

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1164

SPONSOR: Comprehensive Planning Committee; Senators Pruitt and Geller

SUBJECT: Property Rights

DATE: March 31, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CP	Fav/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute (CS) amends the “Bert J. Harris Private Property Rights Protection Act” (Harris Act) to require a governmental entity to report a claim presented to the entity under that section to the “state land planning agency.” In addition, the CS also deletes references to “ripeness” and requires a governmental entity to issue a “final decision” identifying permissible uses of the subject property. The CS further provides the issuance of a final decision by a governmental entity or the failure to issue a final decision is the last prerequisite to judicial review.

Also, the CS provides that the enactment of a law or adoption of a regulation does not constitute applying the law or regulation to a property. Finally, the CS waives sovereign immunity for the state, for itself and for its agencies or subdivisions, for liability for actions subject to the Harris Act.

This CS amends section 70.001 of the Florida Statutes.

II. Present Situation:

Private Property Rights

The government may overtly acquire private property through the power of eminent domain, provided the property owner is compensated.¹ The Fifth Amendment to the United States Constitution guarantees that citizens=private property shall not be taken for public use without just compensation. The “takings” clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, which provides that A[n]o State shall make or enforce any

¹ Chapters 73 and 74, Fla. Stat. (2002).

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. . . .@

Article I, s. 2 of the State Constitution 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, s. 6 of the State Constitution is complimentary to the Fifth and Fourteenth Amendments to the United States Constitution. It provides that A[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . .@

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.² Additionally, where the regulation does not substantially advance a legitimate state interest, it is invalid³ and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.⁴

In other "takings" cases, courts have used 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.⁵

Prior to the enactment of the 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.⁶ 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.⁷ Alternatively, if a regulation directly caused

² See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

³ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁴ See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

⁵ See *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).

⁶ 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).

⁷ See *id.*, citing *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15-16 (Fla. 1976).

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. 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.⁸

In 1995, the Harris Act was enacted by the Legislature to provide a new cause of action for private property owners whose property has been inordinately burdened by state and local government action that may not rise to the level of a “taking” under the State or Federal Constitution.⁹ 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.¹⁰ 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; or
- No changes to the action of the governmental entity.¹¹

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

⁸ *See id.*

⁹ S. 70.001(1) and (9), Fla. Stat. (2002).

¹⁰ S. 70.001(2)-(3)(a), Fla. Stat. (2002).

¹¹ S. 70.001(4), Fla. Stat. (2002).

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.¹²

If the court finds the governmental action has inordinately burdened the subject property, the court will apportion the percentage of the burden if more than one governmental entity is involved. 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), F.S., if the losing party did not make, or rejected, a bona fide settlement offer.

Sovereign Immunity

The doctrine of sovereign immunity, as derived from the English common law, provides that the government cannot be sued in tort without its consent.^{13 14} This blanket of immunity applies to all subdivisions of the state including its agencies, counties, municipalities, and school boards; however, Article X, s. 13 of the State Constitution, provides that sovereign immunity may be waived through an enactment of general law.

The Legislature, in s. 768.28, F.S., has expressly waived sovereign immunity in tort actions for claims against its agencies and subdivisions resulting from the negligent or wrongful act or omission of an employee acting within the scope of employment, but established limits on the amount of liability. A claim or judgment by any one person may not exceed \$100,000, and may not exceed \$200,000 paid by the state or its agencies or subdivisions for claims arising out of the same incident or occurrence. Notwithstanding this limited waiver of sovereign immunity, certain discretionary governmental functions remain immune from tort liability.¹⁵

The Harris Act provides a process for claims against a governmental entity for certain actions. Specifically, the provisions of the Harris Act operate as a separate and distinct cause of action from the law of takings to provide "for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly

¹² S. 70.001(2)(e), Fla. Stat. (2002).

¹³ Wetherington and Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 Fla. L. Rev. 1 (1992).

¹⁴ Public policy in support of sovereign immunity includes: (a) protecting public funds from excessive encroachments; (b) insulating the Legislature's authority over budget expenditures from judicial directives to disburse funds; (c) enabling government officials to engage in decision making without risking liability; and (d) ensuring that the efficient administration of government is not jeopardized by the constant threat of suit. Policy against sovereign immunity includes: (a) leaving those who have been injured by governmental negligence without remedy; (b) failing to deter wrongful government conduct; and (c) limiting public knowledge of governmental improprieties. House of Representatives Committee on Claims, *Sovereign Immunity: A Survey of Florida Law*, at 1-2, January 25, 2001.

¹⁵ See *Commercial Carrier Corp., v. Indian River County*, 371 So. 2d 1010, 1019 (Fla. 1979), citing *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965) (holding "legislative, judicial and purely executive processes" may not be characterized as tortious). See generally *Trianon Park Condominium Assoc., v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985) (stating commissions, boards, and city councils, when enacting or failing to enact laws or regulations, are acting pursuant to the basic governmental actions performed by the Legislature).

affects real property.”¹⁶ Under the act, a property owner may reject a governmental entity’s settlement offer and file a claim for compensation in circuit court.¹⁷ During this proceeding, the court will determine the percentage of responsibility of each governmental entity and a jury impaneled by the court will determine the amount of compensation to the property owner for the loss in value to the subject property.¹⁸ Section 70.001(6)(b), F.S., provides the “award of compensation shall be determined by calculating the difference in the fair market value of the real property” at the time of the governmental action at issue, as though the property owner had the ability to realize the reasonable investment-backed expectation or was not left with unreasonable uses for the property as the result of the governmental action, and the fair market value of the property at the time of the governmental action as inordinately burdened, considering the settlement offer and ripeness decision of the governmental entity. Further, section 70.001(7)(a), F.S., ensures that an award of compensation operates to vest the governmental entity, paying the compensation, with right, title, and interest in rights of use for which the compensation was paid. However, a governmental entity shall not be liable for the loss in value to a subject real property more than once.¹⁹

In a recent circuit court decision, the granting of a motion for partial summary judgment by a governmental entity defending a Harris Act claim was based on sovereign immunity.^{20 21} This claim arose out of the plaintiff’s contention that a new municipal ordinance inordinately burdened their vested rights to construct a project as originally planned and, therefore, violated the Harris Act. In granting the defendant city’s motion, the court held the defense of sovereign immunity shields municipalities from liability for legislative or quasi-legislative acts.²²

Ripeness

Under the ripeness doctrine, a claimant must exhaust administrative remedies prior to seeking judicial relief. Florida courts have adopted the federal ripeness policy which requires a final determination from a governmental entity as to the permissible uses of a property after the adoption of the regulation at issue.²³ The ripeness doctrine has operated to preclude a takings claim when a regulatory agency denies a project application and the landowner fails to resubmit the application with a less intensive use.²⁴ However, a takings claim becomes ripe when the regulatory agency lacks the discretion to permit any development and the permissible uses of the property are known.²⁵ The futility exception to the ripeness doctrine, although limited, provides that a takings claim is ripe where the past history of regulatory agency shows that repeated submissions of an application would be futile and where the agency effectively concedes that any development would be an impermissible use.²⁶

¹⁶ S. 70.001(1), Fla. Stat. (2002). Section 70.001(13), F.S., provides that “section does not affect the sovereign immunity of government”.

¹⁷ S. 70.001(5)(b), Fla. Stat. (2002).

¹⁸ S. 70.001(6)(b), Fla. Stat. (2002).

¹⁹ S. 70.001(9), Fla. Stat. (2002).

²⁰ See *Royal World Metropolitan, Inc., v. City of Miami Beach*, No. 99-17243-CA 23, (Fla. 11th Cir. Ct. July 25, 2002), *reh’g denied* Oct. 24, 2002. (This decision is on appeal.)

²¹ Section 70.001(13), F.S., provides the Harris Act “does not affect the sovereign immunity of government”.

²² See *Royal World Metropolitan, Inc., v. City of Miami Beach*, No. 99-17243-CA 23 (Fla. 11th Cir. Ct. July 25, 2002).

²³ See *Glisson v. Alachua County*, 558 So. 2d 1030, 1034 (Fla. 1st DCA 1990).

²⁴ See *Lost Tree Village Corp. v. City of Vero Beach*, No. 4D01-3954 (Fla. 4th DCA Nov. 13, 2002).

²⁵ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

²⁶ See *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1180 (Fla. 4th DCA 1995). *Accord* *Palazzolo*, 533 U.S. at 622.

The Fourth District Court of Appeal in *Taylor v. Village of North Palm Beach*, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995), affirmed the trial court's ruling that a landowner's failure to request a plan amendment to permit other uses or to submit a meaningful application is fatal to a takings claim. According to the court, the requirement of ripeness serves two important purposes. First, the doctrine requires at least one "meaningful application" which necessitates discussion and possible resolution in an administrative or political forum. Second, the doctrine's final determination requirement enables a court to ascertain if a taking has occurred and, if so, the extent of the taking.²⁷ Although the plaintiff in *Taylor* alleged a regulatory taking and did not file a claim under the Harris act, the court recognized in dicta that the recently enacted Harris Act "altered the ripeness requirement for cases involving governmental regulation of land use."²⁸

Section 70.001(5), F.S., of the Harris Act requires a governmental entity within the 180-day notice period of a claim, unless the property owner accepts a settlement offer from the entity, to issue a written ripeness decision identifying permissible uses of the subject property. Failure of the governmental entity to issue the ripeness decision during the 180-day period operates to ripen the action of the governmental entity and serves as a ripeness decision that has been rejected by the property owner. Further, this section provides the ripeness decision, as a matter of law, is the last prerequisite to judicial review and that the matter is ripe for the purposes of a judicial proceeding under the Harris Act, notwithstanding available administrative remedies.

III. Effect of Proposed Changes:

Section 1 of the CS amends s. 70.001, F.S., to require a governmental entity to report a claim presented to the entity under that section to the "state land planning agency." In addition, the CS also deletes references to "ripeness" when referring to the written final decision of the governmental entity identifying permissible uses of the subject property following the action by the governmental entity. This CS states that the failure of the governmental entity to issue a written final decision also operates as a final decision that has been rejected by the property owner. Further, the CS provides the issuance of a final decision by a governmental entity or the failure to issue a final decision, as a matter of law, is the last prerequisite to judicial review.

The CS also provides that the enactment of a law or adoption of a regulation does not constitute applying the law or regulation to the property. Finally, this CS provides a waiver of sovereign immunity for the state, for itself and for its agencies or subdivisions, for liability for actions subject to s. 70.001, F.S.

Section 2 provides the act shall take effect on July 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁷ See *Taylor*, 659 So. 2d at 1173, citing *Tinnerman v. Palm Beach County*, 641 So. 2d 523 (Fla. 4th DCA 1994) (stating "[r]ipeness requires a firm delineation of permitted uses so that the extent of the taking can be analyzed").

²⁸ See *Taylor*, 659 So. 2d at 1173.

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:

None.

C. Government Sector Impact:

There are pending claims under the Harris Act, including more than \$24 million in claims against the City of Miami Beach. The CS, however, deletes language retroactively applying the waiver of sovereign immunity.

This CS provides an express waiver of sovereign immunity for claims under the Harris Act. The act provides for compensation when a property owner can demonstrate, using the process outlined in s. 70.001, F.S., that his or her property has been inordinately burdened by the action of a governmental entity. Under this process, the property owner may present a claim to the governmental entity which has 180 days to make a written settlement offer. If the parties are unable to reach agreement on the settlement offer and the claimant successfully pursues the claim in court, the resulting compensation award could significantly impact the affected governmental entity.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.