

STORAGE NAME: h0431a.ga

DATE: April 11, 2000

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GENERAL APPROPRIATIONS
ANALYSIS**

BILL #: HB 0431 (PCB CA 00-01b)

RELATING TO: Emergency Management

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

TIED BILL(S):

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

- (1) COMMUNITY AFFAIRS (PRC) 7 YEAS 0 NAYS
 - (2) FINANCE & TAXATION (FRC) YEAS 14 NAYS 0
 - (3) GENERAL APPROPRIATIONS YEAS 19 NAYS 0
 - (4)
 - (5)
-

I. SUMMARY:

This bill primarily implements measures to reduce Florida's existing public hurricane evacuation shelter deficits. The bill's shelter deficit reduction components include:

- The State University System is required to identify its campus facilities that are suitable for public hurricane evacuation use for the general public on certain campuses;
- The Division of Emergency Management in the Department of Community Affairs is required to survey private facilities, with the owners' written permission, in order to provide more public hurricane evacuation shelters; and
- The Department of Management Services is required to incorporate into state agencies lease agreements the use of suitable leased public facilities as public hurricane evacuation shelters.

The bill repeals the requirement that county emergency directors must be appointed by the board of county commissioners. The bill authorizes the board, or intermediate agencies or officials, to appoint emergency management agency directors.

The bill exempts the state, its political subdivisions, employees and volunteers from damages caused by emergency management workers except for cases involving bad faith, gross negligence, malicious purpose, or wanton disregard for safety.

The bill repeals a duplicate reporting requirement of retail petroleum facilities which report to the Department of Community Affairs.

The bill requires expenditures by the following state agencies: Department of Education, the State University System, the Community College System, the Department of Community Affairs, and the Department of Management Services.

A strike all amendment was passed on April 11, 2000 by the House General Appropriations Committee. Please see section VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

Less Government: This bill creates new responsibilities on the following governmental agencies:

Section 1: Requires the Board of Regents to submit to the Governor and the Legislature by September 30 of each year a 5-year capital improvements program that identifies new or retrofitted facilities that can be used as public hurricane evacuation shelters. This section also requires that, in any county with a public hurricane shelter deficit, any campus building which has been identified as appropriate for use as a public hurricane evacuation shelter must be constructed in accordance with shelter standards.

Section 3: Requires the Division of Emergency Management of the Department of Community Affairs to administer a program to survey any private facility that the owner agrees in writing to provide for use as a public hurricane evacuation shelter. Requires district school boards, and community college boards of trustees, along with the Board of Regents and the Department of Education to coordinate and implement the identification survey of public schools, universities, and community colleges facilities for public hurricane evacuation. Requires the Department of Management Services to incorporate provisions for the use of suitable leased public facilities as public hurricane evacuation shelters in lease agreements, subject to certain architectural requirements.

B. 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 effects 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.

HURRICANE FLOYD - September 13 - 17, 1999

According to the American Red Cross, from September 13 though September 17, 1999, during Hurricane Floyd, the ARC Chapters opened and managed 289 shelters throughout the State of Florida. During these five days of intense activities every ARC Chapter in

Florida participated in opening and managing shelters. The ARC Chapters in Florida provided a safe haven for 78,579 evacuees in 289 shelters. The ARC served 172,418 meals and snacks at these shelters. Approximately, 4,796 paid and volunteer staff members logged 172,656 hours of service in support of the largest evacuation in the state's history.

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 spill.

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 what appears to be contravention to s. 252.38, Florida Statutes.

The Attorney General issued an April 8, 1976, opinion holding that the director of a 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 speculate 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 of Emergency Management 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 or 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 the King's courts. In Florida, section 13 of Article X of the State Constitution provides that provision be made by general law.

Section 768.28, Florida Statutes, was enacted by the Legislature in 1973. Pursuant to paragraph (5) of 768.28, Florida Statutes, 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. 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. Any amounts in excess of these caps may be paid only by further act of the Legislature through the Claims Bill 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.

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 duty to the injured party.

Volunteer Immunity: The Florida Volunteer Protection Act, s. 768.135, Florida Statutes, 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. 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. 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.

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.

C. 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 requires the BOR to submit to the Governor and the Legislature by September 30 of each year a 5-year capital improvements program that identifies new or retrofitted facilities that will incorporate enhanced hurricane resistance standards and that can be used as public hurricane evacuation shelters.

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 of Emergency Management. The director may be placed under the direct supervision of the county chief administrative officer.

The bill authorizes the Division of Emergency Management 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 2004. All facilities recommended in the list of facilities to be retrofitted using state funds should be retrofitted by 2009.

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, Florida Statutes. Any excess judgment can only be paid by further act of the Legislature through the claims bill 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.

