HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/CS/HB 59 Growth Management
SPONSOR(S): State Affairs Committee; Civil Justice & Property Rights Subcommittee; Local Administration & Veterans Affairs Subcommittee; McClain and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/CS/SB 496

FINAL HOUSE FLOOR ACTION: 82 **Y's** 32 **N's** **GOVERNOR'S ACTION:** Pending

SUMMARY ANALYSIS

CS/CS/CS/HB 59 passed the House on April 1, 2021, and subsequently passed the Senate on April 8, 2021.

To manage growth in Florida, certain statutory procedures and requirements have been put in place for state agencies and local governments to follow and enforce.

The bill makes the following changes to growth management regulations:

- Requires the comprehensive plan for a newly incorporated municipality that becomes effective after January 1, 2016, to incorporate all development orders existing before the plan's effective date, not to impair the completion of development in accordance with existing development orders, and to vest the density and intensity approved by the development orders existing before the plan's effective date without limitation or modification;
- Requires local governments to include a private property rights element in their comprehensive plans by specified dates and provides a model statement of rights that local governments may adopt;
- Allows the parties to a development agreement to amend or cancel the agreement without the consent of other property owners whose property was originally subject to the agreement, unless the amendment or cancellation would directly modify the allowable uses or entitlements of such owners' property;
- Specifies that development agreements for certain developments of regional impact may be amended using the processes adopted by local governments for amending development orders and specifies that such amendment may authorize the developer to exchange approved land uses under certain conditions; and
- Requires the Florida Department of Transportation, when selling property, to provide a right of first refusal to the prior property owner in certain instances and provides a process for implementing this right of first refusal.

The bill provides a declaration that the act fulfills an important state interest.

The bill does not have a fiscal impact on state government but may have an insignificant negative fiscal impact on local governments.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2021.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Local Comprehensive Plans

Background

Private Property Rights

The "Bert Harris Jr., Private Property Rights Protection Act" (Harris Act) entitles private property owners to relief when a specific action of a governmental entity inordinately burdens the owner's existing use, or a vested right to a specific use, of real property.[1] The Harris Act recognizes that the inordinate burden, restriction, or limitation on private property rights as applied may fall short of a taking under the Florida Constitution or the United States Constitution and establishes a separate and distinct cause of action for relief, or payment of compensation, when a new law, rule, or ordinance of the state or a political entity in the state unfairly affects real property.[2] The Harris Act applies generally to state and local governments but not to the U.S. government, federal agencies, or state or local government entities exercising formally delegated federal powers.[3]

An owner may also seek relief when a state or local governmental entity imposes a condition on the proposed use of the real property that amounts to a prohibited exaction.[4] A prohibited exaction occurs when an imposed condition lacks an essential nexus to a 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.[5]

The "Florida Land Use and Environmental Dispute Resolution Act" provides a non-judicial alternative dispute resolution process for a property owner to request relief from a government entity's development order or enforcement action when the order or action is unreasonable or unfairly burdens the use of the owner's real property.[6] Parties in pending judicial proceedings may agree to use this process, if the court approves.[7]

State and Local Comprehensive Plans

Laws protecting private property rights are balanced against the state's need to effectively and efficiently plan, coordinate, and deliver government services amid the state's continued growth and development.[8] The State Comprehensive Plan provides long-range policy guidance for the orderly management of state growth,[9] which must be consistent with the protection of private property rights.[10] Local governments are required to adopt local comprehensive plans to manage the future growth of their communities.[11]

[1] S. 70.001(2), F.S.
[2] S. 70.001(1), F.S.
[3] S. 70.001(3)(c), F.S.
[4] S. 70.45(2), F.S.
[5] S. 70.45(1)(c), F.S.
[6] S. 70.51, F.S.
[7] S. 70.51(29), F.S.
[8] *See* s. 186.002(1)(b), F.S.
[9] S. 187.101(1), F.S.
[10] S. 187.101(3), F.S. The plan's goals and policies must also be reasonably applied where they are economically and environmentally feasible and not contrary to the public interest.
[11] S. 163.3167(2), F.S.

