

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 383 Private Property Rights

SPONSOR(S): Judiciary Committee; Local Government Affairs Subcommittee; Civil Justice Subcommittee; Edwards, Perry and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/HB 284

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|------------------|---------|---------------------------------------|
| 1) Civil Justice Subcommittee | 13 Y, 0 N, As CS | Malcolm | Bond |
| 2) Local Government Affairs Subcommittee | 11 Y, 0 N, As CS | Miller | Miller |
| 3) Appropriations Committee | 20 Y, 7 N | Kramer | Leznoff |
| 4) Judiciary Committee | 17 Y, 1 N, As CS | Malcolm | Havlicak |

SUMMARY ANALYSIS

The United States Supreme Court has 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 an essential nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use. Governmental exactions of this type were ruled unconstitutional. However, because unconstitutional exactions do not qualify as an unconstitutional taking, the Fifth Amendment's mandated remedy of just compensation to the landowner is not required. Instead, the remedy is determined by the law of the cause of action on which the property owner based the claim.

Although federal law appears to provide a cause of action for unconstitutional exactions, it is unclear whether current Florida law providing a cause of action for unconstitutional takings also applies to unconstitutional exactions by local and state governments and whether monetary damages would be available in such cases.

The bill creates a cause of action to recover damages for landowners where local and state governmental entities impose conditions that rise to the level of prohibited, and therefore unconstitutional, exactions. Plaintiffs under the cause of action will be required to provide pre-suit notice to the governmental entity to allow an opportunity to explain or correct the prohibited exaction without need for further litigation. If the suit is necessary, the bill requires the governmental entity to prove the exaction complies with the standards set by the U.S. Supreme Court while the property owner must prove damages from the prohibited exaction. The bill clarifies the measure of damages recoverable under the cause of action and provides for injunctive relief, and allows recovery of costs and attorney fees. Governmental entities may recover attorney fees and costs if they prevail. Finally, impact fees and non-ad valorem assessments are exempt from the bill, and sovereign immunity is waived to the extent of assessing damages under the new cause of action.

The bill also amends the Bert J. Harris, Jr., Private Property Act to provide that only those property owners whose real property is the subject of and directly impacted by the action of a governmental entity may bring suit under the Act and to provide that the Act's safe harbor provisions for settlement agreements between a property owner and governmental entity apply regardless of when the settlement agreement was entered. In addition, actions taken by counties to adopt FEMA flood maps for the purpose of participating in the National Flood Insurance Program are not subject to claims under the Act, with certain exceptions.

The fiscal impact of the bill on state and local governments is indeterminate.

The bill has an effective date of October 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Private Property Rights and Unconstitutional Exactions

In 2013, the United State Supreme Court, in *Koontz v. St. Johns River Water Management District*,¹ 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 an essential nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use.²

The property owner in *Koontz* owned land consisting primarily of wetlands. He sought to develop a portion of his property, and as part of his proposal offered to grant a substantial conservation easement to the St. Johns River Water Management District (district). The district rejected his proposal, and informed him that his permit would be denied unless he agreed either to scale back his planned development and give the district a larger conservation easement, or to maintain the proposal but hire contractors to make improvements to separate land owned by the district. The district offered to consider alternative approaches as well. The property owner believed the district's demands were unreasonable, and he sued under s. 373.617, F.S., which allows property owners to recover money damages in the event of a government action related to land-use permitting that is an unreasonable exercise of the state's police power constituting a taking without just compensation.

The Supreme Court's decision regarding the constitutionality of the exaction in *Koontz* was an extension of two prior cases, *Nollan v. California Coastal Commission*³ and *Dolan v. City of Tigard*,⁴ in which the Court held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.⁵

These holdings are based on the doctrine of unconstitutional conditions, which prohibits the government from denying a benefit to a person because he or she exercises or vindicates a constitutional right.⁶ The Court explained that "[e]xtortionate demands for property in the land-use permitting context run afoul of 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."⁷

Of particular significance to the bill, the *Koontz* court found that while the government's conditions unconstitutionally burdened the landowner's Fifth Amendment rights, no constitutional taking has occurred that qualifies for the constitutionally mandated remedy of just compensation to the landowner. Instead, the Court left it up to the states to determine what remedies would be available to a landowner who has been subject to an unconstitutional demand where no actual taking has occurred.⁸ 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 compensation—only for takings. In cases where there is an excessive demand but no

¹ 133 S. Ct. 2586 (2013).

