

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: SB 266

INTRODUCER: Senator Perry

SUBJECT: Home-based Businesses

DATE: March 4, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Paglialonga	Ryon	CA	Pre-meeting
2.	_____	_____	CM	_____
3.	_____	_____	RC	_____

I. Summary:

SB 266 preempts the licensing and regulation of home-based businesses to the state and prohibits counties and municipalities from restricting or regulating a home-based business. By operation of law, state preemption would cause existing local government ordinances related to home businesses and home occupations to become null and void.

The bill provides that the legislative intent is to encourage small and home-based business enterprises by allowing potential small business entrepreneurs to use residential property in ways consistent with residential use.

The bill includes criteria that home-based businesses must meet to operate in an area zoned for residential use. Home-based businesses may not have more than two employees who do not reside at the home or are not the residents' immediate family. Home-based businesses must comply with all local parking requirements and may not substantially increase traffic, noise, and waste or recycling. The bill also restricts home-based businesses to activities secondary to the property's use as a residential dwelling and consistent with the uses of surrounding residential property, as viewed from the street. These limitations on home-based businesses resemble current home occupation ordinances imposed by local governments.

The bill takes effect on July 1, 2021.

II. Present Situation:

Home Rule Powers and Preemption

The Florida Constitution

The Florida Constitution establishes and describes the duties, powers, structure, function, and limitations of government in Florida. Article VIII, section 1 of the Florida Constitution, endows

counties and municipalities the power of self-government or home rule power. Under the home rule power, local governments have broad authority to exercise the state's sovereign police powers and legislate on any matter that is not inconsistent with the federal and state constitution and laws.

Counties

A county without a charter has such power of self-government as provided by general or special law and may enact county ordinances not inconsistent with general law.¹ Counties operating under county charters have all the powers of local self-government not inconsistent with general law or with special law approved by a vote of the electors.² General law authorizes counties "the power to carry on county government"³ 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."⁴

Municipalities

Municipalities may be established or abolished, and their charters amended by general or special law. Municipalities have governmental, corporate, and proprietary powers to conduct municipal government, perform municipal functions, and render municipal services. They may exercise any of these powers for municipal purposes except as otherwise provided by law.⁵ Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,⁶ acknowledges these constitutional grants of police powers and better defines municipal powers of self-government.⁷ Chapter 166, F.S., provides municipalities with broad home rule powers to act in a manner not inconsistent with the Florida Constitution, general and special law, and a charter for the county in which the municipality is located.⁸

State Preemption

Although local governments have broad home rule powers, the state legislature may preempt this self-government power and preclude local governments from exercising legislative authority in particular areas of law.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 FLA. CONST. art. VIII, s. 1(f).

² *Id.* at (g).

³ Section 125.01(1), F.S.

⁴ *Id.* at (w).

⁵ FLA. CONST. art. VIII, s. 2.

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 Mar. 3, 2021).

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 On the other hand, implied preemption is found where the local legislation would present the danger of conflicting with the state's pervasive regulatory scheme.¹³ 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 to the state, and there are strong public policy reasons for doing so.¹⁴ In cases determining the validity of ordinances enacted in the face of express and implied state preemption, the effect has been to find such ordinances null, void, and unenforceable.¹⁵

Community Planning

State police powers are derived from the Tenth Amendment to the U.S. Constitution, which affords states all rights and powers "not delegated to the United States."¹⁶ Under this provision, states have police powers to establish and enforce laws protecting the public's welfare, safety, and health.¹⁷ These police powers provide counties and municipalities the authority to enact comprehensive zoning plans to lay out zones or districts where potential uses of real property may be forbidden or restricted.¹⁸

Local governments first began implementing elements of community planning at the turn of the nineteenth century. Private property owners frequently challenged local governments' initial utilization of community planning restrictions as violating rights enumerated in state and U.S. constitutions. Eventually, the constitutionality of community planning restrictions was solidified by the U.S. Supreme Court in a series of decisions that held these land use restrictions were a constitutional exercise of a state's police powers.¹⁹ In doing so, the early nineteenth century Supreme Court decisions noted that a local government's ability to regulate and restrict the use of private property through community planning is not unlimited and must, ultimately, bear a substantial relation to the public health, safety, morals or general welfare.²⁰

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 GLA & Assocs., Inc. v. City of Boca Raton*, 855 So. 2d 278, 282 (Fla. 4th DCA 2003).

¹⁴ *Id.*

¹⁵ *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993); *Hillsborough County v. Fla. Rest. Ass'n*, 603 So.2d 587, 591 (Fla. 2d DCA 1992) ("If [a county] has enacted such an inconsistent ordinance, the ordinance must be declared null and void.")

