



# City of Pensacola

## Environmental Advisory Board

### Agenda

---

Thursday, April 7, 2022, 2:00 PM

Hagler-Mason Conference Room,  
2nd Floor City Hall

---

Members of the public may attend the meeting in person. City Council encourages those not fully vaccinated to wear face coverings that cover their nose and mouth.

One or more members of City Council may be in attendance. The meeting can be watched via live stream at [cityofpensacola.com/video](http://cityofpensacola.com/video).

#### CALL TO ORDER AND WELCOME

#### ROLL CALL AND DETERMINATION OF QUORUM

#### OATH OF OFFICE

#### APPROVAL OF MINUTES

1. [22-00342](#) APPROVAL OF ENVIRONMENTAL ADVISORY BOARD MEETING MINUTES OF MARCH 3, 2022  
*Recommendation:* That the Environmental Advisory Board approve the meeting minutes from the March 3, 2022 EAB meeting.  
*Sponsors:* Kristin Bennett  
*Attachments:* [EAB Minutes 03.03.2022](#)

#### PRESENTATIONS

2. [22-00337](#) CARPENTER CREEK CLEANUP  
*Recommendation:* That the Environmental Advisory Board accept a presentation from Osprey Initiative, LLC regarding the Carpenter Creek Cleanup.  
*Sponsors:* Kristin Bennett

#### SUSTAINABILITY COORDINATOR COMMUNICATIONS

#### ACTION ITEMS

3. [22-00313](#) SELECTION OF CHAIR AND VICE CHAIR OF THE ENVIRONMENTAL ADVISORY BOARD FOR THE 2022-2023 TERM.

**Recommendation:** That the Environmental Advisory Board select a Chair and a Vice Chair for the coming year's term.

**Sponsors:** Kristin Bennett

## DISCUSSION ITEMS

4. [21-00966](#) REVIEW OF SECTION 12-6-1 TO 12-6-6 OF THE TREE AND LANDSCAPE ORDINANCE
5. [21-00975](#) TREE ORDINANCES AFTER SECTION 163.045; CONTROVERSIES AND STRATEGIES - POWERPOINT

**Attachments:** [Lindsay Tree Ordinances PPT - corrected](#)

## BOARD MEMBER COMMENTS

## PUBLIC COMMENT

## ADJOURNMENT

*If any person decides to appeal any decision made with respect to any matter considered at such meeting, he will need a record of the proceedings, and that for such purpose he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.*

*The City of Pensacola adheres to the Americans with Disabilities Act and will make reasonable accommodations for access to City services, programs and activities. Please call 435-1606 (or TDD 435-1666) for further information. Request must be made at least 48 hours in advance of the event in order to allow the City time to provide the requested services.*



# City of Pensacola

222 West Main Street  
Pensacola, FL 32502

## Memorandum

---

**File #:** 22-00342

Environmental Advisory Board

4/7/2022

---

### **ACTION ITEM**

**SPONSOR:** Kristin Bennett, Chair

**SUBJECT:**

APPROVAL OF ENVIRONMENTAL ADVISORY BOARD MEETING MINUTES OF MARCH 3, 2022

**RECOMMENDATION:**

That the Environmental Advisory Board approve the meeting minutes from the March 3, 2022 EAB meeting.

**SUMMARY:**

On March 3, 2022, the EAB held a meeting; this item seeks approval of the minutes from that meeting.

**STAFF CONTACT:**

Don Kraher, Council Executive

**ATTACHMENTS:**

- 1) EAB Meeting Minutes 03.03.2022



# City of Pensacola

## Environmental Advisory Board

### MINUTES

Thursday, March 3, 2022, 2:00 PM

Hagler/Mason Conference Room,  
2nd floor

**Members Present:** Kristin Bennett, Chair, Kelly Hagen, Vice Chair, Neil Richards, Kyle Kopytchak, Katie Fox, Blase Butts, Jay Massey

**Members Absent:** Michael Lynch (resigned from Board 3/3/2022). Note for record—Alex Kozmon did not want to be considered for reappointment to the Board by City Council.