² *Koontz*, supra at 133 S. Ct. 2595.

³ 483 U.S. 825 (1987).

⁴ 512 U.S. 374 (1994).

⁵ *Dolan*, 512 U.S. at 386, 391; *Nollan*, 483 U.S. at 837.

⁶ *Koontz*, 133 S. Ct. at 2594.

⁷ *Id.* at 2596.

⁸ *Id.* at 2597.

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.⁹

Consequently, the Court left unanswered the question of whether the landowner in *Koontz* could recover damages for unconstitutional conditions claims predicated on the Takings Clause because the landowner's claim was based on Florida law, s. 373.617, F.S.¹⁰ Specifically, because s. 373.617, F.S., 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," it is a question of state law as to whether that provision covers an unconstitutional conditions claim.¹¹

Remedies for Unconstitutional Conditions Claims

Currently, while federal law provides a cause of action for unconstitutional conditions claims,¹² it is unclear what type of damages would be recoverable under federal law. As noted above, s. 373.617, F.S., allows for monetary damages to be awarded to a landowner when a circuit court determines a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation." However, because this provision applies to takings, it is unclear whether it provides a cause of action for monetary damages for unconstitutional conditions claims, also known as unconstitutional exactions, predicated on the Takings Clause where no taking has occurred.¹³

The bill creates s. 70.45, F.S., to provide a cause of action and monetary damages for landowners in cases of prohibited exactions by governmental entities. A "prohibited exaction" is defined as

any condition imposed by a governmental entity 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 the governmental entity seeks to avoid, minimize, or mitigate.

The bill defines the terms "governmental entity" consistent with the current definition in ch. 70, F.S.,¹⁴ and it defines the terms "property owner" and "real property" consistent with the amended definitions in ch. 70, F.S.¹⁵ The bill also defines the scope of damages the affected property owner may recover:

"Damages" means, in addition to the right to injunctive relief, the reduction in fair market value of the real property or the amount of the fee or infrastructure cost that exceeds what would be permitted under this section.

The bill provides that 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. Two conditions must be met before the property owner may bring suit under the new cause of action. First, the prohibited exaction actually must be imposed or required, in writing, as a final condition for approval of the proposed land use. Second, at least 90 days before filing the action, but no later than 180 days after the exaction is imposed, the property owner must give the governmental entity written notice identifying the prohibited exaction, explaining why the exaction is prohibited, and estimating the property owner's damages. On

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 2597-98.

¹² See *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

¹³ Article I, s. 21 of the Florida Constitution provides "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." "This provision was intended to give life and vitality to the maxim: 'For every wrong there is a remedy.'" *Swain v. Curry*, 595 So. 2d 168, 174 (Fla. 1st DCA 1992) (citing *Holland v. Mayes*, 155 Fla. 129 (1944)).

¹⁴ Section 70.001(3)(c) defines "governmental entity" to include "an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority." It does not include the United States or any of its agencies, or an agency of the state or a local government when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.

¹⁵ See Limitation of Application discussion below.

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 all or a portion of the exaction. The governmental entity's written response may only be used against it in subsequent litigation for assessing attorney fees and costs. Additionally, officials of the governmental entity are authorized to meet privately with the entity's attorney to discuss the claim.¹⁶

The prevailing party in an action under s. 70.45 may be awarded attorney fees and costs. However, if the court determines that the exaction was a prohibited exaction, the court must award attorney fees and costs to the property owner.

