# An Introduction to Florida's Landmark Law Protecting Private Property Rights

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The Florida Legislature, which pioneered many of the land use, environmental protection and growth management laws that are now being copied by other states, also has taken a lead role in establishing a remedy for private property owners whose real property has suffered a loss of economic value due to regulatory decisions which do not rise to the level of a constitutional taking. Here, in question-and-answer format, is an explanation of the law for a private landowner confronted by a governmental action affecting the landowner's real property.

**Q.** ***What does this property rights law do for me?***

**A.** The measure contains two main parts. Part I, the Bert J. Harris, Jr., Private Property Rights Protection Act, creates a new legal remedy in circuit court for regulatory actions by government entities that may not be as extreme as a constitutional "taking" of property when the government takes all or substantially all economically viable use of the property.

Part II, the Florida Land Use and Environmental Dispute Resolution Act, creates a new non-judicial settlement procedure that a landowner can use, without having to file a lawsuit, in the hope of getting relief from a governmental decision which reduces property value by unfairly or unreasonably restricting the landowner's use of that property.

**Q.** ***Tell me about the new remedy in circuit court. What interests does it protect?***

**A.** The Harris Act protects a landowner's actual, present use or activity on his property as well as any vested right to a specific use of real property. Importantly, it also protects certain reasonably foreseeable future uses for property. Those future uses are protected if they are not speculative in nature, are suitable for the property, are compatible with adjacent land uses, and have created an existing fair market value in the property which is greater than the fair market value of the actual, present use or activity. For example, a city or county may have to compensate a landowner if it denies her the right to change the use of property from agricultural to residential if it was reasonably foreseeable that the land could be developed in this manner.

**Q.** ***What governmental actions does this new law protect me against?***

**A.** It protects you against governmental actions which "inordinately burden" your property. The law defines this to mean an action by a state, regional or local government entity which directly restricts or limits the use of your property as a whole so that you are permanently unable to continue or attain one of the protected existing or future uses. It also can mean that you are left with existing or vested uses that are unreasonable in the sense that you permanently bear a

disproportionate share of a burden imposed for the public good, which in fairness should be borne by the public at large.

**Q.** ***Can I use the Bert Harris Act if my land is devalued by a government decision that does not specifically name my property as the object of that decision?***

**A.** The Bert Harris act applies to "direct actions of government" that inordinately burden property. The law requires an action to be commenced within one year "after a law or regulation is first applied by the governmental entity to the property at issue," so it appears that you may not have a cause of action if your property is not the direct object of the government's decision.

**Q.** ***So does that mean <u>any</u> action that diminishes my property values?***

**A.** The law applies to "a specific action" by a government agency which affects real property. That expressly includes a variety of actions like decisions on permit applications and land use approvals, but the scope of actions to which the law applies appears to be wider. The law may not include truly temporary financial impacts to property, the financial effects of a governmental decision that abates or prohibits a public nuisance at common law or any "noxious uses" of private property. Some of these limitations on the applicability of the Harris Act allows government entities to continue to prohibit unreasonable actions and uses of property that injure the public.

**Q.** ***What other governmental actions are not covered by this law?***

**A.** It does not cover a governmental action based on a statute enacted before the end of the 1995 Regular Session of the Legislature on May 11, 1995, or based on a regulation or ordinance adopted or noticed for adoption prior to that date. It does not alter the existing law of eminent domain as it relates to the operation, maintenance or expansion of transportation facilities.

**Q.** ***What government agencies does it apply to?***

**A.** It applies to state agencies such as the Department of Environmental Protection (DEP), regional agencies such as water management districts and local governments. It does not apply to agencies of the federal government, and it does not apply to any federal programs administered by state, regional or local governments in Florida.

**Q.** ***Is this new remedy available if the government entity has its own appeal processes?***

**A.** Yes. You are not required to exhaust all available administrative remedies before bringing a claim under the Harris Act.

**Q.** ***What do I have to do to bring a lawsuit under this law, and is there is particular deadline?***

**A.** The Harris Act requires that you present a formal written claim to the government agency in question within one year of the government decision affecting your property. You have to support your claim with an appraisal that shows you have lost fair market value in the property because of the government's action. The governmental entity then has 180 days to review the matter, and it must make a written offer to respond to your claim.

