

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 267 State Preemption of Seaport Regulations  
**SPONSOR(S):** Tourism, Infrastructure & Energy Subcommittee, Roach and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 426

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Tourism, Infrastructure & Energy Subcommittee	12 Y, 6 N, As CS	Willson	Keating
2) Local Administration & Veterans Affairs Subcommittee			
3) Commerce Committee			

### SUMMARY ANALYSIS

Federal admiralty and maritime law generally controls the regulation of maritime commerce upon the navigable waters of the United States. Municipalities and counties derive broad home rule authority from the Florida Constitution and general law.

Florida has 15 deepwater ports, including the ports of Jacksonville, Port Canaveral, Port Citrus, Fort Pierce, Palm Beach, Port Everglades, Miami, Port Manatee, St. Petersburg, Tampa, Port St. Joe, Panama City, Pensacola, Key West, and Fernandina.

The bill provides that, except as authorized by general law, a municipal government may not restrict or regulate commerce in the seaports of this state, including, but not limited to, regulating or restricting a vessel's type or size, source or type of cargo, or number, origin, or nationality of passengers.

The bill specifies that, unless preempted by federal or state law, the bill does not limit the authority of a port authority or port district that is owned or operated by a municipal government that is not a county, to:

- Regulate vessel movements within its jurisdiction.
- Establish fees and compensation for its services.
- Adopt guidelines for minimum bottom clearance, for the movement of vessels, and for radio communications of vessel traffic.

However, the bill specifies that any such action may not have the effect of regulating or restricting a vessel's type or size, source or type of cargo, or number, origin, or nationality of passengers, except as required to ensure safety due to the physical limitations of channels, berths, anchorages, or other port facilities.

The bill preempts any provision of a municipal charter, ordinance, resolution, regulation, or policy in existence before, on, or after the effective date of this bill.

The fiscal impact of the bill is indeterminate. See *Fiscal Comments* section.

The bill takes effect upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

#### **Federal Regulation of Vessels and Maritime Commerce**

Generally, federal law controls<sup>1</sup> the regulation of maritime commerce<sup>2</sup>, navigation,<sup>3</sup> seaport security<sup>4</sup>, the regulation of commercial vessels, shipping<sup>5</sup> and common carriers, vessel-related environmental and pollution standards,<sup>6</sup> disease and quarantine efforts,<sup>7</sup> and other aspects of admiralty law in and upon the navigable waters of the United States. The U.S. Supreme Court has consistently determined that federal supremacy principles mandate preemption of efforts of state and local governments to impose conditions on port entry that federal laws already cover.<sup>8</sup>

However, federal law allows a state to regulate its ports and waterways, as long as the regulation is based on the peculiarities of local waters that call for special precautionary measures.<sup>9</sup> Additionally, the

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<sup>1</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) Where Congress has explicitly preempted state law in an area, federal law supplants all state regulation in that area. Even in the absence of express congressional intent to preempt state law, federal preemption is implied where (1) state law “actually conflicts with federal law” or (2) federal law so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.”

<sup>2</sup> *United States v. Locke*, 529 U.S. 89, 103 (2000). (“The existence of the treaties and agreements on standards of shipping is of relevance, of course, for these agreements give force to the longstanding rule that the enactment of a uniform federal scheme displaces state law, and the treaties indicate Congress will have demanded national uniformity regarding maritime commerce.”)

<sup>3</sup> See 33 U.S.C. §§ 1221 et seq. The Ports and Waterways Safety Act of 1972 (PWSA) authorizes the U.S. Coast Guard to establish vessel traffic service/separation schemes (VTSS) for ports, harbors, and other waters subject to congested vessel traffic. The VTSS apply to commercial ships, other than fishing vessels, weighing 300 gross tons (270 gross metric tons) or more. The Oil Pollution Act amended the PWSA to mandate that appropriate vessels must comply with the VTSS. The PWSA was amended by the Port and Tanker Safety Act (PTSA) of 1978 (Public Law 95-474). Under the PTSA, Congress found that increased supervision of vessel and port operations was necessary to reduce the possibility of vessel or cargo loss, or damage to life, property or the marine environment and ensure that the handling of dangerous articles and substances on the structures in, on, or immediately adjacent to the navigable waters of the United States is conducted in accordance with established standards and requirements. NOAA, *Ports and Waterways Safety Act*, <https://coast.noaa.gov/data/Documents/OceanLawSearch/PortsandWaterwaysSafetyAct.pdf> (last visited Mar. 1, 2021).