**Others Present:** Don Kraher, Council Executive, Sonja Gaines, Council Assistant, Mark Jackson, Sustainability Coordinator, Kris Stultz, Arborist, Johnathan Bilby Building Official, City Council Member Sherri Myers, Christian Wagley, Eric Schneider

#### CALL TO ORDER AND WELCOME:

The meeting was called to order by Chair Bennett. Council Executive announced that all board members present were approved for reappointment. Board Member Kozmon did not seek reappointment and Member Lynch resigned, effective March 3, 2022. The City Clerk will be sending out a notice of vacancies on the Board. Anyone interested in serving can submit an online application for board appointment to the City Clerk. The applicant will need to be nominated by a City Council Member. Chair Bennett expressed her appreciation to members Kozmon and Lynch for their service on the Board.

#### ROLL CALL AND DETERMINATION OF QUORUM:

A quorum was established.

#### APPROVAL OF MINUTES:

1. 22-00224 APPROVAL OF FEBRUARY 3, 2022, MEETING MINUTES OF THE ENVIRONMENTAL ADVISORY BOARD
  - Recommendation:** That the Environmental Advisory Board approve the meeting minutes from the February 3, 2002, meeting of the EAB.
  - Sponsors:** Kristin Bennett
  - Attachments:** [EAB Minutes.02.03.2022](#)

Minutes of the Environmental Advisory Board

**Member Kopytchak moved for approval of the minutes of the February 3, 2022 meeting. Member Butts seconded the motion and it carried 7 – 0.**

## **PRESENTATIONS:**

There were no presentations. Chair Bennett indicated she had been contacted by the Pensacola and Perdido Bays Estuary Program to make a presentation at the next EAB meeting.

## **SUSTAINABILITY COORDINATOR COMMUNICATIONS:**

Sustainability Coordinator indicated that he, along with Cynthia Cannon and Caitlin Cerame would be making a presentation at the Agenda Conference on Monday, March 7, providing updates on the City's efforts on the recommendations of the Climate Mitigation and Adaptation Task Force Report. He also reported on the Solar Feasibility Study, the Bayfront Parkway rip/rap shoreline project, and the tree planting in City parks from Hurricane Sally damage. He introduced Kris Stultz, the new Arborist for the City.

Kris Stultz provided the board with his background, credentials, and extensive work experience as an Arborist throughout the State. His specialty is in tree structural mechanics. He is looking forward to working for the City in helping with tree development and planting the right tree in the right spot and to locate those trees that are really a hazard to the public and to keep those that are not.

He pointed out some ambiguity in the listing of protected species in the tree ordinance, particularly as it applies to Laurel Oaks. There are several species of trees called Laurel Oaks by their common name, two of which are not very good trees. The only way to tell the difference is by looking at the leaves.

He stated he thinks the City's tree ordinance is an excellent ordinance. It is well written, very well put together. There are some minor adjustments that need to be made.

Chair Bennett indicated that if Board members had specific questions, they should present them to the Council Executive so that he could present them to the appropriate person. Council Executive agreed. He can then get the response out to all of the board members.

Member Kopytchak suggested that the arborist consider placing pictures or something on the City's website so that citizens can look at the various species, especially laurel oaks and pine trees. Have a description that they can reference and pictures to identify them.

Arborist indicated they are looking at doing that. Anytime a permit is going to be issued for a removal, it is part of his job to go out and check the tree.

## **ACTION ITEMS**

### **2. 22-00226 SWEARING IN OF EAB MEMBERS**

*Recommendation:* That the EAB Members appointed by City Council be sworn in by the City Clerk or Deputy City Clerk.

*Sponsors:* Kristin Bennett

The Oath of Office was administered to all Board Members by Ericka Burnett, City Clerk.

## **DISCUSSION ITEMS**

### **3. 22-00225 TREE MITIGATION PROCESS - AN OVERVIEW BY JONATHAN BILBY.**

*Sponsors:* Kristin Bennett

Jonathan Bilby, Building Official demonstrated and presented an overview of the permitting process and how the tree mitigation process is handled. He distributed a copy of the check-list used in reviewing the project.

