The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1974
INTRODUCER:	Senators Bennett and Baker
SUBJECT:	Agriculture
DATE:	April 20, 2009
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Weidenbenner	Poole	AG	**Favorable**
2.	Molloy	Yeatman	CA	**Fav/1 amendment**
3.	Daniell	Maclure	JU	**Pre-meeting**
4.			GA	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	☐	Statement of Substantial Changes
B. AMENDMENTS.....	☐	Technical amendments were recommended
	☐	Amendments were recommended
	☒	Significant amendments were recommended

I. Summary:

The bill prohibits counties from enforcing any regulations on land classified as agricultural if the activity being enforced is regulated by best management practices, interim measures, or regulations adopted by a state agency or a water management district under the Administrative Procedures Act. However, a county may enforce wetland protection ordinances, regulations, or rules adopted before January 1, 2009. The bill also provides that under certain conditions, a county may not charge an assessment or fee for stormwater management on land classified as agricultural land.

The bill creates the "Agricultural Nuisance Claim Waiver Act," which requires a political subdivision, prior to issuing a local land use permit, building permit, or certificate of occupancy for nonagricultural land located within 1,000 feet of agricultural land, to have the permit/certificate applicant sign and submit to the political subdivision a written waiver of nuisance claims against the neighboring agricultural land.

The bill exempts farm fences, in addition to nonresidential farm buildings which are currently exempted, from the Florida Building Code and any county or municipal fees.

This bill substantially amends sections 163.3162 and 604.50, Florida Statutes. This bill creates section 163.3163, Florida Statutes.

II. Present Situation:

Agricultural Lands and Practices Act

In 2003, the Legislature passed the Agricultural Lands and Practices Act, codified in s. 163.3162, F.S., to prohibit counties from adopting any ordinance, resolution, regulation, rule, or policy that limits activity of a bona fide farm or farm operation on agricultural land if such activity is regulated through best management practices (BMPs), interim measures, or by an existing state, regional, or federal regulatory program. Prior to the enactment of this legislation, some counties enacted measures to regulate various agricultural operations in the state which were duplicative and more restrictive than those already dictated through BMPs or an existing governmental regulatory program. While the Agricultural Land and Practices Act banned the adoption of future local government restrictive measures, it did not explicitly prohibit the enforcement of existing local government measures.

In 2005, Leon County, Florida (Appellee), filed a verified complaint against J-II Investments, Inc. (Appellants), stating that Appellants had development activities being performed on Appellants' property without a permit. Appellants answered the complaint, asserting that the land was being used for agricultural purposes and, therefore, Appellee did not have regulatory authority over the activity pursuant to the Agricultural Lands and Practices Act. The court found that the statute prevented counties from adopting ordinances relating to the regulating of agriculture, but it did not preclude the county from enforcing county regulations already in place at the time the Agricultural Lands and Practices Act was enacted into law. Specifically, the court held:

> The plain, unambiguous terms of section 163.3162(4), Florida Statutes, prevent counties from *adopting* ordinances relating to agriculture. The statute does not address the enforcement of provisions already in place. If the legislature intended to include the term "enforce" in the statute, it clearly would have done so. . . . Thus, since the legislature did not include the word "enforce" . . . we cannot assume that they intended to preempt all existing county regulations.[1]

Stormwater Fees

A number of counties adopted stormwater utility fees to provide a funding source for stormwater management and water quality programs, and have imposed these fees on agricultural lands even though the land owner has a permitted stormwater management system or has implemented BMPs. The revenue generated directly supports maintenance and upgrade of existing storm drain systems, development of drainage plans, flood control measures, water-quality programs, administrative costs, and sometimes construction of major capital improvements. Unlike a stormwater program that draws on the general tax fund or uses property taxes for revenue, the people who benefit from stormwater utility fees are the only ones who pay. This creates a

[1] *J-II Investments, Inc. v. Leon County*, 908 So. 2d 1140, 1141 (Fla. 1st DCA 2005) (emphasis in original).

duplicative financial burden for the agricultural operation that is already paying to manage its own permitted stormwater management system, yet has to pay again for a county program.

