

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 403 Home-based Businesses  
**SPONSOR(S):** Commerce Committee, Giallombardo and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 266

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**FINAL HOUSE FLOOR ACTION:** 77 Y's 41 N's **GOVERNOR'S ACTION:** Pending

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### SUMMARY ANALYSIS

CS/HB 403 passed the House on April 21, 2021. The bill was amended in the Senate on April 29, 2021, and was returned to the House. The House concurred in the Senate amendment and further amended the bill on April 29, 2021. The Senate concurred in the House amendment and passed the bill as amended on April 30, 2021.

General law determines whether local governments are able to regulate businesses, and to what degree. Currently, some local governments have enacted ordinances specific to regulating home-based businesses, or businesses which operate out of a residence.

The bill provides that local governments may not enact or enforce any ordinance, regulation, or policy, or take any action to license or otherwise regulate a home-based business in a manner that is different from other businesses in a local government's jurisdiction. In order to be considered a home-based business, the bill requires that the:

- Business operates, in whole or in part, from a residential property;
- Employees of the business must reside in the residence, except for up to two employees or independent contractors who work at the residence and any number of remote employees;
- Parking related to business complies with local zoning requirements and may not be greater than would be expected at a residence where no business is conducted;
- Use and external modifications of the residential property are consistent with the uses, residential character, and architectural aesthetics of the neighborhood;
- Business complies with local regulations for signage, noise, vibration, heat, smoke, dust, glare, fumes, noxious odors, hazardous or flammable materials, vehicles, and trailers, provided that such regulations are not more stringent than those for a residence where no business is conducted;
- Business may not conduct retail transactions at a structure other than the residential dwelling, except incidental and short term business activities may be conducted at the residential property; and
- Activities of the home-based business are secondary to the use as a residential dwelling.

The bill provides that home-based businesses will only be subject to applicable business taxes in the county and municipality where the home-based business is located.

The bill allows any adversely affected current or prospective home-based business owner to challenge any local government action regulating home-based businesses. The prevailing party may recover reasonable attorney fees and costs.

The application of the bill does not supersede:

- Any current or future declaration or declaration of condominium, cooperative document, or homeowners' association declaration or declaration of covenant.
- Local laws, ordinances, or regulations related to transient public lodging establishments or vacation rentals that are not otherwise preempted under chapter 509.

The bill has an indeterminate fiscal impact on local governments and no fiscal impact on the state.

Subject to the Governor's veto powers, the effective date of the bill is July 1, 2021.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0403z.DOCX

**DATE:** 4/14/2021

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Present Situation

#### Preemption

State preemption precludes a local government from exercising authority in a particular area, and requires consistency with the state constitution or state statute.<sup>1</sup> A local government enactment may be found inconsistent with state law if (1) the Legislature has preempted a particular subject area to the state or (2) the local regulation conflicts with a state statute.<sup>2</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>3</sup> Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.<sup>4</sup> When local ordinances have been enacted in the face of state preemption, the effect has been to find such ordinances null and void.<sup>5</sup>

Implied preemption is a legal doctrine that addresses situations in which the legislature has not expressly preempted an area but, for all intents and purposes, the area is dominated by the state. Findings of implied preemption are for a very narrow class of areas in which the state has legislated pervasively.<sup>6</sup>

#### Local Government Authority

General law authorizes counties "the power to carry on county government" and to "perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law."<sup>7</sup>

Non-charter county governments may exercise those powers of self-government that are provided by general or special law and may enact county ordinances not inconsistent with general law.<sup>8</sup>

Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by a vote of the electors.<sup>9</sup>

Municipalities may be established or abolished by general or special law.<sup>10</sup> Municipalities<sup>11</sup> have governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform functions, provide services, and exercise any power for municipal purposes, except as

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<sup>1</sup> James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009), available at <https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/>.

<sup>2</sup> *Id.*

<sup>3</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>4</sup> *Mulligan*, 934 So. 2d at 1243.

<sup>5</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>6</sup> Wolf and Bolinder, *supra* note 1.

<sup>7</sup> S. 125.01(1), F.S.

<sup>8</sup> Art. VIII, s. 1(f), Fla. Const.

<sup>9</sup> Art. VIII, s. 1(g), Fla. Const.

