

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 Fiscal Policy

BILL: PCS/CS/SB 1192 (939166)

INTRODUCER: Fiscal Policy Committee (Recommended by Appropriations Subcommittee on General Government); Environmental Preservation and Conservation Committee; and Senator Hays

SUBJECT: Waste Management

DATE: February 26, 2016 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hinton</u>	<u>Rogers</u>	<u>EP</u>	<u>Fav/CS</u>
2.	<u>Howard</u>	<u>DeLoach</u>	<u>AGG</u>	<u>Recommend: Fav/CS</u>
3.	<u>Hrdlicka</u>	<u>Hrdlicka</u>	<u>FP</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/CS/SB 1192:

- Precludes a local government from preventing a private company from listing separately on the company's invoice for solid waste collection, disposal, or recycling any governmental taxes or fees;
- Amends provisions regulating local government competition with solid waste collection companies to include disposal and recycling; and
- Creates the crime of theft of recyclable property and provides for a civil right of action for violations.

The Criminal Justice Impact Conference has not yet estimated the impact of this bill. This bill is not expected to have an impact on state government.

The bill is effective July 1, 2016.

II. Present Situation:

Home Rule Authority

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.¹ 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.² Likewise, municipalities have 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.³

The Florida Constitution preempts all forms of taxation to the state except for ad valorem taxes on real estate and tangible personal property or as otherwise provided by general law.⁴ Local governments may levy special assessments or fees under their home rule authority. Many governments levy franchise fees on waste collection companies in exchange for the right to be the sole provider to a specific service area.⁵ Others levy special assessments on the property owner to ensure service for that area.⁶

Current law enumerates the powers and duties of all county governments, unless preempted on a particular subject by general or special law.⁷ Those powers include the provision of 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. Municipalities are afforded broad home rule powers except: annexation, merger, exercise of extraterritorial power, and subjects prohibited or preempted by the federal, state, or county constitutions or law.⁸

Solid Waste

Counties are granted the power to provide and regulate waste and sewage collection and disposal. A county may require that any person within the county demonstrate the existence of some arrangement or contract by which the person's solid waste will be disposed of in a manner consistent with county ordinance or state or federal law.⁹ Counties also have authority to adopt ordinances that govern the disposal of solid waste generated outside the county at the county's solid waste disposal facility.¹⁰ Counties and municipalities are expressly prohibited from discriminating against privately owned solid waste management facilities.¹¹

¹ FLA. CONST. art VIII, s. 1(f).

² FLA. CONST. art VIII, s. 1(g).

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

⁴ FLA. CONST. art VII, s. 1(a).

⁵ *See, e.g.*, City of Tampa, Resolution No. 2012-309.

⁶ *See, e.g.*, Orange County Code of Ordinances, ch. 32, art. IV, s. 32-157 (Ordinance No. 2008-03) (providing that all property entitled to full waste collection services shall be subject to special assessments).

⁷ Section 125.01, F.S.

⁸ Section 166.021, F.S.

⁹ Section 125.01(1)(k)2., F.S.

¹⁰ Section 403.706(1), F.S.

¹¹ Section 403.7063, F.S.

The Department of Environmental Protection (DEP) is responsible for implementing and enforcing the solid waste management program, which provides guidelines for the storage, separation, processing, recovery, recycling, and disposal of solid waste throughout the state.¹² The program is required to include procedures and requirements to ensure cooperative efforts in solid waste management by counties and municipalities and groups of counties and municipalities where appropriate.¹³

Counties are responsible for operating solid waste disposal facilities, which are permitted through the DEP, in order to meet the needs of the incorporated and unincorporated areas of the county.¹⁴ Each county must ensure that municipalities within its boundaries participate in the preparation and implementation of recycling and solid waste management programs through interlocal agreements or other means.¹⁵ In providing services or programs for solid waste management, local governments and state agencies are encouraged to use the most cost-effective means for providing services and are encouraged to contract with private entities for any or all such services or programs to assure that those services are provided on the most cost-effective basis.¹⁶

Recycled and Recovered Materials

Economically recovering material and energy resources from solid waste can eliminate unnecessary waste and slow the depletion of natural resources. The Legislature has declared that maximizing recycling and reuse of resources are high-priority goals of the state.¹⁷ In 2014, 12,684,860 tons of municipal solid waste was recycled in Florida.¹⁸ Section 403.7032(2), F.S., provides that by the year 2020, the long-term goal for the recycling efforts of state and local governmental entities, private companies and organizations, and the general public is to recycle at least 75 percent of the municipal solid waste that would otherwise be disposed of in waste management facilities, landfills, or incineration facilities.

Competition with Private Companies

Section 403.70605, F.S., was enacted in 2000 to require local governments that provide solid waste management services to be subject to the same requirements as private industry and to impose requirements on local governments providing services outside of their jurisdictions.¹⁹ The law addressed concerns of private waste management companies about competition with local government solid waste departments for contracts; the private companies were concerned that in instances where they were competing for services, public entities were able to subsidize

¹² See s. 403.705, F.S.

¹³ Section 403.705(2)(a), F.S.

¹⁴ Section 403.706(1), F.S.

¹⁵ Section 403.706(3), F.S.

¹⁶ Section 403.7063, F.S.

¹⁷ Section 403.7032, F.S.

¹⁸ DEP, *Solid Waste Management in Florida 2014 Annual Report: Florida Municipal Solid Waste Collected and Recycled (2014)*, available at ftp://ftp.dep.state.fl.us/pub/reports/Recycling/Reports/2014AnnualReport/MSW-Composition_2014.pdf (last visited Feb. 1, 2016).

¹⁹ Chapter 00-304, s. 1, L.O.F.

their costs with funds from other government operations, allowing the public entities to unfairly compete for contracts.²⁰

Solid Waste Collection Services in Direct Competition

Section 403.70605(1)(a), F.S., requires a local government that provides specific solid waste collection services in direct competition with a private company to comply with the provisions of local environmental, health, and safety standards that also are applicable to a private company providing such collection services in competition with the local government. The local government may not enact or enforce any license, permit, registration procedure, or associated fee that:

- Does not apply to the local government and for which there is not a substantially similar requirement that applies to the local government; and
- Provides the local government with a material advantage in its ability to compete with a private company in terms of cost or ability to promptly or efficiently provide such collection services. This does not apply to any zoning, land use, or comprehensive plan requirements.

Section 403.70605(1)(b), F.S., authorizes a private company in competition with a local government to bring an action to enjoin violations of the above requirements against any local government. The private company must provide the local government with notice of complaint of a violation, and if the local government does not respond with corrective action within 30 days, then the private company may file suit. Injunctive relief will not be granted if the official action that forms the basis of the suit has a reasonable relationship to the health, safety, or welfare of the citizens of the local government unless the court finds that the actual or potential anticompetitive effects outweigh the public benefits of the challenged action. The court may award the prevailing party costs and reasonable attorney fees.

The Department of Management Services has verified that no state agencies provide solid waste collection, disposal, or recycling services.²¹

Solid Waste Collection Services Outside Jurisdiction

Section 403.70605(2), F.S., subjects a local government that provides solid waste collection services outside its jurisdiction in direct competition with private companies to the same prohibitions against predatory pricing as private companies.²² Any person injured by a violation of this provision may bring an action to enjoin violations and recover damages and costs within 4 years of the injury. The person must provide the local government with notice of complaint of a violation, and if the local government does not respond with corrective action within 30 days, then the person may file suit. Injunctive relief will not be granted when the action taken by the local government was in direct response to a natural disaster or emergency declaration order by the Governor. The court may award the prevailing party costs and reasonable attorney fees.

²⁰ Florida House of Representatives, *CS/HB 1425 Final Analysis*, (May 12, 2000) p. 2, available at <http://archive.flsenate.gov/data/session/2000/House/bills/analysis/pdf/HB1425S1Z.CA.pdf> (last visited Feb. 25, 2016).

²¹ E-mail from Ricky Moulton, Deputy Director of Legislative Affairs, Department of Management Services (Feb. 4, 2016) (on file with the Senate Committee on Environmental Preservation and Conservation).

²² See ss. 542.18 and 542.19, F.S.

Displacement of Garbage, Trash, or Refuse Collection Services

Section 403.70605(3), F.S., prohibits a local government from displacing a private company that provides garbage, trash, or refuse collection without first holding at least one public hearing, publically noticed and notice provided to private companies providing service in the jurisdiction by mail at least 45 days before the hearing. “Displacement” refers to a local government’s provision of a collection service that prohibits or displaces a private company from continuing to provide the same service.²³ The local government must provide 3 years’ notice to a private company before it engages in the actual provision of the service that displaces the company, or, in the alternative, the local government can pay a displaced company an amount equal to the company’s preceding 15 months’ gross receipts for the displaced service in the displacement area or the local government and the private company can voluntarily negotiate a different notice period or amount of compensation.

