

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/CS/SB 1876

INTRODUCER: Rules Committee; Judiciary Committee; and Senator Albritton

SUBJECT: Relief from Burdens on Real Property Rights

DATE: April 20, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	Favorable
3.	<u>Davis</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1876 amends the Bert J. Harris, Jr., Private Property Rights Protection Act and the Florida Land Use and Environmental Dispute Resolution Act. Both acts provide procedures and remedies to land owners whose property is inordinately burdened by a local government regulation. In the Bert Harris Act, the definitions of an “action of a governmental entity” is revised to include government actions that affect “real property including acting on an application or permit or adopting or enforcing any ordinance, resolution, regulation, rule, or policy.” The term “real property” is amended to mean, in part, land and any surface, subsurface, or mineral estates and any appurtenances and improvements to the land, including other relevant interests.

The bill also revises the definition of “land” or “real property” in The Florida Land Use and Environmental Dispute Resolution Act to match, by cross-reference, the newly amended definition of real property in the Bert Harris Act.

Additionally, the bill revises the Bert Harris Act to:

- Reduce the timeframe under which a claimant must notify the government before filing an action;
- Specify that written settlement offers are presumed to protect the public interest;
- Allow the claimant to have the court, rather than a jury, determine damages;
- Extend the point from which a prevailing claimant may recover attorney fees and costs; and

- Authorize a property owner, under specified conditions, to notify the government that he or she deems a law or regulation's impact on his or her real property to be restrictive of allowable uses and the property owner is not required to formally pursue an application for a development order or permit before bringing a claim.

The bill also allows a property owner to challenge an unlawful government exaction without waiting for a written notice of exaction when a local government is poised to impose an exaction upon his or her property.

The bill takes effect October 1, 2021.

II. Present Situation:

Both the Federal Constitution and State Constitution guarantee that a person's private property may not be taken for public use without reimbursement. The Fifth Amendment to the United States Constitution states that no private property shall "be taken for public use without just compensation." Similarly, the Florida Constitution provides that no private property shall be taken except for a public purpose and that each owner must be fully compensated.¹

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

The Legislature enacted the "Bert J. Harris, Jr., Private Property Rights Protection Act" in 1995. The act provides relief to a property owner whose property is inordinately burdened by government regulation. The act is limited in scope and applies only to:

- Real, and not personal, property;
- A property owner and not a leaseholder;
- "As-applied" challenges for specific government actions; and
- Challenges that are not based on temporary impacts.²

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 taking³ under either the State Constitution or the United States Constitution. The Legislature declared that there is "an important state interest in protecting the interests of private property owners from those inordinate burdens." Accordingly, the Legislature created a separate and distinct cause of action for governmental actions that might not rise to the level of taking under the State Constitution or United States Constitution. The Legislature provided a process for private landowners to seek relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity, as applied, unfairly affects real property.⁴

¹ FLA. CONST. art. X, s. 6.

² W. Thomas Hawkins, *Land Use Law in Florida*, 17-3 (Routledge, forthcoming June 2021).

³ A "taking" is generally understood to mean a government action that deprives an owner of the use or enjoyment of his or her property. A regulatory taking occurs when a government regulation seriously restricts a property owner's rights. BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴ Section 70.001(1), F.S.

The phrases “inordinate burden” and “inordinately burdened” mean that an action by one or more governmental entities has directly restricted or limited the use of real property to the extent that:

- The property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole; or
- The property owner is left with existing or vested uses that are unreasonable such that the property owner bears a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.⁵

Presuit Notice

A property owner who seeks compensation under the Harris Act must present a written claim to the head of the government entity at least 150 days before filing an action. If the property in question is agricultural, the notice period is 90 days. In addition to the claim, the property owner must submit a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the property.^{6,7} If other parties are involved, the governmental entity must notify them, including all owners of real property that is contiguous to the owner’s property.⁸

The Government Must Make a Written Settlement Offer

During the 150 or 90 day notice period, which may be extended by an agreement of the parties, the government is required to make a written settlement offer to the claimant. The settlement may contain an offer to:

- Adjust land development, permit standards, or similar provisions controlling the development or use of the land.
- Increase or modify density, intensity, or use of areas of development.
- Transfer development rights.
- Entertain land swaps or exchanges.
- Mitigate, including payments in lieu of onsite mitigation.
- Locate on the least sensitive portion of the property.
- Condition the amount of development or use permitted.
- Require that issues be addressed on a more comprehensive basis.
- Issue a development order, variance, special exception, or other extraordinary relief.
- Purchase the property or an interest in it.
- Make no changes to the proposed action.⁹

⁵ Section 70.001(3)(e)1., F.S. The definition further explains in s. 70.001(3)(e)2, F.S., what the terms do not include with regard to other impacts.

⁶ Section 70.001(4)(a), F.S.

⁷ The appraisal should contain valuations of the property both before and after the government’s restriction was imposed. This will enable the government to adequately evaluate the property owner’s potential claim for the purpose of developing a settlement offer during the pre-suit period. Margaret L. Cooper, Ronald L. Weaver, and Joanne M. Connor, *Statutory Private Property Rights Protection*, 6, The Florida Bar, 2018 Florida Real Property Litigation (2018), available through Westlaw, <https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0368929390&pubNum=0116933&originatingDoc=N090388C02AB211E5823BE24E38CB0B04&refType=SA&originationContext=contextAnalysis&contextData=%28sc.UserEnteredCitation%29&transitionType=ContextAnalysisItem>.

⁸ Section 70.001(4)(b), F.S.

⁹ Section 70.001(4)(c), F.S.

If the Government Offer is Rejected; Timeframe for Filing a Lawsuit

If the property owner rejects the settlement offer with the allowable uses, the property owner may file a claim in circuit court and the county where the real property is located.¹⁰ A cause of action may not be filed more than 1 year after a law or regulation is “first applied” by the government to the property at issue. The 1-year time frame begins when the law or regulation is clear and unequivocal in its terms and notice is provided by mail to the affected property owner or registered agent. Otherwise, the law or regulation is considered first applied to the property when there is a formal denial of a written request for development or variance.¹¹

The court then conducts a bench trial to determine whether an existing use of the real property or a vested right to a specific use of the property existed and whether the government inordinately burdened the owner’s property. If the court determines that an inordinate burden was imposed, the court must also determine the percentage of responsibility each governmental entity must bear.¹² The circuit court must impanel a jury to determine the amount of compensation.¹³

Recovery of Reasonable Costs and Attorney Fees

The court, and not the jury, will determine what constitutes reasonable costs and attorney fees.¹⁴

The property owner is entitled to recover reasonable costs and attorney fees from the government from the date the action was filed in circuit court if:

- The property owner prevails; and
- The court determines that the government’s settlement offer did not constitute a bona fide offer which reasonably would have resolved the claim during the 90 or 150 day notice-period.¹⁵

Similarly, the government is entitled to recover reasonable costs and attorney fees incurred from the date the action was filed in circuit court if:

- The government prevails; and
- The court determines that the property owner did not accept a bona fide settlement offer which reasonably would have fairly resolved the claim if the offer had been accepted by the property owner during the 90 or 150 day notice-period.¹⁶

Governmental Exactions***Background of Prohibited Exactions***

The United States Supreme Court issued a land-use decision in 2013, *Koontz v. St. Johns River Water Management District*,¹⁷ a case that arose in Florida. Mr. Koontz, the land owner, sought to develop a portion of his property that consisted mainly of wetlands. He offered to mitigate the

¹⁰ Section 70.001(5)(b), F.S.

¹¹ Section 70.001(11), F.S.

¹² Section 70.001(6)(a), F.S.

¹³ Section 70.001(6)(b), F.S.

¹⁴ Section 70.001(6)(c)3., F.S.

¹⁵ Section 70.001(6)(c)1., F.S.

¹⁶ Section 70.001(6)(c)2., F.S.

¹⁷ *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013).

adverse environmental effects of his development proposal by deeding a conservation easement to the St. Johns River Water Management District on nearly three-quarters of his remaining property. The district rejected his proposal and told him that his construction permit would be approved *only if* he agreed to reduce the size of his development and, among other things, deed to the district a conservation easement on the resulting larger remainder of his property *or* he agreed to hire contractors to make improvements on district-owned wetlands located several miles away. Mr. Koontz sued the district under s. 373.617, F.S., which allows a property owner to recover money damages if a government action related to land-use permitting constitutes a taking without just compensation, which is an unreasonable exercise of the state’s police power.