Right to Farm Act

Section 823.14, F.S., also known as the Florida Right to Farm Act (RTFA), has been law since 1979. In the RTFA, the Legislature recognized the importance of agricultural production to Florida's economy and the importance of the preservation of agriculture. The Legislature found that agricultural activities in urban areas are potential grounds for lawsuits based on the theory of nuisance. The purpose of the RTFA was to protect reasonable agricultural activities on farm land from nuisance suits. Generally, no farm in operation for a year or more since its established date of operation, which was not a nuisance at the established date of operation, can be a public or private nuisance if the farm operations conform to generally accepted agricultural and management practices. If an existing farm's operations expand to a more excessive operation with regard to noise, odor, dust, or fumes, it can be considered a nuisance if it is adjacent to an established homestead or business as of March 15, 1982. Growers and farmers report that the RTFA has not stopped neighbors and local governments from leveling complaints and making attempts to obstruct agriculture operations.

In 2006, Attorney General Robert Butterworth was asked to opine on whether the provisions of the RTFA, which limit duplicative regulatory authority by local government, would prevent the Suwannee County Board of County Commissioners from regulating a dairy farming operation beyond the regulations imposed by state agencies.[2] The Attorney General opinion stated that the RTFA:

> [P]rotects a farm that has been established for at least one year and was not a nuisance at the time of its established date of operation from being declared a public or private nuisance if the farm operation conforms to generally accepted agricultural and management practices. However, . . . any change to a more excessive farm operation with regard to odor is not afforded the statutory protection if the farm was adjacent to an established homestead or business on March 15, 1982. Thus, if a determination is made that this farm was adjacent to an established homestead or business on March 15, 1982, and the fertilizing practices of the farm have changed to a "more excessive" operation that involves significant or substantial degradation in the locale, the county may enforce regulations applicable to those changes.[3]

Florida Building Code

In 1974, the Legislature established statewide standards known as the State Minimum Building Codes, and in 1998, the Legislature created a statewide unified building code.[4] Nonresidential farm buildings have been exempt from building codes since 1998. In 2001, Attorney General Robert Butterworth opined:

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[2] Fla. Att'y Gen. Opinion 2006-07, 2006 WL 584547 (Fla. A.G. 2006).
[3] *Id*.
[4] Fla. Att'y Gen. Opinion 2001-71, 2001 WL 1194681 (Fla. A.G. 2001).

> The plain language of sections 553.73(7)(c)[5] and 604.50, Florida Statutes, exempts all nonresidential buildings located on a farm from state and local building codes. Thus, to the extent that the State Minimum Building Codes require an individual to obtain a permit for the construction, alteration, repair, or demolition of a building or structure, no such permits are required for nonresidential buildings located on a farm.[6]

Despite the Attorney General Opinion, there have been instances of some counties and municipalities assessing impact fees and requiring permits for nonresidential buildings, even though the buildings are exempt from building codes and are not inspected.

Home Rule Revenue Sources[7]

Under the Florida Constitution, local governments possess strong home rule powers, and may utilize a variety of revenue sources for funding services and improvements without express statutory authorization. Franchise fees, impact fees, special assessments, and user fees are examples of these home rule revenue sources. In implementing fee programs and special assessments, a local government's goal is to create an assessment or fee that avoids classification as a tax by the courts. If an assessment or fee does not meet the case law requirements and is classified as a tax, then the local government must have general law authorization.

Special Assessments

As established in Florida case law, two requirements exist for the imposition of a valid special assessment. First, the property assessed must derive a special benefit from the improvement or service provided, and second, the assessment must be fairly and reasonably apportioned among the beneficiaries of the service. Examples of special assessments include garbage disposal, sewer improvements, fire protection, fire and rescue services, and stormwater management services.

Proprietary Fees

Proprietary fees are imposed under the assets of a local government's exclusive right. The imposed fee must be reasonable in relation to the privilege or service provided by the local government, or the fee-payer receives a special benefit from the local government. Proprietary fees include franchise fees, user fees, and utility fees.

Regulatory Fees

Regulatory fees are imposed under the local government's exercise of police powers in the exercise of its sovereign functions. Two principles guide the use and application of such fees: the

[5] The cited statute has since changed to s. 553.73(9)(c), F.S.
[6] Fla. Att'y Gen. Opinion 2001-71.
[7] See Fla. Legislative Comm. on Intergovernmental Relations, *2008 Local Government Financial Information Handbook,* 19-32 (Oct. 2007), *available at* http://www.floridalcir.gov/UserContent/docs/File/reports/lgfih08.pdf (last visited April 17, 2009).

imposed fee cannot exceed the cost of the regulatory activity, and the fee is generally required to be applied solely to pay the cost of the regulatory activity for which it is imposed.

