

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL: CS/SB 588

INTRODUCER: Commerce and Tourism Committee and Senators Hutson and Bradley

SUBJECT: Preemption of Local Regulations

DATE: April 1, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Little</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Peacock</u>	<u>Yeatman</u>	<u>CA</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 588:

- Establishes a moratorium on the local regulation and enforcement of single-use plastic straws;
- Requires the DEP, or an entity designated by the DEP, to conduct a study to evaluate the environmental impact of single-use plastic straws and to report the study to the Legislature by July 1, 2024;
- Provides that the moratorium is lifted, effective July 1, 2024, if the Legislature does not enact a general law specifying a statewide policy regarding single-use plastic straws or a law preempting local regulation of single-use plastic straws;
- Provides that it is a violation of local government to attempt to adopt or enforce single-use plastic straw regulations before July 1, 2024, which shall result in a fine to the offending local government entity in the amount of \$25,000; and
- Preempts the regulation of over-the-counter proprietary drugs and cosmetics to the state, notwithstanding any other law or local ordinance to the contrary.

The bill takes effect July 1, 2019.

II. Present Situation:

Single-use Plastic Straws

In recent years, the United States has seen an upsurge of initiatives aimed at increasing the rate at which individuals recycle and reuse materials that may be harmful to the environment. As a result, several states have enacted legislation addressing the use of single-use products, such as Styrofoam, paper bags, and plastic bags.¹

In 2018, California became the first state to pass legislation regulating the use of plastic straws. Under the law, full-service restaurants are prohibited from providing a single-use plastic straw unless the straw is requested by a customer.² Many businesses have also taken measures to reduce the use of plastic straws, including Sea World Entertainment, Royal Caribbean Cruises, Bon Appétit, and Alaska Airlines.³

Plastic Straws in Florida

In response to growing concerns regarding the impact of single-use plastic products on the environment, the Florida Department of Environmental Protection (DEP) initiated a “Skip the Straw” campaign. The campaign encourages individuals, schools, and businesses to reduce pollution caused by plastic in Florida. The DEP also 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.⁴

The following Florida cities have passed regulations relating to the use of plastic straws: St. Petersburg,⁵ Town of Fort Myers Beach,⁶ City of Coral Gables,⁷ Village of Pinecrest,⁸ Town of Surfside,⁹ Miami Beach,¹⁰ City of Delray Beach,¹¹ Fort Lauderdale,¹² Deerfield Beach,¹³ and the City of Hallandale Beach.¹⁴

¹ National Conference of State Legislatures (NCSL), *State Plastic and Paper Bag Legislation* (Jan. 17, 2019), available at <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx> (last visited March 1, 2019).

² The law became effective January 1, 2019. See Cal. Civ. Code. PUB. RES. s. 42271 (added by Stats, 2018, Ch. 576, S.1 (AB1884)).

³ Darryl Fears, *A Campaign to Eliminate Plastic Straws is Sucking in Thousands of Converts* (June 24, 2017), Washington Post, available at https://www.washingtonpost.com/national/health-science/a-campaign-to-eliminate-plastic-straws-is-sucking-in-thousands-of-converts/2017/06/24/d53f70cc-4c5a-11e7-9669-250d0b15f83b_story.html?utm_term=.bad6e5bf10e7 (last visited March 1, 2019).

⁴ Florida Dep’t of Environmental Protection, *Skip the Straw*, available at <https://floridadep.gov/waste/waste/campaign/skip-straw> (last visited March 1, 2019).

⁵ City of St. Petersburg, Fl., Ord. No. 356-H, s. 1 (2018).

⁶ Town of Fort Myers Beach, Fl., Ord. No. 17-13 (2017).

⁷ City of Coral Gables, Fl., Ord. No. 2019-01, s. 2 (2019).

⁸ Village of Pinecrest, Fl., Ord. No. 2018-14, s. 2 (2018).

⁹ Town of Surfside, Fl., Ord. No. 18-1676, s. 2 (2018).

¹⁰ Miami Beach, Fl., Ord. No. 2018-4208, s. 2 (2018).

¹¹ City of Delray Beach, Fl., Ord. No. 10-19 (2019).

¹² Fort Lauderdale, Fl., Ord. No. 19-0102 (2019).

¹³ Deerfield Beach, Fl., Ord. No. 2018-028, s. 2 (2018) (Editor's note— Ord. No. 2018/028, s. 2, adopted September 17, 2018, amended the Code by the addition of a new Art. IX, § 34-170; however, said provision has been redesignated as Art. X, § 34-180, at the editor's discretion, for purposes of maintaining Code format and preventing the duplication of section numbers.)

¹⁴ City of Hallandale Beach, Fl., Ord. No. 18-027 (2018).

Similar Legislation

In 2008, the Legislature enacted s. 403.7033, F.S., to require the DEP to analyze “the need for new or different regulation of auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments.”¹⁵ Under the law, the DEP was required to submit a report with its conclusions and recommendations to the Legislature by February 1, 2010. The law also prohibited local governments, local governmental agencies, and state government agencies from enacting any rule, regulation, or ordinance regarding the use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags until the Legislature adopts the DEP’s recommendations.¹⁶

In its *Retail Bags Report*, the DEP found that improperly discarded plastic bags, besides being unsightly litter, can harm land and marine life, interfere with landfill operations, clog flood control systems, and breed mosquitos.¹⁷ The DEP provided the Legislature with options, ranging from educational campaigns to complete bans, for discouraging and reducing the use of single-use paper and plastic retail bags and the pros and cons associated with each option.¹⁸ The report concluded that some strategies were more effective than others, with bans, closely followed by user fees and taxes, producing the fastest results.¹⁹ Voluntary efforts were found to be helpful in changing consumer behavior patterns, but their effectiveness was found to be dependent upon the number of retailers participating.²⁰ Finally, the report concluded that public education, by bringing awareness to the damages caused by single-use bags and the costs associated with undoing such damage, is crucial to any approach.²¹

To date, the Legislature has not yet adopted any recommendations contained in the report and the prohibition on any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags remains in effect.

Home Rule and Preemption

Counties

A county without a charter has such power of self-government as provided by general²² or special law, and may enact county ordinances not inconsistent with general law.²³ Counties operating under county charters shall have all the powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors.²⁴ General law

¹⁵ Ch. 2008-227, s. 96, Laws of Fla.

¹⁶ See s. 403.7033, F.S.

¹⁷ DEP, *Florida Department of Environmental Protection, Retail Bags Report*, pg. 1 (Feb. 1, 2010), available at https://www.dep.state.fl.us/waste/quick_topics/publications/shw/recycling/retailbags/Retail-Bag-Report_01Feb10.pdf (last visited March 1, 2019).

¹⁸ *Id.* at 19.

¹⁹ *Id.* at 1.

²⁰ *Id.* at 2.

²¹ *Id.*

²² Chapter 125, Part I, F.S.

²³ FLA. CONST. art. VIII, s. 1(f).

²⁴ FLA. CONST. art. VIII, s. 1(g).

authorizes counties “the power to carry on county government”²⁵ and to “perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.”²⁶

Municipalities

Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,²⁷ acknowledges the constitutional grant to municipalities of governmental, corporate, and proprietary power necessary to conduct municipal government, functions, and services.²⁸ Chapter 166, F.S., provides municipalities with broad home rule powers, respecting expressed limits on municipal powers established by the Florida Constitution, applicable laws, and county charters.²⁹

Section 166.221, F.S., authorizes municipalities to levy reasonable business, professional, and occupational regulatory fees, commensurate with the cost of the regulatory activity, including consumer protection, on such classes of businesses, professions, and occupations, the regulation of which has not been preempted by the state or a county pursuant to a county charter.

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.³⁰ Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.³¹ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.³² In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.³³

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.³⁴ Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.³⁵ Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and strong public policy reasons exist for

²⁵ Section 125.01(1), F.S.

²⁶ Section 125.01(1)(w), F.S.

²⁷ Section 166.011, F.S.

²⁸ Florida House of Representatives, Publications, *The Local Government Formation Manual 2017-2018*, p. 16, available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2911&Session=2017&DocumentType=General Publications&FileName=2017-2018 Local Government Formation Manual Final Pub.pdf> (last visited March 1, 2019).

²⁹ Section 166.021(4), F.S.

³⁰ Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

³¹ 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).

