

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 519 Private Property Rights Protection

**SPONSOR(S):** Civil Justice Subcommittee, Grant, J.

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 5 N, As CS	Jones	Luczynski
2) Commerce Committee	13 Y, 8 N	Thompson	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 burdening private property amounts to an illegal "taking" under the Takings Clause. Florida law provides legal remedies when a local government burdens property rights in a manner that does not amount to a "taking":

- If a local government enacts a regulation inordinately burdening private property:
  - 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 or limits 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 a chance to explain why the exaction is lawful, or remove the exaction.

Another mechanism for a landowner to resolve disputes against government action is the Florida Land Use and Environmental Dispute Resolution Act, which provides an informal process to challenge government action infringing on property rights without having to file a lawsuit.

CS/HB 519 requires a local government, when settling property rights claims, to treat similar properties similarly. If the government settles or the property owner secures a judgment declaring an inordinate burden, there is a presumption that similarly situated parcels are also inordinately burdened and entitled to the same settlement terms or judicial determination. The bill also makes it easier for a private property owner to challenge a local regulation burdening his or her property by:

- Allowing a jury or the court 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 refuses a bona fide offer which reasonably would have resolved the property claim fairly.

When a local government is poised to impose an exaction upon private property, the bill allows the property owner to sue without having to wait for written notice of the exaction. The bill requires the Department of Transportation to give a right of first refusal to a previous owner before disposing of property in certain cases. The bill also broadens the applicability of the Florida Land Use and Environmental Dispute Resolution Act and provides for the recovery of attorney fees and costs in certain situations if a government acts in bad faith.

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, 2020.

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

**STORAGE NAME:** h0519c.COM

**DATE:** 1/30/2020

## 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> However, some government actions restrict the use of private property without amounting to a "taking" as contemplated by the U.S. Constitution.

##### 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 (Bert Harris Act), codified as s. 70.001, F.S.<sup>2</sup> The Bert Harris Act created a new cause of action for private property owners whose real property is inordinately burdened by a government action<sup>3</sup> not rising to the level of a taking.<sup>4</sup> The inordinate burden can apply in the context of either an existing use of real property or a vested right to a specific use.<sup>5</sup>

Before filing an action under the Bert Harris Act, a claimant must generally give 150 days' notice to the government entity, along with a valid appraisal showing the loss in fair market value.<sup>6</sup> The government must notify all 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>7</sup>

This encourages settlement of property rights claims and allows a government to settle individually with each property owner to avoid unnecessarily burdening property rights.

The property owner may reject the settlement offer and file an action in circuit court.<sup>8</sup> The court must determine whether the government inordinately burdened the property, and if so, calculate the percentage of responsibility for 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>9</sup>

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<sup>1</sup> U.S. Const. amend. 5; *see also* art. I, ss. 2, 9, Fla. Const. (restricting the deprivation of private property).

<sup>2</sup> Ch. 95-181, Laws of Fla.

<sup>3</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>4</sup> S. 70.001(1), (9), F.S.

<sup>5</sup> S. 70.001(2), F.S.

<sup>6</sup> S. 70.001(4)(a), F.S.

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

<sup>8</sup> S. 70.001(5)(b), F.S.

<sup>9</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 was not 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>10</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>11</sup> If the law or regulation does not unequivocally impact the property, or if notice is not mailed, the one-year period does not start 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>12</sup>

In 2013, in *Koontz v. St. Johns River Water Management District*,<sup>13</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>14</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>15</sup>

The property owner in *Koontz* owned land consisting primarily of wetlands. He wanted to develop part of his property and offered a conservation easement to the St. Johns River Water Management District (district). The district rejected his proposal and said it would deny his permit unless he agreed to scale back his plan and give the district a larger conservation easement or to maintain the plan but pay to improve 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 sue a government for 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. The Court left it to the states to determine remedies available to a landowner who is subjected to an unconstitutional demand, but where no actual taking occurs.<sup>16</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 taking, whether money damages are available is not a question of federal constitutional

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

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

<sup>12</sup> *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594 (2013).

<sup>13</sup> *Id.* at 2586.

<sup>14</sup> *Id.* at 2595.

<sup>15</sup> *Id.* at 2596.

<sup>16</sup> *Id.* at 2597.

law but of the cause of action—whether state or federal—on which the landowner relies.<sup>17</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>18</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>19</sup>

### Remedy for Unlawful Government Exaction

In 2015, the Legislature enacted s. 70.45, F.S., to provide a state cause of action against a prohibited exaction. 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.<sup>20</sup>

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.<sup>21</sup>

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 or modify the exaction. The government'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 government 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 resulting from the 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.

### Florida Land Use and Environmental Dispute Resolution Act

In 1995, the Legislature adopted the Florida Land Use and Environmental Dispute Resolution Act (Act) to facilitate the resolution of disputes between landowners and government entities.<sup>22</sup> The Act provides an informal mechanism for a landowner to challenge a government action that may infringe on the landowner's property without having to file a lawsuit.

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<sup>17</sup> *Id.*

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

<sup>19</sup> *Id.* at 2597-98.

<sup>20</sup> S. 70.45(1)(c), F.S.

<sup>21</sup> S. 70.45, F.S.

<sup>22</sup> *See* s. 70.51, F.S.

The Act does not create a private cause of action, nor does it require that a landowner do anything before exercising his or her right to file a lawsuit.<sup>23</sup> Under the Act, a landowner who believes that a government notice or order unfairly or unreasonably burdens his or her property may, within 30 days of receiving the notice or order, file a request for relief with the government that issued the notice or order.<sup>24</sup> The government must forward the request to a special magistrate, a person agreed upon by both parties to preside over the case.

The special magistrate must hold a hearing within 45 days of receiving the request for relief.<sup>25</sup> The special magistrate's primary role is to facilitate a resolution of the conflict between the landowner and government without involving the courts.<sup>26</sup> In this role, the special magistrate acts as a "facilitator or mediator."<sup>27</sup>

If the parties cannot reach an agreement, the special magistrate must determine whether the government action is unreasonable or unfairly burdens the landowner's real property, based on a list of statutory guidelines.<sup>28</sup> Within 14 days of the hearing's conclusion, the special magistrate must submit a written recommendation to the parties.<sup>29</sup>

If the special magistrate's recommendation is that the government action does not unreasonably or unfairly burden the property, the landowner still retains the right to file suit or pursue other remedies.<sup>30</sup> If the recommendation is that the government action unreasonably or unfairly burdens the property, the special magistrate may, if the landowner consents, recommend one or more alternatives that allow for reduced government restraints on the property.<sup>31</sup>

The government must respond within 45 days of receiving the special magistrate's recommendation, deciding whether it accepts, accepts in part, or rejects the recommendation.<sup>32</sup> If the government accepts the recommendation in whole or in part, but the landowner rejects the acceptance or modification, the government must put into writing within 30 days the specific permissible uses of the property.<sup>33</sup>

The special magistrate's recommendation finding that the government acted unreasonably or unfairly may serve as a basis to demonstrate entitlement to relief in a subsequent lawsuit or in other legal proceedings.<sup>34</sup> The process under the Act may not continue longer than 165 days, unless the parties agree otherwise.<sup>35</sup>

### Conveyance of Property by 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 rights-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.<sup>36</sup>

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<sup>23</sup> S. 70.51(24), F.S.

<sup>24</sup> S. 70.51(3) and (4), F.S.

<sup>25</sup> S. 70.51(15)(a), F.S.

<sup>26</sup> See s. 70.51(17)(a), F.S.

<sup>27</sup> *Id.*

<sup>28</sup> S. 70.51(17)(b) and (18), F.S.

<sup>29</sup> S. 70.51(19), F.S.

<sup>30</sup> S. 70.51(19)(a), F.S.

<sup>31</sup> S. 70.51(19)(b), F.S.

<sup>32</sup> S. 70.51(21), F.S.

<sup>33</sup> S. 70.51(22), F.S.

<sup>34</sup> S. 70.51(25), F.S.

<sup>35</sup> S. 70.51(23), F.S.

<sup>36</sup> S. 337.25(1)(a), F.S.

If the department determines acquired property is no longer needed for a transportation facility, it may dispose of the property.<sup>37</sup> The department may afford a right of first refusal to the local government or other political subdivision in the jurisdiction where the parcel is located, 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.<sup>38</sup>

## Effect of Proposed Changes

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

CS/HB 519 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;
- 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 prevailing 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; and
  - Removing the provision allowing a government to recover attorney fees and costs.

The bill provides that when a property owner submits a claim under the Bert Harris Act based on a regulation or ordinance applied to more than one residential parcel, and the case settles or the property owner obtains a judgment declaring an inordinate burden, there is a presumption that similarly situated residential parcels are also inordinately burdened and entitled to equivalent settlement terms or a judicial determination of an inordinate burden. This presumption is rebuttable by clear and convincing evidence, and similarly situated parcels are evaluated on a parcel-by-parcel basis.

