

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/CS/SB 1400

INTRODUCER: Judiciary Committee; Community Affairs Committee; and Senator Albritton

SUBJECT: Private Property Rights

DATE: April 22, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Peacock</u>	<u>Yeatman</u>	<u>CA</u>	<b>Fav/CS</b>
2.	<u>Tulloch</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
3.	<u>Peacock</u>	<u>Phelps</u>	<u>RC</u>	<b>Pre-meeting</b>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 1400 prohibits a local government from enforcing an ordinance or regulation requiring a permit, application, notice, fee, or fine for the pruning, trimming, or removal of certain trees on residential property during March 1 through June 1 of the calendar year under specified circumstances, and the bill prohibits a local government from authorizing the removal of specified trees during this time frame. A local government may require a property owner to replant a tree that has been removed in accordance with these provisions. The bill does not apply to mangrove trees.

The bill also adds a provision allowing an electric utility to prune trees and maintain vegetation in the right of way at the request of the adjacent property owner without prior approval from the local government.

Additionally, the bill requires each county property appraiser to post a Property Owner Bill of Rights on its website. Such bill of rights does not create a civil cause of action.

**II. Present Situation:**

**Home Rule**

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by

general or special law.<sup>1</sup> Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.<sup>2</sup> Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.<sup>3</sup>

County governments have authority to prepare and enforce comprehensive plans for the development of the county and provide fire protection, ambulance services, parks and recreation, libraries, museums and other cultural facilities, waste and sewage collection and disposal, and water and alternative water supplies.<sup>4</sup> Municipalities are afforded broad home rule powers with the exception of annexation, merger, exercise of extraterritorial power, or subjects prohibited or preempted by the Federal or State Constitutions, county charter, or statute.<sup>5</sup>

### **Local Tree Pruning, Trimming and Removal Regulations**

Currently, in Florida there are 67 counties<sup>6</sup> and 412 municipalities.<sup>7</sup> Local governments often have tree ordinances that specify the species that must be used in a given area depending on the land use. Some local governments require a permit prior to trimming certain trees. Local governments may also afford certain trees protection because they are considered an important community resource.<sup>8</sup> The terms used to describe such trees may include heritage,<sup>9</sup> historic, landmark, legacy, patriarch,<sup>10</sup> special interest, significant, or specimen<sup>11</sup> trees.

<sup>1</sup> FLA. CONST. art. VIII, s. 1(f).

<sup>2</sup> FLA. CONST. art. VIII, s. 1(g).

<sup>3</sup> FLA. CONST. art. VIII, s. 2(b). *See also* s. 166.021(1), F.S.

<sup>4</sup> Section 125.01, F.S.

<sup>5</sup> Section 166.021(3), F.S.

<sup>6</sup> *See* ch. 7, F.S.; *The Local Government Formation Manual 2018-2020*, Appx. B, available at <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3025&Session=2019&DocumentType=General%20Publications&FileName=2018-2020%20Local%20Government%20Formation%20Manual%20Final.pdf> (last visited Apr. 3, 2019).

<sup>7</sup> Florida League of Cities, *Municipal Directory Odering & Advertising Information*, <https://www.flcities.com/resources/municipal-directory/municipal-directory-information> (last visited Apr. 3, 2019). *See also* *The Local Government Formation Manual 2018-2020*, Appx. E, available at <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3025&Session=2019&DocumentType=General%20Publications&FileName=2018-2020%20Local%20Government%20Formation%20Manual%20Final.pdf> (last visited Apr. 3, 2019).

<sup>8</sup> *See generally*, American Society of Consulting Arborists, *Tree Ordinances*, available at <https://www.asca-consultants.org/page/TreeOrdinances> (last visited Apr. 3, 2019).

<sup>9</sup> A heritage tree is typically a large, individual tree with unique value, which is considered irreplaceable. The major criteria for heritage tree designation are age, rarity, and size, as well as aesthetic, botanical, ecological, and historical value. *See* Peter A. Coates, *American Perceptions of Immigrant and Invasive Species: Strangers on the Land*, 140 (University of Ca. Press 2006).