Member Richards suggested that in his review of the process, it would be good if he could address any places where there needs to be adjustments made that would help improve the process. It would be helpful to the Board as they review the tree ordinance.

Building Official indicated the biggest challenge they faced was people not reading the ordinance. Everything tree wise will fall under the Arborist for review. The majority of the tree reviews are under the civil side of things, i.e., a land clearing or land disturbance site type permits and those are issued by our engineering department. Part of that component is to have a landscape review. When they are clearing land, it usually involves taking out trees and the mitigation process. The review takes place before any permits are issued. There are two processes that they use, the landscape review and the building process. They have developed a process to notify the City Council Member whenever there is a tree removal in their district. The process is in the ordinance and it is important that it remain in the ordinance. Once they know there are trees proposed for removal, there will be some sort of mitigation either in replanting or in mitigation fees. If there are no protected trees on the site, the tree and landscape portion of the code applies; it is in Section 12.6.6(3). There are also some required plantings within the parking lots. The Code is silent on what happens after the site is developed when there is a redevelopment. The ordinance does address lot splits and heritage trees. It does not address if you were going to develop a parcel that has never been split,

where you can build multiple buildings, unless it affects a heritage tree. Commercial developments protect trees from the protected species size. Commercial is a little bit different than residential. His biggest concern is sites that are required to retain 10% and that is all they retained on site, and there is no further mitigation. You never want to go below that 10%.

Questions were raised with regard to section 12.6.3(2.d)—Curbs, protection of vegetation—to whether consideration is given to the trees growing and infringing on the parking spaces. It is left up to the design review to determine if they have enough planting area for the tree.

City Arborist indicated it would be best to plant the larger trees in a group and have the area with the trees all together. When you have them individually planted, with a space between, that's when you get the infra structure damage.

Building official indicated that there was flexibility in the code with regard to planting small, medium and large tree species. He further reviewed the calculations used in the mitigation process for the demonstrated building site plan per the table contained in the protected tree section, 12.6.6(2.d). When they are doing a calculation on the total site, they take the total inches, retain 10% and anything above the 10% is a credit. Then see how many they are replanting and then do the calculation to come up with the total. Three inches delineates the tree mitigation size. For every three inch tree you cannot plant is \$400. If they are doing a replacement on a single tree, they use section 12.6.6(2.d).

City Arborist indicated that you measure the tree at 4 ½ feet above grade level, use a diameter tape or measuring tape and divide by  $\pi$  (3.14). It is industry standard to appraise trees by inches. That's how you appraise value, by inches. Smaller trees have more live tissue. A tree that is 5 inches is going to grow much faster than a tree that is 10 or 15 inches. There is more growing tree, more carbon sequestration, more water or flood control because there is more live tissue that is active.

The cap for residential properties is \$1,000. The last change in the ordinance removed the cap for new developments. There has never been a \$1,000 cap for commercial developments. The only cap is for an already developed residential lot.

There was discussion on the possibility of increasing the \$400 mitigation fee to cover the cost of a mitigated tree and whether something should be added to the ordinance to revisit the cost per tree every five or so years from an inflation aspect to be sure it is covering the cost of a mitigated tree. Also discussed was the possibility of visiting the costs to maintain the tree once it is planted and the requirements to maintain it.

Building Official indicated the ordinance has a provision that requires them to monitor the sites for a year based on the approved plans after they are developed. One of the sites had a required tree that died. They initiated a code enforcement case and required them to replant the tree. May want to look at adding a provision to maintain the trees for the life of the development.

Vice Chair Hagen brought up the possibility of utilizing some of the stormwater fees to go toward the future tree canopies to help with the planting and to provide a source of money coming into the tree fund, without the loss of trees. Trees do help offset watershed.

Chair Bennett indicated that stormwater fees go towards the maintenance of stormwater.

