

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 410

INTRODUCER: Senator Perry

SUBJECT: Growth Management

DATE: January 23, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 410 amends s. 163.3177(6), F.S., adding a required property rights element to local comprehensive plans. The added element requires local governments to consider certain private property rights while making governmental decisions. The bill provides a model statement of private property rights, which consist of specific property rights recognized under common law and may be added directly to a comprehensive plan. Alternatively, the bill also allows local governments to create unique property rights provisions for a comprehensive plan, as long as the provisions do not conflict with the bill’s model language. The bill requires local governments to adopt a property rights element in their comprehensive plan by the earlier of its next proposed plan amendment or July 1, 2023.

II. Present Situation:

Private Property Rights and Constitutional Protections

Under Article I, section 2 of the Florida Constitution’s Declaration of Rights, individuals are provided the right “*to acquire, possess, and protect property.*”¹ Although these property rights are enshrined in Florida’s constitution, the state and local governments may curtail these rights through sovereign police powers. State police powers are derived from the Tenth Amendment to the U.S. Constitution, which affords states all rights and powers “not delegated to the United States.”² Under this provision, states have police powers to establish and enforce laws protecting the welfare, safety, and health of the public.³ Regarding private property rights, courts have

¹ FLA. CONST. art. I s. 2

² U.S. CONST. amend. X

³ “The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the

continuously held that “even constitutionally protected property rights are not absolute, and are held subject to the fair exercise of the [police] power inherent in the State to promote the general welfare of the people through regulations that are necessary to secure the health, safety, good order, and general welfare.”⁴

When a state or political subdivision thereof exercises police powers to affect property rights, citizens are provided two constitutional challenges to oppose the governmental act. First, government may act arbitrarily in violation of due process.⁵ In *City of Coral Gables v. Wood*, the court ruled that “[a] zoning ordinance will be upheld unless it is clearly shown that it has no foundation in reason and is a mere arbitrary exercise of power without reference to public health, morals, safety or welfare.”⁶ In the first constitutional challenge, government action is simply invalid under the due process clause of the constitution.⁷

Second, government may so intrusively regulate the use of property in pursuit of legitimate police power objectives to take the property without compensation, in violation of the just compensation clause (takings clause).⁸ When reasoning whether a regulation or land use plan constitutes a taking of a landowner's property, the operative inquiry is whether the landowner has been deprived of all or substantially all economic, beneficial or productive use of the property.⁹ In the second constitutional challenge, the government action is invalid absent compensation, and so the government may either abandon its regulation or validate its action by payment of appropriate compensation to the landowner.¹⁰

Since the establishment of these constitutional protections for citizens, the scale of government and land use regulation has considerably expanded, but courts have been reluctant to afford relief to property owners under these constitutional challenges.¹¹ Thus, property owners that experienced property devaluation or economic loss caused by government regulation were seldom compensated.¹²

In 1995, the Legislature addressed the ineffectiveness of these constitutional challenges to government regulation by enacting Chapter 70, F.S., which is known as the “Bert J. Harris, Jr., Private Property Rights Protection Act” (hereinafter the “Harris Act”).¹³

Federal Government, as the police power.” See *NFIB v. Sebelius*, 567 U.S. 519, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) at 535-536.

⁴ *Shrines Hospitals for Crippled Children v. Zrillic*, 563 So.2d 64 at 68 (Fla. 1990) (quoting *Golden v. McCarthy*, 337 So.2d 388, 390 (Fla. 1976))

⁵ See U.S. CONST. amend. V, XIV, s. 1; FLA. CONST. art. I s. 9; see also *Fox v. Town of Bay Harbor Islands*, 450 So.2d 559, 560 (Fla. 3rd DCA 1984)

⁶ *City of Coral Gables v. Wood*, 305 So.2d 261, 263 (Fla. 3rd DCA 1974)

⁷ See *Department of Transp. v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993)

⁸ See FLA. CONST. X s. 6

⁹ See *Taylor v. Villiage of North Pam Beach*, 659 So.2d 1167 (Fla. 4th DCA 1995)

¹⁰ See *Department of Transp. v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993)

¹¹ See *Cooper, Weaver, and Connor, Florida Real Estate Litigation, Statutory Private Property Rights Protection*, RPL FL-CLE 13-1 (2018).

¹² *Id.*

¹³ *Id.*

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

The Harris Act¹⁴ entitles private property owners to relief when a specific action of a governmental entity inordinately burdens the owner's existing use of the real property or a vested right to a specific use of the real property.¹⁵ The Harris Act recognizes that the inordinate burden, restriction, or limitation on private property rights as applied may fall short of a taking or due process violation under the State Constitution or the U.S. Constitution.¹⁶ The law does not apply to the U.S. government, federal agencies, or state or local government entities exercising formally delegated U.S. or federal agency powers.¹⁷

In addition to action that inordinately burdens a property right, an owner may seek relief when a government entity's development order or enforcement action is unreasonable or unfairly burdens the use of the owner's real property,¹⁸ or when a government entity imposes a condition on the proposed use of the real property that amounts to a prohibited exaction.¹⁹ A prohibited exaction occurs when an imposed condition 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.²⁰

The Community Planning Act

The Harris Act is balanced against the state's sovereign rights. The state needs to effectively and efficiently plan, coordinate, and deliver government services amid the state's continued growth and development.²¹ Statutes govern how the state and local governments direct land development²² with the State Comprehensive Plan and local comprehensive plans adopted by counties and municipalities as required by statute.²³

The State Comprehensive Plan must provide long-range policy guidance for the orderly social, economic, and physical growth of the state.²⁴ The goals and policies of the State Comprehensive Plan must be consistent with the protection of private property rights.²⁵ The State Comprehensive Plan must be reviewed every two years by the Legislature, and legislative action is required to implement its policies unless specifically authorized otherwise in the Constitution or law.²⁶

Adopted in 1985, the Local Government Comprehensive Planning and Land Development Regulation Act, also known as Florida's Growth Management Act, was significantly revised in

¹⁴ Section 70.001(1), F.S.

¹⁵ Section 70.001(2), F.S.

¹⁶ Section 70.001(1), F.S.

¹⁷ Section 70.001(3)(c), F.S.

¹⁸ Section 70.51(3), F.S.

¹⁹ Section 70.45(2), F.S.

²⁰ Section 70.45(1)(c), F.S.

²¹ *See* s. 186.002(1)(b), F.S.

²² *See* chs. 186, 187, and 163, part II, F.S.

²³ Section 163.3167(1)(b), F.S.

²⁴ Section 187.101(1), F.S.

²⁵ Section 187.101(3), F.S. The plan's goals and policies must also be reasonably applied where they are economically and environmentally feasible and not contrary to the public interest.

²⁶ Section 187.101(1), F.S.

2011, becoming the Community Planning Act.²⁷ The Community Planning Act governs how local governments create and adopt their local comprehensive plans. The Legislature expressly intended for all governmental entities in the state to recognize and respect judicially acknowledged or constitutionally protected private property rights.²⁸ Authority under the Community Planning Act must be exercised with sensitivity for private property rights, without undue restriction, and leave property owners free from actions by others which would harm their property or constitute an inordinate burden on property rights under the Harris Act.²⁹

Local Comprehensive Plan Elements

Local comprehensive plans must include principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements.³⁰ Plans also are required to identify procedures for monitoring, evaluating, and appraising implementation of the plan.³¹ Plans may include optional elements,³² but must include the following nine elements:

- Capital improvements;³³
- Future land use plan;³⁴
- Intergovernmental coordination;³⁵
- Conservation;³⁶
- Transportation;³⁷
- Sanitary sewer, solid waste, drainage, potable water, and aquifer recharge;³⁸
- Recreation and open space;³⁹
- Housing;⁴⁰ and
- Coastal management (for coastal local governments).⁴¹

All local government land development regulations must be consistent with the local comprehensive plan.⁴² Additionally, all public and private development, including special district projects, must be consistent with the local comprehensive plan.⁴³ However, plans cannot require

²⁷ See ch. 2011-139, s. 4, Laws of Fla.

²⁸ See Section 163.3161(10), F.S., *See also* Section 187.101(3), F.S.

²⁹ *Id.*

³⁰ Section 163.3177(1), F.S.

³¹ Section 163.3177(1)(d), F.S.

³² Section 163.3177(1)(a), F.S.

³³ Section 163.3177(3)(a), F.S. The capital improvements element must be reviewed by the local government on an annual basis.

³⁴ Section 163.3177(6)(a), F.S.

³⁵ Section 163.3177(6)(h), F.S.

³⁶ Section 163.3177(6)(d), F.S.

³⁷ Section 163.3177(6)(b), F.S.

³⁸ Section 163.3177(6)(c), F.S.

³⁹ Section 163.3177(6)(e), F.S.

⁴⁰ Section 163.3177(6)(f), F.S.

⁴¹ Section 163.3177(6)(g), F.S.

⁴² Section 163.3194(1)(b), F.S.

⁴³ See ss. 163.3161(6) and 163.3194(1)(a), F.S.

any special district to undertake a public facility project which would impair the district's bond covenants or agreements.⁴⁴

Amendments to a Local Comprehensive Plan

Local governments must review and amend their comprehensive plans every 7 years to reflect any changes in state requirements.⁴⁵ Within a year of any such amendments, local governments must adopt or amend local land use regulations consistent with the amended plan.⁴⁶ A local government is not required to review its comprehensive plan before its regular review period unless the law specifically requires otherwise.⁴⁷

Generally, a local government amending its comprehensive plan must follow an expedited state review process.⁴⁸ Certain plan amendments, including amendments required to reflect a change in state requirements, must follow the state coordinated review process for the adoption of comprehensive plans.⁴⁹ Under the state process, the state land planning agency is responsible for plan review, coordination, and preparing and transmitting comments to the local government.⁵⁰ The Department of Economic Opportunity (DEO) is designated as the state land planning agency.⁵¹

Under the state coordinated review process, local governments must hold a properly noticed public hearing⁵² about the proposed amendment before sending it for comment from several reviewing agencies,⁵³ including DEO, the Department of Environmental Protection, the appropriate regional planning council, and the Department of Transportation.⁵⁴ Local governments or government agencies within the state filing a written request with the governing body are also entitled to copies of the amendment.⁵⁵ Comments on the amendment must be received within 30 days after DEO receives the proposed plan amendment.⁵⁶

DEO must provide a written report within 60 days of receipt of the proposed amendment if it elects to review the amendment.⁵⁷ The report must state the agency's objections, recommendations, and comments with certain specificity, and must be based on written, not oral, comments.⁵⁸ Within 180 days of receiving the report from DEO, the local government must review the report and any written comments and hold a second properly noticed public hearing on the adoption of the

⁴⁴ Section 189.081(1)(b), F.S.

⁴⁵ Section 163.3191(1), F.S.

⁴⁶ Section 163.3191(2), F.S.

⁴⁷ Section 163.3161(12), F.S.

⁴⁸ Section 163.3184(3)(a), F.S.

⁴⁹ Section 163.3184(2)(c), F.S.

⁵⁰ Section 163.3184(4)(a), F.S.

⁵¹ Section 163.3164(4), F.S.

⁵² Sections 163.3184(4)(b) and (11)(b)1., F.S.

⁵³ *See s. 163.3184(1)(c), F.S.*, for complete list of all reviewing agencies.

⁵⁴ Sections 163.3184(4)(b) and (c), F.S.

⁵⁵ Section 163.3184(4)(b), F.S.

⁵⁶ Section 163.3184(4)(c), F.S.

⁵⁷ Section 163.3184(4)(d)1., F.S.

⁵⁸ Section 163.3184(4)(d)1., F.S. All written communication the agency received or generated regarding a proposed amendment must be identified with enough information to allow for copies of documents to be requested. *See s. 163.3184(4)(d)2., F.S.*

amendment.⁵⁹ Adopted plan amendments must be sent to DEO and any agency or government that provided timely comments within 10 working days after the second public hearing.⁶⁰

Once DEO receives the adopted amendment and determines it is complete, it has 45 days to determine if the adopted plan amendment complies with the law⁶¹ and to issue on its website a notice of intent finding whether or not the amendment is compliant.⁶² A compliance review is limited to the findings identified in DEO's original report unless the adopted amendment is substantially different from the reviewed amendment.⁶³ Unless the local comprehensive plan amendment is challenged, it may go into effect pursuant to the notice of intent.⁶⁴ If there is a timely challenge, then the plan amendment will not take effect until DEO, or the Administration Commission⁶⁵ enters a final order determining the adopted amendment complies with the law.⁶⁶

III. Effect of Proposed Changes:

Section 1 amends s. 163.3177(6), F.S., to require local governments to incorporate a private property rights element into their comprehensive plans and consider private property rights in local decision making.

The bill provides a model statement of property rights, and local governments may incorporate the suggested language directly into their comprehensive plan. The property rights suggested by the bill include the following five acknowledgments that a local government should consider in the decision-making process:

- Physical possession and control of the property owner's interests in the property, including easements, leases, or mineral rights;
- Quiet enjoyment of the property, to the exclusion of all others;
- Use, maintenance, development, and improvement of the property for personal use or the use of any other person, subject to state law and local ordinances;
- Privacy and exclusion of others from the property to protect the owner's possessions and property; and
- Disposal of the property owner's property through sale or gift.

On the other hand, local governments may use a unique construction of their own property rights statement to satisfy the additional element required by the bill, as long as the local government's language does not conflict with the model statement in the bill. Each local government is required to adopt a property rights element in its comprehensive plan by the earlier of its next proposed plan amendment or by July 1, 2023.

⁵⁹ Sections 163.3184(4)(e)1. and (11)(b)2., F.S. If the hearing is not held within 180 days of receipt of the report, the amendment is deemed withdrawn absent an agreement and notice to DEO and all affected persons that provided comments. See s. 163.3184(4)(e)1., F.S.

⁶⁰ Section 163.3184(4)(e)2., F.S.

⁶¹ Sections 163.3184(4)(e)3. and 4., F.S.

⁶² Section 163.3184(4)(e)4., F.S.

⁶³ *Id.*

⁶⁴ Section 163.3184(4)(e)5., F.S.

⁶⁵ Section 14.202, F.S., provides that the Administration Commission is composed of the Governor and the Cabinet (Section 20.03, F.S., provides that "Cabinet" means the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture).

⁶⁶ *Id.*

Section 2 provides the bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, section 18(a) of the State Constitution, provides in part that a county or municipality may not be bound by a general law requiring the county or municipality to spend funds or take an action that requires the expenditure of funds unless certain exemptions or exceptions are met.

The bill will require counties and municipalities to incur some costs to amend their comprehensive plans to add a private property rights element by July 1, 2023. Article VII, section 18 (d) provides eight exemptions, which, if any single one is met, exempts the law from the limitations on mandates. Laws having an “insignificant fiscal impact”⁶⁷ are exempt from the mandate requirements, which for Fiscal Year 2019-2020 is forecast at approximately \$2.2 million.⁶⁸ The cumulative cost for counties and municipalities to update their comprehensive plans to comply with the provisions of the bill is unknown at this time. However, the model language supplied by the bill may help reduce some costs for local governments. Additionally, costs may be lower if a local government were to adopt a private property rights element concurrent with another necessary comprehensive plan amendment prior to July 1, 2023.

If the bill does qualify as a mandate, and no exemption or exception applies, in order to be binding on the counties, the bill must include a finding of important state interest and final passage must be approved by two-thirds of the membership of each house of the Legislature.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

⁶⁷ An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times \$0.10. See Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Impact*, (Sept. 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf> (last visited Dec. 11, 2019)

⁶⁸ Based on the Florida Demographic Estimating Conference’s Dec. 3, 2019 population forecast for 2020 of 21,555,986. The conference packet is available at: <http://edr.state.fl.us/Content/conferences/population/ConferenceResults.pdf> (last visited Dec. 11, 2019).

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The DEO indicated that the bill would have no fiscal impact on the department.⁶⁹

The bill will likely have a fiscal impact on local governments not scheduled to review their plans before 2024 due to the requirement to amend their comprehensive plans by July 1, 2023, to include a property rights element. The Florida League of Cities indicates a range of responses as to the cost for a municipality to adopt a comprehensive plan amendment. According to the Hillsborough County City-County Planning Commission, the review and process of a privately initiated amendment to the text of a comprehensive plan may cost \$10,375. The Fort Myers Community Development Department has found that a small town or city may spend \$50,000 hiring a planning consultant to draft a comprehensive plan amendment and may end up spending another \$50,000 on total staff time, advertising, and paperwork.⁷⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 163.3177 of the Florida Statutes.

⁶⁹ Department of Economic Opportunity, 2020 Agency Legislative Bill Analysis for SB 410 (Oct. 23, 2019) (on file with the Senate Committee on Community Affairs)

⁷⁰ Information received from the Florida League of Cities (Jan. 23, 2020) (on file with Community Affairs).

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.
