

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: CS/SB 518

INTRODUCER: Community Affairs Committee and Senator Brodeur

SUBJECT: Private Property Rights to Prune, Trim, and Remove Trees

DATE: February 9, 2022 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hunter</u>	<u>Ryon</u>	<u>CA</u>	<u>Fav/CS</u>
2.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 518 amends s. 163.045, F.S., which prohibits a local government from requiring a notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree on residential property if the property owner obtains documentation from a certified arborist or a licensed landscape architect, that the tree *presents a danger* to persons or property. (emphasis added). The bill amends this provision to provide that a local government may not burden a property owner's rights to prune, trim, or remove trees on his or her own property if the tree "poses an unacceptable risk" to persons or property. Under the bill, a tree poses an unacceptable risk if removal is the only means of practically mitigating its risk below moderate as outlined in Best Management Practices – Tree Risk Assessment, Second Edition (2017).

The bill defines "documentation" to mean an onsite tree risk assessment performed in accordance with the tree risk assessment procedures outlined in Best Management Practices - Tree Risk Assessment, Second Edition (2017). Documentation must be signed by an arborist certified by the International Society of Arboriculture (ISA) or Florida licensed landscape architect. The bill also defines the term "residential property" as a single-family detached building located on an existing lot, actively used for single-family residential purposes, and which is either an existing conforming use or a legally recognized nonconforming use following the local jurisdiction's applicable land development regulations.

The bill may have an indeterminate fiscal impact on local governments.

The bill takes effect on July 1, 2022.

II. Present Situation:

Home Rule Powers and Preemption

The Florida Constitution

The State Constitution establishes and describes the duties, powers, structure, function, and limitations of government in Florida. Article VIII, section 1 of the State Constitution, endows counties and municipalities the power of self-government or home rule power. Under the home rule power, local governments have broad authority to exercise the state's sovereign police powers and legislate on any matter that is not inconsistent with the federal and state constitution and laws.

Counties

A county without a charter has power of self-government as provided by general or special law and may enact county ordinances not inconsistent with general law.¹ Counties operating under county charters have all the powers of local self-government not inconsistent with general law or with special law approved by a vote of the electors.² General law authorizes counties "the power to carry on county government"³ and to "perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law."⁴

Municipalities

Municipalities may be established or abolished, and their charters amended by general or special law. Municipalities have governmental, corporate, and proprietary powers to conduct municipal government, perform municipal functions, and render municipal services. They may exercise any of these powers for municipal purposes except as otherwise provided by law.⁵ Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,⁶ acknowledges these constitutional grants of police powers and better defines municipal powers of self-government.⁷ Chapter 166, F.S., provides municipalities with broad home rule powers to act in a manner not inconsistent with the State Constitution, general and special law, and a charter for the county in which the municipality is located.⁸

¹ FLA. CONST. art. VIII, s. 1(f).

² *Id.* at (g).

³ Section 125.01(1), F.S.

⁴ *Id.* at (w).

⁵ FLA. CONST. art. VIII, s. 2.

⁶ Section 166.011, F.S.

⁷ Florida House of Representatives, Publications, *The Local Government Formation Manual 2017-2018*, p. 16, available at: <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2911&Session=2017&DocumentType=General%20Publications&FileName=2017-2018%20Local%20Government%20Formation%20Manual%20Final%20Pub.pdf> (last visited Dec. 9, 2021).

⁸ Section 166.021(4), F.S.

State Preemption

Although local governments have broad home rule powers, the state legislature may preempt this self-government power and preclude local governments from exercising legislative authority in particular areas of law.⁹ Florida law recognizes two types of preemption: express and implied.

