

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL: CS/CS/SB 588

INTRODUCER: Community Affairs Committee; Commerce and Tourism Committee; and Senators
Hutson and Bradley

SUBJECT: Preemption of Local Regulations

DATE: April 9, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Little</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Peacock</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/CS</u>
3.	<u> </u>	<u> </u>	<u>RC</u>	<u> </u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 588 prohibits a local government entity from adopting or enforcing an ordinance or regulation relating to over-the-counter proprietary drugs and cosmetics before July 1, 2021. The bill provides for the imposition of a fine and assessment of attorney fees and costs for violation of the moratorium by a local government entity.

The bill preempts the establishment of requirements for alternate generated power sources for motor fuel dispensing facilities, including transfer switches, to the state and the Division of Emergency Management.

The bill takes effect July 1, 2019.

II. Present Situation:

Home Rule and Preemption

Counties

A county without a charter has such power of self-government as provided by general¹ or special law, and may enact county ordinances not inconsistent with general law.² Counties operating under county charters shall have all the powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors.³ General law authorizes counties “the power to carry on county government”⁴ and to “perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.”⁵

Municipalities

Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,⁶ acknowledges the constitutional grant to municipalities of governmental, corporate, and proprietary power necessary to conduct municipal government, functions, and services.⁷ Chapter 166, F.S., provides municipalities with broad home rule powers, respecting expressed limits on municipal powers established by the Florida Constitution, applicable laws, and county charters.⁸

Section 166.221, F.S., authorizes municipalities to levy reasonable business, professional, and occupational regulatory fees, commensurate with the cost of the regulatory activity, including consumer protection, on such classes of businesses, professions, and occupations, the regulation of which has not been preempted by the state or a county pursuant to a county charter.

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. A local government enactment may be inconsistent with state law if (1) the Legislature has preempted a particular subject area or (2) the local enactment conflicts with a state statute. Where state preemption applies, it precludes a local government from exercising authority in that particular area.⁹ Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.¹⁰ Express preemption of a field by the Legislature must be accomplished by clear

¹ Chapter 125, Part I, F.S.

² FLA. CONST. art. VIII, s. 1(f).

³ FLA. CONST. art. VIII, s. 1(g).

⁴ Section 125.01(1), F.S.

⁵ Section 125.01(1)(w), F.S.

⁶ Section 166.011, F.S.

⁷ Florida House of Representatives, Publications, *The Local Government Formation Manual 2017-2018*, p. 16, available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2911&Session=2017&DocumentType=General Publications&FileName=2017-2018 Local Government Formation Manual Final Pub.pdf> (last visited March 1, 2019).

⁸ Section 166.021(4), F.S.

⁹ Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

¹⁰ See *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008).

language stating that intent.¹¹ In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.¹²

In cases determining the validity of ordinances enacted in the face of state preemption, the effect has been to find such ordinances null and void.¹³ Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.¹⁴ Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and strong public policy reasons exist for finding preemption.¹⁵ Implied preemption is found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.¹⁶

The Florida Drug and Cosmetic Act

The Florida Drug and Cosmetic Act (Act) is found in part I of ch. 499, F.S.¹⁷ The Act's purpose is to safeguard the public health and promote the public welfare by protecting the public from injury by product use and by merchandising deceit involving drugs, devices, and cosmetics.¹⁸ The Department of Business and Professional Regulation is responsible for administering and enforcing efforts to prevent fraud, adulteration, misbranding, or false advertising in the preparation, manufacture, repackaging, or distribution of drugs, devices, and cosmetics.¹⁹ Administration of the Act must conform to the Federal Food, Drug, and Cosmetic Act²⁰ and the applicable portions of the Federal Trade Commission Act,²¹ which prohibit the false advertising of drugs, devices, and cosmetics.²²

Division of Emergency Management

The Division of Emergency Management (DEM) is established within the Executive Office of the Governor as a separate budget entity.²³ The director of DEM is appointed by and serves at the pleasure of the Governor. DEM is responsible for administering programs to rapidly apply all available aid to communities stricken by an emergency²⁴ and is the liaison with federal agencies and other public and private agencies.²⁵ DEM is responsible for carrying out the State Emergency Management Act,²⁶ which includes creating a statewide comprehensive emergency

¹¹ *Mulligan*, 934 So. 2d at 1243.

¹² *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

¹³ *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002).

¹⁴ *Phantom of Clearwater, Inc.*, 894 So. 2d at 1019.

¹⁵ *Id.*

¹⁶ *Sarasota Alliance for Fair Elections, Inc.*, 28 So. 3d at 886.

¹⁷ Section 499.001, F.S., provides that ss. 499.001-499.94 is the Florida Drug and Cosmetic Act.

¹⁸ Section 499.002(1)(a), F.S.

¹⁹ Section 499.002(2), F.S.

