FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4344

LARRY and ELLEN VICKERY,

Appellants,

v.

CITY OF PENSACOLA, a Municipal Corporation,

Appellee.

On appeal from the Circuit Court for Escambia County.
Jeffrey Burns, Judge.

February 16, 2022

WINOKUR, J.

Larry and Ellen Vickery appeal from an order denying dissolution of a temporary injunction prohibiting them from removing a tree from their property. Because the injunction was improper, we reverse.

I

The Vickerys own a residential lot in the North Hill Preservation District of Pensacola, on which a live oak tree is situated in the rear corner. Hoping to build a house and wanting to avoid potential damage from the tree, the Vickerys applied to the Parks and Recreation Department for a permit to remove the

tree. The permit was denied shortly before section 163.045(1), Florida Statutes, came into effect on July 1, 2019. See Ch. 2019-155, §§ 1, 4, Laws of Fla. This statute authorizes residential property owners to remove trees from their property without interference from local government if the owners obtain documentation, from an International Society of Arboriculture (ISA)-certified arborist or Florida-licensed landscape architect, indicating that the trees present a danger to persons or property.

The Vickerys' builder emailed the City of Pensacola (the City) to inform it that the Vickerys planned to remove the tree. The builder attached a letter from an ISA-certified arborist indicating that the main trunk of the tree had "severe decay" resulting from the prior removal of one of the tree's main stems, as well as other evidence of the tree "rotting on the inside." As a result, the letter contained the arborist's opinion that the "location of the tree puts homes and the occupants at risk of severe damage and safety" when the tree fails.

The City filed an action for declaratory judgment seeking a determination that section 163.045(1), Florida Statutes, did not prohibit the City from enforcing the local code provisions requiring the Vickerys to obtain a permit to remove the tree. It argued that the statute's use of the words "documentation" and "danger" is ambiguous, that the Vickerys' documentation was insufficient, and that the Legislature must have intended to require property owners to obtain an objective evaluation based on standards used by ISA-certified arborists. The City also requested a temporary injunction prohibiting the Vickerys from removing the tree.

The trial court granted the temporary injunction, which the Vickerys moved to dissolve. In a hearing on this motion, the City called experts to contest the Vickerys' arborist's finding of danger. Additionally, a landscape architect testified that those in his profession are not bound by written guidelines, that they use their own discretion to determine how to assess the danger of a tree, and that he would not typically prepare a written report of the danger.

After the hearing, the court denied the Vickerys' motion. In its order, it discussed the City's likelihood of success on the merits of the declaratory action. In addition to accepting the City's

contention that the tree was not enough of a danger to remove, the court interpreted section 163.045(1). It stated that "the Legislature left express clues in the statutory language to narrow the scope of 'danger' and 'documentation'" and concluded that "[t]he Legislature must be presumed to know the meaning of certified as an arborist or licensed as a landscape architect. By selecting only those two professions, the Legislature has implicitly adopted the professional standards applicable to the two respective industries." It further concluded that "the only reasonable interpretation . . . is one where: (1) an arborist or landscape architect must determine that a tree is a danger; and (2) for the determination and documentation to be rendered utilizing only the methodologies and official documents applicable to the two respective industries." The court determined that the statute applies only when a tree is dangerous, as substantiated by documentation, and also determined that section 163.045(1) does not preempt the City "from challenging, through submission of its own expert opinions, the conclusions reached by an arborist who generated questionable documentation that [the tree] is dangerous."

The Vickerys brought this appeal. They argue that the trial court ignored the plain meaning of section 163.045(1). The City counters that the statute is ambiguous and the trial court correctly interpreted it, including that the statute should be read to require arborists and landscape architects to follow industry standards and methods. It also argues that the trial court's interpretation does not impede the Legislature's purpose, which the City contends is to relieve residents of a bureaucratic process when a tree on their land is dangerous. Additionally, the City maintains that enforcing the local code is permissible because section 163.045(1) does not preempt all municipal protection of trees, that the Vickerys should have appealed the original denial of their permit application, and that the statute should not apply to the Vickerys at all because they do not yet reside on the property containing the tree. Finally, the City opposes a plain-language interpretation on the ground that it would permit property owners to determine for themselves whether a tree is dangerous, as they could simply pay for the opinion they want.

II

We review legal conclusions de novo and factual findings for abuse of discretion. *See Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258 (Fla. 2017).

To obtain an injunction, a party must show "(1) the likelihood of irreparable harm, (2) the unavailability of an adequate remedy at law, (3) a substantial likelihood of success on the merits, and (4) that the injunction will serve the public interest." *Smart Pharmacy, Inc. v. Viccari*, 213 So. 3d 986, 989 (Fla. 1st DCA 2016). Only element (3) is at issue in this appeal.

The merits of the declaratory action turn on the meaning of section 163.045(1), Florida Statutes, which provides the following:

> 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.

In determining the meaning of this statute, we are bound by the plain language of the text:

> If the statutory language is clear and unambiguous, the court must apply that unequivocal meaning and may not resort to the rules of statutory construction. The court must give full effect to all statutory provisions and avoid readings that would render a part of a statute meaningless; additionally, the court may not construe an unambiguous statute in a way that would extend, modify, or limit its express terms or its reasonable and obvious implications.

Herman v. Bennett, 278 So. 3d 178, 179–80 (Fla. 1st DCA 2019) (internal citation omitted). Additionally, the following principles apply: "[T]he Legislature is assumed to know the meaning of the words used in the statute and to have expressed its intent through

the use of the words." *State, Dep't of Revenue v. Lockheed Martin Corp.*, 905 So. 2d 1017, 1020 (Fla. 1st DCA 2005). A court may discern "the plain and obvious meaning of the statute's text" from a dictionary. *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 9 (Fla. 2012). "[I]t is not this Court's function to substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute." *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001). "[N]o court is entitled to disregard the plain language of a statute in favor of what it deems to be a more reasonable construction." *Horizon Hosp. v. Williams ex rel. Williams*, 610 So. 2d 692, 693 (Fla. 2d DCA 1992).

III

Contrary to the City's contention, the words "documentation" and "danger" are unambiguous. They apply broadly, but their meanings are clear: "Documentation" refers to written evidence, and "danger" refers to risk of harm.

Merriam-Webster defines "documentation" as (1) "the act or an instance of furnishing or authenticating with documents"; (2)(a) "the provision of documents in substantiation" or "documentary evidence"; (2)(b)(1) "the use of historical documents"; (2)(b)(2) "conformity to historical or objective facts"; (2)(b)(3) "the provision of footnotes, appendices, or addenda referring to or containing documentary evidence"; (3) "information science"; or (4) "the usually printed instructions, comments, and information for using a particular piece or system of computer software or hardware." *Documentation*, MERRIAM-WEBSTER (10th ed. 1998). "Information science" is "the collection, classification, storage, retrieval, and dissemination of recorded knowledge." *Information Science*, MERRIAM-WEBSTER (10th ed. 1998). Because section 163.045(1) uses "documentation" as a physical thing to be obtained, none of the definitions involving an act, including definition (3), can apply. Definition (4) cannot apply because there is no computer software or hardware at issue. Thus, "documentation" under section 163.045(1) clearly refers to written evidence.