<sup>10</sup> A patriarch tree refers to “the oldest member or representative of a group.” *See* MERRIAM-WEBSTER DICTIONARY (defining patriarch at 1c(1), noting that “the cypress ... is the patriarch of native trees, going back to the time of the dinosaur”), available at <https://www.merriam-webster.com/dictionary/patriarch> (last visited Apr. 4, 2019). In Tallahassee, for example, patriarch live oaks are protected, *see* Tallahassee Land Dev. Cod. s. 5-83; and a live oak on FSU’s campus with a trunk diameter of 72 inches, suggesting it is 160 years old, was deemed a patriarch tree in 2010. *See* FSU Plants, *FSU’s Patriarch Oaks* (Aug. 18, 2011), available at <http://fsuplants.blogspot.com/2011/08/fsus-patriarch-oaks.html> (last visited Apr. 4, 2019).

<sup>11</sup> A specimen tree is a tree with any individual trunk that has a DBH (diameter at breast height) of 18 inches or greater (or a circumference of 56.5 inches or greater) when measured at point 4 1/2 feet from the ground at natural grade. In the case of multiple-trunked trees, the DBH shall mean the sum of each trunk’s diameter measured at the point 4 1/2 feet from where the

For example, in Broward County the removal of any historical tree<sup>12</sup> without first obtaining approval from the Board of County Commissioners is prohibited, as is the removal of any tree without first obtaining a tree removal license from the Environmental Protection and Growth Management Department.<sup>13</sup> Furthermore, municipalities within Broward County are authorized to adopt and enforce their own tree preservation regulations in addition to Broward County's regulation of trees.<sup>14</sup>

### ***Mangrove Trimming***

In 1996, the Florida Legislature enacted the 1996 Mangrove Trimming and Preservation Act (MTPA).<sup>15</sup> This law regulates the trimming and alteration of mangroves statewide, with the exception of the Delegated Local Governments of Broward, Hillsborough, Miami-Dade, and Pinellas Counties, the City of Sanibel, and the Town of Jupiter Island.<sup>16</sup>

The heights to which a mangrove tree may be trimmed will depend upon the provisions of the MTPA as well as the species and condition of the tree.<sup>17</sup> Projects that involve alterations, and trimming projects that exceed the allowances of the exemptions and general permits, may be authorized through individual permits in s. 403.9328, F.S.<sup>18</sup> Trimming may be authorized in an Environmental Resource Permit (ERP) along with other ERP activities for the same property. Mangrove impacts associated with and located within the footprint of an ERP authorized activity do not require a separate authorization under the MTPA.<sup>19</sup>

### **Electric Transmission and Distribution Line Right-of-Way Maintenance**

Section 163.3209, F.S., provides that after a right-of-way for an electric transmission or distribution line has been established, a local government may not require any permits or other approvals for vegetation maintenance, tree pruning, or trimming within that right-of-way. This section defines the term “vegetation maintenance and tree pruning or trimming” as the “mowing of vegetation within the right-of-way, and selective removal of tree branches that extend within the right-of-way.” This section requires a utility to provide five business days advance notice to a

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tree emerges from the ground at natural grade. The following trees are not considered specimen: Non-native fruit trees that are cultivated or grown for the specific purpose of producing edible fruit, including, but not limited to, mangos, avocados or species of citrus; Non-native species of the genus *Ficus*; and all multi-trunk palms except *Paurotis palm/Everglades palm (Acoelorrhapha wrightii)* and *Reclinata palm (Phoenix reclinata)*, which have a minimum overall height of 15 feet. See Miami-Dade County, *Tree Removal or Relocation Permits*, available at <https://www.miamidade.gov/permits/tree-removal.asp> (last visited April 3, 2019).

<sup>12</sup> The Broward County Code of Ordinances defines a “historical tree” as “a particular tree or group of trees which has historical value because of its unique relationship to the history of the region, state, nation or world as designated by the Board [of County Commissioners].” See Broward County Code of Ord., ch. 27, Art. XIV, s. 404, available at [https://library.municode.com/fl/broward\\_county/codes/code\\_of\\_ordinances?nodeId=COBRCOFLVOI](https://library.municode.com/fl/broward_county/codes/code_of_ordinances?nodeId=COBRCOFLVOI) (last visited Apr. 3, 2019).

<sup>13</sup> *Id.* at s. 405(a), (b).

<sup>14</sup> *Id.* at s. 407(a).

<sup>15</sup> Chapter 95-299, s. 1, LAWS OF FLA. See ss. 403.9321-403.9333, F.S.

<sup>16</sup> Florida Department of Environmental Protection, *Mangrove Trimming Guidelines for Homeowners*, “Introduction,” 4, available at [https://floridadep.gov/sites/default/files/Mangrove-Homeowner-Guide-sm\\_0.pdf](https://floridadep.gov/sites/default/files/Mangrove-Homeowner-Guide-sm_0.pdf) (last visited Apr. 3, 2019).

<sup>17</sup> *Id.* at 5 (“Before You Trim”).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citing s. 403.9328(5), F.S.).

local government official prior to conducting vegetation maintenance activities within a right-of-way. An exception applies for service restoration, avoidance of imminent vegetation caused outage, or when performed at the request of the property owner adjacent to the right-of-way, provided the owner has approval of the local government if required.<sup>20</sup>

### **Private Property Guarantees in the Federal and State Constitution**

Both the Federal Constitution and State Constitution guarantee that a person’s private property may not be taken for public use without reimbursement. The Fifth Amendment to the United States Constitution states that no private property shall “be taken for public use without just compensation.” Similarly, the Florida Constitution provides that no private property shall be taken except for a public purpose and that each owner must be fully compensated.<sup>21</sup>

### **The Bert J. Harris, Jr., Private Property Rights Protection Act**

The Legislature enacted the “Bert J. Harris, Jr., Private Property Rights Protection Act” in 1995. The act provides relief to a property owner whose property is inordinately burdened by government regulation. The act is limited in scope and applies only to:

- Real, and not personal, property;
- A property owner and not a leaseholder;
- “As-applied” challenges for specific government actions, not to broad, facial challenges of government regulations; and
- Challenges that are not temporary impacts.<sup>22</sup>

The Legislature recognized that some laws, regulations, and ordinances of the state and its entities could inordinately burden, restrict, or limit private property rights without amounting to a taking<sup>23</sup> under either the State Constitution or the United States Constitution. The Legislature declared that there is “an important state interest in protecting the interests of private property owners from those inordinate burdens.” Accordingly, the Legislature created a separate and distinct cause of action for governmental actions that might not rise to the level of taking under the State Constitution or United States Constitution. The Legislature provided a process for private landowners to seek relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity, as applied, unfairly affects real property.<sup>24</sup>

The phrases “inordinate burden” and “inordinately burdened” mean that an action by one or more governmental entities has directly restricted or limited the use of real property to the extent that:

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<sup>20</sup> *Id.*

<sup>21</sup> FLA. CONST. art. X, s. 6.

<sup>22</sup> Thomas Hawkins, *Land Use Law with a Florida Focus*, 233, (Aug. 2018)

<https://www.dropbox.com/s/3ykseigou178vra/2018%207%2022%20Land%20Use%20with%20a%20Florida%20Focus.pdf?dl=0> (last visited Apr. 22, 2019).

<sup>23</sup> A “taking” is generally understood to mean a government action that deprives an owner of the use or enjoyment of his or her property. A regulatory taking occurs when a government regulation seriously restricts a property owner’s rights. BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>24</sup> Section 70.001(1), F.S.

- The property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole; or
- The property owner is left with existing or vested uses that are unreasonable such that the property owner bears a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.<sup>25</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 163.3209, F.S., to allow an electric utility to maintain vegetation in the right of way at the request of the adjacent property owner *without* prior approval from the local government.

