HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 391 Location of Utilities
SPONSOR(S): Regulatory Affairs Committee; Transportation & Economic Development Appropriations Subcommittee; Local Government Affairs Subcommittee; Ingram and others
TIED BILLS: None. **IDEN./SIM. BILLS:** CS/CS/SB 896

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Government Affairs Subcommittee	11 Y, 1 N, As CS	Zaborske	Miller
2) Transportation & Economic Development Appropriations Subcommittee	12 Y, 0 N, As CS	Davis	Davis
3) Regulatory Affairs Committee	16 Y, 1 N, As CS	Keating	Hamon

SUMMARY ANALYSIS

Consistent with common law, Florida statute expressly provides for a utility to bear the costs of relocating its facilities located upon, under, over, or along any public road or publicly owned rail corridor if it "unreasonably interferes in any way with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion" of the public road or publicly owned rail corridor. The bill revises several statutory provisions related to the placement and relocation of utility facilities. In particular, the bill:

- Specifies the circumstances under which a utility must pay to remove or relocate its facilities that unreasonably interfere with the convenient, safe, or continuous use of, or the maintenance, improvement, extension, or expansion of, a public road or publicly owned rail corridor by:
  - Requiring a utility to relocate facilities at its own expense if the facilities are located *upon, under, over, or within the right-of-way limits of* a road or rail corridor, but not *along* the road or rail corridor.
  - Requiring a third party to pay for relocation of utility facilities located within the right-of-way limits of a road or rail corridor if relocation is required as a condition or result of the third party's project, unless relocation would have been required under a transportation improvement project within 5 years.
  - Requiring the governing authority to pay for relocation of utility facilities if the facilities are located within a utility easement granted by recorded plat.
- Requires a governing authority to pay for relocation of facilities located within the right-of-way limits of a public road or publicly owned rail corridor, less an increase in value of new facilities and any salvage value of old facilities, if relocation is required for purposes other than removal of an unreasonable interference.
- Limits the authority of a county to grant licenses for utility transmission lines to only those facilities located *under, on, over, across, or within the right-of-way limits of*, but not *along,* a county highway or public road or highway.
- Limits the authority of the Florida Department of Transportation and local governmental entities to prescribe and enforce reasonable rules or regulations relating to the placement or maintenance of utility facilities to only those facilities located *across, on, or within the right-of-way limits of*, but not *along,* any jurisdictional public road or publicly owned rail corridor.
- Prohibits a municipality or county from requiring a utility or communications services provider to provide proprietary maps of facilities where such facilities have been previously subject to a permit.

The bill has an indeterminate negative fiscal impact on state and local government expenditures (see Fiscal Analysis Section). The bill is effective upon becoming law.

The county/municipality mandates provision of Art. VII, section 18, of the Florida Constitution may apply. **If the bill does qualify as a mandate, the law must fulfill an important state interest and final passage must be approved by two-thirds of the membership of each house of the Legislature.**

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public roads, highways, and rail corridors, as well as water, sewer, gas, power, telephone, television, and other utilities, play an essential role in our daily lives. Originally, the streets throughout our country were "laid out for the horse and buggy age" and, with time, they became "too narrow for the present traffic conditions."[1] Over time, streets were expanded to accommodate traffic and, even today, streets require expansion to accommodate evolving traffic needs. Rather than acquiring separate easements from private landowners, government authorities historically have allowed utilities to lay their lines and facilities within public rights-of-way and utility easements. Under current law regarding the platting of real property,[2] every plat offered for recording must include a dedication by all owners of record of the land to be subdivided.[3] Once a plat is recorded in compliance with the statute, all streets, rights-of-way, alleys, easements, and public areas shown on the plat are deemed dedicated for public use, for the uses and purposes thereon stated, unless otherwise stated.[4]