Merriam-Webster defines "danger" as (1)(a) "jurisdiction" (archaic); (1)(b) "reach, range" (obsolete); (2) "harm, damage" (obsolete); (3) "exposure or liability to injury, pain, harm, or loss";

or (4) "a case or cause of danger." *Danger*, MERRIAM-WEBSTER (10th ed. 1998). The archaic and obsolete definitions do not make sense in context of section 163.045(1), and so clearly "danger" under the statute refers to risk of harm.

With these definitions in mind, we turn to the plain meaning of section 163.045(1). The statute prohibits local governments from "requir[ing] a notice, application, approval, permit, fee, or mitigation . . . for the removal of a tree" once an ISA-certified arborist or a Florida-licensed landscape architect has provided a residential property owner with documentation—written evidence—indicating that the tree presents a danger—a risk of harm. In short, property owners need not inform, let alone obtain permission from, the local government before removing a tree once they have met these conditions.

If property owners have not met these conditions, this statute does not relieve them from obligations of local rules. As long as a local government does not require notice, we see no impediment to it asking for the documentation required by section 163.045(1). If a property owner has not complied with the statute and has violated a local code, nothing in the statute protects the owner from penalties under the local code. However, section 163.045(1) does not empower a local government to challenge the sufficiency of the documentation either before or after tree removal.[1]

Challenges to the sufficiency of the documentation would render the statute meaningless. Permitting such challenges would mean that property owners would not know whether they could rely on the statute until a local government indicates that it is satisfied with their specialists' findings and the trees' dangerousness. Requiring property owners to undergo the procedures that the statute is designed to allow them to avoid defeats the statute's purpose.

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[1] The dissent claims the Vickerys take an "extreme position" that "*no* judicial review is permitted at all." Dissenting op. at 29. We note that we express no opinion on whether the statute permits challenges to the authenticity of the documentation, as this issue is not before us.

Having established the plain meaning of section 163.045(1), we now address the City's interpretation. The City contends that section 163.045(1) requires arborists and landscape architects to follow particular standards and that their failure to do so removes property owners from the protection of the statute. We disagree.

Had the Legislature intended arborists and landscape architects to follow particular procedures before section 163.045(1) could apply, it would have mandated those procedures. Moreover, the statute explicitly burdens local government—not arborists or landscape architects. The trial court's finding that the statute implicitly obligates the professionals to follow industry standards is unconvincing; it based this finding on the premise that the Legislature is presumed to know what it means to be certified as an arborist or licensed as a landscape architect, but—as a landscape architect testified at the hearing—there are no industry standards for landscape architects and some do not typically provide written documentation when opining that a tree is dangerous. The Legislature's presumptive knowledge of this would indicate that the Legislature did not intend to impose specific standards. The statute would be meaningless if it required property owners to obtain expert opinions but then did not protect them when they relied on those opinions.

The City characterizes the Legislature's purpose as "relieving residents from a bureaucratic process where a tree on a resident's land is a danger to persons or property" and asserts that permitting local governments to challenge the documented finding that a tree is dangerous does not impede this purpose. This argument fails because a property owner whose documentation were to be challenged would have to go through a bureaucratic process before they could remove their trees. In other words, the statute would grant no relief.

While the City is correct that section 163.045(1) does not preempt all municipal protection of trees, any local laws that conflict with state laws are invalid. *See Sarasota All. for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 890–91 (Fla. 2010). Here, the City's local code requires property owners to obtain a permit before removing protected trees from their land. Under section 163.045(1), the City cannot require such a permit if the

property owner obtains documentation indicating that a tree is dangerous. To the extent of the conflict, the City's code cannot be enforced.

We reject the City's contention that section 163.045(1) does not apply to the Vickerys because they do not yet reside on their land. "Residential property" is property zoned for residential use or, in areas that have no zoning, property used for the same purposes as property zoned for residential use. To hold otherwise would ignore the term's common use and improperly limit section 163.045(1). Under such an interpretation, purchasers would be required to move onto property containing a dangerous tree, subjecting themselves to risk, before they could remove the tree. Various residential properties would be excluded, including homes transitioning between occupation by seller and occupation by buyer, vacation homes, and temporarily unoccupied rental properties. Additionally, if a tree located on an unoccupied property zoned for residential use presented a danger to neighbors' persons or property, the owners would not be able to remove it under the statute. All such properties are widely understood to be residential, and they are included in both the statute's express terms and its reasonable and obvious implications. The argument that the Vickerys' land cannot be residential because they have not yet moved onto it ignores the plain meaning of "residential property" and improperly limits an unambiguous statute.

Finally, the City's concern that property owners might abuse section 163.045(1), paying arborists and landscape architects for the opinion they want, is not a reason for the courts to ignore the plain language of the statute. "[H]owever compelling the public policy considerations may be . . ., it is not the province of the judiciary to read into the language of the . . . text anything not included or to limit the text in a manner not supported by its plain language." *Fla. Police Benevolent Assoc., Inc. v. City of Tallahassee*, 314 So. 3d 796, 802–03 (Fla. 1st DCA 2021).

Section 163.045(1) is clear. It expressly prohibits the actions to which the City seeks to establish a right through declaratory judgment. The City therefore failed to show a substantial likelihood of success on the merits, and the temporary injunction is improper.

IV

A

We disagree with several assertions and characterizations of the facts contained in the dissenting opinion. It is generally enough to say that we are confident that we have properly applied the statute to the facts presented. Nonetheless, some of the statements merit a response.

Regarding the tree itself, the dissent provides an imagined backstory and an evocative name for the tree, claiming that it has been "dubbed" "the Old Tree." Dissenting op. at 16. In fact, the record provides no evidence that, prior to this litigation, the tree has ever been named anything.[2] This is unsurprising considering that the tree is in the rear of a residential lot. The dissent also notes that the tree has been designated a "protected heritage tree." *Id.* The record indicates only that the Pensacola municipal code identifies a "heritage tree" as a protected tree that is thirty-four inches in diameter. The record does not reflect how common this designation is. In fact, the record does not reflect any feature of the tree in question that might show it to be unique, or particularly big or old.

The dissent claims that, when the City denied the Vickerys' application to remove the tree, the City's horticultural agent found that the tree "posed no safety concerns." *Id.* at 18. What the agent actually wrote was that the tree was "not in a state of condition that would initiate recommendation for removal for safety reasons," not that there were no safety concerns. In fact, the agent noted that his assessment did not determine the internal stability

[2] The trial court used the phrase "the Old Tree" once during the course of this case, in its order denying the Vickerys' motion to dissolve the injunction. As the litigation was over a tree, and the tree is old, this seems unnoteworthy. In any event, it does not suggest that the tree was remarkable enough to merit a specific name.

of the tree, which constituted the primary reason for safety concerns indicated by the Vickerys' arborist. Likewise, we disagree with the dissent's claim that the City told the Vickerys that they could "tweak" the building plans to avoid removing the tree, suggesting that only a minor modification was needed. *Id.* at 18. The City actually suggested that the Vickerys could revise their plan "to flip the house," which we take to mean an entirely new building plan. This was hardly a "tweak."

We disagree with many comments the dissent makes about the letter provided by the arborist to the Vickerys, both in the manner in which the letter was written and in the content of the letter itself. First, the dissent notes that the Vickerys asked the arborist to add a sentence to the letter regarding the danger posed by the tree, implying that the Vickerys compelled the arborist to indicate that the tree was dangerous. In fact, while Mr. Vickery did request an addition to the original letter, he did not tell the arborist what to write. Instead, the arborist explained that Mr. Vickery told him that he needed to include in his letter what effect a potential failure could have on neighboring homes. This does not make the letter "dubious" or "spurious" or show that it was prepared in a "manipulative manner." *Id.* at 19.

Moreover, while the dissent contends that it was undisputed that the tree was healthy, the Vickerys' arborist concluded that the tree was not "structurally sound" and that it put the occupants at risk of severe damage when the tree fails. The dissent makes much of the arborist's inability to pinpoint a precise time when the tree would fall. But section 163.045 does not require the arborist to identify exactly when the tree will fall, only that it presents a danger to persons or property, which the arborist addressed here.

Finally, we note that the Vickerys' arborist stated that construction on the lot prior to removal of the tree would create a situation where machinery could not be used to remove the tree. This would, he claimed, put his workers at high risk. The arborist stated that he was not sure he would even feel comfortable agreeing to remove the tree after development of the land. In other words, the opinion that the failure to remove the tree presented a danger was not based "solely on convenience and economic efficiency," as the dissent contends. *Id.* at 20.

Contrary to the dissent's contention, we have not made the statements and testimony of the Vickerys' arborist the "*centerpiece*" of this opinion, ignoring the fact that the trial judge rejected it. *Id.* at 22 n.8. In fact, the analysis sections above hold that section 163.045 did not permit the trial judge here to assess the credibility of the arborist's documentation. As such, we have not credited the arborist over the City's witnesses, given that the proceeding where their credibility determinations were made was improper.[3] The only reason that we even mention specifics of the arborist's statements is to dispute several factual assertions made in the dissent.

B

Regarding the application of the statute, the dissent agrees that a local government cannot require notice of removal if the statutory conditions have been met. However, in the event that the local government finds out about a proposed removal anyway, as occurred here, the dissent contends that the government is free to challenge the arborist's conclusions made in the documentation supporting the removal. We disagree. Such a rule implies that the government has the right to condition the removal on its approval, which is explicitly prohibited by the statute and contrary to its aim. Moreover, this proposal creates an unreasonable distinction between homeowners whose removal plans are known to the government and homeowners whose plans are kept quiet.

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[3] Although we have not credited the arborist's testimony over that of the City's witnesses, it is doubtful that we would have been required to defer to the trial judge's credibility determination when he did not have the authority to make such a determination in the first place. *See*, *e.g.*, *Cent. Waterworks, Inc. v. Town of Century*, 754 So. 2d 814, 816 (Fla. 1st DCA 2000) (noting that "[a] finding of fact by the trial court in a non-jury case will not be set aside on review. . . *unless it was induced by an erroneous view of the law*" (emphasis added) (quoting *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956))).

V

Because the temporary injunction is improper, the trial court erred in failing to dissolve it. Accordingly, we reverse and remand for dissolution.

B.L. THOMAS, J., concurs with opinion; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, J., concurring.

I concur in the majority's well-reasoned opinion. The majority opinion properly respects the legislative power to promulgate policies that protect homeowners and their families from the risk of death and serious personal injury from dangerous trees, provided that a certified arborist has documented that a tree "presents a danger to persons or property." § 163.045(1), Fla. Stat. (2019).

Here, the certified arborist provided documentation that the tree would fail due to "severe decay" and "rotting on the inside." The arborist confirmed that the tree presented a danger in an affidavit:

> I probed into the decayed area and it was approximately 24 inches in before I hit solid wood. In addition, fungus, visual decay and fruiting bodies [we]re all visible on the trunk. These are signs [that] the tree [was] rotting on the inside. It is my opinion this tree will fail when the decaying trunk can no longer support the weight of the two stems. The location of this tree puts the homes and the occupants at risk of *severe damage and safety concerns when this failure occurs*. . . .

> The tree is not structurally sound [because of] the cavity in the trunk, the included bark, and the decay from improper pruning. The tree has a deep cavity in the main trunk. The decay from pruning is in the main trunk. The included bark is in the main trunk.
>
> . . . *It is my opinion that the tree presents a danger to persons or property*.

(emphasis added).

As the majority opinion correctly holds, no judicial review has been authorized *anywhere* in the text of the statute. The text of the statute does not even allow a local government to require a residential-property owner to give *notice* before the owner proceeds to remove a documented-dangerous tree.

The dissenting opinion writes extensively about a hypothetical statute that would allow a judicial challenge to an arborist's documentation. But this hypothetical statute is a mirror opposite of the enacted statute which states *in toto*:

> (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 [§§] 403.9321–403.9333.

§ 163.045, Fla. Stat. (emphasis added).

And the title of that act is "[a]n act relating to *private property rights*[] . . . ." Ch. 2019-155, § 1, Laws of Fla. (emphasis added).

Nowhere does the title or body of the law *in any way* authorize a local government to force homeowners into court to defend the certified arborist's documentation that the tree presents a danger to people or property. The dissenting opinion's hypothetical statute has no basis in the actual text of the *enacted* statute. Thus, were we to agree with the dissent, the resulting majority opinion would be in violation of Florida's *strict* separation of powers. *See*, *e.g.*, *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1165 (Fla. 1st DCA 2017), *aff'd*, 262 So. 2d 167 (Fla. 2019). The Legislature and the Governor, not local governments and not the judiciary, have the power to enact substantive state law. *See* Art. III, § 1, Fla. Const. ("The legislative power of the state *shall be vested* in a legislature of the State of Florida[] . . . .") (emphasis added); *see also* Art. III, § 8(a), Fla. Const. ("Every bill passed by the legislature shall be presented to the governor for approval *and shall become law* if the governor approves and signs it[] . . . .") (emphasis added).

A search of the actual text of the enacted statute for any authorization of judicial review, a designated burden of persuasion, or any other evidence that the Legislature intended to allow what occurred here would be in vain.

In addition to the plain text of the statute, which nowhere authorizes judicial review, the majority's interpretation of section 163.045 is further supported by the statute's legislative history and the Legislature's staff analysis. While this Court need not consult these sources as the text is unambiguous, these sources further support the majority's opinion. *See White v. State*, 714 So. 2d. 440, 443 n.5 (Fla. 1998) ("While we recognize that staff analyses are not determinative of final legislative intent, they are, nevertheless, 'one touchstone of the collective legislative will.' " (quoting *Sun Bank/S. Fla., N.A. v. Baker*, 632 So. 2d 669, 671 (Fla. 4th DCA 1994))); *Am. Home Assurance Corp. v. Plaza Materials Corp.*, 908 So. 2d 360, 369 (Fla. 2005) ("In fact, since 1982 this Court has on numerous occasions looked to legislative history and staff analysis to discern legislative intent." (citations omitted)).

The final staff analysis for CS for HB 1159, now codified in section 163.045, Florida Statutes, states:

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate. *There may be a negative fiscal impact associated with prohibiting a local government from requiring a fee, permit, or fine for the maintenance or removal of trees in certain circumstances*. . . .

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There may be a *positive fiscal impact on residential property owners* who are *not required to obtain permits for tree maintenance in specified circumstances or replace removed trees*.

D. FISCAL COMMENTS:

None.

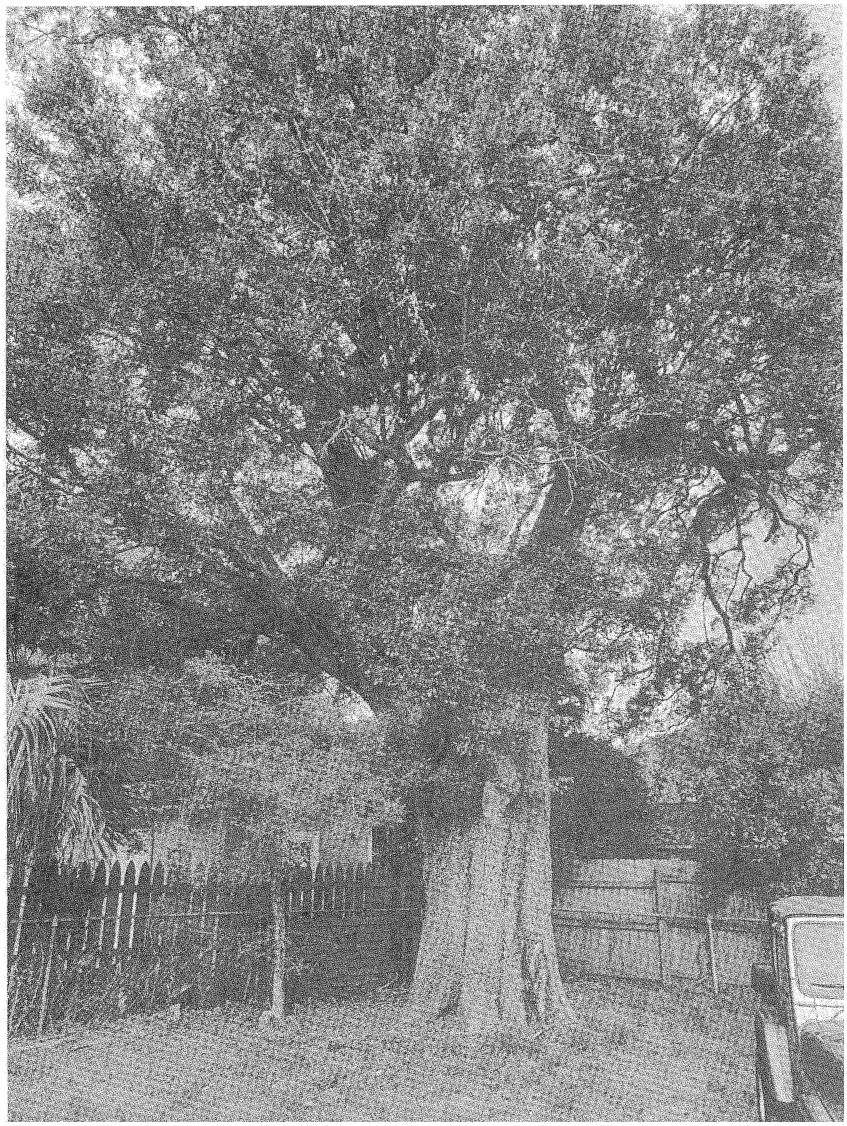
Fla. H.R. Comm. on State Affs., CS for HB 1159 (2019), Final Bill Analysis 7 (June 27, 2019) (emphasis added) https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1159z1.LFV.DOCX&DocumentType=Analysis&BillNumber=1159&Session=2019.

There could be no "positive fiscal impact" on the private sector, if the proposed legislation allowed local governments to force homeowners into court to defend the certified arborist's determination that a tree presented a danger to human life or residential property. The homeowners would have to expend considerable sums on legal fees in addition to the cost of hiring the certified arborist. And homeowners would be subject to the stress and time required to attend judicial proceedings, all to prevent a dangerous tree from killing or injuring the homeowners, their families, or other persons.

Thus, I concur with the majority opinion because it correctly interprets the plain and unambiguous statutory text.

MAKAR, J., dissenting.

Prior to 1845, when Territorial Florida was admitted to the Union, an acorn sprouted in what is now known as the Hill Preservation historic district near downtown Pensacola. Today, that acorn is a large Southern Live Oak (Quercus virginiana) estimated at over 200 years old and designated as a protected heritage tree—one whose trunk chest-level diameter exceeds thirty-four inches—under the City's municipal code. It has been dubbed the "Old Tree," justifiably due to its age and sixty-three-inch girth.



In its centuries-old life, the Old Tree has endured hurricanes, wars, and pestilence; by all accounts, it is healthy and vigorous with an estimated life span potentially reaching 300-350 years. Its ongoing survival, however, may have met its match in a controversial Florida statute adopted in 2019 that allows for the pruning, trimming, or removal of any tree on a residential property for which "documentation" establishes that it is "dangerous." This statute—dubbed herein as the "removal statute" (even though it includes trimming and pruning)—states that:

> 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.

§ 163.045(1), Fla. Stat. (2021). The removal statute, whose genesis partially relates to governmental delays in removing hurricane debris, also prevents local governments from requiring "a property owner to replant a tree that was pruned, trimmed, or removed in accordance with this section." *Id.* § 163.045(2). It does not apply to "the exercise of specifically delegated authority for mangrove protection" set out elsewhere in the statutes. *Id.* § 163.045(3).

At issue in this appeal is whether a temporary injunction preventing the removal of the Old Tree during the litigation on the merits of the City's lawsuit, which involves competing interpretations of the removal statute based on the idiosyncratic facts presented, is warranted.

I.

In the fall of 2018, Larry and Ellen Vickery sought a permit from the City of Pensacola to remove the Old Tree from their undeveloped residential lot, which they bought in 2013 thereby subjecting it to the municipal code's historic district standards.

Vickery[1] sought removal of the tree to clear the lot for a new home and, relatedly, to avoid the risk of removing the tree if it became a hazard after the home is built, as explained in a letter from Tri-State Tree Services, LLC, a company owned by certified arborist Wayne Williams. The letter opined that removing the Old Tree prior to development of the lot would "eliminate the use of equipment [that would] make removal risk extremely high" later. On the City's behalf, a horticultural agent inspected the tree and determined it was healthy and an arborist found it was in satisfactory condition and posed no safety concerns; in addition, the City determined that Vickery could tweak the identical building plans, essentially flip-flopping them mirror-like, without the tree's removal. A removal permit was thereby denied; Vickery did not contest or appeal the denial, rendering it a final decision.

Soon thereafter, the removal statute was enacted with an effective date of July 1, 2019.[2] This prompted an email to the City from Vickery's builder stating an intent to remove the tree. Attached was a revised letter from Williams, who added a sentence—requested by Vickery—to his original letter opining that the Old Tree's location "puts the [neighboring] homes and the occupants at risk of severe damage and safety" when a failure of a stem of the tree occurs (though he had no idea when that would be).

In response, the City immediately filed a lawsuit challenging the legality of the Old Tree's removal and seeking a declaration of its rights under the removal statute; it obtained an ex parte temporary injunction preventing the Old Tree's removal pending

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[1] Mr. Vickery acted for the couple during the administrative and litigation processes, so "Vickery" is used for convenience.

[2] The removal statute was adopted concurrently with a Property Owners Bill of Rights, which sets out a non-comprehensive list of existing property rights to be set out on property appraiser's websites, but which **"**does not create a civil cause of action." Ch. 2019-155, § 3, Laws of Fla. (codified at § 70.002, Fla. Stat.).

resolution of the merits of the litigation, which remains pending in the trial court.

Vickery sought to vacate the temporary injunction, relying on an affidavit from Williams that mirrored parts of his original and revised letters but again included modifications injected by Vickery's lawyer. At the hearing, Williams testified about the genesis of his letter, its dubious basis, and the manipulative manner in which it was prepared and revised.

Initially, Williams was asked to prepare an estimate to remove the tree without consideration of pruning or trimming ("we did not discuss keeping the tree") to facilitate developing the open lot and building a new home.[3] Yet his affidavit averred that he "was not and ha[d] never been retained . . . to remove the tree I was asked to inspect." The affidavit was prepared by Vickery's lawyer who made changes to wording and tone that were different from William's initial statements. In assessing the Old Tree at that time, Williams agreed its canopy was "vigorous and healthy" and that its leaves showed no signs of disease or poor condition and that, like every tree, its components may fail at some point.

The *initial* letter from Williams stated as follows (bracketed and in bold is a sentence that Vickery asked him to include after the removal statute was enacted):

> It is my opinion this tree will fail when the decaying trunk can no longer support the weight of the two stems.[4] **[The location of this tree puts the homes and the occupants at risk of severe damage and safety**

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[3] Williams testified that pruning and trimming can reduce the risk of a failure of a tree's component, noting that he and other tree companies "make their living by not removing a tree, but by pruning it and cycling it, and coming back and back and back. So you actually make more money in the long run by pruning a tree."

[4] In a slightly ironic twist, the letter noted that a "house fire caused one of the [Old Tree's] three main stems to be removed." In other words, a fire at a neighboring house posed a danger to the Old Tree.

> **when this failure occurs.]** I suggest removal of the tree prior to land development which will eliminate the use of equipment and make removal risk extremely high.

The first sentence is a truism, that the Old Tree—like all others—"will fail when the decaying trunk can no longer support the weight of the two stems." But Williams had no idea when that might happen ("Q: And you have no idea when [failure] will be, do you? A: No, ma'am, I do not."). Asked about a timeframe for the Old Tree to have a stem failure, Williams testified that "it could be in my lifetime. It could be today. It could be 100 years from now. Who knows." And he had no basis for saying whether the Old Tree might pose a probable or imminent risk of failure ("Q: [Failure] is not probable, and it is not imminent. Correct? A: *I guess only God knows that*." (emphasis added)).[5] As such, no evidence was presented that a failure of any stem/component of the Old Tree was probable, imminent, or irremediable.

The third sentence, contained in the original letter and slightly revised in the affidavit,[6] related solely to the convenience and economic efficiency of removing the Old Tree to facilitate the planned development; it had nothing to do with the Old Tree's dangerousness, as Williams explained ("Q: And in terms of suggesting removal of the tree prior to land development, that

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[5] God's predictive power of when the Old Tree will tumble down dovetails well with Joyce Kilmer's famous poem, which acknowledges God's generative power in creating trees: "Poems are made by fools like me, But only God can make a tree." *See* Stephen Werner*, The Tragedy of Joyce Kilmer, the Catholic poet killed in World War I*, America: The Jesuit Review (July 27, 2018), https://www.americamagazine.org/arts-culture/2018/07/27/tragedy-joyce-kilmer-catholic-poet-killed-world-war-i.

[6] The affidavit broke the sentence in two, stating "I suggest removal of the tree prior to land development. After home construction, removal would require specialized equipment and the removal risk would be extremely high and practically impossible."

would be a convenience and cost reduction approach. Right? A: Correct."). In addition, Williams never reviewed anything concerning the actual plans for the new house. Instead, he was asked by Vickery to revise his letter to include what would happen if—not when—the Old Tree were to fall on the "targets," i.e., the neighboring homes:

> Q: And did Mr. Vickery ask you to write it up that way?
> A: I was asked to add that in addition to, if the tree fell, what were the targets.
> Q: Did he tell you why he wanted you to add that to the letter?
> A: At that point of our conversation, I was unaware of the new law, or anything that was going on.
> Q: Do you remember that you later found out that is why he asked you to do it?
> A: I mean, I proverbially stepped into a mess that I wish I wasn't phone-called for.

When asked about the addition of a sentence by Vickery lawyer's saying the "tree is not structurally sound," Williams disclaimed they were his words ("I don't know about structurally sound . . . this is not the way I worded my letter.") and continued to maintain that the tree is healthy ("Q: But you still maintain the tree is healthy? A: I do. Q: And you don't know when it will ultimately suffer a failure? A: No ma'am.").

After hearing testimony from the City and its witnesses, including a certified arborist (Jerry Jarrett) who used industry standards in concluding the Old Tree was healthy/vibrant and presented no danger to people or property, the trial court heard oral argument on the merits at a later date and ultimately denied Vickery's request to vacate the temporary injunction in a detailed fifteen-page order containing comprehensive factual findings and detailed legal analysis interpreting the meaning of the removal

statute (and, of course, nicknaming the tree at issue the "Old Tree.").[7]

At the outset, and of critical importance, the trial court specifically concluded that the Vickery's arborist opinion lacked credibility and rejected it entirely:

> Wayne Williams, the arborist hired by [Vickery]. Mr. Williams confirmed he initially rendered an opinion that the Old Tree *was not dangerous*, and that *he only changed his opinion when requested to do so [by Vickery]*. Mr. Williams was also candid that he did not utilize industry standards for determining whether the Old Tree is dangerous. While Mr. Williams presented himself as a tree expert who is ISA certified, *his opinion in the instant matter lacks credibility due to Mr. Williams' failure to utilize industry standards, and his tacit admission to changing his original opinion to suit the whims of [Vickery].*

(Emphases added). This failure and the lack of credibility led the trial court to conclude that the "documentation" submitted by Vickery was dubious ("Here, the evidence at the injunction hearing raised serious doubts as to the accuracy and credibility of the documentation that [Vickery] submitted to the City."). The trial court thereby rejected Williams' opinion and affidavit entirely, concluding that "Jerry Jarrett provided the *only* credible expert opinion. In her opinion, the Old Tree is not a danger." (Emphasis added).[8]

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[7] The trial court noted that "the parties are in apparent agreement that the Old Tree falls under the definition of 'Heritage Tree,' as that term is defined" in the City's code.

[8] The majority fails to mention that the trial judge—who heard the testimony and assessed the demeanor of all witnesses—specifically concluded that Vickery's arborist lacked credibility and totally rejected his opinion; instead, the *centerpiece* of the majority's opinion is its reliance on and multiple citations to the discredited arborist's dubious assertions—despite the trial court having made specific factual findings rejecting them. Doing so is

In conjunction with these findings, the trial court ruled the City had presented a prima facie case of the four elements necessary for injunctive relief:

> (a) *Irreparable harm* (because the destruction of a "200-year-old oak tree, 63 inches in diameter, cannot be replaced, and its loss is irreparable[]");
> (b) *Inadequate remedy at law* ("[M]oney damages alone cannot replace a unique 200-year-old tree which is likely much older than the State of Florida itself.");
> (c) *Likelihood of success* ("The Court does not find [Vickery's] interpretation of section 163.045(1), Florida Statutes to be credible. Specifically, the Court finds that the Legislature has not preempted local governments from challenging the documentation determining a tree is a danger if the documentation and opinion are not credible."); and

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contrary to basic principles of appellate adjudication that do not allow an appellate court to give credence to opinions of expert witnesses that a trial court has specifically discredited as lacking accuracy and believability. *See* Philip J. Padovano, 2 *Fla. Prac., Appellate Practice* § 19:6 (2021 ed.) ("Florida courts have long recognized that questions relating to the credibility of witnesses are best resolved as an aspect of the fact-finding process, and that the decision of a trier of fact on such issues should not be reversed on appeal. A judge or jury may choose to believe one witness and discredit contrary testimony of a host of others, and the appellate court may not reevaluate that decision." (citing, for example, *Tonnelier Const. Grp., Inc. v. Shema*, 48 So. 3d 163, 166 (Fla. 1st DCA 2010) (footnote omitted))); *see also Durousseau v. State*, 55 So. 3d 543, 562 (Fla. 2010) ("As a general rule, the trial court is in the best position to evaluate the credibility of witnesses, and appellate courts are obligated to give great deference to the findings of the trial court."). But it makes the majority's position clear: documentation from an "expert"—no matter how unbelievable, far-fetched, or baseless—satisfies the removal statute, which cannot be what the Legislature intended.

(d) *Public interest* ("The injunction will serve the public interest, as the tree ordinances in place were enacted by local government officials elected by the voters of the City, and are the reflection of the public interest of the residents of Pensacola.").

For these reasons, the trial court denied Vickery's motion to dissolve the temporary injunction. Vickery appealed the non-final order, arguing that the trial court erred in its statutory analysis because the removal statute allows a residential property owner to remove any tree without local government involvement by simply having a "document" from a certified arborist.

II.

A.

As a preliminary matter, a municipality has standing to seek declaratory relief about the scope of its powers, provided a bona fide, actual need is shown, which is clearly the situation in this case. *Santa Rosa Cnty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1192 (Fla. 1995) (quoting *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991)) ("The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations. Parties who seek declaratory relief must show that 'there is a bona fide, actual, present practical need for the declaration[].'").

Such a declaration must be based on present facts and that "some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts" for relief to be available. *Santa Rosa Cnty.,* 661 So. 2d at 1192 (quoting *Martinez,* 582 So. 2d at 1170); *see also* § 86.011, Fla. Stat. (2021) (trial courts "have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. . . . The court may render declaratory judgments on the existence, or nonexistence: . . . Of any immunity, power, privilege, or right" or of any facts dependent thereon).

The City's lawsuit meets these standards by seeking a declaration about its municipal powers in light of the newly enacted removal statute, which creates a limited "dangerous tree" exception from specified aspects of local regulations. Contrary to Vickery's legal position, the removal statute's exemption was not intended to displace or nullify local regulation of trees entirely. To the contrary, local governments continue to have the full extent of their regulatory authority over all trees in their jurisdictions subject to the "documented danger" exception that the removal statute created. A local government's regulatory code continues to apply to all trees within its jurisdiction; it is only when a residential property owner presents documentation of danger in compliance with the removal statute's exemption that the local government's authority is curtailed. Stated differently, a local government retains its full regulatory authority over protected trees *unless* a residential property owner relies upon the exemption and fulfills the removal statute's requirement of documented danger.

For example, if a residential property owner does not present any documentation of danger as specified in the statute, or simply sought removal of non-dangerous trees, the local government retains its full range of regulatory powers over its tree canopy, including imposing requirements such as "notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree." § 163.045(1), Fla. Stat. Absent documentation of danger required by the removal statute, the local government's regulations regarding tree protection remain unchanged and continue in force.

For this reason, the City justifiably applied its regulatory code to deny Vickery's initial request to remove the Old Tree, which occurred before the removal statute's existence. No claim is made that the City's denial of the initial request was improper; indeed, Vickery didn't appeal the denial, which became final absent challenge. Likewise, the City would have been justified in applying its regulatory code to a subsequent request to remove the Old Tree, and denying that request as well, had Vickery not put the City on notice of his intent to invoke the removal statute; the City's code provisions would have prevailed in such a case.

Once a residential property owner puts a local government on notice of the intent to invoke the exemption from the removal statute, the local government is placed in a defensive posture and is thereby entitled to challenge apparent deficiencies in the "documentation" upon which a property owner relies in claiming the statutory exception. That's because the local government's regulatory code continues to apply until it is established that the statutory exemption of documented danger is met. At a minimum, a city may require proof that the removal statute's pre-requisites have been met (how else will it know whether it can apply its own code to a particular tree?) and it may judicially challenge apparent deficiencies in the documentation upon which a property owner relies to except itself from local regulation (otherwise the Legislature's requirement of documentation from a certified arborist/licensed landscape architect would be rendered meaningless).

The Legislature could have—but didn't—use language in the removal statute that creates an *unreviewable* exemption; instead, it used conditional and qualified language premised upon acquiring documentation of danger from a certified or licensed professional. Strong parallels exist with this Court's decision in *Department of Health v. Curry*, 722 So. 2d 874 (Fla. 1st DCA 1998), which noted the significant differences in the statutory language used in the religious and medical exemptions for student immunizations. The religious exemption stated that the immunization requirements "shall not apply" if the parent/guardian "of the child *objects in writing that the administration of immunizing agents conflicts with his or her religious tenets or practices*." *Id.* at 876 (emphasis added). In sharp contrast, the medical exemption required that a *licensed physician* certify that a "child should be permanently exempt from the required immunization for medical reasons stated in writing, *based upon valid clinical reasoning or evidence*, demonstrating the need for the permanent exemption" from immunization. *Id.* (emphasis added).[9]

[9] The religious and medical exemptions were in sections 232.0032(4)(a) and (5)(b), Florida Statutes, but are now contained in sections 1003.22(5)(a) and (5)(b), following a major legislative

This Court rejected the Department's position that it could test the bona fides of Curry's unilateral religious objection, pointing to the unqualified language of the religious exemption and comparing it to the highly qualified language of the medical exemption. *Id.* at 878. In contrasting the differences in the language, the Court noted that "the legislature might have required a certificate from a cleric that immunization would conflict with the parent's or guardian's religious beliefs, much as it did in [the medical exemptions], where it required a certificate from a physician as a condition precedent to the exemptions provided." *Id.* But it did not. Moreover, the Court noted that:

> [a]t a minimum, one might expect that the legislature would have required a parent or guardian to swear or affirm that the objection was bona fide. However, the legislature did none of these things. Instead, it used *unqualified* language which, when given its commonly understood meaning, does not appear to permit the interpretation urged by the Department.

Id. (emphasis added). By parallel reasoning, the Legislature didn't use sparse, unqualified language in the removal statute like that used in the religious exception; instead, it used conditional and highly qualified language akin to the medical exemptions for student immunizations, which posits that a licensed professional must certify the need for an exemption. The natural conclusion is that the removal statute's language does not give residential property owners a "free pass" to remove trees; instead, testing the bona fides of the documentation of danger by a certified arborist is fair game. The removal statute does not say that a residential property owner can merely offer up his personal "objection in writing" to the applicability of the City's tree code; instead, the exemption is conditioned on the requirement of documented proof of danger from a certified arborist.

As to state preemption of the City's code, the trial court noted that the removal statute's language does not preclude the City

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re-write of the education code in 2002. *See* Chapter 2002-387, § 117, Laws of Fla.

from challenging the validity of documentation. No express pre-emption exists; the statute doesn't say it preempts anything and merely creates an exception from a broad list of local regulatory controls. *See Masone v. City of Aventura*, 147 So. 3d 492, 495 (Fla. 2014). The Legislature could have written a different statute, one pre-empting *all* local government regulations (e.g., "No local government regulation shall apply" or "All local regulations are preempted"), but it created something different. Implied pre-emption doesn't apply because state regulation of the tree canopy is not so extensive that it leaves no room for local regulation. *See id.* And no direct conflict exists between the removal statute and local government regulation *if* the statute's exemption requirements are met, i.e., documentation of danger by a designated professional is presented. *See id.* As the trial court phrased it, the "Legislature has not preempted local governments from challenging the documentation determining a tree is a danger if the documentation and opinion are not credible." Importantly, no *state* powers are affected in any way because the removal statute merely creates an exemption from specified *local* provisions if the statute's documentation standard is met.

As Vickery's notification to the City suggests, a commonsense approach is for property owners to provide the City with the documentation that purports to exempt them from the local regulatory process for tree pruning/trimming/removal. At that point, the City may concur in the documentation and dispense with the regulatory requirements the removal statute forbids. But in cases such as this one, where the "documentation" is of facially dubious reliability, a local government may seek a judicial declaration as to the adequacy of the "documentation" itself.[10]

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[10] A potential consequence of allowing judicial challenge to questionable "documentation" is that such proceedings may become protracted and burdensome, which may delay the pruning, trimming, or removal of a truly dangerous tree. A counterpoint is that such proceedings further legislative intent by ensuring that non-dangerous trees remain protected; moreover, proceedings such as this one are likely to be infrequent, typically occurring only when the "documentation" is highly questionable and the stakes are high, such as the loss of a heritage tree, thereby ensuring that only truly dangerous trees can be removed as the Legislature

Vickery argues, however, that *no* judicial review is permitted at all; he posits that the Legislature "set circumstances where a [residential] property owner could act without the need for municipal permission." In his view, he has no obligation to disclose documentation to anyone, nor may it be subject to any judicial scrutiny whatsoever. This extreme position, obviously, would embolden the removal of trees—dangerous or not—based solely on a residential property owner's whim; if no one can obtain or review the documentation authorizing the exception, why require it at all? As the City's attorney argued in the trial court, we "know that the Legislature did not intend to authorize the clear-cutting of the State of Florida." That may be a bit hyperbolic, but it is implausible—and an unreasonable reading of the removal statute—to believe the Legislature intended that residential property owners have an unfettered, unilateral right to furtively remove portions of the tree canopy based on documents that are not subject to *any* disclosure, review, or challenge.

To put it in the context of this case, is it reasonable to believe that the Legislature would allow healthy centuries-old heritage trees, protected by long-standing and valid local laws, to be destroyed based on the spurious "documentation" in this case? Of course not. The better view is that although the Legislature intended to make it much easier for property owners to remove demonstrably unsafe trees, it did not intend to preclude a minimal level of scrutiny to ensure that statutory requirements are met.[11]

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intended. Of course, the extent of litigation in this case is explained, in part, because it involves issues of first impression.

[11] Of note, the Department argued in *Curry* that disallowing review of a religious exemption's bona fides "would lead to unreasonable and absurd results because 'any parent [could] get a religious exemption for entirely bogus, fraudulent, or otherwise non-religious reasons,' thereby defeating the purpose of the statute—to protect the health and welfare of school children." 722 So. 2d at 878. This Court concluded, however, that although it "is true that the intent we have attributed to the legislature will permit parents and guardians to obtain exemptions based upon untruthful representations that immunization would conflict with

The City was thereby justified in seeking declaratory relief and the imposition of a temporary injunction pending a decision on the merits. The limited inquiry is whether the removal statute's requirements were met such that the City's regulatory authority became curtailed. If competent substantial evidence was produced that documentation accords with the removal statute, the exception is met and the City must stand down to that extent specified in the statute; if such evidence is lacking, the exemption is inapplicable.

B.

Next is a question of statutory interpretation: what did the Legislature mean in requiring "*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"? §163.045(1), Fla. Stat. (emphases added). Vickery argues that this language, including the highlighted words, is clear and unambiguous, rendering only one legitimate result, which—in his view—precludes the City and the judicial system from any involvement in the matter. He read the statute to say that his procurement of a document from a certified arborist that says the Old Tree is dangerous ends the inquiry; the statute's requirements have been met, period, thereby nullifying any attempt to obtain or verify the legitimacy of purported documentation.

But such a cramped and literalistic reading of the statute ignores a basic tenet of statutory interpretation, which is that a text must be given its *fair reading* by taking account of its wording, context, and purpose. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012) ("The interpretive approach we endorse is that of the 'fair reading': determining the

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their religious beliefs," the "legislature might well have considered that a relatively minor concern compared to the danger that giving to the Department the authority to determine the bona fides of such objections would pose to the free exercise of religion guaranteed by both the federal and state constitutions." *Id.*

application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."). Purpose and context matter. *Id.* (explaining that the fair reading approach "requires an ability to comprehend the *purpose* of the text, which is a vital part of its context[]"). Each of the highlighted words above in the removal statute—read in isolation, literally, and out of context—can lead to a patently unreasonable result: a residential property owner can unilaterally remove a healthy tree that *presents* no current danger by merely securing a *document* that posits speculative *future* danger that is *inconsistent* with the professional standards of certified arborists. Such a reading, obviously, nullifies the purpose and meaning of the words the Legislature chose.

