

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 Commerce and Tourism

BILL: CS/SB 266

INTRODUCER: Community Affairs Committee and Senator Perry and others

SUBJECT: Home-based Businesses

DATE: March 19, 2021

REVISED: _____

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

Please see Section IX. for Additional Information:

PLEASE MAKE SELECTION

I. Summary:

CS/SB 266 preempts areas of regulation for home-based businesses to the state and forbids counties and municipalities from prohibiting, restricting, regulating, or licensing a home-based business in a manner that is different from other businesses in a local government's jurisdiction. By operation of law, state preemption would cause existing local government ordinances in areas of law restricted by the bill to become null and void.

The bill includes criteria that home-based businesses must meet to operate in an area zoned for residential use. To be considered a home-based business under the bill's criteria, a business must be consistent with a dwelling unit's residential character, subordinate to the use of the dwelling for residential purposes, require no external modifications that detract from the residential appearance, and use no equipment or process that creates noise, vibration, heat, smoke, dust, glare, fumes, odors, or electrical or electronic interference detectable by neighbors.

The bill also include requirements a home-based businesses must comply with to operate in an area zoned for residential use. Namely, a home-based business may only have two non-resident employees or independent contractors and involve activities secondary to the property's use as a residential dwelling. Also, a home-based business must comply with all local regulations related to parking, hours of operation, and business activities conducted outside of the primary residential structure, and all relevant local, state, and federal regulations regarding the use, storage, or disposal of any corrosive, combustible, or other hazardous or flammable materials or liquids.

The bill maintains that a local government may still impose local business taxes under ch. 205, F.S., and provides that the home-based business state regulations do not supersede any current or future declaration of condominium adopted pursuant to ch. 718, F.S., cooperative document adopted pursuant to ch. 719, F.S., or declaration of covenants adopted pursuant to ch. 720, F.S.

These limitations on home-based businesses resemble current home occupation ordinances imposed by local governments.

The bill takes effect on July 1, 2021.

II. Present Situation:

Home Rule Powers and Preemption

The Florida Constitution

The Florida Constitution establishes and describes the duties, powers, structure, function, and limitations of government in Florida. Article VIII, section 1 of the Florida Constitution, endows counties and municipalities the power of self-government or home rule power. Under the home rule power, local governments have broad authority to exercise the state's sovereign police powers and legislate on any matter that is not inconsistent with the federal and state constitution and laws.

Counties

A county without a charter has such power of self-government as provided by general or special law and may enact county ordinances not inconsistent with general law.¹ Counties operating under county charters have all the powers of local self-government not inconsistent with general law or with special law approved by a vote of the electors.² General law authorizes counties “the power to carry on county government”³ 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.”⁴

Municipalities

Municipalities may be established or abolished, and their charters amended by general or special law. Municipalities have governmental, corporate, and proprietary powers to conduct municipal government, perform municipal functions, and render municipal services. They may exercise any of these powers for municipal purposes except as otherwise provided by law.⁵ Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,⁶ acknowledges these constitutional grants

¹ FLA. CONST. art. VIII, s. 1(f).

² *Id.* at (g).

³ Section 125.01(1), F.S.

⁴ *Id.* at (w).

⁵ FLA. CONST. art. VIII, s. 2.

⁶ Section 166.011, F.S.

of police powers and better defines municipal powers of self-government.⁷ Chapter 166, F.S., provides municipalities with broad home rule powers to act in a manner not inconsistent with the Florida Constitution, general and special law, and a charter for the county in which the municipality is located.⁸

State Preemption

Although local governments have broad home rule powers, the state legislature may preempt this self-government power and preclude local governments from exercising legislative authority in particular areas of law.⁹ Florida law recognizes two types of preemption: express and implied.

Express preemption requires a specific legislative statement; it cannot be implied or inferred.¹⁰ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.¹¹ In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.¹² On the other hand, implied preemption is found where the local legislation would present the danger of conflicting with the state's pervasive regulatory scheme.¹³ 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 to the state, and there are strong public policy reasons for doing so.¹⁴ In cases determining the validity of ordinances enacted in the face of express and implied state preemption, the effect has been to find such ordinances null, void, and unenforceable.¹⁵

Community Planning

State police powers are derived from the Tenth Amendment to the U.S. Constitution, which affords states all rights and powers “not delegated to the United States.”¹⁶ Under this provision, states have police powers to establish and enforce laws protecting the public's welfare, safety, and health.¹⁷ These police powers provide counties and municipalities the authority to enact comprehensive zoning plans to lay out zones or districts where potential uses of real property may be forbidden or restricted.¹⁸ A local government's ability to regulate and restrict the use of private property through community planning is not unlimited and must, ultimately, bear a substantial relation to the public health, safety, morals or general welfare.¹⁹

⁷ 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>. (last visited Mar. 19, 2021).

⁸ Section 166.021(4), F.S.

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

¹⁰ 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).

¹¹ *Mulligan*, 934 So.2d at 1243.

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

¹³ See *GLA & Assocs., Inc. v. City of Boca Raton*, 855 So. 2d 278, 282 (Fla. 4th DCA 2003).

