

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 569 Local Business Protection Act

SPONSOR(S): Local Administration & Veterans Affairs Subcommittee and Civil Justice & Property Rights Subcommittee, McClure and others

TIED BILLS: IDEN./SIM. BILLS: CS/SB 620

FINAL HOUSE FLOOR ACTION: 69 Y's 45 N's **GOVERNOR'S ACTION:** Vetoed

SUMMARY ANALYSIS

CS/CS/HB 569 passed the House on March 9, 2022, as CS/SB 620 as amended.

The Takings Clauses of the Florida and U.S. Constitutions prohibit the government from depriving a person of his or her private property for public use "without just compensation," which compensation may include business damages in specified circumstances. Florida law also 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, a property owner may recover damages under the Bert Harris, Jr., Private Property Rights Protection Act ("Bert Harris Act") if certain procedural requirements are met. Additionally, 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 for damages after complying with certain procedural requirements. Business damages, however, are not awardable under the Bert Harris Act or in an action involving an exaction. In other words, business damages are not awardable when a government burden on private property does not amount to a "taking."

The bill creates a mechanism for a private, for-profit business to recover business damages related to local government action not amounting to a taking in specified circumstances. Specifically, the bill:

- Entitles a private, for-profit business to recover business damages from a local government if the local government enacts or amends an ordinance or charter provision that has or will cause a reduction of at least 15 percent of the business's profit, as applied on a per location basis of a business operated within the jurisdiction, and the business has engaged in lawful business in the county or municipality's jurisdiction for at least three years before the ordinance or charter provision is enacted or amended.
- Excludes specified ordinances and charter provisions from the scope of the bill, including certain emergency ordinances.
- Specifies that the bill does not apply to a business that may claim business damages in an eminent domain proceeding.
- Establishes pre-suit requirements, including a settlement offer process involving the provision of business records supporting the business damages claim.
- Provides an opportunity to cure by allowing a local government to avoid liability after receiving notice of a claim.
- Requires that an action to recover business damages be filed within one year of the effective date of the enactment or amendment of the relevant ordinance or charter provision.
- Authorizes the court in such an action to award reasonable attorney fees and costs to the prevailing party.
- Limits the amount of business damages to the present value of the business's future lost profits for the lesser of seven years or the number of years the business was in operation in the jurisdiction before the ordinance or charter provision was enacted.

The bill will have an indeterminate fiscal impact on state government and may have a substantial fiscal impact on local governments. The effective date of this bill was upon becoming a law; however, the Governor vetoed this bill on June 24, 2022.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Eminent Domain

The United States Constitution authorizes the government to take private property for public use as long as it fairly compensates the property owner for the taking.¹ Similarly, the Florida Constitution authorizes the taking of private property for a public purpose² under its eminent domain powers but requires the condemning authority to fully compensate³ the owner for such taking.⁴ The state, counties, municipalities, administrative agencies, railroads, utility companies, and certain districts and authorities (“condemning authorities”) have eminent domain powers.

Presuit Requirements

Before bringing an eminent domain proceeding, the condemning authority must try to negotiate in good faith with the property owner, provide the owner with a written compensation offer, and try to reach an agreement on the amount to be paid for the taking.⁵ If negotiations fail, the condemning authority may file a condemnation petition in the circuit court for the county where the property is located.⁶

Damages

The issue of compensation in an eminent domain proceeding must be referred to a jury of 12 persons, and any compensation awarded must include the value of the property sought to be appropriated.⁷ In some cases, compensation awarded in an eminent domain proceeding can include business damages, consisting of “lost profits, loss of goodwill, and costs related to the moving and selling of equipment” attributable to the taking.⁸ For a business to qualify for a business damages award, the business must:

- Have been established at the place of the taking for at least five years;
- Be subject to a partial, as opposed to a whole, taking of property;
- Have utilized the part of the property taken as part of the business; and
- Set forth in its written defenses the nature and extent of the business damages.⁹

However, a business that rents its premises is not eligible for business damages in an eminent domain proceeding; such damages are only awardable to a business that actually owns its premises and suffers a partial taking.

¹ U.S. Const. amend. V. The Fifth Amendment applies to the states through the Fourteenth Amendment.

² For a use to be public, there must be a right on the part of the public, or some portion of it, to use or enjoy it and a duty on the part of the owner to furnish it to the public. Where both private and public benefits result from a taking, the determination of whether the taking is for a public use may turn on whether the public benefits are of a primary or an incidental nature. 21 Fla. Jur. 2d *Eminent Domain* ss. 26-27.

³ *Joseph B. Doerr Trust v. Cent. Florida Expressway Auth.*, 177 So. 3d 1209 (Fla. 2015) (holding that “it is also fundamentally clear that full compensation under the Florida Constitution includes the right to a reasonable attorney’s fee for the property owner. In Florida eminent domain proceedings, the goal is to render the private property owner as whole as possible”); see also *Florida Dept. of Revenue v. A. Duda & Sons, Inc.*, 608 So. 2d 881 (Fla. 5th DCA 1992) (holding that full compensation is limited to payment for loss of tangible property).

⁴ Art. X, s. 6, Fla. Const.

⁵ S. 73.015(1), F.S.

⁶ S. 73.021, F.S.

⁷ S. 73.071, F.S.

⁸ *Id.; Systems Components Corp. v. Dep’t of Transp.*, 985 So. 2d 687 (Fla. 5th DCA 2008).

⁹ S. 73.071, F.S.

Attorney Fees and Costs

Attorney fees generally may be awarded to a property owner in an eminent domain proceeding based on the “benefits achieved” by the property owner, meaning “the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the [property owner] hires an attorney.”¹⁰ However, if the condemning authority does not make a written offer before the property owner hires an attorney, benefits must be measured from the first written offer after the attorney was hired.¹¹

In determining attorney fees based on benefits achieved, if substantiating business records were:

- Provided to the condemning authority, benefits must be based on the difference between the final judgment or settlement and the written counteroffer made by the condemning authority.¹²
- Not provided to the condemning authority initially but were later deemed material to the business damages determination, benefits must be based on the difference between the final judgment or settlement and the first written counteroffer made by the condemning authority within 90 days from its receipt of the previously not provided business records.¹³

The court may also consider non-monetary benefits obtained for the property owner through the attorney’s efforts, to the extent such benefits are specifically identified by the court and can be quantified within a reasonable degree of certainty.¹⁴

Attorney fees based on benefits achieved are awarded in accordance with the following schedule:

- 33 percent of any benefit up to \$250,000; plus
- 25 percent of any benefit between \$250,000 and \$1 million; plus
- 20 percent of any portion of the benefit exceeding \$1 million.¹⁵

However, in assessing attorney fees incurred in defeating an order of taking, or for apportionment or other supplemental proceedings when not otherwise provided for,¹⁶ a court must consider instead the:

- Novelty, difficulty, and importance of the question involved;
- Skill employed by the attorney in conducting the cause;
- Amount of money involved;
- Responsibility incurred and fulfilled by the attorney;
- Attorney’s time and labor reasonably required to adequately represent the property owner in relation to the benefits resulting to the property owner;
- Fee customarily charged for legal services of a comparable or similar nature; and
- Any attorney fees award based on benefits achieved.¹⁷

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”).¹⁸ The Bert Harris Act created a new cause of action for private property owners whose real property is inordinately burdened by a government action¹⁹ not rising to the level of a

¹⁰ S. 73.092(1), F.S.

¹¹ S. 73.092(1)(a), F.S.

¹² S. 73.092(1)(a)1., F.S.

¹³ *Id.*

¹⁴ S. 73.092(1)(b), F.S.

¹⁵ S. 73.092(1)(c), F.S.

¹⁶ That is, when attorney fees are incurred for a required proceeding that does not result in a monetary benefit upon which a fee can be based.

¹⁷ S. 73.092(2), F.S.; *S.W. Fla. Water Mgmt. Dist. v. Shea*, 86 So. 3d 582 (Fla. 2d DCA 2012).

¹⁸ Ch. 95-181, Laws of Fla., now codified as s. 70.001, F.S.

¹⁹ 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.

taking.²⁰ The inordinate burden can apply in the context of either an existing use of real property²¹ or a vested right²² to a specific use.²³

Presuit Requirements

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.²⁴ 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.²⁵ A property owner may reject the settlement offer and file an action in circuit court.²⁶ However, a claim generally cannot be filed more than one year after the law or regulation unequivocally impacts the property and notice is mailed to the affected property owner.²⁷ 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 owner's development or variance request.²⁸

Damages

The court determines whether the government inordinately burdened the property, and if so, calculates each involved government entity's percentage of responsibility.²⁹ A jury determines the appropriate amount of damages – that is, the loss in the property's fair market value due to the burden – but may not consider or award any business damages.³⁰

Attorney Fees and Costs

There is statutory two-way attorney fee provision for a Bert Harris Act claim. 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.³¹

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.³²

Unlawful Exactions

In 2015, the Legislature enacted s. 70.45, F.S., to provide a state cause of action for a prohibited exaction not rising to the level of a taking. 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

²⁰ S. 70.001(1) and (9), F.S.

