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 Rules

BILL:	CS/SB 410
INTRODUCER:	Community Affairs Committee and Senator Perry
SUBJECT:	Growth Management
DATE:	February 28, 2020 REVISED:

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 410 requires the Department of Economic Opportunity (DEO), when selecting applicants for Community Planning Technical Assistance Grants, to give preference to certain small counties and municipalities located near a proposed multiuse corridor interchange.

The bill also adds 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 consists 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:

DEO Technical Assistance Grant Program

Section 163.3168(3), F.S., requires the DEO, as the state land planning agency, to help communities find creative solutions to fostering vibrant, healthy communities and authorizes DEO to use various means to provide direct and indirect technical assistance within available

resources. To carry out this charge, DEO's Bureau of Community Planning and Growth manages the Community Planning Technical Assistance Grant Program. Under the program, DEO awards grant funds to counties, cities, and regional planning councils to assist local governments in developing economic development strategies, meeting the requirements of the Community Planning Act, addressing critical local planning issues, and promoting innovative planning solutions to challenges identified by local government applicants.[1] The program has funded a wide range of activities which have included, for example, the development and revision of comprehensive plan amendments, economic development strategic plans, affordable housing action plans, downtown master plans, transportation master plans, and revitalization plans.

Beginning in fiscal year 2011-2012, the Legislature has annually appropriated state funds to DEO to implement the program. From fiscal years 2015-2016 to 2019-2020, DEO has expended almost $6 million on 174 approved grant projects.[2]

M-CORES Program

Enacted during the 2019 Regular Session,[3] the Multi-use Corridors of Regional Economic Significance (M-CORES) Program is designed to advance the construction of regional corridors that will accommodate multiple modes of transportation and multiple types of infrastructure.[4] The specific purpose of the program is to revitalize rural communities, encourage job creation in those communities, and provide regional connectivity while leveraging technology, enhancing the quality of life and public safety, and protecting the environment and natural resources.[5]

Section 338.2278(1)(a)-(k), F.S., enumerates the intended benefits which the M-CORES Program seeks to address, which include, but are not limited to: hurricane evacuation; congestion mitigation; trade and logistics; broadband, water, and sewer connectivity; energy distribution; autonomous, connected, shared, and electric vehicle technology; other transportation modes, such as shared-use nonmotorized trails, freight and passenger rail, and public transit; mobility as a service; availability of a trained workforce skilled in traditional and emerging technologies; protection or enhancement of wildlife corridors or environmentally sensitive areas; and protection or enhancement of primary springs protection zones and farmland preservation areas.

The following three corridors comprise the M-CORES Program:
- Southwest-Central Florida Connector (Collier County to Polk County);
- Suncoast Connector (Citrus County to Jefferson County); and
- Northern Turnpike Connector (the northern terminus of the Florida Turnpike northwest to the Suncoast Parkway).[6]

[1] DEO, Division of Community Planning, *Technical Assistance*, *available at:* http://www.floridajobs.org/community-planning-and-development/programs/community-planning-table-of-contents/technical-assistance (last visited Feb. 8, 2020).
[2] Information received from DEO staff on Jan. 23, 2020 (on file with Senate Committee on Judiciary).
[3] Chapter 2019-43, Laws of Fla.
[4] For additional detailed information about M-CORES, see the FDOT M-CORES website, https://floridamcores.com/ (last visited Jan. 28, 2020).
[5] Section 338.2278(1), F.S.
[6] Section 338.2278(2)(a)-(c), F.S.

As required by law, the Florida Department of Transportation (FDOT) has assembled three task forces to study the three specific multi-use corridors.[7] The task forces will make recommendations to FDOT regarding the potential economic and environmental impacts of the corridor and other factors as specified in the M-CORES legislation. Task Forces are required to report their evaluations in a final report submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives by October 1, 2020.[8] The law requires, to the maximum extent feasible, project construction to begin no later than December 31, 2022, with projects open to traffic no later than December 31, 2030.[9]

Private Property Rights and Constitutional Protections

Under Article I, section 2 of the Florida Constitution's Declaration of Rights, individuals are guaranteed the right "*to acquire, possess, and protect property*."[10] 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."[11] Under this provision, states have police powers to establish and enforce laws protecting the welfare, safety, and health of the public.[12] Regarding private property rights, courts have continuously held that "even constitutionally protected property rights are not absolute, and 'are held subject to the fair exercise of the 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.'"[13]

When a state or political subdivision exercises its police powers to affect property rights, citizens are provided two constitutional challenges to oppose the governmental act. The first challenge is that the government may have acted arbitrarily in violation of due process.[14] In the *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."[15] In the first constitutional challenge, government action is simply invalid under the due process clause of the constitution.[16]

The second challenge is whether the government so intrusively regulated the use of property in pursuit of legitimate police power objectives so as to take the property without compensation in

[7] Section 338.2278(3)(c)1., F.S.
[8] Section 338.2278(3)(c)9., F.S.
[9] Section 338.2278(6), F.S.
[10] FLA. CONST. art. I s. 2.
[11] U.S. CONST. amend. X.
[12] "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 Federal Government, as the police power." *See NFIB v. Sebelius*, 567 U.S. 519, 535-536 (2012).
[13] *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So.2d 64, 68 (Fla. 1990) (quoting *Golden v. McCarthy*, 337 So.2d 388, 390 (Fla. 1976)).
[14] *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).
[15] *City of Coral Gables v. Wood*, 305 So.2d 261, 263 (Fla. 3rd DCA 1974).
[16] *See Department of Transp. v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993).

violation of the just compensation clause (takings clause).[17] 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.[18] 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.[19]

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.[20] Thus, property owners who experienced property devaluation or economic loss caused by government regulation were seldom compensated.[21]

In 1995, the Legislature addressed the ineffectiveness of these constitutional challenges to government regulation by enacting ch. 70, F.S., which is known as the "Bert J. Harris, Jr., Private Property Rights Protection Act" (hereinafter the "Harris Act").[22]

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

The Harris Act[23] 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.[24] 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.[25] The law does not apply to the U.S. government, federal agencies, or state or local government entities exercising delegated U.S. or federal agency powers.[26]

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,[27] or when a government entity imposes a condition on the proposed use of the real property that amounts to a prohibited exaction.[28] 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.[29]

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[17] *See* FLA. CONST. art X, s. 6.
[18] *See Taylor v. Village of North Pam Beach*, 659 So.2d 1167 (Fla. 4th DCA 1995).
[19] *See Department of Transp. v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993).
[20] *See* Cooper, Weaver, and 'Connor, The Florida Bar, Florida Real Property Litigation, *Statutory Private Property Rights Protection*, s.13.1 (2018).
[21] *Id.*
[22] *Id.*
[23] Section 70.001(1), F.S.
[24] Section 70.001(2), F.S.
[25] Section 70.001(1), F.S.
[26] Section 70.001(3)(c), F.S.
[27] Section 70.51(3), F.S.
[28] Section 70.45(2), F.S.
[29] Section 70.45(1)(c), F.S.

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.[30] Statutes govern how the state and local governments direct land development[31] with the State Comprehensive Plan and local comprehensive plans adopted by counties and municipalities as required by statute.[32]

The State Comprehensive Plan must provide long-range policy guidance for the orderly social, economic, and physical growth of the state.[33] The goals and policies of the State Comprehensive Plan must be consistent with the protection of private property rights.[34] 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.[35]

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 2011, becoming the Community Planning Act.[36] 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.[37] The authority provided by 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.[38]

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.[39] Plans also are required to identify procedures for monitoring, evaluating, and appraising implementation of the plan.[40] Plans may include optional elements,[41] but must include the following nine elements:

- Capital improvements;[42]

[30] *See* s. 186.002(1)(b), F.S.
[31] *See* chs. 186, 187, and 163, part II, F.S.
[32] Section 163.3167(1)(b), F.S.
[33] Section 187.101(1), F.S.
[34] 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.
[35] Section 187.101(1), F.S.
[36] *See* ch. 2011-139, s. 4, Laws of Fla.
[37] *See* Section 163.3161(10), F.S., *See also* Section 187.101(3), F.S.
[38] *Id*.
[39] Section 163.3177(1), F.S.
[40] Section 163.3177(1)(d), F.S.
[41] Section 163.3177(1)(a), F.S.
[42] Section 163.3177(3)(a), F.S. The capital improvements element must be reviewed by the local government on an annual basis.

- Future land use plan;[43]
- Intergovernmental coordination;[44]
- Conservation;[45]
- Transportation;[46]
- Sanitary sewer, solid waste, drainage, potable water, and aquifer recharge;[47]
- Recreation and open space;[48]
- Housing;[49] and
- Coastal management (for coastal local governments).[50]

All local government land development regulations must be consistent with the local comprehensive plan.[51] Additionally, all public and private development, including special district projects, must be consistent with the local comprehensive plan.[52] However, plans cannot require any special district to undertake a public facility project which would impair the district's bond covenants or agreements.[53]

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.[54] Within a year of any such amendments, local governments must adopt or amend local land use regulations consistent with the amended plan.[55] A local government is not required to review its comprehensive plan before its regular review period unless the law specifically requires otherwise.[56]

Generally, a local government amending its comprehensive plan must follow an expedited state review process.[57] 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.[58] Under the state process, the state land planning agency is responsible for plan review, coordination, and preparing and transmitting comments to the local government.[59] The Department of Economic Opportunity (DEO) is designated as the state land planning agency.[60]

[43] Section 163.3177(6)(a), F.S.
[44] Section 163.3177(6)(h), F.S.
[45] Section 163.3177(6)(d), F.S.
[46] Section 163.3177(6)(b), F.S.
[47] Section 163.3177(6)(c), F.S.
[48] Section 163.3177(6)(e), F.S.
[49] Section 163.3177(6)(f), F.S.
[50] Section 163.3177(6)(g), F.S.
[51] Section 163.3194(1)(b), F.S.
[52] *See* ss. 163.3161(6) and 163.3194(1)(a), F.S.
[53] Section 189.081(1)(b), F.S.
[54] Section 163.3191(1), F.S.
[55] Section 163.3191(2), F.S.
[56] Section 163.3161(12), F.S.
[57] Section 163.3184(3)(a), F.S.
[58] Section 163.3184(2)(c), F.S.
[59] Section 163.3184(4)(a), F.S.
[60] Section 163.3164(44), F.S.

Under the state coordinated review process, local governments must hold a properly noticed public hearing[61] about the proposed amendment before sending it for comment from several reviewing agencies,[62] including DEO, the Department of Environmental Protection, the appropriate regional planning council, and the Department of Transportation.[63] Local governments or government agencies within the state filing a written request with the governing body are also entitled to copies of the amendment.[64] Comments on the amendment must be received within 30 days after DEO receives the proposed plan amendment.[65]

DEO must provide a written report within 60 days of receipt of the proposed amendment if it elects to review the amendment.[66] The report must state the agency's objections, recommendations, and comments with certain specificity, and must be based on written, not oral, comments.[67] 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 amendment.[68] 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.[69]

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 law[70] and to issue on its website a notice of intent finding whether or not the amendment is compliant.[71] 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.[72] Unless the local comprehensive plan amendment is challenged, it may go into effect pursuant to the notice of intent.[73] If there is a timely challenge, then the plan amendment will not take effect until DEO, or the Administration Commission[74] enters a final order determining the adopted amendment complies with the law.[75]

[61] Sections 163.3184(4)(b) and (11)(b)1., F.S.
[62] *See* s. 163.3184(1)(c), F.S., for complete list of all reviewing agencies.
[63] Section 163.3184(4)(b) and (c), F.S.
[64] Section 163.3184(4)(b), F.S.
[65] Section 163.3184(4)(c), F.S.
[66] Section 163.3184(4)(d)1., F.S.
[67] 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.
[68] 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.
[69] Section 163.3184(4)(e)2., F.S.
[70] Section 163.3184(4)(e)3. and 4., F.S.
[71] Section 163.3184(4)(e)4., F.S.
[72] *Id*.
[73] Section 163.3184(4)(e)5., F.S.
[74] 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).
[75] *Id*.

III. Effect of Proposed Changes:

Section 1 amends s. 163.3168, F.S., to require DEO, when selecting applications for Community Planning Technical Assistance Grants, to give preference to certain small counties and municipalities for assistance in:

- Determining whether an area in and around a proposed multiuse corridor interchange contains appropriate land uses and natural resource protection; and
- Developing or amending a local government's comprehensive plan to provide for the land uses, natural resource protection, and intended benefits associated with a proposed multiuse corridor interchange.

Counties with a population of 200,000 or less, and municipalities within such counties, are eligible for the funding preference provided in the bill.

Section 2 amends s. 163.3177(6), F.S., to require local governments to incorporate a private property rights element into their comprehensive plans and respect 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 provided in the bill include the following five acknowledgments that a local government should consider in the decision-making process:

- The right of a property owner to physically possess and control his or her interests in the property, including easements, leases, or mineral rights.
- The right of the property owner to the quiet enjoyment of the property, to the exclusion of all others.
- The right of a property owner to use, maintain, develop, and improve his or her property for personal use or the use of any other person, subject to state law and local ordinances.
- The right of the property owner to privacy and to exclude others from the property to protect the owner's possessions and property.
- The right of the property owner to dispose of his or her property through sale or gift.

Each local government must adopt its own property rights element in its comprehensive plan by the earlier of its next proposed plan amendment or by July 1, 2023. If a local government adopts its own property rights element, the element may not conflict with the statement of rights provided in the bill.

Section 3 provides that 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 no county or municipality shall 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 might 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"[76] are exempt from the mandate requirements, which for the Fiscal Year 2019-2020 is forecast at approximately $2.2 million.[77] 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 adopts a private property rights element concurrent with another necessary comprehensive plan amendment before July 1, 2023.

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

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.

[76] 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)

[77] 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).

C. Government Sector Impact:

Providing a preference to small M-CORES counties and municipalities for technical assistance grants will likely have a minimal fiscal impact, if any, on DEO.

Eligible small M-CORES counties and municipalities will receive preference when applying for DEO technical assistance grants.

DEO indicated that section two of the bill would have no fiscal impact on the department.[78]

There seems to be legitimate disagreement as to whether section two of the bill will have a fiscal impact on local governments that are not scheduled to review their plans before 2024 but under the bill, must amend their comprehensive plans by July 1, 2023, to include a property rights element.

Some people have expressed the opinion that this provision will not require significant costs because they believe no additional consultants will be needed to draft an amendment to comply with the provisions of the bill. They believe that, if local staff does not have the "in-house" expertise, they may simply "copy and paste" the language into the comprehensive plan and be in compliance. The argument has also been offered that a notice requirement would be a minimal expense because the notice could be included on an existing agenda and would not require a separate meeting notice or separate meeting.

In contrast, the Florida League of Cities indicates that there is a range of responses for the cost for a municipality to adopt a comprehensive plan amendment. According to the Hillsborough County City-County Planning Commission, the cost to review and process a privately initiated amendment to the text of a comprehensive plan may be $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.[79] However, the costs to comply with the bill may be significantly lower for a local government depending on the timing of the adoption of the amendment (if done concurrently with another amendment) and whether a local government deems it necessary to enlist the assistance of an outside consultant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[78] Department of Economic Opportunity, 2020 Agency Legislative Bill Analysis for SB 410 (Oct. 23, 2019) http://abar.laspbs.state.fl.us/ABAR/Attachment.aspx?ID=29749.
[79] Information received from the Florida League of Cities (Jan. 23, 2020) (on file with Senate Committee on Judiciary).

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 163.3168 and 136.3177.

IX. Additional Information:

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

CS by Community Affairs on January 27, 2020:
The committee substitute requires DEO to give a preference for technical assistance grant funding to certain small counties and municipalities located near a proposed multiuse corridor interchange.

B. Amendments:

None.