LEGISLATIVE # 110259E

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MEMORANDUM

To: D. Henrichs, Historic Preservation Planner, City of Gainesville
From: Ashley Williams, J.D. Candidate
University of Florida Levin College of Law Conservation Clinic
Thomas Ankersen, Director
Timothy McLendon, Faculty Advisor
Date: May 17, 2010
Subject: Proposed Amendment to the City of Gainesville's Historic Preservation Ordinance to Address Demolition by Neglect and Minimum Maintenance of Historic Properties

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Historic properties are unique and irreplaceable assets to the City of Gainesville and its neighborhoods.[1] For current and future generations, they provide living examples of the physical surroundings in which past generations lived.[2] In addition, protection of these historic assets promotes the economic, aesthetic, and cultural welfare of the public by the enhancement of property values, the stabilization of neighborhoods, and the preservation and enhancement of varied architectural styles.[3] The neglect of historic properties sacrifices these community values and can lead to the spread of blight in historic districts.

GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(d)(4)(e) (2010), requires that a Certificate of Appropriateness be obtained before a historic property can be demolished. Demolition can also occur in a more insidious manner - through neglect. An owner may not properly maintain the property and allow it to fall into such a state of disrepair that it becomes a dangerous building and must be demolished. Such conduct - referred to as "demolition by neglect" - can compromise community efforts at historic preservation and diminish the economic and cultural value of Gainesville's historic assets. Demolition by neglect can be avoided by requiring "minimum maintenance" of historic properties, something that has been done by both small and large communities throughout the country.

Set forth below is a draft of a proposed amendment to GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(d)(4)(g) (2010), a current copy of which is attached as Appendix A. The legality of the addition of a minimum maintenance provision to the ordinance was researched, and it was determined that amendment of the ordinance likely will not result in a takings claim under either the Federal or Florida Constitutions. The effect of Florida's Bert J. Harris, Jr. Private Property Rights Protection Act claims is less clear due to the lack of any significant case law in the area; however, it was also determined that amendment of the ordinance should not violate the provisions of the Harris

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1 *See* GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(a) (2010).
2 *Id.*
3 *See* GAINESVILLE, FLA. CODE OF ORDINANCES § 30-112(b) (2010).

Act. A further discussion of this research and its results can be found in the "The Effect of Takings Claims under Federal and Florida Law and Bert J. Harris, Jr. Private Property Rights Protection Act Claims on Demolition by Neglect and Minimum Maintenance Ordinances" legal memorandum, which is attached as Exhibit 1.

The basis of this ordinance is the result of research into secondary sources and numerous model historic preservation ordinances and ordinances from other local government entities. Where appropriate, citations to other ordinances are footnoted.

Sec. 30-112(d)(4)(g). Demolition by Neglect and Minimum Maintenance.

(1) Intent. The intent of this section of the land development code is to prevent the continuing deterioration of historic properties and neighborhoods through application of this section and chapters 13 and 16 of the code of ordinances.[4]

(2) Definitions.

(i) Demolition by Neglect. The deterioration of a historic property and failure to comply with the minimum maintenance requirements set forth in section 30-112(d)(4)(g)(4) below, whether deliberate or inadvertent.[5]

(ii) Minimum Maintenance. Minimum level of maintenance required to keep a historic property in good repair and prevent structural defects and conditions which threaten the deterioration or loss of such a property.[6]

(3) Applicability. This section applies to structures and buildings listed individually on the local register of historic places or judged as contributing or noncontributing[7] to the character of a district listed on the local register of historic places (collectively, hereinafter, "Historic Properties").

(4) Minimum Maintenance Requirements to Prevent Demolition by Neglect.

(i) All Historic Properties shall be preserved, in accordance with the standards set forth in the applicable Florida Building Code, the City of Gainesville's Housing Code,[8] this article, and this Code, against decay and deterioration in order to maintain property values, prevent hazards to public safety, and discourage blight and unsafe conditions and to further the intent of this section.[9]

(ii) Lack of maintenance that leads to demolition by neglect, as defined in section

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4 Adapted from GAINESVILLE, FLA. CODE OF ORDINANCES § 30-112(d)(4)(g) (2010).

5 Adapted from JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1602 (2009) and MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g) (2010).

6 Adapted from MADISON, GA., CODE OF ORDINANCES § 42-112 (2009) and JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1601 (2009).

7 Note: The inclusion of noncontributing structures and buildings in historic districts is a new approach that was not taken in the original demolition by neglect ordinance. However, this approach is consistent with other areas of the historic preservation code; for example, a Certificate of Appropriateness is required before any structure in a historic district can be demolished. Therefore, noncontributing structures and buildings should also be protected from demolition by neglect because they are important to the overall appearance of the historic districts. In addition, a number of these structures are eligible for contributing status, but due to the time required to complete the listing process, they have not yet been placed on the local historic register.

8 *See* GAINESVILLE, FLA., CODE OF ORDINANCES ch. 13, art. II (2010).

9 Adapted from both MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1) (2010) and the City of Gainesville's first redraft attempt.

30-112(d)(4)(g)(i) above, shall be considered an alteration of the type requiring a Certificate of Appropriateness under section 30-112(d)(5) and other remediation under this section.[10]

(iii) The owner, or other person having such legal possession, custody, and control, shall perform minimum maintenance on all Historic Properties as defined in section 30-112(d)(4)(g)(2)(ii) above, preserve all Historic Properties against decay and demolition by neglect, and keep all Historic Properties free from structural defects which threaten the deterioration or loss of the property.[11]

(iv) Failure to meet the minimum maintenance requirements shall be characterized by the presence of one or more of the following defects:[12]

(a) Deteriorated or inadequate foundations, floors, or floor supports insufficient to carry imposed loads with safety;

(b) Deterioration of exterior walls or other vertical supports that causes sagging, leaning, splitting, listing, or buckling;

(c) Deterioration of roofs, ceilings, or other horizontal members that causes sagging, leaning, splitting, listing, or buckling or the inability to carry imposed loads with safety;

(d) Deteriorated or decayed facade, facade elements, or architectural features, including but not limited to the deterioration or crumbling of exterior plasters or mortar;

(e) Deterioration of fireplaces or chimneys that causes sagging, leaning, splitting, listing, or buckling;

(f) Ineffective waterproofing of exterior walls, roofs, foundations, or floors, including broken, missing, or otherwise defective windows or doors;

(g) Defective or insufficient weather protection which jeopardizes the integrity of exterior or interior walls, roofs, foundations, or floors, including but not limited to lack of paint or other protective covering;

(h) Peeling of external paint, rotting, holes, or other forms of decay;

(i) Deterioration of exterior stairs, porches, handrails, cornices, or entablatures that causes crumbling, instability, or loss of shape and form;

(j) Heaving, subsidence, or cracking of sidewalks, steps, or pathways;

(k) Deterioration of the hardscape that is associated with the defining character of the structures, including but not limited to walls, fences, gates, carriage steps, arbors, pergolas, and accessory structures;

(l) Deterioration of any feature that creates or permits the creation of any dangerous or unsafe condition(s).

