

STORAGE NAME: h2029a.cla

DATE: April 5, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CLAIMS
ANALYSIS**

BILL #: HB 2029 (PCB CA 99-01)

RELATING TO: Emergency Management of Hurricane Evacuation Public Shelters

SPONSOR(S): Committee on Community Affairs and Representative Gay

COMPANION BILL(S): CS/SB 1932

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMUNITY AFFAIRS YEAS 9 NAYS 0
- (2) CLAIMS YEAS 5 NAYS 0
- (3) GENERAL APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

This bill addresses ways to reduce Florida's existing public hurricane evacuation shelter deficits, primarily, by:

- (1) Requiring the State University System to identify its campus facilities that are suitable for public hurricane evacuation shelter use for the general public;
- (2) Authorizing the Division of Emergency Management with the Department of Community Affairs to survey private facilities, with the owners' written permission, in order to provide more public hurricane evacuation shelters; and
- (3) Requiring the Department of Management Services to incorporate into state agencies lease agreements the use of suitable leased public facilities as public hurricane evacuation shelters.

It appears that this bill has an insignificant fiscal impact on the Department of Management Services, State University System, and Community College System.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Florida is frequently confronted with major hurricanes impacting its citizens and visitors. Of the approximately 5.5 million people who are vulnerable to the affects of a hurricane, many will have to evacuate to public shelters. In the wake of Hurricane Andrew, the 1993 Legislature declared in s. 252.385, Florida Statutes, its intent to not have a deficit of safe shelter space in any region of the state by 1998 and thereafter. Currently, according to the Division of Emergency Management with the Department of Community Affairs, counties with no shelters at category 4 or 5 hurricanes for 1997-2002 are Charlotte, Franklin, Gilchrist, Gulf, Hendry, Lafayette, Monroe, Orange, St. Johns, Suwannee, and Wakulla.

PUBLIC SHELTERS: POSTSECONDARY EDUCATION

Chapter 240, Florida Statutes, relates to Florida's postsecondary education programs. The chapter is divided into five parts: (1) General Provisions; (2) State University System; (3) Community College System; (4) Scholarship and Financial Aid, and (5) Specific Programs and Institutions.

Part II of chapter 240, Florida Statutes, assigns the Board of Regents (BOR) general oversight duties and responsibilities of the State University System. Section 240.295, Florida Statutes, under part II of chapter 240, Florida Statutes, provides authorization and guidelines for implementing fixed capital outlay projects. This section requires the BOR to identify campus facilities suitable for public shelters for their students, faculty, employees, and other persons. The BOR must make such identifications in consultation with local and state emergency management agencies.

This section further requires the BOR to submit a report describing the results of its assessment to the Governor and the Legislature by February 1, 1994. The report may include a list of proposed improvements to existing buildings to improve shelter capacity and an estimate of the costs associated with implementing these improvements. Campus buildings for which a design contract has been entered into after July 1, 1994, must be constructed according to public shelter standards unless exempted by the BOR. According to the Division of Emergency Management, this exemption authority has rarely been exercised.

No distinction is made between public shelters for hurricane evacuations and other types of emergency evacuations. Standards for public protection against hurricanes are often different from the standards or requirements for protection against other types of public emergencies such as a hazardous materials spills.

COUNTY EMERGENCY MANAGEMENT AGENCIES

Section 252.38, Florida Statutes, establishes local governments' emergency management powers. County emergency management agencies are created and established pursuant to ss. 252.31-252.91, Florida Statutes. Section 252.38, Florida Statutes, provides that each county board of commissioners must appoint the director of the emergency management agency and set the annual salary of the director. Directors serve at the pleasure of the boards of county commissioners, subject to their direction and control, in conformance with applicable resolutions, ordinances, and laws.

However, the current practice among many counties is to either: (1) appoint a county constitutional officer or an employee of a county constitutional officer such as a sheriff or sheriff's deputy, respectively, or (2) allow the county manager, county administrator, chief administrative officer, or some other intermediate county agency or officer to appoint emergency management agency directors. As such, the county boards of commissioners are placing the director under the administrative supervision and control of some intermediate county agency or official in seemingly contravention to s. 252.38, Florida Statutes.

The Attorney General issued an April 8, 1976, opinion holding that the director of county emergency management agency may not be subordinated to an intermediate county agency or official. In essence, only the county boards of commissioners are statutorily authorized to appoint and supervise the director of a county emergency management agency. Applying the fundamental rule of statutory construction that statutes should be given their plain and obvious meaning, the opinion states in part:

I construe s. [252.38(1)(b)], as plainly providing that no public official, agency, or body other than the county governing body and the Division of [Emergency Management] of the Department of Community Affairs shall have direction and control over the director of a county's disaster preparedness agency. Thus the county governing body may not place the director under the administrative supervision and control of some intermediate county agency or official. This construction appears to be consistent with the declared legislative purpose "to provide effective and orderly governmental control and coordination of emergency operations in disasters and emergencies," [252.38(1)(a)].

The opinion further states that this section operates as an exception to s. 125.73, Florida Statutes, which requires each county to appoint a county administrator as the administrative head of the county. The county administrator is responsible for the administration of all departments of the county government. The opinion reasons that this section concerns the general subject of county administration, and s. 252.38, Florida Statutes, relates particularly with administration of a county disaster preparedness agency. Thus, "the statute relating to the particular part of the general subject will operate as an exception to, or qualification of, the general terms of the more comprehensive statute to the extent of any repugnancy between the two."

According to the Division of Emergency Management more counties complied with the provisions of s. 252.38, Florida Statutes, in 1976 when the opinion was issued than currently. The division surmises that counties have experienced significant growth since 1976, thus, making it necessary to delegate important responsibilities to other intermediate agencies or officials, or county constitutional officers or their employees to achieve efficiency, order, and control at the local government level. The Division of Emergency Management reports that there are six counties with emergency management personnel in the Sheriff's Office. However, some representatives from the Florida Association of Sheriffs speculates that the figure is as high as 17.

GENERAL PUBLIC SHELTER SPACE

Section 252.385, Florida Statutes, provides that it is the Legislature's intent that there not be a deficit of safe public shelter space anywhere in Florida. It requires the division to administer a program to survey existing schools, universities, community colleges, and other state-owned, municipally owned, and county-owned public buildings to identify those that are suitable for use as public shelters. This section does not authorize the division to survey suitable private facilities. Also, property leased by the state is not authorized to be considered for suitable leased public shelters.

This section also provides that the Division of Emergency Management must prepare a list of facilities recommended to be retrofitted using state funds for both Houses of the Legislature and the Governor. All such facilities should be retrofitted by 2003.

PUBLIC SHELTER: STATE LEASES

The Department of Management Services is created pursuant to s. 20.22, Florida Statutes. The department is responsible for the procurement of buildings used for state offices. Section 255.249, Florida Statutes, authorizes the Division of Facilities Management with the Department of Management Services to promulgate rules providing acceptable terms and conditions for inclusion in lease agreements. There does not appear to be a specific statutory provision requiring the Department of Management Services to incorporate the use of suitable leased public facilities as public hurricane evacuation shelters into state agencies' lease agreements.

PUBLIC SHELTER: LIABILITY

Section 252.51, Florida Statutes, extends a waiver of liability to public or private persons or organizations, owning property, who voluntarily and without compensation allow a local emergency management agency to use their property as an emergency shelter. An action of gross negligence, willful and wanton misconduct by such persons invalidates the liability waiver.

However, the Division of Emergency Management represents that the concern over liability is hampering governmental, private, and volunteer agencies' abilities to staff and manage public shelters. The division believes that clarified and enhanced legal protections are needed to ensure

that legal impediments do not diminish Florida's ability to perform emergency functions and provide emergency services.

Sovereign immunity: Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. The doctrine originated in common law, wherein the king and his treasury were immune from suit by his subjects in his own courts. In Florida, section 13 of Article X of the State Constitution provides that provision be made by general law for bringing suit against the state as to all liabilities now existing or hereinafter originating.

Section 768.28, F.S. was enacted by the Legislature in 1973. Pursuant to this law, the state waives sovereign immunity for liability in tort claims in the same manner and to the same extent as a private individual under like circumstances. 768.28(5), F.S. Liability does not include punitive damages or any interest for the period before the judgment. Notwithstanding the waiver of sovereign immunity, the law caps liability at \$100,000 per person, and \$200,000 per incident. 768.28(5), F.S. Any amounts in excess of these caps may be paid only by further act of the Legislature through the Claims Bills process.

The state or an agency or subdivision may settle a claim or pay a judgment rendered against it within the limits of its insurance coverage. Such coverage neither waives the defense of sovereign immunity, nor serves to increase the limits of liability over the statutory caps of \$100,000 and \$200,000. *Id.*

Florida courts have recognized two exceptions to the state's waiver of sovereign immunity: discretionary functions and the public duty doctrine. Discretionary functions are planning level functions; the court uses a four-pronged test to determine whether an activity should be classified as discretionary, thus protecting the state from suit. *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988). The second exception is the public duty doctrine, which protects the state from suit in situations where the government owes a general duty to all citizens, but no particular injury to the injured party.

Volunteer Immunity: The Florida Volunteer Protection Act immunizes volunteers from civil liability for any act or omission by such person which results in personal injury or property damage if the volunteer was acting in good faith within the scope of official duties, and was acting as a reasonably prudent person would have acted under the same or similar circumstances; and the injury or damage was not caused by any wanton or willful misconduct. 768.135, F.S. A "volunteer" is any person who volunteers to perform any service for any nonprofit organization or any federal, state, or local governmental entity, without compensation, except reimbursement for actual expenses. *Id.* However, in situations wherein the volunteer is immunized from liability, the nonprofit organization for which the volunteer was performing services when the damages were caused shall be liable for such damages to the same extent as they would have been absent the immunity of the volunteer. *Id.*

Access to courts: Article 1, section 21 of the Florida Constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay. Generally, the legislature can only eliminate a judicial remedy under two circumstances: valid public purpose combined with a reasonable alternative, or overriding public necessity. The Supreme Court has held that a statute which provided the exclusive remedy under the Workmen's Comp. Act violated the right to access to courts. *Sunspan Engineering & Construction Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975). The Court has also held that a statute that denied recovery to persons with less than \$1,000 in medical expenses unconstitutionally trespassed upon the right of access to courts. *Lasky v. State Farm Insurance Co.*, 296 So.2d 9 (Fla. 1974).

EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT

Section 252.855, Florida Statutes, is designed to alleviate a dual reporting burden for retail petroleum facilities which are regulated by the Department of Environmental Protection's (DEP) Storage Tank Program and which report to the Department of Community Affairs (DCA) under the Emergency Planning and Community Right To Know Act (EPCRA). The section requires consolidated EPCRA reporting forms for DEP and DCA.

On February 11, 1999, the United States Environmental Protection Agency (EPA) published its final rule which dramatically increased the EPCRA reporting thresholds for gasoline and diesel fuel at retail

facilities. In essence, this new federal threshold eliminates the EPCRA reporting obligation for the retail petroleum facilities. Without this obligation, there is no need for the consolidated reporting program by the two agencies pursuant to s. 252.855, Florida Statutes. As such, the Division of Emergency Management of the Department of Community Affairs recommends a repeal of this section. Representatives of Petroleum Marketers and Florida Petroleum Council also support the repeal of this section.

B. EFFECT OF PROPOSED CHANGES:

“Public shelters” are redesignated as “public hurricane evacuation shelters” throughout the bill. The distinction is important because the standards for public hurricane evacuation shelters may differ from other types of emergency shelters.

The bill requires that the State University System assess existing facilities to identify the extent to which each campus has available public hurricane evacuation shelter space for the general public, not just for its students, faculty, and employees. The bill removes obsolete language requiring the BOR to submit a public shelter assessment report to the Governor and the Legislature by February 1, 1994.

The bill authorizes intermediate agencies or officials to appoint emergency management agency directors. Directors are no longer subject to the county boards of commissioners’ direction and control, though directors must continue to serve at the pleasure of the appointing authority, in conformance with applicable resolutions, ordinances, and laws.

