

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1281 Preemption Over Utility Service Restrictions

SPONSOR(S): Buchanan

TIED BILLS: **IDEN./SIM. BILLS:** SB 1256

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy, Communications & Cybersecurity Subcommittee		Walsh	Keating
2) Local Administration, Federal Affairs & Special Districts Subcommittee			
3) 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 is 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 use of any major appliance, including a stove or grill, which uses the types or fuel source of energy production which may be used, delivered, converted, or supplied by:

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

The bill provides an effective date of July 1, 2023.

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 10, 2023, there are 614 active dependent¹¹ special districts and 1,312 active independent special districts in Florida.¹²

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.¹³
- Issue development permits and orders.¹⁴
- Establish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public.¹⁵
- Enforce the Florida Building Code and adopt and enforce local technical amendments thereto.¹⁶

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 10, 2023).

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, Official List of Special Districts Online, *State Totals*, available at <https://www.floridajobs.org/community-planning-and-development/special-districts/special-district-accountability-program/official-list-of-special-districts> (last visited March 10, 2023).

¹³ S. 125.01(1)(g), F.S.

¹⁴ Ss. 125.022, F.S. and 166.033, F.S.

¹⁵ S. 125.01(1)(h), F.S.

¹⁶ S. 125.01(1)(bb), F.S.

- Enter into contracts with utility companies or others for the supply of water, electricity, or telephone service to or in connection with any project.¹⁷
- Construct, operate, and maintain gas plants and distribution systems for domestic, municipal, and industrial uses,¹⁸ construct such other buildings and facilities as may be required to properly and economically operate and maintain such works,¹⁹ and make all necessary rules or regulations governing the use, control and operation of such works;²⁰
- 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.²¹
- Provide and regulate roads, rights-of-way, and related transportation facilities.²²
- License the use of gas and power lines in rights-of-way.²³
- 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.²⁴

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.²⁵

Municipalities are authorized to levy a public service tax on the purchase of electricity, natural gas liquefied petroleum gas, and manufactured gas.²⁶

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.²⁷

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.²⁸ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.²⁹ In cases where the

¹⁷ S. 125.012(19), F.S.

¹⁸ S. 180.06(8), F.S.

¹⁹ S. 180.06(9), F.S.

²⁰ S. 180.13, F.S.

²¹ S. 180.14, F.S.

²² S. 125.01(1)(m), F.S.

²³ S. 125.42, F.S.

²⁴ S. 125.275, F.S.

²⁵ Ss. 403.507(2)(a)3., 403.526(2)(a)5., and 403.941, F.S.

²⁶ S. 166.231, F.S.

²⁷ 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 10, 2023).

²⁸ 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).

²⁹ *Mulligan*, 934 So. 2d at 1243.

Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.³⁰ 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.³¹

Preemption Over Utility Service Restrictions

Section 366.032, F.S., expressly preempts the area of restricting utility services, prohibiting 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 serve 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.³²

An electric utility is one which owns, maintains, or operates an electric generation, transmission or distribution system. An electric utility can be investor-owned, municipally-owned, or it can be a rural electric cooperative.³³ There are four investor-owned electric utilities in Florida: Florida Power & Light Company,³⁴ Duke Energy Florida, Tampa Electric Company, and Florida Public Utilities Corporation.³⁵ Additionally, there are thirty-four municipal electric utilities and seventeen rural electric cooperatives.³⁶ Further, the Florida Municipal Power Agency was created through a series of interlocal agreements under s. 163.01, F.S., to provide wholesale power supply to municipal electric utilities.³⁷ Fuels that Florida electric utilities use to generate electric power include, but are not limited to: natural gas, nuclear, coal, and renewables like solar and biomass.³⁸

A natural gas utility is a utility that supplies natural or manufactured gas, or liquefied gas with air admixture, or a similar gaseous substance by pipeline, to or for the public. A natural gas utility can be a gas public utility, gas district, or natural gas utility or municipality.³⁹ Currently, there are eight investor-owned natural gas utilities, twenty-seven municipally owned natural gas utilities, and four special gas districts.⁴⁰

Liquefied petroleum gas is any material which is composed predominately of any of the following hydrocarbons, or mixtures: propane, propylene, butanes, and butylenes.⁴¹ A category I liquid petroleum gas dealer is someone who sells or offers to sell by delivery, or at a stationary location, any

³⁰ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

³¹ See, e.g., *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

³² S. 366.032, F.S.

³³ S. 366.02, F.S.

³⁴ FPL acquired Gulf Power Company in 2019 and merged as of January 3, 2022.

³⁵ Florida Public Service Commission, *Facts & Figures of the Florida Utility Industry* (2022), p. 4, available at <https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Reports/General/FactsAndFigures/April%202022.pdf> (last visited Mar. 11, 2023).

³⁶ *Id.* at 11-12.

³⁷ 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 Mar. 11, 2023).

³⁸ Florida Public Service Commission, *Facts & Figures of the Florida Utility Industry*, *supra* at n. 35, p. 3.

³⁹ S. 366.04(3)(c), F.S.

⁴⁰ Florida Public Service Commission, *Facts & Figures of the Florida Utility Industry*, *supra* at n. 35, p. 13.

⁴¹ S. 527.01(1), F.S.

liquefied petroleum gas to a consumer for industrial, commercial, or domestic use.⁴² A category II liquefied petroleum gas dispenser is a person who operates a liquefied petroleum gas dispensing unit for the purpose of serving liquid products to the consumer for industrial, commercial, or domestic use, and who sells, or offers to sell or lease equipment for the use of liquefied petroleum gas.⁴³ A category III liquefied petroleum gas cylinder exchange operator is a person who operates a storage facility used for the purpose of storing filled propane cylinders of certain capacities while awaiting sale to the consumer, or a facility used for the storage of empty or filled containers which have been offered for exchange.⁴⁴

Effect of Proposed Changes

The bill creates an express preemption that 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 use of any major appliance, including a stove or grill, which uses the types or fuel source of energy production which may be used, delivered, converted, or supplied by:

- 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.

Under the bill, a board of a municipality or governmental entity is not prevented from adopting rules, regulations, and policies governing an electric or natural gas utility that it owns or operates and directly controls.

The bill provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

Section 1: Amends s. 366.032, relating to preemption over utility service restrictions.

Section 2: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

⁴² This category also includes “any person leasing or offering to lease, or exchanging or offering to exchange, any apparatus, appliances, and equipment for the use of liquefied petroleum gas; any person installing, servicing, altering, or modifying apparatus, piping, tubing, appliances, and equipment for the use of liquefied petroleum or natural gas; any person installing carbur etion equipment or any person requalifying cylinders.” S. 527.01(6), F.S.

⁴³ S. 527.01(7), F.S.

⁴⁴ S. 527.01(8), F.S.

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill uses the term "major appliance," but this term is not defined beyond identifying stoves and grills.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES