

**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.)

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Prepared By: The Professional Staff of the Committee on Community Affairs

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BILL: SB 748

INTRODUCER: Senator Flores

SUBJECT: Takings Claims Within Areas of Critical State Concern

DATE: January 21, 2020

REVISED: \_\_\_\_\_

|    | ANALYST            | STAFF DIRECTOR | REFERENCE | ACTION           |
|----|--------------------|----------------|-----------|------------------|
| 1. | <u>Davis</u>       | <u>Cibula</u>  | <u>JU</u> | <b>Favorable</b> |
| 2. | <u>Paglialonga</u> | <u>Ryon</u>    | <u>CA</u> | <b>Favorable</b> |
| 3. | _____              | _____          | <u>AP</u> | _____            |

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**I. Summary:**

SB 748 establishes the Florida Keys Property Rights Protection Act. The Act provides that the state and a local government located in an area of critical state concern must share equally in judgments if they both are defendants in property rights-related litigation in state court and if:

- The court has found both the state and local government liable for the taking; and
- The regulation restricting development or use, which was the basis of the judgment, was mandated or approved by the state land planning agency or the Administration Commission.

The Act further provides that it applies to judgments by a state court entered jointly and severally against the state and local government before the Act takes effect and becomes law. In those circumstances, the state must reimburse the local government for half of the total amount that the local government paid to satisfy the judgment.

Finally, the Act provides that if a federal court enters the judgment against a local government, the state must reimburse the local government for half of the amounts paid by the local government to the claimant.

**II. Present Situation:**

The adoption of development regulations can impose significant burdens on a property owner's rights. These regulations can be especially significant in areas designated as areas of critical state concern.

Areas of critical state concern are designated by the Administration Commission, which is composed of the Governor and Cabinet, following a process set forth in statute.<sup>1</sup> Areas that qualify for designation include only:

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<sup>1</sup> Section 380.05, F.S.

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.<sup>2</sup>

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.<sup>3</sup>

Several areas have been designated as an area of critical state concern or have had their designations ratified by statute. These areas include the Big Cypress Area,<sup>4</sup> the Green Swamp Area,<sup>5</sup> the Apalachicola Bay Area,<sup>6</sup> and the Florida Keys Area.<sup>7</sup>

For the Florida Keys Area, land planning regulations that are subject to approval by the state must be consistent with the principles of protecting many different natural resources and making affordable housing available.<sup>8</sup> Additionally, these regulations must be consistent with "maintaining a hurricane evacuation clearance time for permanent residents of no more than 24 hours."<sup>9</sup>

A specific regulation that may form the basis of property rights-related litigation in the Florida Keys Area is the Monroe County Rate of Growth Ordinance.<sup>10</sup> 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.

According to representatives from Monroe County, the total number of development permits that may be issued in the future is also capped to allow for sufficient hurricane evacuation clearance time. As a result, the number of undeveloped lots for which owners may seek development permits exceeds the total number of permits that will ultimately be available. This permitting requirement is expected to cause additional property-rights related litigation when the available permits are exhausted in 2023.

### **Informal Agreement for Shared Defense and Liability with the State**

Because the state and the local government in an area designated as an area of critical state concern are involved in the applicable land planning regulations, both the state and the area can

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<sup>2</sup> Section 380.05(2), F.S.

<sup>3</sup> Section 380.05(6), F.S.

<sup>4</sup> Section 380.055, F.S.

<sup>5</sup> Section 380.0551, F.S.

<sup>6</sup> Section 380.0555, F.S.

<sup>7</sup> Section 380.0552, F.S.

<sup>8</sup> Section 380.0552(1)(d), F.S.

<sup>9</sup> Section 380.0552(9)(a)2., F.S.

<sup>10</sup> Rule 28-20.140(2), F.A.C.

be defendants in property-rights based litigation or litigation involving inverse condemnation or takings claims.

For Monroe County and the Florida Keys Area, the state and Monroe County have been operating under an informal agreement for 15 years to defend against property-rights related litigation and share equally in judgments awarded against them.<sup>11</sup> Judgments in property-rights related litigation arising out of the state-approved Monroe County land development regulations are starting to be entered. In a judgment provided as an example by Monroe County, the judgment was entered against the county and the state, jointly and severally.<sup>12,13</sup>

### **Eminent Domain and Inverse Condemnation**

In an eminent domain action, the government, as the plaintiff, asserts its power to take private property for public use. In compliance with the United States Constitution, the government must compensate the landowner for the loss.<sup>14</sup> The Florida Constitution similarly states that no private property may be taken except for a public purpose and each owner must be fully compensated.<sup>15</sup> In an inverse condemnation action, however, the government has “taken” private property without the owner’s consent, either through its activities or conduct and without adequate compensation. Because the government has not adequately compensated the property owner, the property owner is the plaintiff who sues to recover the value of property that has been taken.<sup>16</sup>

There are several forms of takings, one being by regulatory action. In those instances, the trial judge is the trier of all legal and factual issues, except for the issue of what constitutes just compensation for damages.<sup>17</sup> A jury determines the value of damages owed to a landowner. For a landowner to be fully compensated, prejudgment interest reaching back to the date of the taking must be permitted.<sup>18</sup> Attorney fees and costs are also recoverable at the trial level and on appeal.<sup>19</sup>

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<sup>11</sup> Correspondence from Jonathan A. Glogau explaining the Monroe County land development regulations and the informal agreement with the state dated March 6, 2019. (On file with the Committee on Judiciary).

