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 Committee on Appropriations

BILL:	CS/SB 284
INTRODUCER:	Environmental Preservation and Conservation Committee and Senator Diaz de la Portilla
SUBJECT:	Private Property Rights
DATE:	April 20, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinton	Uchino	EP	**Fav/CS**
2.	Howard	DeLoach	AGG	**Recommend: Fav/CS**
3.	Howard	Kynoch	AP	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 284 creates a cause of action under chapter 70, Florida Statutes, and when claims may be brought and procedures for those claims. The bill provides that a governmental agency defending the claim has the burden of proof to defend the agency exaction. It authorizes awards of attorney fees and costs under certain circumstances. The bill provides that the state, its agencies, and political subdivisions waive sovereign immunity for causes of action under section 70.45, Florida Statutes, which is created by the bill. The bill prohibits sections 70.001, 70.45, and 70.51, Florida Statutes, from being construed together as parts of a common subject. The bill clarifies the terms "property owner" and "real property" and provides definitions for "damages," "governmental entity," "prohibited exaction," "property owner," and "real property" under chapter 70, Florida Statutes. It provides circumstances when a governmental entity may treat a claim as pending litigation and clarifies when a settlement offer may be accepted. It provides an exception for counties under certain circumstances.

The bill could have a negative indeterminate fiscal impact on governmental entities due to limitations on conditions that might otherwise be imposed. Legal costs could increase but are estimated to be minimal since claims may be settled prior to a suit being brought by a private property owner.

The bill provides an effective date of October 1, 2015.

II. Present Situation:

The Fifth Amendment to the U.S. Constitution guarantees that citizens' private property will 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 to the U.S. Constitution, which provides, "[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, section 2 of the Florida 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.[2] Article X, section 6 of the Florida Constitution, which provides that private property cannot be taken except for a public purpose and with full compensation paid to each owner, is complimentary to the Fifth and Fourteenth Amendments to the U. S. Constitution.

In addition to physical infringement by a governmental entity upon a property, certain regulations on property can constitute a taking. When a governmental regulation results in a permanent, physical occupation of a property or deprives an owner of "all economically productive or beneficial uses" of the property, a "per se" taking is deemed to have occurred. Such actions require full compensation for the property.[3] Additionally, when the regulation does not substantially advance a legitimate state interest, it is invalid[4] and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.[5]

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, i.e., 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.[6]

The U.S. Supreme Court, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, rejected property owners' contentions that a three-year moratorium on

[1] Chapters 73 and 74, F.S.
[2] FLA. CONST. art. I, s. 9.
[3] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
[4] *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).
[5] *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).
[6] *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).

development constituted a per se taking of property requiring compensation under the Takings Clause.[7] 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."[8] The Court determined that the length of time a parcel of property was undevelopable was one of the many factors to be considered when determining whether a taking occurred.

Regulatory Takings Requiring Compensation

Nollan v. California Coastal Comm'n, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374, established a two-prong test to determine if a landowner should receive compensation under a takings claim. In *Nollan*, the U.S. Supreme Court held that permit conditions that do not demonstrate an essential nexus between the conditions and the purpose served by those conditions constituted a regulatory taking. In *Dolan*, the Court adopted a "rough proportionality" test, requiring that a dedication of private property must also be roughly proportional in nature and extent to the impact, or social costs, of the proposed development.[9]

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, further clarified regulatory takings by limiting them to four situations:

- When there is a permanent physical invasion of property, however slight;
- When the regulation eliminates all economic value in the property;
- When the action is the imposition of a condition on the grant of a permit that does not serve a purpose related to the permitted activity or the condition was not roughly proportional to the impact of the development; and
- When the regulation involves a substantial economic impact on the owner and interferes with the owner's investment-backed expectations or imposes an undue burden on the owner.[10]

This line of jurisprudence concerns permits that have been granted. However, it does not address conditions imposed on permits that have been denied.

Unconstitutional Exactions

In *Koontz v. St. Johns River Water Management District*, 133 S.Ct 2586 (2013), the U.S. Supreme Court held that a government cannot deny a land-use permit based on the landowner's refusal to accede to the government's demands to either turn over property or pay money to the government unless there is a nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use.[11]

The *Koontz* case arose from the denial of a permit by the St. Johns River Water Management District (district). Coy Koontz, Sr., sought to develop part of his property and applied for the necessary permit from the district, which was required due to the effect the development would have on wetlands. Mr. Koontz wanted to develop 3.7 acres of a 14.9 acre tract of land and

[7] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).
[8] *See id.* (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)).
[9] *See Dolan v. City of Tigard*, 512 U.S. 374 (1994).
[10] *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).
[11] *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013).

