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: CS/SB 1766

INTRODUCER: Judiciary Committee and Senators Lee and Perry

SUBJECT: Growth Management

DATE: February 11, 2020 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	**Fav/CS**
2.	Paglialonga	Ryon	CA	**Favorable**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1766 makes several changes to the Bert J. Harris, Jr., Private Property Rights Protection Act, which will facilitate the ability of property owners to obtain compensation or other relief from a governmental entity when their property is inordinately burdened by a law, rule, ordinance, or regulation.

These changes to the Bert Harris Act:
- Shorten the presuit process that is a prerequisite to a lawsuit under the Bert Harris Act from 150 to 90 days.
- Establish a presumption that a settlement offer made by a governmental entity during the presuit process protects the public interest.
- Give a property owner the option of having compensation for an inordinate burden determined by a judge instead of a jury as under current law.
- Allow a property owner to forego an application for a permit or other relief as a prerequisite to making a Bert Harris claim if a governmental entity acknowledges that a law or regulation limits the uses of the property.

The bill also clarifies the time in which a property owner must provide notice to a governmental entity that it has imposed a prohibited exaction, which is an improper condition on the proposed uses of a property. Finally, the bill requires the Department of Transportation, when disposing of surplus real property, to give the prior owner of the property the right of first refusal to purchase the property.

II. Present Situation:

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

The Bert Harris Act provides a cause of action for relief or compensation when a law, rule, regulation, or ordinance inordinately burdens real property without amounting to a taking.[1] An action of a governmental entity is an inordinate burden if it directly restricts or limits the use of real property in a way that permanently prevents the owner from attaining the reasonable, investment-backed expectation for the existing use of the property or to a specific use of the property.[2] A government act may also constitute an inordinate burden on a property if it causes a property owner to permanently bear "a disproportionate burden imposed for the good of the public, which in fairness should be borne by the public at large."[3]

Presuit Process

"The Act was designed to promote settlement, and a claim under the Act requires a presuit procedure."[4] Under the presuit procedure, a property owner seeking compensation must present a written claim to the governmental entity before filing a lawsuit.[5] For nonagricultural properties, the claim must be presented at least 150 days[6] before filing a lawsuit, and for agricultural properties, the minimum notice period is 90 days. Along with the claim, the property owner must submit a "bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property."[7]

Mandatory Settlement Offer

During the notice period, which may be extended by the parties, the governmental entity must make a written settlement offer to effectuate:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of developmental rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief.

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[1] Section 70.001(1), F.S.
[2] Section 70.001(1)(e), F.S.
[3] *Id.*
[4] *Charlotte County Park of Commerce, LLC v. Charlotte County*, 927 So. 2d 236, 237 (Fla. 2d. DCA 2006).
[5] Section 70.001(4)(a), F.S.
[6] The 150-day notice period was reduced from 180 days beginning on July 1, 2011. Chapter 2011-191, Laws of Fla.
[7] Section 70.001(4)(a), F.S.

10. Purchase of the real property, or interest therein, by an appropriate governmental entity or payment of compensation.
11. No changes to the action of the governmental entity.[8]

Public-Interest Protection

If a settlement agreement results from the governmental entity's settlement offer, the settlement agreement may be implemented by any appropriate method. However, if the settlement agreement has the effect of a modification, variance, or special exception to an otherwise applicable rule, regulation, or ordinance, the agreement must protect the public interest served by the regulations at issue and provide appropriate relief to the property owner.[9]

If the settlement agreement effectively contravenes the application of a statute that would otherwise apply to a property, the parties must jointly file an action in the circuit court for approval of the agreement.[10] The court must "ensure that the relief granted protects the public interest served by the statute at issue and is appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."[11]

Implicit Public Participation Requirement

The Bert Harris Act does not expressly require or authorize public participation in the resolution of Bert Harris claims. However, the 2016 appellate court opinion in *Rainbow River Conservation, Inc., v. Rainbow River Ranch, LLC,* found that public participation is necessary for the protection of the public interest, at least in some cases.[12] The *Rainbow River* litigation stemmed from a comprehensive plan amendment by the City of Dunnellon which imposed additional restrictions on the future use of property along the Rainbow River.

At the trial-court level, nonparties intervened in the proceedings to oppose the proposed settlement agreement submitted to the court for approval.[13] The intervenors argued that the settlement did not protect the public interests served by a statute and that the settlement provided far more relief to the property owners than necessary. The intervenors also sought an evidentiary hearing to resolve factual issues that were material to the court's decision on the agreement.

The intervenors' request for an evidentiary hearing was unnecessary, according to the property owners, because the court was required to accept the stipulation of the settling parties.[14] The property owners seemed to further argue that the public interest was satisfied by the fact that the other parties, the City of Dunnellon and the Department of Economic Opportunity, agreed to the settlement.

When reversing the trial court's ruling, the appellate court in *Rainbow River*, stated that the Bert Harris Act grants courts "broad power to 'enter any orders necessary to effectuate the purposes'"

[8] Section 70.001(4)(c), F.S.
[9] Section 70.001(4)(d)1., F.S.
[10] Section 70.001(4)(d)2., F.S.
[11] *Id.*
[12] *Rainbow River Conservation, Inc., v. Rainbow River Ranch, LLC*, 189 So. 3d 312 (Fla. 5th DCA 2016).
[13] *Id.* at 314.
[14] *Id.*

of the Act.[15] Expanding on this concept, the court explained that when approving a settlement that contravenes a statute, courts must provide some mechanism for "robust public input" to ensure the protection of the public interests.[16] These mechanisms could include a requirement that a city conducts public hearings and consider the comments from those proceedings, and at least in the *Rainbow River* proceeding, likely requires a trial court to grant an evidentiary hearing to intervenors.

Statements of Allowable Uses

If the presuit process does not result in the settlement of a Bert Harris claim, the government entities involved must provide the property owner with a written statement of allowable uses for the property.[17] Once issued or once the time for the issuance of the statement expires, the property owner may file a claim for compensation in the circuit court.

Trial—Roles of Judges and Juries

At trial, the judge must determine whether an existing use of the real property or a vested right to a specific use of the property existed and whether a governmental entity has inordinately burdened the property, considering any settlement offer or statement of allowable uses.[18] A jury, however, determines the compensation due for a loss in value due to an inordinate burden.[19]

Ripeness—As Applied Challenges

Claims under the Bert Harris Act are limited to "as applied challenges," meaning that some action of the government beyond the mere enactment of new regulation must apply to a parcel of real property.[20] The action of a governmental entity required to ripen a claim typically involves the formal denial of a written request for development or variance. Several appellate court opinions, which are discussed below, show how the as applied requirement works in practice.

The 2008 appellate court opinion in *M & H Profit, Inc., v. City of Panama City* explained that the city's conduct was insufficient action to enable the developer, M & H, to bring an as applied challenge to a new ordinance.[21] The facts of the case involved the developer's purchase of a property that had no height or setback restrictions and on which the developer intended to build a 20-story residential condominium. About 6 weeks after the purchase, however, the city adopted an ordinance imposing a 120 ft. height restriction and additional setback requirements.

A few months after the ordinance was adopted, the developer met with the city planning manager for pre-application informal discussions about its development plans. Shortly after the discussions, the city planning manager stated by letter that it was clear that the proposed

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[15] *Id.* at 314. The source of the broad powers of the court under the Bert Harris Act is this statement in s. 70.001(7)(a), F.S.: "The circuit court may enter any orders necessary to effectuate the purposes of this section and to make final determinations to effectuate relief available under this section."
[16] *Id.* at 315.
[17] Section 70.001(5), F.S.
[18] Section 70.001(6)(a), F.S.
[19] Section 70.001(6)(b), F.S.
[20] *M & H Profit, Inc., v. City of Panama City,* 28 So. 3d 71 (Fla. 1st DCA 2009).
[21] *Id.*

condominium would not meet the height and setback requirements.[22] The majority of the appellate court held that the adoption of the ordinance and the city planning manager's letter were insufficient actions to permit an as applied challenge under the Bert Harris Act.[23, 24]

The 2018 appellate court decision in *GSK Hollywood Development Group, LLC, v. City of Hollywood*[25] has some similarities to the *M & H* decision on the issue of ripeness and as applied challenges. In *GSK*, a developer contacted the director of planning and zoning for the City of Hollywood before purchasing property to confirm the zoning regulations on the property. The director orally confirmed that the zoning was consistent with the developer's plan to build a 15-story condominium. The developer then purchased the property in 2002.

In 2004, the developer began discussing its conceptual development plans with city leaders. Shortly afterward, residents of a nearby condominium association voiced their opposition to the proposed condominium to the mayor.[26] The mayor, in emails, affirmed her support for the residents of the nearby condominium. Ultimately, the mayor was successful in having the city commission reduce the maximum heights of new buildings to 65 ft.

In response to the new height restrictions, the developer filed a lawsuit against the city under the Bert Harris Act.[27] The city argued that the developer's failure to submit an application to develop the property precluded its claim for compensation. The appellate court agreed, concluding that the developer's claim for compensation was not ripe because it did not seek a permit, variance, or other formal relief before filing its Bert Harris claim.[28] However, the court advised that "[i]f the Legislature intended to allow a claim in such a circumstance, it is for the Legislature to do so."[29]

In another 2018 appellate court opinion on the issue of ripeness, *Golfrock v. Lee County*, Golfrock, a property owner, asked a court to enter a declaratory judgment that its Bert Harris claim was ripe because any further pursuit of its zoning request was futile as a matter of law.[30] Golfrock alleged that it would have been prohibitively expensive to pursue the zoning application further and that the denial of the application was "fait accompli," or inevitable.[31]

The court explained that the "final decision requirement [in the context of regulatory takings claims] 'responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer.'"[32] Moreover, the court indicated that economic losses in these types of cases "cannot be resolved in definitive terms

[22] *Id.* at 73.
[23] *Id.* at 78.
[24] Justice Thomas in his dissenting opinion stated that he "would hold that the City's enactment of the ordinance, and the informal conceptual denial of the building plan, can form the basis of a cause of action under the Bert Harris Act." *Id.*
[25] *GSK Hollywood Development Group, LLC, v. City of Hollywood*, 246 So. 3d 501 (Fla. 4th DCA 2018).
[26] *Id.* at 503.
[27] *Id.*
[28] *Id.* at 506.
[29] *Id.*
[30] *Golfrock v. Lee County*, 247 So. 3d (Fla. 2d DCA 2018).
[31] *Id.* at 39.
[32] *Id.* (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001)).

until a court knows 'the extent of permitted development' on the land in question."[33] The futility exception to the final decision requirement, according to the court, applies only once it is clear that the permitting agency lacks any discretion.[34] The court ultimately dismissed Golfrock's complaint for declaratory relief because it did not state a cause of action.[35]

Governmental Exactions

In 2015, the Legislature enacted s. 70.45, F.S., which created an action for injunctive relief and damages caused by a prohibited exaction. A prohibited exaction is a "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 impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate."[36]

The statute was a response to the U.S. Supreme Court's decision in *Koontz v. St. Johns River Water Management District,*[37] "to address uncertainty over whether Florida provides a cause of action for monetary damages for unconstitutional exactions."[38] In *Koontz*, the water management district denied a property owner's application for the permits to develop his land because he refused to agree to the district's conditions. The conditions required the property owner to:

- Limit development on his 14.9 acre parcel to 1 acre and deed the district a conservation easement on the remaining 13.9 acres and add other costly improvements, or
- Develop 3.7 acres as planned and deed a conservation easement to the government on the remaining property and hire a contractor to improve district-owned land miles away.