²⁰ 21 U.S.C. ss. 301 *et seq.*

²¹ *See* 15 U.S.C. §§ 41-58, as amended.

²² Section 499.002(1)(b), F.S.

²³ Section 14.2016(1), F.S.

²⁴ "Emergency" means any occurrence, or threat thereof, whether natural, technological, or manmade, in war or peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property. Section 252.34(4), F.S.

²⁵ Sections 14.2016(1) and 252.35(1), F.S.

²⁶ Sections 252.31-252.60, F.S., are known as the "State Emergency Management Act."

management plan (CEMP).²⁷ The CEMP serves as the master operations document for Florida and is the framework through which the state handles emergencies and disasters. The CEMP must contain provisions to ensure that the state is prepared for emergencies and minor, major, and catastrophic disasters.²⁸

Alternate Generated Power Capacity for Motor Fuel Dispensing Facilities

Section 526.143, F.S., requires certain motor fuel dispensing facilities to have alternate generated power capacity to operate in the event of a power disruption following a disaster.²⁹ Each motor fuel terminal facility³⁰ and each wholesaler³¹ which sells motor fuel in this state must be capable of operating its distribution loading racks using an alternate generated power source for a minimum of 72 hours. The facility must have such alternate generated power source available for operation no later than 36 hours after a major disaster.³² Installation of appropriate wiring, including a transfer switch, must be performed by a certified electrical contractor.³³

A transfer switch is used to supply power to an electrical circuit from multiple sources, and is part of the back-up system installed with a back-up generator. Transfer switches can be automatic or manual. An automatic transfer switch engages the generator as soon as it senses that one of the sources has lost or gained power. A manual transfer switch requires someone to manually turn on and turn off the generator as needed.³⁴

Each facility subject to these requirements must keep a copy of the documentation of such installation on site or at its corporate headquarters.³⁵ Also, each facility must keep a written statement attesting to the periodic testing and ensured operational capacity of the equipment. The required documents must be made available, upon request, to the DEM and the director of the county emergency management agency.³⁶

All newly constructed or substantially renovated³⁷ motor fuel retail outlets,³⁸ with a certificate of occupancy on or after July 1, 2006, must also have an appropriate transfer switch capable of

²⁷ Section 252.35(2)(a), F.S.

²⁸ *Id.*

²⁹ “Disaster” means any natural, technological, or civil emergency that causes damage of sufficient severity and magnitude to result in a declaration of a state of emergency by a county, the Governor, or the President of the U.S. Section 252.34(2), F.S.,

³⁰ Section 526.303(16), F.S., defines “motor fuel terminal facility” as any inland, waterfront, or offshore appurtenance on land used for the purpose of storing, handling, or transferring motor fuel, but does not include bulk storage facilities owned or operated by a wholesaler.

³¹ Section 525.303(17), F.S., defines “wholesaler” as a person, other than a refiner or dealer, who purchases motor fuel at terminal facility and supplies motor fuel to retail outlets.

³² “Major disaster” means a disaster that will likely exceed local capabilities and require a broad range of state and federal assistance. Section 252.34(2)(b), F.S.

³³ Section 526.143(1), F.S.

³⁴ Cooling Power Emergency Power Solutions, *Generator Transfer Switch Options: Manual Vs. Automatic*, <https://coolingpowercorp.com/news/generator-transfer-switch-options-manual-vs-automatic/> (last visited April 9, 2019).

³⁵ Section 526.143(1), F.S.

³⁶ *Id.*

³⁷ “Substantially renovated” is defined as a renovation that results in an increase of greater than 50 percent in the assessed value of the motor fuel retail outlet. Section 525.143(2), F.S.

³⁸ “Retail outlet” means a facility, including land and improvements, where motor fuel is offered for sale, at retail, to the motoring public. Section 526.303(14), F.S.

operating all fuel pumps, dispensing equipment, lifesafety systems, and payment-acceptance equipment using an alternate power source.³⁹ All motor fuel retail outlets located within one-half mile to an interstate highway or state or federal designated evacuation route must be prewired with an appropriate transfer switch and be capable of operating all required equipment using an alternate power source with the following specifications based on population:

- 16 or more fueling positions located in a county with a population of 300,000 or more;
- 12 or more fueling positions located in a county with a population of 100,000 or more, but fewer than 300,000; or
- 8 or more fueling positions located in a county with a population of fewer than 100,000.⁴⁰

Installation of appropriate wiring, including a transfer switch, must be performed by a certified electrical contractor.⁴¹ The motor fuel retail outlet must also maintain a copy of the documentation of such installation on site or at its corporate headquarters, keep a written statement attesting to the periodic testing and ensured operational capacity of the equipment, and make available, upon request, these records to the DEM and the director of the county emergency management agency.⁴²

Corporations owning 10 or more motor fuel retail outlets located within a single county must maintain at least one portable generator that is capable of providing an alternate generated power source.⁴³ If a corporation owns more than 10 outlets or a multiple of 10 outlets plus an additional 6 outlets, the corporation must provide one additional generator to accommodate such additional outlets.⁴⁴ Each portable generator must be stored within this state, or may be stored in another state if located within 250 miles of this state, and must be available for use in an affected location within 24 hours after a disaster.

