SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2476

SPONSOR: Senator Kirkpatrick

SUBJECT: Property Rights

DATE: April 4, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Johnson	JU	Favorable
2.			CA	
3.			FP	
4.				
5.				

I. Summary:

This bill amends s. 70.001, F.S., which is known as the "Bert J. Harris Private Property Rights Protection Act." The bill provides that the term "action of a governmental entity" includes any action which decreases or modifies the density, intensity, or use of areas of development below the equivalent of one residence for every 5 acres. The bill also provides that any such action creates a rebuttable presumption that the action inordinately burdens the property. Additionally, in any claim seeking compensation for any such governmental action the court shall consider the settlement offer and ripeness decision when it determines whether an inordinate burden has been placed on the property.

This bill substantially amends s. 70.001 of the Florida Statutes.

II. Present Situation:

Government may acquire private property by eminent domain, provided it pays the property owner for the property. The Fifth Amendment to the United States Constitution guarantees that citizens' private property shall not be taken for public use without just compensation. The Fifth Amendment is applicable to the states through the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law..."

The Florida Constitution, in Article I, section 2, also guarantees all natural persons the right to "acquire, possess and protect property" and further provides that no person will be deprived of property without due process of law. Article X, section 6 of the Florida Constitution is complimentary to the Fifth and Fourteenth Amendments to the United States Constitution. It provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner..."

Before the legislature passed the Bert J. Harris Private Property Rights Protection Act (Harris Act), Florida landowners had two judicial remedies available when their properties' value or usefulness was destroyed or severely diminished by government regulation. A property owner could proceed against the governmental entity under the doctrine of equitable estoppel to enjoin the government from revoking a permit or attempting to apply a new regulation. *See,* Vivien J. Monaco, Comment, *The Harris Act: What Relief From Government Regulation Does It Provide For Private Property Owners*, 26 Stetson Law Review 861, 867 (1997). This doctrine applies when a property owner, in good faith reliance on a governmental act or omission with respect to governmental regulations, has made a substantial change in position or incurred substantial expenses. *Id.*, citing *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10, 15-16 (Fla. 1976). Alternatively, if a regulation directly caused a substantial diminution in value, one which reached the level of a taking of the property, the property owner could file an inverse condemnation claim under the Fifth Amendment of the United States Constitution or Article X, section 6 of the Florida Constitution. *Id.* However, a property owner would not be entitled to any relief if the government action was not a "taking" or the property owner did not satisfy the equitable estoppel requirements.

In 1995, the Harris Act was enacted by the legislature to provide an alternative means of relief to private property owners whose property has been "inordinately burdened" by state and local government action. *See* s. 70.001(1), F.S. The inordinate burden applies either to an existing use of real property or a vested right to a specific use, as determined by application of the rules of equitable estoppel. s. 70.001(2),(3)(a), F.S. Under s. 70.001(4)(a), F.S., a property owner seeking compensation must present, within one year of the governmental action, a written claim to the head of the governmental agency whose action caused the inordinate burden, along with a valid appraisal that shows the loss of the fair market value.

The governmental entity then has 180 days to make a written settlement offer that may include:

- An adjustment of land development or permit standards or other provisions controlling the development or use of the land;
- Increases or modifications in the density, intensity, or use of areas of development;
- The transfer of development rights;
- Land swaps or exchanges;
- Mitigation, including payments in lieu of on-site mitigation;
- Location of the least sensitive portion of the property;
- Conditioning the amount of development permitted;
- A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development
- Issuance of the development order, a variance, special exception, or other extraordinary relief
- Purchase of the real property, or an interest therein, by an appropriate governmental agency
- No changes to the action of the governmental entity.

Section 70.001(4)(1)-(11), F.S.

If the property owner accepts the settlement offer then the government implements it pursuant to s. 70.001(4)(c), F.S. If the settlement offer is declined, the government must issue within the 180 day period a written ripeness decision, which must contain identification of allowable uses on the affected land. This ripeness decision serves as the last prerequisite to judicial review, thus allowing the landowner to file a claim in circuit court pursuant to s. 70.001(5)(a)-(b), F.S.

Under s. 70.001(6)(a), F.S., the court decides if there was an existing use of the property or a vested right to a specific use, and if so, whether the governmental action inordinately burdened the property. Private property is inordinately burdened when a government action has directly restricted or limited the use of the property so that the owner is unable to attain reasonable, investment-backed expectations for the existing use, or a vested right in the existing use, of the property as a whole. Alternatively, property is inordinately burdened if the owner is left with existing or vested uses which are unreasonable such that the owner would permanently bear a disproportionate share of a burden imposed for the public good which should be borne by the public at large.

