**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA**

ROBERT MCCAFFREY and
ELLEN MCCAFFREY,

Plaintiffs,

CASE NO. 2017-CA-000284

UCN: 412017CA000284CAAXMA

v.

CITY OF HOLMES BEACH,
a Florida municipality,

Defendant. /

FINAL JUDGMENT

THIS CAUSE was tried before the Court on August 15 through 18, 2018. Fred E. Moore and Scott Rudacille appeared with the Plaintiffs, Robert and Ellen McCaffrey. Jay Daigneault and Randy Mora appeared on behalf of the Defendant, City of Holmes Beach (the "City"), along with Judy Titsworth, the City's Vice Mayor. Robert McCaffrey, Jennifer Davis, Michele Laade, Darrin Wash, Richard Bass, Dawn Wash, Scott Rudacille, Robert Pergolizzi, Shawn Wilson, and Susan Corsi testified as witnesses at trial. Deposition testimony was received from Patricia Petruff, Stacey Johnston, and James McGuinness. The Court also received numerous exhibits into evidence, which are referenced herein either numerically (Plaintiffs' exhibits) or alphabetically (Defendant's exhibits) as appropriate. The Court, having heard the testimony of the witnesses, having considered the other evidence, and having heard the argument of counsel, finds as follows:

FACTS AND PROCEDURAL HISTORY

Plaintiffs (the "McCaffreys" or "McCaffrey") bought the property located at 7003 Holmes Boulevard (the "Property"), located within the City, in 1993 and have lived in the one-story, single-family structure located upon it since then. The property is located in the City's R-2 zoning district.

On January 22, 2013, the City adopted Ordinance 13-03 (referenced at trial as the "LAR ordinance") (Ex. A), which for the first time defined a "Living Area Ratio" in the City's Land Development Code and then regulated the allowable Living Area Ratio in the R-2 district based on lot size. Living Area Ratio "expresses the relationship between the amount of air conditioned floor area (except garages) permitted in a residential dwelling unit and the area of the lot or parcel on which the residential dwelling stands. . ." Plaintiffs' lot exceeds 7,500 square feet, and its maximum LAR for purposes of development/redevelopment is, therefore, 0.34. The existing single family structure has a LAR of 0.16.

On April 9, 2013, the City adopted Ordinance 13-05. (Ex. B). Ordinance 13-05 amended the Land Development Code's definition of a duplex to require that they be "joined from the ground to the roof by an unpierced, continuous, common wall for at least one third (1/3) of the distance from the exterior face of the front to the exterior face of the rear of the longer of the two dwelling units." According to the Ordinance's legislative findings, duplexes in the City were being constructed on a common foundation but with the individual units separated from each other, giving the appearance of being single-family homes.

In early 2014, having observed that other parcels both adjacent to theirs and elsewhere in the R-2 district had been redeveloped, Plaintiffs sought to redevelop their parcel into a "monster" vacation rental duplex in order to sell it and move off of Anna Maria Island. McCaffrey assembled a team consisting of a realtor (Michelle Laade), an attorney (Scott Rudacille), a contractor (Wash Family Construction), and an appraiser (Richard Bass) to assist him through the development process.

The McCaffreys' building permit application, seeking to construct a two-unit duplex structure (connected only by the foundation) with five bedrooms per unit, was submitted to the City on January 16, 2015. (Ex. AE). But, the day prior, the City had enacted a moratorium prohibiting the construction of residential units in the City's R-2, R-3, and R-4 districts that contained or proposed four or more bedrooms. (Ex. C). The moratorium affected applications received by the City's building department after 3:00pm on January 15, 2015, while applications received prior to that time were unaffected. The moratorium was to last until October 31, 2015 in order to provide the City Commission "the time needed to receive information, weigh all factors and craft appropriate policies."

The City's building permit file (Ex. AE) shows that permit application #15-00059 was received on January 16, 2015. Robert McCaffrey testified that, at his direction, the permit application and plans intentionally exceeded the LAR imposed by Ordinance 13-03. (Ex. CM). The City rejected the application on February 27, 2015 because it was not compliant with the moratorium limiting the number of bedrooms. Through their contractor, Wash Family Construction ("Wash"), Plaintiffs reduced the number of bedrooms to three units per side, but the application was rejected on March 30, 2015 because it was not compliant with the definition of a duplex.

On April 13, 2015, Wash transmitted two new sets of plans following the March 30 rejection. The City issued "Plan Re-Review Comments" dated May 18, 2015, indicating again that the "proposed structure does not meet the Land Development (LDC) definition of a duplex, in addition to multiple other deficiencies." Wash submitted revised plans and other documents on August 4, 2015, this time connecting the units in compliance with the definition of a duplex, and again the City issued plan review comments on August 25, 2015 identifying a number of required revisions to the plans.

On January 20, 2016, Wash transmitted additional information in response to the plan review comments. On March 8, 2016, the City issued plan review comments identifying four items that needed to be "added, corrected, and/or submitted." Wash transmitted its response on April 26, 2016 indicating that some of the information requested was provided, but that it was waiting on "drainage stuff." Wash supplemented the submittal on May 11, 2016.

On June 16, 2016, the City issued more plan review comments. In addition to other inconsistencies and deficiencies, the plan review comments noted that "THE L.A.R. ON THE DRAINAGE PLAN STATES A 59% L.A.R. THIS WOULD EXCEED THE L.A.R. REQUIREMENTS OF ORDINANCE 13-03. . ." The review comments asked Wash to "[p]lease submit accurate and detailed responses to these comments so that the review process may continue. . ." Wash submitted additional revisions on July 22, 2016, to which the City issued comments on September 21, 2016, first noting that "all comments from previous reviews have not been addressed" and that the submission still violated the LAR ordinance, 13-03. No further revisions were submitted in response to these September 21, 2016 plan review comments.

On August 16, 2017, McGuinness, the City's Building Official, notified Wash that the permit application would be considered abandoned within fifteen days unless revised plans or submittals were received, and cited to the Florida Building Code section governing same. No further submittals were made, but the McCaffreys responded through counsel to the August 16, 2017 transmittal from McGuinness indicating that they had elected to pursue the permit through "judicial means." None of the submissions made to the City indicated that the McCaffreys intended to construct a pool or pools on the parcel and, in fact, their contract with Wash indicates that pools were "not included in this contract." (Ex. AE, AB).

While the McCaffreys' permit application was pending, the City adopted additional ordinances at issue in the case. On June 23, 2015, the City adopted Ordinance 15-10. (Ex. D). Among other things, the Ordinance added water features such as pools to the impervious surface calculation for development purposes and changed other provisions applicable to such water features, including the required setback.

Ordinance 15-12, adopted on September 8, 2015, altered the parking requirements for resort housing. (Ex. E). In addition, it limited to four the number of bedrooms that could be constructed in a single-family dwelling unit and to two the number of bedrooms that could be constructed on each side of a duplex. The Ordinance also provided that the occupancy of resort housing units cannot exceed six persons or two persons per bedroom, whichever is greater.

Ordinance 15-19, adopted on November 10, 2015, limited the size and other elements of water features such as pools associated with individual dwelling units on duplex lots in the R-2 district. (Ex. F).

Finally, on February 23, 2016, the City adopted Ordinance 16-02. (Ex. G). The Ordinance established a Vacation Rental Certificate program for the purposes of regulating vacation rental units under the provisions of the Land Development Code. Though Robert McCaffrey's testimony was that he intended to redevelop his property as a duplex for purposes of vacation rentals, the property has not been used as a vacation rental while he has owned it and he has not applied for a Vacation Rental Certificate under Ordinance 16-02.

With this factual backdrop, the McCaffreys submitted to the City on August 24, 2016 the first of two claims under the Bert J. Harris, Jr. Private Property Rights Protection Act, § 70.001, Fla. Stat. (the "Harris Act" or the "Act"). (Ex. K). The claim indicated that the McCaffreys began planning to redevelop their property in 2012 in order to cash in on their retirement savings,[1] but that a "series of regulations" implemented by the City had significantly impacted the value of their investment. (Ex. K). The claim first generally describes the ordinances described above, then states the following:

> Through the ***enacting*** of Ordinances 13-03, 13-05, 15-10, 15-12, and 15-19 (cumulatively the "Development Restrictions"), the City

[1] There is no evidence that the McCaffreys' efforts to redevelop the property began before 2014. Robert McCaffrey's testimony, along with that of Michelle Laade, shows no tangible movement toward development until March, 2014 at the earliest, and those efforts did not result in the submission of an actual building permit application to the City until January 16, 2015.

> has engaged in a systematic approach to significantly restrict development rights within the R-2 zoning district, resulting in a ***cumulative inordinate burden*** on the Property. In the face of multiple moratoria and ever-changing development restrictions, and after being in the design and permitting process for two years, the Property Owners recognized the futility of proceeding with permitting and commenced this action.
>
> (Ex. K at 37) (emphases supplied).

The claim further stated that, relative to Ordinance 15-12, only the parking requirements were at issue—the other alleged impacts of the ordinance were not addressed. Finally, the claim contained lengthy narrative sections concerning "existing use" (Ex. K at 39-40) and "inordinate burden" (Ex. K at 40-41), but none further addressing "specific action."

The claim was accompanied by an appraisal performed by Richard Bass of Bass & Associates, Inc. The purpose of the report, according to Bass, "is to render an opinion of market value of the subject 'without' consideration of the impact to the highest and best use of the subject property relative to the enactment of Ordinances 13-303 [sic], 13-305 [sic], 15-10, 15-12 & 15-19; and then separately render an opinion of value 'with' enforcement of said Ordinances . . . This analysis does <u>not</u> address the impact of vacation rental occupancy limitations of Ordinance 15-12 or 16-02." (Ex. K at 2) (emphasis in original). The appraisal goes on to assert a diminution in value of $106,000.00 using an effective date of valuation of January 22, 2013 (the date of adoption of the LAR ordinance), based on a mathematical extrapolation measuring only the impact of the LAR ordinance.

The City responded to this first claim on January 13, 2017, stating the allowable uses of the property and proposing no changes to the ordinances. (Ex. L).

On October 25, 2016, the McCaffreys submitted a second Harris Act claim and appraisal to the City. (Ex. M). Like the first, this second claim first summarized all of the ordinances at issue, then noted that the claim addressed only the remaining elements of Ordinance 15-12 concerning the bedroom and occupancy restrictions, as well as the Vacation Rental Certificate program implemented by Ordinance 16-02. Again, the claim characterized these Ordinances as "cumulative" development restrictions, and again contained narratives concerning "existing use" and "inordinate burden," but did not explicate on "specific action." (Ex. M at 3-6).

The second claim was also accompanied by an appraisal prepared by Bass. The appraisal's retrospective date of value is September 8, 2015, the date of adoption of Ordinance 15-12. The purpose of the report is similar to the first—to render an opinion of market value "relative to the enactment of Ordinances 15-12 & 16-02. . ." (Ex. M at 6). But, the appraisal report and Bass in his testimony misstated the occupancy provision of Ordinance 15-12 as being limited to two persons per bedroom. According to Bass, the McCaffreys' property in the appraised "after" condition "is limited to four guests per unit as a vacation rental." In fact, the ordinance allows two persons per bedroom or a maximum of six, whichever is greater.

The City responded to this claim on March 20, 2017 in substantially the same manner as the first.

