

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1299 Governmental Powers
SPONSOR(S): Business & Professions Subcommittee, Roach
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	10 Y, 4 N, As CS	Thompson	Anstead
2) Local, Federal & Veterans Affairs Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

The Florida Constitution grants local governments broad home rule authority. Specifically, municipalities have governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law. Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. Where state preemption applies, it precludes a local government from exercising authority in that particular area.

The bill:

- Prohibits a municipality from purchasing real property, or annexing, within another municipality's jurisdictional boundaries, without the other municipality's consent;
- Prohibits a municipality from levying or collecting any excise taxes on cigars, nicotine products and dispensing devices, in addition to the current prohibition on levying excise taxes on cigarettes;
- Prohibits local governments from imposing additional requirements for maximum fuel supply or safe temperature and cooling for nursing homes and assisted living communities relating to their comprehensive emergency management plans; and
- Limits the applicability of the tolling provisions related to permits and other authorizations based on a declaration of a state of emergency by the Governor to only apply during a "natural" state of emergency.

The bill expressly preempts to the state:

- The regulation of single-use plastic straws;
 - The bill prohibits local governments from restricting a food service establishment from distributing single-use plastic straws.
- The regulation of over-the-counter proprietary drugs and cosmetics;
- The establishment of the requirements for alternate generated power sources, including transfer switches related to motor fuel dispensing facilities; and
- The establishment of the minimum age for the sale or delivery of tobacco products, nicotine products, and nicotine dispensing devices.
 - The bill also expands the current requirements for employee training related to responsible retail tobacco products dealers to include nicotine products and nicotine dispensing devices.

The bill's fiscal impact on state and local government is indeterminate.

The effective date of the bill is July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Local Government Authority

The Florida Constitution grants local 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 that enable 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

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. Where state preemption applies, it precludes a local government from exercising authority in that particular area.⁵

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.⁶ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.⁷ In cases where the Legislature expressly or specifically preempts an area, the intent of the Legislature is readily ascertained.⁸ 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.⁹

Purchase of Real Property by Municipality

Background

Section 166.045, F.S., sets forth a process by which municipalities may purchase real property. If a municipality utilizes the provisions of this section, the law requires that all appraisals, offers or counteroffers be in writing and are exempt from public record requirements.

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 Wolf, *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/> (last visited March 8, 2019).

⁶ *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).

⁷ *Mulligan*, 934 So. 2d at 1243.

⁸ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

⁹ *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

This exemption is effective until an option contract is executed or, if no option contract is executed, until 30 days before a contract or agreement for purchase is considered for approval by the governing body of the municipality. If the contract or agreement is not submitted to the governing body, the exemption expires 30 days after the termination of negotiations.

The governing body is required to obtain at least one appraisal for each purchase less than \$500,000. For each purchase in excess of \$500,000, the governing body must obtain at least two appraisals.

Notwithstanding the provisions of this section, any municipality that does not choose to utilize the exemption may follow any procedure not in conflict with the provisions of Florida public record law for the purchase of real property which is authorized in its charter or established by ordinance.

Proposed Changes

The bill amends s. 166.045, F.S., prohibiting a municipality from purchasing real property within another municipality's jurisdictional boundaries without the other municipality's consent.

The bill provides an exception for property annexed by a municipality pursuant to interlocal service boundary agreement annexation procedures (in s. 171.205, F.S.).

Municipal Annexation

Background

Section 2 (c), Art. VIII of the State Constitution provides that municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law. This provision authorizes the Legislature to annex unincorporated property into a municipality by special act. It also authorizes the Legislature to establish procedures in general law for the annexation of property.

The Legislature established local annexation procedures by general law in 1974, with the enactment of ch. 171, F. S., the "Municipal Annexation or Contraction Act." This act describes the way in which property may be annexed or de-annexed by cities without legislative action. The purpose of the act is to set forth procedures for adjusting the boundaries of municipalities through annexations or contractions of corporate limits, and criteria for determining when annexations or contractions may take place so as to:

- ensure sound urban development and accommodation to growth;
- establish uniform legislative standards for the adjustment of municipal boundaries;
- ensure efficient provision of urban services to areas that become urban in character; and
- ensure areas are not annexed unless municipal services can be provided to those areas.

Pursuant to s. 171.042, F.S., before local annexation procedures may begin, the governing body of the municipality must prepare a report containing plans for providing urban services to any area to be annexed. A copy of the report must be filed with the board of county commissioners where the municipality is located. This report must include appropriate maps, plans for extending municipal services, timetables and financing methodologies. It must certify that the area proposed to be annexed is appropriate for annexation because it meets the following standards and requirements described by s. 171.043, F.S.:

- The area to be annexed must be an unincorporated area that is contiguous to the boundary of the annexing municipality.¹⁰
- The area to be annexed must be reasonably compact.¹¹

¹⁰This means that a substantial part of the boundary of the area to be annexed has a common boundary with the municipality. There are specified exceptions for cases in which an area is separated from the city's boundary by a publicly owned county park, right-of-way or body of water.

- No part of the area to be annexed may fall within the boundary of another incorporated municipality.
- Part or all of the land to be annexed must be developed for urban purposes.¹²
- Alternatively, if the proposed area is not developed for urban purposes, it can either border at least 60 percent of a developed area, or provide a necessary bridge between two urban areas for the extension of municipal services.

Proposed Changes

The bill amends s. 171.042, F.S., prohibiting a municipality from “attempting” to annex an area within another municipality’s jurisdiction without the other municipality’s consent. The term “attempting” is not defined.

The bill provides an exception for property annexed by a municipality pursuant to interlocal service boundary agreement annexation procedures (in s. 171.205, F.S.).

Municipal Nicotine Taxes

Background

Chapter 210, F.S., governs the assessment of taxes and surcharges on cigarettes and other tobacco products produced or imported in Florida. Section 210.03, F.S., prohibits a municipality from levying or collecting any excise tax on cigarettes.

Section 569.002(6), F.S., defines the term “tobacco products” to include:

loose tobacco leaves, and products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing.

Section 210.25(11), F.S., relating to the tax on tobacco products other than cigarettes or cigars, defines the term “tobacco products” to mean:

loose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts and other chewing tobaccos; shorts; refuse scraps; clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing; but “tobacco products” does not include cigarettes, as defined by s. 210.01(1), or cigars.

Section 877.112, F.S., provides for the regulation of nicotine dispensing devices and nicotine products, such as electronic cigarettes (e-cigarettes). A “nicotine dispensing device” is:

any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.¹³

¹¹ Section 171.031(12), F.S., defines “compactness” as concentration of a piece of property in a single area and precludes any action which would create enclaves, pockets, or finger areas in serpentine patterns. Any annexation proceeding in any county in the state is required to be designed in such a manner as to ensure that the area will be reasonably compact.

¹² An area developed for urban purposes is defined as an area which meets any one of the following standards: (a) a total resident population equal to at least two persons per acre; (b) a total resident population equal to at least one person per acre, with at least 60 percent of subdivided lots one acre or less; or (c) at least 60 percent of the total lots used for urban purposes, with at least 60 percent of the total urban residential acreage divided into lots of five acres or less.

¹³ Section 877.112(1)(a), F.S.

A “nicotine product” is:

any product that contains nicotine, including liquid nicotine intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means. The definition does not include a tobacco product under Florida law, a drug or device under federal law, or a product that contains incidental nicotine.¹⁴

Proposed Changes

The bill revises s. 210.03, F.S., prohibiting after July 1, 2019, a municipality from levying or collecting any excise tax on cigars, nicotine products, as defined in s. 877.112, F.S., and nicotine dispensing devices, as defined in s. 877.112, F.S.

In addition, the bill creates s. 210.305, F.S., prohibiting a municipality from levying or collecting any excise taxes on tobacco products, nicotine products, as defined in s. 877.112, F.S., and nicotine dispensing devices, as defined in s. 877.112, F.S.

Emergency Orders

Background

Current law authorizes the Governor to declare a state of emergency by executive order or proclamation if she or he finds an emergency has occurred or an imminent threat of emergency exists. The state of emergency continues until the Governor terminates it by executive order or proclamation, but no state of emergency may continue for longer than 60 days unless renewed by the Governor. The Legislature by concurrent resolution may terminate a state of emergency at any time. The declaration of a state of emergency indicates the nature of the emergency, the area or areas threatened, and the conditions which have brought the emergency about or which make possible its termination.¹⁵

Section 252.363, F.S., provides for the tolling of permits during a state of emergency and adds an additional six months to existing permits. The permit extension only applies within the geographic area for which the declaration of emergency applies. The permits that are tolled include development orders and building permits, including all local government building permits: from permits as small as repaving a driveway to development orders as large as a development of regional impact (the law explicitly includes build out dates for developments of regional impact), which may have impacts on more than one local government.¹⁶

The language also covers permits issued by the Department of Environmental Protection or a water management district under part IV of chapter 373, F.S., relating to management and storage of surface waters. These permits are primarily Environmental Resource Permits. Part IV of chapter 373, F.S., includes permits for:

- the construction or alteration of storm water management systems, dams, impoundments, or reservoirs;
- dry storage facilities for vessels;
- port conceptual permits;
- mitigation bank permits;
- local government infrastructure mitigation permits; and
- surface water and wetland permits.

¹⁴ Section 877.112(1)(b), F.S.

¹⁵ S. 252.36, F.S.

¹⁶ S. 252.363(1)(a), F.S.

If a permit holder wants to obtain the benefits of this extension, they will need to notify the permitting authority in writing within 90 days of the termination of the declaration of emergency. This provision gives notice to the permitting authority so that they will know which permits receive the extension.¹⁷

The extension does not apply to:

- permits outside the geographic area for which the declaration of emergency applies;
- U.S. Army Corps of Engineers permits;
- permit-holders that are not complying with the terms of their permits; or
- permits that would interfere with court orders.¹⁸

The laws, rules, and ordinances in effect at the time the permit is issued will govern the permit unless those laws, rules, or ordinances will create an immediate threat to public health or safety.¹⁹ The law also reserves to local governments the authority to require permitted properties to be maintained in a safe and sanitary condition.²⁰

Proposed Changes

The bill amends s. 252.363, F.S., restricting the type of state of emergency that tolls permits to a “natural” emergency.

Single-use Plastic Straws

Background

According to the EPA, trash, packaging, and improperly disposed waste from sources on land accounts for 80 percent of the marine debris found on beaches during cleanups and surveys. Up to two-thirds of the debris comes from single-use, disposable plastic packaging from food and beverage-related goods and services (things like plastic cups, bottles, straws, utensils, and stirrers). However, analysis of plastic debris in the environment from beach-cleaning surveys typically provides data that is limited to overall trends and larger items. To gain an accurate and meaningful assessment of plastics and their influence, large-scale and long-term monitoring is needed across countries and environments, including the sea floor, and across a range of debris sizes.²¹

Recently, anti-plastic straw campaigns around the world have led to regulations on plastic straws. The American Chemistry Council (ACC), a trade organization that represents plastics manufacturers, among other industries, has indicated that regulations that focus just on straws, or any one specific product, miss the point. Environmental groups have indicated that plastic straw bans are an important step toward ending the circulation of single-use plastics.²²

California was the first state to regulate plastic straws at restaurants. The law prohibits a full-service restaurant from providing single-use plastic straws to consumers unless requested. First and second violations result in a notice of violation and any subsequent violation are an infraction punishable by a fine of \$25 for each day the full-service restaurant is in violation, but not to exceed an annual total of \$300. The ban is enforced by local food code officers.²³

¹⁷ S. 252.363(1)(b), F.S.