<sup>12</sup> *Thomas and Collins v. Monroe County*, Case No. 04-CA-379-M (Fla. 16th Cir. Ct. Feb. 15, 2017).

<sup>13</sup> The Legislature acknowledged in s.7, ch. 2006-223, Laws of Fla., 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 as follows:

If the designation of the Florida Keys Area as an area of critical state concern is removed, the state shall be liable in any inverse condemnation action initiated as a result of Monroe County land use regulations applicable to the Florida Keys Area as described in chapter 28-29, Florida Administrative Code, and adopted pursuant to instructions from the Administration Commission or pursuant to administrative rule of the Administration Commission, to the same extent that the state was liable on the date the Administration Commission determined that substantial progress had been made toward accomplishing the tasks of the work program as defined in s. 380.0552(4)(c), Florida Statutes.

<sup>14</sup> The Fifth Amendment to the United States Constitution provides “. . . nor shall private property be taken for public use without just compensation.”

<sup>15</sup> FLA. CONST. art. X, s. 6.

<sup>16</sup> 21 FLA. JUR 2d Eminent Domain, s. 221.

<sup>17</sup> *Id.*, at s. 223.

<sup>18</sup> 21 FLA. JUR 2d Eminent Domain at s. 236.

<sup>19</sup> *Id.*, at s. 237.

## Relief from Burdens on Real Property Rights, Chapter 70, F.S.

The Legislature enacted the “Bert J. Harris, Jr., Private Property Rights 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 either the State Constitution or the United States Constitution.<sup>20</sup> The act provides a process whereby private landowners may seek relief and recover damages when the actions of a government inordinately burden their property.<sup>21</sup>

### Recent U.S. Supreme Court Decision on Takings Claim

In June 2019, the U.S. Supreme Court rendered a decision, *Knick v. Township of Scott, Pennsylvania*,<sup>22</sup> which significantly changes how and when a property owner may initiate takings claims against state and local governments. Before the *Knick* decision, a landowner who had a takings claim generally was required first to pursue state remedies before he or she could bring the claim in federal court. Going the state court route first generally involved the plaintiff spending a large sum of money and time. If the plaintiff did not prevail in state court, he or she could be barred from pursuing a claim in federal court. These barriers seemed to work against plaintiffs and to the advantage of defendants.<sup>23</sup> The *Knick* Court determined that requiring state-litigation before federal litigation imposed an unjustifiable burden on takings plaintiffs. The Court held that a property owner has an actionable Fifth Amendment takings claim as soon as a government takes his or her property for public use without paying for it, and the property owner may bring a claim in federal court at the time of the uncompensated taking.

### III. Effect of Proposed Changes:

The bill establishes the Florida Keys Property Rights Protection Act. The Act provides that the state and the local government located in an area of critical state concern must share equally in paying judgments including compensation, costs, attorney fees, and prejudgment interest if they both are defendants in property rights-related litigation and if:

- The court has found both the state and local government liable for the taking; and
- The regulation restricting development or use, which was the basis of the judgment, was mandated or approved by the state land planning agency or the Administration Commission.

These proceedings are brought pursuant to a claim for inverse condemnation or any other property-rights related action when the state is named as a codefendant or a third-party defendant by a local government in an area of critical state concern. A third-party defendant is “brought into a lawsuit by the original defendant”<sup>24</sup> who alleges that the third-party defendant is at fault, or at least partially at fault, for the actions giving rise to the plaintiff’s lawsuit.

<sup>20</sup> Section 70.001, F.S.

<sup>21</sup> 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), <https://www.floridabar.org/the-florida-bar-journal/the-bert-j-harris-jr-private-property-rights-protection-act-an-overview-recent-developments-and-what-the-future-may-hold/>.

<sup>22</sup> *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).

<sup>23</sup> Edward J. Sullivan, *In the Knick of Time: The Supreme Court Provides Direct Relief to Taking Claimants*, 42 No. 9 ZONING AND PLANNING LAW REPORT NL 1 (Oct. 2019).

<sup>24</sup> BLACK’S LAW DICTIONARY (11th ed. 2019).

If a claimant is successful, the Act requires the state court to enter separate judgments for the apportioned amounts against the state and local government. The Act further provides that a governmental entity named as a judgment debtor<sup>25</sup> is only liable for post-judgment interest<sup>26</sup> on the judgment entered against it. The governmental entity is not liable for post-judgment interest on the judgment entered against the other governmental entity. However, the Act does not prohibit a court from awarding a separate judgment for attorney fees and costs.

If, before the bill is enacted, a state court has entered a judgment jointly and severally against the state and a local government where each was found liable for the taking, and the regulation was mandated or approved by the state land planning agency or the Administration Commission, the state is required to reimburse the local government for half of the total amount the local government paid to satisfy the judgment.

The Act also contemplates that a claimant may file property rights-related litigation in federal court against a local government based on regulations approved by the state. In those cases, the Act 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 takes effect upon becoming law.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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<sup>25</sup> A judgment debtor is someone “against whom a money judgment has been entered but not yet satisfied.” BLACK’S LAW DICTIONARY (11th ed. 2014).

<sup>26</sup> 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. TheLaw.com Dictionary <https://dictionary.thelaw.com/postjudgment-interest/>.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

No agency analyses have been provided that estimate the fiscal impact of this bill. However, the bill will provide the affected state and local governments with some certainty on their liability in property-rights related litigation in areas of critical state concern.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 380.050 of the Florida Statutes.

**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.