

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 383 Private Property Rights

SPONSOR(S): Local Government Affairs Subcommittee; Civil Justice Subcommittee; Edwards; Perry and others

TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Malcolm	Bond
2) Local Government Affairs Subcommittee	11 Y, 0 N, As CS	Miller	Miller
3) Appropriations Committee			
4) Judiciary Committee			

SUMMARY ANALYSIS

The United States Supreme Court has 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 an essential nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use. Governmental exactions of this type were ruled unconstitutional. However, because unconstitutional exactions do not qualify as an unconstitutional taking, the Fifth Amendment's mandated remedy of just compensation to the landowner is not required. Instead, the remedy is determined by the law of the cause of action on which the property owner based the claim.

Although federal law appears to provide a cause of action for unconstitutional exactions, it is unclear whether current Florida law providing a cause of action for unconstitutional takings also applies to unconstitutional exactions by local and state governments and whether monetary damages would be available in such cases.

The bill creates a cause of action to recover monetary damages for landowners where local and state governmental entities impose conditions that rise to the level of prohibited, and therefore unconstitutional, exactions. Plaintiffs under the cause of action will be required to provide pre-suit notice to the governmental entity to allow an opportunity to correct the prohibited exaction without need for further litigation. If the suit is necessary, the bill requires the governmental entity to prove the exaction complies with the standards set by the U.S. Supreme Court while the property owner must prove damages from the prohibited exaction. The bill clarifies the measure of damages recoverable under the cause of action and provides for injunctive relief, and allows recovery of prejudgment interest, costs, and reasonable attorney fees. Governmental entities will be allowed recovery for attorney fees and costs if they prevail and the suit was brought in bad faith. Finally, sovereign immunity is waived to the extent of assessing damages under the new cause of action.

The bill also amends the Bert J. Harris, Jr., Private Property Act to provide that only those property owners whose real property is the subject of and directly impacted by the action of a governmental entity may bring suit under the Act and to provide that the Act's safe harbor provisions for settlement agreements between a property owner and governmental entity apply regardless of when the settlement agreement was entered. In addition, actions taken by counties to adopt FEMA flood maps for the purpose of participating in the National Flood Insurance Program are not subject to claims under the Act, with certain exceptions.

The fiscal impact of the bill on state and local governments is indeterminate.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Private Property Rights and Unconstitutional Exactions

In 2013, the United State Supreme Court, in *Koontz v. St. Johns River Water Management District*,¹ 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 an essential nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use.²

The property owner in *Koontz* owned land consisting primarily of wetlands. He sought to develop a portion of his property, and as part of his proposal offered to grant a substantial conservation easement to the St. Johns River Water Management District (district). The district rejected his proposal, and informed him that his permit would be denied unless he agreed either to scale back his planned development and give the district a larger conservation easement, or to maintain the proposal but hire contractors to make improvements to separate land owned by the district. The district offered to consider alternative approaches as well. The property owner believed the district's demands were unreasonable, and he sued under s. 373.617, F.S., which allows property owners to recover money damages in the event of a government action related to land-use permitting that is an unreasonable exercise of the state's police power constituting a taking without just compensation.

The Supreme Court's decision regarding the constitutionality of the exaction in *Koontz* was an extension of two prior cases, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in which the Court held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.³

These holdings are based on the doctrine of unconstitutional conditions, which prohibits the government from denying a benefit to a person because he or she exercises or vindicates a constitutional right.⁴ The Court explained that "[e]xtortionate demands for property in the land-use permitting context run afoul of the [Fifth Amendment] Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."⁵

Of particular significance to the bill, the *Koontz* court found that while the government's conditions unconstitutionally burdened the landowner's Fifth Amendment rights, no constitutional taking has occurred that qualifies for the constitutionally mandated remedy of just compensation to the landowner. Instead, the Court left it up to the states to determine what remedies would be available to a landowner who has been subject to an unconstitutional demand but no actual taking has occurred.⁶ The Court explained:

Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment mandates a particular remedy—just compensation—only for takings. In cases where there is an excessive demand but no

¹ 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)

² *Koontz*, supra at 133 S. Ct. 2595.

³ *Dolan*, 512 U.S. at 386, 391; *Nollan*, 483 U.S. at 837.

⁴ *Koontz*, 133 S. Ct. at 2594.

⁵ *Id.* at 2596.

⁶ *Id.* at 2597.

