

Re: Michael Hapke and Terry-Lyn Mason  
Michael McAleer and Nancy McAleer  
212 Oak Avenue, Anna Maria, Florida

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### **Claim**

This claim is presented to the City of Anna Maria pursuant to §70.001, Florida Statutes, the Bert J. Harris, Jr., Private Property Rights Protection Act (the “Act” or the “Harris Act”).

### **Factual Background**

Michael Hapke, Terry-Lyn Mason, Michael McAleer and Nancy McAleer, (collectively “Property Owner”) are natural persons who own the property located at 212 Oak Avenue, Anna Maria, Florida, as more particularly described in the attached Exhibit “A” (“Property”). The Property Owner purchased the Property on December 31, 2012, as an investment property for vacation rental purposes. The Property contains a five bedroom home, which is advertised for and regularly rented to parties of twelve.

On April 9, 2015, the City Commission for the City of Anna Maria adopted Ordinance No. 15-788, which implemented a number of regulations on vacation rental properties. This ordinance was challenged in the circuit court, was subsequently amended a number of times, and the final version was adopted on November 19, 2015, as Ordinance 15-807 (the “Ordinance”).

Amongst other regulations, the Ordinance enacted a maximum occupancy restriction of two persons per bedroom plus two persons, or eight persons per parcel, whichever is less. Thus, whether the property contains a three bedroom home or a six bedroom home, the maximum occupancy is eight. These occupancy limitations serve as the primary basis for the claim contained herein.

On or about June 18, 2015, the City mailed notice to affected property owners in the City pursuant to the provisions of §70.001(11)(a)1., *Florida Statutes*, advising them that their existing

property rights may be impacted and that they may have only one year within which to assert a claim under the Act.

### **The Harris Act**

The Harris Act begins with the following statement of legislative intent:

The Legislature recognizes that some laws, regulations and ordinances of the state and political entities of 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. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it 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, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property. §70.001(1), *Florida Statutes*.

Specifically, the Act provides that “[w]hen a specific action of a government entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.” §70.001(2), *Florida Statutes*.

The term “existing use” is defined to include the following:

- (1) 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
- (2) 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), *Florida Statutes*.

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), *Florida Statutes*.

The term “inordinate burden” means that an action of one or more governmental entities has directly restricted or limited the use of real property such that:

- (1) 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
- (2) The property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of the burden imposed for the good of the public, which in fairness should be borne by the public at large. §70.001(3)(e), *Florida Statutes*.

The term “action of a governmental entity” means “a specific action of a government entity which affects real property, including action on an application or permit.” §70.001(3)(d), *Florida Statutes*. The term “real property” means “land and includes any appurtenances and improvements to the land.” §70.001(3)(g), *Florida Statutes*.

Historically, the Act provided for claims to be presented within one year from the date the regulation at issue was first applied to the subject property. This created significant confusion and litigation over the years, as it was unclear when the regulations at issue were “first applied” to the property, and thus when the one-year filing timeframe would commence. In 2011, the Legislature added a provision in §70.001(11)(a)1., *Florida Statutes*, which allowed local governments to trigger the one-year filing timeframe by sending a notice to the affected property owner “if the impact of the law or regulation on the real property is clear and unequivocal in its terms.”

## **Case Presented**

### **I. Existing Use/Vested Rights**

A property owner may establish an “existing use” under the Act by demonstrating either that (1) there were actual, present uses of the property or (2) there were reasonably foreseeable, nonspeculative land uses, which were suitable for the property and compatible with adjacent properties, and which created a fair market value that was greater than the actual, present use. The existence of a “vested right” is 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.

#### **A. Actual, Present Use**

The Property Owner has an actual, present use of the Property for vacation rental purposes to parties of twelve. At all times relevant to this claim, the Property has been advertised and rented to parties of twelve people for vacation rental purposes.

**B. Reasonably Foreseeable, Nonspeculative Land Uses**

To the extent it is determined that the Property Owner does not have an actual, present use of the Property for vacation rental purposes to parties of twelve, the ability to utilize the property for vacation rental purposes to parties of twelve is a reasonably foreseeable, nonspeculative use of the Property, which is suitable for the Property and compatible with adjacent land uses, and which has created a fair market value for the Property that is higher than the actual, present use.

The ability of the Property Owner to rent to parties of twelve was not only reasonably foreseeable and nonspeculative, it was permitted *by right* under the City's Code prior to the enactment of the Ordinance. The City has essentially conceded this point by sending out notices in accordance with §70.001(11)(a)1., *Florida Statutes*. As discussed previously, this section provides that the local government may send out notices to the affected property owner in order to begin the timeframe for filing a claim under the Act "if the impact of the law or regulation on the real property is clear and unequivocal in its terms." Thus, in order for the City to send such notices, there were clearly existing property rights that were impacted by the Ordinance.

An occupancy of twelve is suitable for the Property and compatible with adjacent land uses. For decades every home within the City was permitted to rent without limitation on occupancy. Even under the Ordinance, houses with two or three bedrooms are permitted to continue to rent at an occupancy of two persons per bedroom plus two additional persons. There is no basis for determining that such ratios are not likewise appropriate for larger homes which were designed, permitted and constructed to accommodate such occupancies. Further, other residential uses within the City, including seasonal rentals and long-term leases, continue to have no limit on the number of occupants. Any potential impacts created by the additional occupants are also mitigated by the other regulations of the Ordinance and the City Code, which include strict licensure and inspection requirements, lease and posting requirements, solid waste pick-up regulations, noise restrictions, parking requirements, etc.