Express preemption requires a specific legislative statement; it cannot be implied or inferred.¹⁰ In cases where the Legislature expressly preempts an area or forbids local governments from certain actions, there is no problem with ascertaining what the Legislature intended.¹¹ On the other hand, implied preemption is found where the local legislation would present the danger of conflicting with the state's pervasive regulatory scheme.¹² Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area to the state, and there are strong public policy reasons for doing so.¹³ In cases determining the validity of ordinances enacted in the face of express and implied state preemption, the effect has been to find such ordinances null, void, and unenforceable.¹⁴

Local Tree Pruning, Trimming, and Removal Regulations

Florida counties and municipalities have the home rule power to enact ordinances related to tree removal and management. These ordinances regulate how private property owners manage the landscape on their private property. Tree management ordinances address various aspects of land use, including the species used in a given area. Some tree management ordinances require a property owner to receive a permit or pay a fee before pruning, trimming, or removing a tree from their private property.

For example, in Broward County, removing any historical tree¹⁵ without first obtaining approval from the Board of County Commissioners is prohibited. Broward County also outlaws removing any tree without first obtaining a tree removal license from the Environmental Protection and Growth Management Department.¹⁶ Furthermore, municipalities within Broward County have enforced their tree preservation regulations in addition to Broward County's tree regulations.¹⁷

⁹ Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

¹⁰ See *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008).

¹¹ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010).

¹² See *GLA & Assocs. Inc. v. City of Boca Raton*, 855 So. 2d 278, 282 (Fla. 4th DCA 2003).

¹³ *Id.*

¹⁴ *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993); *Hillsborough County v. Fla. Rest. Ass'n*, 603 So.2d 587, 591 (Fla. 2d DCA 1992) (“If [a county] has enacted such an inconsistent ordinance, the ordinance must be declared null and void.”)

¹⁵ Ch. 27, art. XIV, s. 404, Broward County Code of Ordinances (2018), 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.

¹⁶ *Id.* at s. 405. Nuisance trees are exempt from the prohibitions in the tree preservation ordinances. *Id.* at 406. A “nuisance tree” is defined to be one of 10 identified trees including the *Schinus terebinthifolius* (Brazilian pepper tree/Florida holly). *Id.* at 404.

¹⁷ *Id.* at s. 407. Municipalities may regulate exclusively within their jurisdictions upon certification by Broward County with some exceptions.

Similarly, Orange County requires a permit or authorization to remove a protected tree¹⁸ unless an exception applies. The law does not restrict tree trimming or maintenance but encourages property owners to practice proper trimming habits that avoided the need for "severe" trimming of any tree.¹⁹ Municipalities within Orange County are also allowed to provide tree regulations within their jurisdictions.²⁰

Section 163.045, F.S. – Tree Pruning, Trimming, or Removal on Residential Property

During the 2019 Regular Session, the Legislature created s. 163.045, F.S., which prohibits local governments from requiring "a notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree on residential property if the property owner obtains documentation from an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect that the tree presents a danger to persons or property." Additionally, a local government may not require a property owner to replant a tree that was pruned, trimmed, or removed in accordance with this section.²¹ These 2019 provisions do not apply to the exercise of authority for mangrove protection pursuant to ss. 403.9321-403.9333, F.S.²²

The subject matter of s. 163.045, F.S., has been the subject of litigation on several occasions since its enactment. Courts have grappled with the statute's express language and whether local governments maintain some residual authority to regulate tree management on private property.²³

Tree Risk Assessment Standards

In 2017, the International Society of Arboriculture (ISA) and the American National Standard Institute (ANSI) produced the first national standards to address tree risk assessment. The ANSI standards represent the industry criteria for performing tree care operations. The standards can be used for general familiarity with professional requirements and preparation of tree care contract specifications. These standards are published in Best Management Practices - Tree Risk

¹⁸ Protected trees are native trees in certain zones and include Red maple, Red buckeye, and Pignut hickory trees. *See* Ch. 15, Art. VIII, ss. 283 and 301(e), Orange County Code of Ordinances (2018).

¹⁹ Ch. 15, Art. VIII, s. 278, Orange County Code of Ordinances (2018).

²⁰ *Id.*

²¹ Section 163.045(2), F.S.

