

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

To the extent that the bill creates a new administrative remedy, it would appear that the size of government is not reduced.

B. EFFECT OF PROPOSED CHANGES:

Background on Construction Materials Mining: Large quantities of limestone aggregate and other materials that are mined in Florida are used in the construction of roads, highway embankments, and pavements. Mines in Dade County provide an estimated half of the limestone aggregate used by the State Department of Transportation, other governmental entities and the construction industries for their projects. The aggregate and other materials are mined using explosives.¹

The use of explosives in mining activities is regulated by the federal, state, and to a lesser extent, local governments. On the federal level, Title 30 of the U.S. Code and its various implementing regulations establish the basic safety, health, certification, reporting, and environmental requirements for the use of explosives in mining operations. In Florida, chapter 552, F.S., governs the requirements and the enforcement for the manufacture, distribution, and use of explosives. The State Fire Marshall has the sole and exclusive authority to promulgate standards, limits, and regulations regarding the use of explosives in conjunction with construction mining materials.² Chapter 4A-2 of the Florida Administrative Code sets out the rules regarding construction materials mining activities related to permits, ground vibration limits, airblast, time and date of explosives use, reporting requirements, disciplinary actions, and peak particle velocity.³ The Division of the State Fire Marshall has the authority to restrict the quantity and use of explosives at any state location if it is determined that the use of such explosives is likely to cause injury to life or property. In making such restriction, the Division shall consider the distance of blasting activity to structures; the use and occupancy of structures near blasting activity; the geology of the area; and the type of construction use in structures near blasting activities.⁴

Remedies for damages caused by the use of explosives: Liability in connection with the use of explosives may be predicated on negligence, nuisance, the violation of a statute or ordinance, or on strict liability.⁵ There are anecdotal reports that homeowners groups are filing suit against mining companies alleging that the blasting done by the mining companies is damaging their homes.⁶

¹ House of Representatives Committee on Local Government & Veterans Affairs Analysis of HB 1351 (2001), March 27, 2001.

² See s. 552.30, F.S.

³ See Rule 4A-2.024, F.A.C.

⁴ See Rule 4A-2.024(13), F.A.C.

⁵ See *Poole v. Lowell Dunn Co.*, 573 So.2d 51 (Fla. 3rd DCA 1990); *Morse v. Henry Corp.*, 200 So.2d 816 (Fla. 2nd DCA 1967).

⁶ See “Mining blasts away at Glades’ future”, St. Petersburg Times; May 9, 2001.

Effect of Proposed changes: The bill creates the Florida Construction Materials Mining Activities Administrative Recovery Act, which establishes an exclusive administrative process within the Division of Administrative Hearings for recovery of damages to real and personal property caused by construction materials mining activities. The Act does not apply to any claim seeking redress for personal injury, emotional distress, or punitive damages. As relates to claims, recovery or other similar procedure, this Act preempts the authority of municipalities, counties, or other local governmental entities to regulate matters relating to explosives. The Act sets forth the following administrative process:

- **Filing:** A person may initiate an administrative proceeding by filing a petition and a \$100 fee within 180 days after the occurrence of the alleged damage.
- **Petitioners with annual income less than 150% of the federal poverty guidelines:** If the petitioner submits an affidavit stating that their annual income is less than 150 percent of the federal poverty guideline⁷, the filing fee must be waived, the respondent is required to pay the full cost of mediation, and the petitioner is not responsible to pay attorney's fees and costs if they do not prevail.
- **Order of assignment:** Within 5 days of receipt of the petition by the Division of Administrative Hearings (DOAH), the division shall issue an order assigning the case to a specific administrative law judge, advise that a summary hearing is available, and that a mandatory, non-binding mediation is required prior to a summary or final administrative hearing.
- **Mediation:** The administrative law judge shall issue an order directing mediation pursuant to the Florida Rules of Civil Procedure.⁸ The parties are required to jointly select a mediator and location; if they fail to do so within 30 days, the administrative law judge will do so for the parties. The petitioner and respondent each pay half of the cost of mediation. Mediation must be concluded within 60 days of designation of the mediator unless the parties mutually agree otherwise.
- **Formal administrative hearing:** If the parties do not reach an agreement within 30 days after conclusion of mediation, the matter may be set for a formal administrative hearing.
- **Summary hearing:** In lieu of proceeding directly to a formal administrative hearing, the parties may agree to file a petition for a summary hearing. The petition must be filed within 15 days after the conclusion of the unsuccessful mediation. The hearing, governed by s. 120.574, F.S., must be held in the county where the alleged damage occurred.⁹
- **Damages:** If the administrative law judge finds that the preponderance of the evidence presented demonstrates that the petitioner's damages were caused by the respondent's use of explosives, the final order shall reflect precise findings and direct the respondent to pay an amount supported by the findings. Damages shall be paid within 30 days after the final order is issued, unless the matter is appealed. If the respondent fails to pay within 30 days of the final order or appellate mandate, the petitioner may request that the damages be paid from the security bond, and have a judgment entered for any amount not satisfied by the security bond. If the administrative law judge finds that the preponderance of the evidence demonstrates that petitioner's damages were not caused by the respondent's use of explosives, the final order shall set forth precise findings as to the lack of responsibility of the respondent.
- **Attorney's fees and costs:** The prevailing party is entitled to the recovery of taxable costs for the administrative proceedings, including expert witness fees. The prevailing

⁷ The federal poverty guideline is published in the Federal Register by the United States Department of Health and Human Services. For a family of four, the poverty guideline is \$18,100. See 67 F.R. 6931, February 14, 2002.

⁸ Rule 1700 et seq., Florida Rules of Civil Procedure, governs mediation. The Rule provides, among other things, for the appointment of the mediator, and required courses of action if the parties do not reach an agreement. See Rule 1.730, Fla.R.Civ.P. Mediation is also governed by ch. 44, F.S., which sets out standards and procedures for mediators.

