quasi-judicial proceedings and involve the allegation that the local government's action was "unreasonable" in that it misapplied or mischaracterized ordinances and technical standards applicable to the owner's application when acting upon a development permit. For example, to demonstrate that a development order resulting from a denial of a rezoning petition in a quasi-judicial proceeding was "unreasonable," a request for relief may allege that the owner met its burden of proof established under *Board of County Commissioners of Brevard County v. Snyder*,<sup>152</sup> or that the

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believe that citizens can negotiate this dispute process without the advice and counsel of an attorney familiar with land use law." *Id.* at 21.

151. *Infra* n. 158 and accompanying text. This conclusion is also supported by the Author's experience as both a special magistrate and as legal counsel for property owners seeking relief under the Act.

152. 627 So. 2d 469 (Fla. 1993). In *Snyder*, the Florida Supreme Court held that when a local governing body acts in a quasi-judicial capacity, its decision will be upheld if supported by "substantial competent evidence." *Id.* at 474. The court relied on its decision in *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957), which defined the phrase "competent substantial evidence" as follows:

Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion . . . [T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

*Id.* at 916 (citations omitted). *Snyder* also established the burden of proof for a property owner seeking rezoning. Specifically, the court held that

a landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the govern-

government's decision violated the following three elements of a quasi-judicial proceeding subject to judicial review: that the development order was based on substantial competent evidence; that the owner was afforded procedural due process at the hearing(s); and that the government's action met the essential requirements of the law.<sup>153</sup>

In one particular 2000 special magistrate proceeding, a very experienced land use attorney was selected to preside as special magistrate in a case that involved the City of Bradenton's denial of a proposed Planned Unit Development (PUD) located in the middle of the Braden River.<sup>154</sup> The magistrate not only requested that the parties make opening statements as in a trial, but he also requested the City to produce witnesses to demonstrate that there was substantial competent evidence to support the City's denial.<sup>155</sup> At the conclusion of the proceedings, the magistrate issued a seventeen-page recommendation to the Bradenton City Council that was very similar in form and substance to an appellate opinion.<sup>156</sup>

Under the Act, the governmental entity has only fifteen days to respond to the owner's request for relief.<sup>157</sup> Because the request for relief is required to be served on the elected or appointed head of the governmental entity without a summons,<sup>158</sup> and because procedures under the Act are invoked on such a limited basis,<sup>159</sup> it

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mental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, the application should be denied.

*Snyder*, 627 So. 2d at 476.

153. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); see also *Broward Co. v. G.B.V. Intl.*, 787 So. 2d 838, 843 (Fla. 2001) (explaining that this "first-tier certiorari review" is a matter of right); *Lee Co. v. Sunbelt Equities*, 619 So. 2d 996, 1003 (Fla. 2d Dist. App. 1993) (noting that the appellate court is not permitted to reweigh evidence nor to substitute its own judgment for that of the administrative agency).

154. See *Rice & Perry*, *supra* n. 21, at 5 (citing *Manatee River Comm. Dev., Inc. v. City of Bradenton*, No. 2000-CA-2599 (Fla. 12th Cir. 2000)).

155. *Id.* at 6.

156. *Id.* at 5.

157. Fla. Stat. § 70.51(16)(a).

158. *Id.* at § 70.51(4); accord *id.* at § 70.51(6)(d) (requiring a request for relief to contain a certificate of service, but not a summons).

159. See *FCRC Study*, *supra* n. 25, at 16–17 (noting that ninety-six percent of cities and counties responding to the survey had not used the Dispute Resolution Act).

often takes several days for the government to transmit the owner's request to the appropriate department for preparation of a response.<sup>160</sup> Unfortunately, the Act does not provide procedures for determining how the date of service is to be established or what should occur if the government's response is filed late.<sup>161</sup> If a response is not timely filed by the governmental entity, some owners file a motion to strike an untimely response with the special magistrate, thereby seeking to limit the legal argument in the proceeding to that contained within the owner's request for relief.<sup>162</sup> The Act, however, does not delegate authority to the special magistrate to rule on such motions. Additionally, treating the process as if it were litigation at this early stage may also alienate the government, create an adversarial tone for the process, and discourage good-faith negotiations between the parties.<sup>163</sup>

Because there is no required filing fee and only minimal filing requirements, the special magistrate process may also be subject to abuse and manipulation by the owner. For example, the Act's tolling provision can be employed by an owner as a tool for delay, allowing the owner to either proceed with the special magistrate process, to attempt to resolve the dispute without mediation, or to simply "buy more time" to prepare his or her case and seek relief through administrative or judicial proceedings.

#### E. Standing to Participate in the Special Magistrate Process

The parties to a special magistrate proceeding consist of the property owner and the governmental entity.<sup>164</sup> However, the Act provides that the special magistrate may join additional govern-

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160. *Id.* at 20–21. This conclusion is also supported by the Author's experience.

161. *But see FCRC Study, supra* n. 25, at 21 (discussing how the date of service of the owner's petition could be established); Dix et al., *supra* n. 2, at 64–65 (discussing the Act's procedural requirements).

162. This approach has been employed in a number of situations in which the Author has participated as either a special magistrate or legal counsel for a property owner.

163. *See Conrad & Smith, supra* n. 21, at ¶ 2 (noting, for example, that the requirement that the special magistrate proceeding be open to the public places local government staff in "positions of conflict"); Dix et al., *supra* n. 2, at 66–67 (explaining that the Act requires a government entity's "active participation" in the special magistrate process); Spohr, *supra* n. 1, at 341 (commenting that the public character of the special magistrate process may have a chilling effect on settlement negotiations).

164. Fla. Stat. § 70.51(11)–(12) (clarifying that other persons substantially affected by the development order or enforcement action are not granted party or intervenor status).

mental entities as parties to the proceedings if the magistrate believes that “it will assist in effecting the purposes of [the Act] and those governmental entities so joined shall actively participate in the procedure.”<sup>165</sup> Once added as a party, the governmental entity is then required to file a response to the owner’s request for relief within fifteen days following the government’s inclusion in the proceedings.<sup>166</sup>

Standing to initiate proceedings under the Act is limited solely to a legal or equitable owner of real property who believes that “a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of the owner’s real property.”<sup>167</sup> Interestingly, although intended to resolve disputes between private property owners and governmental entities, the Act could also be invoked by a governmental entity acting as a “property owner” if the governmental entity sought a development permit that was granted, denied, or granted with conditions.<sup>168</sup> If a land-use dispute involves only local or regional governments, the Florida Governmental Conflict Resolution Act provides for a mandatory mediation process.<sup>169</sup> However, under that statute, filing suit does not waive a government’s right to mediate its dispute, and court proceedings are halted after litigation is initiated to allow for mediation.<sup>170</sup> In contrast, the right to mediation under the Dispute Resolution Act is waived if a property owner files suit prior to initiating proceedings under the Act.<sup>171</sup>

Not only must a petitioner have either a legal or equitable interest in the property, but the petitioner must have been the per-

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165. *Id.* at § 70.51(11).

166. *Id.* at § 70.51(16)(b).

167. *Id.* at § 70.51(3).

168. Powell et al., *supra* n. 1, at 298–299 (explaining that the definition of “owner” under the Dispute Resolution Act does not expressly exclude governmental entities); *but see* Fla. Stat. § 70.001(3)(f) (explicitly excluding governmental entities from the term “property owner” under the Harris Act).