III. Effect of Proposed Changes:

Section 1

The bill amends s. 163.3162, F.S., to prohibit a county from *enforcing*, in addition to adopting, any ordinance, resolution, regulation, rule, or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land classified as agricultural land under s. 193.461, F.S., if:

- Such activity is regulated by best management practices (BMPs), interim measures, or regulations adopted as rules under ch. 120, F.S.,[8] by the Department of Environmental Protection (DEP), the Department of Agriculture and Consumer Services (DACS), or a water management district (WMD) as part of statewide or regional program; or
- If such activity is expressly regulated by the U.S. Department of Agriculture, the U.S. Army Corps of Engineers, or the U.S. Environmental Protection Agency.

The bill also prohibits a county from charging a fee or assessment for stormwater management on agricultural land if the farm operation has an agricultural discharge permit or has implemented BMPs adopted as rules under ch. 120, F.S., by DEP, DACS, or a WMD, unless the county provides a credit for the water quality and flood control provided by the farm operation.

However, a county may enforce any wetland protection ordinances, regulations, or rules adopted before January 1, 2009.

Section 2

The bill creates s. 163.3163, F.S., which may be cited as the "Agricultural Nuisance Claim Waiver Act."

The bill establishes the Legislature's finding that nonagricultural land may have an adverse affect on neighboring agricultural land, which may lead to its conversion to a nonagricultural use, and it declares the state's intent to make known its support for the preservation of agricultural land and farm operations. The bill incorporates by reference the definitions of "agricultural land" and "farm operation" used elsewhere in the Florida Statutes.

The bill requires a political subdivision to condition the issuance of a local land use permit, a building permit, or a certificate of occupancy for nonagricultural land located within 1,000 feet of agricultural land, upon the political subdivision obtaining a written "Waiver of Nuisance Claims Against Neighboring Agricultural Land" from the applicant. This waiver must include substantially the following information:

[8] Chapter 120, F.S., is the Administrative Procedure Act, which provides, in part, requirements for a grant of rulemaking authority to an agency, rulemaking and notice requirements, and requirements for rule challenges.

- Applicant's name and property address, as well as the address of the agricultural land;
- Applicant's property is within 1,000 feet of agricultural land that is used for farm operations, which may be incompatible with applicant's intended use;
- Farm operations may cause numerous adverse effects resulting in discomfort and inconvenience in any 24-hour period;
- Adverse effects include, but are not limited to, noise, odors, fumes, dust, smoke, burning, vibrations, insects, rodents, or operation of machinery, including aircraft;
- Farm operations conducted according to accepted customs and standards may cause adverse effects even if conducted within applicable laws and regulations;
- Users of property adjoining agricultural land should accept these adverse effects as a normal and necessary aspect of being in a rural, agricultural area;
- Applicant waives any objection to the adverse effects on his property that may arise from the neighboring farm operation on the property described in the waiver;
- Applicant agrees not to bring a claim against the owner of the agricultural land or the political subdivision where it is located based on the farm operation being a nuisance; and
- The waiver is a public record.

Section 3

The bill amends s. 604.50, F.S., to expand the building code exemption for nonresidential farm buildings to specifically include farm fences. The bill exempts nonresidential farm buildings and farm fences from any county or municipal code requirement, as well as, from county or municipal fees. The bill does not provide a definition for "farm fences."

Section 4

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, section 18(b) of the Florida Constitution provides:

> Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989.

However, the constitution also lists certain laws that are exempt from the above requirement, including laws having an insignificant fiscal impact.[9] The Legislature's policy since 1989, to determine what is "insignificant," has been to multiply $0.10 by the

[9] FLA. CONST. art. VII, s. 18(d).

number of people in Florida. Florida's population is estimated to be approximately 19 million.[10]