Plaintiffs filed their Complaint on January 26, 2017. The City moved to dismiss the Complaint, which the Court construed as a Motion for More Definite Statement and granted on March 30, 2017 relative to Counts I and II. The Court directed McCaffrey to identify the required "application" of Ordinance 13-03 and to attach such written comments to the extent relied upon for that application. On March 31, 2017, Jenny Davis, acting on behalf of the McCaffreys' counsel, submitted via email a public records request to the City Clerk, Stacey Johnston, asking her to provide "a copy of the City's records related to permitting at 7003 Holmes Boulevard, specifically including, any permit applications and written review or response comments from the City." (Ex. 65). Following a series of e-mails between Davis, Johnston, and Rudacille, the City made the responsive records available to Plaintiffs on April 26, 2017. The same day, Plaintiffs filed their Amended Complaint, asserting Counts I and II under the Harris Act, Count III alleging a violation of Florida's Sunshine Law,[2] and Count IV alleging a violation of Florida's public records law, Chapter 119, Fla. Stat.

Later, during the course of discovery, the City supplemented its previous responses to Plaintiffs' Request for Production. Plaintiffs allege that the documents provided in supplement should have been included with the April 26, 2017 documents responsive to the public records request.

THE LAW

[2] At trial, the Court granted the City's motion for involuntary dismissal of this claim at the close of Plaintiffs' case, and it is not further addressed herein.

I. *The Bert J. Harris, Jr. Private Property Rights Protection Act*

The Harris Act was enacted in 1995 as a mechanism to protect and compensate any landowner whose property is affected by government action not rising to a taking. § 70.001 (1), Fla. Stat.; Ocean Concrete, Inc. v. Indian River County, 241 So.3d 181, 186 (Fla. 4th DCA 2018). The Act provides for relief when "a new law, rule, regulation, or ordinance . . . ***as applied***, unfairly affects real property." § 70.001 (1), Fla. Stat. (emphasis supplied). Because the Act is an alteration of the common law principles of eminent domain and inverse condemnation, and because it is a waiver of sovereign immunity, it must be construed narrowly, no more broadly than clearly specified. Hardee County v. FINR II, Inc., 221 So.3d 1162, 1166 (Fla. 2017); Bair v. City of Clearwater, 196 So.3d 577, 581 (Fla. 2d DCA 2016). Waivers of sovereign immunity are construed narrowly in order to protect public funds. Hardee County, 221 So.3d at 1166.

The Act contains some "relatively complex" pre-suit requirements. P.I.E., LLC v. DeSoto County, 133 So.3d 577, 578 (Fla. 2d DCA 2014). The property owner must submit a claim in writing to the head of the governmental entity, and the claim must be accompanied by a "bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property." § 70.001 (4) (a), Fla. Stat. If the claim is not resolved, the property owner may file suit in circuit court. § 70.001 (5), Fla. Stat. Suit may not be commenced, though, if the claim is presented more than one year after a law or regulation is first applied by the governmental entity to the property at issue. § 70.001 (11), Fla. Stat. Conversely, a claim under the Act does not ripen until the governmental entity specifically applies the law or ordinance to the property in question. GSK Hollywood Development Group, LLC v. City of Hollywood, 246 So.3d 501, 503 (Fla. 4th DCA 2018). Failure to satisfy the pre-suit requirements results in failure of the claim and the resulting suit. See e.g. Turkali v. City of Safety Harbor, 93 So.3d 493 (Fla. 2d DCA 2012); Wendler v. City of St. Augustine, 108 So.3d 1141 (Fla. 5th DCA 2013).

To prevail substantively under the Harris Act, the property owner must prove that "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." § 70.001 (2), Fla. Stat. (emphases supplied). Accordingly, when a claim under the Harris Act is presented for judicial review, the court must first consider whether a claimed "existing use of the real property" or a claimed "vested right to a specific use of the real property" actually existed. If it finds either, it must next determine whether the government action inordinately burdened the property. § 70.001 (6) (a), Fla. Stat. If the court also finds that that there was an inordinate burden, then it must impanel a jury to determine the total amount of compensation to the property owner for the loss caused by the inordinate burden to the property. § 70.001 (6) (b), Fla. Stat. The party seeking relief under the Harris Act bears the burden of proof. Ocean Concrete, Inc., 241 So. 3d at 186 (citing Town of Ponce Inlet v. Pacetta, LLC, 120 So.3d 27, 29 (Fla. 5th DCA 2013).

With these principles in mind, the Court now turns to the two Harris Act claims.

A. Count I

Count I presents a novel claim, one not previously addressed in any of the reported cases arising under the Act in several respects. Here, Plaintiffs assert that the adoption of five ordinances[3] caused a "cumulative burden" to the Property, and that the City's application ripening this claim occurred on June 16, 2016 when it issued plan review comments noting that the plans were in violation of the City's LAR ordinance, Ordinance 13-03. For the reasons stated below, the Court finds that judgment in favor of the City is appropriate on Count I.

1. Presuit Requirements

a. First application

Section 11 of the Act prescribes two ways to determine when the one-year claim period accrues. First, the claim period may accrue when a law or regulation is enacted provided that (1) its impact on the real property is clear and unequivocal; and (2) notice is provided to the affected property owner in the manner provided. § 70.001 (11) (a) 1, Fla. Stat. This "enactment and notice" provision is not at issue in this case.[4]

Second, "a law or regulation is first applied to the property when there is a formal denial of a written request for development or variance." § 70.001 (11) (a) 2, Fla. Stat. The Court finds that there was no formal denial of a written request for development or variance in this case. What the evidence shows is an ongoing process of submissions by the contractor followed by comments from the City identifying deficiencies in those submissions and requesting additional information.

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[3] Only the provisions of Ordinance 15-12 related to parking are implicated in Count I.

[4] Robert McCaffrey testified to having received notice relative to Ordinances 15-10, 15-12, and 15-19 in October, 2017. (Exs. 83 and 84). But, the claim was submitted to the City in October, 2016 and the lawsuit filed in January, 2017 and amended in April, 2017, well before the notice was sent.

