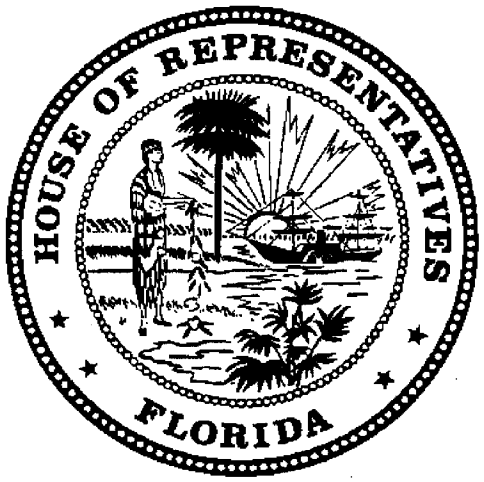

Justice Council

Meeting Packet

Tuesday, March 28, 2006
9:00 AM – 10:00 AM
404 House Office Building

Allan G. Bense
Speaker

Bruce Kyle
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Justice Council

Start Date and Time:	Tuesday, March 28, 2006 09:00 am
End Date and Time:	Tuesday, March 28, 2006 10:00 am
Location:	404 HOB
Duration:	1.00 hrs

Consideration of the following bill(s):

HB 175 CS Drug Court Programs by Adams
HB 191 CS Guardianship by Bogdanoff
HB 193 Public Records Exemptions by Bogdanoff
HB 221 CS Paternity by Richardson
HB 303 CS Dart-Firing Stun Guns by Kravitz
HB 519 CS Internet Screening in Public Libraries by Kravitz
HB 627 CS License Plates by Brummer
HB 1567 CS Eminent Domain by Rubio
HJR 1569 CS Eminent Domain by Rubio
HJR 1571 Assessment of Newly Established Homestead Property after Eminent Domain Taking of Previous Homestead Property by Rubio
HB 7019 CS Mediation by Civil Justice Committee

NOTICE FINALIZED on 03/24/2006 16:20 by COCHRAN.MARGARET

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 175 CS Drug Court Programs
SPONSOR(S): Adams and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 114, SB 444

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	8 Y, 0 N, w/CS	Cunningham	Kramer
2) Juvenile Justice Committee	4 Y, 0 N, w/CS	White	White
3) Judiciary Appropriations Committee	5 Y, 0 N, w/CS	Brazzell	DeBeaugrine
4) Justice Council			
5)			

SUMMARY ANALYSIS

The term "drug court" refers to a process by which substance abusers entering the court system are placed into treatment and proactively monitored by the judge and a team of justice-system and treatment professionals. This bill modifies laws regarding drug court programs in dependency, criminal, and delinquency proceedings.

Dependency court is for children who are dependent upon the state to protect them from abuse or neglect by their adult caretaker(s). This bill authorizes a court to order individuals involved in a dependency case to be evaluated for drug or alcohol problems and allows the court, after a finding of dependency, to require an individual to participate in and comply with treatment-based drug court programs. Individuals may voluntarily enter drug court prior to a finding of dependency.

In adult criminal and juvenile delinquency courts, drug court programs have traditionally been structured as pretrial diversion programs. This bill authorizes a court to require postadjudicatory and sentenced offenders to participate in and comply with treatment-based drug court programs. Individuals charged with crimes may voluntarily enter drug court prior to trial.

This bill also provides that counties with treatment-based drug court programs may adopt a protocol of sanctions for noncompliance with program rules. This protocol may include, but is not limited to: (a) placement in specified licensed substance abuse treatment programs; (b) placement in a jail-based treatment program; (c) secure detention; or (d) incarceration. These provisions of the bill address recent case law holding that incarceration or a licensed substance abuse treatment program may not be imposed for noncompliance with pretrial drug court programs as such sanctions are not authorized by current law.

The fiscal impact to state and local governments of this bill is unknown. The language of the bill is permissive (i.e. participation in drug court programs is at the counties' discretion). As such, the bill does not appear to implicate the mandate provisions of Article VII, Section 18 of the Florida Constitution. *See* Fiscal Analysis & Economic Impact Statement and Applicability of Municipal/County Mandates Provision.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: This bill authorizes the court to order a substance abuse assessment and evaluation, after a shelter petition or dependency petition has been filed, for individuals involved in the case. This bill expands the scope of drug court programs beyond pretrial intervention programs to include dependency drug court, postadjudicatory programs, and the monitoring of sentenced offenders. It also authorizes counties to adopt sanctions for individuals who violate drug court terms and conditions.

Promote Personal Responsibility: This bill provides for court-ordered substance abuse evaluation and treatment and court-monitored compliance with such orders. It also authorizes counties to adopt sanctions for individuals who violate drug court terms and conditions.

Empower Families: This bill increases court responsibilities in dependency court matters.

B. EFFECT OF PROPOSED CHANGES:

Background

Proceedings Relating to Children

There are two main court systems specifically tailored for minors. Dependency court is for children who are dependent upon the state to protect them from abuse or neglect by their adult caretaker(s). Delinquency court is for minors who commit crimes that do not warrant transfer to the adult criminal justice system.

In January 1999, the National Center on Addiction and Substance Abuse at Columbia University (CASA) published a report detailing its two-year analysis of the connection between substance abuse and child maltreatment.[1] CASA estimates that substance abuse causes or contributes to 7 out of 10 cases of child maltreatment and accounts for nearly $10 billion in federal, state, and local spending, exclusive of costs relating to healthcare, operating judicial systems, law enforcement, special education, lost productivity, and privately incurred costs.

The CASA report documented a doubling in the number of child abuse or neglect cases, from 1.4 million cases nationwide in 1986 to nearly 3 million cases in 1997. In connection with the report, CASA conducted a national survey of family court and welfare professionals to ascertain their perceptions of the extent to which substance abuse issues exist in child welfare cases. The survey revealed the following:

- 71.6 percent of respondents cited substance abuse as one of the top three causes for the rise in the number of child abuse and neglect cases.
- Almost 80 percent of respondents stated that substance abuse causes or contributes to at least half of all child abuse and neglect cases while nearly 40 percent stated that substance abuse was a factor in over 75 percent of cases.
- 75.7 percent of respondents believed that children of substance abusing parents were more likely to enter foster care than other children, and more likely to experience longer stays in foster care.
- 42 percent of all caseworkers reported that they were either not required or uncertain if they were required to report substance abuse when investigating child abuse or neglect cases.

In April 1999, the Department of Health and Human Services issued a report to Congress which highlighted the necessity of prioritizing the identification and treatment of parental substance abuse and

[1] "No Safe Haven: Children of Substance-Abusing Parents," January 1999.

its relationship to children in foster care. It stated that children in substance abuse households were more likely than others to be served in foster care, spent longer periods of time in foster care than other children, and were less likely to have left foster care within a year.

Drug Court System

The original drug court concept was developed in Dade County as a response to a federal mandate to reduce the inmate population or lose federal funding.[2] The Florida Supreme Court reported that a majority of the offenders being incarcerated due to drug-related crimes were "revolving back through the criminal justice system because of underlying problems of drug addiction."[3] The Court felt that the delivery of treatment services needed to be coupled with the criminal justice system, strong judicial leadership, and partnerships to bring treatment and the criminal justice system together.[4]

As of July 2004, 88 drug courts operated in 43 counties.[5] There are 1,183 drug courts nationwide, either operational or in the planning stages, and drug courts are operational in all fifty states.[6]

In Florida, in 2002, approximately 10,200 offenders were referred to drug court. Studies show that drug court graduates experience a significantly reduced rate of recidivism and that drug courts are a cost-effective alternative to incarceration of drug offenders.[7]

Drug courts operate on a reward and punishment system. The reward for successful completion of the program is not only a better life but also lowering of a criminal charge to a lesser offense or even dismissal of the criminal charge. Punishments for failing to comply with the program typically include work assignment, increased treatment modalities, increased court appearances, increased urinalysis testing, community service, house arrest, and incarceration. Failure to comply with the program can also result in the continuation of the criminal process and possible additional jail time upon conviction. Recently, two District Courts of Appeal have ruled that because there is no statutory authorization for the imposition of incarceration or a licensed substance abuse treatment program (specifically an Addiction Receiving Facility) upon violation of a drug court program, such sanctions may not be imposed.[8]

Effect of the Bill

Dependency Proceedings

This bill expands existing legislative intent to encourage courts to use the drug court program model and to authorize courts to assess children and persons who have custody or are requesting custody of children for substance abuse problems in every stage of the dependency process. This bill establishes the following goals for substance abuse treatment services in the dependency process:

- ensure the safety of children;
- prevent and remediate the consequence of substance abuse;
- expedite permanent placement; and
- support families in recovery.

This bill authorizes a dependency court, upon a showing of good cause, to order a child, or person who has custody or is requesting custody of the child, to submit to substance abuse assessment or evaluation. The assessment or evaluation must be made by a qualified professional, as defined by s. 397.311, F.S.[9] After an adjudication of dependency, or finding of dependency where adjudication is

[2] Publication by the Florida Supreme Court, *The Florida Drug Court System*, revised January 2004, p.1
[3] *Id.*
[4] *Id.*
[5] *Report on Florida's Drug Courts*, by the Supreme Court Task Force on Treatment-Based Drug Courts, July 2004, p.5
[6] *Id.*
[7] *Id.*
[8] *Diaz v. State*, 884 So.2d 299 (Fla. 2nd DCA 2004); *T.N. v. Portesy*, 30 FLW D2369 (Fla. 2nd DCA October 7, 2005).
[9] Section 397.311(24), F.S., defines "qualified professional" to mean "a physician licensed under chapter 458 or chapter 459; a professional licensed under chapter 490 or chapter 491; or a person who is certified through a department-

withheld, the court may require the individual to participate in and comply with treatment and services identified as necessary, including, when appropriate and available, participation in and compliance with a treatment-based drug court program. Prior to a finding of dependency, participation in treatment, including a treatment-based drug court program, is voluntary. The court, in conjunction with other public agencies, may oversee progress and compliance with treatment and may impose appropriate available sanctions for noncompliance. The court may also make a finding of noncompliance for consideration in determining whether an alternate placement of the child is in the child's best interests.

This bill provides that counties with treatment-based drug court programs may adopt a protocol of sanctions for noncompliance with dependency drug court program rules, which may include, but is not limited to: (a) placement in a substance abuse program offered by a licensed service provider as defined in s. 397.311, F.S.;[10] (b) placement in a jail-based treatment program; (c) secure detention under ch. 985, F.S.;[11] or (d) incarceration within the time limits established for contempt of court (six months).

Criminal and Juvenile Delinquency Proceedings

Drug court programs typically provide services and monitoring in the pretrial stage of a criminal case. A defendant who successfully completes the drug court program receives the benefit of dismissal of the criminal charge, thereby sparing the defendant from jail and from a permanent criminal record of a conviction. Pretrial drug court programs suspend the setting of a trial date and use the threat of resetting the trial date, and possible conviction, as a means to encourage compliance with the program.

This bill provides that, in addition to pretrial intervention programs, treatment-based drug court programs may include sentenced offenders and offenders in postadjudicatory programs.

This bill specifies that entry into any pretrial treatment-based drug court program is voluntary and that the coordinated strategy adopted by the county for its drug court program, which may include a protocol of sanctions, must be provided in writing to a participant before he or she agrees to enter into a pretrial treatment-based drug court program. A recent court ruling indicates that a participating individual may be allowed to "opt out" of the program if there is an administrative order stating that *participation* in the program is voluntary.[12]

This bill provides that counties with treatment-based drug court programs may adopt a protocol of sanctions for noncompliance with criminal and juvenile delinquency drug court program rules, which may include, but is not limited to: (a) placement in a substance abuse program offered by a licensed

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recognized certification process for substance abuse treatment services and who holds, at a minimum, a bachelor's degree. A person who is certified in substance abuse treatment services by a state-recognized certification process in another state at the time of employment with a licensed substance abuse provider in this state may perform the functions of a qualified professional as defined in this chapter but must meet certification requirements contained in this subsection no later than 1 year after his or her date of employment."

[10] Section 397.311(18) defines a "licensed service provider" as, ". . . a public agency under this chapter, a private for-profit or not-for-profit agency under this chapter, a physician or any other private practitioner licensed under this chapter, or a hospital that offers substance abuse impairment services . . ." through one or more of the following licensable service components: (a) an addictions receiving facility; (b) detoxification; (c) intensive inpatient treatment; (d) residential treatment; (e) nonresidential day and night treatment; (f) outpatient treatment; (g) medication and methadone maintenance treatment; (h) prevention; and (i) intervention.

[11] In the event a juvenile violates a dependency drug court treatment program, the court may find that the juvenile committed contempt of court under s. 985.216, F.S., and may securely detain the juvenile if no alternative sanctions are available for up to five days for a first offense and up to 15 days for a second offense.

[12] Section 948.08, F.S. requires that pretrial substance abuse education and treatment intervention programs be approved by the chief judge of the circuit. The court in *Mullin v. Jenne*, 890 So.2d 543 (Fla. 4th DCA 2005), referenced this statute and held that where a chief judge's administrative order defining the parameters of the program stated that *participation* in the program was voluntary (rather than *entry*), a court could not require a defendant to remain in a drug court treatment program. The court noted that had the administrative order stated that "entry" into the program was voluntary, a different result would have occurred. Although this bill provides that entry, rather than participation, is voluntary, pretrial substance abuse intervention programs are still, by statute, subject to approval by the chief judge of the circuit. Thus, should a chief judge issue an administrative order stating that participation in a program is voluntary, participating individuals may opt out of the program.

service provider as defined in s. 397.311, F.S.;[13] (b) placement in a jail-based treatment program; (c) secure detention under ch. 985, F.S.;[14] or (d) incarceration within the time limits established for contempt of court (six months).[15]

This bill provides that an individual who successfully completes a treatment-based drug court program, if otherwise eligible, may have his or her arrest record and nolo contendere plea expunged.

This bill requires, contingent upon an annual appropriation, each judicial circuit to establish at least one coordinator position for the treatment-based drug court program.[16]

Current law provides that any person eligible for participation in a drug court treatment program may be eligible to have his or her case transferred to a county other than that in which the charge arose if the drug court program agrees and specific conditions are met. The bill specifies that if approval for transfer is received from all parties, the trial court must accept a plea of nolo contendere. The bill further specifies that the jurisdiction to which a case has been transferred is responsible for disposition of the case.

Finally, the bill adds tampering with evidence, solicitation to purchase a controlled substance, and obtaining a prescription by fraud to the list of offenses that make a child eligible for admission into a delinquency pretrial substance abuse education and treatment intervention program.

C. SECTION DIRECTORY:

Section 1. Names the act the "Robert J. Koch Drug Court Intervention Act."

Section 2. Amends s. 39.001(4), F.S., adding legislative intent language regarding substance abuse treatment services in proceedings relating to children.

Section 3. Amends s. 39.407, F.S., providing that at any time after a shelter or dependency petition is filed, a court may order a child or a person who has or is requesting custody of a child to submit to substance abuse assessment or evaluation.

Section 4. Amends s. 39.507, F.S., providing that after an adjudication of dependency or finding of dependency where adjudication is withheld, the court may order a child or person who has or is requesting custody of a child to submit to substance abuse assessment or evaluation; that the court may require participation and compliance with treatment; providing that the court may oversee progress and compliance with treatment; and that the court may impose sanctions for noncompliance or make a finding of noncompliance for consideration in determining a child's placement.

Section 5. Amends s. 39.521(1)(b)1., F.S., providing that when a child is adjudicated dependent, the court may order a child or person who has or is requesting custody of a child to submit to substance abuse assessment or evaluation; the court may require participation and compliance with treatment; that the court may oversee progress and compliance with treatment; and the court may impose sanctions for noncompliance or make a finding of noncompliance for consideration in determining a child's placement.

Section 6. Amends s. 397.334, F.S., providing that entry into a pretrial treatment-based drug court program is voluntary; expanding the types of treatment-based drug court programs; providing for a protocol of sanctions that may be adopted by a county; and providing a treatment-based drug court

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[13] *See* Footnote 10.

[14] In the event a juvenile violates a delinquency drug court treatment program, the court may securely detain the juvenile if: (a) it finds that the juvenile committed contempt of court under s. 985.216, F.S. (for up to five days for a first offense and up to 15 days for a second offense, if no alternative sanctions are available); or (b) the juvenile has absconded from a drug court treatment program imposed as a condition of probation or conditional release (under s. 985.215(2)(a), F.S., a juvenile who absconds from a probation program or while on conditional release may be held in secure detention for up to 24 hours at which point the court must conduct a detention hearing to determine whether the juvenile's score on the risk assessment instrument warrants continued detention for up to 21 days under s. 985.215(2) and (5)(c), F.S.).

[15] The bill's provision of permissible sanctions would have the effect of overturning the effect of the decisions in *Diaz* and *T.N. Diaz v. State*, 884 So.2d 299 (Fla. 2nd DCA 2004) ; *T.N. v. Portesy*, 30 FLW D2369 (Fla. 2nd DCA October 7, 2005). Note that the *Diaz* court suggested that the Legislature make this change.

[16] These positions were established in prior budgets and are currently staffed and funded.

program coordinator within each judicial circuit; and permitting a circuit's chief judge to appoint an advisory committee for the drug program.

Section 7. Amends s. 910.035(5), F.S., relating to transfers from county for pleas and sentencing.

Section 8. Amends s. 948.08, F.S., providing that while in a felony pretrial substance abuse education and treatment intervention program, participants are subject to a coordinated strategy developed by a drug court team and that the coordinated strategy may include a protocol of sanctions for noncompliance with the program.

Section 9. Amends s. 948.16, F.S., providing that while in a misdemeanor pretrial substance abuse education and treatment intervention program, participants are subject to a coordinated strategy developed by a drug court team and that the coordinated strategy may include a protocol of sanctions for noncompliance with the program.

Section 10. Amends s. 985.306, F.S., expanding the list of crimes for which an offender is eligible for participation in a delinquency pretrial substance abuse education and treatment intervention program and providing that while in a delinquency pretrial substance abuse education and treatment intervention program, participants are subject to a coordinated strategy developed by a drug court team and that the coordinated strategy may include a protocol of sanctions for noncompliance with the program.

Section 11. Provides that the act takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None. This bill does not affect a state revenue source.

2. Expenditures:

   See "Fiscal Comments," below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None. This bill does not affect a local government revenue source.

2. Expenditures:

   Indeterminate. The language in this bill is permissive and participation in a drug court program will be left to the counties' discretion. Likewise, the bill authorizes counties in their discretion to adopt a protocol of sanctions for individuals who fail to comply with drug court programs. The protocol of sanctions for programs may include jail-based treatment programs, incarceration, and secure detention for noncompliance. These sanctions would result in a cost to the counties. Given the permissive nature of the drug court programs and sanctions authorized, there is no data to estimate the number of individuals that may be sanctioned under this bill. It should be noted that pretrial intervention programs are already authorized in law and are designed to reduce jail populations and associated costs. Thus, pretrial intervention programs are generally perceived as providing a financial benefit to counties.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may increase the use of private drug assessment and treatment programs. Individuals are often required to pay for services ordered through drug courts.

D. FISCAL COMMENTS:

Departments of Children and Families and Juvenile Justice

The fiscal impact on state government is indeterminate but expected to be insignificant.

Section 29.008(2), F.S., provides for counties to be responsible for the costs of the state court system to meet local requirements. Since a county may choose whether to implement a drug court system, it is considered a local requirement, and thus drug court funding is a county responsibility. However, decisions made by a judge in the course of drug court proceedings may impact certain state expenditures. Such expenditures primarily include those made by the Department of Children and Families (DCF) for substance abuse treatment and by the Department of Juvenile Justice (DJJ) for detention of juveniles who have committed certain offenses under ch. 985, F.S.

Whether these expenditures are increased significantly depends on (1) whether the bill increases the number of individuals entering drug courts and (2) the degree to which the bill changes the extent to which individuals involved in drug courts access substance abuse treatment services from the DCF or are subject to detention by the DJJ and these departments' abilities to absorb these costs. In regard to (1), the bill's impact on the number of individuals entering drug courts is unclear. While the bill does expand the number of individuals eligible for drug court, it does not appear that it will result in a significant increase. In regard to (2), the bill's impact is also unclear but is likely to be insignificant since the bill primarily codifies in more specific language many drug courts' existing practices. Also:

- The DCF states that it gives priority for funding to individuals involved in the drug court system. It currently funds substance abuse treatment for an estimated 8,602 adults and 2,200 children involved in the drug court system. Based on these factors and the permissiveness of the language, according to the DCF, "the net impact of this legislation may not be significant."
- According to the DJJ, though "it is impossible to accurately calculate the fiscal impact [from the placement of youth in secure detention] due to the lack of specific guidelines for the individual's sanctions", the DJJ estimates a fiscal impact ranging from $204,825 to $422,280 or above.[17] However, secure detention is only one of the sanctions (and is one of the more severe sanctions) that could be assessed in a drug court, so not all violators would receive secure detention. Additionally, some youths who would be detained under this bill for violating drug court would likely have received detention anyway, absent the bill, by exiting drug court and re-entering the DJJ system. Also, by making slightly more youth eligible for drug court and thus diverting them from the DJJ system, the bill may lead to some youths not entering DJJ secure detention who otherwise would, though this number is not likely to be significant. Furthermore, it appears that the court can already impose secure detention as a sanction in certain instances. Based on decision tree analysis incorporating these factors, it appears that the fiscal impact on DJJ, while potentially positive, would not be significant.

Office of State Courts Administrator

The bill requires the establishment by each judicial circuit, contingent upon appropriations, of a coordinator for the drug court program. However, the Office of State Courts Administrator reports that all judicial circuits already have a drug court coordinator, so there would not be a fiscal impact related to this provision.

Under the implementation of Revision 7 to Article V of Florida's Constitution, the state is obligated to pay from state revenues certain case management costs which include "service referral, coordination,

[17] Section 985.215(5)(c), F.S., permits a period of detention up to 21 days for specified offenses, including absconding from a nonresidential commitment program; s. 985.216, F.S., permits a period of detention of up to 5 days for a first offense and up to 15 days for subsequent offenses. Secure detention costs the DJJ $115 per day, and the average stay is 12 days. DJJ states that according to the Office of the State Courts Administrator (OSCA), 1,798 youth participated in drug court programs during calendar year 2004, not including Broward and Seminole Counties. The DJJ states that the rate of violation in other department diversion programs is approximately 17%. Using these figures and assuming the youth are post-dispositional, detained under s. 985.216, F.S., with 5% second-time violators, DJJ estimates a fiscal impact of $204,825. Assuming that the youth are post-dispositional and detained under s. 985.215(5)(c), DJJ estimates a fiscal impact of $422,280. However, since the number of youth participating in drug court does not include those from Broward or Seminole Counties, the fiscal impact could be higher.

monitoring, and tracking for treatment-based drug court programs under s. 397.334."[18] However, "costs associated with the application of therapeutic jurisprudence principles by the courts" are excluded from the mandated portion of these costs to be borne by the state.[19] Therefore, while costs associated with case management will be paid by the state, to the extent the assessments and treatment described by the provisions of the bill are "therapeutic," they do not appear to have a significant fiscal impact on the state.

Committee on Criminal Justice Fiscal Comments

The State Courts Administrator asserts that the costs of evaluation of individuals ordered by a dependency court would be "therapeutic", and therefore not paid by the state under s. 29.004(10), F.S. However, that section is only applicable to "case management services." Section 29.004(6), F.S., provides that the state will be responsible for "expert witnesses not requested by any party which are appointed by the court pursuant to an express grant of statutory authority." If a finding is made that an assessment is not therapeutic, but only explores whether therapeutic services are necessary, then s. 29.004(10), F.S., will not apply and the state may be obligated to pay for the evaluation for indigent persons.

Currently, these assessments are already being ordered and paid for through a variety of sources, including payment by individuals who can afford it. The number of annual assessments is unknown. Also unknown is whether this bill will increase the number of substance abuse assessments ordered. In FY 2002-2003, there were 16,215 dependency cases filed.[20] If 70 percent of cases involve substance abuse, and courts were to order a substance abuse evaluation in each case, this would result in a potential of 11,351 cases with substance abuse evaluations. Note, however, that some cases may involve multiple individuals, but that evaluations may not be ordered where the individual admits to his or her addiction. The estimated cost for an assessment is $50.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Article VII, Section 18 of the state constitution reads as follows: "No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance."

The bill's language is permissive (i.e. participation in drug court programs and adoption of a protocol of sanctions are at the counties' discretion). As such, the bill does not appear to implicate the mandate provisions of Article VII, Section 18 of the Florida Constitution

2. Other:

[18] Section 29.004(10)(d), F.S.
[19] Section 29.004(10), F.S.
[20] *Trial Court Statistical Reference Guide*, published by the Office of State Courts Administrator.

The amendments to s. 397.334, F.S. provide that the protocol of sanctions for treatment-based programs authorized in Chapter 39 (dependency proceedings) may include incarceration for noncompliance with the program rules within the time limits established for contempt of court. Thus, an individual participating in a treatment-based drug court program as part of a dependency proceeding may be incarcerated for failing to comply with the program's terms and conditions. As written, this bill authorizes a court to impose a criminal punishment (incarceration) in a civil proceeding (dependency proceedings are civil proceedings). Although incarceration can be used in civil proceedings as a sanction for criminal and civil contempt, this bill does not specify that incarceration would be the result of contempt proceedings (only that the incarceration may not exceed the time limits established for contempt of court). This could result in a constitutional challenge.

It is uncertain whether the statements that parents or other caregivers make during the substance abuse assessment can be used against them in a criminal proceeding. Although some of the persons who administer assessments may qualify as psychotherapists for purposes of the psychotherapist and patient privilege[21], the privilege does not apply to statements made in the course of a court-ordered evaluation of the mental or emotional condition of a patient.[22]

Section 7 of this bill provides that offenders who are "postadjudicatory" may be referred to drug court for assessment and treatment of addictions. The ex post facto and double jeopardy clauses may prohibit a court from compelling such a referral for an offender whose offense was committed prior to the effective date of this bill.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted one amendment to the bill. As filed, the bill provides that individuals participating in treatment-based drug court programs are subject to a coordinated strategy that *must* include a protocol of sanctions. The bill also provides that individuals participating in pretrial intervention programs, misdemeanor pretrial substance abuse education and treatment intervention programs, and delinquency pretrial intervention programs are subject to a coordinated strategy that *must* include a protocol of sanctions. The first amendment adopted by the committee made the language of these provisions more permissive by providing that the coordinated strategy *may* include a protocol of sanctions. The first amendment also deletes a provision allowing state attorneys to deny a defendant's admission into a pretrial substance abuse education and treatment intervention program if the defendant previously declined admission to such a program.

The Juvenile Justice Committee adopted two amendments to the bill, which amended its provisions to: (a) consistently provide that counties may, rather than must, adopt specified sanctions for drug court program noncompliance; (b) clarify that the specified sanctions are not exclusive, i.e., counties may adopt other types of sanctions; (c) substitute "substance abuse treatment program offered by a licensed service provider as defined in s. 397.311" for the undefined term "secure licensed clinical program;" and (d) provide that juveniles who fail

[21] Section 90.503, F.S. The constitutional privilege against self-incrimination relates to protecting the accused from giving an admission of guilt against his or her will. Psychiatric examinations generally require testimonial communications of the person examined and any statements obtained from the patient by the doctor are used as evidence of mental condition only, and not as evidence of the factual truth contained therein, *Parkin v. State*, 238 So.2d 817 (Fla. 1970). A person's prior substance abuse treatment as part of a plea agreement did not constitute a court-ordered examination under the statute providing that there is no psychotherapist-patient privilege for communications made during a court-ordered examination of the mental conduct of the patient, *Viveiros v. Cooper*, 832 So.2d 868 (Fla. 4th DCA 2002).

[22] Section 90.503(4)(b), F.S.

to comply with drug court programs may be securely detained when permitted under ch. 985, F.S., rather than only when permitted by s. 985.216, F.S., the juvenile contempt of court statute.

At its February 9, 2006, meeting, the Judiciary Appropriations committee adopted eight amendments to the bill. These amendments:

- Clarify legislative intent regarding the persons from whom courts may require substance abuse assessments in dependency cases;
- Revise language to clarify that the bill does not authorize placement of children with certain persons who require substance abuse treatment;
- Remove bill language granting judges the ability to modify terms of a case plan to require participation in drug court;
- Restore current statutory language allowing the court to deny certain persons the ability to enter drug court, with the modification that the state attorney cannot deny outright but may file a motion to do so; and
- Make conforming and technical changes.

CHAMBER ACTION

The Judiciary Appropriations Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to drug court programs; providing a short title; amending s. 39.001, F.S.; providing additional legislative purposes and intent with respect to the treatment of substance abuse, including the use of the drug court program model; authorizing the court to require certain persons to undergo treatment following adjudication; amending s. 39.407, F.S.; authorizing the court to order specified persons to submit to a substance abuse assessment or evaluation upon a showing of good cause in connection with a shelter petition or petition for dependency; amending ss. 39.507 and 39.521, F.S.; authorizing the court to order specified persons to submit to a substance abuse assessment as part of an adjudicatory order or pursuant to a disposition hearing; requiring a showing of good cause; authorizing the court to require participation in a treatment-based drug court program; authorizing the court to impose sanctions for noncompliance; amending s. 397.334, F.S.; revising

legislative intent with respect to treatment-based drug court programs to reflect participation by community support agencies, the Department of Education, and other individuals; including postadjudicatory programs as part of treatment-based drug court programs; providing requirements and sanctions, including treatment by specified licensed service providers, jail-based treatment, secure detention, or incarceration, for the coordinated strategy developed by the drug court team to encourage participant compliance; requiring each judicial circuit to establish a position for a coordinator of the treatment-based drug court program, subject to annual appropriation by the Legislature; authorizing the chief judge of each judicial circuit to appoint an advisory committee for the treatment-based drug court program; providing for membership of the committee; revising language with respect to an annual report; amending s. 910.035, F.S.; revising language with respect to conditions for the transfer of a case in the drug court treatment program to a county other than that in which the charge arose; amending ss. 948.08, 948.16, and 985.306, F.S., relating to felony, misdemeanor, and delinquency pretrial substance abuse education and treatment intervention programs; providing for application of the coordinated strategy developed by the drug court team; removing provisions authorizing appointment of an advisory committee, to conform to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This act may be cited as the "Robert J. Koch Drug Court Intervention Act."

Section 2. Subsection (4) of section 39.001, Florida Statutes, is amended to read:

39.001 Purposes and intent; personnel standards and screening.--

(4) SUBSTANCE ABUSE SERVICES.--

(a) The Legislature recognizes that early referral and comprehensive treatment can help combat substance abuse in families and that treatment is cost effective.

(b) The Legislature establishes the following goals for the state related to substance abuse treatment services in the dependency process:

1. To ensure the safety of children.

2. To prevent and remediate the consequences of substance abuse on families involved in protective supervision or foster care and reduce substance abuse, including alcohol abuse, for families who are at risk of being involved in protective supervision or foster care.

3. To expedite permanency for children and reunify healthy, intact families, when appropriate.

4. To support families in recovery.

(c) The Legislature finds that children in the care of the state's dependency system need appropriate health care services, that the impact of substance abuse on health indicates the need

for health care services to include substance abuse services to children and parents where appropriate, and that it is in the state's best interest that such children be provided the services they need to enable them to become and remain independent of state care. In order to provide these services, the state's dependency system must have the ability to identify and provide appropriate intervention and treatment for children with personal or family-related substance abuse problems.

(d) It is the intent of the Legislature to encourage the use of the drug court program model established by s. 397.334 and authorize courts to assess children and persons who have custody or are requesting custody of children where good cause is shown to identify and address substance abuse problems as the court deems appropriate at every stage of the dependency process. Participation in treatment, including a treatment-based drug court program, may be required by the court following adjudication. Participation in assessment and treatment prior to adjudication shall be voluntary, except as provided in s. 39.407(16).

(e) It is therefore the purpose of the Legislature to provide authority for the state to contract with community substance abuse treatment providers for the development and operation of specialized support and overlay services for the dependency system, which will be fully implemented and used ~~utilized~~ as resources permit.

(f) Participation in the treatment-based drug court program does not divest any public or private agency of its responsibility for a child or adult, but is intended to enable

these agencies to better meet their needs through shared responsibility and resources.

Section 3. Subsection (15) of section 39.407, Florida Statutes, is amended, and subsection (16) is added to that section, to read:

39.407 Medical, psychiatric, and psychological examination and treatment of child; physical, ~~or~~ mental, or substance abuse examination of ~~parent or~~ person with or requesting child custody ~~of child~~.--

(15) At any time after the filing of a shelter petition or petition for dependency, when the mental or physical condition, including the blood group, of a parent, caregiver, legal custodian, or other person who has custody or is requesting custody of a child is in controversy, the court may order the person to submit to a physical or mental examination by a qualified professional. The order may be made only upon good cause shown and pursuant to notice and procedures as set forth by the Florida Rules of Juvenile Procedure.

(16) At any time after a shelter petition or petition for dependency is filed, the court may order a child or a person who has custody or is requesting custody of the child to submit to a substance abuse assessment or evaluation. The assessment or evaluation must be administered by a qualified professional, as defined in s. 397.311. The order may be made only upon good cause shown. This subsection does not authorize placement of a child with a person seeking custody, other than the parent or legal custodian, who requires substance abuse treatment.

Section 4. Subsection (9) is added to section 39.507, Florida Statutes, to read:

39.507 Adjudicatory hearings; orders of adjudication.--

(9) After an adjudication of dependency, or a finding of dependency where adjudication is withheld, the court may order a child or a person who has custody or is requesting custody of the child to submit to a substance abuse assessment or evaluation. The assessment or evaluation must be administered by a qualified professional, as defined in s. 397.311. The court may also require such person to participate in and comply with treatment and services identified as necessary, including, when appropriate and available, participation in and compliance with a treatment-based drug court program established under s. 397.334. In addition to supervision by the department, the court, including the treatment-based drug court program, may oversee the progress and compliance with treatment by the child or a person who has custody or is requesting custody of the child. The court may impose appropriate available sanctions for noncompliance upon the child or a person who has custody or is requesting custody of the child or make a finding of noncompliance for consideration in determining whether an alternative placement of the child is in the child's best interests. Any order entered under this subsection may be made only upon good cause shown. This subsection does not authorize placement of a child with a person seeking custody, other than the parent or legal custodian, who requires substance abuse treatment.

Section 5. Paragraph (b) of subsection (1) of section 39.521, Florida Statutes, is amended to read:

39.521 Disposition hearings; powers of disposition.--

(1) A disposition hearing shall be conducted by the court, if the court finds that the facts alleged in the petition for dependency were proven in the adjudicatory hearing, or if the parents or legal custodians have consented to the finding of dependency or admitted the allegations in the petition, have failed to appear for the arraignment hearing after proper notice, or have not been located despite a diligent search having been conducted.

(b) When any child is adjudicated by a court to be dependent, the court having jurisdiction of the child has the power by order to:

1. Require the parent and, when appropriate, the legal custodian and the child~~,~~ to participate in treatment and services identified as necessary. The court may require the child or the person who has custody or who is requesting custody of the child to submit to a substance abuse assessment or evaluation. The assessment or evaluation must be administered by a qualified professional, as defined in s. 397.311. The court may also require such person to participate in and comply with treatment and services identified as necessary, including, when appropriate and available, participation in and compliance with a treatment-based drug court program established under s. 397.334. In addition to supervision by the department, the court, including the treatment-based drug court program, may oversee the progress and compliance with treatment by the child

or a person who has custody or is requesting custody of the child. The court may impose appropriate available sanctions for noncompliance upon the child or a person who has custody or is requesting custody of the child or make a finding of noncompliance for consideration in determining whether an alternative placement of the child is in the child's best interests. Any order entered under this subparagraph may be made only upon good cause shown. This subparagraph does not authorize placement of a child with a person seeking custody of the child, other than the child's parent or legal custodian, who requires substance abuse treatment.

2. Require, if the court deems necessary, the parties to participate in dependency mediation.

3. Require placement of the child either under the protective supervision of an authorized agent of the department in the home of one or both of the child's parents or in the home of a relative of the child or another adult approved by the court, or in the custody of the department. Protective supervision continues until the court terminates it or until the child reaches the age of 18, whichever date is first. Protective supervision shall be terminated by the court whenever the court determines that permanency has been achieved for the child, whether with a parent, another relative, or a legal custodian, and that protective supervision is no longer needed. The termination of supervision may be with or without retaining jurisdiction, at the court's discretion, and shall in either case be considered a permanency option for the child. The order terminating supervision by the department shall set forth the

powers of the custodian of the child and shall include the powers ordinarily granted to a guardian of the person of a minor unless otherwise specified. Upon the court's termination of supervision by the department, no further judicial reviews are required, so long as permanency has been established for the child.

Section 6. Section 397.334, Florida Statutes, is amended to read:

397.334 Treatment-based drug court programs.--

(1) Each county may fund a treatment-based drug court program under which persons in the justice system assessed with a substance abuse problem will be processed in such a manner as to appropriately address the severity of the identified substance abuse problem through treatment services ~~plans~~ tailored to the individual needs of the participant. It is the intent of the Legislature to encourage the Department of Corrections, the Department of Children and Family Services, the Department of Juvenile Justice, the Department of Health, the Department of Law Enforcement, the Department of Education, and such ~~other~~ agencies, local governments, law enforcement agencies, ~~and~~ other interested public or private sources, and individuals to support the creation and establishment of these problem-solving court programs. Participation in the treatment-based drug court programs does not divest any public or private agency of its responsibility for a child or adult, but enables ~~allows~~ these agencies to better meet their needs through shared responsibility and resources.

