



# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

**Safeguard Individual Liberty** – The bill provides expanded options for private landowners to obtain redress for government action that unduly burdens real property.

### B. EFFECT OF PROPOSED CHANGES:

#### **Background**

#### Bert J. Harris, Jr., Private Property Rights Protection Act

The Bert J. Harris, Jr., Private Property Rights Protection Act<sup>1</sup> was enacted by the Florida Legislature in 1995<sup>2</sup> to provide a new cause of action for private property owners whose property has been inordinately burdened by a specific action<sup>3</sup> of a governmental entity<sup>4</sup> that may not rise to the level of a “taking” under the State or Federal Constitution.<sup>5</sup> The inordinate burden can apply to either an existing use of real property or a vested right to a specific use.<sup>6</sup> A property owner seeking compensation must present, at least 180 days prior to filing an action under the act (90 days prior to filing an action for property classified as agricultural by a property appraiser pursuant to s. 193.461, F.S.), a written claim to the head of the governmental entity and a bona fide, valid appraisal that demonstrates the loss in fair market value to the real property.<sup>7</sup>

The governmental entity must provide notice of the claim to parties to any administrative action that gave rise to the claim, and to owners of real property contiguous to the owner's property. The governmental entity shall report the claim to the Department of Legal Affairs within 15 days after the claim is filed.

During the 180-day-notice period (or the 90-day-notice period for land classified as agricultural property), unless extended by agreement of the parties, the governmental entity must 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;

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<sup>1</sup> Section 70.001, F.S.

<sup>2</sup> Ch. 95-181, L.O.F.

<sup>3</sup> Section 70.001(3)(d), F.S., provides that the “term ‘action of a governmental entity’ means a specific action of a governmental entity which affects real property, including action on an application or permit.”

<sup>4</sup> Section 70.001(3)(c), F.S., provides that the “term ‘governmental entity’ includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.”

<sup>5</sup> Sections 70.001(1) and (9), F.S.

<sup>6</sup> Section 70.001(2), F.S.

<sup>7</sup> Section 70.001(4)(a), F.S.

- Conditioning the amount of development use 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 entity; or
- No changes to the action of the governmental entity.<sup>8</sup>

If the property owner accepts the settlement offer, then the governmental entity may implement the settlement by appropriate development agreement.<sup>9</sup> If the property owner rejects the settlement offer, the governmental entities involved must issue within the 180 day period (or the 90-day-notice period for land classified as agricultural property) a written ripeness decision that identifies the allowable uses to which the affected property may be put.<sup>10</sup> Failure to issue the ripeness decision during the applicable time period is deemed to ripen the prior action of the governmental entity and operates as a ripeness decision that has been rejected by the property owner.<sup>11</sup> The ripeness decision serves as the last prerequisite to judicial review, thereby allowing the landowner to file a claim in circuit court pursuant to the Harris Act.<sup>12</sup>

The circuit court is charged with determining 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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<sup>16</sup> and will impanel a jury to decide the monetary value based upon the loss in fair market value attributable to the governmental action.<sup>17</sup> The prevailing party is entitled to reasonable costs and attorney's fees.<sup>18</sup>

### Private Property Rights

The government may overtly acquire private property through the power of eminent domain, provided the property owner is compensated.<sup>19</sup> The Fifth Amendment to the United States Constitution guarantees that a citizen's private property may 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 "[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. . ."

<sup>8</sup> Section 70.001(4)(c), F.S.

<sup>9</sup> Section 70.001(4)(c), F.S.

<sup>10</sup> Section 70.001(5)(a), F.S.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Section 70.001(6)(a), F.S.

<sup>14</sup> Section 70.001(2)(e), F.S.

<sup>15</sup> *Ibid.*

<sup>16</sup> Section 70.001(6)(a), F.S.

<sup>17</sup> Section 70.001(6)(b), F.S.

<sup>18</sup> Section 70.001(6)(c), F.S.

<sup>19</sup> Chapters 73 and 74, F.S.; Art. X, s. 6, FLA. CONST.