Historically, utilities have been required to pay to relocate lines or facilities located within property held for the public's benefit when relocation is required for a public project. For example, in 1905 the U.S. Supreme Court held that a gas utility company, which had an agreement providing it would make reasonable changes when directed by the City of New Orleans, was not entitled to be compensated for relocating certain lines located within streets and alleys in order for the city to develop a drainage system.[5] Similarly, in 1906 the Florida Supreme Court explained that it is a "rule well settled in the law [that with any] grant to individuals and corporations [of] the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, and gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety, and convenience, notwithstanding the same may interfere with legal franchise rights."[6] Accordingly, in 1935, the U.S. Supreme Court held that a utility, which had purchased a right-of-way for pipes and auxiliary telephone lines, had purchased a private right-of-way, or private easement, which the court held was land subject to compensation by the authority seeking to build a highway across it.[7] In 1983, the U.S. Supreme Court reaffirmed the common-law principle that a utility forced to relocate from a public right-of-way must do so at its own expense.[8]

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[1] *Ridgefield Land Co. v. City of Detroit*, 217 N.W. 58, 59 (Mich. 1928).

[2] Current law provides that every plat submitted to the approving agency of a local governing body must be accompanied by a boundary survey of the platted lands, as well as a title opinion of an attorney-at-law licensed in Florida or a certification by an abstractor or a title company, as specified by statute. s. 177.041, F.S. Prior to approval by the appropriate governing body, the plat must be reviewed for conformity to the governing statutes by a professional surveyor and mapper either employed by or under contract to the local governing body, the costs of which must be borne by the legal entity offering the plat for recordation, and evidence of such review must be placed on such plat. s. 177.031(16), F.S.

[3] s. 177.081(3), F.S. As used in chapter 177, F.S., "'[e]asement' means any strip of land created 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," s. 177.031(7)(a), F.S., and "'[r]ight-of-way' means 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," s. 177.031(16), F.S.

[4] *Id.*

[5] *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 454 (1905).

[6] *Anderson v. Fuller*, 41 So. 684, 688 (1906).

[7] *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n of Kansas*, 294 U.S. 613 (1935). *See City of Grand Prairie v. Am. Tel & Tel. Co.*, 405 F.2d 1144,1146 (5th Cir. 1969) (holding the common law rule that a utility pay for relocation did not apply where the utility facilities were located within a private easement acquired long prior to planning and laying out and construction of a street). *See Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (the Eleventh Circuit Court of Appeals has adopted all of the decisions of the former Fifth Circuit decided prior to October 1, 1981).

[8] *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tele. Co. of Va.*, 464 U.S. 30, 35 (1983).

In 2014, the Florida Second District Court of Appeal (Second DCA) ruled that the requirement for utilities to pay for relocation within a right-of-way is well established in the common law[9] and, absent another arrangement by agreement between a governmental entity and the utility, or a statute dictating otherwise, this common law principle governs.[10] This case involved a platted public utility easement, six feet or less on each side of the boundary for each home site in the subdivision, in which the electric utility had installed lines and other equipment.[11] The municipality and the utility had a franchise agreement granting the utility the right to operate its electric utility in the public easement, but the agreement did not address who would be responsible for the cost of moving the utility's equipment if the municipality required the utility to do so. The Second DCA held that the utility would bear the 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.[12]

Utility Use of Public Lands

Various provisions of Florida law establish the authority of utilities to place their facilities on or beside public property. Chapter 361, F.S., establishes eminent domain rights over public and private property for companies that construct, maintain, or operate public works, such as water, sewer, wastewater reuse, natural gas, and electric utilities.[13] Through eminent domain, a utility acquires the property at issue.

Other provisions of law establish the authority of telecommunications companies to place their facilities along public roads or in the public right-of-way without acquiring the property. For example, s. 362.01, F.S., authorizes any telegraph or telephone company to "erect posts, wires and other fixtures for telegraph or telephone purposes on or beside any public road or highway" provided that this does not "obstruct or interfere with the common uses of said roads and highways." Permission to occupy the streets of an incorporated city or town must be obtained by the city or town council. In addition, s. 610.104, F.S., provides that a cable or video service provider granted a statewide franchise is authorized to "construct, maintain, and operate facilities through, upon, over, and under any public right-of-way … subject to the applicable governmental permitting."

Statutory Responsibility for Cost of Removal or Relocation of Utility Facilities

[9] *Lee County Electric Coop., Inc. v. City of Cape Coral*, No. 2D10-3781, 2014 WL 2218972, at *4 (Fla. 2d DCA May 23, 2014), *cert. 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).

[10] *Lee County Electric Coop., Inc. v. City of Cape Coral*, No. 2D10-3781, 2014 WL 2218972, at *4 (Fla. 2d DCA May 23, 2014).

[11] "A right-of-way is not the same thing as an easement. The term 'right-of-way' has been construed to mean ... a right of passage over the land of another.... It does not necessarily mean a legal and enforceable incorporeal [or intangible] right such as an easement." *City of Miami Beach v. Carner*, 579 So. 2d 248, 253 (Fla. 3d DCA 1991) (citation & internal quotation marks omitted). An easement gives someone else a reserved right to use property in a specified manner. *Se. 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."). An easement "does not involve title to or an estate in the land itself." *Estate of Johnston v. TPE Hotels, Inc.*, 719 So. 2d 22, 26 (Fla. 5th DCA 1998) (citations omitted).

[12] *Id.* 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." *Lee County Electric Coop., Inc.*, 2014 WL 2218972, at *3. 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, 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.

[13] Telegraph and telephone companies are granted eminent domain powers to construct, maintain, and operate their lines along and upon the railroad right-of-way, provided that it does not interfere with the ordinary use of the railroad. s. 362.02, F.S.

Since 1957, Florida law expressly has provided that in the event of widening, repair, or reconstruction of a county's public road or highway,[14] the licensee must move or remove the lines at no cost to the county.[15] 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.[16] In 2014, it was made subject to an additional requirement that the county 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.[17]

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[18] that an authority[19] finds unreasonably interferes in any way with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion of the road.[20] In 1994, that law was amended to include utilities placed upon, under, over, or along any publicly owned rail corridor.[21] Current law requires utility owners, upon 30 days' notice, to eliminate the unreasonable interference within a reasonable time or an agreed time, at their own expense.[22] However, since 1987, numerous exceptions to the general rule that the utility bear the costs under these circumstances have been statutorily carved out.[23]

- In 1987, exceptions were made providing:
  - When the project is on the federal aid interstate system and federal funding is identified for at least 90 percent of the cost, DOT pays for the removal or relocation with federal funds.[24]
  - When utility work is performed as part of a transportation facility construction contract, DOT may participate in those costs in an amount limited to the difference between the official estimate of all the work in the agreement plus 10 percent of the amount awarded for the utility work in the construction contract.[25]

- In 1999, an exception was made providing:
  - When utility work is performed in advance of a construction contract, DOT may participate in the cost of clearing and grubbing necessary for relocation.[26]

- In 2009, exceptions were made providing:
  - If the utility being removed or relocated was initially installed to serve an authority or its tenants, or both, the authority bears the cost of the utility work but is not responsible for the cost of removal or relocation of any subsequent additions to the facility for the purpose of serving others.[27]
  - If, in an agreement between the utility and an authority entered into after July 1, 2009, the utility conveys, subordinates, or relinquishes a compensable property right to the authority for the purpose of accommodating the acquisition or use of the right-of-way by the authority without the agreement expressly addressing future responsibility for cost of removal or relocation the

[14] In this context, "road" means "a way open to travel by the public, including, but not limited to, a street, highway, or alley. The term includes associated sidewalks, the roadbed, the right-of-way, and all culverts, drains, sluices, ditches, water storage areas, waterways, embankments, slopes, retaining walls, bridges, tunnels, and viaducts necessary for the maintenance of travel and all ferries used in connection therewith." s. 334.03(22), F.S.
[15] ch. 57-777, s. 1, Laws of Fla., now codified at s. 125.42(5), F.S.
[16] ch. 2009-85, s. 2, Laws of Fla., now codified at s. 125.42(5), F.S.
[17] ch. 2014-169, s. 1, Laws of Fla., now codified at s. 125.42, F.S.
[18] See definition of "road" in footnote 13.
[19] "[A]uthority" means DOT and local governmental entities. s. 337.401(1), F.S.
[20] ch. 57-1978, s. 1, Laws of Fla., now codified at s. 337.403, F.S.
[21] ch. 1994-247, s. 28, Laws of Fla., now codified at s. 337.403, F.S.
[22] s. 337.403, F.S.
[23] s. 337.403(1)(a)-(i), F.S.
[24] ch. 1987-100, s. 12, Laws of Fla., now codified at s. 337.403(1)(a), F.S.
[25] ch. 1987-100, s. 12, Laws of Fla., now codified at s. 337.403(1)(b), F.S.
[26] ch. 1999-385, s. 25, Laws of Fla., now codified at s. 337.403(1)(c), F.S.
[27] ch. 2009-85, s. 10, Laws of Fla., now codified at s. 337.403(1)(d), F.S.

authority bears the cost of the utility work, but nothing impairs or restricts, or may be used to interpret, the terms of any agreement entered into prior to July 1, 2009.[28]
    - If the utility is an electric facility being relocated underground to enhance vehicular, bicycle, and pedestrian safety, and if ownership of the electric facility to be placed underground has been transferred from a private to a public utility within the past five years, DOT bears the cost of the necessary utility work.[29]

- In 2012, an exception was made providing:
    - An authority may bear the cost of utility work when the utility is not able to establish a compensable property right in the property where the utility is located:
        - If the utility was physically located on the particular property before the authority acquired rights in the property,
        - The information available to the authority does not establish the relative priorities of the authority's and the utility's interest in the property, and
        - The utility demonstrates that it has a compensable property right in all adjacent properties along the alignment of the utility[30] or, pursuant to a 2014 amendment, after due diligence, the utility certifies that it does not have evidence to prove or disprove it has a compensable property right in the particular property where the utility is located.[31]

- Additionally, in 2014, exceptions were made providing:
    - If a municipally-owned or county-owned utility is located in a rural area of critical economic concern[32] and DOT determines that the utility is unable, and will not be able within the next 10 years, to pay for the cost of utility work necessitated by a DOT project on the State Highway System, DOT may pay, in whole or in part, the cost of such utility work performed by DOT or its contractor.
    - If the relocation of utility facilities is needed for the construction of a commuter rail service project or an intercity passenger rail service project, and the cost of the project is reimbursable by the Federal Government, then the utility that owns or operates the facilities located by permit on a DOT owned rail corridor shall perform all necessary utility relocation work after notice from DOT, and DOT must pay the expense for the utility relocation work in the same proportion as Federal funds are expended on the rail project after deducting any increase in the value of a new facility and any salvage value derived from an old facility.[33]

Also, in 2014, the Legislature clarified the 2009 exception that requires an authority to bear the costs to relocate a utility facility that was initially installed to exclusively serve the authority or its tenants. Under this clarification, if the utility facility was installed in the right-of-way to serve a county or municipal facility on property adjacent to the right-of-way and the county or municipal facility is intended to be used for purposes other than transportation purposes, the county or municipality is obligated to pay only for the utility work done outside the right-of-way.[34]

Florida statutory law is silent as to cost responsibility for relocation of utility facilities located on or along public roads or rights-of-way in circumstances other than those identified above. The U.S. Supreme Court, in reaffirming the common-law principle related to cost responsibility for utility relocation, has noted that "[i]t is a well-established principle of statutory construction that '[t]he common law ... ought

[28] ch. 2009-85, s. 10, Laws of Fla., now codified at s. 337.403(1)(e), F.S.
[29] ch. 2009-85, s.10, Laws of Fla., now codified at s. 337.403(1)(f), F.S.
[30] ch. 2012-174, s. 35, Laws of Fla., now codified at s. 337.403(1)(g), F.S.
[31] ch. 2014-169, s. 5, Laws of Fla., now codified at s. 337.403(1)(g)2., F.S.
[32] Section 288.0656(2)(d) defines "rural area of critical economic concern" as "a rural community, or a region composed of rural communities, designated by the Governor, that has been adversely affected by an extraordinary economic event, severe or chronic distress, or a natural disaster or that presents a unique economic development opportunity of regional impact."
[33] ch. 2014-169, s. 5, Laws of Fla., now codified at s. 337.403(1)(i), F.S. The exception expressly provides that in no event is the state required to use state dollars for such utility relocation work and that it does not apply to any phase of the Central Florida Rail Corridor project known as SunRail. S. 337.403(1)(i), F.S.
[34] ch. 2014-169, s. 5, Laws of Fla., now codified at s. 337.403(1)(d), F.S.

not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'"[35] Thus, in circumstances not explicitly addressed in Florida statutory law, the courts may apply the common law principle requiring a utility to pay for relocation of its facilities as required by a governmental authority, absent an agreement otherwise or the presence of a private utility easement.

Specific Grant of Authority to Counties to Issue Licenses to Utilities

Section 125.42, F.S., gives counties the 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 utility, and television transmission lines located under, on, over, across and along any county roads or highways.[36] The "under, on, over, across and along" county roads or highway language has been in the statute since 1947.[37]

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

Chapter 337, F.S., relates to public contracts and the acquisition, disposal, and use of property.[38] In relation to the placement and maintenance of utility facilities along, across, or on any public road or publicly owned rail corridor, current law authorizes the Florida Department of Transportation (DOT) and local governmental entities[39] to prescribe and enforce reasonable rules or regulations.[40] "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 the statute refers to as a "utility."[41] Florida local governments have enacted ordinances regulating utilities located within city rights-of-way or easements.[42]

Effect of Proposed Changes

The bill revises several statutory provisions related to the placement and relocation of utility facilities. In general, the bill changes references to utility facilities located *along* public roads and publicly owned rail corridors to utility facilities located *within the right-of-way limits of* such roads and rail corridors. These changes specify the circumstances under which a utility must pay to remove or relocate its facilities (s. 337.403, F.S.), limit the authority of a county to grant licenses for utility transmission lines (s. 125.42, F.S.), and limit the authority of DOT and local governmental entities to prescribe and enforce rules or regulations relating to the placement or maintenance of utility facilities (s. 337.401, F.S.).

In *Lee County Electric Cooperative, Inc. v. City of Cape Coral*, the Florida Second DCA interpreted the term "along" in s. 337.403, F.S., in determining who would bear the burden of the cost of moving a utility line.[43] The interpretation of "along," as that term as used in s. 337.403, F.S., informs its similar use in ss. 125.42 and 337.401, F.S.[44] The Second DCA determined that s. 337.403, F.S., codified common law and, applying the statute, the utility was responsible for bearing the costs of relocation.[45] The court did not find any "cases interpreting the 'along' the road portion of the statute," but determined

[35] *Norfolk Redevelopment & Hous. Auth.*, 464 U.S. at, 35 (1983), quoting *Fairfax's Devisee v. Hunter's Lessee,* 11 U.S. (7 Cranch) 603, 623, 3 L. Ed. 453 (1812).
[36] s. 125.42, F.S.
[37] ch. 23850, ss. 1-3, Laws of Fla., now codified at s. 125.42, F.S.
[38] ss. 337.015 - 337.409, F.S.
[39] These are referred in ss. 337.401-337.404, F.S., as an "authority." s. 337.401(1)(a), F.S.
[40] s. 337.401, F.S.,
[41] s. 337.401(1)(a), F.S.
[42] *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.
[43] *Lee County Electric Coop., Inc. v. City of Cape Coral*, No. 2D10-3781, 2014 WL 2218972 (Fla. 2d DCA May 23, 2014), *cert. denied*, 151 So. 3d 1226 (Fla. 2014).
[44] "When a court interprets a statute, it is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole [and], whenever possible, . . . give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." *Almerico v. RLI Ins.,* 716 So. 2d 774, 779, n.7 (Fla. 1998) (citations & internal quotation marks omitted).
[45] *Id.* at Part II of the opinion.

the statutory language was clear, holding that "[t]he utility lines at issue . . . were located 'along' the road and they were 'interfering' with the City's 'expansion' of the road."[46]

Statutory Responsibility for Cost of Removal or Relocation of Utility Facilities

First, the bill limits a utility's responsibility to pay for the removal or relocation of its facilities that unreasonably interfere with the convenient, safe, or continuous use of, or the maintenance, improvement, extension, or expansion of, a public road or publicly owned rail corridor to only those facilities located *upon, under, over, or within the right-of-way limits of* the road or rail corridor, but not *along* the road or rail corridor. By eliminating the reference to facilities "along" a pubic road or publicly owned rail corridor, this provision removes the precedential effect of the *Lee County* case on facilities similarly located in public utility easements along a road or rail corridor but outside the right-of-way. Thus, the bill appears to shift cost responsibility in these instances to the governmental authority.

Second, the bill expressly requires DOT or the local government authority to pay for the relocation of facilities lawfully located[47] *within the right-of-way* limits of a public road or publicly owned rail corridor if relocation is required for purposes *other than* removal of an unreasonable interference with the convenient, safe, or continuous use of, or the maintenance, improvement, extension, or expansion of, the road or rail corridor. As previously noted, current Florida statutory law is silent as to cost responsibility for relocation of utility facilities for relocation of utility facilities located on or along public roads or rights-of-way in circumstances other than those specifically identified in statute. In these circumstances, under U.S. Supreme Court precedent,[48] courts may apply the common law principle requiring a utility to pay for relocation of its facilities, absent an agreement otherwise or the presence of a private utility easement. Thus, the bill appears to broadly shift the utility's common law cost responsibility to the governmental authority in circumstances in which utility relocation from the right-of-way is required for any purpose not expressly addressed in Florida statutory law. Such purposes appear to include, but are not limited to, municipal utility projects such as water, wastewater, stormwater, electric, and natural gas utility projects and other non-transportation projects, both within and outside the right-of-way, that require work within the right-of-way.

Based on discussions with utility and local government representatives, the practical impact of this provision is not entirely clear. Utility representatives assert that local government authorities, under current law, routinely pay to relocate utility facilities from the right-of-way for projects not related to maintenance, improvement, extension, or expansion of the road. Local government representatives assert that this is not always this case. Further, it appears that cost responsibility for at least some projects is negotiated on a case-by-case basis. In sum, it is difficult to identify a clear and consistent prior practice upon which to determine the full, practical impact of this provision. Regardless, to the extent that these circumstances were previously resolved through negotiation, this provision of the bill shifts the dynamic away from such resolutions.

Third, the bill requires DOT or the local government authority to pay for relocation of facilities that unreasonably interfere with the convenient, safe, or continuous use of, or the maintenance, improvement, extension, or expansion of, a public road or publicly owned rail corridor if the facilities are located within a utility easement granted by recorded plat, regardless of whether such land was subsequently acquired by the authority by dedication, transfer of fee, or otherwise. This provision appears to directly address the factual scenario presented in the *Lee County* case, thus removing the precedential effect of that case on facilities similarly located in public utility easements granted by recorded plat. Thus, the bill appears to shift cost responsibility in these instances to the governmental authority.

