

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 Judiciary

BILL: SB 1720

INTRODUCER: Senator Lee

SUBJECT: Property Rights

DATE: March 29, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	Pre-meeting
2.			CA	
3.			RC	

I. Summary:

SB 1720 amends chapter 70, F.S., the Bert J. Harris, Jr., Private Property Rights Protection Act. The Harris Act permits a property owner to seek relief and financial damages when his or her property is inordinately burdened by government regulation.

The bill amends provisions of that chapter and:

- Requires a government to treat “similarly situated” residential properties alike when one property owner is given a settlement offer that includes a modification or variance to a regulation;
- Allows a property owner to request a judge, instead of a jury, to determine damages;
- Revises the criteria for awarding attorney fees and costs to a prevailing property owner and increases the time over which fees and costs may be recovered;
- Allows a property owner to file suit without following the usual formal application process when the government does not provide a mailed notice that a regulation will affect the property and the application process would be futile; and
- Allows a property owner to sue for injunctive relief and have a court declare that a prohibited extraction, which is an unconstitutional condition for a development permit, is invalid without first exhausting the usual administrative remedies.

II. Present Situation:

Private Property Guarantees in the Federal and State Constitution

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, not to broad, facial challenges of government regulations; and
- Challenges that are not 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

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

¹ FLA. CONST. art. X, s. 6.

² Thomas Hawkins, *Land Use Law with a Florida Focus*, 233, (Aug. 2018)

<https://www.dropbox.com/s/3ykseigou178vra/2018%207%2022%20Land%20Use%20with%20a%20Florida%20Focus.pdf?dl=0>.

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.

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

question is agricultural, the notice period is 90 days. In addition to the claim, the property owner must submit a 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

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,

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) <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.

¹⁰ Section 70.001(5)(b), F.S.

¹¹ Section 70.001(11), F.S.

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 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

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).

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 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

¹⁸ *Id.* at 607.

¹⁹ *Id.* at 608-609.

²⁰ Ch. 2015-142, s. 2, Laws of Fla.

²¹ Section 70.45(1)(c), F.S.

²² Section 70.45(2), F.S.

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

III. Effect of Proposed Changes:

The bill amends Chapter 70, F.S., the Harris Act, by adding provisions that are beneficial to property owners when a governmental entity enacts an ordinance or regulation that affects their property.

“Similarly Situated” Properties

The bill amends the legislative findings and intent provisions contained in s. 70.001(1), F.S., by adding a provision which states that the Legislature recognizes that it is in the public interest to ensure that “*similarly situated properties*” are subject to the same rules and regulations.

The bill also provides that when a claim involving one or more residential properties is brought due to the enactment of a governmental regulation or ordinance that applies to residential property, any settlement offer that includes a modification or variance to the regulation or ordinance applies to all “*similarly situated residential properties*” subject to regulation by the governmental entity. This provision will require a governmental entity to treat all similarly situated residential properties alike if it offers one property owner a modification or variance.

The term “similarly situated” is not defined in the bill. Determining whether properties are sufficiently similarly situated to merit a waiver or a variance that was offered to another property could create a substantial amount of litigation. This may result in judicially-created guidelines rather than legislatively-created guidelines. To minimize litigation and to provide clarity as to which properties are similarly situated, the Legislature may wish to add some guidelines to the bill.

²³ Section 70.45(3), F.S.

²⁴ Section 70.45(4), F.S.

²⁵ Section 70.45(5), F.S.

Permitting a Judge, Rather than a Jury, to Determine a Property Owner's Damages

Current law provides that a jury must be impaneled to calculate the amount of compensation due to a property owner whose property is inordinately burdened. This provision is amended and permits a property owner to waive the jury requirement and request a court to determine damages.

Awarding a Property Owner Reasonable Costs and Attorney Fees

Currently, a prevailing property owner is entitled to recover reasonable costs and attorney fees beginning on the date an action is filed in court, if the court determines that the government's settlement offer with allowable uses did not constitute a bona fide offer. The condition requiring that the offer must have been a bona fide offer is deleted. The bill allows a property owner to recover attorney fees and costs during the presuit resolution period when a notice is filed with the government, instead of the date of filing suit. The net effect of this change will be to permit a prevailing plaintiff to recover more in attorney fees from the government because the attorney will be billing for a longer period of time and for additional work with more costs preparing the cause of action for court.

Notice and When a Property Owner's Claim is Ripe

The bill states, "If a property owner is not provided notice . . ." that a law or regulation affects his or her property, the property owner may file suit after the law or regulation is enacted. If the law or regulation's effect is clear and unequivocal on its terms, a property owner is not required to follow the usual channels and submit a formal application or proceed through any formal application process if the action would be futile and a waste of resources.

Current law does not require that the notice be sent by certified mail to the property owner. However, this change may require that notice of future changes by the governmental entity be sent by certified mail to clarify whether the notice was sent and received.

Governmental Exactions

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.

Effective Date

The bill takes effect July 1, 2018.

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:

By simplifying the process for property owners to sue for burdensome regulations, more property owners may be encouraged to bring lawsuits and recover attorney fees and costs or have burdensome regulations removed. However, the removal of a regulation that burdens one property may have a negative effect on the values of other nearby properties.

C. Government Sector Impact:

The bill may negatively impact state and local government entities by making it easier for property owners to challenge government regulations and recover attorney fees. However, these changes may encourage government entities to be more responsive to concerns that a regulation that may benefit many properties may, nonetheless, inordinately burden others.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

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

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.
