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Golfrock, LLC v. Lee County, Florida, Case No. 2D15-2105 (Fla. 2d DCA 2017).
Upon rehearing, the Second District reaffirms that a party cannot use a declaratory action to divorce the determination whether an aggrieved party needs to take further action to ripen a takings claim from the takings claim itself, i.e., both must be done at the same time.

Muchnick v. Goihman, Case No. 3D17-122 (Fla. 3d DCA 2018).
A sales agent, in addition to his or her broker, may be individually liable for misrepresentations made to contracting parties.

GSK Hollywood Development Group, LLC v. City of Hollywood, Case No. 4D16-3453 (Fla. 4th DCA 2018).
The 2010 version of the Bert Harris Act, Florida Statute section 71.001, required "action of a governmental entity," and there can be no violation of the Act if the landowner did not seek a permit, variance, waiver, or other governmental action.

Third District Court of Appeal

State of Florida

Opinion filed May 2, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-122
Lower Tribunal No. 14-2925

Michael Muchnick and Valerie Muchnick,
Appellants,

vs.

Richard Goihman,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Antonio Marin, Judge.

International Law Partners LLP and Zahra Khan (Hollywood), for appellants.

Nexterra Law, Steven M. Liberty, and Eric A. Jacobs, for appellee.

Before LAGOA, EMAS and LUCK, JJ.

LUCK, J.

Michael and Valerie Muchnick, former tenants in a Williams Island apartment, appeal the trial court's summary judgment in favor of their former

rental agent, Richard Goihman, on their claims that Goihman fraudulently induced the couple to rent the apartment, and negligently repaired the water intrusion and mold problems with the apartment. We affirm the summary judgment on the fraud in the inducement claim, but reverse on the negligence claim and remand for further proceedings.

Factual Background and Procedural History

Goihman was a real estate agent working for Fortune International Realty. He knew the Muchnicks because they lived in the same apartment building in Aventura. When Goihman learned the Muchnicks needed to move from their current apartment because it was being sold, he approached them about renting a different unit in the same building. In April 2012, the Muchnicks entered into a two-year lease agreement to rent the new apartment for $7,500 a month. They paid their rent in six-month installments. Fortune International Reality was listed as the broker on the transaction.

During a walk-through of the apartment with Goihman, the Muchnicks pointed out cosmetic issues with the unit – scuffed floors; paint touch ups – which Goihman assured them would be addressed prior to them moving in. But the issues were not resolved, and when the Muchnicks moved in, they discovered that the problems were greater and more serious than they first realized. Most significantly, leaks in the bathroom resulted in water damage and mold in the

ventilation system. The mold, according to the Muchnicks, affected their children's health and required that they be put on medication. The Muchnicks communicated primarily with Goihman regarding issues with the unit because the owner lived abroad. Due to the mounting repairs and Goihman's failure to quickly resolve the issues, the Muchnicks terminated the lease about six months early and, in February 2014, filed suit against Goihman and the owner of the apartment.

The complaint alleged the following against Goihman: fraud in the inducement; breach of covenant of quiet enjoyment of the premises; breach of covenant of good faith and fair dealing; unjust enrichment; and negligence. Goihman moved for summary judgment on all counts, which the trial court granted. The Muchnicks appeal only the trial court's summary judgment on their fraud in the inducement and negligence claims.

Standard of Review

"The determination of duty, as an element of negligence, is a question of law, and is therefore subject to de novo review. We also review de novo a trial court's granting of summary judgment." Chirillo v. Granicz, 199 So. 3d 246, 248-49 (Fla. 2016) (citations omitted).

Discussion

We affirm without discussion the summary judgment on the fraud claim, but reverse summary judgment and remand for further proceedings on the negligence

claim. In their complaint, the Muchnicks alleged that Goihman "owed a duty . . . to maintain a secure and mold free home, and when necessary, to repair or replace areas of the home to ensure the quiet enjoyment by the Muchnicks." Goihman breached this duty, they alleged, by: "failing to protect their home from damaging water intrusion"; "failing to repair the corrosion with the plumbing throughout the apartment"; "failing to take quick measures to remedy"; "failing to remedy the long term effects of water intrusion into the home and throughout the common elements creating an environment conducive to the spread of harmful algae, spores and mold"; and "failing to provide a habitable home for the Muchnicks and maintain the home in a manner conducive to healthy living."

Goihman moved for summary judgment on the negligence claim because: (1) he was acting in the scope of his employment with Fortune International Realty, and thus, was not a proper party; and (2) Goihman owed no duty to the Muchnicks. Not knowing from the trial court's unelaborated order on what basis it granted summary judgment, we will address both summary judgment arguments.[1]

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[1] In addition to his proper party and duty arguments, Goihman says we must affirm because there is no transcript of the summary judgment hearing in the appellate record. We rejected the same contention in Seal Products v. Mansfield, 705 So. 2d 973 (Fla. 3d DCA 1998), explaining:

> Where the appeal is from a summary judgment, the appellant must bring up the summary judgment record, that is, the motion, supporting and opposing papers, and other matters of record which were pertinent to the summary judgment motion. Those are the portions of the record essential to a determination whether summary judgment was

Proper Party

Goihman argued that he was not liable for negligence, and not a proper party, because he was acting in the scope of his employment, and not in his individual capacity, in his dealings with the Muchnicks. But just because Goihman was acting in the scope of his employment when he rented the apartment, promised to fix it, and managed the repairs, doesn't mean that he was shielded from personal liability under all circumstances. "[O]fficers or agents of corporations may be individually liable in tort if they commit or participate in a tort, even if their acts are within the course and scope of their employment. All that needs to be alleged is that the agent or officer personally participated in the tort, even if the complained of action was because of and entirely within the scope of his or her employment." Vesta Const. & Design, L.L.C. v. Lotspeich & Assocs., Inc., 974 So. 2d 1176, 1180 (Fla. 5th DCA 2008) (Lawson, J.) (citations and quotations omitted).

> properly entered. However, the hearing on the motion for summary judgment consists of the legal argument of counsel, not the taking of evidence. Consequently, it is not necessary to procure a transcript of the summary judgment hearing, although it is permissible and often helpful to do so.

Id. at 975 (citation omitted). Here, as in Mansfield, we have Goihman's motion for summary judgment, the Muchnicks' response, and the evidence they relied on. While a transcript would have been helpful, it is not necessary for our de novo review of whether there's a genuine issue of material fact on the Muchnicks' negligence claim.

Here, the summary judgment evidence showed that Goihman personally participated in the negligence. Mr. Muchnick testified in his deposition that Goihman promised the problems in the apartment would be taken care of before the Muchnicks moved in. Mr. Muchnick testified that after his family moved into the apartment, and there were continued problems, Goihman again promised to fix them. Mr. Muchnick testified that Goihman made some arrangements to fix the mold and water intrusion issues, but the issues were not resolved. This precludes summary judgment on whether Goihman was the proper party.

Duty

Goihman contends that because he was not the owner or landlord of the apartment, he owed no duty of reasonable care to the Muchnicks. But once Goihman made the promise to fix the problems in the apartment, and managed the repairs, he had a duty through the undertaker's doctrine to exercise reasonable care in making the repairs.

The Florida Supreme Court has described the "undertaker's doctrine" this way: "Whenever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service – i.e., the 'undertaker' – thereby assumes a duty to act carefully and to not put others at an undue risk of harm." Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003). "The undertaker is subject to liability if: (a) he or she fails

to exercise reasonable care, which results in increased harm to the beneficiary; or (b) the beneficiary relies upon the undertaker and is harmed as a result." Limones v. Sch. Dist. of Lee Cty., 161 So. 3d 384, 388 n.3 (Fla. 2015).

Goihman had a duty of reasonable care to the Muchnicks when he voluntarily undertook to fix the problems with the apartment. In Mr. Muchnick's deposition, he testified that "[Goihman] promised that he would take care of the issues while we were living there" and that he "made it very clear that since [] [they] lived in the building together that if there were any issues, to let him know, and he would be on top of it." Mr. Muchnick testified that Goihman was the "go-to guy" for purposes of addressing issues with the apartment both before and after his family moved in. According to Muchnick, Goihman repeatedly told him that he would take care of the repairs and yet Goihman never resolved the issues. By undertaking the responsibility for the repairs throughout the time the Muchnicks lived in the apartment, Goihman "assume[d] a specific, legally recognized duty to act with reasonable care." Pascual v. Fla. Power & Light Co., 911 So. 2d 152, 154 (Fla. 3d DCA 2005).

