

**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.)

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

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BILL: SB 82

INTRODUCER: Senator Bradley

SUBJECT: Vegetable Gardens

DATE: January 3, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Peacock</u>	<u>Yeatman</u>	<u>CA</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 82 prohibits a county, municipality, or other political subdivision of the state from regulating vegetable gardens on residential properties. Additionally, any such local ordinance or regulation regarding vegetable gardens on residential properties is void and unenforceable.

However, local governments may still adopt a local ordinance or regulation of a general nature which does not specifically regulate vegetable gardens, including, but not limited to, regulations and ordinances relating to water use during drought conditions, fertilizer use, or control of invasive species.

**II. Present Situation:**

**Florida Constitution**

The Florida Constitution establishes and describes the duties, powers, structure, and function of government in Florida, and establishes the basic law of the state.

Article I, section 2 of the Florida Constitution's Declaration of Rights provides that "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, *and to acquire, possess and protect property...*"

Article I, section 23 of the Florida Constitution's Right to Privacy provides that "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life..." The Florida Constitution's right to privacy is perceived to provide greater protection than the United States Constitution.<sup>1</sup>

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<sup>1</sup> Overton and Giddings, *The Right to Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, Florida State University Law Review, Volume 25, Issue 1, Article 3, (1997), available at <https://ir.law.fsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1394&context=lr>.

## Home Rule and Preemption

### *Counties*

A county without a charter has such power of self-government as provided by general<sup>2</sup> or special law, and may enact county ordinances not inconsistent with general law.<sup>3</sup> 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.<sup>4</sup> General law authorizes counties “the power to carry on county government”<sup>5</sup> 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.”<sup>6</sup>

### *Municipalities*

Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,<sup>7</sup> acknowledges the constitutional grant to municipalities of governmental, corporate, and proprietary power necessary to conduct municipal government, functions, and services.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.<sup>11</sup> Express preemption of a field by the Legislature must be accomplished by clear

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<sup>2</sup> Chapter 125, Part I, F.S.

<sup>3</sup> FLA. CONST. art. VIII, s. 1(f).

<sup>4</sup> FLA. CONST. art. VIII, s. 1(g).

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

<sup>6</sup> Section 125.01(1)(w), F.S.

<sup>7</sup> Section 166.011, F.S.

<sup>8</sup> Florida House of Representatives, Publications, The Local Government Formation Manual 2017-2018, p. 16, available at <http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?PublicationType=Committees&CommitteeId=2911&Session=2017&DocumentType=General Publications&FileName=2017-2018 Local Government Formation Manual Final Pub.pdf>.

<sup>9</sup> Section 166.021(4), F.S.

<sup>10</sup> Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

<sup>11</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), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008).

language stating that intent.<sup>12</sup> In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.<sup>13</sup>

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.<sup>14</sup> Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.<sup>15</sup> 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 finding preemption.<sup>16</sup> Implied preemption is found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.<sup>17</sup>

### **Village of Miami Shores Court Case**

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.<sup>18</sup> Violators of the ordinance faced fines of \$50 per day. The residents claimed the ordinance violated their constitutional rights to acquire, possess, and protect property; and their right to privacy. In its opinion, the Court held that even constitutionally protected property rights are not absolute and are subject to the fair exercise of the State's powers including the power to promote the general welfare of the people through regulation. As a result, using a rational basis standard of review,<sup>19</sup> the Court found that the ordinance was rationally related to the Village code's design standards and landscaping regulations. The ordinance was upheld, and the prohibition remains in place.

On February 9, 2018, the Florida Supreme Court denied the petition for review of the case.<sup>20</sup>

### **III. Effect of Proposed Changes:**

The bill provides that except as otherwise provided by law, a county, municipality, or other political subdivision may not regulate vegetable gardens on residential properties. Additionally, any such ordinance or regulation regarding vegetable gardens on residential properties is void and unenforceable.

However, the section does not preclude the adoption of a local ordinance or regulation of a general nature that does not specifically regulate vegetable gardens, including, but not limited to, regulations and ordinances relating to water use during drought conditions, fertilizer use, or control of invasive species.

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<sup>12</sup> *Mulligan*, 934 So.2d at 1243.

<sup>13</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010).

<sup>14</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).

<sup>15</sup> *Phantom of Clearwater, Inc.*, 894 So.2d at 1019.

<sup>16</sup> *Id.*

<sup>17</sup> *Sarasota Alliance for Fair Elections, Inc.*, 28 So.3d at 886.

<sup>18</sup> *Ricketts v. Village of Miami Shores*, 232 So. 3d 1095 (Fla. 3d DCA 2017).

<sup>19</sup> The rational basis standard of review is a deferential standard that requires the reviewing court to uphold the enactment if it is "fairly debatable" whether the purpose of the law is legitimate and whether the methods adopted in the law serve that legitimate purpose. *Membreno & Florida Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13, 25 (Fla. 3d DCA 2016).

<sup>20</sup> *Ricketts v. Village of Miami Shores*, 2018 WL 794717 (Fla. 2018).

The bill also provides that it is the Legislature's intent to encourage the development of sustainable cultivation of vegetables and fruits at all levels of production, including for personal consumption, as an important state interest.

The bill takes effect July 1, 2019.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Occupants of residential properties will be able to cultivate a vegetable garden without government intrusion.

C. Government Sector Impact:

Counties, municipalities, and other political subdivisions of the state are prohibited from regulating vegetable gardens on residential properties.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 604.71 of the Florida Statutes.

**IX. Additional Information:**

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

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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