

# **Model Native Plant Landscape Ordinance Handbook**



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## I. OVERVIEW

Appropriate native vegetation is defined as vegetation found in the natural community that is suited to the soil, topography, and hydrology of a particular site. Current landscape laws and regulations in Florida fail to adequately protect and encourage the use of native plant species, leading to landscape that is damaging to the natural environment. The Florida Native Plant Society (FNPS) presents these model landscape guidelines and landscape ordinance suggestions that require the use of only appropriate native vegetation in all public landscaped areas and minimum percentages of appropriate native vegetation for private, newly landscaped areas.

Key issues that threaten Florida's native plant populations that warrant analyzing regulatory and incentive based policies are the elimination of harmful, Invasive plant species and to provide much needed protection for threatened and endangered native species.

Local governments can derive substantial benefits from promoting and protecting native vegetation that is appropriate to the area. "Appropriate native vegetation" is vegetation found in the natural community that is suited to the soil, topography, and hydrology of a particular site.<sup>1</sup> The use of appropriate native vegetation in local landscaping can help achieve water conservation goals, preserve habitat in urban areas, greatly reduce maintenance costs for landscaping, and protect property values.

This model ordinance is intended to be used by local governments that wish to adopt or amend their existing landscape ordinance to encourage or require the use of appropriate native vegetation in all landscaped areas. This document provides sample language that can be adopted by a local government that wants to promote these goals and acquire the benefits of appropriate native landscaping. The ordinance guidelines have been annotated to provide background information and rationales behind the key provisions. These annotations, noted in *italics*, serve to explain the importance of each provision and are not official language that would be adopted as a part of the landscape ordinance.

The model ordinance is designed to be used by local governments to improve the landscape principles that guide landscaping of all new developments. Local governments may decide to adopt this ordinance in whole or only certain provisions, as others may be covered by existing regulations. The annotations also include alternative drafting options that provide flexibility for a community to adopt a landscape ordinance that promotes appropriate native vegetation and meets its particular needs.

The goal of the model ordinance is to provide a comprehensive plan to promote appropriate native vegetation and best landscaping practices. It therefore includes provisions to address issues such as education about native plants, including a requirement for a landscape manual that delineates best landscaping practices using native plants.

In addition, this model ordinance provides a framework against which existing ordinance provisions can be questioned, including those which allow the expansive use of Invasive plants that are detrimental to the environment. It includes provisions that prohibit these harmful plants

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<sup>1</sup> Pais, D. 1994. Toward a Working Definition of "Florida Native Plant" *The Palmetto*, 14(3), 17. Available at <http://www.fnps.org/palmetto/v14i3p17pais.pdf> (July 6, 2002).

as well as establishes protection methods for endangered and threatened plants that are often weakly protected or ignored in existing landscape codes.

Many city and county governments throughout Florida have already addressed the preservation and planting of Florida native plants in their communities. The following is a listing of those municipalities that have taken a pro-active approach:

Brevard - 50% Native vegetation required

- Satisfaction of the landscaping standards shall be achieved through the preservation of existing native vegetation to the Greatest Extent Feasible. When the minimum landscaping standards cannot be achieved through preservation, plantings of new vegetation shall be required to meet the standards.

Dade County - 30% Native vegetation required

Indian River County - 50% Native vegetation required

- Minimum number of species diversity required
- Wide planted buffers between commercial properties & along roadways

Islamorada - 75% Native vegetation required

- The director of planning and development services may reduce the height requirement 50 percent for rare native plant species.

Key Colony Beach - 50% Native vegetation or xeriscape vegetation required

Key West - 70% Native vegetation required

- The natural landscape of the site shall be preserved as much as possible
- Prior to the issuance of a certificate of occupancy for a new development, the owner/applicant shall remove all nuisance and Invasive vegetation from the site for which a development order or permit is requested.
- The clearing of native vegetation sufficient to create the required landscape screening or portion thereof is prohibited without approval from the city
- Credit shall be granted for trees which are preserved on a site and which meet the tree requirements of any landscaping section of this division

Lee County - 75% Native vegetation required for tree species; 50% Native vegetation required for shrub and groundcover species

Manatee County - 30% Native vegetation required

- Residential Street Trees: Existing native trees should be used to fulfill ordinance requirements when feasible
- Preserve native plant communities is encouraged and required as appropriate
- Right plant in the right place for soil conditions
- Plantings in required landscape areas shall be with plant species that are native and/or naturalized to Florida. All required landscape areas shall retain existing native trees, shrubs, groundcover and grasses to the greatest extent

possible. Native plant species typical to the vegetative communities found in non-coastal Manatee County shall be encouraged.

Marathon - 70% Native vegetation required

Martin County – 50% Native vegetation required

Monroe County – 70% Native vegetation required

Miami - 30% Native vegetation required

- The right plant in the right place for dry and wet soils
- Reduce negative impact of exotic pest plant species
- Prohibit use of noxious exotic plants which invade native plant communities
- Maximum size of turfgrass lawn area
- One native plant per square foot in retention/detention areas

Ocoee – 40% Native tree required; 40% Native shrubs and groundcover required.

Pasco County – 30% Native vegetation required.

Polk County - Recommends native vegetation and includes native vegetation on the recommended plant list

St. Lucie County - 50% Native vegetation or waterwise landscape required

- Existing, native trees, vegetation and other natural features shall be preserved to the extent practicable.
- Residential: 100% of the planted trees shall consist of native species or waterwise vegetation
- Agriculture/horticulture buildings: 100% of the planted trees shall consist of native species
- Large scale residential and commercial: A minimum of 15% of any existing native upland habitat on the property must be preserved in its natural condition as part of the required 35 percent common open space. For each acre of preserved native habitat above the required minimum 15 percent that is preserved in its original state, credit shall be given at a rate of 150 percent per acre towards the remaining common open space requirement.
- Planned Unit Developments: A minimum of 50% of any existing native upland habitat on the property must be preserved in its natural condition as part of the required open space. For each acre of preserved native habitat above the required minimum 50% that is preserved in its original state, credit shall be given at a rate of 150% per acre towards the remaining open space requirement.
- The preservation of existing native vegetation shall be required where the location of said vegetation is not in conflict with the proposed building or parking areas.

- The County may require that reasonable changes be made to any site plan or application for building permit for the purpose of preserving or protecting any special or unique existing tree(s) or native habitat.
- 100% of required lawn areas shall consist of water-wise turfgrasses listed in Section 7.09.04(L)(2)(a).
- If the site's proposed landscape plan preserves all or a substantial part of the existing native vegetation found on the property, then the requirements of this landscape section may be presumed to be satisfied. The county shall determine if the quality and quantity of the preserved native vegetation meets the intent of this Code. Preservation of existing native upland plant communities on the site may substitute for all landscape requirements if:
  1. The existing native plant communities shall be viable and in good condition and include canopy, understory, and ground cover.
  2. The existing native plant community/communities is protected by a conservation easement or other legally enforceable preservation mechanism.
  3. The execution of the site plan will not threaten the viability of the existing native plant community.
  4. The plant community to be preserved shall be at least one-half (1/2) acre in size, except that micro-communities totaling at least one-half (1/2) acre may be preserved providing that each micro-community is at least ten (10) feet in width and contains at least one hundred (100) square feet.
  5. A management plan is submitted to show how the viability of the preserved communities will be maintained without the use of heavy equipment.

## II. AUTHORITY TO ENACT LANDSCAPE ORDINANCES

Local governments may adopt ordinances in the interests of public health, safety, and welfare, as long as their powers are exercised for a valid public purpose<sup>2</sup> and the means chosen to serve the purpose are not arbitrary or unreasonable.<sup>3</sup> The Municipal Home Rule Powers Act implements home rule provisions of the Florida Constitution that provide that counties and municipalities have governmental, corporate, and proprietary powers to enable them to conduct government, perform governmental functions, and render governmental services, except when expressly prohibited by law.<sup>4</sup> Article VIII of the Florida Constitution grants counties and municipalities the power to enact legislation.<sup>5</sup> Procedures for the adoption of ordinances and resolutions are provided by section 166.041 of the Florida Statutes. A county or municipality may also, under its home rule powers, proscribe penalties for violation of its ordinances.<sup>6</sup> Any prior ordinances are repealed to the extent that they are in conflict with a subsequent adopted ordinance.<sup>7</sup>

Landscape ordinances nationwide have been upheld under the power local governments have to apply restrictions to private land in the interest of public health, safety, and welfare. The power of cities to apply restrictions to the use of private land was upheld in 1926 in *Euclid v. Ambler Realty*,<sup>8</sup> which is the basis of modern zoning laws. The Supreme Court in *Euclid* determined that “every community has the right to determine its own character and the nature of development within.” This authority validated in *Euclid* was successfully applied to planting requirements for the first time in 1949 in *Ayres v. City Council of Los Angeles*.<sup>9</sup> Furthermore, in 1954, the Supreme Court upheld a local government’s ability to require plantings as a means of beautification in *Berman v. Parker*,<sup>10</sup> stating that:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced, as well as carefully patrolled.<sup>11</sup>

Landscape ordinances have also been consistently upheld by the Florida courts.<sup>12</sup> Thus, a local community can enact an ordinance, such as this model landscape ordinance, in the interests of public health, safety, and welfare. In addition, in sections 125.568 (Counties) and 166.048

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<sup>2</sup> *State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978).

<sup>3</sup> *Carter v. Town of Palm Beach*, 327 So. 2d 130 (Fla. 1970).

<sup>4</sup> FLA. STAT. § 166.021(1) (2004).

<sup>5</sup> Municipalities pursuant to Section 2(b), Article VIII, Fla. Const.; Counties pursuant to Section (1)(f) [non-charter counties] and section (1)(g) [charter counties], Article VIII, Fla. Const.

<sup>6</sup> *Thomas v. State*, 583 So. 2d 336 (1991), approved 614 So.2d 468.; Op. Atty. Gen. No.89-24, April 21,1989.

<sup>7</sup> *Greeley v. City of Jacksonville*, 17 Fla. 174 (1879).

<sup>8</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>9</sup> *Ayres v. City of Los Angeles*, 207 P.2d 1 (1949).

<sup>10</sup> *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>11</sup> *Id.*

<sup>12</sup> See e.g. *City Nat. Bank of Miami v. City of Coral Springs*, 475 So. 2d 984 (Fla. App. 4 Dist., 1985) (finding that city validly imposed a condition of approval for proposed plat for convenience store of a ten-foot buffer strip of landscaped area along one boundary of the plat, as reasonable application of the city’s code of ordinances)

(Cities) of the Florida Statutes, the State of Florida recognizes the scarcity of natural resources, particularly water resources, requiring that local governments consider adopting ordinances that will reduce the amount of water used for irrigation of landscapes.

### Consistency with the Comprehensive Plan

All ordinances must be consistent with the local Comprehensive Plan. Each local government in Florida is required to adopt a comprehensive plan for the lands within its jurisdiction pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act (“Growth Management Act”), F.S. § 163.3161 through 163.3217. A landscape ordinance is a land development regulation (LDR)<sup>13</sup>, and in order for an LDR to be effective, it must be consistent with the local government’s existing comprehensive plan.<sup>14</sup> The comprehensive plan is like a constitution that states goals, objectives, and policies for future planning of the local government.<sup>15</sup> If any provision of the ordinance is in conflict with the comprehensive plan language, then that provision will be held invalid.

Therefore, any local government wishing to protect native vegetation should also consider amending their comprehensive plan to include language, likely in the conservation element of the Comprehensive Plan, that encourages or requires the use of appropriate native vegetation on landscaped areas and encourages the protection of existing appropriate native plants. Since comprehensive plans are legislative actions, challenges to plans confront a very difficult “fairly debatable” standard whereby great deference is given to local legislative decisions.<sup>16</sup> The challenger must show that the data and analysis relied upon to create the comprehensive plan was so deficient according to professional standards that no fair argument can be made in support of the decision.<sup>17</sup>

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<sup>13</sup> Florida statutes section 163. 3213(2)(b) defines “Land Development Regulation” as an “ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, *landscaping, tree protection*, or sign regulation or any other regulation concerning the development of land.”