Mootness

Goihman finally argues that the case is moot because the Muchnicks agreed to a final judgment against the codefendant for $82,000, and filed a satisfaction as

to the codefendant. According to Goihman, because the claims and damages against him are the same, the satisfaction also released him from liability.

Goihman assumes one important fact: that the settlement amount covered the entire amount of the Muchnicks' damages. There is nothing in the record to indicate that the $82,000 paid by the codefendant covered all of their repair costs, the replacement costs of a new apartment, moving expenses, and medical bills for their children, among other expenses. Mid-litigation monetary settlements are often less than the total amount of damages that the plaintiff was claiming. Each side gives up something when they settle, including some of the plaintiff's potential monetary damages award.

The final judgment against the codefendant appears to be that kind of settlement. It provided that the $82,000 is for "partial" rent reimbursement and out-of-pocket expenses. The final judgment did not say it was in full satisfaction of the Muchnicks' damages, and it didn't mention the other expenses the family had as a result of Goihman's alleged negligence.

Ultimately, we don't know at this point of the litigation what the Muchnicks total damages will be. Damages were not an issue in Goihman's summary judgment motion. Without evidence of the amount of the Muchnicks' damages, we cannot say that the settlement with the codefendant extinguished or mooted the claim against Goihman.

Conclusion

We, therefore, affirm the summary judgment in favor of Goihman on the Muchnicks' fraud in the inducement claim, and reverse on the negligence claim. We remand for further proceedings on the negligence claim only.

Affirmed in part, reversed in part, and remanded for further proceedings.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

May 2, 2018

GOLFROCK, LLC, a Florida limited liability company, Appellant, v. LEE COUNTY, FLORIDA, a political subdivision of the State of Florida, Appellee.	)	Case No. 2D15-2105

BY ORDER OF THE COURT:

Appellant's motion rehearing en banc is denied. The court's opinion filed July 7, 2017, is withdrawn sua sponte, and the following opinion is substituted for clarification.

No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

GOLFROCK, LLC, a Florida limited liability company, Appellant, v. LEE COUNTY, FLORIDA, a political subdivision of the State of Florida, Appellee.	)	Case No. 2D15-2105

Opinion filed May 2, 2018.

Appeal from the Circuit Court for Lee County; Alane Laboda, Judge.

Gregory S. Rix and S. William Moore of Moore Bowman & Rix, P.A., Tampa, for Appellant.

Jay J. Bartlett and Jeffrey L. Hinds of Smolker, Bartlett, Loeb, Hinds & Sheppard, P.A., Tampa, and Richard Wm. Wesch, County Attorney, Fort Myers, for Appellee.

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

KELLY, Judge.

Appellant, GolfRock, LLC, submitted an application to Appellee, Lee County, seeking to change the zoning of a parcel of land. Complete details of what transpired in the application process are not pertinent to our disposition of this appeal. It suffices to say that Lee County amended its comprehensive plan and asked GolfRock to withdraw its application. GolfRock did not withdraw the application; however, Lee County has deemed it withdrawn so no rezoning application is presently pending.

After being asked to withdraw its application for rezoning, GolfRock filed an action for declaratory judgment against Lee County. The complaint alleged that "[i]n order to assert its private property rights under Article X, Section 6(a) of the Florida Constitution . . . or under the statutory protection of Section 70.001, Florida Statutes . . ., the 'Bert J. Harris, Jr., Private Property Rights Protection Act,' GolfRock is required to 'ripen' its claim . . . ." GolfRock asked the trial court to "enter a Declaratory Judgment finding that any continuation of the current zoning request is futile as a matter of law and that any claims for remedy for the injury to GolfRock's private property rights under the constitution or laws of Florida are ripe for adjudication."