A corporation or other entity that owns 10 or more motor fuel retail outlets located within a single domestic security region⁴⁵ that does not own any outlets outside of this region must have a written agreement with at least one similarly equipped entity for the use of portable generators located in the state but outside the affected region.⁴⁶ This agreement must guarantee the availability of generators to the affected location within 24 hours after a disaster.

The Department of Agriculture and Consumer Services (DACs)⁴⁷ is authorized to temporarily waive requirements for maintaining generators if the generators are to be used in preparation for, or in response to, an emergency or major disaster in another state.⁴⁸ The waiver must be in

³⁹ Section 526.143(2), F.S.

⁴⁰ Section 526.143(3)(a), F.S.

⁴¹ Section 526.143(3)(b), F.S.

⁴² Section 526.143(2) and (3)(b), F.S.

⁴³ Section 526.143(5)(a), F.S.

⁴⁴ *Id.*

⁴⁵ Section 943.0312(1), F.S. The Florida Department of Law Enforcement (FDLE) has established 7 operational regions. *See* FDLE, Regional Domestic Security Task Forces, *available at* <http://www.fdle.state.fl.us/Domestic-Security/Organization> (last visited April 8, 2019).

⁴⁶ Section 526.143(5)(b), F.S.

⁴⁷ Section 526.09, F.S., provides that DACs enforces the provisions of ch. 526, F.S.

⁴⁸ Section 526.143(5)(c), F.S.

writing and include a beginning and ending date. The waiver may be modified or terminated by DACS if the Governor declares an emergency in this state.⁴⁹

III. Effect of Proposed Changes:

Section 1 creates s. 499.072, F.S., to prohibit a county, municipality, or another local governmental entity from adopting or enforcing an ordinance or other local regulation relating to over-the-counter proprietary drugs and cosmetics before July 1, 2021.

Any attempt by a county, municipality, or another local government entity to adopt or enforce an over-the-counter proprietary drugs and cosmetics regulations before July 1, 2021, will result in the imposition of \$25,000 fine imposed on the offending local government entity. Additionally, the bill provides that the offending local government entity will be responsible for the attorney fees and costs of any party filing a civil action to enforce the terms of the moratorium.

Section 2 amends s. 526.143, F.S., to preempt the establishment of requirements for alternate generated power sources for motor fuel dispensing facilities, including transfer switches, to the state and the Division of Emergency Management.

Section 3 provides an effective date of July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

⁴⁹ *Id.*

B. Private Sector Impact:

None.

C. Government Sector Impact:

Local government entities who adopt or enforce over-the-counter proprietary drugs and cosmetics regulations before July 1, 2021, may have to pay fines and attorney fees and costs if found in violation of the moratorium.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 499.072 of the Florida Statutes. The bill amends section 526.143 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Community Affairs on April 9, 2019:**

The committee substitute:

- Deletes all provisions regarding local regulation and enforcement of single-use plastic straws;
- Deletes the proposed amendment to s. 499.002, F.S., regarding preemption for over-the-counter proprietary drugs and cosmetics;
- Prohibits a local government entity from adopting or enforcing an ordinance or regulation relating to over-the-counter proprietary drugs and cosmetics before July 1, 2021, and provides penalties for violations of the moratorium by a local government entity; and
- Preempts the establishment of requirements for alternate generated power sources for motor fuel dispensing facilities, including transfer switches, to the state and the Division of Emergency Management.

CS by Commerce and Tourism on March 4, 2019:

The committee substitute:

- Establishes a moratorium on the local regulation and enforcement of single-use plastic straws;

- Requires the DEP, or an entity designated by the DEP, to conduct a study to evaluate the environmental impact of single-use plastic straws and to report the results of the environmental impact study to the Legislature by January 1, 2024;
- Provides that the moratorium is lifted, effective July 1, 2024, if the Legislature does not enact a general law specifying a statewide policy regarding single-use plastic straws or a law preempting local regulation of single-use plastic straws;
- Provides that it is a violation of local government that attempts to adopt or enforce single-use plastic straw regulations before July 1, 2024, which shall result in a fine to the offending local government entity in the amount of \$25,000; and
- Preempts the regulation of over-the-counter proprietary drugs and cosmetics to the state, notwithstanding any other law or local ordinance to the contrary.

B. Amendments:

None.