Member Kopytchak mentioned that trees need to be put back in the district that they come out of. So many trees have been replanted downtown, when the funds have been generated in District 2 around Carpenter Creek.

Building official also briefly discussed the possibility of setting up an accounting feature by Council District that could be included within the tree fund. He also reviewed the tree planting process for the three CRA districts. They are required to plant perimeter trees in the right of way. He also suggested involving staff in any of the proposed changes.

He also reviewed the requirements in the ordinance to post signs, when tree removal permits have been applied for. The sign includes language for questions, call 311. They usually ask that a date stamped photo, showing the location of the posted signs be provided as well as visiting the site to make sure they are in the right locations. It is best to have the responsibility of placing the signs with the applicant, so that insures they are in compliance with the ordinance. He also reviewed the checks and balances they have in the permitting process.

Vice Chairman Hagen mentioned another potential topic, to identify brownfield sites within the City, so that if a permit is applied for within one of those areas that is highly contaminated from previous use, it should be flagged in the system for a different protocol for the potential removal of trees in a highly contaminated area, especially if dirt is going to be disturbed and there is particulate matter that could be dangerous if released into the air.

Building Official stated that the DEP handles all of the brownfield sites. There are Florida statutes that govern holding up permits. That might be a discussion the Board could have with DEP, to get better coordination on those sites.

Once the City Arborist is comfortable with the processes, he will be the main person to go to with regard to trees.

Member Richards inquired as to whether there was anything dealing with invasive species, especially the Chinese Tallow.



Building Official stated with regard to the tree ordinance, it is not a protected tree. If it is removed, it doesn't count. Simple changes to the tree ordinance can be easily made. In changing the ordinance, use science, use justified means to do it. Try to be friendly to the development community. There is a balance between protecting the trees and being anti-development. Make sure to maintain that balance.

Council Executive posed a question about the land development code being the right place for the tree ordinance and explained the process any proposed changes would have to go through to be adopted.

Building Official stated that he thought it was put in the land development code because there are parking provisions, parking lot provisions and a lot of development provisions within it. However, there could be a conversation about breaking it into two parts and having the development standards, the parking lot, the interior planting areas, the perimeter planting areas, the planting plan in the land development code and the tree protection plan elsewhere in the environment type portion of the code.

Council Executive indicated that it could be a discussion later on in the review process and may be a good idea to have the Development Services Director make a presentation as to why it was placed in the land development code.

Comments were also made with regard to the tree trimming done by utility companies through a tree canopy to protect their wires. Chair Bennett pointed out there is currently an exemption for utilities for the requirements of the trimmings in the ordinance and perhaps that can be addressed as to whether the exemption is appropriate. Also the undergrounding of utilities.

A question was raised about the footprint of a building being exempt. Building Official indicated that as far as removal of a tree or trees, one of the conditions of the removal is construction improvements. If a tree is located in the footprint of the building and the building has no ability to be moved around on the lot, then it would be applicable to allow removal. There are five or six conditions on removal of trees in the ordinance. That's what they look at and make sure that it checks one of those boxes. If there is a site that it can be moved around without causing a hardship, they will obviously recommend it.

Member Kopytchak pointed out that there is a document that a power company has to submit for approval to the Public Service Commission that gives them guidelines on what to cut around power lines. That is something that should be included in the ordinance that we get a copy.

Building Official indicated there was a section in the code that the utility companies have to comply with the American National Standards Institute Standard Practices.

4. 21-00966 REVIEW OF SECTION 12-6-1 TO 12-6-6 OF THE TREE AND LANDSCAPE ORDINANCE

No further discussion on this item.

5. 21-00975 TREE ORDINANCES AFTER SECTION 163.045; CONTROVERSIES AND STRATEGIES - POWERPOINT

*Attachments: Lindsay Tree Ordinances PPT - corrected*

No further discussion on this item.

**BOARD MEMBER COMMENTS:**

Member Butts mentioned an event at Bruce Beach.

