

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 Community Affairs

BILL: CS/SB 416

INTRODUCER: Community Affairs Committee and Senator Flores

SUBJECT: Location of Utilities

DATE: October 14, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Present	Yeatman	CA	Fav/CS
2.			TR	
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 416 addresses the responsibility for the cost of relocating utility facilities in a public easement. Easements dedicated to the public for utilities are typically located along existing road or highway rights-of-way and are available for use by a variety of utility providers. Under the bill, the owner of a utility that requires relocation will be liable for relocation costs only if their lines and facilities are across, on or “*within*” the right-of-way, rather than “*along*” any right-of-way.

The bill also provides that a governmental authority must bear the cost of utility work required to eliminate an unreasonable interference if the utility is located within an existing and valid utility easement granted by recorded plat, regardless of whether such land was subsequently acquired by the governmental authority, by dedication, transfer of fee, or otherwise.

According to the Florida Department of Transportation (DOT), CS/CS/SB 896, a similar bill from 2015, was expected to have an indeterminate negative fiscal impact on state expenditures relating to the cost of utility relocation on state roads. To the extent funds are expended for such relocations, projects currently planned in the Work Program may need to be adjusted.

The bill, like CS/CS/SB 896 from 2015, is also expected to have an indeterminate negative fiscal impact on local governments that may now be responsible for the cost of utility relocations.

II. Present Situation:

Specific Grant of Authority to Counties to Issue Licenses to Utilities

Section 125.42, F.S., gives counties specific authority to grant a license to any person or private corporation to construct, maintain, repair, operate, and remove, within the unincorporated areas of a county, water, sewage, gas, power, telephone, other public utilities, and television transmission lines located “under, on, over, across and along” any county roads or highways.¹ The statutory phrase “under, on, over, across and along” county roads or highways has been in the statute since 1947.²

Specific Grant of Authority to Regulate the Placement and Maintenance of Utility Lines

Chapter 337, F.S., relates to public contracts and the acquisition, disposal, and use of property. DOT and local governmental entities³ prescribe and enforce reasonable rules or regulations related to the placement and maintenance of the utility lines along, across, or on any public road or rail corridor.⁴ “Utility” in this context means any electric transmission, telephone, telegraph, or other communication services lines; pole lines; poles; railways; ditches; sewers; water, heat or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures that the statute refers to as a “utility.”⁵ Florida local governments have enacted ordinances regulating utilities located within city rights-of-way or easements.⁶

Payment of Moving or Removing Utilities and Exceptions

Since 1957, Florida law expressly has provided that in the event of widening, repair or reconstruction of a county’s public road or highway, the licensee, i.e., the utility provider, must move or remove the lines at no cost to the county.⁷ In 2009, that requirement was made subject to a provision in s. 337.403(1), F.S., relating to agreements entered into after July 1, 2009.⁸ In 2014, it was made subject to an additional requirement that the authority⁹ find the utility is “unreasonably interfering” with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion, of such public road or publicly owned rail corridor.¹⁰

Additionally, beginning in 1957, Florida statutorily required utilities to bear the costs of relocating a utility placed upon, under, over, or along any public road the authority finds unreasonably interferes in any way with the convenient, safe, or continuous use, or the maintenance, improvement, extension or expansion of a road.¹¹ In 1994, that law was amended

¹ Section 125.42, F.S.

² Ch. 23850, ss. 1-3, Laws of Fla., now codified at s. 125.42, F.S.

³ These are referred in ss. 337.401-337.404, F.S., as an “authority.” S. 337.401(1)(a), F.S.

⁴ Section 337.401, F.S.

⁵ Section 337.401(a), F.S.

⁶ See City of Cape Coral Code of Ordinances, Ch. 25; City of Jacksonville Code of Ordinances, Title XXI, Ch. 711; City of Orlando Code of Ordinances, Ch. 23.

⁷ Ch. 57-777, s. 1, Laws of Fla., now codified at s. 125.42(5), F.S.

⁸ Ch. 2009-85, s. 2, Laws of Fla., now codified at s. 125.42(5), F.S.

⁹ “[A]uthority” means DOT and local governmental entities. Section 337.401(1), F.S.

¹⁰ Ch. 2014-169, s. 1, Laws of Fla., now codified at s. 125.42, F.S.

¹¹ Ch. 57-1978, s. 1, Laws of Fla., now codified at s. 337.403, F.S.

to include utilities placed upon, under, over, or along any publicly owned rail corridor.¹² Utility owners, upon 30 days' notice, must eliminate the unreasonable interference within a reasonable time or an agreed time, at their own expense.¹³ The general rule remains that utilities bear the costs of relocating a utility unless governmental participation in such costs is authorized. Since 1987, numerous exceptions to that general rule have been statutorily carved out, and can be found in s. 337.403(1), F.S., as follows:

- When the project is on the federal aid interstate system and federal funding is identified for at least 90 percent of the cost, DOT pays for the removal or relocation with federal funds.¹⁴
- When utility work is performed as part of a transportation facility construction contract, DOT may participate in those costs in an amount limited to the difference between the official estimate of all the work in the agreement plus 10 percent of the amount awarded for the utility work in the construction contract.¹⁵
- When utility work is performed in advance of a construction contract, DOT may participate in the cost of clearing and grubbing necessary for relocation.¹⁶
- If the utility being removed or relocated was initially installed to serve an authority or its tenants, or both, the authority bears the cost of the utility work but is not responsible for the cost of removal or relocation of any subsequent additions to the facility for the purpose of serving others.¹⁷
- If, in an agreement between the utility and an authority entered into after July 1, 2009, the utility conveys, subordinates, or relinquishes a compensable property right to the authority for the purpose of accommodating the acquisition or use of the right-of-way by the authority without the agreement expressly addressing future responsibility for cost of removal or relocation, the authority bears the cost of the utility work, but nothing impairs or restricts, or may be used to interpret, the terms of any agreement entered into prior to July 1, 2009.¹⁸
- If the utility is an electric facility being relocated underground to enhance vehicular, bicycle, and pedestrian safety, and if ownership of the electric facility to be placed underground has been transferred from a private to a public utility within the past five years, DOT bears the cost of the necessary utility work.¹⁹
- An authority may bear the cost of utility work when the utility is not able to establish a compensable property right in the property where the utility is located:
 - If the utility was physically located on the particular property before the authority acquired rights in the property,
 - The information available to the authority does not establish the relative priorities of the authority's and the utility's interest in the property, and
 - The utility demonstrates that it has a compensable property right in all adjacent properties along the alignment of the utility²⁰ or, pursuant to a 2014 amendment, after due diligence,

¹² Ch. 1994-247, s. 28, Laws of Fla., now codified at s. 337.403, F.S.]

¹³ Section 337.403, F.S.

¹⁴ Ch. 1987-100, s. 12, Laws of Fla., now codified at s. 337.403(1)(a), F.S.

¹⁵ Ch. 1987-100, s. 12, Laws of Fla., now codified at s. 337.403(1)(b), F.S.

¹⁶ Ch. 1999-385, s. 25, Laws of Fla., now codified at s. 337.403(1)(c), F.S.

¹⁷ Ch. 2009-85, s. 10, Laws of Fla., now codified at s. 337.403(1)(d), F.S.

¹⁸ Ch. 2009-85, s. 10, Laws of Fla., now codified at s. 337.403(1)(e), F.S.

¹⁹ Ch. 2009-85, s.10, Laws of Fla., now codified at s. 337.403(1)(f), F.S.

²⁰ Ch. 2012-174, s. 35, Laws of Fla., now codified at s. 337.403(1)(g), F.S.

- the utility certifies that it does not have evidence to prove or disprove it has a compensable property right in the particular property where the utility is located.²¹
- If a municipally-owned or county-owned utility is located in a rural area of critical economic concern²² and DOT determines that the utility is unable, and will not be able within the next ten years to pay for the cost of utility work necessitated by a DOT project on the State Highway System, DOT may pay, in whole or in part, the cost of such utility work performed by DOT or its contractor.
 - If the relocation of utility facilities is needed for the construction of a commuter rail service project or an intercity passenger rail service project, and the cost of the project is reimbursable by the federal government, then the utility that owns or operates the facilities located by permit on a DOT owned rail corridor shall perform all necessary utility relocation work after notice from DOT, and DOT must pay the expense for the utility relocation work in the same proportion as federal funds are expended on the rail project after deducting any increase in the value of a new facility and any salvage value derived from an old facility.²³

Utility Relocation under Common Law and the *Cape Coral* Decision

Legal scholarship has addressed the common law implications of utility relocation.²⁴ Generally, under common law, a utility will bear the costs of moving or relocating its utility lines or facilities if they are within the right-of-way or a public utility easement, unless there exists an agreement providing otherwise or a private easement pursuant to which the utility locates and runs its lines or facilities. A right-of-way differs from an easement. The term right-of-way “has been construed to mean ... a right of passage over the land of another It does not necessarily mean a legal and enforceable incorporeal [or intangible] right such as an easement.”²⁵ An easement gives someone else a reserved right to use property in a specified manner,²⁶ but “does not involve title to or an estate in the land itself.”²⁷

In 2014, the Florida Second District Court of Appeal (DCA) ruled in *Lee County Electric Coop., Inc. v. City of Cape Coral* that the requirement for utilities to pay for relocation within a right-of-way is well established in the common law.²⁸ That court found that, absent another arrangement by agreement between a governmental entity and the utility, or a statute dictating otherwise, the common law principle governs.²⁹ This case involved a platted public utility easement on each

²¹ Ch. 2014-169, s. 5, Laws of Fla., now codified at s. 337.403(1)(g)2., F.S.

²² Section 288.0656(2)(d) defines “rural area of critical economic concern” as “a rural community, or a region composed of rural communities, designated by the Governor, that has been adversely affected by an extraordinary economic event, severe or chronic distress, or a natural disaster or that presents a unique economic development opportunity of regional impact.”

²³ Ch. 2014-169, s. 5, Laws of Fla., now codified at s. 337.403(1)(i), F.S. The exception expressly provides that in no event is the state required to use state dollars for such utility relocation work and that it does not apply to any phase of the Central Florida Rail Corridor project known as SunRail. Section 337.403(1)(i), F.S.

²⁴ Michael L. Stokes, *Moving the Lines: The Common Law of Utility Relocation*, 45 Val. U.L. Rev. 457 (Winter, 2011).

²⁵ *City of Miami Beach v. Carner*, 579 So. 2d 248, 253 (Fla. 3d DCA 1991).

²⁶ *Southeast Seminole Civic Ass'n v. Adkins*, 604 So. 2d 523, 527 (Fla. 5th DCA 1992) (“[E]asements are mere rights to make certain limited use of lands and at common law, they did not have, and in the absence of contractual provisions, do not have, obligations corollary to the easement rights.”).

²⁷ *Estate of Johnston v. TPE Hotels, Inc.*, 719 So. 2d 22, 26 (Fla. 5th DCA 1998) (citations omitted).

²⁸ *Lee County Electric Coop., Inc. v. City of Cape Coral*, 159 So. 3d 126, 130 (Fla. 2d DCA 2014), *review denied*, 151 So. 3d 1226 (Fla. 2014), quoting *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983).

²⁹ *Id.*

side of the boundary for each home site in the subdivision, in which the electric utility had installed lines and other equipment. The easement was “along” the public right-of-way and was dedicated *to the public*, not to any utility owner, for the purpose of furnishing utilities. No reserved right to use the property was granted to the Lee County Electric Coop by virtue of the platted public easement. The municipality and the utility had a franchise agreement granting the utility the right to operate its electric utility in the public easement, but the agreement did not address who would be responsible for the cost of moving the utility’s equipment if the municipality required the utility to do so. The Second DCA held that the utility would bear the burden of the cost of moving a utility line located within a public utility easement to another public utility easement as part of the municipality’s expansion of an existing road.³⁰

III. Effect of Proposed Changes:

Section 1 amends s. 125.42, F.S., relating to licenses for water, sewage, gas, power, telephone, other public utilities, and television lines. The bill reduces a county’s authority to grant licenses for lines to only locations under, on, over, across, or within the right-of-way limits of a county highway or public road, as opposed to “under, on, over, across and along” such highways or roads. Specifically, the bill provides that the authority of a county to grant a license to construct, maintain, repair, operate, or remove, within the unincorporated areas of the county, lines for the transmission of water, sewage, gas, power, telephone, other public utilities, television lines, and other communications services³¹ is limited to those lines located within the right-of-way limits of any county roads or highways. Accordingly, this change narrows a county’s ability to grant licenses to construct such lines within a public easement, running along a road or highway but not within the actual right-of-way.

The bill also makes a conforming change, substituting a reference to ss. 337.403(1)(d) through (i), F.S., with ss. 337.403(1)(d) through (j), F.S., to correspond with the new exception set forth in Section 3 of the bill.

Section 2 amends s. 337.401, F.S., relating to rules or regulations concerning specified structures within public roads or rail corridors. The bill reduces the ability of defined government authorities to grant licenses to only locations “across, on, or within” the right-of-way limits of a county highway or public road, as opposed to “along, across, or on” such highways or roads. Specifically, the bill narrows the authority of DOT and local governmental entities to prescribe and enforce rules or regulations related to the placing and maintaining of a utility³² to only across, on, or within the right-of-way limits of any public road or publicly owned rail corridors.

³⁰ *Id.* at 133. In reaching this conclusion, the Second District distinguished *Panhandle E. Pipe Line Co.*, noting that case concerned “a private easement the utility purchased from a property owner, rather than pursuant to a franchise agreement that allows the utility to use public property.” *Id.* at 129. The Second District in its opinion also distinguished an earlier Second District case, *Pinellas County v. General Tel. Co. of Fla.*, 229 So. 2d 9 (Fla. 2d DCA 1969). In *Pinellas County*, without citing or discussing relevant cases or statutes, the court determined that the utility, which had a franchise agreement with the City, had a property right in the agreement, and held that the County had to pay the utility’s costs in moving its telephone lines located within a right-of-way of an alley dedicated to the City and which was within property the County was purchasing as part of a County building construction.

³¹ The bill adds “other communications services” to the list of utilities in current law.

³² Section 337.401(1)(a), F.S., provides that utilities include “electric transmission, telephone, telegraph, or other communication services lines; pole lines; poles; railways; ditches; sewers; water, heat or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section as the “utility”.”

By changing the language to “right-of-way,” the bill reduces the authority of DOT and local governments to prescribe and enforce rules and regulations regarding the placement and maintenance of utilities within a public easement. The bill also changes the expression “other structures referred to as a utility” to mean those structures referred to in ss. 337.401-337.404, F.S., instead of just those found in s. 337.401, F.S.

Section 3 amends s. 337.403, F.S., relating to alleviating an interference that a utility causes to a public road or publicly owned rail corridor. The bill limits the responsibility of utility providers to pay for relocating their lines and facilities under certain circumstances. Specifically, the bill limits the responsibility of a utility provider to pay for relocating a utility that is located upon, under, over or *within the right-of-way limits* of the road or rail corridor, rather than upon, under, over, or *along* the road or rail corridor.

Furthermore, if a utility is located within an existing and valid utility easement granted by recorded plat, regardless of whether such land was subsequently acquired by the governmental authority, by dedication, transfer of fee, or otherwise, the authority must bear the cost of the utility work required to eliminate an unreasonable interference. The bill also provides that if an authority is required to bear such a cost, the authority is required to pay the entire expense properly attributable to such work after deducting any increase in the value of a new facility and any salvage value derived from an old facility.