²¹ "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.

²² 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.

²³ S. 70.001(2), F.S.

²⁴ 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.

²⁵ S. 70.001(4)(c), F.S.

²⁶ S. 70.001(5)(b), F.S.

²⁷ S. 70.001(11)(a)1., F.S.

²⁸ S. 70.001(11)(a)2., F.S.

²⁹ S. 70.001(6)(a), F.S.

³⁰ S. 70.001(6)(b), F.S.

³¹ S. 70.001(6)(c)1., F.S.

³² S. 70.001(6)(c)2., F.S.

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.³³

Presuit Requirements

A property owner may bring an action to recover damages caused by a prohibited exaction 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.³⁴

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.³⁵ The government's written response may only be used against it in subsequent litigation to assess attorney fees and costs.³⁶

Damages

For a prohibited exaction claim, 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.³⁷ The property owner in such a claim has the burden of proving damages resulting from the prohibited exaction.³⁸ Relief available in such a claim includes:

- Injunctive relief;
- An amount of damages equal to the reduction in fair market value of the real property; and
- The amount of the fee or infrastructure cost that exceeds what would otherwise be allowed.³⁹

However, business damages are not awardable in an exaction claim.⁴⁰

Attorney Fees and Costs

The prevailing party in a prohibited exaction claim may recover attorney fees and costs.⁴¹ 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.⁴²

Sovereign Immunity

Sovereign immunity is a principle recognizing that a government cannot be sued without its consent.⁴³ The Florida Constitution itself waives sovereign immunity for specified claims, such as eminent domain proceedings.⁴⁴ Further, article X, section 13 of the Florida Constitution authorizes the Legislature to waive sovereign immunity by statute. However, any statute purporting to waive sovereign immunity

³³ S. 70.45(1)(c), F.S.

³⁴ S. 70.45(2) and (3), F.S.

³⁵ S. 70.45(3)(a), F.S.

³⁶ S. 70.45(3)(b), F.S.

³⁷ S. 70.45(4), F.S.

³⁸ *Id.*

³⁹ S. 70.45(1)(a), F.S.

⁴⁰ See *id.*

⁴¹ S. 70.45(5), F.S.

⁴² *Id.*

⁴³ Legal Information Institute, *Sovereign Immunity*, https://www.law.cornell.edu/wex/sovereign_immunity (last visited Mar. 22, 2022).

⁴⁴ Art. X, s. 6, Fla. Const.

must be strictly construed and narrowly interpreted, and a waiver may not be found unless it is “unequivocally expressed.”⁴⁵

The Florida Constitution does not impose caps on the amount of damages awardable in an eminent domain proceeding. Further, the Legislature has waived sovereign immunity for Bert Harris and exaction claims without imposing caps on the amount of damages awardable for such claims.⁴⁶ Thus, parties bringing an eminent domain, Bert Harris Act, or exaction claim may recover for their actual losses as authorized by law.

Effect of the Bill

Business Damages Claims

The bill creates s. 70.91, F.S., entitled the “Local Business Protection Act,” to provide a mechanism for a private, for-profit business owner to recover business damages related to local government action not rising to the level of a taking in specified circumstances. Specifically, the bill entitles a private, for-profit business to claim business damages from a county or municipality if:

- The county or municipality enacts or amends an ordinance or charter provision that has or will cause a reduction of at least 15 percent of the business’s profit, as applied on a per location basis of a business operated within the jurisdiction; and
- The business has engaged in lawful business in the county or municipality’s jurisdiction for at least three years before the ordinance or charter provision was enacted or amended.

The amount of business damages may be established by any reasonable method but may not exceed the present value of the business’s future lost profits for the lesser of seven years or the number of years the business was in operation in the jurisdiction before the ordinance or charter provision was enacted or amended.

However, under the bill, a county or municipality is not liable for business damages due to:

- An ordinance or charter provision that is required to comply with, or is expressly authorized by, state or federal law;
- An emergency ordinance, declaration, or order adopted under the State Emergency Management Act;⁴⁷
- A temporary emergency ordinance⁴⁸ in effect for no more than 90 days;
- An ordinance or charter provision enacted to implement:
 - Part II of chapter 163, F.S., relating to growth policy, county and municipal planning, and land development regulation;
 - The Florida Building Code;⁴⁹ or
 - The Florida Fire Prevention Code;⁵⁰
- An ordinance or charter provision required to implement a contract or agreement, including, but not limited to, any federal, state, local, or private grant, or other financial assistance;
- An ordinance or charter provision relating to the issuance or refinancing of debt;
- An ordinance or charter provision related to the adoption of a budget or budget amendment, including revenue sources necessary to fund the budget;
- An ordinance or charter provision relating to procurement; or
- An ordinance or charter provision intended to promote, enable, or facilitate economic competition.