The U.S. Supreme Court held that a governmental entity may not deny a land-use permit for failing to agree to the entity's conditions unless there is an essential nexus and rough proportionality between the conditions and the proposed land use.

The *Koontz* Court further stated that the availability of monetary damages for an excessive demand when no taking has occurred is determined by the statutory cause of action on which the property owner relies, not on federal constitutional law.[39]

When a property owner seeks damages under s. 70.45, F.S., for a prohibited exaction, the owner must comply with presuit procedures.[40] These procedures require the owner to submit a written notice to the relevant governmental entity of the intent to seek damages for a prohibited exaction. This notice must also identify the prohibited exaction, briefly explain why the owner believes the exaction is prohibited, and provide an estimate of the damages. The property owner must provide the notice to the relevant governmental entity within a short window:

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[33] *Id.* (quoting *Palazzolo* at 618).
[34] *Id.*
[35] *Id.* at 38.
[36] Section 70.45(1)(c), F.S.
[37] *Koontz. v. St. Johns River Water Management District*, 570 U.S. 595 (2013).
[38] Margaret L. Cooper, Ronald L. Weaver, Jonne M. Connor, The Florida Bar, *Statutory Property Rights Protection,* RPL FL CLE 13-1 (9th ed. 2018).
[39] *Id.* at 609.
[40] Section 70.45(3), F.S.

> At least 90 days before filing an action under this section, but no later than 180 days after imposition of the prohibited exaction.[41]

The statute, however, does not further explain how to identify the point in time at which the exaction is imposed.

At trial, "the governmental entity has the burden of proving 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."[42] The property owner must prove its damages. Damages from a prohibited exaction are the reduction in the fair market value of the real property or the amount of the fee or infrastructure costs that exceed what is permissible.[43]

Acquisition and Disposition of Surplus Property

The Department of Transportation is authorized to dispose of property it has held for longer than 10 years if the property is not needed for the construction, operation, and maintenance of a transportation facility or is not located within a transportation corridor.[44] If the department decides to dispose of property, it may be disposed of through negotiations, sealed competitive bids, auctions, or any other means the department deems to be in its best interest. However, the property may not be sold for less than the department's estimated value.

The statute authorizing the department to dispose of surplus property, further places some individuals higher in priority to receive or to be offered the property for purchase.[45] For example, the statute places a higher priority on returning a donated property to the original donor or the donor's heirs than on offering the property to a local government in which the property is located.

Chapter 73, F.S., relating to eminent domain, also provides limitations on how property taken by eminent domain may be transferred or sold. Under s. 73.013(1)(f), F.S., for example, property taken by eminent domain and held less than 10 years must be offered to the prior owner for the amount the condemning authority paid for it before it can be offered to others.

III. Effect of Proposed Changes:

Bert Harris Act Revisions

This bill makes several changes to the Bert Harris Act which will facilitate the recovery of compensation or other relief resulting from laws, rules, regulations, and ordinances that are an inordinate burden on real property.

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[41] *Id.*
[42] Section 70.45(4), F.S.
[43] Section 70.45(1)(a), F.S.
[44] Section 337.25(3) and (4).
[45] Section 337.25(4), F.S.

Presuit Notice Period

The Bert Harris Act requires a property owner to provide notice of the intent to seek compensation under the Act to the relevant governmental entity at least 150 days before filing a lawsuit if the property is nonagricultural. For agricultural properties, the presuit notice period is 90 days.

The bill sets 90 days as the presuit period for all properties, whether agricultural or nonagricultural.

Settlement Offers in the Public Interest

The Bert Harris Act requires a governmental entity receiving a claim to make a written settlement offer to the claimant to resolve the claim before a lawsuit is filed. The Act further requires that any settlement agreement both protect the public interests served by the underlying rules, regulations, or statutes and provide appropriate relief to the property owner from inordinate burdens.