Initially, Lee County moved to dismiss the complaint on several grounds. Among them, Lee County argued that the complaint failed to state a claim for declaratory relief. The trial court denied the motion and the case proceeded. Eventually, the parties filed cross-motions for summary judgment on the issue of ripeness. GolfRock's motion asked the trial court to find that "under the futility exception to the ripeness doctrine, any claim by GolfRock for a regulatory partial taking is now ripe for adjudication." Lee County argued that regardless of which type of takings claim GolfRock might eventually pursue, its claims were not ripe and the futility exception to

the ripeness doctrine did not apply. The trial court agreed that GolfRock had not established its claim was ripe nor had it established "the applicability of the futility exception[]." It entered summary judgment in favor of Lee County.

In this appeal GolfRock challenges that determination. We need not reach the merits of that issue, however, because we conclude GolfRock's complaint did not state a cause of action for declaratory relief. As a result, the trial court lacked jurisdiction and it should have dismissed the complaint.

To state a claim for declaratory relief, the party seeking the declaration must show that he is in doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that he is entitled to have such doubt removed. May v. Holley, 59 So. 2d 636, 638-39 (Fla. 1952); see also § 86.011, Fla. Stat. (2013). GolfRock's complaint does not allege GolfRock is in doubt as to the existence or nonexistence of any immunity, power, privilege, status, or right. The only mention of rights anywhere in the complaint is GolfRock's assertion that it has private property rights, the existence of which is unquestioned.

GolfRock's complaint explains that to pursue a takings claim for any injury to its property rights occasioned by how Lee County handled its zoning application, it must have a final denial of the application. It alleges it would be "prohibitively expensive" to pursue the application further, however, and that its denial is a "fait accompli." It points to the fact that Lee County's comprehensive plan, as amended while GolfRock's application was pending, no longer permits the planned use of its property. Accordingly, it asks the court to declare that its claim is ripe and that "any continuation of the current zoning request is futile as a matter of law."

Ripeness in the context of a regulatory takings claim is a prudential principle adopted by the Supreme Court that requires a plaintiff to "demonstrate that [he] has both received a 'final decision regarding the application of the [challenged] regulations to the property at issue' . . . and sought 'compensation through the procedures the State has provided for doing so.' " Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733-34 (1997) (quoting Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 194 (1985)). "Florida courts have adopted the federal ripeness policy of requiring a 'final determination from the government as to the permissible uses of the property.' " Taylor v. Vill. of N. Palm Beach, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995) (quoting Glisson v. Alachua Cty., 558 So. 2d 1030, 1034 (Fla. 1st DCA 1990)); see also Lost Tree Vill. Corp. v. City of Vero Beach, 838 So. 2d 561, 569-71, 573-75 (Fla. 4th DCA 2002).

The Supreme Court has explained the necessity of having a final decision:

> A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question.

Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001) (citations omitted) (quoting MacDonald, Sommer & Frates v. Yolo Cty., 477 U.S. 340, 351 (1986)). The "final decision requirement 'responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer.' " Id. at 620 (quoting Suitum, 520 U.S. at 738). The Supreme Court has carved out what has been characterized as a limited exception in cases where further

attempts to obtain approval of an application would be futile. Id. at 619-22; see also Lost Tree, 838 So. 2d at 573-75. As explained in Palazzolo,

> [w]hile a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

533 U.S. at 620.

GolfRock's complaint does not purport to assert any type of takings claim. Rather, it asks the trial court to declare that the County's actions amount to a final decision and that any further pursuit of its application would be futile. Viewed in the context of the case law on takings, GolfRock is essentially asking the trial court to determine — in the abstract — whether it can establish an as applied regulatory takings claim. When defending its complaint, it cited no authority to support divorcing the "final decision" determination, which is at the heart of whether a party has established a takings claim, from the takings action itself. See id. at 621 (explaining that "until these ordinary processes have been followed the extent of the restriction on property is not known and *a regulatory taking has not been established*")(emphasis supplied)); see generally MacDonald, 477 U.S. 340 (linking the ability to establish a taking with the ability to show that the government has made a final determination regarding how the land may be used); see also Lost Tree, 838 So. 2d at 573-76 (determining whether a complaint stated a cause of action for an as-applied regulatory takings claim based on the sufficiency of the allegations to demonstrate a final decision or alternatively to establish that further applications were futile).

