

STORAGE NAME: H0601.hcr

DATE: March 17, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
HEALTH CARE STANDARDS & REGULATORY REFORM
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 0601

RELATING TO: Clean Indoor Air Act

SPONSOR(S): Representative Casey and others

STATUTE(S) AFFECTED: Chapter 386, Part II, Florida Statutes

COMPANION BILL(S): S 306(i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) HEALTH CARE STANDARDS & REGULATORY REFORM
- (2)
- (3)
- (4)
- (5)

I. SUMMARY:

This bill amends chapter 386, part II, F.S., by changing the current uniform statewide maximum code that regulates tobacco smoke in public places and meetings to a minimum code. The bill also deletes the provision preempting all smoking regulation to the state to permit local regulation beyond the statewide minimum code.

No direct fiscal impact is anticipated.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Tobacco smoking has long been recognized as a major cause of mortality and morbidity, responsible for an estimated 419,000 deaths in the United States during 1990 (approximately 20% of all deaths). In late 1992, the Environmental Protection Agency (EPA) issued its report on the Respiratory Effects of Passive Smoking. The report analyzed studies on the respiratory effects of passive smoking and concluded that Environmental Tobacco Smoke (ETS) is a human lung carcinogen, or "Group A" carcinogen, and that a causal association exists between ETS and a number of respiratory disorders. On July 21, 1993, the EPA announced voluntary guidelines on smoking in public buildings. Focusing on the need to protect children, the agency urged all restaurants, schools, day-care centers, and other places where children spend time to prohibit smoking or establish practices to insure that air from smoking areas is not recirculated to the rooms occupied by children. The fact that the EPA has identified ETS as a known carcinogen is also expected to have an impact on workers' compensation cases and on suits by consumers who feel that they have been harmed by smoke in public places. At present, approximately 25 percent of adult Americans smoke.

Currently, chapter 386, part II, F.S., establishes a uniform maximum state code regulating the use of tobacco at public places and meetings. Further, local governments in Florida are currently unable to enact ordinances that regulate smoking because Florida has expressly preempted the subject to the state (s. 386.209, F.S.).

Preemption can be defined as a law that restricts the authority of lower jurisdictions to enact or enforce their own legislation. At present 13 states, including Florida, expressly preempt all smoking regulation to the state (see e.g. s. 386.209, F.S.). This means that counties and municipalities are forbidden to adopt local ordinances which enforce the provisions of the Clean Indoor Air Act or further regulate in areas not covered by the Act (see AGO 92-89).

The Florida Constitution grants to charter counties the power to enact ordinances not inconsistent with general law (see Art. VIII, s. 1(g)). Non-charter counties also have authority under statute to carry on county government to the extent not inconsistent with general or special law (see s. 125.01(1) and (3)). In addition, chapter 166, F.S., which implements the state constitution's grant of power to municipalities, provides that municipalities may enact legislation concerning any subject except, among others, those subjects expressly preempted to state or county government (See Art. VIII, s. 2(b), (s. 166.021(3), F.S.). Thus, while municipal ordinances are inferior to laws of the state, municipalities and the state may legislate concurrently in areas that are not expressly preempted by the state. A municipality's concurrent legislation must not conflict with state law.

Because the state has preempted smoking, local enforcement of chapter 386, F.S. is problematic. Section 386.208, F.S. declares that a person who violates s. 386.204, F.S., commits a non-criminal violation, punishable by a fine of not more than \$100 for the first violation and not more than \$500 for each subsequent violation. However, in order to enforce a non-criminal violation, there has to be some sort of citation/enforcement/record-keeping mechanism in place to permit enforcement of the statute. Chapter 386 provides no such mechanism. (Compare chapter 386 with the

express procedures for the enforcement of non-criminal statewide and local traffic violations detailed in chapters 316 and 318, F.S.). Because local governments are forbidden to enact ordinances permitting enforcement of the act, and because no such system has been established or funded, the statute is virtually non-enforceable.

B. EFFECT OF PROPOSED CHANGES:

The effect of this bill would be to change the current uniform statewide maximum code that regulates tobacco smoke in public places and meetings to a statewide minimum code. The removal of express state preemption would allow local governments to regulate smoking in public forums beyond the state's minimum level. Local ordinances which supplement the state's restrictions may coexist with that statute. If local governments adopted ordinances that further restrict smoking in public places, then citizens would be further protected from the dangers of environmental tobacco smoke. The health benefits of the bill depend on the number of local governments that enact stricter limits on environmental smoke, and the extent to which local ordinances are implemented and enforced.

Additionally, local governments are currently unable to pass ordinances to enforce the minimum state standards due to preemption. The repeal of express state preemption would empower local governments to create a citation/enforcement/record keeping mechanism, via ordinances, to enforce either the minimum state standards, or stricter local standards. However, while local governments may create greater restrictions against smoking in public places, they may not impose greater sanctions than are authorized by the state. The Florida Supreme Court has ruled that while a municipality may provide a penalty less severe than that imposed by a state statute, an ordinance penalty may not exceed the penalty imposed by the state. See *Thomas v. State*, 614 So.2d 468 (Fla. 1993). Therefore, local governments may only impose sanctions for violations of the Clean Air Act up to the amounts currently authorized in s. 386.208, F.S.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes, The creation of minimum state standards and repeal of state preemption would empower local governments, both county and municipal, to enact stricter local standards regulating smoking in public places. These local governments would then be responsible for enforcing those ordinances.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Local governments would have the responsibility to enforce any ordinances supplementing the Clean Indoor Air Act.

- (3) any entitlement to a government service or benefit?

No.

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A.

- (2) what is the cost of such responsibility at the new level/agency?

Indeterminate.

- (3) how is the new agency accountable to the people governed?

N/A.

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

Indeterminate. If local governments choose to restrict smoking, the costs of enforcement may be assessed locally.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

The bill would allow local governments to further restrict smoking in public places. Such smoking is currently a lawful activity.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A.

(2) Who makes the decisions?

N/A.

(3) Are private alternatives permitted?

N/A.

(4) Are families required to participate in a program?

N/A.

(5) Are families penalized for not participating in a program?

N/A.

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A.

(2) service providers?

N/A.

(3) government employees/agencies?

N/A.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 386.202, F.S. to declare that the Florida Clean Indoor Air Act establishes uniform minimum state standards for smoking in public places and meetings.

Section 2. Repeals s. 386.209, F.S., to remove preemption of smoking regulation to the state. This will allow local governments to enact ordinances further restricting smoking so long as the local ordinances are not inconsistent with state law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. There may be some long term health care savings to the state, particularly Medicaid costs, due to the health benefits of not inhaling second hand smoke in public places.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. There may be increased costs in notification or enforcement of local ordinances.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

Indeterminate. There may be an indirect effect on private businesses that are designated "public forums." If local governments enact greater restrictions on smoking, smoking customers may patronize businesses located in areas of little restriction. Alternatively, non-smoking customers may patronize businesses in areas that impose greater restrictions on smoking. It is difficult to tell the effect of the shifting, or if the effect will be a "zero sum gain" to local industry.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A.

V. COMMENTS:

The removal of express state preemption would allow local governments to enact concurrent legislation so long as the legislation does not conflict with the Clean Indoor Air Act. Locally however, a county and its municipalities may each enact ordinances that conflict with each other. A charter county's ordinance shall prevail in the event of any conflict between the county and municipal ordinances (Art. VIII, s. 1(g)). However, in a non-charter county, a municipal ordinance shall prevail to the extent of conflict with a county ordinance (Art. VIII, s. 1(f)). In short, a charter county is in a better position to establish uniform county-wide regulation of smoking as their ordinances prevail over municipal ordinances in case of conflict. In a non-charter county, there may indeed be several municipal ordinances that prevail over a county ordinance in case of conflict.

As stated above, the ability of municipalities to enact local ordinances that further restrict smoking, particularly in non-charter counties, may create confusion as people travel from one town to the next. The Legislature may want to consider amending this bill to include a "notice" provision. That is, the state could require local governments that pass such ordinances to place a notice of the ordinance outside the building or area that is affected. This would reduce confusion for those who travel between cities or counties with differing standards.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

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