<sup>4</sup> For example, the Maritime Transportation Security Act of 2002 created a broad range of programs to improve the security conditions at the ports and along American waterways, such as identifying and tracking vessels, assessing security preparedness, and limiting access to sensitive areas

<sup>5</sup> See Shipping Act of 1984. 46 U.S.C. §§ 40101(1), 40101(2). One purpose of the Act is to ‘establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs.’ A second purpose is to ensure that U.S.-flag ships are on a level playing field with foreign vessels.

<sup>6</sup> In 1973, the International Maritime Organization (IMO) adopted the International Convention for the Prevention of Pollution by Ships and subsequently modified it by Protocol in 1978. The Convention is widely known as MARPOL 73/78. Its objective is to limit ship-borne pollution by restricting operational pollution and reducing the possibility of accidental pollution. MARPOL specifies standards for stowing, handling, shipping, and transferring pollutant cargoes, as well as standards for discharge of ship-generated operational wastes. Acceptance of the convention by national government obliges them to make the requirements part of domestic law. USCG, *Office of Commercial Vessel Compliance*, <https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Commercial-Vessel-Compliance/Domestic-Compliance-Division/MARPOL/> (last visited Mar. 1, 2021).

<sup>7</sup> See John T. Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access and Jurisdiction Over Foreign-Flag Vessels in U.S. Ports*, 5 S.C. J. Int'l. L. & Bus. 209, 2 (2009) footnotes 153 & 154. 42 U.S.C. § 267(a): “[The Surgeon General] shall from time to time select suitable sites for and establish such additional ... anchorages in the States and possessions of the United States as in his judgment are necessary to prevent the introduction of communicable diseases into the States and possessions of the United States.” “It shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations ....” U.S.C. § 268(b). Congress has provided statutory authority for controlling infectious diseases, including quarantining of suspect vessels and their crews and passengers. 42 U.S.C. §§ 264-272. The President regularly updates the list of communicable diseases subject to quarantine. Exec. Order No. 13,295, Apr. 4, 2003, 68 Fed. Reg. 17,255 (Apr. 9, 2003), reprinted in 42 U.S.C. § 264, as amended by Exec. Order No. 13,375, Apr. 1, 2005, 70 Fed. Reg. 17299 (Apr. 5, 2005). He has also delegated to the Secretary of Health and Human Services his authority to carry out duties under the statute.

<sup>8</sup> See *United States v. Locke* 471 U.S. 84 (1985)

<sup>9</sup> Ports and Waterways Safety Act of 1972, 33 U.S.C. §1223(a) (2006). There is no pre-emption by operation of Title I of the Ports and Waterways Safety Act if the state regulation is directed to local circumstances and problems, such as water depth and narrowness, idiosyncratic to a particular port or waterway, and if the Coast Guard has not adopted regulations on the subject or determined that regulation is unnecessary or inappropriate. See *United States v. Locke*, 529 U.S. 89, 109 (2000)

United States Supreme Court has held that fees to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce.<sup>10</sup>

The United States Coast Guard (USCG) regulates all commercial vessels, including cruise vessels, calling on U.S. ports, regardless of the vessel's country of origin, and inspects each foreign-flagged cruise vessel calling on a U.S. port at least twice a year to ensure compliance with certain treaties and U.S. regulations governing safety, security, and environmental protections.<sup>11</sup>

## Florida Ports

There are 15 deepwater seaports in Florida:<sup>12</sup>

- Port Canaveral,
- Port Citrus,
- Port Everglades,
- Port of Fernandina,
- Port of Fort Pierce,
- Port of Jacksonville
- Port of Key West,
- Port Manatee,
- Port of Miami,
- Port of Palm Beach
- Port of Panama City,
- Port of Pensacola,
- Port of Port St. Joe,
- Port of St. Petersburg, and
- Port of Tampa.

Approximately half of Florida's deepwater ports are organized as independent or dependent special districts created by special act,<sup>13</sup> and the remainder are organized within their respective municipal or county government.

According to the Florida Ports Council, Florida seaports generate nearly 900,000 direct and indirect jobs and contribute \$117.6 billion in economic value to the state through cargo and cruise activities. Florida maritime activities account for approximately 13 percent of Florida's gross domestic product while contributing \$4.2 billion in state and local taxes.<sup>14</sup> In 2018, approximately 110,268,130 tons of cargo and 16,835,986 passengers moved through Florida's seaports.<sup>15</sup>

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<sup>10</sup> See *Clyde Mallory Lines v. State of Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 267 (1935). The Court observed that state regulations of harbor traffic, even if they incidentally affect commerce, interstate or foreign, are of local concern, so long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress are not forbidden.

