

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 1380

INTRODUCER: Senator Rodrigues

SUBJECT: Relief from Burdens on Real Property Rights

DATE: March 18, 2021

REVISED: _____

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

I. Summary:

SB 1380 amends three definitions in statutes designed to protect the private property rights of landowners. Two definitions are amended in the Bert J. Harris, Jr., Private Property Rights Protection Act. The definition of an “action of a governmental entity” is revised to include government actions that affect real property including the adoption or enforcement of “any ordinance, resolution regulation, rule, or policy.” The term “real property” is amended to include any legal interest in land, including surface, subsurface, and mineral estates and any other interest held by a property owner in the land.

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.

The act takes effect July 1, 2021.

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

¹ FLA. CONST. art. X, s. 6.

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 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

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

Before a property owner files an action for compensation under the Bert Harris Act, he or she 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 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

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.

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.

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),

governmental entity must notify them, including all owners of real property that is contiguous to the owner's property.⁸

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 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

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:

<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.

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.

- 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

In response to a 2013 U.S. Supreme Court case, *Koontz v. St. John’s River Water Management District*,¹⁷ 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.”¹⁸ 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.¹⁹

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.²⁰

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.²¹

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.

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).

¹⁸ Chapter 2015-142, s. 2, Laws of Fla.

¹⁹ Section 70.45(1)(c), F.S.

²⁰ Section 70.45(2), F.S.

²¹ Section 70.45(3), F.S.

The burden of proving damages that result from the prohibited exaction rests upon the property owner.²²

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.²³

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. FLUEDRA is codified in s. 70.51, F.S., and is designed to encourage dispute resolution between real property²⁴ owners and government entities using a special magistrate in an informal hearing.²⁵ FLUEDRA provides an informal mechanism for a property owner to challenge a governmental action infringing on his or her property without filing a lawsuit.

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.²⁶ Under 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.²⁷ The government must forward the request to a special magistrate,²⁸ who must hold a hearing within 45 days after receiving the request for relief.²⁹ 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.³⁰ In this role, the special magistrate acts as a “facilitator or mediator.”³¹

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.³² Within 14 days after the hearing’s conclusion, the special magistrate must submit a written recommendation to the parties.³³ If the special magistrate finds that the government action does not unreasonably or unfairly burden the use of the property, the

²² Section 70.45(4), F.S.

²³ Section 70.45(5), F.S.

²⁴ “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. S. 70.51(2)(g), F.S.

²⁵ See s. 70.51, F.S.

²⁶ Section 70.51(24), F.S.

²⁷ Section 70.51(3) and (4), F.S.

²⁸ 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.

²⁹ Section 70.51(15)(a), F.S.

³⁰ See s. 70.51(17)(a), F.S.

³¹ *Id.*

³² Section 70.51(17)(b) and (18), F.S.

³³ Section 70.51(19), F.S.

property owner may still file suit or pursue other remedies.³⁴ 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.³⁵

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.³⁶ 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.³⁷

The special magistrate's recommendation finding that the government acted unreasonably or unfairly may serve as a basis to support modification, variances, or special exceptions to the property.³⁸ The FLUEDRA process may not continue longer than 165 days, unless the parties agree otherwise.³⁹

III. Effect of Proposed Changes:

Definitions in the Bert Harris Act - Section 1

The bill revises the definition of an "action of a governmental entity" in the Bert Harris Act to include government actions that affect real property including the adoption or enforcement of "any ordinance, resolution, regulation, rule, or policy."

The term "real property" is amended to include any legal interest in land, including surface, subsurface, and mineral estates and any other interest held by a property owner in the land. In a 1969 Florida Supreme Court case, *Dickinson v. Davis*,⁴⁰ 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.

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.

³⁴ Section 70.51(19)(a), F.S.

³⁵ Section 70.51(19)(b), F.S.

³⁶ Section 70.51(21), F.S.

³⁷ Section 70.51(22), F.S.

³⁸ Section 70.51(25), F.S.

³⁹ Section 70.51(23), F.S.

⁴⁰ *Dickinson v. Davis*, 224 So. 2d 262 (Fla. 1969). The case dealt with separate tax assessments for mineral, oil, gas, and other subsurface rights.

Definitions in the Florida Land Use and Environmental Dispute Resolution Act – Section 2

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. Similarly and as discussed above, this change might make additional disputes qualified for resolution before a special magistrate.

Reenactment of a Term – Section 3

As a technical matter, s. 70.45(1)(e), F.S., is reenacted to incorporate the amendment made to s. 70.001, F.S.

The bill takes effect July 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:

None.

C. **Government Sector Impact:**

If the revision of definitions in SB 1380 provides an opportunity for more lawsuits under the Bert Harris Act, local governments might expend more funds addressing these claims.

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 70.51. This bill reenacts section 70.45, Florida Statutes.

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.