The bill also provides that if relocation of facilities located within the right-of-way limits of a public road or publicly owned rail corridor is required as a condition or result of a project by an entity other than DOT or the local government authority, the other entity must bear the cost of relocation. The bill

[46] *Id.*.
[47] The bill provides that the utility owner must be authorized by state law, common law, or state or local agreement to have its facilities located in the public right-of-way.
[48] See footnote 35, *supra*.

provides an exception if such relocation would otherwise have been required in connection with a transportation improvement identified in the authority's capital improvement schedule and scheduled for construction within five years. In such instances, it appears that the utility will pay for the relocation because it would have otherwise paid to relocate its facilities in connection with the scheduled transportation improvement.

The bill provides that, to the extent an authority is required to bear the cost of relocating a utility, the authority shall 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.

The bill states that it will not affect any lawfully issued permit or lawful contract entered into between an authority and a utility prior to April 15, 2015. The bill further states that it will not impair any rights of the holder of any private railroad right-of-way or obligate the holder of such right-of-way to bear the cost of relocation in its right-of-way, subject to any agreement between the holder of the right-of-way and a utility that otherwise allocates the relocation cost.

Specific Grant of Authority to Counties to Issue Licenses to Utilities

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 utility, television lines, and other communications services[49] is limited to those lines located *under, on, over, across, or within the right-of-way limits* of any county roads or highways.[50] Accordingly, this change removes a county's authority to grant licenses for such lines running *along* a road or highway, but not within the actual right of way, which may include a public utility easement.

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

The bill narrows the authority of FDOT and local governmental entities to prescribe and enforce reasonable rules or regulations in relation to the placing and maintaining of 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 as a utility, to the placement or maintenance of such utilities *across, on, or within the right-of-way limits* of any public road or publicly owned rail corridors.[51] By changing the language to "right-of-way," the bill removes the authority of FDOT and local governments to prescribe and enforce reasonable rules and regulations regarding the placement and maintenance of the foregoing utilities *along* a public road or rail corridor, which may include a public utility 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.[52]

Information Required by Municipalities and Counties

The bill provides that a municipality or county, in exercising its general authority over a utility, may not require a utility to provide proprietary maps of facilities where such facilities have been previously subject to a permit from the authority. The bill separately provides that a municipality or county in exercising its authority to regulate providers of communication services[53] may not require a provider to provide proprietary maps of facilities where such facilities have been previously subject to a permit from the authority.

[49] The bill adds "other communications services" to the list of utilities in current law.
[50] s. 125.42(1), F.S.
[51] Current law references placement and maintenance "along, across, or on" any road or publicly owned rail corridors, rather than the "right-of-way of" any road or publicly owned rail corridors. s. 337.401(1)(a), F.S.
[52] Current law includes only those other structures referred to in s. 337.401, F.S., as a "utility," which includes "any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps." s. 337.401(1)(a), F.S.
[53] s. 337.401, F.S

Finding of Important State Interest

The bill provides the following legislative finding:

> The Legislature finds that a proper and legitimate state purpose is served by clarifying a utility's responsibility for relocating its facilities within the right of way or within a utility easement granted by recorded plat. Therefore, the Legislature determines and declares that this act fulfills an important state interest.

B. SECTION DIRECTORY:

Section 1. Amends s. 125.42, F.S., relating to water, sewage, gas, power, telephone, other utility and television line licenses.

Section 2. Amends s. 337.401, F.S., relating to rules or regulations concerning specified structures within public roads or rail corridors.

Section 3. Amends s. 337.403, F.S., relating to alleviating interference a utility causes to a public road or publicly owned rail corridor.

Section 4. Provides a legislative finding that the act fulfills an important state interest.

