

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 145 Vegetable Gardens

**SPONSOR(S):** Local, Federal & Veterans Affairs Subcommittee, Fetterhoff and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 82

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local, Federal & Veterans Affairs Subcommittee	13 Y, 1 N, As CS	Darden	Miller
2) Commerce Committee	18 Y, 0 N	Smith	Hamon
3) State Affairs Committee	20 Y, 3 N	Darden	Williamson

### SUMMARY ANALYSIS

County and municipal governments have authority to enact ordinances that are not inconsistent with general law. The Legislature may preempt to the state the regulation of particular subject areas for the purpose of uniformity and promoting important state interests.

The bill prohibits the regulation of vegetable gardens on residential property by a county, municipality, or other political subdivision of the state, except as otherwise provided by law. The bill defines a vegetable garden as a plot of ground where herbs, fruits, flowers, or vegetables are cultivated for human ingestion. The bill declares void and unenforceable existing ordinances or regulations governing vegetable gardens on residential property. The bill specifies that the preemption does not apply to general regulations not specifically regulating vegetable gardens, such as water use limits during droughts, fertilizer use, or the control of invasive species.

The bill has no fiscal impact on state government. The bill may have a negative fiscal impact on local governments to the extent those governments are assessing fines for violations of ordinances prohibiting vegetable gardens.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### Local Government Powers

The powers of all levels of local government in the state are derived from the Florida Constitution.<sup>1</sup>

The powers of a county depend on whether the county has a charter or non-charter government. A charter county government possesses all powers of local self-government that are not inconsistent with general law or with special law approved by electors of the county.<sup>2</sup> The county commission may enact ordinances that are not inconsistent with general law and the charter governs the relationship of those ordinances to municipal ordinances. In a non-charter county, the powers of the government are limited to those provided in general or special law.<sup>3</sup> The county commission may enact ordinances not inconsistent with general or special law, but those ordinances are not effective within a municipality to the extent they conflict with a municipal ordinance.

Section 125.01, F.S., provides that the governing body of a county has the power to “carry on county government” and includes a thorough, but not exhaustive, list of county government powers.<sup>4</sup> These powers include the authority to perform any acts not inconsistent with law that are in the common interest of the people of the county.<sup>5</sup>

Municipalities possess the “governmental, corporate, and proprietary powers” required to “conduct municipal government, perform municipal functions, and render municipal services.”<sup>6</sup> A municipality may exercise any power for municipal purposes unless it is otherwise prohibited by law. A municipal purpose includes “any activity or power which may be exercised by the state or its political subdivisions.”<sup>7</sup> A municipal government may not act on any subject expressly prohibited by the Florida Constitution, preempted to a county under a county charter, or expressly preempted to the state or county government by the Florida Constitution or by general law.<sup>8</sup>

##### Preemption

State preemption precludes a local government from exercising authority in a particular subject matter area.<sup>9</sup> Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement and cannot be implied or inferred.<sup>10</sup> Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.<sup>11</sup> Legislative intent is clear where the Legislature expressly or specifically preempts an area.<sup>12</sup> In cases determining the

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<sup>1</sup> See Art. VIII, Fla. Const. (Local Government).

<sup>2</sup> Art. VIII, s. 1(g), Fla. Const.

<sup>3</sup> Art. VIII, s. 1(f), Fla. Const.

<sup>4</sup> S. 125.01(1), F.S.

<sup>5</sup> S. 125.01(1)(w), F.S.

<sup>6</sup> Fla. Const., Art. VIII, s. 2(b).

<sup>7</sup> S. 166.021(2), F.S.

<sup>8</sup> S. 166.021(3), F.S.

<sup>9</sup> James R. Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

<sup>10</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), *aff'g sub nom. Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008).

<sup>11</sup> *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2006).

<sup>12</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010).

validity of local ordinances enacted in the face of a conflicting state preemption, such ordinances are found null and void.<sup>13</sup>

Implied preemption is judicially inferred in the absence of explicit legislative directive.<sup>14</sup> Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to show an intent to preempt the particular area and strong public policy reasons exist for finding preemption.<sup>15</sup> Implied preemption is found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.<sup>16</sup>

### Village of Miami Shores

Residents of the Village of Miami Shores brought an action challenging the constitutionality of a zoning ordinance that prohibited the residents from growing vegetables in their front yard, with violators facing a fine of \$50 per day.<sup>17</sup> The residents challenged the ban as a violation of their rights under the Due Process and Equal Protection Clauses of the Florida Constitution, as well as their rights to acquire, possess, and protect property and the right to privacy.<sup>18</sup> The Third District Court of Appeal upheld the ordinance, stating that constitutionally protected property rights are “subject to the ... power inherent in the State to promote the general welfare of the people through regulations that are necessary to secure the healthy, safety, good order, [and] general welfare.”<sup>19</sup> The court found that the ordinance was rationally related to the Village code’s design standards and landscaping regulations.<sup>20</sup> The Florida Supreme Court denied the petition for review of the case.<sup>21</sup>

### Effect of Proposed Changes

The bill states the Legislature intends to encourage the development of sustainable cultivation of fruits and vegetables at all levels of production, including for personal consumption, as an important state interest.

The bill prohibits the regulation of vegetable gardens on residential property by a county, municipality, or other political subdivision of the state, except as otherwise provided by law. The bill declares void and unenforceable existing ordinances or regulations governing vegetable gardens on residential property. The bill defines a vegetable garden as a plot of ground where herbs, fruits, flowers, or vegetables are cultivated for human ingestion.

The bill provides that the preemption does not apply to general ordinances or regulations that are not specific to vegetable gardens, such as limits on water use during drought conditions, fertilizer use, or control of invasive species.

#### B. SECTION DIRECTORY:

Section 1: Creates s. 604.71, F.S., prohibiting local regulation of vegetable gardens.

Section 2: Provides an effective date of July 1, 2019.

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<sup>13</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) (invalidating municipal firearms ordinance).

<sup>14</sup> *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d at 1019.

<sup>15</sup> *Id.*

<sup>16</sup> *Sarasota Alliance for Fair Elections, Inc.*, 28 So.3d at 886.

<sup>17</sup> See *Ricketts v. Village of Miami Shores*, 232 So.3d 1095 (Fla. 3d DCA 2017) (upholding trial court’s final order dismissing the resident’s constitutional challenge to the ordinance). The Third DCA reviewed the ordinance for facial constitutionality since an “as-applied” constitutional challenge was barred by res judicata and waiver from the initial appeal of the code enforcement board’s decision to circuit court. *Ricketts*, 232 So.3d at 1097-98.

<sup>18</sup> *Id.* at 1096-97.

<sup>19</sup> *Id.* at 1098 (quoting *Golden v. McCarty*, 337 So.2d 388, 390 (Fla. 1976)).

<sup>20</sup> *Id.* at 1199.

<sup>21</sup> *Ricketts v. Village of Miami Shores*, No. SC17-2131 (Fla. Feb. 9, 2018).

## 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:

The bill may have an insignificant negative fiscal impact to local governments to the extent these governments are using fines collected from regulating vegetable gardens as a revenue source.

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. The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

The bill does not provide rulemaking authority or require executive branch rulemaking.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 23, 2019, the Local, Federal & Veterans Affairs Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment defined the term "vegetable garden" as a plot of ground where herbs, fruits, flowers, and vegetables are cultivated for human ingestion.

This analysis is drafted to the committee substitute as passed by the Local, Federal & Veterans Affairs Subcommittee.