<sup>11</sup> U.S. House of Representatives, Subcommittee on Coast Guard and Maritime Transportation. *Hearing on "Commercial and Passenger Vessel Safety: Challenges and Opportunities*, p. 4 (Nov. 9, 2019) <https://www.congress.gov/116/meeting/house/110181/documents/HHRG-116-PW07-20191114-SD001.pdf> (last visited Feb. 28, 2021)

<sup>12</sup> For a map of Florida's deepwater seaports which indicates the primary streams of commerce (i.e. cargo, cruise passenger, other, or a combination thereof) see DOT, *Seaport System*, <https://www.fdot.gov/seaport/seamap.shtm> (last visited Mar. 1, 2021).

<sup>13</sup> <http://specialdistrictreports.floridajobs.org/webreports/criteria.aspx> (last visited Mar. 2, 2021).

<sup>14</sup> Florida Ports Council, *The Florida System of Seaports*, <https://flaports.org/about/the-florida-system-of-seaports/> (last visited Mar. 1, 2021).

<sup>15</sup> FDOT, *2018 Update of Tables and Figures*, p.4, [https://fdotwww.blob.core.windows.net/sitefinity/docs/default-source/seaport/pdfs/2018-update-of-tables-and-figures-florida-seaport-system-plan-717752830.pdf?sfvrsn=e1879b60\\_2](https://fdotwww.blob.core.windows.net/sitefinity/docs/default-source/seaport/pdfs/2018-update-of-tables-and-figures-florida-seaport-system-plan-717752830.pdf?sfvrsn=e1879b60_2) (last visited Mar. 1, 2021).

## State Law Relating to Seaports

### *Florida Seaport and Economic Development Program*

In 1990, the Legislature created Ch. 311, F.S., authorizing the Florida Seaport Transportation and Economic Development (FSTED) Program.<sup>16</sup> The program established a collaborative relationship between the Florida Department of Transportation (DOT) and the seaports and currently codifies an annual minimum of \$25 million for a seaport grant program.<sup>17</sup> FSTED funds are to be used on approved projects on a 50-50 matching basis.<sup>18</sup> Funding grants under the FSTED program are limited to the following port facilities or port transportation projects:

- Transportation facilities within the jurisdiction of the port;
- The dredging or deepening of channels, turning basins, or harbors;
- The construction or rehabilitation of wharves, docks, structures, jetties, piers, storage facilities, cruise terminals, automated people mover systems, or any facilities necessary or useful in connection with the foregoing;
- The acquisition of vessel tracking systems, container cranes, or other mechanized equipment used in the movement of cargo or passengers in international commerce;
- The acquisition of land to be used for port purposes;
- The acquisition, improvement, enlargement, or extension of existing port facilities;
- Environmental protection projects: which are necessary because of requirements imposed by a state agency as a condition of a permit or other form of state approval; which are necessary for environmental mitigation required as a condition of a state, federal, or local environmental permit; which are necessary for the acquisition of spoil disposal sites; or which result from the funding of eligible projects;
- Transportation facilities which are not otherwise part of DOT's adopted Work Program.<sup>19</sup>
- Intermodal access projects;
- Construction or rehabilitation of port facilities, excluding any park or recreational facility, in ports listed in s. 311.09(1), F.S.,<sup>20</sup> with operating revenues of \$5 million or less, provided that such project creates economic development opportunities, capital improvements, and positive financial returns to such ports; and
- Seaport master plan or strategic plan development updates, including the purchase of data to support such plans or other provisions of the Community Planning Act.<sup>21</sup>

The FSTED program is managed by the FSTED Council, which consists of the port director, or director's designee of the 15 deepwater ports, the Secretary of DOT or his or her designee, and the Executive Director of the Department of Economic Opportunity or his or her designee.<sup>22</sup>

In order for a project to be eligible for consideration by the FSTED Council, a project must be consistent with the port's comprehensive master plan, which is incorporated as part of the approved local government comprehensive plan.

