

## **Brief Outline of State Takings laws**

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### **Florida's Bert Harris Act and Dispute Resolution Act**

The Bert Harris Act is prospective and only applies to restrictions adopted after May 11, 1995. The Act creates a right of action to recover financial compensation or other relief when a government regulation “inordinately burden[s] an existing use of real property.”

#### **Definitions and threshold requirements**

- The Act defines a future use to be an “existing use” if the use:
  1. Is “reasonably foreseeable;”
  2. Is “non-speculative;”
  3. Is “suitable for the subject real property;”
  4. Is “compatible with adjacent land uses;” and
  5. Creates “an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.”
  
- The Act defines “inordinate burden” as a government action that has directly restricted or limited the use of real property such that:
  1. The property owner is permanently unable to attain the reasonable, investment-backed expectations for the existing (i.e., or proposed) use of the real property; or
  2. The property owner is left with existing (i.e., or proposed) uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.
  
- The Act includes several exemptions:
  1. “Temporary” limitations on real property use (e.g., development moratoria);
  2. Impacts to private property resulting from government efforts to abate or otherwise address a “public nuisance” or a “noxious use of private property;”
  3. Government actions “taken to grant relief” to a developer or other property owner under the Act (i.e., neighbors cannot assert a claim under the Act on the ground that they have been harmed by the government granting relief to a claimant objecting to regulations as too burdensome).

#### **Claim process**

- A landowner must submit a “claim” along with a “bona fide, valid appraisal demonstrating the loss in fair market value to the real property.”

- The government must then provide written notice of the claim to members of the public who were “parties” to the underlying administrative proceeding, owners of contiguous properties, and the Florida Department of Legal Affairs within 180 days of receipt of the claim (90 days in the case of agricultural lands).
- The government must respond with a “written settlement offer.” The offer can be among other things, the rejection of the claim, the modification of the regulatory decision, the purchase of the property, or new conditions or mitigation measures.

### **Settlement/compensation**

- If a settlement is reached and the government agrees to modify its decision, the government must ensure that “the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the Government’s regulatory effort from inordinately burdening the property.” If the settlement “would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property,” the parties must obtain court approval of the agreement.
- If the parties fail to reach agreement, the government must issue a “ripeness decision” specifying what property uses it will allow. Upon issuance of this decision, or if the government fails to issue a decision, the landowner can proceed to sue in court for “compensation” or other relief.
- If the court determines that the government action imposed an inordinate burden it must impanel a jury to fix appropriate payment. Compensation is determined by calculating the difference in the fair market value of the property, as it existed at the time of the governmental action without the regulation and with the regulation considering the settlement offer together with the ripeness decision.

### **Attorney fees**

- A prevailing claimant may recover reasonable attorney fees and costs from the other party if the court determines that “the settlement offer, including the ripeness decision, of the governmental entity did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim.”
- If the government prevails it is also entitled to recover reasonable fees and costs from a property claimant if the court determines that the property owner declined a reasonable settlement offer.

### **Sovereign immunity**

- The Bert Harris Act states “his [Act] does not affect the sovereign immunity of government.” The Florida Third District Court of Appeals ruled that it should not be

read to prohibit an award of monetary compensation, reasoning that the contrary reading would effectively gut the Act.

**Public input.**

- The Act does not expressly speak to the rights of the public to participate in proceedings under the Act.

## ***Florida's Dispute Resolution Act***

Adopted along with the Bert Harris act, the Dispute Resolution Act gives landowners an opportunity to seek regulatory relief. The Act was designed to encourage informal resolution of property owners' complaints about regulatory burdens. The Dispute Resolution Act applies regardless of when the regulation was adopted.

### **Process**

- A landowner who believes that a regulation “is unreasonable or unfairly burdens the use of the owner’s real property” may initiate a proceeding under the Dispute Resolution Act by “fil[ing] a request for relief” with the government. The Act does not define the terms “unreasonable” or “unfair.” The government must forward the request for relief to a special magistrate who is acceptable to both parties.
- The government must provide a copy of the request for relief to contiguous property owners and to “[a]ny substantially affected party” who substantively participated in the underlying administrative proceeding. Participation in the proceeding “is limited to addressing issues raised regarding alternatives, variances, or other types of adjustment to the development order or enforcement action which may impact their substantial interests.”