The bill provides that a county constitutional officer or an employee of a county constitutional officer must not be appointed as director of a county emergency management agency without the consultation of the division. The director may be placed under the direct supervision of the county chief administrative officer.

The bill authorizes the division to survey private facilities that the owner, in writing, agrees to provide for use as a public hurricane evacuation shelter. Retrofitting facilities in regions with public hurricane evacuation shelter deficits shall be given first priority and should be completed by 2003. All facilities recommended in the list of facilities to be retrofitted using state funds should be retrofitted by 2008.

The bill authorizes the consideration of suitable state-leased property for use as public hurricane evacuation shelters. Further, the bill directs the Department of Management Services to incorporate the use of suitable leased public facilities as public hurricane evacuation shelters into state agencies’ lease agreements. The bill provides a definition of “suitable leased public facility” and “emergency management worker.”

The bill clarifies and enhances the liability waiver. It extends the liability waiver to the state and its political subdivisions as a result of any emergency management worker complying with the emergency management requirements in chapter 252, Florida Statutes. Such a waiver is invalid if injurious action was due to bad faith, gross negligence, malicious purpose, or wanton and willful disregard of human rights, safety, or property. While the Volunteer Protection Act would seemingly protect volunteers from liability, in order to be immune from liability, the Act requires that the volunteer acted in good faith, and as an ordinary reasonable person would have acted under similar circumstances. These prerequisites for immunity may be litigated, thus requiring the volunteer to prove that he or she met the prerequisite in order for immunity to attach. The Department of Community Affairs has expressed that they would prefer immunity to attach to the volunteer without any prerequisite showing of good faith or reasonableness. Rather, the bill calls for the plaintiff to prove bad faith, gross negligence, malicious purpose, or wanton and willful disregard of human rights, safety or property, thus providing more protection to the volunteer.

Similarly, sovereign immunity would protect the state and its political subdivisions up to the limits provided for in s. 768.28, F.S. Any excess judgment can only be paid by further act of the Legislature through the claims bills process. The bill completely eliminates any cause of action against the state for the actions of any emergency management worker who is performing emergency management activities in Florida, with stated exceptions. Thus, the state would not be liable up to the caps of liability, nor liable for any excess judgments.

The bill expressly keeps emergency management workers' rights under the Worker's Compensation and pension laws from being affected by the liability provisions.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The State University System must assess its campus facilities for suitable public hurricane evacuation shelter use for the general public.

The district school boards and the community college boards of trustees are responsible for coordinating and implementing the survey of public schools, universities, and community colleges with the Division of Emergency Management or the local emergency management agency.

Intermediate county agencies or officials may appoint directors of emergency management agencies. County constitutional officers or employees of county constitutional officers may serve as directors of emergency management agencies.

The bill authorizes the Division of Emergency Management to survey private facilities that the owner, in writing, agrees to provide for the use as a public hurricane evacuation shelter. Retrofitting facilities in regions with public hurricane evacuation shelter deficits shall be given first priority and should be completed by 2003. All facilities recommended in the list of facilities to be retrofitted using state funds should be retrofitted by 2008.

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

The beneficiaries of this bill are the residents of the state of Florida, none of which will directly pay any portion of the cost of implementation and operation of reducing the state's public hurricane evacuation shelter deficit.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Private owners of facilities may opt, in writing, to make their facilities available for use as a public hurricane evacuation shelter.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Chapters 240 and 252, Florida Statutes

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 240.295, Florida Statutes; redesignates in relevant parts of the Florida Statutes "public shelters" as "public hurricane evacuation shelters" to distinguish from other types of shelters; requires Florida's University System to make its suitable hurricane shelter space available to the general public; and eliminates an obsolete reporting requirement.

Section 2: Amends s. 252.38, Florida Statutes; authorizes county chief administrative officers to appoint directors of emergency management agencies; authorizes county constitutional officers or employees of county constitutional officers to serve as directors of emergency management agencies.

Section 3: Amends s. 252.385, Florida Statutes; authorizing the Division of Emergency Management with the Department of Community Affairs to survey private facilities with the owners' written permission in order to provide more public hurricane evacuation shelters in the state; adds district school boards and community college boards to the list of agencies responsible for implementing and coordinating public hurricane evacuation shelter surveys for the state's public education facilities; deletes an obsolete date; changes the deadline to complete the retrofitting of facilities in regions with public shelter deficits from 1998 to 2003; provides that owners of a shelter included on the retrofit list are not required to make any of the recommended improvements; requires public facilities suitable for use as public hurricane evacuation shelters be available at the request of the local emergency management agencies; charges the Department of Management Services with the responsibility of incorporating provisions for use of suitable leased space as public hurricane evacuation shelters in its

lease agreements; and establishes standards for state-leased public facilities suitable for use as public hurricane evacuation shelters.

Section 4: Amends s. 252.51, Florida Statutes; clarifies and enhances legal protection for governmental, private, and volunteer emergency management workers; defines “emergency management workers”; and maintains “emergency management workers” rights under the Worker’s Compensation and pension laws from being affected by the legal protection provisions.

Section 5: Repeals s. 252.855, Florida Statutes; relates to reporting requirements for retail petroleum facilities.

Section 6: Provides a July 1, 1999, effective date.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate. The Department of Management Services manages and coordinates an ongoing public hurricane evacuation shelter survey program using existing federal and state funds. This bill provides the Department of Management Services with additional facilities to survey for their potential use as public hurricane evacuation shelters.

The Department of Management Services and the University and Community College Systems may have fiscal impacts to accomplish the coordination function proposed in the bill. However, these impacts are expected to be insignificant.

2. Recurring Effects:

Indeterminate. The Department of Management Services manages and coordinates an ongoing public hurricane evacuation shelter survey program using existing federal and state funds. This bill provides the Department of Management Services with additional facilities to survey for their potential use as public hurricane evacuation shelters.

The Department of Management Services and the University and Community College Systems may have fiscal impacts to accomplish the coordination function proposed in the bill. However, these impacts are expected to be insignificant.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

Indeterminate. The Department of Management Services manages and coordinates an ongoing public hurricane evacuation shelter survey program using existing federal and state funds. This bill provides the Department of Management Services with additional facilities to survey for their potential use as public hurricane evacuation shelters.

The Department of Management Services and the University and Community College Systems may have fiscal impacts to accomplish the coordination function proposed in the bill. However, these impacts are expected to be insignificant.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. Direct Private Sector Costs:

Private sector concerns may offer the use of private space for potential use as a public hurricane evacuation shelter. This offer is optional to the private sector. However, if this option is exercised, the private sector may incur costs to negotiate and manage lease agreements or other appropriate legal instruments.

2. Direct Private Sector Benefits:

Those in the private sector, choosing to help the state reduce its public hurricane evacuation shelters deficit may experience goodwill with the community that benefits from the donation of suitable private facility space as public hurricane evacuation shelter.

In addition, individual taxpayers' benefits may be derived from the identification of additional hurricane evacuation shelters for which no state or local government will have to fund to retrofit for use as a hurricane evacuation shelter.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. **FISCAL COMMENTS:**

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. **APPLICABILITY OF THE MANDATES PROVISION:**

This bill does not require the counties or municipalities to expend funds or take action requiring the expenditure of funds.

B. **REDUCTION OF REVENUE RAISING AUTHORITY:**

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. **REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:**

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

STORAGE NAME: h2029a.cla

DATE: April 5, 1999

PAGE 11

V. COMMENTS:

Committee on Claims: In order to protect against a possible constitutional challenge regarding the right of access to the courts, consider the addition of a Legislative finding that the limitation on liability serves an overriding public necessity. Such addition would require an amendment to the bill. However, because the bill does not eliminate a specific cause of action, and provides for exceptions to the immunity provided, it is unlikely that a constitutional challenge would prevail.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

Prepared by:

Nayola R. Frazier

Staff Director:

Joan Highsmith-Smith

AS REVISED BY THE COMMITTEE ON CLAIMS:

Prepared by:

Stephanie O. Birtman

Staff Director:

Stephanie O. Birtman