<sup>10</sup> Art. VIII, s. 2(a), Fla. Const. Under a separate provision, Miami-Dade County has sole authority to establish or abolish municipalities within the County. See art. VIII, s. 6(e), Fla. Const., incorporating art. VIII, s. 11, Fla. Const. (1885, as amended).

<sup>11</sup> 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."

otherwise provided by law.<sup>12</sup> Chapter 166, F.S., also known as the Municipal Home Rule Powers Act, defines municipal powers of self-government. It also provides municipalities with broad home rule powers to act in a manner not inconsistent with the Florida Constitution, general and special law, and the charter for the county in which the municipality is located.<sup>13</sup>

### Revenue Sources Authorized in the Florida Constitution<sup>14</sup>

The Florida Constitution limits the ability of local governments to raise revenue for their operations. The Florida Constitution provides:

No tax shall be levied except in pursuance of law. No state ad valorem taxes<sup>15</sup> shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.<sup>16</sup>

Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.<sup>17</sup>

However, not all local government revenue sources are taxes requiring general law authorization. When a county or municipal revenue source is imposed by ordinance, the question is whether the charge is a valid assessment or fee. As long as the charge is not deemed a tax, the imposition of the assessment or fee by ordinance is within the constitutional and statutory home rule powers of county and municipal governments. If the charge is not a valid assessment or fee, it is deemed a revenue source requiring general law authorization.

### Revenue Sources Based on Home Rule Authority

Pursuant to home rule authority, local governments may impose proprietary fees, regulatory fees, and special assessments to pay the cost of providing a facility or service or regulating an activity. A regulatory fee should not exceed the regulated activity's cost and is generally required to be applied solely to the regulated activity's cost for which the fee is imposed.<sup>18</sup>

### Local Business Tax

The local business tax authorized in ch. 205, F.S., represents the fees charged and the method by which a local government authority grants the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction.<sup>19</sup> Counties and municipalities may levy a business tax.<sup>20</sup>

### Community Planning

The Tenth Amendment to the U.S. Constitution reserves to the states all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States."<sup>21</sup> Under this provision, states have

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<sup>12</sup> Art. VIII, s. 2(b), Fla. Const. See also s. 166.021(1), F.S.

<sup>13</sup> S. 166.021(4), F.S.

<sup>14</sup> The Florida Legislature, Office of Economic and Demographic Research, 2019 Local Government Financial Information Handbook, p. 1, <http://edr.state.fl.us/Content/local-government/reports/lgfih19.pdf>.

<sup>15</sup> "Ad valorem tax" means a tax based upon the assessed value of property." Section 192.001(1), F.S.

<sup>16</sup> Art. VII, s. 1(a), Fla. Const.

<sup>17</sup> Art. VII, s. 9(a), Fla. Const.

<sup>18</sup> The Florida Legislature, Office of Economic and Demographic Research, 2020 Local Government Financial Information Handbook, p. 9, <http://edr.state.fl.us/Content/local-government/reports/lgfih20.pdf> (Feb. 10, 2021).

<sup>19</sup> S. 205.022(5), F.S.

<sup>20</sup> Ss. 205.033 and 205.043, F.S.

<sup>21</sup> U.S. CONST. amend. X.

police powers to establish and enforce laws protecting the public's welfare, safety, and health.<sup>22</sup> These police powers provide counties and municipalities the authority to enact comprehensive zoning plans to lay out zones or districts where potential uses of real property may be forbidden or restricted.<sup>23</sup> A local government's ability to regulate and restrict the use of private property through community planning is not unlimited and must, ultimately, bear a substantial relation to the public health, safety, morals or general welfare.<sup>24</sup>

Section 163.3167, F.S., of the Community Planning Act<sup>25</sup> statutorily requires incorporated municipalities and counties to prepare and maintain a comprehensive plan to set out the regulations and policies governing land within a community. Comprehensive plans address both physical elements of land and buildings and the land uses permitted therein. Under s.163.3177, F.S., comprehensive plans are required to include elements that address the distribution, extent, and location of various land uses within a community. Some of the statute's land uses include residential, commercial, industrial, agricultural, recreational, conservation education, public, historic, and mixed-use categories.<sup>26</sup>

