

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 Environmental Preservation and Conservation

BILL: SB 284

INTRODUCER: Senator Diaz de la Portilla

SUBJECT: Permitting

DATE: March 22, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinton	Uchino	EP	Pre-meeting
2.			AGG	
3.			AP	

I. Summary:

SB 284 creates a cause of action under chs. 253, 373, and 403, F.S., to challenge final agency actions in circuit court with respect to permit applications when the issuing agency makes extortionate demands as conditions for issuing a permit that violate the unconstitutional conditions doctrine.

II. Present Situation:

Takings

The Fifth Amendment to the U.S. Constitution guarantees that citizens' private property will not be taken for public use without just compensation. The Takings Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment to the U.S. Constitution, which provides, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law..." The government may acquire private property through the power of eminent domain, provided the property owner is compensated.¹

Article I, section 2 of the Florida Constitution also guarantees all natural persons the right to "acquire, possess and protect property" and further provides that no person will be deprived of property without due process of law.² Article X, section 6 of the Florida Constitution, which provides that private property cannot be taken except for a public purpose and with full compensation paid to each owner, is complimentary to the Fifth and Fourteenth Amendments to the U. S. Constitution.

¹ Chapters 73 and 74, F.S.

² FLA. CONST. art. I, s. 9.

In addition to physical infringement by a governmental entity upon a property, certain regulations on property can constitute a taking. When a governmental regulation results in a permanent, physical occupation of a property or deprives an owner of "all economically productive or beneficial uses" of the property, a "per se" taking is deemed to have occurred. Such actions require full compensation for the property.³ Additionally, when the regulation does not substantially advance a legitimate state interest, it is invalid⁴ and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.⁵

In other takings cases, courts have used a multi-factor, "ad hoc" analysis to determine whether a regulation has adversely affected the property to such an extent as to require government compensation. The factors considered by the courts include:

- The economic impact of the regulation on the property owner;
- The extent to which the regulation interferes with the property owner's investment-backed expectations;
- Whether the regulation confers a public benefit or prevents a public harm (the nature of the regulation);
- Whether the regulation is arbitrarily and capriciously applied; and
- The history of the property, history of the development, and history of the zoning and regulation.⁶

The U.S. Supreme Court, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, rejected property owners' contentions that a three-year moratorium on development constituted a per se taking of property requiring compensation under the Takings Clause.⁷ The Court recognized that there are a wide range of moratoria that occur as a regular part of land use regulation such as "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."⁸ The Court determined that the length of time a parcel of property was undevelopable was one of the many factors to be considered when determining whether a taking occurred.

Regulatory Takings Requiring Compensation

Nollan v. California Coastal Comm'n, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374, established a two-prong test to determine if a landowner should receive compensation under a takings claim. In *Nollan*, the U.S. Supreme Court held that permit conditions that do not demonstrate an essential nexus between the conditions and the purpose served by those conditions constituted a regulatory taking. In *Dolan*, the Court adopted a "rough proportionality" test, requiring that a dedication of private property must also be roughly proportional in nature and extent to the impact, or social costs, of the proposed development.⁹

³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁴ *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁵ *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

⁶ *See Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992). *See also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Graham v. Estuary Properties*, 399 So. 2d 1374 (Fla. 1981).

⁷ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

⁸ *See id.* (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)).

⁹ *See Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, further clarified regulatory takings by limiting them to four situations:

- When there is a permanent physical invasion of property, however slight;
- When the regulation eliminates all economic value in the property;
- When the action is the imposition of a condition on the grant of a permit that does not serve a purpose related to the permitted activity or the condition was not roughly proportional to the impact of the development; and
- When the regulation involves a substantial economic impact on the owner and interferes with the owner's investment-backed expectations or imposes an undue burden on the owner.¹⁰

What is notable about this line of jurisprudence is that it concerns permits that have been granted. However, it does not address conditions imposed on permits that have been denied.

Unconstitutional Exactions

In *Koontz v. St. Johns River Water Management District*, 133 S.Ct 2586 (2013), the U.S. Supreme Court held that a government cannot deny a land-use permit based on the landowner's refusal to accede to the government's demands to either turn over property or pay money to the government unless there is a nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use.¹¹

The *Koontz* case arose from the denial of a permit by the St. Johns River Water Management District (district). Coy Koontz, Sr., sought to develop part of his property and applied for the necessary permit from the district, which was required due to the effect the development would have on wetlands. Mr. Koontz wanted to develop 3.7 acres of a 14.9 acre tract of land and offered to grant a conservation easement on most of the rest of the parcel. The district considered the conservation easement inadequate and, along with offering to entertain any other suggestions, gave Mr. Koontz two choices:

- He could reduce the size of the development to one acre and grant a conservation easement on the rest of the property and make other changes to his proposed development; or
- He could build on the full 3.7 acres if he deeded to the district a conservation easement on the rest of the property, and pay to enhance approximately 50 acres of district-owned wetlands, or an equivalent project proposed by Mr. Koontz.¹²

The U.S. Supreme Court heard the case in 2013 and decided later that year in favor of Mr. Koontz. The Court's decision was based on violation of the unconstitutional condition doctrine. The doctrine precludes the government from burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them. The constitutional right burdened under the doctrine is the right to compensation when private property is taken for public use.¹³ As explained by the Court, "[e]xtortionate demands for property in the land-use permitting

¹⁰ See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

¹¹ *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013).

¹² *Id.* at 2593.

¹³ U.S. Const. amend. V.

context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”¹⁴

The Court did not rule on state or federal remedies for violating the holdings of the case. “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.”¹⁵ The case was remanded back to the state for further consideration in light of the opinion. Upon remand, the Fifth District Court of Appeals reaffirmed its earlier decision, which was consistent with the U.S. Supreme Court’s opinion.¹⁶

Judicial Review of Agency Permits

Sections 253.763, 373.617, and 403.90, F.S., provide for judicial review relating to permits and licenses under chs. 253, 373, and 403, F.S. The three chapters relate to state lands, water resources, and environmental control, respectively. The sections are identical and provide that anyone substantially affected by any agency action concerning a permit may seek review within 90 days in circuit court. The sections limit the circuit court’s review to determining whether final agency action is an unreasonable exercise of the state’s police power constituting a taking without just compensation. If the circuit court finds that the decision is an unreasonable exercise of the state’s police power constituting a taking without just compensation, the relevant agency has three options:

- Agree to issue the permit;
- Agree to pay appropriate monetary damages; or
- Agree to modify its decision to avoid an unreasonable exercise of police power.¹⁷

III. Effect of Proposed Changes:

The bill amends ss. 253.763, 373.617, and 403.90, F.S., to provide an additional cause of action for permit applicants when an entity of the state violates the unconstitutional conditions doctrine by making extortionate demands as a condition or conditions of issuing a permit. The bill provides the cause of action in the three identical sections of law for violations arising from permitting conditions under chs. 253, 373, and 403.

The bill provides an effective date of July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁴ *Supra* note 11, at 2596.

¹⁵ *Supra* note 11, at 2597.

¹⁶ *St. Johns River Water Management District v. Koontz, Jr.*, 2014 WL1703942 (Florida 5th DCA 2014).

¹⁷ Sections 253.763, 373.617, and 403.90, F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

This could potentially limit expenditures required of people or entities seeking a permit by providing a limit on conditions imposed on the issuance of a permit.

C. Government Sector Impact:

This bill could have an indeterminate negative effect due to limitations on conditions that might otherwise have been imposed on permit applicants.

This bill could result in an increase in legal costs for the permitting agency due to the potential for increased litigation under the new cause of action provided for in the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill refers directly to elements of the *Koontz* decision. It uses the phrase “extortionate demands,” which was used in the U.S. Supreme Court decision to describe demands by the permitting agency that run afoul of the Takings Clause. The phrase “extortionate demands” is not defined in the bill which could lead to different interpretations between permitting agencies.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 253.763, 373.617, and 403.90.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