<sup>14</sup> FLA. STAT. § 163.3194(1)(b) (2004).

<sup>15</sup> Machado v. Musgrove, 519 So. 2d 629, 632 (Fla. App. 3 Dist., 1987).

<sup>16</sup> Martin County v. Yusem, 690 So.2d 1288 (Fla.1997).

<sup>17</sup> See generally *id.*

### **III. METHODS**

The purpose of drafting this ordinance is to create a reference by which a local government or community can amend their existing landscape ordinance or adopt a new landscape ordinance which will promote and protect appropriate native vegetation.

In order to draft this model ordinance, we researched existing landscape and tree protection ordinances from around the state of Florida and the nation.<sup>18</sup> We first determined the essential legal elements of a landscape ordinance that must be included in order for the ordinance to be both valid and feasible. These provisions include procedures for variances, appeals, and resolution with conflicting laws.

We then compared each of these ordinances in terms of their strengths and weaknesses in protecting and promoting appropriate native vegetation. We determined that there was a wide range of landscape ordinances and approaches to landscaping both within the state of Florida and nationwide. Many of the ordinances failed to address native plants at all. Others contained landscaping requirements that could favor the use of non-native plants over natives. Some required that a certain percentage of the landscaped area be planted native. Most of these ordinances, however, failed to fully protect and promote native vegetation, particularly native vegetation that is appropriate to the particular soil, topography, and hydrology of a site. A main goal, therefore, in drafting this model ordinance was to create a feasible landscape ordinance that maximizes the use of appropriate native vegetation and encourages the protection of existing native vegetation.

In addition, we found that the majority of landscape ordinances fail to adequately deal with the problem of invasive plant species and lack adequate protections for threatened, endangered, and rare plant species. We therefore drafted provisions in this model ordinance to address these two elements of protecting native plants.

The model ordinance was initially presented for comments to a small, expert group of landscape architects and local government planners in November 2004. On February 24, 2005, a native plant ordinance workshop open to the public was held at the University of Florida to present the draft model ordinance and receive comments during a three week comment period. These comments were all reviewed and considered in further editing of the model ordinance.

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<sup>18</sup> One resource which was helpful in this research process is: BUCK ABBEY, U.S. LANDSCAPE ORDINANCES: AN ANNOTATED REFERENCE HANDBOOK (1998). This book contains a review of existing landscape ordinances nationwide.

## **IV. ISSUES**

In drafting this model ordinance, the main goal was to design landscape provisions that are the most protective of appropriate native vegetation in order to ensure that the benefits of native landscaping, as listed in the “Purpose and Intent” in section 2 of the ordinance, are achieved. Additionally, our goal was to draft a model ordinance that could be adopted or used to amend an existing landscape ordinance by any local government or community. In order to satisfy these goals, we identified issues that are central to the challenges of drafting such an ordinance. These issues are addressed below:

### How Native?

A major consideration facing communities considering a native plant ordinance is the extent to which native plant usage is required. Individuals within communities and native plant advocacy groups may differ in their approach to this question. Some communities establish a percentage of cover. For example, City of Sanibel has a 75% coverage requirement, the highest percent cover we encountered in Florida. This model ordinance addresses this by establishing an unspecified minimum percentage and requiring retention of existing appropriate native vegetation where possible. In the case of public property, the requirement is 85% native.

### Appropriate Native Vegetation

Simply because a plant is a Florida native does not mean it should be planted on a specific site. Sites vary in their soil characteristics, topography, hydrology, fire regime, and these environmental factors influence the natural plant communities. Because Florida has a wide range of native plant communities, this ordinance leaves appropriateness determinations to individual local governments. In order to guide appropriateness determinations, the ordinance requires the community to establish landscape categories based on soil, topography, and hydrology and include a list of appropriate native plants for each landscape category in a technical manual that the local government must develop based on its plant communities.

Installation size requirements for native plant material are typically smaller in size than exotic plant material due to the fact that native plants are long lived and therefore takes longer to grow. Adjustments in plant installation size requirements may need to be made.

Plant lists should include a wide range of diversity and all commercially available native plants in groundcover, low shrub, large shrub, understory tree, canopy tree, wetland plants in the region should be listed.

### Soil Additions

Any new soil required shall be similar to the existing soil in pH, texture, permeability & other characteristics.

### Mulch

Cypress mulch is not recommended due to the detrimental effects of logging wetland and aquifer recharge areas to acquire this material. Natural leaf litter, pine needles or mulch nuggets from a sustainable source are preferred.

### Landscape Requirements for Single-Family Residences

Generally, landscape ordinances do not apply to single-family residential properties. Single-family residences, however, often constitute a significant portion of a local government's landscaped areas. The inclusion of single-family residential properties in the requirements of this ordinance will therefore greatly increase the amount of habitat that is created and protected for appropriate native plants and associated native communities, as well as increase the benefits that will be received from a community-wide promotion of native plants.

A balance should be struck between achieving the goals of planting in all landscaped areas with appropriate native plants and imposing an onerous burden on residential landowners. This balance is achieved in the model ordinance by significantly lessening the requirements for landscape plan approval for single-family residential properties and allowing for flexibility in design. This includes the requirement that a single-family residential landowner submit a list of plants to be used in the landscaped area to ensure that they are appropriate native plants. A key to the effectiveness of the ordinance is education of the public and providing tools that are readily available to help landowners design native landscapes. Single-family landowners need to be aware of the benefits of native landscaping, the types of native plants that are appropriate to their particular area, and the landscape practices they should use.

### Specificity of Landscape Needs By Locality: Landscape Manual

This model ordinance is designed to be used by any local government or community. Because landscape ordinances can be very complex and vary by the type of region in which the local government or community is located, as well as its needs, specific landscape requirements are difficult to draft in a model ordinance. Some communities choose very detailed requirements while others give only general guidelines.

Section 11 of this ordinance, "Landscaping Requirements," therefore, only suggests key topics that should be addressed in a landscaping requirements section, including protection of existing appropriate native vegetation. Each zoning category should have specific landscaping requirements to meet the unique needs in that landscape category. In addition, as noted in the annotations of the model ordinance, within each zoning category there may be additional requirements to deal specifically with very large developments and preservation of natural areas. This ordinance incorporates by reference a landscape manual which should be developed with local expertise.

### Invasives as a Public Nuisance and Limits on Weed Control Laws

This ordinance is unique in its treatment of Invasives under Florida nuisance law. The ordinance declares Invasive species to be public nuisances and authorizes the local government to require removal. The local government must provide notice of the nuisance to a landowner and provide an opportunity for the landowner to cure the nuisance by removal, after which the local government may undertake removal and seek cost recovery. This is not unlike treatment given to other public nuisances, such as excessive wildfire fuel build up and hazardous structures.<sup>19</sup> The ordinance also prohibits public and private “weed control laws.” Weed control laws have been used to harass native landscapers for failing to conform to aesthetic standards favoring exotics.

### Rare, Threatened, and Endangered Plants

The ordinance also addresses the protection of threatened and endangered as well as rare plants and adopts an incentive based approach that includes expedited review, fee waivers, and other incentives. However, some communities have prohibited the removal of rare plants without authorization. The City of Scottsdale, Arizona, for example, requires a permit to remove any native listed as rare pursuant to their local ordinance.<sup>20</sup>

### Landscape Committee

This ordinance creates a landscape committee (Section 27) which advises the local governing body in matters of policy including developing the landscape manual. Responsibility for day-to-day implementation of this ordinance remains with local government staff.

### Irrigation, Fertilizers and Pesticides

This ordinance does not address issues related to irrigation, fertilizers and pesticides. Local government authority to regulate irrigation may be restricted by the authority of the state’s water management districts.<sup>21</sup> Fertilizer and pesticide use are also not addressed by the ordinance. However, there are state and local government precedents for the outright banning or restrictions on use of fertilizers, especially adjacent to water bodies.<sup>22</sup>

### Enforcement

In order for any landscape ordinance to be effective, it must be supported by effective enforcement.<sup>23</sup> This means that there must be sufficient resources for inspection of landscaped

<sup>19</sup> J. Morgan Varner and David Steinau, Wildfire in Florida: Issues of Law and Forestry Practices, a report to the City of Waldo, Florida, June 2001 Available at <http://www.law.ufl.edu/conservation/pdf/firepaper.pdf>.

<sup>20</sup> City of Scottsdale Native Plant Ordinance, Ch. 46, Art. V.

<sup>21</sup> FLA. STAT. § 373.217(2),(3),(4) (2004).

<sup>22</sup> Recently, the City of Madison and surrounding Dane County in Wisconsin and the State of Minnesota have all passed measures that ban the sale and use of phosphorus fertilizers on domestic lawns. Each of these bans was passed in an attempt to prevent and reverse the continued cultural eutrophication in lakes and streams from phosphorus contamination. All of the measures provide limited exceptions in the case of a new lawn being established or the performance of a soil test showing a phosphorus deficiency. See Jason Evans & Adam Regar, Murky Waters: Fertilizer Ordinances and Best Management Practices as Policy Tools for Achieving Water Quality Protection in Florida’s Lakes, Streams, and Bays (December 2004)(available at [http://www.law.ufl.edu/conservation/resources/resources\\_clinic.shtml](http://www.law.ufl.edu/conservation/resources/resources_clinic.shtml))

<sup>23</sup> Duane R. Durgee, Alachua County Forester, *Characteristics of Good Tree Protection and Landscape Ordinances*.

areas, serious and deterrent punishment for violations, and effective incentives to promote and protect appropriate native vegetation. Because resources allocated to landscape enforcement are often limited, it is essential that landscape compliance is an integral part of the development approval process.

## **V. ANNOTATED MODEL LANDSCAPE ORDINANCE REQUIRING THE USE OF APPROPRIATE NATIVE VEGETATION**

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*The annotated language in italics is intended to provide rationales for some of the provisions, alternative drafting options, and examples of communities that have implemented similar provisions. The language in italics therefore is not part of the official language that would be adopted if the ordinance were enacted.*

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## **MODEL LANDSCAPE ORDINANCE PROMOTING THE USE OF APPROPRIATE NATIVE VEGETATION**

**ORDINANCE NO.\_\_\_\_\_**

### **AN ORDINANCE OF THE CITY OF SABALVILLE,<sup>24</sup> FLORIDA, TO ADOPT NEW LANDSCAPE REGULATIONS THAT PROMOTE THE USE OF APPROPRIATE NATIVE VEGETATION.**

**BE IT ENACTED BY THE PEOPLE OF THE CITY OF SABALVILLE:**

**Sec. 1. TITLE.**

This chapter shall be known and may be cited as “City of Sabalville Landscape Ordinance Promoting the Use of Appropriate Native Vegetation.”

**Sec. 2. PURPOSE AND INTENT.**

The purpose of these regulations is to establish minimum standards for the design, installation, and maintenance of landscaped areas that require the use of appropriate native vegetation and to promote the preservation of indigenous plant communities on site. The City recognizes the significant benefits of establishing and protecting appropriate native vegetation and, therefore, the necessity to maximize the use of appropriate native vegetation in all public and private landscaped areas within the City. It is the intent of this ordinance that these minimum landscape requirements be incorporated in order to promote the public health, safety, and welfare by:

- (1) protecting and promoting appropriate native vegetation;
- (2) promoting microhabitats in urban areas for the conservation of wildlife by establishing new wildlife habitat and maintaining existing wildlife habitat;<sup>25</sup>
- (3) creating larger, more connected plant populations, helping ensure the future of native plant species by increasing their ability to migrate in response to changes in climate;<sup>26</sup>

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<sup>24</sup> Sabalville represents a fictitious community in Florida.

<sup>25</sup> ENVIRONMENTAL PROTECTION AGENCY (EPA), LANDSCAPING WITH NATIVE PLANTS FACTSHEET. Available at <http://www.epa.gov/glnpo/greenacres/nativeplants/factsht.html#Native%20Plant>.

- (4) conserving scarce water resources by promoting water-efficient landscaping through the use of appropriate native plants which, once established, typically require much less water than other species;<sup>27</sup>
- (5) reducing the use of chemical fertilizers and pesticides to maintain landscaping<sup>28</sup>;
- (6) reducing the negative impacts of landscape maintenance on local air quality;<sup>29</sup>
- (7) reducing the negative impacts on the land from the use of inappropriate vegetation and poorly planned landscaping;
- (8) reducing the financial costs of landscape maintenance;<sup>30</sup>
- (9) encouraging creative landscaping designs that further the above stated goals; and
- (10) providing for wildfire protection through the appropriate placement of highly-flammable native plants or protecting structures from wildfire by removing or reducing the volume of highly-flammable native plants within 30 feet of the structure.<sup>31</sup>

*The purposes section increases the legal defensibility of the ordinance by substantiating that the regulations of the ordinance are warranted exercises of the police power by governments for the protection of the public health, safety and welfare. Specific purposes and intent should be custom tailored to the individual municipality with respect to its needs, resources, environmental conditions, and reasons for adopting the ordinance.*

<sup>26</sup> THE INSTITUTE FOR REGIONAL CONSERVATION, NATIVES FOR YOUR NEIGHBORHOOD. Available at <http://www.regionalconservation.org/beta/nfyn/about.asp>.

<sup>27</sup> *Id.* Many species of sod and grass require significant amounts of water for irrigation, as much as 30% of water consumption on the east coast and 60% on the west, while native plants require less water and often contribute to decreased water runoff. *Id.*

<sup>28</sup> *Id.* “Vast amounts of fertilizers are applied to lawns. Excess phosphorus and nitrogen (the main components of fertilizers) run off into lakes and rivers causing excess algae growth. This depletes oxygen in our waters, harms aquatic life and interferes with recreational uses.” *Id.* In addition, lawns require over 70 million pounds of pesticides each year nationwide. Rivers and lakes become contaminated with pesticides, as well as cause harm to people through degraded water quality. *Id.*

<sup>29</sup> According to the EPA, “Natural landscapes do not require mowing. Lawns, however, must be mowed regularly. Gas powered garden tools emit 5% of the nation’s air pollution. Forty million lawnmowers consume 200 million gallons of gasoline per year. One gas-powered lawnmower emits 11 times the air pollution of a new car for each hour of operation. Excessive carbon from the burning of fossil fuels contributes to global warming. Native plants sequester, or remove, carbon from the air.” EPA, LANDSCAPING WITH NATIVE PLANTS FACTSHEET. Available at <http://www.epa.gov/glnpo/greenacres/nativeplants/factsht.html#Native%20Plant>. Therefore, a goal of this model ordinance is to reduce the amount of mowing required for landscape maintenance in order to reduce the negative impacts of this pollution on the local air and environment.

<sup>30</sup> According to one study, over twenty years, the costs to maintain a native prairie or wetland is \$3,000 versus \$20,000 for non-native turf grasses. *Id.*; In a cost comparison study in Florida of initial landscape planting comparing two 60’ x 180’ plots, one non-native landscape with St. Augustine grass lawn and one native plant landscape with lawn substitute, the cost for initial planting of the native landscape was \$5,615 compared to \$8,358 for the non-native landscape. See Presentation, Karina Veaudry, “Cost Comparison for Initial Landscape Planting.” In a cost comparison for life cycle cost per year study of the same plots, the total cost for the non-native landscape was \$1,680 compared to \$300 for the native landscape. *Id.*

<sup>31</sup> See e.g., Florida Department of Community Affairs and Florida Department of Agriculture and Consumer Services, *Wildfire Mitigation in Florida: Land use planning strategies and best development practices* (April 2004). This manual is a guide for communities in Florida to reduce their wildfire risk, including a chapter devoted to landscaping for wildfire mitigation. *Id.*

### **Sec. 3. DEFINITIONS.**

- (a) Appropriate Native Vegetation: vegetation found in the natural community that is suited to the soil, topography, hydrology, and wildfire risk of a particular site.

*Defining native vegetation as “appropriate” recognizes that some plant species are only native to a very small or restrictive habitat type and particular region, rather than arbitrary political boundaries. Therefore, it may be inappropriate for some native plants to be planted outside of these specific habitats or communities.<sup>32</sup> In addition, some appropriate native vegetation may present wildfire risks when planted too close to a structure.<sup>33</sup>*

- (b) Community Garden: a public or community use area intended for the purposes of gardening<sup>34</sup>

- (c) Community Play Area: public use areas, including school and athletic fields, composed of predominantly turfgrass intended for use for recreational purposes<sup>35</sup>

- (d) Endangered Plant: any plant species which is in danger of extinction throughout all or a significant part of its range<sup>36</sup>

*[\*Note: May incorporate by reference in this definition a list of endangered plants that is periodically updated]*

- (e) Caliper: a measurement of the size of a tree equal to the diameter of the trunk six (6) inches from the root ball<sup>37</sup>

- (f) Highly-flammable plant: a plant species that has characteristics which make it more volatile by encouraging easy ignition and the spread of fire through its foliage due to low moisture content, dense dry leaves, needles, grass-like leaves, or volatile resins and oils

- (g) Indigenous Plants: those species of plants naturally occurring within a specific habitat or biogeographical region prior to significant human impacts<sup>38</sup>

- (h) Invasive Plant: a plant reproducing outside its native range and outside cultivation that disrupts naturally occurring native plant communities by altering structure, composition,

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<sup>32</sup> Pais, D. 1994. Toward a Working Definition of “Florida Native Plant” *The Palmetto*, 14(3), 17. Available at <http://www.fmps.org/palmetto/v14i3p17pais.pdf> (July 6, 2002).

<sup>33</sup> Florida Department of Community Affairs and Florida Department of Agriculture and Consumer Services, *Wildfire Mitigation in Florida: Land use planning strategies and best development practices* (April 2004).

<sup>34</sup> See American Community Gardening Association, at <http://www.communitygarden.org/>.

<sup>35</sup> Adapted from the definition of “Community Play Area” adopted by the Sarasota County Water Efficient Landscape Ordinance, Ordinance 2001-081.

<sup>36</sup> See The Endangered Species Act of 1973, definition of an “endangered species,” 16 U.S.C. §1532(6).

<sup>37</sup> Definition from Orange County Code, Landscaping, Buffering, and Open Space §24-2.

<sup>38</sup> Id.

natural processes or habitat quality.<sup>39</sup> Invasive plants are those plants recognized on the State of Florida's Noxious Weed and Invasive Plants List (FLA. ADMIN. CODE r. 5B-57.007).

*The State of Florida, pursuant to Florida statute section 581.091(4), requires that a local government adopting an ordinance or regulation on or after March 1, 2002 for the purposes of identifying noxious weeds, invasive plants, or plants deemed to be a public nuisance or threat shall only adopt the Noxious Weed and Invasive Plant List provided by the State (FLA. ADMIN. CODE r. 5B-57.007). All local government ordinances or regulations adopted before March 1, 2002, however, remain in effect. The official State list of noxious weeds and invasive plants is reviewed once every two years by the Department of Agriculture and Consumer Services, in conjunction with the Institute of Food and Agricultural Sciences at the University of Florida.<sup>40</sup> The Department will propose classification of a plant as a noxious weed or invasive plant and consider including it on the official State List "if the plant is determined to be a serious agricultural threat in Florida, or has a negative impact on the plant species protected under Florida statute section 581.185 [Preservation of Native Flora of Florida], or if the plant is a naturalized plant that disrupts naturally occurring native communities."<sup>41</sup> All plants listed in Florida statute section 369.251 (*Melaleuca quinquenervia*, *Schinus terebinthifolius*, *Casuarina equisetifolia*, *Casuarina glauca*, and *Mimosa pigra*) shall be included in the Department's Noxious Weed and Invasive Plant List.<sup>42</sup>*

- (i) Landscaped Area: the entire parcel less the building footprint, driveway, non-irrigated portions of parking lots, hardscapes such as decks and patios, and other non-porous areas. Water features are included in the calculation of landscaped areas.<sup>43</sup>
- (j) Landscaping: any combination of living plants and non-living landscape material (such as rocks, pebbles, sand, mulch, walls, fences, or decorative paving materials)<sup>44</sup>
- (k) Landscape Category: areas of the City are divided into landscape categories based upon their similar soil, topography and hydrology. Since lands within one category will have similar soil, topography, and hydrology features, the same species of native plants that are appropriate at one site are likely to be appropriate native plants to all lands within the same landscape category.<sup>45</sup>

*The purpose of the "Landscape Category" is to provide landowners with a general idea of which native plants are appropriate for their particular site. A list of appropriate plants for each category will be included in the landscape manual,*

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<sup>39</sup> FLA. ADMIN. CODE r. 5B-57.001(9).

<sup>40</sup> FLA. STAT. 581.091 (2004).

<sup>41</sup> FLA. ADMIN. CODE r. 5B-57.010.

<sup>42</sup> FLA. ADMIN. CODE r. 5B-57.001(9).

<sup>43</sup> Jacksonville Landscape and Tree Protection Regulations, §656.1203(o).

<sup>44</sup> Definition adapted from the Draft "Florida Friendly Landscape Model Ordinance," February 14, 2002.

<sup>45</sup> See e.g., Native plants to plant by area in Florida, available at [http://www.flnps.org/pages/plants/landscape\\_plants.php](http://www.flnps.org/pages/plants/landscape_plants.php)

*referenced in section 25. These lists will be particularly useful for single-family residential land owners who may not wish to hire a landscape professional to design their appropriate native landscape.*

- (l) Native Plant: those species of plants occurring within the city boundaries prior to European contact, according to best scientific and historical documentation. More specifically, it includes those species understood as indigenous, occurring in natural associations in habitats that existed prior to significant human impacts and alterations of the landscape.

*[Note: May incorporate by reference in this definition a list of native plants, by landscape category that is periodically updated]*

*Defining what constitutes a “native” plant species is often complicated and critically impacts the application and policy goals of this ordinance. The above definition adopted by the Florida Native Plant Society (FNPS) for a “Florida Native Plant”<sup>46</sup> is the best definition to use for a landscape ordinance promoting the use of appropriate native vegetation because it relies more on natural associations of indigenous plants than political boundaries. First, the definition refers to those species found prior to European contact, an event that marks a radical transformation in native habitats and species due to human interference. In addition, the definition recognizes that to be native to an area the species must be indigenous to the specific habitat or biogeographical region rather than merely to an arbitrary political boundary, such as an entire state or city. (See Appendix A for a list of other currently used definitions of “native plant” that do not completely address both of these issues)*

- (m) Natural Community: a distinct and recurring assemblage of populations of plants, animals, fungi and microorganisms naturally associated with each other and their physical environment, as described in the *Guide to the Natural Communities of Florida* (available from Florida Department of Natural Resources at <http://www.fnai.org/descriptions.cfm>).
- (n) Natural Area: an area on a site that contains natural vegetation and that will be undisturbed during development and will remain undisturbed when the property is fully developed
- (o) Rare Plant: a scarce plant species that may or may not have been designated with a legally protected status such as “threatened” or “endangered.” Some rare plants naturally occur less frequently than other plants, which makes the rare plants more susceptible to decline or extinction.<sup>47</sup>

*[\*Note: May incorporate by reference in this definition a list of rare plants that is periodically updated]*

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<sup>46</sup> Id.

<sup>47</sup> See Linda McMahan, Comment, Legal Protection for Rare Plants, 29 Am. U. L. Rev. 515, 515 n.1 (1980); See also Kevin E. Regan, *The Need for a Comprehensive Approach to Protecting Rare Plants: Florida as a Case Study*, 44 NAT. RESOURCES J. 125 (2004).

- (p) Remove: to transport a native plant from the premises on which it has been growing<sup>48</sup>
- (q) Threatened Plant: any plant species that is likely to become an endangered plant within the foreseeable future throughout all or a significant portion of its range<sup>49</sup>
- [\*Note: May incorporate by reference in this definition a list of threatened plants that is periodically updated]*

- (r) Tree: a self-supporting woody plant having a single trunk or a multi-trunk of lower branches, growing to a mature height of at least twelve (12) feet<sup>50</sup>

*The height requirement for what constitutes a “tree” may vary depending on the locality of the community.*

- (s) Turfgrass: continuous plant coverage consisting of a grass species that is mowed to maintain an established height

*\* Note: For many of the definitions listed above, it may be beneficial to refer to a list of plants, which is periodically updated to provide certainty to an applicant as to which species of plants are included under a particular definition. Incorporating a reference by name rather than a specific listing of plants in the ordinance itself allows for the list to be updated easily without changing the ordinance. The limitation of incorporating a specific reference list is that plants not on the reference list or not yet updated are excluded from the definition under the ordinance. It is necessary, therefore, that the reference listed be one that is comprehensive and regularly updated.*

#### **Sec. 4. APPLICABILITY.**

This ordinance shall be a minimum standard and shall apply to all newly developed public and private buildings, developments, and land within the incorporated areas of the City. This ordinance shall also apply to the expansion or renovation of any existing development when the expansion or renovation of the existing development is equal to fifty percent (50%) of the assessed value of the lot improvements according to the Property Appraiser or when the total square footage of a structure is expanded by fifty percent (50%) or greater.

*This section describes how the law applies in the local community. As drafted, this model ordinance will apply to all zoning districts defined within the community’s zoning laws, including residential properties. Some landscape ordinances limit their applicability by listing express exemptions in the applicability or scope sections, e.g. exemptions for single-family dwellings or for all residential zoning districts. By making this ordinance applicable to everyone,*

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<sup>48</sup> City of Scottsdale, Arizona, Native Plant Ordinance, City Code, §46-105.

<sup>49</sup> See definition of a “threatened species,” 16 U.S.C. §1532(20).

<sup>50</sup> Jacksonville Landscape and Tree Protection Regulations, §656.1203(gg).

*the community will further the goals of the ordinance as defined in Section 2, Purposes and Intent, and greatly expand the areas in the community that will be fully landscaped with appropriate native vegetation.*

## **Sec. 5. EXEMPTIONS.**

*These exemptions do not authorize the use of Invasive plant species, which are prohibited by section 7 of this ordinance.*

The following areas are exempt from this ordinance.<sup>51</sup>

- (1) community gardens;
- (2) community play areas;
- (3) non-invasive food plants on residential properties;

*This exemption would allow homeowners to plant vegetable gardens or fruit trees on their property.*

- (4) golf course play areas;

*Consideration could be given to restricting the use of non-native vegetation to fairways and greens. There are nongovernmental certification programs for golf course best management practices that encourage the use of native vegetation.<sup>52</sup>*

- (5) turfgrass in stormwater management areas;
- (6) turfgrass in public rights-of-way;
- (7) agricultural lands,<sup>53</sup>
- (8) scientific and educational purposes,<sup>54</sup> and

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<sup>51</sup> Adapted from the Sarasota County Water Efficient Landscape Ordinance, Ordinance No. 2001-081.

<sup>52</sup> Audubon International, Audubon Cooperative Sanctuary Programs for Golf, Available at <http://www.audubonintl.org/programs/acss/golf.htm>.

<sup>53</sup> The Florida Right to Farm Act, Florida statute section 823.14(6), provides that “a local government may not adopt any ordinance, regulation, rule, or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land classified as agricultural land pursuant to s. 193.461, where such activity is regulated through implemented best-management practices or interim measures developed by the Department of Environmental Protection, the Department of Agriculture and Consumer Services, or water management districts and adopted under chapter 120 as part of a statewide or regional program.” *Id.* Agricultural lands are classified under Florida statute section 193.461 as “only lands which are used for bona fide agricultural purposes.” *Id.* “Bonafide agricultural purposes” is defined as “good faith commercial agricultural use of the land.” FLA. STAT. § 193.461(3)(b). There are seven factors which are used to determine whether the use of the land for agricultural purposes is “bonafide:” 1) the length of time the land has been so utilized; 2) whether the use has been continuous; 3) the purchase price paid; 4) size, as it relates to specific agricultural use; 5) whether an indicated effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforesting, and other accepted agricultural practices; 6) whether such land is under lease, if so, the effective length, terms, and conditions of the lease; and 7) other such factors as may from time to time become applicable. *Id.*

<sup>54</sup> This exemption would allow, for example, for botanical gardens. It should be noted that in the past botanical gardens have been responsible for the release of Invasive species, some of which have had significant negative biological and economic impact. See e.g., <http://www.centerforplantconservation.org/invasives/codesN.html>.

(9) cemeteries

The City shall, however, encourage the protection and promotion of appropriate native vegetation in these areas to the maximum extent practicable.

*The purpose of these exemptions is to allow uses that could be restricted by the appropriate native vegetation requirement. In these areas, however, appropriate native vegetation should be used in landscaping unless there is no appropriate native plant that will serve the intended use of the area.*

**Sec. 6. MINIMUM APPROPRIATE NATIVE VEGETATION REQUIRED.**

**Sec. 6.1. Public Property.**

The City shall require the use of only appropriate native vegetation in all newly-developed, publicly-owned landscaped areas within the City limits. The City shall encourage the use of appropriate native vegetation in all existing landscaped areas, while recognizing that any plant in the proximity of structures may create a wildfire hazard.

**Sec. 6.2. Private Property.**

The City shall require a minimum coverage of appropriate native vegetation in all newly landscaped private areas, as set forth in section 11 of this ordinance. However, at no time shall the minimum coverage of appropriate native vegetation be less than \_\_\_\_\_ %.

*The recommended minimum percentage is 50%. A recommended maximum percentage is 90%.*

**Sec. 6.3. Unavailability of Appropriate Native Vegetation.**

In the event that appropriate native vegetation is not available at the time of installation, the landowner may substitute appropriate non-native vegetation.

*This model ordinance recognizes the importance of expanding the use of appropriate native vegetation by requiring their 100% use in all newly-landscaped publicly owned areas and requiring a minimum level of appropriate native vegetation that must be used in all newly landscaped private areas. The minimum landscaping requirements for private areas promotes the use of appropriate native vegetation but also allows land owners the ability to plant noninvasive, non-native vegetation. The minimum landscaping requirements are set forth by zoning category in section 11 of this model ordinance. The purpose of the 100% use requirement for all newly landscaped publicly owned areas is that*

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Voluntary codes of conduct have been developed to address ethical and scientific issues associated with the introduction of exotic plants. *Id.*

*local governments should lead by example, as well as to achieve the benefits of native landscaping as set forth in section 2 of this model ordinance.*

*The Florida Native Plant Society (FNPS) recommends and encourages the maximum use of appropriate native vegetation and protection of existing native vegetation in all landscaped areas; however, in light of the economic and feasibility burdens put on land owners by the potential unavailability of native plant material in local nurseries, FNPS, at this time, does not recommend a 100% native vegetation requirement for private properties.*

*An alternative way that some ordinances seek to provide protection for native plants is by requiring that a minimum set percentage of vegetation at a site be native.<sup>55</sup> The recognized benefits of landscaping with only appropriate native vegetation warrant the 100% use requirement for newly landscaped publicly owned areas and the promotion of appropriate native vegetation through minimum requirements for newly landscaped areas. A local government should provide incentives for promoting the use of appropriate native vegetation in existing landscaped areas and encouraging their maximum use in newly landscaped private areas (See, for example, incentives provided in section 22 of this model ordinance).*

*Some communities are already providing significant protection for and promoting native plants. The city of Scottsdale, Arizona, for example, has implemented a “Protection of Native Plants” ordinance to preserve the unique character of native plants in the Sonoran Desert, determining that the presence of native plants contributes to the aesthetic and economic well-being of their community. The ordinance requires that “No person shall destroy, mutilate, remove from the premises, or relocate to another place on the premises any protected native plant existing within the city without first obtaining a native plant permit from the city.”<sup>56</sup>*

## **Sec. 7. INVASIVE PLANT SPECIES PROHIBITION. PUBLIC NUISANCE DECLARED. SURVEY REQUIRED FOR NEW DEVELOPMENT.**

The City declares that Invasive species are a public nuisance that degrade landscaped and natural areas. The City shall prohibit the planting of any Invasive plant species in all public and private properties. The city may require the owner of the property to remove any Invasive species that the city deems to be a public nuisance pursuant to the procedures set forth below.

*This is a critical section because the invasion of non-indigenous species causes “ecological, economic, and resource management problems.”<sup>57</sup> Florida is one the*

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<sup>55</sup> For example, the City of Sanibel requires 75% of newly landscaped areas to be native vegetation. City of Sanibel Landscape Ordinance, Art. II, Sec. 122-49, 122-73.

<sup>56</sup> City of Scottsdale, Arizona, Native Plant Ordinance, City Code, Chapter 46, Article V.

<sup>57</sup> U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, HARMFUL NON-INDIGENOUS SPECIES IN THE UNITED STATES (1993).

*most severely impacted states experiencing the harmful effects of non-indigenous invasive species.<sup>58</sup> Invasive species have reduced biological diversity, caused severe ecological and economic impacts, displaced indigenous wildlife (particularly endangered and threatened species), altered natural ecosystems, and impaired navigational and recreational activities.<sup>59</sup>*

*In the model ordinance, Invasive species are identified as a “public nuisance.” A “public nuisance” is defined in the law as “an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property.”<sup>60</sup> Because Invasive species are likely to spread rapidly from the subject property into surrounding natural and landscaped properties and degrade them, they appear to fit well within the definition of a “public nuisance.” Florida case law gives the state and local governments the authority, under their police powers to protect public health, safety, and welfare, to regulate private property to prevent public harm.<sup>61</sup> One of the earliest cases in Florida recognized, “All property is owned and used subject to the laws of the land. Under our system of government, property may be used as its owner desires within the limitations imposed by law for the protection of the public and private rights of others.”<sup>62</sup> Examples of other areas where public nuisance law has been applied in Florida include preventing pollution,<sup>63</sup> enjoining operation of horse tracks or betting facilities,<sup>64</sup> and the removal of crack houses or houses of prostitution.<sup>65</sup>*

*Many local governments already have existing procedures for abatement of public nuisances in a general nuisance ordinance. Where this is the case, these can be incorporated by reference in the section declaring Invasive plants as a public nuisance. When a local government has no existing procedures for abatement of a public nuisance, the following subsections, adapted from the City of Gainesville’s public nuisance ordinance,<sup>66</sup> outline the basic contents.*

- (a) The city manager or the city manager’s designee has authority to declare as a public nuisance a property previously found to be in violation of this ordinance if the owner of the property has not corrected the violation within the thirty (30) days provided by this ordinance.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Black’s Law Dictionary, 2nd edition.

<sup>61</sup> See *Hav-A-Tampa Cigar Co. v. Johnson*, 5 So. 2d 433 (Fla. 1941), *Sheip Co. v. Amos*, 130 So. 699 (Fla. 1930), and *Pompano Horse Club, Inc. v. Bryan*, 11 So. 801 (Fla. 1927); See also Ellen Avery, *Terminology of Florida’s New Property Rights Law: Will it allow equity to prevail or government to be “taken” to the cleaners?*, 11 J. LAND USE & ENVTL. L. 181 (1995).

<sup>62</sup> *Cason v. Florida Power Co.*, 76 So. 535 (Fla. 1917).

<sup>63</sup> See e.g., *National Container Corp. v. State ex rel. Stockton*, 189 So. 4 (Fla. 1939) (recognizing a right based on private and public nuisance law to prevent an environmental nuisance from a paper mill polluting a local river)

<sup>64</sup> See e.g., *Pompano Horse Club, Inc. v. Bryan*, 11 So. 801 (Fla. 1927).

<sup>65</sup> See e.g., *Demetree v. State ex rel. Marsh*, 89 So. 2d 498 (Fla. 1956).

<sup>66</sup> City of Gainesville Code of Ordinances, Ch. 30, Article 5.

