

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1383 Private Property Rights Protection

**SPONSOR(S):** Commerce Committee, Grant, J.

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 5 N	Jones	Poche
2) Commerce Committee	21 Y, 2 N, As CS	Smith	Hamon
3) Judiciary Committee			

### SUMMARY ANALYSIS

The Takings Clause of the U.S. Constitution prohibits the government from depriving a person of his or her private property for public use "without just compensation." However, not every government action restricting or burdening the use of private property is an illegal taking.

Florida law provides legal remedies when a local government enacts an ordinance or regulation that burdens property rights without amounting to a "taking":

- If a local government enacts a regulation inordinately burdening a private property right:
  - The property owner may notify the government of the burden;
  - The government must make a written offer to settle the claim; and
  - The property owner may:
    - Accept the settlement offer; or
    - Reject the offer, and file a lawsuit against the government for damages.
- If the local government unreasonably rejects a property owner's proposed use of his or her property, otherwise known as an "exaction," the property owner may sue the government after providing notice and allowing the government an opportunity to:
  - Explain why the exaction is lawful; or
  - Agree to remove the exaction.

The prevailing party can recover attorney fees and costs if certain conditions are met.

CS/HB 1383 requires a local government, when settling property rights claims, to treat similar properties in the same way. If the government reaches a settlement or the owner secures a judgement declaring an inordinate burden, there is a presumption that similarly situated parcels, evaluated on a parcel-by-parcel basis, are also inordinately burdened and entitled to equivalent settlement terms or a judicial determination of an inordinate burden. The bill also makes it easier for a private property owner to challenge a local government regulation burdening his or her property by:

- Allowing a jury to consider business damages in making its damages calculation.
- Removing a provision allowing the government to seek attorney fees and costs when a property owner unreasonably refuses a bona fide offer to settle a property claim.

With respect to a property owner's challenge to a government exaction, the bill clarifies that the property owner may sue as soon as the property owner is forced to comply with the government exaction or condition of approval, without having to wait for a formal, written statement of the exaction.

The bill requires the Florida Department of Transportation to afford a right of first refusal to the previous property owner before disposing of property in certain circumstances.

The bill does not appear to have a fiscal impact on state government, but appears to have an indeterminate negative impact on local governments.

The bill provides an effective date of July 1, 2019.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h1383c.COM

**DATE:** 4/5/2019

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Takings Clause

The U.S. Constitution prohibits the government from depriving a person of his or her private property for public use "without just compensation."<sup>1</sup> The Florida Constitution also places restrictions on the deprivation of property.<sup>2</sup> Not every government action restricting the use of private property, however, amounts to an illegal taking.

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

In 1995, the Florida Legislature enacted the Bert J. Harris, Jr., Private Property Rights Protection Act<sup>3</sup> (Act) to provide a new cause of action for private property owners whose real property has been inordinately burdened by a government action<sup>4</sup> not rising to the level of a constitutional taking.<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>

Before filing an action under this provision, a claimant must generally give 150 days' notice to the government entity, along with a valid appraisal demonstrating the loss in fair market value.<sup>7</sup> The government must notify all real property owners adjacent to the claimant's property of the pending claim. The government must make a written settlement offer to the claimant, which may include an offer to:

- Adjust land development or permit standards;
- Transfer developmental rights;
- Land swaps or exchanges;
- Mitigation;
- Conditioning the amount of development or use permitted;
- Issue a development order, variance, special exception, or other extraordinary relief;
- Purchase the property or an interest therein; or
- Other actions, including making no changes to the proposed government action.<sup>8</sup>

This encourages settlement of property rights claims and allows a government to settle individually with each property owner to avoid inordinate burdens on property rights.

If the property owner rejects the settlement offer, he or she may file an action in circuit court in the county where the real property is located.<sup>9</sup> The court must determine whether the government inordinately burdened the claimant's property, and if so, the percentage of responsibility borne by each government entity. A jury must determine damages and cannot consider any business damages relative to development, activity, or use the government has restricted or prohibited.<sup>10</sup>

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<sup>1</sup> U.S. Const. amend. 5.

<sup>2</sup> See art. I, ss. 2, 9, Fla. Const.

<sup>3</sup> Ch. 95-181, Laws of Fla.

<sup>4</sup> 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.

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

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

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

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

<sup>9</sup> S. 70.001(5)(b), F.S.

<sup>10</sup> S. 70.001(6), F.S.

The claimant is entitled to recover costs and attorney fees incurred from the time the action was filed if:

- The claimant prevails; and
- The court determines that the settlement offer did not constitute a bona fide offer which reasonably would have resolved the claim.