GolfRock has utterly failed to explain how this is an appropriate claim for declaratory relief. The complaint does not allege, even in a perfunctory fashion, that GolfRock is in doubt regarding the existence of a right, power, privilege, or immunity as required to invoke the trial court's jurisdiction to render a declaratory judgment. Nor has GolfRock argued its complaint can somehow be construed to satisfy that requirement. GolfRock does not claim it is in doubt regarding the existence of its property rights, nor does it say it is in doubt regarding the effect of the amended comprehensive plan on the land use it had proposed in its now withdrawn rezoning application. While the declaratory judgment act is intentionally broad, it does have limits—one of which is that courts will not render advisory opinions or give legal advice. See May, 59 So. 2d at 639. Because GolfRock has not met its burden to demonstrate how its complaint is sufficient to meet the jurisdictional requirements of the declaratory judgment act, we reverse the final summary judgment and remand with directions to the trial court to dismiss the action.

Reversed and remanded.

LaROSE, C.J., and BADALAMENTI, JJ., Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

GSK HOLLYWOOD DEVELOPMENT GROUP, LLC,
Appellant,

v.

THE CITY OF HOLLYWOOD, FLORIDA,
a Florida municipal corporation,
Appellee.

No. 4D16-3453

[May 2, 2018]

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Jr., Judge; L.T. Case No. 09-032688 (13).

Harvey W. Gurland, Jr., Scott H. Marder and Lida Rodriguez-Taseff of Duane Morris LLP, Miami, for appellant.

Laura K. Wendell, Daniel L. Abbott and Adam A. Schwartzbaum of Weiss Serota Helfman Cole & Bierman, P.L., Fort Lauderdale, for appellee.

KUNTZ, J.

GSK Hollywood Development Group, LLC filed a two-count complaint against the City of Hollywood ("City"), asserting a violation of the Bert J. Harris, Jr. Private Property Rights Protection Act (the "Harris Act")[1] and a violation of its substantive due process rights. The circuit court entered a final judgment in favor of GSK on its Harris Act claim, and in favor of the City on the substantive due process claim. On appeal, both parties challenge the court's findings.

We find merit in the City's argument on cross-appeal.[2] The then-existing version of the Harris Act required "action of a governmental entity." Because GSK never asked the City to act through a permit or

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[1] *See* § 70.001, Fla. Stat. (2010).

[2] We affirm, without further discussion, the issues raised by GSK on direct appeal as moot based on our resolution of the City's cross-appeal.

variance application, a waiver request, or otherwise, it was not entitled to recover under the Harris Act. We reverse the court's judgment against the City.

Background

In 2002, GSK purchased two parcels of real property located on Hollywood Beach, intending to develop the Mirador Project, a luxury 15-story condominium, on the property. The property was zoned to permit construction of up to 150 vertical feet and up to 25 residential units per acre. Before purchase, GSK spoke to the City's Director of Planning and Zoning, who orally confirmed the zoning.

In 2004, while working on conceptual plans, GSK presented the Mirador Project to various city leaders at an informal event. Following this presentation, the mayor informed GSK that residents of Summit Towers Condos, a neighboring condominium association, were voicing opposition to the project. At trial, GSK presented evidence that the mayor was receptive to Summit's residents. The mayor responded to their emails, writing that she had "protected the Summit from every bad project that has come down the pike" and that "when the presentations are made and the vote is taken, I'm sure my vote will make my friends at Summit happy . . . as they always have."

Subsequently, the mayor introduced a proposal at a city commission meeting to reduce building-height limits from 150 feet down to 65 feet. Though the commission did not adopt the proposal, it ordered the City to begin a study on building heights.

After completing the study, the City's Planning and Zoning Board proposed a step-down ordinance, which would maintain the 150-foot height restriction, but gradually reduce building height approaching the beach. The commission rejected this plan on first reading while also rejecting the mayor's renewal of her proposal to immediately reduce building-height limits to 65 feet.

Days later, the mayor again placed her proposal on the agenda for the next commission meeting and, at her request, the city attorney prepared a new height ordinance limiting building height to 65 feet. At that meeting, the commission rejected the step-down ordinance proposed by the City's Planning and Zoning Board on second reading but the Mayor's new height ordinance passed on first reading. The commission formally approved the new 65 foot height ordinance at a later meeting.

GSK then filed its lawsuit against the City. GSK's complaint alleged the City violated its rights under the Harris Act by enacting a height ordinance with a height restriction that burdened its use of the property. The City moved for summary judgment on the basis that GSK's failure to submit an application to develop the property precluded it from establishing the City had applied a law or ordinance in a manner that burdened GSK's property.[3] The motion for summary judgment was denied without explanation.

The case went to trial. The City again argued GSK failed to apply for a permit or variance, which precluded recovery under the Harris Act. The court heard extensive testimony on the City's motion for directed verdict and again when the City renewed its motion. The court, however, did not orally rule on the issue. Instead, the record suggests the court informed the parties three separate times that a ruling on the motion would be forthcoming.

After oral argument, because of concerns that the issue was not preserved, we ordered the parties to direct the Court to any indication in the record showing the circuit court's ruling. The parties responded and disagree about how the circuit court conveyed its ruling. GSK asserts the court announced its oral ruling on liability during its instructions to the jury. The City argues the court announced its ruling during an unscheduled conference call from the court to the parties and later included its ruling on liability in the final judgment awarding damages. Regardless, both parties agree the court rejected the City's arguments and found the City liable under the Harris Act.

The City appeals the court's ruling at summary judgment and at trial, which rejected its argument that GSK's failure to apply for a permit, variance, or other formal relief precluded recovery under the Harris Act.

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[3] In 2010, after filing the lawsuit in 2009, GSK formally submitted a preliminary site review plan to the City. Due to changes in the real estate market, this plan was substantially different than the plan at issue in this lawsuit. Regardless, the City's Technical Advisory Committee found GSK's project was "substantially compliant with the requirements of preliminary review." However, GSK informed the City it would not be seeking a height variance and the City's Planning and Development Services Department refused to sign-off on the project and schedule it for public hearing until either the application was amended to indicate a height variance or a settlement agreement was entered into regarding the project's proposed height.

Analysis

We review the court's ruling on the City's motion for summary judgment, and the legal rulings during trial, *de novo*. *Ionniedes v. Romagosa*, 93 So. 3d 431, 433 (Fla. 4th DCA 2012).

In 1995, the "Legislature recognize[d] that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution." § 70.001(1), Fla. Stat. (2006). As a remedy, it enacted the Harris Act, and specifically stated in the statutory text:

> [I]t is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

Id.

In this case, we are tasked with determining whether a property owner can state a claim under the Harris Act when he or she never formally applied to develop the property. We conclude the answer is no. A claim relating to building restrictions under the then-existing version of the Harris act does not accrue unless the property owner formally applied to develop the property; thus, allowing the governmental entity to specifically apply the law or ordinance to the property in question.

The plain language of the statute supports our conclusion. The statute contains several references to laws, regulations, and ordinances "as applied," as well as the "specific action of a governmental entity" and the "specific use" of real property.

The first subsection of the Harris Act states that the "Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, *as applied*, may inordinately burden, restrict, or limit private property rights . . . ." § 70.001(1), Fla. Stat. (2006) (emphasis added). It also states that "the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, *as applied*, unfairly affects real property." *Id.* (emphasis added).

The second subsection focuses on "*specific action* of a governmental entity," and "*specific use*" of real property. *Id.* § 70.001(2) (emphasis added). Similarly, the third subsection provides that the "term '*action* of a governmental entity' means a *specific action* of a governmental entity which affects real property, including *action* on an application or permit." *Id.* § 70.001(3) (emphasis added). And the "terms 'inordinate burden' or 'inordinately burdened' mean that an *action* of one or more governmental entities has *directly* restricted or limited the use of real property . . . ." *Id.* § 70.001(3)(e) (emphasis added).

Finally, a later subsection provides that a "cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is *first applied by the governmental entity to the property at issue*." *Id.* § 70.001(11) (emphasis added).

Thus, the statute's plain language establishes that a claim under the Harris Act does not ripen until the governmental entity specifically applies the law or ordinance to the property in question. Because the plain language of the statute answers the question presented, we need not resort to the rules of statutory construction. *14269 BT LLC v. Village of Wellington*, 43 Fla. L. Weekly D166, D167 (Fla. 4th DCA Jan. 17, 2018).

While the facts here are materially different, the issue here is nearly identical to the issue addressed en banc by the First District in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015). In *Smith*, the majority explained that the "dispositive issue . . . is whether a property owner may maintain an action pursuant to the Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property." *Id.* at 888–89.

The Smiths filed a lawsuit under the Harris Act, claiming their property was inordinately burdened by the city's rezoning of an adjoining piece of land, which resulted in the construction and operation of a fire station next door. *Id.* at 889. Because it had taken no direct action against the property, the City argued the Smiths failed to state a claim. *Id.* On appeal, the en banc majority agreed. *Id.* at 894. The First District concluded that direct action by the government as to the property in question was required for a claim under the Harris Act to ripen. *Id.* Allowing a claim to be presented when the governmental entity took no direct action "broadens the scope of the Harris Act far beyond its intended purpose and has the potential to open the floodgates for claims under the Act against state, regional, and local governmental entities whenever they approve development on one property (or conduct activities on their own property) that adversely impacts the value of another property." *Id.* at 894.

Judge Makar's dissent in *Smith* provides further support for our conclusion in this case. In his dissent, Judge Makar argued that "facial claims directed to the mere enactment of a law, for example, are not permissible until the law is applied to the property in question. Thus, jurisdiction-wide enactments of general applicability cannot be challenged; to do so would constitute a 'facial' challenge, which the Act prohibits." *Id.* at 909 (Makar, J., dissenting). Judge Makar continued, stating "[u]ntil a government action is actually applied in a specific situation, the Act is dormant and merely inchoate. Contrarily, when an enactment is first applied to a property, it constitutes governmental action that may be subject to the Act in an 'as applied' context." *Id.* As discussed, GSK did not request a variance from the City to deviate from the ordinance. The ordinance at issue was never applied to the property, leaving the Harris Act claim "dormant" and "inchoate."

We also acknowledge, as the Fifth District recognized in *Citrus County v. Halls River Development, Inc.*, 8 So. 3d 413, 420 (Fla. 5th DCA 2009), the requirement that a property owner apply to develop property is not absolute. In *Citrus County*, the Fifth District explained the difference between a comprehensive plan and a zoning regulation. A "comprehensive plan is similar to a constitution for all future development within the governmental boundary"; whereas, "zoning involves the exercise of discretionary powers within limits imposed by the comprehensive plan." *Id.* at 420–21. In that case, the property owner argued the Harris Act claim could not be presented until an actual plan was submitted and rejected. *Id.* at 422. The court disagreed with the property owner and held that a change to a comprehensive plan can give rise to a claim under the Harris Act because a later zoning decision "that is not in accordance with the comprehensive plan is unlawful." *Id.* at 421. In other words, there was no action that could be taken to escape the effect of the "law or regulation" after the comprehensive plan was implemented.

This case is distinguishable from *Citrus County*. *See also M & H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 78 (Fla. 1st DCA 2009) ("*Citrus County* involved an amendment to a comprehensive plan which reclassified the land use category on a particular piece of property. In this case, we are dealing with adoption of a general land development regulation effective throughout an entire zoning district. Citrus County is, therefore, not controlling."). Furthermore, GSK could have acted to escape the zoning height requirement and, had it done so, the City may have granted it a variance allowing the property to be built. Because GSK failed to make a formal application to develop the property, the City did not apply

the ordinance to the property at issue. Thus, the claim under the Harris Act was not ripe.

Finally, we again note that the statute has been amended and now uses different language than the language used in the version of the statute governing this dispute. Our holding applies to the case before us and the version of the statute that governs this case. We express no comment about whether the statutory amendments would have affected GSK's claims.

Conclusion

GSK failed to seek a permit, variance, or other formal relief from the City before filing its Harris Act claim. As such, the City took no specific action on GSK's property and the claim was not yet ripe. If the Legislature intended to allow a claim in such a circumstance, it is for the Legislature to do so. The judgment in favor of GSK is reversed with instructions to enter judgment in favor of the City.

Reversed and remanded.

WARNER and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.