TREE ORDINANCES AFTER SECTION 163.045: CONTROVERSIES AND STRATEGIES

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WHAT TO DO ABOUT DANGEROUS TREES?

Tallahassee to the Rescue:

Saving property owners from arbitrary local governments

SECTION 163.045, Florida Statutes (2019)

(1) A local government 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.

(2) A local government may not require a property owner to replant a tree that was pruned, trimmed, or removed in accordance with this section.

(3) This section does not apply to the exercise of specifically delegated authority for mangrove protection pursuant to ss. 403.9321-403.9333

As George Carlin said, “rhetoric paints with a broad brush.”

- No definitions in the statute:

  Residential

  Danger

  Documentation

  Tree

- No language regarding implementing ordinances or existing definitions in local laws
- No understanding of the disruption caused by eliminating notice
- No acknowledgment of the consequences of a failure to mitigate

Has the Legislature authorized the clear-cutting of the State of Florida?

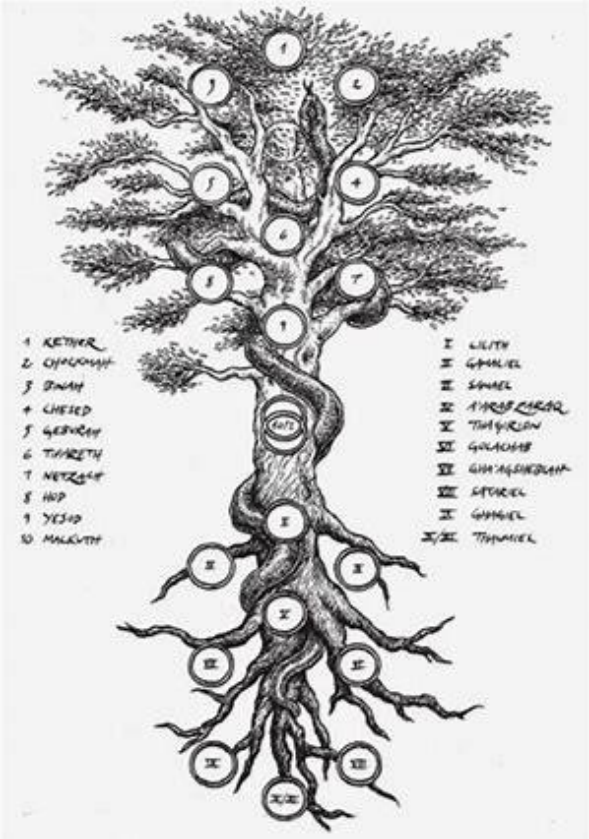
Tree Regulations – Safer at Home

- Other than protecting mangroves, the legislation lacks specificity
- No recognition of heritage trees in spite of local standards preserving them
- No recognition of delegation of police power to private parties
- Legislation punishes local governments and their residents by treating every local government as if it has been arbitrary and abusive, but legitimate concerns were isolated
- Local issues are best resolved locally – one size does not fit all

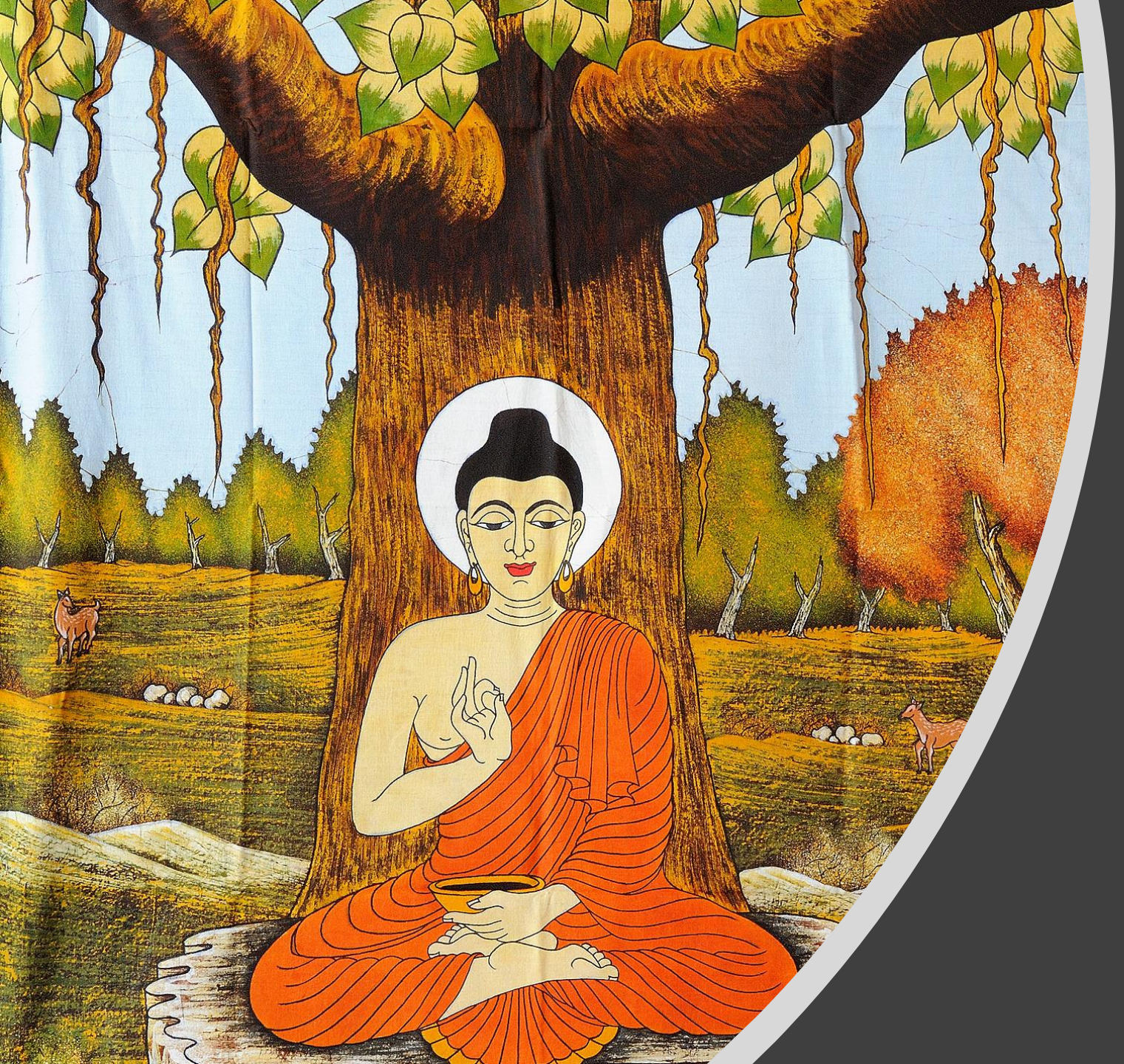
What’s so special about trees?

Benefits of Trees

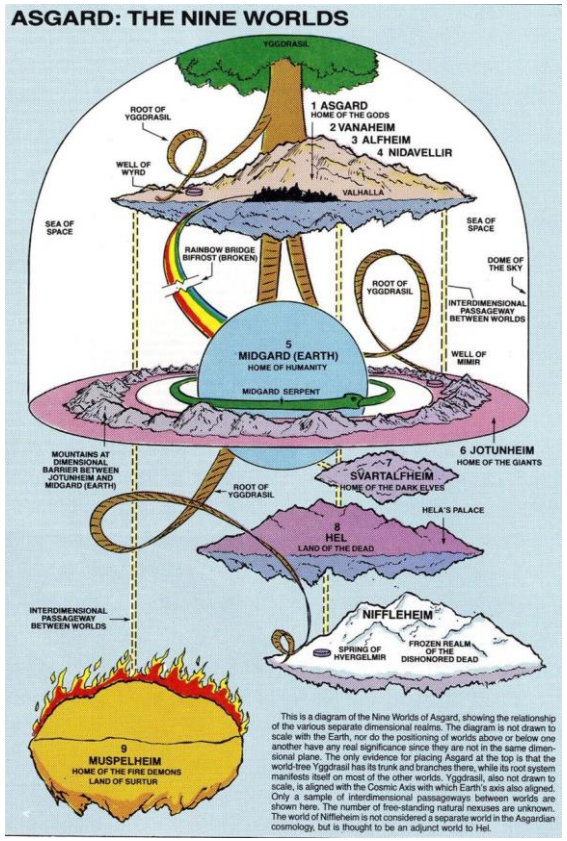
- Air quality
- Storm protection
- Stormwater storage and treatment
- Soil stabilization and strengthening
- Protection from heat, energy savings
- Beautification, privacy, enhanced property value



Trees Have Intrinsic Value to Many



Trees figure in sacred traditions worldwide



Throughout History, In Every Culture

Any Surprise That Controversies Abound?

- City of Pensacola v. Larry and Ellen Vickery (on appeal)
- S Tile & Marble Inc. v. City of Tampa; Miller & Sons, LLC v. City of Tampa (on appeal)
- Temple Terrace (code enforcement officer found no violation)
- Broward County v. Tom Chapman and Sherlock Tree Service (final order issued against the county)
- Village of Pinecrest (Village prevailed)
- Dania Beach (developing)

The City of Tampa pursued code enforcement violations after apparently healthy trees were destroyed on commercial property

Hefty fines were imposed

appeals filed in November 2020

https://www.tampabay.com/news/tampa/2020/11/27/tampa-tree-cutting-spat-headed-to-an-appeals-court/

Temple Terrace – No Violation

- The arborist shifted his story (as happened in Vickery)
- The tree at issue had been determined healthy by the city arborist
- The arborist contradicted the city arborist after looking at photographs, with no inspection at the site
- Arborist admitted at hearing that he could not view the tree except from sixty feet away late in the day, and the tree was merely a “danger” to a decorative wall that was not attached to the house
- The property owner did not want to have to remove branches and leaves from his roof
- Tree service counsel argued that the city has no authority to question the accuracy of the opinion; however, the tree was not correctly identified by species or by location or size

Broward County: no violation, no appeal

- The matter arose during removal, as inspector responded to a complaint
- Documentation generally claimed trees (misidentified) were a danger, noted driveway damage; no hazard was evaluated
- Stipulation property was residential
- Substantive corrections were made after the fact to the “documentation” in an effort to cure the asserted violation
- Hearing Examiner expressed the statute is “vague, ambiguous, [and] overbroad”
- Nonetheless, Hearing Examiner determined statute had to be applied in favor of the property owner and tree cutting company in spite of these concerns
- Determination not to appeal to avoid risk of adverse ruling

Village of Pinecrest – no statutory exemption

- Property owner failed to provide documentation dated or prepared prior to removal of the trees
- Property owner submitted “documentation” from a medical doctor regarding allergies of the owner and his family, from the owner of a landscaping company, and finally from a certified arborist
- The arborist stated merely that he looked at the property (not visited) and that he agreed with the doctor the trees were dangerous
- The arborist seemingly failed to make an independent determination the trees were dangerous and failed to appear at the hearing to present evidence
- Further, a development order with a landscape buffer to mitigate impacts of development was akin to a contract and could not be impaired by the statutory exemption*

**Standard Distributing Co. v. Fla. Dept. of Business Regulation*, 473 So. 2d 216 (Fla. 1st DCA 1985)

Tree Removal Prompts Consideration of Overlay Ordinance

Dania Beach Residents Object to Tree Removal

https://www.local10.com/news/local/2020/12/02/mayor-gets-involved-as-residents-of-dania-beach-neighborhood-fight-over-removal-of-old-oak-trees/

Strategies

- Evaluate how the statute fits within the applicable local standards, including multi-family landscape plans and development orders
- Consider a preservation overlay with narrowly tailored exemption consistent with local community standards
- Define what documentation is acceptable (TRAQ)
- Hold professionals accountable for documentation
- Clarify that residential property owners with valid documentation have a complete defense to any code enforcement action
- Ensure code enforcement officers educated

Code Amendments

- Define residential to mean currently occupied
- Define documentation to include the certifying person's identity and qualifications (the ISA license check can be done with just the name)
- Require documentation to be no less than a completed Basic Tree Risk Assessment Form (disciplined inquiry, mitigation options are part of the assessment) *
- Most tree regulations already include a definition for hazardous or diseased trees, but the legislature's use of "danger" is not necessarily communicating the same idea to the average person; thus, clarify to define "danger" consistent with imminent or probable risk of failure which is likely to cause significant or severe consequences
- Clarify the residential property owner is subject to code enforcement action without this documentation being prepared prior to any action being taken with regard to the tree(s)

*https://www.isa-arbor.com/education/resources/BasicTreeRiskAssessmentForm_Fillable_FirstEdition.pdf

Lobbying for Amendments

(1) A local government may not require an ~~notice,~~ application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree on developed, occupied, single-family residential property if the property owner obtains and submits to the local government for review ~~documentation~~ a Tree Risk Assessment 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~~ has an extreme or high risk rating prior to pruning, trimming or removal.

(2) A local government may not require a property owner to replant a tree that was pruned, trimmed, or removed in accordance with this section, except to meet landscape plan minimum standards.

(3) This section does not apply to the exercise of specifically delegated authority for mangrove protection pursuant to ss. 403.9321-403.9333, or to healthy trees with preservation designations pursuant to local ordinance.

Representative Sabatini's Memorandum

- On August 8, 2019, Representative Sabatini stated that "it is my opinion that the Florida Legislature has expressly preempted local government … [and] … any local government that seeks to enforce its local tree ordinances in hits situation likely runs afoul" of Section 163.045

- Representative Sabatini also referenced the new law concerning attorney fees and costs being awarded to a prevailing party where a local government adopts or enforces an expressly preempted local ordinance.

Speaker Oliva's Memorandum

- In January 2020, Speaker Oliva sent a memorandum to licensed professionals with a request that they contact his office if they became aware of any local government "restricting the free exercise of property owners' rights"
- Tone of memorandum reflects belief that local governments threaten sanctions or levy fines against arborists and landscape architects for engaging in their fields of expertise
- Speaker Oliva also in January 2020 warned local governments that the House would protect the rights of property owners against illegal governmental actions

Dillon’s Rule

Municipalities possess only those powers expressly granted by the state legislature, those fairly implied from the powers expressly granted, and those essential to the declared purposes of the corporation. If reasonable doubt exists as to whether a municipality can exercise a certain power, the doubt is, as a matter of law, resolved against the municipality.

Home Rule

Every municipality in this state has the authority to conduct municipal government, or perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the state legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.

Article VII, Section 2, Fla. Const.

Only Conflict Preemption Theoretically Applies

- A municipality may legislate concurrently on any matter not preempted to the state
- Intrusions on home rule are construed narrowly
- Express preemption requires explicit language reflecting intent to occupy the field
- Implied preemption applies only when a legislative scheme is so pervasive that evidence of intent to preempt can be found
- Conflict preemption occurs if enforcement of the local ordinance prevents compliance with the state statute or compliance with the local ordinance is a violation of the state statute

Tallahassee Memorial Regional Med. Center, Inc. v. Tallahassee Med. Center, Inc., 681 So. 2d 826 (Fla. 1st DCA 1996)

Phantom of Clearwater v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005)

Municipal Legislative Power

Pursuant to section 166.02(4), Florida Statutes,

The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental , corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

Community-based Strategies

Accountability of ISA Florida Chapter, which committed to a public awareness campaign to teach people that trees are not inherently dangerous and to education on ethics of its certified arborists: https://files.constantcontact.com/962ea051201/bce1a8c3-44fd-4f93-9b5a-81cb25f3fec5.pdf (noting that the Florida Legislature “with support from the insurance and construction industries,” in enacting Section 163.045, was placing more trust in this private organization than in Florida’s local governments)

ISA has produced a guide to creating preservation ordinances: https://www.isa-arbor.com/Portals/0/Assets/PDF/Certification/Tree-Ordinance-Guidelines.pdf

Locating significant trees in your community for historical preservation purposes could raise awareness of the value of trees: https://www.americanforests.org/get-involved/americas-biggest-trees/

Each community will vary on how to value trees, but evidence supports valuing them based on environmental benefits

Final Thoughts

- Don’t overlook the impact of 5G: with the loss of control of public rights-of-way, protecting trees is challenged by more than Section 163.045
- Legislators are less inclined to respect Home Rule principles
- Private parties are being given more influence over processes that involve public safety and balancing competing interests among stakeholders
- Local governments must persist in advocating for retaining flexibility to address local concerns

Acknowledgments

I am grateful for the contributions of so many during the litigation of the *Vickery* matter and in preparing this presentation, including

Susan Woolf, City Attorney, City of Pensacola

William Wells, Deputy City Attorney, City of Pensacola

Vanessa Moore, Assistant City Attorney, City of Pensacola

Jose Arango, Esq., & Chad Friedman, Esq., of Weiss Serota, *et al.*

Eve Boutsis, Assistant City Attorney, City of Dania Beach

Pamela Cichon, City Attorney, City of Temple Terrace

Michael Owens, Senior Assistant County Attorney, Broward County

Ursula Richardson, Chief Assistant City Attorney, City of Tampa