These changes overturn the results reached by the Second DCA in *Lee County Electric Cooperative, Inc. v. City of Cape Coral*, which held that the cost of relocating utilities from a public easement in the absence of a permit or other agreement is the responsibility of the utility owner.³³ Under the bill, if a utility is located in a public easement and no permit or agreement is in place to address relocation, the state or local government will be required to pay relocation costs because the utility is located *along* a public right-of-way.

The provisions extend beyond the issue before the court in the Lee County case. For example, current law defers to private property rights by requiring the state or local government to pay for relocation when a utility is located on a *private* easement, i.e., on property for which the utility has paid for the right to use or occupy. The bill’s provisions seemingly extend private property rights to public property by requiring the governmental entity to pay for utility relocation even when the governmental entity has purchased a *public* easement, i.e., property dedicated *to the public* in general, not to any specific utility owner, effectively bestowing a compensable property right to private users of a public easement, even when such users were granted the right to use the public property without compensation.

Section 4 provides that the Legislature finds that the bill fulfills an important state interest by clarifying a utility’s responsibility for relocation of its facilities.

Section 5 provides that the act shall take effect upon becoming a law.

³³ *Lee County Electric Coop., Inc.*, 159 So. 3d at 133.

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

Subsection (a) of s. 18, Art. VII of the Florida Constitution provides in pertinent part that “no county or municipality shall be bound by any general law requiring such county or municipality to spend funds . . . unless the legislature has determined that such law fulfills an important state interest and unless: . . . the expenditure is required to comply with a law that applies to all persons similarly situated.”

The bill applies to all persons similarly situated, including the state and local governments. The bill includes a legislative finding that the bill fulfills an important state interest.

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:

The bill would have an indeterminate positive impact on the private sector, depending upon the number of eligible reimbursements for relocation made to utilities by DOT, local governments, or other entities.

C. Government Sector Impact:

State and local governments would bear the cost of relocation if they require the relocation of a utility, with certain exceptions. State and local governments would be required to bear the cost of utility work when a utility is located within an existing and valid utility easement granted by recorded plat, regardless of how such land was subsequently acquired by the local government, even where the state or local government subsequently acquired the property by outright purchase.

While the extent is unknown, potential negative fiscal impacts appear to exist, given that utility facilities are located along the public right-of-way all over the state. The increased responsibility of state and local governments, and nonusers of utilities, to bear the cost of utility relocation previously borne by the utility owner and its users may delay or even prevent needed transportation improvements, particularly for local governments.

According to DOT, a similar bill from 2015 was expected to have an indeterminate negative fiscal impact on state expenditures relating to the cost of utility relocation on state roads.³⁴ To the extent funds are expended for such relocations, projects currently planned in the Work Program may need to be adjusted.

The similar bill from 2015 was also expected to have an indeterminate negative fiscal impact on local governments, based on the number of situations in which local governments will be responsible for the cost of certain utility relocations.³⁵

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 125.42, 337.401, and 337.403.

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 October 20, 2015:

Removes two provisions that prohibited a municipality or county from requiring a utility or a provider of communication services to provide proprietary maps of facilities that were previously subject to a permit from the authority. The bill also removes several provisions regarding the allocations of costs when relocation of a utility is required. Specifically, the bill removes a provision that required an authority to bear the cost of relocating a utility if the authority required the relocation of the utility for purposes other than an unreasonable interference with the use, maintenance, improvement, extension, or expansion of a publicly owned road or publicly owned rail corridor. The bill also removes a provision that required an entity other than the authority to bear the cost of relocating a utility if the relocation was required as a condition or result of a project by that entity. Furthermore, the bill removes several corresponding provisions relating to the impairment of the rights of a holder of a private railroad right-of-way; the obligations of a holder of a private railroad right-of-way; and contracts between an authority and a utility before October 1, 2015.

B. Amendments:

None.

³⁴ Florida Dep't of Transportation, *Legislative Bill Analysis of 2015 SB 896*, at 3 (Feb. 13, 2015).

³⁵ *Id.*

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
