

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 919 Preemption Over Restriction of Utility Services

SPONSOR(S): Tourism, Infrastructure & Energy Subcommittee; Tomkow

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1128

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Tourism, Infrastructure & Energy Subcommittee	16 Y, 1 N, As CS	Keating	Keating
2) Local Administration & Veterans Affairs Subcommittee	14 Y, 4 N	Renner	Miller
3) Ways & Means Committee			
4) Commerce Committee			

SUMMARY ANALYSIS

The Florida Constitution grants county and municipal governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law. Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by vote of the electors. Likewise, municipalities have those governmental, corporate, and proprietary powers enabling them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law. In contrast, special districts have only those powers expressly authorized by general or special law. County and municipal 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.

The bill prohibits a municipality, county, special district, or other political subdivision of the state from enacting or enforcing a resolution, ordinance, rule, code, or policy, or take any other action that restricts or prohibits, or has the effect of restricting or prohibiting, the types or fuel sources of energy production which may be used, delivered, converted, or supplied by the following entities to customers that these entities are authorized to serve:

- Investor-owned electric utilities;
- Municipal electric utilities;
- Rural electric cooperatives;
- Entities formed by interlocal agreement to generate, sell, and transmit electrical energy;
- Investor-owned gas utilities;
- Gas districts;
- Municipal natural gas utilities;
- Natural gas transmission companies; and
- Certain propane dealers, dispensers, and gas cylinder exchange operators.

The bill provides that any municipal, county, special district, or political subdivision charter, resolution, ordinance, rule, code, policy, or action preempted by the bill that existed before or on July 1, 2021, is void.

The bill provides that it does not expand or alter the jurisdiction of the Public Service Commission.

The bill appears to have no fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Local Government Authority

The Florida Constitution grants county and municipal governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.¹ Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by vote of the electors.² Likewise, municipalities³ have those governmental, corporate, and proprietary powers enabling them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.⁴

A “special district” is a unit of local government created for a particular purpose, with jurisdiction to operate within a limited geographic boundary.⁵ Special districts are created by general law,⁶ special act,⁷ local ordinance,⁸ or by rule of the Governor and Cabinet.⁹ A special district has only those powers expressly provided by, or reasonably implied from, the authority provided in the district’s charter. Special districts provide specific municipal services in addition to, or in place of, those provided by a municipality or county.¹⁰

As of March 17, 2021, there are 627 active dependent¹¹ special districts and 1,163 active independent special districts in Florida.¹² Community development districts are the most frequently created form of independent special district. Other common special districts in Florida include water control districts, fire control districts, and community redevelopment agencies.¹³ Currently, one special electric district and four special natural gas districts exist in Florida.¹⁴

¹ Art. VIII, s. 1(f), Fla. Const.

² Art. VIII, s. 1(g), Fla. Const.

³ A municipality is a local government entity created to perform functions and provide services for the particular benefit of the population within the municipality, in addition to those provided by the county. The term “municipality” may be used interchangeably with the terms “town,” “city,” and “village.”

⁴ Art. VIII, s. 2(b), Fla. Const. See also s. 166.021(1), F.S.

⁵ See *Halifax Hospital Medical Center v. State of Fla., et al.*, 278 So. 3d 545, 547 (Fla. 2019).

⁶ S. 189.031(3), F.S.

⁷ *Id.*

⁸ S. 189.02(1), F.S.

⁹ S. 190.005(1), F.S. See, generally, s. 189.012(6), F.S.

¹⁰ *2020-2022 Local Gov’t Formation Manual*, p. 62,

<https://myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3117&Session=2021&DocumentType=General+Publications&FileName=2021-2022+Local+Government+Formation+Manual.pdf> (last visited March 15, 2021).

¹¹ Dependent special districts are under some control by a single county or municipality. S. 189.012(2), F.S. An independent special district is any district that is not a dependent district. S. 189.012(3), F.S. A special district that includes more than one county is independent unless it lies wholly within the boundaries of a single municipality.

¹² Florida Department of Economic Opportunity, Division of Community Development, Special District Accountability Program, Official List of Special Districts Online, *State Totals*, <http://dca.deo.myflorida.com/fhcd/sdip/OfficialListdeo/report.cfm> (last visited March 17, 2021).