First adopted in 1975[12] and extensively expanded in 1985,[13] Florida's comprehensive land planning laws were significantly revised in 2011, becoming the Community Planning Act (CPA).[14] The CPA directs how local governments create and adopt their local comprehensive plans. The CPA requires that all governmental entities in the state recognize and respect judicially acknowledged or constitutionally protected private property rights and exercise their authority without unduly restricting private property rights, leaving property owners free from actions by others that would harm their property or constitute an inordinate burden on property rights under the Harris Act.[15]

Local Comprehensive Plan Elements

Local comprehensive plans must include principles, guidelines, standards, and strategies for orderly and balanced future land development. A plan must reflect community commitments to implement the plan[16] and identify procedures for monitoring, evaluating, and appraising its implementation.[17] A plan may include optional elements,[18] but must include the following elements:

- Capital improvements;[19]
- Future land use plan;[20]
- Intergovernmental coordination;[21]
- Conservation;[22]
- Transportation;[23]
- Sanitary sewer, solid waste, drainage, potable water, and aquifer recharge;[24]
- Recreation and open space;[25]
- Housing;[26] and
- Coastal management (for coastal local governments).[27]

Counties and municipalities may employ individual comprehensive plans or joint plans (if both entities agree such a plan would align with their common interests).[28] A county plan controls in a municipality until a municipal comprehensive plan is adopted.[29] New municipalities must adopt a comprehensive plan within three years after the date of incorporation.[30]

Amendments to a Local Comprehensive Plan

Local governments must review and amend their comprehensive plans at least once every seven years to reflect any changes in state requirements.[31] Conforming amendments to the comprehensive plan must be made within one year of the determination that an amendment is necessary.[32] A local

[12] *See* ch. 75-257, Laws of Fla.
[13] *See* ch. 85-55, Laws of Fla.
[14] *See* ch. 2011-139, s. 17, Laws of Fla.
[15] S. 163.3161(10), F.S.
[16] S. 163.3177(1), F.S.
[17] S. 163.3177(1)(d), F.S.
[18] S. 163.3177(1)(a), F.S.
[19] S. 163.3177(3)(a), F.S. The local government must annually review the capital improvements element.
[20] S. 163.3177(6)(a), F.S.
[21] S. 163.3177(6)(h), F.S.
[22] S. 163.3177(6)(d), F.S.
[23] S. 163.3177(6)(b), F.S.
[24] S. 163.3177(6)(c), F.S.
[25] S. 163.3177(6)(e), F.S.
[26] S. 163.3177(6)(f), F.S.
[27] S. 163.3177(6)(g), F.S.
[28] S. 163.3167(1), F.S.
[29] S. 163.3167(3), F.S.
[30] *Id.*
[31] S. 163.3191(1), F.S.
[32] S. 163.3191(2), F.S.

government is not required to review its comprehensive plan before its regular review period unless the law specifically requires otherwise.[33]

Generally, a local government amending its comprehensive plan must follow an expedited state review process.[34] Certain plan amendments, including amendments required to reflect a change in state requirements, must follow the state coordinated review process for the adoption of comprehensive plans.[35] Under this review process, the state land planning agency is responsible for plan review, coordination, and preparing and transmitting comments to the local government.[36] The Department of Economic Opportunity (DEO) is designated as the state land planning agency.[37]

Under the state coordinated review process, a local government must hold a properly noticed public hearing about the proposed amendment before sending it for comment from several reviewing agencies, including DEO, the Department of Environmental Protection, the appropriate regional planning council, and the Department of State.[38] Local governments and government agencies within the state filing a written request with the governing body are also entitled to copies of the amendment.[39] Comments on the proposed plan amendment must be received within 30 days after its receipt by DEO.[40]

DEO must provide a written report within 60 days of receiving the proposed plan amendment if it elects to review the amendment.[41] The report must state the agency's objections, recommendations, and comments with certain specificity and must be based on written, not oral, comments.[42] Within 180 days of receiving the report from DEO, the local government must review the report and any written comments and hold a second properly noticed public hearing on the adoption of the amendment.[43] Adopted plan amendments must be sent to DEO and any agency or government that provided timely comments within 10 working days after the hearing.[44]

After receiving the adopted plan amendment and finding it complete, DEO has 45 days to determine if the amendment complies with the law and to issue on its website a notice of intent stating its determination.[45] A compliance review is limited to the findings identified in DEO's original report unless the adopted amendment is substantially different from the reviewed amendment.[46] Unless challenged, a local comprehensive plan amendment takes effect pursuant to the notice of intent.[47] If there is a timely filed challenge, the plan amendment will not take effect until DEO or the Administration Commission enters a final order determining the adopted amendment complies with the law.[48]

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[33] S. 163.3161(12), F.S.
[34] S. 163.3184(3)(a), F.S.
[35] S. 163.3184(2)(c), F.S.
[36] S. 163.3184(4)(a), F.S.
[37] S. 163.3164(44), F.S.
[38] S. 163.3184(4)(b), (c), and (11)(b)1., F.S.
[39] S. 163.3184(4)(b), F.S.
[40] S. 163.3184(4)(c), F.S.
[41] S. 163.3184(4)(d)1., F.S.
[42] S. 163.3184(4)(d)1., F.S. All written communication the agency received or generated regarding a proposed amendment must be identified with enough information to allow for copies of documents to be requested. S. 163.3184(4)(d)2., F.S.
[43] S. 163.3184(4)(e)1. and (11)(b)2., F.S. If the hearing is not held within 180 days of receipt of the report, the amendment is deemed withdrawn absent an agreement and notice to DEO and all affected persons that provided comments. S. 163.3184(4)(e)1., F.S.
[44] S. 163.3184(4)(e)2., F.S.
[45] S. 163.3184(4)(e)4., F.S.
[46] *Id*.
[47] S. 163.3184(4)(e)5., F.S.
[48] *Id*. The Administration Commission consists of the Governor and Cabinet. S. 14.202, F.S.

Requirements for Local Land Development Regulations and Comprehensive Plans

Section 163.3202(2), F.S., outlines the minimum provisions that counties and municipalities must include in their local government land development regulations, including provisions:

- Regulating the subdivision of land;
- Regulating the use of land and water;
- Providing for protection of potable water wellfields;
- Regulating areas subject to seasonal and periodic flooding and providing for drainage and stormwater management;
- Ensuring the protection of environmentally sensitive lands designated in the comprehensive plan;
- Regulating signage;
- Addressing concurrency;
- Ensuring safe and convenient onsite traffic flow; and
- Maintaining the existing density of residential properties or recreational vehicle parks.

Further, local comprehensive plans adopted after January 1, 2019, and all land development regulations adopted to implement the plan, must incorporate development orders existing before the plan's effective date.[49] The plan may not impair a party's ability to complete development in accordance with an existing development order and must vest the density[50] and intensity[51] approved by the development order without any limitations or modifications.[52]

Effect of the Bill

Comprehensive Plans for Newly-Created Municipalities

The bill provides that a comprehensive plan for a newly incorporated municipality that becomes effective after January 1, 2016, as well as all land development regulations adopted to implement such plan, must:

- Incorporate all development orders existing before the plan's effective date;
- Not impair the completion of development in accordance with existing development orders; and
- Vest the density and intensity approved by the development orders existing on the plan's effective date without limitation or modification.

Property Rights Element

The bill requires each local government to include a property rights element in its comprehensive plan by the earlier of the date of adoption of its next proposed plan amendment initiated after July 1, 2021, or the date of its next scheduled comprehensive plan evaluation and appraisal.

The bill also provides a model statement of rights a local government may adopt. However, the bill allows a local government to develop its own property rights language if such language does not

[49] S. 163.3167(3), F.S.
[50] S. 163.3164(12), F.S., defines the term "density" as an objective measure of the number of people or residential units allowed per unit of land, such as residents or employees per acre.
[51] S. 163.3164(22), F.S., defines the term "intensity" as an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on, or below the ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services.
[52] S. 163.3167(3), F.S.

conflict with the model statement of rights, which requires local governments to consider the property owner's right to:

- Physically possess the property and control his or her interests in the property, including easements, leases, or mineral rights;
- Use, maintain, develop, and improve the property for personal use or the use of another, subject to state law and local ordinances;
- Privacy and exclusion of others from the property to protect his or her possessions and property; and
- Dispose of the property through sale or gift.

Local Government Development Agreements

Background

Local governments may enter into development agreements with developers.[53] A development agreement is a "contract between a local government and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits."[54]

A local government may establish, by ordinance, procedures and requirements for considering and entering into a development agreement with any person having a legal or equitable interest in real property located within its jurisdiction.[55] A development agreement may provide that the entire agreement, or any phase thereof, must be commenced or completed within a specific time and must include:[56]

- A legal description of the land subject to the agreement and the names of its legal and equitable owners;
- The duration of the agreement;
- The development uses permitted on the land, including population densities, and building intensities and height;
- A description of public facilities that will service the development, including who will provide such facilities, the date any new facilities, if needed, will be constructed, and a schedule to assure public facilities are available concurrent with the impacts of the development;
- A description of any reservation or dedication of land for public purposes;
- A description of all local development permits approved or needed to be approved for the development of the land;
- A finding that the development permitted or proposed is consistent with the local government's comprehensive plan and land development regulations;
- A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety, or welfare of its citizens; and
- A statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction does not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, terms, or restrictions.

