

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: SB 916

INTRODUCER: Senator Brodeur

SUBJECT: Residential Home Protection

DATE: March 10, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

Section 163.045, F.S., dictates that local governments may not require 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.

SB 916 amends this section of law to define "documentation" as tree risk assessment processes and guidelines established by the International Society of Arboriculture (ISA), the American National Standards Institute (ANSI), or the International Organization for Standardization and signed by the certified arborist or licensed landscape architect. The bill also defines "residential property" as an existing single-family detached building located on an existing lot of record, 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 requires a property owner to possess documentation that a tree poses an *unacceptable risk* to persons or property instead of a *present danger* before engaging in tree pruning, trimming, or removal. The bill states that a tree poses an unacceptable risk if removal is the only means of practically mitigating its risk below moderate, as defined by the ANSI A300 (Part 9)—2017 tree risk assessment standards, using a 2-year timeframe.

The bill takes effect on July 1, 2021.

II. Present Situation:

Home Rule Powers and Preemption

The Florida Constitution

The Florida Constitution establishes and describes the duties, powers, structure, function, and limitations of government in Florida. Article VIII, section 1 of the Florida 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 such 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 Florida 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: <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2911&Session=2017&DocumentType=General Publications&FileName=2017-2018 Local Government Formation Manual Final Pub.pdf>. (last visited Mar. 3, 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

Community Planning

State police powers are derived from the Tenth Amendment to the U.S. Constitution, which affords states all rights and powers "not delegated to the United States."¹⁵ Under this provision, states have police powers to establish and enforce laws protecting the public's welfare, safety, and health.¹⁶ These police powers are granted to counties and municipalities by the state and provide the authority to enact comprehensive zoning plans to layout zones or districts where potential real property uses may be forbidden or restricted.¹⁷

Today, s. 163.3167, F.S. of the Community Planning Act¹⁸ statutorily requires incorporated municipalities and counties to prepare and maintain a comprehensive plan to set out the regulations and policies governing land within a community. Comprehensive plans address both physical elements of land and buildings and the land uses permitted therein.

Local comprehensive plans are required to address many concepts, including strategies for the orderly and balanced future land development of the area and procedures for monitoring and

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 U.S. CONST. amend. X.

¹⁶ "The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the police power." See *NFIB v. Sebelius*, 567 U.S. 519, 535-536 (2012).

¹⁷ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974)

¹⁸ See ch. 163, part II, F.S.

evaluating the plan's implementation.¹⁹ Along with optional elements,²⁰ plans must include the following nine elements:

- Capital improvements;²¹
- Future land use plan;
- Intergovernmental coordination;
- Conservation;
- Transportation;
- Sanitary sewer, solid waste, drainage, potable water and aquifer recharge;
- Recreation and open space;
- Housing; and
- Coastal management (for coastal local governments).²²

All local government land development regulations must be consistent with the local comprehensive plan.²³

Local Tree Pruning, Trimming, and Removal Regulations Before 2019

Florida counties and municipalities have the home rule power to enact ordinances related to vegetation management. These ordinances regulate how private property owners manage vegetation on their private property. Vegetation management ordinances address various aspects of land use, including the species used in a given area.

Before 2019, many local governments utilized vegetation management ordinances that required a property owner to receive a permit or pay a fee before pruning, trimming, or removing a tree from their private property. These ordinances also occasionally protected individual trees because they are considered an important community resource.

For example, in Broward County, removing any historical tree²⁴ without first obtaining approval from the Board of County Commissioners was prohibited. Broward County also outlawed removing any tree without first obtaining a tree removal license from the Environmental Protection and Growth Management Department.²⁵ Furthermore, municipalities within Broward County enforced their tree preservation regulations in addition to Broward County's tree regulations.²⁶ However, the county administrator had the authority to suspend county tree regulations during emergency conditions caused by hurricanes or other natural disasters.²⁷

¹⁹ S. 163.3177(1), F.S.

²⁰ S. 163.3177(1)(a), F.S.

²¹ S. 163.3177(3)(a), F.S. The capital improvements element must be reviewed by the local government on an annual basis.

²² S. 163.3177(6)(a)-(g), F.S.

²³ S. 163.3194(1)(b), F.S.

²⁴ 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.

²⁵ *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.

²⁶ *Id.* at s. 407. Municipalities may regulate exclusively within their jurisdictions upon certification by Broward County with some exceptions.

²⁷ *Id.* at 406.

Similarly, Orange County required a permit or authorization to remove a protected tree²⁸ unless an exception applied. The law did not restrict tree trimming or maintenance but encouraged property owners to practice proper trimming habits that avoided the need for "severe" trimming of any tree.²⁹ Municipalities within Orange County were also allowed to provide tree regulations within their jurisdictions.³⁰

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

During the 2019 legislative session, the Legislature created s. 163.045, F.S., which preempts 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." This section of the law also provides that a local government may not require a property owner to replant a tree that was pruned, trimmed, or removed in accordance with this section.³¹ Notwithstanding, the provisions of s. 163.045, F.S., do not apply to the exercise of authority for mangrove protection pursuant to ss. 403.9321-403.9333.³²

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.³³

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

²⁸ 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).

²⁹ Ch. 15, Art. VIII, s. 278, Orange County Code of Ordinances (2018).

³⁰ *Id.*

³¹ Section 163.045(2), F.S.

³² *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 Mar. 10, 2021).

³³ *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.).

specifications. These standards are published in Part 9 of the ANSI A300 Standards.³⁴ The stated purpose of Part 9, Tree Risk Assessment, is to provide performance standards for the practice of tree risk assessment and to guide the development of written specifications, best practices, training materials, regulations, and other performance measures.³⁵

Under Part 9 of the ANSI A300 Standards, the tree risk assessor shall inspect the tree, analyze the tree, site, target, and information, and analyze the risk level posed by the tree. The level of risk that is determined shall be reported to the client. A written tree risk assessment report should include, but is not limited to:³⁶

- The objective of the assessment;
- The date of inspection;
- Identification of the assessor(s) and their qualifications;
- Identification and location of the specified tree(s);
- Part(s) of the tree assessed;
- A description of the methodology used;
- Time frame for the assessment;
- Tree risk assessment data;
- Risk rating for the tree or tree part(s);
- Recommendations for Risk mitigation options and/or recommendations;
- Recommendation for additional assessment(s), when appropriate;
- The residual risk following for any recommended mitigation;
- Recommendations for monitoring and follow-up; and,
- A statement of the limitations of the inspection and assessment methods methodology.

Part 9 of the ANSI A300 Standards also provides that the assessment should give recommendations to mitigate risk by means other than tree removal and contain an advisory that not all risks associated with trees can be eliminated. Monitoring, mitigation, and future maintenance recommendations should be made based on the objective, targets, current level of risk, mitigation recommendation, and residual risk.³⁷

As a complementary component to Part 9 of the ANSI A300 Standards, the ISA provides a Basic Tree Risk Assessment Form. This form utilizes tree risk assessment standards to provide a risk rating matrix. The risk rating matrix considers the likelihood of tree failure and the consequences of the failure to project a low, moderate, high, or extreme indicator.³⁸

³⁴ See ISA, ANSI A300 Tree Risk Assessment Standard- Part 9 (2017), available at: <https://www.isa-arbor.com/store/product/133/> (last visited Mar. 19, 2021).

³⁵ ISA, ANSI A300 Tree Risk Assessment Standard- Part 9 (2017).

³⁶ *Id.*

³⁷ *Id.*

³⁸ ISA, *Basic Tree Risk Assessment Form*, available at: http://manoa.hawaii.edu/landscaping/documents/ISA_Tree_Risk_Assess.pdf (last visited Mar. 10, 2021).

III. Effect of Proposed Changes:

The bill amends s. 163.045, F.S., to provide a specific definition of "documentation." Under the bill, the documentation a property owner must possess prior to tree pruning, trimming, or removal is an onsite assessment performed by an arborist certified by the International Society of Arboriculture (ISA) or a Florida licensed landscape architect in accordance with tree risk assessment processes and guidelines established by the ISA, the American National Standards Institute (ANSI), or the International Organization for Standardization and signed by the certified arborist or licensed landscape architect.

The bill also provides a specific definition of "residential property." Under this definition, the protections provided by 163.045, F.S., would only apply to an existing single-family, detached building located on an existing lot of record, 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, the bill requires certified arborists and licensed landscape architects to certify that a tree poses an unacceptable risk to persons or property instead of presenting a danger to persons or property. The bill states that a tree poses an unacceptable risk to persons or property if removal is the only means of practically mitigating the risk below moderate, as defined by the ANSI A300 (Part 9)—2017 tree risk assessment standards, using a 2-year timeframe.

The bill takes effect July 1, 2021.

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 identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

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 Changes:

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

None.

B. Amendments:

None.