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 Committee on Environmental Preservation and Conservation

BILL:	SB 586
INTRODUCER:	Senator Altman
SUBJECT:	Brownfields
DATE:	February 4, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gudeman	Uchino	EP	**Pre-meeting**
2.			CA	
3.			JU	

I. Summary:

SB 586 clarifies procedures for brownfield designation under the Brownfields Redevelopment Act. The bill provides additional liability protection for individuals responsible for rehabilitating brownfield sites.

II. Present Situation:

The Brownfields Redevelopment Act

The term "brownfield" came into existence in the 1970s and originally referred to any previously developed property, regardless of any contamination issues. The term, as it is currently used, originated in 1992 during a U.S. Congressional field hearing and is defined by the U.S. Environmental Protection Agency (EPA) as, "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[1] In 1995, the EPA created the Brownfields Program in order to manage contaminated property through site remediation and redevelopment. The program was designed to provide local communities access to federal funds allocated for redevelopment, including environmental assessments and cleanups, environmental health studies, and environmental training programs.[2]

In 1997, the Florida Legislature enacted the Brownfields Redevelopment Act (Act).[3] The Act provides financial and regulatory incentives to encourage voluntary remediation and

[1] Robert A. Jones and William F. Welsh, *Michigan Brownfield Redevelopment Innovation: Two Decades of Success*, (Sept. 2010), *available at* http://www.miseagrant.umich.edu/downloads/focus/brownfields/10-201-EMU-Final-Report.pdf (last visited Jan. 27, 2014).

[2] The Florida Brownfields Association, *Brownfields 101*, *available at* http://floridabrownfields.org/associations/11916/files/Brownfields101.pdf (last visited Jan. 27, 2014).

[3] *See* ch. 97-277, Laws of Fla.

redevelopment of brownfield sites in order to improve public health and reduce environmental hazards.[4] The Act required the Department of Environmental Protection (DEP) to adopt rules to determine site-specific investigation methods, clean-up methods, and clean-up target levels by incorporating risk based corrective action (RBCA) principles,[5] which it did in 1998.[6] In 2013, in an effort to provide consistency and consolidate the cleanup criteria rules, the DEP repealed Rule 62-785, Florida Administrative Code, and is currently merging the rules with Rule 62-780, Florida Administrative Code.

The Act provides liability protection for program participants who have not caused or contributed to the contamination of a brownfield site on or after July 1, 1997. A person who successfully completes a brownfield site rehabilitation agreement (BSRA) is relieved from further liability for remediation of the contaminated site or sites to the state and to third parties.[7] The Act also provides protection from liability for contribution to any other party who has or may incur liability for cleanup of the contaminated site.[8] The Act does not limit the right of a third party, other than the state, to pursue an action for damages to property or person. An action may not require rehabilitation in excess of what is outlined in the approved BSRA, or required by the DEP or the local pollution control program.[9]

The Act provides lenders the same liability protections as program participants as long as the lender has not caused or contributed to the contamination of a brownfield site. The lender liability protections are provided to encourage financing of real-property transactions involving brownfield sites.[10]

The Act also created the brownfield redevelopment bonus refund to provide a refund to qualified businesses for new jobs that are created in a brownfield area.[11] The Act identifies specific procedures and criteria for the designation of a brownfield area by local governments, counties, and municipalities.[12]

Economic Incentives

In 1998, the Legislature passed SBs 244, 1202, and 1204, providing economic and financial incentives to promote the redevelopment of brownfield areas.[13] SB 1202 created the Brownfield Area Loan Guarantee Program, which authorizes up to five years of state loan guarantees for

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[4] DEP, *Florida Brownfields Redevelopment Act-1998 Annual Report, available at* http://www.dep.state.fl.us/waste/quick_topics/publications/wc/brownfields/leginfo/1998/98final.pdf (last visited Jan. 27, 2014).

[5] ASTM International defines "risk based corrective action principles" as consistent decision-making processes for assessment and response to chemical releases. *See* http://www.astm.org/Standards/E2081.htm (last visited Jan. 27, 2014).

[6] See Rule 62-785, F.A.C.

[7] *Id*. "Brownfield site rehabilitation agreement (BSRA) means an agreement entered into between the person responsible for brownfield site rehabilitation and the DEP or a delegated local program. The BSRA shall at a minimum establish the time frames, schedules, and milestones for completion of site rehabilitation tasks and submission of technical reports, and other commitments or provisions pursuant to s. 376.80(5), F.S., and [Rule 62-780, F.A.C.]"

[8] Todd S. Davis, Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property, 525 (2d ed. 2002).

[9] Section 376.82, F.S.

[10] *Id*.

[11] Section 288.107, F.S.

[12] See ss. 376.80, 125.66, and 166.041, F.S., respectively.

[13] See chs. 98-198, 98-75, and 98-118, Laws of Fla., respectively.

redevelopment and applies to 50 percent of the primary lender loan.[14] The loan guarantee applies to 75 percent of the lender loan if the brownfield area redevelopment is for "affordable" housing.[15] SB 244 authorized a voluntary cleanup tax credit of up to 35 percent of the costs of voluntary cleanup activity of brownfield areas with a maximum allowable amount of $250,000 per site per year.[16] SB 1204 authorized the Brownfield Property Ownership Clearance Assistance and Revolving Loans Trust Fund to facilitate the redevelopment of properties that may be more difficult to redevelop due to various liens on the property or complications from bankruptcy. The trust fund was created to help clear prior liens on the property through the negotiation process. The loans would then be repaid by the resale of the brownfield property and other activities that may have enhanced the property's value.[17] This trust fund was never capitalized or used for its intended purpose and was later repealed.[18]

In 2006, the Legislature passed HB 7131, which substantially increased the economic and financial incentives for redevelopment of brownfield areas and repealed the Brownfield Property Ownership Clearance Assistance and Revolving Loans Trust Fund.[19] The voluntary clean-up tax credit increased from 35 to 50 percent, which may be applied against intangible property tax and corporate income tax for the remediation of the brownfield area with a maximum allowable amount of $500,000 per year per site. The Brownfield Areas Loan Guarantee Program increased from 10 to 25 percent. The percentage of tax credit that may be received during the final year of cleanup was increased from 10 to 25 percent and the amount was increased from $50,000 to $500,000. The total amount of tax credits that may be granted for brownfield cleanup was increased from $2 million annually to $5 million annually. The law also provides incentives for cleaning unlicensed or historic solid waste dumpsites and requires Enterprise Florida, Inc., to market brownfields for redevelopment and job growth.[20]

In 2008, the Legislature passed HB 527 providing additional tax credits for brownfield area developers.[21] The law allows a tax credit for the costs incurred to remove solid waste from a brownfield site. The tax credit applicant may claim 50 percent of the cost of solid waste removal, not to exceed $500,000. An additional 25 percent of the total site rehabilitation costs, up to $500,000, may be claimed if a health care facility is constructed on the brownfield site.[22]

The DEP must submit an annual report to the President of the Senate and Speaker of the House by August 1st each year. The annual report must include the number, locations and sizes of the brownfield sites that have been remediated or are currently being rehabilitated under the

[14] Section 376.86, F.S.
[15] "Affordable" housing, as defined in s. 420.0004, F.S., means that monthly rents or monthly mortgage payments including taxes, insurance, and utilities do not exceed 30 percent of that amount which represents the percentage of median adjusted gross annual income for the households as indicated in ss. 420.0004(9), (11), (12), or (17), F.S.
[16] Section 220.1845, F.S.
[17] *See* ch. 98-118, Laws of Fla.
[18] The Florida Senate, Comm. On Government Efficiency Appropriations, *Senate Bill CS/SB 1092 Staff Analysis*, (April 4, 2006), *available at* http://archive.flsenate.gov/data/session/2006/Senate/bills/analysis/pdf/2006s1092.ge.pdf (last visited Feb. 4, 2014).
[19] See ch. 2006-291, Laws of Fla.
[20] See ss. 196.012, 196.1995, 199.1055, 220.1845, 288.9015, 376.30781, 376.80, and 376.86, F.S. Sections 376.87 and 376.875, F.S., were repealed.
[21] See ch. 2008-238, Laws of Fla.
[22] Section 376.30781, F.S.