(5) Implementation of Minimum Maintenance Standards and Citation Process[13,14,15]

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10 *See also* SAVANNAH, GA., CODE OF ORDINANCES ch. 3, § 8-3029(H)(4)(e) (2010), which refers to this as a "negative visual alteration." Additional possible variations include "material change in appearance," "unauthorized alteration," or "violation of this Code."

11 Adapted from MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(a) (2010).

12 Adapted from MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(a) (2010), RALEIGH, N.C., CODE OF ORDINANCES § 10-6180 (2009), CHARLOTTESVILLE, VA., CODE OF ORDINANCES § 34-281 (2009), and JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1602 (2009).

13 Adapted from JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, §§ 11-1603-11-1605 (2009).

14 Note: The current language of the GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(d)(4)(g) (2010), states: "1. The historic preservation board may, on its own initiative, file a formal complaint with the codes enforcement division requesting repair or correction of defects to any designated structure so that it is preserved and protected. 2. The code enforcement division shall provide written notice to the staff member assigned to the historic preservation board of any minor or major housing code violation for a building or structure that is either listed on the national or local historic register or is a contributing structure to either a nationally or locally designated historic district. 3. The code enforcement office shall provide written notice to the staff member assigned to the historic preservation board of a determination that a building or structure that is either listed on the national or local historic register or is a contributing structure to either a nationally or locally designated historic district is "dangerous," as defined by section 16-17 of the code of ordinances. 4. Upon receipt of this notice, the city manager or designee is authorized to access these properties accompanied by a code enforcement officer to assess the damage that formed the basis for the decision to find the building "dangerous." The assessment will be presented to the historic preservation board, which shall be allowed to appeal the determination to the board of adjustment pursuant to section 16-27 of this code and present evidence against the determination that the building is "dangerous"."

15 Alternative methods for identifying and addressing demolition by neglect can be found in MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(b)-(d) (2010) and MADISON, GA., CODE OF ORDINANCES §§ 42-114--42-119 (2009).

The Miami Beach ordinance does not explicitly outline a method for the identification of properties which may be failing to meet minimum maintenance requirements. If a historic property, in the opinion of the historic preservation board, planning director, or building official, is failing to meet minimum maintenance requirements, the planning director or building official has the right to inspect the property after giving 48 hours notice of the inspection to the property owner. MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(b) (2010). If the owner refuses to allow the inspection, the city may file an action to compel the owner to allow officials access to the property. *Id*. After the inspection, the inspector makes a report of his or her findings including what remedial action is required, and transmits the report to the owner, who is required to immediately take steps to correct the violations and bring the property into compliance. *Id*. The owner must complete the remedial action within 30 days of the date of receipt of the report or the amount of time deemed appropriate by the building official after consultation with the planning director. *Id*. If the owner fails to substantially complete the work in the allowed time frame, the city may, at the owner's expense and only at the discretion of the city manager, file an action seeking an injunction compelling the owner to perform the work. MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(c) (2010). Violations may also be punished by a civil penalty of up to $5,000.00 per day for each day that the remedial action is not taken. MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(d) (2010).

The Madison ordinance provides that the historic preservation commission and the city will monitor the condition of all historic properties. MADISON, GA., CODE OF ORDINANCES § 42-114 (2009). The commission reports all failures to meet minimum maintenance requirements to the city's building official. *Id*. The building official is then authorized to enter on and inspect the property, and, after inspection, prepares a condition assessment for the commission. MADISON, GA., CODE OF ORDINANCES § 42-115 (2009). If the commission determines that the owner has failed to meet the minimum maintenance requirements, it will given notice to the property owner and all parties in interest stating the steps necessary to remedy the violations. MADISON, GA., CODE OF ORDINANCES § 42-116 (2009). The owner has 30 days from the receipt of the notice to respond in writing outlining his or her intentions and the steps he or she is taking to remedy the violations. *Id*. The owner has 60 days from receipt of the notice to begin the remedial action and 180 days to complete the work, unless an extension, up to 180 additional days, is given due to the expense or complexity of the repairs. *Id*. If the owner or a party in interest disagrees with the determination of a failure to perform minimum maintenance, within 30 days of receipt of the notice, the owner or the party in interest may request a public hearing on the matter. MADISON, GA., CODE OF ORDINANCES § 42-117 (2009). Then, the owner or party in interest will be given an opportunity to appear before the commission and present evidence on the issue. *Id*. Notice of the date, time, and place of the hearing is given to the owner or other party by certified mail. *Id*. If the commission agrees with the original notice, it will state its reasons and transmit a recommendation of action, in writing, to the affected party, the mayor, and the city council. *Id*. The mayor and council will review the commission's recommendation, consider the matter on the merits, and render a written decision. MADISON, GA., CODE OF ORDINANCES § 42-118 (2009). If the owner or party in interest fails to comply with the original notice and either the owner fails to seek or a hearing, a hearing is held upholding the notice and no appeal is taken, or all appeals have been exhausted and the notice has been upheld, the city

(i) Identification of Failure to Perform Minimum Maintenance.

(a) Initial Identification of Failure to Perform Minimum Maintenance. Initial identification of a failure to meet the minimum maintenance requirements in a Historic Property, as listed in section 30-112(d)(4)(g)(4) above, may be made by a member of the Historic Preservation Board, staff, or a building inspector[16] upon an inspection of the district or neighborhood.[17]

(b) Referral to Board. Information related to the initial identification of the failure to perform minimum maintenance resulting in demolition by neglect shall first be presented to the Historic Preservation Board.

(c) Board Determination and Inspection. Upon determination by the Board that the Historic Property may be in violation of this section, the Historic Preservation Board, upon majority vote, may request that the building department, code enforcement, fire department, or other appropriate official (hereinafter, "inspector") inspect the property.

(d) Notice of Inspection. The Board shall send a letter by certified mail to inform the property owner and any registered lien holder(s) on the property of the action by the Board, the impending inspection of the property by the building inspector,[18] and the opportunity he or she will have at the next meeting to address the Board about the preliminary identification of demolition by neglect and the inspection report.