¹⁸ S. 252.363(1)(d), F.S.

¹⁹ S. 252.363(2), F.S.

²⁰ S. 252.363(3), F.S.

²¹ United States Environmental Protection Agency, *Sources of Aquatic Trash*, <https://www.epa.gov/trash-free-waters/sources-aquatic-trash> (last visited Mar. 20, 2019).

²² Sarah Gibbens, *A brief history of how plastic straws took over the world* (Mar. 20, 2019),

<https://www.nationalgeographic.com/environment/2018/07/news-plastic-drinking-straw-history-ban/> (last visited Feb. 9, 2019).

²³ California Legislative Information, Legislative Counsel’s Digest, Assembly Bill No. 18814 (Sep. 20, 2018),

https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1884 (last visited Feb. 9, 2019).

In addition, effective July 1, 2018, Seattle, Washington prohibited its restaurants from using plastic utensils, plastic straws, and plastic cocktail picks.²⁴ In Florida, several cities have enacted their own plastic straw regulations.²⁵ The scope of each regulation and strength of penalties varies among the respective ordinances.

The city of St. Petersburg recently passed an ordinance requiring food service establishments to distribute single-use plastic drinking straws to a customer only upon the customer's specific request, with the exception of drive-through food orders. After January 1, 2020, the St. Petersburg law will become an outright ban with no exceptions.²⁶ Punishments for violations of the ban will include the following:

- First violation - written warning;
- Second violation within one year after the first violation - \$40.00 fine;
- Third and subsequent violations within one year after the first violation - \$80.00 fine;
- Violators will have 30 calendar days to correct the violation;
- Each day a person continues to violate will be considered a separate violation.²⁷

The Florida Department of Environmental Protection (DEP) "Skip the Straw" campaign encourages individuals, schools, and businesses to reduce pollution caused by plastic in Florida. DEP suggests that participants help the cause by picking up litter and participating in beach and river cleanups. Participants of "Skip the Straw" pledge to eliminate their use of plastic straws and other single-use products.²⁸

Alternatives

Food distributors looking for environmentally friendly alternatives to plastic straws have started to use products such as reusable straws and paper straws. The benefit of using paper straws is that they are biodegradable. However, paper straws cost about 2.5 cents to make, compared with a half-cent cost to make a plastic straw.²⁹ In addition, it has been found that paper can also have negative environmental impacts.³⁰ Other alternatives to plastic straws include recyclable lids, stainless steel straws, bamboo straws, glass straws, and ice straws.

Proposed Changes

The bill preempts the regulation of single-use plastic straws to the state. The bill specifies that a municipality, county, or other local governmental entity may not adopt, enforce, or implement any ordinance, rule, or law that would restrict a food service establishment from distributing single-use plastic straws to customers.

Over the Counter Drugs and Cosmetics

Background

²⁴ Seattle Municipal Code Sec. 21.36.084 and 21.36.086.

²⁵ These cities include Deerfield Beach, Dania Beach, Fort Lauderdale, Fort Myers, Hollywood, Hallandale, Marco Island, Miami Beach, Sanibel, St. Petersburg and Surfside.

²⁶ Ord. No. 356-H, § 1, 12-13-2018.

²⁷ *Id.*

²⁸ Florida Department of Environmental Protection, *Skip the Straw*, <https://floridadep.gov/waste/waste/campaign/skip-straw> (last visited Mar. 21, 2019).

²⁹ Kellie Ell, *Paper straws cost 'maybe 10 times' more than plastic straws, says paper straw distributor*, YAHOO FINANCE (Jul. 9, 2018), <https://finance.yahoo.com/news/paper-straws-cost-apos-maybe-024500832.html> (last visited Mar. 21, 2019).

³⁰ Suzie Cave, *Carrier bags – Environmental Impact*, Northern Ireland Assembly Research and Information Service Briefing Paper, (Apr. 7, 2014), <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/environment/8314.pdf> (last visited Feb. 9, 2019).

In the US, sunscreen ingredients are treated like over-the-counter drugs and are carefully regulated. Currently, the Federal Drug Administration (FDA) has approved 16 ingredients in its sunscreen monograph. Colloquially, the types of filters are referred to as either “physical” or “chemical.” Physical blockers are zinc oxide and titanium dioxide, and they generally deflect ultraviolet (UV) rays. Chemical ingredients include everything else, like oxybenzone, and they absorb and disperse UV rays.³¹

On February 26, 2019, the FDA published a proposed rule, Sunscreen Products for Over-the-Counter Human Use. The proposed rule classifies the safety and effectiveness of certain active ingredients and dosage forms, updates sunscreen testing and recordkeeping requirements, and addresses new uses of sunscreens, including the sale of combination sunscreen-insect repellent products. FDA has proposed a 90-day comment period, and comments must be submitted on or before May 28, 2019.³²

In addition, the FDA proposes to:

- classify zinc oxide and titanium dioxide as Category I (Generally Recognized as Safe and Effective – GRASE);
- designate oil, lotion, cream, gel, butter, paste, ointment, stick, and spray sunscreen dosage forms as GRASE under the monograph (and the powder form potentially GRASE subject to FDA's receipt of additional safety and efficacy data regarding the dosage form);
- designate all other dosage forms, including wipes, towelettes, body washes, and shampoos as "new drugs" that are ineligible for inclusion in the monograph;
- establish new labeling and broad spectrum requirements (including a maximum SPF level of SPF 60+); and
- classify combination insect repellent-sunscreen products as Category II (not GRASE).³³

In July, 2018, Hawaii became the first state to ban sunscreens. The law prohibits the sale, offer of sale, and distribution of sunscreens that contain the chemicals oxybenzone and octinoxate beginning Jan. 1, 2021.³⁴

According to reports, the Key West City Commission passed a ban on sunscreens recently. Beginning in January 2021, Key West will ban the sale of sunscreens containing oxybenzone and octinoxate within its city limits.³⁵

Current Law

Part I of ch. 499, F.S., the Florida Drug and Cosmetic Act (FDCA), requires DBPR to regulate drugs, devices, and cosmetics.³⁶ Most of the regulations relate to the distribution of prescription drugs into and within Florida. In particular, the regulations require various entities in the distribution chain, such as prescription drug manufacturers and prescription drug wholesale distributors, to obtain permits.

Florida has 18 distinct permits based on the type of entity and intended activity, and includes permits for entities within the state, out of state, or even outside of the United States.³⁷ DBPR has broad

³¹ Cheryl Wischhover, *American sunscreen isn't good enough. Can new regulations help?*, Vox (Feb. 22, 2019), <https://www.vox.com/the-goods/2019/2/22/18235262/fda-sunscreen-regulations-safety-testing> (last visited Mar. 21, 2019).

³² 84 C.F.R. § 6204 (2019).

³³ *Id.*

³⁴ HAW. REV. STAT. § 342D (2019).

³⁵ Lindsey Bever, *'We have one reef': Key West bans popular sunscreens to help keep coral alive*, The Washington Post, (Feb. 6, 2019), https://www.washingtonpost.com/climate-environment/2019/02/06/we-have-one-reef-key-west-bans-popular-sunscreens-help-keep-coral-alive/?utm_term=.a4f0e5cd60da (last visited Mar. 21, 2019).

³⁶ S. 27, ch. 2010-161, Law of Fla., shifted responsibility for operation and enforcement of the Florida Drugs, Devices, and Cosmetics Act from the Department of Health to the Department of Business and Professional Regulation.

³⁷ A permit is required for a prescription drug manufacturer; a prescription drug repackager; a nonresident prescription drug manufacturer; a prescription drug wholesale distributor; an out-of-state prescription drug wholesale distributor; a retail pharmacy drug wholesale distributor; a restricted prescription drug distributor; a complimentary drug distributor; a freight forwarder; a veterinary prescription drug retail establishment; a veterinary prescription drug wholesale distributor; a limited prescription drug veterinary wholesale distributor; an over-the-counter drug manufacturer; a device manufacturer; a cosmetic manufacturer; a third party logistics provider; or a health care clinic establishment. S. 499.01(1), F.S.

authority to inspect and discipline permittees for violations of state or federal laws and regulations, which can include seizure and condemnation of adulterated or misbranded drugs or suspension or revocation of a permit.³⁸

Among other provisions, the chapter provides for:

- criminal prohibitions against distribution of contraband and misbranded prescription drugs;
- regulation of the advertising and labeling of drugs, devices, and cosmetics;
- permits for manufacturing and distributing drugs, devices, and cosmetics;
- regulation of the wholesale distribution of prescription drugs with pedigree papers;
- regulation of the provision of drug samples;
- the Cancer Drug Donation Program; and
- numerous enforcement avenues for DBPR, including seizure and condemnation of drugs, devices, and cosmetics.

Proposed Changes

The bill expressly preempts the regulation of over-the-counter proprietary drugs and cosmetics to the state. This includes the local regulation of sunscreen products.

Emergency Fuel Generators

Background

Section 526.143, F.S., provides for the availability of alternate generated power capacity for motor fuel dispensing facilities. This section specifies that each motor fuel terminal facility and each motor fuel wholesaler facility must be capable of operating using an alternate generated power source for a minimum of 72 hours. The facility must have the additional power source available for operation no later than 36 hours after a major disaster.

DBPR is authorized to temporarily waive requirements for maintaining generators if the generators are to be used in preparation for, or response to, an emergency or major disaster in another state. The waiver may be modified or terminated by DBPR if the Governor declares an emergency in this state. Each business that is subject to this requirement must keep documents relating to installation and periodic testing to ensure the operational capacity of the equipment. The required documents must be made available, upon request, to the Division of Emergency Management and the director of the county emergency management agency.

A transfer switch is used to supply power to an electrical circuit from multiple sources, and is part of the back-up system installed with a back-up generator. Transfer switches can be automatic or manual. An automatic transfer switch engages the generator as soon as it senses that one of the sources has lost or gained power. A manual transfer switch requires someone to manually turn on and turn off the generator as needed.³⁹

Proposed Changes

The bill preempts to the state and to the Division of Emergency Management the authority to establish requirements for alternate generated power sources, including any requirements related to transfer switches used in conjunction with such power sources.

³⁸ Ss. 499.051, 499.062, 499.065, 499.066, 499.0661, and 499.067, F.S.