**Q.** ***What can the agency offer to do?***

**A.** The agency may offer to change permit requirements, swap or buy your land, re-arrange development on the site, grant a variance or special exception or take other steps to ameliorate the adverse economic effects of its "specific action." Alternatively, the entity can choose to stand by its earlier decision. As the landowner, you can accept the governmental entity's offer and jointly implement it, or you can reject it and bring your lawsuit.

**Q.** ***What if more than one governmental entity is causing the problem?***

**A.** The law allows you to commence proceedings against several government entities. All of them have to respond and, if their written offers are not satisfactory, you can sue all of them.

**Q.** ***What happens if I don't like the governmental entity's written offer?***

**A.** You can file suit in circuit court. The case then goes to a judge, who decides (1) whether you have a protected existing use or vested right to a specific use on your real property and (2) whether your use of your property has been "inordinately burdened." If she rules in your favor, a jury will decide how much compensation you are due. The law says you are entitled to receive the difference between the fair market value of your property before and after the governmental action. Those amounts will be determined after testimony by each side's appraisers.

**Q.** ***Does anyone else have an opportunity to participate in the lawsuit?***

**A.** Yes. After receiving the formal written claim, the government entity must notify everyone who was involved in any administrative proceeding which led up to the government's action and the owners of real property that is contiguous to your property. It also must notify the Attorney General. Those persons and others may intervene in the lawsuit if they meet the legal tests for doing so and persuade the judge to let them participate.

**Q.** ***Will the government pay my attorneys' fees?***

**A.** If you reject a settlement offer from the governmental entity and then prevail in court, the judge will award you your costs and attorneys' fees <u>if</u> the judge decides that the settlement offer from the government entity was not a bona fide offer which reasonably would have resolved your claim. On the other hand, if you reject a settlement offer and then the judge rules against you in your lawsuit, the government agency is entitled to have you pay its attorneys' fees and costs <u>if</u> the

judge decides the agency's offer was a bona fide offer which reasonably would have resolved your claim. The threat of having to pay the other side's attorneys' fees and cost is intended to be an inducement for the parties to settle.

**Q.** ***What happens if I win and receive money from the government?***

**A.** Then the government owns whatever rights were in dispute. That's what the government gets in exchange for the money it pays you. It's a forced governmental purchase of those rights which the government agency wouldn't let you use.

**Q.** ***This remedy doesn't cover all governmental actions. Why is it good for me?***

**A.** There are two major benefits. First, you no longer have to meet the stringent constitutional requirements to prove that a governmental action has "taken" your property before you can receive compensation. To prove a taking you generally have to prove that you have lost all or substantially all profitable use of your property. Under the Harris Act, you can receive compensation for regulatory actions which lessen your property values even if you retain some profitable uses. This is a big benefit for many landowners.

Second, this is the first real response by the Legislature to the steady erosion of property rights that landowners have suffered due to the increasing burdens created by Florida's environmental protection and growth management programs. There is ample evidence that, because landowners now have this remedy, regulators are being much more cautious about enlarging current requirements or enacting new ones.

**Q.** ***Well, what about the second part of the 1995 law. What does it do?***

**A.** Part II creates a non-judicial settlement procedure to resolve disputes over regulatory burdens on land before those disputes result in lawsuits.

**Q.** ***Who can initiate this new dispute resolution process?***

**A.** Any landowner who believes a specific development order or a specific enforcement action is unreasonable or unfairly burdens the use of her property may ask the governmental entity in question for a fact-finding proceeding by a neutral third party, called a "special master." The request must be made within 30 days after receiving the order or notice of the intended action.

**Q.** ***Is a special master proceeding also available only for future laws and regulations?***

**A.** No. Unlike the Harris Act, you may request a special master proceeding to review a governmental action which is based on existing environmental protection or growth management laws or regulations. The only time limitation is that the request must be submitted within 30 days of the governmental action at issue.

**Q.** ***What governmental actions are subject to a special master proceeding?***

**A.** Any decision by a state, regional or local government which has the effect of granting, denying, or putting conditions on a development approval. That includes zoning actions, building permits, subdivision approvals, and other local government development approvals, as well as permits from state and regional agencies under various state environmental laws. It does not include state or local government actions on amendments to local comprehensive plans.