(e) Report of Findings. The inspector or his or her designee will present the inspection findings at the next Board meeting. The report shall detail any defects which constitute, in the inspector's opinion, a failure to meet the minimum maintenance requirements.

(f) Meeting with Owner and Tenant. If the determination is made by the inspector that the property does not meet the minimum maintenance requirements, the Board or its designee shall request a meeting with the owner and/or the tenant, if appropriate, to discuss steps to improve the condition of the property.[19] The Board shall provide notice of the meeting to the Code Enforcement Board.

(g) Initiation of Citation Process. If resolution is not reached by the property

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may perform the corrective work required to stabilize and prevent further deterioration of the property or commence prosecution in a municipal court. *Id*. If the repairs are performed by the city, the property owner is liable for the costs, the amount of which will attach as a lien on the property. MADISON, GA., CODE OF ORDINANCES § 42-119 (2009).

16 Possibilities of who may identify demolition by neglect. Customize to Gainesville - Does the city want a certain person to be responsible for making routine inspections or does it want to have a list such as this one?

17 The Town of Jonesborough initially identifies properties which may be failing to meet minimum maintenance standards through a routine inspection of the district or neighborhood. JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1603(1) (2009) . The routine inspection is performed annually from the public right-of-way by a Building Maintenance Inventory Committee, which consists of three members. *See* Policies and Procedures, Jonesborough Historic Zoning Commission, Under Ordinance Chapter 16, Demolition by Neglect, As Amended 10/13/03.

18 Are there homestead issues with the inspection? Another way to phrase this can be taken from MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(b) (2010), which states that a building official has a right of entry onto the subject property and may inspect the property after 48 hours' notice to the owner of the intent to inspect.

19 Adapted from TAMPA, FLA., CODE OF ORDINANCES § 27-104 (2009).

owner and the Board or its designee, the Board, upon majority vote, may initiate the citation process as specified is section 30-112(d)(4)(g)(5)(ii) below.

(h) Preparation of Application for Certificate of Appropriateness. The Board or its designee shall prepare an application for a Certificate of Appropriateness specifying the corrective work that is required according to the Board's Historic Preservation Rehabilitation and Design Guidelines, and indicating a schedule for completion of the required improvements. The time schedule mandated by the Board or its designee shall be a minimum of six (6) months unless the inspector determines that failure to immediately meet minimum maintenance requirements creates an imminent threat to the safety of the public[20] or the Board finds that the failure creates an imminent threat to the historic and architectural integrity of the property.[21,22]

(ii) Citation Process.[23]

(a) Citation Defined. A citation is a formal notification to the property owner and registered lien holder(s) on the property that the Historic Preservation Board has determined that demolition by neglect is occurring on the property because minimum maintenance requirements have not been met and that corrective work shall be undertaken by the owner.

(b) Notice of Citation. The Board shall send a letter by certified mail to inform the property owner and any registered lien holder(s) on the property of the determination of demolition by neglect by the Board and that the Board is issuing a citation to the owner. The citation shall state the reasons why the property is found to be in violation of the minimum maintenance requirements, and shall include a copy of the application for a Certificate of Appropriateness specifying the work required. The citation shall also include the date, time, and location of a citation hearing at which the owner may address the Board concerning the violation.[24]

(c) Failure to Acknowledge Receipt of Notice. If, after two (2) attempts, the owner fails to acknowledge the notification regarding the determination

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20 A threat to safety would trigger a code enforcement action.

21 The Board should consider the following issues regarding the Certificate of Appropriateness: (1) Would the owner be required to pay the fee? (2) If the owner complied, would the Board waive the fee?

22 An emergency C.O.A. may be issued under GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(d)(8) (2010).

23 This process is similar to the standard code enforcement proceeding. GAINESVILLE, FLA., CODE OF ORDINANCES § 2-385(b) (2010), states, in pertinent part, "[I]f a violation of the codes is found, the code inspector shall notify the violator and give him or her a reasonable time to correct the violation. Should the violation continue beyond the time specified for correction, the code inspector shall notify the board and request a hearing. The board, through its clerical staff, shall schedule a hearing, and written notice of such hearing shall be hand delivered or mailed as provided in section 2-390 to said violator. In the case of notice provided under section 2-390(a), such shall be given at least seven days in advance of the hearing, not counting the day of the hearing. At the option of the board, notice may additionally be served by publication or posting as provided in section 2-390. If the violation is corrected and then recurs or if the violation is not corrected by the time specified for correction by the code inspector, the case may be presented to the board even if the violation has been corrected prior to the board hearing, and the notice shall so state."

24 The city may wish to consider making this a joint meeting with the Code Enforcement Board.

of demolition by neglect, the building inspector or other authorized designee of the Board will post a notice of the violation in a conspicuous location on the property. The posted notice shall include the fact that the property is in violation of minimum maintenance requirements and the date, time and location of the citation hearing to be held by the Board on the violation.

(d) Time of Notice. The property owner and any registered lien holder(s) on the property determined to be in violation of the minimum maintenance requirements shall be given a minimum of thirty (30) days advanced notice prior to the date of the citation hearing.

(e) Commencement of Corrective Work. After receiving notification of the determination of demolition by neglect, the owner may initiate corrective action before the citation hearing is held. However, before corrective work has begun, the owner must secure final Board or staff approval of the Certificate of Appropriateness[25] and obtain any necessary building permits.[26]

(iii) Citation Hearing.[27]

(a) Hearing. If, by the time of the citation hearing, the property owner has not completed the corrective work specified in the notification of demolition by neglect and the application for a Certificate of Appropriateness, the Historic Preservation Board shall restate the determination of demolition by neglect and the the violations of the minimum maintenance requirements related to the property. The owner shall then be provided with the opportunity to address the concerns of the Board, to provide evidence, and to show cause why a citation should not be issued regarding the violation.

(b) Issuance of Citation. Upon conclusion of the hearing, the Board may consider a motion to find the property not in compliance with the minimum maintenance requirements. Upon a finding of non-compliance by majority vote of the Board, the Board shall issue a citation to the owner for failure to comply with the minimum maintenance requirements of this ordinance. This citation shall include the following:

1. A list of the minimum maintenance requirements still in violation;
2. Any remaining or amended requirements detailed in the application for a Certificate of Appropriateness initially issued through section 30-112(d)(4)(g)(5)(i)(h) above;
3. A written schedule of the time allotted to correct the violations;
4. A statement detailing the requirement to complete and return

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25 As prepared in subsection (5)(i)(h) above.