Member Richards reported that a contractor has been chosen for the solar co-op and there are not as many signed up for it as there should be. From an educational standpoint, there is an obligation to get as many people educated about roof top solar and encourage them to learn more about the co-op.

Sustainability Coordinator indicated there are several events planned throughout the month of March and also there will be a booth set up at Ciclovía as well on Saturday, March 26, 2022.

**PUBLIC COMMENT:**

City Council Member Sherri Myers addressed the board with her concerns about clear cutting of trees along Carpenter Creek. She also pointed out the notification process that Gulf Power agreed to that provided notifying property owners of tree trimming taking place in their neighborhoods. State Law 163.3208,--electric transmission and distribution line right-of-way maintenance-- requires local utility companies to submit a plan. She also would like to see a provision in the ordinance that any plan submitted by the utility company come to the Environmental Advisory Board so that the public could have some input into it.

Building Official indicated if the plan was submitted in the past that it probably went to the Parks and Recreation Department, since they had oversight for trees in the right-of-way.

**ADJOURNMENT:**

There being no further business to come before the board, the meeting was adjourned at 4:06 p.m.



# City of Pensacola

222 West Main Street  
Pensacola, FL 32502

## Memorandum

---

**File #:** 22-00337

Environmental Advisory Board

4/7/2022

---

### **PRESENTATION ITEM**

**FROM:** Kristin Bennett, Chair

**SUBJECT:**

CARPENTER CREEK CLEANUP

**REQUEST:**

That the Environmental Advisory Board accept a presentation from Osprey Initiative, LLC regarding the Carpenter Creek Cleanup.

**SUMMARY:**

The Pensacola & Perdido Bays Estuary Program has partnered with Osprey Initiative, LLC who were contracted for the cleanup of Carpenter Creek.

Osprey Initiative's state mission is to bridge the gap between intent and action in the sustainability world by brining and implementing realistic solutions to their clients, partners and communities. Their vision is to be the worldwide leader in providing solutions in reducing humanity's impact on the environment.

Osprey Initiative conducted the cleanup from February 7-11, 2022 with a follow up the week of April 7-11.

**PRIOR ACTION:**

None

**STAFF CONTACT:**

Don Kraher, Council Executive

**ATTACHMENTS:**

None

**PRESENTATION:** Yes



# City of Pensacola

222 West Main Street  
Pensacola, FL 32502

## Memorandum

---

**File #:** 22-00313

Environmental Advisory Board

4/7/2022

---

### **ACTION ITEM**

**SPONSOR:** Kristin Bennett, Chair

**SUBJECT:**

SELECTION OF CHAIR AND VICE CHAIR OF THE ENVIRONMENTAL ADVISORY BOARD FOR THE 2022-2023 TERM.

**RECOMMENDATION:**

That the Environmental Advisory Board select a Chair and a Vice Chair for the coming year's term.

**SUMMARY:**

Each year the members of the EAB select a Chair and Vice Chair from their membership. Nominations are made from the floor with a motion and a second. There are no term limits imposed on serving as the Chair or Vice Chair.

**STAFF CONTACT:**

Don Kraher, Council Executive

**ATTACHMENTS:**

- 1) None



# City of Pensacola

222 West Main Street  
Pensacola, FL 32502

## Memorandum

---

**File #:** 21-00966

Environmental Advisory Board

4/7/2022

---

### **DISCUSSION ITEM**

**SPONSOR:** Kristin Bennett, Chair

**SUBJECT:**

REVIEW OF SECTION 12-6-1 TO 12-6-6 OF THE TREE AND LANDSCAPE ORDINANCE

**SUMMARY:**

A comprehensive review of the Tree and Landscape Ordinance was referred to the EAB. The EAB is in the process of conducting that review.

This item allows for suggested modifications to the currently existing language to be considered by the Board as a whole.

