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 Environmental Preservation and Conservation Committee

BILL:	SB 554
INTRODUCER:	Senator Altman
SUBJECT:	Brownfield Areas
DATE:	March 13, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gudeman	Uchino	EP	**Pre-meeting**
2.			CA	
3.			AFT	
4.			AP	
5.				
6.				

I. Summary:

SB 554 amends procedures that must be followed in order to designate brownfield areas under the Brownfields Redevelopment Act and provides additional tax exemptions for certain building materials. The bill also provides additional liability protection for individuals responsible for the rehabilitation of a brownfield site.

The bill amends ss. 212.08, 376.78, 376.80, and 376.82 of the Florida Statutes.

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 around the country access to federal funds

[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 Feb. 15, 2013).

that have been allocated for redevelopment, including environmental assessments and cleanups, environmental health studies, and environmental training programs.[2]

In 1997, the Legislature enacted the Brownfields Redevelopment Act (Act).[3] The Act provides financial and regulatory incentives to encourage voluntary remediation and 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] The Brownfields Cleanup Criteria Rule, Rule 62-785 of the Florida Administrative Code (F.A.C.), was adopted by the DEP on April 30, 1998, and became effective July 6, 1998.[6]

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, and of liability in contribution to any other party who has or may incur cleanup liability for the contaminated site. [7] 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; however, 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.[8]

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.[9]

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.[10] The Act identifies specific procedures and criteria for the designation of a brownfield area by local governments,[11] counties,[12] and municipalities.[13]

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[2] The Florida Brownfields Association, *Brownfields 101, available at* http://floridabrownfields.org/associations/11916/files/Brownfields101.pdf (last visited Feb. 15, 2013).
[3] Chapter 97-277, Laws of Fla.
[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 Feb. 15, 2013).
[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 Feb. 22, 2013).
[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 Department 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 62-785, F.A.C.
[8] *See* s. 376.82, F.S.
[9] *Id*.
[10] *See* s. 288.107, F.S.
[11] *See* s. 376.80, F.S.
[12] *See* s. 125.66, F.S.

Economic Incentives

In 1998, the Legislature passed SBs 1202 and 244 providing economic and financial incentives to promote the redevelopment of brownfield areas. SB 1202 created the Brownfield Area Loan Guarantee Program, which authorizes up to five years of state loan guarantees for redevelopment and applies to 50 percent of the primary lender loan.[14] The loan guaranty applies to 75 percent of the lender loan if the brownfield area redevelopment is for "affordable" housing.[15] SB 244 authorized a voluntary clean-up tax credit (VCTC) of up to 35 percent of the costs of voluntary clean-up activity of brownfield areas with a maximum allowable amount of $250,000 per site per year.[16]

In 2005, the Legislature passed SB 1338, the Brownfield Property Ownership Clearance Assistance and Revolving Loans Trust Fund, facilitating 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 to help clear prior liens on the property through the negotiation process. The loans would then be repaid through the resale of the brownfield property and other activities that may have enhanced the property's value. This trust fund was never capitalized or used for its intended purpose and was later repealed.[17]

In 2006, the Legislature passed HB 7131, which substantially increased the economic and financial incentives for the redevelopment of brownfield areas and repealed the Brownfield Property Ownership Clearance Assistance and Revolving Loans Trust Fund. The VCTC increased from 35 percent to 50 percent, which may be applied against intangible property tax and corporate income tax for the remediation of brownfield area with a maximum allowable amount of $500,000 per year per site. The Brownfield Area Loan Guarantee Program increased from 10 percent to 25 percent. The percentage of tax credit that may be received during the final year of clean-up was increased from 10 percent 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 clean-up 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.[18]

In 2008, the Legislature passed HB 527 providing additional tax credits for the developers of brownfield areas. 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, not to exceed $500,000, may be claimed if a health care facility is constructed on the brownfield site.[19]

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[13] *See* s. 166.041, F.S.
[14] *See* s. 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] *See* s. 220.1845, F.S.
[17] *See* ch. 2005-3, Laws of Fla.
[18] *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.
[19] *See* s. 376.30781, F.S.

In 2010, the Legislature passed SB 550 requiring the DEP to submit an annual report to the President of the Senate and Speaker of the House by August 1 of 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 provisions of the Act.[20]

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 that contains a map of the proposed area and the parcels to be included in the brownfield designation. Municipalities that propose to designate a brownfield area must do so according to the resolution adoption procedures outlined in s. 166.041, F.S., and notice the public hearing according to s. 166.041(3)(c)2., F.S. Counties that propose to designate a brownfield area must do so according to the resolution adoption procedures outlined in s. 125.66, F.S., and notice the public hearing according to s. 125.66(4)(b)2., F.S.[21]

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 whether the area has sites that can be used for recreation, cultural or historical preservation.[22]

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 permittable. Notice of the proposed designation must be proved to the residents of the area and published in a newspaper of local circulation. The person requesting the designation must also provide reasonable assurance that they have 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.[23]

The Act also requires that if a property owner within the proposed designation area requests in writing to the local government to have their property removed from the designation, then the request must be granted.[24]

[20] *See* s. 376.85, F.S.
[21] Chapter 97-277, Laws of Fla.
[22] *Id*.
[23] *Id*.
[24] *Id*.

As of January 23, 2013, local governments have adopted 330 resolutions to officially designate brownfield areas and 183 BSRAs have been executed. A total of 56 Site Rehabilitation Completion Orders or "No Further Action" orders have been issued since the inception of the program.[25]

III. Effect of Proposed Changes:

Section 1 amends s. 212.08, F.S., to provide a tax exemption for the building materials used for the substantial rehabilitation of a "housing project" in a designated brownfield area. This is an expansion of the tax exemption that was previously only available for the construction of affordable housing.

Section 2 amends s. 376.78, F.S., to confirm that the redevelopment of a brownfield area within a community redevelopment area, empowerment zone, closed military bases, or designated brownfield pilot project area has a positive impact on these areas. By specifying these areas, the bill may prioritize them over non-specified areas.

Section 3 amends s. 376.80, F.S., to clarify and revise the procedures for the designation of a brownfield area for the purpose of rehabilitation under the Brownfield Redevelopment Act.

The bill specifies the following procedures in order to designate a brownfield area for rehabilitation according to the Act:

- The designation must be adopted as a resolution at a public hearing held by the local government that has jurisdiction over the area.
- The resolution must include a detailed map of the parcels that are to be designated or a legal description of the parcels along with a less detailed map.
- The resolution must be adopted according to the resolution adoption procedures and requirements of the local government at the time of the proposal.
- Prior to the public hearing, the local government or person proposing the designation must conduct at least one community forum as close to the proposed area as possible.
- The public hearing must be announced at the community forum.
- The public hearing must be published in a newspaper of general circulation and in a community publication or bulletin posted in a visible location within the proposed area.
- A property owner within the proposed brownfield area who makes a written request to have their property removed from the designation before the adoption of the resolution must be granted the request.
- The local government with jurisdiction over the brownfield area must notify the DEP of the adoption of the resolution within 30 days.

The bill specifies that if the designation is proposed by a local government that has jurisdiction over the area and the area is located in an existing community redevelopment area, an enterprise zone, an empowerment zone, a closed military base, or a designated brownfield pilot project, then the following procedures apply:

[25] DEP, *Senate Bill 554 Agency Analysis* (Feb. 2013) (on file with the Senate Committee on Environmental Preservation and Conservation).

- The local government is not required to notice the proposed designation or conduct a community forum and public hearing as outlined above.
- The local government is not required to use the term "brownfield" within the name of the area for the designation.
- A property owner within the proposed brownfield area who makes a written request to have their property removed from the designation before the adoption of the resolution must be granted the request.
- The local government with jurisdiction over the brownfield area must notify the DEP of the adoption of the resolution within 30 days.

The bill specifies that if the designation is proposed by a local government that has jurisdiction over the area and the area is outside an existing community redevelopment area, an enterprise zone, an empowerment zone, a closed military base, or a designated brownfield pilot project, then the local government is required to follow the designation procedures outlined in paragraph two of this section of the analysis. The local government is not required to use the term "brownfield" within the name of the area for the designation. In addition, the following must be considered at the public hearing:

- Whether the proposed brownfield area warrants development;
- Whether the proposed area covers an overly large area;
- Whether the proposed area has the potential for the private sector to participate in rehabilitation; and
- Whether the proposed area contains sites that may be used for recreational open space, cultural or historical preservation purposes.

The bill also 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 designation procedures in paragraph two of this section of the analysis are required. The individual 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 permittable;
- The individual may conduct a community forum as specified above, or choose an alternate method of notifying the residents of the proposed designation;
- The individual has provided reasonable assurance that they have sufficient financial resources to complete the rehabilitation and redevelopment of the brownfield area; and
- The individual must enter into a site rehabilitation agreement with the DEP or local pollution control program, and the individual is entitled to negotiate the terms of the agreement.

Section 4 amends s. 376.82, F.S., to revise the liability protection for a person who executes and implements a successful BSRA to include:

- Liability 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;

- The stigma to real property or improvements caused by the contamination that was addressed in the BSRA; and
- Causes of action accruing on or after July 1, 2013, and retroactively to the cause of action before July 1, 2013, for which a lawsuit has not be filed before July 1, 2013.

Section 5 provides an effective date of July 1, 2013.

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:

This bill has been submitted to the Revenue Estimating Conference.

B. Private Sector Impact:

Individuals, corporations, community-based organizations, and not-for-profit corporations proposing to designate brownfield areas should benefit from the provisions of the act.

The bill reduces the right of a third party to pursue an action for damages to property.

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 relief of liability.

The Department of Revenue was unable to determine the fiscal impact because of technical deficiencies in this bill.

VI. Technical Deficiencies:

On lines 44 and 60-61, the bill does not define the term "substantial rehabilitation" therefore it is unclear how much rehabilitation is required to qualify for the tax exemption.[26]

On line 44, the bill expands the refund provisions to allow for any construction or substantial rehabilitation done in a brownfield area for low-income persons to qualify for the refund, rather than restricting it to affordable housing. On lines 60 - 61 of the bill, the refund eligibility is restricted to building materials used for affordable housing. These two provisions are in conflict with one another and it is not clear what use of materials can qualify for the refund.[27] Removing the term "affordable house" could lead to an unintentional expansion of the program.

In s. 376.80(1), F.S., the notice requirements that are established by reference, s. 166.041, F.S., and s. 125.041, F.S., are in conflict with the notice requirements of s. 376.80(2)(a). The bill does not appear to address this conflict. Lines 127-129 state, "the resolution must be adopted in accordance with the resolution adoption procedures and requirements of the local government in effect at the time of the proposal." If the procedures and requirements referenced in this language contain notice requirements that are different than those listed beginning on line 142 of the bill, then the conflict in the notice requirements still exists.[28]

There is conflict in the current statute regarding the number of public hearings required for brownfield area designation. Currently, s. 376.80(1), F.S., references s. 166.041(3)(c)2., F.S., and s. 125.66(4)(b), F.S. As referenced, these can be read to require two public hearings and one public hearing, respectively. SB 554 may not address this conflict directly, but does seem to imply that only one public hearing is required (see line 130).[29]

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:

None.

[26] Dept. of Revenue, *Senate Bill 554 Agency Analysis* (Feb. 2013) (on file with the Senate Committee on Environmental Preservation and Conservation).
[27] *Id*.
[28] Email from Katie Kelly, Deputy Legislative Affairs Director, DEP, (Mar. 12, 2013) (on file with the Senate Committee on Environmental Preservation and Conservation).
[29] *Id*.