The government is entitled to recover costs and attorney fees if:

- The government prevails; and
- The court determines the claimant did not accept a bona fide settlement offer which reasonably would have resolved the claim fairly.<sup>11</sup>

A claim cannot be filed more than one year after the government applies a law or regulation to the property at issue. The one-year timeframe begins running when the law or regulation unequivocally impacts the property and notice is mailed to the property owner.<sup>12</sup> If the law or regulation does not unequivocally impact the property, or if notice is not mailed, the one-year period does not begin running until the government formally denies a request for development or variance.

### Private Property Rights and Unconstitutional Exactions

The doctrine of unconstitutional conditions prohibits the government from denying a benefit to a person because he or she exercises or vindicates a constitutional right.<sup>13</sup>

In 2013, in *Koontz v. St. Johns River Water Management District*,<sup>14</sup> the United States Supreme Court held that a government cannot deny a land-use permit based on the landowner's refusal to agree to the government's demands to relinquish property 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.<sup>15</sup> Extortionate demands for property in the land-use permitting context violate 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.<sup>16</sup>

The property owner in *Koontz* owned land consisting primarily of wetlands. He sought to develop a portion of his property and offered a 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 pay to make improvements to separate land owned by the district. The district offered to consider alternative approaches as well. The property owner sued the district 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 constitutes an unlawful taking.

The *Koontz* court found that while the district's conditions unconstitutionally burdened the landowner's Fifth Amendment rights, no constitutional taking had occurred. 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 where no actual taking has occurred.<sup>17</sup> 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

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<sup>11</sup> S. 70.001(6)(c), F.S.

<sup>12</sup> S. 70.001(11), F.S.

<sup>13</sup> *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594 (2013).

<sup>14</sup> *Id.* at 2586.

<sup>15</sup> *Id.* at 2595.

<sup>16</sup> *Id.* at 2596.

<sup>17</sup> *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.<sup>18</sup>

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.<sup>19</sup> 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 claim.<sup>20</sup>

### Remedy for Unlawful Government Exaction

In 2015, the Legislature enacted 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 any condition imposed by the government 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 impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate.

A property owner may bring an action to recover damages caused by a prohibited exaction in addition to any other remedies available in law or equity, if:

- The prohibited exaction is imposed or required, in writing, as a final condition for approval of the proposed land use; and
- At least 90 days before filing the action, but no later than 180 days after the exaction is imposed, the property owner gives the government written notice:
  - Identifying the exaction;
  - Explaining why it is unlawful; and
  - Estimating the damages.

Upon receiving written notice of the alleged claim, the governmental entity must review the notice and respond in writing by identifying the basis for the exaction and explaining why the exaction is proportionate to the harm created by the proposed use of real property, or by proposing to remove all or a portion of the exaction. The governmental entity's written response may only be used against it in subsequent litigation for assessing attorney fees and costs.

For a claim filed under s. 70.45, F.S., the governmental entity has the burden to prove 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. The property owner has the burden of proving damages that result from a prohibited exaction.

The prevailing party in an action under s. 70.45, F.S., may recover attorney fees and costs. If the court determines the exaction lacks an essential nexus to a legitimate public purpose, the court must award attorney fees and costs to the property owner.

### Conveyance of Property by Florida Department of Transportation

The Department of Transportation is authorized under s. 337.25, F.S., to purchase, lease, exchange, or otherwise acquire any land, property interests, buildings, or other improvements necessary to secure or use transportation right-of-way for existing, proposed, or anticipated transportation facilities on the State Highway System, on the State Park Road System, in a rail corridor, or in a transportation corridor designated by the department. If the department determines acquired property is no longer needed for

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2597-98.

the construction, operation, or maintenance of a transportation facility they may dispose of the property through negotiations, sealed competitive bids, auctions, or any other means the department deems to be in its best interest.<sup>21</sup> The department may afford a right of first refusal to the local government or other political subdivision in the jurisdiction the parcel is located, except when:<sup>22</sup>

- The property was donated to the state for transportation purposes and the facility has not been constructed for at least 5 years, plans have not been prepared, and the property is not located in a transportation corridor.
- The property was originally acquired specifically to provide replacement housing for persons displaced by transportation projects.
- At the discretion of the department, a sale to a person other than an abutting property owner would be inequitable.