*Certain minimum requirements are necessary to create both an effective and constitutionally-sound ordinance. The following four subsections provide for procedural safeguards and enforcement provisions. These include notice, a right of the property owner to cure the violation of the ordinance, the right to a quasi-judicial hearing, and the right of a local government to abate a nuisance and charge the property owner.*

**(b) Notice**

- (1) After declaration of a public nuisance due to invasive plants, the city manager or his or her designee shall provide notice to the owner of the affected property.
- (2) The notice shall include the date of the declaration, the date of the previous and uncorrected violation of this ordinance, the name or names of the invasive plants giving rise to the declaration, notification that the property owner may contest the declaration of a nuisance by requesting a hearing within 15 days of the declaration of nuisance, and information on how to request a hearing.

**(c) Right of Property Owner to Cure the Nuisance**

The owner of a property with Invasive species that have been declared a public nuisance shall have thirty (30) days after receipt of notice to eliminate the Invasive plants.<sup>67</sup>

**(d) Right to a Hearing to Contest Designation of a Nuisance**

Owners of a property declared a public nuisance have the right to a hearing to contest the declaration of a public nuisance. At the conclusion of the hearing and after considering all evidence presented at such hearing, the board is authorized to issue findings of fact

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<sup>67</sup> One way that a local government can assist citizens with the removal of Invasive vegetation is through local government removal programs or cost-share programs where the local government may help to remove the invasive vegetation with a cost-share fee paid by the landowner. The City of Palm Beach, for example, has a removal program for Australian Pine and Melaleuca and a cost share program for seven other invasive non-native species with a minimal cost-share, no greater than \$500, to be paid by the landowner. See Matthew King, *Exotic Removal Incentives Approved*, ENVTL. TIMES (2003); City of Palm Beach Prohibited Invasive Non-Native Vegetation Removal Ordinance, Art 14-Environmental Standards, Appendix 12 Incentive Programs.

based upon the evidence presented and made part of the record that a public nuisance does not exist or that an unlawful public nuisance does exist.

(e) **Local Government May Abate Nuisance, Charge Owner, and File a Lien**

Should a property owner fail to correct a violation of this ordinance within either thirty (30) days of a declaration of nuisance or thirty (30) days after conclusion of a hearing to contest a declaration of nuisance, if one was requested, the City may enter the property and abate the public nuisance.

- (1) All costs incurred by the City in abatement of a nuisance on private property may be charged to the owner of the property. A copy of these costs and other costs authorized to be levied against a property owner may be filed in the public records.
- (2) Should the property owner fail to pay the City's expenses incurred in abatement of the nuisance within thirty (30) days of billing by the City, the City may file a certified copy of the City's expenses to abate the nuisance and other expenses authorized in subsection (3) below in the public record. Such a filing then shall constitute a lien on the property.
- (3) When billing a property owner for abatement costs the City may also include any previously levied fines for violation of this ordinance and all charges—including reasonable attorney's fees—incurred by the City in a hearing contesting the declaration of nuisance if the hearing results in a finding of a nuisance.

One year from the filing in the public record of a lien on a property under this subsection, the City may foreclose on the property to satisfy the lien.<sup>68</sup>

(f) **Invasive Species Survey Required for New Development.**

For all properties submitting a landscape plan pursuant to Section 10, other than single family residences, the landowner or their representative shall submit with the landscape plan a survey indicating the presence of Invasive species.

**Sec. 8. LIMITS ON WEED CONTROL LAWS.**

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<sup>68</sup> It should be noted that no real property which is a homestead under Section 4, Article X of the State Constitution shall be foreclosed for a lien originating from a violation of this ordinance. In Florida, the state constitution provides protections against foreclosures for liens such as the one created here. Local governments in other states must also include provisions exempting homesteads when required.

No regulation shall be made by the City or any person, community, or group which makes the planting, maintenance, or protection of appropriate native vegetation illegal or encourages the removal of appropriate native vegetation, except when deemed necessary for public safety.<sup>69</sup>

*This ordinance seeks to make any barrier to the planting or protection of appropriate native vegetation illegal. This provision expressly prohibits any group from creating “weed control laws” that would prohibit a homeowner from creating a natural landscape using native plants on their property based on aesthetic preferences.<sup>70</sup> Natural landscaping using native plants shall not be considered the same as a neglected property on the basis that it does not use traditional lawn landscaping.*

*There are a few cases that uphold the right of a homeowner to use natural landscaping in the face of a weed law challenge. In City of New Berlin v. Hagar (1976), a Wisconsin judge ruled that natural landscaping did not affect neighbor’s property values and the weed law in question was in violation of the Equal Protection Clause because its factual basis was too weak.<sup>71</sup> In Montgomery County, Maryland v. Stewart (1987), homeowners defended their natural landscape against challenges by the City and neighbors, obtaining a change in the weed law to allow meadows with adequate buffers as long as all noxious weeds were removed.<sup>72</sup> In Little Rock, Arkansas v. Allison (1988), a home owner defended her natural landscape, considered a natural wildlife area by the Arkansas Game and Fish Commission, against a City code prohibiting “grass, weeds, or any other plant that is not cultivated” to grow higher than 10 inches or “in rank profusion on the premises.”<sup>73</sup> In Palm Beach County, Florida, home owners saved their native trees and self-mulching pine needle yard from the County lot clearing ordinance that required clearing of all “uncultivated vegetation” by appealing to the Environmental Control Hearing Board, with the help of the Florida Audubon Society, Florida Native Plant Society, and several neighbors, to have the county ordinance rewritten to exclude native vegetation from the county lot clearing ordinance.<sup>74</sup>*

## **Sec. 9. PROTECTION OF RARE, THREATENED, AND ENDANGERED PLANTS.**

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<sup>69</sup> Public safety reasons include recommendations of the local fire service having jurisdiction or necessity to clear out condemned lots that present public safety hazards, such as crack houses.

<sup>70</sup> For a discussion of Natural Landscaping and challenges to weed laws, see “Green Landscaping with Native Plants: Weed Laws,” John Marshall Law Review, Vol. 26, No. 3 (1993). Available at <http://www.epa.gov/glnpo/greenacres/weedlaws/JMLR.html#INTRODUCTION>.

<sup>71</sup> City of New Berlin v. Hagar, No. 33582 (Wis. Cir. Ct. Waukesha Cty. Apr. 21, 1976).

<sup>72</sup> Montgomery County, Maryland v. Stewart, SW-87-2056 (Montgomery County, Md. Circuit Court, 1987).

<sup>73</sup> Little Rock, Arkansas v. Allison, No. 89-10401, slip op. (Little Rock Mun. Ct. 1989); Telephone Interview with Lyndae Allison (Apr. 15, 1993).

<sup>74</sup> See Wesley Starr, *Land Clearing Ordinance Defeated*, THE PALMETTO (Florida Native Plant Soc'y, Orlando, Fla.), Spring 1990, at 13.

For all properties submitting a landscape plan pursuant to Section 10 of this ordinance, other than single family residences, the landowner or their representative shall submit with the landscape plan a survey indicating the presence of state and federally listed threatened and endangered plants including species of special concern. A land owner who provides protection and maintenance in perpetuity for all or a percentage of existing rare, threatened, and endangered plants at the site as set forth in the landscape plan, and does not dig up or disturb the natural placement of any such plant at the site, shall be eligible, at the discretion of the appropriate local government staff,<sup>75</sup> to receive:

- (a) expedited landscape plan review;
- (b) a waiver from any fees required by this ordinance;
- (c) variances from the landscape requirements of Section 11 of this ordinance to the extent necessary for flexible landscape planning around existing rare, threatened, or endangered plants; and
- (d) a certificate of recognition as a “City of Sabalville Rare, Threatened, and Endangered Plant Conservation Site.”

*The purpose of this section is to provide protection for rare, threatened, and endangered plants in their natural settings by providing incentives for landowners to leave existing plants in place at a site and to discourage the removal or relocation of any such plants. Some communities, like Scottsdale, Arizona, have gone further and prohibited the removal of listed species and created a permitting process to authorize their removal.<sup>76</sup> The community can maintain a public register of the “Rare, Threatened, and Endangered Plant Conservation Sites,” preferably published on a community landscape or development planning website, other community website, or other prominent place in the community. This program will be a particular incentive for local businesses that can advertise their conservation status to attract environmentally-conscious customers and show their concern for the local environment. Rare, threatened, and endangered plants currently receive very little protection under existing laws; therefore, protective programs such as that provided by this section are essential.*

*Under federal regulation, the Endangered Species Act (ESA)<sup>77</sup> provides limited protection for plants, especially for plants not located on federal lands. The U.S. Fish and Wildlife Service (USFWS) lists species of plants as “Endangered” or “Threatened” under Section 4 of the ESA.<sup>78</sup> Under Section 7 of the ESA, all federal agencies are required to consult with USFWS to determine if their actions are “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of such species’ critical habitat.<sup>79</sup> The “taking”<sup>80</sup> of any such plant, under Section 9 of*

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<sup>75</sup> “Appropriate local government staff” is a general term which should be replaced by the term used by a particular local government to identify the staff who review and either approve or deny landscape plans.

<sup>76</sup> City of Scottsdale Native Plant Ordinance, Ch. 46, Art. V.

<sup>77</sup> Endangered Species Act of 1973, 16 USC §1531 [hereinafter, ESA].

<sup>78</sup> ESA, 16 USC §1533.

<sup>79</sup> ESA, 16 USC §1536.

the ESA, is only prohibited on federal lands,<sup>81</sup> and even then, only considered a “taking” when a plant is removed and reduced to possession.<sup>82</sup> Section 9, therefore, provides no protection for destruction of plants on federal lands where the plant is not reduced to possession.<sup>83</sup> Endangered or threatened plants not on federal lands receive the least protections. Section 9 only prohibits the removal of listed plants when in knowing violation of state law.<sup>84</sup> This means that if there are no state laws to the contrary, private landowners are free to destroy any endangered or threatened plant on their property. A 1998 study confirmed that “plants that depend on private property for their habitat do not fare well, and fare much worse in states that do not restrict private landowners.”<sup>85</sup>

Under Florida law, state protection for threatened and endangered plants is provided by the Preservation of Native Flora of Florida<sup>86</sup> statute (PNFFS) and the related Endangered Plant Advisory Council<sup>87</sup> statute (EPAC). The PNFFS lists plant species that are “native to the state that are endangered, threatened, or commercially exploited,” and its goal is to protect native flora from unlawful harvesting on public and private land.<sup>88</sup> The PNFFS broadens the categories of regulated plants further than the ESA with the addition of “commercially exploited species” which are defined as “species native to the state which are subject to being removed in significant numbers from native habitats in the state and sold or transported for sale.” The list of endangered, threatened, and commercially exploited plants is kept by the Florida Department of Agriculture and Consumer Services (DACS) as the Regulated Plant Index.<sup>89</sup> The EPAC sets up the committee that considers native plants for inclusion in the Regulated Plant Index. PNFFS provides different levels of protection for plants that are endangered, threatened, or commercially exploited. For endangered plants, PNFFS prohibits willful destruction or harvesting of plants without prior written permission of the landowner and a permit from DACS. However, no permits are required for threatened plants and only for commercial plants when three or more plants are harvested. Under the PNFFS, private landowners may still, as under federal law, destroy plants on their property. The PNFFS does provide some restrictions beyond that provided by federal law on private landowners by requiring a permit for the sale of endangered or commercial exploited plants from their land (threatened plants are not included under this provision). The most

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<sup>80</sup> “Take” is defined in the ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” ESA, 16 USC §1532 (19).

<sup>81</sup> ESA, 16 USC §1538 (a)(2)(B).

<sup>82</sup> See George C. Coggins & Anne F. Harris, *The Greening of American Law?: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247, 248 n.2 (1987).

<sup>83</sup> *Id.*

<sup>84</sup> ESA, 16 USC §1538 (a)(2)(B).

<sup>85</sup> Jeffrey J. Rachlinski, *Protecting Endangered Species Without Regulating Private Landowners: The Case of Endangered Plants*, 8 CORNELL J.L. & PUB. POL’Y 1, 3 (1998).

<sup>86</sup> FLA. STAT. § 581.185 (2002).

<sup>87</sup> *Id.* at § 581.186.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

*limiting factor of the PNFFS is that all land development activities and land clearing for agricultural, silvicultural, mining assessment, or fire control purposes are exempt from the statute, providing no protection from these activities that significantly destroy habitat and plants.*

## **Sec. 10. LANDSCAPE PLAN REQUIREMENT AND APPROVAL.**

Prior to the issuance of any building permit, a landowner or their representative shall submit a landscape plan to the appropriate local government staff. The staff shall review and either approve or deny the landscape plan.

*It is suggested that local government staff complete a follow up inspection to ensure that the landscape installation was completed as per the plan submitted for approval.*

*The applicant should be required to locate existing native vegetation areas on the landscape plan. Incentives should be given to promote the on-site preservation of native vegetation and native plant communities.*

### **Sec. 10.1. Single-Family Residence Landscape Plan Requirements**

A single-family residence shall submit a landscape plan that includes a drawing of the proposed landscaped area, a list of each species of appropriate native plant to be installed, and the quantities of each species of plant to be installed. The landowner should select appropriate native vegetation that is suitable for their landscape category. Single-family residences are not subject to the requirement that a design professional prepare the landscape plan.

*This provision only applies to newly landscaped areas or modifications to 50% or greater of the existing landscaped area pursuant to sections 4 and 15.*

### **Sec. 10.2. Multi-family, Commercial, Industrial, or Municipal Landscape Plan Requirements**

An applicant for development or modification of a multi-family, commercial, industrial, or municipal site shall submit a landscape plan that is prepared and signed by a registered landscape architect or a Florida Certified Landscape Designer. The landscape plan shall be drawn to scale, including all dimensions and distances, and shall include:

- (1) the names, addresses, and phone numbers of the landowner and landscape designer;
- (2) the parcel number, legal description, and address of the proposed property;
- (3) property lines with dimensions;
- (4) location and dimensions of new and existing buildings and structures;
- (5) graphic symbols for all new and existing vegetation, labeled by name;
- (6) a legend that indicates sizes, quantity, and spacing of all vegetation; and
- (7) a graphic representation of the irrigation system.<sup>90</sup>

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<sup>90</sup> Adapted from, Monterey County Planning and Building Inspection, Checklist for Landscape Plan Submittal, Available at <http://www.co.monterey.ca.us/pbi/howto/landscpcchklist.htm>.

*A registered landscape architect must meet certain requirements and be registered with the Board of Landscape Architects under Florida statutes section 481.301-329. A local government may choose, however, to allow that these plans, or plans for smaller projects, be prepared by a “certified landscape designer.” Qualified professional designer is a broad term that includes unregulated design professionals, as well as registered landscape architects.*

## **Sec. 11. LANDSCAPING REQUIREMENTS.**

All landscape applicants shall comply with the guidelines for landscape design provided in the Landscape Manual, pursuant to section 25 of this ordinance, in designing and completely installing all elements of the landscape plan. Where possible, landscape applicants should satisfy these requirements by preserving existing native vegetation on the site. Staff may adjust the requirements of this section for a particular site in circumstances where adjustments are necessary to protect existing native vegetation at the site. The source of all plant material, other than existing native vegetation at the site, shall be from plant nurseries.

*This section refers to the minimum landscaping requirements that must be planted with appropriate native vegetation for each zoning category. Pursuant to section 6 of the model ordinance, all newly landscaped private areas shall plant the minimum landscaping requirements of this section with appropriate native vegetation but may in addition to the minimum landscaping requirements plant additional native vegetation or non-invasive non-native vegetation at the site (See 6.2). According to section 6.2, however, at no time shall coverage of native vegetation be less than \_\_\_\_ %. (The recommended minimum is 50% to 90%). In addition, the staff or landscape committee may wish to impose species diversity by requiring no more than a certain percentage of groundcovers, shrubs, or trees may be any one species. A minimum number of plant species for groundcovers, shrubs and trees can also be suggested to create species diversity. This could be accomplished in the landscape manual refer to in Section 25. Any additions above the minimum landscaping requirements on publicly owned property shall be only appropriate native vegetation (See 6.1).*

*The use of appropriate native vegetation in this section is subject to the availability of appropriate native vegetation pursuant to section 6.3. The purpose of specifying the source of the plant material used in landscapes is to prohibit wild collecting of native vegetation from other sites in order to protect existing native vegetation.*

*The detailed minimum landscaping requirements provide the standards that landscaping plans within each zoning category must satisfy, including preservation of existing native vegetation. A local government should modify these section headings to reflect all current zoning categories in the local government jurisdiction. The subheadings under each zoning category are the general topics that should be covered in a landscape requirements section.*

*Drafting specific landscape requirements, however, is beyond the scope of these model ordinance guidelines, because particular landscaping requirements provisions can vary by locality and community needs. The number of appropriate native trees, shrubs, and groundcovers will vary depending on the particular landscaping requirements set by the local government. These numbers will also be different for different properties, varying by the area of the lot size. For example, a local government may require a certain number of appropriate native trees, shrubs or groundcover per specified unit of area, therefore larger lots will require that more appropriate native vegetation be planted or preserved. A local government can further promote the use of appropriate native vegetation through the use of incentives (See section 22). In addition, existing laws and ordinances may interact with an adopted landscape code.<sup>91</sup> For example “parking requirements, utility easements, roads, setbacks, drainage, and especially zoning will all affect a property.”<sup>92</sup>*

*Local governments with landscaping requirements in place should also examine their current requirements to ensure that they do not hinder the goal of promoting and protecting native vegetation. For example, provisions that require a minimum growth height of vegetation within a certain time period may favor non-native plants over native plants that are typically slower growing.*

### **Sec. 11.1 Single-Family Residential\*\***

The minimum landscaping requirements for single-family residential properties shall be fulfilled by appropriate native trees, shrubs, and groundcovers, as specified:

- (1) Buffer and Perimeter Planting
- (2) Interior Planting
- (3) Foundation Planting
- (4) Tree Planting Requirements
- (5) Preservation of Existing Appropriate Native Vegetation\*

### **Sec. 11.2 Multi-Family Residential\*\***

The minimum landscaping requirements for multi-family residential properties shall be fulfilled by appropriate native trees, shrubs, and groundcovers, as specified:

- (1) Buffer and Perimeter Planting
- (2) Interior Planting
- (3) Foundation Planting
- (4) Parking Lot and Street Trees
- (5) Tree Planting Requirements
- (6) Preservation of Existing Appropriate Native Vegetation\*

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<sup>91</sup> Duane R. Durgee, Alachua County Forester, *Characteristics of Good Tree Protection and Landscape Ordinances*.

<sup>92</sup> *Id.*

### **Sec. 11.3 Commercial\*\***

The minimum landscaping requirements for commercial properties shall be fulfilled by appropriate native trees, shrubs, and groundcovers, as specified:

- (1) Buffer and Perimeter Planting
- (2) Interior Planting
- (3) Foundation Planting
- (4) Parking Lot and Street Trees
- (5) Tree Planting Requirements
- (6) Preservation of Existing Appropriate Native Vegetation\*

### **Sec. 11.4 Industrial\*\***

The minimum landscaping requirements for industrial properties shall be fulfilled by appropriate native trees, shrubs, and groundcovers, as specified:

- (1) Buffer and Perimeter Planting
- (2) Interior Planting
- (3) Foundation Planting
- (4) Parking Lot and Street Trees
- (5) Tree Planting Requirements
- (6) Preservation of Existing Appropriate Native Vegetation\*

### **Sec. 11.5 Municipal\*\***

The minimum landscaping requirements for municipal properties shall be fulfilled by appropriate native trees, shrubs, and groundcovers, as specified:

- (1) Buffer and Perimeter Planting
- (2) Interior Planting
- (3) Foundation Planting
- (4) Parking Lot and Street Trees
- (5) Tree Planting Requirements
- (6) Preservation of Existing Appropriate Native Vegetation\*

*\* Within these requirements, a local government should provide provisions for the mandatory preservation of existing appropriate native vegetation at the site. Several counties in Florida require mandatory preservation of canopy, habitat, or upland natural area preservation.<sup>93</sup> One way that local governments can protect existing vegetation is by requiring that a set percentage, e.g. 25%, of sites*

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<sup>93</sup> See Brevard County Natural Resources Management Office, *Florida Counties with Mandatory Canopy, Habitat, or Upland Natural Area Preservation* ( December 16, 2003); See also David Schwartz, *Local Government Authority to Protect Upland Habitats*. Presentation at the University of Florida Levin College of Law's Public Interest Environmental Conference (February, 2003); R. Hamann, et al., *Implementation of the Model Land Development Code for Florida Springs Protection* (2004).

*containing significant existing native vegetation be set aside as a natural area and left untouched for preservation. Another example of a way to protect existing native vegetation is through permitting for removal of this vegetation. The City of Sanibel, for example, requires a permit for the removal of native trees that are over 6 feet in height (or more than 2 inches in truck diameter 2 feet from the ground) and native shrub-like plants that are more than two feet in height.<sup>94</sup>*

*\*\*A local government may choose to add additional requirements for large-scale developments. This is recommended because large-scale developments (e.g. > 20 acres) may have a more significant geographical impact on plant communities. Adding separate landscape requirements may allow, for example, for a requirement to preserve a certain percentage of “natural areas” left untouched by development and protected on the property. One way to accomplish this would be to break down each zoning category into acreage increments. In drafting, for example:*

***Sec. 11.2.a Multi-Family Residential, Less than 20 Acres***

- (1) Buffer and Perimeter Planting*
- (2) Interior Planting*
- (3) Foundation Planting*
- (4) Parking Lot and Street Trees*
- (5) Tree Planting Requirements*
- (6) Preservation of Existing Appropriate Native Vegetation*

***Sec. 11.2.b Multi-Family Residential, 20 Acres or More***

- (1) Buffer and Perimeter Planting*
- (2) Interior Planting*
- (3) Foundation Planting*
- (4) Parking Lot and Street Trees*
- (5) Tree Planting Requirements*
- (6) Preservation of Existing Appropriate Native Vegetation*
- (7) Protection of Natural Areas*

*In the model ordinance, this would be done for sections 11.2-11.5 above.*

**Sec. 12. TURFGRASS.**

Non-native turfgrass shall be considered within the percentage of non-native vegetation permitted. The landowner shall use a low-water use turfgrass that is approved by staff as the most appropriate turfgrass for use in the area. Staff may vary the percentage of turf grass requested by the landowner in the landscape plan.

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<sup>94</sup> City of Sanibel Landscape Code, Art. II, Sec. 122-145, Removal of Native Species.

*The local government must determine whether to consider turfgrass within the maximum percentage of non-native vegetation allowed pursuant to Section 6 or to permit an applicant to exceed the requirement to accommodate the use of non-native turf grass.*

### **Sec. 13. LANDSCAPE PLAN REVIEW CRITERIA.**

When reviewing a landscape plan, appropriate local government staff, including the City Arborist, may consider the following factors in order to approve or deny a landscape plan:

- (1) whether the landscaping requirements of sections 10 and 11 have been satisfied;
- (2) whether adequate measures have been taken to protect existing appropriate native vegetation at the site;
- (3) whether adequate measures have been taken to protect any existing rare, threatened, and endangered plants at the site;
- (4) the level of appropriateness of the native vegetation chosen for the site based on the soil, topography, hydrology, and flammability of the particular site;
- (5) the diversity of the plants; and
- (6) whether the landscape plan takes into account the area's wildfire risks.

### **Sec. 14. LANDSCAPE MAINTENANCE.**

A landowner is responsible for ensuring that all landscape material that is part of an approved landscape plan regulated by this ordinance is maintained in a healthy condition. Within the first year after the date that the landscape plan has been completely installed, if any native plant that is part of the requirements of this ordinance dies or is substantially damaged, the landowner shall replace the plant with the same landscape material or other appropriate native vegetation as approved by appropriate local government staff.

*One year is a common time period used by many landscape ordinances, and generally, a plant that survives the first year of planting will be well established.*

*A local government, however, may choose to implement a more stringent and longer time period during which a land owner would be responsible for replacing any plants that have died or been substantially damaged.*

### **Sec. 15. MODIFICATION OF EXISTING LANDSCAPING.**

If a land owner modifies fifty-percent (50%) or greater of the entire landscaped area of an existing landscape plan which was installed prior to the implementation of this ordinance, the land owner shall bring the portion of the landscaped area that is being modified into compliance with the provisions of this ordinance.

*This section of the ordinance applies to situations where only the existing landscaped area is being modified by greater than 50%. Section 15 above requires existing landscapes to be brought into compliance with this ordinance when there is greater than 50% renovation or expansion of the existing development, increase in lot improvement value, or structure expansion. This ordinance, however, does not address incremental landscape modifications.*

## **Sec. 16. LAND CLEARING.**

No construction shall begin or land shall be cleared until a land clearing permit has been acquired and the landscape plan for the site has been approved according to the provisions of this ordinance.

*The two primary purposes for this section are to preserve existing appropriate native vegetation and to provide protection for any rare, threatened, or endangered plants which may be located at the site prior to removal of any existing vegetation. When reviewing the landscape plan, appropriate local government staff may consider the level of appropriateness of the existing native vegetation to the site, whether an adequate amount of the existing appropriate native vegetation has been preserved in the plan, and whether rare, threatened, or endangered plants are protected as required by the ordinance and applicable laws. The failure to adequately preserve appropriate existing native vegetation or protect rare, threatened, or endangered plants as required may be the basis for the denial of a landscape plan. Incentives can be given to encourage the on-site preservation of appropriate existing native vegetation.*

## **Sec. 17. TREE PROTECTION DURING CONSTRUCTION AND LAND CLEARING.**

It shall be unlawful for any person to remove, destroy, or permanently damage any existing appropriate native tree that is four (4) caliper inches or larger without first obtaining a Tree Removal Permit from the appropriate local government staff. All existing appropriate native trees designated as remaining in their original placement as a part of the landscape plan shall be protected during construction and land clearing from permanent damage to any part of the tree. A developer shall follow the guidelines for protecting existing native trees during construction and land clearing provided in the Landscape Manual, pursuant to section 25 of this ordinance.

*The purpose of this section is to prevent destructive land clearing and construction practices that may leave an existing native tree in its place but so severely damage it that it is no longer a viable tree and will eventually die. Trees are often damaged due to the destruction of roots when installing utilities, spills of harmful materials, and loss of air and water to the roots due to the compacting of soil or fill above the critical root systems.<sup>95</sup> Some of the ways to protect these trees during construction and land clearing include protecting groups of trees with protective barriers within which construction is prohibited, requiring minimum layers of soil protection such as chip mulch or pine straw where heavy*

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<sup>95</sup> Fulton County Tree Preservation Ordinance, “Protecting ‘Save’ Trees,” TREE CITY USA BULLETIN NO. 31.

*machinery does have to cut through a protected tree area to prevent compacting of soil and damage to roots, carefully cutting roots to allow for new root growth rather than tearing roots, tunneling utility pipes rather than trenching where they cannot be rerouted around trees, and providing aeration systems over roots that may be covered with pavement or fill.<sup>96</sup> This section can be amended to expressly list required or suggested methods of protection.*

## **Sec. 18. TREE REPLACEMENT AND MITIGATION BANK.**

A landowner who removes any tree from a site shall replace that tree with a replacement tree or a number of replacement trees in sum that are equal or greater to the diameter of the tree that was removed inch for inch. All replacement trees shall be appropriate native trees. If a landowner cannot feasibly replace all the caliper inches of trees removed at a site, the landowner must pay a tree replacement fee to the Tree Mitigation Trust. Funds from the Tree Replacement Trust shall only be used to purchase trees and vegetation for planting on public property within the City or to fund landscape enforcement and educational activities required by this ordinance.

*The City of Winter Park is an example of a local community in Florida that has established a Tree Replacement Trust Fund.<sup>97</sup>*

## **Sec. 19. FINANCIAL ASSURANCES.**

When deemed necessary by appropriate local government staff, appropriate security or guarantees shall be provided by the applicant to ensure proper implementation of the landscape plan as approved. The guarantee may be in the form of a performance bond, trust fund, irrevocable letter of credit, or other financial assurance mechanisms acceptable and payable to the City. The amount of financial assurances shall be determined by the City.

When the appropriate local government staff determines that under the particular circumstances planting of trees or vegetation would not be prudent before a certificate of occupancy or certificate of completion is issued, the applicant may post a performance bond with the City Council, in a form acceptable to the City. The performance bond shall be in an amount no less than 125 percent of the estimated cost of all trees and vegetation to be planted, plus labor. The performance bond shall be received and accepted by the City prior to the issuance of the certificate of occupancy or certificate of completion.<sup>98</sup>

## **Sec. 20. VARIANCE PROCEDURES.**

*As a matter of local government law, variances provide a means to address circumstances where there is a unique hardship placed on a landowner by strict application of a zoning regulation that is not shared by other property owners in*

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<sup>96</sup> *Id.*

<sup>97</sup> City of Winter Park, § 58-297, Alternatives to the preservation of trees not permitted for removal.

<sup>98</sup> Based upon Brevard County, Florida, Landscape Ordinance, Sec. 62-4334, General Landscaping Requirements.

*the area.<sup>99</sup> A "variance" is relief granted from literal enforcement of a zoning ordinance permitting use of property in a manner otherwise forbidden upon a finding that enforcement of the ordinance as written would inflict practical difficulty or unnecessary hardship on a property owner. Generally, variances cannot be granted based on economic hardship alone or when the hardship is self-imposed.<sup>100</sup> In some jurisdictions in Florida, the hardship that warrants the variance must be such that it renders it virtually impossible to use land for the purpose for which it is zoned, i.e. no reasonable use can be made of the property.<sup>101</sup>*

*Granting a variance allows the applicant to depart from the requirements of the ordinance. This provision leaves the ultimate decision regarding these sorts of requests to the community governing body. Anticipated uses that are inconsistent with the requirements and goals of the ordinance may alternatively be permitted by express inclusion in the list of exemptions in section 5 of this ordinance.*

- (1) Petition. Any landowner whose property is regulated by this ordinance may petition the appropriate local government staff for a variance from the requirements of this ordinance. The petition must include:
  - (a) the name and address of the applicant;
  - (b) a detailed description of the exigent circumstances that warrant variance from the requirements;
  - (c) a proposed landscape plan; and
  - (d) any other relevant information that staff requests of the applicant.
- (2) Decision. Within thirty (30) days of receiving the petition, the appropriate local government staff will notify the landowner in writing of its decision to either approve or deny the petition.
- (3) Appeal. The landowner may appeal a denial of the variance to the City Council by submitting a written notice of appeal to the City Council within thirty (30) days after the date of determination by the appropriate local government staff.

## **Sec. 21. ENFORCEMENT.**

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<sup>99</sup> See e.g. Town of Indialantic v. Nance, 485 So. 2d 1318 (Fla. App. 5th Dist., 1986), Bernard v. Town Council of Palm Beach, 569 So. 2d. 853 (Fla. App. 4th Dist., 1990), Crossroads Lounge, Inc v. City of Miami, 195 So. 2d 232 (Fla. App. 3d Dist., 1967), Board of Adjustment of City of Ft. Lauderdale V. Kremer, 139 So. 2d 448 (Fla. App. 2d Dist., 1962).

<sup>100</sup> See e.g. Metropolitan Dade County v. Reineng Corp., 399 So. 2d 379 (Fla. App. 3d Dist., 1981), Thompson v. Planning Com'n of City of Jacksonville, 464 So. 2d 1231 (Fla. App. 1sr Dist., 1985), Burger King Corp. v. Metropolitan Dade County, 349 So. 2d 210 (Fla. App. 3d Dist., 1977).

<sup>101</sup> See e.g. Town of Indialantic v. Nance, 485 So. 2d 1318 (Fla. App. 5th Dist., 1986), Thompson v. Planning Com'n of City of Jacksonville, 464 So. 2d 1231 (Fla. App. 1st Dist., 1985).

Implementation and enforcement of this ordinance by staff, including the City Arborist, shall consist of:

- (1) **Notice of Violation.** If any provision of this ordinance is violated at any time, the staff shall issue a written notice of the violation to the owner of the landscaped area. The owner shall have thirty (30) days within which to correct the violation before any punitive action is taken.
- (2) **Fines.** If any person who violates the provisions of this ordinance has not corrected the violation within thirty (30) days after receiving notice of the violation, the City may issue a fine to such person.
- (3) **Injunctive Relief.** If any person engages in landscaping activities regulated by this ordinance without the prior approval of a landscape plan by the staff, then the City may file an action for injunctive relief in a court of competent jurisdiction.
- (4) **Denial of Permits.** If any person fails to obtain approval of a landscape plan from the staff or implements a landscape plan contrary to the plan approved by the staff, the City may deny such person additional development permits on the basis of failure to comply with the requirements of this ordinance.
- (5) **Inspections.** Designated City landscape inspectors shall have the authority to make inspections at reasonable hours of all areas landscaped pursuant to this ordinance at any time during the development of a site, installation of the landscape plan at the site, and within the first year after the date that the landscaping is completely installed. The inspections may be made without notice, and refusal to allow such inspection will be a violation of this ordinance. Refusal to allow inspection will constitute grounds for a court of competent jurisdiction to issue an administrative warrant for the purposes of inspecting the landscaped area.
- (6) **Suspension or Revocation of License and/or Certification:** All registered landscape architects, landscape designers and landscape contractors that submit a landscape plan pursuant to this ordinance shall be responsible for ensuring that the landscape plan is installed as approved. Any landscape architect, landscape designer or landscape contractor that installs a landscape plan in violation of this ordinance shall be subject to suspension or revocation of their license in the municipality where the work was completed.

*The keys to success for a landscape ordinance will be both public support and sufficient enforcement.<sup>102</sup> A community must be willing to put resources into landscape inspections in order to enforce the provisions of this ordinance to*

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<sup>102</sup> Duane R. Durgee, Alachua County Forester, *Characteristics of Good Tree Protection and Landscape Ordinances*.

*achieve the goals laid out in section 2. Implementing strict requirements that deny development permits for noncompliance with this ordinance and placing responsibility on landscape professionals for certifying that their work is installed as planned are two powerful ways to ensure compliance.*

## **Sec. 22. INCENTIVE PROGRAM.**

*A local government may choose to provide incentives to promote the use of appropriate native vegetation. This may be especially useful for property owners who are not otherwise subject to the ordinance, e.g. those not contemplating modifications to their landscaping. There are many incentives that a local government may offer to encourage its citizens to participate in the promotion of appropriate native vegetation. The following list provides examples of such incentives, including:*

- 1) *Fast track permitting for building and landscape permits*
- 2) *Reduced permitting fees*
- 3) *Certified Native Landscape Programs/Marketing*
- 4) *Tax Breaks/user fee reductions*
- 5) *Payment or Cost-Share Programs for Removal of Invasive Species*

## **Sec. 23. APPEALS TO CITY COUNCIL.**

Any person adversely affected by a decision of the staff in the enforcement or interpretation of any provisions of this ordinance may appeal such decision to the City Council. Such appeal shall be made in writing to the City Council within thirty (30) days after the decision of the staff. The City Council shall set a time and place to allow the applicant to be heard. The City Council shall thereafter either grant or deny the application in whole or in part and notify the applicant in writing of its decision.

*As an alternative, a local government may choose to provide appeals to the Landscape Committee, created pursuant to section 27 of this model ordinance, rather than to the City Council.*

## **Sec 24. FEES.**

The City Council may charge an applicant reasonable fees for any permits and applications required by this ordinance. Such fees may from time to time be amended by the City Council.