offered to grant a conservation easement on most of the rest of the parcel. The district considered the conservation easement inadequate and, along with offering to entertain any other suggestions, gave Mr. Koontz two choices:

- He could reduce the size of the development to one acre and grant a conservation easement on the rest of the property and make other changes to his proposed development; or
- He could build on the full 3.7 acres if he deeded to the district a conservation easement on the rest of the property, and pay to enhance approximately 50 acres of district-owned wetlands, or an equivalent project proposed by Mr. Koontz.[12]

The U.S. Supreme Court heard the case in 2013 and decided later that year in favor of Mr. Koontz. The Court's decision was based on violation of the unconstitutional condition doctrine. The doctrine precludes the government from burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them. The constitutional right burdened under the doctrine is the right to compensation when private property is taken for public use.[13] As explained by the Court, "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[14]

The Court did not rule on state or federal remedies for violating the holdings of the case. "In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action – whether state or federal – on which the landowner relies."[15] The Court left unanswered the question of whether the landowner in *Koontz* could recover damages for unconstitutional conditions claims based on the Takings Clause because the landowner's claim was based on s. 373.617, F.S.[16] Because s. 373.617, F.S., allows for damages when a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation," it is a question of state law as to whether that provision covers an unconstitutional conditions claim.[17]

Remedies for Unconstitutional Conditions Claims

Federal law provides a cause of action for unconstitutional conditions claims.[18] However, it is unclear what type of damages would be recoverable under federal law. Section 373.617, F.S., allows for monetary damages to be awarded to a landowner when a circuit court determines a state agency's action is "an unreasonable exercise of the State's police power constituting a taking without just compensation." However, because this provision applies to takings, it is unclear whether it provides a cause of action for monetary damages for unconstitutional conditions claims based on the Takings Clause where no taking has occurred.

[12] *Id.* at 2593.
[13] U.S. CONST. amend. V.
[14] *Supra* note 11, at 2596.
[15] *Supra* note 11, at 2597.
[16] *Supra* note 11, at 2597.
[17] *Royal World Metropolitan, Inc. v. The City of Miami Beach,* 863 So. 2d 320 (Fla. 3d DCA 2003).
[18] See *O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712 (1996).

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

Limitation of Application of the Bert J. Harris, Jr., Private Property Rights Protection Act

In 1995, the Legislature enacted the Bert J. Harris, Jr., Private Property Rights Protection Act (Bert Harris Act)[19] to provide a new cause of action for private property owners whose real property has been inordinately burdened by a specific action of a governmental entity that may not rise to the level of a taking under the Florida or U.S. Constitutions.[20] The inordinate burden can apply to either an existing use of real property or a vested right to a specific use.[21]

For the purposes of the Bert Harris Act, the term "property owner" is defined as "the person who holds legal title to the real property at issue," but does not include a governmental entity. "Real property" is defined as "land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest."[22]

Safe Harbor Provisions for Settlement Agreements

The Bert Harris Act provides for a mandatory presuit procedure in which a property owner must present written notice of the claim to the governmental entity at least 150 days, or 90 days if the property in question is classified as agricultural, prior to filing a lawsuit. During that period, unless it is extended by agreement of the parties, the governmental entity must make a written settlement offer.[23]

If the parties enter into a settlement agreement that would have the effect of a modification, variance, or special exception to the application of a rule, regulation, or ordinance that would otherwise apply to the property, the agreement must protect the public interest served by the regulation at issue and be the appropriate relief necessary to prevent the regulation from inordinately burdening the property. If the settlement agreement would have the effect of contravening the application of a statute that would otherwise apply to the property, the parties must file an action in the circuit court seeking approval of the settlement agreement, "to ensure that the relief granted protects the public interest served by the statute…and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property." These safe harbor provisions allow settlement terms that provide for the property to be immune from the application of contrary statutes and local regulations.[24]

Recently, a Florida appellate court affirmed the denial of a settlement agreement between a property owner and a governmental entity on the grounds that the parties failed to enter into the settlement agreement within the period provided in the Bert Harris Act and after the property

[19] Chapter. 95-181, Laws of Fla.
[20] Section 70.001, F.S.
[21] Section 70.001(2), F.S.
[22] Section 70.001(2), F.S. As recently noted by a Florida appellate court, "[t]he expressed legislative intent, as well as numerous other sections of the Act, indicate the Harris Act only applies when rules, ordinances, or regulations are actually applied to the property in question." *City of Jacksonville v. R. Lee Smith and Christy Smith*, Fla. 1st DCA, Case No. 1D14-2192 (Feb. 26, 2015). *See also* Op. Att'y Gen. Fla. 95-78 (1995), stating that the act "does not provide recovery of damages to property that is not the subject of governmental action or regulation, but which may have incidentally suffered a diminution in value or other loss as a result of the regulation of the subject property."
[23] Section 70.001(4)(c), F.S.
[24] Section 70.001(4)(d), F.S.

owner had filed a lawsuit under the Bert Harris Act.[25] The court's ruling, in effect, limits the safe harbor provision in the Bert Harris Act to only those settlement agreements made within the time-frame specified in the Bert Harris Act.