### Preemption of Local Licensing and Regulating Professions and Occupations

General law directs a number of state agencies and licensing boards to regulate certain professions and occupations. For example, the Department of Business and Professional Regulation (DBPR) currently regulates approximately 25 professions and occupations.<sup>27</sup>

General law determines whether local governments are able to regulate occupations and businesses, and to what degree.<sup>28</sup> If state law preempts regulation for an occupation, then, generally, local governments may not regulate that occupation.<sup>29</sup> For example, Florida law currently preempts local regulation with regard to the following:

- Zoning of family day care homes;<sup>30</sup>
- Zoning of community residential homes;<sup>31</sup>
- Pest control;<sup>32</sup>
- Assessing local fees in certain circumstances for contractors;<sup>33</sup>
- Assessing local fees for low-voltage alarm system projects;<sup>34</sup>
- Public lodging establishments and public food service establishments;<sup>35</sup>
- Food trucks;<sup>36</sup>
- Mobile home parks, lodging parks, recreational vehicle parks, and recreational camps;<sup>37</sup>
- Beekeeping;<sup>38</sup>
- Nonresidential farm buildings, farm fences and farm signs;<sup>39</sup>
- Insurers and agents;<sup>40</sup>

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<sup>22</sup> See *NFIB v. Sebelius*, 567 U.S. 519, 535-536 (2012).

<sup>23</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974).

<sup>24</sup> See *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

<sup>25</sup> See ch. 163, part II, F.S.

<sup>26</sup> S. 163.3177, F.S.

<sup>27</sup> S. 20.165, F.S.

<sup>28</sup> Art. VIII, s. 1(f), Fla. Const.; Art. VII, s. 9(a), Fla. Const.; Art. VIII, s. 2(b), Fla. Const.; s. 166.021(1), F.S.

<sup>29</sup> *Id.*; Wolf and Bolinger, *supra* note 1.

<sup>30</sup> S. 125.0109, F.S.

<sup>31</sup> S. 419.001, F.S.

<sup>32</sup> S. 482.242(1), F.S.

<sup>33</sup> S. 553.80(7)(d), F.S.

<sup>34</sup> S. 489.503(14), F.S.

<sup>35</sup> S. 509.032, F.S.

<sup>36</sup> S. 509.102, F.S.

<sup>37</sup> S. 513.051, F.S.

<sup>38</sup> Ss. 586.10(1) & 586.055, F.S.

<sup>39</sup> S. 604.50, F.S.

<sup>40</sup> S. 624.401(3), F.S.

- Sellers of travel;<sup>41</sup>
- Movers of household goods and moving brokers;<sup>42</sup>

Conversely, Florida law also specifically grants local jurisdictions the right to regulate businesses, occupations and professions in certain circumstances.<sup>43</sup> For example, Florida law specifically authorizes regulations relating to:

- Zoning and land use;
- The levy of “reasonable business, professional, and occupational regulatory fees, commensurate with the cost of the regulatory activity, including consumer protection, on such classes of businesses, professions, and occupations, the regulation of which has not been preempted by the state or a county pursuant to a county charter”;<sup>44</sup>
- The levy of local business taxes;<sup>45</sup>
- Building code inspection fees;<sup>46</sup>
- Tattoo establishments;<sup>47</sup>
- Massage practices;<sup>48</sup>
- Child care facilities;<sup>49</sup>
- Taxis and other vehicles for hire;<sup>50</sup> and
- Waste and sewage collection.<sup>51</sup>

### Home-based Business Regulations

Local governments have the authority to designate permitted land uses, such as commercial, residential, agricultural and industrial. Local governments have historically persevered the right for individuals to use residential dwellings to conduct business for certain activities deemed home occupations or home-based businesses. Such provisions have been incorporated in residential land use ordinances and are considered an accessory use to a residential property.<sup>52</sup> The overarching premise of such provisions is that residents may use a dwelling for business activities secondary to residential uses that do not change the residential character of the property. There is no enumerated right to or precise definition of a home-based business in Florida law.

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

Examples of local regulation of home-based businesses include:

- In Volusia County, home-based businesses are required to occupy no more than 25 percent of the habitable floor area of the residence,<sup>53</sup>

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<sup>41</sup> S. 559.939

<sup>42</sup> S. 507.13, F.S.