³⁹ Cooling Power Emergency Power Solutions, *Generator Transfer Switch Options: Manual Vs. Automatic*, <https://coolingpowercorp.com/news/generator-transfer-switch-options-manual-vs-automatic/> (last visited Mar. 28, 2019).

Emergency Environmental Control for Nursing Homes and Assisted Living Facilities

Background

In September 2017, Hurricane Irma posed an unprecedented threat to the state and a severe test of existing emergency preparedness and response protocols. Fifty-four of Florida's 67 counties issued evacuation orders to a record 6.8 million people. Nearly 700 shelters were opened throughout the state, housing a record-breaking peak population of 191,764 people. All of Florida's 67 counties were included under a Presidential Disaster Declaration.⁴⁰

In the aftermath of the hurricane, the nursing home Rehabilitation Center at Hollywood Hills (home) was left without power and air conditioning for multiple days. As a result of the uncontrolled heat in the home and because the home's staff neglected to evacuate its residents, 12 home residents died from heat exposure.⁴¹

On September 16, 2017, (after eight of the 12 resident deaths had occurred) Governor Scott issued a press release announcing emergency action for nursing homes and ALFs. In the press release, the Governor stated:

“[a]ssisted living facilities and nursing homes serve our elderly and Florida's most vulnerable residents, and so many families rely on the health care professionals at these facilities to care for their loved ones... During emergencies, health care facilities must be fully prepared to ensure the health, safety and wellbeing of those in their care and there is absolutely no excuse not to protect life. The inability for this nursing home in Broward County to protect life has shined the light on the need for emergency action.”⁴²

Regulation of Nursing Homes

Nursing homes are regulated by the Agency for Health Care Administration (AHCA) under the Health Care Licensing Procedures Act (Act) in part II of chapter 408, F.S., which contains uniform licensing standards for 29 provider types, including nursing homes. In addition, nursing homes must comply with the requirements contained in the individual authorizing statutes of part II of chapter 400, F.S., which includes unique provisions for licensure beyond the uniform criteria.

Section 400.23, F.S., requires that the rules adopted by AHCA for the regulation of nursing homes include criteria by which a reasonable and consistent quality of resident care may be ensured. Section 400.23, F.S. requires AHCA to adopt rules for housing conditions that will ensure the health, safety, and comfort of residents and the equipment essential to the health and welfare of the residents in nursing homes.

There are 690 licensed nursing homes in Florida, representing approximately 84,000 beds.⁴³

Nursing Home Comprehensive Emergency Management Plans

Section 400.23, F.S., requires nursing homes to prepare a comprehensive emergency management plan that must address at a minimum:

- Emergency evacuation transportation;

⁴⁰ Florida House of Representatives, *Final Report of the Select Committee on Hurricane Response and Preparedness, January 16, 2018*, Available at <https://www.myfloridahouse.gov/Sections/Committees/committeesdetail.aspx?CommitteeId=2978> (last visited Mar. 24, 2019).

⁴¹ The Associated Press, *12 of 14 Nursing Home Deaths After Irma Ruled Homicides*, WUSF NEWS, Nov. 27, 2017 <http://wusfnews.wusf.usf.edu/post/12-14-nursing-home-deaths-after-irma-ruled-homicides>, (last visited Mar. 24, 2019).

⁴² See <https://www.flgov.com/2017/09/16/gov-scott-i-am-aggressively-fighting-to-keep-vulnerable-floridians-safe-during-emergencies/>, (last visited on Jan. 26, 2018).

⁴³ Agency for Health Care Administration, *Facility/Provider Locator*, <http://www.floridahealthfinder.gov/facilitylocator/FacilitySearch.aspx> (last visited Mar. 24, 2019).

- Adequate sheltering arrangements;
- Post-disaster activities, including emergency power, food, and water;
- Post-disaster transportation;
- Supplies;
- Staffing;
- Emergency equipment;
- Individual identification of residents and transfer of records; and
- Responding to family inquiries.

The comprehensive emergency management plan is subject to review and approval by the local emergency management agency. During its review, the local emergency management agency must ensure that the Department of Elder Affairs (DOEA), Department of Health (DOH), Agency for Health Care Administration (AHCA), the Division of Emergency Management, and appropriate volunteer organizations are given the opportunity to review the plan. The local emergency management agency must complete its review within 60 days and either approve the plan or advise the facility of necessary revisions.

Regulation of Assisted Living Facilities

An assisted living facility (ALF) is a residential establishment, or part of a residential establishment, that provides housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.⁴⁴ A personal service is direct physical assistance with, or supervision of, the activities of daily living and the self-administration of medication.⁴⁵ Activities of daily living include ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks.⁴⁶

ALFs are licensed and regulated by AHCA under part I of ch. 429, F.S., and part II of ch. 408, F.S. In addition to a standard license, an ALF may have one or more specialty licenses that allow the ALF to provide additional care. These specialty licenses include limited nursing services,⁴⁷ limited mental health services,⁴⁸ and extended congregate care services.⁴⁹ The DOEA, in consultation with AHCA, is responsible for establishing minimum standards for ALFs.⁵⁰

As of March 24, 2019, there were 3,085 licensed ALFs representing approximately 100,000 beds.⁵¹

ALF Comprehensive Emergency Management Plans

Section 429.41, F.S., requires ALFs to prepare a comprehensive emergency management plan that must address at a minimum:

- Emergency evacuation transportation;
- Adequate sheltering arrangements;
- Post-disaster activities, including provision of emergency power, food, and water;
- Post-disaster transportation;
- Supplies;
- Staffing;
- Emergency equipment;
- Individual identification of residents and transfer of records; and

⁴⁴ S. 429.02(5), F.S. An ALF does not include an adult family-care home or a non-transient public lodging establishment.