That process ended not with a "formal denial" as is required by the statute, but with the Plaintiffs' abandonment of the permit application. When notified that their permit application would be considered abandoned in the absence of further submissions, Plaintiffs informed the City through counsel that they were pursuing the permit through judicial means. Accordingly, because the evidence shows no formal denial of written request for development or variance as is required under the plain language of the Act, the Court finds that Count I must fail.[5]

Plaintiffs' contention that the June 16, 2016 plan review comments represent an "effective denial" for purposes of triggering the claims period must also be rejected.[6] The Act does not by its plain language make provision for effective denials. In the Bair case, the Second DCA considered a similar argument. Bair, 196 So.3d at 577. There, the property owners argued that actions of the government beyond the mere application of ordinances could inordinately burden their property under the Act. The court rejected the argument, writing that "it was the *application* of . . . ordinances that sometimes inordinately burden real property, not ongoing requests for information, requests for revisions to plans, or a governmental entity's change in position." Id. at 582 (emphasis in original). Though analyzed in the context of the "specific action" necessary to sustain a Harris Act claim, the Court finds the case instructive in determining whether the one-year claim period has been triggered here. The Court finds that, if requests for information and revisions to plans cannot constitute a specific action under the Act, neither can they represent a formal denial.

Plaintiffs' "effective denial" theory has additional shortcomings that defeat Count I due to their improper aggregation of claims. If the City's plan review comments dated June 16, 2016 can act as an effective denial based on their identification of the LAR ordinance issue, then the theory must be applied to all of the ordinances aggregated within the August 24, 2016 claim presented to the City. The City's first two plan review comments, dated March 30 and May 18, 2015, respectively, noted specifically that the plans violated the City's definition of a duplex set

[5] The Court acknowledges Plaintiffs' counsel's argument that local governments might seek to avoid Harris Act claims by intentionally avoiding the issuance of a formal denial of a development application. The Court need not reach the question because there is no evidence the City did so here.

[6] The Court notes that Plaintiffs responded to the June 16, 2016 plan review comments with another set of revisions and additional documentation. This suggests to the Court that Plaintiffs themselves did not view the June 16 review comments as a denial, but rather as a request for more information or revisions to plans.

forth in Ordinance 13-05. Accordingly, "effective denials" ostensibly occurred on those dates as to Ordinance 13-05, but the claim was not submitted to the City until August 24, 2016, some eighteen months and fifteen months after those review comments. Therefore, the claim was not made within the one year time limitation imposed by Section 11, and the claim's arguable timeliness as to Ordinance 13-03 cannot bootstrap its untimeliness as to Ordinance 13-05. Because the Harris Act must be strictly construed, all of a claim must be timely or none of it is.

Moreover, if an applicant is "effectively denied" a building permit when one is applied for but not issued, then that denial applies to the whole of the permit application and the supporting documents, whether the specific wording sought by the applicant in the plan review comments is used or not. Here, Robert McCaffrey testified that the plans at all times exceeded the LAR permissible under the ordinance. Thus, the first "effective denial" in March, 2015 implicitly encompassed the LAR ordinance, and the claim was presented untimely to the City.

As to the other ordinances, none of the plan review comments spanning from early 2015 into late 2016 identify deficiencies as to any. The provisions of Ordinances 15-10 and 15-19 governing pools were never mentioned, likely because the submitted plans did not anticipate a pool or pools. Further, the parking requirements of Ordinance 15-12 were not identified in any of the City's review comments. Thus, these three ordinances have not been applied to the property under Plaintiffs' "effective denial" theory.

Crediting the "effective denial" theory, what the Court is left with is a claim alleging a cumulative burden as to the application of five ordinances. But, the claim is untimely as to the application of one of those ordinances (13-05) and there has been no application whatsoever, effective or otherwise, as to three more (15-10, 15-12, 15-19). The Court finds that the Act does not permit aggregation and presentation of claims in this fashion, and the claim cannot be saved by the arguably timely application of Ordinance 13-03 via an "effective denial."

b. Bona fide, valid appraisal

Section 4 (a) of the Act requires that, along with the claim, the property owner must submit a "bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the property." The purpose of the appraisal is to provide the governmental entity the means by which to evaluate the potential claim for the purpose of making a settlement offer prior to the filing of a suit. § 70.001 (4) (c), Fla. Stat.; Turkali, 93 So.3d at 495.

The City contends that the appraisal submitted in support of the first claim is insufficient under the Act. The City's expert appraiser, Shawn Wilson, performed a review of Mr. Bass' work and concluded that it did not meet the standards of the appraisal profession for a variety of reasons. The most compelling of these reasons was that Mr. Bass did not perform the "before and after" valuation required by the Act and, instead, simply performed a mathematical extrapolation based on the "before" value in order to arrive at the "after" value. Of course, Bass testified that this was appropriate under the governing USPAP standards. Due to the other deficiencies of the appraisal, the Court need not resolve that competing testimony for the purposes of this Judgment.

There are two issues with the appraisal that render it and, consequently the claim itself, deficient under the Act. First, its effective date of valuation is January 22, 2013, which is the date of adoption of Ordinance 13-03 (the LAR ordinance). But the evidence shows that the City took no specific action relative to the property on that date.[7] To the contrary, the evidence shows that the McCaffreys themselves did nothing relative to the re-development of the property before March, 2014, and did not make the City aware of any such plans until the submission of the building permit application on January 16, 2015. The mere adoption of an ordinance of general applicability is not a "specific action" of government sufficient to sustain a Harris Act claim. M&H Profit, Inc. v. City of Panama City, 28 So.3d 71, 75-76 (Fla. 1st DCA 2009), review denied 41 So.3d 218 (Fla. 2010). Significantly, the Act requires that a supporting appraisal demonstrate the loss in fair market value ***at the time of the governmental action at issue***. § 70.001 (4) (a) and (6) (b), Fla. Stat. (emphasis supplied); Bair, 196 So.3d at 582 ("In determining legislative intent based on the plain language of a statute, we read the statute as a whole"). This Court has previously recognized this requirement in Morgan v. City of Holmes Beach, Case No. 2015-CA-001023 (Manatee County Circuit Court March 22, 2017), writing that "[b]ecause the fair market value presented by the plaintiffs was not the date relied upon by plaintiff as the specific act by the City, the amount of the Bert Harris claim was not by a valid, bona fide appraisal under [the Act] and therefore was not proper." More importantly, a contrary construction would result in the phrase

[7] The trial testimony of Richard Bass and Scott Rudacille shows that they disagreed whether the effective date of valuation should be the date of adoption of the ordinance or the date the City "effectively denied" the permit via the June 16, 2016 plan review comments. Though ultimately immaterial since the appraisal was submitted with the January 22, 2013 valuation date, appraiser Bass' position prevailed over attorney Rudacille's.

