

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 587 Takings Claims Within Areas of Critical State Concern
SPONSOR(S): Judiciary Committee, Civil Justice Subcommittee, Raschein and Rodriguez, A. M.
TIED BILLS: **IDEN./SIM. BILLS:** SB 748

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 0 N, As CS	Jones	Luczynski
2) Judiciary Committee	15 Y, 0 N, As CS	Jones	Luczynski

SUMMARY ANALYSIS

Florida law provides a process for certain environmentally or historically sensitive areas to be designated as "areas of critical state concern" by the Administration Commission. When an area is so designated, its land planning regulations must comply with certain principles for development. These principles are set by the Administration Commission and applied to the local governments by the Department of Economic Opportunity.

Several areas within the State have been designated as areas of critical state concern, including the Florida Keys. For this area, land planning regulations subject to approval by the state must be consistent with the principles of protecting many different natural resources and making affordable housing available.

Additionally, general law requires that the regulations must be consistent with maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours. This 24-hour mandatory evacuation time limits opportunity for development within the Keys, since further development could inhibit the ability to meet this timeframe. In turn, local governments within the Keys, bound by the 24-hour period, must restrict the number of building permits they can issue for new development.

When a state or local government takes private property for government use or otherwise places burdens upon private property, the landowner may sue for damages under the Takings Clause of the U.S. Constitution or under a provision of state law. Such a right of action may arise when a local government denies a landowner's application for a permit to develop his or her property. If the landowner prevails, the government responsible for the taking must compensate the landowner for his or her losses.

CS/CS/HB 587 requires that the state and a local government must share liability for certain court-ordered damages for property disputes within areas of critical state concern, as follows:

- If the case is adjudicated in state court, the court must require the state and local government to each pay half of the amount of damages, costs, attorney fees, and prejudgment interest if:
 - The court finds liability against both the state and local government; and
 - The regulation restricting development or land use was mandated or approved by the state land planning agency or the Administration Commission.
- If a federal court awards damages, costs, attorney fees, or prejudgment interest against a local government, the state must reimburse the local government for 50 percent of the total if the regulation restricting development or property use was mandated or approved by the state land planning agency or the Administration Commission.

However, the state is not liable under the bill for a growth-limiting regulation enacted at the locality's discretion. The bill directs the land planning agency to update a hurricane evacuation model after the 2020 census.

The bill may have a significant negative fiscal impact on state government and may have a significant positive fiscal impact on local governments. The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Property Rights and Areas of State Critical Concern

Florida law provides a process for certain environmentally or historically sensitive areas to be designated as "areas of critical state concern" by the Administration Commission, which is composed of the Governor and Cabinet, following a process set forth in statute.¹ Areas that qualify for designation include:

An area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance, including, but not limited to, state or federal parks, forests, wildlife refuges, wilderness areas, aquatic preserves, major rivers and estuaries, state environmentally endangered lands, Outstanding Florida Waters, and aquifer recharge areas, the uncontrolled private or public development of which would cause substantial deterioration of such resources.²

Once designated, the area's land planning regulations must comply with the principles guiding development specified by the Administration Commission, which must be approved by the Department of Economic Opportunity.³ Several areas have been designated as areas of critical state concern or have had their designations ratified by statute, including the Big Cypress Area,⁴ the Green Swamp Area,⁵ the Apalachicola Bay Area,⁶ and the Florida Keys Area.⁷

The Florida Keys Area

With respect to the Florida Keys Area ("the Keys"), land planning regulations subject to approval by the state must be consistent with the principles of protecting many different natural resources and making affordable housing available.⁸

Additionally, Florida law requires these land planning regulations to be consistent with maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours.⁹ This means that permanent residents of the Keys must be able to evacuate within 24 hours of being warned to do so.

This statutory 24-hour timeframe limits development within the Keys, since further development would presumably inhibit the local governments' ability to evacuate all permanent residents in a 24-hour period. In turn, the local governments within the Keys must restrict the number of building permits they issue for new development.

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

¹ S. 380.05, F.S.

² S. 380.05(2), F.S.

³ S. 380.05(6), F.S.

⁴ S. 380.055, F.S.

⁵ S. 380.0551, F.S.

⁶ S. 380.0555, F.S.

⁷ S. 380.0552, F.S.

⁸ S. 380.0552(1)(d), F.S.

⁹ S. 380.0552(9)(a)2., F.S.

¹⁰ Rule 28-20.140(2), F.A.C.