(2) Entry into any pretrial treatment-based drug court program shall be voluntary. The court may only order an individual to enter into a pretrial treatment-based drug court program upon written agreement by the individual, which shall include a statement that the individual understands the requirements of the program and the potential sanctions for noncompliance.

(3) ~~(2)~~ The treatment-based drug court programs shall include therapeutic jurisprudence principles and adhere to the following 10 key components, recognized by the Drug Courts Program Office of the Office of Justice Programs of the United States Department of Justice and adopted by the Florida Supreme Court Treatment-Based Drug Court Steering Committee:

(a) Drug court programs integrate alcohol and other drug treatment services with justice system case processing.

(b) Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

(c) Eligible participants are identified early and promptly placed in the drug court program.

(d) Drug court programs provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

(e) Abstinence is monitored by frequent testing for alcohol and other drugs.

(f) A coordinated strategy governs drug court program responses to participants' compliance.

(g) Ongoing judicial interaction with each drug court program participant is essential.

(h) Monitoring and evaluation measure the achievement of program goals and gauge program effectiveness.

(i) Continuing interdisciplinary education promotes effective drug court program planning, implementation, and operations.

(j) Forging partnerships among drug court programs, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

(4) ~~(3)~~ Treatment-based drug court programs may include pretrial intervention programs as provided in ss. 948.08, 948.16, and 985.306, treatment-based drug court programs authorized in chapter 39, postadjudicatory programs, and the monitoring of sentenced offenders through a treatment-based drug court program. While enrolled in any treatment-based drug court program, the participant is subject to a coordinated strategy developed by the drug court team under paragraph (3)(f). Each coordinated strategy may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions for treatment-based programs may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or in a jail-based treatment program or serving a period of secure detention under chapter 985 if a child or a period of incarceration within the time limits established for contempt of court if an adult. The coordinated strategy must be provided in writing to the

participant before the participant agrees to enter into a pretrial treatment-based drug court program. Any person whose charges are dismissed after successful completion of the treatment-based drug court program, if otherwise eligible, may have his or her arrest record and plea of nolo contendere to the dismissed charges expunged under s. 943.0585.

(5) Contingent upon an annual appropriation by the Legislature, each judicial circuit shall establish, at a minimum, one coordinator position for the treatment-based drug court program within the state courts system to coordinate the responsibilities of the participating agencies and service providers. Each coordinator shall provide direct support to the treatment-based drug court program by providing coordination between the multidisciplinary team and the judiciary, providing case management, monitoring compliance of the participants in the treatment-based drug court program with court requirements, and providing program evaluation and accountability.

(6) ~~(4)~~ (a) The Florida Association of Drug Court ~~Program~~ Professionals is created. The membership of the association may consist of treatment-based drug court program practitioners who comprise the multidisciplinary treatment-based drug court program team, including, but not limited to, judges, state attorneys, defense counsel, treatment-based drug court program coordinators, probation officers, law enforcement officers, community representatives, members of the academic community, and treatment professionals. Membership in the association shall be voluntary.

(b) The association shall annually elect a chair whose duty is to solicit recommendations from members on issues relating to the expansion, operation, and institutionalization of treatment-based drug court programs. The chair is responsible for providing on or before October 1 of each year the association's recommendations and an annual report to the appropriate Supreme Court ~~Treatment-Based Drug Court Steering~~ committee or to the appropriate personnel of the Office of the State Courts Administrator~~, and shall submit a report each year, on or before October 1, to the steering committee~~.

(7) ~~(5)~~ If a county chooses to fund a treatment-based drug court program, the county must secure funding from sources other than the state for those costs not otherwise assumed by the state pursuant to s. 29.004. However, this does not preclude counties from using treatment and other service dollars provided through state executive branch agencies. Counties may provide, by interlocal agreement, for the collective funding of these programs.

(8) The chief judge of each judicial circuit may appoint an advisory committee for the treatment-based drug court program. The committee shall be composed of the chief judge, or his or her designee, who shall serve as chair; the judge of the treatment-based drug court program, if not otherwise designated by the chief judge as his or her designee; the state attorney, or his or her designee; the public defender, or his or her designee; the treatment-based drug court program coordinators; community representatives; treatment representatives; and any other persons the chair finds are appropriate.

Section 7. Paragraphs (b) and (e) of subsection (5) of section 910.035, Florida Statutes, are amended to read:

910.035 Transfer from county for plea and sentence.--

(5) Any person eligible for participation in a drug court treatment program pursuant to s. 948.08(6) may be eligible to have the case transferred to a county other than that in which the charge arose if the drug court program agrees and if the following conditions are met:

(b) If approval for transfer is received from all parties, the trial court shall accept a plea of nolo contendere and enter a transfer order directing the clerk to transfer the case to the county which has accepted the defendant into its drug court program.

(e) Upon successful completion of the drug court program, the jurisdiction to which the case has been transferred shall dispose of the case pursuant to s. 948.08(6). If the defendant does not complete the drug court program successfully, the jurisdiction to which the case has been transferred shall dispose of the case within the guidelines of the Criminal Punishment Code ~~case shall be prosecuted as determined by the state attorneys of the sending and receiving counties~~.

Section 8. Subsections (6), (7), and (8) of section 948.08, Florida Statutes, are amended to read:

948.08 Pretrial intervention program.--

(6)(a) Notwithstanding any provision of this section, a person who is charged with a felony of the second or third degree for purchase or possession of a controlled substance under chapter 893, prostitution, tampering with evidence,

solicitation for purchase of a controlled substance, or obtaining a prescription by fraud; who has not been charged with a crime involving violence, including, but not limited to, murder, sexual battery, robbery, carjacking, home-invasion robbery, or any other crime involving violence; and who has not previously been convicted of a felony nor been admitted to a felony pretrial program referred to in this section is eligible for voluntary admission into a pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, approved by the chief judge of the circuit, for a period of not less than 1 year in duration, upon motion of either party or the court's own motion, except:

1. If a defendant was previously offered admission to a pretrial substance abuse education and treatment intervention program at any time prior to trial and the defendant rejected that offer on the record, then the court, upon motion of ~~or~~ the state attorney, may deny the defendant's admission to such a program.

2. if the state attorney believes that the facts and circumstances of the case suggest the defendant's involvement in the dealing and selling of controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the defendant was involved in the dealing or selling of controlled substances, the court shall deny the defendant's admission into a pretrial intervention program.

(b) While enrolled in a pretrial intervention program authorized by this subsection, the participant is subject to a coordinated strategy developed by a drug court team under s. 397.334(3). The coordinated strategy may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or in a jail-based treatment program or serving a period of incarceration within the time limits established for contempt of court. The coordinated strategy must be provided in writing to the participant before the participant agrees to enter into a pretrial treatment-based drug court program or other pretrial intervention program.

(c) ~~(b)~~ At the end of the pretrial intervention period, the court shall consider the recommendation of the administrator pursuant to subsection (5) and the recommendation of the state attorney as to disposition of the pending charges. The court shall determine, by written finding, whether the defendant has successfully completed the pretrial intervention program.

~~(c)1.~~ If the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment, which may include substance abuse treatment programs offered by licensed service providers as defined in s. 397.311 or jail-based treatment programs, or order that the charges revert to normal channels for prosecution.

~~2.~~ The court shall dismiss the charges upon a finding that the defendant has successfully completed the pretrial intervention program.

(d) Any entity, whether public or private, providing a pretrial substance abuse education and treatment intervention program under this subsection must contract with the county or appropriate governmental entity, and the terms of the contract must include, but need not be limited to, the requirements established for private entities under s. 948.15(3).

~~(7) The chief judge in each circuit may appoint an advisory committee for the pretrial intervention program composed of the chief judge or his or her designee, who shall serve as chair; the state attorney, the public defender, and the program administrator, or their designees; and such other persons as the chair deems appropriate. The advisory committee may not designate any defendant eligible for a pretrial intervention program for any offense that is not listed under paragraph (6)(a) without the state attorney's recommendation and approval. The committee may also include persons representing any other agencies to which persons released to the pretrial intervention program may be referred.~~

(7) ~~(8)~~ The department may contract for the services and facilities necessary to operate pretrial intervention programs.

Section 9. Section 948.16, Florida Statutes, is amended to read:

948.16 Misdemeanor pretrial substance abuse education and treatment intervention program.--

(1)(a) A person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under chapter 893, and who has not previously been convicted of a felony nor been admitted to a pretrial program, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, approved by the chief judge of the circuit, for a period based on the program requirements and the treatment plan for the offender, upon motion of either party or the court's own motion, except, if the state attorney believes the facts and circumstances of the case suggest the defendant is involved in dealing and selling controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the defendant was involved in dealing or selling controlled substances, the court shall deny the defendant's admission into the pretrial intervention program.

(b) While enrolled in a pretrial intervention program authorized by this section, the participant is subject to a coordinated strategy developed by a drug court team under s. 397.334(3). The coordinated strategy may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or in a jail-based treatment program or serving a period of incarceration within the time limits

established for contempt of court. The coordinated strategy must be provided in writing to the participant before the participant agrees to enter into a pretrial treatment-based drug court program or other pretrial intervention program.

(2) At the end of the pretrial intervention period, the court shall consider the recommendation of the treatment program and the recommendation of the state attorney as to disposition of the pending charges. The court shall determine, by written finding, whether the defendant successfully completed the pretrial intervention program.

~~(a)~~ If the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment or return the charges to the criminal docket for prosecution.

~~(b)~~ The court shall dismiss the charges upon finding that the defendant has successfully completed the pretrial intervention program.

(3) Any public or private entity providing a pretrial substance abuse education and treatment program under this section shall contract with the county or appropriate governmental entity. The terms of the contract shall include, but not be limited to, the requirements established for private entities under s. 948.15(3).

Section 10. Section 985.306, Florida Statutes, is amended to read:

985.306 Delinquency pretrial intervention program.--

(1) ~~(a)~~ Notwithstanding any provision of law to the contrary, a child who is charged ~~under chapter 893~~ with a felony of the second or third degree for purchase or possession of a controlled substance under chapter 893; tampering with evidence; solicitation for purchase of a controlled substance; or obtaining a prescription by fraud, and who has not previously been adjudicated for a felony ~~nor been admitted to a delinquency pretrial intervention program under this section~~, is eligible for voluntary admission into a delinquency pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, approved by the chief judge or alternative sanctions coordinator of the circuit to the extent that funded programs are available, for a period based on the program requirements and the treatment services that are suitable for the offender ~~of not less than 1 year in duration~~, upon motion of either party or the court's own motion. However, if the state attorney believes that the facts and circumstances of the case suggest the child's involvement in the dealing and selling of controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes by a preponderance of the evidence at such hearing that the child was involved in the dealing and selling of controlled substances, the court shall deny the child's admission into a delinquency pretrial intervention program.

(2) While enrolled in a delinquency pretrial intervention program authorized by this section, a child is subject to a coordinated strategy developed by a drug court team under s. 397.334(3). The coordinated strategy may include a protocol of

sanctions that may be imposed upon the child for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or serving a period of secure detention under this chapter. The coordinated strategy must be provided in writing to the child before the child agrees to enter the pretrial treatment-based drug court program or other pretrial intervention program.

(3) ~~(b)~~ At the end of the delinquency pretrial intervention period, the court shall consider the recommendation of the state attorney and the program administrator as to disposition of the pending charges. The court shall determine, by written finding, whether the child has successfully completed the delinquency pretrial intervention program.

~~(c)1.~~ If the court finds that the child has not successfully completed the delinquency pretrial intervention program, the court may order the child to continue in an education, treatment, or urine monitoring program if resources and funding are available or order that the charges revert to normal channels for prosecution.

~~2.~~ The court may dismiss the charges upon a finding that the child has successfully completed the delinquency pretrial intervention program.

(4) ~~(d)~~ Any entity, whether public or private, providing pretrial substance abuse education, treatment intervention, and a urine monitoring program under this section must contract with the county or appropriate governmental entity, and the terms of

the contract must include, but need not be limited to, the requirements established for private entities under s. 948.15(3). It is the intent of the Legislature that public or private entities providing substance abuse education and treatment intervention programs involve the active participation of parents, schools, churches, businesses, law enforcement agencies, and the department or its contract providers.

~~(2) The chief judge in each circuit may appoint an advisory committee for the delinquency pretrial intervention program composed of the chief judge or designee, who shall serve as chair; the state attorney, the public defender, and the program administrator, or their designees; and such other persons as the chair deems appropriate. The committee may also include persons representing any other agencies to which children released to the delinquency pretrial intervention program may be referred.~~

Section 11. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 191 CS Guardianship
SPONSOR(S): Bogdanoff; Goodlette; Seiler
TIED BILLS: HB 193 **IDEN./SIM. BILLS:** SB 356

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N, w/CS	Shaddock	Bond
2) Judiciary Appropriations Committee	5 Y, 0 N	Brazzell	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Guardianship is a process designed to protect and exercise the legal rights of individuals with functional limitations that prevent them from being able to make their own decisions. Individuals in need of guardianship may have medical conditions such as dementia or Alzheimer's disease, a developmental disability, chronic mental illness, or other condition that may cause functional limitations; they also may be minors in specific circumstances. A guardian is appointed by a court to manage some or all the legal affairs of a ward. A ward is a person who is unable to manage some or all of his or her legal affairs. This bill amends guardianship law and related trust law to:

- Provide that a guardianship court may appoint a court monitor on an emergency basis to determine whether court action is necessary to protect the ward's interest with no notice to the guardian.
- Provide that a guardian for a ward who had created a trust may sue to modify a trust before the trust becomes irrevocable.
- Require that a court consider all possible alternatives to guardianship, such as use of an existing trust or existing durable power of attorney, prior to imposing a guardianship on an incapacitated person.

This bill appears to have an insignificant fiscal impact on state government and no fiscal impact on local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- The bill has the potential to increase the number of cases in which a monitor is appointed and, therefore, require a greater number of individuals to serve as monitors and increase the workload of the court.

Empower families -- This bill affects family relationships by allowing the court or other concerned parties to intervene when a guardian may be taking advantage of a ward.

B. EFFECT OF PROPOSED CHANGES:

Introduction

Guardianship is a process designed to protect and exercise the legal rights of individuals with functional or other limitations that prevent them from being able to make their own decisions by reassigning certain rights from the incapacitated individual (the "ward") to another person to exercise of the individual's behalf, in the individual's interests (the "guardian"). Individuals in need of guardianship may have medical conditions such as dementia or Alzheimer's disease, a developmental disability, chronic mental illness, or other condition that may cause functional limitations, or may be minors experiencing certain circumstances, such as the death of parents. However, at times a guardian does not act in the interest of the ward; alternatively, the guardian, acting in the interest of the ward, after appointment, identifies certain financial abuses of the ward which occurred prior to the guardian's appointment but while the ward was incapacitated. The proposed changes in HB 191 CS are designed to address such situations by:

- Providing that a guardian for a ward who had created a trust while incapacitated, which trust may not be in the best interest of that ward, may sue to modify a trust before the trust becomes irrevocable.

- Providing that a guardianship court may appoint a court monitor on an emergency basis to determine whether court action is necessary to protect the ward's interest with no notice to the guardian.

- Require that a court consider all possible alternatives to guardianship, such as use of an existing trust or existing durable power of attorney, prior to imposing a guardianship on an incapacitated person.

Current law

Trusts

A trust is generally defined as:

> [A] fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the

> legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.[1]

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."[2] "Trustee" refers to "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."[3]

Trust Contests

Section 737.2065, F.S., expressly prohibits the bringing of any action to contest the validity of any or all parts of a trust until the trust becomes irrevocable. This section was enacted in 1992, along with similar legislation forbidding the commencement of will contests before the death of the testator.[4]

Generally, revocable trusts are correctly treated as will substitutes, although they serve an additional function that is not contemplated by a will: a revocable trust can serve as the framework for the investment, management, expenditure, and distribution of the grantor's assets during his or her life.[5] It is because of the similarity between a will and a revocable trust that the Legislature, in 1992, enacted statutes forbidding challenges to either instrument prior to the death of the testator for a will or prior to the trust becoming irrevocable, which typically occurs upon the death of the trust's settlor.[6] However, because a trust can operate during the settlor's lifetime, and because the settlor may become incapacitated, there is also a potential guardianship aspect to a trust which, again, is not present in a will. An invalid revocable trust, which administers the grantor's assets during his or her lifetime, has the potential to cause great harm to the grantor.[7]

Guardianship

The Legislature has stated the general purpose of the guardianship chapter as follows:

> [I]t is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs. Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf.[8]

As noted elsewhere, the Legislature's intent in section 744.344, F.S., indicates that a "guardian should be granted no more authority over the ward and his or her property than is necessary for the guardian to address the needs created by the specific incapacities of the ward, so that the substitute decision-making of the guardian leaves the ward with as much personal autonomy as is feasible."[9]

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[1] 55A Fla. Jur. 2d Trusts s.1.
[2] S. 731.201(17), F.S.
[3] *Id.* at (35).
[4] Wm. Fletcher Belcher, *Proposed Exception to Existing Prohibition Against Contesting Revocable Trusts*, Vol. XXV ActionLine No. 2, 11 (2003). ActionLine is a publication of the Florida Bar's Real Property, Probate and Trust Law Section.
[5] *Id.*
[6] *See Id.*
[7] Belcher, *Prohibition Against Contesting Revocable Trusts*, at 11.
[8] S. 744.1012, F.S.
[9] *In re Guardianship of Fuqua*, 646 So. 2d 795, 796 (Fla. 1st DCA 1994).

Some of the relevant definitions of terms used in guardianship include: "ward," a person for whom a guardian has been appointed;[10] "guardian," a person who has been appointed by the court to act on behalf of a ward's person, property, or both;[11] and "court monitor," a person appointed by the court pursuant to s. 744.107, F.S., to provide the court with information concerning a ward.[12]

Determining Incapacity

Section 744.331, F.S., sets forth the procedures for determining whether a person is incapacitated. The notice of filing of a petition to determine incapacity and the petition for appointment of a guardian must be read to the alleged incapacitated person; the person must be provided with an attorney, who cannot serve as the guardian or counsel for the guardian; and within five days of filing a petition for determination of incapacity, the court must appoint a examining committee which must include a psychiatrist or physician and two other persons, such as a psychologist, a nurse, social worker, gerontologist, or other qualified persons with sufficient knowledge, skill, experience, or training.[13] Each committee member must examine the person and then issue a joint report evaluating the person's mental health, functional ability, and physical health.[14] If the committee determines that the person is not incapacitated in any respect, the court must dismiss the petition.[15] Pursuant to s. 744.331(6), F.S., if the court finds by clear and convincing evidence that the person is incapacitated, the court must enter a written order determining the person's incapacity, although such incapacity shall extend only to the rights specified in the order. Section 744.331(6)(b), F.S., provides that the "court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward." Section 744.331(6)(f), F.S., provides that "[w]hen an order is entered which determines a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights."

Powers of Guardian Upon Court Approval

Section 744.441(11), F.S., provides that a plenary or limited guardian of the property may "[p]rosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in performance of his or her duties."[16] Other powers given under s. 744.441, F.S., and which a guardian may only exercise with court approval, include executing, exercising, or releasing any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised if not incapacitated, if the execution, exercise, or release would be in the best interest of the ward.[17] Additionally, a guardian may "[c]reate revocable or irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning."[18] Thus, it appears that a guardian may exercise powers over a revocable trust, which might include the power to revoke the trust.

Court-Appointed Guardianship Monitors

The "front end" of adult guardianship is the determination of incapacity and appointment of a guardian, and the "back end" is accountability of the guardian and court monitoring.[19] Court monitoring of guardianship is vital to the protection of the ward by providing the court with a way to verify the financial accounts the guardian provides to the court.[20] Verifying information in personal-status reports requires

[10] S. 744.102(20), F.S.
[11] *Id.* at (8).
[12] *Id.* at (5).
[13] S. 744.333(1)-(3)(a), F.S.
[14] *Id.* at (3)(b)-(c).
[15] *Id.* at (4).
[16] S. 744.411(11), F.S.
[17] *Id.* at (2).
[18] *Id.* at (19).
[19] Hurme, *Guardian Accountability*, 31 STETSON L. REV. at 867.
[20] *Id.* at 907.

more personal involvement by the court and is best accomplished by someone who can visit the ward to ascertain the suitability of the ward's living arrangements, the frequency of guardian visits, and the implementation of the care plan.[21]

Court Monitors

Section 744.107, F.S., allows the court to appoint a monitor "upon inquiry from any interested person" or on its own motion. The monitor has authority to "investigate, seek information, examine documents, or interview the ward," and to present a report of such findings to the court.[22] A family member or any other person with an interest in the proceedings may not serve as a monitor.[23] A monitor may be paid a reasonable fee from the property of the ward, but no state, county, or municipal employee may be paid a fee for serving as a monitor.[24]

This section gives the trial court broad authority to appoint a monitor in guardianship cases, but the statute has been criticized for its lack of guidelines regarding how the court-appointed monitor should perform his or her duties.[25] In 2003, the Florida Supreme Court's Commission on Fairness, Committee on Court Monitoring, issued a report and recommendations finding that greater oversight of court monitors was warranted and recommending an overhaul and expansion of the court monitoring statute.[26]

Effect of the Bill

Trusts

This bill amends s. 737.2065, F.S. to create an exception to the prohibition on filing an action against a trust prior to that trust becoming irrevocable. Under this bill, a challenge to the trust could only be brought by a court-appointed guardian of the person of the incompetent ward/settlor of the trust, and the court would have to make a finding that the challenge to the trust was in the ward's best interests during his or her probable lifetime. This bill creates a requirement that, if the court denied the guardian's request, the court must review whether the ward was still in need of a guardian and whether the current delegation of rights was appropriate to serve the ward's needs. Unless there is a court-appointed guardian of the property of an incapacitated settlor, there cannot be any contest challenging the trust before it becomes irrevocable because, presumably, a competent trust settlor can personally revoke or amend the trust as necessary during the settlor's lifetime.[27]

Guardianship

This bill amends s. 744.331, F.S. to require that when a court finds by clear and convincing evidence that a person is incapacitated, the court must enter a written order determining such incapacity, but that the incapacity may only extend to the rights specified in the order. When entering an order of incapacity, the court must consider and determine whether or not there is an alternative to guardianship that will sufficiently meet the needs of the incapacitated person. Unless the court finds that there is a suitable alternative that will sufficiently address the problems of the incapacitated person, a guardian must be appointed. Additionally, this bill amends s 744.331, F.S. to provide that when an interested person files a verified statement asserting a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid, and a reasonable factual basis for the belief is given, the existence of such an instrument is not considered an alternative to the appointment of a guardian. However, the appointment of a guardian does not preclude the court from determining

[21] *Id.* at 907-08.
[22] S. 744.107, F.S.
[23] *Id.*
[24] *Id.*
[25] The Florida Bar, Real Property, Probate, and Trust Law Section, White Paper on PROPOSED AMENDMENTS TO CHAPTERS 737 & 744, F.S.
[26] *Id.*
[27] *Id.*

that specific authority established by a durable power of attorney may still be exercised by the attorney in fact.

This bill amends s. 744.107, F.S. to provide for service of the order of appointment and the monitor's report upon the guardian, the ward, the respective attorneys and other persons, as determined by the court. The bill also authorizes, if necessary, further action by the court to protect the interests of the ward. If further action is warranted upon receipt of the monitor's report, the trial court must conduct a noticed hearing and then take whatever action is necessary to protect the assets of the ward's estate, including suspending a guardian or taking steps to remove a guardian.

This bill amends s. 744.441(11), F.S. to provide that before a guardian may bring an action pursuant to s. 737.2065, F.S., contesting the validity of a trust, the court must first find that the action appears to be in the ward's best interest during the ward's probable lifetime. Furthermore, if the court denies the guardian's request to bring an action under s. 737.2065, F.S., the court must review the ward's continued need for a guardian and the extent of that need, if any.

The bill creates a new section, s. 744.462, F.S., which provides a framework after a guardian has been appointed through which the court may respond to new developments or information which may affect the guardianship proceeding. This section authorizes the court to review the extent of the ward's continued need for a guardian in the event of any new developments such as a judicial determination of the existence of a valid durable power of attorney or a valid trust amendment.

Emergency Court Monitors

The bill also creates s. 744.1075, F.S. to provide that a court may, upon inquiry from any interested person or upon its own motion, appoint a court monitor on an emergency basis without notice. The limitation on this authority is that the court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.[28]

The court order must specifically name the powers and duties of the monitor and the matters to be investigated. Fifteen days after entering the order of appointment, the monitor must file a verified report of findings and recommendations to the court, along with supporting documents or evidence. After reviewing the monitor's report, the court shall determine whether there is probable cause to take further action on behalf of the ward's person or property. If there is no probable cause, the court shall issue an order so stating and discharge the monitor.

However, if probable cause exists, the court must issue a show cause order directing the guardian or other respondent to state the essential facts constituting the charge and directing the respondent to appear and show cause as to why the court should not take further action. The order shall name a time and place for a hearing and provide "a reasonable time to allow for the preparation of a defense after service of the order." The authority of an emergency monitor is limited to sixty days or until an order showing no cause is issued, whichever occurs first. However, the monitor's authority may be extended by thirty days if there is a showing that emergency conditions still exist. Prior to the hearing on the order to show cause, the court may take action to protect the ward's physical or mental health, safety, or assets, including issuing a temporary injunction, restraining order, or an order freezing assets. The court shall give a copy of such order to all parties. After the hearing on the show cause order, the court may impose sanctions on the guardian, his or her attorney, or any other respondent. The court may also take any other action authorized by law, including entering a judgment of contempt, ordering an accounting, freezing assets, referring the case for criminal charges, filing a complaint with the Department of Children and Families Services, or initiating proceedings to remove a guardian.

[28] S. 744.1075(1), F.S.

Finally, a monitor may be paid a reasonable fee, as determined by the court, which shall be paid from the ward's property. An employee of the state, county, or municipality may not be compensated for conducting an investigation and providing such a report. If the court finds that the motion for a court monitor was filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

C. SECTION DIRECTORY:

Section 1. Amends s. 737.2065, F.S., to state that the guardian of the property for an incapacitated grantor may initiate a trust contest prior to the trust becoming irrevocable.

Section 2. Amends s. 744.107, F.S., to establish certain restrictions upon whom the court may name as a monitor, listing certain individuals who have a right to receive the monitor's report, and granting the court power to conduct a hearing should the monitor's report warrant action on behalf of the ward.

Section 3. Creates s. 744.1075, F.S., establishing guidelines whereby a court may sua sponte appoint a court monitor on an emergency basis without notice.

Section 4. Amends s. 744.331(6)(b) and (f), F.S., regarding procedures to determine incapacity, setting forth procedures for the court to follow when entering an order of incapacity, and establishing requirements for an interested person who wishes to challenge the validity of an incapacitated person's trust, trust amendment, or durable power of attorney.

Section 5. Amends s. 744.441(11), F.S., to require a finding by the court that an action to be commenced by the guardian appears to be in the ward's best interests, and stating that if the court denies the guardian's request, the court shall review the ward's continued need for a guardian.

Section 6. Creates s. 744.462, F.S., to require that any judicial determination concerning the validity of an instrument concerning the ward's property must be promptly recorded in the guardianship proceeding and stating that, under certain circumstances, the court shall review the ward's continued need for a guardian.

Section 7. Provides that this bill shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Agency for Persons with Disabilities and the Department of Children and Family Services reported no fiscal impact to their agencies. Neither the Office of the State Courts Administrator nor the Department of Elder Affairs provided a written fiscal analysis.

   However, it appears that the impact on the state court system will be minimal in the initial years. In the long term, as the state population grows and ages and a larger number of individuals are provided guardians, judicial circuits may be required to employ additional court monitors and other support staff.

   Also, please see "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides that the fee for a monitor, as determined by the court, may be paid from the assets of the ward. These fees vary, but may run from $500 - $1200. While this may result in a financial consequence to the ward, it may be offset by savings that will result if the monitor prevents his or her assets from being mismanaged by a guardian.

D. FISCAL COMMENTS:

The bill provides that the fee for a monitor, as determined by the court, may be paid from the assets of the ward. The bill, as well as existing law, is silent on the issue of an indigent ward that does not have sufficient assets to pay the monitor. Currently, some private court monitors provide their services pro bono to indigent wards, and some judicial circuits have court monitors on staff who could provide services to indigent wards. Existing law specifically prohibits such payments to full time state, county or municipal employees or officers.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that counties and municipalities have to raise revenue.

2. Other:

The bill provides that the court may, under certain circumstances, appoint a court monitor on an emergency basis without notice, which could raise due process concerns. Minimal procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may take advantage of that right, they must be notified. Issues associated with such due process concerns were raised and discussed as the Supreme Court's Commission on Fairness, Committee on Guardianship Monitoring explored guardianship monitoring in Florida. The Committee concluded:

> Attorneys and professional guardians who appeared before the committee repeatedly expressed concern about due process issues associated with confidential communications between the court and the guardianship monitor. The committee thoroughly explored and debated the matter. While the committee is sensitive to the fact that attorneys and guardians may perceive there is a potential ex parte communication issue, the committee believes that in reality there is no impropriety as long as proper court procedures are established, published, and followed. Because the guardianship monitor is an arm of the court and works at the direction of the judge, it is permissible for communication between the court and monitor to be confidential (see, for example, rule 2.051(c)(3)(b), Florida Rules of Judicial Administration). Nevertheless, the committee recommends that insofar as possible, the monitoring process should be transparent and open, and all communications between the monitor and the judge should be in writing, becomes part of the confidential portion of the court file, and copies provided to counsel and other interested persons as prescribed by Florida law.[29]

[29] Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Wards. Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, 2003 [hereinafter Guardianship Monitoring in Florida].

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Guardianship Monitoring

A guardian is essentially a surrogate decision-maker for an adult with disabilities who has been adjudicated incapacitated or for a minor without parents.[30] "When the court removes an adult's rights to order his or her own affairs, there is an accompanying duty to protect the individual."[31] While guardianship proceedings are initiated by an adversarial hearing, once incapacity has been determined, there are typically no "adversaries" to raise issues before the court. Hence, the courts must be proactive to detect and respond to disputes. Guardianship monitoring is a mechanism Florida courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected.[32]

In 1999, former Chief Justice Major B. Harding directed the Supreme Court Commission on Fairness to investigate and report on various models for guardianship monitoring.[33] The Commission established the Guardianship Monitoring Committee ("Committee") with a membership that included probate judges, chief judges, court staff, representatives of the Statewide Public Guardianship Office, attorneys with experience in guardianship matters, academics, and professionals in the field of social work, all with considerable direct experience. The Committee reviewed available literature on the subject, visited Florida courts that are experimenting with innovative guardianship monitoring methods, and conducted public hearings around the state to receive input from guardians, clerks of court, attorneys, advocates, and other interested persons. The Committee found that while most guardians and attorneys do an admirable job, more active oversight is necessary in guardianship cases.[34]

As a result of its work, the Committee adopted a number of findings, including the following:

- An ideal guardianship monitoring program encompasses four major service areas: (1) initial and ongoing screening and reviewing of guardians; (2) reporting on the well-being of the ward; (3) reporting on the protection of the ward's assets; and (4) case administration.
- Minimum requirements for guardianship monitoring should be established and the monitoring process should be well-defined.
- Insofar as possible, the monitoring process should be transparent and open, and communication between the monitor and the judge should be in writing and become part of the official court record.
- It is sound public policy for guardianship monitoring to be available in every judicial circuit.
- Monitoring will require additional resources in order to adequately oversee guardianship cases. The cost of monitoring can be mitigated through the effective use of technology.
- Existing guardianship monitoring programs that utilize well-trained and experienced professional staff are working well.

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[30] Guardianship Monitoring in Florida provides a more thorough definition. It provides that a guardian is a "surrogate decision-maker appointed by the court to make personal and/or financial decisions either (1) for an adult with mental or physical disabilities who has been adjudicated incapacitated; or (2) for a minor in circumstances where the parents die or become incapacitated or if a child receives an inheritance, proceeds of a lawsuit, or insurance policy exceeding the amount allowed by state statute." Guardianship Monitoring in Florida, *supra* at 3

[31] *Id.*

[32] Guardianship Monitoring in Florida, *supra* at 5.

[33] *Id.*

[34] Guardianship Monitoring in Florida, *supra* at 6.

- Monitoring programs that rely entirely upon volunteers are not always efficient and effective. Although well intentioned, volunteers often lack knowledge and experience with the complex medical, legal, and financial issues involved in adult guardianship cases.

- There is a need to recruit highly qualified, motivated, and trained professionals into the guardianship field; both as guardians and attorneys.[35]

The bill expands the provisions for the appointment of court monitors without incorporating all findings of the Committee.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 25, 2005, the Civil Justice Committee adopted two amendments to the bill. The amendments were technical in nature and were intended to conform the bill to HB 425. The bill was then reported favorably with a committee substitute.

[35] Guardianship Monitoring in Florida, *supra* at 4.

CHAMBER ACTION

The Civil Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to guardianship; amending s. 737.2065, F.S.; excepting the contesting of trust validity by property guardians of incapacitated settlors from a prohibition against commencing certain actions; amending s. 744.107, F.S.; revising provisions relating to court monitors; requiring orders of appointment and monitors' reports to be served upon certain persons; authorizing the court to determine which persons may inspect certain orders or reports; authorizing the court to enter any order necessary to protect a ward or ward's estate; requiring notice and hearing; authorizing a court to assess certain costs and attorney's fees under certain circumstances; creating s. 744.1075, F.S.; authorizing a court to appoint a court monitor on an emergency basis under certain circumstances; requiring the court to make certain findings; specifying a time period for a monitor's authority; providing for extending such time period; requiring the monitor to report findings and

recommendations; providing duties of the court relating to probable cause for the emergency appointment; authorizing the court to determine which persons may inspect certain orders or reports; providing requirements for a court order to show cause for the emergency appointment; authorizing the court to issue certain injunctions or orders for certain purposes; requiring the court to provide copies of such injunctions or orders to all parties; authorizing the court to impose sanctions or take certain enforcement actions; providing for payment of reasonable fees to the monitor; prohibiting certain persons from receiving certain fees; authorizing a court to assess certain costs and attorney's fees under certain circumstances; amending s. 744.331, F.S.; requiring a court to determine whether acceptable alternatives to guardianship of incapacitated persons exist under certain circumstances; requiring appointment of a guardian if no alternative exists; prohibiting such appointment if an alternative exists; specifying circumstances of nonexistence of an alternative; preserving certain court authority to determine exercise of certain powers of attorney; amending s. 744.441, F.S.; requiring a court to make certain findings in a ward's best interest before authorizing a guardian to bring certain actions; requiring a court to review certain continuing needs for guardians and delegation of a ward's rights; creating s. 744.462, F.S.; requiring guardians to immediately report certain judicial determinations in certain guardianship

proceedings; requiring a court to review certain continuing needs for guardians and delegation of a ward's rights under certain circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 737.2065, Florida Statutes, is amended to read:

737.2065 Trust contests.--An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable, except this section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Section 2. Section 744.107, Florida Statutes, is amended to read:

744.107 Court monitors.--

(1) The court may, upon inquiry from any interested person or upon its own motion in any proceeding over which it has jurisdiction, appoint a monitor. The court shall not appoint as a monitor a family member or any person with a personal interest in the proceedings. The order of appointment shall be served upon the guardian, the ward, and such other persons as the court may determine.

(2) The monitor may investigate, seek information, examine documents, or interview the ward and shall report to the court his or her findings. The report shall be verified and shall be served on the guardian, the ward, and such other persons as the

court may determine. ~~The court shall not appoint as a monitor a family member or any person with a personal interest in the proceedings.~~

(3) If it appears from the monitor's report that further action by the court to protect the interests of the ward is necessary, the court shall, after a hearing with notice, enter any order necessary to protect the ward or the ward's estate, including amending the plan, requiring an accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.

(4) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds the motion for court monitor to have been filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

Section 3. Section 744.1075, Florida Statutes, is created to read:

744.1075 Emergency court monitor.--

(1)(a) A court, upon inquiry from any interested person or upon its own motion, in any proceeding over which the court has jurisdiction, may appoint a court monitor on an emergency basis without notice. The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated,

or lost unless immediate action is taken. The scope of the matters to be investigated and the powers and duties of the monitor must be specifically enumerated by court order.

(b) The authority of a monitor appointed under this section expires 60 days after the date of appointment or upon a finding of no probable cause, whichever occurs first. The authority of the monitor may be extended for an additional 30 days upon a showing that the emergency conditions still exist.

(2) Within 15 days after the entry of the order of appointment, the monitor shall file his or her report of findings and recommendations to the court. The report shall be verified and may be supported by documents or other evidence.

(3) Upon review of the report, the court shall determine whether there is probable cause to take further action to protect the person or property of the ward. If the court finds no probable cause, the court shall issue an order finding no probable cause and discharging the monitor.

(4)(a) If the court finds probable cause, the court shall issue an order to show cause directed to the guardian or other respondent stating the essential facts constituting the conduct charged and requiring the respondent to appear before the court to show cause why the court should not take further action. The order shall specify the time and place of the hearing with a reasonable time to allow for the preparation of a defense after service of the order.

(b) At any time prior to the hearing on the order to show cause, the court may issue a temporary injunction, a restraining order, or an order freezing assets, may suspend the guardian or

appoint a guardian ad litem, or may issue any other appropriate order to protect the physical or mental health or safety or property of the ward. A copy of all such orders or injunctions shall be transmitted by the court or under its direction to all parties at the time of entry of the order or injunction.

(c) Following a hearing on the order to show cause, the court may impose sanctions on the guardian or his or her attorney or other respondent or take any other action authorized by law, including entering a judgment of contempt, ordering an accounting, freezing assets, referring the case to local law enforcement agencies or the state attorney, filing an abuse, neglect, or exploitation complaint with the Department of Children and Family Services, or initiating proceedings to remove the guardian.

(5) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds the motion for a court monitor to have been filed in bad faith, the costs of the proceeding, including attorney's fees, may be assessed against the movant.

Section 4. Paragraphs (b) and (f) of subsection (6) of section 744.331, Florida Statutes, are amended to read:

744.331 Procedures to determine incapacity.--

(6) ORDER DETERMINING INCAPACITY.--If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to

the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity. A person is determined to be incapacitated only with respect to those rights specified in the order.

(b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person. A guardian must be appointed to exercise the incapacitated person's delegable rights unless the court finds there is an alternative. A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person ~~In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward~~.

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief,

the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a

durable power of attorney is to remain exercisable by the attorney in fact ~~When an order is entered which determines that a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights~~.

Section 5. Subsection (11) of section 744.441, Florida Statutes, is amended to read:

744.441 Powers of guardian upon court approval.--After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in s. 737.2065, the court shall first find that the action appears to be in the ward's best interests during the ward's probable lifetime. If the court denies a request that a guardian be authorized to bring an action described in s. 737.2065, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 6. Section 744.462, Florida Statutes, is created to read:

744.462 Determination regarding alternatives to guardianship.--Any judicial determination concerning the validity of the ward's durable power of attorney, trust, or trust amendment shall be promptly reported in the guardianship

proceeding by the guardian of the property. If the instrument has been judicially determined to be valid or if, after the appointment of a guardian, a petition is filed alleging that there is an alternative to guardianship which will sufficiently address the problems of the ward, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 7. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 193 Public Records Exemptions
SPONSOR(S): Bogdanoff
TIED BILLS: HB 191 **IDEN./SIM. BILLS:** SB 358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N	Shaddock	Bond
2) Governmental Operations Committee	6 Y, 0 N	Williamson	Williamson
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

A court monitor is a person appointed by a court in a guardianship case to oversee a guardian. A court monitor may be appointed without notice to the guardian in cases where the court does not want the guardian to be warned of the oversight. Reports filed with the court by a court monitor may contain confidential medical and financial information regarding the ward.

This bill provides that certain court orders appointing a court monitor and discharging a court monitor, and certain reports filed by an appointed court monitor, are confidential and exempt from public disclosure.

This bill does not appear to have a fiscal impact on state or local government.

The bill requires a two-thirds vote of the members present and voting for passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill decreases access to public records.

B. EFFECT OF PROPOSED CHANGES:

Current Law

Section 744.107, F.S., allows the court to appoint a monitor "upon inquiry from any interested person" or upon its own motion. The monitor has authority to "investigate, seek information, examine documents, or interview the ward," and to present a report of such findings to the court.[1] A family member or any other person with an interest in the proceedings may not serve as a monitor.[2] A monitor may be paid a reasonable fee from the property of the ward, but no state, county, or municipal employee shall be paid a fee for serving as a monitor.[3] The orders appointing court monitors and the reports of court monitors are not currently exempt from public disclosure.

HB 191

A court monitor is responsible for providing a court with information regarding how well a ward is functioning under the care of a guardian. HB 191 gives a court the authority to take any action necessary to protect a ward depending upon the information presented to the court by a monitor. The bill also gives authority to a court to appoint an emergency court monitor if the ward appears to be in imminent danger of physical or mental harm; the safety of the ward could be seriously impaired; or the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The bill specifies the powers, compensation, and length of service of an emergency court monitor.

HB 193

This bill makes the order of any court appointing a monitor pursuant to s. 744.107, F.S., and the required reports submitted by such monitors relating to the medical condition, financial affairs, or mental health of the ward, confidential and exempt from the requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution.[4] While these reports and orders are confidential[5], they may be subject to inspection as determined by the court or upon a showing of good cause.

In addition, this bill makes the order of any court appointing a monitor on an emergency basis, pursuant to proposed s. 744.1075, F.S. the reports submitted by such monitors relating to the medical condition, financial affairs, or mental health of the ward, and subsequent court orders finding no probable cause or orders to show cause, confidential and exempt from s. 119.07(1) F.S. and s. 24(a), Art. I of the

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[1] Section 744.107, F.S.
[2] *Id.*
[3] *Id.*
[4] There is a difference between information and records that the Legislature has designated exempt from public disclosure and those the Legislature has deemed confidential and exempt. Information and records classified exempt from public disclosure are permitted to be disclosed under certain circumstances. *See City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than the persons or entities specifically designated in the statutory exemption. *See Attorney General Opinion 85-62*, August 1, 1985.
[5] Section 744.1076(1)(a)-(b), F.S.

Florida Constitution. These orders and reports, however, may be subject to inspection as determined by the court or upon a showing of good cause.[6]

Additionally, a court determination that no probable cause exists, pursuant to s. 744.107, F.S. or s. 744.1075, F.S. are confidential and exempt from s. 119.07(1) F.S. and s. 24(a), Art. I of the Florida Constitution. However, like the other sections these documents may be subject to inspection as determined by the court or upon a showing of good cause.[7]

C. SECTION DIRECTORY:

Section 1. Creates s. 744.1076, F.S., creating a public records exemption for the order of any court appointing a court monitor, and any order appointing a court monitor on an emergency basis.

Section 2. Provides a statement of public necessity.

Section 3. Provides a contingent effective date.

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:

None.

D. FISCAL COMMENTS:

The public records law in general creates a significant, although unquantifiable, increase in government spending. Government employees must locate requested documents and information, and must examine every requested document or piece of information to determine if a public records exemption prohibits release of the document or information. Passage of any new public records exemption will result in a minimal negative non-recurring fiscal impact, because governments will be required to communicate the new exemption to employees responsible for complying with public records requests. Every public records exemption also represents an unknown negative recurring expense to governments, as each exemption slightly increases the number and complexity of the training and management materials required to be maintained by governments, further complicates the process of complying with public records requests, and increases the chances that a government will be involved in litigation. There is no known reliable method for determining the marginal fiscal impact attributable to a single public records exemption.

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[6] Section 744.1076(2)(b), F.S.

[7] Section 744.1076(3), F.S.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that counties and municipalities have to raise revenue.

2. Other:

Article I, s. 24(c), of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public records or public meetings exemption.

Public Records Law

Article I, s. 24(a), of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of the government.

In general, "all court records are presumed open."[8] Subject to the rulemaking power of the Florida Supreme Court, as provided by art. V, s. 2, of the Florida Constitution, the public shall have access to all records of the judicial branch of government and its agencies, except as otherwise provided.[9] Various court records are presently deemed confidential by court rule, by Florida Statutes, and by prior case law of the state.[10]

The Legislature may provide for the exemption of records from the requirements of Art. I, s. 24, by passage of a general law. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is also addressed in s. 119.07(1), F.S., which guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act of 1995, s. 119.15, F.S., provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet one of the following public purposes: 1) allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2) protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety, although only the individual's identity may be exempted under this provision; or 3) protecting trade or business secrets.

B. RULE-MAKING AUTHORITY:

This bill does not grant rule-making authority to any administrative agency.

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[8] *Times Publishing Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995).
[9] *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records*, 651 So. 2d 1185, 1188 (Fla. 1995).
[10] *Id.* at 1189; Rule of Judicial Administration 2.051(c)(9).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to public records exemptions; creating s. 744.1076, F.S.; creating exemptions from public records requirements for certain court records relating to appointment of certain court monitors, reports of such monitors, and determinations and orders of a court relating to findings of no probable cause; providing for future legislative review and repeal; providing findings of public necessity; providing a contingent effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 744.1076, Florida Statutes, is created to read:

744.1076 Court orders appointing court monitors and emergency court monitors; reports of court monitors; findings of no probable cause; public records exemptions.--

(1)(a) The order of any court appointing a court monitor pursuant to s. 744.107 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(b) The reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward that are required pursuant to s. 744.107 are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such reports may be subject to inspection as determined by the court or upon a showing of good cause.

(c) The public records exemptions provided in this subsection expire if a court makes a finding of probable cause, except that information otherwise made confidential or exempt shall retain its confidential or exempt status.

(2)(a) The order of any court appointing a court monitor on an emergency basis pursuant to s. 744.1075 is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(b) The reports of a court monitor appointed on an emergency basis relating to the medical condition, financial affairs, or mental health of the ward that are required pursuant to s. 744.1075 are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such reports may be subject to inspection as determined by the court or upon a showing of good cause.

(c) The public records exemptions provided in this subsection expire if a court makes a finding of probable cause, except that information otherwise made confidential or exempt shall retain its confidential or exempt status.

(3) Court determinations relating to a finding of no probable cause and court orders finding no probable cause pursuant to s. 744.107 or s. 744.1075 are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution; however, such determinations and findings may be subject to inspection as determined by the court or upon a showing of good cause.

(4) This section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15 and shall stand

repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. (1) The Legislature finds that it is a public necessity that the order of any court appointing a court monitor pursuant to s. 744.107, Florida Statutes, or appointing a court monitor on an emergency basis pursuant to s. 744.1075, Florida Statutes, be made exempt from public records requirements. The Legislature finds that the release of the exempt order would produce undue harm to the ward. In many instances, a court monitor is appointed to investigate allegations that may rise to the level of physical neglect or abuse or financial exploitation. When such allegations are involved, if the order of appointment is public, the target of the investigation may be made aware of the investigation before the investigation is even underway, raising the risk of concealment of evidence, intimidation of witnesses, or retaliation against the reporter. The Legislature finds that public disclosure of the exempt order would hinder the ability of the monitor to conduct an accurate investigation if evidence has been concealed and witnesses have been intimidated.

(2) The Legislature finds that it is a public necessity that the reports of a court monitor or a court monitor appointed on an emergency basis, relating to the medical condition, financial affairs, or mental health of the ward, be made confidential and exempt from public records requirements. The Legislature finds that the release of the confidential and exempt reports would produce undue harm to the ward. Release of the confidential and exempt reports could hinder the ability of

the monitor to conduct an investigation and interview parties because many parties involved in such an investigation would be reluctant to speak to a court monitor knowing that the information provided would be public. Protecting reports relating to the medical condition, financial affairs, or mental health of a ward would provide an environment in which to discuss information in a free and open way and would allow the court monitor to develop the information needed for reporting purposes. Furthermore, information contained in the reports relating to the medical condition, financial affairs, or mental health of a ward contains sensitive, personal information that, if released, could cause harm or embarrassment to the ward or his or her family.

(3) The Legislature finds that it is a public necessity that court determinations relating to a finding of no probable cause and court orders finding no probable cause be made confidential and exempt from public records requirements. Unfounded allegations against a guardian are sometimes made by individuals for unscrupulous reasons. Release of unfounded allegations could be damaging to the reputation of a guardian and could cause undue embarrassment as well as invade the guardian's privacy. If such information were released, it could have a negative impact on the guardian and the ward of that guardian. The guardian program relies heavily on volunteers and, as such, volunteers could be reticent to serve as the guardian of a ward. The release of such information could cause undue harm to a guardian who is the subject of an allegation for which no probable cause has been found.

(4) The public's ability to scrutinize and monitor the actions of the court is not diminished by nondisclosure of the exempt court order and the confidential and exempt reports because the exemptions expire if the court has made a finding of probable cause. In addition, such information could also be made public upon a showing of good cause.

Section 3. This act shall take effect on the same date that House Bill 191 or substantially similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 221 CS Paternity
SPONSOR(S): Richardson; Kendrick
TIED BILLS: None. **IDEN./SIM. BILLS:** SB 438

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N	Shaddock	Bond
2) Future of Florida's Families Committee	7 Y, 0 N, w/CS	Preston	Collins
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Paternity is the state or condition of being a father to a child. A child born during a valid marriage is presumed to be the legitimate and legal child of the husband and wife, whereas paternity must be established for children born out of wedlock. Current law does not provide a means for challenging a judgment of paternity, but a general court rule applicable to all civil actions effectively prohibits a father from challenging a paternity determination later than one year after entry of the judgment.

This bill provides that a father may challenge a paternity judgment at any time until the child's 18th birthday, provided that DNA testing shows he is not the biological father and other specified conditions are met. If the father prevails, his future child support obligations will terminate.

This bill may have an unknown but negative recurring fiscal impact on state government revenues. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- This bill may allow a father to, years after the entry of a paternity judgment, set the judgment aside and stop paying child support. This may result in mothers and their children losing court ordered support, and force them into seeking public assistance until the actual father can be found (if he can be).

Empower families -- This bill allows a man required to pay child support as the father of a child to petition to set aside the determination of paternity upon meeting certain conditions. This may have the effect of affecting relationships between family members and may decrease family stability.

B. EFFECT OF PROPOSED CHANGES:

Establishment of Paternity

A child born during a valid marriage is presumed to be the legitimate and legal child of the husband and wife.[1] Paternity is defined as "the state or condition of being a father."[2] In order to establish paternity for children born out of wedlock, s. 742.10, F.S., sets forth the criteria. A determination of paternity must be established by clear and convincing evidence.[3] In any proceeding to establish paternity, the court may on its own motion require the child, the mother, and the alleged father to submit to scientific tests generally relied upon for establishing paternity.[4] A woman who is pregnant or who has a child, any man who has reason to believe he is the father of a child, or any child may bring a proceeding to determine the paternity of the child when the paternity has not otherwise been established.[5]

A male can acknowledge paternity by a notarized voluntary acknowledgement or a voluntary acknowledgement signed under penalty of perjury in the presence of two witnesses. These acknowledgements create a rebuttable presumption of paternity, subject to the right of rescission within 60 days of the date of signing the acknowledgement.[6] After the expiration of the 60-day period, the signed voluntary acknowledgement of paternity constitutes an establishment of paternity and is only subject to challenge in court on the basis of fraud, duress, or material mistake of fact.[7] However, the challenger to the determination of paternity is still responsible for his legal responsibilities, including child support, during the pendency of the challenge, except upon a finding of good cause by the court.[8]

Currently, there is no statute authorizing a male who has been determined to be the father of a child to challenge that determination and be discharged from making child support payments. In order for a man determined to be the father of a child to be relieved of his child support obligation, he must bring an action pursuant to Florida Rules of Civil Procedure 12.540[9] and 1.540. Rule 1.540(b), entitled "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.," states in pertinent part that a party may file a motion for relief:

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[1] Section 382.013(2)(a), F.S.; *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1059 (Fla. 2d DCA 2004) (citations omitted).
[2] Black's Law Dictionary, 1163 (rev. 8th ed. 2004)
[3] Section 742.031, F.S.; *T.J. v. Dep't of Children & Families*, 860 So. 2d 517, 518 (Fla. 4th DCA 2003).
[4] Section 742.12(1), F.S.
[5] Section 742.011, F.S.
[6] Section 742.10(1), F.S.
[7] Section 742.10(4), F.S.
[8] *Id.*
[9] Rule 12.540 provides that Rule 1.540 "shall govern general provisions concerning relief from judgment, decrees, or orders, except that there shall be no time limit for motions based on fraudulent financial affidavits in marital or paternity cases."

> from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . *The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken.* A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court. *[emphasis in italics not in original]*

Once paternity has been adjudicated, unless there is a showing of fraud upon the court, "a paternity order is res judicata on the issue of paternity, and relitigation of the paternity issues is unauthorized in connection with any subsequently-filed motion for contempt for failure to pay court-ordered child support."[10] A final judgment of dissolution of marriage that establishes a child support obligation for a former husband is a final determination of paternity, and any subsequent paternity challenge must be brought pursuant to rule 1.540.[11]

In other words, the key section of the above rule under which a petitioner may seek relief from an order of paternity is Rule 1.540(b)(3) (the fraud provision). A petition would be required to demonstrate fraud, either extrinsic or intrinsic, within the one year time limitation imposed by the rule.

Extrinsic fraud "occurs where a defendant has somehow been prevented from participating in a cause."[12] [13] One may seek relief from extrinsic fraud by filing an independent action in equity attacking the final judgment.[14] Nevertheless, due to the constraints of the definition, extrinsic fraud generally is not available as an avenue for relief for a petitioner seeking relief from an adverse paternity finding.

Intrinsic fraud, on the other hand, is fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried.[15] The Florida Supreme Court has expressly found, consistent with the general rule, "that false testimony given in a proceeding is intrinsic fraud."[16] Florida Rule of Civil Procedure 1.540(b) authorizes an action for relief from a final judgment which was obtained through intrinsic fraud, among other grounds, but within a one-year time limitation.[17] Failure to act within that one year will preclude the court from hearing any additional evidence concerning paternity and will act as a procedural bar to a petitioner's relief.

In a non-marital paternity dispute, the Second District Court of Appeal has determined that a man who was informed by the mother that he was the father of her child, and who was named as the biological father in a final judgment of paternity, could not have the judgment of paternity vacated six years later

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[10] *Dep't of Revenue v. Clark*, 866 So. 2d 129 (Fla. 4th DCA 2004)(quoting *Dep't of Revenue v. Gouldbourne*, 648 So. 2d 856 (Fla. 4th DCA 1995)).
[11] *D.F. v. Dep't of Revenue*, 823 So. 2d 97, 100 (Fla. 2002).
[12] *DeClaire v. Yohanon*, 453 So. 2d 375, 377 (Fla. 1984).
[13] The Florida Supreme Court, in *DeClaire*, pointed to the United States Supreme Court's definition of extrinsic fraud as authoritative. *Declaire*, 453 So.2d at 377. That definition, from *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878), provides: Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side--these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. (Citations omitted.)
[14] *DeClaire*, 453 So. 2d at 378.
[15] *DeClaire*, 453 So. 2d at 379.
[16] *Id.*
[17] *DeClaire*, 453 So. 2d at 377.

absent a showing that the mother had committed a fraud on the court at the time of the original paternity action.[18] Any subsequent blood testing of the alleged father, mother, and child would not change the alleged father's monetary obligations to the child in the absence of proof of fraud on the court.[19] The fact that, six years later, the mother submitted an affidavit expressing her belief that the man paying child support was not the biological father, did not constitute evidence of fraud on the court.[20]

Furthermore, the Fifth District Court of Appeal on December 2, 2005, held that a trial court erred in setting aside a judgment of paternity to which father stipulated in 1991, and in reducing child support arrearages to zero, on ground that DNA test results showed zero percent probability of paternity.[21] The judgment could not be vacated under Rule 1.540(b)(3), since the motion was not timely filed within one year.[22] Additionally, the motion was premised on intrinsic fraud, it concerned allegations of perjury or misrepresentation, and the court could not properly vacate judgment under Rule 1.540(b)(5), which provides that court may relieve party from final judgment if it is no longer equitable that the judgment should have prospective application. Equity "is not available to deprive a child of parental support based on facts that could have been determined prior to entry of the stipulated judgment of paternity."[23] Therefore, the "judgment [was] entitled to res judicata effect."[24]

Finally, in an opinion released on November 30, 2005, the Fourth District Court of Appeal, was confronted with a situation in which a male and female were married when a child was born.[25] The female represented to the male that he was the biological father of the child. Three years later the couple was divorced and the male was obligated to pay child support. After the child's fifth birthday the former husband filed an action maintaining that he was not the child's biological father and DNA testing excluded him as such.[26] The former husband's petition was dismissed by the trial court and that decision was affirmed by the appellate court. The court grappled with what it termed a "fundamental choice" in a case such as the one before them "between the interests of the legal father on the one hand and the child on the other."[27] The main issue, according to the court, "affecting the child in a disestablishment suit is the psychological devastation that the child will undoubtedly experience from losing the only father he or she has ever known."[28] On the other hand, the former husband "may feel victimized,"[29] however, an adult is best able to "absorb the pain of betrayal rather than inflict additional betrayal on the involved children."[30] The court concluded, "the issue of paternity misrepresentation in marital dissolution proceedings is a matter of intrinsic fraud. It is not extrinsic fraud, or a fraud upon the court, that can form the basis for relief from judgment more than a year later. Any relevant policy considerations that would compel a different result are best addressed by the legislature."[31]

Effect of Bill

This bill provides an avenue for a male, in any action where he has been required to pay child support as the father of a child, to file a petition to set aside a determination of paternity. The petition to set aside may be filed at any time, up to the child's eighteenth (18th) birthday.

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[18] *State, Dep't of Revenue v. Pough*, 723 So. 2d 303, 306 (Fla. 2d DCA 1998).
[19] *Id.*
[20] *Id.*
[21] *Dep't of Revenue v. Boswell*, 915 So. 2d 717 (Fla. 5th DCA 2005).
[22] *Boswell*, 915 So. 2d at 723.
[23] *Boswell*, 915 So. 2d at 723.
[24] *Id.*
[25] *Parker v. Parker*, 2005 WL 3179971 (Fla. 4th DCA Nov. 30, 2005).
[26] *Id.*
[27] *Parker*, 2005 WL 3179971, *5.
[28] *Id.*
[29] *Parker*, 2005 WL 3179971, *6.
[30] *Parker*, 2005 WL 3179971, *6 (citation omitted).
[31] *Parker*, 2005 WL 3179971, *6.

A petition to set aside a determination of paternity must be filed in the circuit court and served on the mother or other legal guardian or custodian. If the support order was established administratively, the petition must also be served on the Department of Revenue. The petition must include:

- An affidavit from the petitioner affirming that newly discovered evidence relating to the paternity of a child has come to his knowledge since the entry of judgment;
- The results of scientific testing, generally accepted within the scientific community for showing a probability of paternity, administered within 90 days prior to the filing of such a petition, indicating that the male ordered to pay child support cannot be the father of the child for whom he is required to pay support or an affidavit from the petitioner stating he did not have access to the child to have the testing done; and
- An affidavit executed by the petitioner stating that he is current on all child support payments for the child whose paternity is in question or that he is substantially in compliance, with any delinquency being the result of an inability to pay.

The trial court must grant relief on a petition that complies with the above requirements if the court finds that all of the following have been met:

- Newly discovered evidence has come to the petitioner's knowledge since the initial paternity determination;
- The genetic test was properly conducted;
- The male is current on all child support payments for the child, or any delinquency in payments is the result of an inability to pay;
- The male ordered to pay child support has not adopted the child;
- The child was not conceived by artificial insemination while the child's mother and the male who is ordered to pay child support were married; and
- The male ordered to pay child support did not prevent the biological father of the child from asserting parental rights over the child.

The court shall not set aside the paternity determination or child support order if the male engaged in the following conduct after learning that he is not the biological father of the child:

- Married the child's mother and voluntarily assumed a parental obligation and duty to pay support;
- Acknowledged paternity of the child in a sworn statement;
- Consented to be named as the child's biological father on the child's birth certificate;
- Voluntarily promised in writing to support the child and was required to support the child based on that promise;
- Received and disregarded a written notice from any state agency or court instructing him to submit to genetic testing; or
- Signed a voluntary acknowledgement of paternity pursuant to section 742.10(4), Florida Statutes.

If the petitioner fails to make the showing required by this section, the court must deny the petition.

If the trial court grants relief, it must be limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. This section does not create a cause of action for the recovery of previously paid child support.

While the petition is pending, the duty to pay child support and other legal obligations for the child remain in effect and may not be suspended unless good cause is shown. The court may order child support payments to be held in the court registry until the final determination of paternity has been made.

If the genetic testing results are provided solely by the male ordered to pay child support, the court may, on its own motion, and must, on the motion of any party, order the child and the male to submit to genetic tests. This genetic testing must occur within 30 days of an order by the trial court.

Should the child's mother or the male ordered to pay child support willfully refuse to submit to genetic testing, or if either party, as custodian of the child, willfully fails to submit the child for testing, the court must issue an order granting relief on the petition against the party failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, the failure will not be considered willful.

The party requesting genetic testing must pay any fees charged for the tests. If the child's custodian receives services from an administrative agency providing enforcement of child support orders, the agency must pay the costs of genetic testing if it requests the test, and the agency may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

The bill provides a process for issuing a new birth certificate if relief is granted on a filed petition. Granting a petition does not affect the legitimacy of a child born during a lawful marriage.

If relief is not granted on a petition filed in accordance with this section, the court must assess costs and attorney's fees against the petitioner.

C. SECTION DIRECTORY:

Section 1. Creates an unnumbered section establishing grounds by which a man required to pay child support as the father of a child may petition to set aside a determination of paternity. The bill may fit within Chapter 742, Determination of Parentage, Chapter 39, Proceedings Relating to Children, or another provision of Florida Statutes.

Section 2. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Unknown, but it appears that this bill may have a negative recurring fiscal impact on state revenues. See Fiscal Comments.

2. Expenditures:

   Unknown, but it appears that this bill may have some impact on state government. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may relieve a financial burden on men ordered to pay child support for children who are not their biological children. Additionally, this bill authorizes setting aside of paternity determinations and stopping prospective child support payments and the cessation of these payments will undoubtedly impact the child(ren) and the mothers. Finally, a child who is legally considered to be the "child" of a male is entitled to inheritance rights that would also be eliminated should a paternity judgment be set aside.

D. FISCAL COMMENTS:

This bill may have a fiscal impact on the Department of Revenue, as the department would no longer be able to seek reimbursement for services provided to the mother from the male formerly determined to be the father. This bill may have a fiscal impact on the Department of Revenue, as the department would expend resources to locate the "new" father if there is a judicial determination on a petition to set aside a paternity that the original male who was required to pay child support payments is not the "father" of the child(ren). Also, loss of child support payments to a mother and her child(ren) may result in that family having to receive public assistance.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   Separation of Powers

   This bill might raise a separation of powers issue, because it allows for a petition to set aside a determination of paternity to be brought "at any time," although the procedural rules established by the Supreme Court restrict challenges to final orders and judgments to one year from entry of the judgment or order, except in cases of fraud upon the court. This bill could raise a constitutional concern if it were considered a procedural rather than a substantive law, although it can be argued that this bill constitutes substantive law.[32]

   With respect to the separation of powers issue, several Supreme Court justices and appellate court judges have urged the Legislature to address paternity issues, although the courts' concern seems to focus on the paternity of children whose mothers are married to men who are not the biological fathers of their children.[33]

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[32] Altenbernd, Quasi-Marital Children, 26 Fla. St. U. L. Rev. at 260-61 (noting that in a due process challenge, the Supreme Court has upheld a statute's conclusive presumption of fatherhood as a substantive rule of law supported by social policy concerns) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

[33] *Anderson v. Anderson*, 845 So. 2d 870, 872-874 (2003)(Pariente, J., dissenting); *D.F.*, 823 So. 2d at 101-03 (Pariente, J., concurring); *Fla. Dep't of Revenue v. M.L.S.*, 756 So. 2d 125, 127-33 (Altenbernd, J., dissenting); *Lefler*, 722 So. 2d at 942-44 (Klein, J., specially concurring).

In *Anderson*, the Florida Supreme Court noted that "this is another case requiring the Court to define the law regarding a child support obligation of a husband who is not the biological father of the child."[34] The supreme court upheld the trial court's determination that the father had not proven "'by a preponderance of the evidence that he had been defrauded into believing that the minor child was his.'"[35] Justice Pariente dissented, stating that:

> Cathy Anderson's unequivocal, affirmative response to Michael Anderson that the child was his constituted a misrepresentation under Florida Rule of Civil Procedure 1.540(b)(3) . . . . In light of this affirmative misrepresentation, it was error to refuse to set aside the final judgment of dissolution in this case based on his timely filed postjudgment motion.
>
> . . . a father should be able to rely on the unequivocal, affirmative representations of his wife that he is the father of her child, and should not be obligated to request DNA testing during the divorce action to disprove this presumed fact.[36]

In *D.F.,* where the supreme court held that a final judgment of dissolution of marriage establishing a child support obligation for a former husband is a final determination of paternity, subject to challenge only through rule 1.540, Justice Pariente concurred, stating:

> I write separately to urge the Legislature to address the difficult issues raised in cases such as this one. Cases involving the rights and responsibilities of biological and non-biological parents are no doubt fraught with difficult social issues that translate into complicated legal issues. The legal problems that arise are not limited to the area of child support, but also may arise in the area of probate, wrongful death, adoption, and actions to terminate parental rights.[37]

Finally, as mentioned above the Fourth District Court of Appeal, in *Parker*, stated, "the issue of paternity misrepresentation in marital dissolution proceedings is a matter of intrinsic fraud. It is not extrinsic fraud, or a fraud upon the court, that can form the basis for relief from judgment more than a year later. Any relevant policy considerations that would compel a different result are best addressed by the legislature."[38]

Due Process

The bill may infringe upon the child's due process rights by failing to provide the child with representation in a process which will significantly affect the child's legal rights and may leave him or her without a father and without financial support. A child has a constitutional due process right to retain his or her legitimacy if doing so is in the child's best interest.[39] The child has a strong interest in maintaining legitimacy and stability,[40] and the legal recognition of a biological father other than the legal father will affect the heretofore legal father's rights to the care, custody, and control of the child.[41] Because the law does not recognize "dual fathership,"[42] the entry of a judgment of paternity and,

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[34] *Anderson*, 845 So. 2d at 870.
[35] *Id.* at 871.
[36] *Id.* at 872-73.
[37] *D.F.*, 823 So. 2d at 101.
[38] *Parker*, 2005 WL 3179971, *6.
[39] *Dep't of Health & Rehab. Servs. v. Privette*, 716 So. 2d 305, 307 (Fla. 1993).
[40] *R.H.B. v. J.B.W.*, 826 So. 2d 346, 350 n.5 (Fla. 2d DCA 2002) (citation omitted).
[41] *Dep't of Revenue v. Cummings*, 871 So. 2d 1055, 1060 (Fla. 2d DCA 2004).
[42] *G.F.C. v. S.G.*, 686 So. 2d 1382, 1386 (Fla. 5th DCA 1997).

presumably, the entry of an order rescinding a determination of paternity, affects the legal rights of both the father and the child.[43]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There is no provision in the bill for considering the best interests of the child, nor is there any requirement that the court consider appointing a guardian ad litem for the child.

Lines 99-101 use the term "disregarded" without providing a specific definition for the term or incorporating a timeframe which could be utilized to assist in defining the term.

Line 42 uses the term "cannot," in reference to results of paternity testing, yet it would appear that DNA testing is measured in terms of probability rather than such finite terms.

Lines 137-139 state that "Nothing shall prevent the child from reestablishing paternity under s. 742.10, Florida Statutes." Children do not establish paternity; alleged fathers establish paternity for a child.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Future of Florida's Families Committee adopted a strike-all amendment to the bill. The amendment:

- Reflects the fact that some child support obligations are established administratively and requires that the Department of Revenue be noticed when petitions are filed in those cases;
- Relaxes the standard requiring the petitioner to be current in his child support to allow for substantial compliance with any delinquency being the result of the inability to pay;
- Removes the requirement that the mother of a child undergo genetic testing;
- Provides a process for issuing a new birth certificate if relief is granted under a petition;
- Provides that granting relief under a petition does not affect the legitimacy of a child born during a lawful marriage; and
- Provides that nothing precludes an individual from seeking relief from a final judgment, decree, or order of proceeding pursuant to Rule 1.540, Florida Rules of Civil Procedure, or from challenging a paternity determination pursuant to s. 742.10(4), Florida Statutes.

As amended, the bill was reported favorably as a committee substitute.

[43] See Cummings, 871 So. 2d at 1060.

CHAMBER ACTION

The Future of Florida's Families Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to paternity; permitting a petition to set aside a determination of paternity or terminate a child support obligation; specifying contents of the petition; providing standards upon which relief shall be granted; providing remedies; providing that child support obligations shall not be suspended while a petition is pending; providing for scientific testing; providing for the amendment of the child's birth certificate; providing for assessment of costs and attorney's fees; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) This section establishes circumstances under which a male may disestablish paternity or terminate a child support obligation when the male is not the biological father of the child. To disestablish paternity or terminate a

child support obligation, the male must file a petition in the court with continuing jurisdiction over the child support obligation. The petition must also be served on the mother or other legal guardian or custodian of the child. If the child support obligation was determined administratively and has not been ratified by a court, then the petition must be filed in the circuit court where the mother or legal guardian or custodian of the child resides. Such a petition must be served on the Department of Revenue and on the mother or other legal guardian or custodian. The petition must include:

(a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.

(b) The results of scientific tests that are generally acceptable within the scientific community to show a probability of paternity, administered within 90 days prior to the filing of such petition, which results indicate that the male ordered to pay such child support cannot be the father of the child for whom support is required or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition. A male who suspects he is not the father but does not have access to the child to have scientific testing performed may file a petition requesting the court to order the child to be tested.

(c) An affidavit executed by the petitioner stating that the petitioner is current on all child support payments for the

child for whom relief is sought or that he has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.

(2) The court shall grant relief on a petition filed in accordance with subsection (1) upon a finding by the court of all of the following:

(a) Newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.

(b) The scientific test required in paragraph (1)(b) was properly conducted.

(c) The male ordered to pay child support is current on all child support payments for the applicable child or that the male ordered to pay child support has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.

(d) The male ordered to pay child support has not adopted the child.

(e) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock.

(f) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child.

(g) The child had not yet reached his or her 18th birthday when the petition was filed.

(3) Notwithstanding subsection (2), a court shall not set aside the paternity determination or child support order if the male engaged in the following conduct after learning that he is not the biological father of the child:

(a) Married the mother of the child while known as the putative father in accordance with s. 742.091, Florida Statutes, and voluntarily assumed the parental obligation and duty to pay child support;

(b) Acknowledged his paternity of the child in a sworn statement;

(c) Consented to be named as the child's biological father on the child's birth certificate;

(d) Voluntarily promised in writing to support the child and was required to support the child based on that promise;

(e) Received and disregarded written notice from any state agency or any court directing him to submit to scientific testing; or

(f) Signed a voluntary acknowledgment of paternity as provided in s. 742.10(4), Florida Statutes.

(4) In the event the petitioner fails to make the requisite showing required by this section, the court shall deny the petition.

(5) In the event relief is granted pursuant to this section, relief shall be limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. The male's previous status as father continues to be in existence until the order granting relief is rendered. All previous lawful actions taken based on reliance on that status are confirmed retroactively but not prospectively. This section shall not be construed to create a cause of action to recover child support that was previously paid.

(6) The duty to pay child support and other legal obligations for the child shall not be suspended while the petition is pending except for good cause shown. However, the court may order the child support to be held in the registry of the court until final determination of paternity has been made.

(7)(a) In an action brought pursuant to this section, if the scientific test results submitted in accordance with paragraph (1)(b) are provided solely by the male ordered to pay child support, the court on its own motion may, and on the petition of any party shall, order the child and the male ordered to pay child support to submit to applicable scientific tests. The court shall provide that such scientific testing be done no more than 30 days after the court issues its order.

(b) If the male ordered to pay child support willfully fails to submit to scientific testing or if the mother or legal guardian or custodian of the child willfully fails to submit the child for testing, the court shall issue an order determining the relief on the petition against the party so failing to

submit to scientific testing. If a party shows good cause for failing to submit to testing, such failure shall not be considered willful. Nothing in this paragraph shall prevent the child from reestablishing paternity under s. 742.10, Florida Statutes.

(c) The party requesting applicable scientific testing shall pay any fees charged for the testing. If the custodian of the child is receiving services from an administrative agency in its role as an agency providing enforcement of child support orders, that agency shall pay the cost of the testing if it requests the testing and may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

(8) If relief on a petition filed in accordance with this section is granted, the clerk of the court shall, within 30 days following final disposition, forward to the Office of Vital Statistics of the Department of Health a certified copy of the court order or a report of the proceedings upon a form to be furnished by the department, together with sufficient information to identify the original birth certificate and to enable the department to prepare a new birth certificate. Upon receipt of the certified copy or the report, the department shall prepare and file a new birth certificate that deletes the name of the male ordered to pay child support as the father of the child. The certificate shall bear the same file number as the original birth certificate. All other items not affected by the order setting aside a determination of paternity shall be copied as on the original certificate, including the date of

registration and filing. If the child was born in a state other than Florida, the clerk shall send a copy of the report or decree to the appropriate birth registration authority of the state where the child was born. If the relief on a petition filed in accordance with this section is granted and the mother or legal guardian or custodian requests that the court change the child's surname, the court may change the child's surname. If the child is a minor, the court shall consider whether it is in the child's best interests to grant the request to change the child's surname.

(9) The rendition of an order granting a petition filed pursuant to this section shall not affect the legitimacy of a child born during a lawful marriage.

(10) If relief on a petition filed in accordance with this section is not granted, the court shall assess the costs of the action and attorney's fees against the petitioner.

(11) Nothing in this section precludes an individual from seeking relief from a final judgment, decree, or order of proceeding pursuant to Rule 1.540, Florida Rules of Civil Procedure, or from challenging a paternity determination pursuant to s. 742.10(4), Florida Statutes.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 303 CS Dart-Firing Stun Guns
SPONSOR(S): Kravitz
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 214, SB 560

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	7 Y, 1 N, w/CS	Cunningham	Kramer
2) Criminal Justice Appropriations Committee	4 Y, 0 N	Burns	DeBeaugrine
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Approximately 230 law enforcement agencies in Florida have authorized their officers to use dart-firing stun guns. Although many of these agencies have developed policies and procedures regarding training and use of the devices, there is no state law requiring that officers receive such training. This bill would require the Criminal Justice Standards and Training Commission, housed within the Florida Department of Law Enforcement, to establish standards for instructing law enforcement, correctional, and correctional probation officers in the use of dart-firing stun guns, and incorporate dart-firing stun gun training into the Basic Recruit Training Programs for each discipline. This bill sets forth the circumstances under which a law enforcement, correctional, or correctional probation officer may use a dart-firing stun gun. This bill also defines the term "dart-firing stun gun" and conforms other current statutory provisions to that definition.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – This bill will require the Criminal Justice Standards and Training Commission to establish standards for instructing law enforcement, correctional, and correctional probation officers in the use of dart-firing stun guns.

Maintain Public Security – This bill requires that law enforcement, correctional, and correctional probation officers receive a minimum of 4 hours training in the use of dart-firing stun guns as part of their respective Basic Recruit Training Programs.

B. EFFECT OF PROPOSED CHANGES:

In recent years, there has been a growing interest in the use of less-than-lethal weapons by law enforcement agencies. One such weapon, the stun gun, is a hand-held weapon that delivers an electric shock, effectively incapacitating an individual. One of the most widely-used types of stun gun is the type that fires electrodes that are tethered to the device.[1] These "dart-firing" devices are currently in use by over 7,000 of the 18,000 law enforcement agencies in the United States.[2] This widespread use of dart-firing stun guns by law enforcement has drawn attention to the training officers receive in using the devices (or lack thereof), as well as whether the devices are being used properly in the field.[3]

Definitions

Section 790.001(15), F.S., defines "remote stun gun" as "any nonlethal device with a tethered range not to exceed 16 feet and which shall utilize an identification and tracking system which, upon use, disperses coded material traceable to the purchaser through records kept by the manufacturer on all remote stun guns and all individual cartridges sold which information shall be made available to any law enforcement agency upon request."[4] Section 790.001(14), F.S., defines "electric weapon or device" as "any device which, through the application or use of electrical current, is designed, redesigned, used, or intended to be used for offensive or defensive purposes, the destruction of life, or the infliction of injury."[5] The term "dart-firing stun gun" is not currently defined in the Florida Statutes.

Currently, Florida law authorizes the open carrying of remote stun guns and other nonlethal electric weapons or devices which do not fire a dart or projectile and are designed solely for defensive purposes.[6] If carried for lawful self-defense purposes, the above weapons may be carried in a concealed manner.[7]

This bill deletes the term "remote stun gun" and its definition contained in s. 790.001, F.S., and creates the definition of the term "dart-firing stun gun." "Dart-firing stun gun" is defined as "any device having

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[1] A number of new types of stun gun are being developed including stun guns that administer the electric shock through a stream of liquid, through a laser, and through rubber bullet-type projectiles. http://en.wikipedia.org/wiki/Taser.

[2] *Use of Tasers by Selected law Enforcement Agencies*, Report to the Chairman, Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform, House of Representatives, May, 2005.

[3] *See, e.g., Police Taser 6-Year-Old*, Fox News, November 12, 2004; *Police, Principal Defend Officer's Use Of Taser On 15-Year-Old* Girl, wftv.com, June 2, 2005; *Man Dies After Police Use Taser Gun To Subdue Him*, nbc6.net, June 29, 2005; *Florida Family Sues Sheriff Over Inmate Death, Claims Taser Used*, Associated Press, October 7, 2005.

[4] In addition to firing tethered probes, remote stun guns may be used in a "touch stun" mode, where the probes are not launched, but rather, the device itself actually makes contact with the subject being stunned. This "touch stun" application was the sole method of delivering the electrical current in "electric weapons," the precursor to remote stun guns.

[5] It should be noted that by statutory definition, "remote stun guns" and "electronic weapons" would not be considered firearms. A firearm is a firearm because it expels a projectile "by the action of an explosive." s. 790.001(6), F.S. The most widely-distributed modern models of remote stun guns use nitrogen cartridges to launch the tethered probes. (*Electronic Control Weapons, Concepts and Issues Paper;* IACP National Law Enforcement Policy Center; 1996, rev. Jan. 2005.)

[6] s. 790.053, F.S.

[7] s. 790.01, F.S.

one or more tethered darts that are capable of delivering an electrical current." Other statutory references to "remote stun gun" are amended by this bill to become "dart-firing stun gun."

Training:

In Florida, the Criminal Justice Standards and Training Commission (CJSTC), housed within the Florida Department of Law Enforcement, establishes uniform minimum standards for the employment and training of full-time, part-time, and auxiliary law enforcement, correctional, and correctional probation officers.[8] Every prospective law enforcement officer (LEO), correctional officer (CO), and correctional probation officer (CPO) must successfully complete a CJSTC-developed Basic Recruit Training Program in order to receive their certification. At this time, the CJSTC does not include training in the use of dart-firing stun guns in the curricula for the LEO, CO, or CPO Basic Recruit Training Programs. In addition, Florida law does not require that LEOs, COs, CPOs receive any type of training in the use of dart-firing stun guns. Instead, the majority of agencies who authorize their officers to carry dart-firing stun guns have developed specific policies regarding their use, or have incorporated such training into their existing policies.

This bill requires the CJSTC to establish standards for instructing LEOs, COs, and CPOs in the use of dart-firing stun guns and to incorporate such training into the Basic Recruit Training Programs.[9] The dart-firing stun gun training portion of the Basic Recruit Training Program must include instruction on the effects the device has on persons, and must last a minimum of 4 hours. After completing the Basic Recruit Training Program, LEOs, COs, and CPOs who have been authorized by their agency to use a dart-firing stun gun must complete a 1-hour annual training course on the use of dart-firing stun guns.

Use of Force:

Currently, Florida Statutes do not specify the circumstances under which any tool of police enforcement can legally be used. The responsibility to "establish uniform minimum training standards for the training of officers in the various criminal justice disciplines" has been statutorily assigned to the CJSTC.[10] As stated above, the CJSTC currently does not include instruction in the use of dart-firing stun guns in its curricula for the Basic Recruit Training Programs for LEOs, COs, and CPOs. However, included in all three of these programs is instruction on the "Use of Force Resistance Matrix." The matrix outlines six levels of resistance and six corresponding levels of response and is used as a guide for officers to apply in real life situations. It appears that Florida law enforcement agencies that use dart-firing stun guns teach their officers to deploy the weapon between Resistance Level 3 and Resistance Level 4 of the Matrix.[11]

This bill specifies that an LEO, CO, or CPO's decision to use a dart-firing stun gun must involve an arrest or custodial situation during which the subject of the arrest or custodial situation escalates resistance to the officer from passive physical to active physical resistance and:

- has the apparent ability to physically threaten the office or others; or
- is preparing or attempting to flee.

This language would appear to place the use of dart-firing stun guns within Level 4 of the Use of Force Resistance Matrix.

C. SECTION DIRECTORY:

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[8] http://www.fdle.state.fl.us/cjst/commission/index.html

[9] The definitions of "law enforcement officer," "correctional officer," and "correctional probation officer," found in s. 943.10, F.S., will apply to these terms as used in the bill.

[10] s. 943.12(5), F.S.

[11] Resistance Level 3 (Passive Physical), is defined as "a subject refuses to comply with or respond physically...makes no attempt to physically defeat your actions but forces you to use physical maneuvers to establish control." Resistance Level 4 (Active Physical) is where a subject makes physically evasive movements to prevent an officer from taking control (e.g. bracing or tensing themselves, pushing or pulling away, taking a fighting stance, not allowing the officer to approach, or running away). *Response to Resistance Matrix*, Basic Recruit Curriculum, Module 5, Unit 1, Lesson 1, Florida Department of Law Enforcement Instructor's Manual, 2005.

Section 1. Amends s. 790.001(15), F.S., deleting the term "remote stun gun" and creating the definition of the term "dart-firing stun gun."

Section 2. Amends s. 790.01, F.S., changing references to "remote stun gun" to "dart-firing stun gun" in relation to carrying concealed weapons.

Section 3. Amends s. 790.053, F.S, changing references to "remote stun gun" to "dart-firing stun gun" in relation to the open carrying of weapons.

Section 4. Amends s. 790.054, F.S., changing references to "remote stun gun" to "dart-firing stun gun" in relation to the penalties for using such a device against an on-duty law enforcement officer.

Section 5. Creates s. 943.1717, F.S., providing that an LEO, CO, or CPO's decision to use a dart-firing stun gun must involve an arrest or custodial situation where the person subject to the arrest or custody escalates resistance to active physical resistance and either has the apparent ability to physically threaten the officer or others or is preparing or attempting to flee or escape; requiring the CJSTC to establish standards for instructing LEOs, COs, and CPOs in the use of dart-firing stun guns and the effects of stun guns on persons; requiring that basic skills courses for LEOs, COs, and CPOs include a minimum of four hours instruction on the use of dart-firing stun guns; requiring LEOs, COs, and CPOs who have been authorized by their agency to use a dart-firing stun gun to complete a 1-hour annual training course on the use of dart-firing stun guns.

Section 6. This act takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Manufacturers and retailers of dart-firing stun guns may benefit in that dart-firing stun guns will be needed for training purposes.

D. FISCAL COMMENTS:

The Basic Recruit Training Program for LEOs consists of 672 hours of training, while COs and CPOs must undergo 532 and 424 hours of training, respectively.[12] The Florida Department of Law Enforcement's (FDLE) analysis of this bill states that the bill's 4-hour dart-firing stun gun training requirement will have a negligible fiscal impact because the additional hours can be included among the flexible hours currently available in the FDLE Basic Recruit Training Programs.

Other agencies could incur increased costs if the academies that provide their training choose not to include the dart-firing stun gun training within the current curriculum but choose to add the additional 4 hours to existing requirements. While this has the potential to produce a significant impact, FDLE staff believe that most agencies that allow officers to use stun guns already provide training.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not specify whether the 4 hours of training would be included in the current hourly training requirements for LEOs (672), COs (532), and CPOs (424) or whether the 4 hours would be in addition to those training requirements.

The bill provides that COs and CPOs must undergo a minimum of 4-hours training in the use of dart-firing stun guns as part of their respective Basic Recruit Training Programs. The Department of Corrections reports that they do not use "dart-firing stun guns" and have no plans to use such devices in the future.[13] The Florida Highway Patrol and the Department of Transportation (Motor Carrier Compliance) have also reported that their agencies do not use dart-firing stun guns.

The bill provides that an LEO, CO, or CPO's decision to use a dart-firing stun gun must involve an arrest or custodial situation where the person subject to the arrest or custody escalates resistance to the officer from "passive physical resistance" to "active physical resistance." The above-quoted terms are not defined in the bill or otherwise in statute.

As noted above, there are many different types of stun guns (touch guns, some that fire probes, etc...), and different types (guns that deliver the shock through a stream of water or via laser) are being

[12] Rule 11B-35.002, F.A.C.

[13] The Department reports that although they currently use hand-held electronic immobilization devices (EIDs), such devices are not considered "dart-firing" and would not fall under the purview of the bill.

developed. This bill specifically addresses the use of "dart-firing stun guns," thus excluding from its provisions any other type of stun gun that an LEO, CO, or CPO may carry.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2006, the Criminal Justice Committee adopted a strike-all amendment and reported the bill favorably with Committee Substitute. The strike-all amendment addressed some of the issues raised in the original bill analysis. Specifically, the amendment:

- Defined the term "dart-firing stun gun" and conformed other current statutory provisions to that definition.
- Broadened the required officer training of the potential effects of dart-firing stun guns so that it is not limited to people who are under the influence of drug or alcohol.
- Eliminates the annual training requirement for officers who are not authorized by their agency to use dart-firing stun guns.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to dart-firing stun guns; amending s. 790.001, F.S.; defining "dart-firing stun gun" for the purposes of ch. 790, F.S.; deleting the definition of "remote stun gun"; amending ss. 790.01 and 790.053, F.S., relating to the carrying of concealed weapons and the open carrying of weapons, to conform; authorizing the carrying of a dart-firing stun gun, both openly and in a concealed manner, for purposes of lawful self-defense; amending s. 790.054, F.S.; prohibiting the use of a dart-firing stun gun against a law enforcement officer who is on duty; providing a penalty; creating s. 943.1717, F.S.; providing circumstances during which law enforcement, correctional, and correctional probation officers may use a dart-firing stun gun; requiring the Criminal Justice Standards and Training Commission to establish standards for instruction in the use of dart-firing stun guns; requiring that a minimum number of hours in such training be included in the basic skills course required for certification;

requiring annual training for certain officers; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (15) of section 790.001, Florida Statutes, is amended to read:

790.001 Definitions.--As used in this chapter, except where the context otherwise requires:

(15) "Dart-firing ~~Remote~~ stun gun" means any ~~nonlethal~~ device having one or more ~~with a~~ tethered darts that are capable of delivering an electrical current ~~range not to exceed 16 feet and which shall utilize an identification and tracking system which, upon use, disperses coded material traceable to the purchaser through records kept by the manufacturer on all remote stun guns and all individual cartridges sold which information shall be made available to any law enforcement agency upon request~~.

Section 2. Subsections (4) and (5) of section 790.01, Florida Statutes, are amended to read:

790.01 Carrying concealed weapons.--

(4) It is not a violation of this section for a person to carry for purposes of lawful self-defense, in a concealed manner:

(a) A self-defense chemical spray.

(b) A nonlethal stun gun or dart-firing ~~remote~~ stun gun or other nonlethal electric weapon or device that ~~which does not~~

~~fire a dart or projectile and~~ is designed solely for defensive purposes.

(5) This section does not preclude any prosecution for the use of an electric weapon or device, a dart-firing ~~or remote~~ stun gun, or a self-defense chemical spray during the commission of any criminal offense under s. 790.07, s. 790.10, s. 790.23, or s. 790.235, or for any other criminal offense.

Section 3. Section 790.053, Florida Statutes, is amended to read:

790.053 Open carrying of weapons.--

(1) Except as otherwise provided by law and in subsection (2), it is unlawful for any person to openly carry on or about his or her person any firearm or electric weapon or device.

(2) A person may openly carry, for purposes of lawful self-defense:

(a) A self-defense chemical spray.

(b) A nonlethal stun gun or dart-firing ~~remote~~ stun gun or other nonlethal electric weapon or device that ~~which does not fire a dart or projectile and~~ is designed solely for defensive purposes.

(3) Any person violating this section commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Section 4. Section 790.054, Florida Statutes, is amended to read:

790.054 Prohibited use of self-defense weapon or device against law enforcement officer; penalties.--A person who knowingly and willfully uses a self-defense chemical spray, ~~or~~ a

nonlethal stun gun or other nonlethal electric weapon or device, or a dart-firing ~~remote~~ stun gun against a law enforcement officer engaged in the performance of his or her duties commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 5. Section 943.1717, Florida Statutes, is created to read:

943.1717 Use of dart-firing stun guns.--

(1) A decision by a law enforcement officer, correctional officer, or correctional probation officer to use a dart-firing stun gun must involve an arrest or a custodial situation during which the person who is the subject of the arrest or custody escalates resistance to the officer from passive physical resistance to active physical resistance and the person:

(a) Has the apparent ability to physically threaten the officer or others; or

(b) Is preparing or attempting to flee or escape.

(2) The Criminal Justice Standards and Training Commission shall establish standards for instructing law enforcement, correctional, and correctional probation officers in the use of dart-firing stun guns. The instructional standards must include the effect that a dart-firing stun gun may have on a person.

(3) Each basic skills course required for certification as a law enforcement, correctional, or correctional probation officer must include instruction on the use of dart-firing stun guns. The portion of the basic skills course on the use of stun guns must be a minimum of 4 hours' duration.

(4) After completing the basic skills course, each law enforcement, correctional, and correctional probation officer who is authorized by his or her agency to use a dart-firing stun gun must complete an annual training course on the use of dart-firing stun guns. The annual training course on the use of dart-firing stun guns must be a minimum of 1 hour's duration.

Section 6. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 519 CS Internet Screening in Public Libraries
SPONSOR(S): Kravitz
TIED BILLS: None **IDEN./SIM. BILLS:** SB 960

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 1 N, w/CS	Shaddock	Bond
2) Transportation & Economic Development Appropriations Committee	17 Y, 1 N	McAuliffe	Gordon
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

This bill addresses the access by adults and children to internet pornography in public libraries. The bill requires public libraries to adopt an internet safety policy and install technology protection measures on all public computers. The protection measures are to prevent adults from using the libraries computers to access child pornography or obscene visual depictions, and to prevent minors from accessing child pornography and visual depictions that are obscene or harmful to minors. The protection measures can be disabled upon an adult's request to use the computer for bona fide research or other lawful purposes. Libraries are precluded from maintaining a record of the adults who request this disablement.

The bill authorizes the Division of Library and Information Services to adopt rules requiring the head of each administrative unit to give an annual written statement, under penalty of perjury, that all public library locations within the unit are in compliance with this section, as a condition of receiving state funds.

This bill appears to have a minimal negative fiscal impact on local governments. This bill does not appear to have a fiscal impact on state government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill creates additional responsibilities for public libraries and their administrative units. The bill establishes rule-making authority in the Department of State, Division of Library and Information Services.

Empower Families -- This bill seeks to benefit families by decreasing the possibility of children and adults being exposed to pornography at public libraries.

B. EFFECT OF PROPOSED CHANGES:

Background

Federal Law

In 2000, Congress enacted the Children's Internet Protection Act ("CIPA"), which requires public libraries participating in certain internet technology programs to certify that they are using computer filtering software to prevent the on-screen depiction of obscenity, child pornography, or other material harmful to minors.[1] The Supreme Court upheld CIPA in *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), determining the law did not violate the First Amendment's free speech clause nor did it impose an unconstitutional condition on public libraries. CIPA does not impose any penalties on libraries that choose not to install filtering software; however, libraries that choose to offer unfiltered internet access will not receive federal funding for acquiring educational internet resources.[2]

State Law

Currently, state law does not contain any requirements that public libraries place internet filters on the public computers. Nevertheless, there are a number of statutes that prohibit the display of obscene materials to minors and child pornography.

"Obscenity" is defined in s. 847.001(10), F.S., as:

> the status of material which:
>
> (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
>
> (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

This definition of obscenity is taken directly from the Supreme Court's definition in *Miller v. California*, 413 U.S. 15 (1973).[3]

"Harmful to minors" is defined in s. 847.001(6), F.S., as:

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[1] National Conference of State Legislatures, *Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in Schools and Libraries*, Feb. 17, 2005.
[2] *U.S. v. Am. Libraries Ass'n*, 539 U.S. 194, 212 (2003)(plurality opinion).
[3] *Haggerty v. State*, 531 So. 2d 364, 365 (Fla. 1st DCA 1988).

> [A]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:
>
> (a) Predominantly appeals to the prurient, shameful, or morbid interests of minors;
>
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

Section 847.0133, F.S., prohibits any person from knowingly selling, renting, loaning, giving away, distributing, transmitting, or showing any obscene material to a minor.[4] [5] Section 847.0137, F.S., prohibits the transmission of any image, data, or information, constituting child pornography through the internet or any other medium. Section 847.0138, F.S., prohibits the transmission of material harmful to minors to a minor by means of electronic device or equipment. Section 847.0139, F.S., provides immunity from civil liability for anyone reporting to a law enforcement officer what the person reasonably believes to be child pornography or the transmission to a minor of child pornography or any information, image, or data that is harmful to minors. Section 847.03, F.S., requires any officer arresting a person charged with an offense under s. 847.011, F.S., relating to acts relating to lewd or obscene materials, to seize such materials at the time of the arrest.

Current Library Internet Policies

The Department of State, Division of Library and Information Services, conducted a survey of Florida's public libraries to ascertain their internet use policies and filtering practices.[6] Out of 149 county and municipal libraries in Florida's 67 counties, 139 libraries responded to the survey. All of the libraries who answered the survey had locally adopted internet use policies, and 138 of the libraries prohibited the display of obscene or offensive images.[7] Of the libraries responding to the survey, 110 currently had filtering software or technology on their computers, and twenty-three did not filter.[8] Fourteen counties have one or more libraries that do not have filters, another four libraries only filter computers in the children's or youth section of the library, and three of the counties that did not have filters indicated that they would be installing filters soon or were in the process of negotiating with vendors.[9]

Three libraries reported that they were not CIPA compliant, twenty-nine libraries stated that CIPA did not apply to them, and the other 107 libraries indicated that they were CIPA compliant.[10]

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[4] Obscene materials means "any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose." Section 847.0133, F.S.

[5] The term "obscene" has the same meaning in s. 847.0133, F.S as it has in s. 847.001, F.S.

[6] Department of State, Division of Library and Information Services, *Internet Policies & Filtering in Florida's Public Libraries Report*, March 21, 2005 (hereinafter "*Internet Policies*").

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

Effect of Bill

Definitions

The bill creates a new section, s. 257.44, F.S., requiring internet screening in public libraries. A number of terms that are crucial to an understanding of the requirements and prohibitions provided for in the bill are detailed below. The bill defines "public library" as "any library that is open to the public and that is established or maintained by a county, municipality, consolidated city-county government, special district, or special tax district, or any combination thereof."[11] Excluded from this definition are libraries open to the public that are maintained or established by a community college or state university. A "public computer" is any computer made available to the public and that has internet access.[12]

This bill requires a public library to enforce an internet safety policy providing for:

- Installation and operation of a protection measure on all public computers in the library that restricts access by adults to visual depictions that are obscene or constitute child pornography and that restricts access by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors, and

- Disablement of the protection measure when an adult requests to use the computer for bona fide research or other lawful purpose.

A "technology protection measure" is software or equivalent technology that blocks or filters internet access to the visual depictions that are obscene, contain child pornography, or that are harmful to minors.[13]

The definition of child pornography is the same definition that appears in s. 847.001, F.S. For the purposes of this bill, harmful to minors is defined as:

> [A]ny picture, image, graphic image file, or other visual depiction that:
>
> 1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
>
> 2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
>
> 3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[14]

"Obscene" is defined as it is currently in s. 847.001, F.S.[15] "Administrative unit" is defined as "the entity designated by a local government body as responsible for administering all public libraries established or maintained by that local government body."[16]

[11] Section 257.44(1)(g).
[12] Section 257.44(1)(f).
[13] Section 257.44(1)(i).
[14] Section 257.44(1)(c).
[15] Section 257.44(1)(e).
[16] Section 257.44(1)(a).

Internet Policy

Each public library is required to post a conspicuous notice informing library patrons of the internet safety policy and indicating that the policy is available for review.[17] Libraries must disable the protection measure upon the request of any adult who wishes to use the computer for bona fide research or other lawful purpose,[18] and the library may not maintain a record containing the names of any adult who has requested the protection measure be disabled.[19]

Rule-Making Authority

The Division of Library and Information Services must adopt administrative rules requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all libraries within the administrative unit are in compliance with the internet safety policy as a condition of the receipt of any state funds being distributed under ch. 257, F.S.[20]

C. SECTION DIRECTORY:

Section 1 creates s. 257.44, F.S., requiring internet screening in public libraries.

Section 2 provides a legislative finding that the installation and operation of technology protection measures in public libraries to protect against adult access to obscene visual depictions or child pornography, or access by minors to obscene visual depictions, child pornography, or images that are harmful to minors, fulfills an important state interest.

Section 3 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The fiscal analysis provided by the Department of State states that there is no fiscal impact to the Department. However, this bill would appear to have a minimal but unknown fiscal impact on state government. The Department of State is required to promulgate rules concerning annual compliance by libraries, and the Department is required to collect and maintain those annual attestations.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The Department of State estimates that this bill will require recurring expenditures of $108,240 annually for libraries not currently using filtering software. The department estimates that the total recurring cost to all libraries regulated by this bill for filtering software is $666,600.

[17] Section 257.44(2)(b).
[18] Section 257.44(2)(a)(2).
[19] Section257.44(2)(c).
[20] Section 257.44(4).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Although the bill requires counties and municipalities to spend funds or take an action requiring the expenditure of funds, the impact is less than $1.8 million and is insignificant. The bill is therefore exempt from the provisions of Article VII, Section 18(b), Florida Constitution.

2. Other:

Access by Minors

This bill may raise First Amendment concerns since the statute creates a new definition of "harmful to minors" that extends beyond the current definition found in s. 847.001(10), F.S., which is similar to the Supreme Court's definition of obscenity. Although obscenity is not a protected category of speech, "'[s]exual expression which is indecent but not obscene is protected by the First Amendment."[21] In other words, obscene material is unprotected by the Constitution but indecent material is constitutionally protected. Hence, the new definition should be reviewed to determine whether it would infringe upon Constitutional protected speech.

For the purposes of this bill, harmful to minors is defined as:

> [A]ny picture, image, graphic image file, or other visual depiction that:
>
> 1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
>
> 2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
>
> 3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[22]

This "harmful to minors" standard is a content-based regulation of speech[23], which must be narrowly tailored to promote a compelling government interest.[24] However, internet access in a public library is

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[21] *Simmons v. State*, 886 So. 2d 399, 492-03 (Fla. 1st DCA 2004) (quoting *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

[22] Section 257.44(1)(c).

[23] According to 16A Am. Jur. 2d, Constitutional Law s. 460:

> [t]he most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message, but regulations that are unrelated to content are subject to an intermediate level of scrutiny reflecting the less substantial risk of excising ideas or viewpoints from public dialogue.... Regulations of speech that are regarded as content-neutral receive an intermediate rather than a strict scrutiny under the First Amendment; this includes regulations that restrict the time, place, and

not a traditional or designated public forum,[25] and a library "does not acquire internet terminals in order to create a public forum for Web publishers to express themselves."[26]

The protection of children from harmful material is a compelling state interest, as "common sense dictates that a minor's rights are not absolute," and the legislature has the right to protect minors from the conduct of others.[27] The legislature has the responsibility and authority to protect all of the children in the state, and the state "has the prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interests of the individual."[28]

"A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the internet than when it collects material from any other source."[29] Thus, internet access in public libraries is not afforded the broadest level of free speech protection, and the government is free to regulate the content of speech and to determine which topics are appropriate for discussion, although to the extent that internet access might be considered a limited public forum, it is treated as a public forum for its topics of discussion.[30] A government-run public forum requires that content-based prohibitions be narrowly drawn to effectuate a compelling state interest.[31]

"The state has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from material that is not obscene by adult standards, but the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected)."[32]

The Supreme Court has "repeatedly" recognized that the government has an interest in protecting children from harmful materials.[33] As with CIPA, any internet materials that are suitable for adults but not for children may be accessed by an adult simply by asking a librarian to unblock or disable the filter provided that the adult desires to access the material for "bona fide research or other lawful purposes."[34]

Request for Unblocking

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manner of expression in order to ameliorate the undesirable secondary effects of sexually explicit expression. Therefore, as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based and subject to strict scrutiny under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral. Regulations which permit the government to discriminate on the basis of the content of a speaker's message ordinarily cannot be tolerated under the First Amendment.

[24] *Simmons v. State*, 886 So. 2d at 403 (internal citations omitted).

[25] Whether or not a place is designated a traditional or designated public form can be significant. The following quotation from 16A Am. Jur. 2d, Constitutional Law, s. 518 is particularly enlightening:

> Even protected speech is not equally permissible in all places and at all times; nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by a speaker's activities. The right to communicate is not limitless; even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. Thus, the government's ownership of property does not automatically open that property to the public for First Amendment purposes. However, the Constitution forbids a state from enforcing certain exclusions from a forum generally open to the public, even if the state is not required to create the forum in the first place.

[26] *Am. Library Ass'n*, 539 U.S. at 205-06.

[27] *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995)(citing *In re T.W.*, 551 So.2d 1186 (Fla.1989).

[28] *Simmons*, 886 So. 2d at 405 (citing *Jones v. State*, 640 So. 2d 1084, 1085-87 (Fla. 1994)).

[29] *Am. Library Ass'n.* 539 U.S at 208.

[30] *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

[31] *Id.* at 46.

[32] *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

[33] *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Morris v. State*, 789 So. 2d 1032, 1036 (Fla. 1st DCA 2001)).

[34] *Am. Library Ass'n*, 539 U.S. at 209.

CIPA provides for the disabling of the filtering software upon request. Specifically, CIPA provides: "[a]n administrator, supervisor, or other authority *may disable* a technology protection measure under paragraph (1) to enable access for a bona fide research or other lawful purpose." 20 U.S.C. s. 9134(f)(3) (emphasis added). The bill provides that "each public library shall enforce an Internet safety policy that provides for:" "[d]isablement of the technology protection measure by an employee of the public library upon an adult's request to use the computer for bona fide research or other lawful purpose."[35] In discussing CIPA's express requirement that the filtering software be disabled for bona fide research or other lawful purposes the Supreme Court stated that even if there is embarrassment by a person requesting the lifting of the software, "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."[36]

Access by Adults

The constitutional standards regarding adult access to indecent materials are different from those applicable to minors. It is possible that a court might find that an adult's constitutional right to access such material is hindered by the inherent time delay required to stop the filtering software for the adult patrons benefit. There is no definitive line for determining when an extended delay in granting an adult's request to unblock the software might be considered an unreasonable infringement upon an adult's right to conduct bona fide research and pursue other lawful uses of the internet. For as Justice Kennedy opined in his concurrence in the plurality opinion in *Am. Library Ass'n*:

> If, on the request of an adult user, a librarian will unblock filtered material or disable the internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact.
>
> ****
>
> If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.
>
> ****
>
> There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.[37]

B. RULE-MAKING AUTHORITY:

This bill requires the Department of State, Division of Library and Information Services, to adopt rules pursuant to s. 120.536(1), F.S., and s. 120.54, F.S., requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations within the administrative unit are in compliance with s. 257.44(2), which requires each public library to enforce an internet safety policy.

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[35] Section 257.44(2)(a).
[36] *Am. Library Ass'n*, 539 U.S. at 209.
[37] *Am. Library Ass'n*, 539 U.S. at 214-15 (Kennedy, J., concurring).

C. DRAFTING ISSUES OR OTHER COMMENTS:

Filtering Difficulties

The following is an enlightening quote from Justice Stevens' dissent in *Am. Library Ass'n*,

> Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is complicated by the fact that Web site publishers may use image files rather than text to represent words, i.e., they may use a file that computers understand to be a picture, like a photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather than regular text, a search engine would not see or recognize this Playboy name in that logo.[38]

Harmful to Minors

Section 847.001(6), F.S., provides a definition for "harmful to minors." The instant bill seeks to establish a new definition for "harmful to minors" for the purposes of this bill. It is unclear why a different definition of "harmful to minors" is included in the bill.

Visual Depictions

Section 257.44(1)(i), F.S., defines technology protection measure as "software or equivalent technology that blocks or filters internet access to the visual depiction that are proscribed under subsection (2) [the internet safety policy]". This definition would seem not to include audio depictions. The CIPA provides additional protection against other materials that may be prohibited by providing: "(2) Access to other materials[:] Nothing in this subsection shall be construed to prohibit a library from limiting internet access to or otherwise protecting against materials other than those referenced in subclauses (I), (II), and (III) of paragraph (1)(A)(i) [items that are obscene, child pornography, or harmful to minors]" 20 U.S.C. s. 9134.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 8, 2006, the Civil Justice Committee adopted one amendment to the bill. The amendment removed the civil action provision from the bill. The bill was then reported favorably with a committee substitute.

[38] *Am. Library Ass'n*, 539 U.S. at 221 (Stevens, J., dissenting).

CHAMBER ACTION

The Civil Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to Internet screening in public libraries; creating s. 257.44, F.S.; defining terms; requiring public libraries to provide technology that protects against Internet access to specified proscribed visual depictions; allowing adults to request disablement of the technology for specified purposes; prohibiting a public library from maintaining a record of adults who request such disablement; requiring a public library to post notice of its Internet safety policy; directing the Division of Library and Information Services within the Department of State to adopt rules requiring a written attestation of compliance as a condition of state funding; providing a cause of action is not authorized for a violation by a public library; providing a finding of important state interest; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 257.44, Florida Statutes, is created to read:

257.44 Internet screening in public libraries.--

(1) As used in this section, the term:

(a) "Administrative unit" means the entity designated by a local government body as responsible for administering all public libraries established or maintained by that local government body.

(b) "Child pornography" has the same meaning as in s. 847.001.

(c) "Harmful to minors" means any picture, image, graphic image file, or other visual depiction that:

1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and

3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(d) "Minor" means an individual who is younger than 18 years of age.

(e) "Obscene" has the same meaning as in s. 847.001.

(f) "Public computer" means a computer that is made available to the public and that has Internet access.

(g) "Public library" means any library that is open to the public and that is established or maintained by a county,

municipality, consolidated city-county government, special district, or special tax district, or any combination thereof. The term does not include a library that is open to the public and that is established or maintained by a community college or state university.

(h) "Reasonable efforts" means the public library, in implementing the policy required by subsection (2), in its ordinary course of business:

1. Posts its Internet safety policy;

2. Uses a technology protection measure on all public computers; and

3. Disables the technology protection measure upon an adult's request to use the computer for bona fide research or other lawful purpose.

(i) "Technology protection measure" means software or equivalent technology that blocks or filters Internet access to the visual depictions that are proscribed under subsection (2).

(2)(a) Each public library shall enforce an Internet safety policy that provides for:

1. Installation and operation of a technology protection measure on all public computers in the public library which protects against access through such computers by adults to visual depictions that are obscene or constitute child pornography and by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors; and

2. Disablement of the technology protection measure by an employee of the public library upon an adult's request to use the computer for bona fide research or other lawful purpose.

(b) Each public library shall post a notice in a conspicuous area of the public library which indicates that an Internet safety policy has been adopted and informs the public that the Internet safety policy is available for review at each public library.

(c) A public library may not maintain a record of names of adults who request that the technology protection measure be disabled under this subsection.

(3) The Division of Library and Information Services within the Department of State shall adopt rules pursuant to ss. 120.536(1) and 120.54 that require the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations for which the administrative unit is responsible are in compliance with subsection (2) as a condition of the receipt of any state funds distributed under this chapter.

(4) This section does not authorize a cause of action in favor of any person due to a public library's failure to comply with subsection (2).

Section 2. In accordance with s. 18, Art. VII of the State Constitution, the Legislature finds that the installation and operation by public libraries of technology protection measures that protect against access by adults to visual depictions that are obscene or constitute child pornography and by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors fulfills an important state interest.

Section 3. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 627 CS License Plates
SPONSOR(S): Brummer
TIED BILLS: **IDEN./SIM. BILLS:** SB 538

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 1 N, w/CS	Kramer	Kramer
2) Transportation Committee	13 Y, 4 N, w/CS	Thompson	Miller
3) Transportation & Economic Development Appropriations Committee	16 Y, 1 N	McAuliffe	Gordon
4) Justice Council			
5)			

SUMMARY ANALYSIS

HB 627 w/CS requires the Department of Highway Safety and Motor Vehicles to develop a DUI license plate that must be displayed on any vehicle that is operated by a person whose driving privileges are restricted pursuant to s. 322.271, F.S. because of a conviction related to driving under the influence. The bill also requires the DUI license plate to be a condition of issuance of the offender's restricted driver license.

The license plate must be a bright coral color that is easily distinguished from other license plates issued by the department. The bill requires the first three letters of the plate to be "DUI". The bill requires an additional annual surcharge of $20 to be collected for each DUI plate and the proceeds from the surcharge to be deposited into the Trauma Services Trust Fund.

This bill becomes effective July 1, 2006

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill requires a person who has been convicted of DUI to use a DUI license plate in certain circumstances.

B. EFFECT OF PROPOSED CHANGES:

Upon conviction for driving under the influence (DUI)[1], the court must revoke the driver's license of the convicted person as follows:

- For a first conviction, the driver's license must be revoked for not less than 180 days or more than 1 year.
- For a second conviction for an offense that occurs within 5 years after the date of a prior conviction, the driver's license must be revoked for not less than 5 years.
- For a third conviction for an offense that occurs within a period of 10 years after the date of a prior conviction, the driver's license must be revoked for not less than 10 years.
- For a fourth conviction, the driver's license must be permanently revoked.[2]

Section 322.271, F.S. authorizes the department to issue a restricted license that is commonly known as a "hardship" license upon a showing that the revocation of an offender's license causes a serious hardship and precludes the person's carrying out his or her normal business, occupation, trade or employment and that the use of the person's license in the normal course of his or her business is necessary to the proper support of the person or his or her family. The following are the two types of restricted driving privileges for a DUI:

- A driving privilege restricted to business purposes only, means a driving privilege that is limited to any driving necessary to maintain livelihood, including driving to and from work, necessary on-the-job driving, driving for educational purposes, and driving for church and for medical purposes.
- A driving privilege restricted to employment purposes only, means a driving privilege that is limited to driving to and from work and any necessary on-the-job driving required by an employer or occupation.

A person whose license has been revoked for a DUI offense for 5 years or less is required to wait 12 months before applying for a hardship license. A person whose license has been revoked for more than 5 years is required to wait 24 months before applying for a hardship license.[3] A person whose license has been permanently revoked because of a fourth DUI conviction is not eligible to apply for a hardship license.[4]

HB 627 w/CS requires the Department of Highway Safety and Motor Vehicles to develop a DUI license plate that must be displayed on any vehicle that is operated by a person whose driving privileges are restricted pursuant to s. 322.271, F.S. because of a conviction relating to driving under the influence in violation of s. 316.193, F.S.

The license plate must be a bright coral color that is easily distinguished from other license plates issued by the department. The bill requires the word "Florida" to appear at the top of the plate and the first three letters of the plate to be "DUI". The bill requires an additional annual surcharge of $20 to be

[1] s. 316.193, F.S.
[2] s. 322.28(2)(a), F.S.
[3] s, 322.271(2)(b), F.S.
[4] s. 322.28(2)(e), F.S.

collected for each DUI plate and the proceeds from the surcharge to be deposited into the Trauma Services Trust Fund created by s. 395.4035, F.S.[5]

The bill also amends s. 322.27, F.S., to provide that as a condition of issuance of the "hardship license" the DHSMV must place the DUI license plate restriction on the offender's driver license. The purpose of the placement of the additional restriction on the offender's driver license is to inform law enforcement that a DUI license plate must be displayed on the vehicle being operated by the offender.

C. SECTION DIRECTORY:

Section 1. Requires a driver whose driving privilege is restricted for a DUI offense to have a DUI license plate; provides for the design of the plate; and provides for the collection and use of a $20 surcharge for the license plate.

Section 2. Amends s. 322.27, F.S., to require a DUI license plate restriction as a condition of issuing a hardship license.

Section 3. Provides effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Department of Highway Safety and Motor Vehicles (DHSMV) estimates that the bill will generate $240,000 annually from surcharges for deposit into the Trauma Services Trust Fund based on the issuance of 12,000 hardship licenses per year.

2. Expenditures:

   The department estimates that the bill will have an annual $44,520 impact for the design, manufacture and distribution of a new license plate - $15,000 in personnel costs and $29,520 in license plate costs. The bill will also require contracted programming modifications to the Motor Vehicle software systems at an estimated cost of $26,915.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

A person who is issued a DUI license plate will be required to pay a $20 annual surcharge for the license plate.

D. FISCAL COMMENTS:

None.

[5] Section 395.4035, F.S. creates the Trauma Services Trust Fund which is required to be used for the development and support of a system of state-sponsored trauma centers.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Special license plate: In *Goldschmitt v. State*,[6] the Second District Court of Appeal ruled on the constitutionality of a DUI offender being required to place a bumper sticker on his vehicle which read, "CONVICTED D.U.I. – RESTRICTED LICENSE". The court rejected the offender's claim that the order infringed upon his First Amendment rights by "forcing him to broadcast an ideological message via the bumper sticker."[7] The court also ruled that the bumper sticker did not constitute cruel and unusual punishment. *See also*, *Lindsay v. State*, 606 So.2d 652 (Fla. 4th DCA 1992)(requirement that probationer place and pay for advertisement in newspaper consisting of defendant's mug shot, name and caption indicating defendant was "DUI –convicted" did not violate constitution).

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to the bill's sponsor, this legislation is intended to address a public safety issue by providing notice to other drivers that a vehicle is being operated by a person whose driving privileges are restricted due to a violation of driving under the influence.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted three amendments. The first amendment changed the color of the license plate from bright pink to bright coral. The second amendment removed language from the original bill which would have allowed a law enforcement officer to stop any vehicle that bears a DUI plate without probable cause to check the operator for compliance with the restrictions provided in s. 316.193, F.S. The third amendment corrected a statutory reference in the bill.

On March 7, 2006 the Committee on Transportation amended HB 627 to require the DUI license plate restriction as a condition of issuance of the offender's restricted driver license. The committee then voted 13-4 to report the bill favorably with committee substitute.

[6] *Goldschmitt v. State*, 490 So.2d 123 (Fla. 2nd DCA 1986)
[7] *Goldschmitt*, 490 So.2d at 125.

CHAMBER ACTION

The Transportation Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to license plates; requiring a driver whose driving privileges are restricted because of a conviction related to driving under the influence to have a DUI plate on any vehicle that he or she operates; providing for the Department of Highway Safety and Motor Vehicles to develop such a plate; providing requirements for such a plate; providing an annual surcharge for the plate; providing for the use of such surcharge; amending s. 322.271, F.S.; requiring that a person whose driving privilege has been revoked under a specified provision only be granted restricted driving privileges on the condition that he or she operates only a vehicle that displays a DUI license plate; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) The Department of Highway Safety and Motor Vehicles shall develop a DUI license plate that must be

displayed on any vehicle that is operated by a person whose driving privileges are restricted pursuant to s. 322.271, Florida Statutes, because of a conviction related to driving under the influence in violation of s. 316.193, Florida Statutes.

(2) The plate shall be a bright coral color that is easily distinguishable from other plates issued in this state. The word "Florida" must appear at the top of the plate, and the first three letters in the alphanumeric numbering system used on the plate must be "DUI".

(3) In addition to the other license plate fees and charges collected, an annual surcharge of $20 shall be collected for each DUI plate. The proceeds from the surcharge shall be deposited into the Trauma Services Trust Fund created by s. 395.4035, Florida Statutes, and used for purposes provided in that section.

Section 2. Subsection (1) of section 322.271, Florida Statutes, is amended to read:

322.271 Authority to modify revocation, cancellation, or suspension order.--

(1)(a) Upon the suspension, cancellation, or revocation of the driver's license of any person as authorized or required in this chapter, except a person whose license is revoked as a habitual traffic offender under s. 322.27(5) or a person who is ineligible to be granted the privilege of driving on a limited or restricted basis under subsection (2), the department shall immediately notify the licensee and, upon his or her request, shall afford him or her an opportunity for a hearing pursuant to

chapter 120, as early as practicable within not more than 30 days after receipt of such request, in the county wherein the licensee resides, unless the department and the licensee agree that such hearing may be held in some other county.

(b) A person whose driving privilege has been revoked under s. 322.27(5) may, upon expiration of 12 months from the date of such revocation, petition the department for reinstatement of his or her driving privilege. Upon such petition and after investigation of the person's qualification, fitness, and need to drive, the department shall hold a hearing pursuant to chapter 120 to determine whether the driving privilege shall be reinstated on a restricted basis solely for business or employment purposes.

(c) For the purposes of this section, the term:

1. "A driving privilege restricted to business purposes only" means a driving privilege that is limited to any driving necessary to maintain livelihood, including driving to and from work, necessary on-the-job driving, driving for educational purposes, and driving for church and for medical purposes.

2. "A driving privilege restricted to employment purposes only" means a driving privilege that is limited to driving to and from work and any necessary on-the-job driving required by an employer or occupation.

Driving for any purpose other than as provided by this paragraph is not permitted by a person whose driving privilege has been restricted to employment or business purposes. In addition, a person whose driving privilege is restricted to employment or

business purposes remains subject to any restriction that applied to the type of license which the person held at the time of the order of suspension, cancellation, or revocation. As a condition of the issuance of restricted driving privileges, the department shall also restrict a person whose driving privilege has been revoked under s. 322.28(2) to operating only a vehicle that displays a DUI license plate.

Section 3. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1567 CS Eminent Domain
SPONSOR(S): Rubio
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Local Government Council	8 Y, 0 N, w/CS	Camechis	Hamby
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill eliminates authority to take property for the purpose of eliminating slum or blight conditions in a geographical area and enhancing the tax base in community redevelopment areas. Taking of a parcel of property by eminent domain under the Community Redevelopment Act is allowed, however, if taking the property is reasonably necessary to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain as evidenced by at least one factor in an enumerated list. These parcels are referred to as "condemnation-eligible". The bill requires local governments to exercise the power of eminent domain under the Community Redevelopment Act and prohibits delegation of that power to a community redevelopment agency. The bill requires enhanced property owner notice prior to consideration of any resolution finding slum or blight. Enhanced notice must also be provided 45 days prior to consideration of a county or city resolution to take a specific parcel of property, and the notice must indicate that the property will not be subject to taking if the conditions that pose a threat to public health or public safety are removed prior to the public hearing at which the resolution is considered. Notice must also be posted on the property subject to taking.

If a property owner challenges an attempt to acquire his or her property by eminent domain under the Community Redevelopment Act, the condemning authority must demonstrate by clear and convincing evidence in an evidentiary hearing before the circuit court that the public purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain, that the property is condemnation-eligible, and that taking the property is reasonably necessary in order to accomplish the public purpose. The circuit court must determine whether the public purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain, whether the property is condemnation-eligible, and whether taking the property is reasonably necessary in order to accomplish the public purpose. The court must make these determinations without attaching a presumption of correctness or extending judicial deference to any determinations or findings in the resolution of taking adopted by the condemning authority.

The bill also prohibits transfers of taken property to another private entity with specified exceptions, which include: transfers for use by common carriers, public utilities, private utilities, and private entities that occupy an incidental part of a public facility for the purpose of providing goods or services to the public; and transfers for use in providing public infrastructure. In addition, the bill allows the transfer of taken property to a private entity for any use if the property is retained by the condemning authority, or a private party to whom property was transferred under one of the exceptions, for 5 years after acquiring title to the property. This bill does not prohibit or limit the ability of local governments to take private property to abate a public nuisance inside or outside of a community redevelopment area. Therefore, cities and counties retain authority to take property to abate or eliminate any public nuisance if the taking is reasonably necessary.

City and county power to take property by eminent domain for a public purpose is otherwise unchanged; however, cities and counties are required to strictly comply with the prohibitions against transfers of taken property to private entities as provided in new s. 73.013, F.S.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: This bill provides for limited government by restricting the circumstances under which local governments may take private property by eminent domain. The bill does not, however, alter the manner in which community redevelopment areas are created, funded, modified, or otherwise governed. The bill also restricts the circumstances under which private property taken by eminent domain may be transferred to private entities.

B. EFFECT OF PROPOSED CHANGES:

INTRODUCTION

On June 23, 2005, the United States Supreme Court issued its decision in the case of *Kelo v. City of New London*[1], concluding that the U.S. Constitution does not prohibit the City of New London from taking private property by eminent domain for the public purpose of economic development. Even though the Court's decision approved *Kelo*-type takings under the U.S. Constitution, the decision does not restrict the State of Florida from prohibiting takings for economic development or prohibiting transfers of property taken by eminent domain to private parties.

On June 24, 2005, House Speaker Allen Bense announced the creation of the Select Committee to Protect Private Property Rights chaired by Representative Marco Rubio. The Select Committee was tasked with reviewing Florida law in an effort to identify areas of ambiguity and recommend changes to ensure appropriate protections of property rights.

The fundamental issue raised by the *Kelo* decision may be summarized as follows: Under Florida law, is economic development -- which may include, but is not limited to, creating jobs and enhancing the tax base -- a valid public purpose for which private property may be taken and transferred to another private entity? In short, the Florida Constitution, Florida Statutes, and Florida Supreme Court decisions do not explicitly prohibit takings of private property for the purpose of economic development. Therefore, unless the Florida Constitution or statutes are amended, the question of whether a city or a county may take property for purposes of economic development will remain unanswered until directly addressed by the Florida Supreme Court.

While the case law and statutes do not expressly authorize takings for economic development purposes, private property rights advocates assert that current statutes authorizing the taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions within a geographical area are being used to take property that is not genuinely blighted for economic development purposes. Much of the concern expressed by property rights advocates centers around the application of the statutory definition of "blighted area" and what many perceive as vague and inappropriate criteria in the definition. On the other hand, representatives of local government assert that the statutory criteria for slum and blight are sufficiently narrow and that the power of eminent domain is rarely exercised in the community redevelopment context.

This bill addresses takings of private property outside the redevelopment context for economic development purposes by prohibiting the transfer of taken property to private parties unless the transfer qualifies as one of the listed exceptions to the prohibition. The bill significantly limits eminent domain authority in the redevelopment context by authorizing the taking of property only if conditions on the property pose an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain as evidenced by at least one factor in an enumerated list; requiring enhanced notice to property and business owners under the Community Redevelopment Act; increasing the burden

[1] 125 S.Ct. 2655 (2005).

of proof on the local government at the time of taking property under the Community Redevelopment Act; and requiring a circuit court reviewing a proposed taking of property located in a redevelopment area to make certain determinations without applying a presumption of correctness or extending judicial deference to the local government determinations regarding the taking. The bill does not, however, alter the manner in which community redevelopment areas are created, funded, modified, or otherwise governed.

CURRENT SITUATION

General Principles of Eminent Domain Law

"Eminent domain" may be described as the fundamental power of the sovereign to take private property for a public use without the owner's consent. The power of eminent domain is absolute, except as limited by the Federal and State Constitutions, and all private property is subject to the superior power of the government to take private property by eminent domain.

The U.S. Constitution places two general constraints on the use of eminent domain: The taking must be for a "public use" and government must pay the owner "just compensation" for the taken property.[2] Even though the U.S. Constitution requires private property to be taken for a "public use", the U.S. Supreme Court long ago rejected any requirement that condemned property be put into use for the general public. Instead, the Court embraced what the Court characterizes as a broader and more natural interpretation of public use as "public purpose".

As long ago as 1905, the Court upheld state statutes that resulted in the transfer of taken property from one private owner to another for a legislatively declared public purpose. Prior to *Kelo*, the two most significant cases regarding this type of taking were *Berman v. Parker*[3] and *Hawaii Housing Authority v. Midkiff*[4].

In 1954, the Court issued a decision in the *Berman* case upholding a redevelopment plan targeting a blighted area. Under the Plan, part of the taken property would be leased or sold to private parties for redevelopment. A property owner challenged the taking, arguing that his property was not blighted and that the creation of a "better balanced, more attractive community" was not a valid public use. The Court held that eliminating slum or blight conditions in a geographic area is a public purpose and that it is permissible for government to take a parcel of private property in the area even if that particular parcel is not slum or blighted. Perhaps the most important aspect of the decision is the Court's conclusion that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."

In 1984, the Court decided the *Midkiff* case in which private property owners challenged a Hawaii statute under which private properties were taken and transferred to lessees of those properties for the public purpose of reducing concentration of land ownership. Reaffirming the *Berman* decision's deferential approach to legislative judgments, the court unanimously upheld the statute. The Court concluded that a taking should be upheld as long as it is "rationally related to a conceivable public purpose."

Kelo v. City of New London

In 1990, a state agency designated the City of New London a "distressed municipality." The City was not, however, designated as a blighted or slum area. Thereafter, state and local officials targeted the area for economic revitalization, and a development plan was drafted. In addition to creating a large number of jobs and increasing the City's tax base, the plan was designed to make the City more attractive and to create leisure and recreational opportunities. While most of the property owners in the development area negotiated the sale of their property, negotiations with 7 property owners were unsuccessful. The property owners who did not wish to negotiate challenged the taking arguing that the use of eminent domain was

[2] U.S. Const. amend. V.
[3] 348 U.S. 326 (1954).
[4] 467 U.S. 229 (1984).

unconstitutional because economic development without a determination of blight is not a valid public purpose.

In a 4-3 decision, the Supreme Court of Connecticut ruled that the takings were authorized by Connecticut's municipal development statute, which declares that the taking of land as part of an economic development project is a "public use" and in the "public interest". The case was appealed to the U.S. Supreme Court. The specific question before the Court was whether the City's taking of non-blighted private property for the purpose of economic development, in compliance with a state statute, satisfied the "public use" requirement of the U.S. Constitution even though the property would be transferred to other private entities for seemingly private uses.

The Court concluded that because the City's development plan "unquestionably" serves a public purpose, the takings satisfy the public use requirement of the U.S. Constitution. The Court immediately acknowledged, however, that a governmental entity may not take the private property of party A for the sole purpose of transferring the property to another private party B, even though A is paid just compensation. The court also noted that a one-to-one transfer of private property for the purpose of putting the property to more productive use, executed outside the confines of an integrated development plan, was not at issue in this case. The court concluded that, while such an unusual exercise of government power "would certainly raise a suspicion that a private purpose was afoot" the issue was not presented in the *Kelo* case and would not be addressed by the Court until directly presented in a future case.

The Court explicitly stated that the City could not take property simply to confer a private benefit to a "particular" private party. The Court also acknowledged that a governmental entity may not take property under the mere "pretext" of a public purpose, when its actual purpose was to bestow a private benefit. In *Kelo*, the Court noted that the takings would be executed pursuant to a "carefully considered" development plan; therefore, the property was not being taken under a mere pretext of public purpose.

Unlike more traditional public use takings, i.e., roads, schools, public parks, the Court recognized that the private lessees of the condemned property in New London would not be required to make the property or their services available to all comers. However, the Court noted that over the last hundred years, it has repeatedly rejected a literal requirement that condemned property be put into use for the general public and embraced the broader and more natural interpretation of public use as public purpose. The Court explained the erosion of "use by the public" as the definition of "public use" by pointing to the difficulty in administering the test and the impracticality of the test "given the diverse and always evolving needs of society."

The Court noted that, without exception, its decisions have "defined [the concept of public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field." The Court pointed out that its earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" the Court "owe[s] state legislatures and state courts in discerning local public needs." For more than a century, the Court said, its public use jurisprudence has "wisely eschewed" rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

Moreover, citing the *Berman* redevelopment case, the Court reasoned that promoting economic development is a traditional function of government and that "[t]here is... no principled way of distinguishing economic development from the other public purposes that we have recognized."

The Court also noted that a determination by municipal officials, acting pursuant to state authorization, that city-planned economic redevelopment is necessary "is entitled to [the Court's] deference." The city had, the Court recognized, carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue.

As with many eminent domain cases, the holding of the *Kelo* case is not absolutely clear. However, the Court explicitly concluded that the City's plan unquestionably serves a public purpose and that taking

private property under the facts presented in the case is permissible under the public use requirement of the U.S. Constitution.

It should be emphasized that the *Kelo* decision does not in any way restrict the State of Florida from prohibiting takings for purposes similar to those in *Kelo*, or for any other purpose for that matter. The Court emphasized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." Every state is entitled to interpret the public purpose provisions of its own state constitution in a manner that more narrowly interprets the public purpose requirement. In short, Florida may prohibit takings that are allowed under the U.S. Constitution, but may not allow takings that are prohibited.

Florida Eminent Domain Law

The Florida Constitution addresses eminent domain in section 6, Article X, as follows:

> (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
>
> (b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

The Florida Constitution prohibits takings of private property unless the taking is for a "public purpose" and the property owner is paid "full compensation." The Florida Supreme Court recognized long ago that the taking of private property is one of the most harsh proceedings known to the law, that "private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law."[5]

Generally speaking, in order for a taking to be valid in Florida, the condemning authority must:

1. Possess authority to exercise the power of eminent domain;
2. Demonstrate that a taking of private property is pursued for a valid public purpose and that all statutory requirements have been fulfilled;
3. Offer evidence showing that the taking is reasonably, not absolutely, necessary to accomplish the public purpose of the taking; and
4. Pay the property owner full compensation as determined by a 12-member jury.

Each of these four requirements is more fully discussed below.

1. The condemning authority must be authorized to exercise the power of eminent domain.

In order to take private property by eminent domain, an entity must possess statutory or constitutional authority to exercise the power of eminent domain. With the exception of cities and possibly charter counties, an entity does not have authority to exercise the power of eminent domain unless authorized to do so by the Legislature. If the Legislature delegates authority to exercise the power of eminent domain, procedures and requirements imposed by statute are mandatory.

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[5] *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (Fla. 1947).
Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale, 315 So.2d 451 (Fla. 1975).

a. Constitutional Delegation of Home Rule Powers to Cities and Counties

The municipal home rule provision in Florida's Constitution authorizes cities to "exercise any power for municipal purposes except as otherwise provided by law".[6] In 1992, the Florida Supreme Court concluded that a statutory grant of authority is not necessary in order for a city to exercise the power of eminent domain.[7] However, because cities have all powers "except as otherwise provided by law", the Legislature may expressly prohibit cities from exercising the power of eminent domain for particular purposes. Rather than prohibiting municipal exercise of the power of eminent domain, the Legislature has granted municipalities broad statutory powers of eminent domain, including the power to take private property for "good reason connected in anywise with the public welfare of the interests of the municipality and the people thereof" and for "municipal purposes".[8]

The Florida Constitution grants charter counties "all powers of local self government not inconsistent with general law" and grants noncharter counties "such power of self-government as is provided by general law."[9] Based upon the broad constitutional grant of authority, it appears that charter counties possess the power of eminent domain except as expressly prohibited by general law. However, the Florida Supreme Court has stated, in what appears to be dicta, that counties may not have the power of eminent domain unless specifically authorized by the Legislature.[10] Even if charter counties do not possess constitutional home rule power to take property, the Legislature has granted broad statutory powers to all counties, including the power to take property for "any county purpose".[11]

It should be noted there is no evidence indicating that a city or county in Florida has exercised the power of eminent domain under constitutional home rule powers for the declared purpose of economic development.

2. A condemning authority must demonstrate that a taking is pursued for a valid public purpose and that any statutory requirements have been fulfilled.

a. What is a valid public purpose for which property may be taken by eminent domain under Florida law?

The second requirement for a valid taking is that the property must be taken for a public purpose. The fundamental question is this: what qualifies as a public purpose in Florida? There is not a definitive answer to the question for at least three reasons. First, the determination of whether a taking serves a valid public purpose depends upon the facts of each case. Second, the concept of public purpose has evolved in Florida case law over the past century from a narrowly defined and applied concept to broadly defined and applied concept. Third, the Florida Supreme Court has equated the public purpose necessary to support the issuance of public bonds with the public purpose necessary to support a taking of private property by eminent domain. However, as with eminent domain cases, recent bond validation cases appear to apply a broad interpretation of the public purpose doctrine while early cases apply a more narrow interpretation of the doctrine.

The Florida Courts have long held that the public purpose requirement in the Florida Constitution does not require private property taken by eminent domain to be "used by the public" if the court determines that the taking accomplishes a valid public purpose. However, Florida law does not allow government to take property from private owner A and transfer it to private owner B for "the sole purpose of making such property available to private enterprises for private use."[12]

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[6] Art. VIII, § 2, Fla. Const.
[7] *City of Ocala v. Nye*, 608 So.2d 15 (Fla. 1992).
[8] § 166.411, F.S.
[9] Art. VIII, § 1, Fla. Const.
[10] *City of Ocala v. Nye*, 608 So.2d 15 (Fla. 1992).
[11] § 127.01, F.S.
[12] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980); *State ex rel. Ervin v. Cotney*, 104 So.2d 346 (Fla. 1958).

In order to demonstrate that public purpose is not a clearly defined concept, the following Florida Supreme Court decisions illustrate the fact that some decisions apply the public purpose concept narrowly, while other cases apply the concept broadly.

The first case illustrating the narrow view is the 1947 case of *Peavy-Wilson Lumber Co. v. Brevard County.*[13] In the *Peavy* case, the Court concluded that the power of eminent domain should be limited to taking property for "something basically essential" such as roads, schools, drainage projects, parks, and playgrounds. However, even the *Peavy* Court recognized that the concept is not static and advances with caution to meet society's needs in conformity with the constitution.

In 1975, the court considered the case of *Baycol v. Downtown Development Authority of City of Ft. Lauderdale*[14], in which a downtown development authority attempted to condemn private property for a parking garage. The Supreme Court concluded that there was not a public need for extra parking facilities, which was cited as the sole basis for the taking, without the shopping center that would be constructed atop the parking garage. The development authority did not assert that economic development -- job creation or tax base enhancement -- was the public purpose for condemning the property. Therefore, the *Baycol* court did not explicitly rule on whether a taking for the declared public purpose of economic development is permissible under the Florida Constitution. The *Baycol* court declared, however, that private property may not be taken by eminent domain for a predominantly private use. To date, the Court has not established a "test" for determining when a public purpose predominates over the private interest. Each case is viewed on the individual facts presented to the court and based upon the public purpose asserted by the condemning authority. Therefore, it is unknown whether the Florida courts would consider a *Kelo*-type taking as serving a predominately public or private use.

In 1977, the court considered the case of *Deseret Ranches of Florida v. Bowman,*[15] and upheld a state statute that permitted one private property owner to exercise the power of eminent domain for the purpose of obtaining an easement of necessity over the property of another private landowner. The court reasoned that the "the statute's purpose is predominantly public and the benefit to the landowner is incidental to the public purpose....Useful land becomes more scarce in proportion to the population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stock raising, the statute is designed to fill these needs. There is then a clear public purpose in providing means of access to such lands so that they may be utilized in the enumerated ways." It has been asserted that the court's decision in *Deseret* "utterly complicates what some thought might have otherwise been a straightforward argument that *Baycol* prohibits *Kelo*-style economic development takings. In *Deseret Ranches*, it was clear that all the direct benefits of the taking were private, and any public benefits were purely incidental. Yet the 'sensible utilization of land' was, for the Court, of such a dominant public purpose as to allow that rather lopsided outcome to be characterized as consistent with *Baycol.* One does not have to possess much imagination to think of how economic development takings could be portrayed as also serving the predominant public purpose of 'sensible utilization of land.'"[16]

In 1988, the court continued to broaden the application of the public purpose doctrine in *Fl. Dep't of Transp. v Fortune Federal Savings and Loan Ass'n,*[17] concluding that "[t]he term 'public purpose' does not mean simply that the land is used for a specific public function, i.e. a road or other right of way. Rather, the concept of public purpose must be read more broadly to include projects which benefit the state in a tangible, foreseeable way."

There is also a large body of case law addressing the "public purpose" necessary to support the issuance of public bonds or the spending of public funds. When the Florida Supreme Court upheld the Community

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[13] *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (Fla. 1947).
[14] *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975).
[15] 349 So.2d 155 (Fla. 1977).
[16] Professor J. B. Ruhl, *Property Rights at Risk? Eminent Domain Law in Florida After The U.S. Supreme Court Decision In Kelo v. City of New London*, p. 11 (James Madison Institute Backgrounder, Number 46, Sept. 2005).
[17] *Dep't of Transp. v. Fortune Federal Sav. and Loan Ass'n*, 532 So.2d 1267 (Fla. 1988).

Redevelopment Act in 1980[18], it equated the public purpose necessary to support the issuance of public bonds with the public purpose necessary to support a taking of private property by eminent domain. At least since 1968, the Court has broadly applied the public purpose concept in bond validation cases. However, there are early bond validation cases that appear to apply a narrow view of the public purpose doctrine.

b. Determinations of public purpose

The Legislature may authorize an entity to take property and, at the same time, declare that the taking serves a particular public purpose. However, the ultimate question of the validity of a legislatively declared public purpose is resolved by the courts.[19] Nonetheless, the courts' role in determining whether the power of eminent domain is exercised in furtherance of a legislatively declared public purpose is narrow.[20] In order to invalidate a statute that has a stated public purpose, the party challenging the statute must show that the stated purpose is arbitrary and capricious and so clearly erroneous as to be beyond the power of the legislature.[21] The threshold question for the courts is not whether the proposed use is a public one, but whether the Legislature might reasonably consider it a public one.[22]

While the question of whether the use for which private property is taken is a public use is ultimately a judicial question, where the Legislature declares a particular use to be a public use, the presumption is in favor of its declaration, and the courts will not interfere unless the use is clearly and manifestly of a private character.[23]

Similarly, when a local government's governing body determines that a taking of private property serves a statutory public purpose, the determination is entitled to judicial deference and is presumed valid and correct unless patently erroneous. Unless a condemning authority acts illegally, in bad faith, or abuses its discretion, its selection of land for condemnation will not be overruled by a court; a court is not authorized to substitute its judgment for that of a governmental body acting within the scope of its lawful authority.[24] The court will sustain the local government's determination that a taking serves the statutory public purpose as long as it is "fairly debatable".[25]

3. A condemning authority must offer evidence showing that the taking is reasonably, not absolutely, necessary to accomplish the public purpose of the taking.

If a governmental entity is authorized to take property for a valid public purpose, the entity must show that taking the property is reasonably, not absolutely, necessary in order to accomplish the declared public purpose. First, the condemning authority must show some evidence of a reasonable necessity for the taking. Once a reasonable necessity is shown, the exercise of the condemning authority's discretion will not be disturbed in the absence of illegality, bad faith, or gross abuse of discretion.[26]

4. A condemning authority must pay the property owner full compensation as determined by a 12-member jury.

If a court finds that a governmental entity is authorized to take private property for a valid public purpose, and that the entity has presented evidence showing that the property is reasonably necessary to accomplish the declared public purpose, the property owner must be paid full compensation for the taken

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[18] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980).
[19] *Dep't of Transp. v. Fortune Federal Sav. and Loan Ass'n*, 532 So.2d 1267 (Fla. 1988).
[20] *Id.*
[21] *Id.*
[22] *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527 (Fla. 1929).
[23] *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (Fla. 1926).
[24] *Canal Authority v. Miller*, 243 So.2d 131 (Fla. 1970).
[25] *Panama City Beach Community Redevelopment Agency v. State*, 831 So.2d 662 (Fla. 2002); *JFR Inv. v. Delray Beach Community Redevelopment Agency*, 652 So.2d 1261 (Fla. 4th DCA 1995).
[26] *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977).

property. Key aspects of the constitutional requirement for payment of full compensation may be summarized as follows:

- A property owner is entitled to full and just compensation.
- A twelve-member jury determines the amount of compensation.
- Determining the amount of just compensation is a judicial function that cannot be performed by the Legislature directly or indirectly.
- The Legislature may create an obligation to pay more than what the courts might consider full compensation.
- Generally, the just and full compensation due is the fair market value of the property at the time of the taking.
- A condemning authority must pay reasonable attorney's fees and costs.
- A landowner is entitled to compensation for the reasonable cost of moving personal property, including impact fees.
- Business damages are available only in the case of partial takings, not takings of a full parcel.

Impact of the *Kelo* Decision on Florida Law

The question of whether the *Kelo* decision impacts takings in Florida continues to be the subject of debate. Arguably, the *Kelo* decision has no direct impact on Florida's eminent domain law. Although the decision applies in Florida to the extent that a *Kelo*-type taking may not violate the U.S. Constitution, the decision does not mean that a *Kelo*-type taking is allowed under the Florida Constitution. Whether the Florida Constitution allows a *Kelo*-type taking must be decided by the Florida Supreme Court, not the U.S. Supreme Court. What remains uncertain is whether the *Kelo* decision will have an indirect impact on the Florida courts' interpretation and application of eminent domain law in any future attempts by cities or counties to take private property for economic development purposes.

Determining whether a *Kelo*-type taking may occur in Florida must be considered in two contexts:

1. First, whether a city or county taking of private property in a non-blighted or non-slum area for the purpose of economic development is permitted outside the context of Florida's Community Redevelopment Act; and

2. Second, whether *Kelo*-type takings are now occurring under the Community Redevelopment Act.

Kelo-type takings outside the Community Redevelopment Act context

Unlike Connecticut, the Florida Legislature has not enacted a statute that expressly authorizes takings of private property in non-blighted or non-slum areas for the purpose of economic development. Therefore, state agencies are prohibited from taking property for economic development purposes. Based on the absence of a statutory delegation of authority, it may appear that a *Kelo*-type taking cannot occur under any circumstances. As previously discussed, however, cities have and charter counties may have constitutional home rule power to take property by eminent domain for economic development purposes without an explicit authorization from the Legislature. In addition, current statutes grant broad home rule authority to cities and counties, including the authority to exercise the power of eminent domain for any municipal or county purpose, and declare that economic development is a public purpose for which cities and counties may expend public funds. It could be argued that, since the Legislature has declared economic development a public purpose for spending public funds[27], economic development may be considered a public purpose for which cities and counties may exercise the power of eminent domain.

Based upon the uncertainty created by the current case law and the lack of case law directly on point, it is not possible to determine how the Florida courts will view takings of private property for economic development purposes in Florida if directly presented with the issue. What is certain is that there is not an explicit statutory or constitutional provision that prohibits cities or counties from taking private property in

[27] ss. 125.045 and 166.021, F.S.

non-blighted or non-slum areas for purposes of increasing jobs, increasing the tax base, maximizing efficient use of property, or other general economic development purposes. Further, the Florida Supreme Court has never considered a case involving a taking of private property in non-blighted or non-slum areas by a city or county asserting home rule powers for the declared public purpose of economic development.

Therefore, the decision as to whether *Kelo*-type takings are permissible in Florida lies squarely in the judiciary, and will remain so unless the constitution or statutes are amended to restrict takings for economic development purposes or restrict transfers of taken property to private entities.

Takings in the context of the Community Redevelopment Act

After the *Kelo* decision was issued, the media and other interested parties focused primarily on Florida's Community Redevelopment Act (Act), alleging that abuses of the Act are occurring throughout Florida. However, the *Kelo* decision does not have a direct impact on takings in the redevelopment context due to the fact that the property at issue in *Kelo* was not blighted or taken under a "redevelopment" statute.

In 1980, the Florida Supreme Court upheld Florida's Community Redevelopment Act in its entirety. The Act authorizes the use of eminent domain for acquisition and clearance of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions in a geographic area. The Act also authorizes "substantial private and commercial uses of the property after redevelopment."[28]

The Act imposes requirements that must be satisfied by a county or city that wishes to create a redevelopment agency, declare redevelopment areas, or issue revenue bonds to finance projects within these areas. Under the Act, a county or city may not exercise community redevelopment authority, including the power of eminent domain, until the county or city satisfies the statutory requirements. Those requirements include adoption of a resolution, supported by data and analysis, which makes a legislative finding that the conditions in the area meet the criteria of a "slum area" or "blighted area" as defined in statute,[29] and that the rehabilitation, conservation, or redevelopment of the area is necessary in the interest of the public health, safety, morals, or welfare of the residents of the county or city.[30]

The Community Redevelopment Act does not specifically authorize takings for "economic development" purposes; rather, the Act authorizes the taking of property within a blighted or slum area for the public purpose of eliminating and preventing slum and blight conditions, and permits the transfer of taken property to private entities for redevelopment in order to accomplish that public purpose. Private property rights advocates assert that the Act is being used to take areas of property that are not genuinely blighted for purely economic development purposes. Much of the concern expressed by property rights advocates centers around the application of the statutory definition of "blighted area," and what many perceive as the vague and inappropriate criteria in the definition.

Soon after the *Kelo* decision was issued, an Order of Taking was entered by the Circuit Court in Volusia County in a case involving takings of private property on the Daytona Beach Boardwalk, which is located within a community redevelopment area. The Order of Taking cites extensively to the *Kelo* decision, as well as to Florida judicial decisions, to uphold the takings in the case. Citing the *Kelo* decision, the circuit court opined that "[w]hen a taking serves a public purpose, the fact that the property ultimately is transferred to a private owner and that it confers a private benefits on others does not render the taking unconstitutional. The public use clause would be violated only if the taking were for purely private purposes or if the alleged public purpose were merely pretextual."[31]

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[28] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980).
[29] § 163.355, F.S.
[30] § 163.355, F.S.
[31] *City of Daytona Beach v. Mathas*, 2004-31846-CICI (Fla. Cir. Ct. Aug. 19, 2005).

Community Redevelopment Act issues addressed in case law

A large body of case law exists regarding the exercise of eminent domain under the Community Redevelopment Act, which includes the following significant judicial conclusions:

- A community redevelopment agency is not required to prove that the same level of blight exists when it seeks to condemn property as was present when the redevelopment plan was initially adopted.[32]
- Designations of blight or slum do not expire after a given period of time; therefore, property located within a redevelopment area is subject to taking for an indefinite period of time.[33]
- If a public purpose and reasonable necessity exists for the taking of property for slum or blight clearance, the fact that a landowner has begun to develop the property in accordance with the redevelopment plan does not give the owner an option to retain and develop the property unless approved by the redevelopment agency.[34]
- The general characteristics of a slum or blighted geographic area control whether property within the entire area is subject to taking, not the condition of an individual parcel.[35] Therefore, a parcel of property may be subject to taking by eminent domain if the parcel is located in an area designated as slum or blighted even if the parcel itself is not in a slum or blighted condition.

Summary of Key Points

The following may be considered a summary of the key aspects of the preceding discussion of the law:

- The decision as to whether a taking for economic development purposes is permissible in Florida lies squarely in the judiciary, and will remain so unless the constitution or statutes are amended to restrict such takings.
- The *Kelo* decision did not directly affect the fundamental principles of Florida's eminent domain law; however, for the first time, the U.S. Supreme Court approved, under the U.S. Constitution, a taking of private property in a non-blighted or non-slum area and subsequent transfer to private parties for the purpose of economic development.
- Whether the *Kelo* decision will have an indirect impact on the Florida courts' interpretation and application of the law in a future attempt by cities or counties to take private property for economic development purposes is unknown.
- There is not a Florida statute that explicitly prohibits the taking of private property for economic development purposes; therefore, cities and counties appear to have the underlying authority to initiate a taking for economic development purposes under their constitutional and statutory home rule power.
- The Florida Supreme Court has not considered a case involving a taking for the declared public purpose of economic development. Therefore, whether the Court will uphold or prohibit such takings in the future is unknown.
- The Florida Supreme Court has upheld the Community Redevelopment Act, concluding that the elimination and prevention of slum and blight serves a public purpose and that the public purpose is not invalidated by the substantial involvement of private interests in redevelopment.
- The Community Redevelopment Act includes a broad definition of "blighted area," which may permit the taking of an individual parcel of property that does not appear to be blighted. Private property rights advocates claim that under the current definition of "blight," *Kelo*-type takings are occurring in Florida.

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[32] *Batmasian v. Boca Raton Community Redevelopment Agency*, 580 So.2d 199 (Fla. 4th DCA 1991); *City of Daytona Beach v. Mathas*, 2004-31846-CICI (Fla. Cir. Ct. Aug. 19, 2005).

[33] *Rukab v. City of Jacksonville Beach*, 866 So.2d 773 (Fla. 1st DCA 2004); *Batmasian v. Boca Raton Community Redevelopment Agency*, 580 So.2d 199 (Fla. 4th DCA 1991); *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977).

[34] *Post v. Dade County*, 467 So.2d 758 (Fla. 3rd DCA 1985); rev. den. *Post v. Dade County*, 479 So.2d 118 (Fla. 1985).

[35] *Berman v. Parker*, 348 U.S. 26 (1954); *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980); *Post v. Dade County*, 467 So.2d 758 (Fla. 3rd DCA 1985); rev. den. *Post v. Dade County*, 479 So.2d 118 (Fla. 1985); *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So.2d 745 (Fla. 1959).

- The League of Cities and the Community Redevelopment Association assert that eminent domain is typically a last resort to complete the land assembly process. However, they predict that, without the power of eminent domain, "CRAs will have much difficulty in assembling land especially where many landowners are involved".

Community Redevelopment Act Generally

The Community Redevelopment Act of 1969, Ch. 163, Part II, F.S. (Act), provides a mechanism to eliminate and prevent the recurrence of slum or blighted areas, "which constitute a serious and growing menace, injurious to the public health, safety, morals, and welfare of the residents of the state." The Act finds and declares that the powers conferred by the Act, including the power of eminent domain, are for public uses and purposes for which public money may be expended and the power of eminent domain exercised. In short, the Act declares that eliminating and preventing the recurrence of slum or blight conditions is a valid public purpose for which property may be taken by eminent domain.

The Act authorizes counties and cities to exercise the community redevelopment powers under the Act if the governing body first adopts a "finding of necessity" resolution finding that conditions in the area meet the criteria for a "slum area" or "blighted area" under the Act. The definition has undergone revisions over the years whereby the criteria were made more general in order to allow non-traditional "slum" and "blighted" areas to be eligible for participation. Section 163.340, F.S., defines "slum area" and "blighted area" as follows:

(7) "Slum area" means an area having physical or economic conditions conducive to disease, infant mortality, juvenile delinquency, poverty, or crime because there is a predominance of buildings or improvements, whether residential or nonresidential, which are impaired by reason of dilapidation, deterioration, age, or obsolescence, and exhibiting one or more of the following factors:
(a) Inadequate provision for ventilation, light, air, sanitation, or open spaces;
(b) High density of population, compared to the population density of adjacent areas within the county or municipality; and overcrowding, as indicated by government-maintained statistics or other studies and the requirements of the Florida Building Code; or
(c) The existence of conditions that endanger life or property by fire or other causes.

(8) "Blighted area" means an area in which there are a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property, and in which two or more of the following factors are present:
(a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;
(b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;
(c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
(d) Unsanitary or unsafe conditions;
(e) Deterioration of site or other improvements;
(f) Inadequate and outdated building density patterns;
(g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;
(h) Tax or special assessment delinquency exceeding the fair value of the land;
(i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;
(j) Incidence of crime in the area higher than in the remainder of the county or municipality;
(k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;
(l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality;
(m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or
(n) Governmentally owned property with adverse environmental conditions caused by a public or private entity.

However, the term "blighted area" also means any area in which at least one of the factors identified in paragraphs (a) through (n) are present and all taxing authorities subject to s. 163.387(2)(a) agree, either by interlocal agreement or agreements with the agency or by resolution, that the area is blighted. Such agreement or resolution shall only determine that the area is blighted. For purposes of qualifying for the tax credits authorized in chapter 220, "blighted area" means an area as defined in this subsection.

Upon a further finding that there is a need for a community redevelopment agency to carry out the community redevelopment purposes of the Act, the governing body may create a community redevelopment agency. The finding of necessity resolution is not required to specify that property within the redevelopment area may be subject to taking by eminent domain, and the governing body is not required to provide notice of the resolution to property owners within the area other than the notice typically provided for public hearings conducted by a governmental entity. The notice of the public hearing is not required to specify that property within the redevelopment area may be subject to taking. After the finding of necessity resolution is adopted and the community redevelopment agency is formed, property within the area is subject to taking if taking the property is reasonably necessary to accomplish the public purpose of eliminating and preventing the recurrence of slum or blight conditions in the area.

Section 163.375, F.S., currently authorizes any county or municipality, or any community redevelopment agency pursuant to specific approval of the governing body of the county or municipality that established the agency, to acquire by eminent domain any interest in real property, including a fee simple title, that it deems necessary for, or in connection with, community redevelopment and related activities under the Act. Any county or municipality, or any community redevelopment agency pursuant to specific approval by the governing body of the county or municipality that established the agency, may exercise the power of eminent domain in the manner provided in chs. 73 and 74, F.S., or may exercise the power of eminent domain in the manner provided by any other statutory provision for the exercise of the power of eminent domain. Property in unincorporated enclaves surrounded by the boundaries of a community redevelopment area may be acquired when it is determined necessary by the agency to accomplish the community redevelopment plan. Property already devoted to a public use may be acquired in like manner. However, no real property belonging to the United States, the state, or any political subdivision of the state may be acquired without its consent.

If a governing body adopts a finding of necessity resolution and creates a redevelopment agency, any property within the redevelopment area may be subject to taking if taking the property is reasonably necessary to accomplish the public purpose of eliminating and preventing the recurrence of slum or blight conditions. If, at some point after the resolution is adopted, a property owner challenges the taking of a specific parcel of private property and questions the validity of the resolution finding blight or slum conditions, the courts will sustain the resolution and findings of the governing body "as long as [they were] fairly debatable" at the time the resolution was adopted.[36]

When a local government determines that a taking of private property serves the statutory public purpose of eliminating slum or blight conditions, the determination is entitled to judicial deference and is presumed valid and correct unless patently erroneous. Unless a condemning authority acts illegally, in bad faith, or abuses its discretion, its selection of land for condemnation will not be overruled by a court, and a court is not authorized to substitute its judgment for that of a governmental body acting within the scope of its lawful authority.[37] The court will sustain the local government's determination that a taking serves the declared public purpose as long as it is "fairly debatable".[38]

If a governmental entity is authorized to take property for a valid public purpose, the entity must show that a taking of the property is reasonably, not absolutely, necessary in order to accomplish the declared public purpose of eliminating and preventing the recurrence of slum or blight conditions. First, the condemning authority must show some evidence of a reasonable necessity for the taking. Once a reasonable necessity

[36] *Panama City Beach Community Redevelopment Agency v. State*, 831 So.2d 662 (Fla. 1992).
[37] *Canal Authority v. Miller*, 243 So.2d 131 (Fla. 1970).
[38] *Panama City Beach Community Redevelopment Agency v. State*, 831 So.2d 662 (Fla. 2002); *JFR Inv. v. Delray Beach Community Redevelopment Agency*, 652 So.2d 1261 (Fla. 4th DCA 1995).

is shown, the exercise of the condemning authority's discretion will not be disturbed in the absence of illegality, bad faith, or gross abuse of discretion.[39]

Within community redevelopment areas, charter counties and cities may also exercise the power of eminent domain pursuant to their home rule powers or any other statutory authorization, including the power to take property for any county or municipal purpose. Non-charter counties may take property within the boundaries of a community redevelopment area for any purpose authorized by statute, including any county purpose.

EFFECT OF PROPOSED CHANGES

Section-by-Section Analysis

Section 1. Creates s. 73.013, F.S.

This section creates new s. 73.013, F.S., to restrict transfers of property taken by eminent domain to private parties. This section is created to address takings for economic development purposes by prohibiting transfers of property taken by eminent domain to private parties unless the transfer qualifies as one of the exceptions listed in this section.

According to this new section, if the state, any political subdivision as defined by statute, or any other entity to which the power of eminent domain is delegated files a petition of taking on or after July 1, 2006, regarding a parcel of real property, ownership or control of property acquired pursuant to the petition may not be conveyed by the condemning authority or any other entity to a natural person or private entity, except that ownership or control of property acquired pursuant to the petition may be conveyed to:

(1) (a) A natural person or private entity for use in providing common carrier services or systems;
(b) A natural person or private entity for use as a road or other right-of-way or means open to the public for transportation, whether at no charge or by toll;
(c) A natural person or private entity that is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;
(d) A natural person or private entity for use in providing public infrastructure;
(e) A natural person or private entity that occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;
(f) A natural person or private entity if the property was owned and controlled by the condemning authority or a governmental entity for at least 5 years after the condemning authority acquired title to the property; or
(g) A natural person or private entity in accordance with subsection (2).
(2) If ownership of property is conveyed to a natural person or private entity pursuant to paragraph (1)(a), (b), (c), (d), and (e), and that natural person or private entity retains ownership and control of the property for at least 5 years after acquiring title, the property may subsequently be transferred, after public notice and competitive bidding, to another natural person or private entity without restriction.

[39] *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977).

1. Common Carriers

New s. 73.013(1)(a), F.S., allows transfers of taken property to a natural person or private entity for use in providing common carrier services or systems. A common carrier is generally defined as "one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally....The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently and hence he is regarded, in some respects, as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession or holding out, by words or by a course of conduct, as to the service offered or performed.... To constitute a public conveyance a common carrier, it is not necessary that it come within the definition of a public utility so as to be subjected to the rules and regulations of a public utility commission."[40]

2. Public Infrastructure

New s. 73.013(1)(d), F.S., allows the transfer of taken property to a private person or entity if the property will be used for purposes of public infrastructure. Although the new statutory section does not define "public infrastructure", the term is defined in The American Heritage Dictionary as "[t]he basic facilities, services, and installations needed for the functioning of a community or society, such as transportation and communications systems, water and power lines, and public institutions including schools, post offices, and prisons."[41]

Infrastructure has come to connote a diverse collection of constructed facilities and associated services, ranging from airports to energy supply to landfills to wastewater treatment. Many of the facilities are built and operated by governments, and thus fall easily into the category of public works, but others are built or operated, in whole or in part, by private enterprise or joint public-private partnership. What is today considered infrastructure has traditionally been viewed as separate systems of constructed facilities, supporting such functions as supplying water, enabling travel, and controlling floods.[42]

A 1987 committee of the National Research Council, reporting on Infrastructure for the 21st Century adopted the term "public works infrastructure" including both specific functional modes—highways, streets, roads, and bridges; mass transit; airports and airways; water supply and water resources; wastewater management; solidwaste treatment and disposal; electric power generation and transmission; telecommunications; and hazardous waste management—and the combined system these modal elements comprise. Parkland, open space, urban forests, drainage channels and aquifers, and other hydrologic features also qualify as infrastructure, not only for their aesthetic and recreational value, but because they play important roles in supplying clean air and water.[43]

Section 2. Amends s. 163.335, F.S.

Currently, s. 163.335, F.S., provides legislative findings and declarations of necessity in the Community Redevelopment Act. This section finds and declares that the powers conferred by the Act, including the power of eminent domain, are for public uses and purposes for which public money may be expended and the power of eminent domain exercised. In short, this provision declares that eliminating and preventing the recurrence of slum or blight conditions is a valid public purpose for which private property may be taken by eminent domain. In 1980, the Florida Supreme Court stated that "it was recognized very early that slum clearance and public housing, when declared to be so by the legislature, were public purposes...The wisdom of authorizing the cataclysmic demolition and redesign of neighborhoods or even whole districts is

[40] *L. B. Smith Aircraft Corp. v. Green,* 94 so.2d 832 (Fla.1957); *Ruke Transport Line, Inc. v. Green*, 156 So.2d 176 (Fla. 1st DCA 1963).
[41] The American Heritage® Dictionary of the English Language, Fourth Edition. Copyright © 2000 by Houghton Mifflin Company.
[42] In Our Own Backyard: Principles for Effective Improvement of the Nation's Infrastructure, COMMITTEE ON INFRASTRUCTURE BUILDING RESEARCH BOARD COMMISSION ON ENGINEERING AND TECHNICAL SYSTEMS NATIONAL RESEARCH COUNCIL, Albert A. Grant, Andrew C. Lemer, Editors, NATIONAL ACADEMY PRESS, WASHINGTON, D.C., 1993.
[43] *Id.*

not for the Court to determine."[44] The courts have concluded that eliminating and preventing the recurrence of slum or blight conditions is a valid public purpose for taking any property within a community redevelopment area even if the property is in immaculate condition and the taking occurs long after the local government determines that slum or blight conditions exist in the area.[45]

The bill amends s. 163.335, F.S., to specify that the prevention or elimination of a "slum area" or "blighted area" as defined in the Act, and the preservation or enhancement of the tax base, are not public uses or purposes for which private property may be taken by eminent domain.

Section 3. Amends s. 163.355, F.S.

Currently, s. 163.355, F.S., requires a city or county to adopt a finding of necessity resolution that makes a legislative finding that the conditions in the area meet the criteria described in the statutory definitions of "slum area" and "blighted area". The resolution must state that (a) one or more slum or blighted areas, or one or more areas in which there is a shortage of housing affordable to residents of low or moderate income, including the elderly, exist in such county or municipality; and (b) the rehabilitation, conservation, or redevelopment, or a combination thereof, of such area or areas, including, if appropriate, the development of housing which residents of low or moderate income, including the elderly, can afford, is necessary in the interest of the public health, safety, morals, or welfare of the residents of such county or municipality.

The bill adds new provisions to s. 163.355, F.S., all of which generally relate to providing enhanced notice prior to formation of a community redevelopment area to owners of property that may be located within the community redevelopment area. The enhanced notice is designed to inform the public that property located within a proposed redevelopment area may be subject to taking by eminent domain if the area is designated as a redevelopment area under the Act.

New subsection (2) requires each resolution finding slum or blight conditions to indicate that property within the community redevelopment area may be subject to taking by eminent domain pursuant to s. 163.375, F.S. In the alternative, the county or municipality may explicitly state in the resolution that the power of eminent domain provided under s. 163.375, F.S., will not be exercised by the county or municipality within the community redevelopment area. A county or municipality is not required to provide notice in accordance with subsections (3) and (4) if the resolution finding slum or blight conditions, as proposed and adopted by the county or municipality, expressly declares that the power of eminent domain provided under s. 163.375, F.S. will not be exercised by the county or municipality within the community redevelopment area.

New subsection (3) provides that, at least 30 days prior to the first public hearing at which a proposed resolution finding slum or blight conditions will be considered by a county or municipality, actual notice of the public hearing must be mailed via first class mail to each real property owner whose property may be included within the community redevelopment area and to each business owner, including a lessee, who operates a business located on property that may be included within the community redevelopment area.

a. Notice to Property Owners. Notice must be sent to each owner of real property that may be included within the community redevelopment area at the owner's last known address as listed on the county ad valorem tax roll. Alternatively, the notice may be personally delivered to a property owner. If there is more than one owner of a property, notice to one owner constitutes notice to all owners of the property. The return of the notice as undeliverable by the postal authorities constitutes compliance with this subsection. The condemning authority is not required to give notice to a person who acquires title to property after the notice required by this subsection has been given.

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[44] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980); *Batmasian v. Boca Raton Community Redevelopment Agency*, 580 So.2d 199 (Fla. 4th DCA 1991); *City of Daytona Beach v. Mathas*, 2004-31846-CICI (Fla. Cir. Ct. Aug. 19, 2005).
[45] See *Berman v. Parker*, 348 U.S. 326 (1954); *City of Jacksonville v. Moman*, 290 So.2d 105 (Fla. 1st DCA 1974); cert. den., 297 So.2d 570 (Fla. 1974); *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So.2d 745 (Fla. 1959).

b. Notice to Business Owners. Notice must be sent to the address of the registered agent for the business located on the property or, if no agent is registered, by certified mail or personal delivery to the address of the business located on the property. Notice to one owner of a multiple ownership business constitutes notice to all owners of that business. The return of the notice as undeliverable by the postal authorities constitutes compliance with this subsection. The condemning authority is not required to give notice to a person who acquires an interest in a business after the notice required by this subsection has been given.

c. At a minimum, the mailed notice required by paragraphs (a) and (b) must:

- Generally explain the purpose, effect, and substance of the proposed resolution;
- Indicate that private property within the proposed redevelopment area may be subject to taking by eminent domain if the current condition of the property poses an existing threat to the public health or public safety that is likely to continue absent the exercise of eminent domain;
- Indicate that private-to-private transfers of property may occur;
- Contain a geographic location map that clearly indicates the area covered by the resolution, including major street names as a means of identification of the general area;
- Provide the dates, times, and locations of future public hearings during which the resolution may be considered;
- Identify the place or places within the county or municipality at which the resolution may be inspected by the public;
- Indicate that the property owner may file written objections with the local governing board prior to any public hearing on the resolution; and
- Indicate that interested parties may appear and be heard at all public hearings at which the resolution will be considered.

New subsection (4) provides that, in addition to mailing notice to property owners, the county or municipality must conduct at least two advertised public hearings prior to adoption of the proposed resolution. At least one hearing must be held after 5 p.m. on a weekday, unless the governing body, by a majority plus one vote, elects to conduct the hearing at another time of day. The first public hearing must be held at least 7 days after the day the first advertisement is published. The second hearing must be held at least 10 days after the first hearing and must be advertised at least 5 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 a tabloid size newspaper, and the headline in the advertisement must be in a type no smaller than 18 point. The advertisement must not be placed in that portion of the newspaper where legal notices and classified advertisements appear and must be placed in a newspaper of general paid circulation rather than one of limited subject matter. Whenever possible, the advertisement must appear in a newspaper that is published at least 5 days a week unless the only newspaper in the community is published fewer than 5 days a week. At a minimum, the advertisement must:

- Generally explain the substance and effect of the resolution;
- Include a statement indicating that private property within the proposed redevelopment area may be subject to taking by eminent domain if the current condition of the property poses an existing threat to the public health or public safety that is likely to continue absent the exercise of eminent domain;
- Provide the date, time, and location of the meeting;
- Identify the place or places within the county or municipality at which the resolution may be inspected by the public;
- Contain a geographic location map that clearly indicates the area covered by the resolution, including major street names as a means of identification of the general area;
- Indicate that any interested party may file written objections with the local governing board prior to the public hearing; and
- Indicate that any interested party may appear and be heard at the public hearing.

Section 4. Amends s. 163.358, F.S.

Currently, under s. 163.358, F.S., community redevelopment powers assigned to a community redevelopment agency include all the powers necessary or convenient to carry out and effectuate the purposes and provisions of the Act, except the following, which vest in the governing body of the county or municipality:

- The power to determine an area to be a slum or blighted area, or combination thereof; to designate such area as appropriate for community redevelopment; and to hold any public hearings required with respect thereto.
- The power to grant final approval to community redevelopment plans and modifications thereof.
- The power to authorize the issuance of revenue bonds.
- The power to approve the acquisition, demolition, removal, or disposal of property and the power to assume the responsibility to bear loss.
- The power to approve the development of community policing innovations.

This bill amends s. 163.358, F.S., to specify that the power of eminent domain vests in the governing body of a city or county that has created a community redevelopment agency, and to prohibit delegation of the power of eminent domain by the governing body of a city or county to a community redevelopment agency.

Section 5. Amends s. 163.360, F.S.

Currently, s. 163.360, F.S., provides that community redevelopment in a community redevelopment area may not be planned or initiated unless the governing body has, by resolution, determined such area to be a slum area, a blighted area, or an area in which there is a shortage of housing affordable to residents of low or moderate income, including the elderly, or a combination thereof, and designated such area as appropriate for community redevelopment. The county, municipality, or community redevelopment agency may itself prepare or cause to be prepared a community redevelopment plan, or any person or agency, public or private, may submit such a plan to a community redevelopment agency. Prior to adopting a plan, the governing body must hold a public hearing on a community redevelopment plan after public notice by publication in a newspaper having a general circulation in the area of operation of the county or municipality. The notice must describe the time, date, place, and purpose of the hearing, identify generally the community redevelopment area covered by the plan, and outline the general scope of the community redevelopment plan under consideration.

This bill amends s. 163.360, F.S., to require each community redevelopment plan to indicate that real property within the community redevelopment area may be subject to taking by eminent domain pursuant to s. 163.375, F.S. If consistent with the resolution finding slum or blight conditions, the plan must indicate that the power of eminent domain provided under s. 163.375, F.S., will not be exercised by the county or municipality within the community redevelopment area.

Section 6. Amends s. 163.370, F.S.

Currently, s. 163.370, F.S., specifies that every county and municipality has all the powers necessary or convenient to carry out and effectuate the purposes and provisions of the Act, including a non-exclusive list of powers found in that section. A county or city may exercise all or any part or combination of powers granted under the Act or to elect to have such powers exercised by a community redevelopment agency

This bill amends s. 163.370, F.S., to specify that the power of eminent domain may not be exercised by a community redevelopment agency. The bill also specifies that property may only be acquired by a community redevelopment agency by voluntary methods of acquisition prior to approval of the community redevelopment plan or approval of plan modifications.

Section 7. Amends s. 163.375, F.S.

Section 163.375, F.S., currently authorizes any county or municipality, or any community redevelopment agency pursuant to specific approval of the governing body of the county or municipality which established the agency, to acquire by condemnation any interest in real property, including a fee simple title, which it deems necessary for, or in connection with, community redevelopment and related activities under the Act. Any county or municipality, or any community redevelopment agency pursuant to specific approval by the governing body of the county or municipality which established the agency, may exercise the power of eminent domain in the manner provided in chs. 73 and 74, F.S., or it may exercise the power of eminent domain in the manner provided by any other statutory provision for the exercise of the power of eminent domain. Property in unincorporated enclaves surrounded by the boundaries of a community redevelopment area may be acquired when it is determined necessary by the agency to accomplish the community redevelopment plan. Property already devoted to a public use may be acquired in like manner. However, no real property belonging to the United States, the state, or any political subdivision of the state may be acquired without its consent.

If a governing body adopts a finding of necessity resolution and creates a redevelopment agency, any property within the redevelopment area may be subject to taking if taking the property is reasonably necessary to accomplish the public purpose of eliminating and preventing the recurrence of slum or blight conditions in a geographic area. If, at some point after the resolution is adopted, a property owner challenges the taking of a specific parcel of private property and questions the validity of the resolution finding blight or slum conditions, the courts will sustain the resolution and findings of the governing body "as long as [they were] fairly debatable" at the time the resolution was adopted.[46]

This bill substantially amends s. 163.375, F.S., to limit authority to take property by eminent domain under the Act. This bill provides that, after the community redevelopment plan is adopted, a county or municipality may acquire by eminent domain any interest in a parcel of real property within a community redevelopment area, including a fee simple title, for the purpose of eliminating an existing threat to public health or public safety if the parcel of real property is condemnation eligible. A parcel of real property is condemnation eligible only if the current condition of the property poses an existing threat to public health or public safety and the existing threat to public health or public safety is likely to continue absent the exercise of eminent domain as evidenced by at least one of the following factors:

- The property contains a structure which, in its current condition, has substantial dilapidation which is either physically incurable or economically incurable in that the cost of repair of rehabilitation would exceed the replacement cost of a new structure. Superficial or cosmetic disrepair, which is reparable by a nominal expenditure, not to exceed 20% of the market value of the existing structure, is not considered dilapidation for purposes of constituting a condemnation-eligible factor;
- The property contains a structure which, in its current condition, is unsanitary, unsafe, or vermin-infested, and is designated by the agency responsible for enforcement of the housing, building, or fire codes as unfit for human habitation or use;
- The property contains a structure which, in its current condition, is a fire hazard, or otherwise dangerous to the safety of persons or property, and is designated by the agency responsible for enforcement of the housing, building, or fire codes as unfit for human habitation or use;
- The property contains a structure from which, in its current condition, the utilities, plumbing, heating, sewerage, or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for human habitation or use; or
- The physical condition, use, or occupancy of the property constitutes a public nuisance and the property has been the subject of code violations affecting public health or public safety that have not been substantially rehabilitated within one year of receipt of notice to rehabilitate from the appropriate code enforcement agency.

[46] *Panama City Beach Community Redevelopment Agency v. State*, 831 So.2d 662 (Fla. 1992).

A county or municipality must exercise the power of eminent domain in the manner provided in this section and in chs. 73 and 74, F.S., or pursuant to the power of eminent domain provided by any other statutory provision, as limited by new s. 73.013, F.S.

A county or municipality may not initiate an eminent domain proceeding pursuant to authority conferred by this section unless the governing body first adopts a resolution of taking containing specific determinations or findings that:

- The public purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain;
- The parcel of real property is condemnation eligible, including a specific description of the current conditions on the property that pose an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain; and
- Taking the property by eminent domain is reasonably necessary in order to accomplish the public purpose of eliminating an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain.

The county or municipality may not adopt a resolution of taking under this section unless actual notice of the public hearing at which the resolution is considered was provided, at least 45 days prior to the hearing, to the property owner and to any business owner, including a lessee, who operates a business located on the property.

a. Notice to Property Owners. Notice must be sent by certified mail, return receipt requested, to the last known address listed on the county ad valorem tax roll of each owner of the property. Alternatively, the notice may be personally delivered to each property owner. Notice must also be posted on the property subject to taking under the resolution. The condemning authority is not required to give notice to a person who acquires title to the property after the notice required by this subsection has been given.

b. Notice to Business Owners. Notice must be sent by certified mail, return receipt requested, to the address of the registered agent for the business located on the property to be acquired or, if no agent is registered, by certified mail or personal delivery to the address of the business located on the property to be acquired. Notice to one owner of a multiple ownership business constitutes notice to all business owners of that business. Notice must also be posted on the property subject to taking under the resolution. The condemning authority is not required to give notice to a person who acquires an interest in the business after the notice required by this subsection has been given.

At a minimum, the notices to property and business owners required above must indicate:

- That the county or municipal governing body will determine whether to take the parcel of real property pursuant to authority granted by this part and will formally consider a resolution of taking at a public hearing;
- That the property is subject to taking by eminent domain under this part because current conditions on the property pose an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain;
- The specific conditions on the property that pose an existing threat to public health or public safety and form the basis for taking the property;
- That the property will not be subject to taking if the specific conditions that pose an existing threat to public health or public safety and form the basis for the taking are removed prior to the public hearing at which the resolution will be considered by the governing body;
- The date, time, and location of the public hearing at which the resolution of taking will be considered;
- That the property owner or business owner may file written objections with the governing board prior to the public hearing at which the resolution of taking is considered; and
- That any interested party may appear and be heard at the public hearing at which the resolution of taking is considered.

If a property owner challenges an attempt to acquire his or her property by eminent domain under this section, the condemning authority must prove by clear and convincing evidence in an evidentiary hearing before the circuit court that:

- The public purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain;
- The property is condemnation eligible because conditions on the property pose an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain; and
- Taking the property by eminent domain is reasonably necessary in order to accomplish the public purpose of eliminating an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain.

The circuit court must determine whether the public purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain, whether the property is condemnation eligible, and whether taking the property is reasonably necessary in order to accomplish the public purpose of eliminating an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain. The circuit court must make these determinations without attaching a presumption of correctness or extending judicial deference to any determinations or findings in the resolution of taking adopted by the condemning authority.

Section 8. Amending s. 127.01, F.S.

Currently, s. 127.01, F.S., authorizes counties to exercise the right and power of eminent domain; that is, the right to appropriate property, except state or federal, for any county purpose. The absolute fee simple title to all taken property vests in the county unless the county seeks to condemn a particular right or estate in such property. Each county is further authorized to exercise the eminent domain power granted to the Department of Transportation by s. 337.27(1), F.S., the transportation corridor protection provisions of s. 337.273, F.S., and the right of entry onto property pursuant to s. 337.274, F.S.

However, no county has the right to condemn any lands outside its own county boundaries for parks, playgrounds, recreational centers, or other recreational purposes. In eminent domain proceedings, a county's burden of showing reasonable necessity for parks, playgrounds, recreational centers, or other types of recreational purposes is the same as the burden in other types of eminent domain proceedings.

The bill amends s. 127.01, F.S., to require strict compliance by counties with new s. 73.013, F.S., which limits the circumstances under which property taken by eminent domain may be transferred to private parties. (Please see Section 1 for detailed discussion of s. 73.013, F.S.)

Section 9. Amending s. 127.02, F.S.

Currently, s. 127.02, F.S., allows a board of county commissioners to, by resolution, authorize acquisition by eminent domain of property, real or personal, for any county use or purpose designated in the resolution.

This bill amends s. 127.02, F.S., to subject county acquisitions of real property to the restrictions on transfers to private parties provided in new s. 73.013, F.S., which is created by this bill. (Please see Section 1 for detailed discussion of s. 73.013, F.S.)

Section 10. Amends s. 166.401, F.S.

Currently, s. 166.401, F.S., authorizes all municipalities to exercise the right and power of eminent domain; that is, the right to appropriate property within the state, except state or federal property, for the uses or purposes authorized pursuant to part IV of ch. 166, F.S. The absolute fee simple title to all taken property vests in the municipal corporation unless the municipality seeks to condemn a particular right or estate in such property. Each municipality is further authorized to exercise the eminent domain power granted to

the Department of Transportation in s. 337.27(1), F.S., and the transportation corridor protection provisions of s. 337.273, F.S.

This bill amends s. 166.401, F.S., to require strict compliance by municipalities with new s. 73.013, F.S., which limits the circumstances under which property taken by eminent domain may be transferred to private parties. (Please see Section 1 for detailed discussion of s. 73.013, F.S.)

Section 11. Amends s. 166.411, F.S.

Currently, s. 166.411(1), F.S., authorizes municipalities to exercise the power of eminent domain "[f]or the proper and efficient carrying into effect of any proposed scheme or plan of drainage, ditching, grading, filling, or other public improvement deemed necessary or expedient for the preservation of the public health, or for other good reason connected in anywise with the public welfare or the interests of the municipality and the people thereof." Section 166.411(10), F.S., authorizes the exercise of the power of eminent domain "[f]or city buildings, waterworks, ponds, and other municipal purposes which shall be coextensive with the powers of the municipality exercising the right of eminent domain".

This bill amends s. 166.411(1) and (10), F.S., to subject any exercise of power under these subsections to the restrictions on transfers to private parties provided in new s. 73.013, F.S., which is created by this bill. (Please see Section 1 for detailed discussion of s. 73.013, F.S.)

Section 12. Effective Date

This act takes effect July 1, 2006, and applies to all condemnation proceedings in which a petition of taking is filed pursuant to ch. 73, F.S., on or after that date.

C. SECTION DIRECTORY:

Section 1. Creating s. 73.013, F.S.; restricting certain transfers of property taken by eminent domain to certain natural persons or private entities;
Section 2. Amending s. 163.335, F.S.; providing legislative findings and declarations;
Section 3. Amending s. 163.355, F.S.; requiring disclosure of eminent domain authority in resolutions finding slum or blight conditions; providing for notice to property owners and business owners or lessees and requirements therefor; providing for hearings and advertising requirements therefor;
Section 4. Amending s. 163.358, F.S.; providing that the power of eminent domain does not vest in a community redevelopment agency but rather with the governing body of a county or municipality;
Section 5. Amending s. 163.360, F.S.; requiring disclosure of eminent domain authority in community redevelopment plans;
Section 6. Amending s. 163.370, F.S.; revising powers of community redevelopment agencies with respect to the acquisition of real property;
Section 7. Amending s. 163.375, F.S.; revising eminent domain authority and procedures;
Section 8. Amending s. 127.01, F.S.; requiring county compliance with eminent domain limitations;
Section 9. Amending s. 127.02, F.S.; requiring county compliance with eminent domain limitations;
Section 10. Amending s. 166.401, F.S.; requiring municipal compliance with eminent domain limitations;
Section 11. Amending 166.411, F.S.; requiring municipal compliance with eminent domain limitations;
Section 12. Providing an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: Please see Fiscal Comments.

2. Expenditures: Please see Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: Please see Fiscal Comments.

2. Expenditures: Please see Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: Private property owners will not be required to relinquish their property under the Community Redevelopment Act for purposes of removing slum or blight conditions in a geographic area. Private property owners may realize economic benefits due to the ability to negotiate as willing sellers of property located in community redevelopment areas rather than through involuntary eminent domain proceedings. Private entities who may, today, acquire taken property for "non-traditional" economic uses will no longer be permitted to acquire ownership or control of taken property unless the transfer qualifies as an exception to the general prohibition provided in s. 73.013, F.S., as created in this bill.

D. FISCAL COMMENTS:

Impact of Local Governments: This bill eliminates authority under the Community Redevelopment Act to take property by eminent domain for the purpose of eliminating slum or blight conditions. Elimination of this authority may increase the cost to local government of assembling property, which cost may or may not be passed on to private developers. New s. 73.013, F.S., created by this bill, allows the transfer of taken property to a private entity for any use if the property is retained by the condemning authority, or a private party to whom property was transferred under one of the exceptions, for 5 years after acquiring title to the property. Requiring taken property to be retained for five years before the property may be transferred to a private entity for any use may result in some costs to the condemning authority, including costs of maintenance.

Impact on State Government: New s. 73.013, F.S., created by this bill, allows the transfer of taken property to a private entity for any use if the property is retained by the condemning authority, or a private party to whom property was transferred under one of the exceptions, for 5 years after acquiring title to the property. This provision applies to state agencies as well as any other condemning authority in the state. Requiring taken property to be retained for five years before the property may be transferred to a private entity for any use may result in some costs to a state agency condemning authority, including costs of maintenance.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other: See Current Situation for a general discussion of constitutional issues.

B. RULE-MAKING AUTHORITY: This bill does not address rule-making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: The bill creates s. 73.013, F.S., which allows the transfer of taken property to a private party for any use if the property is retained by the condemning authority, a governmental entity, or a private party to whom property was transferred for one of the authorized purposes, for 5 years after acquiring title to the property. On March 13, 2006, the Select Committee to Protect Private Property Rights recommended an amendment to this section to require public notice and competitive bidding prior to the transfer of taken property to a private party by a condemning authority, governmental entity, or private party to whom property was transferred for one of the authorized purposes. Due to a drafting error, however, the strike-all amendment adopted by the Local Government Council did not include the requirement for public notice and competitive bidding in the provision allowing transfers of taken property by a condemning authority or governmental entity.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 2006, the Local Government Council adopted a strike-all amendment that incorporated amendments recommended by the Select Committee to Protect Private Property Rights at its March 13, 2006 meeting. The strike-all amendment:

- Removes authority to transfer taken property to a private entity if the property was taken under the Act to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain. As a result, property taken under the Act may be transferred to private parties only if the transfer qualifies under one of the remaining exceptions;
- Retains the authority to transfer taken property after 5 years, but requires public notice and competitive bidding prior to the transfer unless otherwise provided by general law;
- Allows a city or county to take property under the Act if the purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain as evidenced by at least one of a list of factors that indicate an existing threat. In short, the amendment more explicitly defines the conditions that constitute a threat to public health or public safety; and
- Adds language to require that notice must be posted to property to be acquired by eminent domain under the Community Redevelopment Act as well as mailed.

CHAMBER ACTION

The Local Government Council recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to eminent domain; creating s. 73.013, F.S.; restricting certain transfers of property taken by eminent domain to certain natural persons or private entities; amending s. 163.335, F.S.; providing legislative findings and declarations; amending s. 163.355, F.S.; requiring disclosure of eminent domain authority in resolutions finding slum or blight conditions; providing for notice to property owners and business owners or lessees and requirements therefor; providing for hearings and advertising requirements therefor; amending s. 163.358, F.S.; providing that the power of eminent domain does not vest in a community redevelopment agency but rather with the governing body of a county or municipality; amending s. 163.360, F.S.; requiring disclosure of eminent domain authority in community redevelopment plans; amending s. 163.370, F.S.; revising powers of community redevelopment agencies with respect to the acquisition of real property; amending s. 163.375,

F.S.; revising eminent domain authority and procedures, including notice, hearings, and challenge; amending ss. 127.01 and 127.02, F.S.; requiring county compliance with eminent domain limitations; amending ss. 166.401 and 166.411, F.S.; requiring municipal compliance with eminent domain limitations; providing application; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 73.013, Florida Statutes, is created to read:

73.013 Conveyance of property taken by eminent domain.--

(1) Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, if the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated files a petition of taking on or after July 1, 2006, regarding a parcel of real property in this state, ownership or control of property acquired pursuant to such petition may not be conveyed by the condemning authority or any other entity to a natural person or private entity, except that ownership or control of property acquired pursuant to such petition may be conveyed to:

(a) A natural person or private entity for use in providing common carrier services or systems;

(b) A natural person or private entity for use as a road or other right-of-way or means open to the public for transportation, whether at no charge or by toll;

(c) A natural person or private entity that is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;

(d) A natural person or private entity for use in providing public infrastructure;

(e) A natural person or private entity that occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;

(f) A natural person or private entity if the property was owned and controlled by the condemning authority or a governmental entity for at least 5 years after the condemning authority acquired title to the property; or

(g) A natural person or private entity in accordance with subsection (2).

(2) If ownership of property is conveyed to a natural person or private entity pursuant to any of paragraphs (1)(a)-(e), and that natural person or private entity retains ownership and control of the property for at least 5 years after acquiring title, the property may subsequently be transferred, after public notice and competitive bidding unless otherwise provided

by general law, to another natural person or private entity without restriction.

Section 2. Subsection (3) of section 163.335, Florida Statutes, is amended, and subsection (7) is added to that section, to read:

163.335 Findings and declarations of necessity.--

(3) It is further found and declared that the powers conferred by this part are for public uses and purposes for which public money may be expended, the police power exercised, and the power of eminent domain exercised subject to the limitations in s. 163.375 ~~and the power of eminent domain and police power exercised~~, and the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination.

(7) It is further found that the prevention or elimination of a "slum area" or "blighted area" as defined in this part and the preservation or enhancement of the tax base are not public uses or purposes for which private property may be taken by eminent domain.

Section 3. Section 163.355, Florida Statutes, is amended to read:

163.355 Finding of necessity by county or municipality.--

(1) No county or municipality shall exercise the community redevelopment authority conferred by this part until after the governing body has adopted a resolution, supported by data and analysis, which makes a legislative finding that the conditions in the area meet the criteria described in s. 163.340(7) or (8). The resolution must state that:

(a) ~~(1)~~ One or more slum or blighted areas, or one or more areas in which there is a shortage of housing affordable to residents of low or moderate income, including the elderly, exist in such county or municipality; and

(b) ~~(2)~~ The rehabilitation, conservation, or redevelopment, or a combination thereof, of such area or areas, including, if appropriate, the development of housing which residents of low or moderate income, including the elderly, can afford, is necessary in the interest of the public health, safety, morals, or welfare of the residents of such county or municipality.

(2) A resolution finding slum or blight conditions must indicate that property within the community redevelopment area may be subject to taking by eminent domain pursuant to s. 163.375. In the alternative, the county or municipality may explicitly state in the resolution that the power of eminent domain provided under s. 163.375 will not be exercised by the county or municipality within the community redevelopment area. A county or municipality is not required to provide notice in accordance with subsections (3) and (4) if the resolution finding slum or blight conditions, as proposed and adopted by the county or municipality, expressly declares that the power of eminent domain provided under s. 163.375 will not be exercised by the county or municipality within the community redevelopment area.

(3) At least 30 days prior to the first public hearing at which a proposed resolution finding slum or blight conditions will be considered by a county or municipality, actual notice of the public hearing must be mailed via first class mail to each

real property owner whose property may be included within the community redevelopment area and to each business owner, including a lessee, who operates a business located on property that may be included within the community redevelopment area.

(a) Notice must be sent to each owner of real property that may be included within the community redevelopment area at the owner's last known address as listed on the county ad valorem tax roll. Alternatively, the notice may be personally delivered to a property owner. If there is more than one owner of a property, notice to one owner constitutes notice to all owners of the property. The return of the notice as undeliverable by the postal authorities constitutes compliance with this subsection. The condemning authority is not required to give notice to a person who acquires title to property after the notice required by this subsection has been given.

(b) Notice must be sent to the address of the registered agent for the business located on the property or, if no agent is registered, by certified mail or personal delivery to the address of the business located on the property. Notice to one owner of a multiple ownership business constitutes notice to all owners of that business. The return of the notice as undeliverable by the postal authorities constitutes compliance with this subsection. The condemning authority is not required to give notice to a person who acquires an interest in a business after the notice required by this subsection has been given.

(c) At a minimum, the mailed notice required by paragraphs (a) and (b) must:

1. Generally explain the purpose, effect, and substance of the proposed resolution;

2. Indicate that private property within the proposed redevelopment area may be subject to taking by eminent domain if the current condition of the property poses an existing threat to the public health or public safety that is likely to continue absent the exercise of eminent domain;

3. Indicate that private-to-private transfers of property may occur;

4. Contain a geographic location map that clearly indicates the area covered by the resolution, including major street names as a means of identification of the general area;

5. Provide the dates, times, and locations of future public hearings during which the resolution may be considered;

6. Identify the place or places within the county or municipality at which the resolution may be inspected by the public;

7. Indicate that the property owner may file written objections with the local governing board prior to any public hearing on the resolution; and

8. Indicate that interested parties may appear and be heard at all public hearings at which the resolution will be considered.

(4) In addition to mailing notice to property owners, the county or municipality must conduct at least two advertised public hearings prior to adoption of the proposed resolution. At least one hearing must be held after 5 p.m. on a weekday, unless the governing body, by a majority plus one vote, elects to

conduct the hearing at another time of day. The first public hearing must be held at least 7 days after the day the first advertisement is published. The second hearing must be held at least 10 days after the first hearing and must be advertised at least 5 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 a tabloid size newspaper, and the headline in the advertisement must be in a type no smaller than 18 point. The advertisement must not be placed in that portion of the newspaper where legal notices and classified advertisements appear and must be placed in a newspaper of general paid circulation rather than one of limited subject matter. Whenever possible, the advertisement must appear in a newspaper that is published at least 5 days a week unless the only newspaper in the community is published fewer than 5 days a week. At a minimum, the advertisement must:

(a) Generally explain the substance and effect of the resolution;

(b) Include a statement indicating that private property within the proposed redevelopment area may be subject to taking by eminent domain if the current condition of the property poses an existing threat to the public health or public safety that is likely to continue absent the exercise of eminent domain;

(c) Provide the date, time, and location of the meeting;

(d) Identify the place or places within the county or municipality at which the resolution may be inspected by the public;

(e) Contain a geographic location map that clearly indicates the area covered by the resolution, including major street names as a means of identification of the general area;

(f) Indicate that any interested party may file written objections with the local governing board prior to the public hearing; and

(g) Indicate that any interested party may appear and be heard at the public hearing.

Section 4. Subsection (6) is added to section 163.358, Florida Statutes, to read:

163.358 Exercise of powers in carrying out community redevelopment and related activities.--The community redevelopment powers assigned to a community redevelopment agency created under s. 163.356 include all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, except the following, which continue to vest in the governing body of the county or municipality:

(6) The power of eminent domain.

Section 5. Paragraph (d) is added to subsection (2) of section 163.360, Florida Statutes, to read:

163.360 Community redevelopment plans.--

(2) The community redevelopment plan shall:

(d) Indicate that real property within the community redevelopment area may be subject to taking by eminent domain pursuant to s. 163.375. If consistent with the resolution finding slum or blight conditions, the plan must indicate that the power of eminent domain provided under s. 163.375 will not

be exercised by the county or municipality within the community redevelopment area.

Section 6. Paragraph (o) of subsection (1) and paragraph (a) of subsection (3) of section 163.370, Florida Statutes, are amended to read:

163.370 Powers; counties and municipalities; community redevelopment agencies.--

(1) Every county and municipality shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers in addition to others herein granted:

(o) To exercise all or any part or combination of powers herein granted or to elect to have such powers exercised by a community redevelopment agency; however, the power of eminent domain shall not be exercised by a community redevelopment agency.

(3) With the approval of the governing body, a community redevelopment agency may:

(a) Prior to approval of a community redevelopment plan or approval of any modifications of the plan, acquire real property in a community redevelopment area by purchase, lease, option, gift, grant, bequest, devise, or other voluntary method of acquisition, demolish and remove any structures on the property, and pay all costs related to the acquisition, demolition, or removal, including any administrative or relocation expenses.

Section 7. Section 163.375, Florida Statutes, is amended to read:

163.375 Eminent domain.--

(1) After the community redevelopment plan is adopted, a county or municipality may acquire by eminent domain any interest in a parcel of real property within a community redevelopment area, including a fee simple title thereto, for the purpose of eliminating an existing threat to public health or public safety if the parcel of real property is condemnation eligible as defined in subsection (2). A county or municipality shall exercise the power of eminent domain in the manner provided in this section and in chapters 73 and 74, or pursuant to the power of eminent domain provided by any other statutory provision, as limited by s. 73.013. Real property belonging to the United States, the state, or any political subdivision of the state may not be acquired without its consent. ~~Any county or municipality, or any community redevelopment agency pursuant to specific approval of the governing body of the county or municipality which established the agency, as provided by any county or municipal ordinance has the right to acquire by condemnation any interest in real property, including a fee simple title thereto, which it deems necessary for, or in connection with, community redevelopment and related activities under this part. Any county or municipality, or any community redevelopment agency pursuant to specific approval by the governing body of the county or municipality which established the agency, as provided by any county or municipal ordinance may exercise the power of eminent domain in the manner provided in chapters 73 and 74 and acts amendatory thereof or supplementary thereto, or it may exercise the power of eminent domain in the manner now or which may be hereafter provided by any other~~

~~statutory provision for the exercise of the power of eminent domain. Property in unincorporated enclaves surrounded by the boundaries of a community redevelopment area may be acquired when it is determined necessary by the agency to accomplish the community redevelopment plan. Property already devoted to a public use may be acquired in like manner. However, no real property belonging to the United States, the state, or any political subdivision of the state may be acquired without its consent.~~

(2) Private property is condemnation eligible if the current condition of the property poses an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain as evidenced by at least one of the following factors:

(a) The property contains a structure which, in its current condition, has substantial dilapidation which is either physically incurable or economically incurable in that the cost of repair or rehabilitation would exceed the replacement cost of a new structure. Superficial or cosmetic disrepair, which is repairable by a nominal expenditure, not to exceed 20 percent of the market value of the existing structure, shall not constitute dilapidation for purposes of constituting a condemnation-eligible factor;

(b) The property contains a structure which, in its current condition, is unsanitary, unsafe, or vermin infested and is designated by the agency responsible for enforcement of the housing, building, or fire codes as unfit for human habitation or use;

(c) The property contains a structure which, in its current condition, is a fire hazard, or otherwise dangerous to the safety of persons or property, and is designated by the agency responsible for enforcement of the housing, building, or fire codes as unfit for human habitation or use;

(d) The property contains a structure from which, in its current condition, the utilities, plumbing, heating, sewerage, or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for human habitation or use; or

(e) The physical condition, use, or occupancy of the property constitutes a public nuisance and the property has been the subject of code violations affecting public health or public safety that have not been substantially rehabilitated within 1 year after receipt of notice to rehabilitate from the appropriate code enforcement agency.

(3) A county or municipality may not initiate an eminent domain proceeding pursuant to authority conferred by this section unless the governing body first adopts a resolution of taking containing specific determinations or findings that:

(a) The public purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain;

(b) The parcel of real property is condemnation eligible as defined in subsection (2), including a specific description of the current conditions on the property that pose an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain; and

(c) Taking the property by eminent domain is reasonably necessary in order to accomplish the public purpose of eliminating an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain.

(4) The county or municipality may not adopt a resolution of taking under this section unless actual notice of the public hearing at which the resolution is considered was provided, at least 45 days prior to the hearing, to the property owner and to any business owner, including a lessee, who operates a business located on the property.

(a) Notice must be sent by certified mail, return receipt requested, to the last known address listed on the county ad valorem tax roll of each owner of the property. Alternatively, the notice may be personally delivered to each property owner. Compliance with this subsection shall also require conspicuous posting of the notice to the premises of the property to be acquired. The posted notice shall prominently and legibly display the information provided in paragraph (c). The condemning authority is not required to give notice to a person who acquires title to the property after the notice required by this subsection has been given.

(b) Notice must be sent by certified mail, return receipt requested, to the address of the registered agent for the business located on the property to be acquired or, if no agent is registered, by certified mail or personal delivery to the address of the business located on the property to be acquired. Notice to one owner of a multiple ownership business constitutes

notice to all business owners of that business. Compliance with this subsection shall also require conspicuous posting of the notice to the premises of the property to be acquired. The posted notice shall prominently and legibly display the information provided in paragraph (c). The condemning authority is not required to give notice to a person who acquires an interest in the business after the notice required by this subsection has been given.

(c) At a minimum, the notices required by paragraphs (a) and (b) shall indicate:

1. That the county or municipal governing body will determine whether to take the parcel of real property pursuant to authority granted by this part and will formally consider a resolution of taking at a public hearing;

2. That the property is subject to taking by eminent domain under this part because current conditions on the property pose an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain;

3. The specific conditions on the property that pose an existing threat to public health or public safety and form the basis for taking the property;

4. That the property will not be subject to taking if the specific conditions that pose an existing threat to public health or public safety and form the basis for the taking are removed prior to the public hearing at which the resolution will be considered by the governing body;

5. The date, time, and location of the public hearing at which the resolution of taking will be considered;

6. That the property owner or business owner may file written objections with the governing board prior to the public hearing at which the resolution of taking is considered; and

7. That any interested party may appear and be heard at the public hearing at which the resolution of taking is considered.

(5)(a) In accordance with chapters 73 and 74, if a property owner challenges an attempt to acquire his or her property by eminent domain under this section, the condemning authority must prove by clear and convincing evidence in an evidentiary hearing before the circuit court that:

1. The public purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain;

2. The property is condemnation eligible as defined in subsection (2); and

3. Taking the property by eminent domain is reasonably necessary in order to accomplish the public purpose of eliminating an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain.

(b) The circuit court shall determine whether the public purpose of the taking is to eliminate an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain, whether the property is condemnation eligible as defined in subsection (2), and whether

taking the property is reasonably necessary in order to accomplish the public purpose of eliminating an existing threat to public health or public safety that is likely to continue absent the exercise of eminent domain. The circuit court shall make these determinations without attaching a presumption of correctness or extending judicial deference to any determinations or findings in the resolution of taking adopted by the condemning authority.

(6) ~~(2)~~ In any proceeding to fix or assess compensation for damages for the taking of property, or any interest therein, through the exercise of the power of eminent domain or condemnation, evidence or testimony bearing upon the following matters shall be admissible and shall be considered in fixing such compensation or damages in addition to evidence or testimony otherwise admissible:

(a) Any use, condition, occupancy, or operation of such property, which is unlawful or violative of, or subject to elimination, abatement, prohibition, or correction under, any law, ordinance, or regulatory measure of the state, county, municipality, or other political subdivision, or any agency thereof, in which such property is located, as being unsafe, substandard, unsanitary, or otherwise contrary to the public health, safety, morals, or welfare.

(b) The effect on the value of such property of any such use, condition, occupancy, or operation or of the elimination, abatement, prohibition, or correction of any such use, condition, occupancy, or operation.

(7) ~~(3)~~ In any proceeding to fix or assess compensation for damages for the taking of property, or any interest therein, the foregoing testimony and evidence shall be admissible notwithstanding that no action has been taken by any public body or public officer toward the abatement, prohibition, elimination, or correction of any such use, condition, occupancy, or operation. Testimony or evidence that any public body or public officer charged with the duty or authority so to do has rendered, made, or issued any judgment, decree, determination, or order for the abatement, prohibition, elimination, or correction of any such use, condition, occupancy, or operation shall be admissible and shall be prima facie evidence of the existence and character of such use, condition, or operation.

Section 8. Subsection (3) is added to section 127.01, Florida Statutes, to read:

127.01 Counties delegated power of eminent domain; recreational purposes, issue of necessity of taking.--

(3) Each county shall strictly comply with the limitations set forth in s. 73.013.

Section 9. Section 127.02, Florida Statutes, is amended to read:

127.02 County commissioners may authorize acquirement of property by eminent domain.--The board of county commissioners may, by resolution, authorize the acquirement by eminent domain of property, real or personal, for any county use or purpose designated in such resolution, subject to the limitations set forth in s. 73.013.

Section 10. Subsection (3) is added to section 166.401, Florida Statutes, to read:

166.401 Right of eminent domain.--

(3) Each municipality shall strictly comply with the limitations set forth in s. 73.013.

Section 11. Subsections (1), (9), and (10) of section 166.411, Florida Statutes, are amended to read:

166.411 Eminent domain; uses or purposes.--Municipalities are authorized to exercise the power of eminent domain for the following uses or purposes:

(1) For the proper and efficient carrying into effect of any proposed scheme or plan of drainage, ditching, grading, filling, or other public improvement deemed necessary or expedient for the preservation of the public health, or for other good reason connected in anywise with the public welfare or the interests of the municipality and the people thereof, subject to the limitations set forth in s. 73.013;

(9) For laying wires and conduits underground; and

(10) For city buildings, waterworks, ponds, and other municipal purposes which shall be coextensive with the powers of the municipality exercising the right of eminent domain subject to the limitations set forth in s. 73.013.~~; and~~

Section 12. This act shall take effect July 1, 2006, and shall apply to all condemnation proceedings in which a petition of taking is filed pursuant to chapter 73, Florida Statutes, on or after that date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1569 CS Eminent Domain
SPONSOR(S): Rubio
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Local Government Council	8 Y, 0 N, w/CS	Camechis	Hamby
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

This House Joint Resolution proposes an amendment to the State Constitution to prohibit the transfer of ownership or control of private real property taken by eminent domain pursuant to a petition filed on or after January 2, 2007, to any natural person or private entity, except that:

(a) Ownership or control of such property may be conveyed to:
(1) A natural person or private entity for use in providing common carrier services or systems;
(2) A natural person or private entity for use as a road or other right-of-way or means open to the public for transportation, whether at no charge or by toll;
(3) A natural person or private entity that is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;
(4) A natural person or private entity for use in providing public infrastructure;
(5) A natural person or private entity that occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;
(6) A natural person or private entity if the property was owned and controlled by the condemning authority or a governmental entity for at least 5 years after the condemning authority acquired title to the property; or
(7) A natural person or private entity in accordance with subsection (b).
(b) If ownership of property is conveyed to a natural person or private entity pursuant to paragraph (a)(1), (2), (3), (4), or (5), and that natural person or private entity retains ownership and control of the property for at least 5 years after acquiring title, the property may subsequently be transferred to another natural person or private entity without restriction.

Pursuant to Article XI, section 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The proposed amendment must then be submitted to the electors at the next general election held more than ninety days after the joint resolution is filed with the custodian of state records, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: This joint resolution provides for limited government by limiting the circumstances under which a condemning authority may transfer taken property to another private entity, thereby limiting the circumstances under which government may exercise the power of eminent domain.

B. EFFECT OF PROPOSED CHANGES:

The following Introduction and Current Situation are repeated in the Staff Analysis of HB 1567.

INTRODUCTION

On June 23, 2005, the United States Supreme Court issued its decision in the case of *Kelo v. City of New London*[1], concluding that the U.S. Constitution does not prohibit the City of New London from taking private property by eminent domain for the public purpose of economic development. Even though the Court's decision approved *Kelo*-type takings under the U.S. Constitution, the decision does not restrict the State of Florida from prohibiting takings for economic development or prohibiting transfers of property taken by eminent domain to private parties.

On June 24, 2005, House Speaker Allen Bense announced the creation of the Select Committee to Protect Private Property Rights chaired by Representative Marco Rubio. The Select Committee was tasked with reviewing Florida law in an effort to identify areas of ambiguity and recommend changes to ensure appropriate protections of property rights.

The fundamental issue raised by the *Kelo* decision may be summarized as follows: Under Florida law, is economic development -- which may include, but is not limited to, creating jobs and enhancing the tax base -- a valid public purpose for which private property may be taken and transferred to another private entity? In short, the Florida Constitution, Florida Statutes, and Florida Supreme Court decisions do not explicitly prohibit takings of private property for the purpose of economic development. Therefore, unless the Florida Constitution or statutes are amended, the question of whether a city or a county may take property for purposes of economic development will remain unanswered until directly addressed by the Florida Supreme Court.

While the case law and statutes do not expressly authorize takings for economic development purposes, private property rights advocates assert that current statutes authorizing the taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions within a geographical area are being used to take property that is not genuinely blighted for economic development purposes. Much of the concern expressed by property rights advocates centers around the application of the statutory definition of "blighted area" and what many perceive as vague and inappropriate criteria in the definition. On the other hand, representatives of local government assert that the statutory criteria for slum and blight are sufficiently narrow and that the power of eminent domain is rarely exercised in the community redevelopment context.

This joint resolution addresses takings of private property outside the redevelopment context for economic development purposes by prohibiting the transfer of taken property to private parties unless the transfer qualifies as one of the listed exceptions to the prohibition.

CURRENT SITUATION

[1] 125 S.Ct. 2655 (2005).

General Principles of Eminent Domain Law

"Eminent domain" may be described as the fundamental power of the sovereign to take private property for a public use without the owner's consent. The power of eminent domain is absolute, except as limited by the Federal and State Constitutions, and all private property is subject to the superior power of the government to take private property by eminent domain.

The U.S. Constitution places two general constraints on the use of eminent domain: The taking must be for a "public use" and government must pay the owner "just compensation" for the taken property.[2] Even though the U.S. Constitution requires private property to be taken for a "public use", the U.S. Supreme Court long ago rejected any requirement that condemned property be put into use for the general public. Instead, the Court embraced what the Court characterizes as a broader and more natural interpretation of public use as "public purpose".

As long ago as 1905, the Court upheld state statutes that resulted in the transfer of taken property from one private owner to another for a legislatively declared public purpose. Prior to *Kelo*, the two most significant cases regarding this type of taking were *Berman v. Parker*[3] and *Hawaii Housing Authority v. Midkiff*[4].

In 1954, the Court issued a decision in the *Berman* case upholding a redevelopment plan targeting a blighted area. Under the Plan, part of the taken property would be leased or sold to private parties for redevelopment. A property owner challenged the taking, arguing that his property was not blighted and that the creation of a "better balanced, more attractive community" was not a valid public use. The Court held that eliminating slum or blight conditions in a geographic area is a public purpose and that it is permissible for government to take a parcel of private property in the area even if that particular parcel is not slum or blighted. Perhaps the most important aspect of the decision is the Court's conclusion that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."

In 1984, the Court decided the *Midkiff* case in which private property owners challenged a Hawaii statute under which private properties were taken and transferred to lessees of those properties for the public purpose of reducing concentration of land ownership. Reaffirming the *Berman* decision's deferential approach to legislative judgments, the court unanimously upheld the statute. The Court concluded that a taking should be upheld as long as it is "rationally related to a conceivable public purpose."

Kelo v. City of New London

In 1990, a state agency designated the City of New London a "distressed municipality." The City was not, however, designated as a blighted or slum area. Thereafter, state and local officials targeted the area for economic revitalization, and a development plan was drafted. In addition to creating a large number of jobs and increasing the City's tax base, the plan was designed to make the City more attractive and to create leisure and recreational opportunities. While most of the property owners in the development area negotiated the sale of their property, negotiations with 7 property owners were unsuccessful. The property owners who did not wish to negotiate challenged the taking arguing that the use of eminent domain was unconstitutional because economic development without a determination of blight is not a valid public purpose.

In a 4-3 decision, the Supreme Court of Connecticut ruled that the takings were authorized by Connecticut's municipal development statute, which declares that the taking of land as part of an economic development project is a "public use" and in the "public interest". The case was appealed to

[2] U.S. Const. amend. V.
[3] 348 U.S. 326 (1954).
[4] 467 U.S. 229 (1984).

the U.S. Supreme Court. The specific question before the Court was whether the City's taking of non-blighted private property for the purpose of economic development, in compliance with a state statute, satisfied the "public use" requirement of the U.S. Constitution even though the property would be transferred to other private entities for seemingly private uses.

The Court concluded that because the City's development plan "unquestionably" serves a public purpose, the takings satisfy the public use requirement of the U.S. Constitution. The Court immediately acknowledged, however, that a governmental entity may not take the private property of party A for the sole purpose of transferring the property to another private party B, even though A is paid just compensation. The court also noted that a one-to-one transfer of private property for the purpose of putting the property to more productive use, executed outside the confines of an integrated development plan, was not at issue in this case. The court concluded that, while such an unusual exercise of government power "would certainly raise a suspicion that a private purpose was afoot" the issue was not presented in the *Kelo* case and would not be addressed by the Court until directly presented in a future case.

The Court explicitly stated that the City could not take property simply to confer a private benefit to a "particular" private party. The Court also acknowledged that a governmental entity may not take property under the mere "pretext" of a public purpose, when its actual purpose was to bestow a private benefit. In *Kelo*, the Court noted that the takings would be executed pursuant to a "carefully considered" development plan; therefore, the property was not being taken under a mere pretext of public purpose.

Unlike more traditional public use takings, i.e., roads, schools, public parks, the Court recognized that the private lessees of the condemned property in New London would not be required to make the property or their services available to all comers. However, the Court noted that over the last hundred years, it has repeatedly rejected a literal requirement that condemned property be put into use for the general public and embraced the broader and more natural interpretation of public use as public purpose. The Court explained the erosion of "use by the public" as the definition of "public use" by pointing to the difficulty in administering the test and the impracticality of the test "given the diverse and always evolving needs of society."

The Court noted that, without exception, its decisions have "defined [the concept of public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field." The Court pointed out that its earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" the Court "owe[s] state legislatures and state courts in discerning local public needs." For more than a century, the Court said, its public use jurisprudence has "wisely eschewed" rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

Moreover, citing the *Berman* redevelopment case, the Court reasoned that promoting economic development is a traditional function of government and that "[t]here is... no principled way of distinguishing economic development from the other public purposes that we have recognized."

The Court also noted that a determination by municipal officials, acting pursuant to state authorization, that city-planned economic redevelopment is necessary "is entitled to [the Court's] deference." The city had, the Court recognized, carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue.

As with many eminent domain cases, the holding of the *Kelo* case is not absolutely clear. However, the Court explicitly concluded that the City's plan unquestionably serves a public purpose and that taking private property under the facts presented in the case is permissible under the public use requirement of the U.S. Constitution.

It should be emphasized that the *Kelo* decision does not in any way restrict the State of Florida from prohibiting takings for purposes similar to those in *Kelo*, or for any other purpose for that matter. The Court emphasized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." Every state is entitled to interpret the public purpose provisions of its own state constitution in a manner that more narrowly interprets the public purpose requirement. In short, Florida may prohibit takings that are allowed under the U.S. Constitution, but may not allow takings that are prohibited.

Florida Eminent Domain Law

The Florida Constitution addresses eminent domain in section 6, Article X, as follows:

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

The Florida Constitution prohibits takings of private property unless the taking is for a "public purpose" and the property owner is paid "full compensation." The Florida Supreme Court recognized long ago that the taking of private property is one of the most harsh proceedings known to the law, that "private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law."[5]

Generally speaking, in order for a taking to be valid in Florida, the condemning authority must:

1. Possess authority to exercise the power of eminent domain;
2. Demonstrate that a taking of private property is pursued for a valid public purpose and that all statutory requirements have been fulfilled;
3. Offer evidence showing that the taking is reasonably, not absolutely, necessary to accomplish the public purpose of the taking; and
4. Pay the property owner full compensation as determined by a 12-member jury.

Each of these four requirements is more fully discussed below.

1. The condemning authority must be authorized to exercise the power of eminent domain.

In order to take private property by eminent domain, an entity must possess statutory or constitutional authority to exercise the power of eminent domain. With the exception of cities and possibly charter counties, an entity does not have authority to exercise the power of eminent domain unless authorized to do so by the Legislature. If the Legislature delegates authority to exercise the power of eminent domain, procedures and requirements imposed by statute are mandatory.

[5] *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (Fla. 1947).
Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale, 315 So.2d 451 (Fla. 1975).

a. Constitutional Delegation of Home Rule Powers to Cities and Counties

The municipal home rule provision in Florida's Constitution authorizes cities to "exercise any power for municipal purposes except as otherwise provided by law".[6] In 1992, the Florida Supreme Court concluded that a statutory grant of authority is not necessary in order for a city to exercise the power of eminent domain.[7] However, because cities have all powers "except as otherwise provided by law", the Legislature may expressly prohibit cities from exercising the power of eminent domain for particular purposes. Rather than prohibiting municipal exercise of the power of eminent domain, the Legislature has granted municipalities broad statutory powers of eminent domain, including the power to take private property for "good reason connected in anywise with the public welfare of the interests of the municipality and the people thereof" and for "municipal purposes".[8]

The Florida Constitution grants charter counties "all powers of local self government not inconsistent with general law" and grants noncharter counties "such power of self-government as is provided by general law."[9] Based upon the broad constitutional grant of authority, it appears that charter counties possess the power of eminent domain except as expressly prohibited by general law. However, the Florida Supreme Court has stated, in what appears to be dicta, that counties may not have the power of eminent domain unless specifically authorized by the Legislature.[10] Even if charter counties do not possess constitutional home rule power to take property, the Legislature has granted broad statutory powers to all counties, including the power to take property for "any county purpose".[11]

It should be noted there is no evidence indicating that a city or county in Florida has exercised the power of eminent domain under constitutional home rule powers for the declared purpose of economic development.

2. A condemning authority must demonstrate that a taking is pursued for a valid public purpose and that any statutory requirements have been fulfilled.

a. What is a valid public purpose for which property may be taken by eminent domain under Florida law?

The second requirement for a valid taking is that the property must be taken for a public purpose. The fundamental question is this: what qualifies as a public purpose in Florida? There is not a definitive answer to the question for at least three reasons. First, the determination of whether a taking serves a valid public purpose depends upon the facts of each case. Second, the concept of public purpose has evolved in Florida case law over the past century from a narrowly defined and applied concept to broadly defined and applied concept. Third, the Florida Supreme Court has equated the public purpose necessary to support the issuance of public bonds with the public purpose necessary to support a taking of private property by eminent domain. However, as with eminent domain cases, recent bond validation cases appear to apply a broad interpretation of the public purpose doctrine while early cases apply a more narrow interpretation of the doctrine.

The Florida Courts have long held that the public purpose requirement in the Florida Constitution does not require private property taken by eminent domain to be "used by the public" if the court determines that the taking accomplishes a valid public purpose. However, Florida law does not allow government to take property from private owner A and transfer it to private owner B for "the sole purpose of making such property available to private enterprises for private use."[12]

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[6] Art. VIII, § 2, Fla. Const.
[7] *City of Ocala v. Nye*, 608 So.2d 15 (Fla. 1992).
[8] § 166.411, F.S.
[9] Art. VIII, § 1, Fla. Const.
[10] *City of Ocala v. Nye*, 608 So.2d 15 (Fla. 1992).
[11] § 127.01, F.S.
[12] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980); *State ex rel. Ervin v. Cotney,* 104 So.2d 346 (Fla. 1958).

In order to demonstrate that public purpose is not a clearly defined concept, the following Florida Supreme Court decisions illustrate the fact that some decisions apply the public purpose concept narrowly, while other cases apply the concept broadly.

The first case illustrating the narrow view is the 1947 case of *Peavy-Wilson Lumber Co. v. Brevard County.*[13] In the *Peavy* case, the Court concluded that the power of eminent domain should be limited to taking property for "something basically essential" such as roads, schools, drainage projects, parks, and playgrounds. However, even the *Peavy* Court recognized that the concept is not static and advances with caution to meet society's needs in conformity with the constitution.

In 1975, the court considered the case of *Baycol v. Downtown Development Authority of City of Ft. Lauderdale*[14], in which a downtown development authority attempted to condemn private property for a parking garage. The Supreme Court concluded that there was not a public need for extra parking facilities, which was cited as the sole basis for the taking, without the shopping center that would be constructed atop the parking garage. The development authority did not assert that economic development -- job creation or tax base enhancement -- was the public purpose for condemning the property. Therefore, the *Baycol* court did not explicitly rule on whether a taking for the declared public purpose of economic development is permissible under the Florida Constitution. The *Baycol* court declared, however, that private property may not be taken by eminent domain for a predominantly private use. To date, the Court has not established a "test" for determining when a public purpose predominates over the private interest. Each case is viewed on the individual facts presented to the court and based upon the public purpose asserted by the condemning authority. Therefore, it is unknown whether the Florida courts would consider a *Kelo*-type taking as serving a predominately public or private use.

In 1977, the court considered the case of *Deseret Ranches of Florida v. Bowman,*[15] and upheld a state statute that permitted one private property owner to exercise the power of eminent domain for the purpose of obtaining an easement of necessity over the property of another private landowner. The court reasoned that the "the statute's purpose is predominantly public and the benefit to the landowner is incidental to the public purpose....Useful land becomes more scarce in proportion to the population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stock raising, the statute is designed to fill these needs. There is then a clear public purpose in providing means of access to such lands so that they may be utilized in the enumerated ways." It has been asserted that the court's decision in *Deseret* "utterly complicates what some thought might have otherwise been a straightforward argument that *Baycol* prohibits *Kelo*-style economic development takings. In *Deseret Ranches*, it was clear that all the direct benefits of the taking were private, and any public benefits were purely incidental. Yet the 'sensible utilization of land' was, for the Court, of such a dominant public purpose as to allow that rather lopsided outcome to be characterized as consistent with *Baycol.* One does not have to possess much imagination to think of how economic development takings could be portrayed as also serving the predominant public purpose of 'sensible utilization of land.'"[16]

In 1988, the court continued to broaden the application of the public purpose doctrine in *Fl. Dep't of Transp. v Fortune Federal Savings and Loan Ass'n,*[17] concluding that "[t]he term 'public purpose' does not mean simply that the land is used for a specific public function, i.e. a road or other right of way. Rather, the concept of public purpose must be read more broadly to include projects which benefit the state in a tangible, foreseeable way."

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[13] *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (Fla. 1947).
[14] *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975).
[15] 349 So.2d 155 (Fla. 1977).
[16] Professor J. B. Ruhl, *Property Rights at Risk? Eminent Domain Law in Florida After The U.S. Supreme Court Decision In Kelo v. City of New London*, p. 11 (James Madison Institute Backgrounder, Number 46, Sept. 2005).
[17] *Dep't of Transp. v. Fortune Federal Sav. and Loan Ass'n*, 532 So.2d 1267 (Fla. 1988).

There is also a large body of case law addressing the "public purpose" necessary to support the issuance of public bonds or the spending of public funds. When the Florida Supreme Court upheld the Community Redevelopment Act in 1980[18], it equated the public purpose necessary to support the issuance of public bonds with the public purpose necessary to support a taking of private property by eminent domain. At least since 1968, the Court has broadly applied the public purpose concept in bond validation cases. However, there are early bond validation cases that appear to apply a narrow view of the public purpose doctrine.

b. Determinations of public purpose

The Legislature may authorize an entity to take property and, at the same time, declare that the taking serves a particular public purpose. However, the ultimate question of the validity of a legislatively declared public purpose is resolved by the courts.[19] Nonetheless, the courts' role in determining whether the power of eminent domain is exercised in furtherance of a legislatively declared public purpose is narrow.[20] In order to invalidate a statute that has a stated public purpose, the party challenging the statute must show that the stated purpose is arbitrary and capricious and so clearly erroneous as to be beyond the power of the legislature.[21] The threshold question for the courts is not whether the proposed use is a public one, but whether the Legislature might reasonably consider it a public one.[22]

While the question of whether the use for which private property is taken is a public use is ultimately a judicial question, where the Legislature declares a particular use to be a public use, the presumption is in favor of its declaration, and the courts will not interfere unless the use is clearly and manifestly of a private character.[23]

Similarly, when a local government's governing body determines that a taking of private property serves a statutory public purpose, the determination is entitled to judicial deference and is presumed valid and correct unless patently erroneous. Unless a condemning authority acts illegally, in bad faith, or abuses its discretion, its selection of land for condemnation will not be overruled by a court; a court is not authorized to substitute its judgment for that of a governmental body acting within the scope of its lawful authority.[24] The court will sustain the local government's determination that a taking serves the statutory public purpose as long as it is "fairly debatable".[25]

3. A condemning authority must offer evidence showing that the taking is reasonably, not absolutely, necessary to accomplish the public purpose of the taking.

If a governmental entity is authorized to take property for a valid public purpose, the entity must show that taking the property is reasonably, not absolutely, necessary in order to accomplish the declared public purpose. First, the condemning authority must show some evidence of a reasonable necessity for the taking. Once a reasonable necessity is shown, the exercise of the condemning authority's discretion will not be disturbed in the absence of illegality, bad faith, or gross abuse of discretion.[26]

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[18] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980).
[19] *Dep't of Transp. v. Fortune Federal Sav. and Loan Ass'n*, 532 So.2d 1267 (Fla. 1988).
[20] *Id.*
[21] *Id.*
[22] *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527 (Fla. 1929).
[23] *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (Fla. 1926).
[24] *Canal Authority v. Miller*, 243 So.2d 131 (Fla. 1970).
[25] *Panama City Beach Community Redevelopment Agency v. State*, 831 So.2d 662 (Fla. 2002); *JFR Inv. v. Delray Beach Community Redevelopment Agency*, 652 So.2d 1261 (Fla. 4th DCA 1995).
[26] *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977).

4. A condemning authority must pay the property owner full compensation as determined by a 12-member jury.

If a court finds that a governmental entity is authorized to take private property for a valid public purpose, and that the entity has presented evidence showing that the property is reasonably necessary to accomplish the declared public purpose, the property owner must be paid full compensation for the taken property. Key aspects of the constitutional requirement for payment of full compensation may be summarized as follows:

- A property owner is entitled to full and just compensation.
- A twelve-member jury determines the amount of compensation.
- Determining the amount of just compensation is a judicial function that cannot be performed by the Legislature directly or indirectly.
- The Legislature may create an obligation to pay more than what the courts might consider full compensation.
- Generally, the just and full compensation due is the fair market value of the property at the time of the taking.
- A condemning authority must pay reasonable attorney's fees and costs.
- A landowner is entitled to compensation for the reasonable cost of moving personal property, including impact fees.
- Business damages are available only in the case of partial takings, not takings of a full parcel.

Impact of the *Kelo* Decision on Florida Law

The question of whether the *Kelo* decision impacts takings in Florida continues to be the subject of debate. Arguably, the *Kelo* decision has no direct impact on Florida's eminent domain law. Although the decision applies in Florida to the extent that a *Kelo*-type taking may not violate the U.S. Constitution, the decision does not mean that a *Kelo*-type taking is allowed under the Florida Constitution. Whether the Florida Constitution allows a *Kelo*-type taking must be decided by the Florida Supreme Court, not the U.S. Supreme Court. What remains uncertain is whether the *Kelo* decision will have an indirect impact on the Florida courts' interpretation and application of eminent domain law in any future attempts by cities or counties to take private property for economic development purposes.

Determining whether a *Kelo*-type taking may occur in Florida must be considered in two contexts:

1. First, whether a city or county taking of private property in a non-blighted or non-slum area for the purpose of economic development is permitted outside the context of Florida's Community Redevelopment Act; and

2. Second, whether *Kelo*-type takings are now occurring under the Community Redevelopment Act.

Kelo-type takings outside the Community Redevelopment Act context

Unlike Connecticut, the Florida Legislature has not enacted a statute that expressly authorizes takings of private property in non-blighted or non-slum areas for the purpose of economic development. Therefore, state agencies are prohibited from taking property for economic development purposes. Based on the absence of a statutory delegation of authority, it may appear that a *Kelo*-type taking cannot occur under any circumstances. As previously discussed, however, cities have and charter counties may have constitutional home rule power to take property by eminent domain for economic development purposes without an explicit authorization from the Legislature. In addition, current statutes grant broad home rule authority to cities and counties, including the authority to exercise the power of eminent domain for any municipal or county purpose, and declare that economic development is a public purpose for which cities and counties may expend public funds. It could be argued that,

since the Legislature has declared economic development a public purpose for spending public funds[27], economic development may be considered a public purpose for which cities and counties may exercise the power of eminent domain.

Based upon the uncertainty created by the current case law and the lack of case law directly on point, it is not possible to determine how the Florida courts will view takings of private property for economic development purposes in Florida if directly presented with the issue. What is certain is that there is not an explicit statutory or constitutional provision that prohibits cities or counties from taking private property in non-blighted or non-slum areas for purposes of increasing jobs, increasing the tax base, maximizing efficient use of property, or other general economic development purposes. Further, the Florida Supreme Court has never considered a case involving a taking of private property in non-blighted or non-slum areas by a city or county asserting home rule powers for the declared public purpose of economic development.