Within 14 days after a local government enters into a development agreement, the local government must record the agreement with the clerk of the circuit court in the county where the local government is located, and such an agreement is not effective until it is properly recorded.[57] A development agreement binds any person who obtains ownership of a property already subject to an agreement

[53] S. 163.3220(4), F.S.; *See* ss. 163.3220-163.3143, F.S., known as the "Florida Local Government Development Agreement Act."
[54] *Morgran Co., Inc. v. Orange County*, 818 So. 2d 640 (Fla. 5th DCA 2002); 7 Fla. Jur. 2d Building, Zoning, and Land Controls § 168 (2019).
[55] S. 163.3223, F.S; 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).
[56] S. 163.3227(1) and (2), F.S.; 7 Fla. Jur. 2d Building, Zoning, and Land Controls § 168 (2019).
[57] S. 163.3239, F.S; 7 Fla. Jur. 2d Building, Zoning, and Land Controls § 168 (2019).

(successor in interest).[58] A development agreement may be amended or canceled by mutual consent of the parties to the agreement or by their successors in interest.[59]

Effect of the Bill

The bill allows a party or its designated successor in interest to a development agreement and the local government to amend or cancel a development agreement without securing the consent of the other parcel owners that were originally subject to the development agreement unless the amendment or cancellation directly modifies the allowable uses or entitlements of such owners' property. For example, under the bill, if a development agreement amendment will change the terms and conditions under which all property subject to the agreement may be developed, all owners of property subject to the agreement must consent to the amendment. However, if a development agreement amendment will change the terms and conditions under which only one property subject to the agreement may be developed, only the owner of the property affected by the amendment must consent to it; the consent of all other owners of property subject to the agreement is not required.

Department of Transportation Disposal of Real Property

Background

The Florida Department of Transportation (DOT) is authorized to convey any land, building, or other real or personal property it acquired if it determines the property is not needed for a transportation facility.[60] In such cases, DOT may dispose of the property through negotiations, sealed competitive bids, auctions, or any other means it deems to be in its best interest and must advertise the disposal of any property valued over $10,000.[61]

DOT may not sell unneeded property for a price less than DOT's current estimate of value, except that:

- If the property was donated for transportation purposes and a transportation facility has not been constructed for at least five years, plans have not been prepared for the construction of such facility, and the property is not located in a transportation corridor, a governmental entity in whose jurisdiction the property lies may authorize reconveyance of the donated property for no consideration to the original donor or the donor's heirs, successors, assigns, or representatives.[62]
- If the property is to be used for a public purpose, the property may be conveyed without consideration to a governmental entity.[63]
- If the property was originally acquired specifically to provide replacement housing for persons displaced by transportation projects, DOT may negotiate for the sale of such property as replacement housing.[64]
- If DOT determines the property requires significant costs to be incurred or that continued ownership of the property exposes DOT to significant liability risks, DOT may use the projected maintenance costs over the next 10 years to offset the property's value in establishing a value for disposal of the property, even if that value is zero.[65]

If, in DOT's discretion, a sale to a person other than an abutting property owner would be inequitable, the property may be sold to the abutting owner for DOT's current estimate of value.[66] Further, in cases of property to be used for a public purpose, and in cases of property requiring significant costs to be

[58] A successor in interest is one who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance. Black's Law Dictionary 1473 (8th ed. 2004); s. 163.3239, F.S.
[59] S. 163.3237, F.S.
[60] S. 337.25(4), F.S.
[61] *Id.*
[62] S. 337.25(4), F.S.
[63] S. 337.25(4)(b), F.S.
[64] S. 337.25(4)(c), F.S.
[65] S. 337.25(4)(d), F.S.
[66] S. 337.25(4)(e), F.S.

incurred or exposing DOT to significant liability risks, DOT may first offer the property ("right of first refusal") to the local government or other political subdivision in whose jurisdiction the property is situated.[67]

Effect of the Bill

Notwithstanding any provision of s. 337.25, F.S., to the contrary, the bill requires DOT to provide a right of first refusal to the previous property owner from whom DOT originally acquired the property for DOT's current estimate of value if the property is to be used for public purpose, requires significant costs to be incurred, or exposes DOT to significant liability risks, or if DOT determines that a sale to any person other than an abutting property owner would be inequitable. The offer must be made in writing, by certified mail or hand delivery, is effective upon receipt by the previous property owner, and must provide the previous property owner with at least 30 days to exercise the right of first refusal. If the previous property owner wants to purchase the property, he or she must send notice to DOT by certified mail or hand delivery, and such acceptance is effective upon dispatch. Once the right is exercised, the previous property owner has at least 90 days to close on the property. These provisions do not apply to property acquired by DOT more than 10 years before the date of disposition.

Developments of Regional Impact

Background

A Development of Regional Impact (DRI) is "any development which, because of its character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of citizens of more than one county."[68] The DRI statutes were created in 1972 as an interim program intended to be replaced by comprehensive planning and permitting laws.[69] The program provided a process to identify regional impacts stemming from large developments and appropriate provisions to mitigate impacts on state and regional resources.[70]

The process to review or amend a DRI agreement and its implementing development orders went through several revisions[71] until repeal of the requirements for state and regional reviews in 2018.[72] Affected local governments are responsible for the implementation and amendment of existing DRI agreements and development orders.[73] Currently, an amendment to a development order for an approved DRI may not amend to an earlier date the date to which the local government had agreed not to impose downzoning, unit density reduction, or intensity reduction, unless:[74]

- The local government can demonstrate that substantial changes in the conditions underlying the approval of the development order have occurred;
- The development order was based on substantially inaccurate information provided by the developer; or
- The change is clearly established by local government to be essential to the public health, safety, or welfare.

[67] S. 337.25(4), F.S.
[68] S. 380.06(1), F.S.
[69] The Florida Senate, Committee on Community Affairs, Interim Report 2012-114, September 2011, citing: Thomas G. Pelham, *A Historical Perspective for Evaluating Florida's Evolving Growth Management Process*, in *Growth Management in Florida: Planning for Paradise*, 8 (Timothy S. Chapin, Charles E. Connerly, and Harrison T. Higgins eds. 2005).
[70] Ch. 72-317, s. 6, Laws of Fla.
[71] *See* ch. 2015-30, Laws of Fla. (requiring that new DRI-sized developments proposed after July 1, 2015, must be approved by a comprehensive plan amendment in lieu of the state review process provided for in s. 380.06, F.S.) and ch. 2016-148, Laws of Fla. (requiring DRI reviews to follow the state coordinated review process if the development, or an amendment to the development, required an amendment to the comprehensive plan).
[72] Ch. 2018-158, Laws of Fla.
[73] S. 380.06(4)(a) and (7), F.S.
[74] S. 380.06(4)(a), F.S.

Any proposed change to a previously approved DRI must be reviewed by the local government based on the standards and procedures in its adopted local comprehensive plan and local land development regulations.[75] However, a proposed change reducing the originally approved height, density, or intensity of the development must be reviewed by the local government based on the standards in the local comprehensive plan at the time the development was originally approved.[76] If the proposed change would have been consistent with the comprehensive plan in effect when the development was originally approved, the local government may approve the change.[77]

In the 2018 revisions, DRI agreements classified as essentially built out and valid on or before April 6, 2018, were preserved, but the provisions allowing such agreements to be amended to exchange approved land uses were eliminated.[78] For such agreements, a DRI is essentially built out if:[79]

- All the mitigation requirements in the development order were satisfied, all developers were in compliance with all applicable terms and conditions of the development order except the buildout date, and the amount of proposed development that remained to be built was less than 40 percent of any applicable development-of-regional-impact threshold; or
- The project was determined to be an essentially built-out development of regional impact through an agreement executed by the developer, the state land planning agency, and the local government.

Effect of the Bill

The bill authorizes the amendment of any DRI agreement entered into on or before April 6, 2018, and previously classified as, or officially determined to be, essentially built out. Such amendments may authorize the developer to exchange approved land uses, subject to the developer demonstrating that the exchange will not increase impacts to public facilities. The bill also specifies that DRI agreement amendments must be made pursuant to the processes adopted by local governments for amending development orders.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The bill may have an insignificant negative fiscal impact on local governments by requiring each county and municipality to adopt a private property rights element into its comprehensive plan by

[75] S. 380.06(7)(a), F.S. These procedures must include notice to the applicant and public about the issuance of development orders.
[76] *Id*.
[77] *Id.*
[78] S. 380.06(4), F.S.; s*ee also ch*. 2018-158, s. 1, Laws of Fla.
[79] S. 380.06(15)(g)3. and 4., F.S. (2017).

the earlier of its next proposed plan amendment initiated after July 1, 2021, or the next scheduled evaluation and appraisal of its comprehensive plan.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.