

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 Rules

BILL: CS/CS/SB 170

INTRODUCER: Rules Committee, Community Affairs Committee and Senators Trumbull and Perry

SUBJECT: Local Ordinances

DATE: February 23, 2023

REVISED: 2/24/23

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hackett</u>	<u>Ryon</u>	<u>CA</u>	Fav/CS
2.	<u>Hackett</u>	<u>Twogood</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 170 pertains to the passage and challenging of local ordinances. It adds to the process for local governments passing ordinances and gives certain additional rights to those challenging local ordinances.

The bill requires counties and cities to produce a “business impact estimate” prior to passing an ordinance, with exceptions. The estimate must be published on the local government’s website and include certain information, such as the proposed ordinance’s purpose, estimated economic impact on businesses, and compliance costs.

Additionally, the bill imposes certain conditions on lawsuits brought by any party to challenge the legal validity of local ordinances as preempted by state law, arbitrary, or unreasonable. In these cases, the bill:

- Requires the local government to suspend enforcement of an ordinance of such legal challenge, under certain circumstances.
- Requires the court to give those cases in which enforcement of the ordinance is suspended priority over other pending cases and render a preliminary or final decision as expeditiously as possible.
- Provides that a court may award up to \$50,000 in attorney fees to a prevailing plaintiff who successfully challenges an ordinance as arbitrary or unreasonable.

The bill also provides that properly noticed consideration of a proposed ordinance may be continued to a subsequent meeting under certain circumstances without further publication, mailing, or posted notice.

The bill contains a finding of important state interest.

The bill takes effect October 1, 2023, except as otherwise provided.

II. Present Situation:

Local Ordinances

The governing body of a county or municipality has broad legislative powers to enact ordinances, local laws, to perform governmental functions and exercise power to promote the health, welfare, safety, and quality of life of a local government's residents. Ordinances address a wide variety of local issues, from government structure and zoning laws to speed limits and noise ordinances. Procedures for passing local ordinances are prescribed by the Legislature and differ only slightly between counties and municipalities.

Procedures for Enacting Ordinances

A board of county commissioners must notice its intent to consider an ordinance or amendment to an ordinance 10 days before the meeting at which the ordinance will be considered. The notice, placed in a newspaper of general circulation, should include the date, time, and place of the meeting, the proposed ordinance title, and instructions for how to view the language. The board may then vote to pass the ordinance at the meeting, and upon passage, must send a certified copy of the ordinance to the Florida Department of State (DOS).¹ County ordinances take effect upon filing with the DOS, unless otherwise prescribed in the ordinance.²

Similarly, municipalities must notice intent to consider an ordinance 10 days before adoption. However, municipalities must also read the ordinance by title or in full on at least 2 separate days before adoption by vote.³ An ordinance passed by a municipality becomes effective 10 days after passage, unless otherwise prescribed in the ordinance.⁴

Emergency Ordinances

A board of county commissioners may adopt an emergency ordinance that bypasses the notice requirements 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 of the membership.⁵ A municipality may bypass reading and notice requirements to pass an emergency ordinance by a two-thirds vote of the governing body.⁶ An emergency ordinance may not be used to adopt zoning and land use changes.⁷

¹ Section 125.66(2), F.S.

² *Id.*

³ Section 166.041(3)(a), F.S.

⁴ Section 166.041(4), F.S.

⁵ Section 125.66(3), F.S.

⁶ Section 166.041(3)(b), F.S.

⁷ *Supra* notes 5 and 6.

Local Government Authority

The Florida Constitution grants local governments broad authority to take actions furthering citizens' health, welfare, safety, and quality of life. This "home rule" authority includes legislative powers to enact local laws. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.⁸ Those counties operating under a county charter have all powers of local self-government not inconsistent with general law or special law approved by the vote of the electors.⁹ Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide municipal services, and exercise any power for municipal purposes, except as otherwise provided by law.¹⁰

This authority, under the umbrella of governmental or municipal purpose, extends broadly to any ordinance necessary to promote the health, welfare, safety, and quality of life of a local government's residents.¹¹ Local governments' authority has been liberally construed when reviewed by courts. For example, courts have found the following to meet the standards for what constitutes a "municipal purpose," and therefore were valid local government actions:

- Acquisition and maintenance of a golf course;¹²
- Sale of souvenir photographs;¹³ and
- Prohibiting the rental of motorized scooters.¹⁴

In general, this broad home rule authority is limited by two guideposts: preemption, where a higher level of government such as the State has already legislated on a topic, and standards of reasonableness. Local governments may not pass ordinances which are apparently unreasonable or unreasonable, despite their wide-ranging powers.¹⁵ Anyone affected by an ordinance may challenge its validity in court by filing a civil action against the local government.¹⁶

Preemption

An ordinance can be declared invalid on the grounds that it is inconsistent with the State Constitution or Florida Statutes. Inconsistency may be found where a local ordinance is either preempted by or in conflict with the State Constitution or Florida Statutes.¹⁷ Preemption means that a local government is precluded from exercising authority in a particular area, while conflict exists where a municipality has the right to act but such action frustrates the purpose of the state

⁸ FLA. CONST. art. VIII, s. 1(f).