The bill appears to restrict the home rule authority of local governments to raise revenue by prohibiting the imposition of a fee or assessment for stormwater management on agricultural lands under certain conditions, and by exempting nonresidential farm buildings and farm fences from any county or municipal fee. If the fiscal impact to local governments exceeds $1.9 million, the bill will require a two-thirds vote of the members of each house of the Legislature to be enacted.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill requires a political subdivision, in certain circumstances, to obtain a written "Waiver of Nuisance Claims Against Neighboring Agricultural Land." By signing this waiver, an applicant for a local land use permit, building permit, or certificate of occupancy agrees to not bring any claim of nuisance against the owner of the agricultural land that is identified in the waiver. The Right to Farm Act (RTFA) provides certain protection to farms from nuisance suits if the farm operation "conforms to generally accepted agricultural and management practices."[11] The purpose of the statute is to "protect reasonable agricultural activities conducted on farm land from nuisance suits."[12] However, it is unclear whether a farm that does not conform to generally accepted practices or does not conduct reasonable agricultural activities is protected under the statute. Additionally, the RTFA does not define "reasonable agricultural activity." The waiver in the bill provides that the applicant agrees to "waive *any* objection to, the adverse effects to my property" and agrees to not bring "*any* claim against the owner of the agricultural land." The waiver language in the bill appears to be broad and may require an applicant to waive legitimate claims against the owner of the agricultural land.

By essentially limiting the liability for owners of agricultural land, the bill could be subject to a constitutional challenge under the access to courts provision of the Florida Constitution.[13]

[10] Office of Economic and Demographic Research, Fla. Legislature, *Florida Population* (April 1, 2008), http://edr.state.fl.us/population.htm (follow "Florida Demographic Summary" hyperlink) (last visited April 17, 2009).
[11] Section 823.14(4)(a), F.S.
[12] Section 823.14(2), F.S.
[13] FLA. CONST. art. I, s. 21.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

See comments in the Private Sector Impact and Government Sector Impact sections of this analysis.

B. Private Sector Impact:

The bill would relieve an agricultural landowner from assessment of a stormwater fee, if the farm operation has an agricultural discharge permit or implements best management practices, or an impact fee for a nonresidential farm building or farm fence. The amount of these fees is indeterminate at this time.

C. Government Sector Impact:

The Revenue Estimating Conference determined on March 20, 2009, that the provisions of the bill have a minimal impact on local government and no impact on state government. However, the conference did note the following:

> The amendment [to s. 604.50, F.S.] expands the exemption afforded to nonresidential farm buildings from the state, city and county building codes to any nonresidential farm building or farm fence from any county or municipal code or fee. This would appear to include land use planning, environmental and virtually any local code or fee, including locally imposed impact fees. According to a survey conducted . . . in 2006, no local governments reported imposing impact fees specifically on agricultural buildings.[14]

In 2008, the Legislature's Office of Economic and Demographic Research (EDR or the Office) conducted a limited telephone survey, which indicated that only Jefferson County had imposed an impact fee on a nonresidential farm building in the past. The fee was a public safety impact fee of $1,488 on a 4,650 square foot nonresidential agricultural building due to its intended office and warehouse uses.

Also, in 2008, EDR identified 11 county stormwater utilities. Of those, six indicated that they exempted agricultural parcels from paying any assessment or fee, and five indicated that they did not provide such an exemption. The Office conducted telephone surveys of the utilities that had indicated that they did not fully exempt agricultural lands to determine the revenue loss if revisions relating to stormwater management assessments or fees were enacted. Sarasota County estimated a revenue loss of $118,500, and Pasco County estimated a revenue loss of approximately $72,000.[15]

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[14] Office of Economic and Demographic Research, Fla. Legislature, *Revenue Estimating Conference*, 228 (Mar. 20, 2009), http://edr.state.fl.us/conferences/revenueimpact/impact.htm (follow "3/20/09 and 3/21/09 results, part 1" hyperlink) (last visited April 17, 2009).
[15] *Id*.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

Barcode 464490 by Community Affairs on March 31, 2009:
Clarifies conditions under which a county may not charge an assessment or fee for stormwater management on agricultural lands. If the agricultural operation has an National Pollutant Discharge Elimination System permit, an Environmental Resource Permit, a works-of-the-district permit issued by a water management district, or is implementing best management practices adopted by rule by the Department of Environmental Protection, the Department of Agriculture and Consumer Services, or a water management district as part of a statewide or regional program, then a local government may not impose an assessment or fee for stormwater management on the agricultural operation.

The amendment creates the "Agricultural Land Acknowledgement Act" to provide that, before issuing a land use permit, a building permit, or a certificate of occupancy for non-agricultural lands located contiguous to agricultural lands, a political subdivision must require that the permit applicant sign a written acknowledgement stating that the applicant understands that the farm operation on the neighboring land will be conducted according to generally accepted agricultural practices under the "Right to Farm Act." A standard form is created. (WITH TITLE AMENDMENT)