

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 325 Brownfields

**SPONSOR(S):** Economic Affairs Committee; Local & Federal Affairs Committee; Economic Development & Tourism Subcommittee; Stone

**TIED BILLS:**           **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Economic Development & Tourism Subcommittee	11 Y, 1 N, As CS	Duncan	West
2) Local & Federal Affairs Committee	17 Y, 0 N, As CS	Dougherty	Rojas
3) Economic Affairs Committee	17 Y, 0 N, As CS	Duncan	Creamer

### SUMMARY ANALYSIS

CS/CS/CS/HB 325 revises the process for designating brownfield areas and specifies the criteria that must be met when a brownfield designation is proposed by a local government, or a person other than a governmental entity, such as an individual, corporation, community-based organization, or not-for-profit corporation.

The bill clarifies the requirements that apply to all local procedures for brownfield area designations, including the notice and hearing requirements and criteria that must be met for brownfield designation proposals.

Local governments that designate brownfield areas pursuant to the procedures within the Brownfields Redevelopment Act are not required to use the term "brownfield area" within the name of the area designated by the local government.

The bill provides relief from liability for claims of property damage caused by contamination for those who successfully implement a brownfield site rehabilitation agreement. The liability protection applies to causes of action accruing on or after July 1, 2014. The bill also provides the circumstances under which liability protection would not apply and provides that liability protection does not limit the right of a third party other than the state to pursue an action for damages to persons for bodily harm.

The bill does not have a fiscal impact on state or local government revenues.

The bill provides an effective date of July 1, 2014.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Brownfields

In 1995, the U.S. Environmental Protection Agency (EPA) initiated a program to empower states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and reuse brownfields.<sup>1</sup>

The federal brownfields program was significantly expanded on January 11, 2002, when President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act,<sup>2</sup> also known as the “Brownfields Law.” Sections 221-22 of the Brownfield Law included liability exemptions for prospective purchasers, and for owners of contiguous properties who were not a fault in causing the contamination.<sup>3</sup> The main purpose of this law was to create incentives for the redevelopment of brownfield properties and Superfund sites and provide grants to assess or cleanup a brownfields property.

Florida followed federal law in 1997 when the Legislature enacted the Brownfields Redevelopment Act<sup>4</sup> (Act). The Act is intended to provide incentives for private sector entities to redevelop abandoned or underused real property, which was complicated by real or perceived environmental contamination.<sup>5</sup> Included in the Act was a process for designating brownfield areas, environmental contamination cleanup criteria, eligibility criteria and liability protections, and economic and financial incentives.<sup>6</sup>

According to the Department of Environmental Protection (DEP), as of November 22, 2013, local governments in Florida have adopted 352 resolutions that officially designate brownfield areas and 190 Brownfield Site Rehabilitation Agreements have been executed with entities to rehabilitate brownfield sites. Sixty-nine Site Rehabilitation Completion Orders sometimes referred to as “No Further Action” orders have been issued since the beginning of the program for brownfield sites that have been cleaned up to levels protective of human health and the environment. The remaining sites are in some phase of site assessment or cleanup.<sup>7</sup>

##### Brownfield Designation and Administration

A “brownfield area” is a contiguous area of one or more brownfield sites, portions of which may not be contaminated, and which has been designated by local government resolution. Brownfield areas may include all or portions of community redevelopment areas, enterprise zones, empowerment zones, other such designated economically deprived communities and areas, and EPA-designated brownfield pilot projects.<sup>8</sup>

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<sup>1</sup> Brownfields and Land Revitalization, Community Reinvestment Fact Sheet, U.S. Environmental Protection Agency, *available at* <http://www.epa.gov/swerosps/bf/laws/cra.htm> (last visited Dec.10, 2013).

<sup>2</sup> Public Law No. 107-118, 115 stat. 2356.

<sup>3</sup> Summary of the Small Business Liability Relief and Brownfields Revitalization Act, U.S. Environmental Protection Agency, *available at* <http://epa.gov/brownfields/laws/2869sum.htm> (last visited Dec. 10, 2013).

<sup>4</sup> Ch. 97-277, L.O.F.; codified at ss. 376.77 – 376.86, F.S., are known as the “Brownfields Redevelopment Act.”