## **Sec. 25. LANDSCAPE MANUAL.**

The City Council shall adopt a “Landscape Manual” by resolution that illustrates best management practices and standards for preserving existing native vegetation and natural areas, landscape design, tree installation, tree preservation, wildfire protection, and maintenance using appropriate native vegetation. The manual shall include a list for each landscape category of the appropriate native plants that should be planted in that landscape category. The purpose of the

manual is to provide landscape applicants with a resource that clearly depicts guidelines for landscaping design in accordance with these standards, including landscaping drawings, sample plans, and suggested landscaping practices that will promote a healthy environment in accordance with the goals as stated in section 2 of this ordinance. The manual shall be made available to the public at (<http://www.---.gov>) or by written request to the Landscape Committee. This manual may be amended and updated from time to time with approval of the Landscape Committee.

*This landscape manual should be made widely accessible to the public and written to be both easily understood by single-family residential land owners and detailed enough to assist landscape professionals in their design plans for larger developments. The contents of this landscape manual are beyond the scope of this model ordinance, which is designed to set out the language for an ordinance requiring the use of native plants. The ordinance sets out the minimum landscaping requirements, while the manual can be used to assist landowners, landscape designers, and planners in designing creative landscaping using appropriate native plants and best landscaping practices.*

## **Sec. 26. EDUCATION.**

The City recognizes that education of its citizens on the benefits of appropriate native vegetation and the need for the use of more efficient landscaping practices is essential in order to protect the City's valuable natural resources, including water, wildlife, and native plants. In order to increase public awareness and educate its citizens of the critical need for the protection and promotion of appropriate native vegetation, the City shall sponsor workshops on landscape design principles and the benefits of landscaping with appropriate native plants. The City shall also make available educational materials to instruct landowners on the most efficient methods of landscape design and maintenance.

*Education is a critical component to achieving benefits for the local community by encouraging the use of landscape design principles that incorporate appropriate native plants. This is particularly essential for single-family homeowners who may not be aware of the individual benefits they will receive, what plants actually are native or endangered or threatened, and how to design their landscaping to achieve water conservation, efficiency, and protection goals. Single-family landscaping can account for a large portion of a local community's landscaped areas and if designed properly can contribute significantly to protecting native habitat.*

## **Sec. 27. LANDSCAPE COMMITTEE.**

*Review and approval or denial of individual landscape plans are handled at the appropriate local government staff level. The purpose of the Landscape Committee is to coordinate overall landscaping design and education within the local government's jurisdiction to promote the use of appropriate native vegetation and further the purposes of this model ordinance, pursuant to section*

*2, to achieve the benefits of preservation of existing native vegetation and use of appropriate native vegetation in landscaping.*

### **Sec. 27.1. Purpose.**

The Landscape Committee is created with the following general purposes:

- (a) to protect existing appropriate native vegetation;
- (b) to promote the use of appropriate native vegetation in all public and private landscaped areas;
- (c) to coordinate efforts to educate citizens of the City of Sabalville about the benefits of appropriate native vegetation and best management practices for efficient landscaping design; and
- (d) to make recommendations for the design of the overall landscaping plan for all public property within the City.

*The purpose of this Landscape Committee is to have one knowledgeable group with an overall goal to promote efficient landscape design and use of appropriate native plants that acts as the coordinator of the local government's overall landscape design and education. Approval of individual landscape plans is handled at the staff level and not by the Landscape Committee. A local government may, however, choose to have the Landscape Committee hear appeals from staff denial of landscape plans instead of appeals to its City Council, see annotations to section 23 of this model ordinance, Appeals to City Council.*

*There is precedent for landscape committees that promote landscaping design principles. The City of Jacksonville, for example, has a landscape committee made up of eleven members that does not approve the landscape plans but has purposes to make recommendations to the City Council regarding landscaping of public property, create an overall landscaping and beautification plan for public property in the City, and to act as a coordinating body to encourage public and private participation in the landscaping of the City.<sup>103</sup> The City of Winter Park, as another example, has a Tree Protection Board that handles appeals from tree removal permits and makes recommendations for variances from tree protection requirements.<sup>104</sup>*

### **Sec. 27.2. Membership.**

The Landscape Committee shall consist of a group of seven (7) members. The Landscape Committee, where practicable, should be made up of one member from each of the following categories:

- (1) local native plant society or organization representative;
- (2) local nursery growers association representative;
- (3) registered landscape architect;

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<sup>103</sup> Jacksonville Landscape Commission, Jacksonville Ordinance Code §54.101-54.106.

<sup>104</sup> City of Winter Park, Tree Removal and Protection, §58-291-293.

- (4) certified landscape designer;
- (5) master gardener representative;
- (6) master naturalist representative;
- (7) public natural resource manager;
- (8) representative from the local builders association;
- (9) city arborist or other knowledgeable staff member if the City does not have an arborist on staff;
- (10) city forester or other knowledgeable staff member if the City does not have an forester on staff;
- (10) botanist or plant ecologist, ideally with an advanced degree in that field; and
- (11) representative of the Division of Forestry or local fire service with knowledge of highly-flammable plant issues near structures.

*The purpose of listing the categories in the ordinance from which the City Council should consider selecting members to the Landscape Committee is to ensure that the City Council will select a balanced Landscape Committee that represents all interests fairly in the promotion of native plants. The number and types of members on the Landscape Committee in a particular community depends upon the size of the community, its specific needs, and the expertise available. The number of members on the Committee should be a small enough number to promote manageable decision making but not so small as to lose adequate representation of the interests.*

### **Sec. 27.3. Appointment.**

Members of the Landscape Committee shall be appointed by the City Council to serve a term of four (4) years. Members may be reelected for consecutive terms upon approval by the City Council.

### **Sec. 28. CONFLICTING REGULATIONS REPEALED.**

All regulations that are in conflict with this ordinance, in whole or in part, are hereby repealed to the extent that they are in conflict.

### **Sec. 29. SEVERABILITY.**

If any portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate provision and shall not affect the validity of the remaining portions of the ordinance.

### **Sec. 30. EFFECTIVE DATE.**

This ordinance shall take effect on the date on which it is enacted by the City of Sabalville.

### **Appendix A.**

## **EXISTING “NATIVE PLANT” DEFINITIONS**

The following is a list of definitions of native plants and native vegetation used in existing legislation or academic journals. The Florida Native Plant Society definition is the one used in this model ordinance as the best definition of a “native plant.” The following examples are listed only to demonstrate examples of existing definitions for comparison and are *not* intended to be used as alternative definitions in a landscape ordinance. Several of these definitions may in fact be broad enough to include non-native or even Invasive plants.

- **Florida Native Plant Society** ([www.fnps.org](http://www.fnps.org))

*Florida Native Plant:* refers to those species occurring within the state boundaries prior to European contact, according to best scientific and historical documentation. More specifically, it includes those species understood as *indigenous*, occurring in natural associations in habitats that existed prior to significant human impacts- and alterations of the landscape.

- Adopted by the Association of Florida Native Nurseries

- **Federal Native Plant Conservation Committee, 1994**

*Native Plant:* a plant species “that occurs naturally in a particular region, state, ecosystem, and habitat without direct or indirect human actions.”

- Adopted by the U.S. Department of Transportation, Federal Highway Administration, *Roadside Use of Native Plants* (<http://www.fhwa.dot.gov/environment/rdsduse/rdsduse5.htm>)

- **The United States National Arboretum** ([www.usna.usda.gov/Gardens/glossary.html](http://www.usna.usda.gov/Gardens/glossary.html))

*Native Plant:* A plant that lives or grows naturally in a particular region without direct or indirect human intervention.

- **St. John’s River Water Management District Model Landscape Water Conservation Ordinance, Draft**

*Native Vegetation:* Native or drought-resistant plants include those in the District’s Waterwise Florida Landscapes, available at <http://www.sjrwmd.com/programs/outreach/conservation/landscape/index.html>; the Florida Native Plant Society’s list of native landscapes plants for \_\_\_\_\_ County, available at [http://www.fnps.org/pages/plants/landscape\\_plants.php](http://www.fnps.org/pages/plants/landscape_plants.php); *A Gardener’s Guide to Florida’s Native Plants* (Osorio 2001); or other compatible guidelines

- **City of Sanibel Code of Ordinances (Sec. 122-101)**

*Endangered native plants:* An indigenous plant species that has been identified as in danger of becoming extinct because of harmful human activity or environmental factors,

and that is thus the subject of protective regulations and conservation measures. These plants are identified on the following two lists:

*Federal List:* <http://endangered.fws.gov/50cfr/plants.pdf>

*Native plants:* Those plant species whose natural range included Florida at the time of European contact (1500 A.D.) as identified on the Atlas of Vascular Plants Website, which is identified as follows: *Atlas of Vascular Plants, University of South Florida Institute for Systematic Botany:* <http://www.plantatlas.usf.edu/default.asp>

- **Miami-Dade County Landscaping Ordinance (Sec. 18A-3)**

*Native habitat:* An area enhanced or landscaped with an appropriate mix of native tree, shrub and groundcover species that resembles a native plant community or natural forest community in structure and composition or is naturally occurring.

*Native plant species:* Plant species with a geographic distribution indigenous to all or part of Miami-Dade County. Plants which are described as being native to Miami-Dade County in botanical manuals such as, but not limited to, "A Flora of Tropical Florida" by Long and Lakela and "The Biology of Trees Native to Tropical Florida" by P. B. Tomlinson, are native plant species within the meaning of this definition. Plant species which have been introduced into Miami-Dade County by man are not native plant species.

*Native plant community:* A natural association of plants dominated by one (1) or more prominent native plant species, or a characteristic physical attribute.

- **City of Jacksonville Landscape and Tree Protection Regulations (Sec. 656-1203)**

*Vegetation, native:* means any plant species with a geographic distribution indigenous to all or part of the State of Florida.

*Naturally occurring existing plant communities.* See Vegetation, native.

- **City of Tampa Code of Ordinances (sec. 13-4)**

*Native plant community:* means those plant communities naturally occurring in north and central Florida.

*Native plant material:* means any plant material indigenous to central Florida and which is naturally grown or commercially propagated or cultivated for the nursery or landscaping industry.

*Native tree:* means any tree indigenous to central Florida or the city and which is naturally grown or commercially propagated or cultivated for the nursery or landscaping industry.

- **City of Gainesville Code of Ordinances** (Sec. 30-23)

*Native*: means those plants and animals, including commonized vegetation, and especially vegetation known to have existed locally when Ponce de Leon arrived in Florida, which are appropriate to the ecological setting, have noninvasive growth habits, are tolerant of the hydrologic conditions of the site, and require little maintenance upon maturity.

*Native plants*: means those plants, including commonized plants, which are appropriate to the ecological setting, have noninvasive growth habits, are tolerant of the hydrological conditions of the site, and require little maintenance upon maturity.

- **City of Orlando Code of Ordinances** (Sec. 66-200)

*Native Plant Community*: An indigenous association of plants identified by one or more prominent species or a characteristic physical attribute. In Central Florida, native plant communities include pine flatwoods; hydric, mesic and xeric hammocks; sand pine scrub; wetlands and cypress domes; prairies; sandhills; and hardwood forests.

*Native Species (Plant or Tree)*: (Reserved.)

- **Florida Department of Environmental Protection, Draft Florida Friendly Landscape Model Ordinance**

*Native Vegetation*: Any plant species with a geographic distribution indigenous to all, or part, if the State of Florida

- **“Origin of the Species: Native versus Non-native Rangeland Plants.” By Sherry Dodson.**  
(<http://www.cnr.uidaho.edu/range456/hot-topics/native-plants-debate.htm>)

*Native, indigenous*: Species that evolved in the region they inhabit.

- **Florida Nursery Growers and Landscape Association –**  
Landscape Ordinance Policy Position Paper ([www.fnsla.org](http://www.fnsla.org)):

"The basic foundation of a local or county landscape ordinance must incorporate the overarching principle of horticultural science: 'put the right plant in the right place.' In other words, landscape ordinances must feature flowers, plants, trees, and shrubs that are suited for the soil, topography, and climate found at the landscape site. By 'putting the right plant in the right place,' FNGLA fully supports the wide use of native and non-native plants as there are plenty of sensible opportunities for both."