169. *Id.* at § 164.1041(1). The Conflict Resolution Act encourages governmental entities to mediate their disputes under the statute, but requires those entities to exhaust the statutory proceedings before seeking judicial relief. *Id.*

170. *Id.* The statute mandates that the governmental body invoking the Conflict Resolution Act file a motion to abate any court proceedings. *Id.*

171. *Id.* at § 70.51(10)(a).

son who actually filed for the development permit.<sup>172</sup> A typical development scenario is for an applicant seeking a rezoning or other development permit to enter into a contract to purchase a landowner's property with one of the contract contingencies being the receipt of a development order from a local government. The Act, however, is silent as to whether a petitioner may actually invoke proceedings if he or she had an equitable interest in the property at the time the development order was issued, but was actually "out of contract" at the time the owner filed for relief under the Act.

Participation in the special magistrate process by non-parties is extremely limited and is restricted to only the following two classes: contiguous landowners or "substantially affected" persons.<sup>173</sup> Notably, a "substantially affected" person does not have party or intervenor status, and its participation is limited solely to addressing issues raised in the mediation concerning various alternatives which may impact its individual substantial interests.<sup>174</sup> To have standing to participate as a "substantially affected person," a person would have had to submit "oral or written testimony, sworn or unsworn, of a substantive nature which stated with particularity, objections to or support for any development order or enforcement action at issue . . . ."<sup>175</sup> Even the Act indicates that there is no assurance that a substantially affected person wishing to participate in the proceedings is guaranteed participation, as this decision is left solely up to the discretion of the special magistrate.<sup>176</sup>

Public participation of third parties often impedes the negotiations between the parties because, unfortunately, these persons generally fail to adhere to the Act's requirement restricting their comments to issues raised at the mediation concerning proposed alternatives that may impact their substantial interests.<sup>177</sup>

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172. *Id.* at § 70.51(2)(d), (3).

173. *See id.* at § 70.51(5)(a)–(b) (requiring the governmental entity to serve copies of the request for relief on contiguous landowners and substantially affected parties); § 70.51(12) (requiring those parties to request to participate in the special magistrate proceedings within twenty-one days of receiving notice).

174. *Id.* at § 70.51(12).

175. *Id.*

176. *See id.* (stating that substantially interested persons "may" be allowed to participate).

177. *See* Conrad & Smith, *supra* n. 21, at ¶ 3 (observing that the public's intervention

Instead, third-party participation sometimes consists of attacking the special magistrate proceedings as being unfair and “rehashing” the proceedings that transpired at the public hearings.<sup>178</sup> However, prohibiting an otherwise qualified person’s request to participate would be unwise as it would frustrate those who are already suspicious about an unusual process that restricts their participation (and which they believe favors the owner’s interests). Such prohibition would also call into question the fairness and legitimacy of the proceedings. Impeding the ability of a third party to participate in the proceedings would also not be viewed with high regard by the ultimate legislative decisionmakers when presented with the special magistrate’s recommendation at the conclusion of the process.

The Act also requires that any person seeking to participate must have “indicated a desire to receive notice of any subsequent special magistrate proceedings occurring on the development or enforcement action.”<sup>179</sup> This provision obviously sets a high standard to allow participation, and unless the local government advertised or provided direct notice of public hearings, most concerned lay citizens are usually unfamiliar with a typical original permit application or enforcement action.<sup>180</sup> Therefore, they would likely not have previously submitted oral or written testimony and would not have expressed a desire to receive notice of any subsequent special magistrate proceedings. Most persons, as well as many local governments, are also unfamiliar with the special magistrate process, fail to request notice of subsequent proceedings, and consequently do not technically qualify to participate in

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in the mediation phase is usually counterproductive); Spohr, *supra* n. 1, at 341 (noting that opening the hearing to the public may be disruptive); *FCRC Study*, *supra* n. 25, at 20, 30–31 (listing survey respondents’ concerns about public participation in the special magistrate process).

178. See e.g. Julie Pace, *Defeated Projects Refuse to Die*, Tampa Trib. 1 (Mar. 23, 2006) (describing a special magistrate proceeding in which citizen participants complained about the Act’s bias toward developers and about being relegated to mere spectators in the audience).

179. Fla. Stat. § 70.51(5)(b).

180. See Spohr, *supra* n. 1, at 341–342 (noting that a layperson, unaware of the original development order or enforcement action, would likely not have submitted oral or written testimony and would therefore be excluded from participating under subsection (5)(b) of the Act); *FCRC Study*, *supra* n. 25, at 21–22 (discussing the public’s general unawareness of the Act); see e.g. Pace, *supra* n. 178, at 1 (noting that both citizens and governmental officials feel that the Act favors developers).

the process.<sup>181</sup> Notwithstanding this limitation in the Act, most local governments, in an abundance of caution, take a liberal perspective and allow anyone who participated in the proceedings that gave rise to the owner's request for relief (either through oral or written testimony, including letters, emails and petitions, or who received notice of a public hearing for the proceedings below) the opportunity to receive notice and participate in the special magistrate process, irrespective of whether they requested to participate in any subsequent special magistrate proceedings.<sup>182</sup>

Third parties must request to participate in the mediation within twenty-one days after the filing of a request for relief.<sup>183</sup> To avoid or minimize repeating prior controversial, chaotic, or emotional public hearings, the owner may request that the special magistrate determine who has established proper standing to participate prior to the mailing of the notice and request for relief. The downside to employing this measure, however, is that the opposition, which often perceives the proceedings to be a developer's "end run" around the normal land-use process and an unwarranted "second bite at the apple," may feel attacked, deprived, and frustrated, further encouraging these disgruntled persons to contact their elected officials and to ultimately challenge the special magistrate's recommendation.<sup>184</sup>

The special magistrate process is provided strictly as an option for the owner,<sup>185</sup> and although invoking the process tolls the

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181. The Author has never experienced a situation in which a third-party participant actually requested to participate in subsequent proceedings under the Act when the original development order was acted upon, as required by Florida Statutes § 70.51(5)(b).

182. For example, although the Hillsborough County Land Development Code requires notice to be provided to only those persons who request it, the Code also provides that notice may be provided to anyone who submitted oral or written testimony in the original process that resulted in the denial of a development order. Hillsborough Co. Land Dev. Code (Fla.) § 11.05.02.D (2007). The recipient of such notice then has twenty-one days to indicate whether they would like to participate in the special magistrate proceedings. *Id.* at § 11.05.02.E.

183. Fla. Stat. § 70.51(12).

184. See e.g. Pace, *supra* n. 178, at 1 (describing the "confusion and frustration" that occurred when a developer who had been denied the right to build a shopping center requested a hearing under the Act). It has also been the Author's experience that when the governing body presents the special magistrate's recommendation for action, opponents of the original development order will often attack the merits of the defeated development permit, instead of commenting on how a proposed settlement recommendation may impact their special interests.

185. Fla. Stat. § 70.51(3) (stating that landowners *may* invoke proceedings under the Act); *FCRC Guide*, *supra* n. 21, at 1 (noting that participating in the Act is voluntary);

time for an owner to initiate legal or administrative proceedings,<sup>186</sup> the Act does not provide for the tolling of any third party's obligation to timely file an appeal under other applicable laws or ordinances. Therefore, potential third-party challenges to the underlying development order may not be timely filed once proceedings under the Act are initiated and may then arguably be barred as a result of invoking the Act. In addition, if the underlying development order or enforcement action does not provide the opportunity for any third parties to qualify as a "substantially affected party," these persons would presumably not be entitled to participate in the special magistrate process.<sup>187</sup>

#### F. The Special Magistrate

The special magistrate<sup>188</sup> plays a dual role in presiding over the process.<sup>189</sup> Although first assuming the role of mediator, in the event of an impasse the magistrate transforms to an arbitrator who makes a nonbinding recommendation and ultimately resolves the dispute.<sup>190</sup> The parties must mutually select the special magistrate within ten days after the owner files his or her request for relief.<sup>191</sup> There is no process contained in the statute to select a special magistrate in the event the parties cannot mutually agree on a candidate.<sup>192</sup> The Act does provide the opportunity for gov-

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*FCRC Model Guidelines*, *supra* n. 53, at § 1(1) (asserting that Act participation is voluntary).