### *Community Planning Act*

The Community Planning Act includes four primary references to deepwater ports:

Section 163.3177(6)(b), F.S., identifies different levels of transportation analysis that must be included in a local government's comprehensive plan transportation element based on the size and location of the local government and whether it is in the metropolitan planning area of a Metropolitan Planning Organization. At a minimum, traffic circulation issues related to ports must be addressed as well as plans for port facilities. Additionally, cities greater than 50,000 persons and counties greater than

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<sup>16</sup> Ch. 90-136, Laws Of Fla.

<sup>17</sup> Ss. 311.07 and 311.09, F.S.

<sup>18</sup> S. 311.07(3)(a), F.S.

<sup>19</sup> DOT's Work Program is adopted pursuant to s. 339.135, F.S.

<sup>20</sup> The ports listed in s. 311.09(1), F.S., are the ports of Jacksonville, Port Canaveral, Port Citrus, Fort Pierce, Palm Beach, Port Everglades, Miami, Port Manatee, St. Petersburg, Tampa, Port St. Joe, Panama City, Pensacola, Key West, and Fernandina.

<sup>21</sup> Part II of Ch. 163, F.S.

<sup>22</sup> S. 311.09(1), F.S.

75,000 persons must address "Plans for port . . . and related facilities coordinated with the general circulation and transportation element." Some or all of these requirements can be addressed in the port master plan.

Section 163.3177(6)(g)8., F.S., requires that the comprehensive plan's coastal management element "Direct the orderly development, maintenance, and use of ports to facilitate deepwater commercial navigation and other related activities." This requirement can be addressed in the port master plan.

Section 163.3178(2)(k), F.S., requires that port master plans be included in the local government's coastal management element and requires that port master plans identify existing port facilities and any proposed expansions. To the extent that they are applicable, port master plans must also address the following requirements:

- Provide a land use and inventory map of existing coastal uses;
- Analyze the environmental, socioeconomic, and fiscal impact of development;
- Analyze effects of existing drainage systems on estuarine water quality;
- Outline principles for hazard mitigation and protection of human life;
- Outline principles for protecting existing beach and dune systems;
- Outline principles to eliminate inappropriate and unsafe development;
- Identify public access to shoreline areas and preservation of working waterfronts;
- Designate coastal high-hazard areas and mitigation criteria;
- Outline principles to assure that public facilities will be in place; and,
- Mitigate the threat to human life and protect the coastal environment.

Section 163.3178(3), F.S., provides that certain eligible port expansions, projects, and facilities, both on the port and within three miles of the port, cannot be designated as Developments of Regional Impact if they are consistent with an in compliance port master plan.

#### *Port Facility Financing*

Section 315.03, F.S. authorizes any county, port district<sup>23</sup>, port authority<sup>24</sup>, municipality or certain governmental units created pursuant to the Florida Interlocal Cooperation Act<sup>25</sup> that includes at least one deepwater port to:

- Exercise jurisdiction, control and supervision over any port facilities now or hereafter acquired, owned, or constructed by the local government(s).
- Operate and maintain, and to fix and collect rates, rentals, fees and other charges for any of the services and facilities provided by the port facilities now or hereafter acquired, owned or constructed by the unit excluding state bar pilots.
- Lease or rent, or contract with others for the operation of all or any part of any port facilities now or hereafter acquired, owned or constructed by the unit, on such terms and for such period or periods and subject to such conditions as the governing body shall determine to be in the best interests of the local government(s).

#### *Vessel movement and related fees*

Section 313.22, F.S., authorizes ports to regulate vessel movements within its jurisdiction, whether involving public or private facilities or areas, by:

- Scheduling vessels for use of berths, anchorages, or other facilities at the port.
- Ordering and enforcing a vessel, at its own expense and risk, to vacate or change position at a berth, anchorage, or facility, whether public or private, in order to facilitate navigation, commerce, protection of other vessels or property, or dredging of channels or berths.
- Designating port facilities for the loading or discharging of vessels.

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<sup>23</sup> A "port district" is any district created by or pursuant to the provisions of any general or special law and authorized to own or operate any port facilities. S. 315.02(1), F.S.

<sup>24</sup> A "port authority" is created by or pursuant to the provisions of any general or special law or any district or board of county commissioners acting as a port authority under or pursuant to the provisions of any general or special law. S. 315.02(2), F.S.

<sup>25</sup> S. 163.01(7)(d), F.S.

- Assigning berths at wharves for arriving vessels.

Ports are authorized to establish fees and compensation for these services when provided by the port.

### *Harbor safety*

Ports, in agreement with the United States Coast Guard, state harbor pilots, and other ports in its operating port area, must adopt guidelines for:

- minimum bottom clearance for each berth and channel,
- the movement of vessels, and
- radio communications of vessel traffic for all commercial vessels entering and leaving its harbor channels.<sup>26</sup>

### *County seaport projects and facilities*

Section 125.012, F.S. confers broad authority to counties to provide for port improvements within their jurisdiction, including the ability to:

- Construct, acquire, establish, improve, extend, enlarge, reconstruct, equip, maintain, repair, and operate any project<sup>27</sup>, either within or without the territorial boundaries of the county.
- Subject to the jurisdiction of the United States and the State of Florida and the general laws of Florida relating to dredging and filling, to construct, establish, and improve harbors in the county and all navigable and nonnavigable waters connected therewith; to regulate and control all such waters; to construct and maintain such canals, slips, turning basins, and channels and upon such terms and conditions as may be required by the United States; and to enact, adopt, and establish by resolution rules and regulations for the complete exercise of jurisdiction and control over all such waters.
- To appoint shipping masters for ports or harbors under its control, to determine their qualifications, and to adopt rules and regulations prescribing their duties.
- To license stevedores as independent contractors for hire to handle stevedoring at and in the harbors and airports in the county, to fix the terms and conditions of such licenses, and to determine the fees to be charged for same.
- To make and enter into all contracts and agreements and to do and perform all acts and deeds necessary and incidental to the performance of its duties and the exercise of its powers.
- To fix, regulate, and collect rates and charges for the services and facilities furnished by any project under its control; to establish, limit, and control the use of any project as may be deemed necessary to ensure the proper operation of the project; to impose sanctions to promote and enforce compliances; to prescribe rules and regulations and impose penalties and sanctions to ensure the proper performance of the duties of any stevedore or of any shipping master and the enforcement of any rule or regulation which the county may adopt in the regulation of the ports, harbors, wharves, docks, airports, and other projects under its control.
- To fix the rates of wharfage, dockage, warehousing, storage, and port and terminal charges for the use of the port and harbor facilities located within or without the county and owned or operated by the county; and to fix and determine the rates, tolls, and other charges for the use of harbor and airport improvements and harbor and airport facilities located within or without the county insofar as it may do so under the State Constitution and the Constitution and laws of the United States.
- To regulate the operation, docking, storing, and conduct of all watercraft of any kind plying or using the waterways within the county and of all aircraft of any kind operating over and within the county or utilizing any other area, field, location, or place within the county for air navigation purposes or for the repair, storage, or handling of aircraft within the county.

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<sup>26</sup> S. 313.23, F.S.

<sup>27</sup> Section 125.011(2)(a), F.S. defines “project” as one or more of the following: “harbor, port, shipping, and airport facilities of all kinds and includes, but is not limited to, harbors, channels, turning basins, anchorage areas, jetties, breakwaters, waterways, canals, locks, tidal basins, wharves, docks, piers, slips, bulkheads, public landings, warehouses, terminals, refrigerating and cold storage plants, railroads and motor terminals for passengers and freight, rolling stock, car ferries, boats, conveyors and appliances of all kinds for the handling, storage, inspection and transportation of freight and the handling of passenger traffic, ... and the loading and unloading and handling of passengers, mail, express and freight;”