Section 5. Provides an effective date upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Indeterminate. In its analysis of the bill, the Florida Department of Transportation (DOT) states that the bill has an indeterminate negative fiscal impact on State expenditures relating to the cost of utility relocation on state roads.[54] To the extent funds are used for such relocations, projects could be adjusted within the confines of the Work Program.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Indeterminate. In its analysis, DOT indicates that the bill has an indeterminate negative fiscal impact on local government expenditures based on the number of situations in which it will be responsible for utility relocation costs.[55] Staff requested data from representatives of local governments regarding the bill's fiscal impact. The City of Cape Coral submitted data showing the cost of moving two utilities as part of three road projects is over $4 million.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. With respect to relocation of facilities located in utility easements that are along but not within the right-of-way, the bill appears to reduce utilities' cost responsibility as specified in the Florida

[54] Florida Department of Transportation, Agency Analysis of 2015 House Bill 391 (updated April 7, 2015).
[55] *Id.*

Second DCA's decision in *Lee County*. With respect to relocation of facilities located within the right-of-way for purposes other than those currently specified in statute, at the request of an authority, the bill appears to reduce utilities' cost responsibility under common law.

Utility representatives assert that the bill conforms the law to practice prior to the *Lee County* decision, thus protecting them from costs previously borne by local governments. Local government representatives assert that this prior practice was not consistent. It appears that cost responsibility for at least some projects is negotiated on a case-by-case basis. Staff has requested and received information from both utility and local government representatives but, based on these limited circumstances, cannot fairly identify a clear and consistent prior practice with respect to payment for relocation of utility facilities in the various circumstances addressed by the bill. Regardless, to the extent that these circumstances were previously resolved through negotiation, the bill shifts the dynamic away from such resolutions.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18, of the Florida Constitution may apply because utilities currently are located, or in the future may be located, within utility easements, and an authority would be required to pay for moving or relocating the utility if it is located within said easement and not within a right-of-way for any public road or publicly owned rail corridors. However, an exception may apply because the bill appears to apply to all persons similarly situated, including the state and local governments.

<u>If the bill does qualify as a mandate, the law must fulfill an important state interest and final passage must be approved by two-thirds of the membership of each house of the Legislature</u>.

The bill includes a finding that the act fulfills an important state interest.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

To the extent DOT has any rules affected by this legislation, it may need to amend those rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 3, 2015, the Local Government Affairs Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment conforms the bill to its Senate companion, SB 896, but includes additional language prohibiting a municipality, county, or other governmental authority from requesting information already submitted by a utility provider.

On March 12, 2015, the Transportation & Economic Development Appropriations Subcommittee adopted one amendment which removed duplicative uses of the term "authority" from the bill. The bill was reported favorably as a committee substitute.

On April 14, 2015, the Regulatory Affairs Committee adopted four amendments and reported the bill favorably as a committee substitute. The adopted amendments made the following changes:

- Specified that a municipality or county, in exercising its authority over a utility or communications services provider, may not require the utility or communications services provider to provide proprietary maps of facilities where such facilities have been previously subject to a permit from the authority.
- Specified the authority's responsibility to pay utility relocation costs in certain circumstances where the utility owner is authorized by state law, common law, or state or local agreement to have its facilities located in the public right-of-way.
- Provided an exception to a third party's responsibility to pay utility relocation costs if the relocation would otherwise have been required in connection with a transportation improvement identified in the authority's capital improvement schedule and scheduled for construction within five years.
- Specified that, to the extent an authority is required to bear the cost of relocating a utility, the authority may deduct any increase in the value of a new utility facility and any salvage value derived from an old utility facility.
- Clarified that the bill will not affect any lawfully issued permit or lawful contract entered into between an authority and a utility prior to April 15, 2015.
- Clarified that the bill will not impair any rights of the holder of any private railroad right-of-way or obligate the holder of such right-of-way to bear the cost of relocation in its right-of-way, subject to any agreement between the holder of the right-of-way and a utility that otherwise allocates the relocation cost.
- Provided a legislative finding that the bill fulfills an important state interest.

This analysis reflects the committee substitute passed by the Regulatory Affairs Committee.