26 The city has an emergency exception on the issuance of a COA in GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(d)(8) (2010).

27 The citation hearing would be conducted as a quasi-judicial hearing under Florida law. *See Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991) (outlining the requirements of a quasi-judicial hearing). *See also* Mark P. Barnebey & Bonnie T. Polk, *Quasi-Judicial Land Use Hearings: Does Your Evidence Pass Muster?*, FLA. B.J., Mar. 1995, at 42 (discussing the amount of weight that should be given to evidence presented at quasi-judicial hearings).

within ten (10) days the application for a Certificate of Appropriateness, and to obtain both a Certificate of Appropriateness and any necessary building permits.

(6) Enforcement.[28,29]

(i) Penalties. Any person failing to comply with any of the provisions of this section shall be subject to civil sanctions as provided in section 1-9 of the Code of Ordinances.

(ii) Stop Work Orders. A stop work order shall be issued by the code enforcement official in any case where work has commenced, or preparation for work has commenced, which requires a Certificate of Appropriateness under sections 30-112(d)(4)(g)(5)(ii)(e) or 30-112(d)(4)(g)(5)(iii)(b) above or section 30-112(d)(5), and where no such certificate has been obtained. The stop work order shall be issued to the property owner, the occupant, or any person, company, or corporation commencing work or preparation for work in violation of this section. The stop work order shall remain in full force and effect until a Certificate of Appropriateness has been obtained and posted on the property or it has determined by the Historic Preservation Board that no Certificate of Appropriateness is required.

(7) Rehearings.[30,31]

(i) The Historic Preservation Board may consider a petition for rehearing by the applicant, the owner of the subject property, the city manager, or an affected person.[32] For the purposes of this section, "affected person" is defined as either a

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28 This language comes from GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(c) (2010).

29 Alternative methods of enforcement can be found in MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(c) (2010) and JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1606 (2009).

The Miami Beach Ordinance allows the city, at the property owner's expense, to file an action seeking an injunction ordering the owner to perform the corrective work required to bring the property into compliance. MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-532(g)(1)(c) (2010).

The Jonesborough Ordinance provides that the Historic Zoning Commission may vote to request that the Mayor direct the town attorney to take appropriate civil or criminal legal action against the property owner. JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1606(b) (2009). The town may also bring charges against the owner in municipal court. JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1606(c) (2009). Furthermore, the Commission may vote to request that the Mayor have the property repaired by the town or a designated agent of the town, at the town's expense. JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1606(d) (2009). A lien would then be placed on the property for the total cost of the repairs plus interest. *Id*. Finally, the Commission may vote to request that the Mayor exercise the town's power of eminent domain to obtain ownership of the property. JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1606(e) (2009).

30 This language comes from MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-537(a) (2010).

31 In GAINESVILLE, FLA., CODE OF ORDINANCES § 30-354(m)(1)-(3) (2010), the Board of Adjustment ("B.O.A.") has a rehearing process which may be used by the City as an alternative to this language. A request for rehearing may be made by the original petitioner or agent, the city manager or designee, the city commission, or an affected person who testified at the initial hearing. The request must be made within 10 days of the date of the initial hearing, and the rehearing will be held at the next B.O.A. meeting. The request will be granted only if at least three B.O.A. members find that the person requesting the rehearing has presented competent substantial evidence that the B.O.A. overlooked or failed to correctly interpret the evidence at the initial hearing. Notice must be given to all property owners within 300 feet of the property involved in the hearing.

32 This is a model list of parties who may petition for a rehearing of the Historic Preservation Board's decision. It may be expanded to include historic preservation societies or scaled back to include only the applicant. The City will want to

person owning property within 400 feet[33] of the applicant's project reviewed by the Board or a person that appeared before the Board (directly or represented by counsel) and whose appearance is confirmed in the record of the Board's public hearing(s) for such project. The petition for rehearing must demonstrate to the Board that:

(a) There is newly discovered evidence which is likely to be relevant to the decision of the Board;

(b) The Board has overlooked or failed to consider something which may render the decision issued erroneous[34]; or

(c) The board's action or order:[35]

1. Took place after May 11, 1995 and is actionable under the Bert J. Harris, Jr. Private Property Rights Protection Act, F.S. § 70.001 et seq., (referred to herein as the "Harris Act"); and
2. Inordinately burdens an existing use of the applicant's real property or a vested right to a specific use of the applicant's real property (referred to herein as a "Harris Act claim").

As used herein, the phrases "inordinate burden" or "inordinately burden," "existing use," and "vested right to a specific use" shall have the same meanings ascribed to such phrases within the Harris Act.

(ii) A petition for rehearing shall be in writing, shall be by or on behalf of a named appellant(s), and shall be submitted to the planning director or his or her designee[36] on or before the fifteenth (15th) day after the date of rendition of the Board's order; however, in cases where a condition imposed by the Board is not followed by the applicant or is incapable of being done within this 15 day time frame, a petition for rehearing may be filed within sixty (60) days of the date of rendition of the order imposing the condition. For the purposes of this article, the "date of rendition" shall be the date upon which a signed, written order is filed with the Board's clerk, and order shall be deemed "filed" when a fully executed order is returned to, and in the possession of, the clerk.

(iii) In the event the petition is based on a Harris Act claim, the petition shall include the following documentation which shall be submitted no later than fifteen (15)

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determine how broad the scope of the rehearing option should be. Does the City want to include lien holders here as well?

33 The City of Miami Beach chose 375 as the zone around an applicant's property in which a neighbor may be affected by the proposed actions of the applicant. *See* MIAMI BEACH, FLA., CODE OF ORDINANCES, art. X, div. 1, § 118-537(a) (2010). Gainesville should consider what the appropriate range for its historic districts is; currently, the standard is 400 feet. *See* GAINESVILLE, FLA., CODE OF ORDINANCES § 30-350(b)(3) and 30-351(c)(2)(a),(d)(2) (2010).

34 This erroneous standard is taken from MIAMI BEACH, FLA., CODE OF ORDINANCES, art. X, div. 1, § 118-537(a)(1)(b) (2010). The City of Gainesville currently does not have a rehearing provision in its historic preservation ordinances. Does the city have another legal standard that it would want to use instead?

35 This language is taken from MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-537(a)(1)(c) (2010) and has been adapted from the "Bert J. Harris, Jr. Private Property Rights Protection Act," § 70.001 et seq., Florida Statutes (2010). Does the City of Gainesville want a provision regarding the Harris Act in its demolition by neglect and minimum maintenance ordinance?