186. Fla. Stat. § 70.51(10)(a).

187. *Id.* at § 70.51(5)(b).

188. See 1997 Fla. Laws at ch. 97-96 (amending Fla. Stat. § 70.51(15)(a) to reflect a change from the term "master" to "magistrate").

189. At least one respondent to the FCRC Study expressed concern over the special magistrate's "dual role" as both mediator and ultimate arbiter of the dispute. *FCRC Study*, *supra* n. 25, at 26; Spohr, *supra* n. 1, at 342 (citing Telephone Interview with Thomas Taylor, Asst. Dir., Fla. Conflict Res. Consortium (Jan. 29, 1997) (describing this dual role as one of the "biggest obstacles" in the dispute-resolution process)).

190. Fla. Stat. § 70.51(19)(a)–(b); see *FCRC Model Guidelines*, *supra* n. 53, at §§ 16–17 (outlining the mediation and information-gathering phases of the dispute-resolution process and describing the special magistrate's role during each phase); Spohr, *supra* n. 1, at 342–343 (explaining that the special magistrate is "really a mediator who, absent a settlement, becomes the equivalent of a [nonbinding] arbitrator.>").

191. Fla. Stat. § 70.51(4).

192. If the parties cannot agree on a special magistrate, the FCRC Model Guidelines state that the parties must then jointly select an impartial third party, who will in turn select the special magistrate. *FCRC Model Guidelines*, *supra* n. 53, at § 8(4). The FCRC, the American Arbitration Association, and local Regional Planning Councils may be able to assist parties in selecting that third party. *FCRC Guide*, *supra* n. 21, at § 7.

ernments to develop guidelines and procedures that could be used to establish a special magistrate selection process.<sup>193</sup> However, notwithstanding this opportunity to provide structure and organization to apply the Act, most local governments in Florida have failed to adopt any such procedures.<sup>194</sup> Notably, less than one percent of Florida's combined cities and counties have enacted ordinances to process petitions under the Act.<sup>195</sup> The FCRC has added "special magistrates" to its statewide dispute-resolution directory, which is available to assist in the selection of a special magistrate.<sup>196</sup> The FCRC's Model Guidelines also suggest a process for identifying a special magistrate in the event that the parties cannot agree otherwise. This procedure allows both parties to select an impartial third party, who in turn selects the special magistrate according to certain agreed-upon criteria.<sup>197</sup> Other available options to assist the parties in selecting a magistrate include the process set forth in the Florida Rules of Civil Procedure,<sup>198</sup> the American Arbitration Association (AAA) process,<sup>199</sup> or asking a neutral organization such as the FCRC, or a regional planning council to make the selection.<sup>200</sup>

The Act does not mandate that the special magistrate have any legal training or even be certified by the Florida Supreme Court as a mediator.<sup>201</sup> The Act only requires that the special

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193. Fla. Stat. § 70.51(28).

194. *Supra* n. 26 and accompanying text.

195. *Id.*

196. *FCRC Guide*, *supra* n. 21, at § 7; *see FCRC Study*, *supra* n. 25, at 14 (indicating that the FCRC has assisted local, regional, and state governments by creating a directory of special magistrates and assisting in their training and selection).

197. *FCRC Model Guidelines*, *supra* n. 53, at § 8(4).

198. Fla. R. Civ. P. 1.720(f) (requiring the parties to agree upon a mediator within ten days of referral to mediation or allowing the court to appoint a mediator if the parties cannot agree on a candidate).

199. *See e.g.* Constr. Indus. Arb. Rs. & Mediation Procs. R. M-4 (Am. Arb. Assn. 2007) (allowing the parties to strike mediators from an approved panel of mediators and then to rank the remaining names, and if the parties cannot agree on a candidate, then allowing the association to appoint a mediator); *see* Dix et al., *supra* n. 2, at 66 (noting that the AAA provides the parties with a list of qualified special magistrates, and its model guidelines allow each party to strike only two suggested names and require the parties to rank the remaining names).

200. The power of regional planning councils include the following: to hold public hearings and sponsor public forums; to act in an "advisory capacity" to local governments in planning matters; and to perform a "coordinating function" relating to preparation and review of the strategic regional policy plan. Fla. Stat. §§ 186.505(6), (10), (21).

201. *Id.* at § 70.51(2)(c). Additionally, the Florida Rules of Court require only that a

magistrate be a resident of the state, have mediation experience, and expertise in at least one of the following areas: “land use and environmental permitting; land planning; land economics; local and state government organization and powers; [or] the law governing [these areas].”<sup>202</sup> Although considered to be presiding over an informal “information[-]gathering” process,<sup>203</sup> the special magistrate will be required to interpret and apply various laws and regulations. The magistrate also retains subpoena power<sup>204</sup> along with limited power to rule on motions.<sup>205</sup> Therefore, because of the legal and evidentiary issues involved in the special magistrate process, along with land-use processes that the owner’s permit application may have to ultimately undergo, an attorney experienced in the particular area of law relating to the case at issue is often selected to act as special magistrate.

The Dispute Resolution Act empowers the special magistrate with very little legal authority. The magistrate’s legal powers are restricted to holding a hearing on a motion to dismiss the owner’s petition for failure to include the required information<sup>206</sup> and issuing subpoenas to any in-state, nonparty witnesses that the special magistrate believes will assist in the disposition of the case.<sup>207</sup> This lack of legal authority is one of the frequent criticisms of the Act. Not only is the magistrate’s recommendation nonbinding on the governmental entity, but the magistrate also has no authority to enforce any of the Act’s provisions.<sup>208</sup> Accordingly, there are no penalties that may be imposed should a party disregard the law.

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candidate be at least twenty-one years old and be of “good moral character” to be certified as a mediator. Fla. R. Ct. § 10.100.

202. Fla. Stat. § 70.51(2)(c).

203. *Id.* at § 70.51(17)(b); see *FCRC Model Guidelines*, *supra* n. 53, at §17 (referring to the proceedings as an “information[-]gathering hearing”).

204. Fla. Stat. § 70.51(14).

205. Florida Statutes § 70.51(8) allows the special magistrate to conduct a hearing on whether a request for relief may be dismissed for failing to include information required in Florida Statutes § 70.51(6). Florida Statutes § 70.51(10)(c) also provides for a special magistrate to rule on a request of a party to be dropped from the proceeding.

206. *Id.* at § 70.51(8).

207. *Id.* at § 70.51(14).

208. See Conrad & Smith, *supra* n. 21, at ¶ 8 (noting that the special magistrate’s written recommendation has no legal significance); Spohr, *supra* n. 1, at 342–343 (noting that the uncertainty of the recommendation’s value as precedent). Additionally, respondents to the FCRC Study complained that the Dispute Resolution Act does not specify by what authority the special magistrate can act. *FCRC Study*, *supra* n. 25, at 29. Others noted that the special magistrate is bound by the local court’s determination of jurisdiction. *Id.*

Given the magistrate's lack of enforcement authority, how should disputed issues, such as whether an owner has an equitable interest in the property, or whether an owner has timely filed its petition and exhausted all of its administrative appeals within the four-month period, or whether the government timely filed its response, or disagreement over selection of a special magistrate be resolved?