¹³ Florida Department of Economic Opportunity, Division of Community Development, Special District Accountability Program, Official List of Special Districts Online, *Special District Function Totals* at <http://www.floridajobs.org/community-planning-and-development/assistance-for-governments-and-organizations/special-district-accountability-program> (last visited Feb. 28, 2021).

¹⁴ See PSC, Facts & Figures of the Florida Utility Industry

<http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Factsandfigures/April%202020.pdf> (last visited Feb. 28, 2021).

Intergovernmental Utility Authorities

The Florida Interlocal Cooperation Act of 1969 (Act) allows local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage.¹⁵ The Act provides that local governmental entities may jointly exercise their powers by entering into a contract in the form of an interlocal agreement.¹⁶ Under such an agreement, the local governmental units may create a separate legal or administrative entity “to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.”¹⁷

In 1978, the Florida Municipal Power Agency (FMPA) was created through a series of interlocal agreements under s. 163.01, F.S., to provide wholesale power supply to municipal electric utilities. FMPA is currently owned by 31 municipalities.¹⁸ Through various joint power supply projects¹⁹, it supplies all of the electrical power needs of 13 member utilities (referred to as “All-Requirements Project” or “ARP” members) and some of the power needs for seven other member utilities. Through these projects, FMPA members maintain ownership interests in various electrical power plants throughout Florida. FMPA manages the transmission of electrical power over facilities owned by FMPA or its ARP members. FMPA also manages a “power pool” that includes the generating resources of its All-Requirements Project, Lakeland Electric, and Orlando Utilities Commission.²⁰

Local Government Authority over Matters Related to Utility and Energy Services

Many of the powers granted to local governments by general law relate, directly or indirectly, to the provision of utility or other energy services to property owners or utility customers in general or to the authority of local governments to provide these services themselves. These powers include, but may not be limited to, the authority to:

- Prepare and enforce comprehensive plans for development.²¹
- Issue development permits and orders.²²
- Establish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public.²³
- Enforce the Florida Building Code and adopt and enforce local technical amendments thereto.²⁴
- Enter into contracts with utility companies or others for the supply of water, electricity, or telephone service to or in connection with any project.²⁵
- Construct, operate, and maintain gas plants and distribution systems for domestic, municipal, and industrial uses,²⁶ construct such other buildings and facilities as may be required to properly

¹⁵ S. 163.01(2), F.S.

¹⁶ S. 163.01(5), F.S.

¹⁷ S. 163.01(2), F.S.

¹⁸ Currently, FMPA serves the following municipalities: Alachua, Bartow, Blountstown, Bushnell, Chattahoochee, Clewiston, Fort Meade, Fort Pierce, Gainesville, Green Cove Springs, Havana, Homestead, Jacksonville Beach, Key West, Kissimmee, Lake Worth, Lakeland, Leesburg, Moore Haven, Mount Dora, New Smyrna Beach, Newberry, Ocala, Orlando, Quincy, St. Cloud, Starke, Vero Beach, Wauchula, Williston, and Winter Park. FLORIDA MUNICIPAL POWER AGENCY, *Members*, <http://fmpa.com/about/members/> (last visited Feb. 28, 2021).

¹⁹ S. 361.12, F.S., authorizes any electric utility, or any organization, association, or separate legal entity whose membership consists only of electric utilities, to join with any other such entity to finance, acquire, construct, manage, operate, or own an electric power supply project for the joint generation or transmission of electrical energy, or both. Further, section 361.13, F.S., authorizes any such entity to purchase capacity or energy, or both, in an agreed upon quantity from any project in which the purchaser has an ownership interest.

²⁰ FLORIDA MUNICIPAL POWER AGENCY. For a list of the projects and the cities participating in each project, see FLORIDA MUNICIPAL POWER AGENCY, *Projects*, <https://fmpa.com/power-supply-projects/> (last visited Feb. 28, 2021).

²¹ S. 125.01(1)(g), F.S.

²² Ss. 125.022, F.S. and 166.033, F.S.

²³ S. 125.01(1)(h), F.S.

²⁴ S. 125.01(1)(bb), F.S.

²⁵ S. 125.012(19), F.S.

²⁶ S. 180.06(8), F.S.

and economically operate and maintain such works,²⁷ and make all necessary rules or regulations governing the use, control and operation of such works;²⁸

- Contract with private companies for the right to construct, operate, and maintain gas plants and distribution systems for domestic, municipal, and industrial uses, including the privilege or franchise of exercising its corporate powers for such terms of years and upon such conditions and limitations as may be deemed expedient and for the best interest of the municipality, for up to 30 years, provided that the rates or charges to be made by the private company to the individual users of the utility are fixed by the municipality.²⁹
- Provide and regulate roads, rights-of-way, and related transportation facilities.³⁰
- License the use of gas and power lines in rights-of-way.³¹
- Adopt, revise, and amend, from time to time, appropriate ordinances, rules, and regulations reasonably necessary to maintain air quality standards established pursuant to state and federal law, including the federal Clean Air Act.³²

Further, general law provides a role for local governments in state proceedings related to the siting of certain new electrical power plants, transmission lines, and natural gas pipelines. Specifically, part II of ch. 403, F.S., requires local governments to provide a report to the Department of Environmental Protection (DEP) as to the consistency of proposed electrical power plants, transmission lines, and natural gas pipelines with all applicable local ordinances, regulations, standards, or criteria that apply to the proposed facility, including local comprehensive plans, zoning regulations, land development regulations, and any applicable local environmental regulations.³³

Municipalities are authorized to levy a public service tax on the purchase of electricity, natural gas liquefied petroleum gas, and manufactured gas.³⁴

As noted above, many municipalities own and operate electric utilities and natural gas utilities and govern the operation of those utilities through ordinance, code, or policies. Some special districts provide these services under policies adopted by each special district.

State 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. State preemption precludes a local government from exercising authority in that particular area.³⁵

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.³⁶ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.³⁷ In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the

²⁷ S. 180.06(9), F.S.

²⁸ S. 180.13, F.S.

²⁹ S. 180.14, F.S.

³⁰ S. 125.01(1)(m), F.S.

³¹ S. 125.42, F.S.

³² S. 125.275, F.S.

³³ Ss. 403.507(2)(a)3., 403.526(2)(a)5., and 403.941, F.S.

³⁴ S. 166.231, F.S.

³⁵ Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009), <https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/> (last visited March 16, 2021).

³⁶ 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).

³⁷ *Mulligan*, 934 So. 2d at 1243.

Legislature intended.³⁸ 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.³⁹

Effect of the Bill

The bill prohibits a municipality, county, special district, or other political subdivision of the state from enacting or enforcing a resolution, ordinance, rule, code, or policy, or take any other action that restricts or prohibits, or has the effect of restricting or prohibiting, the types or fuel sources of energy production which may be used, delivered, converted, or supplied by the following entities to customers that these entities are authorized to serve:

- Investor-owned electric utilities;
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- Certain propane dealers, dispensers, and gas cylinder exchange operators.

The bill provides that it does not expand or alter the jurisdiction of the Public Service Commission.

The bill provides that any municipality, county, special district, or political subdivision charter, resolution, ordinance, rule, code, policy, or action that is preempted by this act that existed before or on July 1, 2021, is void.

B. SECTION DIRECTORY:

Section 1 Creates s. 377.707, F.S.; providing a definition; providing legislative findings; intent; prohibiting a local government from regulating energy infrastructure; preempting such regulation to the state.

Section 2 Provides an effective date of July 1, 2021.

³⁸ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

³⁹ *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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:

The bill neither authorizes nor requires administrative rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 11, 2021, the Tourism, Infrastructure & Energy Subcommittee adopted one amendment to the bill and reported the bill favorably as a committee substitute. The amendment:

- Modified the prohibition in the bill to address actions that restrict or prohibit or have the effect of restricting or prohibiting the types or fuel sources of energy production which may be used, delivered, converted, or supplied by certain energy providers to customers that those providers are authorized to serve.
- Provided that the bill does not expand or alter current Public Service Commission jurisdiction.
- Removed an exception for levying public services taxes.
- Removed a definition for the term “utility service provider” and removed references to that term.

This analysis reflects the committee substitute adopted by the Tourism, Infrastructure & Energy Subcommittee.