D. SECTION-BY-SECTION ANALYSIS:

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

Section 6: Provides a July 1, 2000, effective date.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

Department of Management Services: According to information provided by the Department of Management Services this bill requires DMS to survey additional facilities for their potential use as public hurricane evacuation shelters. Because very few leases would meet the bill's requirements for suitable shelter space, DMS does not anticipate a significant fiscal impact.

Department of Community Affairs: According to information provided by the Department of Community Affairs, this bill will not have any significant fiscal impact on the Department.

Board of Regents: The Board of Regents provided the following statement, dated October 18, 1999:

Under the proposed statute changes the BOR will be responsible for providing shelter space for the entire county in which it is residing to help meet the county deficit. This bill would add 2%-5% to the total construction cost for each new building project constructed to these requirements. This percentage number would be subject to increasing by as much as an additional 2%-4% depending on what the Florida Building Commission decides to do relevant to wind requirements and other relevant areas in the New Florida Building Code.

[Note: The bill requires that, in counties where there is a hurricane evacuation shelter deficit, the BOR, in consultation with local and state emergency management agencies, must assess and identify existing, campus facilities which are suitable for use as public hurricane evacuation shelters. The bill also requires the BOR to submit to the Governor and the Legislature, by September 30 of each year a 5-year capital improvements program identifying new or retrofitted facilities that will incorporate enhanced resistance standards and that can be used as public hurricane evacuation shelters. Also contained in the bill is the requirement that any design contract for a campus building entered into after July 1, 2001, located in a county with a hurricane evacuation shelter deficit, must contain a requirement that the building be constructed in accordance with public shelter standards.]

Department of Education: According to information provided by the Department of Education the cost of hiring engineering services to survey and analyze structures for district school and community college facilities deemed most suitable by the Department of Community Affairs and the local educational agency would be approximately \$300,000 per fiscal year for FY 99-00, FY00-01, and FY01-02. The long term retrofitting costs of existing structures cannot be estimated until after a survey is complete and depends on the condition of the facilities to be upgraded to shelters.

Division of Community Colleges: The Division of Community Colleges provided the following information:

To include the Community Colleges in the coordinating and implementing of a survey for emergency shelters, expertise would have to be contracted for at a minimum of a structural engineer to make the proper evaluation of the conditions of college facilities contemplated for use as a hurricane evacuation shelter. This could be done either through the DOE/Educational Facilities Office or the Division of Community Colleges if they were provided additional contract authority and funding. The cost should not be great, maybe about \$200,000 per year for a couple of years from the PECO Trust Fund. After the survey to determine what needs to be either retrofitted or constructed, additional funding would be needed. An estimate of \$10 to \$15 million per year for three to five years are reasonable.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private sector organizations or individuals may offer the use of private space as public hurricane evacuation shelters. However, this is a completely voluntary action by the organization or individual. If this option is exercised, the organization or individual may incur costs to negotiate and manage lease agreements or other appropriate legal instruments.

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 counties or municipalities to spend funds or to take any actions requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate, as such authority existed on February 1, 1989.

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

This bill does not reduce the percentage of a state tax shared with counties and municipalities as an aggregate, as such existed on February 1, 1989.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Providing an enhanced waiver of liability for emergency management workers, including employees and volunteers, raises the issue of access to the 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. For example, 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).

Generally, the legislature can only eliminate a judicial remedy under two circumstances: valid public purpose combined with a reasonable alternative, or overriding public necessity. If a court found that the bill denied access to courts, the state would have to demonstrate an preexisting alternative remedy or an overriding public necessity for the waiver of liability, since no alternative remedy is offered by the bill.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

House Bill 2029 (PCB CA 99-01), 1999 Session: HB 2029 failed to pass the 1999 Legislature. The bill originated as a Proposed Committee Bill (PCB) by the House Committee on Community Affairs. On April 30, 1999, HB 2029 died in House Messages.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On November 3, 1999, the House Committee on Community Affairs passed one clarifying amendment. The amendment clarified that public hospitals and nursing homes are exempted from being required to serve as public hurricane evacuation shelters.

On April 11, 2000, the House General Appropriations Committee passed one strike everything amendment that conforms the House bill to the Senate bill. The amendment contains compromise liability language, agreed to by the Academy of Florida Trial Lawyers and the Department of Community Affairs. The language provides that where a person or organization provides shelter space for profit, that person or organization is treated as an instrumentality of the state. The amendment requires a \$10 million annual appropriation from the Florida Catastrophe Trust Fund. Three million dollars of the total appropriation is to be used for retrofitting existing shelter space. The amendment exempts school districts from having to incorporate public shelter criteria when they are located in a regional planning council region

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that does not have a hurricane evacuation shelter deficit. The state wide emergency shelter plan must identify, by regional planning council region, the general location and square footage of needed shelters.

VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

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