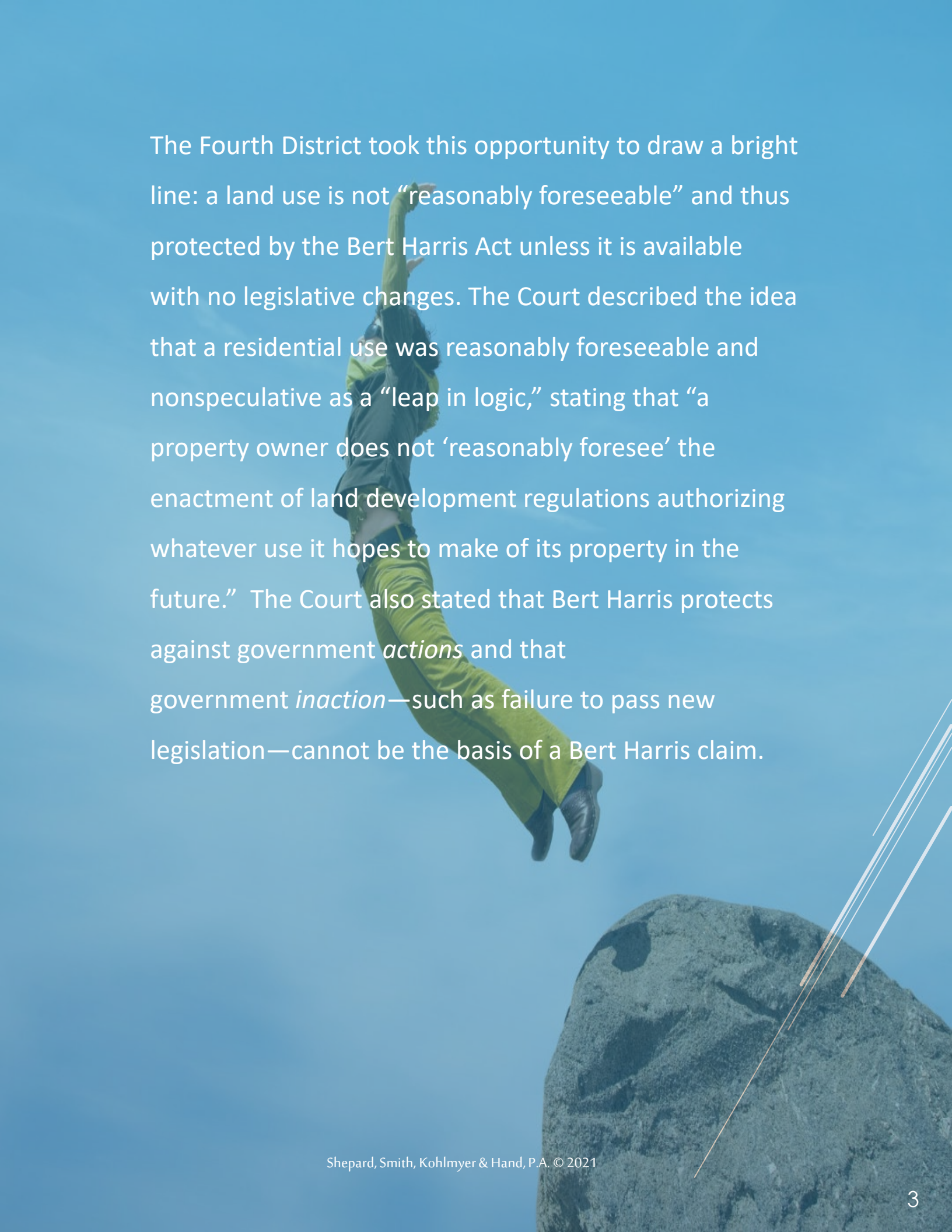


# NO “BERT HARRIS” LAWSUIT AVAILABLE FOR LOCAL GOVERNMENT REFUSAL TO CHANGE ZONING REGULATION

By: Jacob Schumer

Courts have long struggled to balance property owners' rights and local governments' ability to regulate land use for the public's benefit. While the Constitution provides protection from extreme land use restrictions, Florida elected to further protect property interests with the Bert J. Harris Jr., Private Property Rights Protection Act (Fla. Stat. §70.001, et seq.), which requires compensation when a government regulation inordinately burdens a property. Because what constitutes a compensable "inordinate burden" is unclear, local governments and property owners often must engage in expensive litigation to determine whether a regulation went too far. In a recent decision, the Fourth District Court of Appeals drew a clear line as to one subset of Bert Harris claims. *Boca Center at Military, LLC v. City of Boca Raton*, 4D19-2736 (February 3, 2021).

In *Boca Center*, developers purchased property in the City's midtown area. The City's comprehensive plan designated the property as "Planned Mobility," which allowed for residential uses when called for by the City's zoning regulations. Because the existing land use regulations only allowed for commercial and retail development, the property could not be developed for residential uses until the City enacted new zoning regulations. After the developers purchased the midtown property, the City delayed, then canceled a scheduled regulation change which would have allowed residential uses on the property. The developers then sued under Bert Harris, arguing that the City had inordinately burdened the "reasonably foreseeable" residential use of their property.

A person wearing a bright green jumpsuit and black boots is captured mid-air, jumping over a large, dark, textured rock. The background is a clear, bright blue sky. The person's arms are raised, and their legs are bent at the knees, suggesting a powerful leap. The rock is positioned in the lower right quadrant of the frame. The overall scene conveys a sense of freedom, risk-taking, and overcoming a challenge.

The Fourth District took this opportunity to draw a bright line: a land use is not “reasonably foreseeable” and thus protected by the Bert Harris Act unless it is available with no legislative changes. The Court described the idea that a residential use was reasonably foreseeable and nonspeculative as a “leap in logic,” stating that “a property owner does not ‘reasonably foresee’ the enactment of land development regulations authorizing whatever use it hopes to make of its property in the future.” The Court also stated that Bert Harris protects against government *actions* and that government *inaction*—such as failure to pass new legislation—cannot be the basis of a Bert Harris claim.

While this result may seem obvious, it brings some much-needed clarity to the field of regulatory takings law. The saga of the *Pacetta v. Town of Ponce Inlet* takings suit, which spanned over a decade with multiple appeals and costing millions in attorneys' fees, all centered around the Town *not* passing new legislation to allow a boat storage complex. The fact that the Court drew a clear line will help avoid such costly litigation in the future.



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