The bill creates a presumption that settlement offers made by a governmental entity to resolve a Bert Harris claim protect the public interest. This change appears likely to limit the ability of nonparties to intervene or participate in the resolution of Bert Harris claims except in compelling circumstances.

Compensation Calculations

Currently, under the Bert Harris Act, a judge determines whether an action of a governmental entity is an inordinate burden on the existing use of real property or a vested right to a specific use of the property. A jury determines compensation for the loss in value due to the inordinate burden.

The bill gives a claimant the option of having compensation determined by the judge.

Ripeness of Claims

The Bert Harris Act, according to case law, provides relief to property owners after a government action has been applied to and has inordinately burdened a property. To initiate an applied challenge, a property owner typically must apply for and be denied a permit, variance, or other relief by a governmental entity.

The bill requires governmental entities, within 45 days after receipt of notice from a property owner, to explain in writing whether a particular law or regulation applies to the owner's property and to describe further the limitations imposed on the property by the law or regulation. If the governmental entity acknowledges that the law or regulation applies to the property and imposes new limitations on the uses of the property, an application for a development order, development permit, or building permit is deemed a waste of resources and unnecessary to bring a claim for compensation. However, a property owner has only 1 year after the receipt of the explanation from the governmental entity to pursue a Bert Harris claim.

Prohibited Exactions

Existing s. 70.45, F.S., allows a property owner to seek injunctive relief and damages when a governmental entity imposes a prohibited exaction on the owner's property. However, there is a small window of time during which the property owner must submit a notice of intent to seek relief from the exaction. This notice must be submitted "[a]t least 90 days before filing an action [for relief], but no later than 180 days after imposition of the prohibited exaction."

The bill defines the time of imposition of the exaction as the "time at which the property owner must comply with the prohibited exaction or condition of approval." This change appears likely to add some clarity as to when the time to submit a notice of intent ends.

Prospective Application of Changes to Chapter 70, F.S.

The bill provides that the changes relating to the Bert Harris Act and s. 70.45, F.S., relating to prohibited exactions, apply to claims from government actions occurring on or after July 1, 2020, the effective date of the bill.

Right of First Refusal for Surplus Property

The bill requires the Department of Transportation to offer surplus real property to its prior owner for the property's estimated value before offering the property to others. The prior owner must have at least 15 days to exercise this right of first refusal. After accepting the offer, the prior owner must be given at least 60 days to close on the property. Additionally, if the department intends to offer the property at better terms to others than the terms in the first offer to the prior owner, the property must be reoffered to the prior owner under the new terms.

This concept of giving a prior owner the right of first refusal to purchase property is somewhat similar to that required under s. 73.013, F.S., for property acquired by eminent domain and held for less than 10 years.

Effective Date

The bill takes effect on July 1, 2020.

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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill will facilitate compensation or other relief to the owner of real property that is inordinately burdened by a law, rule, regulation, or ordinance. Moreover, property owners may be able to avoid the expenses of applying for a permit or other relief that is almost certain to be denied.

C. Government Sector Impact:

Local governments will likely exercise caution when imposing new rules, regulations, and ordinances that affect real property. Local governments must also work more quickly to resolve Bert Harris claims during the shortened presuit process. By obviating the need for the denial or other relief as a prerequisite to a Bert Harris claim, more claims will likely be submitted. These claims will need to be resolved by local governments and other state permitting authorities.

VI. Technical Deficiencies:

To effectuate the removal of the 150-day-notice period, the bill should also strike the references to 150 days on lines 196, 208, and 209.

VII. Related Issues:

It is unclear what kind of governmental entity settlement offers are presumed to protect the public interest. The Legislature may wish to clarify which settlement offers are presumed to protect the public interest and whether the involvement of a circuit court is needed before the presumption applies.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 70.001, 70.45, and 337.25.

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 Judiciary on February 4, 2020:
The committee substitute does not include the provisions of the original bill which would have entitled property owners to compensation or other relief when an owner of a similarly situated residential property becomes entitled to relief due to the same regulation or ordinance.

B. Amendments:

None.

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