The Court held that a government cannot deny a land-use permit based upon a landowner’s refusal to agree to the government’s demands to either turn over property or pay money to the government *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. The Court’s decision was based upon a violation of the “unconstitutional condition” doctrine which precludes the government from burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them. In this particular case, the constitutional right burdened was the right to compensation when private property is taken for public use. The Court explained that “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.”¹⁸

The Court held that, even though the district’s conditions unconstitutionally burdened the landowner’s Fifth Amendment rights, a constitutional taking did not occur. Instead, the Court left it up to the states to determine what remedies would be available to a landowner who was subject to an unconstitutional demand where no actual taking has occurred. The Court wrote:

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 law but of the cause of action – whether state or federal – on which the landowner relies.¹⁹

2015 Legislative Response

The Legislature enacted s. 70.45, F.S., in 2015, and created a cause of action for a property owner to recover damages caused by a “prohibited exaction.”²⁰ Essential phrases from the *Koontz* decision are embedded in the statute. A prohibited exaction is defined as any condition imposed by a governmental entity on a property owner’s proposed use of real property that does not have “an essential nexus to a legitimate public purpose and is not roughly proportionate to

¹⁸ *Id.* at 607.

¹⁹ *Id.* at 608-609.

²⁰ Chapter 2015-142, s. 2, Laws of Fla.

the impacts of the proposed use that the governmental entity” is seeking to avoid, minimize, or mitigate.²¹

Presuit Notice and Prohibition against Waivers

The action may not be brought until a prohibited exaction is actually imposed or required in writing as a final condition of approval for the requested use of real property. The right to bring the action may not be waived.²²

The property owner must provide a written notice to the relevant governmental entity of his or her proposed action at least 90 days before filing an action but no later than 180 days after imposition of the prohibited exaction. The notice must identify the exaction that the property owner believes is prohibited and briefly explain why he or she believes the action is prohibited along with an estimate of the damages. The relevant governmental entity must review the notice of the claim, respond in writing and identify the basis for the exaction, and explain why it maintains that the exaction is proportionate to the harm created by the proposed use of real property, or propose to remove all or a proportion of the exaction.²³

Burden of Proof

The government has the burden of proving that the exaction has an essential nexus to a legitimate public purpose and that it is roughly proportionate to the impact the government seeks to avoid. The burden of proving damages that result from the prohibited exaction rests upon the property owner.²⁴

Attorney Fees and Costs

The court may award attorney fees and costs to the prevailing party. However, if the court finds that the exaction lacks an essential nexus to a legitimate public purpose, the court must award attorney fees and costs to the property owner.²⁵

Florida Land Use and Environmental Dispute Resolution Act

When the Legislature adopted the Bert Harris Act in 1995, it also created the Florida Land Use and Environmental Dispute Resolution Act (FLUEDRA) in the same chapter. The FLUEDRA is codified in s. 70.51, F.S., and is designed to encourage dispute resolution between real property²⁶ owners and government entities using a special magistrate in an informal hearing.²⁷ The FLUEDRA provides an informal mechanism for a property owner to challenge a governmental action infringing on his or her property without filing a lawsuit.

²¹ Section 70.45(1)(c), F.S.

²² Section 70.45(2), F.S.

²³ Section 70.45(3), F.S.

²⁴ Section 70.45(4), F.S.

²⁵ Section 70.45(5), F.S.

²⁶ “Real property” or “land” means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the owner had a relevant interest. Section 70.51(2)(g), F.S.

²⁷ See s. 70.51, F.S.

The FLUEDRA does not create a private cause of action or require that a property owner do anything before exercising his or her right to file a lawsuit.²⁸ Under the FLUEDRA, a property owner who believes that a government notice or order unfairly or unreasonably burdens his or her real property may, within 30 days after receiving the notice or order, file a request for relief with the government that issued the notice or order.²⁹ The government must forward the request to a special magistrate,³⁰ who must hold a hearing within 45 days after receiving the request for relief.³¹ The special magistrate's primary role is to facilitate a resolution of the conflict between the property owner and government without involving the courts. The hearing is open to the public and does not require the use of an attorney.³² In this role, the special magistrate acts as a "facilitator or mediator."³³

