

## What the Future May Hold for Land Developers and Local Governments: Relief from Burdens on Real Property Rights

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Jun 17, 2021



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Local governments may face challenges as a new proposed legislation regarding relief from burdens on real property rights awaits the approval of Governor DeSantis. An amendment to the Bert Harris Act, CS/CS for HB 421 & HB 1101, was passed by the House on April 21, 2021, and amended on April 28, 2021. The new legislation makes it easier for property owners to challenge local government regulation that burdens, restricts or limits their property. The bill is scheduled to go into effect October 1, 2021, subject to the Governor's veto powers.

Florida is a state that provides legal remedies to private landowners when a regulation inordinately burdens private property that does not qualify as a formal "taking" under the U.S. Constitution.<sup>i</sup> The State of Florida enacted the Bert J. Harris, Jr., Private Property Rights Protection Act in 1995, which provides a formal process for landowners to seek relief when their property is unfairly burdened or limited by government action.

In order to have a Bert Harris claim, the government must "burden the existing use of real property or a vested right to a specific use of real property."<sup>iii</sup> Under the Act, the property owner may notify the government of the burden, the government must make a written offer to settle the claim; and the property owner may accept the settlement offer or reject the offer and file a lawsuit against the government for

damages.<sup>iii</sup>

Additionally, a property owner may also seek resolution of government action disputes under the informal process created by the Florida Land Use and Environmental Dispute Resolution Act ("FLUEDRA"), which amends the Bert Harris Act to Revise the terms "action of a governmental entity" and "real property."

This new bill specifically amends the Bert Harris Act to:

- Reduce the timeframe for a claimant to notify the government;
- Specify that written settlement offers are presumed to protect the public interest;
- Allow the claimant to have a judge, rather than a jury, determine damages;
- Allow a prevailing claimant to recover attorney fees and costs from the time the claimant files notice; and
- Provide that a property owner may pursue the claim even if the property owner subsequently relinquishes title to the subject real property before the claim's resolution.<sup>iv</sup>

\*It is important to note that the amendments apply only to Bert Harris Act claims brought on or after July 1, 2021.

While the trend in litigation has resulted in numerous favorable rulings for local governments, implications of this bill include an increase in government liability in favor of property owners, causing an "indeterminate negative fiscal impact" on government entities.<sup>v</sup> The bill makes it easier for property owners to challenge local government regulation that burdens their property, increases attorney fees and costs that a local government must pay (hundreds of thousands of dollars in legal fees), and in some circumstances, allows a property owner to continue pursuing a claim under the Act after relinquishing title to the real property.<sup>vi</sup> Conversely, the bill positively impacts private property owners by simplifying the procedural process for establishing a Bert Harris claim.<sup>vii</sup>

The proposed bill may impact land-use projects across the state, deterring local governments from approving project developments that could have the potential to infringe on entitlements of current properties. Accordingly, the bill could impinge on land developers' acquisitions and expansive projects in the future, limiting the improvement of areas afflicted by arduous parking, dangerous roads, and nonfunctional design. For example, in Winter Park, Fla., project plans to create an overlay district as the "Orange Avenue Overlay" have faced recent controversy resulting in litigation between property owners and the city.

The implementation of HB 421 & HB 1101 evidences Florida Legislature's objective to recognize and honor private property owner's rights pursuant to the Bert Harris Act. While the courts battle with the extent to which the protection extends, the new legislation could inadvertently affect local governments' planning efforts.

\*Kyla Szubinski, a summer law clerk, assisted with this article.