<sup>43</sup> See examples, Chapters 559 and 553, F.S.

<sup>44</sup> S. 166.221, F.S.

<sup>45</sup> Ch. 205, F.S.

<sup>46</sup> S. 166.222, F.S.

<sup>47</sup> S. 381.00791, F.S.

<sup>48</sup> S. 480.052, F.S.

<sup>49</sup> S. 402.306, F.S.

<sup>50</sup> S. 125.01(1)(n), F.S.

<sup>51</sup> S. 125.01(1)(k), F.S.

<sup>52</sup> See Law Insider, Dictionary, Definition of Accessory use, <https://www.lawinsider.com/dictionary/accessory-use> (Accessory use means a use which is incidental and subordinate to the principal use of the parcel of land on which it is located; use that is subsidiary to a permitted or discretionary use and that is customarily expected to occur with the permitted or discretionary use.)

<sup>53</sup> Volusia County, FL., Ch. 72, art. II, div. 8, s. 72-283.

- In Tampa, home-based businesses are prohibited from storing or selling merchandise, and may not conduct business in any accessory building;<sup>54</sup>
- In Naples, home-based businesses are not allowed to conduct retail, wholesale, or warehousing activities at the residence;<sup>55</sup>
- In Gainesville, a home-based business may not have more than one automobile used for the home-based business parked on the premises within view of surrounding properties. Such automobile may not have more than two signs, not exceeding two square feet in area, each mounted flat against or painted along the sides;<sup>56</sup>
- Jacksonville limits home occupations to small-scale, limited businesses that do not detract from the residential character of the neighborhood, and limits the floor area that may be used by the home occupation;<sup>57</sup>
- Orlando requires home occupations to obtain an occupational license, and the applicant must also submit detailed information relating to the physical space of the home. Orlando also prohibits certain specified occupations;<sup>58</sup>
- Miami limits home occupations to specified occupations, and occupations that do not generate high vehicular demand and limits the workspace of certain specified occupations;<sup>59</sup>
- Miami-Dade County prohibits on-site signage related to a home occupation;<sup>60</sup>
- Winter Park prohibits employees other than family members living in the house, and prohibits the use of accessory buildings;<sup>61</sup> and
- Clearwater requires traffic generated by the home-based business to be no greater in volume than regular residential traffic, limits the use of commercial vehicles, and prohibits parking by marked vehicles on the property.<sup>62</sup>

Another common component of local home-based business ordinances is the method of enforcing the restrictions. Typically, local government code enforcement divisions are tasked with the enforcement of such ordinances. Other community residents may report violations to a code enforcement officer, who usually provides the violator with a warning about the behavior. If the restricted behavior continues, local governments have the authority to issue a civil infraction or penalty that the violator may contest in court.<sup>63</sup> Ch. 162, the Local Government Code Enforcement Boards Act, provides procedures and maximum fine amounts for citations. Refusal to sign and accept a citation could result in a local government issuing misdemeanor fines as described in s. 775.083, F.S.<sup>64</sup>

### **Effect of the Bill**

The bill provides that local governments may not:

- Enact or enforce any ordinance, regulation, or policy, or take any action to license or otherwise regulate a home-based business that does not meet the requirements of newly created s. 559.955, F.S.

<sup>54</sup> Tampa, FL., Ch. 27, art. VI, div. 2, s. 27-282.5.

<sup>55</sup> Naples, FL., Ch. 56, art. III, s. 56-92.

<sup>56</sup> Gainesville, FL., Ch. 30, art. V, div. 2, s. 30-5.37.

<sup>57</sup> Jacksonville, FL., Sec. 656.369(c)(1).

<sup>58</sup> Orlando, FL., Sec. 58.941 and 58.939. (Prohibited home occupations: Adult Entertainment, Antique Shops, Auto Service & Repair, Barber & Beauty Shops, Bed and Breakfast Facilities, Body Scrubs, Child Day Care Centers and Adult Day Care Centers, Churches, Clubs, Private, Commercial Physical Contact Establishments, Drive-in Facilities, Eating and Drinking Establishments, Escort Services, Food Processing and Handling, Fortune Tellers, Funeral Homes, Group Instruction of More Than (4) People, Health Spas, Hospitals and Clinics, Hotels/Motels, Kennels, Massage Establishments, Modeling of Clothes, Pain Management Clinic, Plasmapheresis Facilities, Vehicle Sales, Rental or Repair, Whole Blood Facilities.)