If the parties cannot reach an agreement, the special magistrate must determine whether the government action is unreasonable or unfairly burdens the property owner's real property, based on a list of statutory guidelines.³⁴ Within 14 days after the hearing's conclusion, the special magistrate must submit a written recommendation to the parties.³⁵ If the special magistrate finds that the government action does not unreasonably or unfairly burden the use of the property, the property owner may still file suit or pursue other remedies.³⁶ If the recommendation is that the government action unreasonably or unfairly burdens the property, the special magistrate may, with the property owner's consent, recommend one or more alternatives that allow for reduced government restraints on the property.³⁷

The government must respond within 45 days after receiving the special magistrate's recommendation and indicate whether it accepts, accepts in part, or rejects the recommendation.³⁸ If the government accepts the recommendation in whole or in part, but the property owner rejects the acceptance or modification, the government must put into writing within 30 days the specific permissible uses of the property.³⁹

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.⁴⁰ The FLUEDRA process may not continue longer than 165 days, unless the parties agree otherwise.⁴¹

²⁸ Section 70.51(24), F.S.

²⁹ Section 70.51(3) and (4), F.S.

³⁰ A "special magistrate" is a person selected by the parties to resolve the case. The special magistrate must be a Florida resident with experience and expertise in mediation and at least one of the following disciplines and a working familiarity with the others: land use and environmental permitting; land planning; land economics; local and state government organizations and powers; and the law governing the same. Section 70.51(2)(c) and (4), F.S.

³¹ Section 70.51(15)(a), F.S.

³² See s. 70.51(17)(a), F.S.

³³ *Id.*

³⁴ Section 70.51(17)(b) and (18), F.S.

³⁵ Section 70.51(19), F.S.

³⁶ Section 70.51(19)(a), F.S.

³⁷ Section 70.51(19)(b), F.S.

³⁸ Section 70.51(21), F.S.

³⁹ Section 70.51(22), F.S.

⁴⁰ Section 70.51(25), F.S.

⁴¹ Section 70.51(23), F.S.

Subsurface Rights

In a 1969 Florida Supreme Court case, *Dickinson v. Davis*,⁴² the Court stated that land can “be divided horizontally as well as vertically, so that one person may own the surface and another the minerals underground.” Accordingly, the Court long ago recognized that separate legal rights to surface and subsurface holdings exist.

III. Effect of Proposed Changes:

The bill makes several changes to the Bert Harris Act, amends the governmental exactions statute, and revises one definition in the Florida Land Use and Environmental Dispute Resolution Act.

Bert Harris Act Changes (Section 1)

The Bert Harris Act is amended to:

- Revise the definition of an “action of a governmental entity” to include specific government actions that affect real property including acting on an application or permit or adopting or enforcing “any ordinance, resolution, regulation, rule, or policy.”
- Revise the term “real property” to mean land and any surface, subsurface, or mineral estates and any appurtenances and improvements to the land, including any other relevant interests in the real property in which the property owner has a relevant interest. The term includes only parcels that are the subject of and directly impacted by the action of a governmental entity.⁴³ Reduce the pre-suit dispute resolution period for nonagricultural properties to 90 days from 150 days. This is accomplished by eliminating the distinction between agricultural properties and other properties. (s. 70.001(4), F.S.)
- Revise the description of what constitutes an appraisal. Before filing an action, a property owner must submit an appraisal, along with a claim, to the head of a governmental entity to demonstrate the loss in a property’s fair market value. The “bona fide, valid” appraisal language in current law is replaced with a requirement for a “written appraisal report” that is described in s. 475.611(1)(e), F.S.⁴⁴
- Specify that settlement offers are presumed to protect the public interest. This change appears to reverse a 2016 Fifth District Court of Appeal decision, *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*,⁴⁵ in which the court held that a trial court was required to

⁴² *Dickinson v. Davis*, 224 So. 2d 262, 265 (Fla. 1969). The case dealt with separate tax assessments for mineral, oil, gas, and other subsurface rights.

⁴³ The broadening of the definition of real property might be perceived as an expansion of the Harris Act that would allow more successful causes of action than exist under current law. Under existing law damages are measured by the change in the market value of land. Under this proposal, a claimant might argue that the market value of his or her mineral estate has declined and he or she is therefore entitled to damages against a governmental entity. In contrast, some might argue that the revised definition is only a clarification, not an expansion, of current law, such that there is no change in the existing law.