⁴⁵ *Florida Dept. of Transp. v. Schwefringhaus*, 188 So. 3d 840 (Fla. 2016).

⁴⁶ Ss. 70.001(13) and 70.45(6), F.S.

⁴⁷ The Emergency Management Act is set out in ss. 252.31-252.60, F.S.

⁴⁸ Ss. 125.66 and 166.041, F.S.

⁴⁹ S. 553.73, F.S.

⁵⁰ S. 633.202, F.S.

Presuit Requirements

Settlement Offers

Under the bill, a business seeking business damages must present a good faith written settlement offer to the county or municipality that enacted or amended the relevant ordinance or charter provision at least 180 days before filing a lawsuit and within 180 days after the relevant ordinance or charter provision's enactment or adoption. The settlement offer must:

- Include an explanation of the nature, extent, and monetary amount of the damages alleged;
- Be prepared by the business owner, a certified public accountant, or a business damages expert familiar with the business's operations; and
- Be accompanied by copies of substantiating business records.⁵¹

If additional information is needed, the county or municipality and the business may agree on a schedule for the submission of the necessary information.

Within 120 days after receipt of the good faith settlement offer and accompanying business records, the county or municipality must, by certified mail, accept or reject the offer or make a counteroffer, which may include an offer to grant a waiver of the application of the ordinance or charter provision. Evidence of negotiations or of any written or oral statements used in mediation or negotiations between the parties under this section is inadmissible in any proceeding for business damages, except in a proceeding to determine reasonable costs and attorney fees. If the business damages claim is not settled, the business may file an action to recover its business damages within one year of the effective date of the enactment or amendment of the relevant ordinance or charter provision.

Opportunity to Cure

A county or municipality will not incur business damages liability if, within 120 days after receipt of the good faith settlement offer, the county or municipality takes one of the following actions:

- Repeals the ordinance or charter provision that gave rise to the business's claim;
- Amends the ordinance or charter provision back to its form in existence before the business's claim arose or in a manner that avoids causing a reduction of at least 15 percent of the business's profit as applied on a per location basis within the jurisdiction;
- Publishes notice of its intent to repeal or amend the ordinance and, within 30 days after notice publication, amends the ordinance in a manner that returns the ordinance to its form in existence before the business's claim arose or in a manner that avoids causing a reduction of at least 15 percent of the business's profit as applied on a per location basis within the jurisdiction, or repeals the ordinance;
- Grants a waiver of the application of the ordinance or charter provision to the business submitting a claim for damages; or
- With respect to a charter provision, the county provides notice of its intent to amend or repeal the charter provision that is the basis of the business damages claim and the charter provision is amended or repealed by the voters at an election or special election that occurs within 90 days after notice publication.

The governing body of a municipality may provide relief relating to the opportunity to cure notwithstanding any ordinance or charter provision to the contrary.

Attorney Fees and Costs

⁵¹ The bill defines "business records" to include federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, state corporate income tax returns for the three years preceding the ordinance or charter provision's enactment or adoption, and other records relied upon by a business to substantiate a business damages claim.

In an action for business damages, the bill authorizes the court to award reasonable attorney fees and costs to the prevailing party.

Effective Date and Application

The bill provides an effective date of upon becoming a law and applies to county and municipal ordinances or charter provisions enacted or amended on or after that date. However, an amendment to an ordinance or a charter provision after the bill's effective date gives rise to a business damages claim only to the extent that the application of the amendatory language, and not the original language of the ordinance or charter provision, is the cause of the claimed impact on the business. Further, the bill does not apply to a business that can claim business damages in an eminent domain proceeding. In other words, the bill does not authorize a business to recover both under an eminent domain proceeding and an action authorized by the bill.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate fiscal impact on state government by increasing litigation in the state court system, as it creates a new cause of action for business damages claims.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have a significant fiscal impact on local governments. Specifically, the bill makes counties and municipalities potentially liable for business damages to an indeterminate number of impacted businesses upon an enactment or amendment of an ordinance or charter provision that impacts businesses in the manner specified in the bill.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may help a private business suffering economic harm due to the enactment or adoption of a county or municipal ordinance or charter provision by allowing the business to recover business damages directly related to such ordinance or charter provision.

D. FISCAL COMMENTS:

None.