Inland Protection Trust Fund reimbursements; takings

Number: INFORMAL

Date: December 19, 1995

The Honorable Carlos Lacasa
Representative, District 117
3191 Coral Way, Suite 616
Miami, Florida 33145

Dear Representative Lacasa:

Thank you for considering this office as a source for assistance regarding reimbursement from the Inland Protection Trust Fund.

Section 376.3071, Florida Statutes 1994, provides for the Inland Protection Trust Fund to serve as a repository for funds that will enable the Department of Environmental Protection to respond without delays to incidents of inland contamination related to the storage of petroleum and petroleum products in order to protect the public health, safety and welfare and to minimize environmental damage. Subsection (9) of the statute, authorizes the department, within the guidelines established therein, to conduct an incentive program known as the Early Detection Incentive Program (EDI) to encourage and provide for early detection, reporting, and cleanup of contamination from leaking petroleum storage systems.

The owner, operator, or designee of a site which is eligible for restoration funding in the EDI program

"shall be entitled to reimbursement from the Inland Protection Trust Fund of allowable costs at reasonable rates incurred on or after January 1, 1985, for completed program tasks as identified in the department rule promulgated pursuant to paragraph (5)(b), subject to the conditions in this section."[1]

Rule 62-773.350(7), Florida Administrative Code, states that "[n]othing in this chapter shall be construed to authorize reimbursement for costs of site rehabilitation unless cleanup program tasks are completed in accordance with Rule 62-773.500, F.A.C., or, where applicable, with a Consent Order which
establishes cleanup procedures and criteria for the site."[2]

Moreover, early in the 1995 legislative session, the Legislature enacted Chapter 95-2, Laws of Florida, relating to underground petroleum storage tank cleanups. Section 2 of the act provides:

"Effective March 27, 1995, no further site rehabilitation work on sites eligible for state-funded cleanup from the Inland Protection Trust Fund and pursuant to section 376.305(6), 376.305(7), 376.3071(9) and (12), 376.3072, and 376.3073, Florida Statutes, shall be eligible for reimbursement pursuant to section 376.3071(12), Florida Statutes, 1994 Supplement. The person responsible for conducting site rehabilitation may seek reimbursement pursuant to

section 376.3071(12), Florida Statutes, 1994 Supplement, for all site rehabilitation work conducted prior to March 27, 1995, regardless of whether a site rehabilitation program task is completed. After March 27, 1995, only persons who have received prior written approval from the department of the scope of work and costs may continue site rehabilitation work. . . . In the event of a new release, the facility operator shall be required to abate the source of the discharge. If free product is present, the operator shall notify the department, which may direct the removal of the free product as a reimbursable expense pursuant to this act. The department shall grant approval to continue site rehabilitation based on the degree of threat to human health, safety, and welfare and to the environment, and shall negotiate costs for any work for which approval is sought notwithstanding other provisions of law or department rules."

The act also authorizes the completion of site rehabilitation tasks which were in progress or which are subject to a court order requiring rehabilitation on March 27, 1995.

Thus, the mere application for certification of eligibility for reimbursement, without more, would not qualify the applicant for reimbursement under section 376.3071, Florida Statutes, or the rules, or entitle the applicant to reimbursement under Chapter 95-2, Laws of Florida.[3] This office has been advised of the Interim Project Report on Florida's Petroleum Underground Storage Tanks Programs prepared by the House Committee on Natural Resources staff, dated November 1995, stating that section 376.3071(12)(b), Florida Statutes, appears to create a vested right for the payment of actual and reasonable costs incurred. However, your inquiry to this office addresses the situation where only an application has been filed and no funds have been expended in the actual cleanup of the underground storage tank site.

You also ask whether a future legislative reduction in the target level for the petroleum storage tank cleanup program would constitute a "taking" since the adjacent owner's property values may be reduced as a result. Florida courts have recognized that while regulation exercised under the state's police power may interfere to some extent with private property rights, compensation must be paid only when the interference deprives the landowner of substantial economic use of his or her property.[4]

The courts have stated that in a regulatory taking case, the court must consider the following factors: 1) whether there has been a physical invasion of property; 2) whether the regulation precludes all economically reasonable use of the property; 3) whether the regulation confers a public benefit or prevents a public harm; 4) whether the regulation promotes the health, safety, welfare, or morals of the public; 5) whether the regulation is arbitrarily and capriciously applied; and 6) the extent to which regulation curtails investment-backed expectations.[5] Such a determination necessarily involves a mixed question of law and fact dependent upon the particular circumstances in any given instance.

During the 1995 legislative session, the Legislature enacted the "Bert J. Harris, Jr., Private Property Rights Protection Act." The act provides in part that when a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in the statute. As a newly enacted law,[6] the parameters of the statute have not yet been determined by the courts. In subsection 1(1) of the

act, however, the Legislature has stated:

"[I]t is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property."

The act operates prospectively, providing in subsection (12):

"No cause of action exists under this section as to the application of any law enacted on or before the date of adjournment sine die of the 1995 Regular Session of the Legislature, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption on or before that date. A subsequent to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended."

The determination of a vested right under the new act is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or the statutory laws of this state. The terms "inordinate burden" or "inordinately burdened " are defined by the act to mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with exiting or vested used 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 terms "inordinate burden" or "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.

Thus, as with takings, the determination as to whether a governmental regulation has directly inordinately burden property presents questions of fact which this office cannot resolve.

This office has recently been asked by St. Johns Board of County Commissioners if, given a factual finding that a governmental entity has by some action directly restricted or limited the use of certain real property, the owner of such property is precluded from recovery under the Bert J. Harris, Jr., Private Property Rights Protection Act, solely because neither the property owner nor the subject of such property are specifically named subjects or objects of such governmental action. A copy of this office's opinion on this matter will be forwarded to you as soon as it is issued.

I trust that the above informal advisory comments may be of some assistance to you in resolving these issues. If my office may be of assistance to you in the future, please let me know.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

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[1] Section 376.3071(12)(b)1., Fla. Stat. (1994 Supp.). Section 376.3071(12)(b)2. provides that sites which are eligible for state-contracted cleanup may be entered into the reimbursement program; however, after July 1, 1994, once a facility is entered into the reimbursement program, state-contracted cleanup shall not be available and the owner, operator, or designee must complete site restoration. *And see* subsection (5) of the statute requiring the department to adopt rules establishing priorities for state-conducted cleanup and requiring the secretary to establish criteria by rule to determine the rehabilitation program tasks for which reimbursement may be made and the level at which the program may be deemed complete.

[2] *See also* Rule 62-773.350(2), F.A.C., stating that "[n]othing in this chapter shall be construed to authorize reimbursement for costs of site rehabilitation for a discharge which has not received a final order of eligibility for reimbursement pursuant to Chapter 120, F.S., or which has not received authorization for reimbursement pursuant to Section 376.305(6), F.S."

[3] *Cf.* Rule 62-773.100(5), F.A.C., which provides that review and approval of reimbursement applications shall be based upon the statute's rules and written guidelines in effect at the time the work was performed; and Rule 62-773.800, F.A.C., requiring reimbursement from the Inland Protection Trust Fund within 10 days provided there are sufficient unencumbered funds available to make such payments.

[4] *See, e.g., Joint Ventures, Inc. v. Department of Transportation,* 563 So. 2d 622 (Fla. 1990); *Florida Game & Fresh Water Fish Commission v. Flotilla,* 636 So.2d 761 (Fla. 2d DCA 1994).

[5] *Florida Game & Fresh Water Fish Commission, supra; Graham v. Estuary Properties, Inc.,* 399 So. 2d 1374, 1380 (Fla. 1981), *cert. denied sub nom., Taylor v. Graham,* 454 U.S. 1083 (1981).

[6] Chapter 95-181, Laws of Florida became effective October 1, 1995. *See* s. 6, Ch. 95-181, Laws of Florida.