The bill waives sovereign immunity of the state and its political subdivisions for claims brought under new s. 70.45, F.S.¹⁷ Because actions under the new statute will be against governmental entities (only if they impose prohibited exactions), the sovereign immunity of the state must be waived for the plaintiff to maintain the suit or recover on the claim.¹⁸

The bill also provides that s. 70.45, F.S., does not apply to impact fees adopted pursuant to s. 163.31801, F.S., or non-ad valorem assessments as defined in s. 197.3632.¹⁹ Additionally, s. 70.45, F.S., only applies to prohibited exactions imposed or required as a final condition of approval on or after October 1, 2015.

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

Limitation of Application of the Bert J. Harris, Jr., Private Property Rights Protection Act

In 1995, the Florida Legislature enacted the Bert J. Harris, Jr., Private Property Rights Protection Act²⁰ (act) to provide a new cause of action for private property owners whose real property has been inordinately burdened by a specific action²¹ of a governmental entity that may not rise to the level of a "taking" under the State or Federal Constitutions.²² The inordinate burden can apply to either an existing use of real property or a vested right to a specific use.²³

For the purposes of the act, the term "property owner" is defined as "the person who holds legal title to the real property at issue."²⁴ "Real property" is likewise defined as "land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest."²⁵

The bill amends the definitions of "property owner" and "real property" in the act to provide that only those property owners whose real property is the subject of and directly impacted by the action of government entity may bring suit under the act.²⁶

¹⁶ s. 286.011(8), F.S. This statute requires initiation in a public meeting by a request for advice, requires public notice of the scheduled private meeting, limits the subject matter of the private meeting to settlement negotiations or strategy related to litigation expenditures, and requires recodation of the entire private meeting by a certified court reporter.

¹⁷ Art. X, s. 13, Fla. Const.

¹⁸ *Royal World Metropolitan, Inc. v. The City of Miami Beach*, 863 So. 2d 320 (Fla. 3d DCA 2003).

¹⁹ "Non-ad valorem assessment" is defined in 197.3632(e), F.S., as "only those assessments which are not based upon millage and which can become a lien against a homestead as permitted in s. 4, Art. X of the State Constitution."

²⁰ Ch. 95-181, Laws of Fla.; codified as s. 70.001, F.S.

²¹ Section 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."

²² s. 70.001(1) and (9), F.S.

²³ s. 70.001(2), F.S.

²⁴ s. 70.001(2)(f), F.S. The term does not include a governmental entity.

²⁵ s. 70.001(2)(g), F.S.

²⁶ As recently observed by a Florida appellate court, "The expressed legislative intent, as well as numerous other sections of the Act, indicate the Harris Act only applies when rules, ordinances, or regulations are actually applied to the property in question." *City of Jacksonville v. R. Lee Smith and Christy Smith*, ---So. 3d---, 2015 WL 798154 (Fla. 1st DCA 2015). See also Op. Att'y Gen. Fla. 95-78 (1995) (stating that the act "does not provide recovery of damages to property that is not

Safe Harbor Provisions for Settlement Agreements

Currently, the act provides for a mandatory presuit procedure in which a property owner must present written notice of the claim to the governmental entity at least 150 days prior to filing a lawsuit. During that 150 day period,²⁷ the governmental entity must make a written settlement offer.²⁸

If the parties enter into a settlement agreement that would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance that would otherwise apply to the property, the agreement must protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the regulation from inordinately burdening the property.²⁹ If the settlement agreement would have the effect of contravening the application of a statute that would otherwise apply to the property, the parties must file an action in the circuit court seeking approval of the settlement agreement “to ensure that the relief granted protects the public interest served by the statute . . . and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.”³⁰ These safe harbor provisions allows settlement terms that provide for the property to be immune from the application of contrary statues and local regulations.³¹

Recently, a Florida appellate court affirmed the denial of a settlement agreement between a property owner and governmental entity on the grounds that the parties failed to enter into the settlement agreement within the 150-day period provided in the act and after the property owner had filed a lawsuit under the act.³² The court's ruling, in effect, limits the safe harbor provision in the act to only those settlement agreements made within the time-frame specified in the act.