Although proceedings under the Act are required to be open to the public, the Act itself does not expressly subject the proceedings to Florida's Sunshine Law. The Sunshine Law requires that meetings of any agency or authority of the state, county or a municipal authority wherein "official acts" are to be undertaken must be open to the public at all times.<sup>209</sup> Special magistrate proceedings may not qualify as "official acts" and therefore may not necessarily be subject to the Sunshine Law.<sup>210</sup> Recognizing, however, that a governmental entity must be represented at the proceeding by someone with settlement authority,<sup>211</sup> that the magistrate's recommendation is a public record,<sup>212</sup> and that the Act characterizes the proceedings as "hearings,"<sup>213</sup> there is a strong argument that a special magistrate proceeding does qualify as an "official act."

Although a special magistrate's recommendation is specifically deemed a public record under the Dispute Resolution Act, the Act is silent as to whether documents, records, evidence, and exhibits submitted to the special magistrate are also considered public records. The Act expressly provides that the words and actions of all participants are considered offers of compromise and are inadmissible in any judicial or administrative proceedings.<sup>214</sup> However, the special magistrate's recommendation is admissible as an indication of sufficient hardship in support of a permit-application proceeding and could therefore provide an owner with an important advantage, as it could ultimately become part of the record in subsequent administrative or judicial proceedings.<sup>215</sup>

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209. Fla. Stat. § 286.011(1).

210. Dix et al., *supra* n. 2, at 67; Spohr, *supra* n. 1, at 340.

211. Fla. Stat. § 70.51(17)(a).

212. *Id.* at § 70.51(20).

213. *Id.* at §§ 70.51(17), (17)(c), (19).

214. *Id.* at § 70.51(20).

215. *Id.* at § 70.51(25).

The Act also specifically recognizes that a special magistrate's recommendation is considered data in support of a comprehensive-plan amendment; here again, the magistrate's recommendation could ultimately become evidence in the event of subsequent litigation.<sup>216</sup>

### G. The Owner's Burden of Proof

In the event that the mediation phase of the proceedings is unsuccessful, the information-gathering phase is triggered, and the owner's burden is to demonstrate to the special magistrate that a development order or enforcement action is unreasonable or unfairly burdens the use of the owner's real property. The Act sets forth specific circumstances for the special magistrate to consider when formulating his or her recommendation as follows:

- (1) the history of the real property, including when it was purchased, how much was purchased, where it is located, the nature of the title, the composition of the property, and how it was initially used;
- (2) the development and use of the real property, including what was developed on the property and by whom, if and how it was subdivided, to whom it was sold, whether plats were filed or recorded, and whether infrastructure and other public services or improvements have been dedicated to the public;
- (3) the history of environmental protection, land-use controls, and other regulations, including how and when the land was classified, how use was proscribed, and what changes in classifications occurred;
- (4) the present nature and extent of the real property, including its natural and altered characteristics;
- (5) the reasonable expectations of the owner either at the time of acquisition or immediately prior to the implementation of the regulation at issue, whichever is later, under the regulations then in effect and under common law;

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216. *Id.* at. § 70.51(25)–(26).

- (6) the public purpose sought to be achieved by the development order or enforcement action, including the nature and magnitude of the problem addressed by the underlying regulations on which the development order or enforcement action is based, whether the development order or enforcement action is necessary to the achievement of the public purpose, and whether there are alternative development orders or enforcement action conditions that would achieve the public purpose and allow for reduced restrictions on the use of the property.<sup>217</sup>

However, the Act specifically states that the special magistrate is not limited to the above criteria, but he or she may also consider “[a]ny other information determined relevant by the special magistrate.”<sup>218</sup> Therefore, because the special magistrate is required to have expertise and knowledge of the “governing law” as part of his or her qualifications, the owner may be well served by providing legal argument in his or her request for relief in situations in which the government purportedly failed to properly interpret or apply controlling law.

#### H. The Costs of the Proceedings

Although there is no required filing fee for invoking proceedings under the Act, the governmental entity has discretion to establish procedures governing the conduct of the proceedings, including payment of special magistrate fees and expenses (including costs of notice), which are to be borne equally by the governmental entity and the owner.<sup>219</sup> Some local governments even have contracts with special magistrates, establishing their hourly rates and compensable expenses.<sup>220</sup> Accordingly, the owner, the

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217. *Id.* at § 70.51(18)(a)–(f).

218. *Id.* at § 70.51(18)(h).

219. *Id.* at § 70.51(28); see *FCRC Guide*, *supra* n. 21, at ¶ 3 (providing an estimated cost of invoking proceedings under the Act); *FCRC Study*, *supra* n. 25, at 29 (indicating government officials’ concerns about the Act being an “unfunded mandate”); Dix et al., *supra* n. 2, at 66 (discussing whether the Act constitutes an unfunded mandate on local government). Additionally, the FCRC Model Guidelines suggests that all costs should be set out in writing before initiating proceedings under the Act. *FCRC Model Guidelines*, *supra* n. 53, at § 9(3).

220. *Id.*; see *FCRC Guide*, *supra* n. 21, at § 7 (noting that many special magistrates may ask for a written agreement specifying costs before the proceedings begin). Additionally,

governmental entity, and the special magistrate often enter a tri-party contract not only to define the scope of the magistrate's work and the payment of fees and costs, but also to clarify to what extent the special magistrate's recommendation may be used in any administrative or legal proceedings, and whether the special magistrate may be called as a witness in any concurrent or subsequent proceedings.

### I. The Legality of a Special Magistrate Recommendation

The Dispute Resolution Act specifically states that the special magistrate proceedings do not constitute, nor do they create, a judicial cause of action.<sup>221</sup> Therefore, it appears that there is no point of entry to challenge the proceedings and their end result by any party or participant who may disagree with the outcome. The Act provides that if the special magistrate's recommendation grants a modification, variance or special exception to laws or rules, then the property owner is not required to duplicate any previous process in which the owner had participated.<sup>222</sup> For example, if the special magistrate process involved the denial of a zoning variance by a zoning appeals board, and the special magistrate's recommendation is that the local government grant the zoning variance, the local government would act upon the magistrate's recommendation without requiring the owner to undergo the variance process.

The unique provision contained in Florida Statutes § 70.51(21)(a) that suggests alternative methods for granting development approvals was tested in *St. Johns/St. Augustine Committee for Conservation and Recreation, Inc. v. City of St. Augustine*,<sup>223</sup> wherein the trial court determined that a rezoning application was not required to repeat the City of St. Augustine's

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certain local ordinances recognize the possibility of the parties entering into a contractual agreement to determine costs. Coral Gables City Code § 101-95(8); Broward Co. Code § 5-577(e); Charlotte Co. Code Ls. & Ordin. § 3-3.8-7(4); Escambia Co. Code Ordin. § 78-216(d)(4); Highlands Co. Code Ordin. § 2.226(d)(4); Holmes Beach City Code Ordin. § 67-9(c); Marion Co. Code Ordin. § 14.5-27(d)(4).

221. Fla. Stat. § 70.51(24).

222. *Id.* at § 70.51(21)(a); *see id.* at § 70.51(25) (suggesting that the special magistrate's recommendations *may* support the governing body's "modifications" to the governing body's statutes, rules, regulations, or conditions to the property).

223. 909 So. 2d 575 (Fla. 5th Dist. App. 2005).

rezoning process in order to be approved by the City Commission.<sup>224</sup> However, notwithstanding the state court decision, a settlement involving a scenario such as this may cause concerns and raise issues relating to ex parte communication, denial of due process, and unauthorized contract zoning that would cause the settlement to be attacked for being *ultra vires*.<sup>225</sup> In fact, the FCRC Study found that in all of the special magistrate cases it had reviewed, local governments had advised owners that they cannot waive their laws and rules (or create variances) based on the special magistrate's recommendation.<sup>226</sup> Contrary to the express language in the Act, local governments are apparently not granting waivers to approve settlement recommendations, thereby forcing owners to duplicate the same processes that resulted in the denial of their original development orders. In fact, according to the FCRC Study, one of the major reasons the Act is not employed is its failure to assure an owner that the proceedings can be concluded with a legally defensible decision by the governmental body.<sup>227</sup>

#### J. The Special Magistrate Recommendation as Evidence in Administrative and Judicial Actions

Pursuant to Florida's Public Records Act, the special magistrate's recommendation is considered a public record and may be considered in any subsequent administrative or legal proceedings.<sup>228</sup> However, the actions or statements of all participants to the special magistrate proceeding are considered offers to com-

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224. Or. Denying Petr.'s Req. Writ Cert. at 2–3, *St. Johns/St. Augustine Comm. for Conserv. and Recreation, Inc. v. City of St. Augustine*, 909 So. 2d 575 (Fla. 5th Dist. App. 2005) (copy on file with *Stetson Law Review*).

225. See *FCRC Study*, *supra* n. 25, at 21, 34 (expressing concern over the legality of a governing body waiving its laws in approving a recommendation of the special magistrate). Additionally, several Florida cases have disapproved of private contracting between governmental bodies and landowners to rezone property for consideration. *E.g. Chung v. Sarasota Co.*, 686 So. 2d 1358, 1359 (Fla. 2d Dist. App. 1996); *Morgran Co. Inc. v. Orange Co.*, 818 So. 2d 640, 642 (Fla. 5th Dist. App. 2002); *Co. of Volusia v. City of Deltona*, 925 So. 2d 340, 345–346 (Fla. 5th Dist. App. 2006).

226. *FCRC Study*, *supra* n. 25, at 21.

227. See Fla. Stat. § 70.51(21)(c) (giving the governmental body the option of rejecting the special magistrate's recommendation); *FCRC Study*, *supra* n. 25, at 34 (noting that if the outcome of the special magistrate proceedings were "legal and defensible," the Act might be employed more often).

228. Fla. Stat. § 70.51(20).

promise and are therefore inadmissible in any judicial or administrative proceedings.<sup>229</sup>

The Act indicates that a special magistrate's recommendation that a development order or enforcement action is unreasonable or unfairly burdens the property owner may serve as evidence in a subsequent administrative or judicial proceeding indicating sufficient hardship to support modification, variance, or special exceptions to the application of statutes, rules, regulations, or ordinances relating to the subject property.<sup>230</sup> In addition, the special magistrate's recommendation is considered evidence and can serve as data in support of a comprehensive plan or amendment, although these actions are not considered "development orders" for purposes of the Act.<sup>231</sup>

Whether the special magistrate may be called as a witness in any subsequent judicial action to express his opinions presents an interesting question. The proceedings under the Act are not governed by Florida's Mediation Confidentiality and Privilege Act.<sup>232</sup> Therefore, it appears that a special magistrate could possibly be called as a witness to validate or explain his or her recommendation, or to opine on nonlegal issues, assuming he or she has relevant testimony to offer in an area within his or her expertise. To eliminate this possibility, the FCRC Model Guidelines state that the special magistrate may not be called as a witness "with respect to any aspect of the proceeding, nor may the special [magistrate] be compelled to furnish notes or drafts."<sup>233</sup> Additionally, to ensure that the special magistrate is not dragged into subsequent or concurrent legal or administrative proceedings, the majority of local governments that have enacted procedures to implement the Act require that the special magistrate enter into an agreement prohibiting participation outside of the Act's proceedings.<sup>234</sup> Therefore, to avoid the possibility of the special magistrate being injected into a legal dispute, an employment agreement with the

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229. *Id.*

230. *Id.* at § 70.51(25).

231. *Id.* at § 70.51(26).

232. *Id.* at. §§ 44.401–44.406 (2006) (prohibiting a party to a court-ordered mediation, including a mediator, from testifying in a subsequent proceeding regarding mediation communications).

233. *FCRC Model Guidelines, supra* n. 53, at § 20(3).

234. *Supra* n. 26 and accompanying text (listing the municipalities that have enacted ordinances to implement the Act).

special magistrate should prohibit the magistrate from testifying in any administrative or legal proceedings involving the development order or enforcement action in dispute.

#### IV. ANALYSIS OF ISSUES FACING APPELLATE COURTS ARISING FROM THE DISPUTE RESOLUTION ACT

##### A. What Constitutes a Development Order?

In the first reported case under the Act, *Hanna v. Environmental Protection Commission*, the Second District Court of Appeal was presented with the question of what exactly constitutes a development order for purposes of the Act. In *Hanna*, a property owner obtained a building permit to construct a culvert necessary for a driveway connection between his property and a county road.<sup>235</sup> However, once the owner began clearing the land, the EPC advised the owner in a letter that the owner's activity might have violated its wetland rules.<sup>236</sup> In response, the owner asserted that the EPC's letter constituted a development order and sought to invoke proceedings under the Act.<sup>237</sup>

The Act requires that the governmental entity conduct a hearing within forty-five days after the special magistrate receives the owner's request, and that the proceedings must be completed within 165 days.<sup>238</sup> The EPC, however, failed to act upon the owner's request for relief. After 165 days had passed, the owner filed an inverse-condemnation suit alleging that because of the EPC's failure to appoint a special magistrate within 165 days, the agency had unconstitutionally taken his property, and he was entitled to full compensation as provided by the Florida Constitution.<sup>239</sup>

In its analysis, the court noted how expansive the term "development order" was by characterizing it as "broad."<sup>240</sup> The court,

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235. 735 So. 2d at 545.

236. *Id.*

237. *Id.*

238. Fla. Stat. § 70.51(23).

239. *Hanna*, 735 So. 2d at 545. Additionally, the Florida Constitution states that "No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner." Fla. Const. art. X, § 6(a).

240. *Hanna*, 735 So. 2d at 545.

however, stated that it was not convinced that a letter from a governmental agency rose to the level of a development order under the Act.<sup>241</sup> Furthermore, because the Act specifically does not create a judicial cause of action, the court affirmed the trial court's order dismissing the owner's inverse-condemnation claim for failure to state a cause of action.<sup>242</sup>

#### B. Does a Trial Court Have Jurisdiction to Dismiss Proceedings under the Act?

In *Scott v. Polk County*,<sup>243</sup> the Second District Court of Appeal was presented with the question of whether a trial court could dismiss proceedings under the Act while the property owner simultaneously sought judicial review.<sup>244</sup> In *Scott*, the Polk County Board of County Commissioners denied a property owner's application seeking a PUD.<sup>245</sup> The PUD proposed developing a portion of the owner's property into a marina and resort.<sup>246</sup> After the PUD petition was denied, the owner timely filed her request.<sup>247</sup> However, only eight days later, the owner filed suit against the County alleging that her substantive due process rights had been violated as a result of unlawful ex parte communications between county staff and the local water management district, which apparently was interested in acquiring the owner's property.<sup>248</sup> The

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241. *Id.*

242. *Id.*

243. 793 So. 2d 85 (Fla. 2d Dist. App. 2001).

244. *Id.* at 86.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 85.

owner alleged that under *Jennings v. Dade County*,<sup>249</sup> the court should not have considered the ex parte communications.<sup>250</sup>

After taking approximately seven months to process the owner's request for relief under the Act, the special magistrate indicated to the County Commission that the process had resulted in an impasse.<sup>251</sup> However, the special magistrate's recommendation also stated that the special magistrate was willing to continue the proceedings "upon agreement of the parties or further direction of the trial court."<sup>252</sup> Notably, there is no provision under the Act that allows a special master to unilaterally intrude into parallel court proceedings. Three months later, the County filed a motion to dismiss the special master proceedings.<sup>253</sup> The trial court granted the motion and concluded that once judicial proceedings had commenced, the owner had waived her right to employ the Act.<sup>254</sup>

In its analysis, the appellate court noted that the Act allows an owner to institute proceedings prior to seeking judicial review of a denial of a zoning decision.<sup>255</sup> The court noted that the time for contesting the validity of a development order is tolled under the Act until the local government takes action on the special magistrate's recommendation.<sup>256</sup> The court, however, indicated that if an owner should challenge the rezoning denial in court prior to initiating proceedings under the Act, the owner then

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249. 589 So. 2d 1337 (Fla. 2d Dist. App. 2001). In *Jennings*, a landowner applied for and was granted a variance to operate an oil-change business on his property. *Id.* at 1339. The petitioner, who was opposed to the variance, alleged that ex parte communication between the landowner's lobbyist and members of the county commission violated the petitioner's due process because the communication occurred while the variance application was still pending. *Id.* The trial court dismissed the due process complaint and the petitioner appealed. *Id.* at 1340. The district court held that "[e]x parte communications are inherently improper and are anathema to quasi-judicial proceedings." *Id.* at 1341. The court then held that once an aggrieved party offers proof that an ex parte communication has occurred, its effect is presumed prejudicial unless the defendant can prove otherwise. *Id.*

250. *Scott*, 793 So. 2d at 86.

251. *Id.*

252. *Id.* (quoting the special magistrate's "Mediator's Report").

253. *Id.*

254. *Id.* (finding that special master proceedings under the Act "were intended only as an alternative to judicial proceedings").

255. *Id.* at 87.

256. *Id.*

waives his or her right to employ the Act.<sup>257</sup> The court then concluded that the plain language of the Act allows for an informal and nonjudicial process strictly controlled by the parties and the special magistrate, noting that nothing in the Act grants jurisdiction to a trial court to intervene in special magistrate proceedings.<sup>258</sup> Finally, the court determined that because the trial court departed from the essential requirements of law in dismissing the owner's case, the owner's original notice of appeal should be converted into a petition for writ of certiorari, which the court then issued.<sup>259</sup>

C. May a Local Government Adopt a Special Magistrate's  
Recommendation That Fails to Replicate the  
Applicable Land-Use-Approval Process?

In *St. Johns/St. Augustine*, the Fifth District Court of Appeal was presented with a case of first impression involving the application of a provision contained in the Dispute Resolution Act.<sup>260</sup> Specifically, the question presented to the trial court was whether an owner whose PUD rezoning was denied was required to duplicate the rezoning process after receiving a positive recommendation from a special magistrate resulting from a Dispute Resolution Act proceeding.<sup>261</sup>

In *St. Johns/St. Augustine*, a property owner entered into a pre-annexation agreement with the City of St. Augustine. This agreement stated that the "[o]wner requires that City diligently and expeditiously process certain zoning and comprehensive plan amendment applications."<sup>262</sup> Notably, Section 171.062(2) of the Florida Statutes states that

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257. *Id.* (finding that in this case, no such judicial review had been initiated).

258. *Id.* (noting that the judicial review of a zoning decision is an alternative and completely distinct process from the special master proceeding).

259. *Id.* (holding that because the trial court's order of dismissal was not reviewable as an interlocutory appeal pursuant to Florida Rule of Appellate Procedure 9.130, the appellate court would treat the appeal as a petition for a writ of common law certiorari).

260. *St. Johns/St. Augustine*, 909 So. 2d. at 576; see Fla. Stat. § 70.51(21)(a) (not requiring that an owner duplicate previous processes in which the owner has participated in order to effectuate the granting of the development permit recommended by a special magistrate).

261. Or. Denying Petr.'s Req. Writ Cert. at 4, *St. Johns/St. Augustine*, 909 So. 2d 575.

262. *St. Johns/St. Augustine*, 909 So. 2d at 575 (Sharp, J., dissenting).

[i]f the area annexed was subject to a county land[-]use plan and county zoning or subdivision regulations, said regulations shall remain in full force and effect until the municipality adopts a comprehensive plan amendment to include the annexed area.<sup>263</sup>

In addition, the state's growth-management act (the Local Government Comprehensive Planning and Land Development Regulation Act) intends for, "all development be in conformity with comprehensive plans and regulations and that all land development regulations be consistent with comprehensive plans."<sup>264</sup>

However, approximately two years after the annexation occurred, the City had not yet fulfilled its obligation under the pre-annexation agreement requiring it to amend its comprehensive plan to include the owner's property.<sup>265</sup> The owner then filed a petition seeking to modify the project's PUD zoning that, if approved, would increase both the project's density and intensity, which several parties opposed.<sup>266</sup> The City's Planning and Zoning Board approved the PUD amendment and the opponents appealed to the City Commission.<sup>267</sup> The City Commission reversed the Planning and Zoning Board and denied the petition, and the owner sought alternative relief under the Dispute Resolution Act.<sup>268</sup>

At the conclusion of the special magistrate proceedings, the special magistrate recommended conditionally approving the PUD, suggesting measures such as the addition of buffers, trees, and landscaping to minimize the project's impacts.<sup>269</sup> The application of the City's comprehensive plan to the property was apparently not addressed through the special magistrate proceedings, and the property was still subject to the St. Johns County's com-

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263. *Id.* at 579.

264. *Id.* at 577. The express purpose of the act is "to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development." *Id.* (citing Florida Statutes Section 163.3161(2)).

265. *Id.* at 579 (reasoning from footnote three of the case, that as of 2005, two years after the City amended its county PUD, it still had not "brought this property under the City's Comprehensive Plan").

266. *Id.* at 576.

267. *Id.*

268. *Id.*

269. *Id.*

prehensive plan.<sup>270</sup> In addition, the revised rezoning application that reflected the special magistrate's recommendations was, contrary to the City's land-use-approval process, not forwarded to the City's Planning and Zoning Board for action, but presented directly back to the City Commission.<sup>271</sup> In response, the City Commission reversed its prior decision to deny the PUD and approved the special master's recommendation through the dispute-resolution process without the Planning and Zoning Board's input.<sup>272</sup> The trial court noted that there was no existing statute that required the City Commission to remand the rezoning application back to the Planning and Zoning Board before making modifications to the PUD zoning.<sup>273</sup> In addition, the trial court held that "to require [the] City to resubmit the Application to the Planning and Zoning Board would be a duplicative process, requiring the Board to reconsider the same subject and the same arguments as it ha[s] already heard, and which the Commission ha[s] already approved."<sup>274</sup> Thus, in accordance with the express provision of the Act that does not require an owner to duplicate a previous process to effectuate a recommended settlement,<sup>275</sup> the owner was not required to repeat the same PUD rezoning process.<sup>276</sup>

#### D. Is the Dispute Resolution Act's Tolling Provision Constitutional?

The Dispute Resolution Act states that initiating special magistrate proceedings tolls the time for seeking judicial review of a government's development order until the special magistrate's recommendation is acted upon by the government.<sup>277</sup> The legality of this tolling provision, which has often been the subject of debate among land use practitioners and special magistrates, was

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270. Or. Denying Petr.'s Req. Writ Cert. at 4, *St. Johns/St. Augustine*, 909 So. 2d 575.

271. *Id.* at 4.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* (citing to Fla. Stat. § 70.51(21)(a)).

276. *Id.*

277. Fla. Stat. § 70.51(1)(a).

finally challenged in the recent case of *Peninsular Properties Braden River, LLC v. City of Bradenton*.<sup>278</sup>

In *Peninsular Properties*, an owner sought zoning-site-plan approval for a multistory condominium project with marina facilities.<sup>279</sup> Approval of the project's site plan came through a quasi-judicial process in which the City Council was the ultimate decisionmaker.<sup>280</sup> During the course of several public hearings, nearby residents and public interest groups vehemently opposed the project, arguing that it was incompatible with existing development in the area and would have a detrimental affect on the area's natural resources, including the Braden River.<sup>281</sup> After a very contentious final public hearing, the City Council denied the owner's site-plan application.<sup>282</sup> The owner then timely invoked proceedings under the Act alleging that the City's development order was both unreasonable and imposed an unfair burden on the use of the owner's property.<sup>283</sup>

After it became apparent that the City would not approve the site plan through the special magistrate proceedings, the owner filed its petition seeking a writ of certiorari (petition) fifty-one days after the City had denied its zoning application.<sup>284</sup> Notably, Florida Rule of Appellate Procedure 9.100(c) requires that a petition seeking review of a local government's quasi-judicial decision must seek appellate jurisdiction within thirty days from the date a decision was rendered; therefore the owner filed the petition more than twenty days beyond the Rule's thirty-day period.<sup>285</sup>

The City then filed a motion to dismiss the owner's petition, alleging that because the owner's petition was not filed within the required thirty-day time frame, the trial court did not have jurisdiction over the matter.<sup>286</sup> Pursuant to Florida Rule of Appellate Procedure 9.300, the City also asserted that the Act's tolling provision was an unconstitutional infringement on the Florida Su-

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278. 965 So. 2d 160.

279. *Id.* at 161.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

preme Court's exclusive rulemaking authority conferred by the Florida Constitution.<sup>287</sup> In support of this argument, the City claimed that the Act's tolling provision was the Legislature's attempt to amend the appellate rule, thereby violating the constitutional separation of powers.<sup>288</sup>

The trial court ruled in favor of the City, noting that if the procedural elements of a statute impermissibly intrude upon the procedural practice of the courts, the legislative provisions must acquiesce to court rules and procedures.<sup>289</sup> In its analysis, the trial court cited *Kalway v. State*,<sup>290</sup> wherein the court determined that the procedural aspects of an inmate-indigency statute were minimal and did not void the law as they were intended to implement the law's substantive provisions.<sup>291</sup> Therefore, the law at issue in *Kalway* did not conflict with the Florida Supreme Court's practice and procedures.<sup>292</sup> To the contrary, the trial court found that the Dispute Resolution Act's tolling provision was not merely incidental, but rather intrusive and conflicted with the strict thirty-day jurisdictional deadline set forth in the Florida Rule of Appellate Procedure. Accordingly, the trial court held that the Act's tolling provision was an unconstitutional "trespass upon the Court's rulemaking authority."<sup>293</sup> The court then dismissed the plaintiff's petition for lack of jurisdiction.<sup>294</sup>

The Second District Court of Appeal reversed.<sup>295</sup> In its analysis, the Second District noted that the Act was intended

to encourage mediation, and that intent is facilitated by the tolling of the time required to file an action in court. Because the procedural tolling provision of subsection 70.51(10)(a) is intertwined with the remainder of the statute, the circuit

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287. *Id.* Additionally, Article V, section 2(a) of the Florida Constitution provides that the Florida Supreme Court shall adopt rules of procedure in all courts, "including the time for seeking appellate review."

288. Or. on Respt.'s Mot. to Dismiss Pet. for Writ of Cert. at 2–3, *Peninsular Properties*, No. 2005-CA-006018.

289. *Id.* at 5, 11.

290. 730 So. 2d 861 (Fla. 1st Dist. App. 1999).

291. *Id.* at 862.

292. Or. on Respt.'s Mot. to Dismiss Pet. for Writ of Cert. at 5, *Peninsular Properties*, No. 2005-CA-006018.

293. *Id.* at 11.

294. *Id.* at 11–12.

295. *Peninsular Properties*, 965 So. 2d at 162.

court erred in finding section 70.51(10)(a) unconstitutional.<sup>296</sup>

The court then reversed and remanded the case for a review of the substance of the owner's petition for writ of certiorari.<sup>297</sup>

*V. SUGGESTED MODIFICATIONS TO INCREASE  
THE USE AND EFFECTIVENESS OF THE  
DISPUTE RESOLUTION ACT*

Involvement in numerous proceedings under the Act since its creation, as both a special magistrate and owner's legal counsel, provides the Author with a unique perspective on the mechanics associated with implementing the Act and the Act's effectiveness as a means to resolve land-use disputes. Most cases the Author has either participated in or observed have arisen from quasi-judicial proceedings where rezoning, special-use, or site-plan permit applications were denied. The Act has now been in effect for over twelve years, and many owners and local governments participate in special magistrate proceedings on a routine basis.<sup>298</sup> The parties now recognize that proceedings under the Act allow the opportunity for a predictable, expeditious, and economical process for achieving their competing goals. The Act provides both governments and developers the opportunity to achieve solutions and compromises outside of the political and emotional public-hearing process.<sup>299</sup> Such flexibility is not available through costly and time-consuming litigation.<sup>300</sup>

However, the governmental body is usually aware that the special magistrate's recommendation is nonbinding and does not carry weight in any subsequent administrative or legal proceeding.<sup>301</sup> This lack of legal significance provides the opportunity for local governments to summarily ignore recommendations without

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296. *Id.*

297. *Id.* In response to the Second District's ruling, the City filed a motion for rehearing that was ultimately denied.

298. *See supra* n. 1 (stating that the Act was enacted in 1995).

299. *See supra* nn. 18–19 and accompanying text (explaining that the Act provides an alternative to judicial proceedings).

300. *See supra* nn. 219–220 and accompanying text (describing the costs associated with litigation).

301. *See supra* nn. 221–227 and accompanying text (discussing the legal significance of a special magistrate recommendation in administrative and judicial actions).

any consequences, resulting in a lengthy, expensive, and wasted effort for landowners.

Although the Act provides a viable alternative to litigation, certain changes to the Act are suggested to increase the confidence in the effectiveness and integrity of the Act. These changes, if enacted, would provide some procedural regularity and certainty to the Act and may also motivate owners to invest the time and resources required to resolve their disputes through these proceedings. Accordingly, the following are some suggested changes to the Act for the Legislature's consideration:<sup>302</sup>

- (1) Amend the Act to enhance the powers of the special magistrate to ensure compliance. The current lack of an enforcement mechanism provides the opportunity for either party to abuse or manipulate the special magistrate process.<sup>303</sup> Accordingly, the Act should be amended to allow the special magistrate to enforce the provisions of the Act or to provide that a party may, upon filing a motion with the court, compel compliance with the provisions of the Act. To further encourage good-faith compliance with the Act, either the special magistrate or the court should be provided authority to assess and award attorneys' fees and costs against the noncompliant party.
- (2) Amend the Act to incorporate the appropriate legal standard of review for the denial of the original development permit. Additionally, allow the special magistrate to consider this standard of review as an additional criterion for determining whether an action by local government on a development order was unreasonable or imposed an unfair burden on the owner's use of his or her property. A special magistrate recommendation that applies the appropriate legal standard will provide both parties with valuable perspective concerning the strength of their po-

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302. Several authors and organizations have set forth numerous recommendations for improving proceedings under the Act. *E.g.* FCRC Study, *supra* n. 25, at 35–36; Conrad & Smith, *supra* n. 21, at ¶¶ 5–8; Dix et al., *supra* n. 2, at 68 (commenting that the Act should facilitate an organized, efficient, and fair dispute-resolution process).

303. See *supra* n. 208 and accompanying text (describing the lack of legal authority on behalf of the special magistrate as well as the absence of enforcement mechanisms).

sitions should the parties consider administrative or judicial proceedings to resolve their dispute.

- (3) Amend the Act to address the ongoing confusion and debate concerning the proper procedures for adopting a special magistrate's recommendation. Many property owners and local governments refrain from using the Act because they question the legality and defensibility of a government's ability to grant variances to its laws, rules, and procedures. To clarify this situation and provide a consistent process to ensure the certainty and confidence of all parties—and to also avoid potential challenges based on local government's unlawfully contracting away its police power—the Act should be amended to indicate that the special magistrate's recommendation may be adopted by a development agreement pursuant to the Florida Local Government Development Agreement Act<sup>304</sup> or through a procedure providing for a distinct notice and a public hearing. Furthermore, the governing body's approval or rejection of the special magistrate's recommendation should be made by simple majority of the decisionmaking body in attendance, and that decision should not be subject to legal challenges by any third parties.
- (4) To add significance to the special magistrate's recommendation and ensure that it is duly considered by local governments, the Act should also be amended to clarify that the special magistrate's recommendation shall be considered substantial competent evidence in support of an owner's development order in the event that the recommendation is rejected and subsequent administrative or legal proceedings are initiated.
- (5) Amend the Act to indicate that the special magistrate may not be called as a witness in any administrative or legal proceedings involving his or her recommendation or

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304. See Florida Local Government Development Agreement Act, Fla. Stat. §§ 163.3220–3243 (2006).

involving the real property that was the subject of the special magistrate's recommendation.

- (6) Amend the Act to require that local governments include in their development orders a notice of the right of a defeated applicant to invoke the Act. Most property owners and local governments are unfamiliar with the Act, and notwithstanding the Act's twelve-year existence, less than one percent of Florida's local governments have adopted procedures to implement its provisions.<sup>305</sup>
- (7) Amend the Act to define "enforcement action." Also, amend the Act to allow persons having any legal or equitable interest in the property at issue to qualify as parties that are eligible to invoke proceedings under the Act.
- (8) Although the Act suggests that the proceedings be divided into distinct mediation and information-gathering stages, the Act requires that only one hearing be conducted.<sup>306</sup> This wording causes confusion concerning whether the special magistrate process can legally be bifurcated into two distinct proceedings that require two separate hearings, which may extend the proceedings beyond the Act's 165-day time limit. The Act now indicates that even if a contingent settlement is achieved between the parties during the mediation phase, no written recommendation is required.<sup>307</sup> However, if mediation should fail, a hearing is then conducted, and the special magistrate must prepare a recommendation.<sup>308</sup> Logically, if mediation is the goal, the parties should not be required to prepare for an adversarial hearing by bringing all of their witnesses and evidence at this stage of the process. Preparation for a hearing that may not occur not only results in unnecessary costs but also creates an adversarial setting that is counterproductive to the spirit

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305. *See supra* n. 26 (detailing the few cities that have enacted ordinances providing for procedures under the Act).

306. Fla. Stat. § 70.51(8).

307. *Id.* at § 70.51(17)(a).

308. *Id.* at § 70.51(17)(b), (19).

and intent of the Act.<sup>309</sup> Accordingly, the Act should be amended to clarify that the proceedings are to be bifurcated with the first phase consisting of an informal mediation that will result in a settlement recommendation to the governing body. If a recommendation is then rejected, the owner may, at its discretion, initiate the hearing stage of the proceedings to determine whether the government's action was unreasonable or imposed an unfair burden on the use of the owner's property.

- (9) Amend the Act to provide a process for appointing a special magistrate in situations in which the parties cannot agree. Additionally, incorporate a procedural safeguard into the Act to ensure that a mutually chosen special magistrate is selected within ten days of the owner's filing of its request for relief. The Act should consider incorporating by reference the AAA's guidelines for securing agreement of the parties, or the process suggested by the FCRC Model Guidelines.
- (10) Amend the Act to allow the owner, at its discretion, to waive the mediation phase of the proceedings and proceed directly to the hearing stage to determine whether the governmental entity's decision on a development order or enforcement action was unreasonable or imposed an unfair burden.
- (11) Amend the Act to require that all testimony at the hearing stage of the proceedings be under oath to ensure the veracity of the testimony and accountability of all participants.
- (12) Amend the Act to allow for alteration and extension of deadlines by mutual consent of the parties. The Act's strict deadlines are difficult to meet and often require local governments to convene special call meetings in order to adhere to its time frames.
- (13) The Act requires that the owner consent to any special magistrate recommendation without providing a process

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309. Conrad & Smith, *supra* n. 21, at 2.

for this consent to be given subsequent to the information-gathering phase of the process.<sup>310</sup> Accordingly, amend the Act to require the special magistrate to send his or her recommendation to the owner for review and approval prior to forwarding it to the governmental entity. If the owner should disagree with the terms of the recommendation, the owner should be able to reject the recommendation and file a motion with the special magistrate seeking clarification. The resulting motion hearing should involve only the parties and special magistrate.

- (14) The Act requires that the special magistrate send his or her recommendation only to the SDLA and the governmental entity.<sup>311</sup> Therefore, amend the Act to indicate that the owner shall also be provided with the magistrate's recommendation.
- (15) In order to ensure that the decisionmaking body completely understands both the owner's and the government's perspectives on a proposed settlement, amend the Act to indicate that the hearing wherein the special magistrate's recommendation will be acted upon is not considered a quasi-judicial hearing. Accordingly, the governing body may, prior to such hearing, engage in discussions with the owner, staff, and persons who have qualified to participate in the proceedings concerning a proposed recommendation, subject to public disclosure of any ex parte contacts placed on the record of the settlement hearing.

## VI. CONCLUSION

The Dispute Resolution Act is intended to provide an informal mediation process that affords an owner a viable alternative to achieve a compromise solution to a land-use dispute, as opposed to resolution of a dispute through the unpredictable, expensive, and frustrating litigation process. The Act can serve as a

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310. Fla. Stat. § 70.51(19)(b).

311. *Id.* at § 70.51(27).

very effective, creative, and cost-saving tool, allowing property owners and local governments to expeditiously and economically resolve their disputes by fashioning reasonable, innovative compromises outside the limitations of the often chaotic, emotional, and hostile public-hearing process. However, recognizing some of the procedural and substantive deficiencies in the Act, owners and local governments seeking to find a meaningful compromise under the Act should agree in advance on process and interpretation to avoid confusion, disappointment, and wasted efforts. To encourage and to motivate owners to utilize the Act and to also improve the Act's overall effectiveness, the Legislature should give due consideration to making certain changes to the Act, especially focusing on changes that will ensure that the recommendation-approval process is legally defensible.