Therefore, the decision as to whether *Kelo*-type takings are permissible in Florida lies squarely in the judiciary, and will remain so unless the constitution or statutes are amended to restrict takings for economic development purposes or restrict transfers of taken property to private entities.

Takings in the context of the Community Redevelopment Act

After the *Kelo* decision was issued, the media and other interested parties focused primarily on Florida's Community Redevelopment Act (Act), alleging that abuses of the Act are occurring throughout Florida. However, the *Kelo* decision does not have a direct impact on takings in the redevelopment context due to the fact that the property at issue in *Kelo* was not blighted or taken under a "redevelopment" statute.

In 1980, the Florida Supreme Court upheld Florida's Community Redevelopment Act in its entirety. The Act authorizes the use of eminent domain for acquisition and clearance of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions in a geographic area. The Act also authorizes "substantial private and commercial uses of the property after redevelopment."[28]

The Act imposes requirements that must be satisfied by a county or city that wishes to create a redevelopment agency, declare redevelopment areas, or issue revenue bonds to finance projects within these areas. Under the Act, a county or city may not exercise community redevelopment authority, including the power of eminent domain, until the county or city satisfies the statutory requirements. Those requirements include adoption of a resolution, supported by data and analysis, which makes a legislative finding that the conditions in the area meet the criteria of a "slum area" or "blighted area" as defined in statute,[29] and that the rehabilitation, conservation, or redevelopment of the area is necessary in the interest of the public health, safety, morals, or welfare of the residents of the county or city.[30]

The Community Redevelopment Act does not specifically authorize takings for "economic development" purposes; rather, the Act authorizes the taking of property within a blighted or slum area for the public purpose of eliminating and preventing slum and blight conditions, and permits the transfer of taken property to private entities for redevelopment in order to accomplish that public purpose. Private property rights advocates assert that the Act is being used to take areas of property that are not genuinely blighted for purely economic development purposes. Much of the concern expressed by property rights advocates centers around the application of the statutory definition of "blighted area," and what many perceive as the vague and inappropriate criteria in the definition.

Soon after the *Kelo* decision was issued, an Order of Taking was entered by the Circuit Court in Volusia County in a case involving takings of private property on the Daytona Beach Boardwalk, which is

[27] ss. 125.045 and 166.021, F.S.
[28] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980).
[29] § 163.355, F.S.
[30] § 163.355, F.S.

located within a community redevelopment area. The Order of Taking cites extensively to the *Kelo* decision, as well as to Florida judicial decisions, to uphold the takings in the case. Citing the *Kelo* decision, the circuit court opined that "[w]hen a taking serves a public purpose, the fact that the property ultimately is transferred to a private owner and that it confers a private benefits on others does not render the taking unconstitutional. The public use clause would be violated only if the taking were for purely private purposes or if the alleged public purpose were merely pretextual."[31]

Community Redevelopment Act issues addressed in case law

A large body of case law exists regarding the exercise of eminent domain under the Community Redevelopment Act, which includes the following significant judicial conclusions:

- A community redevelopment agency is not required to prove that the same level of blight exists when it seeks to condemn property as was present when the redevelopment plan was initially adopted.[32]
- Designations of blight or slum do not expire after a given period of time; therefore, property located within a redevelopment area is subject to taking for an indefinite period of time.[33]
- If a public purpose and reasonable necessity exists for the taking of property for slum or blight clearance, the fact that a landowner has begun to develop the property in accordance with the redevelopment plan does not give the owner an option to retain and develop the property unless approved by the redevelopment agency.[34]
- The general characteristics of a slum or blighted geographic area control whether property within the entire area is subject to taking, not the condition of an individual parcel.[35] Therefore, a parcel of property may be subject to taking by eminent domain if the parcel is located in an area designated as slum or blighted even if the parcel itself is not in a slum or blighted condition.

Summary of Key Points

The following may be considered a summary of the key aspects of the preceding discussion of the law:

- The decision as to whether a taking for economic development purposes is permissible in Florida lies squarely in the judiciary, and will remain so unless the constitution or statutes are amended to restrict such takings.
- The *Kelo* decision did not directly affect the fundamental principles of Florida's eminent domain law; however, for the first time, the U.S. Supreme Court approved, under the U.S. Constitution, a taking of private property in a non-blighted or non-slum area and subsequent transfer to private parties for the purpose of economic development.
- Whether the *Kelo* decision will have an indirect impact on the Florida courts' interpretation and application of the law in a future attempt by cities or counties to take private property for economic development purposes is unknown.
- There is not a Florida statute that explicitly prohibits the taking of private property for economic development purposes; therefore, cities and counties appear to have the underlying authority to initiate a taking for economic development purposes under their constitutional and statutory home rule power.

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[31] *City of Daytona Beach v. Mathas*, 2004-31846-CICI (Fla. Cir. Ct. Aug. 19, 2005).
[32] *Batmasian v. Boca Raton Community Redevelopment Agency*, 580 So.2d 199 (Fla. 4th DCA 1991); *City of Daytona Beach v. Mathas*, 2004-31846-CICI (Fla. Cir. Ct. Aug. 19, 2005).
[33] *Rukab v. City of Jacksonville Beach*, 866 So.2d 773 (Fla. 1st DCA 2004); *Batmasian v. Boca Raton Community Redevelopment Agency*, 580 So.2d 199 (Fla. 4th DCA 1991); *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977).
[34] *Post v. Dade County*, 467 So.2d 758 (Fla. 3rd DCA 1985); rev. den. *Post v. Dade County*, 479 So.2d 118 (Fla. 1985).
[35] *Berman v. Parker*, 348 U.S. 26 (1954); *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980); *Post v. Dade County*, 467 So.2d 758 (Fla. 3rd DCA 1985); rev. den. *Post v. Dade County*, 479 So.2d 118 (Fla. 1985); *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So.2d 745 (Fla. 1959).

- The Florida Supreme Court has not considered a case involving a taking for the declared public purpose of economic development. Therefore, whether the Court will uphold or prohibit such takings in the future is unknown.
- The Florida Supreme Court has upheld the Community Redevelopment Act, concluding that the elimination and prevention of slum and blight serves a public purpose and that the public purpose is not invalidated by the substantial involvement of private interests in redevelopment.
- The Community Redevelopment Act includes a broad definition of "blighted area," which may permit the taking of an individual parcel of property that does not appear to be blighted. Private property rights advocates claim that under the current definition of "blight," *Kelo*-type takings are occurring in Florida.
- The League of Cities and the Community Redevelopment Association assert that eminent domain is typically a last resort to complete the land assembly process. However, they predict that, without the power of eminent domain, "CRAs will have much difficulty in assembling land especially where many landowners are involved".

Effect of Proposed Changes

This House Joint Resolution proposes an amendment to the State Constitution to prohibit the transfer of ownership or control of private real property taken by eminent domain pursuant to a petition filed on or after January 2, 2007, to any natural person or private entity, except that:

> (a) Ownership or control of such property may be conveyed to:
> (1) A natural person or private entity for use in providing common carrier services or systems;
> (2) A natural person or private entity for use as a road or other right-of-way or means open to the public for transportation, whether at no charge or by toll;
> (3) A natural person or private entity that is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;
> (4) A natural person or private entity for use in providing public infrastructure;
> (5) A natural person or private entity that occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;
> (6) A natural person or private entity if the property was owned and controlled by the condemning authority or a governmental entity for at least 5 years after the condemning authority acquired title to the property; or
> (7) A natural person or private entity in accordance with subsection (b).
> (b) If ownership of property is conveyed to a natural person or private entity pursuant to paragraph (a)(1), (2), (3), (4), or (5), and that natural person or private entity retains ownership and control of the property for at least 5 years after acquiring title, the property may subsequently be transferred to another natural person or private entity without restriction.

Common Carriers

Subsection (a)(1) allows transfers of taken property to a natural person or private entity for use in providing common carrier services or systems. A common carrier is generally defined as "one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally....The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently and hence he is regarded, in some respects, as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession or holding out, by words or by a course of conduct, as to the service offered or performed.... To constitute a public conveyance a

common carrier, it is not necessary that it come within the definition of a public utility so as to be subjected to the rules and regulations of a public utility commission."

Public Infrastructure

Subsection (a)(4) allows the transfer of taken property to a private person or entity if the property will be used for purposes of public infrastructure. Although the new statutory section does not define "public infrastructure", the term is defined in The American Heritage Dictionary as "[t]he basic facilities, services, and installations needed for the functioning of a community or society, such as transportation and communications systems, water and power lines, and public institutions including schools, post offices, and prisons."

Infrastructure has come to connote a diverse collection of constructed facilities and associated services, ranging from airports to energy supply to landfills to wastewater treatment. Many of the facilities are built and operated by governments, and thus fall easily into the category of public works, but others are built or operated, in whole or in part, by private enterprise or joint public-private partnership. What is today considered infrastructure has traditionally been viewed as separate systems of constructed facilities, supporting such functions as supplying water, enabling travel, and controlling floods.

A 1987 committee of the National Research Council, reporting on Infrastructure for the 21st Century adopted the term "public works infrastructure" including both specific functional modes—highways, streets, roads, and bridges; mass transit; airports and airways; water supply and water resources; wastewater management; solidwaste treatment and disposal; electric power generation and transmission; telecommunications; and hazardous waste management—and the combined system these modal elements comprise. Parkland, open space, urban forests, drainage channels and aquifers, and other hydrologic features also qualify as infrastructure, not only for their aesthetic and recreational value, but because they play important roles in supplying clean air and water.

C. SECTION DIRECTORY: Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: Please see Fiscal Comments.

2. Expenditures: Publication costs incurred by the Department of State in informing the public of this proposed committee amendment would be an estimated $50,000, assuming the ballot summary contains 75 or less words. Please see Fiscal Comments for additional information.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: Please see Fiscal Comments.

2. Expenditures: Please see Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: Private entities who may, today, acquire taken property for "non-traditional" economic uses will no longer be permitted to acquire ownership or control of taken property from a condemning authority unless the transfer qualifies as an exception to the general prohibition. On the other hand, less private property may be taken given the prohibition on transfers to private entities except under limited circumstances.

D. FISCAL COMMENTS:

Impact of Local Governments: The amendment proposed by this joint resolution allows the transfer of taken property to a private entity for any use if the property is retained by the condemning authority, or a private party to whom property was transferred under one of the exceptions, for 5 years after acquiring title to the property. Requiring taken property to be retained for five years before the property may be transferred to a private entity for any use may result in some costs to the condemning authority, including costs of maintenance.

Impact on State Government: The amendment proposed by this joint resolution allows the transfer of taken property to a private entity for any use if the property is retained by the condemning authority, or a private party to whom property was transferred under one of the exceptions, for 5 years after acquiring title to the property. This provision applies to state agencies as well as any other condemning authority in the state. Requiring taken property to be retained for five years before the property may be transferred to a private entity for any use may result in some costs to a state agency condemning authority, including costs of maintenance.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The mandates provisions of Article VII, section 18 of the Florida Constitution do not apply to joint resolutions.

2. Other: Article XI, Section 1 of the State Constitution provides the Legislature with the authority to propose amendments to the State Constitution by joint resolution approved by three-fifths of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or may be placed at a special election held for that purpose.

B. RULE-MAKING AUTHORITY: Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS: Amendments or revisions to the Florida Constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[36] Passage in a committee requires a simple majority vote. If the joint resolution is passed in this session, the proposed amendment would be placed before the electorate at the 2006 general election, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and is limited to a single amendment or revision.[37] Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, must be published in one newspaper of general circulation in each county in which a newspaper is published.[38]

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 2006, the Local Government Council adopted an amendment to the resolution to eliminate exception (a)(6), which allows the transfer of taken property to a natural person or private entity if the property was taken to eliminate an existing threat to public health or public safety as provided by general law. This amendment was recommended by the Select Committee to Protect Private Property Rights at its March 13, 2006 meeting.

[36] *See* Art. XI, Sec. 1, Fla. Const.
[37] *See* Art. XI, Sec. 5(a), Fla. Const. The 2006 general election is on November 7, 2006.
[38] *See* Art. XI, Sec. 5(c), Fla. Const.

CHAMBER ACTION

The Local Government Council recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

House Joint Resolution

A joint resolution proposing an amendment to Section 6 of Article X of the State Constitution relating to eminent domain.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 6 of Article X of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE X

MISCELLANEOUS

SECTION 6. Eminent domain.--

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

(c) If a petition is filed on or after January 2, 2007, to initiate eminent domain proceedings regarding a parcel of real property in this state, ownership or control of property acquired pursuant to such petition shall not be conveyed by the condemning authority or any other entity to a natural person or private entity, except that ownership or control of property acquired pursuant to such petition may be conveyed to:

(1) A natural person or private entity for use in providing common carrier services or systems;

(2) A natural person or private entity for use as a road or other right-of-way or means open to the public for transportation, whether at no charge or by toll;

(3) A natural person or private entity that is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;

(4) A natural person or private entity for use in providing public infrastructure;

(5) A natural person or private entity that occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;

(6) A natural person or private entity if the property was owned and controlled by the condemning authority or a governmental entity for at least 5 years after the condemning authority acquired title to the property; or

(7) A natural person or private entity in accordance with subsection (d).

(d) If ownership of property is conveyed to a natural person or private entity pursuant to any of paragraphs (c)(1)-(5), and that natural person or private entity retains ownership and control of the property for at least 5 years after acquiring title, the property may subsequently be transferred to another natural person or private entity without restriction.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE X, SECTION 6

EMINENT DOMAIN.--Proposing an amendment to the State Constitution to prohibit the transfer of ownership or control of private real property taken by eminent domain pursuant to a petition filed on or after January 2, 2007, to any natural person or private entity, except that:

(a) Ownership or control of such property may be conveyed to:

(1) A natural person or private entity for use in providing common carrier services or systems;

(2) A natural person or private entity for use as a road or other right-of-way or means open to the public for transportation, whether at no charge or by toll;

(3) A natural person or private entity that is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;

(4) A natural person or private entity for use in providing public infrastructure;

(5) A natural person or private entity that occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;

(6) A natural person or private entity if the property was owned and controlled by the condemning authority or a governmental entity for at least 5 years after the condemning authority acquired title to the property; or

(7) A natural person or private entity in accordance with subsection (b).

(b) If ownership of property is conveyed to a natural person or private entity pursuant to any of paragraphs (a)(1)-(5), and that natural person or private entity retains ownership and control of the property for at least 5 years after acquiring title, the property may subsequently be transferred to another natural person or private entity without restriction.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1571 Assessment of Newly Established Homestead Property after Eminent Domain Taking of Previous Homestead Property
SPONSOR(S): Rubio
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Local Government Council	8 Y, 0 N	Camechis	Hamby
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

This joint resolution proposes to amendment the Florida Constitution's "Save Our Homes" property tax protections to provide that, when a person's homestead property in this state is taken by power of eminent domain and within two years the person purchases another property and establishes such property as homestead property, the newly established homestead property must be initially assessed at less than just value, as provided by general law. The difference between the new homestead property's just value and its assessed value in the first year the homestead is established may not exceed the difference between the previous homestead property's just value and its assessed value in the year the homestead property was taken by eminent domain. In addition, the assessed value of the new homestead property must equal or exceed the assessed value of the previous homestead property. Thereafter, the homestead property must be assessed as provided by the Constitution.

The proposed amendment will be submitted to the electors at the next general election or at an earlier special election specifically authorized by law for that purpose. If approved by the voters, this amendment will take effect January 2, 2007, and will apply to property tax valuations for the 2008 tax year. If approved by the voters, the proposed amendment will require enactment of implementing legislation.

Pursuant to Article XI, section 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The proposed amendment must then be submitted to the electors at the next general election held more than ninety days after the joint resolution is filed with the custodian of state records, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide for lower taxes: This joint resolution proposes to amend the Florida Constitution to provide "portability" of the Save Our Homes ad valorem property tax protections if a homestead property is taken by eminent domain by any entity authorized to exercise the power of eminent domain in Florida.

B. EFFECT OF PROPOSED CHANGES:

Introduction

In 1992, Florida voters approved the popularly named "Save Our Homes" amendment to the State Constitution to limit the annual growth in the assessed value of homestead property to 3 percent over the prior year assessment or the percentage change in the U. S. Consumer Price Index, whichever is less. The amendment also provided for a reassessment of homestead property at just value after any change of ownership.

This joint resolution proposes to amend the Florida Constitution to provide "portability" of the Save Our Homes ad valorem property tax protections if a homestead property is taken by eminent domain by any entity authorized to exercise the power of eminent domain in Florida. The amendment may limit the growth in the amount of revenue generated from property taxes absent an adjustment in millage rates, while providing homeowners protection from increased property taxes if a homeowner's property is taken by eminent domain.

Current Situation

Ad valorem property taxes are the single largest source of tax revenues for general purpose local governments in Florida. In FY 2002-03 (the last year for which published fiscal information is available), property taxes accounted for 31 percent of county governmental revenue (i.e., $6.3 billion), and almost 20 percent of municipal government revenue (i.e., $2.4 billion). Ad valorem property tax revenues also are the primary local revenue source for school districts. For that same fiscal year, school districts levied $8.4 billion in property taxes.

Ad valorem property tax revenues result from multiplying the millage rate adopted by counties, municipalities, and school boards, by the taxable value of property within that jurisdiction. Each entity may levy up to 10 mills and, in most cases, the real property must be assessed at just value. Article VII, s. 6 of the State Constitution authorizes a $25,000 ad valorem property tax exemption for homestead property.

In 1992, Florida voters approved the so-called "Save Our Homes" amendment to the State Constitution. This amendment limits the annual growth in the assessed value of homestead property to 3 percent over the prior year assessment or the percentage change in the U. S. Consumer Price Index, whichever is less. It also provides for a reassessment of homestead property at just value after any change of ownership. The "Save Our Homes" constitutional amendment, originally proposed as a way to protect homeowners from being forced to sell their homes because of escalating property taxes caused by assessment increases, is now seen by some as keeping people from selling their homes and buying another home because of substantially higher property taxes resulting from the constitutionally required reassessment upon change in ownership.

Largely due to the recent surge in housing values and lack of corresponding millage rate reductions by local officials to offset double-digit increases in taxable values, ad valorem property tax revenues have increased substantially in recent years: 9.2 percent in 2002, 11.5 percent in 2003, and 10.4 percent in 2004. These annual property tax increases are twice as high as the 5 percent average increase

experienced between 1991 and 2000, but comparable to the 12.5 percent average annual increase from 1981 to 1990. Despite the growth in total taxable values, the statewide average actual millage rates have remained relatively unchanged, although on a generally downward trend. However, the differential between the actual millage rate and the so-called "roll back rate" (i.e., the millage rate necessary to generate the same amount of revenue as the prior year excluding new construction and boundary changes) is substantially more pronounced since 2000, than it was from 1990 to 1999. The taxable value of all real property has increased 53 percent over the past four years.

The amount of value removed from the tax rolls from the "Save Our Homes" provision is growing at a much faster rate than the amount of value removed by the homestead exemption. For example, in 2005, the amount of value excluded from the tax rolls as a result of the Save Our Homes provision grew by $81 billion over the previous year compared to $1.7 billion removed as a result of the homestead exemption.

Effect of Proposed Changes

This joint resolution proposes to amendment the Florida Constitution's "Save Our Homes" property tax protections to provide that, when a person's homestead property in this state is taken by power of eminent domain and within two years the person purchases another property and establishes such property as homestead property, the newly established homestead property must be initially assessed at less than just value, as provided by general law. The difference between the new homestead property's just value and its assessed value in the first year the homestead is established may not exceed the difference between the previous homestead property's just value and its assessed value in the year the homestead property was taken by eminent domain. In addition, the assessed value of the new homestead property must equal or exceed the assessed value of the previous homestead property. Thereafter, the homestead property must be assessed as provided by the Constitution.

The proposed amendment will be submitted to the electors at the next general election or at an earlier special election specifically authorized by law for that purpose. If approved by the voters, this amendment will take effect January 2, 2007, and will apply to property tax valuations for the 2008 tax year. If approved by the voters, the proposed amendment will require enactment of implementing legislation.

C. SECTION DIRECTORY: Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures: Publication costs incurred by the Department of State in informing the public of this proposed committee amendment would be an estimated $50,000, assuming the ballot summary contains 75 or less words. Please see Fiscal Comments for additional information.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The amendment may limit the growth in the amount of revenue generated from property taxes absent an adjustment in millage rates, while providing homeowners protection from increased property taxes if a homeowner's property is taken by eminent domain.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: The amendment may limit the growth in the amount of revenue generated from property taxes absent an adjustment in millage rates, while providing homeowners protection from increased property taxes if a homeowner's property is taken by eminent domain.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The mandates provisions of Article VII, section 18 of the Florida Constitution do not apply to joint resolutions.

2. Other: Article XI, Section 1 of the State Constitution provides the Legislature with the authority to propose amendments to the State Constitution by joint resolution approved by three-fifths of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or may be placed at a special election held for that purpose.

B. RULE-MAKING AUTHORITY: Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS: Amendments or revisions to the Florida Constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[1] Passage in a committee requires a simple majority vote. If the joint resolution is passed in this session, the proposed amendment would be placed before the electorate at the 2006 general election, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and is limited to a single amendment or revision.[2] Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, must be published in one newspaper of general circulation in each county in which a newspaper is published.[3]

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

[1] *See* Art. XI, Sec. 1, Fla. Const.
[2] *See* Art. XI, Sec. 5(a), Fla. Const. The 2006 general election is on November 7, 2006.
[3] *See* Art. XI, Sec. 5(c), Fla. Const.

House Joint Resolution

A joint resolution proposing an amendment to Section 4 of Article VII of the State Constitution to provide an additional circumstance for assessing homestead property at less than just value.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 4 of Article VII of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE VII

FINANCE AND TAXATION

SECTION 4. Taxation; assessments.--By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

(a) Agricultural land, land producing high water recharge to Florida's aquifers, or land used exclusively for noncommercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at

just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.

(1) Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

a. Three percent (3%) of the assessment for the prior year.

b. The percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

(2) No assessment shall exceed just value.

(3) After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year, unless the provisions of subsection (8) apply. Thereafter, the homestead shall be assessed as provided herein.

(4) New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead, unless the provisions of subsection (8) apply. That assessment shall only change as provided herein.

(5) Changes, additions, reductions, or improvements to homestead property shall be assessed as provided for by general law; provided, however, after the adjustment for any change, addition, reduction, or improvement, the property shall be assessed as provided herein.

(6) In the event of a termination of homestead status, the property shall be assessed as provided by general law.

(7) The provisions of this amendment are severable. If any of the provisions of this amendment shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any remaining provisions of this amendment.

(8) When a person's homestead property in this state is taken by power of eminent domain and within two years the person purchases another property and establishes such property as homestead property, the newly established homestead property shall be initially assessed at less than just value, as provided by general law. The difference between the new homestead property's just value and its assessed value in the first year the homestead is established may not exceed the difference between the previous homestead property's just value and its assessed value in the year the homestead property was taken by eminent domain. In addition, the assessed value of the new homestead property must equal or exceed the assessed value of the previous homestead property. Thereafter, the homestead property shall be assessed as provided herein. .

(d) The legislature may, by general law, for assessment purposes and subject to the provisions of this subsection, allow counties and municipalities to authorize by ordinance that historic property may be assessed solely on the basis of character or use. Such character or use assessment shall apply only to the jurisdiction adopting the ordinance. The

requirements for eligible properties must be specified by general law.

(e) A county may, in the manner prescribed by general law, provide for a reduction in the assessed value of homestead property to the extent of any increase in the assessed value of that property which results from the construction or reconstruction of the property for the purpose of providing living quarters for one or more natural or adoptive grandparents or parents of the owner of the property or of the owner's spouse if at least one of the grandparents or parents for whom the living quarters are provided is 62 years of age or older. Such a reduction may not exceed the lesser of the following:

(1) The increase in assessed value resulting from construction or reconstruction of the property.

(2) Twenty percent of the total assessed value of the property as improved.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE VII, SECTION 4

ASSESSMENT OF NEWLY ESTABLISHED HOMESTEAD PROPERTY AFTER EMINENT DOMAIN TAKING OF PREVIOUS HOMESTEAD PROPERTY.--Proposing an amendment to the State Constitution to provide for assessing at less than just value property purchased within 2 years after a homestead is taken by eminent domain, if the newly purchased property is established as homestead, to provide that the difference between the new homestead property's just value and its assessed value in the first year may not exceed the

difference between the previous homestead property's just value and its assessed value in the year the previous homestead property was taken by eminent domain and to provide that the assessed value of the new homestead property must equal or exceed the assessed value of the previous homestead property.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7019 CS PCB CJ 06-01 Mediation
SPONSOR(S): Civil Justice Committee
TIED BILLS: none **IDEN./SIM. BILLS:** SB 2188

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Civil Justice Committee	7 Y, 0 N	Blalock	Bond
1) Judiciary Committee	11 Y, 0 N, w/CS	Hogge	Hogge
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

In mediation, a trained intermediary assists parties to a dispute in reaching agreement. Courts often refer cases to mediation in order to assist the parties and to relieve docket congestion. In 2005, family court references in the statutes were changed to references to the unified family court model; however, mediation law was not correspondingly changed.

This PCB amends mediation law to conform to the unified family court model. This PCB also makes other technical and corrective changes to mediation law.

This PCB does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This PCB does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

Mediation is a type of alternative dispute resolution used to resolve legal conflict between parties. Family law is one area where mediation has been widely used by the courts to assist parties in reaching agreement prior to trial. In mediation, parties involved in a dispute meet to work out their differences with the help of a mediator. The mediator assists and guides the parties toward their own solution by helping them to define the important issues and understand each other's interests. The mediator focuses each side on the crucial factors necessary for settlement and on the consequences of not settling. The mediator does not decide the outcome of the case and cannot compel the parties to settle.

In 2005, the Florida Legislature passed SB 348, which in part created s. 25.375, F.S. Section 25.375, F.S., authorizes the Supreme Court to adopt a unified family court model. The unified family court model utilizes a unified system of judicial case coordination in the state to identify cases relating to individuals and families. Individuals and families are assigned to a single circuit court judge that handles all of their cases dealing with family law matters. This model alleviates the problem of having different judges presiding over one family's various family law cases. The purpose is to reduce confusion and avoid conflicting court orders.

The act creating the unified family court system did not make corresponding changes to related statutes pertaining to mediation.

Effect of the Bill

This bill redefines mediation in chapter 44, F.S., to provide for mediation in the unified family court. This bill reflects the changes created by the passage in 2005 of s. 25.375, F.S., which created the unified family court system.

This bill amends s. 44.1011, F.S., to create a definition for "unified family court mediation". "Unified family court mediation" means mediation of any of the following circuit court matters:

- Dissolution of marriage.
- Division and distribution of property arising out of a dissolution of marriage.
- Annulment.
- Support unconnected with dissolution of marriage.
- Paternity.
- Child support.
- The Uniform Reciprocal Enforcement of Support Act and the Uniform Interstate Family Support Act.
- Custodial care of and access to children.
- Adoption.
- Name changes.
- Declaratory judgment actions related to premarital, marital, or postmarital agreements.
- Civil domestic, repeat, sexual, or dating violence injunctions.
- Juvenile dependency.
- Termination of parental rights.

- Juvenile delinquency.
- Emancipation of a minor.
- Children in need of services.
- Families in need of services.
- Truancy.
- Modification and enforcement of orders entered in these cases.

This bill also amends s. 44.1011, F.S., to remove the definitions for "family mediation" and "dependency or in need of service mediation".

This bill creates s. 44.1015, F.S. The new section contains substantive law regarding the scope and content of mediation currently in s. 44.1011, F.S. (definitions applicable to ch. 44, F.S.).

This bill amends s. 44.102, F.S., to provide that a court must refer to mediation matters that involve disputed custody, visitation, or other parental responsibility issues. However, a court must not refer to mediation, regardless of any other law, any case dealing with domestic violence, dating violence, or sexual violence injunctions, except pursuant to rules adopted by the Supreme Court of Florida. This PCB also provides that a court must not refer to mediation any case where the court finds that there has been a history of violence which would compromise the mediation process or endanger any person's safety.

This bill provides that the Supreme Court is responsible for maintaining a list of certified mediators instead of the chief judge of each judicial circuit. This change reflects current practice.

This bill amends s. 44.108, F.S., related to fees for mediation services. The PCB changes responsibility for payment from each "person" in a case to each "party".

Section 61.183(1), F.S., provides that a court may refer to mediation any proceeding in which the issues of parental responsibility, primary residence, visitation, or support of a child are contested. However, s. 44.102, F.S., provides that a court must refer to mediation disputed custody, visitation, or other parental responsibility issues. This PCB amends s. 61.183, F.S., to conform to s. 44.102, F.S., requiring that a court refer to mediation cases where the issue of parental responsibility, primary residence, visitation, or support of a child is contested.

The bill would limit the current practice of waiving mediation fees in dependency cases to only those parties found to be indigent.

C. SECTION DIRECTORY:

Section 1 amends s. 44.1011, F.S., to revise definitions applicable to mediation.

Section 2 creates s. 44.1015, F.S., to provide for conduct of mediation.

Section 3 amends s. 44.102, F.S., to provide when a court must refer cases to mediation and when the courts must not refer cases to mediation.

Section 4 amends s. 44.108, F.S., to provide fee provisions related to mediation.

Section 5 amends s. 61.183, F.S., to require mediation in certain family law cases and provide conformity with section 44.102(c), F.S.

Section 6 provides an effective date of July 1, 2006.

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:

None.

D. FISCAL COMMENTS:

The Dispute Resolution Center provided the following fiscal comment:

"Under current law, the only mediation cases for which fees can be charged are county court cases above small claims and "family" cases as currently defined in 44.1011(c). Dependency cases (and other cases which would be under the umbrella of the unified family court) currently are exempt from mediation fees."

Under the bill, fees would be waived in these cases only for those parties found to be indigent.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 & COMBINED BILL CHANGES

On March 15, 2006, the Judiciary Committee adopted one amendment and reported the bill as a CS. The CS differs from the original bill in that the CS changes the current practice of waiving mediation fees in dependency cases for all parties by limiting the waiver to only those parties found to be indigent.

CHAMBER ACTION

The Judiciary Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to mediation; amending s. 44.1011, F.S.; revising, creating, and deleting definitions; creating s. 44.1015, F.S.; providing standards for conduct of mediation; providing for the role of the mediator and counsel in specified mediations; amending s. 44.102, F.S.; requiring referral of certain cases to mediation; prohibiting certain cases from being referred to mediation; requiring the Supreme Court to maintain a list of certified mediators; amending s. 44.108, F.S.; exempting certain parties from mediation fees in certain cases; amending s. 61.183, F.S.; requiring mediation in certain family law cases; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 44.1011, Florida Statutes, is amended to read:

44.1011 Definitions.--As used in this chapter:

(2) "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process in which decisionmaking authority rests with the parties with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. ~~In mediation, decisionmaking authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.~~ "Mediation" includes:

(a) "Appellate court mediation," which means mediation that occurs during the pendency of an appeal of a civil case.

(b) "Circuit court mediation," which means mediation of civil cases, other than unified family court matters, in circuit court. ~~If a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court.~~

(c) "County court mediation," which means mediation of civil cases within the jurisdiction of county courts, including small claims. ~~Negotiations in county court mediation are primarily conducted by the parties. Counsel for each party may participate. However, presence of counsel is not required.~~

(d) "Unified family court mediation," which means mediation of any of the following circuit matters or any combination thereof:

1. Dissolution of marriage.

2. Division and distribution of property arising out of a dissolution of marriage.

3. Annulment.

4. Support unconnected with dissolution of marriage.

5. Paternity.

6. Child support.

7. The Uniform Reciprocal Enforcement of Support Act and the Uniform Interstate Family Support Act.

8. Custodial care of and access to children.

9. Adoption.

10. Name changes.

11. Declaratory judgment actions related to premarital, marital, or postmarital agreements.

12. Civil domestic, repeat, sexual, or dating violence injunctions.

13. Child dependency.

14. Termination of parental rights.

15. Juvenile delinquency.

16. Emancipation of a minor.

17. Children in need of services.

18. Families in need of services.

19. Truancy.

20. Modification and enforcement of orders entered in matters listed in this paragraph.

~~(d) "Family mediation" which means mediation of family matters, including married and unmarried persons, before and after judgments involving dissolution of marriage; property division; shared or sole parental responsibility; or child~~

~~support, custody, and visitation involving emotional or financial considerations not usually present in other circuit civil cases. Negotiations in family mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required, and, in the discretion of the mediator, and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.~~

~~(e) "Dependency or in need of services mediation," which means mediation of dependency, child in need of services, or family in need of services matters. Negotiations in dependency or in need of services mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required and, in the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.~~

Section 2. Section 44.1015, Florida Statutes, is created to read:

44.1015 Conduct of mediation.--

(1) The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.

(2) Legal counsel may be involved in mediation as follows:

(a) In circuit court mediation, if a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court.

(b) In unified family court mediation, negotiations are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with his or her clients. However, in the discretion of the mediator, and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.

(c) In county court mediation, negotiations are primarily conducted by the parties. Counsel for each party may participate. However, presence of counsel is not required in actions under the Florida Small Claims Rules.

Section 3. Subsections (2) and (4) of section 44.102, Florida Statutes, are amended to read:

44.102 Court-ordered mediation.--

(2) A court, under rules adopted by the Supreme Court:

(a) Shall ~~Must~~, upon request of one party, refer to mediation any filed civil action for monetary damages, provided the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties, unless:

1. The action is a landlord and tenant dispute that does not include a claim for personal injury.

2. The action is filed for the purpose of collecting a debt.

3. The action is a claim of medical malpractice.

4. The action is governed by the Florida Small Claims Rules.

5. The court determines that the action is proper for referral to nonbinding arbitration under this chapter.

6. The parties have agreed to binding arbitration.

7. The parties have agreed to an expedited trial pursuant to s. 45.075.

8. The parties have agreed to voluntary trial resolution pursuant to s. 44.104.

(b) Shall, in circuits in which a mediation program has been established, refer to mediation all or part of disputed custody, visitation, or other parental responsibility issues.

(c) ~~(b)~~ May refer to mediation all or ~~any~~ part of any ~~a~~ filed case ~~civil action~~ for which mediation is not required under this section.

(d) Shall not refer to mediation, regardless of any other law requiring mediation:

1. Any case regarding issuance of domestic, repeat, dating, or sexual violence injunctions, except to the extent authorized by rules adopted by the Supreme Court; or

2. Any case in which the court finds, upon motion or request of a party, there has been a history of violence, including, but not limited to, domestic violence, that would compromise the mediation process or endanger any person's safety.

~~(c) In circuits in which a family mediation program has been established and upon a court finding of a dispute, shall refer to mediation all or part of custody, visitation, or other~~

~~parental responsibility issues as defined in s. 61.13. Upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.~~

~~(d) In circuits in which a dependency or in need of services mediation program has been established, may refer to mediation all or any portion of a matter relating to dependency or to a child in need of services or a family in need of services.~~

(4) The Supreme Court ~~chief judge of each judicial circuit~~ shall maintain a list for each circuit of mediators whom it has ~~who have been~~ certified ~~by the Supreme Court~~ and who have registered for appointment in that circuit.

(a) Whenever possible, qualified individuals who have volunteered their time to serve as mediators shall be appointed. If a mediation program is funded pursuant to s. 44.108, volunteer mediators shall be entitled to reimbursement pursuant to s. 112.061 for all actual expenses necessitated by service as a mediator.

(b) Nonvolunteer mediators shall be compensated according to rules adopted by the Supreme Court. If a mediation program is funded pursuant to s. 44.108, a mediator may be compensated by the state, the county, or ~~by~~ the parties.

Section 4. Subsection (2) of section 44.108, Florida Statutes, is amended to read:

44.108 Funding of mediation and arbitration.--

(2) When court-ordered mediation services are provided by a circuit court's mediation program, the following fees, unless

otherwise established in the General Appropriations Act, shall be collected by the clerk of court:

(a) Eighty dollars per party ~~person~~ per scheduled session in unified family court mediation when the parties' combined income is greater than $50,000, but less than $100,000 per year;

(b) Forty dollars per party ~~person~~ per scheduled session in unified family court mediation when the parties' combined income is less than $50,000; or

(c) Forty dollars per party ~~person~~ per scheduled session in county court cases.

No mediation fees shall be assessed under this subsection in residential eviction cases, against a party found to be indigent, or for any small claims action. For a party found to be indigent, no mediation fees shall be assessed under this subsection in unified family court cases that are limited to one or more of the following issues: child dependency, children in need of services, families in need of services, juvenile delinquency, or issues arising out of judicial findings in relation to injunctions for protection against domestic violence. Fees collected by the clerk of court pursuant to this section shall be remitted to the Department of Revenue for deposit into the state courts' Mediation and Arbitration Trust Fund to fund court-ordered mediation. The clerk of court may deduct $1 per fee assessment for processing this fee. The clerk of the court shall submit to the chief judge of the circuit, no later than 30 days after the end of each quarter, a report

specifying the amount of funds collected under this section during each quarter of the fiscal year.

Section 5. Subsection (1) of section 61.183, Florida Statutes, is amended to read:

61.183 Mediation of certain contested issues.--

(1) In any proceeding in which the issues of parental responsibility, primary residence, visitation, or support of a child are contested, the court shall ~~may~~ refer the parties to mediation in accordance with s. 44.102 ~~rules promulgated by the Supreme Court~~. In Title IV-D cases, any costs, including filing fees, recording fees, mediation costs, service of process fees, and other expenses incurred by the clerk of the circuit court, shall be assessed only against the nonprevailing obligor after the court makes a determination of the nonprevailing obligor's ability to pay such costs and fees.

Section 6. This act shall take effect July 1, 2006.