The bill amends the act to provide that the safe harbor provisions for settlement agreements between a property owner and governmental entity apply regardless of when the settlement agreement was entered so long as it fully resolves all claims.

Exception for Flood Insurance Rate Maps

The NFIP is a federal program created by Congress with the passage of the National Flood Insurance Act of 1968.³³ The NFIP was created to mitigate future flood losses nationwide through sound, community-enforced building and zoning ordinances and to provide access to affordable, federally backed flood insurance protection for property owners. The NFIP is designed to provide an insurance alternative to disaster assistance to meet the escalating costs of repairing damage to buildings and their contents caused by floods.³⁴ Community participation in the NFIP is voluntary (although some states require NFIP participation as part of their floodplain management program). Each identified flood-prone community must assess its flood hazard and determine whether flood insurance and floodplain management would benefit the community's residents and economy.³⁵ Participation in the NFIP is based on an agreement between local communities and the federal government that states that if a community will adopt and enforce a floodplain management ordinance to reduce future flood risks to new construction in Special Flood Hazard Areas, the federal government will make flood insurance available within the community as a financial protection against flood losses.³⁶ FEMA identifies flood

the subject of a governmental action or regulation, but which may have incidentally suffered a diminution in value or other loss as a result of the regulation of the subject property.”).

²⁷ If the property is classified as agricultural, the time-period is reduced to 90 days.

²⁸ s. 70.001(4)(c), F.S.

²⁹ s. 70.001(4)(d), F.S.

³⁰ *Id.*

³¹ *Id.*

³² *Collier County v. Hussey*, 147 So. 3d 35 (Fla. 2d DCA 2014).

³³ Florida Emergency Management Act, National Flood Insurance Program – Answers to Questions About the NFIP, FEMA F-084/March 2011, at 1, <https://www.fema.gov/media-library/assets/documents/272> (accessed 3/19/2015).

³⁴ *Id.*

³⁵ *Id.* at 4.

³⁶ *Id.*

hazard areas throughout the United States and its territories. Areas of flood hazard are commonly identified on an official map of a community, referred to as a Flood Insurance Rate Map (FIRM).³⁷

Some Florida counties implementing updated FIRMs as required by FEMA have received claims under the act for the alleged impacts to property caused by the maps. As of 2015, Lee County had received a number of claims under the act due to adopting the maps.³⁸

The bill expressly excludes from the act any actions a county takes to adopt a Flood Insurance Rate Map (FIRM) issued by the Federal Emergency Management Agency (FEMA) in order to participate in the National Flood Insurance Program (NFIP).

Legislative Declaration of Construction

Section 70.80, F.S., currently declares that "ss. 70.001 and 70.51³⁹ have separate and distinct bases, objectives, applications, and processes." It further states that it is "the intent of the Legislature that ss. 70.001 and 70.51 are not to be construed in *pari materia*."⁴⁰

The bill adds the newly created s. 70.45, F.S., to the legislative declaration that these sections have separate and distinct objectives, applications, and processes. It also adds s. 70.45, F.S., to the statement of legislature intent that ss. 70.001 and 70.51 are not to be construed in *pari materia*.

B. SECTION DIRECTORY:

Section 1 amends s. 70.001, F.S., related to private property rights protection.

Section 2 creates s. 70.45, F.S., related to governmental exactions.

Section 3 amends s. 70.80, F.S., related to construction of ss. 70.001 and 70.51, F.S.

Section 4 provides an effective date of October 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

Indeterminate. See Fiscal Comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

Indeterminate. See Fiscal Comments below.

³⁷ *Id* at 2.

³⁸ Lee County 2015 Legislative Agenda at

<http://www.leegov.com/gov/BoardofCountyCommissioners/Documents/Forms/AllItems.aspx> (last visited 3/19/2015).

³⁹ Section 70.51 is the Florida Land Use and Environmental Dispute Resolution Act, which provides a mechanism for resolving land use disputes that involve development orders or governmental enforcement actions.

⁴⁰ *In pari materia* is a principle of statutory construction used by the courts. It requires related statutes to be construed together "so that they will illuminate each other and are harmonized." *Grant v. State*, 832 So. 2d 770, 773 (Fla. 5th DCA 2002).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill creates a cause of action to recover monetary damages for landowners where local and state governmental entities impose conditions that rise to the level of prohibited exactions, which could result in monetary damages being awarded to certain landowners. The bill provides for the awarding of prejudgment interest and reasonable attorney fees and costs to a property owner who prevails in such an action. If a private litigant brings a meritless claim for an alleged prohibited exaction the court could award costs and attorney fees if the plaintiff is found to have acted in bad faith. The bill could potentially limit expenditures required of people or entities seeking a permit by preventing a governmental entity from imposing any conditions that are deemed to be prohibited exactions.

D. FISCAL COMMENTS:

Section 1 of the bill limits causes of action against government entities under the Bert Harris Act, and thus appears to have a positive fiscal impact on state and local governments. In that lawsuits under s. 70.001, F.S., by neighboring properties are uncommon, the fiscal impact is anticipated to be minimal. The exception for counties of adopting required flood maps appears to have an additional positive fiscal impact on these specific local governments.

Section 2 creates a specific cause of action related to prohibited exactions and waives sovereign immunity for such causes of action. The measure of damages of the state law cause of action for such lawsuits is an issue currently pending before the Florida Supreme Court,⁴¹ and it is possible that Section 2 of the bill may provide a different measure of damages.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 10, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendments:

- Modify the definitions of "property owner" and "real property" in the Bert J. Harris, Jr., Private Property Rights Protection Act to provide that only those property owners whose property is the subject of *and directly impacted by* a government action may bring suit;
- Replace the legislative findings with a statement that a cause of action for damages exists for unconstitutional exactions where a government condition on private property lacks an essential nexus to a legitimate public purpose and rough proportionality to the harm the government seeks to avoid;

⁴¹ *St. Johns River Water Management District v. Koontz*, Case no. SC14-1092.

- Modify the definition of "unconstitutional exaction" to mean a condition imposed by a governmental entity on real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportional to the harm the governmental entity seeks to avoid; and
- Provide that a cause of action under the bill may be brought in a court of competent jurisdiction.

On March 18, 2015, the Local Government Affairs Subcommittee adopted one amendment and reported the bill favorably as a committee substitute to CS/HB 383. The amendment:

- Replaces the defined term "unconstitutional exaction" with the term "prohibited exaction."
- Defines the nature and extent of damages a court may award a successful claimant for the imposition of a prohibited exaction by a governmental entity.
- Adds the ability for plaintiffs to seek injunctive relief under s. 70.45, F.S.
- Requires claimants under s. 70.45, F.S., to provide pre-suit notice to the governmental entity to allow an opportunity to correct the prohibited exaction without need for further litigation.
- In a suit under s. 70.45, F.S., the governmental entity will be required to prove the exaction complies with the standards set by the U.S. Supreme Court.
- The property owner will be required to prove damages caused by the prohibited exaction.
- The property owner will be entitled to recover defined damages, prejudgment interest, costs, and reasonable attorney fees.
- Governmental entities will be allowed to recover attorney fees and costs for claims brought in bad faith.
- Sovereign immunity is waived to the extent of assessing damages under the new cause of action.
- Actions taken by counties to adopt FEMA flood maps for the purpose of participating in the National Flood Insurance Program are not subject to claims under the Act, with certain exceptions.

On April 8, 2015, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Revises the definition of "damages";
- Excludes impact fees and non-ad valorem assessments from the act;
- Requires a notice of action to be filed no later than 180 days after the exaction is imposed;
- Requires a governmental entity that receives a notice of action to review and explain why the exaction is not prohibited or propose to remove all or a portion of the exaction;
- Provides that a governmental entity's response to a notice of action is only admissible to determine attorney fees and costs;
- Provides attorney fees and costs to the prevailing party;
- Removes language that allowed for the award of attorney fees and costs to a governmental entity if the claim was made in bad faith; and
- Makes the act applicable to prohibited exactions imposed on or after October 1, 2015.

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