According to the appraisal report prepared by Bass & Associates, Inc., dated April 1, 2016, and attached hereto ("Appraisal Report"), the highest and best use for the Property is for vacation rental purposes to parties of twelve. To the extent it is determined that the

Property Owner does not have an actual, present use of the Property for vacation rental purposes to parties of twelve, the ability to rent to parties of twelve has created a fair market value for the Property that is greater than with the actual, present use.

### **C. Vested Rights**

The Property Owner has demonstrated “vested rights” to the use of the home for vacation rental purposes at an occupancy of twelve people.

Vested rights under the Harris Act may be established under the common law principle of equitable estoppel. “Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds.” *Town of Largo v. Imperial Homes Corp.*, 309 So.2d 571 (Fla. 2d DCA 1975).

The existing home on the Property was permitted by the City for 5 bedrooms and enough square footage to comfortably and lawfully accommodate an occupancy of twelve people. The house was constructed in accordance with the permit, and the Property Owner invested in the Property in reliance upon the existence of this permitted structure. The City is prohibited under the principles of equitable estoppel from now coming back and rendering those permitted bedrooms and square footage as unusable.

## **II. Inordinate Burden**

The existing use or vested rights in the Property, as established herein, have been inordinately burdened by the City’s enactment of the Ordinance. Once the Property Owner has established the existence of an “existing use” or “vested rights”, a claim of inordinate burden may be made under the Act by proving either that the Property Owner is permanently unable to attain the reasonable investment-backed expectations for the existing use of vested rights in the Property, or that the Property Owner is left with existing or vested uses that are unreasonable such that the Property Owner bears permanently a disproportionate share of the burden imposed for the good of the public, which in fairness should be borne by the public at large.

### **A. Unable to Attain Investment-Backed Expectations**



The Property Owner made a substantial investment in the Property based upon the existing and potential use of the Property in accordance with the existing ordinances of the City. The market value for the Property was driven by the actual and potential rental income at an occupancy of twelve, as described in the Appraisal Report. Such uses were permitted by right under the City's Code prior to the enactment of the Ordinance, and are included under the protection of the Act in its definition of "existing use" and "vested rights". Because those rights have been limited by the Ordinance, the Property Owner is now permanently unable to obtain the investment-backed expectation for the existing use and vested rights in the Property.

The City sent notices to affected property owners under §70.001(11)(a)1., *Florida Statutes*, in order to start the one-year timeframe for potential claims under the Act. This was an implicit recognition by the City that the adoption of the Ordinance would "clearly and unequivocally" impact property rights.

According to the Appraisal Report, the Property is worth One Million One Hundred Thirty Thousand Dollars (\$1,130,000.00) without the occupancy limitation, and is worth Eight Hundred Fifty-Five Thousand Dollars (\$855,000.00) with the occupancy limitation in place. Thus the value of the Property has been reduced by Two Hundred Seventy-Five Thousand Dollars (\$275,000.00) as a result of the City's adoption of the Ordinance. This number represents the loss of investment-backed expectations for the Property, and the Property Owner's inability to now obtain that return constitutes an inordinate burden to the Property.

#### **B. Unreasonable Remaining Use**

Under the occupancy restrictions of the Ordinance, the remaining uses for the Property are unreasonable given that the Property was designed, permitted and constructed to accommodate a higher occupancy.

The City has enacted a number of regulations over the past three years to limit the size of new homes being constructed. Indeed it is likely that the occupancy limits of the Ordinance will further serve to deter the construction of new vacation rental houses containing more than three bedrooms. However, it is unreasonable for the City to attempt to impose such occupancy restrictions on houses which were lawfully designed, permitted, and constructed to accommodate higher occupancies under Code provisions in effect at the time.

The Harris Act does not punish local governments which enact regulations intended to serve the greater good of their community. It simply requires the local government to

provide relief to property owners who are unfairly impacted when a regulation is enacted for the “greater good”.

Simply stated it is unfair that this Property Owner must “take one for the team”, so that the City can accomplish its goal of deterring large vacation rentals. The Property Owner is bearing a disproportionate share of the burden imposed by the City for the public good, and in fairness this burden should be borne by the public at large, through the granting of relief or the payment of compensation by the City. This constitutes an inordinate burden to the Property under the Act.

### **Prayer for Relief**

The Property Owner seeks relief in the form of a modification from the maximum occupancy provisions of the Ordinance such that the Property may permanently maintain a maximum occupancy of twelve persons for vacation rental uses, or in the alternative payment in the amount of Two Seventy-Five Thousand Dollars (\$275,000.00) to compensate the Property Owner for the loss in value to the Property, and such other relief as the court may ultimately deem appropriate.

Respectfully Submitted this 27<sup>th</sup> day of April, 2016,



Scott E. Rudacille, Esquire  
Blalock Walters, P.A.  
For the Property Owner

**BASS & ASSOCIATES, INC.**  
**CONSULTING APPRAISERS • PLANNERS • ECONOMISTS**

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**APPRAISAL REPORT**

**DIMINUTION IN VALUE ANALYSIS  
IMPROVED RESIDENTIAL PROPERTY  
212 OAK AVENUE  
ANNA MARIA, FLORIDA 34216**

**FOR  
SCOTT E. RUDACILLE, ESQUIRE  
BLALOCK WALTERS  
802 11TH STREET WEST  
BRADENTON, FLORIDA 34205**

**PROPERTY OF  
MICHAEL HAPKE & TERRI-LYN MASON  
MICHAEL & NANCY MCALEER  
1198 RIVER ROAD  
MANOTICK, ONTARIO K4M 1B4**

**RETROSPECTIVE DATE OF VALUE  
NOVEMBER 19, 2015**

**DATE OF APPRAISAL REPORT  
APRIL 1, 2016**

**FILE 16-122F**