### **Hearing**

- The magistrate’s primary responsibility is “to facilitate a resolution of the conflict” that addresses the claimant’s concerns and reduces regulatory burdens. Following the hearing, the magistrate must prepare a written recommendation based on her findings, including any recommendations that the government “reduce[] restraints on the use of the owner’s real property.”
- The magistrate’s findings “may serve as an indication of sufficient hardship to support modification, variances, or special exemptions,” suggesting the findings may provide a legal basis for challenging the government’s failure to grant regulatory relief.

### **Settlement**

- The government must respond to the magistrate’s recommendation by accepting, modifying, or rejecting it. If the landowner and the government agree on how to modify the restrictions, the government will proceed to implement the resolution through the normal land use process.
- If the government rejects the magistrate’s recommendations and the parties cannot reach an alternative agreement, the government must issue “a written decision . . . that describes as specifically as possible the use or uses available to the subject real property.”

## *Oregon's Measure 37 and Measure 49*

### *Measure 37*

#### **Application**

- Measure 37 was retroactive and required state and local governments to pay “just compensation” when it “enacts or enforces” a regulatory restriction that “reduce[s] the fair market value of property, or any interest therein.”

#### **Process**

- To initiate a claim, a landowner must submit a “written demand.” The measure did not prescribe any information that must be submitted with the written demand. State or local governments could adopt “procedures for the processing of claims,” but a landowner’s claim could not be rejected for failing to follow these procedures.
- In addition, Measure 37 provided that a “decision by a governing body under this act shall not be considered a land use decision . . .” making those government actions not subject to administrative review by Oregon’s Land Use Board of Appeals.
- The measure also provided a two year deadline for the filing of facial claims based on regulations in place on the date Measure 37 was adopted. Claims after that based on those regulations could only be brought on an as applied basis.

#### **Compensation or waiver**

- Government entities could “modify, remove, or not apply” the challenged regulation within a certain amount of time after the claim was filed to avoid liability (“pay or waive”).
- If the government elected to pay, the “just compensation” must “be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner made written demand for compensation.” Compensation could be paid from funds “specifically allocated” for that purpose or from other “available funds.” No funds were made available under the Act.
- If the government was unable or unwilling to pay, “the governing body responsible for enacting the land use regulation” was authorized to “modify, remove, or not to apply the land use regulation . . . to allow the owner to use the property for a use permitted at the time the owner acquired the property.”

## **Exceptions**

- Measure 37 contained five exemptions for regulations that:
  1. Restricted “activities commonly and historically recognized as public nuisances under common law;”
  2. Regulated “activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;”
  3. Were necessary “to comply with federal law;”
  4. Restricted “the use of a property for the purpose of selling pornography or performing nude dancing;” or
  5. Were enacted before the claimant, or a family member, acquired the property.

## ***Measure 49***

Measure 49 was passed by voters on November 6, 2007, replacing Measure 37.

## **Application**

- Other than dealing with Measure 37 claims, Measure 47 is prospective regarding new regulations that restrict residential development, farm or forest practices. Affected landowners may file claims seeking compensation or a waiver. However, claims are no longer allowed for new commercial or new industrial uses.
- Measure 49 defines a reduction in “fair market value” as being “equal to the decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after enactment, plus interest.” This methodology applies to certain prior Measure 37 claims and prospectively to claims based on new regulation.

## **Compensation, waiver or new development**

- If a landowner can demonstrate a loss in value, the owner is entitled either to compensation “for the reduction in value” or permission to engage in additional development “to the extent necessary to offset the reduction in fair market value of the property.”
- Development rights authorized under Measure 49 are not personal to the claimant and may be sold and transferred to new owners of the property.

## **Addressing Measure 37 claims**

Measure 49 allows landowners who previously filed valid claims (or had already been granted waivers) under Measure 37 to seek permission to construct up to:

1. Three dwelling units on land outside of urban growth boundaries, or
2. Ten units on land inside urban growth boundaries or land outside urban growth boundaries that is not high-value farmland or high-value forestland or in a ground water restricted area.

