FLC
FLORIDA LEAGUE OF CITIES

The Honorable Travis Hutson
The Florida Senate
416 Senate Office Building
404 South Monroe Street
Tallahassee, FL 3239-1100

Re: SB 620 Business Damages Against Local Government
11/30/21 Agenda, Senate Judiciary Committee

November 23, 2021 *Via E-mail Delivery*

Dear Senator Hutson:

The Florida League of Cities appreciates your willingness to discuss SB 620 and consider comments and suggestions that would narrow the scope of the bill and provide additional clarity. We understand that work on this bill is a continuing process that involves many stakeholders. In that spirit of cooperation, attached are the League's preliminary comments for your consideration at the bill's first hearing in the Senate Judiciary Committee on November 30. We look forward to working with you as the bill moves forward and we further refine our suggestions.

Sincerely,

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cc: Chair Burgess and Members of the Senate Judiciary Committee

SB 620 (Hutson) – Business Damages Against Local Government
Florida League of Cities' Initial Comments 11.23.21

Summary:

SB 620 authorizes a business that has been engaged in a lawful business in the state for at least 3 years to claim business damages from a local government if the government enacts or amends an ordinance or charter provision that will cause a reduction of at least 15 percent of the business' revenue or profit.

A local government is not liable for business damages caused by: 1) ordinances required to comply with state or federal law; 2) emergency ordinances, declarations, or orders adopted pursuant to the state Emergency Management Act; 3) a temporary emergency ordinance; and ordinances that "increase economic freedom."

The bill specifies procedures for claimants to recover business damages, attorney fees, and costs that are virtually identical to the process for recovery of business damages under Florida's eminent domain statute. Timelines are provided for: the business to notify a local government of its claim; the local government to respond/make an offer to settle; and the business to proceed with a civil claim and jury trial.

Comments:

- The bill subjects only local governments to liability for business damages. It should also allow businesses to recover business damages caused by state statutes and administrative rules, which likely have a greater adverse impact on business than any local ordinance.
- The bill does not require a jury to account for the public benefit and legitimate interests served by the ordinance in awarding damages. It elevates the interests of a single business owner over the interests of everyone else.
- The bill should narrow its focus to ordinances that **directly** regulate businesses. It should apply only to "ordinances adopted or amended by a local government after October 1, 2022, that directly impose regulatory restrictions on a business."
- "Business" should be defined in the bill as "a trade or occupation operated for profit within the geographic boundaries of the municipality for at least 5 years preceding the adoption of the ordinance."
- The bill is excessively punitive and provides no avenue for local governments to mitigate its exposure to liability. It offers no guidance for how a local elected body might legislate in a manner that avoids triggering claims (other than simply never legislating at all). Ordinances are developed in an open and public process, with multiple opportunities for businesses to participate. A business that anticipates potential economic losses from an ordinance should have a duty to notify the local government of potential adverse economic impact BEFORE the ordinance is adopted. This would allow the local government to make any revisions necessary to mitigate the ordinance's economic impact.
    - At a minimum, we suggest adding the following:
      "A business may pursue the relief authorized in this section if the business has submitted oral or written comments to the local government on the ordinance's economic impact to the business during the period of time beginning with the initial public hearing on the proposed ordinance and ending with the adoption of the

ordinance. The oral or written comments shall specify the nature and extent of the anticipated damages that will directly and immediately result from enforcement of the ordinance against the business."

- The bill essentially creates a new business tort. Such torts typically require a claimant to establish three things: 1) the conduct upon which the claim is based caused the damages (proximate cause); 2) the damages were a foreseeable consequence of the defendant's conduct (foreseeability); and 3) the damages are capable of proof with reasonable certainty. The bill fails to address the first two elements: proximate cause and foreseeability. The bill should be amended to require consideration of proximate cause and foreseeability.
- In addition to exemptions for emergency ordinances; the bill should specifically exempt the following:
    - regulatory ordinances that apply to all persons and entities similarly situated (e.g., noise ordinances, parking and traffic regulations, utility services);
    - ordinances the authority for which is expressly authorized or mandated by state law;
    - ordinances necessary to implement a federal mandate or grant;
    - ordinances implementing Section 163, Part II, F.S.;
    - ordinances implementing the Florida Fire Code;
    - ordinances implementing the Florida Building Code;
    - special assessment ordinances;
    - impact fee ordinances;
    - ordinances imposing fees for remediation;
    - ordinances assessing ad valorem taxes;
    - ordinances assessing taxes authorized by general law;
    - ordinances authorizing fees negotiated pursuant to a contract between a business and a local government;
    - budget adoption and amendment ordinances;
    - ordinances relating to municipal obligations or relating to the issuance of debt;
    - ordinances imposing utility fees and rates;
    - ordinances adopted pursuant to a contract or agreement entered by a municipality; and
    - ordinances imposing a temporary moratorium.
- The bill authorizes businesses that have operated for 3 years at **any** location in Florida to make a claim. It should be amended to specify the business has been operating **within** the applicable county or municipality, rather than anywhere in the state, for the specified timeframe.
- Florida's eminent domain statute requires a business to be operating for at least 5 years to be eligible for business damages claims. The bill should change the eligibility timeframe from 3 years to 5 years, consistent with the timeframe in the eminent domain statute.
- The bill should define business damages. Specifically, business damages should be defined as "those damages that directly and immediately result from enforcement of the ordinance against the business, and do not include losses that are collateral to, or that result indirectly, from enforcement of the ordinance. Business damages may not be speculative, possible, or imaginary, but must be reasonably certain and directly traceable to the ordinance. Damages cannot be remote or the result of other intervening causes."
- The exemptions provided in the bill are too vague. What, precisely, is meant by ordinances that "increase economic freedom?" Further, what happens if an ordinance "increases economic

freedom" for some businesses to the alleged detriment of others? Years will be spent litigating whether an ordinance falls within one of the exemptions.

- The percentage of qualifying reduction should be 30 percent rather than 15 percent, and it should be based on "**net** revenue" or "**net** profit".
- The business should be required to present its written offer to the municipality by "certified mail, return receipt requested."
- The bill should require the award of attorney fees and costs against claimants or their counsel for bad faith claims and filings.
- The amount of business damages should be offset by any incentives, regulatory relief, or governmental services that may have been provided by the municipality to the business and which have enhanced the business' value or revenues, as well as any unpaid liens or fines owed by the business to the municipality.
- Like the eminent domain statute, f the claimant is a lessee, the claimant's business damages should be limited to the period of the claimant's current lease.
- The bill currently specifies that a jury shall determine both liability (whether a business is entitled to damage) and the amount of business damages. This should be changed to allocate the responsibilities of the judge and jury comparable to Florida's eminent domain statute, where the judge is assigned the responsibility to determine the validity of the government's eminent domain action and the jury is responsible for determine the amount of damages. Specifically, the bill should specify the judge determines the claimant's entitlement to business damages and the jury should determine only the amount of business damages.
- The bill applies prospectively in the sense that a claim for damages could arise from any ordinance or charter provision that is adopted or amended after the effective date of the bill. Many ordinances and charter provisions are routinely amended for technical and other non-substantive reasons. The bill should be clarified to provide that future amendments to an ordinance or charter provision shall give rise to a cause of action only to the extent that the application of the amendatory language is the proximate cause of the alleged business damages apart from the ordinance or charter being amended.