⁹ FLA. CONST. art. VIII, s. 1(g).

¹⁰ FLA. CONST. art. VIII, s. 2(b). *See also* s. 166.021(1), F.S.

¹¹ Art. VIII, § 2(b), Fla. Const.; Section 125.86, F.S.; for municipalities see *Quiles v. City of Boynton Beach*, 802 So. 2d 397, 398 (Fla. 4th DCA 2001); § 166.021, Fla. Stat.

¹² *West v. Town of Lake Placid*, 97 Fla. 127, 120 So. 361 (1929).

¹³ *City of Winter Park v. Montesi*, 448 So. 2d 1242 (Fla. 5th DCA 1984).

¹⁴ *Classy Cycles, Inc. v. Panama City Beach*, 301 So. 3d 1046 (Fla. 1st DCA 2019).

¹⁵ *Dennis v. City of Key West*, 381 So. 2d 312 (Fla. 3d DCA 1980).

¹⁶ *Hardage v. City of Jacksonville Beach*, 399 So. 2d 1077 (Fla. 1 DCA 1981). There are statutory requirements for being allowed to bring suit in certain cases, such as those based on a technical deficiency in the ordinance, but the cases at issue in this analysis merely require being affected.

¹⁷ *City of Jacksonville v. American Environmental Services Inc.*, 699 So. 2d 255 (Fla. 1st DCA 1997)

regulation.¹⁸ Express preemption refers to instances where the Legislature has directly written into law that the State intends to occupy a field of law, prohibiting local governments from taking action in that field.¹⁹

Implied preemption, however, refers to situations where no express preemption is written into statute, but the Legislature has regulated a field such that local legislation would present the danger of conflict with that regulatory scheme.²⁰ In this context, conflict occurs any time a citizen would necessarily violate one provision in order to comply with the other. Implied preemption and conflict are necessarily more nuanced and less foreseeable than express preemption.

Arbitrary and Unreasonable Ordinances: Presumption of Validity

An ordinance can also be declared invalid on the grounds that it is arbitrary or unreasonable, meaning that it has no legitimate governmental interest. In legal challenges to local ordinances based on being arbitrary or unreasonable, the local ordinances are presumed valid by courts reviewing them, and the burden falls on the challenger to establish the ordinance's arbitrary or unreasonable nature.²¹ Courts apply "rational basis review" to ordinances, simply determining whether an ordinance is rationally related to a legitimate government interest- if it fails to meet this test, an ordinance is declared invalid.²² In these instances, courts have stated that there is no governmental purpose where there is no apparent benefit, such as protecting the health, welfare, safety, and quality of life, to the citizens, the benefit appears to apply to non-residents, or the government has attempted to frustrate the purpose of another governmental entity.²³

Given this deference, courts have rarely found that an ordinance entirely lacks governmental, or municipal purpose. However, in one case, the Florida Supreme Court ruled that a local ordinance prohibiting the operation of surfboards and skimmers on beaches was unlawfully arbitrary and unreasonable. In its ruling, the court stated, "[t]he Town of Palm Beach may regulate and control surfing and skinning in areas subject to its jurisdiction and may prohibit these activities at certain places along the beach. However, the complete prohibition of this sport from all the beach area is arbitrary and unreasonable."²⁴

Attorney Fees for Challenges Based on Express Preemption

Current law provides that in a civil action to challenge the validity of a local ordinance on the grounds that it is expressly preempted by the State Constitution or by state law, the court must

¹⁸ *Id.*

¹⁹ *See, e.g.,* s. 790.33, F.S. "... the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition..."

²⁰ *See, e.g.,* Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So. 3d 880 (Fla. 2010).

²¹ *See* Panama City Beach Community Redevelopment Agency v. State, 831 So. 2d 662 (Fla. 2002), Orange County v. Costco Wholesale Corp., 823 So.2d 732 (Fla. 2002)..

²² *Supra* note 12 at page 133, 134 "In testing the validity of a statute with reference to the facts and circumstances upon which it is to operate, the validity of the statute does not depend upon the preponderance of evidentiary considerations; but the statute stands unless it conclusively appears that there are or can be no conceivable circumstances upon which it can validly operate or that under no circumstances can it operate or be effective to accomplish the intended purpose, without violating organic rights."

²³ *See generally supra*, notes 13, 14, 15.

²⁴ *Carter v. Town of Palm Beach*, 237 So.2d 130 (Fla. 1970).

assess and award reasonable attorney fees, costs, and damages to the prevailing party, either the challenger or local government.²⁵ The local government can avoid paying attorney fees, costs, and damages if after receiving notices that an ordinance is expressly preempted, the governing body withdraws the proposed ordinance within 30 days.²⁶

Priority Docketing

The Florida Rules of Judicial Administration govern the ways a judge controls a case in terms of timing and docketing. Some cases that come before a court are deemed priority cases, either directly in statute, in rule of procedure, or case law. Every judge has a duty to expedite priority cases to the extent reasonably possible.²⁷ For these cases judges are tasked with implementing docket control policies necessary to advance the case and ensure prompt resolution.²⁸ Docket control policies include setting deadlines for phases of the case, giving priority to hearings required to advance the case, and advancing the trial setting. A party in a priority status case may file a notice of priority status, and has recourse if they believe the case has not been appropriately advanced on the docket or received priority in scheduling.²⁹

III. Effect of Proposed Changes:

Attorney Fees

Section 1 amends s. 57.112, F.S., to provide that when an ordinance is successfully challenged in court as arbitrary or unreasonable, the court may, but is not required to, award up to \$50,000 in attorney fees and costs to the prevailing plaintiff. These fees are not applicable where the plaintiff prevails on a separate claim regarding the same ordinance, or for fees and costs associated with litigating over attorney fees. This section applies prospectively to ordinances adopted on or after October 1, 2023.

Business Impact Estimate

Sections 3 and 6 amend ss. 125.66 and 166.041, F.S., to require counties and cities, respectively, to produce or have produced a “business impact estimate” prior to passing an ordinance. The business impact estimate must include the following:

- A summary of the proposed ordinance, including a statement of the public purpose to be served by the proposed ordinance;
- An estimate of the direct economic impact of the proposed ordinance on private for-profit businesses in the county or city, including:
 - An estimate of direct compliance costs for businesses;
 - Identification of new charges and fees; and
 - An estimate of the county’s or city’s regulatory costs.
- A good faith estimate of the number of businesses likely impacted; and

²⁵ Section 57.112, F.S.

²⁶ Or notices the intent to repeal the ordinance within 30 days and repeals the notice within 30 days thereafter. S. 57.112(3), F.S.

²⁷ Fla. R. Jud. Admin. 2.215(g).

²⁸ Fla. R. Jud. Admin. 2.545(b).

²⁹ Fla. R. Jud. Admin. 2.545(c).

- Any additional information deemed useful.

The bill specifies that this requirement is not to be construed to require a county or city to procure an accountant or other financial consultant in preparing the estimate.

A business impact estimate is not required for the following types of ordinances:

- Emergency ordinances;
- Growth policy, county and municipal planning, and land development regulations under part II of ch. 163, F.S.;
- Building code ordinances under s. 553.73, F.S.;
- Fire prevention code ordinances under s. 633.202, F.S.;
- Ordinances establishing or terminating Community Development Districts under ss. 190.005 and 190.046, F.S.;
- Ordinances required to comply with federal or state law or regulation;
- Ordinances relating to financial obligations or issuance and refinancing of debt;
- Ordinances related to the adoption of county or municipal budgets or budget amendments; or
- Ordinances required to implement a contract or agreement, to include federal, state, local, or private grants and other financial assistance.

Challenging Ordinances

Sections 4 and 7 create ss. 125.675 and 166.0411, F.S., to set conditions on lawsuits brought by any party to challenge local ordinances as preempted by the State Constitution or by state law, arbitrary, or unreasonable. The bill requires the local government to suspend enforcement of an ordinance subject to such an action, including appeals, if:

- The action was filed with the court no later than 90 days after the adoption date of the ordinance;
- The plaintiff or petitioner requests suspension in the initial complaint or petition; and
- The county or city has been served with a copy of the complaint or petition.

Unless the plaintiff obtains a stay of the lower court's order pending appeal, the local government may enforce the ordinance 45 days after the entry of the lower court's order. In filing such an action, a party certifies that they do not file such a suit for frivolous or improper purposes, and may be subject to sanctions and fees if they do so.