**PRIOR ACTION:**

July 15, 2021 - City Council referred to EAB a comprehensive review of the Tree and Landscape Ordinance

**STAFF CONTACT:**

Don Kraher, Council Executive

**ATTACHMENTS:**

1) (to be distributed)

**PRESENTATION:** No



# City of Pensacola

222 West Main Street  
Pensacola, FL 32502

## Memorandum

---

**File #:** 21-00975

Environmental Advisory Board

4/7/2022

---

### **DISCUSSION ITEM**

**SPONSOR:** Kyle Kopytchak, Board Member

**SUBJECT:**

TREE ORDINANCES AFTER SECTION 163.045; CONTROVERSIES AND STRATEGIES - POWERPOINT

**SUMMARY:**

The PowerPoint being referenced was made in response to a recently (at the time) passed statute and some of the controversies and challenges being viewed across the state.

It does have a quasi-tie in to litigation the City is currently involved in which is under appeal.

I would caution the board about speaking to an issue the City is currently involved in, until such time as that issue has reached its legal conclusion.

**PRIOR ACTION:**

None

**STAFF CONTACT:**

Don Kraher, Council Executive

**ATTACHMENTS:**

1) Tree Ordinances after Section 163.045; controversies and strategies

**PRESENTATION:** No



TREE ORDINANCES  
AFTER SECTION 163.045:  
CONTROVERSIES AND  
STRATEGIES

*Heather F. Lindsay*  
*Assistant City Attorney*  
*City of Pensacola, Florida*  
[hlindsay@cityofpensacola.com](mailto:hlindsay@cityofpensacola.com)  
850-435-1614



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

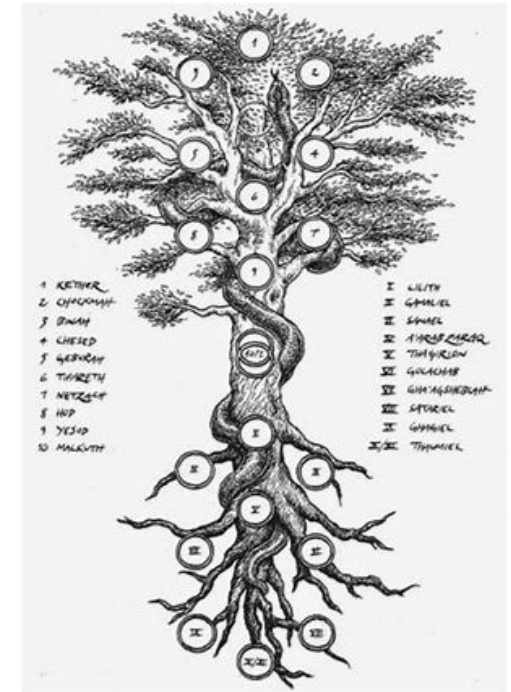
- Other than protecting mangroves, the legislation lacks specificity
- No recognition of heritage trees in spite of local standards preserving them
- No recognition of delegation of police power to private parties
- Legislation punishes local governments and their residents by treating every local government 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

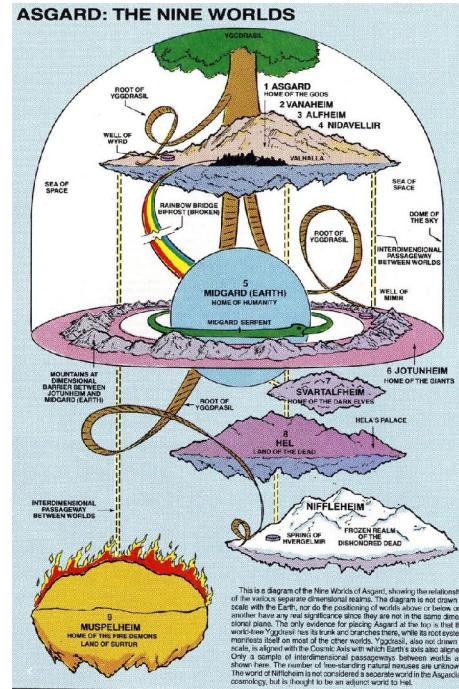


# Trees Have Intrinsic Value to Many





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. 1<sup>st</sup> 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](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. 1<sup>st</sup> 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