

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 421 & 1101 Governmental Actions Affecting Private Property Rights

**SPONSOR(S):** Local Administration & Veterans Affairs Subcommittee, Tuck and others

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	15 Y, 3 N	Mawn	Jones
2) Local Administration & Veterans Affairs Subcommittee	15 Y, 2 N, As CS	Darden	Miller
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." Specifically:

- If a local government enacts a regulation inordinately burdening private property, under the Bert Harris, Jr., Private Property Rights Protection Act ("Bert Harris Act"):
  - 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 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 to explain why the exaction is lawful, or remove the exaction.

A property owner may also resolve government action disputes under the Florida Land Use and Environmental Dispute Resolution Act ("FLUEDRA"), which provides an informal process to challenge government action infringing on property rights.

The PCSMB modifies the Bert Harris Act to:

- Revise the terms "action of a governmental entity" to include adopting or enforcing any ordinance, resolution, regulation, rule or policy; and "real property" to include any legal interest in land, including surface, subsurface, and mineral estates and any other relevant land interest held by a property owner;
- 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.

The PCSMB also allows a property owner to challenge an unlawful government exaction upon his or her property without waiting for a written notice of the action if the local government action is imminent. The PCSMB revises the definition of "land" and "real property" under FLUEDRA to have the same meaning as "real property" under the Bert Harris Act.

The bill does not appear to have a fiscal impact on state government, but may have an indeterminate negative fiscal impact on local governments.

# 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").<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<sup>5</sup> or a vested right<sup>6</sup> to a specific use.<sup>7</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 the property's fair market value.<sup>8</sup> The government must then notify all property owners adjacent to the claimant's property of the pending claim and make a written settlement offer to the claimant, which may include an offer to:

- Adjust land development or permit standards;
- Transfer developmental rights;
- Conduct land swaps or exchanges;
- Mitigate;
- Condition 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
- Take other actions, including making no changes to the proposed government action.<sup>9</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.

A property owner may reject the settlement offer and file an action in circuit court.<sup>10</sup> The court must determine whether the government inordinately burdened the property, and if so, calculate each involved government entity's percentage of responsibility.<sup>11</sup> A jury must determine damages but cannot

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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., now codified as s. 70.001, F.S.

<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> "Existing use" means: 1) an actual, present use or activity on the real property, including periods of inactivity normally associated with, or incidental to, the nature or type of use; or 2) an activity or such reasonably foreseeable, non-speculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the property. S. 70.001(3)(b), F.S.

<sup>6</sup> The existence of a "vested right" is determined by applying the common law principles of equitable estoppel or substantive due process or by applying the state's statutory law. S. 70.001(3)(a), F.S.

<sup>7</sup> S. 70.001(2), F.S.

<sup>8</sup> S. 70.001(4)(a), F.S. If a property is classified as agricultural under s. 193.461, F.S., the notice period is 90 days.

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

<sup>10</sup> S. 70.001(5)(b), F.S.

<sup>11</sup> S. 70.001(6)(a), F.S.

consider any business damages relative to the development, activity, or use the government has restricted or prohibited.<sup>12</sup>

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.<sup>13</sup>

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>14</sup>

A claim cannot be filed more than one year after the government applies a law or regulation to the property at issue.<sup>15</sup> The one-year timeframe begins when the law or regulation unequivocally impacts the property and notice is mailed to the affected property owner.<sup>16</sup> If the law or regulation does not unequivocally impact the property, or if notice to the property owner is not mailed, the one-year period does not start until the government formally denies the property owners' request for development or variance.<sup>17</sup>

### 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>18</sup> In 2013 the United States Supreme Court held that a government cannot deny a land-use permit based on the property owner'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 property owner and the effect of the proposed land use.<sup>19</sup> Extortionate demands to relinquish property in the land-use permitting context violate the Fifth Amendment Takings Clause not because of an actual taking but because such demands impermissibly burden the right not to have property taken without just compensation.<sup>20</sup>

The property owner in *Koontz* owned land consisting primarily of wetlands, wanted to develop part of the property, and offered a conservation easement to the St. Johns River Water Management District ("district"). The district rejected his proposal, stating it would deny his permit unless he agreed to scale back his plan and give the district a larger conservation easement or maintain the plan but pay to improve separate district-owned land. The district also offered to consider alternative approaches. The property owner sued the district under the statute authorizing property owners to sue a government for actions related to land-use permitting that constitutes an unlawful taking.<sup>21</sup>

The Supreme Court found that while the district's conditions unconstitutionally burdened the property owner's Fifth Amendment rights, no constitutional taking had occurred. The Court left it to the states to determine remedies available to a property owner subjected to an unconstitutional demand, but where no actual taking occurs.<sup>22</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

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<sup>12</sup> S. 70.001(6)(b), F.S.

<sup>13</sup> S. 70.001(6)(c)1., F.S.

<sup>14</sup> S. 70.001(6)(c)2., F.S.

<sup>15</sup> S. 70.001(11), F.S.

<sup>16</sup> S. 70.001(11)(a)1., F.S.

<sup>17</sup> S. 70.001(11)(a)2., F.S.

<sup>18</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

<sup>19</sup> *Id.* at 606.

<sup>20</sup> *Id.* at 607.

<sup>21</sup> S. 373.617, F.S.

<sup>22</sup> *See id.* at 609.