²² *Id.* at (3). Florida has three native species of mangrove trees growing along its coastline, which can be harmed or killed if not trimmed properly. The "1996 Mangrove Trimming and Preservation Act" (Act) requires the Department of Environment Protection (DEP) to regulate the trimming and alteration of mangroves statewide, except where DEP has delegated its authority to local governments that meet certain requirements and request such delegation. The Act prohibits mangrove trimming or alteration without a permit issued by DEP or a delegated local government, unless the trimming or alteration falls within certain exceptions. *See* 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 (last visited Dec 9, 2021).

²³ *See Vickery v. City of Pensacola*, 2020 WL 1190558, No. 1D19-4344 (Fla. 1st DCA 2020)(Appellate Brief, file Feb. 5, 2020) (Appealing from a Circuit Court of Escambia County injunction on the removal of a tree); *see also Schuh v. City of St. Petersburg*, 2019 WL 10784582, No. 18-007493-CI. (Fla.Cir.Ct. 6th Jud.Cir., Pinellas County)(Plaintiffs alleged that before altering their landscape in any way—including pruning, trimming, or removing trees—the City requires notification, an application, and approval in violation of s. 163.045, F.S.).

Assessment, Second Edition.²⁴ The stated purpose of Best Management Practices - Tree Risk Assessment, Second Edition is to serve as a guide for arborists to assess tree risk as accurately and consistently as possible, to evaluate that risk, and to recommend measures that achieve an acceptable level of risk.²⁵

Best Management Practices - Tree Risk Assessment, Second Edition covers topics arborists should include in tree risk assessments including:²⁶

- Risk Assessment Basics;
- Levels and Scope of Tree Risk Assessment;
- Assessing Targets, Sites, and Trees;
- Tree Risk Categorization;
- Risk Mitigation: Preventive and Remedial Actions;
- Risk Reporting;
- Tree Related Conflicts That Can Be a Source of Risk;
- Loads on Trees;
- Structural Defects and Conditions That Affect Likelihood of Failure;
- Response Growth; and
- Description of Selected Types of Advanced Tree Risk Assessments.

III. Effect of Proposed Changes:

Section 1 amends s. 163.045, F.S., to define the following terms:

- "Documentation" means an onsite assessment performed in accordance with the tree risk assessment procedures outlined in best Management Practices – Tree Risk Assessment, Second Edition (2017) by an arborist certified by the International Society of Arboriculture (ISA) or a Florida licensed landscape architect and signed by the certified arborist or licensed landscape architect.
- "Residential property" means a single-family, detached building located on a lot actively used for single-family residential purposes, and which is either an existing conforming use or a legally recognized nonconforming use under the local jurisdiction's applicable land development regulations

Before a residential property owner may prune, trim, or remove a tree pursuant to s. 163.045, F.S., the bill requires an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect to certify that a tree poses "an unacceptable risk" to persons or property. A tree poses an unacceptable risk to persons or property if removal is the only means of practically mitigating the risk below moderate, Best Management Practices - Tree Risk Assessment, Second Edition (2017).

The bill takes effect July 1, 2022.

²⁴ See ISA, Best Management Practices - Tree Risk Assessment, Second Edition (2017), available at: <https://www.isa-arbor.com/store/product/324> (last visited Jan. 19, 2022).

²⁵ *Id.*

²⁶ *Id.*

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Not applicable. The bill does not require counties or municipalities to take 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.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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

None.

B. Private Sector Impact:

The private sector may avoid future fines and legal costs associated with a local government's implementation of s. 163.055, F.S., due the specificity provided in the bill.

C. Government Sector Impact:

Local governments may avoid future legal costs associated with potential lawsuits filed to challenge a local government's implementation of s. 163.045, F.S., due to the specificity provided in the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 163.045 of the Florida Statutes.

IX. Additional Information:

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

CS by Community Affairs on January 18, 2022:

The CS modifies the definitions of “documentation” and “residential property” and changes the title of the bill from “an act relating to residential home protection” to “an act relating to private property rights to prune, trim, and remove trees.”

- B. **Amendments:**

None.