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 “[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.<sup>20</sup> Additionally, where the regulation does not substantially advance a legitimate state interest, it is invalid<sup>21</sup> and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.<sup>22</sup>

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.<sup>23</sup>

Prior to the enactment of the Harris Act, Florida landowners had two judicial remedies available when a property's 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.<sup>24</sup> 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.<sup>25</sup> 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. 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.<sup>26</sup>

### 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.<sup>27</sup> This blanket of immunity applies to all subdivisions of the state including its agencies, counties, municipalities, and school boards; however,

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<sup>20</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>21</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>22</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

<sup>23</sup> *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992); *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).

<sup>24</sup> 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).

<sup>25</sup> See *ibid.*, citing *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10, 15-16 (Fla. 1976).

<sup>26</sup> See *ibid.*

<sup>27</sup> *Wetherington and Pollock, Tort Suits Against Governmental Entities in Florida*, 44 Fla. L. Rev. 1 (1992).

Article X, s. 13 of the State Constitution, provides that sovereign immunity may be waived through an enactment of general law. Public policy concerns in support of sovereign immunity include: (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. Public policy concerns against sovereign immunity include: (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.<sup>28</sup>

The Legislature 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.<sup>29</sup> 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.<sup>30</sup>

The Harris Act specifically provides that the Act does not affect the sovereign immunity of government.<sup>31</sup> An 11<sup>th</sup> Circuit Court held in a challenge under the Harris Act that this provision meant that sovereign immunity still remains effective and serves as a viable defense against liability under the Act.<sup>32</sup> On appeal, the Third District Court reversed the decision and remanded to the trial court. The District Court found that the Harris Act:

evinces a sufficiently clear legislative intent to waive sovereign immunity as to a private property owner whose property rights are inordinately burdened, restricted, or limited by government actions where the governmental regulation does not rise to the level of a taking under the Florida and United States Constitutions. [citations omitted] A literal reading of Section 13 [the sovereign immunity provision of the Harris Act] is inconsistent with the clear intent and purpose of the Act, as it would be absurd to interpret Section 13 to undo everything the Act is designed to achieve. Since it is impossible under the appropriate rules of statutory construction to give Section 13 literal effect within the meaning of the statute, its application must be construed consistent with the general purpose and intent of the Act. [citations omitted] We therefore hold that Section 13 does not bar a private property rights claim pursuant to the Harris Act, but merely preserves the sovereign immunity benefits the City in the instant case, and governmental entities in general, otherwise enjoy.<sup>33</sup>

### Ripeness

Under the ripeness doctrine, a claimant must exhaust administrative remedies prior to seeking judicial relief. Florida courts have adopted the federal ripeness policy that requires a final determination from a

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<sup>28</sup> House of Representatives Committee on Claims, *Sovereign Immunity: A Survey of Florida Law*, at 1-2, January 25, 2001.

<sup>29</sup> Section 768.28, F.S.

<sup>30</sup> *Commercial Carrier Corp., v. Indian River County*, 371 So.2d 1010, 1019 (Fla. 1979), citing *Evangelical United Brethren Church v. State*, 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).

<sup>31</sup> Section 70.001(13), F.S.

<sup>32</sup> *Royal World Metropolitan, Inc. v. City of Miami Beach*, 11th Judicial Circuit, Miami-Dade County, Case. No. 99-17243-CA-23.

<sup>33</sup> *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So.2d 320, 322 (Fla. 3d DCA 2004).

governmental entity as to the permissible uses of a property after the adoption of the regulation at issue.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

The Fourth District Court of Appeal has held 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.<sup>38</sup> 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.<sup>39</sup> 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."<sup>40</sup>

### **Effect of Proposed Changes**

The bill amends s. 70.001, F.S., the Bert J. Harris, Jr., Private Property Rights Protection Act, to provide that a moratorium on "development," as that term is defined in s. 380.04, F.S.,<sup>41</sup> that is in effect for longer than one year is not a temporary impact to real property for purposes of the Harris Act, and therefore, is to be included within the term "inordinate burden."