36 Customize to the City of Gainesville.

days after the submission of the petition for rehearing:[37]

(a) A bona fide, valid appraisal supporting the claim of inordinate burden and demonstrating the loss, or expected loss, in fair market value to the real property as a result of the Board's action;

(b) All factual data described in section 30-112(d)(6)(e)(1);[38] provided, however, in the event all or any portion of the factual data was available to the applicant prior to the conclusion of the public hearing before the Historic Preservation Board and the applicant failed to furnish same to the Board's staff[39] as specified in section 30-112(d)(6)(e)(1), then the Board may, in its discretion, deny the applicant's request to introduce such factual data;

(c) A report prepared by a licensed architect or engineer analyzing the financial implications of the requirements, conditions, or restrictions imposed by the Board on the property or development proposed by the applicant with respect to which the applicant is requesting a rehearing;

(d) A report prepared by a licensed architect or engineer analyzing alternative uses for the real property, if any;

(e) A report prepared by a licensed architect or engineer determining whether, as a result of the Board's action, the owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable; and

(f) A report prepared by a licensed architect or engineer addressing the feasibility or lack of feasibility of effectuating the Board's requirements, conditions, or restrictions and the impact of the same on the existing use of the real property or a vested right to a specific use of the real property.

(iv) In the event that any of the documentation required in section 30-112(d)(4)(g)(7)(iii) above is not reasonably available to the applicant and cannot be obtained by the applicant, the applicant shall file an affidavit stating the information which cannot be obtained and describing the reasons why such information cannot be obtained; provided, however, neither failure to retain a professional to prepare the required documentation nor the requirement to pay a fee for the preparation of such required documentation shall be sufficient to excuse an applicant from the requirements listed in section 30-112(d)(4)(g)(7)(iii) above. Evidence, testimony, and information establishing and/or disproving the inordinate burden may be introduced by the applicant, the

37 This language is taken from MIAMI BEACH, FLA. CODE OF ORDINANCES art. X, div. 1, § 118-537(a)(2) (2010) and has been adapted from the "Bert J. Harris, Jr. Private Property Rights Protection Act," § 70.001 et seq., Florida Statutes (2010). Does the City of Gainesville want a provision regarding the Harris Act in its demolition by neglect and minimum maintenance ordinance?

38 The data referenced here are the information requirements to demonstrate undue economic hardship under GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(d)(6)(e) (2010).

39 Customize to the City of Gainesville

Board's staff and city staff, the public, or any other party, and considered by the Board.

(v) Notice requirements for a rehearing shall be identical to the notice requirements for the original hearing and shall be the responsibility of the party filing the petition.

(vi) The Board may rehear a case, take additional testimony, and either reaffirm its previous decision or issue a new decision reversing or modifying the previous decision. If the petition is based on a Harris Act claim, and the Board concludes that the action or order inordinately burdens an existing use of the applicant's real property or a vested right to a specific use of the applicant's real property, then the Board shall amend or modify the action or order, in whole or in part, to eliminate the inordinate burden.[40]

(8) Appeals.[41] The decision of the Historic Preservation Board related to the citation and Certificate of Appropriateness as specified in section 30-112(d)(4)(g)(5)(iii)(b) above shall, on the date it is authorized, be appealable to the Board of Adjustment pursuant to section 16-27 of this code.[42] The decision of the Board of Adjustment shall, on the date it is rendered, be a final administrative decision subject only to the petition process for economic hardship as specified in section 30-112(d)(6)(e) of this code and appealable only to the appropriate state court. Any appeal of the Historic Preservation Board's decision to the Board of Adjustment or of the Board of Adjustment's decision to the state court must be made within thirty (30) days of each decision, respectively.

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40 This language is taken from MIAMI BEACH, FLA., CODE OF ORDINANCES art. X, div. 1, § 118-537(a)(4) (2010) and has been adapted from the "Bert J. Harris, Jr. Private Property Rights Protection Act," § 70.001 et seq., Florida Statutes (2010). Does the City of Gainesville want a provision regarding the Harris Act in its demolition by neglect and minimum maintenance ordinance?

41 Adapted from JONESBOROUGH, TENN., CODE OF ORDINANCES ch. 16, § 11-1605(3) (2009).

42 This method is taken from the language of Gainesville's original demolition by neglect ordinance. GAINESVILLE, FLA., CODE OF ORDINANCES § 30-112(d)(4)(g)(4) (2010). However, the City Attorney has indicated that all appeals likely will be referred to a hearing officer in the future, in a process currently used by the Development Review Board and the Planning Review Board.

EXHIBIT 1

MEMORANDUM

To: D. Henrichs, Historic Preservation Planner, City of Gainesville
From: Ashley Williams, J.D. Candidate
University of Florida Levin College of Law Conservation Clinic
Thomas Ankersen, Director
Timothy McLendon, Faculty Advisor
Date: February 17, 2010
Subject: The Effect of Takings Claims under Federal and Florida Law and Bert J. Harris, Jr. Private Property Rights Protection Act Claims on Demolition by Neglect and Minimum Maintenance Ordinances

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QUESTION PRESENTED:

Will the addition of a minimum maintenance provision to the City of Gainesville's historic preservation code give rise to a cause of action under the "Bert J. Harris, Jr. Private Property Rights Protection Act," § 70.001, Florida Statutes (2010), by inordinately burdening an existing use of real property or a vested right to a specific use of real property?

BRIEF ANSWER:

Probably Not. The addition of minimum maintenance standards will not deprive an owner of a historic property or of property in a historic district of all "economically viable use" of the property, but will allow the owner to continue the current use of the property, leaving the owner with a "reasonably beneficial use." Furthermore, the addition of minimum maintenance standards will likely not impose an inordinate burden apart from the demolition by neglect ordinance that will be amended. Finally, the minimum maintenance requirements will prevent, abate, or remediate a public nuisance.

DISCUSSION:

The City of Gainesville wants to know if the addition of minimum maintenance standards into its historic preservation code will give rise to claims under The "Bert J. Harris, Jr. Private Property Rights Protection Act" ("Harris Act"). The Harris Act reads, in pertinent part,

> When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

§ 70.001(2), Fla. Stat. (2010).

The Harris Act is a not a taking cause of action; it is a separate and distinct cause of action that provides relief to a property owner when a new regulation or ordinance, as applied, unfairly affects real property. § 70.001(1), Fla. Stat. (2010). *See generally Palm Beach Polo v. Vill. of Wellington*, 918 So. 2d 988 (Fla. 4th DCA 2006); *Holmes v. Marion County*, 960 So. 2d 828 (Fla. 5th DCA 2007).