"fair market value" having different meanings under sections (4) (a) and (6) (b). Therefore, the Court finds that the appraisal submitted in support of the claim was not a bona fide, valid appraisal.

Second, the Court finds that the appraisal does not "support the claim" as it is required to do under § (4) (a). The claim submitted to the City was that the adoption of the five ordinances at issue caused a "cumulative inordinate burden" to the Property. By its plain terms, though, the Act nowhere makes allowance for "cumulative" burdens or burdens allegedly resulting from the adoption of a series of ordinances or, as Plaintiffs' counsel characterized this case, "death by a thousand cuts." But assuming the Act provided for it, the accompanying appraisal would need to demonstrate the impact caused by each "cut" asserted in the claim. Here, Bass testified that all of the ordinances impacted the value of the Property, but based the alleged diminution in value only on the impact of the previously unregulated LAR, and the appraisal states explicitly that "[o]ther impacts of these ordinances cannot be estimated, such as the parking requirements, increased cost of buffering and landscaping, limitation of a nominal pool size and the imposed design criteria of these cited Ordinances." (Ex. 3 at 58). In other words, Plaintiffs claimed a cumulative burden caused by a series of actions, then submitted an appraisal that attempted to quantify only one. The appraisal does not "support the claim" and is therefore deficient.

For the reasons stated herein, Count I fails to state a claim because Plaintiffs failed to comply with the Act's pre-suit requirements.

2. Substantive Elements

Turning now to the substantive elements of Count I, the Court finds that Plaintiffs have failed to prove they are entitled to relief.

a. Existing Use

The Court must first consider whether a claimed "existing use of the real property" or a claimed "vested right to a specific use of the real property" actually existed. Because Plaintiffs have proceed on the theory of "existing use," an analysis of a "vested right to a specific use" is unwarranted.

The term "existing use" has two alternative definitions, only one of which is at issue here. Under § (3) (b) 2 of the Act, an existing use means "[a]ctivity or such reasonably foreseeable, non-speculative 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."

At the outset, the Court notes that none of the ordinances at issue in Count I changed the permissible use of the Property. Prior to and after the adoption of the ordinances at issue, the Property could be used for residential purposes or vacation rentals with single or duplex structures. Though not made entirely clear by Plaintiffs at trial, the Court finds that the "existing use" claimed by Plaintiffs is that of a duplex connected only by a foundation and used for short-term vacation rentals without the development characteristics set forth by the five ordinances at issue. This finding is consistent with the claim itself, which states that "[t]he ability to construct additional square footage with large pools and more flexibility by right under the Prior Code had created a fair market value for the Property that was higher than with the use of the existing structure." (Ex. K at 40).

Under Ocean Concrete, the Court must first inquire whether such use was reasonably foreseeable and non-speculative at the time the City amended its Land Development Code. The Court first notes that the ordinances at issue addressed either previously unregulated elements of development within the City (Ordinances 13-03, 15-10, 15-12, and 15-19) or amended definitional sections of the code (Ordinance 13-05). The Court finds that the future use of the Property as a duplex vacation rental was both reasonably foreseeable and non-speculative, but that such use is still allowed. Plaintiffs' reliance on specific characteristics of that use, though, was neither reasonable nor non-speculative. Local governments frequently add to, subtract from, or amend their land development regulations in order to address development trends and match the development of communities to the governing Comprehensive Plan. So, though the City's code did not expressly regulate, for example, living area ratios prior to the adoption of Ordinance 13-03, it was not reasonable for Plaintiffs to rely on that lack of regulation, and they acquired no legally cognizable right in such lack of regulation. A contrary holding would create an entirely new subset of property rights not set forth in the Harris Act or elsewhere. It was speculative and unreasonable for Plaintiffs to expect to develop their Property with unlimited LAR, pool size, and parking based only on the premise that others in the R-2 district had done so.

Assuming, though, that the claimed existing use was reasonable and non-speculative, there is a second part to the analysis (". . . ***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" (emphasis supplied)). Plaintiffs failed to prove at trial that the use has created an existing fair market value in the property greater than the fair market value of the single-family home presently existing. Neither the appraisal submitted in support of the claim nor the trial testimony attempted to establish a value for the single-family residential home, which is the actual, present use existing on the Property. Instead, the appraisal assumed that the Property is a vacant lot, and no other evidence or testimony attempted to establish the fair market value for that actual, present use of the Property. Thus, any valuation assigned to the Property's proposed existing use lacks the comparator required by § (3) (b) 2, and the Plaintiffs consequently failed to prove this element at trial.

b. Specific Action

The Harris Act is violated when a "specific action of a governmental entity inordinately burdens real property." § 70.001 (2); Fla. Stat. The term "action of a governmental entity" means a specific action which affects real property, including action on an application or permit. The plain and unambiguous language of the Harris Act establishes that it is limited to "as-applied" challenges to new laws or ordinances, as opposed to facial challenges. § 70.001 (1), Fla. Stat.; City of Jacksonville v. Smith, 159 So.3d 888(Fla. 1st DCA 2015), jurisdiction discharged 220 So.3d 1118 (Fla. 2017); M&H Profit, Inc., 28 So.3d at 75-76. A facial challenge is based on the mere enactment of an ordinance, whereas an as-applied claim is based on a specific application for development. Id. Thus, the Act does not provide a cause of action when a governmental entity adopts an ordinance of general applicability but has taken no steps to apply that ordinance to a particular property. Id.