<sup>5</sup> See s. 376.78, F.S., relating to legislative intent, and s. 376.79(3), F.S., which defines “brownfield site.”

<sup>6</sup> The Brownfields Redevelopment Act authorizes various financial, regulatory, and technical assistance to persons and businesses involved in the redevelopment of brownfields, including the Brownfield Areas Loan Guarantee Program under s. 376.86, F.S. See ss. 376.78 – 376.84, F.S.

<sup>7</sup> Department of Environmental Protection, 2014 Agency Legislative Bill Analysis, HB 325, Dec. 10, 2013. Document on file with the House Economic Development & Tourism Subcommittee.

<sup>8</sup> See s. 376.79(4), F.S. “Brownfield sites” are real property, the expansion, redevelopment, or reuse of which may be complicated by actual or perceived environmental contamination. Section 376.79(3), F.S.

The designation of a brownfield area may be initiated in one of two ways:<sup>9</sup>

- by a local government to encourage redevelopment of an area of specific interest to the community; or
- by a person<sup>10</sup> with a plan to rehabilitate and redevelop a brownfield site.

To designate a brownfield area, a local government must pass a local resolution specifying the exact area to be designated. Once a brownfield area has been designated, the local government must notify DEP and attach a map that clearly identifies the parcels proposed for designation or a less-detailed map accompanied by a detailed legal description of the brownfield area. If a property owner within the proposed area requests in writing to have his or her property removed from the proposed designation, then the local government must grant the request.<sup>11</sup>

If a local government proposes to designate a brownfield area that is outside a community redevelopment area, enterprise zone, empowerment zone, closed military base, or designated brownfield pilot project area, the local government must adopt a resolution pursuant to the process established under the Act. At least one of the required public hearings must be conducted as close as reasonably practicable to the area proposed for designation to provide an opportunity for the public to provide input as to the size of the area, the objectives for rehabilitation, job opportunities and economic developments anticipated, neighborhood residents' considerations, and other local issues.<sup>12</sup>

#### *Required Considerations*

In determining the area to be designated, the local government must consider the following:<sup>13</sup>

- whether the brownfield area warrants economic development and has a reasonable potential for such activities;
- whether the proposed area to be designated represents a reasonable focused approach and is not overly large in geographic coverage;
- whether the area has potential to interest the private sector in participating in rehabilitation; and
- whether the area contains sites or parts of sites suitable for limited recreational open space, cultural or historical preservation purposes.

#### *Required Conditions*

A local government must designate a brownfield area under the following conditions:<sup>14</sup>

- the person who owns or controls a potential brownfield site is requesting the designation and has agreed to rehabilitate the site;
- the redevelopment and rehabilitation of the proposed brownfield site will result in economic productivity of the area and will create at least five new permanent jobs at the brownfield site. The full-time positions must not be associated with the implementation of the brownfield site agreement<sup>15</sup> or the redevelopment project's demolition or construction activities pursuant to the redevelopment of the proposed brownfield site or area;
- the redevelopment of the proposed brownfield site is consistent with the local comprehensive plan and is a permissible use under the applicable local land development regulations;

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<sup>9</sup> See s. 376.80, F.S.

<sup>10</sup> "Person" means any individual, partner, joint venture, or corporation; any group of the foregoing, organized or united for a business purpose; or any governmental entity. Section 376.79(14), F.S.

<sup>11</sup> Section 376.80(1), F.S.

<sup>12</sup> Section 376.80(2)(a), F.S.

<sup>13</sup> Section 376.80(2)(a)1.-4., F.S.

<sup>14</sup> Section 376.80(2)(b) 1.-5., F.S.

<sup>15</sup> See s. 376.80(5), F.S., for the contents of a brownfield site agreement.

- notice has been provided to neighbors and nearby residents of the proposed area to be designated and the person proposing the area for designation has provided the neighbors and residents an opportunity to comment and make suggestions about rehabilitation; and
- the person proposing the area for designation has provided reasonable assurance that there are sufficient financial resources to implement and complete the rehabilitation agreement and redevelopment of the brownfield area.