If more than one governmental entity is involved the court will decide the percentage of the burden for which each agency is responsible. The court then impanels a jury to decide the monetary value, pursuant to s. 70.001(6)(b), F.S., based upon the loss in fair market value attributable to the governmental action. The prevailing party is entitled to reasonable costs and attorney's fees, pursuant to s. 70.001(6)(c)(1)-(2), F.S., if the losing party did not make, or rejected, a bona fide settlement offer.

III. Effect of Proposed Changes:

The bill amends three subsections of s. 70.001, F.S. Paragraph (d) of subsection (3) is amended to provide that the term "action of a governmental entity" includes any action which decreases or modifies the density, intensity, or use of areas of development below the equivalent of one residence for every 5 acres. Although the bill does not provide definitions for "density," "intensity," and "residential uses," the Florida Administrative Code does in Rule 9J-5.003.

> 9J-5.003(59) defines intensity as: "an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on, or below ground; the measurement of the use of or demand on natural resources: and the measurement of the use of or demand on facilities and services."
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> 9J-5.003(31) defines density as: "an objective measurement of the number of people or residential units allowed per unit of land, such as residents or employees per acre."
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> 9J-5.003(108) defines residential uses as: "activities within land areas used predominately for housing."

Paragraph (e) of subsection (3) is amended to provide a rebuttable presumption in the definition of "inordinate burden" or "inordinately burdened." The bill states that any action by a governmental entity which "involuntarily" decreases or modifies the density, intensity, or use of areas of development below the equivalent of one residence for every 5 acres creates a rebuttable presumption that the governmental action inordinately burdens the property. A conforming

provision is also placed in subsection (5)(b) of s. 70.001, F.S. The term "involuntarily" is not defined.

Paragraph (a) of subsection (6) is amended to reflect the newly created rebuttable presumption. When a claim is filed by a property owner seeking compensation for governmental action that involuntarily decreases or modifies the density, intensity, or use below the equivalent of one residence for every 5 acres, the court shall determine whether an existing use of the real property or a vested right to a specific use of the property existed and, if so, whether the governmental entity's action did not inordinately burden the real property. The bill also provides that the court shall consider the government's settlement offer and ripeness decision when making this decision. This amendment could be construed as limiting subsection (6)(a), and by implication the entire section, solely to claims for compensation involving the newly created rebuttable presumption.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will make it easier for private property owners to prove that a government action has placed an inordinate burden on their property for which they deserve compensation. Currently, the property owner has the burden of proving that the government action restricted or limited the use of the property so as to prevent the owner from attaining the reasonable, investment-backed expectations of the use of the property. For situations involving density or intensity, a presumption in favor of the property owner is now created and the governmental entity will now have the burden of proving that its action did not inordinately burden the property.

C. Government Sector Impact:

The bill expressly provides for a class of claims based on the density threshold and a corresponding rebuttable presumption in favor of the property owner. This could foster a

chilling effect on the discretion of local governments and the state to regulate private property. For example, in 1995 Palm Beach County abandoned plans to limit development in a 20,500 acre agricultural reserve area east of the Everglades. *See,* Roy Hunt, *Property Rights And Wrongs: Historic Preservation And Florida's 1995 Private Property Rights Protection Act,* 48 U. Fla. L. Rev. 709, 718-719 (1996). The county had proposed to lower permitted densities from one house per five acres to one house per ten acres. *Id.* It was reported that the county abandoned its plans based on the fear that further restriction of the area would trigger claims under the Harris Act. *Id.*

The Department of Community Affairs (DCA) reports that the bill will have long-term and recurring fiscal effects on state and local governmental entities associated with the defense of lawsuits initiated under the bill and the payout of compensation awards. Additionally, the DCA indicates that local governments may have to expend funds to provide public services to suburban development in "unsuitable areas, far from urban areas" as a result of the bill. The exact amount of all of these costs is indeterminate.

DCA also reports that the bill affects county and municipal governments seeking to amend their comprehensive plans under Ch. 163, Part II, F.S. Specifically, local governments desiring to amend their future land use map, future land use element, or conservation policies of their comprehensive plan, will be required to analyze such plan amendments to determine if they will reduce or limit density, intensity or use below the prescribed level. One possible consequence of this proposal is that local governments may be discouraged from reclassifying areas for conservation, agricultural, rural or similar equivalent land use categories having lower densities if the effect would be to subject the entity to significant monetary exposure, despite any desirability from a planning and land use perspective. Various regional entities, such as regional planning councils and water management districts, as well as the DCA and the Department of Environmental Protection could be similarly affected.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.