Additionally, the court must give those cases in which enforcement of the ordinance is suspended priority over other pending cases and render a preliminary or final decision as expeditiously as possible.

Provisions regarding an ordinance's stay and priority docketing for challenges do not apply to:

- Emergency ordinances;
- Growth policy, county and municipal planning, and land development regulations under part II of ch. 163, F.S.;
- Building code ordinances under s. 553.73, F.S.;
- Fire prevention code ordinances under s. 633.202, F.S.;

- Ordinances establishing or terminating Community Development Districts under ss. 190.005 and 190.046, F.S.;
- Ordinances required to comply with federal or state law or regulation;
- Ordinances relating to financial obligations or issuance and refinancing of debt;
- Ordinances related to the adoption of county or municipal budgets or budget amendments; or
- Ordinances required to implement a contract or agreement, to include federal, state, local, or private grants and other financial assistance.

Finally, the bill provides a cross reference to the new attorney fee provisions in section 1 of the bill.

Continuance of Ordinance Consideration

Sections 2 and 5 amend ss. 125.66 and 166.041, F.S., respectively, to provide that when a local government is considering a proposed ordinance at a duly noticed meeting, they may continue such consideration to a subsequent meeting without repeating publication and mailing requirements for the notice of intent to consider so long as the date, time, and place of the subsequent meeting is publicly stated, and the continuation is communicated in an agenda or similar communication produced for the subsequent meeting.³⁰

These amendments are considered remedial in nature, and are intended by the bill to apply retroactively.

These sections take effect upon the bill becoming a law.

Sections 8 through 14 correct statutory references to conform to changes made by the bill.

Section 15 contains a finding of important state interest.

Section 16 provides that, except as otherwise provided, the bill takes effect October 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The county and municipality mandate provisions of Article VII, section 18 of the Florida Constitution may apply because the bill requires local governments to expend funds to produce a business impact statement for each ordinance prior to consideration for adoption. Article VII, section 18 (a) of the Florida Constitution provides in part that a county or municipality may not be bound by a general law requiring a county or municipality to spend funds or take an action that requires the expenditure of funds unless certain specified exemptions or exceptions are met.

None of the constitutional exceptions appear to apply.

³⁰ While common practice by local governments, the validity of continuing consideration of proposed ordinances was called into question by *Testa v. Town of Jupiter Island*, 2023 WL 1808293 (Fla. 4th DCA, Feb. 8 2023).

Article VII, section 18 (d) provides eight exemptions, which, if any single one is met, exempts the law from the limitations on mandates. Laws having an “insignificant fiscal impact” are exempt from the mandate requirements, which for Fiscal Year 2022-2023 is forecast at approximately \$2.3 million.^{31,32} However, any local government costs associated with the bill are speculative and not readily estimable for purposes of determining whether the exemption for bills having an insignificant fiscal impact applies.

If the bill does qualify as a mandate, in order to be binding upon cities and counties, the bill must contain a finding of important state interest and be approved by a two-thirds vote of the membership of each house. The bill contains a legislative finding that its provisions fulfill an important state interest.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

This bill does not create or raise state taxes or fees. Therefore, the requirements of Article VII, s. 19 of the Florida Constitution do not apply.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

This bill does not affect state or local revenue.

B. Private Sector Impact:

The bill may have an indeterminate positive impact on private parties who bring actions challenging the enactment or enforcement of an ordinance by a local government. Private parties may benefit from the automatic stay and priority docketing, which may reduce costs for legal action, and will benefit from recovering attorney fees for successful actions, if awarded.

³¹ FLA. CONST. art. VII, s. 18(d).

³² An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times \$0.10. See Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Impact*, (Sept. 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf> (last visited Feb. 6, 2023).

C. Government Sector Impact:

Business impact estimates will require staffing time and resources for each ordinance passed by a local government. The negative economic impact is indeterminate at this time.

Courts may see indeterminate economic impact as suspensions may reduce hearings sought for temporary injunctive relief, while priority docketing may increase workload for clerks of court.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 57.112, 125.66, 166.041, 163.2517, 163.3181, 163.3215, 376.80, 497.270, 562.45, and 847.0134.

This bill creates sections 125.675 and 166.0411, Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

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

CS/CS by Rules on February 23, 2023:

The CS provides that properly noticed consideration of a proposed ordinance may be continued to a subsequent meeting under certain circumstances without further publication, mailing, or posted notice.

CS by Community Affairs on February 8, 2023:

The CS makes a technical change to correct two references to municipal government.

B. Amendments:

None.