¹⁶ U.S. CONST. amend. X.

¹⁷ "The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the police power." *See NFIB v. Sebelius*, 567 U.S. 519, 535-536 (2012).

¹⁸ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974)

¹⁹ *See Eubank v. city of Richmond*, 226 U.S. 137, 33 S.Ct. 76 (1912); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447 (1928); *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50 (1928)

²⁰ In *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, the Supreme Court stated: "Zoning measures must find their justification in the police power exerted in the interest of the public. The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Legislatures may not, under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities."

Today, s. 163.3167, F.S. of the Community Planning Act²¹ statutorily requires incorporated municipalities and counties to prepare and maintain a comprehensive plan to set out the regulations and policies governing land within a community. Comprehensive plans address both physical elements of land and buildings and the land uses permitted therein. Under s.163.3177, F.S., comprehensive plans are required to include elements that address the distribution, extent, and location of various land uses within a community. Some of the statute's land uses include residential, commercial, industrial, agricultural, recreational, conservation education, public, historic, and mixed-use categories.²²

Residential Use Restrictions

Community zoning plans typically contain two significant distinctions of property use: residential and commercial. Property zoned for residential use requires residents to use a building or premises therein as a dwelling.²³

Areas zoned for residential use may exclude other nonresidential buildings and uses. Residential use ordinances allow local governments to deny land uses not customary to a home or dwelling. Courts have opined that residential land use restrictions serve the public health, safety, morals, and general welfare by providing an attractive community, lessening congestion, increasing safety, and preventing overcrowding, among other things.²⁴ Although local governments may use similar definitions of residential use in an ordinance, counties and municipalities are free to decide the specific uses or terms allowed for this land.

As a practical matter, residential use restrictions largely exclude property uses that include most commercial or business operations. Residential use areas are often cordoned off from business zones to promote the state's interest in preserving the quality of home life for the community and ensuring residential neighborhoods' safety.²⁵ The traditional purpose for this categorical separation of residential and business uses has been to prevent unwanted secondary effects of a business operating in a residential area.²⁶

²¹ See ch. 163, part II, F.S.

²² Section 163.3177, F.S.

²³ Black's Law Dictionary 505 (6th ed. 1990) (*Dwelling* is defined as: "The house or other structure in which a person or persons live; a residence; abode; habitation; the apartment or building, or group of buildings, occupied by a family as a place of residence. Structure used as place of habitation.")

²⁴ *Flava Works, Inc. v. City of Miami*, 800 F.Supp.2d 1182 (S.D. Fla. 2011).

²⁵ *Voyeur Dorm, L.C. v. City of Tampa, Fla.*, 265 F.3d 1232 (11th Cir. 2001).

²⁶ In the landmark case, *Village of Euclid, Ohio v. Amber Realty Co.* (upholding the constitutionality of a broad residential zoning restriction on all land uses that did not constitute a single-family dwelling), the 1926 Supreme Court describes numerous secondary effects of allowing businesses to operate in a residential zone and states the benefits of exclusion. The Court reasoned exclusion of business uses would "prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations... The danger of fire and of contagion are often lessened... A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy is street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts... [A]ny business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc... By reducing the traffic and

Home Occupation Ordinances

Although local governments have the authority to discriminate between commercial and residential land uses, local governments have historically persevered the right for individuals to use residential dwellings to conduct business for certain activities deemed home occupations. Home occupation provisions are widely incorporated in residential land use ordinances and are considered an accessory use²⁷ to a residential property.

Home occupation ordinances are not a modern idea. These accessory use provisions have been incorporated in land use ordinances since the early nineteenth century. In the 1928 Supreme Court case, *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, the land use ordinance being challenged included a home occupation provision that reads remarkably similar to home occupation provisions today.²⁸ The overarching premise of home occupation provisions that has remained unchanged for over a century is that residents may use a dwelling for business activities secondary to residential uses and don't disturb the residential character of the property. There is no enumerated right to or precise definition of a home occupation in Florida law. Local governments have the home rule power to include home occupation provisions in land use ordinances and define the provision as they see fit.

Current home occupation ordinances vary on the types of businesses allowed, the activities authorized, and the permitting and taxes imposed. Common home occupation regulation areas include residential character requirements, licensing/permitting/certification, permitted home occupations, prohibited home occupations, signage, employees, traffic and parking, storage and sale of merchandise, and floor area used for the home occupation.