An important limitation on this settlement procedure: The law requires cities and counties to offer you mediation or some other form of alternative dispute resolution when the officials have denied your request for a comprehensive plan amendment applicable to your property. You and the local government share the cost of the mediation. It also requires the Department of Community Affairs to offer mediation if it finds a comprehensive plan amendment that has been adopted by a local government not in compliance with state law.

**Q.** ***Who selects the special master?***

**A.** A special master must be jointly selected by the governmental entity and you. To be a special master, one must be a Florida resident and have experience and expertise in both mediation and one of the following disciplines -- land use and environmental permitting, land planning, land economics, or local and State government organization and powers. The Florida Conflict Resolution Consortium in Tallahassee has been training mediators to meet the special requirements for serving as a special master, so a cadre of trained special masters is available.

**Q.** ***What if I want to go straight to court? Do I have to go to a special master first?***

**A.** No. A special master proceeding is strictly voluntary for the landowner. However, a governmental entity must participate if you request it. If you decide to go straight to court, you cannot decide later to seek a special master proceeding. You will have waived that right. If your dispute is with a state agency, you can request a special master proceeding prior to requesting a formal administrative hearing on a permit application or other agency action before a state hearing officer and you won't lose your right to the formal hearing. But if you request a formal hearing, you will have waived your right to a special master proceeding.

**Q.** ***Are there any other prerequisites to a special master proceeding?***

**A.** Yes. For actions by local governments, you have to take advantage of all non-judicial local government administrative appeals. However, you make request a special master proceeding at the end of four months, even if the appeal is not concluded.

**Q.** ***Who is entitled to participate in a special master proceeding?***

**A.** You and the governmental agency or agencies that entered the decision. In addition,

anyone owning land that is contiguous to yours may participate, along with any substantially affected person who previously submitted public testimony or written comments on your development proposal. However, those third-party participants have only limited rights to address variances and other forms of potential relief to you that might affect them.

**Q.** ***What kind of hearing will the special master hold?***

**A.** It is supposed to be informal and not require a lawyer, although a landowner would be wise to include his counsel. It must be held within 45 days after the special master received the request for relief, but the parties can agree on a later date. It must take place in the county where the property is located and be open to the public. The special master may subpoena witnesses, and the parties are expected to bring witnesses to discuss various technical issues. The special master's principal purpose is to serve as a mediator to try to bring the parties to a compromise that will enable you as a landowner to use your property and still satisfy the public interests behind the government's decision.

**Q.** ***What happens if the special master can't get everyone to agree on a compromise?***

**A.** Then the special master must submit a written report to the parties. If the special master finds for the government entity – that is, that the government entity's action was not unreasonable – the proceeding is at an end, and you may immediately file a lawsuit. If the special master finds for you, he may recommend alternatives to the governmental action at issue in the proceeding. The agency then has 45 days to respond to the recommendation. You can either accept or reject the special master's recommendation, no matter what the government entity decides.

**Q.** ***Who pays the special master's fees?***

**A.** The governmental agency and you are required to split the fees and costs.

**Q.** ***How long does this special master proceeding take?***

**A.** The law specifically says that the proceeding can't take more than 165 days unless all the parties agree to a longer time period.

**Q.** ***This special master can't force the agency to do anything. Is this going to be useful?***

**A.** It may be helpful in some cases, depending upon the attitude of the government officials and the landowner. It certainly signals to the agency that you are serious about getting some relief. And it may lead to a creative solution to the regulatory problem facing you. On the other hand, you are not required to use this remedy and can go straight to court if you want. Or you may want to try another form of alternative dispute resolution, such as conventional mediation, which is not subject to some of the procedural constraints of a special master proceeding. So it's just another tool that may be quicker and less expensive than a lawsuit that is available for you, as

a landowner, when dealing with the government.

**Q.** ***Can your law firm help me evaluate a problem relating to property rights?***

**A.** Yes. Our law firm specializes in land use, environmental protection and other legal matters for clients like you in the private sector. We serve clients in all areas of the state. While we are known for our work on legislative and policy-making matters like property rights, the bulk of our work is representing clients with specific regulatory problems, from initial approvals to final environmental permitting. So, in addition to the experience we can bring to bear on the full range of regulatory issues that you face, we are well-equipped to apply this new property rights law in many different settings.