The National Flood Insurance Program

The National Flood Insurance Program (NFIP) is a federal program created by Congress with the passage of the National Flood Insurance Act of 1968.[26] The NFIP was created to mitigate future flood losses nationwide through sound, community-enforced building and zoning ordinances and to provide access to affordable, federally-backed flood insurance protection for property owners. The NFIP is designed to provide an insurance alternative to disaster assistance to meet the escalating costs of repairing damage to buildings and their contents caused by floods.[27] Community participation in the NFIP is voluntary, although some states require NFIP participation as part of their floodplain management program. Each identified flood-prone community must assess its flood hazard and determine whether flood insurance and floodplain management would benefit the community's residents and economy.[28] Participation in the NFIP is based on an agreement between local communities and the federal government, which states if a community will adopt and enforce a floodplain management ordinance to reduce future flood risks to new construction in Special Flood Hazard Areas, the federal government will make flood insurance available within the community as a financial protection against flood losses.[29] The Federal Emergency Management Agency (FEMA) identifies flood hazard areas throughout the United States and its territories. Areas of flood hazard are commonly identified on an official map of a community, referred to as a Flood Insurance Rate Map.[30]

Some Florida counties implementing updated Flood Insurance Rate Maps required by FEMA have received claims under the Bert Harris Act for the alleged impacts to property caused by the maps. For example, Lee County's 2015 State Legislative Agenda indicates the county has received 18 claims under the Bert Harris Act due to adopting Flood Insurance Rate Maps.[31]

III. Effect of Proposed Changes:

Section 1 amends s. 70.001, F.S., to clarify that the term "property owner" means the person who holds legal title to the real property that is the subject of and directly impacted by the action of a governmental entity.

The bill clarifies that the term "real property" includes only parcels that are the subject of and directly impacted by the action of a governmental entity.

---

[25] *Collier County v. Hussey*, 147 So. 3d 35 (Fla. 2d DCA 2014).
[26] Federal Emergency Management Agency, *National Flood Insurance Program – Answers to Questions About the NFIP, FEMA F-084*, 1 (Mar. 2011), *available at* http://www.fema.gov/media-library-data/20130726-1438-20490-1905/f084_atq_11aug11.pdf (last visited Mar. 25, 2015).
[27] *Id.*
[28] *Id.* at 4.
[29] *Id.* at 4.
[30] *Id.* at 2.
[31] Lee County, *State Legislative Agenda*, (Dec. 16, 2014), *available at* http://www.leegov.com/gov/BoardofCountyCommissioners/Documents/2015%20State%20Agenda_7JAN2015.pdf (last visited Mar. 25, 2015).

The bill allows a governmental entity to treat a claim as pending litigation for the purposes of s. 286.011(8), F.S., which concerns discussions between a governmental entity and a private entity's attorney.

The bill allows a settlement agreement to be reached between a property owner and a governmental entity regardless of when the settlement agreement is entered into if the agreement fully resolves all claims.

The bill exempts counties from claims regarding the adoption of a Flood Insurance Rate Map issued by FEMA for the purpose of participating in the NFIP, unless the map incorrectly applies an aspect of the map to the property in such a way, but not limited to, incorrectly assessing the elevation of the property.

Section 2 creates s. 70.45, F.S. regarding governmental exactions.

The bill defines "damages" as "the monetary amount necessary to fully and fairly compensate the property owner for harm caused by an exaction prohibited by the section." It also provides that "the term includes a reduction in the fair market value of the real property, a refund of excessive fees charged, or infrastructure costs incurred, or such other actual damages as may be proven at trial."

The bill defines "prohibited exaction" as any condition imposed by a governmental entity on a property owner's proposed use of real property which lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the governmental entity is seeking to avoid, minimize, or mitigate.

The bill defines "governmental entity," "property owner," and "real property" as having the same meaning as provided in s. 70.001(3), F.S.

The bill provides that a property owner may bring an action for injunctive relief or to recover damages caused by a prohibited exaction. Further, it provides that the action may not be brought until a prohibited exaction is actually imposed or required in written form as a final condition of approval for the requested use of real property, and that the right to bring the action may not be waived.