**Section 2** creates s. 163.3214, F.S., relating to tree pruning, trimming, or removal on residential property. From March 1 through June 1 of the calendar year, a local government is prohibited from doing either of the following:

- If the property owner has obtained documentation from an arborist certified by the International Society of Arboriculture that the tree is a danger to persons or property and the tree is not a listed endangered species, enforce an ordinance or regulation governing the pruning or trimming of specimen, heritage, or patriarch trees, as defined by local ordinances or regulations, or the pruning, trimming, or removal of other trees on residential property which requires a permit, an application, the provision of notice, a fee, or a fine.
- Authorize the removal of specimen, heritage, or patriarch trees, as defined by local ordinances or regulations.

Additionally, the particular wording of the bill appears to ban local governments from authorizing the removal of specimen, heritage, or patriarch trees for any reason from March 1 through June 1 of a calendar year. However, the intent may have been to preserve the authority of local governments to require property owners to obtain permits before these trees are removed.

The bill defers to the definitions of specimen, heritage, and patriarch trees in local ordinances and regulations. If a local ordinance contains an expansive definition of these types of trees, the effect of the bill may be significantly affected.

The bill does not apply to the exercise of specifically delegated authority for mangrove protection pursuant to the Mangrove Trimming and Preservation Act.<sup>26</sup>

**Section 3** creates s. 715.015, F.S., establishing a property owner bill of rights to be posted on the website of each county property appraiser. The purpose of the bill of rights is to identify certain existing rights afforded to property owners. The bill provides several disclaimers concerning the bill of rights:

- It is not comprehensive.

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<sup>25</sup> Section 70.001(3)(e)1., F.S. The definition further explains in s. 70.001(3)(e)2., F.S., what the terms do not include with regard to other impacts.

<sup>26</sup> Sections 403.9321-403.9333, F.S.

- It does not create a civil cause of action.

In addition to the foregoing disclaimers, the required language to be posted on county appraiser websites also lists the following disclaimers concerning the bill of rights:

- It does not expand or limit rights or remedies.
- It is not intended to replace legal advice.

The websites must further advise that laws relating to property rights are found in the Florida Constitution, Florida Statutes, local ordinances, and court decisions.

Following the above disclaimers, the bill of rights provides that private property owners generally have the following rights and protections:

- The right to acquire, possess, and protect property.
- The right to use and enjoyment of property.
- The right to exclude others from property.
- The right to dispose of property.
- The right to due process.
- The right to just compensation for property taken for a public purpose.
- The right to relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state unfairly affects real property.

**Section 4** provides the bill takes effect July 1, 2019.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Property owners may save costs associated with permit fees to trim or cut down certain trees.

**C. Government Sector Impact:**

Local governments may temporarily see a decline in revenues from fines or fees associated with various tree ordinances in effect. In addition, local governments may incur costs associated with establishing a property owner bill of rights and posting the information on the property appraiser's website.

**VI. Technical Deficiencies:**

On line 110, the bill refers to the "replanting" of trees but it is unlikely that a tree that has been removed would be replanted. Thus, it appears "replanting" should be changed to "replacing."

**VII. Related Issues:**

The bill prohibits a local government from authorizing the removal of specimen, heritage or patriarch trees from March 1 through June 1 even with a permit.

**VIII. Statutes Affected:**

This bill substantially amends section 163.3209 of the Florida Statutes.

This bill creates the following sections of the Florida Statutes: 163.3214 and 715.015.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Judiciary on April 8, 2019:**

The committee substitute adds the Property Owner Bill of Rights back into the bill.

**CS by Community Affairs on April 2, 2019:**

The committee substitute:

- Amends s. 163.3209, F.S., to allow an electric utility to maintain vegetation in the right of way at the request of the adjacent property owner without prior approval from the local government.
- Prohibits enforcement of local government ordinances requiring a permit for pruning, trimming and removal of certain trees during a specified time period.

- Prohibits a local government from authorizing the removal of certain trees during a specified time period.
- Authorizes a local government to enforce ordinances or regulations requiring the replanting of trees under certain circumstances.
- Exempts mangrove trees from the bill's application.
- Deletes provisions regarding the Private Property Bill of Rights.

B. Amendments:

None.