

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 Environmental Preservation and Conservation Committee

BILL: CS/SB 2530

INTRODUCER: Committee on Environmental Preservation and Conservation and Senator Baker

SUBJECT: Water Resources

DATE: April 14, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	Fav/1 amendment
2.	Uchino	Kiger	EP	Fav/CS
3.			GO	
4.			GA	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This Committee Substitute (CS) replaces the term “xeriscape” with “Florida-friendly landscape;” elaborates on the factors to be considered as part of Florida-friendly landscapes; specifies the experience that water well contractors should have; clarifies penalties for unlicensed water well contractors; and provides conforming and technical changes.

The CS provides for an effective date of July 1, 2009.

The CS substantially amends sections 125.568, 166.048, 255.259, 335.167, 373.185, 373.228, 373.323, 373.333, 380.061, 388.291, 481.303, and 720.3075 of the Florida Statutes; and creates section 373.187 of the Florida Statutes.

II. Present Situation:

Xeriscape or Florida-Friendly Landscape

Landscape irrigation accounts for one of the largest uses of water in Florida. Finding that water conservation is increasingly critical to the continuance of an adequate water supply for the citizens of the state, the Legislature has found that “xeriscape” can contribute significantly to the

conservation of water.¹ Moreover, the Legislature finds that state government has the responsibility to promote xeriscape as a water conservation measure by using xeriscape on public property associated with publicly owned buildings or facilities.² “Xeriscape” or “Florida-friendly landscape” means quality landscapes that conserve water and protect the environment, are adaptable to local conditions, and are drought tolerant. The principles of xeriscape include planning and design, appropriate choice of plants, soil analysis that may include the use of solid waste compost, efficient irrigation, practical use of turf, appropriate use of mulches, and proper maintenance.³

Currently, s. 373.185, F.S., provides that each water management district must design and implement an incentive program to encourage all local governments within its district to adopt new ordinances or amend existing ordinances to require xeriscape landscaping for development permitted after the effective date of the new ordinance or amendment. Each district must adopt rules governing the implementation of its incentive program and governing the review and approval of local government xeriscape ordinances or amendments that are intended to qualify a local government for the incentive program. In addition, each district must assist the local governments within its jurisdiction by providing a model xeriscape code and other technical assistance. A local government xeriscape ordinance or amendment, in order to qualify the local government for a district's incentive program, must include certain minimum requirements.⁴ The districts also must work with local governments to promote, through educational programs and publications, the use of xeriscape practices, including the use of solid waste compost, in existing residential and commercial development. The xeriscape provisions do not limit the authority of the districts to require xeriscape ordinances or practices as a condition of any consumptive use permit.⁵ A deed restriction or covenant entered after October 1, 2001, or local government ordinance may not prohibit any property owner from implementing xeriscape or Florida-friendly landscape on his or her land.⁶

The water management districts are required to work with statutorily specified organizations and governmental entities to develop landscape irrigation and xeriscape design standards for new construction that incorporate a landscape irrigation system and develop scientifically based model guidelines for urban, commercial, and residential landscape irrigation, including drip irrigation, for plants, trees, sod, and other landscaping.⁷

The Florida Yards and Neighborhoods (FYN), which is established in the University of Florida's Cooperative Extension Service, is a public outreach educational program that encourages homeowners, landscape maintenance personnel, and others to practice environmentally sensitive landscape techniques to conserve water and protect water quality. FYN is the source of the term “Florida-Friendly Landscaping.” FYN incorporates the principles of xeriscape but goes one step further by focusing on all aspects of water quality and quantity that relate to urban landscape

¹ Section 255.259(1), F.S.

² *id.*

³ Section 373.185(1)(b), F.S.

⁴ Section 373.185(2), F.S.

⁵ *id.*

⁶ Section 373.185(3), F.S.

⁷ Section 373.228(4), F.S.

systems and the natural systems they impact. The FYN publishes a handbook explaining the concepts of Florida-friendly landscaping approach.⁸

Sections 125.568 and 166.048, F.S., provides that if a county's board of county commissioners or a municipality's governing body respectively determines that xeriscape would be a significant benefit as a water conservation measure relative to the cost to implement xeriscape landscaping, the board or governing body must enact a xeriscape ordinance.