### **Effect of Proposed Changes**

CS/HB 1383 amends the Bert J. Harris, Jr., Private Property Rights Protection Act to:

- Change the timeframe under which a claimant must notify the government before filing an action from 150 days to 90 days;
- Expand the type of relief a government may offer a claimant to include any extraordinary relief;
- Allow the claimant to have the court, rather than a jury, determine damages;
- Remove the prohibition that the factfinder cannot consider business damages in making a determination of the claimant's damages; and
- Change the process for attorney fees and costs by:
  - Allowing a claimant to recover attorney fees and costs incurred from the time he or she files notice with the government instead of from the time he or she files suit;
  - Allowing any prevailing claimant, regardless of the reasonableness of the settlement offer, to recover attorney fees and costs; and
  - Removing the provision allowing a government to recover attorney fees and costs.

The bill also provides that if the government does not provide a mailed notice to the property owner when a law or regulation affects the property, the property owner may file suit immediately upon passage of the law or regulation without having to proceed through the normal application process, if doing so would be futile and a waste of resources.

The bill provides that when a property owner submits a claim under the Act based on a regulation or ordinance applied to more than one residential parcel, and the property owner reaches a settlement or secures a judgement declaring an inordinate burden, that there is a presumption that similarly situated residential parcels have also been inordinately burdened and are entitled to equivalent terms of settlement or a judicial determination of an inordinate burden. This presumption is rebuttable only by clear and convincing evidence and similarly situated parcels are to be evaluated on a parcel-by-parcel basis. In such cases, the similarly situated residential property owner must submit the specified appraisal no less than 120 days before a trial on the merits of the damages portion of the proceedings. The governmental entity is encouraged, during the 90 day notice period of claims, to negotiate terms of settlement consistent with settlement agreements for similarly situated residential parcels. Under the bill, settlement offers are presumed to protect the public interest.

With respect to an action under s. 70.45, F.S., to challenge a government's exaction, the bill clarifies that the property owner may sue as soon as the property owner is forced to comply with the government exaction or condition of approval. This means the property owner no longer has to wait to sue until the exaction is imposed as a final condition of approval for the requested property use.

Relating to the conveyance of property by the Florida Department of Transportation, under s. 337.25, F.S., the bill provides that before the department explores the options of disposing of property no longer

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<sup>21</sup> S. 337.25(4), F.S.

<sup>22</sup> *Id.*

needed for construction, operation, or maintenance of a transportation facility, the department shall afford a right of first refusal to the previous property owner at the department's current estimate of value of the property, except when:

- The property was donated to the state for transportation purposes and the facility has not been constructed for at least 5 years, plans have not been prepared, and the property is not located in a transportation corridor.
- The property was originally acquired specifically to provide replacement housing for persons displaced by transportation projects.
- At the discretion of the department, a sale to a person other than an abutting property owner would be inequitable.

The bill provides an effective date of July 1, 2019.

**B. SECTION DIRECTORY:**

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

**Section 2:** Amends s. 70.45, F.S., relating to governmental exactions.

**Section 3:** Amends s. 337.25, F.S., relating to acquisition, lease, and disposal of real and personal property.

**Section 4:** Provides an effective date of July 1, 2019.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate negative fiscal impact on local governments by:

- Making it easier for a private property owner to challenge a local government regulation that burdens the property.
- Requiring a local government, when it makes a settlement offer to a property owner, to treat all other similarly-situated residential properties within the political subdivision similarly.
- Allowing a jury to consider business damages in making its calculation to determine a property owner's damages.
- Removing the right of a government to seek attorney fees and costs when a property owner unreasonably refuses a bona fide offer to settle a property claim.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill streamlines and simplifies the process for a private property owner to sue the government for enacting a regulation that burdens private property rights. The bill also allows the jury, in an action for damages, to consider business damages. These provisions may have an indeterminate positive impact on the private sector.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On April 4, 2019 the Commerce Committee considered a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute removed a provision relating to similarly situated residential parcels and inserted:

- That when a governmental entity reaches a settlement, or a property owner secures a judgement declaring an inordinate burden, there shall be a presumption, rebuttable only by clear and convincing evidence, that similarly situated residential parcels, evaluated on a parcel-by-parcel basis, have been inordinately burdened and are entitled to equivalent terms or settlement or a judicial determination of an inordinate burden.
  - The similarly situated residential property owner must submit the specified appraisal not less than 120 days before a trial on the merits of the damages portion of the proceedings.
  - During the 90-day-notice period of such claims, the governmental entity is encouraged to negotiate terms of settlement agreements for similarly situated residential parcels.

In addition, the committee substitute established that before the Florida Department of Transportation explores the options of disposing of property in certain circumstances, the department shall afford a right of first refusal to the previous property owner at the department's current estimate of value of the property.