The designation of a brownfield area and the identification of a person responsible for brownfield site rehabilitation simply entitle the identified person to negotiate a brownfield site rehabilitation agreement with DEP or an approved local pollution control program.<sup>16</sup>

### *Public Notice Requirements*

The Act also establishes public notice requirements for local governments to follow when designating a brownfield. Municipalities are required to adopt a resolution in accordance with the procedures under the Municipal Home Rule Powers Act<sup>17</sup> and counties are required to adopt a resolution in accordance with the county self-government provisions of state law.<sup>18</sup>

For municipalities,<sup>19</sup> the notice for public hearings on the proposed resolution must follow the procedures used when a proposed ordinance changes the permitted, conditional, or prohibited uses within a zoning category, or changes the actual zoning map designation of a parcel or parcels of land of 10 contiguous acres or more, which are as follows:

- Two advertised public hearings on the proposed ordinance, one of which must be held after 5 p.m. on a weekday, unless the local governing body, by a majority plus one vote, elects to conduct that hearing at another time of day.
  - The first public hearing must be held at least seven days after the day that the first advertisement is published.
  - The second hearing must be held at least 10 days after the first hearing and advertised at least five days prior to the public hearing.
- The required advertisements must be no less than 2 columns wide by 10 inches long in a standard size or tabloid size newspaper and the headline must be in a type of at least 18 point.
  - The advertisement must be placed in a newspaper of general paid circulation in the municipality and of general interest and readership in the municipality, not one of limited subject matter.<sup>20</sup> The legislative intent is that whenever possible, the advertisement appears in a newspaper that is published at least five days a week unless the only newspaper in the municipality is published less than five days a week. The form of the notice is provided.<sup>21</sup>
  - With the exception of amendments which change the actual list of permitted, conditional, or prohibited uses within a zoning category, the advertisement must contain a geographic location map clearly indicating the area covered by the proposed ordinance. The map must include major street names and must also be included in an online<sup>22</sup> notice.

<sup>16</sup> Section 376.80(2)(c), F.S. The Brownfields Redevelopment Act defines “local pollution control program” as a local pollution control program that has received delegated authority from DEP under ss. 376.80(9) and 403.182, F.S. Section 376.79(11), F.S.

<sup>17</sup> Section 376.80(1), F.S.; See s. 166.041, F.S. Ch. 166, F.S., is known as the Municipal Home Rule Powers Act. Section 166.011, F.S.

<sup>18</sup> Sections 376.80(1). See also s. 125.66, F.S., relating to county ordinances.

<sup>19</sup> Section 166.041(3)(c)2., F.S.

<sup>20</sup> See ch. 50, F.S.

<sup>21</sup> See s. 166.041(3)(c)2., F.S.

<sup>22</sup> See s. 50.0211, relating to internet website publication.

For counties,<sup>23</sup> it is unclear whether the notice for the public hearings must follow the procedures used when a proposal seeks zoning changes. The statutory reference under the Act describes how the required advertisements are to appear in a newspaper of general circulation. However, it is unclear if counties are required to hold public hearings.<sup>24</sup> Thus, there appears to be a technical error in the statutory cross-reference under the Act.

#### Eligibility criteria

A person who has not caused or contributed to the contamination of a brownfield site on or after July 1, 1997, is eligible to participate in the brownfield program.<sup>25</sup> However, certain sites are not eligible for the program. Those sites include areas that are subject to an ongoing formal judicial or administrative enforcement or corrective action pursuant to federal authority; or have obtained or are required to obtain a hazardous waste operation, storage, or disposal facility permit.<sup>26</sup>

#### Protection from contamination remediation liability

A person who executes and complies with the terms of a brownfield rehabilitation agreement is relieved of further liability for remediation of the contaminated sites to the state and to third parties and of liability in contribution to any other party who has or may incur cleanup liability for the contaminated site or sites.<sup>27</sup>

Until a person successfully completes a rehabilitation agreement, liability protection may be revoked upon that person's failure to comply with the rehabilitation agreement.<sup>28</sup> In an effort to secure federal liability protection for those persons willing to undertake remediation responsibility at a brownfield site, DEP must attempt to negotiate an agreement with the EPA to forego federal enforcement of corrective action authority.<sup>29</sup>

The eligibility and liability provisions of the Act do not limit the right of a third party other than the state to pursue an action for property damages or personal injury. However, such an action may not compel site rehabilitation beyond what is required in the approved brownfield site rehabilitation agreement or required by DEP or an approved local pollution control program.<sup>30</sup>