First off, the trial court's invalidation of Vickery's "documentation" was based on statutory analysis that hewed closely to traditional norms, citing well-worn principles of statutory construction. In doing so, the trial court made a critical observation: "In a vacuum, the words 'danger' and 'documentation' are arguably vague and ambiguous because they are susceptible to innumerable interpretations."[12] That's eminently correct as to

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[12] Everyone agrees that the Old Tree is a "tree" for purposes of the removal statute, but even the word "tree" can be viewed as ambiguous in its scope; those in the industry struggle to agree upon a clear definition of what distinguishes it from a shrub, bush, or vine. *See, e.g.*, Kathy Warner, *Q: What is the difference between a tree and a shrub?*, UF IFAS: Blogs (July 19, 2017), http://blogs.ifas.ufl.edu/nassauco/2017/07/19/q-difference-tree-shrub/; *see also* Peter Wohlleben, *The Hidden Life of Trees* 79–84 (2016) (chapter entitled *Tree or Not Tree*) (noting that centuries old tree stumps remain alive and that tundra dwarf trees are often "trampled to death by travelers who don't even know they are there[]"); Vanessa Richins Myers, *What Is the Difference Between a Tree and a Shrub?*, The Spruce (updated Oct. 20, 2021), https://www.thespruce.com/the-difference-between-trees-and-shrubs-3269804 (noting that "[m]any people think, for example, that so-called banana trees are trees, but in fact, they are considered the world's largest herb[]").

"danger" because it takes little imagination to conjure up—whether from one's own mind or a thick dictionary—ways in which a tree might be potentially dangerous. As the trial court noted:

> All trees are potentially dangerous, and can: (1) cause serious allergies; (2) attract rodents (squirrels); (3) attract bats (who have rabies); (4) act as lightning rods; (5) drop limbs and pine cones on people and property, causing injury; (6) damage property when sap drips, or leaves fall and stain with their tannins; (7) grow root systems that damage foundations, driveways, and roads; (8) have roots that act as trip hazards; (9) fall over when a strong wind blows, damaging property or killing people and pets; (10) catch on fire; (11) be used to fashion arrows, clubs, and other weapons; (12) harbor ticks, roaches, spiders, and other critters that cause disease; (13) cast large shadows that prevent healthy sunlight from making it through to the ground; (14) harbor raccoons and other larger animals that can attack people; and (15) they attract termites that can destroy the infrastructure of any house.

All trees are dangerous to some degree; as the City's attorney argued, you "can slip on an acorn, or a limb, or be below a coconut tree and have a coconut hit your head. Does that mean every tree should be cut down?" The answer to this rhetorical question is no, but the Legislature clearly wanted genuinely dangerous trees to be subject to pruning, trimming, or even removal, if statutory requirements are met.

Remember that the statute requires documentation that a "tree *presents* a danger to persons or property," which signifies a legislative intent that a *present* danger must be shown versus a potential risk of danger at some unspecified future date. The statute doesn't say that a tree can be removed simply because it presents "*a risk* of danger," "*potential* danger," or "*future* danger"—doing so would open up the broad panoply of imponderables the trial judge and City attorney conjured up and thereby render the statute unreasonably overbroad. In addition, *risk* is the term used in the industry; risk can be low to high, depending on the probability of the risk and its potential harm. In contrast, the statute uses the word *danger*, which signifies a peril or hazard

associated with a high risk of current endangerment. The statute doesn't say the tree is a hazard, a risk, a threat, a peril, or the like; it says the tree must be documented as truly presenting a danger to justify its pruning, trimming, or removal.

As such, the most reasonable reading of the removal statute requires a showing of *current* danger, not a potential risk of danger at some speculative time in the future. Saying a tree is dangerous and can be removed, simply because one or more limbs might fall in the future or that it might be more difficult or dangerous to remove the tree in the future, is not what the statute envisions.

Next, the removal statute uses an important noun: *documentation*. It did not use a more generic noun, *document*. That's because documentation is more than a document. Documentation implies meaningful proof of what is asserted. Saying it was *documented* that a roof leak exists implies something more than a barebones *document* making such an assertion; documentation requires *proof*. *See Document*, *Black's Law Dictionary* (8th ed. 2004) (defining 'document' as "[t]o support with records, instruments, or other evidentiary authorities[]"). The trial judge made this point via hypotheticals, saying:

> Could somebody simply share a beer with a licensed arborist who then scribbles on a bar napkin that a certain tree is dangerous because 'a lot of people are allergic to oak tree pollen'? Or maybe one beer later scribbles that the tree is dangerous because "trees attract lightening [sic] and lightening [sic] can cause injuries"? Or after several more cocktails scribbles that a tree is dangerous because "the tree attracts birds, and for somebody with Ornithophobia (the fear of birds), such a bird magnet would lead to traumatic results."

The Legislature's use of the noun documentation—rather than document—signifies that a document with speculative or insupportable assertions is inadequate; a document must contain "records, instruments, or other evidentiary authorities" that support its conclusions to be legitimate.

This understanding of "documentation" is the most reasonable. Keep in mind that the statute requires "documentation *from an arborist certified by the International Society of Arboriculture*" to meet the statutory exception. By specifying documentation from a certified arborist, the Legislature by necessary implication requires that the documentation itself be produced according to the industry standards by which certified arborists govern their conduct. *See Curry*, 722 So. 2d at 878 (noting that student immunization statute requires "certificate from a physician as a condition precedent to the exemptions provided[]"). Certified arborists operate within the standards of their profession, which use a matrix of factors that injects a degree of objectivity in the risk analysis associated with trees; when a certified arborist documents the degree of risk a tree poses, the documentation is done within those standards. It makes no sense otherwise; the phrase "documentation from an arborist certified" by the industry's standard-bearer is rendered meaningless if fabricated whims and bar napkin conjectures make the cut. The far more reasonable conclusion is that the Legislature intended legitimate documentation that meets professional standards from certified arborists who are independent and not swayed by the whims of their clients.

III.

The trial judge reasonably concluded that the statutory requirement of "documentation" from a certified arborist that a "tree presents a danger to persons or property" was not met in this case. To the contrary, the trial judge—who reviewed the evidence and observed the live testimony—found that the arborist lacked credibility and that his affidavit and letters were inconsistent with industry standards, didn't hew to the statute's requirement of present danger, and had no better predictive power of the Old Tree's purported dangerousness than a Magic 8 Ball. The arborist opined initially that the Old Tree was healthy and not dangerous only to change his opinion when Vickery asked him to do so, which simply catered to the "whims" of Vickery. This can't be the type of "documentation" of "danger" the Legislature envisioned. Under these circumstances, the Legislature couldn't have intended that a healthy, non-dangerous heritage tree—one older than the State of Florida itself—be destroyed based on a bogus report. Reading the

statute to permit such an unintended and absurd result defies what the Judge Learned Hand said long ago: "We do not forget that courts must not make law, but only declare it; but there is no vade mecum to guide us between *a sterile literalism which loses sight of the forest for the trees*, and a proper scruple against imputing meanings for which the words give no warrant."[13]

Paul Bailey of Welton Law Firm, LLC, Crestview and Kim Anthony Skievaski of Kim Anthony Skievaski, P.A., Pensacola, for Appellants.

Heather F. Lindsay, Assistant City Attorney, Pensacola, for Appellee.

[13] *New York Tr. Co. v. Comm'r of Internal Revenue*, 68 F.2d 19, 20 (2d Cir. 1933) (emphasis added), *aff'd sub nom. Helvering v. New York Tr. Co.*, 292 U.S. 455 (1934).