

STORAGE NAME: h0659s1z.jud  
DATE: June 19, 2000

**\*\*FAILED TO PASS THE LEGISLATURE\*\***

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
JUDICIARY  
FINAL ANALYSIS**

**BILL #:** CS/HB 659

**RELATING TO:** Private Property Rights

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

**TIED BILL(S):** None

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

- (1) JUDICIARY YEAS 6 NAYS 1
  - (2)
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

CS/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 involuntary decrease of the density of development of the property below one residence per five acres.

To accomplish this, the bill modifies the definitions of "action of a government entity" and creates a rebuttable presumption. The bill also provides that the government entity has the burden of proving that the government action did not inordinately burden the property.

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.

**Died on House Calendar.**

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 involuntarily decreases the density of development below one residence for every five acres.

The bill also amends s. 70.001(3)(e), F.S., to create a rebuttable presumption that government action which involuntarily decreases the density of development below one residence for every five acres is an inordinate burden on the property.

The bill also provides that the government entity has the burden to prove that its action did not inordinately burden the property.

These amendments will create a fixed “trigger” that may entitle a property owner to compensation under the Act. Any government action that results in the involuntary reduction of density of development below one residence per every five acres will automatically constitute an “action by a governmental entity” raising a presumption that the action 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 density threshold, and in so doing may 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:

N/A

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:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Judiciary adopted a strike-everything amendment to the bill on March 15, 2000 and made the bill a committee substitute. The amendment clarifies that the bill is focused on residential uses of property and redefines the government action to center only on involuntary modifications resulting in a density of development below one residence for every five acres. It also sets up a rebuttable presumption that the government action creates an inordinate burden if it decreases the density of development below one residence for every five acres and provides that the government entity shall have the burden to prove that its action did not inordinately burden the property.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Michael W. Carlson, J.D.

Staff Director:

P.K. Jameson, J.D.

**FINAL ANALYSIS PREPARED BY THE COMMITTEE ON JUDICIARY:**

Prepared by:

Michael W. Carlson, J.D.

Staff Director:

P.K. Jameson, J.D.