⁹ Section 120.574, F.S., governs summary hearings under the Administrative Procedure Act and allows the filing of limited motions, a limited record, and a decision by the administrative law judge within 30 days.

party is also entitled to recover reasonable attorney's fees if the administrative law judge determines that the claim or defense of the non prevailing party: was not supported by the material facts necessary to establish the claim or defense; would not be supported by the application of then-existing law to those material facts; or was brought or advanced primarily to harass, cause unnecessary delay, for frivolous purposes, or to needlessly increase the costs incurred by the opposition. The losing party has 120 days to pay attorney's fees and taxable costs assessed.¹⁰

- **Appeal:** Either party may appeal to the district court of appeal with jurisdiction over the county where the hearing was held. The payment of any award is stayed during the pendency of the appeal.

Filing fees: Filing fees are to be deposited into the Administrative Trust Fund of the Division of Administrative Hearings to defray the expenses and costs associated with the administration of the act.

License requirement: The Florida Statutes require users of explosives to possess a valid license or permit issued by the Division of the State Fire Marshall.¹¹

Effect of proposed changes: The bill requires the posting and maintenance of a bond or letter of credit as security as a prerequisite to obtaining or renewing a valid user license or permit. Evidence of compliance with this section must be maintained as a part of required records maintenance in accordance with s. 552.112, F.S. The amount of the bond must not be less than \$100,000. The bond or letter may be released when the user license or permit expires or 181 days after the final use of explosives under the license occurs, whichever is later, if the user of explosives has not been identified as the respondent in any pending claim for damages.

Sole and exclusive authority by State Fire Marshall: The State Fire Marshall has sole and exclusive authority to promulgate standards, limits, and regulations regarding the use of explosives in conjunction with construction materials mining activities.¹² 'Construction materials mining activities' includes the extraction of limestone and sand suitable for production of construction aggregates, sand, cement, and road based materials by any person or company primarily engaged in the commercial mining of any such materials.

Effect of proposed changes: The definition of 'construction materials mining activities' has been changed to include road based materials for shipment offsite.

C. SECTION DIRECTORY:

Section 1 amends s. 552.30, F.S., to change the definition of 'construction materials mining activities' as it relates to the State Fire Marshall's exclusive authority to promulgate standards regarding the use of explosives.

Section 2 creates s. 552.32, F.S., the "Florida Construction Materials Mining Activities Administrative Recovery Act."

Section 3 creates s. 552.34, F.S., providing for legislative findings and public purpose.

Section 4 creates s. 552.36, F.S., providing for exclusive jurisdiction of DOAH.

Section 5 creates s. 552.38, F.S., providing for a security requirement.

Section 6 creates s. 552.40, F.S., providing for the administrative remedy for alleged damage due to the use of explosives in connection with construction materials mining activities.

Section 7 creates s. 552.42, F.S., providing for appeal.

¹⁰ This provision is similar to the provisions of s. 57.105, F.S., which provides for sanctions for raising unsupported claims or defenses, or for delay of litigation. However in s. 57.105, F.S., the losing party and the losing party's attorney are each responsible for half of the attorney's fees.

¹¹ See s. 552.091, F.S.

¹² See s. 552.30, F.S.

Section 8 creates s. 552.44, F.S., providing that this act does not affect any claim filed in any tribunal before the effective date of the act.

Section 9 provides that the act becomes effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill requires a \$100 filing fee to be paid into the Administrative Trust Fund of the Division of Administrative Hearings. It is unknown how many petitions for damages due to the use of explosives in connection with construction materials mining activities will be filed.

2. Expenditures:

The \$100 filing fee is to be used to defray the expenses and costs associated with the administration of the act.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may provide a more cost-effective, expedient, and mutually beneficial administrative remedy to the traditional judicial process. It is unknown how many properties have allegedly been damaged, or will be damaged, by the use of explosives in connection with construction materials mining activities. It is also unknown how many of those who petition will also have annual incomes less than 150% of the federal poverty guidelines, which would entitle such persons to have filing fees waived.

Users of explosives will be required to post a bond or letter of security.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require the counties or cities to spend funds or take action requiring the expenditure of funds.

2. Other:

Access to Courts: The Florida Constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.¹³ Where citizens have enjoyed a historical right of access to the courts, the Legislature may only eliminate a judicial remedy under two circumstances: 1) a valid public purpose coupled with a reasonable alternative; or 2) overriding public necessity.¹⁴ In this case, both a formal and an expedited administrative process with attendant due process protections have been provided.

B. RULE-MAKING AUTHORITY:

Section 5 of the bill creates s. 552.38, F.S., relating to the bond or letter of credit required as a prerequisite for obtaining or renewing a valid user license. Section 552.38(3), F.S., allows the State Fire Marshall to adopt rules for the administration of this section.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 12, 2003, the Judiciary Committee adopted 4 main amendments and 1 amendment to the amendment, as follows:

- Amendment 1 extends the security requirement to persons who obtain or renew a valid license or permit pursuant to s. 552.30, F.S., and allows multiple license and permit holders to maintain a single bond in the aggregate amount of not less than \$100,000.
- Amendment 2, as amended, deletes the limit on attorney's fees and provides that the prevailing party is entitled to recover taxable costs and reasonable attorney's fees in enumerated circumstances.
- Amendment 3 clarifies that the name and address of the applicable user license or permit holder must be included in the petition.
- Amendment 4 corrects terminology regarding the appeal process.

This analysis has been drafted to the bill as amended.

¹³ See Article 1, Section 21 of the State Constitution.

¹⁴ See *Kluger v. White*, 281 So.2d 1 (Fla. 1973).