³² *Mulligan*, 934 So. 2d at 1243.

³³ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

³⁴ See, e.g., *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002).

³⁵ *Phantom of Clearwater, Inc.*, 894 So. 2d at 1019.

finding preemption.³⁶ Implied preemption is found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.³⁷

Recent Litigation

The City of Coral Gables enacted an ordinance on February 9, 2016, banning the sale or use of containers made of polystyrene, also known as Styrofoam, by different entities and in different places within the City. The ordinance set forth exemptions from the ban for certain products or uses of polystyrene and provided code enforcement procedures for issuing tickets and fines for violations and for appealing violations. On March 9, 2016, the Legislature passed House Bill 7007 which, among other provisions, created s. 500.90, F.S.³⁸ The new statutory section preempted to the Department of Agriculture and Consumer Services the regulation of the use or sale of polystyrene products by entities regulated under ch. 500, Chapter 500, F.S., is related to the regulation of food products. Section 500.90, F.S., provided exceptions to the preemption including local ordinances enacted before January 1, 2016. House Bill 7007 became effective July 1, 2016. On July 18, 2016, the City was sued by the Florida Retail Federation, Inc. and Super Progreso Inc., who alleged that the City's ordinance was preempted by state statute.³⁹ The plaintiffs sought a declaratory judgment to that effect and injunctive relief to prevent the enforcement of the ordinance. The State of Florida was granted permission to intervene by the court and filed a response in opposition to the City's motion for summary judgment.⁴⁰

In an order dated February 27, 2017, the court granted the City's Motion for Summary Judgment, holding that the statutory sections relied on by the plaintiffs in asserting preemption lack the necessary standards and guidelines for implementation and are unconstitutionally vague. Final judgment in the case was rendered on March 8, 2017. The court ruled in favor of the City of Coral Gables and held that the statutes preempting the regulation by local governments of polystyrene,⁴¹ plastic bags,⁴² and the packaging of products manufactured or sold in the state⁴³ are unconstitutional and that the City's ordinance is valid and enforceable.⁴⁴

Thereafter, the Florida Retail Federation, Inc. and Super Progreso Inc. (Appellants) filed an appeal of the Eleventh Judicial Circuit's order with the Florida Third District Court of Appeal (3rd DCA). On December 13, 2017, oral arguments were held before the 3rd DCA. A decision has not yet been rendered by the 3rd DCA. On March 20, 2019, the Appellants filed a Notice of Pendency and Request for Ruling with the court.

³⁶ *Id.*

³⁷ *Sarasota Alliance for Fair Elections, Inc.*, 28 So. 3d at 886.

³⁸ Ch. 2016-61, s. 7, LAWS OF FLA.

³⁹ The plaintiffs asserted that ss. 500.90, 403.708(9), and 403.7033, F.S., preempted the ordinance.

⁴⁰ *Florida Retail Federation, Inc. and Super Progreso Inc. v. The City of Coral Gables*, Case No. 2016-018370-CA-01 (Fla. 11th Jud. Cir. 2017).

⁴¹ Section 500.90, F.S.

⁴² Section 403.7033, F.S.

⁴³ Section 403.708(9), F.S.

⁴⁴ *See supra* note 40.

On January 8, 2019, the City of Coral Gables City Commission voted to ban plastic straws and stirrers from city facilities, parks and permitted events. The ban also applies to city vendors and contractors.⁴⁵

The Florida Drug and Cosmetic Act

The Florida Drug and Cosmetic Act (Act) is found in part I of ch. 499, F.S.⁴⁶ The Act's purpose is to safeguard the public health and promote the public welfare by protecting the public from injury by product use and by merchandising deceit involving drugs, devices, and cosmetics.⁴⁷ The Department of Business and Professional Regulation is responsible for administering and enforcing efforts to prevent fraud, adulteration, misbranding, or false advertising in the preparation, manufacture, repackaging, or distribution of drugs, devices, and cosmetics.⁴⁸ Administration of the Act must conform to the Federal Food, Drug, and Cosmetic Act⁴⁹ and the applicable portions of the Federal Trade Commission Act,⁵⁰ which prohibit the false advertising of drugs, devices, and cosmetics.⁵¹

III. Effect of Proposed Changes:

Section 1 establishes a moratorium on the local regulation and enforcement of plastic straws until July 1, 2024. Under the bill, a county, municipality, or another local entity of local government is prohibited from adopting or enforcing an ordinance or other local regulation relating to single-use plastic straws before July 1, 2024.

The bill requires the DEP, or an entity designated by the DEP, to conduct a study to evaluate the environmental impact of single-use plastic straws. An entity designated by the DEP to conduct the study is required to be competent, knowledgeable, and unbiased regarding environmental impact studies. The environmental impact study must:

- Focus on the scientific data regarding the environmental impact of single-use plastic straws and the potential impact on the environment of this state if a reduction in the number of, or a prohibition on the use of, single-use plastic straws; and
- Consider the usefulness and environmental impact of potential alternatives to single-use plastic straws on the quality of life of persons with disabilities who may rely on single-use plastic straws for feeding and hydration.

The bill also provides that the environmental impact study may also consider single-use plastic straw regulations adopted in other jurisdictions in the United States and the actual effectiveness of such regulations in those jurisdictions in terms of environmental impact.

⁴⁵ File #18-8138, City of Coral Gables City Commission Meeting, *available at* <https://coralgables.legistar.com/LegislationDetail.aspx?ID=3823521&GUID=2F753430-AD58-49FB-B9DE-EE6780BFEDEB&Options=ID|Text|&Search=> (last visited March 1, 2019).

⁴⁶ Section 499.001, F.S., provides that ss. 499.001-499.94 is the Florida Drug and Cosmetic Act.

⁴⁷ Section 499.002(1)(a), F.S.

⁴⁸ Section 499.002(2), F.S.

⁴⁹ 21 U.S.C. ss. 301 *et seq.*

⁵⁰ *See* 15 U.S.C. §§ 41-58, as amended.

⁵¹ Section 499.002(1)(b), F.S.

The DEP is required to report the results of the environmental impact study to the Legislature by January 1, 2024. If, upon evaluating the results of the study, the Legislature does not enact a general law specifying a statewide policy regarding single-use plastic straws or a law preempting local regulation of single-use plastic straws, the moratorium on local regulation and enforcement of plastic straws ends on July 1, 2024.

Under the bill, an attempt by a county, municipality, or another entity of local government to adopt or enforce single-use plastic straw regulations before July 1, 2024 constitutes a violation, which shall result in a fine to the offending local governmental entity in the amount of \$25,000. Additionally, the offending local government is responsible for the attorney fees and costs of any party filing and prevailing in a civil action to enforce the terms of the moratorium.

Section 2 amends s. 499.002, F.S., to provide that, notwithstanding any other law or local ordinance to the contrary, the regulation of over-the-counter proprietary drugs and cosmetics is preempted to the state to be uniformly administered.

Section 3 provides an effective date of July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. **Government Sector Impact:**

The DEP may incur costs associated with conducting the study required by the bill.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

Several local regulations apply to the distribution of both single-use plastic straws and plastic stirrers. It is unclear whether the enforcement or adoption of local regulations relating to plastic stirrers will be subject to the fine imposed by the bill. Additionally, the bill does not specify who will impose the fine against an offending local government entity.

VIII. **Statutes Affected:**

This bill creates section 403.7034 of the Florida Statutes. The bill amends section 499.002 of the Florida Statutes.

IX. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on March 4, 2019:

The committee substitute:

- Establishes a moratorium on the local regulation and enforcement of single-use plastic straws;
- Requires the DEP, or an entity designated by the DEP, to conduct a study to evaluate the environmental impact of single-use plastic straws and to report the results of the environmental impact study to the Legislature by January 1, 2024;
- Provides that the moratorium is lifted, effective July 1, 2024, if the Legislature does not enact a general law specifying a statewide policy regarding single-use plastic straws or a law preempting local regulation of single-use plastic straws;
- Provides that it is a violation of local government that attempts to adopt or enforce single-use plastic straw regulations before July 1, 2024, which shall result in a fine to the offending local government entity in the amount of \$25,000; and
- Preempts the regulation of over-the-counter proprietary drugs and cosmetics to the state, notwithstanding any other law or local ordinance to the contrary.

B. **Amendments:**

None.