

**STORAGE NAME:** h0659.jud

**DATE:** March 13, 2000

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
JUDICIARY  
ANALYSIS**

**BILL #:** HB 659

**RELATING TO:** Private Property Rights

**SPONSOR(S):** Representatives Alexander, Putnam, and others.

**TIED BILL(S):** None

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

(1) JUDICIARY

(2)

(3)

(4)

(5)

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**I. SUMMARY:**

HB 659 amends s. 70.001, F.S., known as the "Bert J. Harris, Jr., Private Property Rights Protection Act," (hereinafter the "Act"), to allow a property owner to seek relief in court if that property owner can demonstrate that a government entity took action that resulted in the modification of the density, intensity, or use of the property below the equivalent of one residence per five acres.

To accomplish this, the bill modifies the definitions of "action of a government entity" and "inordinate burden" to include an action by a governmental entity which decreases or modifies the density, intensity, or use of areas of development below the equivalent of one residence for every five acres.

The bill may have a significant fiscal impact on state and local government associated with the compensation provisions of the Act. However, that impact cannot be determined.

The bill has an effective date of July 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |                              |                             |   |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u>         | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u>             | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u>      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

B. PRESENT SITUATION:

**Taking Jurisprudence**

Government may overtly acquire private property for public use through its power of eminent domain pursuant to Chapters 73 or 74, F.S. Additionally, governmental regulation of property may adversely affect property to such an extent that the government has effectively condemned the property. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In those cases, the property owner may maintain an inverse condemnation suit against the governmental unit to obtain just compensation for the property. See U.S. Const. amend. V; Art. X, s. 6, Fla. Const.

In Florida, a jury of 12 persons must be impaneled to determine the amount of compensation owed by the government to the property owner. See s. 73.071 (1), F.S. The jury is to base its determination on the value of the property which the government has proposed to take. If applicable, the jury must also consider business damages, the cost of removing a mobile home, and the enhancement of the value of remaining adjoining property. See s. 73.071(2)-(4), F.S.

Under both statutory and case law, the term "full compensation" includes the payment of attorney's fees to enforce the rights of the property owner at both the hearing to determine compensation and at ancillary hearings. See ss. 73.091 and 73.092, F.S.; s. 73.131, F.S.; Schick v. Department of Agriculture, 586 So.2d 452 (Fla. 1st DCA 1991); State Road Department v. Lewis, 190 So. 2d 598 (Fla. 1st DCA 1962) cert. den. 192 So. 2d 499 (Fla. 1962); and Orange State Oil Co. v. Jacksonville Expressway Authority, 143 So. 2d 892 (Fla. 1st DCA 1962). In addition, s. 73.092, F.S. requires the condemning authority to pay the condemnee's appraisal fees; expert witness fees; and, when business damages are at issue, the condemnee's accountant's fees.

Where a governmental regulation results in permanent physical occupation of the property or deprives the owner of "all economically productive or beneficial uses" of the property, a "per se" taking is deemed to have occurred, thereby requiring full compensation for the property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). Additionally, where the regulation does not substantially advance a legitimate state interest, it is invalid, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

In all other "takings" cases, courts use a multi-factor, "ad hoc" analysis to determine whether a regulation has adversely affected the property to such an extent as to require government compensation. The factors considered by the courts include:

- \* the economic impact of the regulation on the property owner;
- \* the extent to which the regulation interferes with the property owner's investment-backed expectations;
- \* whether the regulation confers a public benefit or prevents a public harm (the nature of the regulation);
- \* whether the regulation is arbitrarily and capriciously applied; and
- \* the history of the property, history of the development, and history of the zoning and regulation.

Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992). See also Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Graham v. Estuary Properties, 399 So. 2d 1374 (Fla.1981).

### **The Bert J. Harris Private Property Rights Protection Act**

The Act provides for a circuit court cause of action for property owners whose current use or vested right in a specific use of real property is inordinately burdened by the actions of a governmental entity. The Act authorizes relief, including compensation, to be granted by the court to the private property owner for the actual loss to the fair market value of the real property at issue. Under the Act a property owner may also be entitled to an award of attorney's fees.

Private property is "inordinately burdened" when an action of one or more governmental entities 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, or if the property 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.

The Act specifically excludes from the definition of inordinate burden temporary impacts; impacts occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance or noxious use; or impacts caused by an action of a governmental entity taken to grant relief to an owner under the Act.

The Act includes "existing uses" which are actual, present uses or activities on the property and reasonably foreseeable, non-speculative land uses which are suitable for the property, are compatible with adjacent land uses, and have created a fair market value in the property greater than the fair market value of the actual, present use or activity.

The Act dictates that the existence of a "vested right" in an existing use is to be determined by applying the principles of equitable estoppel, common law substantive due process, or statutory law of this state.

### **Definitions of Land Use Terms**

Rule 9J-5.003(59)A.C., defines "intensity" to mean "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."

Rule 9J-5.003(31), F.A.C., defines the term “density” to mean “an objective measurement of the number of people or residential units allowed per unit of land, such as residents or employees per acre.”

Rule 9J-5.003(108), F.A.C., defines the term “residential uses” to mean “activities within land areas used predominantly for housing.”

Rule 9J-5.006(1)(a), F.A.C., classifies a number of “uses” of land, including residential, commercial, industrial, agricultural, and recreational use.

**C. EFFECT OF PROPOSED CHANGES:**

The bill amends s. 70.001(3)(d), F.S., which defines the term “action of a governmental entity,” to include any action by a governmental entity which decreases or modifies the density, intensity, or use of areas of development below the equivalent of one residence for every five acres.

The bill also amends s. 70.001(3)(e), F.S., which defines the terms “inordinate burden” and “inordinately burdened” to include any action by a governmental entity which decreases or modifies the density, intensity, or use of areas of development below the equivalent of one residence for every five acres.

These amendments will create a fixed “trigger” that will entitle a property owner to compensation under the Act. Any government action that results in a density, intensity, or use of property below the equivalent of one residence per every five acres will automatically constitute an “action by a governmental entity” that places an “inordinate burden” on the property. A court sitting in review of a case under the modified Act would not be able to consider the broader standard of whether the government action restricts or limits the use of the property so as to prevent the property owner from attaining the reasonable, investment-backed expectations of the use of the property.

The bill will create a new class of claims based on the revised density or use threshold, and in so doing will limit the authority of local governments and the state to regulate private property. It may also increase the amount of litigation under the Act and raise the costs for the state and/or local governments that take actions triggering the Act’s compensation provisions.

**D. SECTION-BY-SECTION ANALYSIS:**

This section need be completed only in the discretion of the Committee.

**III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

None

2. Expenditures:

The Department of Community Affairs reports that the bill will have a long-term and recurring fiscal effect on state government associated with the defense by the state of lawsuits initiated under the bill and the payout of compensation awards. The Department indicates that the exact costs cannot be determined.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

The Department of Community Affairs reports that the bill will have long-term and recurring fiscal effects on local governments. The Department notes 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 these costs cannot be determined. The Department also notes that local governments will have to bear the burden of litigation expenses and resulting compensation awards under the bill.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The Department of Community Affairs indicates that certain property owners will benefit from the bill by virtue of its de facto mandate of a minimum density that the property might not otherwise qualify for.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not affect the revenue raising authority of any city or county.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the amount of state tax shared with any city or county.

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V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The revised definition of governmental action and inordinate burden appear to go to residential density issues, but the inclusion of the terms "intensity" and "use" seem to go to commercial or other non-residential uses. It is unclear whether the bill is intended to apply to modifications in the density residential uses or to more broadly apply to modifications of density in non-residential uses. The inclusion of residential and non-residential use terms in the single definition may confuse property owners and local governments who will be affected by the bill.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

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Michael W. Carlson, J.D.

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P.K. Jameson, J.D.