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.⁷

Consequently, the Court left unanswered the question of whether the landowner in *Koontz* could recover damages for unconstitutional conditions claims predicated on the Takings Clause because the landowner's claim was based on Florida law, s. 373.617, F.S.⁸ Specifically, 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 claims.⁹

Remedies for Unconstitutional Conditions Claims

Currently, while federal law provides a cause of action for unconstitutional conditions claims,¹⁰ it is unclear what type of damages would be recoverable under federal law. As noted above, s. 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, also known as unconstitutional exactions, predicated on the Takings Clause where no taking has occurred.¹¹

The bill creates s. 70.45, F.S., to provide a cause of action and monetary damages for landowners in cases of prohibited exactions by governmental entities. A "prohibited exaction" is defined as

any condition imposed by a governmental entity on a property owner's proposed use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the harm the governmental entity seeks to avoid, minimize, or mitigate.

The bill defines the terms "governmental entity" consistent with the current definition in ch. 70, F.S.,¹² and it defines the terms "property owner" and "real property" consistent with the amended definitions in ch. 70, F.S.¹³ The bill also defines the scope of damages the affected property owner may recover:

"Damages" means the monetary amount necessary to fully and fairly compensate the property owner for harm caused by an exaction prohibited by this section. Damages may include 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 provides that a property owner may bring an action for injunctive relief or to recover damages caused by a prohibited exaction in addition to any other remedies available in law or equity. Two conditions must be met before the property owner may bring suit under the new cause of action. First, the prohibited exaction actually must be imposed, in writing, as a final condition for approval of the proposed land use. Second, at least 90 days before filing the action, the property owner must give the governmental entity written notice identifying the prohibited exaction, explaining why the exaction is

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2597-98.

¹⁰ See *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

¹¹ Article I, s. 21 of the Florida Constitution provides "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." "This provision was intended to give life and vitality to the maxim: "For every wrong there is a remedy.'" *Swain v. Curry*, 595 So. 2d 168, 174 (Fla. 1st DCA 1992) (citing *Holland v. Mayes*, 155 Fla. 129, 19 So. 2d 709 (1944)).

¹² Section 70.001(3)(c) defines "governmental entity" to include "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." It does not include the United States or any of its agencies, or an agency of the state or a local government when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.

¹³ See Limitation of Application discussion below.

prohibited, and estimating the property owner's damages. On receiving written notice of the alleged claim, specified officials of the governmental entity are authorized to meet privately under certain conditions with that entity's attorney to discuss the claim.¹⁴

A prevailing property owner will be entitled to prejudgment interest,¹⁵ costs, and reasonable attorney fees. If the governmental entity establishes the exaction was not prohibited, the entity may recover attorney fees and costs if the property owner filed the suit in bad faith and without a colorable basis for the claim. In legal actions, "bad faith" generally means more than mere animosity; a party acts in "bad faith" if they take legal action or engage in behavior not to vindicate legitimate claims but to knowingly and intentionally oppress or abuse the rights of another without any merit to their position.¹⁶ A "colorable claim" is one appearing to have merit, as opposed to a claim supported neither by material facts nor applicable law.¹⁷

The bill waives sovereign immunity of the state and its political subdivisions for claims brought under new s. 70.45, F.S.¹⁸ Because actions under the new statute will be against governmental entities (only if they impose prohibited exactions), the sovereign immunity of the state must be waived for the plaintiff to maintain the suit or recover on the claim.¹⁹

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 Florida Legislature enacted the Bert J. Harris, Jr., Private Property Rights Protection Act²⁰ (act) to provide a new cause of action for private property owners whose real property has been inordinately burdened by a specific action²¹ of a governmental entity that may not rise to the level of a "taking" under the State or Federal Constitutions.²² The inordinate burden can apply to either an existing use of real property or a vested right to a specific use.²³

For the purposes of the act, the term "property owner" is defined as "the person who holds legal title to the real property at issue."²⁴ "Real property" is likewise 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."²⁵

¹⁴ S. 286.011(8), F.S. This statute requires initiation in a public meeting by a request for advice, requires public notice of the scheduled private meeting, limits the subject matter of the private meeting to settlement negotiations or strategy related to litigation expenditures, and requires recordation of the entire private meeting by a certified court reporter.