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 [property owner] relies.<sup>23</sup>

Consequently, the Court left unanswered the question of whether the property owner in the case could recover damages for his unconstitutional conditions claims predicated on the Takings Clause because his claim was based on Florida law.<sup>24</sup> Specifically, because the statute 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," whether that provision covers an unconstitutional conditions claim is a question of state law.<sup>25</sup>

### Unlawful Government Exaction Challenges

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>26</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>27</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.<sup>28</sup> The government's written response may only be used against it in subsequent litigation for assessing attorney fees and costs.<sup>29</sup>

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.<sup>30</sup>

The prevailing party in an action under the statute may recover attorney fees and costs.<sup>31</sup> Moreover, 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.<sup>32</sup>

### Florida Land Use and Environmental Dispute Resolution Act

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<sup>23</sup> *Id.* at 608-09.

<sup>24</sup> *Id.* at 609.

<sup>25</sup> *Id.* at 610.

<sup>26</sup> S. 70.45(1)(c), F.S.

<sup>27</sup> S. 70.45(2) and (3), F.S.

<sup>28</sup> S. 70.45(3)(a), F.S.

<sup>29</sup> S. 70.45(3)(b), F.S.

<sup>30</sup> S. 70.45(4), F.S.

<sup>31</sup> S. 70.45(5), F.S.

<sup>32</sup> *Id.*

In 1995, the Legislature adopted the Florida Land Use and Environmental Dispute Resolution Act ("FLUEDRA"), codified as s. 70.51, F.S., to facilitate the resolution of disputes between property owners and government entities.<sup>33</sup> FLUEDRA provides an informal mechanism for a property owner to challenge a government action that may infringe on his or her property without having to file a lawsuit.

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.<sup>34</sup> Under FLUEDRA, a property owner 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>35</sup> The government must forward the request to a special magistrate, who must hold a hearing within 45 days of receiving the request for relief.<sup>36</sup> The special magistrate's primary role is to facilitate a resolution of the conflict between the property owner and government without involving the courts.<sup>37</sup> In this role, the special magistrate acts as a "facilitator or mediator."<sup>38</sup>

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.<sup>39</sup> Within 14 days of the hearing's conclusion, the special magistrate must submit a written recommendation to the parties.<sup>40</sup> If the special magistrate's recommendation is that the government action does not unreasonably or unfairly burden the property, the property owner may still file suit or pursue other remedies.<sup>41</sup> 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.<sup>42</sup>

The government must respond within 45 days of receiving the special magistrate's recommendation and indicate whether it accepts, accepts in part, or rejects the recommendation.<sup>43</sup> 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.<sup>44</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>45</sup> The FLUEDRA process may not continue longer than 165 days, unless the parties agree otherwise.<sup>46</sup>

## **Effect of Proposed Changes**

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

The PCSMB amends the Bert Harris Act to:

- Reduce the timeframe in which a claimant must notify the government before filing an action from 150 days to 90 days;
- Specify that written settlement offers are presumed to protect the public interest;

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<sup>33</sup> See s. 70.51, F.S.

<sup>34</sup> S. 70.51(24), F.S.

<sup>35</sup> S. 70.51(3) and (4), F.S.

<sup>36</sup> S. 70.51(15)(a), F.S. 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. S. 70.51(2)(c) and (4), F.S.

<sup>37</sup> See s. 70.51(17)(a), F.S.

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

<sup>39</sup> S. 70.51(17)(b) and (18), F.S.

<sup>40</sup> S. 70.51(19), F.S.

<sup>41</sup> S. 70.51(19)(a), F.S.

<sup>42</sup> S. 70.51(19)(b), F.S.

<sup>43</sup> S. 70.51(21), F.S.

<sup>44</sup> S. 70.51(22), F.S.

<sup>45</sup> S. 70.51(25), F.S.

<sup>46</sup> S. 70.51(23), F.S.

- Allow the claimant to have a judge, rather than a jury, determine damages; and
- Allow a prevailing claimant to recover attorney fees and costs incurred from the time the claimant files notice with the government instead of from the time the claimant files suit.

The PCSMB also provides that if notice to an affected property owner is not provided after a law or regulation's enactment, the property owner may, at any time after enactment, notify 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 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 such claim must be filed within one year after the date the property owner receives the government's response.

The PCSMB makes the following modifications to terms under the Bert Harris Act:

- "Action of a governmental entity" to include adopting or enforcing any ordinance, resolution, regulation, rule, or policy; and
- "Real property" to include any legal interest in land, including surface, subsurface, and mineral estates and any other relevant land interest held by a property owner.

Finally, the PCSMB specifies that the changes apply only to Bert Harris Act claims brought in response to government actions taken on or after July 1, 2021.

#### Unlawful Government Exaction Challenges

With respect to an action challenging an unlawful exaction under s. 70.45, F.S., the PCSMB 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.

The PCSMB also provides that the changes apply only to exaction challenges brought in response to government actions taken on or after July 1, 2021.

#### Florida Land Use and Environmental Dispute Resolution Act

The PCSMB revises the definitions of the terms "land" and "real property" under FLUEDRA to have the same meaning as "real property" under the Bert Harris Act.

#### 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:** Provides an unnumbered section providing the applicability of sections 1 and 2.

**Section 4:** Amends s. 70.51, F.S., relating to land use and environmental dispute resolution.

**Section 5:** Provides an effective date of July 1, 2021.

## 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 his or her property.
- Increasing the amount of attorney fees and costs that a local government must pay in certain situations.

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, which 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:

The bill neither provides authority for nor requires rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 1, 2021, the Local Administration & Veterans Affairs Subcommittee adopted a proposed committee substitute for multiple bills (PCSMB) and reported the resulting bill favorably as a committee substitute. The PCSMB removed provisions broadening applicability, time limits and tolling provisions, and recovery of attorney fees and costs in certain situations under FLUEDRA.

This analysis is drafted to the committee substitute as passed by the Local Administration & Veterans Affairs Subcommittee.