- To receive and accept, from any federal agency, grants for or in aid of the construction, improvement, or operation of any project and to receive and accept contributions from any source of either money, property, labor, or other things of value.
- To make any and all applications required by the Treasury Department and other departments or agencies of the United States Government as a condition precedent to the establishment within the county of a free port, foreign trade zone, or area for the reception from foreign countries of articles of commerce; to expedite and encourage foreign commerce and the handling, processing, and delivery thereof into foreign commerce free from the payment of custom duties and to enter into any agreements required by such departments or agencies in connection therewith; and to make like applications and agreements with respect to the establishment within the county of one or more bonded warehouses.
- To enter into any contract with the government of the United States or any agency thereof which may be necessary in order to procure assistance, appropriations, and aid for the deepening, widening, and extending of channels and turning basins, the building and construction of public mass transit facilities, airport and airport facilities, slips, wharves, breakwaters, jetties, bulkheads, and any and all other harbor and air navigation improvements and facilities.
- To make or cause to be made such surveys, investigations, studies, borings, maps, plans, drawings, and estimates of cost and revenues as it may deem necessary and to prepare and adopt a comprehensive plan or plans for the location, construction, improvement, and development of any project.
- To grant exclusive or nonexclusive franchises to persons, firms, or corporations for the operating of restaurants, cafeterias, bars, taxicabs, vending machines, and other concessions of a nonaeronautical nature in, on, and in connection with any project owned and operated by the county.
- To adopt and promulgate suitable rules, regulations, and directions for the operation and conduct of any project owned or operated by the county and for the use of any such project and any facility connected therewith by others.
- To enter into contracts with utility companies or others for the supplying by such utility companies or others of water, electricity, or telephone service to or in connection with any project.
- To own, maintain, operate, and control export trading companies, foreign sales corporations, and consulting services corporations as provided by the laws of the United States or this state; to enter into management contracts with such corporations or companies established for the purpose of providing or operating such facilities; to own, maintain, operate, and control cargo clearance centers and customs clearance facilities, and to enter into management contracts with corporations established for the purpose of providing or operating such facilities; to maintain the confidentiality of trade information and data pursuant to the patent or copyright laws of the United States, pursuant to the patent or copyright laws of foreign nations to the extent that same are enforced by the courts of the United States, and pursuant to the trade secrets doctrine; and to authorize airport and port employees to serve as officers and directors of export trading companies, foreign sales corporations, customs and cargo clearance corporations, and consulting services corporations for the sale of services to others. Counties are hereby authorized to expend any unobligated and available surplus funds from the activities authorized in this subsection for the construction of capital facilities.

## *State freight logistics zones and the Intermodal Logistics Center Infrastructure Support Program*

Section 311.103, F.S. authorizes counties to designate geographic areas as a freight logistics zones.<sup>28</sup> A freight logistics zone is a grouping of activities and infrastructure associated with freight transportation and related services within a defined area around an intermodal logistics center. The Intermodal Logistics Center Infrastructure Support Program is designed to provide DOT funds for roads, rail facilities, or other means for the conveyance or shipment of goods through a seaport and allow the state to respond to private sector market demands and meet the state's economic development goal of becoming a hub for trade, logistics, and export-oriented activities.

### *Passenger transportation fees and for-hire vehicles*

Sections 316.85(6), and 627.748(17)(b), F.S., acknowledge the ability of a seaport to charge reasonable fees to for-hire vehicles for their use of the airport's or seaport's facilities as well as designate locations for staging, pickup, or other similar operations at the seaport.

## **Key West Ordinance**

On November 3, 2020, voters adopted three charter amendments to the City Charter for the City of Key West.<sup>29</sup> The amendments:

- Limit the number of persons disembarking from cruise ships to a total of not more than 1,500 persons per day at any and all public and privately owned or leased property located within the municipal boundary of the City of Key West.
- Prohibit cruise ships with a capacity of 1,300 or more persons (passengers and crew) from disembarking individuals at any and all public and privately owned or leased property located within the municipal boundary of the City of Key West.
- Give preference and priority to cruise ships and cruise lines that have the best record (the lowest number of environmental violations, penalties and fines) and best health record (the best scores and least number of violations in health inspections and reports issued by the Center for Disease Control Vessel Sanitation Program).

## **Preemption**

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.<sup>30</sup>

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.<sup>31</sup> Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.<sup>32</sup> In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the

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<sup>28</sup> S. 311.103, F.S. A "freight logistics zone" is a grouping of activities and infrastructure associated with freight transportation and related services within a defined area around an intermodal logistics center.

<sup>29</sup> City of Key West, *Code of Ordinances*, Charter Amendment of 11-16-2020.

[https://library.municode.com/fl/key\\_west/ordinances/code\\_of\\_ordinances?nodeId=1052747](https://library.municode.com/fl/key_west/ordinances/code_of_ordinances?nodeId=1052747) (last visited Feb. 28, 2021).

<sup>30</sup> Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009). Historically, certain types of local action have been found to frustrate the purpose of state law, and, thus, conflict has resulted. Specifically, Florida jurisprudence makes clear that local action cannot 1) provide for more stringent regulation than the state legislation in violation of the express wording of the statute; 2) provide for a more stringent penalty than that allowed by state statute; 3) prohibit behavior otherwise allowed by state legislation; 4) allow behavior otherwise prohibited by state statute; or 5) provide for a different method for doing a particular act than the method proscribed by state legislation.

Generally, a local government can pass more stringent regulations than those provided for by statute. However, if the state legislation expressly forbids a stricter regulation or if the imposition of a stricter regulation frustrates the purpose of the statute, the local government must abstain

<sup>31</sup> 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).

<sup>32</sup> *Mulligan*, 934 So. 2d at 1243.

Legislature intended.<sup>33</sup> 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.<sup>34</sup>

### **Effect of the Bill**

The bill creates s. 311.25, F.S., to provide that, except as authorized by general law, a municipal government may not restrict or regulate<sup>35</sup> commerce<sup>36</sup> in the seaports of this state, including, but not limited to, regulating or restricting a vessel's type or size, source or type of cargo, or number, origin, or nationality of passengers.

The bill specifies that, unless preempted by federal or state law, the bill does not limit the authority of a port authority or port district that is owned or operated by a municipal government that is not a county, to:

- Regulate vessel movements within its jurisdiction pursuant to s. 313.22(1), F.S.
- Establish fees and compensation for its services pursuant to s. 313.22(2), F.S.
- Adopt guidelines for minimum bottom clearance, for the movement of vessels, and for radio communications of vessel traffic pursuant to s. 313.23, F.S.

However, the bill specifies that any such action may not have the effect of regulating or restricting a vessel's type or size, source or type of cargo, or number, origin, or nationality of passengers, except as required to ensure safety due to the physical limitations of channels, berths, anchorages, or other port facilities.

The bill provides that any provision of a municipal charter, ordinance, resolution, regulation, or policy that is preempted by the bill and that existed before, on, or after the effective date of this bill is void.

The Ports of Key West, Pensacola, and St. Petersburg are departments of their respective municipalities. The Port of Jacksonville is a dependent special district and component unit of the City of Jacksonville.<sup>37</sup> The Panama City Port Authority is a dependent special district and an agency of the City of Panama City<sup>38</sup>

#### **B. SECTION DIRECTORY:**

- Section 1** Creates s. 311.25, F.S.; preempting to the state the regulation of commerce in state seaports; providing exceptions.
- Section 2** Provides construction.
- Section 3** Provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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<sup>33</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

<sup>34</sup> *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

<sup>35</sup> "Regulate" means "to govern or direct according to rule;" "to bring under the control of law or constituted authority;" "to make regulations for or concerning;" or "to bring order, method, or uniformity to." <https://www.merriam-webster.com/dictionary/regulate> (last visited Mar. 1, 2021).

<sup>36</sup> "Commerce" means "an interchange of goods or commodities, especially on a large scale between different countries (foreign commerce) or between different parts of the same country (domestic commerce); trade; business." <https://www.dictionary.com/browse/commerce> (last visited Mar. 1, 2021).

<sup>37</sup> Jacksonville Port Authority, *Annual Report 2012/2019* at 20. [https://www.jaxport.com/wp-content/uploads/2020/04/Annual-report-2019\\_web\\_comp-1.pdf](https://www.jaxport.com/wp-content/uploads/2020/04/Annual-report-2019_web_comp-1.pdf) (last visited Mar. 4, 2021).

<sup>38</sup> Port Panama City <http://www.panamacityportauthority.com/about-us.html> (last visited Mar. 4, 2021).

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate. *See Fiscal Comments section.*

2. Expenditures:

Indeterminate. *See Fiscal Comments section.*

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Indeterminate. *See Fiscal Comments section.*

2. Expenditures:

Indeterminate. *See Fiscal Comments section.*

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. *See Fiscal Comments section.*

D. FISCAL COMMENTS:

Due to the potential breadth of the preemption, the scope of fiscal impacts on state and local government and the private sector is unknown.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear whether the bill preempts to the state certain matters (vessel's type or size, source or type of cargo, or number, origin, or nationality of passengers) that may already be preempted by the federal government.

As drafted, the bill may preempt the ability of a seaport governed by a municipality to regulate non-vessel related commerce, such as parking lot fees, food vendors, construction contracts, and other land-based activities. It is not clear whether this is intended.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 3, 2021, the Tourism, Infrastructure & Energy Subcommittee adopted four amendments and reported the bill favorably as a committee substitute. The amendments:

- Narrow the breadth of the preemption by replacing “Notwithstanding any other law to the contrary” with “Except as authorized by general law”.
- Limit the scope of the preemption to the regulation of seaports by municipal governments only.

This analysis addresses the committee substitute as approved by the Tourism, Infrastructure & Energy Subcommittee.