The bill provides that a property owner seeking compensation must present, at least 120 days (rather than the present requirement of 180 days) prior to filing an action under the act, a written claim to the head of the governmental entity and a bona fide, valid appraisal that demonstrates the loss in fair market value to the real property. The bill leaves intact the provision of 90 days prior to filing an action for property classified as agricultural by a property appraiser pursuant to s. 193.461, F.S.

The bill specifically provides for the "payment of compensation" to the list of remedies that may be offered by a governmental entity in a written settlement offer.

The bill modifies the ripeness provisions to specifically provide that failure to issue the written ripeness decision during the requisite notice period causes the last decision made by the governmental entity to be its final decision on the allowable uses of the property at issue. This final decision then operates as a final decision that has been rejected by the property owner, and as such, allows the civil cause of action to be filed in the circuit court.

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<sup>34</sup> *Glisson v. Alachua County*, 558 So.2d 1030, 1034 (Fla. 1st DCA 1990).

<sup>35</sup> *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561 (Fla. 4th DCA 2002).

<sup>36</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

<sup>37</sup> *City of Riviera Beach v. Shillingburg*, 659 So.2d 1174, 1180 (Fla. 4th DCA 1995); *Palazzolo*, 533 U.S. at 622.

<sup>38</sup> *Taylor v. Village of North Palm Beach*, 659 So.2d 1167, 1173 (Fla. 4th DCA 1995).

<sup>39</sup> *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").

<sup>40</sup> *Taylor*, 659 So.2d at 1173.

<sup>41</sup> Section 380.04(1), F.S., provides that the "term 'development' means the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels."

The bill provides that a cause of action may not be commenced under this section if the claim is presented more than 2 years after a law or regulation is first applied by the governmental entity to the property at issue (the present statute provides that the action must be brought within 1 year).

The bill further provides that the enactment of a law or the adoption of a regulation does not constitute applying the law or regulation to a property. This change will specifically provide that the time limitation on bringing an action will not begin to run until the law, regulation, or ordinance at issue is actually applied to a particular parcel of real property.

The bill strikes the provision in the current statute that states that the Act “does not affect the sovereign immunity of government” and replaces it with a provision that states:

In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or political subdivisions, waives sovereign immunity for liability for actions subject to this section, but only to the extent specified in this section.

The bill provides that the amendments made to the Harris Act by the bill apply prospectively only and do not apply to any claim or action pending under the Harris Act on the effective date of the bill.

The bill provides a whereas clause that states that the Legislature intends to clarify its original intent under the Harris Act and to provide a waiver of sovereign immunity under the Harris Act.

The bill takes effect July 1, 2008.

C. SECTION DIRECTORY:

**Section 1:** Amends s. 70.001, F.S., relating to private property rights protection.

**Section 2:** Provides that the bill will apply prospectively only.

**Section 3:** Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See D. Fiscal Comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See D. Fiscal Comments below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill is intended to provide expanded options for private landowners to obtain redress for government action that unduly burdens real property.

D. FISCAL COMMENTS:

The fiscal impact of this bill is indeterminate. The Harris Act allows civil causes of action to be brought against all Florida governments, both state and local. Because, historically, actions have only been brought pursuant to the Harris Act against local governments, it appears the bill has a greater potential fiscal impact on local governments. The bill does not apply to existing claims under the Act, therefore, it is impossible to predict what impact this bill will have on future actions under the Harris Act.

By explicitly waiving sovereign immunity (removing the traditional defense that government cannot be sued in tort without its consent) for claims under the Harris Act, it is possible that government in Florida may be subject to additional damages. While a court has already held the Act impliedly waives sovereign immunity to some extent under the Act, this new provision could lead a court to find that even other damages may be available to property owners who bring a cause of action under the Act.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

It is unknown whether this bill will require counties or municipalities to take action requiring the expenditure of funds, but it does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate or appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to require rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No Statement Submitted.

### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES