

FLORIDA STATUTORY PRIVATE PROPERTY RIGHTS PROTECTIONS¹ & SEA LEVEL RISE

Part 3 of the Factsheet Series 'Law & Adaptation in Florida'



What is the Bert Harris Act?

The Act was established to provide protections to private property that are more restrictive of land use change or government regulation than the limits set by the U.S. Constitution's Protections of private property. The Bert Harris Act intends to compensate property owners for "inordinate burdens" placed upon their properties.

In 1995, Florida passed the Bert J. Harris, Jr., Private Property Rights Protection Act (Act or Bert Harris Act). The Act serves as an additional layer of protection in Florida beyond the protections for property rights offered by the U.S. Constitution's Fifth Amendment. The Act allows property owners to notify government agencies when property owners believe that their property is "inordinately burdened" by government action. The governmental entity is then given 90 days to respond with a settlement offer and either settle with the claimant or issue a written "statement of allowable uses" that identifies the uses to which the subject property may be put.² Failure of a governmental entity to issue a required "statement of allowable uses" automatically allows the property owner to file a lawsuit at the end of the 90-day period.

The Act has been amended several times since 1995 and has been a subject for both criticism and praise. Some individuals in local governments, including those focused on environmental or resilience issues, have criticized the chilling effect it has on local and state government willingness to regulate to protect people and the environment. Others praise the Act for doing exactly that.

This fact sheet analyzes recent changes to the Bert Harris Act to evaluate potential impacts on the growing fields of resilience and sea level rise adaptation.



Figure 1: Erosion and seawater affecting the septic systems of houses at Summer Haven, St. Johns County, Florida. Photo credit: Maia McGuire

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² Fla. Stat. § 70.001(5)(a) (2021).

To appreciate the importance of the Bert Harris Act and the 2022 legislative changes to the Act, some context about the current focus on resilience and adaptation to sea level rise are in order.

Those working in the fields of SLR and flooding understand five basic facts:

1 The rate of sea level rise (SLR) is increasing, and sea levels will rise for centuries.

2 Most of the risk from SLR and flooding comes from how and where we choose to develop.

3 While individuals and communities suffer greatly when disasters strike vulnerable areas, the public also pays the bill through massive federal spending to address the foreseeable damage that occurs due to our development decisions in hazardous areas.

4 Infrastructure modifications alone will not always be able to mitigate the risks of sea level rise and flooding.

5 The most powerful tools local governments have to decrease existing risk and avoid creating more vulnerabilities to hazards such as SLR, storm surge, and flooding include planning, zoning, and development restrictions/conditions.



Figure 2: High-tide flooding in Coconut Grove, Florida. Photo credit: Thomas Ruppert

Many small- and medium-sized local governments will not have sufficient funds to develop large infrastructure projects to offset rising seas or the increasing intensity of rainfall events. Even when we do develop infrastructure considering SLR over a time horizon of up to 100 years, the question becomes what level of protection do we design for?

In the United States, we often use the “100-year storm event” (a storm calculated as having a 1% chance of occurring in any given year) as our standard for flood-control infrastructure projects. However, as we have seen, many storm events exceed this threshold, meaning that the standard does not necessarily provide adequate protection from major events. Even adding SLR to this, SLR is only one factor in causing flooding. For infrastructure to truly offer long-term, consistent, high levels of protection of people and property, the infrastructure must consider multiple causes of flooding and their interactions, including heavier future rainfall events, higher sea levels, high-tide patterns, stronger storms/higher storm surges, additional impervious area, and decreasing drainage efficiency of existing drainage systems due to SLR.

Such “compounding” of the causes of flooding can lead to much higher estimates of future flood risk. Furthermore, dependence on infrastructure can actually lead to creation of far more risk: When people see or hear about big infrastructure projects, they often assume that the project will “protect” an area. Thus, people invest more in the area. If—or when—an event exceeds the capacity of the infrastructure, the losses are even greater than had the infrastructure not been built. This dynamic has been referred to as “the levee effect.” The impact of Hurricane Katrina on New Orleans provides an excellent example of this dynamic.

With these five realities in mind, how does the Bert Harris Act interact with future flood risk?

As noted above, the Bert Harris Act has long been acknowledged by many local government attorneys to decrease the willingness of local governments to engage in additional regulatory activity to control contributors to flood risk. For example, passing a new wetlands protection ordinance might reduce flood risk, but it may also result in Bert Harris Act claims against the local government. Local government bans on development in areas currently—or soon to be—at risk of flooding could effectively limit flooding losses. However, such bans are almost certain to be challenged under the Act. In other words, the Act works against local government efforts that could increase resilience without building expensive new infrastructure that ultimately might serve to put more people and property at risk of flooding.

The recent changes to the Bert Harris Act exacerbate the impact of the Act on local government resilience and adaptation efforts by making it easier to sue local governments, providing less time for local governments to respond to claims under the Act, and increasing the potential liability costs for local governments defending against claims under the Act.

Changes to the Bert Harris Act in 2022 appear to make it possible to sue under the Act *without applying for a permit or even having had any development plans contrary to a challenged new law*. Instead, property owners could sue a local government for “damages” caused by the mere adoption of new rules or regulations on property, even if there is no clear demonstration that property owner plans were actually impacted.

Other 2022 changes:

- Make it easier for a prevailing property owner in a lawsuit to recover attorney’s fees covering a longer time period than for a prevailing defendant government. This increases financial risk to local governments when defending against Bert Harris claims.
- Creates a presumption that any settlement agreement between government and a property owner is “in the public interest.”
- Allows property owners to retain rights to a claim under the Act even if the property owner sells the property at issue. This change to the Act creates a new question: If I sell a property but specifically retain the rights to an existing Bert Harris claim I filed, will the property purchaser automatically be subject to the law I am challenging? If not, this would raise the surreal possibility that a local government could face multiple lawsuits from different owners for “application” of the same regulation to the same property.
- Reduces the amount of time local governments have to respond to Bert Harris Act claims.

Billion-dollar disasters have been growing for decades. Financial and legal dynamics continue to encourage or support new development that is or will be at risk of flooding:

- Just as disasters create human misery and suffering, they also create financial costs. Much of this financial cost ends up being paid by taxpayers. This happens at the federal level through the National Flood Insurance Program (which has racked up \$40 billion in losses beyond its income in the past two decades) and through the Federal Emergency Management Agency's various forms of disaster assistance, including reimbursements to local government for infrastructure damaged in a presidentially declared disaster.
- Reimbursing local government infrastructure rebuilding encourages local governments to allow at-risk development: Why should the local government say "no" to proposed development that will increase property tax revenue; keep property owners happy; avoid any potential land-use dispute, such as a Bert Harris claim; and whose extra infrastructure costs, if damaged by a disaster, are subsidized by federal taxpayers?
- Federal taxpayers also pay the costs for past development that should not have been allowed in at-risk places. We pay through "buyout" programs that seek to end the flood-rebuild-flood-again cycle by purchasing such properties. The irony is that recent research shows that in some places new homes are built in floodplains at 10 times the rate we are buying them out.³

The evidence is clear: Where and how we build is the primary driver of our disaster losses. We have put a lot of attention on how we build as we have been increasing building standards. However, for decades, we have been avoiding the issue of where we build. The price tag for allowing development in high-risk areas continues to grow. And it will only get higher going forward.

We can change the dynamic of increasing building new at-risk development. But it will take proactive land use planning, floodplain management, and regulation by local governments since our current laws and regulations have created an environment where many different actors (land speculators, developers, builders, local governments, etc.) benefit economically from building in at-risk areas, even despite the high cost to us as a society. Yet recent changes to Florida's Bert Harris Act disincentivize exactly the types of actions local governments could take to decrease current and future disaster risk.



Figure 3: The foundation of Bonita Beach condos suffers following the impact of Hurricane Ian in 2022. Photo credit: Michael Sipos

³ See, e.g. : Miyuki Hino, Todd K. BenDor, Jordan Branham, Nikhil Kaza, Antonia Sebastian & Shane Sweeney *Growing Safely or Building Risk?*, O J. Am. Planning Assoc. 1 (2023). For federal level data on how the number of "severe repetitive loss" homes continues to *increase* rather than decrease with billions spent on buyouts, see U.S. Government Accountability Office, report GAO-20-508, National Flood Insurance Program: Fiscal Exposure Persists Despite Acquisitions 25 (June 2020).