provisions of the Act.[23]

Brownfield Designation Procedures

Currently, a local government that has jurisdiction over a proposed brownfield area is required to notify the DEP of the decision to designate the brownfield area for rehabilitation according to the Act. The notification must include a resolution containing a map of the proposed area and the parcels to be included in the brownfield designation. Municipalities and counties that propose to designate a brownfield area must do so according to the resolution adoption procedures outlined in ss. 166.041 and 125.66, F.S., respectively, and notice the public hearing according to ss. 166.041(3)(c)2. and 125.66(4)(b)2., F.S., respectively.[24]

The Act requires a local government that proposes to designate a brownfield area that is outside of a community redevelopment area, enterprise zone, empowerment zone, closed military base, or designated brownfield pilot project, to notify the DEP of the proposed designation. The notification must include a resolution that contains a map of the proposed area and the parcels to be included in the brownfield designation. The local government is also required to consider if the area warrants development, confirm the area is not too large, determine if the area has the potential for the private sector to participate in the rehabilitation, and determine whether the area has sites that can be used for recreation, cultural or historical preservation.[25]

The Act allows a local government to designate a brownfield area if the person who owns or controls a potential brownfield area is requesting the designation and has agreed to rehabilitate and redevelop the area. The redevelopment must provide an economic benefit to the area and create at least five permanent new jobs. The redevelopment of the proposed area must be consistent with the local comprehensive plan and be able to be permitted. Notice of the proposed designation must be provided to the residents of the area and published in a newspaper of local circulation. The person requesting the designation must also provide reasonable assurance of sufficient financial resources to complete the rehabilitation and redevelopment of the brownfield area and enter into a site rehabilitation agreement with the department or local pollution control program.[26]

The Act also requires that if property owners within the proposed designation area requests in writing to the local government to have their properties removed from the designation, then the request must be granted.[27]

As of November 22, 2013, local governments have adopted 352 resolutions to officially designate brownfield areas and 190 BSRAs have been executed. A total of 69 Site Rehabilitation Completion Orders or "No Further Action" orders have been issued since the inception of the program for sites that have been remediated to levels protective of human health and the

[23] Section 376.85, F.S.
[24] Chapter 97-277, Laws of Fla.
[25] *Id*.
[26] *Id*.
[27] *Id*.

environment. The remaining sites are in some phase of site assessment or cleanup. [28]

III. Effect of Proposed Changes:

Section 1 amends s. 376.78, F.S., to clarify that the redevelopment of a brownfield area within a community redevelopment area, empowerment zone, closed military base, or designated brownfield pilot project area has a positive impact on these areas. By specifying these areas, the bill prioritizes them over non-specified areas.

Section 2 amends s. 376.80, F.S., to clarify, reorganize, and revise the procedures for the designation of a brownfield area for the purpose of rehabilitation under the Act.

The bill specifies the following procedures for the designation of a brownfield area:

- A local government with jurisdiction over the brownfield area must adopt a resolution to designate the proposed area.
- The local government must notify the DEP, and, if applicable, the local pollution control program within 30 days of the adoption of the resolution.
- The resolution must continue to include a detailed map of the parcels to be designated or a legal description of the parcels along with a less detailed map.
- Municipalities must adopt the resolution according to s. 166.041, F.S., and the notice for public hearings must comply with s. 166.041(3)(c)2, F.S.
- Counties must adopt the resolution according to s. 125.66, F.S., and the notice for the public hearings must comply with s. 125.66(4)(b), F.S.
- Property owners within the proposed brownfield area who make written requests to have their properties removed from the designation before the adoption of the resolution must be granted the request.

The bill specifies that if a designation is proposed by a local government that has jurisdiction over the area and the area is located outside an existing community redevelopment area, or if designation is proposed by a non-governmental entity, then the following public hearing and notification procedures are required:

- At least one of the required public hearings must be conducted as close to the proposed area as possible to provide an opportunity for public input on the size of the area, the objectives for rehabilitation, job opportunities and economic development, and residents' considerations.
- Notice of the public hearing must be at least 16 square inches and published in a newspaper of general circulation, published in ethnic newspapers or community bulletins, posted in the affected area, and announced at a scheduled meeting of the local governing body held prior to the public hearing.
- At the public hearing, the local government must consider whether the proposed brownfield area:
  - Warrants development;
  - Covers an overly large area;
  - Has the potential for the private sector to participate in rehabilitation; and

[28] DEP, *Senate Bill 586 Agency Analysis* (Jan. 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

- Contains sites that may be used for recreational open space, cultural, or historical preservation purposes.

The bill specifies that if the designation is proposed by a local government that has jurisdiction over the area and the area is located inside an existing community redevelopment area, an enterprise zone, an empowerment zone, a closed military base, or a designated brownfield pilot project, then the public hearing considerations outlined above are not required. However, the local government must comply with the notification and resolution adoption procedures outlined earlier.

The bill specifies that if the designation is proposed by individuals, corporations, partnerships, limited liability corporations, community-based organizations, not-for-profit corporations, or other non-governmental entities, then the following public hearing and notification procedures are required:

- A public hearing must be conducted as close to the proposed area as possible to provide an opportunity for public input on the size of the area, the objectives for rehabilitation, job opportunities and economic developments, and local residents' considerations.
- Notice of the public hearing must be published in a newspaper of general circulation, published in an ethnic newspaper or community bulletin, posted in the affected area, and announced at a scheduled meeting of the local governing body held prior to the public hearing.
- The person proposing the designation must also meet the following criteria:
  - The person owns or controls the proposed area;
  - The rehabilitation and redevelopment of the proposed area will be economically beneficial and include the creation of at least five new permanent jobs;
  - The redevelopment is consistent with the local comprehensive plan and is able to be permitted;
  - The person has provided reasonable assurance of sufficient financial resources to complete the rehabilitation and redevelopment of the brownfield area; and
  - The person must enter into a site rehabilitation agreement with the DEP or local pollution control program. The person is entitled to negotiate the terms of the agreement.

The bill specifies that a local government that designates a brownfield area according to these procedures is not required to use the term "brownfield area" within the name of the brownfield area proposed for designation by the local government.

Section 3 amends s. 376.82, F.S., to revise the liability protection for a person who executes and implements a successful BSRA to include liability protection for:

- Claims of any person for property damage;
- Diminished value of real property or improvements;
- Lost or delayed rent, sale, or use of real property or improvements; and
- The stigma to real property or improvements caused by the contamination that was addressed in the BSRA.

The liability protection applies to causes of action occurring on or after July 1, 2014. The bill specifies that the liability protection does not apply to a person who commits fraud in

demonstrating site conditions, in completing a site rehabilitation agreement, or who exacerbates contamination of a property subject to a BSRA in violation of applicable laws, which causes property damage.

Section 4 provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill eliminates the right of a third party to pursue an action for property damages, unless a person commits fraud in demonstrating site conditions, in completing a site rehabilitation agreement, or who exacerbates contamination of a property subject to a BSRA in violation of applicable laws. The elimination of this legal remedy may harm third parties whose properties are damaged. However, individuals, corporations, community-based organizations, and not-for-profit corporations proposing to designate brownfield areas should benefit from this limitation of liability provision. The impacts are too remote to determine at this time.

C. Government Sector Impact:

Local governments may incur costs associated with damages to public property that have been impacted by contamination from a brownfield site due to the limitation of liability provisions in the bill.

VI. Technical Deficiencies:

There is a conflict in the current statute regarding the number of public hearings required for brownfield area designation and the noticing requirements for the public hearings. Currently, s. 376.80(1), F.S., references s. 166.041, F.S., (municipalities) and s. 125.66, F.S., (counties) as the required procedures for adopting a resolution. The number of required public hearings is not

specified and, as referenced, it is unclear how many are actually required. In addition, the format for the newspaper publications on lines 107–112 conflicts with the newspaper noticing requirements in current statute, which is also referenced as a requirement in the bill.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 376.78, 376.80, and 376.82.

IX. Additional Information:

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

None.

B. Amendments:

None.