The following excerpts are examples of local government ordinances addressing the common areas of home occupation regulation:

- **Residential character:** "Home occupations are intended to be small-scale, limited businesses that do not detract from the residential character of the neighborhood. Home occupations shall be accessory to the principal residential use."²⁹
- **Licensing/Permitting/Certification:** "All home occupations shall be required to obtain an occupational license prior to the start of such use. In addition to any other submittals required for an occupational license, the applicant shall also submit the following: (a) Location of dwelling unit where the home occupation will be conducted; (b) Total floor area of the dwelling unit; (c) Area of room or rooms to be utilized in the conduct of the home occupation; (d) A sketch with dimensions showing the floor plan and the area to be utilized for the conduct of the home occupation; (e) A written description of the exact nature of the

resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (quotations and citations omitted).

²⁷ Black's Law Dictionary 15 (6th ed. 1990) (*accessory use* is "a use which is dependent on or pertains to principal or main use; a use which is subordinate to, clearly incidental to, customary in connection with, and ordinarily located on same lot with, principle use").

²⁸ The exact language of the provision reads: "The office of a physician, dentist, or other professional person when located in his or her dwelling, also home occupations engaged in by individuals within their dwellings shall be considered as accessory uses, provided that no window display is made or any sign shown other than one not exceeding two (2) square feet in area and bearing only the name and occupation of the occupant." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50 (1928).

²⁹ Jacksonville, FL., Sec. 656.369(c)(1).

home occupation; and (f) Notarized letter of approval for the home occupation from the property owner and/or property manager; (g) The Zoning Official may require a site plan indicating the location of all improvements."³⁰

- **Permitted home occupations:** "Home occupation uses: (subject to all regulations set forth in section 906.5 and in addition to all those listed therein) Accountant, advertising agency, building contractor, credit reporting service, investigative service, insurance agent, market research service, optician, public relations service, real estate agency, stenographic service, stock broker, telephone answering service, telemarketing service, and other similar occupations which do not generate high vehicular demand."³¹
- **Prohibited home occupations:** "Notwithstanding any other provision of this Code, the following uses are hereby prohibited as home occupations: Adult Entertainment Antique Shops Auto Service & Repair Barber & Beauty Shops Bed and Breakfast Facilities Body Scrubs Child Day Care Centers and Adult Day Care Centers Churches Clubs, Private Commercial Physical Contact Establishments Drive-in Facilities Eating and Drinking Establishments Escort Services Food Processing and Handling Fortune Tellers Funeral Homes Group Instruction of More Than (4) People Health Spas Hospitals and Clinics Hotels/Motels Kennels Massage Establishments Modeling of Clothes Pain Management Clinic Plasmapheresis Facilities Vehicle Sales, Rental or Repair Whole Blood Facilities Also, any other similar use or activity as determined by the Zoning Official."³²
- **Signage:** "No sign relating to the home occupation may be posted or displayed on the site."³³
- **Employees:** "No person shall be engaged in any home occupation as an employee or volunteer worker other than members of the immediate family residing in the dwelling unit. No accessory building shall be used for such home occupation. Any home occupation that creates objectionable noise, fumes, odor, dust, electrical interference shall be prohibited."³⁴
- **Traffic and parking:** "Traffic generated by the home occupation shall be no greater in volume than would normally be expected at a similar residence where no home occupation is conducted. The occupation shall not involve the use of a commercial vehicle for delivery of materials to or from the premises except for travel from the home occupation-site to a job location and to return, such trips not to exceed on the average more than two trips per day. No marked vehicle or equipment used in conjunction with the home occupation shall be parked on the property or contiguous to the street right-of-way so as to identify, advertise or otherwise attract attention to the occupation."³⁵
- **Storage and sale of merchandise:** "No commodity shall be sold on the premises nor displayed or warehoused on the premises for sale elsewhere."³⁶
- **Floor area used for home occupation:** "Home occupations may occupy up to 500 square feet or 25 percent of the floor area of the residence, whichever is less. If the property also has an accessory apartment, total floor area devoted to both uses shall not exceed 1,250 square feet or 35 percent of the floor area of the residence, whichever is less."³⁷

³⁰ Orlando, FL., Sec. 58.941.

³¹ Miami, FL., Sec. 622.7.2.

³² Orlando, FL., Sec. 58.939.

³³ Miami-Dade County, FL., Sec. 33-25.1(A)4.

³⁴ Winter Park, FL., Sec. 58-71(5).

³⁵ Clearwater, FL., Sec. 3-1102.A.5 – 7.

³⁶ Tampa, FL., Sec. 27-282.5.(7).

³⁷ Jacksonville, FL., Sec. 656.369(c)(1)(A).