In Count I, it is not clear following trial what Plaintiffs rely upon as the "specific action" of government that has inordinately burdened the Property. According to the written claim and appraisal, it was the enactment of the five ordinances that inordinately burdened the Property. (Ex. K at 37). During closing argument, though, Plaintiffs' counsel argued that the "specific action" element was satisfied by the City's action in effectively denying or rejecting the permit application or providing comments, and then asserted that the element was satisfied by "all sorts of things because the City did all sorts of things." The plain language of the Act requires "specific action," so the claim must fail.

Inasmuch as the claim is predicated on the adoption of the five ordinances,[8] it must fail under M&H Profit. Here again, the Plaintiffs' unprecedented aggregation of undifferentiated claims clouds the analysis, but what is undisputed is that (1) all of the ordinances are ordinances of general applicability; and (2) the City has taken action relative to the Property on only two of the five, and then only if the Court credits Plaintiffs' "effective denial" theory. There is no evidence that Ordinances 15-10, 15-12, and 15-19 have been applied by the City,[9] thus the City has taken no action relative to them. In other words, the Act is "dormant" and "inchoate" as to those three. GSK, 246 So.3d at 505-506. Ordinance 13-05 was applied under the effective denial theory on March 30 and May 18, 2015 when the City issued plan review comments noting that the plans did not meet the code's definition of a duplex. If that is the action relied upon, the claim was submitted untimely to the City. Ordinance 13-03, also adopted before Plaintiffs acted to redevelop the Property, was applied under Plaintiffs' effective denial theory via the June 16, 2016 plan review comments. So, within a single claim asserting the "cumulative inordinate burden" imposed by all five ordinances, the City has taken no action as to three of them, untimely action as to one, and arguably timely action as to the remaining. Because it acts in derogation of common law and as a waiver of sovereign immunity, the Court finds that the Act required Plaintiffs to prove the specific action that burdened the Property and that Plaintiffs have failed to do so.

Further, to the extent the claim is predicated upon "all sorts of things" or multiple actions, the Court notes that the specific action referenced in the Act is repeatedly referenced in the singular, and nowhere makes reference to cumulative actions or burdens. §§ 70.001 (2), (3) (d), (6) (a), (6) (b), (9), (11) (b), Fla. Stat. Where it is used in the plural, it recognizes that actions of more than one governmental entity may be responsible for the action that burdened the subject property, again recognizing the necessity of identifying and relying on a singular, specific action. § 70.001 (6) (a), Fla. Stat. Applied here, the Court assumes without deciding that a property may be burdened by more than one action, but holds that the Act requires that each action be specifically

[8] The appraisal also supports the position that Plaintiffs are bringing impermissible facial claims against the ordinances because the effective date of valuation, which must reflect the date of specific action, reflects instead the date of adoption of Ordinance 13-03.

[9] Ordinances 15-10 and 15-19 simply could not have been applied, since the plans submitted by Plaintiffs did not include a pool or other water feature. Further, there were no plan review comments identifying the parking as non-compliant.

identified and proven, and the burden caused by each clearly and discreetly quantified in order that the governmental entity be given a fair opportunity to evaluate the claim. That did not happen here.

The Court finds that Plaintiffs have failed to meet their burden in identifying and proving a specific action of the City that inordinately burdened the Property.

c. Inordinate Burden

The terms "inordinate burden" and "inordinately burdened" mean that an action of government 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 that the property owner is left with existing 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. Plaintiffs' position appears to be that the very fact that the ordinances impose development limitations that were not present previously satisfies this element. "Because those development rights no longer exist, the Property Owner is now permanently unable to obtain the investment-backed expectation for the existing use of the Property. ***Nothing more is required under the Act.***" (Ex. K at 40). By its plain language, the Act requires more. The Court finds that Plaintiffs have failed to prove an inordinate burden under either provision of the Act.

As to the first ("permanently unable to attain the reasonably investment-backed expectation for the existing use"), Plaintiffs failed to prove either what their investment-backed expectation was or that they are permanently unable to obtain it. Robert McCaffrey testified that he wanted to do what his immediate neighbors had done in building large duplex structures with large pools, but admitted that he knew nothing of the particular features of those structures relative to their square footage, number of bedrooms, usage, or pools. What the McCaffreys set out to do was to develop their property to have two large houses on it.[10] The evidence shows that they can still build two large units on their Property—none of the ordinances at issue prevent them from doing that. In fact, the LAR of the single-family structure currently existing on the Property can be more than doubled in re-development. Further, Robert McCaffrey described his Property in an email from November, 2016 (past the adoption date of all of the ordinances and the "effective denial" of the

[10] There is no evidence that two separate structures have been built on any parcel in the R-2 district. The City's code previously allowed duplexes to be connected only by a foundation, giving the appearance of two separate structures, but they were not, in fact, separate. (Ex. B).

building permit application) as "The Best Little Building Lot in Holmes Beach," one whose value "cannot be under estimated" and one with "unlimited profit potential," belying any assertion that a reasonable investment-backed expectation is not obtainable. (Ex. CM).

As to the second method of proving an inordinate burden, Robert Pergolizzi's undisputed testimony showed that the single-family or duplex structure that the McCaffreys can build and use under the ordinances is not only reasonable, but perfectly consistent with the present composition of the neighborhood. Only 44 properties (or 18%) in the 245-parcel area defined by Pergolizzi as the McCaffreys' neighborhood contain structures exceeding the 0.34 LAR applicable to the Property. Because they are amongst the other 82% of parcels, Plaintiffs are not disproportionately bearing any burden alleged to be imposed by the Ordinance. Further, Plaintiffs offered no evidence whatsoever on this point relative to the other ordinances implicated within the claim.

For the reasons stated herein, judgment is hereby entered in favor of the Defendant CITY on Count I.