Theft

Section 812.014, F.S., defines and categorizes thefts into misdemeanor or felony criminal violations. Whether a theft is a misdemeanor or a felony generally depends upon the value of the property taken by the defendant, the defendant’s history of theft convictions or, in some cases, the type of property taken. A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

- Deprive the other person of a right to the property or a benefit from the property; or
- Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.²⁴

Second degree petit theft, a second degree misdemeanor, is theft of property valued at less than \$100.²⁵ First degree petit theft, a first degree misdemeanor, is theft of property valued at \$100 or more but less than \$300.²⁶ Petit theft incurs greater penalties if there is a prior theft conviction: a first degree misdemeanor if there was a prior conviction,²⁷ and a third degree felony if there are two or more prior convictions.²⁸

Third degree grand theft, a third degree felony, is theft of property valued at \$300 or more but less than \$20,000; or theft of specified property (e.g., a firearm or fire extinguisher).²⁹ Theft of

²³ Section 403.70605(3)(a), F.S., provides several exclusions.

²⁴ Section 812.014(1), F.S.

²⁵ Section 812.014(3)(a), F.S. A second degree misdemeanor is punishable by up to 60 days in jail and a fine of up to \$500. Sections 775.082 and 775.083, F.S.

²⁶ Section 812.014(2)(e), F.S. A first degree misdemeanor is punishable by up to one year in jail and a fine of up to \$1,000. Sections 775.082 and 775.083, F.S.

²⁷ Section 812.014(3)(b), F.S.

²⁸ Section 812.014(3)(c), F.S. A third degree felony is punishable by up to 5 years in state prison and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S. However, if the third degree felony is not a forcible felony (excluding a third degree felony under ch. 810, F.S.) and total sentence points are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction unless the court makes written findings that a nonstate prison sanction could present a danger to the public. Section 775.082(10), F.S.

²⁹ Section 812.014(2)(c), F.S.

property from a dwelling or its unenclosed curtilage is third degree grand theft, a third degree felony, if the property is valued at \$100 or more, but less than \$300.³⁰

Second degree grand theft, a second degree felony, is theft of:

- Property valued at \$20,000 or more but less than \$100,000;
- Cargo valued at less than \$50,000 in specified circumstances; or
- Emergency medical equipment or law enforcement equipment valued at \$300 or more in specified circumstances.³¹

First degree grand theft, a first degree felony, is:

- Theft of property valued at \$100,000 or more;
- Theft of a semitrailer deployed by a law enforcement officer;
- Theft of cargo valued at \$50,000 or more in specified circumstances; or
- Grand theft and, in the course of committing the offense, a motor vehicle is used as specified or the offender causes damage to the real or personal property of another in excess of \$1,000.³²

Civil Remedy for Theft

Section 772.11(1), F.S., provides that any person who proves by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation of statutes concerning theft is entitled to three times the actual damages sustained, a minimum damage award of \$200, and reasonable attorney fees and court costs in the trial and appellate courts.

Before a person may file an action for damages, the person claiming to be injured must make a written demand for \$200 or the treble damage amount to the person liable for the damages. If the person liable for damages complies with the demand within 30 days, that person is released from further civil liability for the act of theft or exploitation by the person making the demand. A defendant may recovery reasonable attorney fees and court costs in the trial and appellate courts if the claim raised was without substantial fact or legal support.³³

Clear and Convincing Standard

The clear and convincing standard of evidence requires that the evidence must be found to be credible, the facts to which the witnesses testify must be distinctly remembered, the testimony must be precise and explicit, and the witnesses must be lacking in confusion as to the facts at issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.³⁴

³⁰ Section 812.014(3)(d), F.S.

³¹ Section 812.014(2)(b), F.S. However, this theft is reclassified from a second degree felony to a first degree felony if the theft occurs within a county subject to a state of emergency declared by the Governor, is committed after the declaration is made, and is facilitated by conditions arising from the emergency. *Id.* A second degree felony is punishable by up to 15 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

³² Section 812.014(2)(a), F.S. A first degree felony is generally punishable by up to 30 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

³³ Section 772.11, F.S.

³⁴ Florida Bar Journal, *Considerations before Implementing Florida's Civil Theft Statute*, 77-MAR Fla. B.J. 28 (Mar. 2003).

III. Effect of Proposed Changes:

Section 1 creates s. 403.70491, F.S., to preclude a local government from preventing a private company from listing separately on the company's invoice for solid waste collection, disposal, or recycling any governmental taxes or fees, including any franchise fees.

Section 2 amends s. 403.70605, F.S., to expand the scope of s. 403.70605(1), F.S., which currently applies only to solid waste collection, to include solid waste disposal and recycling services. Under the bill, a local government that provides specific solid waste disposal and recycling services in direct competition with a private company must comply with the provisions of local environmental, health, and safety standards that also are applicable to a private company providing such services in competition with the local government.

However, the bill amends the terms "in competition" and "in direct competition" and "private company" to include disposal and recycling services for the purpose of the entire statute. The definition of "in competition" or "in direct competition" is effectively "the competition between a local government and a private company to provide substantially similar solid waste collection, disposal, or recycling services to the same customer." The definition of "private company" is effectively "an entity other than a local government which provides solid waste collection, disposal, or recycling services." See Technical Deficiencies below.

Section 3 creates s. 812.0141, F.S., to create the crime of theft of recyclable property. The bill defines "recyclable property" to mean recovered materials, as defined in s. 403.703, F.S., in addition to wooden or plastic pallets.³⁵

The bill provides that a person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the recyclable property of another with intent to, either temporarily or permanently:

- Deprive the other person of a right to possess the recyclable property or of a benefit derived therefrom; or
- Appropriate the recyclable property for his or her own use or to the use of a person not entitled to the use of the recyclable property.

A first or second violation is punished as a first degree misdemeanor, punishable by a term of imprisonment not to exceed one year and a fine not to exceed \$1,000. A third or subsequent violation within three years of a prior conviction is punishable as a third degree felony, which is punishable by a term of imprisonment not to exceed 5 years and a fine not to exceed \$5,000. Prosecution for violation of the provision does not preclude prosecution for theft pursuant to s. 812.014, F.S.

The bill provides that a person who proves by clear and convincing evidence that he or she has been injured in any manner by reason of a violation of the provisions of this section may pursue

³⁵ Section 403.703, F.S., defines "recovered materials" as metal, paper, glass, plastic, textile, or rubber materials that have known recycling potential, can be feasibly recycled, and have been diverted and source separated or have been removed from the solid waste stream for sale, use, or reuse as raw materials, whether or not the materials require subsequent processing or separation from each other. The term does not include materials destined for any use that constitutes disposal. Recovered materials as described are not solid waste.

a civil remedy; however, the minimum damage award is \$5,000 in addition to reasonable attorney fees and costs in the trial and appellate courts.

Section 4 provides that the bill is effective July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Individuals found to be guilty of theft of recyclable property would be subject to new penalties in addition to punishment for the crime of theft.

C. Government Sector Impact:

Expanding the applicability of s. 403.70605, F.S., could result in more litigation costs for local governments that are found to be in violation of the statute due to the addition of solid waste disposal and recycling services. Similarly, restricting the defenses available to local governments could also lead to increased litigation costs.

The Criminal Justice Impact Conference has not yet estimated the impact of this bill.

VI. Technical Deficiencies:

The bill amends s. 403.70605(1), F.S., to include solid waste disposal and recycling services. Subsections (2) and (3) of s. 403.70605, F.S., are not amended, and thus still apply only to solid waste collection services. However, the bill amends the definitions of the terms “in competition,” “in direct competition,” and “private company” to include solid waste disposal and recycling services for the purpose of the entire statute. The definitions as amended create an internal conflict within the statute, especially where provisions appear to apply only to solid waste collection services.

VII. Related Issues:

Typically bills that create new crimes are effective on October 1.

VIII. Statutes Affected:

This bill substantially amends section 403.70605 of the Florida Statutes.

This bill creates sections 403.70491 and 812.0141 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.)

Recommended CS/CS by Appropriations Subcommittee on General Government on February 24, 2016:

The committee substitute removes state agencies as entities that private companies may bring an action against. The CS also removes provisions limiting the application of the amended definitions of “in competition,” “in direct competition,” and “private company” to subsection (1) of s. 403.70605, F.S., and instead amends the terms to apply to the entire statute.

CS by Environmental Preservation and Conservation on February 9, 2016:

The committee substitute:

- Removes provision concerning conditions under which commercial vehicle weight limits may be suspended;
- Removes requirement for certain information to be included on invoices for solid waste disposal, collection, and recycling services;
- Adds a provision prohibiting a local government from preventing a private company from listing certain information on a company’s invoice for solid waste collection, disposal, or recycling;
- Restores original law by removing the word “immediate” in the provision limiting the condition under which a local government may avoid being enjoined by a private company to actions related to the immediate health, safety, or welfare of its citizens;
- Restores a provision that was struck in the bill that provided that a local government that exclusively provides solid waste collection services or pursuant to an exclusive franchise was not subject to the provisions of 403.70605(1), F.S., concerning competition with private companies over solid waste collection, disposal, or recycling services. The change in the bill made them subject to those provisions under those circumstances;
- Removes the following provisions from the bill related to solid waste collection services outside a local governments jurisdiction:
 - Local governments that compete with private companies must remit certain funds to the Solid Waste Management Trust Fund; and
 - A reporting requirement;

- Removes changes made by the bill to 403.70605(2) and (3), F.S., regarding Solid Waste Collection Services Outside Jurisdiction and Displacement of Private Waste Companies so that instead of applying to solid waste collection, disposal, or recycling services, the original language is retained so that both subsections apply solely to solid waste collection services; and
- Makes conforming changes to the definitions of “‘in competition’ or ‘in direct competition’” and “‘private company.’”

B. Amendments:

None.