If a state or local government has acquired a contaminated site within a brownfield area as a gift or by virtue of its operations as a sovereign, it is not liable for implementing site rehabilitation corrective actions, unless the state or local government has caused or contributed to a release of contaminants at the brownfield site.<sup>31</sup> In addition, nonprofit conservation organizations, acting for the public interest, which purchase contaminated sites and did not contribute to the release of contamination on the site also warrant protection from liability.<sup>32</sup>

Lenders are afforded certain liability protections to encourage financing of real property in brownfield areas. Essentially, the same liability protections apply to lenders if they have not caused or contributed to a release of a contaminant at the brownfield site.<sup>33</sup>

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<sup>23</sup> See s. 125.66(4)(b)2., F.S.

<sup>24</sup> See ss. 376.80(1), F.S., and 125.66(4)(b), F.S.

<sup>25</sup> Section 376.82(1), F.S. Persons who have not caused or contributed to the contamination of a brownfield site on or after July 1, 1997, and who, prior to DEP's approval of a brownfield site rehabilitation agreement, are subject to corrective action or enforcement under state authority established in ch. 376, F.S., or ch. 403, F.S., relating to environmental control, including those persons subject to a pending consent order with the state, are eligible to participate in a brownfield site rehabilitation agreement under certain conditions. See s. 376.82(1)(b), F.S.

<sup>26</sup> Section 376.82(1)(a), F.S.

<sup>27</sup> Section 376.82(2)(a) and (2)(d), F.S.

<sup>28</sup> See s. 376.80(8), F.S.

<sup>29</sup> See s. 376.82(2)(g), F.S.

<sup>30</sup> Section 376.82(2)(b), F.S.

<sup>31</sup> Section 376.82(2)(h), F.S.

<sup>32</sup> Section 376.82(2)(j), F.S.

<sup>33</sup> See s. 376.82(4), F.S.

## Effect of Proposed Changes

### Legislative Intent

The bill specifies that brownfields redevelopment, when properly done, can be a significant element in community revitalization, especially within community redevelopment areas, empowerment zones, closed military bases, or designated brownfield pilot project areas.

### Brownfield Program Administration Process

The bill revises the provisions relating to the process for designating brownfield areas and clarifies the criteria that must be satisfied when a brownfield area designation is proposed by a local government or a person other than a governmental entity, such as an individual, corporation, community-based organization, or not-for-profit corporation.

The bill clarifies the requirements that apply to all brownfield area designations, regardless of whether the area proposed for designation is located inside or outside a community redevelopment area, enterprise zone, empowerment zone, closed military base, or designated brownfield pilot project area:

- A local government must notify DEP, and if applicable, the local pollution control program<sup>34</sup> within 30 days after the adoption of a resolution by the local governing body of its decision to designate a brownfield area for rehabilitation.
- As required in current law, the adopted resolution must include a map that clearly identifies the parcels proposed for designation or a less-detailed map accompanied by a detailed legal description of the brownfield area.

### *Public hearing and notice requirements*

The bill clarifies which provisions of the Act relating to the public hearings, conditions, and criteria apply when a local government proposes to designate a brownfield area *within* and *outside* the following redevelopment areas:

- community redevelopment area;
- enterprise zone;
- empowerment zone;
- closed military base; or
- designated brownfield pilot project.

As provided in current law, municipalities and counties are required to adopt the designation resolution in accordance with the procedures in chapters 166 and 125, F.S., respectively. The bill corrects a statutory cross-reference under the Act. By referencing s. 166(4)(b), F.S., the bill requires counties to notice public hearings in the manner used when a proposed ordinance changes the list of permitted, conditional, or prohibited uses within a zoning category, or changes the zoning map designation of a parcel or parcels of land involving 10 contiguous acres or more. In addition, the bill clarifies that counties must also hold two advertised public hearings and states when the hearings must be held.

The bill maintains the requirement that the local government or person proposing the designation to conduct at least one public hearing as close as reasonably practicable to the area proposed for designation to give the public an opportunity to provide input as to the size of the area, the objectives for rehabilitation, job opportunities and economic developments anticipated, and neighborhood residents' considerations. The bill specifies that this public hearing must occur prior to the designation of the proposed brownfield area.