B. Count II

In Count II, Plaintiffs allege that the bedroom and occupancy restrictions of Ordinances 15-12 and 16-02 impose a cumulative inordinate burden on the Property. Plaintiffs assert that the adoption of the ordinances caused a cumulative burden to the Property. No proof was offered at trial the City applied the ordinances to the Property. For that reason and the others stated below, the Court finds that judgment in favor of the City is appropriate on Count II.

1. Presuit requirements

a. First application

Plaintiffs failed to prove at trial that the ordinances at issue in Count II had been applied to the Property for purposes of ripening a claim under the Act. As noted previously, the building permit application was abandoned in 2017 and the City did not issue the formal denial required under the Act. The permitting file also shows that the original plans submitted by Wash on January 16, 2015 (one day after the moratorium imposed by Ordinance 15-01 became effective) proposed five bedrooms per side in the duplex structure. The number of bedrooms was then reduced to three per side. Ordinance 15-12 was adopted on September 8, 2015, and the City continued to process the permit application proposing three bedrooms per side up through its abandonment. McCaffrey himself acknowledged that the three-bedroom per side proposal positioned him better than those whose applications were submitted after the adoption of Ordinance 15-12. (Ex. CM). Further, Robert McCaffrey testified that the Property has never been used as a vacation rental and that he has never applied for the Vacation Rental Certificate required under Ordinance 16-02 to use it as such. These ordinances have not been applied to the Property within the meaning of the Act and the claims presented to the City were, therefore, not ripe.

b. Bona fide, valid appraisal

Again, the parties presented evidence concerning the methodology used in producing the appraisal accompanying this second claim and whether it comported with the standards of the appraisal profession. The Court need not resolve that testimony because the second appraisal suffers from the same deficiencies as the first.

Like the first, the second appraisal fails to demonstrate the loss in fair market value at the time of the governmental action at issue. The appraisal bears an effective date of valuation of September 8, 2015, the date of adoption of Ordinance 15-12, but the City took no specific action relative to the Property on that date. It did not even issue plan review comments on that date. The claim itself asserts that the Property was burdened by the "actions" of government, but does not specify what those actions were, and no proof of any was adduced at trial. Plaintiffs' counsel's argument that the City "did all sorts of things" is simply insufficient under the Act, and the appraisal's failure to demonstrate the asserted loss in value at the time of the governmental action renders it invalid.

Also like the first, the second appraisal does not "support the claim" as it is required to do. The claim was that both ordinances caused an inordinate burden to the Property, but the appraisal makes no attempt to quantify the burden alleged to be caused by Ordinance 16-02 or the occupancy provision of 15-12, and no evidence of same was presented at trial. At best, the appraisal sets forth Bass' opinion of value as to a single bedroom, then uses a multiple of that number to arrive at its "after" valuation. There is no value whatsoever placed on the occupancy limitations imposed by the Ordinance. In fact, Bass asserted both in the appraisal report and at trial that the occupancy provision of Ordinance 15-12 limits the McCaffrey property to accommodating two persons per bedroom for a total of four in the "after" condition. His understanding of the operation of the ordinance, which forms in part the basis of his appraisal, is invalid: the ordinance allows occupancy for two persons per bedroom or a maximum of six persons, whichever is greater. The appraisal does not support the claim. The Court finds that the appraisal is not a bona fide, valid appraisal under the Act.

2. Substantive elements

a. Existing use

In Count II, and though no additional evidence or argument was presented to the Court, the claim itself asserts that "[t]he ability to construct additional bedrooms with higher occupancy numbers under the prior Code had created a fair market value for the Property that was higher than with the use of the existing structure." (Ex. M at 5). Because Plaintiffs failed to prove the claimed existing use, Count II must fail.

Under Ocean Concrete, the Court must first inquire whether such use was reasonably foreseeable and non-speculative at the time the City amended its Land Development Code. The Court finds that the future use of the Property as a vacation rental was both reasonably foreseeable and non-speculative, but that such use is still allowed. But, it was both unreasonable and speculative to construct an unidentified number of "additional bedrooms" for "higher occupancy numbers" based only on the belief that others had done so. Local governments frequently add to, subtract from, or amend their land development regulations in order to address development trends and match the development of communities to the governing Comprehensive Plan. So, though the City's code did not expressly regulate either the number of bedrooms or the number of occupants prior to the adoption of Ordinance 15-12, it was not reasonable for Plaintiffs to rely on that absence of regulation. They acquired no legally cognizable right in such lack of regulation.[11] It was purely speculative for Plaintiffs to expect to develop their Property in such a manner based only on the premise that others in the R-2 district had done so.

Again assuming that the claimed existing use was reasonable and non-speculative, there remains a second part to the analysis (". . . ***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" (emphasis supplied). Plaintiffs failed to prove that the claimed use has created an existing fair market value in the property greater than the fair market value of the single-family home presently existing. Neither the appraisal submitted in support of the claim nor the trial testimony attempted to establish a value for a single-family residential home, which is the actual,

[11] The Court notes that this occupancy limited appeared in the City's Comprehensive Plan amendment in 2009. (Exs. I, J). It wasn't until five years later that Plaintiffs contemplated re-developing the Property.

present use existing on the Property. Like the appraisal submitted with the first claim, the second appraisal valued the Property as if it was a vacant lot, and no evidence or testimony established or even addressed the value of its actual, present use. Thus, any valuation assigned to the Property's use as a vacation rental with any number of bedrooms or occupants lacks the comparator required by § (3) (b) 2, and Plaintiffs failed to prove this required element.

b. Specific action

As noted previously, Plaintiffs have failed to prove that the City took any action relative to the Property as to Ordinances 15-12 or 16-02.

c. Inordinate burden

As to the first definition of inordinate burden ("permanently unable to attain the reasonably investment-backed expectation for the existing use"), Plaintiffs again failed to prove either what their investment-backed expectation was or that they are permanently unable to obtain it. The evidence shows that they can still build large duplex units on their Property and use them for vacation rentals. None of the ordinances at issue prevent them from doing that. Further, Robert McCaffrey described his Property in an email from November, 2016 (past the adoption date of the ordinances) as "The Best Little Building Lot in Holmes Beach," one whose value "cannot be under estimated" and one with "unlimited profit potential," recognizing that his investment-backed expectation remains intact. (Ex. CM).

As to the second method of proving an inordinate burden, Robert Pergolizzi's undisputed testimony made clear that the single-family or duplex structure that the McCaffreys can build and use as a vacation rental is not only reasonable, but perfectly consistent with the present composition of the neighborhood. Robert McCaffrey testified that there are vacation rental properties adjacent and close to him that are larger than those he is now permitted to construct, but no evidence whatsoever was offered regarding how many bedrooms those structures have or how many guests they accommodate for a rental. At best, the photographs presented by Plaintiffs showed that the abutting structures were newer and taller than the McCaffreys', which would be true of any structure built by them if its value exceeded the FEMA 50% substantial improvement rule.

The evidence shows a trend toward duplex structures with a greater number of bedrooms per side, but no evidence that Plaintiffs were forced to bear a disproportionate share of any alleged burden caused by Ordinance 15-12. The evidence shows that, between 2009 and 2011, seven of fourteen single-family homes constructed in the entire R-2 district contained five or more bedrooms. (Ex. 78). Assuming all were constructed in the McCaffreys' neighborhood as defined by Pergolizzi (which does not include the entire R-2 district), they would represent about 6% of those parcels. Further, four of twenty-eight duplexes (or 14.3%) constructed in R-2 between 2009 and 2011 contained five bedrooms or more, which added to the twenty-one such duplexes existing in 2008. Assuming that all twenty-five structures were in the McCaffreys' neighborhood, they would represent just 10% of those parcels, leaving Plaintiffs' Property in the remaining 90%. Plaintiffs have failed to prove that they bear a disproportionate share of the burden allegedly imposed by the ordinances. Moreover, the occupancy limitation is applicable to all vacation rental units after May 1, 2016 (Ex. G), so Plaintiffs would be on equal footing with every other vacation rental owner in R-2 in that respect, so there can be no disproportionate impact on them. In sum, there is no evidence that the McCaffreys are disproportionately bearing any burden alleged to be imposed by the Ordinance.

For the reasons stated herein, judgment is hereby entered in favor of the Defendant CITY on Count II.

II. Count IV- Chapter 119, Fla. Stat.

In Count IV, Plaintiffs allege that the City's response to their March 31, 2017 public records violated Chapter 119, Fla. Stat, because it was not timely and because it was not complete. Custodians of public records are required to make them available for inspection and copying at reasonable times under reasonable conditions. § 119.07 (1) (a), Fla. Stat. "A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith." § 119.07 (1) (c), Fla. Stat. Providing access to public records is a duty of each agency. § 119.01(1), Fla. Stat.

The facts adduced at trial show that the City Clerk, Stacey Johnston, promptly responded to the public records request made by Davis. (Ex. 65). The request was forwarded to Susan Corsi, the City's public works clerk, for processing. At the time, Ms. Corsi's workload was heavier than normal due to the departure of one employee and another's retirement, and she believed that her supervisor, McGuinness, wanted to review the responsive documents but was then out of the office for professional training. On April 26, Johnson indicated to Davis that the responsive records were available for review, and that she had been advised by Corsi that "there are no electronic documents available at this time." (Ex. 70). In the meantime, Plaintiffs wrote several emails to

Johnston questioning the City's procedures in responding and suggesting that the response could have and should have come more quickly. (Exs. 66-70).

The Court finds that the twenty-six days between the time of the request and the time the records were made available to Plaintiffs does not constitute an unreasonable delay under Chapter 119. Florida's public records law demands "prompt attention and a reasonable response time, not the quickest-possible response." Siegmeister v. Johnson, 240 So. 3d 70, 74 (Fla. 1st DCA 2018), reh'g denied (Mar. 28, 2018), review denied, 2018 WL 3301636 (Fla. July 5, 2018). The alleged delay here didn't come close to approaching the length of delay of cases where courts have found an unlawful refusal to provide public records. Id.; see also Promenade D'Iberville, LLC v. Sundy, 145 So.3d 980, 982–83 (sixty-three days); Office of State Att'y for Thirteenth Jud. Cir. of Fla. v. Gonzalez, 953 So.2d 759, 765 (Fla. 2d DCA 2007) (more than ninety days).

Finally, Plaintiffs allege that documents produced later in discovery demonstrate that the City violated Chapter 119 because the records produced in discovery should have also been produced in response to the public records request. The Court has reviewed the documents later produced in discovery. (Ex. 64). The substantive difference is the four-page internal routing event ledger generated by the City's electronic Citizen-Serve application.[12] Corsi testified that this event log did not specifically include permit application or written review or response comments from the City, which were the precise documents sought in the public records request. The Court finds that the print-outs of the Citizen-Serve interface were not responsive to the public records request. Therefore, there is no violation.

For the foregoing reasons, it is

ORDERED and ADJUDGED that judgment is in favor of Defendant, City of Holmes Beach, on all counts and that Plaintiffs, Robert and Ellen McCaffrey, shall take nothing from this action.

FURTHER ORDERED and ADJUDGED that jurisdiction is retained for the Court to determine the prevailing parties' entitlement to and amount of reasonable attorneys' fees and costs to be recovered in this action.

[12] The remaining documents are duplicative of those previously produced, simply in different format.

DONE AND ORDERED in chambers at Bradenton, Manatee County, Florida this 2nd day of November, 2018.

LON AREND, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to:

Jay Daigneault, Esquire
1001 South Fort Harrison Ave., Ste. 201
Clearwater, Florida 33756

Fred E. Moore, Esquire
802 11th Street West
Bradenton, Florida 34205

This 2 day of November, 2018.

Judicial Assistant