Section 373.228, F.S., provides that the water management districts must work with the Florida Nurserymen and Growers Association, the Florida Chapter of the American Society of Landscape Architects, the Florida Irrigation Society, the Department of Agriculture and Consumer Services, the Institute of Food and Agricultural Sciences, the Department of Environmental Protection (department), the Department of Transportation, the Florida League of Cities, the Florida Association of Counties, and the Florida Association of Community Developers to develop landscape irrigation and xeriscape design standards for new construction which incorporate a landscape irrigation system and develop scientifically based model guidelines for urban, commercial, and residential landscape irrigation, including drip irrigation, for plants, trees, sod, and other landscaping. The standards and guidelines must be reviewed by January 1, 2011 to determine whether new research findings require a change or modification of the standards and guidelines.

Water Well Contractors

Section 373.323(3), F.S., provides that an applicant for a water well contractor's license is entitled to take the licensure examination if the applicant, among other things, has at least two years of experience in constructing, repairing, or abandoning wells. Section 373.333, F.S., provides that a water management district may impose a fine, not to exceed \$5,000, against a person that has engaged in the unlicensed practice of water well contracting.

III. Effect of Proposed Changes:

Section 1 amends s. 373.185, F.S., providing the legislative finding that the use of Florida-friendly landscaping and other water use and pollution prevention measures that conserve or protect Florida's water resources serve a compelling public interest and that participation of homeowners' associations and local governments is essential to state water conservation and protection efforts.

The CS removes the term "xeriscape" from Florida Statutes, and replaces the term with "Florida-friendly landscaping."⁹ It also amends a number of statutory sections to incorporate additional principles into the definition of Florida-friendly landscaping. These principles include:

- Planting the right plants in the right place;
- Efficient watering;
- Appropriate fertilization;
- Mulching;

⁸ FLORIDA YARDS AND NEIGHBORS, A GUIDE TO FLORIDA-FRIENDLY LANDSCAPING. 12 Apr. 2009 Available at <<http://fyn.ifas.ufl.edu/materials/handbook.pdf>>

⁹ Sections 125.568, 166.048, 255.259, 335.167, 373.228, 373.185, 380.061, 388.291, 481.303, and 720.3075 of the Florida Statutes.

- Attraction of wildlife;
- Responsible management of yard pests;
- Recycling yard waste;
- Reduction of stormwater runoff; and
- Waterfront protection.

The CS requires each water management district to assist local governments by developing or providing a Florida-friendly landscape model ordinance. The districts may use a model contained in the “Florida-friendly Landscape Guidance Models for Ordinances, Covenants, and Restrictions” manual. To qualify for a district’s incentive program, a local government must adhere to certain criteria, including water quality protection or restoration and identification of prohibited exotic species.

The CS requires water management districts to work with the department, county extension agents or offices, nursery and landscape industry groups, and other interested stakeholders to promote the use of Florida-friendly landscaping practices through educational programs and publications. The districts shall use materials developed by the University of Florida’s Institute of Food and Agricultural Sciences, the Center for Landscape Conservation and Ecology Florida-Friendly Landscaping Program, including the Florida Yards and Neighborhoods extension program, the Green Industries Best Management Practices Program, and other programs with suitable materials. In addition, the CS provides that a deed restriction, covenant, or local government ordinance may not be enforced to prohibit any property owner from implementing Florida-friendly landscaping. It also prohibits all deed restrictions, covenants, or local government ordinances from restricting the use of Florida-friendly landscaping. It clarifies that s. 373.185, F.S., does not limit the authority of the department or the water management districts to require Florida-friendly landscaping as a condition for receiving a permit. Lastly, it provides for technical and conforming changes.

Section 2 creates s. 373.187, F.S., directing each water management district to use Florida-friendly landscaping on all public property associated with a building or facility constructed after June 30, 2009. It also directs that each water management district create a 5-year phased plan for those buildings or facilities constructed before June 30, 2009.

Section 3 amends s. 373.228, F.S., replacing “xeriscape” with “Florida-friendly landscaping.” It adds the Florida Native Plant Society as an organization the water management districts must cooperate with to develop design standards for Florida-friendly landscaping. It also provides for technical changes.

Section 4 amends s. 373.323(3), F.S., requiring applicants for a water well contractor’s license to demonstrate proof of the required two years experience by providing:

- Evidence of the length of time the applicant has been engaged in the construction, repair, or abandonment of water wells. Such experience shall be considered satisfactory if attested to by in writing by any three the following:
 - A water well contractor;
 - A water well driller;
 - A water well parts and equipment vendor; or
 - A water well inspector employed by a government entity.