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<sup>34</sup> See *supra* note 16.

The bill provides that a local government that designates a brownfield area pursuant to the Act is not required to use the term "brownfield area" within the name of the area designated by the local government.

### Liability Protection

The liability portion of the bill expands the protections provided to the person responsible for the brownfield site rehabilitation. Specifically, the bill provides relief from liability for claims of property damages, including but not limited to, diminished value of real property or improvements; lost or delayed rent, sale, or use of real property or improvements; or stigma to real property or improvements caused by contamination for those who execute and comply with the terms of a brownfield site rehabilitation agreement. The liability protection applies to causes of action accruing on or after July 1, 2014.

The bill further provides that such liability protection does not apply to a person who discharged contaminants on property subject to a brownfields site rehabilitation agreement; fraudulently demonstrates site conditions or fraudulently completes site rehabilitation of a property subject to a brownfield site rehabilitation agreement. Nor does liability protection apply to a person who exacerbates the contamination of a property subject to a brownfield site rehabilitation agreement in violation of applicable laws, and which causes property damage. The bill also provides that liability protection does not limit the right of a third party other than the state to pursue an action for damages to persons for bodily harm.

#### B. SECTION DIRECTORY:

Section 1: Amends s. 376.78(8), F.S., relating to legislative intent, to provide that brownfield redevelopment when done properly can be significant element in community revitalization, especially community redevelopment areas, enterprise zones, empowerment zones, closed military bases, and designated brownfield pilot project areas.

Section 2: Amends s. 376.80(1) and (2), F.S., and creates subsection (12) of s. 376.80, F.S., relating to the brownfield program administration process, to revise the process for designating brownfield areas and clarifying the criteria that must be met when a brownfield area designation is proposed by a local government or a person other than a governmental entity such as an individual, corporation, community-based organization, or not-for-profit corporation. A new subsection (12) is added to provide that a local government that designates a brownfield area pursuant to the Act is not required to use the term "brownfield area" within the name of the area designated by the local government.

Section 3: Amends s. 376.82(2), F.S., relating to eligibility criteria and liability protection, to provide relief from liability for property damages caused by contamination for those who execute and comply with the terms of a brownfield site rehabilitation agreement. The liability protection applies to causes of action accruing on or after July 1, 2014. The bill also provides the circumstances under which liability protection would not apply and provides that liability protection does not limit the right of a third party other than the state to pursue an action for damages to persons for bodily harm.

Section 4: Provides an effective date of July 1, 2014.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Local governments, individuals, corporations, community-based organizations, and not-for-profit corporations proposing to designate brownfield areas should benefit from clearer provisions in the Act.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenues in the aggregate, or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

#### Economic Development & Tourism Subcommittee

On February 4, 2014, the Economic Development & Tourism Subcommittee adopted a strike-all amendment and passed the bill as a committee substitute. The committee substitute:

- Clarifies the procedures for the public hearings on the proposed resolution required to be adopted by a local government proposing to designate a brownfield area.
- Removes inconsistent provisions relating to the size of the public notice for the newspaper. Pursuant to s. 376.80(1)(c), F.S., the bill requires counties and municipalities to follow the public notice and hearing requirements in ss. 125.66 and 166.041, F.S., respectively.
- Clarifies that a local government does not have to use the term "brownfield area" in the name of such area after the brownfield area has been designated by the local government.



The analysis has been updated to reflect the committee substitute as passed by the Economic Development & Tourism Subcommittee.

#### Local & Federal Affairs Committee

On March 6, 2013, the Local & Federal Affairs Committee adopted an amendment and passed the bill as a committee substitute. The amendment clarifies that the applicable notice requirements must be published in a paper of general circulation.

The analysis has been updated to reflect the committee substitute as passed by the Local & Federal Affairs Committee.

#### Economic Affairs Committee

On April 11, 2014, the Economic Affairs Committee adopted an amendment and passed the bill as a committee substitute. The amendment provides that the liability protections established in the bill also do not apply to a person who discharged contaminants on property that is subject to a brownfield site rehabilitation agreement.

The analysis has been updated to reflect the committee substitute as passed by the Economic Affairs Committee.