

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 Community Affairs

BILL: SB 1694

INTRODUCER: Senator Flores

SUBJECT: Takings Claims Within Areas of Critical State Concern

DATE: March 28, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Toman</u>	<u>Yeatman</u>	<u>CA</u>	Favorable
3.	_____	_____	<u>AP</u>	_____

I. Summary:

SB 1694 provides that the state and the local government located in an area of critical state concern must share equally in judgments if they both are defendants in property rights-related litigation and if:

- The court has found liability against both the state and local government;
- The regulation restricting development or use, which was the basis of the judgment, was mandated or approved by the state land planning agency or the Administration Commission; or
- The regulation adopted by the local government restricting development or use, which was the basis of the judgment, was necessary to comply with the guiding principles for the area or other obligations for the area.

II. Present Situation:

The adoption of development regulations can impose significant burdens on a property owner's rights. These regulations can be especially significant in areas designated as areas of critical state concern.

Areas of Critical State Concern

Areas of critical state concern are designated by the Administration Commission, which is composed of the Governor and Cabinet, following a process set forth in statute.¹ Areas that qualify for designation include only:

An area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance, including, but not limited to, state

¹ Section 380.05, F.S.

or federal parks, forests, wildlife refuges, wilderness areas, aquatic preserves, major rivers and estuaries, state environmentally endangered lands, Outstanding Florida Waters, and aquifer recharge areas, the uncontrolled private or public development of which would cause substantial deterioration of such resources.²

Once designated, the area's land planning regulations must comply with the principles guiding development specified by the Administration Commission which must be approved by the Department of Economic Opportunity.³

Several areas have been designated as an area of critical state concern or have had their designations ratified by statute. These areas include the Big Cypress Area,⁴ the Green Swamp Area,⁵ the Apalachicola Bay Area,⁶ and the Florida Keys Area.⁷

With respect to the Florida Keys Area, land planning regulations that are subject to approval by the state must be consistent with the principles of protecting many different natural resources and making affordable housing available.⁸ Additionally, these regulations must be consistent with "maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours."⁹

A specific regulation that may form the basis of property rights-related litigation in the Florida Keys Area is the Monroe County Rate of Growth Ordinance.¹⁰ Under this ordinance, Monroe County permits for new residential development are subject to an annual cap of 197 units plus unused allocations from previous years. Additionally, at least 71 but not more than 126 of the 197 permits must be allocated to affordable housing.

According to representatives from Monroe County, the total number of development permits that may be issued in the future is also capped in order to allow for sufficient hurricane evacuation clearance time. As a result, the number of undeveloped lots for which owners may seek development permits exceeds the total number of permits that will ultimately be available. This is expected to provide the impetus for additional property-rights related litigation when the available permits are exhausted in 2023.

Informal Agreement for Shared Defense and Liability with the State

Because the state and the local government in an area designated as an area of critical state concern are involved in the applicable land planning regulations, both the state and the area can be defendants in property-rights based litigation or litigation involving inverse condemnation or takings claims.

² Section 380.05(2), F.S.

³ Section 380.05(6), F.S.

⁴ Section 380.055, F.S.

⁵ Section 380.0551, F.S.

⁶ Section 380.0555, F.S.

⁷ Section 380.0552, F.S.

⁸ Section 380.0552(1)(d), F.S.

⁹ Section 380.0552(9)(a)2., F.S.

¹⁰ Rule 28-20.140(2), F.A.C.

With respect to Monroe County and the Florida Keys Area, the state and Monroe County have been operating under an informal agreement for 14 years to defend against property-rights related litigation and share equally in judgments awarded against them.¹¹ Judgments in property-rights related litigation arising out of the state-approved Monroe County land development regulations are starting to be entered. And in a judgment provided as an example by Monroe County, the judgment was entered against the county and the state, jointly and severally.^{12,13}

Eminent Domain and Inverse Condemnation

In an eminent domain action the government, as the plaintiff, asserts its power to take private property for a public use. In compliance with the United States Constitution, the government must compensate the land owner for the loss.¹⁴ The Florida Constitution similarly states that no private property may be taken except for a public purpose and each owner must be fully compensated.¹⁵ In an inverse condemnation action, however, the government has “taken” private property without the owner’s consent, either through its activities or conduct, and without adequate compensation. Because the government has not adequately compensated the property owner, the property owner is the plaintiff who sues to recover the value of property that has been taken.¹⁶

There are several forms of takings, one being by regulatory action. In those instances, the trial judge is the trier of all legal and factual issues, except for the issue of what constitutes just compensation for damages.¹⁷ Damages are determined by a jury. For a landowner to be fully compensated, prejudgment interest reaching back to the date of the taking must be permitted.¹⁸ Attorney fees and costs are also recoverable at the trial level and on appeal.¹⁹

Relief from Burdens on Real Property Rights, Chapter 70, F.S.

