The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL:	CS/SB 416
INTRODUCER:	Community Affairs Committee and Senator Flores
SUBJECT:	Location of Utilities
DATE:	November 18, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Present	Yeatman	CA	**Fav/CS**
2.	Price	Eichin	TR	**Favorable**
3.	Pace	Hrdlicka	FP	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 416 requires a state or local government to bear the responsibility for the cost of relocating utility facilities in a public easement, absent an agreement to the contrary. Specifically, the bill 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.

Currently, both statute and common law require a utility to pay for the cost of relocating its facilities within a public easement, absent an agreement to the contrary. Both the statute and common law were reaffirmed in a recent court case by the Second District Court of Appeals requiring a utility to pay for the cost of relocating its utility facilities.

The bill also 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.

According to the Florida Department of Transportation (FDOT), the bill is 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 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. The FDOT and local governmental entities[3] 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 public easements.[6]

Payment for 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 authority[9] 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

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[1] Section 125.42(1), F.S.
[2] Chapter 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(1) (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, all of which include public easements within the definition of right-of-way.
[7] Chapter 57-777, s. 1, Laws of Fla., now codified at s. 125.42(5), F.S.
[8] Chapter 2009-85, s. 2, Laws of Fla., now codified at s. 125.42(5), F.S.
[9] "[A]uthority" means the FDOT and local governmental entities. Section 337.401(1), F.S.
[10] Chapter 2014-169, s. 1, Laws of Fla., now codified at s. 125.42(5), F.S.

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 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 agreed upon. Since 1987, numerous exceptions to that general rule have been enacted, and can be found in s. 337.403(1)(a)-(i), F.S.

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

Legal scholarship has addressed the common law implications of utility relocation.[14] 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 an agreement exists providing otherwise or a *private* easement exists in which the utility locates and runs its lines or facilities.

An easement[15] differs from a right-of-way.[16] An easement gives a reserved right to use property in a specified manner,[17] but "does not involve title to or an estate in the land itself."[18] In accordance with s. 177.081(3), F.S., in the case of a platted public easement, the reserved right to use the property is granted *to the public* for the specified use.

On the other hand, 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."[19]

In 2014, the Florida Second District Court of Appeal (DCA) ruled in *Lee County Electric Cooperative, 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.[20] That court found that, absent another arrangement by agreement between a governmental entity and the utility, or a statute

[11] Chapter 57-1978, s. 1, Laws of Fla., now codified at s. 337.403, F.S.
[12] Chapter 1994-247, s. 28, Laws of Fla., now codified at s. 337.403(1), F.S.
[13] Section 337.403(1), F.S.
[14] Michael L. Stokes, *Moving the Lines: The Common Law of Utility Relocation*, 45 Val. U.L. Rev. 457 (Winter, 2011).
[15] See s. 177.031(7)(a), F.S. An easement is defined as any strip of land creased by a subdivider for public or private utilities, drainage, sanitation, or other specified uses having limitations, the title to which shall remain in the name of the property owner, subject to the right of use designated in the reservation of the servitude.
[16] See s. 177.031(16), F.S. A right-of-way is defined as land dedicated, deeded, used, or to be used for a street, alley, walkway, boulevard, drainage facility, access for ingress and egress, or other purpose by the public, certain designated individuals, or governing bodies.
[17] *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.").
[18] *Estate of Johnston v. TPE Hotels, Inc.*, 719 So. 2d 22, 26 (Fla. 5th DCA 1998) (citations omitted).
[19] *City of Miami Beach v. Carner*, 579 So. 2d 248, 253 (Fla. 3d DCA 1991).
[20] *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).

dictating otherwise, the common law principle governs.[21] This case involved a platted public utility easement on each side of the boundary for each home site in a 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 Cooperative 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. Although many agreements do, the subject franchise 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.[22]

III. Effect of Proposed Changes:

Generally, the bill shifts utility relocation costs from the utility owner and its users to taxpayers when a utility lines must be relocated from a public easement. The bill reduces the responsibility of a utility provider to pay for relocating a utility located upon, under, over, *or along* the road or rail corridor, limiting such responsibility to those utilities located upon, under, over, or *within the right-of-way limits* of the road or rail corridor. Relocation costs of utilities located in public easements located along a road or corridor will become the responsibility of the government.

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 services[23] 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.

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[21] *Id*.

[22] *Id.* at 133. In reaching this conclusion, the Second DCA 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 DCA in its opinion also distinguished an earlier Second DCA 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 of St. Petersburg, 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.

[23] The bill adds "other communications services" to the list of utilities in current law. *See* s. 207.11(1), F.S.

Section 2 amends s. 337.401, F.S., relating to FDOT and local government jurisdiction and control of public roads or rail corridors. The bill narrows the authority of the FDOT and local governmental entities to prescribe and enforce rules or regulations related to the placing and maintaining of a utility[24] to across, on, or *within the right-of-way limits,* as opposed to *along,* across, or on of any public road or publicly owned rail corridors. By deleting the word "along" and changing the language to "right-of-way," the bill appears to eliminate the FDOT and local governments' authority 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.[25] 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 possesses 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.

[24] 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'."
[25] *Lee County Electric Coop., Inc.,* 159 So. 3d at 133.

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.

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 the FDOT, local governments, or other entities.

C. Government Sector Impact:

State and local governments would bear costs associated with relocation of utilities previously borne by the utility and its customers. 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 throughout 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 the FDOT the bill is expected to have an indeterminate negative fiscal impact on state expenditures relating to the cost of utility relocation on state roads.[26] To the extent funds are expended for such relocations, projects currently planned in the Work Program may need to be adjusted.

The bill is 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.[27]

VI. Technical Deficiencies:

None.

VII. Related Issues:

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 possesses 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.

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.

[26] Florida Dep't of Transportation, *2016 Legislative Bill Analysis SB 416*, at 3 (October 28, 2015).
[27] *Id.*

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.