⁴⁴ Section 475.611(1)(e), F.S., defines an “appraisal report” as any communication, written or oral, of an appraisal, appraisal review, appraisal consulting service, analysis, opinion, or conclusion relating to the nature, quality, value, or utility of a specified interest in, or aspect of identified real property, and includes any report communicating an appraisal analysis, opinion, or conclusion of value, regardless of title. However, in order to be recognized in a federally related transaction, an appraisal report must be written.

⁴⁵ *Rainbow River Conservation, Inc. v. Rainbow River Ranch*, 189 So. 3d 312 (Fla. 5th DCA 2016).

make findings regarding whether a settlement protected public interest and property before approving a settlement between a property owner and government entities.

- Allow a property owner the choice of having the court, rather than a jury, determine damages.
- Allow a property owner who prevails in an action to recover reasonable costs and attorney fees incurred in litigation from the date of the presentation of the claim to the head of the governmental entity, as opposed to the date the action is filed in court. The net effect of this change will be to permit a prevailing plaintiff to recover more in attorney fees from the government because the property owner will be recovering attorney fees from an earlier period in time and for additional work in preparing the cause of action for court. This revision also deletes the requirement that the court, in awarding reasonable costs and attorney fees, determine that the government's settlement offer did not constitute a bona fide offer to the property owner which would have resolved the claim during the notice period.

The bill also provides that if proper notice is not provided to a property owner after a law or regulation's enactment, the property owner may, *at any time after enactment*, notify the head of the government in writing by certified mail and e-mail, if available, that the property owner deems the law or regulation's impact on the property owner's real property to be clear and unequivocal in its terms and, as such, restrictive of allowable uses. The government then has 45 days from receipt of the notice to respond in writing by certified mail and e-mail, if available, to describe the limitations imposed on the property by the law or regulation. The property owner is not subsequently required to formally pursue an application for a development order, development permit, or building permit to bring a claim under the Bert Harris Act, but any claim must be filed within one year after the date the property owner receives the government's response.

Finally, the bill specifies that the changes to this section, except for the changes made to the definitions, apply only to Bert Harris Act claims brought in response to government actions taken on or after July 1, 2021, pursuant to language in section 3.

Governmental Exactions (Section 2)

This provision permits a property owner to sue for injunctive relief, and a court to declare, that a prohibited exaction is invalid. The property owner does not have to exhaust all administrative remedies before filing suit to declare a prohibited exaction invalid and recover damages.

The changes in the bill to the governmental exaction statute apply to claims that are made in response to actions taken by governmental entities on or after July 1, 2021, pursuant to language in section 3.

Florida Land Use and Environmental Dispute Resolution Act (Section 4)

The bill amends the definition of "land" or "real property" to match, by cross-reference, the newly amended definition of "real property" in the Bert Harris Act.

“WHEREAS” Clauses

The bill contains five “Whereas” clauses. The first three clauses recognize that the Bert J. Harris, Jr., Private Property Rights Protection Act was enacted in 1995, that the state has historically recognized subsurface estates, and that the bill clarifies the definition of property to preserve the original intent of the act. The final two clauses recognize that the state has an interest in the timely resolution of claims brought under the act, and that landowners and governmental entities benefit by knowing when a claim brought under the act may be asserted to avoid unnecessary future litigation.

The bill is effective October 1, 2021.

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.

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

None.

B. Private Sector Impact:

Property owners will likely be able to have more freedom to develop and use their real property and generate income by doing so. Alternatively, property owners will have a better chance at receiving compensation for regulatory burdens imposed on their property.

C. **Government Sector Impact:**

CS/CS/SB 1876 might have a financial impact on local governments by making it easier for a property owner to challenge a local government regulation that burdens his or her property and increasing the amount of attorney fees and costs that a local government must pay to a property owner.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 70.001, 70.45, and 70.51.

IX. **Additional Information:**

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

CS/CS by Rules on April 20, 2021:

The committee substitute revises the description of an appraisal that a property owner must submit, along with a claim, to a governmental entity before filing an action for compensation.

The effective date of the bill is changed from July 1, 2021, to October 1, 2021.

CS by Judiciary on March 22, 2021:

The committee substitute adds the substance of SB 1380 to SB 1876, but then removes the previous revisions in SB 1876 pertaining to the Florida Land Use and Environmental Dispute Resolution Act, except for the definition of “land” or “real property.” The committee substitute also adds five “Whereas” clauses that were not contained in either bill.

B. **Amendments:**

None.