The Legislature enacted the “Bert J. Harris, Jr., Private Property Rights Act” in 1995. The Legislature recognized that some laws, regulations, and ordinances of the state and its entities could inordinately burden, restrict, or limit private property rights without amounting to a taking

¹¹ Correspondence from Jonathan A. Glogau explaining the Monroe County land development regulations and the informal agreement with the state dated March 6, 2019 (On file with the Committee on Judiciary).

¹² *Thomas and Collins v. Monroe County*, Case No. 04-CA-379-M (Fla. 16th Cir. Ct. Feb. 15, 2017)

¹³ The Legislature acknowledged in s.7, ch. 2006-223, Laws of Fla., that the state may have some liability for inverse condemnation actions in the Florida Keys Area due to the state’s role in adopting land use regulations for the area as follows:

If the designation of the Florida Keys Area as an area of critical state concern is removed, the state shall be liable in any inverse condemnation action initiated as a result of Monroe County land use regulations applicable to the Florida Keys Area as described in chapter 28-29, Florida Administrative Code, and adopted pursuant to instructions from the Administration Commission or pursuant to administrative rule of the Administration Commission, to the same extent that the state was liable on the date the Administration Commission determined that substantial progress had been made toward accomplishing the tasks of the work program as defined in s. 380.0552(4)(c), Florida Statutes.

¹⁴ The Fifth Amendment to the United States Constitution provides “. . . nor shall private property be taken for public use without just compensation.”

¹⁵ FLA. CONST. art. X, s. 6.

¹⁶ 21 FLA. JUR 2d Eminent Domain, s. 227.

¹⁷ *Id.*, at s. 240.

¹⁸ 21 FLA. JUR 2d Eminent Domain at s. 241.

¹⁹ *Id.*, at s. 242.

under either the State Constitution or the United States Constitution.²⁰ The act provides a process whereby private landowners may seek relief and recover damages when their property is inordinately burdened by the actions of a government.²¹

III. Effect of Proposed Changes:

The bill provides that the state and the local government located in an area of critical state concern must share equally in any award of compensation, costs, attorney fees, and prejudgment interest if:

- The court has determined that both the state and the local government are liable;
- The regulation that restricts development or use of the property was mandated or approved by the state land planning agency or the Administration Commission; or
- The regulation that restricts development or use of the property adopted by the local government was necessary for the local government to comply with the principles for guiding development established for the area or other obligations of the area under the area of critical state concern designation.

These proceedings must be brought pursuant to the Bert J. Harris, Jr. Private Property Rights Protection Act of ch. 70, F.S., a claim for inverse condemnation, or any other property-rights related action when the state is named as a codefendant or a third-party defendant by a local government in an area of critical state concern. A third-party defendant is “brought into a lawsuit by the original defendant”²² who alleges that the third-party defendant is at fault, or at least partially at fault, for the actions giving rise to the plaintiff’s lawsuit.

The court must enter separate judgments for the apportioned amount against the state and local government, notwithstanding other provisions of law.²³

A governmental entity named as a judgment debtor²⁴ is only liable for postjudgment interest²⁵ on the judgment entered against it. The governmental entity is not liable for postjudgment interest on the judgment entered against the other governmental entity. However, the bill does not prohibit a court from awarding a separate judgment for attorney fees and costs made under these provisions.

The bill takes effect July 1, 2019.

²⁰ Section 70.001, F.S.

²¹ Amber L. Ketterer and Rafael E. Suarez-Rivas, *The Bert J. Harris, Jr., Private Property Rights Protection Act: An Overview, Recent Developments, and What the Future May Hold*, THE FLORIDA BAR JOURNAL, (Sept./Oct. 2015), <https://www.floridabar.org/the-florida-bar-journal/the-bert-j-harris-jr-private-property-rights-protection-act-an-overview-recent-developments-and-what-the-future-may-hold/>.

²² BLACK’S LAW DICTIONARY (10th ed. 2014).

²³ The bill cites specifically to s. 11.066, F.S., and s. 7, chapter 2006-223. Section 11.066, F.S., provides that the presumption that the state, when exercising its inherent police power, is presumed to be acting to prevent a public harm, but that presumption may be rebutted in a suit seeking monetary damages from the state or a state agency only by clear and convincing evidence to the contrary. Section 7, chapter 2006-223 is discussed above in footnote 13.

²⁴ A judgment debtor is someone “against whom a money judgment has been entered but not yet satisfied.” BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁵ Postjudgment interest is the amount of interest that a creditor is allowed to collect from a debtor after a judgment is rendered until the date it is paid by the debtor. TheLaw.com Dictionary <https://dictionary.thelaw.com/postjudgment-interest/>.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

No agency analyses have been provided that estimate the fiscal impact of this bill. However, the bill will provide the affected state and local governments with some certainty on their liability in property-rights related litigation in areas of critical state concern.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 380.0501 of the Florida Statutes.

IX. Additional Information:

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

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