<sup>59</sup> Miami, FL., Sec. 622.7.

<sup>60</sup> Miami-Dade County, FL., Sec. 33-25.1(A)4.

<sup>61</sup> Winter Park, FL., Sec. 58-71(5).

<sup>62</sup> Clearwater, FL., Sec. 3-1102.A.5 – 7.

<sup>63</sup> S. 162.21, F.S.

<sup>64</sup> Fines may be up to \$1,000, when the conviction is of a misdemeanor of the first degree, \$500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation, or may be any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim, or any higher amount specifically authorized by statute.

- Prohibit, restrict, regulate or license home-based businesses in a manner that is different from other businesses in a local government's jurisdiction, except as provided in s. 559.955, F.S.

Home-based businesses may operate in an area zoned for residential use and are only subject to applicable business taxes in the county and municipality where the home-based business is located.

In order to qualify as a home-based business, the bill:

- Requires home-based businesses to operate, in whole or in part, from a residential property of which the activities of the home-based business must be secondary to the property's use as a residential dwelling.
- Requires employees of the home-based business who work at the residential dwelling to reside in the residential dwelling, except for up to a total of two employees or independent contractors may work at the home-based business but not reside there. Employees who work remotely are permitted.
- Requires parking related to business activities to comply with local zoning requirements, and the need for parking generated by the business may not be greater in volume than would normally be expected at a similar residence where no business is conducted.
  - Vehicles and trailers used in connection with the business must be parked in legal parking spaces that are not located within the right-of-way, on or over a sidewalk, or on any unimproved surfaces at the residence.
  - Local governments may regulate the use of vehicles or trailers operated or parked at the business or on a street right-of-way, provided that such regulations are not more stringent than those for a residence where no business is conducted.
  - Local governments may also regulate the parking or storage of heavy equipment<sup>65</sup> at the business which is visible from the street or neighboring property.
- Prohibits retail transactions from taking place at a structure other than the residential dwelling, except for incidental business uses and activities.
- Requires the use of the residential property to be consistent with the uses of the residential areas that surround the property and external modifications to conform to the residential character and architectural aesthetics of the neighborhood, as viewed from the street.
- Requires business activities to comply with any relevant local or state regulations with respect to signage and equipment or processes that create noise, vibration, heat, smoke, dust, glare, fumes, or noxious odors. However, such local regulations may not be more stringent than those that apply to a residence where no business is conducted.
- Requires all business activities to comply with any relevant local, state, and federal regulations with respect to the use, storage, or disposal of any corrosive, combustible, or other hazardous or flammable materials or liquids. However, such local regulations may not be more stringent than those that apply to a residence where no business is conducted.

The bill allows any adversely affected current or prospective home-based business owner to challenge any local government action regulating home-based businesses. The prevailing party may recover reasonable attorney fees and costs incurred in challenging or defending the action, including reasonable appellate attorney fees and costs.

The application of these provisions do not supersede:

- Any current or future declaration or declaration of condominium, cooperative document, or homeowners' association declaration or declaration of covenant.
- Local laws, ordinances, or regulations related to transient public lodging establishments or vacation rentals that are not otherwise preempted under chapter 509.

The bill provides an effective date of July 1, 2021.

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<sup>65</sup> "Heavy equipment" means commercial, industrial, or agricultural vehicles, equipment, or machinery.

## 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:

Indeterminate. The bill provides that home-based businesses will only be subject to applicable business taxes in the county and municipality where the home-based business is located.

#### 2. Expenditures:

Indeterminate. The bill allows a party to challenge any local government action regulating home-based businesses. The prevailing party is entitled to recover reasonable attorney fees and costs incurred in challenging or defending the action, including reasonable appellate attorney fees and costs.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may allow more home-based businesses to operate more freely and efficiently.

### D. FISCAL COMMENTS:

None.