⁴⁵ S. 429.02(16), F.S.

⁴⁶ S. 429.02(1), F.S.

⁴⁷ S. 429.07(3)(c), F.S.

⁴⁸ S. 429.075, F.S.

⁴⁹ S. 429.07(3)(b), F.S.

⁵⁰ S. 429.41, F.S.

⁵¹ Agency for Health Care Administration, *supra* note 42.

- Communication with families, and responses to family inquiries.

The comprehensive emergency management plan is subject to review and approval by the local emergency management agency. The local emergency management agency must ensure the DOEA, DOH, AHCA, the Division of Emergency Management, and the appropriate volunteer organizations are given the opportunity to review the plan. The local emergency management agency must complete its review within 60 days and must either approve the plan or advise the ALF of necessary revisions.

Federal Regulations for Nursing Home Emergency Power

Federal regulations currently in effect require nursing homes to obtain emergency power in a similar manner to the rules developed by AHCA. The regulations in 42 CFR 483.73 require each long term care facility, including nursing homes, to develop and implement emergency preparedness policies and procedures that must include alternative sources of energy to maintain safe air temperatures for residents. Based on the facility's policies and procedures, each facility must implement emergency and standby power systems and maintain on onsite fuel source and a plan to keep the power systems operational, unless the facility evacuates. These regulations took effect on November 16, 2017, and are a requirement for the nursing home to participate in the Medicare or Medicaid programs.

While nursing homes are federally regulated, the regulation of ALFs is delegated to the states. According to the National Center for Assisted Living, some federal rules and regulations may apply to assisted living communities; however, state-level regulation of assisted living services and operations ensures a coordinated, comprehensive licensure system.⁵²

Emergency Environmental Control for Nursing Homes and ALFs

On November 14, 2017, AHCA began the process of adopting rules that required nursing homes⁵³ and ALFs⁵⁴ to secure alternative power sources. The rules were ratified during the 2018 Legislative Session and became effective March 2018. The rules require nursing homes and ALFs to install and maintain an alternative power source, such as a generator, that can maintain air-conditioning at a temperature of 81 degrees Fahrenheit or lower for at least 96 hours. The rules require sufficient fuel to be kept on site to maintain the required temperature for at least 96 hours. The rules allow piped gas as a fuel source.

Proposed Changes – Nursing Homes and Assisted Living Facilities

The bill prohibits local governments from adopting, enforcing, or implementing any ordinance, rule, or law that would impose additional requirements for maximum fuel supply or safe temperature and cooling related to comprehensive emergency management plans for nursing homes and ALFs.

Responsible Retail Tobacco Products Dealers

Federal Regulation of Tobacco Products

Federal law requires states to have a minimum age of 18 years for sale and purchase of tobacco products. State and local laws may extend this prohibition, prohibit supply, possession and consumption, or increase the age beyond 18. The law is enforced by withholding FEMA disaster and non-disaster grants from states that have purchasing ages under 18.⁵⁵

⁵² National Center for Assisted Living, State Regulations, <https://www.ahcancal.org/ncal/advocacy/regs/Pages/AssistedLivingRegulations.aspx?View=%7B70165baa-f970-44ec-ad71-158c8e827d93%7D&SortField=LinkFilename&SortDir=Desc> (last visited Mar. 24, 2019).

⁵³ R. 59A-4.1265, F.A.C.

⁵⁴ R. 58A-5.036, F.A.C.

⁵⁵ 21 U.S.C. § 387f(d)(3)(A)(ii).

The Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act) gives the Food and Drug Administration (FDA) authority to regulate the manufacture, distribution, and marketing of tobacco products to protect the public health. Among other provisions, the Tobacco Control Act provides advertising and labeling guidelines, provides standards for tobacco products, and requires face-to-face transactions for tobacco sales with certain exceptions.⁵⁶

Federal law requires that a retailer may sell cigarettes and smokeless tobacco only in “direct, face-to-face exchanges between the retailer and the customer.” This language explicitly prohibits vending machines and self-service displays.⁵⁷ This language is referred to in the industry as the “behind the counter” language; however, this does not specifically require that a retailer place cigarettes or smokeless tobacco behind the counter. A locked display case would likely meet the self-service display prohibition. Facilities that prohibit minors under the age of 18 are exempted from this federal requirement.

Federal law preempts states from providing additional or different requirements for tobacco products in regards to “standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.” However, federal law explicitly preserves the right of states, or any political subdivision of a state, to provide any other law, rule, regulation or other measure related to “prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of” tobacco products to require more stringent requirements for tobacco products beyond federal requirements.⁵⁸

Federal Drug Administration

The Federal Drug Administration (FDA), an agency within the U.S. Department of Health and Human Services, protects the public health by assuring the safety, effectiveness, and security of human and veterinary drugs, vaccines and other biological products for human use, and medical devices. The agency also is responsible for the safety and security of our nation’s food supply, cosmetics, dietary supplements, products that give off electronic radiation, and for regulating tobacco products.⁵⁹

According to the FDA, among middle school and high school students, 3.62 million were current users of e-cigarettes in 2018. E-cigarette use, from 2017 to 2018, increased 78 percent among high school students and 48 percent among middle school students from 2017 to 2018. According to a 2013-2014 survey, 81 percent of current youth e-cigarette users cited the availability of appealing flavors as the primary reason for use.⁶⁰

It has also been found that:

- Adolescents who try e-cigarettes are more likely to transition to traditional cigarettes than their peers who haven’t used the devices.
- Adolescents who begin using e-liquid with high nicotine levels are more than twice as likely to regularly smoke traditional cigarettes as vapers who used nicotine-free liquid.
- High nicotine liquid in e-cigarettes is associated with 65 percent higher odds that teens will develop a regular vaping habit.⁶¹

⁵⁶ Federal Food, Drug, and Cosmetic Act, 21 USC s. 351 et seq; 15 U.S.C. s. 1333, s. 1335 (2017); 21 U.S.C. s. 387g, s. 387f (2017).

⁵⁷ 21 C.F.R. § 1140.14.

⁵⁸ 21 U.S.C. s. 387p (2017).

⁵⁹ Federal Drug Administration, *Statement from FDA Commissioner Scott Gottlieb, M.D., on advancing new policies aimed at preventing youth access to, and appeal of, flavored tobacco products, including e-cigarettes and cigars* <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm633291.htm> (last visited Mar. 23, 2019).

⁶⁰ *Id.*

⁶¹ Nicholas Goldenson, Adam M. Leventhal, Matthew D. Stone, *Associations of Electronic Cigarette Nicotine Concentration With Subsequent Cigarette Smoking and Vaping Levels in Adolescents*, *Journal of American Medical Association*, <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2657310> (last visited Mar. 23, 2019).

State Regulation of Tobacco Products

The Division of Alcoholic Beverage and Tobacco (division) within the Department of Business and Professional Regulation (DBPR) is the state agency responsible for the regulation and enforcement of the tobacco products under ch. 569, F.S. In order to deal at retail in tobacco products, or operate a tobacco products vending machine, in Florida, a person, firm, association, or corporation must obtain a retail tobacco products dealer permit from the division for each place of business or the premises where tobacco products are sold. The fee for such a permit is \$50.⁶²

Section 569.002(6), F.S., defines the term “tobacco products” to include:

loose tobacco leaves, and products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing.

Section 210.25(11), F.S., relating to the tax on tobacco products other than cigarettes or cigars, defines the term “tobacco products” to mean:

loose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts and other chewing tobaccos; shorts; refuse scraps; clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing; but “tobacco products” does not include cigarettes, as defined by s. 210.01(1), or cigars.

“Tobacco products” does not include nicotine products or nicotine dispensing devices. A dealer permit is not required to sell nicotine dispensing devices and nicotine products, such as electronic cigarettes (e-cigarettes).

A “nicotine dispensing device” is:

any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.⁶³

A “nicotine product” is:

any product that contains nicotine, including liquid nicotine intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means. The definition does not include a tobacco product under Florida law, a drug or device under federal law, or a product that contains incidental nicotine.⁶⁴

Tobacco Products and Minors

Florida law prohibits:

- the sale, delivery, bartering, furnishing or giving of tobacco products to persons under the age of 18. A violation of this prohibition is a second degree misdemeanor. A second or subsequent violation within one year of the first violation is a first degree misdemeanor.⁶⁵
- persons under the age of 18 years from possessing, directly or indirectly, any tobacco

⁶² S. 569.003, F.S.

⁶³ S. 877.112(1)(a), F.S.

⁶⁴ S. 877.112(1)(b), F.S.

⁶⁵ S. 569.101, F.S.

- products.⁶⁶
- giving of sample tobacco products to persons under the age of 18.⁶⁷

Nicotine Products and Minors

Florida law extends the current prohibitions related to tobacco products to the sale, gifting, possession, or use of nicotine dispensing devices and nicotine products to and by persons under 18 years of age.⁶⁸

The sale or giving of nicotine products or nicotine dispensing devices to any person under 18 years of age is prohibited and punishable as a second degree misdemeanor.⁶⁹

Persons under 18 years of age from possessing, purchasing, or misrepresenting their age or military service to obtain nicotine products or nicotine dispensing devices.⁷⁰

Recent Activity

Tobacco 21, funded by the Preventing Tobacco Addiction Foundation, a public health nonprofit organization established in 1996, is a national campaign that advocates for states and local jurisdictions in the U.S. to raise the tobacco and nicotine sales age to 21.⁷¹ According to reports, multiple cities and communities around the country have passed ordinances that increase the minimum legal age to purchase tobacco products, including e-cigarettes, from 18 to 21.⁷² Popularly known as Tobacco 21 ordinances, more than 450 local governments in 25 states have adopted such measures.

In January of 2019, Alachua County became the first county in Florida to raise the minimum legal age to purchase tobacco to 21. The ordinance applies to tobacco products, e-cigarettes, vaping products and liquid nicotine devices. Municipalities in the county are authorized to opt out of the ordinance if they choose. In addition, retailers are required to purchase and maintain a special license to sell tobacco and nicotine products. Businesses located within 1,000 feet of a public school are prohibited from licensure; however, businesses previously licensed to sell tobacco products by the state are grandfathered in. Penalties for violations include license suspensions ranging from seven days up to losing the license permanently for four violations in a 24-month period.⁷³

Proposed Changes – Preemption Related to Tobacco Products

The bill also preempts to the state the establishment of the minimum age for the sale or delivery of tobacco products, nicotine products, and nicotine dispensing devices.

Responsible Dealer Program

Section 569.008, F.S., provides a process for retailers to mitigate penalties imposed against a dealer because of an employee's illegal sale of a tobacco product to a person under 18 years of age. Also known as the Responsible Vendor Program, the intent of the process is to prevent the sale of tobacco

⁶⁶ S. 569.11, F.S.

⁶⁷ S. 569.0075, F.S.

⁶⁸ S. 877.112, F.S.

⁶⁹ S. 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S. provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

⁷⁰ S. 877.112(6) and (7), F.S.

⁷¹ Tobacco twenty-one, <https://tobacco21.org/> (last visited Mar. 28, 2019).

⁷² Katelyn Newman, *A Local Push to Boost the Smoking Age*, *U.S. News & World Report*, <https://www.usnews.com/news/healthiest-communities/articles/2018-10-05/local-governments-nationwide-are-increasing-minimum-smoking-age> (last visited Mar. 28, 2019).

⁷³ Ord. No. 2019-04.

products to persons under 18 years of age and to encourage retailers to comply with responsible practices.⁷⁴

The division is authorized to mitigate penalties, if:

- the retailer is qualified as a responsible dealer having established and implemented specified practices designed to ensure that the dealer's employees comply with ch. 569, F.S., such as employee training;
- the retailer had no knowledge of that employee's violation at the time of the violation and did not direct, approve, or participate in the violation; and
- the sale was made through a vending machine equipped with an operational lock-out device.⁷⁵

To qualify as a responsible retailer, the retailer must provide a training program for employees which addresses the use and sale of tobacco products and which includes at least the following topics:

- laws covering the sale of tobacco products;
- methods of recognizing and handling customers under 18 years of age;
- procedures for proper examination of identification cards in order to verify that customers are not under 18 years of age; and
- the use of the age audit identification function on electronic point-of-sale equipment, where available.⁷⁶

The division is required to develop and make available a model tobacco products training program designed to ensure adherence to this act by retailers and their employees which, if followed, will qualify retailers as responsible.⁷⁷

Proposed Changes – Responsible Retail Tobacco Products Dealers

The bill revises s. 569.008, F.S., broadening the provisions of the responsible dealer program to include nicotine products. The bill adds the "delivery" of tobacco products, in addition to the "sale" of tobacco products in current law.

The bill adds nicotine products and nicotine dispensing devices to the following provisions relating to the:

- legislative intent;
- training program requirements that retailers must provide for their employees;
- mitigating factors; and
- model training program developed by the division.

B. SECTION DIRECTORY:

- | | |
|-----------|---|
| Section 1 | Amends s. 166.045, F.S., relating to proposed purchase of real property by municipality; confidentiality of records; procedure. |
| Section 2 | Amends s. 171.042, F.S., relating to municipal annexation. |
| Section 3 | Amends s. 210.03, F.S., relating to prohibition against levying of taxes on cigarettes, cigars, and nicotine products and dispensing devices by municipalities. |
| Section 4 | Creates s. 210.305, F.S., relating to prohibition against levying of taxes on tobacco products, nicotine products, and nicotine dispensing devices by municipalities. |

⁷⁴ Department of Business and Professional Regulation, *Responsible Vendor Brochure*, <http://www.myfloridalicense.com/dbpr/os/documents/ResponsibleVendorsBrochure2.pdf> (last visited Mar. 22, 2019).

⁷⁵ See s. 569.008(3), F.S.

⁷⁶ S. 569.008(3), F.S.

⁷⁷ S. 569.008(4), F.S.

- Section 5 Amends s. 252.363, F.S., relating to tolling and extension of permits and other authorizations during a state of emergency.
- Section 6 Amends s. 400.23, F.S., relating to prohibition on local governmental entities from imposing maximum fuel and safe temperature requirements for nursing homes.
- Section 7 Creates s. 403.7034, F.S., relating to preemption of single-use plastic straws.
- Section 8 Amends s. 429.41, F.S., relating to prohibition on local governmental entities from imposing maximum fuel and safe temperature requirements for assisted living facilities.
- Section 9 Amends s. 499.002, F.S., relating to preemption of regulation of over-the-counter proprietary drugs and cosmetics.
- Section 10 Amends s. 526.143, F.S., relating to preemption of alternate generated power capacity for motor fuel dispensing facilities.
- Section 11 Amends s. 569.008, F.S., relating to responsible retail tobacco products dealers; qualifications; mitigation of disciplinary penalties; diligent management and supervision.
- Section 12 Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Requiring the division to address additional products in its model training program may create a cost to DBPR. According to DBPR, the Bureau of Enforcement will need to revise the model training program format to comply with the bill's provisions. This can be handled within existing resources.⁷⁸

2. Expenditures:

Unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Unknown.

2. Expenditures:

Unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Unknown.

D. FISCAL COMMENTS:

None.

⁷⁸ Department of Business and Professional Regulation, Agency Analysis of 2019 HB 1299, p. 7 (Mar. 18, 2019).
STORAGE NAME: h1299a.BPS
DATE: 3/28/2019

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:

DBPR will have to update rules regarding its retail vendor program. There is sufficient rulemaking authority in s. 569.009, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

V. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 26, 2019, the Business & Professions Subcommittee adopted the following four amendments and reported the bill favorably as a committee substitute:

- Amendment 1: prohibits local governments from imposing additional requirements for maximum fuel supply or safe temperature and cooling for assisted living communities and nursing homes.
- Amendment 2: prohibits local governments from imposing additional requirements for maximum fuel supply or safe temperature and cooling for assisted living communities.
- Amendment 3: clarifies the plastic straw preemption by removing the restrictions on distributing plastic straws by food service establishments and makes conforming changes.
- Amendment 4: clarifies that the section on municipal annexation applies to municipal jurisdictions.

This analysis is drafted to the committee substitute as passed by the Business & Professions subcommittee.