- A list of at least ten water wells that the applicant has constructed, repaired, or abandoned within the preceding five years. Of these wells, at least seven must have been constructed by the applicant. The list must also include:
 - The name and address of the owner of each well;
 - The location, primary use, and depth and diameter of each well; and
 - The approximate date the construction, repair, or abandonment of each well was completed.

It also provides for technical changes.

Section 5 amends s. 373.333(8), F.S., providing that a water management district may impose a fine, not to exceed \$5,000 *per occurrence*, against a person that has engaged in the unlicensed practice of water well contracting. It also provides for technical changes.

Section 6 amends s. 125.568, F.S., replacing “xeriscape” with “Florida-friendly landscaping,” and including, by reference, the meaning in s. 373.185, F.S. It directs boards of county commissioners to consider Florida-friendly landscaping as water conservation or water quality protection or restoration ordinances. It specifies that deed restrictions, covenants, or local government ordinances may not be enforced to prohibit any property owner from implementing Florida-friendly landscaping and may not create any requirement or limitation in conflict with any provision of part II of chapter 373, F.S. It provides the legislative finding that the use of Florida-friendly landscaping and other water use and pollution prevention measures that conserve or protect Florida’s water resources serve a compelling public interest and that participation of homeowners’ associations and local governments is essential to state water conservation and protection efforts. It also provides for technical and conforming changes.

Section 7 amends s. 166.048, F.S., replacing “xeriscape” with “Florida-friendly landscaping,” and including, by reference, the meaning in s. 373.185, F.S. It provides the legislative finding that Florida-friendly landscaping contributes to water conservation, protection and restoration, and that it should be used as a planning measure. It directs the governing bodies of each municipality to consider Florida-friendly landscaping as water conservation or water quality protection or restoration ordinances. It provides for the additional legislative finding that the use of Florida-friendly landscaping and other water use and pollution prevention measures that conserve or protect Florida’s water resources serve a compelling public interest and that participation of homeowners’ associations and local governments is essential to state water conservation and protection efforts. In addition, it specifies that deed restrictions, covenants, or local government ordinances may not be enforced to prohibit any property owner from implementing Florida-friendly landscaping and may not create any requirement or limitation in conflict with any provision of part II of chapter 373, F.S. Lastly, it provides for technical and conforming changes.

Section 8 amends s. 255.259, F.S., replacing “xeriscape” with “Florida-friendly landscaping,” and including, by reference, the meaning in s. 373.185, F.S. It provides the legislative finding that water conservation, protection and restoration are critical to healthy surface water and groundwater, and Florida-friendly landscaping can contribute to protecting and restoring those waters. It directs the Department of Management Services in cooperation with other agencies to adopt rules for using Florida-friendly landscaping on public property associated with building or

facilities constructed on or after June 30, 2009, and to create a 5-year phased plan for those buildings or facilities constructed before June 30, 2009. It provides for the additional legislative finding that the use of Florida-friendly landscaping and other water use and pollution prevention measures that conserve or protect Florida's water resources serve a compelling public interest and that participation of homeowners' associations and local governments is essential to state water conservation and protection efforts. In addition, it specifies that deed restrictions, covenants, or local government ordinances may not be enforced to prohibit any property owner from implementing Florida-friendly landscaping and may not create any requirement or limitation in conflict with any provision of part II of chapter 373, F.S. Lastly, it provides for technical and conforming changes.

Section 9 amends s. 335.167, F.S., replacing "xeriscape" with "Florida-friendly landscaping," and including, by reference, the meaning in s. 373.185, F.S. It provides that the Department of Transportation use Florida-friendly landscaping on its lands for construction or acquisition of projects occurring on or after June 30, 2009, and to create a -5-year phased plan for those projects constructed or acquired before June 30, 2009. It provides the legislative finding that the use of Florida-friendly landscaping and other water use and pollution prevention measures that conserve or protect Florida's water resources serve a compelling public interest and that participation of homeowners' associations and local governments is essential to state water conservation and protection efforts. It also specifies that deed restrictions, covenants, or local government ordinances may not be enforced to prohibit any property owner from implementing Florida-friendly landscaping and may not create any requirement or limitation in conflict with any provision of part II of chapter 373, F.S. Lastly, it provides for technical and conforming changes.