### **Process**

To obtain permission to construct up to three dwellings, the owner is required to show that a current regulation prohibits the construction of units that were otherwise permitted at the time he acquired the property. To take advantage of the ten-unit option, the claimant also has to demonstrate, using a new formula for calculating alleged loss in value, that the adoption of the regulation reduced the value of the property.

## *The Louisiana Right to Farm Act*

### **Application**

- The Act was adopted in 1995. It is prospective in nature and only applies to farmland and forestland.
- It defines a taking as a “reduction of twenty percent or more” of the value of “the affected portion of any parcel” agricultural or forest land.
- An owner is not required to convey title to the property to the public as a condition of receiving payment. If an owner prevails in a suit under the measure, the government has the option of rescinding the regulation, but the government must pay for the diminution in value while the law.

### **Cause of action**

- The landowner may bring an action in court to determine whether the governmental action caused a diminution in value of a parcel of agricultural or forestry land.
- The owner must show that the diminution in value did not result from a restriction or prohibition of a use of the property that was not already prohibited by law.

### **Determination of property value**

The Act provides that in determining the assessed value of real agricultural or forestry land, a governing authority must shall reduce the assessment by the diminution in value as determined by the court or, in the absence of a court determination, by the appropriate assessing official. No such assessment shall be retroactive.

### **Impact assessment**

- The Act requires the governmental entity to prepare a written assessment of any proposed action that will likely result in a diminution in value of private agricultural or forestry property.
- The commissioner of agriculture and forestry shall promulgate guidelines for owners of private agricultural property and governmental entities to assist in determining what governmental actions are likely to result in a diminution of value of private agricultural property.

## **Compensation**

- Upon a determination that a governmental action caused a diminution in value of private agricultural or forestry property, the owner is entitled to:
  1. Recover a sum equal to the diminution in value of the property and retain title to the property; or
  2. Recover the entire fair market value of the property prior to the diminution in value of twenty percent or more and transfer title to the property to the governmental entity.
  
- If the claimant prevails, the governmental entity may rescind or repeal the regulation which caused the diminution in value of the property but the governmental entity is still liable for damages sustained by the property owner.

## **Attorney fees**

The court may award costs of litigation, including reasonable attorney and expert witness fees, to the prevailing party in addition to other remedies provided by law.

## *The Mississippi Agricultural and Forestry Activities Act*

### **Application**

- Enacted in 1994, it is very similar to the Louisiana measure and applies only prospectively.
- The Act defines a taking to mean a prohibition or restriction on an owner's use of property for forestry or agricultural activities that results in a reduction in the fair market value of the property "or any part or parcel thereof ...by 40 percent or more."

### **Cause of action/compensation**

- The Act authorizes owners to sue for money damages and allows an owner who recovers payment to retain title to the property, unless the reduction in property rises to the "100%" level.
- If the government is unable to make a judicially mandated payment, the government action is automatically rescinded and if the government is found liable, officials have the option of rescinding the regulation, but the state must pay for the period the regulation was in place.
- Like the Louisiana measure, the act is limited to restrictions on forest and agricultural lands. It applies only prospectively, and includes several exceptions, but does not contain the broad exemptions found in the Louisiana statute.

## ***The Texas Real Property Rights Preservation Act***

### **Application**

- In 1995, the Texas legislature passed the Texas Real Property Rights Preservation Act. The Act is prospective and defines a taking as a government action which causes “a reduction of at least 25 percent in the market value of the affected private real property.” It applies to state agencies and political subdivisions but not cities.
- Applies only to governmental actions for adoption of a rule, ordinance or guideline with a number of exceptions involving federal mandates, public health and safety and certain hunting and fishing regulations.

### **Initiating a claim**

- Land owner must file a claim within 180 days of the date that landowner “knew or should have known that the governmental action restricted or limited the landowner’s right in the private real property. Once filed, the court finds a taking when a governmental action ... and is the producing cause of a reduction of at least 25 percent in the market value of the affected real property.”

### **Taking Impact Assessment**

- It requires government agencies to prepare takings impact assessments if an agency action “may result” in a taking as defined in the act. If an agency fails to prepare the assessment when one is required, an owner can sue to invalidate the governmental action on that basis.

### **Remedies and attorney fees**

- The governmental entity may opt to rescind the regulation or pay compensation for the takings from the date regulatory takings occurred.
- The prevailing party may be awarded attorney fees.