¹⁵ Under longstanding Florida law, where a verdict determines the actual amount of a plaintiff's damages as of a date certain, the plaintiff is entitled to interest on that amount from the date of the loss. *Bosem v. Musa Holding, Inc.*, 46 So. 3d 42 (Fla. 2010), citing *Argonaut Insurance Company v. May*, 474 So. 2d 212 (Fla. 1985).

¹⁶ See *Hall v. Cole*, 412 U.S. 1, 5; 93 S. Ct. 1943, 1946 (1973). In Florida, a court may award attorney fees for bad faith conduct based on the theory of "inequitable conduct," provided the court expressly finds bad faith and makes detailed factual findings of bad faith conduct resulting in the opponent incurring unnecessary attorney fees. *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002); *Bank of New York Mellon v. Mestre*, ---So. 3d---, 2015 WL 107113 (Fla. 5th DCA March 13, 2015).

¹⁷ See s. 57.105(1), F.S. The statute provides for an award of attorney fees and costs applying this standard under applicable circumstances, but provides a good description of a meritless claim. A better term may be "justiciable claim," one capable of judicial resolution by applying law to fact.

¹⁸ Art. X, s. 13, Fla. Const.

¹⁹ *Royal World Metropolitan, Inc. v. The City of Miami Beach*, 863 So. 2d 320 (Fla. 3d DCA 2003).

²⁰ Ch. 95-181, Laws of Fla.; codified as s. 70.001, F.S.

²¹ S. 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."

²² Ss. 70.001(1) and (9), F.S.

²³ S. 70.001(2), F.S.

²⁴ S. 70.001(2)(f), F.S. The term does not include a governmental entity.

²⁵ S. 70.001(2)(g), F.S.

The bill amends the definitions of "property owner" and "real property" in the act to provide that only those property owners whose real property is the subject of and directly impacted by the action of government entity may bring suit under the act.²⁶

Safe Harbor Provisions for Settlement Agreements

Currently, the 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 prior to filing a lawsuit. During that 150 day period,²⁷ the governmental entity must make a written settlement offer.²⁸

If the parties enter into a settlement agreement that would have the effect of a modification, variance, or a 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 regulations at issue and be the appropriate relief necessary to prevent the regulation from inordinately burdening the property.²⁹ 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."³⁰ These safe harbor provisions allows settlement terms that provide for the property to be immune from the application of contrary statues and local regulations.³¹

Recently, a Florida appellate court affirmed the denial of a settlement agreement between a property owner and governmental entity on the grounds that the parties failed to enter into the settlement agreement within the 150-day period provided in the act and after the property owner had filed a lawsuit under the act.³² The court's ruling, in effect, limits the safe harbor provision in the act to only those settlement agreements made within the time-frame specified in the act.

The bill amends the act to provide that the safe harbor provisions for settlement agreements between a property owner and governmental entity apply regardless of when the settlement agreement was entered so long as it fully resolves all claims.

The bill expressly excludes from the Act any actions a county takes to adopt a Flood Insurance Rate Map (FIRM) issued by the Federal Emergency Management Agency (FEMA) in order to participate in the National Flood Insurance Program (NFIP).

The NFIP is a federal program created by Congress with the passage of the National Flood Insurance Act of 1968.³³ 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.³⁴ Community participation in the NFIP is voluntary (although some states require NFIP participation as part of their floodplain management program). Each identified

²⁶ As recently observed by a Florida appellate court, "The 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 (En Banc), Case No. 1D14-2191 (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 a 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.")

²⁷ If the property is classified as agricultural, the time-period is reduced to 90 days.

²⁸ S. 70.001(4)(c), F.S.

²⁹ S. 70.001(4)(d), F.S.

³⁰ *Id.*

³¹ *Id.*

³² *Collier County v. Hussey*, 147 So. 3d 35 (Fla. 2d DCA 2014).

³³ Florida Emergency Management Act, National Flood Insurance Program – Answers to Questions About the NFIP, FEMA F-084/March 2011, at 1, <https://www.fema.gov/media-library/assets/documents/272> (accessed 3/19/2015).