The bill requires a property owner to provide written notice of the action to the relevant governmental entity at least 90 days before filing the action. The notice must identify the exaction the property owner believes is prohibited and include a brief explanation of why the property owner believes the exaction is prohibited and include an estimate of the damages. When the governmental entity receives the notice, it may treat the claim as pending litigation for the purposes of s. 286.011(8), F.S., which allows for a governmental entity or its representative to discuss pending litigation with the affected party and its representative.

The bill requires the governmental entity to prove an exaction at issue has an essential nexus to a legitimate public purpose and is roughly proportionate to the impacts of the proposed use that the

governmental entity is seeking to avoid, minimize, or mitigate. It requires the property owner to prove damages resulting from a prohibited exaction.

The bill requires a court to award prejudgment interest and reasonable attorney fees and costs to a property owner who prevails. It also allows the court to award reasonable attorney fees and costs to the governmental entity if the court finds that the property owner filed an action in bad faith and without a colorable basis for relief.

The bill waives sovereign immunity for causes of action brought under this section of the bill. It limits the waiver to claims brought under this section.

Section 3 amends s. 70.80, F.S., to clarify that s. 70.45, F.S., has a separate and distinct basis, objective, application, and process from ss. 70.001 and 70.51, F.S., and that it may not be construed in pari materia with those two sections, meaning that it may not interpreted in light of those sections though they have a common purpose.

The bill provides an effective date of October 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues

The bill waives sovereign immunity protection for the state, its agencies, and political subdivisions for causes of action based on governmental exactions. The bill provides no limitation on the liability of political entities found to be in violation of the provisions of the bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/SB 284 could potentially limit expenditures required of people or entities seeking a permit by preventing a governmental entity from imposing any conditions that are deemed to be prohibited exactions.

It could have a negative impact on private property owners who are found to have brought suits in bad faith.

C. Government Sector Impact:

This bill could have an indeterminate negative effect due to limitations on conditions that might otherwise have been imposed by governmental entities.

The bill could have a positive impact on counties that would otherwise be subject to suits based on the effects of adopting required Flood Insurance Rate Map.

This bill could result in an increase in legal costs for governmental entities due to the potential for increased litigation under the new cause of action provided for in the bill. However, legal costs are likely to be minimal since claims may be settled prior to a suit being brought by a private property owner.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 70.001 and 70.80.

The bill creates section 70.45 of the Florida Statutes.

IX. Additional Information:

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

CS by Environmental Preservation and Conservation on March 24, 2015:

- Deletes references to ss. 253.763, 373.617, and 403.90, F.S., which were amended by the original bill to provide a cause of action for exactions takings as a result of extortionate demands as conditions of permits;
- Clarifies terms for “property owner,” “real property,” and “governmental entity” under ch. 70, F.S.;
- Defines “damages” and “prohibited exaction”;

- Clarifies that upon receipt of a written claim, a governmental entity may treat the claim as pending litigation for the purposes of s. 286.011(8), F.S.;
- Clarifies that a settlement offer may be accepted either before or after filing an action so long as it fully resolves all claims;
- Exempts claims under the Bert Harris Act against a county for adopting a Flood Insurance Rate Map issued by FEMA for the purpose of participating in the NFIP, unless the adoption incorrectly applies an aspect of the Flood Insurance Rate Map;
- Provides a cause of action under ch. 70, F.S., for a property owner for injunctive relief or to recover damages caused by a prohibited exaction;
- Provides the cause of action may not be brought until a prohibited exaction is actually imposed or required in written form as a final condition of approval for the requested use of real property, and that the right to bring such an action may not be waived;
- Provides that a property owner must provide a written notice of the action 90 days before filing the action;
- Provides that the notice must identify the exaction the property owner believes is prohibited and include a brief explanation of why the owner believes the exaction is prohibited and an estimate of the damages;
- Provides that upon receipt of the property owner's notice, the governmental entity may treat the claim as pending litigation;
- Assigns the burden of proof to the governmental entity that the exaction has an essential nexus to a legitimate public purpose and is roughly proportionate to the impacts of the proposed use that the governmental entity is seeking to avoid, minimize, or mitigate;
- Assigns the burden of proving damages resulting from a prohibited exaction on the property owner;
- Requires the court to award prejudgment interest and reasonable attorney fees and costs to a prevailing property owner;
- Provides the court with the option of awarding reasonable attorney fees and costs to the governmental entity if the court finds that the property owner filed the action in bad faith and absent a colorable basis for relief;
- Waives sovereign immunity for the state and its agencies or political subdivisions for causes of action brought under s. 70.45, F.S., created by the bill; and
- Provides that s. 70.45, F.S., has separate and distinct bases, objectives, applications, and processes from ss. 70.001 and 70.51, F.S.

B. Amendments:

None.