The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 998
INTRODUCER:	Judiciary Committee, Senator Simmons, and others
SUBJECT:	Property Rights
DATE:	March 30, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Favorable**
2.	Munroe	Maclure	JU	**Fav/CS**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill amends the Bert Harris Act to make the following changes to Florida's statutory protections on real property rights. The bill:

- specifies that a moratorium on a development that is in effect for longer than one year may, depending upon the circumstances, constitute an "inordinate burden";
- changes a notification period from 180 days to 120 days before filing an action against a governmental entity;
- renames the term "ripeness decision" to "statement of allowable uses" and revises language specifying when the prerequisites for judicial review are met for property owners;
- specifies that enacting a law or adopting a regulation does not constitute applying the law or regulation to a property for purposes of the statute of limitations to pursue remedies under the Bert Harris Act; and
- specifies that sovereign immunity is waived for purposes of the Bert Harris Act.

This bill substantially amends section 70.001, Florida Statutes.

II. Present Situation:

Takings

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 "[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 government may acquire private property through the power of eminent domain, provided the property owner is compensated.[1]

Article I, s. 2 of the State Constitution also guarantees all natural persons the right to "acquire, possess and protect property" and the State Constitution further provides that no person will be deprived of property without due process of law.[2] 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."[3]

In addition to actually physically infringing upon the property, certain regulations on property can constitute a taking. 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.[4] Additionally, where the regulation does not substantially advance a legitimate state interest, it is invalid[5] and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.[6]

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. Some of 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.[7]

---

[1] Chapters 73 and 74, F.S.
[2] Art. I, s. 9, Fla. Const.
[3] Art. X, s. 6(a), Fla. Const.
[4] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).
[5] *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).
[6] *See First English Evangelical Lutheran Church of Glendale, supra* note 4.
[7] *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, 485-98 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *Graham v. Estuary Properties*, 399 So. 2d 1374, 1380-81 (Fla. 1981).

The Supreme Court, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, rejected property owners' contentions that a three-year moratorium on development constituted a per se taking of property requiring compensation under the Takings Clause.[8] The court recognized that there are a wide range of "moratoria" that occur as a regular part of land use regulation, such as "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[9] The court ultimately determined that the length of time that a parcel of property was undevelopable was one of the many factors to be considered when determining whether a taking has occurred.[10]

The Bert Harris Act

In 1995, the Bert 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.[11] The inordinate burden applies either to an existing use of real property or a vested right to a specific use.[12]

Under the Bert Harris Act, the term "existing use" means:

> an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.[13]

In *City of Jacksonville v. Coffield*, the First District Court of Appeal held that a city's closure of a public road did not inordinately burden an existing use or a vested right to use of the property under the Bert Harris Act.[14] The court held that the property owner's planned development was not an existing use to the property, nor did he have a vested right to develop the property prior to the city's closing the public road near the property.[15] Specifically, the court stated that once the property owner "learned that an application had been filed to close the only roadway providing ingress and egress to the property, development of the property into eight single-family lots was, if still a possibility, by no means a 'reasonably foreseeable, nonspeculative,' use of the property."[16] Furthermore the court stated that:

---

[8] 535 U.S. 302, 342-43 (2002).
[9] *See id.* at 329 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987)).
[10] *Id.* at 318-19.
[11] Section 70.001(1) and (9), F.S.
[12] Section 70.001(2)-(3)(a), F.S.
[13] Section 70.001(3)(b), F.S.
[14] 18 So. 3d 589, 599 (Fla. 1st DCA 2009).
[15] *Id*.
[16] *Id.* at 596.

> Determinations under the Act that a claimant has "an existing use of the real property or a vested right to a specific use of the real property" and that government action has permanently precluded the claimant from attaining "the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property" are conclusions of law.[17]

The court then proceeded to review the conclusions of law in the case *de novo*.[18] "The existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state."[19] The common law doctrine of equitable estoppel limits the government in the exercise of its power over real property when "a property owner (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such excessive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired."[20]

An often quoted Second District Court of Appeal case said, "the theory of estoppel amounts to nothing more than an application of the rules of fair play."[21] Equitable estoppel applies against a governmental entity "only in rare instances and exceptional circumstances;" the government's act must "go beyond mere negligence."[22]

In addition to the elements of equitable estoppel, the landowner's knowledge of future changes to a zoning ordinance is an important consideration in determining whether the landowner has obtained a vested right. A series of cases from the Florida Supreme Court have emphasized that the doctrine of equitable estoppel may not be invoked where "the party claiming to have been injured by relying upon an official determination had good reason to believe before or while acting to his detriment that the official mind would soon change."[23] *Sakolsky v. City of Coral Gables* (*Sakolsky*)[24] clarified the rule, stating that "[n]otice or knowledge of mere equivocation independent of actual infirmities or pending official action cannot operate to negative or prevent reliance on the official act."[25]

---

[17] *Id*. at 594.
[18] *Id*.
[19] Section 70.001(3)(a), F.S.
[20] *Smith v. City of Clearwater*, 383 So. 2d 681, 686 (Fla. 2d DCA 1980). *See also Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1334 (11th Cir. 2004).
[21] *Town of Largo v. Imperial Homes Corp*., 309 So. 2d 571, 573 (Fla. 2d DCA 1975). *See also Equity Resources Inc. v. County of Leon*, 643 So. 2d 1112, 1119-20 (Fla. 1st DCA 1994); *Branca v. City of Miramar*, 634 So. 2d 604, 606 (Fla. 1994).
[22] *Villas of Lake Jackson, Ltd. v. Leon County*, 884 F. Supp. 1544, 1568 (N.D. Fla. 1995), *aff'd*, 121 F.3d 610 (11th Cir. 1997) (internal citations omitted) (finding that although fact questions existed on issue of equitable estoppel and vested property right, rational basis for rezoning precluded due process claims).
[23] *Sharrow v. City of Dania*, 83 So. 2d 274, 276 (Fla. 1955); *Gross v. City of Miami*, 62 So. 2d 418 (Fla. 1953); *City of Ft. Lauderdale v. Lauderdale Industrial Sites*, 97 So. 2d 47, 50 (Fla. 2d DCA 1957); *City of Miami v. State ex rel. Ergene, Inc.*, 132 So. 2d 474, 476 (Fla. 3d DCA 1961) (*per curiam*) ("It would appear childish to assert that the permittees were without knowledge of these undisputed facts and for the respondents to wholly disregard them and simultaneously incur financial obligations incidental to the construction of the building under the questioned permit, shows that they acted while red flags were flying and cannot complain of lack of notice."(quoting *Miami Shores Village v. Wm. N. Brockway Post*, 24 So.2d 33, 36 (Fla. 1945)).
[24] 151 So. 2d 433 (Fla. 1963).
[25] *Id.* at 435-36.

An inordinate burden is a government action that has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for:

- the existing use of the real property;
- a vested right to a specific use of the real property with respect to the real property as a whole; or
- when the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.[26]

The terms "inordinate burden" or "inordinately burdened" do not include:

- temporary impacts to real property;
- impacts to real property occasioned by governmental abatement;
- prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or
- impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner.[27]

Under s. 70.001, F.S., a property owner seeking compensation must present a written claim to the head of the governmental agency whose action caused the inordinate burden 180 days (90 days for agriculture) prior to bringing a suit.[28] The written notice must be accompanied by a valid appraisal that shows the loss of the fair market value.[29] The property owner must commence his or her cause of action within one year of the date the "law or regulation is first applied by the governmental entity."[30] This has been interpreted as starting the running of the time limitation when the legislative or quasi-legislative restriction is adopted.[31]

The governmental entity must make a written settlement offer within the 180-day-notice period 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;

[26] Section 70.001(3)(e), F.S.
[27] *Id.*
[28] Section 70.001(4)(a), F.S.
[29] *Id.*
[30] Section 70.001(11), F.S.
[31] *See Citrus County v. Halls River Development, Inc*., 8 So. 3d 413, 422-24 (Fla. 5th DCA 2009).

- 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.[32]

If the property owner accepts the settlement offer, then the government implements it pursuant to s. 70.001(4)(d), 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.[33] This ripeness decision serves as the last prerequisite to judicial review, thus allowing the landowner to file a claim in circuit court.[34]

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.[35] 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.[36]

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.[37] 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 reject, a bona fide settlement offer.

Citrus County v. Halls River Development held that the one-year limitation period applicable under the Bert Harris Act accrued on the date the statute was amended and first impacted the land in question by changing its zoning designation from mixed use to low intensity coastal and lakes.[38] In *Citrus County*, the Fifth District Court of Appeal rejected a equitable estoppel argument by the developer's that the Bert Harris Act should be liberally construed to permit the developer access to the Act's remedies for aggrieved property owners where the developer and local government both misperceived the legal significance in determining the timeliness of the developer's claim.[39]

[32] Section 70.001(4)(c), F.S.
[33] Section 70.001(5)(a), F.S.
[34] *Id.*
[35] Section 70.001(3)(e), F.S.
[36] *Id.*
[37] Section 70.001(6)(a), F.S.
[38] *Citrus*, 8 So. 3d at 422-24.
[39] *Id.*

However *M & H Profit, Inc. v. Panama City*, stated that the clear and unambiguous language of the Bert Harris Act establishes that the law is limited to "as-applied" challenges not facial challenges based on the mere enactment of a new ordinance or regulation.[40] The First District Court of Appeal in *M &H Profit*, found that the "language of the Bert Harris Act does not contemplate facial challenges to general, health, safety, and welfare ordinances of a municipality."[41] The court found that "an interpretation of state statutes which would impede the ability of local government to protect the health and welfare of its citizens should be rejected unless the Legislature has clearly expressed the intent to limit or constrain local government action."[42]

Sovereign Immunity

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.[43] 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.[44] Notwithstanding this limited waiver of sovereign immunity, certain discretionary governmental functions remain immune from tort liability.[45]

The Bert Harris Act provides a process for claims against a governmental entity for certain actions. Specifically, the provisions of the 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 affects real property."[46]

Section 70.001(13), F.S., provides that, "This section does not affect the sovereign immunity of government." In 2003, the Third District Court of Appeal in *Royal World Metropolitan, Inc. v. City of Miami Beach* overturned a trial court's decision that subsection (13) serves to bar a cause

[40] 28 So. 3d 71, 75-76 (Fla. 1st DCA 2010).
[41] *Id.* at 73.
[42] *Id.* at 77.
[43] See generally, Wetherington and Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 Fla. L. Rev. 1 (1992).
[44] Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S., effective October 1, 2011, to increase the limits to $200,000 for one person for one incident and $300,000 for all recovery related to one incident, to apply to claims arising on or after that effective date.
[45] *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, 444-45 (1965).
[46] Section 70.001(1), F.S. Section 70.001(13), F.S., provides that "section does not affect the sovereign immunity of government".

of action against a governmental entity.[47] Specifically, the court found s. 70.001, F.S., "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 governmental regulation does not rise to the level of taking under the Florida and United States Constitutions."[48]

III. Effect of Proposed Changes:

The bill amends the "Bert J. Harris, Jr., Private Property Rights Protection Act."

Section 1 amends s. 70.001, F.S. The bill restructures the definition of existing use to make it clearer that the term "existing use" has two separate definitions:

(1) an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity *or*
(2) such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

The bill clarifies that both "inordinate burden" *and* "inordinately burdened" mean the same thing.

The bill specifies that a moratorium on a development[49] that is in effect for longer than one year may, depending upon the circumstances, constitute an "inordinate burden."

The bill changes the requirement that property owners who seek compensation under the Bert Harris Act present the claim in writing to the head of the governmental entity 180 days prior to filing an action, to make it 120 days prior to filing an action. The bill specifies that payment of compensation can be part of a settlement offer from the local government.

The bill deletes the term "ripeness" and in lieu thereof requires the local government to provide a "statement of allowable uses," which is a written decision identifying the allowable uses to which the subject property may be put. The bill clarifies that the failure of the local government to issue the "statement of allowable uses" within the notice period is deemed the local government's denial for purposes of allowing a property owner to file an action in the circuit court under the Bert Harris Act. If a written statement of allowable uses is issued, it constitutes the last prerequisite to judicial review for purposes of the judicial proceeding created under the Bert Harris Act.

The bill specifies that enacting a law or adopting a regulation does not constitute applying the law or regulation to a property. This provision should allow property owners to sue when the

[47] *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So. 2d 320, 322-23 (Fla. 3rd DCA 2003).
[48] *Id.* at 322.
[49] Development, as defined in s. 380.04, F.S., 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.

restrictions are applied to their property without being excluded by the statute of limitations even if the law or regulation was enacted more than a year before it is applied to the property.

The bill provides that s. 70.001, F.S., waives sovereign immunity "solely to the extent provided" in the Bert Harris Act; however, the Bert Harris Act does not otherwise affect the sovereign immunity of government. This is consistent with how the section of law was interpreted by the court in *Royal World Metropolitan, Inc. v. City of Miami Beach*.[50]

Section 2 states that the act is applied prospectively and does not affect pending litigation.

Section 3 provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill expands the options for private property owners to obtain compensation or another remedy for governmental action that inordinately burdens real property by providing that certain moratoria lasting more than one year, depending on the circumstances, may constitute an "inordinate burden" on property under the Bert Harris Act.

C. Government Sector Impact:

The bill reduces the timeframe for the governmental entity to respond to the claim, and expressly waives sovereign immunity for claims under the Bert Harris Act.

[50] *Royal World Metropolitan, Inc.*, 863 So. 2d at 322-23.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 28, 2011:
The committee substitute makes the following changes to the bill:

- Deletes the whereas clauses, which provided legislative intent for implementation of the Bert Harris Act;
- Specifies that a moratorium on development that is effect for longer than one year may still constitute an inordinate burden but is no longer statutorily defined as a temporary impact to real property for purposes of the Bert Harris Act;
- Provides that the "statement of allowable uses" is the written decision identifying the allowable uses to which the subject property may be put to under the Bert Harris Act;
- Specifies that the failure of local government to issue the written statement of allowable use is deemed a denial for purposes of allowing a property owner to file an action in circuit court to pursue remedies under the Bert Harris Act; and
- Revises the sovereign immunity language applicable to local governments under the Bert Harris Act to provide that sovereign immunity is waived solely to the extent provided in the Bert Harris Act.

B. Amendments:

None.