The similarly situated residential property owner must submit the specified appraisal at least 120 days before a trial on the merits of the damages portion of the proceedings. The government is encouraged to negotiate settlement terms consistent with settlement agreements for similarly situated residential parcels during the 90-day notice period. Under the bill, settlement offers are presumed to protect the public interest.

The bill also provides that if the government does not provide notice by mail to the property owner when a law or regulation affects the property, the one-year timeframe for filing suit does not apply and the property owner may, at any time, notify the government in writing that the law or regulation restricts property usage. Within 45 days of receiving the notice, the government must respond in writing, clarifying whether the law or regulation applies to the owner's property, and if so, to what extent. If the government's response indicates the law or regulation is applicable and imposes new limitations, the owner may file suit immediately without having to go through the normal application process for a development order, development permit, or building permit, as doing so would be futile and a waste of resources. The owner must file suit within one year of receiving the response from the government stating that limitations apply to the property.

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<sup>37</sup> S. 337.25(4), F.S.

<sup>38</sup> *Id.*

## Unconstitutional Exaction Challenges Under s. 70.45, F.S.

With respect to an action challenging an unlawful exaction, the bill clarifies that the property owner may sue as soon as he or she must comply with the exaction or condition of approval. This means that under certain circumstances the property owner no longer has to wait to sue until the government gives written notice of the exaction.

## Florida Land Use and Environmental Dispute Resolution Act

The bill makes several changes to the Florida Land Use and Environmental Dispute Resolution Act (Act), codified at s. 70.51, F.S., including:

- Broadening the types of disputes between a landowner and a government that are covered by the Act, thus allowing for cost-effective dispute resolution in more cases.
- Clarifying that the special magistrate is not required to be a certified mediator.
- Requiring that mediation adhere to certain provisions within chapter 44, F.S.
- Allowing the special magistrate to determine whether a request for relief is complete and timely.
- Updating the Act's timeframes and procedures for tolling of timeframes.
- Updating other provisions within the Act, including providing that certain filings may be made by e-mail.
- Awarding attorney fees and costs to a landowner who successfully sues to require the government to participate in dispute resolution under the Act.
- Allowing the special magistrate, when determining whether the government action is unreasonable or unfair, to consider whether the government attempted to resolve the dispute in good faith.
- Providing procedures for a government to reconsider a prior decision after the special magistrate issues his or her recommendation, and to resolve disputes through the public meeting process.
- Clarifying that the Act does not limit a landowner's applicable judicial and administrative remedies.
- Clarifying that the special magistrate's recommendation may be considered in a subsequent proceeding but does not preclude any issue or defense in a subsequent proceeding.

The bill also amends s. 163.3181, F.S., to provide that if a local government denies a landowner's request for an amendment to a comprehensive plan, the landowner may proceed under the Act.

## Conveyance of Property by Department of Transportation

The bill provides that before the department disposes of property under s. 337.25, F.S., it must offer a written right of first refusal to the previous property owner at the department's current estimate of property value, 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.

Under the bill, the right of first refusal must give the previous owner fifteen days to accept the offer. If the previous owner exercises the right of first refusal, he or she has sixty days to close on the property. If the previous owner does not exercise the right, the department may not offer new terms to a different buyer without first allowing the previous owner a chance to accept the new terms.

The bill provides an effective date of July 1, 2020.

## 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. 70.51, F.S., relating to land use and environmental dispute resolution.

**Section 4:** Amends s. 163.3181, F.S., relating to public participation in the comprehensive planning process; intent; alternative dispute resolution.

**Section 5:** Amends s. 337.25, F.S., relating to acquisition, lease, and disposal of real and personal property.

**Section 6:** Provides an effective date of July 1, 2020.

## 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 or the court 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.
- Requiring a court to award a landowner attorney fees and costs in certain situations under the Land Use and Environmental Dispute Resolution Act.
- Requiring the Department of Transportation, in certain situations, to offer a previous property owner a right of first refusal.

### 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 or the court, in an action for damages, to consider business damages. The bill broadens the types of disputes that may be resolved under the informal process within s. 70.51, F.S. 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 January 16, 2020, the Civil Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Broadened the types of disputes between a landowner and a government that are covered by the Land Use and Environmental Dispute Resolution Act (Act).
- Updated and modified the Act's procedures.
- Added a provision allowing a landowner to recover attorney fees and costs if a government refuses to mediate under the Act.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.