In March 2013, the Administration Commission approved a recommendation to allocate 3,550 building permits for the Keys. At least part of the reason for this cap on building permits is to accommodate for the statutory 24-hour mandatory evacuation period. According to Monroe County officials, as of October 1, 2019, 2,129 of the permits had been allocated, leaving only 1,421 remaining.¹¹

The latest estimate provided by the Monroe County Board of County Commissioners projects that, in a worst-case scenario, after the 1,421 remaining permits are allocated, there will be 8,269 parcels left whose owners could bring lawsuits based on the denial of a development permit.¹² The total value of those parcels is estimated at \$846,961,269.¹³ Local officials are concerned about the possibility of takings and other property-related litigation once the permits are exhausted.

Shared Liability between State and Local Governments

Because the State and local governments in an area of critical state concern are both involved in land planning regulations, both can be sued as defendants in property rights litigation. For example, in 2018 a circuit court entered judgment against both Monroe County and the State, finding that both defendants were responsible for "taking" the plaintiff's property.^{14,15}

Eminent Domain and Inverse Condemnation

In an eminent domain action, the government, as the plaintiff, asserts its power to take private property for a public use. Under the U.S. Constitution, the government must compensate the landowner for the loss.¹⁶ The Florida Constitution similarly states that no private property may be taken except for a public purpose and each owner must be fully compensated.¹⁷

In an inverse condemnation action, by contrast, the government "takes" private property without the owner's consent, either through its activities or conduct, and without adequate compensation. Because the government does not adequately compensate the property owner, the property owner is the plaintiff who sues to recover the value of taken property.¹⁸

Bert Harris Act

The Legislature enacted the Bert J. Harris, Jr., Private Property Rights Act ("Act") in 1995. The Legislature recognized that some laws, regulations, and ordinances of the state and its entities could inordinately burden, restrict, or limit private property rights without amounting to a taking under the State or U.S. Constitution.¹⁹ The Act provides a process whereby private landowners may seek relief and recover damages when their property is inordinately burdened by government action.²⁰

¹¹ See Monroe County Board of County Commissioners, *The Florida Keys Area of Critical State Concern – Private Property Rights Protection Challenges*, p. 1 (Sept. 2019).

¹² Monroe County acknowledges, however, that of these 8,269 parcels, about 3,534 are located within protected areas, meaning they are less likely to be the subject of property-related litigation.

¹³ See Monroe County Board of County Commissioners, *supra* note 11, at 1.

¹⁴ *Thomas and Collins v. Monroe County*, Case No. 04-CA-379-M (Fla. 16th Cir. Ct. Feb. 15, 2017).

¹⁵ See ch. 2006-223, s. 7, Laws of Fla. (acknowledging that the state may have some liability for inverse condemnation actions in the Florida Keys Area due to the state's role in adopting land use regulations for the area.)

¹⁶ See amend. V, U.S. Const. ("Nor shall private property be taken for public use without just compensation").

¹⁷ Art. X, s. 6, Fla. Const.

¹⁸ 21 Fla. Jur 2d Eminent Domain, s. 221.

¹⁹ S. 70.001, F.S.

²⁰ Amber L. Ketterer and Rafael E. Suarez-Rivas, *The Bert J. Harris, Jr., Private Property Rights Protection Act: An Overview, Recent Developments, and What the Future May Hold*, THE FLORIDA BAR JOURNAL, (Sept./Oct. 2015).

Recent U.S. Supreme Court Decision on Takings Claims

In June 2019, the U.S. Supreme Court decided *Knick v. Township of Scott, Pennsylvania*,²¹ which significantly changed how and when property owner may initiate takings claims against state and local governments. Before *Knick*, a landowner with a takings claim generally was required to first pursue state remedies before bringing the claim in federal court. If the plaintiff did not prevail in state court, he or she could be barred from suing in federal court.

The *Knick* Court determined that requiring state litigation before allowing federal litigation imposed an unjustifiable burden on takings plaintiffs. The Court held that a property owner has an actionable federal Fifth Amendment takings claim as soon as a government takes property for public use without payment, and the property owner may bring the claim in federal court at the time of the uncompensated taking.

Effect of Proposed Changes

CS/CS/HB 587 requires a state court adjudicating a property rights dispute within an area of critical state concern to apportion damages, costs, attorney fees, and prejudgment interest equally between the state and a local government if:

- The court finds liability against both the state and the local government; and
- The regulation restricting development or land use was mandated or approved by the state land planning agency or the Administration Commission under s. 380.05, F.S.

Such a proceeding may be brought as a claim for inverse condemnation or other property rights claim when the State is named as a codefendant or a third-party defendant²² by a local government in an area of critical state concern.

If a plaintiff is successful, the bill requires the state court to enter separate judgments for the apportioned amounts against the state and local government. The bill further provides that a governmental entity named as a judgment debtor²³ is only liable for its own postjudgment interest.²⁴ The bill does not prohibit a court from awarding a separate judgment for attorney fees and costs.

If, before the bill is enacted, a state court enters a judgment jointly and severally against the state and a local government, finding each liable for a taking, and the government action was mandated or approved by the state land planning agency or the Administration Commission, the state must reimburse the local government for half of the judgment amount.

The bill also contemplates that a plaintiff may file property rights-related litigation in federal court against a local government based on regulations approved by the state. In that case, the bill requires the state to reimburse the local government for half of the total amount that the local government pays to satisfy any judgment, including interest, costs, and attorney fees.

The bill also provides, however, that the state is not liable under the bill if a local government enacts a growth-limiting regulation solely at its own discretion. The bill directs the state land planning agency to update a hurricane evacuation model after the 2020 census.

The practical effect of the bill is to require the State to pay half of the aforementioned future property-related liability costs for the Keys, which is estimated at a worst-case scenario total of \$846,961,269.

The bill takes effect upon becoming a law.

²¹ *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).

²² A third-party defendant is a person brought into a lawsuit by the original defendant, who alleges that the third-party defendant is at least partially at fault for the actions giving rise to the plaintiff's lawsuit. See Black's Law Dictionary 1518 (8th ed. 2004).

²³ A judgment debtor is a party against whom a money judgment has been entered but not yet satisfied. Black's Law Dictionary (8th ed. 2004).

²⁴ Postjudgment interest is the amount of interest that a creditor is allowed to collect from a debtor after a judgment is rendered until the date it is paid by the debtor. See The Law.com Dictionary, Postjudgment interest, <https://dictionary.thelaw.com/postjudgment-interest/> (last visited Feb. 19, 2020).

B. SECTION DIRECTORY:

Section 1: Creates s. 380.0501, relating to apportionment of awards of damages for takings claims within an area of critical state concern.

Section 2: Provides that the bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill requires a state court to apportion damages to the State when the court enters a judgment against a local government for certain takings claims, which may have a significant negative fiscal impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill requires a state court to apportion damages to the State when the court enters a judgment against a local government for certain takings claims, which may have a significant positive fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indirect positive impact on the private sector by directing the State to share in takings claims costs, thus ensuring that landowners may recover from the State.

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:

Art. V, s. 1 of the State Constitution vests all "judicial power" in the courts. Art. II, s. 3 of the State Constitution prohibits any person belonging to one branch of government from exercising any powers appertaining to either of the other branches except as authorized by the Constitution. This bill requires a state court, if it finds any liability on the part of the State and a local government, to apportion damages in an equal manner. This requirement may implicate the aforementioned constitutional provisions and their prohibition on the violation of separation of powers principles.

Both the U.S. and State Constitutions provide a right to trial by jury. Art. I, s. 22 of the State Constitution states that the "right to trial by jury shall be secure to all and remain inviolate." The bill requires a court to apportion damages equally among defendants in certain cases without regard for the findings of the jury, which may implicate a litigant's right to have a jury decide the amount of damages against each party.²⁵

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires the State to reimburse a local government for half of the amount a federal court orders the local government to pay. This may lead to an unintended consequence if a federal court apportions damages between the State and a local government. In that case, the bill would arguably require the State, after paying its own share, to reimburse the local government for 50 percent of the local government's share.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 29, 2020, the Civil Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed provisions stating that the State is liable for half of the costs of certain takings liability.
- Changed the mandatory evacuation period for permanent residents within the Keys from 24 hours to 30 hours.

On February 18, 2020, the Judiciary Committee adopted a strike-all amendment and an amendment to the amendment and reported the bill favorably as a committee substitute. The strike-all amendment, as amended:

- Changed the mandatory evacuation period within the Keys back to 24 hours, as current law provides.
- Required the State to share half of the potential takings liability with local governments within areas of critical state concern.
- Directed a state court to apportion liability in a particular manner under certain circumstances.
- Provided that the State is not liable for any growth-limiting regulation enacted solely at the discretion of a local government.
- Directed the state land planning agency, after the 2020 census, to update a hurricane evacuation model.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.

²⁵ See also Fla. R. Civ. P. 1.430(a) ("The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate").