

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 403 Local Ordinances

**SPONSOR(S):** Giallombardo

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 280

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Administration & Veterans Affairs Subcommittee	11 Y, 4 N	Darden	Miller
2) Civil Justice & Property Rights Subcommittee			
3) State Affairs Committee			

### SUMMARY ANALYSIS

Local governments have broad authority to legislate on any matter not inconsistent with federal or state law. If the Legislature preempts an area of regulation to the state, local governments are prohibited from exercising authority in that area. If a local government enacts an ordinance on a matter preempted to the state, a person may file a lawsuit asking the court to declare the ordinance void.

Florida law allows for the awarding of attorney fees to the prevailing party challenging an ordinance adopted or enforced by a local government that is expressly preempted by the Florida Constitution or state law. However, attorney fees and costs may not be awarded against a local government if it:

- Receives written notice that an ordinance or proposed ordinance is expressly preempted; and
- Within 30 days of receiving the notice, withdraws the proposed ordinance; or, in the case of an adopted ordinance, notices an intent to repeal the ordinance within 30 days of receiving the notice and repeals the ordinance within 30 days thereafter.

This provision does not apply to ordinances relating to growth management, building codes, fire prevention codes, or biosolids and is supplemental to other sanctions or remedies available under law or court rule.

The bill:

- Provides that a court may award attorney fees to the complainant successfully challenging a local government ordinance on the grounds that the ordinance is arbitrary or unreasonable, or that the ordinance is prohibited by a law other than an express preemption;
- Requires counties and municipalities to adopt a "business impact statement" before the adoption of any proposed ordinance. The statement must be published on the local government's website and contain specified information;
- Requires the suspension of enforcement of any newly enacted ordinance if a party challenging the ordinance requests suspension by the court;
- Provides for expedited court review of challenged ordinances; and
- Provides criteria for courts to consider when determining if an ordinance is arbitrary or unreasonable.

The bill does not appear to have a fiscal impact on state government, but may have an indeterminate negative impact on local governments. The bill also may have an indeterminate positive impact on private parties who successfully challenge a local government's enactment or enforcement of an ordinance.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Ordinances

The Florida Constitution grants local governments broad home rule authority. Non-charter county governments may exercise those powers of self-government that are provided by general or special law.<sup>1</sup> Counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.<sup>2</sup> Municipalities have governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform municipal functions and provide municipal services, and exercise any power for municipal purposes except when expressly prohibited by law.<sup>3</sup> A local government enactment may be inconsistent with state law if:

- The State Constitution preempts the subject area;
- The Legislature preempts the subject area; or
- The local enactment conflicts with a state statute.

Local governments exercise these powers through adopting ordinances. The adoption or amendment of a regular ordinance (other than an ordinance making certain changes to zoning) may be considered at any regular or special meeting of the local governing body.<sup>4</sup> Notice of the proposed ordinance must be published at least ten days before the meeting in a newspaper of general circulation in the area and must state the date, time, and location of the meeting, the title of the proposed ordinance, locations where the proposed ordinance may be inspected by the public, and advise that interested parties may appear and speak at the meeting. Municipal ordinances must also be read by title or in full on at least two separate days.<sup>5</sup> Ordinances may only encompass a single subject and may not be revised or amended solely by reference to the title.<sup>6</sup>

A county may adopt an emergency ordinance that bypasses the notice requirement if the governing body declares that an emergency exists requiring the immediate enactment of the ordinance and the ordinance is approved by a four-fifths vote.<sup>7</sup> A municipality may adopt an emergency ordinance by two-thirds vote.<sup>8</sup> An emergency ordinance may not be used to adopt zoning changes.<sup>9</sup>

##### Preemption

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.<sup>10</sup> To expressly preempt a subject area, the Legislature must use clear statutory language stating that intent.<sup>11</sup> Implied preemption occurs when the Legislature has demonstrated an intent to preempt an area, though not expressly. Florida courts find implied preemption when "the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature."<sup>12</sup>

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<sup>1</sup> Art. VIII, s. 1(f), Fla. Const.

<sup>2</sup> Art. VIII, s. 1(g), Fla. Const.

<sup>3</sup> Art. VIII, s. 2(b), *See also* s. 166.021(1), F.S.

<sup>4</sup> *See* ss. 125.66(2)(a), 166.041, F.S.

<sup>5</sup> S. 166.041(3)(a), F.S.

<sup>6</sup> Ss. 125.67, 166.041(2), F.S.

<sup>7</sup> S. 125.66(3), F.S.

<sup>8</sup> S. 166.041(3)(b), F.S.

<sup>9</sup> Ss. 125.66(3), 166.041(3)(b), F.S.

<sup>10</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).

<sup>11</sup> *Mulligan*, *supra* at 934 So. 2d at 1243.

<sup>12</sup> *Tallahassee Mem. Reg. Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

Where state preemption applies, a local government may not exercise authority in that area.<sup>13</sup> Whether a local government ordinance or other measure violates preemption is ultimately decided by a court. If a local government improperly enacts an ordinance or other measure on a matter preempted to the state, a person may challenge the ordinance by filing a lawsuit. A court ruling against the government may declare the preempted ordinance void.<sup>14</sup>

### Attorney Fees, Costs, and Interest

In Florida, a party generally may recover attorney fees only if authorized by statute or agreement of the parties. This is known as the "American Rule."<sup>15</sup> Attorney fees as a sanction generally may be levied only where a party or attorney brings an unsupported claim or defense, such as:

- A claim or defense unsupported by the material facts necessary to establish the claim or defense;
- A claim or defense unsupported by the application of then-existing law to the material facts; or
- An action was taken primarily for the purpose of causing an unreasonable delay.<sup>16</sup>

Attorney fees as a sanction may not be imposed:

- Where a party reasonably presented a claim or defense as a good faith argument for the extension, modification, or reversal of existing law;
- Against the culpable party's attorney, if the attorney acted in good faith based on his or her client's representations as to material fact; or
- Against a represented party whose attorney raised an unsupported legal claim or defense.<sup>17</sup>

A party may appeal a court's ruling on sanctions, and the appellate court must review the award or denial of sanctions under the abuse of discretion standard, meaning the appellate court must uphold the lower court's decision unless it was "arbitrary, fanciful, or unreasonable."<sup>18</sup>

Under Florida law, the prevailing party in any civil action is entitled to an award of litigation costs.<sup>19</sup> A judgment may award costs including those for which account is kept by the clerk of the court<sup>20</sup> and other specified expenses such as amounts for posting and maintaining bonds, court reporter fees, taxes on legal services, if applicable, and expert witness fees under certain conditions.<sup>21</sup>

The holder of a judgment for money damages is entitled to interest on the entire judgment amount at the specified statutory rate.<sup>22</sup> If the judgment has the practical effect of determining the specific amount of damages on the claim, or "liquidating" the claim, as of a date prior to the judgment, the plaintiff is entitled to prejudgment interest at the applicable statutory rate from the date of that loss.<sup>23</sup> The prejudgment interest amount is added to the remaining amounts awarded by the court for damages in the judgment.

Additionally, Florida law provides that the prevailing party in an action challenging a local government ordinance expressly preempted by the Florida Constitution or Florida law is entitled to attorney fees and costs.<sup>24</sup> For the purpose of this provision, costs are defined as all reasonable and necessary fees and

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<sup>13</sup> Judge James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

<sup>14</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>15</sup> *Dade County v. Peña*, 664 So. 2d 959, 960 (Fla. 1995); *Reiterer v. Monteil*, 98 So. 3d 586, 587 (Fla. 2d DCA 2012).

<sup>16</sup> S. 57.105, F.S.

<sup>17</sup> S. 57.105(3), F.S.

<sup>18</sup> *MC Liberty Express, Inc. v. All Points Servs., Inc.*, 252 So. 3d 397 (3d DCA 2018) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)); *Ferere v. Shure*, 65 So. 3d 1141 (Fla. 4th DCA 2011).

<sup>19</sup> S. 57.041, F.S.

<sup>20</sup> S. 57.021, F.S.

<sup>21</sup> S. 57.071, F.S.

<sup>22</sup> S. 55.03, F.S. The Chief Financial Officer determines the applicable interest rate on a quarterly basis. S. 55.03(1), F.S. The initial interest rate for a judgment is that in effect at the time the judgment is awarded. The judgment interest rate is then adjusted annually on January 1 to the rate in effect on that date. S. 5.03(3), F.S.

<sup>23</sup> *Argonaut Insurance Company v. May Plumbing Company*, 474 So. 2d 212, 215 (Fla. 1985).

<sup>24</sup> S. 57.112(2), F.S.

costs incurred for preparation, motions, hearings, trials, and appeals.<sup>25</sup> Under this statute, attorney fees and costs may not awarded against a local government if it:

- Receives written notice that an ordinance or proposed ordinance is expressly preempted; and
- Within 30 days of receiving the notice, withdraws the proposed ordinance; or, in the case of an adopted ordinance, notices an intent to repeal the ordinance within 30 days of receiving the notice and repeals the ordinance within 30 days thereafter.<sup>26</sup>

The award of attorney fees under this provision are supplemental to other sanctions or remedies available under law or court rule and do not apply to ordinances relating to growth management, building codes, fire prevention codes, or biosolids.<sup>27</sup>

### Economic Analysis of Business Impacts

Some governmental entities conduct economic analysis of business impacts. For example, before adopting an administrative rule, state agencies may prepare a statement of estimated regulatory cost (SERC), estimating the potential impact of a proposed rule on the public, particularly the potential costs to the public of complying with the rule as well as to the agency and other governmental entities to implement the rule.<sup>28</sup> Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.<sup>29</sup> However, a SERC is required if the proposed rule will have an adverse impact on small businesses or increase regulatory costs by more than \$200,000 in the aggregate within one year after implementation of the rule.<sup>30</sup> If the agency revises a rule before adoption and the revision increases the regulatory costs of the rule, the agency must revise the SERC to reflect that alteration.<sup>31</sup>

A SERC must include:

- A good faith estimate of the number of people and entities affected by the proposed rule;
- A good faith estimate of the cost to the agency and other governmental entities to implement the proposed rule;
- A good faith estimate of transactional costs likely to be incurred by people, entities, and governmental agencies for compliance; and
- An analysis of the proposed rule's impact on small businesses, counties, and municipalities.<sup>32</sup>

The SERC must also include an economic analysis on the likelihood that the proposed rule will have an adverse impact in excess of \$1 million within the first five years of implementation on:

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness, productivity, or innovation; or
- Regulatory costs, including any transactional costs.<sup>33</sup>

If the economic analysis results in an adverse impact or regulatory costs in excess of \$1 million within five years after implementation of the rule, then the rule must be ratified by the Legislature in order to take effect.<sup>34</sup>

An agency's failure to prepare a SERC can be raised in a proceeding at DOAH to invalidate a rule as an invalid exercise of delegated legislative authority, if it is raised within one year of the effective date of the rule and is raised by a person whose substantial interests are affected by the regulatory costs of the rule.<sup>35</sup>

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<sup>25</sup> S. 57.112(1), F.S.

<sup>26</sup> S. 57.112(3), F.S.

<sup>27</sup> S. 57.112(4)-(5), F.S.

<sup>28</sup> S. 120.541(2), F.S.

<sup>29</sup> S. 120.54(3)(b)1., F.S.

<sup>30</sup> *Id.*

<sup>31</sup> S. 120.541(1)(c), F.S.

<sup>32</sup> S. 120.541(2)(b)-(e), F.S.

<sup>33</sup> S. 120.541(2)(a), F.S.

<sup>34</sup> S. 120.541(3), F.S.

<sup>35</sup> S. 120.541(1)(f), F.S.

## Effect of Proposed Changes

### Attorney Fees

The bill provides a court may award attorney fees to the complainant successfully challenging a local government ordinance on the grounds that the ordinance is arbitrary or unreasonable, or that the ordinance is prohibited by a law other than an express preemption. This provision is prospective in nature and would only apply to cases commenced on or after October 1, 2022.

### Business Impact Statements

The bill requires each county and municipality to prepare a “business impact statement” before adopting a proposed regular ordinance. The statement must include:

- A statement of public purpose, such as serving public health, safety, or welfare;
- A statement describing a reasonable connection between the public purpose and the expected effects of the ordinance;
- The estimated economic effect of the proposed ordinance on business, including those outside of the jurisdiction of the county or municipality, and considering both adverse and beneficial effects, as well as direct and indirect effects;
- A good faith estimate of the number of businesses likely to be affected by the ordinance;
- An analysis of the extent to which the proposed ordinance will deter or encourage the formation of new business within the county or municipality’s jurisdiction;
- An analysis of the extent to which the proposed ordinance will impede the ability of businesses within the county or municipality to compete with businesses in other areas of the state or other domestic markets;
- The scientific basis of the proposed ordinance (if applicable);
- Alternatives considered by the county or municipality that would reduce the impact of the propose ordinance on businesses; and
- Any additional information the board determines may be useful.

The statement must be published to county or municipality’s website on the same day the notice of proposed enactment of the ordinance is published.

### Ordinance Challenges

The bill prohibits a county or municipality from enforcing any ordinance that is the subject of legal action, including any appeal, challenging the ordinance’s validity on the grounds that it is preempted by the Florida Constitution, state law, is arbitrary or unreasonable, or otherwise prohibited by law if:

- The legal action is filed no later than 20 days after the effective date of the ordinance;
- The plaintiff or petitioner requests suspension pursuant to the statute in the initial complaint or petition; and
- The county or municipality has been served with a copy of the complaint or petition.

The bill requires courts with a pending action concerning enforcement of an ordinance to give those cases priority over other pending cases and to render a preliminary or final decision as expeditiously as possible.

The bill establishes a series of factors for courts to consider when determining in an ordinance is arbitrary or unreasonable, including but not limited to:

- The extent to which the ordinance protects the health, welfare, safety, and quality of life of the residents of the county or municipality;
- The impact of the ordinance on the personal rights and privileges of the residents of the county or municipality;
- The total economic impact of the ordinance; and
- The business impact statement prepared by the county or municipality.

This provision does not apply to emergency ordinances or ordinances relating to growth management, building codes, fire prevention codes, or biosolids.

### Important State Interest

The bill states that the Legislature finds and declares the act fulfills an important state interest.

#### B. SECTION DIRECTORY:

- Section 1: Amends s. 57.112, F.S., related to attorney fees and costs for preempted local actions.
- Section 2: Amends s. 125.66, F.S. to require the preparation of business impact statements for proposed ordinances by counties.
- Section 3: Creates s. 125.675, F.S., related to legal challenges to recently enacted county ordinances.
- Section 4: Amends s. 166.041, F.S. to require the preparation of business impact statements for proposed ordinances by municipalities.
- Section 5: Creates s. 166.0411, F.S., related to legal challenges to recently enacted municipal ordinances.
- Section 6: Amends s. 163.2517, F.S., conforming a cross-reference.
- Section 7: Amends s. 163.3181, F.S., conforming a cross-reference.
- Section 8: Amends s. 163.3215, F.S., conforming a cross-reference.
- Section 9: Amends s. 376.80, F.S., conforming a cross-reference.
- Section 10: Amends s. 497.270, F.S., conforming a cross-reference.
- Section 11: Amends s. 562.45, F.S., conforming a cross-reference.
- Section 12: Amends s. 847.0134, F.S., conforming a cross-reference.
- Section 13: Provides a statement of important state interest.
- Section 14: Provides an effective date of October 1, 2022.

## **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:

The bill provides that a court may award attorney fees and costs, including prejudgment interest, against a local government for passing certain ordinances and requires each local government to prepare a business impact statement before adopting a proposed ordinance, which may have an indeterminate negative fiscal impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive impact on private parties who successfully bring actions challenging the enactment or enforcement by a local government, in that the private parties will be authorized to recover their attorney fees for such actions.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18 of the Florida Constitution may apply because this bill requires local governments to prepare business impact statements before the adoption of any ordinance; however, an exemption may apply if the bill has an insignificant fiscal impact. Additionally, an exception may apply because the bill provides a legislative finding that it fulfills an important state interest and it applies to all similarly situated entities that adopt ordinances.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not provide rulemaking authority or require executive branch rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.