Another common component of home occupation ordinances is the method of enforcing these restrictions. Typically, local government code enforcement divisions are tasked with the enforcement of home occupation ordinances. Other community residents may report violations to a code enforcement officer, who usually provides the violator with a warning about the behavior. If the restricted behavior continues, local governments have the authority to issue a civil infraction or penalty that the violator may contest in court. Repeated refusal to cease code violations could result in a local government issuing misdemeanor fines as described in s. 775.083, F.S.

Florida Business Address

To establish a formal business organization in Florida, an individual must file specific paperwork with the Florida Department of State, Division of Corporations. Regardless of the corporate business structure, Florida law requires that the business provide the street address of its principal place of business, register agent, and persons owning the business.³⁸ Residential property may be used as a principal place of business for these corporate filings. It is unclear how using a residential home address as a principal place of business for state corporate filings is interpreted in the context of home occupation ordinances.

III. Effect of Proposed Changes:

The bill preempts the licensing and regulation of home-based businesses to the state and prohibits counties and municipalities from restricting or regulating a home-based business. By operation of law, state preemption would cause existing local government ordinances related to home businesses and home occupations to become null and void.

To be considered a home-based business under the bill, the business must meet the following criteria:

- The business operates, in whole or in part, from residential property;
- The employees of the home-based business reside in the home, are immediate family to residents, or are two employees not required to be related or reside in the home;
- Parking related to the home-based business activities complies with local zoning requirements;
- The home-based business activities do not generate a substantial increase in traffic, noise, or waste and recycling;
- As viewed from the street, the use of the residential property is consistent with the uses of the residential areas that surround the property; and
- The home-based business activities are secondary to the property's use as a residential dwelling.

The bill allows a home-based business that meets the above criteria to operate from residential property and in an area zoned for residential use. Local governments are prohibited from enacting or enforcing any ordinance, regulation, or policy or taking any action to license or otherwise regulate a home-based business.

³⁸ See s. 605.0201, F.S. (limited liability company); s. 607.0202, F.S. (corporation); s. 620.1111, F.S. (partnership).

The bill takes effect on July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, section 18(b) of the Florida Constitution states that "[e]xcept upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989." Although the bill does not expressly mention local business taxes and fees, the bill may implicate this constitutional restriction by affecting counties and municipalities' ability to impose local businesses taxes on home businesses and home occupations pursuant to ch. 205, F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Restricting the number and types of persons allowed to engage in otherwise legal activities³⁹ conducted wholly within the confines of a private dwelling may unconstitutionally infringe on an individual's freedom of association⁴⁰ and right to privacy.⁴¹ If these fundamental rights are implicated, the judiciary may require the State to demonstrate that limiting the number and types of persons allowed to work at a home-

³⁹ See *Henry v. Board of County Com'rs of Putnam County*, 509 So.2d 1221 (Fla. 5th DCA 1987)(describing that there is a considerable distinction between regulating the use of land and prohibiting the advertising for, and business use of, telephone located on residential property); see also *Coca-Cola Co., Food Division, Polk County v. State, Dept. of Citrus*, 406 So.2d 1079 (Fla.1981)(wherein the Florida Supreme Court discussed first amendment protection of commercial speech).

⁴⁰ "Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one's associates. Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members... The freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy. The right to establish a home is an essential part of the liberty guaranteed by the Fourteenth Amendment. And the Constitution secures to an individual a freedom to satisfy his intellectual and emotional needs in the privacy of his own home." See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974)(Justice Marshall, dissenting; quotations and citations omitted).

⁴¹ Courts have long recognized that the boundaries of a home create a constitutionally protected zone of privacy. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The Florida Constitution contains an explicit right to privacy which affords Florida citizens greater protection in the area of privacy than does the federal Constitution. See *State v. J.P.*, 907 So.2d 1101, 1115 (Fla. 2004).

based business serves a compelling State interest and accomplishes its goals through the use of the least intrusive means.⁴²

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

For small and family-owned businesses that operate in a local government jurisdiction with a more severe restriction on home occupations, the bill will likely provide a significant net positive fiscal impact by allowing these businesses to avoid the costs associated with commercial property. Notwithstanding, this positive fiscal impact may be negatively correlated to the market demand for small-scale commercial real estate.

C. Government Sector Impact:

The bill may have a negative fiscal impact on local governments that charge fees and taxes to individuals that engage in home occupations.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 559.955 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

⁴² It is settled law that each of the personal liberties enumerated in the Declaration of Rights of the Florida Constitution is a fundamental right. Florida courts consistently have applied the strict scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity. *See State v. J.P.*, at 1109. *See also Winfield v. Div. of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985)(explaining that where law intrudes on fundamental right to privacy guaranteed in Florida's Constitution, the State must demonstrate that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means).

B. Amendments:

None.

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