Section 10 amends s. 380.061(3)(a), F.S., replacing "xeriscape" with "Florida-friendly landscaping," and including, by reference, the meaning in s. 373.185, F.S. It also provides for technical changes.

Section 11 amends s. 388.291(3), F.S., replacing "xeriscape" with "Florida-friendly landscaping," and providing for technical changes.

Section 12 amends s. 481.303(6)(a), F.S., replacing "xeriscape" with "Florida-friendly landscaping," and including, by reference, the meaning in s. 373.185, F.S.

Section 13 amends s. 720.3075, F.S., replacing "xeriscape" with "Florida-friendly landscaping." It provides the legislative finding that the use of Florida-friendly landscaping and other water use and pollution prevention measures that conserve or protect Florida's water resources serve a compelling public interest and that participation of homeowners' associations and local governments is essential to state water conservation and protection efforts. It specifies that covenants, articles of incorporation, or bylaws may not be enforced to prohibit any property owner from implementing Florida-friendly landscaping and may not create any requirement or limitation in conflict with any provision of part II of chapter 373, F.S. Lastly, it provides for technical and conforming changes.

Section 14 provides for an effective date of July 1, 2009.

Other Potential Implications:

Taking a more comprehensive approach to landscaping would likely contribute significantly to the conservation of water, help reduce runoff, minimize groundwater and surface water pollution, and enhance the aesthetics of the State of Florida.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The statute prohibits the enforcement of deed restrictions and covenants that prohibit any property owner from implementing Florida-friendly landscape. This may impair existing contracts, which would require that the law serve an important public purpose.¹⁰

Article I, Section 10 of the *United States Constitution* prohibits state legislatures from enacting laws impairing the obligation of contracts. As early as 1880, the federal courts recognized that the contract clause does not override the police power of the states to establish regulations to promote the health, safety, and morals of the community. *Stone v. Mississippi*, 101 U.S. 814 (1880). The severity of the impairment is a key issue when evaluating whether a state law impairs a contract. *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). In *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), the Supreme Court suggested it would uphold legislation that imposes a generally applicable rule of conduct designed to advance a broad societal interest that only incidentally disrupts existing contractual relationships.

In 1989, the Federal District Court in Tampa held that the state statute permitting condominium unit owners to display the American Flag [s. 718.113(4), F.S.] did not impair existing contract rights of the condominium association to restrict such display. The court suggested in dicta that personal display of the flag is constitutionally protected speech, and because “the statute did not create rights, but merely recognized them, it does not impair existing contract rights.” *Gerber v. Longboat Harbour North Condominium, Inc.*, 724 F.Supp. 884 (M.D.FL., 1989).

¹⁰ *Yellow Cab Co. v. Dade County*, 412 So.2d 395 (Fla. 3rd DCA 1982), petition den. 424 So.2d 764 (Fla. 1982).

Article I, Section 10 of the *Florida Constitution* also prohibits the state from enacting laws impairing the obligation of contracts. While Florida courts have historically strictly applied this restriction, they have exempted laws when they find there is an overriding public necessity for the state to exercise its police powers. *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681 (Fla. 1980). This exception extends to laws that are reasonable and necessary to serve an important public purpose *Yellow Cab Company of Dade County. v. Dade County*, 412 So.2d 395 (Fla. 3rd DCA 1982), petition den. 424 So.2d 764 (Fla. 1982), to include protecting the public's health, safety or welfare. [*Khoury v Carvel Homes South, Inc.*, 403 So.2d 1043 (Fla. 1st DCA 1981), petition den. 412 So.2d 467 (Fla. 1981)].

Historically, both the state and federal courts have attempted to find a rational and defensible compromise between individual rights and public welfare when laws are enacted that may impair existing contracts. *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The impact to homeowners and business owners is indeterminate. In addition, the costs of nullifying deed restrictions and covenants are unknown. This provision may generate significant litigation.

C. Government Sector Impact:

There will be some costs associated with educational materials and campaigns targeted at the public. These costs are unknown. The impact to each water management district that is required to adopt rules is unknown, but will likely be met with existing staff and resources.

VI. Technical Deficiencies:

Section 2 amends subsection (3) of s. 373.323, F.S., requiring water well contractors to provide satisfactory proof of experience but provides no mechanism to challenge a finding that the proof provided was not satisfactory.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environmental Preservation and Conservations on April 14, 2009:
The strike amendment is the subject of this analysis.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