³⁴ *Id.*

flood-prone community must assess its flood hazard and determine whether flood insurance and floodplain management would benefit the community's residents and economy.³⁵ Participation in the NFIP is based on an agreement between local communities and the federal government that states that 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.³⁶ 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 (FIRM).³⁷

Some Florida counties implementing updated FIRMs as required by FEMA have received claims under the Act for the alleged impacts to property caused by the maps. As of 2015 Lee County had received a number of claims under the Act due adopting the maps.³⁸

Legislative Declaration of Construction

Section 70.80, F.S., currently declares that "ss. 70.001 and 70.51³⁹ have separate and distinct bases, objectives, applications, and processes." It further states that it is "the intent of the Legislature that ss. 70.001 and 70.51 are not to be construed in *pari materia*."⁴⁰

The bill adds the newly created s. 70.45, F.S., to the legislative declaration that these sections have separate and distinct objectives, applications, and processes." It also adds s. 70.45, F.S., to the statement of legislature intent that ss. 70.001 and 70.51 are not to be construed in *pari materia*.

B. SECTION DIRECTORY:

Section 1 amends s. 70.001, F.S., related to private property rights protection.

Section 2 creates s. 70.45, F.S., related to governmental exactions.

Section 3 amends s. 70.80, F.S., related to construction of ss. 70.001 and 70.51, F.S.

Section 4 provides an effective date of October 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

Indeterminate. See Fiscal Comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

³⁵ *Id* at 4.

³⁶ *Id*.

³⁷ *Id* at 2.

³⁸ Lee County 2015 Legislative Agenda at

<http://www.leegov.com/gov/BoardofCountyCommissioners/Documents/Forms/AllItems.aspx> (accessed 3/19/2015).

³⁹ S. 70.51 is the Florida Land Use and Environmental Dispute Resolution Act, which provides a mechanism for resolving land use disputes that involve development orders or governmental enforcement actions

⁴⁰ *In pari materia* is a principle of statutory construction used by the courts. It requires related statutes to be construed together "so that they will illuminate each other and are harmonized." *Grant v. State*, 832 So. 2d 770, 773 (Fla. 5th DCA 2002).

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

Indeterminate. See Fiscal Comments below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have a direct economic impact on the private sector. However, under section 2, if a private litigant brings a meritless claim for an alleged prohibited exaction the court could award costs and attorney fees if the plaintiff is found to have acted in bad faith.

D. FISCAL COMMENTS:

Section 1 of the bill limits causes of action against government entities, and thus appears to have a positive fiscal impact on state and local governments. In that lawsuits under s. 70.001, F.S., by neighboring properties are uncommon, the fiscal impact is anticipated to be minimal. The exception for counties of adopting required flood maps appears to have an additional positive fiscal impact on these specific local governments.

Section 2 creates a specific cause of action related to unconstitutional takings. The measure of damages of the state law cause of action for such lawsuits is an issue currently pending before the Florida Supreme Court,⁴¹ and so it is possible that Section 2 of the bill may provide a different measure of damages. However, it is clear that, if there is a cost to a government, the cost is voluntary. A state or local government entity who does not insist on prohibited exactions will in turn not pay damages, interest, costs, or attorney fees for imposing such exactions.

A fiscal impact estimate has not been received from any affected party, and thus these comments are speculative.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 18, 2015, the Local Government Affairs Subcommittee adopted one amendment and reported the bill favorably as a committee substitute to CS/HB 383. The amendment:

- Replaces the defined term “unconstitutional exaction” with the term “prohibited exaction.”

⁴¹ *St. Johns River Water Management District v. Koontz*, Case no. SC14-1092.

- Defines the nature and extent of damages a court may award a successful claimant for the imposition of a prohibited exaction by a governmental entity.
- Adds the ability for plaintiffs to seek injunctive relief under s. 70.45, F.S.
- Requires claimants under s. 70.45, F.S., to provide pre-suit notice to the governmental entity to allow an opportunity to correct the prohibited exaction without need for further litigation.
- In a suit under s. 70.45, F.S., the governmental entity will be required to prove the exaction complies with the standards set by the U.S. Supreme Court.
- The property owner will be required to prove damages caused by the prohibited exaction.
- The property owner will be entitled to recover defined damages, prejudgment interest, costs, and reasonable attorney fees.
- Governmental entities will be allowed to recover attorney fees and costs for claims brought in bad faith.
- Sovereign immunity is waived to the extent of assessing damages under the new cause of action.
- Actions taken by counties to adopt FEMA flood maps for the purpose of participating in the National Flood Insurance Program are not subject to claims under the Act, with certain exceptions.

This analysis is drafted to the committee substitute as passed by the Local Government Affairs Subcommittee.