There is very little case law applying the Harris Act to specific government actions, particularly to historic preservation codes and minimum maintenance standards. There could be for several causes for this lack of precedent: (1) the Harris Act has had a chilling effect on new legislation because government entities are afraid to enact legislation that will "inordinately burden" real property and give rise to a claim, (2) few claims have been brought under the Act, or (3) most claims that have been brought were settled. Therefore, it is unclear whether courts will use takings law in interpreting the Act. Courts may choose to draw upon takings precedent when dealing with terms of art so distinctive to the takings context; however, due to the fact the Florida Legislature intended the Harris Act to be a separate cause of action, courts may apply a different standard. For the most part, this has yet to be judicially determined.

However, courts in other jurisdictions have upheld reasonable requirements for landowners to maintain their property under a takings analysis. For example, in *Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975), the court ruled that, "Once it has been determined that the purpose of the...legislation is a proper one, upkeep of buildings appears reasonably necessary to the

accomplishment of the goals of the ordinance." The court further stated, "The fact that an owner may incidentally be required to make out-of-pocket expenditures in order to remain in compliance with an ordinance does not per se render that ordinance as a taking." *Id*. at 1067.

It is not in dispute that the protection and preservation of historic properties and neighborhoods is a legitimate government purpose. As in *Maher*, the requirement that an owner of a historic property or property in a historic district perform minimum maintenance of the property would be reasonably necessary to accomplish the goals of the ordinance. Therefore, should Florida courts follow takings precedent, the addition of a minimum maintenance provision likely will not trigger a cause of action under the Harris Act.

However, it is by no means certain that Florida courts will follow such precedent in Harris Act analyses. Therefore, the issue remains in dispute as to whether will the addition of a minimum maintenance provision to the City of Gainesville's historic preservation code will give rise to a cause of action under the Harris Act. This memorandum will discuss the various provisions of the Harris Act and their potential impacts on historic preservation and minimum maintenance standards.

A. Inordinate Burden

The Harris Act defines "inordinate burden" as

> [A]n action of one or more governmental entities [that] has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

§ 70.001(3)(e), Fla. Stat. (2010).

Therefore, to prove that a regulation has inordinately burdened property, the owner must show

an inability to attain reasonable, investment backed expectations. The question then becomes, if owners or buyers of a historic property or property in a historic district know or should know that all individual property or property in neighborhoods that are designated as historic are subject to stricter local government controls, what reasonable, investment backed expectations for development can they have? In this case, it is a stretch to believe that a court would find that the prospect of failing to maintain a property and allowing it to fall into disrepair in order to be able to demolish the property to be reasonable, investment backed expectations. For example, in *Palm Beach Polo,* the court held that a developer who purchased a large tract of land subject to a development plan requiring preservation and restoration of a forest located within the tract had no reasonable investment-backed expectation of being able to develop the forest. 918 So. 2d at 995.

Because "reasonable, investment backed expectations" is a term of art so distinctive to the takings context, courts may choose to draw upon takings precedent. In a takings context, "reasonable, investment backed expectations" is a term used to list the factual inquiries necessary under a proper regulatory takings analysis. The inquiry is whether a property owner has an objectively reasonable expectation for developing the property in a certain way and is based on the owner's substantial expenses or obligations reasonably incurred to attain that development. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). However, an owner's "unilateral expectation or abstract need" is not sufficient. *Id*. An owner of real property is not entitled to make the most possible money from the "highest and best use" of his property, and, as long as the restrictions on the property leave the owner with a "reasonable beneficial use" of the property, a taking will not be held to have occurred. *Penn Cent. Transp. v. N.Y. City*, 438 U.S. 104, 138 (1978). In addition, a land use regulation will not result in a taking if it "substantially advances legitimate state interests" and doesn't prohibit all "economically viable of use" of the property. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834

(1987). There only must be a nexus between the effect of a regulation and the public interest the regulation is supposed to serve. *Id*.

In the instant case, the addition of minimum maintenance standards will not deprive an owner of a historic property or of property in a historic district of all "economically viable use" of the property. As in *Penn Central*, the owner will be allowed to continue the current use of the property, and as such will be left with a "reasonably beneficial use." Furthermore, the protection of historic sites advances the legitimate government interests of enhancing property values, stabilizing neighborhoods, increasing economic benefits to the city and its inhabitants, enriching human life in its educational and cultural dimensions, serving spiritual as well as material needs, and fostering civic pride in the beauty and noble accomplishments of the past. The effect of requiring minimum maintenance will be the preservation of these important historical sites. Therefore, applying takings precedent to the Harris Act, the addition of a minimum maintenance provision likely will not deprive owners of historic properties of their reasonable, investment backed expectations.

As an alternative method of proving an inordinate burden under the Harris Act, an owner may try to prove that the remaining uses of the property are unreasonable. § 70.001(3)(e), Fla. Stat. (2010). The property owner must show that, in light of the restricted uses left on the property, the property owner is being singled out from similarly situated property owners to serve an otherwise legitimate government interest or meet a public need, "which in fairness should be borne by the public at large." *Id*. Nevertheless, this method of proving an inordinate burden will likely not be applicable to the addition of minimal maintenance requirements because the ordinance would apply equally to all "similarly situated" historic properties and properties within historic districts.

Finally, no cause of action exists under the Harris Act as to the application of any law enacted on or prior to May 11, 1995, and an amendment to that law, regulation, or ordinance only gives rise to a

cause of action if, and up to the extent that, the amended language "imposes an inordinate burden apart from the law...regulation, or ordinance being amended. § 70.001(12), Fla. Stat. (2010). Therefore, because it is believed that the demolition by neglect ordinance was passed prior to 1995, perhaps one of the most important issues at hand is whether the addition of minimum maintenance standards to the demolition by neglect ordinance in Gainesville's historic preservation code imposes an additional or greater burden on owners of historic properties or properties in historic districts than that burden which was already imposed by the original ordinance.

The demolition by neglect ordinance that is currently in place in section 30-112 of the City of Gainesville's Code of Ordinances already imposes a requirement that historic properties not be allowed to fall into disrepair and references maintenance standards that apply to all properties in the City of Gainesville and are outlined in Gainesville's Housing Code. The addition of minimal maintenance standards to the demolition by neglect ordinance will primarily clarify and codify more specific standards in addition to those in the housing code; in reality, the standards may be stricter but likely will not be very different than the ordinary housing code standards that are meant to keep all properties in the city limits safe and free from defects. Therefore, the addition of minimum maintenance standards likely will not impose an inordinate burden apart from the demolition by neglect ordinance that will be amended.

However, assuming arguendo that a property owner can make a strong case regarding the inability to obtain reasonable, investment backed expectations, the City of Gainesville still will likely be able to defend against a Harris Act claim. The term "inordinate burden" does "not include...impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property." § 70.001(3)(e), Fla. Stat. (2010).

Public nuisance has been defined as "an unreasonable interference with a right common to the

general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property." BLACK'S LAW DICTIONARY 1097 (8th ed. 2007). "A 'public nuisance' violates public rights, subverts public order, decency or morals, or causes inconvenience or damage to the public generally." *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 884 (Fla. 1972). It may be classified as something that causes "any annoyance to the community or harm to public health." *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1036 (Fla. 2001).

"Under Florida law, a municipality may not declare an activity to be public nuisance absent proof that the activity is in fact a public nuisance." *Jacobs v. City of Jacksonville*, 762 F. Supp. 327, 330 (M.D. Fla. 1991). In addition, the activity being prohibited as a nuisance must be clearly and narrowly defined. *See Easy Way of Lee County, Inc. v. Lee County*, 674 So. 2d 863 (Fla. 2d DCA 1996) (holding a county ordinance which prohibited operating a device for production or reproduction of sound which was “plainly audible” 50 feet from such device was both overly broad and vague, and therefore, was unconstitutional). Therefore, the issue is whether neglecting to maintain a historic property or property located in a historic district and letting that property fall into disrepair qualifies as a public nuisance under Florida's common law.

Under Florida common law, a building that is not fit for human use or habitation is not a nuisance per se, even if it is unsightly or old and dilapidated; however, a building may become a nuisance due to its inherent lack of safety. *See Trushin v. City of Miami Beach*, 328 So. 2d 27 (Fla. 3d DCA 1976) (holding that an apartment building that was vacant, dilapidated, unfit for human habitation, and failed to conform to zoning requirements was a public nuisance and could be demolished by the city). *See also Lawton v. Steele*, 152 U.S. 133, 136 (1894) (stating that a state's police power "is universally conceded to include everything essential to the public safety, health, and

morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance" including "a house falling to decay, or otherwise endangering the lives of passers-by").

In the instant case, allowing historically important sites to fall into disrepair to the point where they need to be demolished is a public nuisance because it causes inconvenience or damage to the public generally by failing to provide an opportunity for the study of local history, architecture, and design, and to develop an understanding of the importance and value of a particular culture and heritage. It also presents a safety issue, as a structurally unsound building or property feature which is inherently dangerous to passers-by and neighboring property owners, as well as the public at large. Therefore, requiring minimum maintenance would be an effort to prevent, abate, or remediate a public nuisance, and as such, is exempt from claims under the Harris Act.

As a side note, does Gainesville have an ordinance that declares dilapidated or run-down buildings a threat to public safety and a public nuisance? If not, it may want to consider passing such an ordinance or including it into the historic preservation ordinances as a finding of fact.

B. Existing Use

The Harris Act defines the term "existing use" to mean

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

§ 70.001(3)(b), Fla. Stat. (2010).

Under the Act, "existing use" not only includes its plain meaning of actual present use or activity, but also includes reasonably foreseeable, non-speculative uses. However, when an anticipated

use will be deemed to be non-speculative is open to debate. *See City Nat'l Bank v. Dade County*, 715 So. 2d 350 (Fla. 3d DCA 1998) (holding that an unapproved site plan was too speculative to be considered in determining damages in an eminent domain proceeding). *But see Patel v. Broward County*, 641 So. 2d 40 (Fla. 1994) (holding that because variances were probably obtainable, they were cognizable by the court).

In *City of Jacksonville v. Coffield*, a property owner filed an action against the city under the Harris Act after he was unable to proceed with a planned development due the city's closure of a public road. 18 So. 2d 589, 593 (Fla. 1st DCA 2009). The court held that the property owner's planned development of the property was not an existing use because the owner knew that the road may closing but speculated that it would not actually close and that, if it did, he could still develop the property. *Id*. at 595. Therefore, the court held that the closure of the road by the city did not inordinately burden the owner's property. *Id*. at 599.

The court went farther in *Citrus County v. Halls River Dev.*, 8 So. 3d 413 (Fla. 5th DCA 2009). In *Citrus County*, the court found that even though the local government misinformed a developer regarding allowable uses of his property, the developer's intended use of land as a condominium did not qualify as an existing use because such use of property was not reasonable given the property's low intensity and coastal lake zoning designation. *Id*. at 421.

The line between speculation and reasonably foreseeable future uses is not clear. Property owners will probably be more likely to be successful if they can establish that similarly situated neighboring properties enjoy development approvals similar to that sought by the owner, which would be unlikely in the demolition by neglect and minimum maintenance context because all neighboring properties would be subject to same standards and development restrictions.

C. Vested Right

"The existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state." § 70.001(3)(a), Fla. Stat. (2010). Under Florida common law, the doctrine of equitable estoppel can be invoked against a local government when a property owner (1) in good faith, (2) upon some act or omission of the government (3) has made such a substantial change in position or has has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right acquired and not apply estoppel doctrine. *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1334 (11th Cir. 2004).

In *Aquaport v. Collier County*, No. 03-1609-CA (Fla. 20th Cir. Ct. 2004), Aquaport applied for and obtained site plan approvals and permits for a 10 story, 68 room hotel. The county received complaints from neighboring condominium associations and revoked the permits. *Id*. It then amended its land development regulations to limit hotel density to 26 rooms per acre. *Id*. The trial court found that Aquaport had a vested right to the site plan and building permit approvals and the county's revocation of the approvals and adoption of new land development regulations created an inordinate burden under the Act. *Id*.

Unlike in *Aquaport*, the City of Gainesville is not seeking to revoke an already approved permit. In the instant case, it is difficult to imagine a vested right would exist to develop what would essentially be a nonconforming use. With the strict standards regarding the alteration or demolition of a historic property, as well as the prohibition against demolition by neglect, codified in Gainesville's code of ordinances, owners or developers of historic property or property in historic district can learn about the requirements by performing due diligence. As such, they should be on notice of the regulations, which would make it difficult to establish a good faith belief. The addition of a minimum maintenance

provision should not change that.

An owner may also seek to establish a protectable interest under the Act by showing a deprivation of a right that would violate constitutional due process rights. This would require proof of a property interest protected by the U.S. or FL Constitution, arbitrary and capricious legislative action, and an infringement of a fundamental right sufficient to warrant judicial interference. *See Villas of Lake Jackson v. Leon County*, 121 F.3d 610 (11th Cir. 1997); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). However, in the instant case, it likely would be difficult to meet such a high burden of proof.

D. Government Action

"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." § 70.001(3)(d), Fla. Stat. (2010). When a government action will be held to have occurred awaits full judicial determination. Some hold the view that a jurisdiction wide piece of legislation doesn't become actionable until a property owner has applied for a development approval and been denied. In *Holy Trinity Church v. West Palm Beach*, No. CL-97-4711-AE (Fla. 15th Cir. Ct. 1997) and *Holy First Church of Christ Scientist v. West Palm Beach*, No. CL-97-4710-AE (Fla. 15th Cir. Ct. 1997), the circuit court judge held that mere enactment of an ordinance without application doesn't constitute government action under the Act. Support for this proposition can be found in the Act where it expressly defines an actionable event to include "action on an application or permit." § 70.001(3)(d), Fla. Stat. (2010). However, when a government action has been specifically applied to property would still require a case-by-case analysis.

The amendment of the demolition by neglect ordinance to add minimum maintenance standards will likely qualify as "action of a governmental entity." While this term is defined in the Act to include action on an application or permit, it is not limited to such an action. The definition itself is broad, and encompasses any specific action of a government that affects real property. The amendment of the

demolition by neglect ordinance is a specific government action that affects real property, and as such should qualify as "action of a governmental entity."

E. Time Limits

A property owner seeking compensation under the Harris Act must submit a claim to the government entity that passed the regulation no later than one-year after the regulation is first applied to property. § 70.001(11) , Fla. Stat. (2010). This one year time frame is tolled until conclusion of administrative or judicial proceedings that have been brought. *Id*. In the case of amendments to regulations or ordinances where its effects are not readily immediately ascertainable, the one year limitation period accrues on date the statute is amended and first impacted the property in question. *Citrus County*, 8 So. 3d at 422.

At least one court has interpreted the one year period only to be pre-suit condition. *Russo Assoc.*, 920 So. 2d at 717. The court held that Harris Act actions are subject to the four year catch-all statute of limitations governing actions other than for recovery of real property, rather than the one year allowed for presentation of claims under the statute. *Id*. at 718.

The one year limitation in the Harris Act and the four year catch-all statute of limitations do not affect the issue at hand, and should not pose a problem to Gainesville's addition of a minimum maintenance provision. It is simply something to be aware of.

F. Transferable Development Rights

Transferable Development Rights (TDRs) shift a community's development from areas of the community sensitive to development pressures, like a historic district, to other receiving areas. Timothy McLendon, *Summary of Florida Historic Preservation Law*, *in* FLA. ENVTL. AND LAND USE L. 1, 22 (March 2009). For example, in return for leaving historic property intact, an owner may receive rights to develop land within a receiving area more intensely or to transfer those rights to

landowners within the receiving area. *Id*. Their purpose is to lessen "wipeouts," decreases in the value of real estate caused by government regulations, other than those caused by the owner or general deflation. *Id*.

The use TDR programs were first upheld in Florida courts when the use of a TDR program was approved by a the court in *Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. 4th DCA 1983), *rev. denied*, 441 So. 2d 632 (Fla. 1983). In addition, the Harris Act specifically mentions TDRs as a means of settlement and mitigation which may prevent a government regulation from "inordinately burdening" private property. § 70.001(4)(c)(3), Fla. Stat. (2010).

Using TDRs in the historic preservation context could provide a means to protect historic properties and properties in historic districts while proving to be a method not only of settling claims that could potentially be brought under the Harris Act, but of preventing such claims. In fact, the existence of viable TDRs was a factor in the *Penn Central* court's decision that an application of New York's preservation law was not a taking. 438 U.S. at 137. Therefore, the City of Gainesville may want to consider the establishment of a TDR program.

CONCLUSION

In conclusion, amendment of the City of Gainesville's demolition by neglect ordinance to include minimum maintenance requirements likely will not inordinately burden an existing use or vested right to a use of a historic property or property located in a historic district. The requirement that an owner of a historic property or property in a historic district perform minimum maintenance of the property would be reasonably necessary to accomplish the goals of the demolition by neglect ordinance and would promote the legitimate government purpose of protecting and preserving historic properties and neighborhoods. Furthermore, the addition of minimum maintenance standards likely will not deprive an owner of historic property or of property in a historic district of all "economically

viable use" of the property, but will allow the owner to continue the current use of the property, leaving the owner with a "reasonably beneficial use." Finally, the addition of minimum maintenance standards likely will not impose an inordinate burden apart from the demolition by neglect ordinance that will be amended, and will prevent, abate, or remediate a public nuisance. Therefore, it likely will be exempt from claims under the Harris Act.

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Cases

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20 F.3d 1550 (11th Cir. 1994)

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Villas of Lake Jackson v. Leon County,
121 F.3d 610 (11th Cir. 1997)

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980)

Statute

§ 70.001(1)-(4), (11), Fla. Stat. (2010)

APPENDIX A

Sec. 30-112. Historic preservation/conservation.

(d) *Local register of historic places.*

(4) *Effect.*

g. *Demolition by neglect.* The intent of this section of the land development code is to stop the continuing deterioration of historic properties and neighborhoods through application of chapters 13 and 16 of the code of ordinances.

1. The historic preservation board may, on its own initiative, file a formal complaint with the codes enforcement division requesting repair or correction of defects to any designated structure so that it is preserved and protected.

2. The code enforcement division shall provide written notice to the staff member assigned to the historic preservation board of any minor or major housing code violation for a building or structure that is either listed on the national or local historic register or is a contributing structure to either a nationally or locally designated historic district.

3. The code enforcement office shall provide written notice to the staff member assigned to the historic preservation board of a determination that a building or structure that is either listed on the national or local historic register or is a contributing structure to either a nationally or locally designated historic district is "dangerous," as defined by section 16-17 of the code of ordinances.

4. Upon receipt of this notice, the city manager or designee is authorized to access these properties accompanied by a code enforcement officer to assess the damage that formed the basis for the decision to find the building "dangerous." The assessment will be presented to the historic preservation board, which shall be allowed to appeal the determination to the board of adjustment pursuant to section 16-27 of this code and present evidence against the determination that the building is "dangerous".