¹⁴ *Id.*

¹⁵ *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993); *Hillsborough County v. Fla. Rest. Ass'n*, 603 So.2d 587, 591 (Fla. 2d DCA 1992) (“If [a county] has enacted such an inconsistent ordinance, the ordinance must be declared null and void.”)

¹⁶ U.S. CONST. amend. X.

¹⁷ See *NFIB v. Sebelius*, 567 U.S. 519, 535-536 (2012).

¹⁸ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974)

¹⁹ See *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

Section 163.3167, F.S. of the Community Planning Act²⁰ statutorily requires incorporated municipalities and counties to prepare and maintain a comprehensive plan to set out the regulations and policies governing land within a community. Comprehensive plans address both physical elements of land and buildings and the land uses permitted therein. Under s.163.3177, F.S., comprehensive plans are required to include elements that address the distribution, extent, and location of various land uses within a community. Some of the statute's land uses include residential, commercial, industrial, agricultural, recreational, conservation education, public, historic, and mixed-use categories.²¹

Residential Use Restrictions

Community zoning plans typically contain two significant distinctions of property use: residential and commercial. Property zoned for residential use requires residents to use a building or premises therein as a dwelling.²²

Areas zoned for residential use may exclude other nonresidential buildings and uses. Residential use ordinances allow local governments to deny land uses not customary to a home or dwelling. Courts have opined that residential land use restrictions serve the public health, safety, morals, and general welfare by providing an attractive community, lessening congestion, increasing safety, and preventing overcrowding, among other things.²³ Although local governments may use similar definitions of residential use in an ordinance, counties and municipalities are free to decide the specific uses or terms allowed for this land.

As a practical matter, residential use restrictions largely exclude property uses that include most commercial or business operations. Residential use areas are often cordoned off from business zones to promote the state's interest in preserving the quality of home life for the community and ensuring residential neighborhoods' safety.²⁴ The traditional purpose for this categorical separation of residential and business uses has been to prevent unwanted secondary effects of a business operating in a residential area.²⁵

Home Occupation Ordinances

Although local governments have the authority to discriminate between commercial and residential land uses, local governments have historically persevered the right for individuals to use residential dwellings to conduct business for certain activities deemed home occupations. Home occupation provisions are widely incorporated in residential land use ordinances and are

²⁰ See ch. 163, part II, F.S.

²¹ Section 163.3177, F.S.

²² Black's Law Dictionary 505 (6th ed. 1990) (*Dwelling* is defined as: "The house or other structure in which a person or persons live; a residence; abode; habitation; the apartment or building, or group of buildings, occupied by a family as a place of residence. Structure used as place of habitation.")

²³ *Flava Works, Inc. v. City of Miami*, 800 F.Supp.2d 1182 (S.D. Fla. 2011).

²⁴ *Voyeur Dorm, L.C. v. City of Tampa, Fla.*, 265 F.3d 1232 (11th Cir. 2001).

²⁵ In *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926) (upholding the constitutionality of a broad residential zoning restriction on all land uses that did not constitute a single-family dwelling), the 1926 Supreme Court describes numerous secondary effects of allowing businesses to operate in a residential zone and states the benefits of exclusion.

considered an accessory use²⁶ to a residential property. The overarching premise of home occupation provisions is that residents may use a dwelling for business activities secondary to residential uses and don't disturb the residential character of the property. There is no enumerated right to or precise definition of a home occupation in Florida law. Local governments have the home rule power to include home occupation provisions in land use ordinances and define the provision as they see fit.

Current home occupation ordinances vary on the types of businesses allowed, the activities authorized, and the permitting and taxes imposed. Common home occupation regulation areas include residential character requirements, licensing/permitting/certification, permitted home occupations, prohibited home occupations, signage, employees, traffic and parking, storage and sale of merchandise, and floor area used for the home occupation.

The following excerpts are examples of local government ordinances addressing the common areas of home occupation regulation:

- Jacksonville limits home occupations to small-scale, limited businesses that do not detract from the residential character of the neighborhood, and limits the floor area that may be used by the home occupation.²⁷
- Orlando requires home occupations to obtain an occupational license, and the applicant must also submit detailed information relating to the physical space of the home.²⁸ Orlando also prohibits certain specified occupations.²⁹
- Miami limits home occupations to specified occupations, and occupations that do not generate high vehicular demand.³⁰
- Miami-Dade County prohibits on-site signage related to the home occupation.³¹
- Winter Park prohibits employees other than family members living in the house, and prohibits the use of accessory buildings.³²
- Clearwater requires traffic generated by the home occupation to be no greater in volume than regular residential traffic, limits the use of commercial vehicles, and prohibits parking by marked vehicles on the property.³³
- Tampa prohibits the storage or sale of merchandise, and prohibits the conduct of a home-based business in any accessory building;³⁴
- Volusia County limits home-based businesses to no more than 25 percent of the habitable floor area of the residence.³⁵

²⁶ Black's Law Dictionary 15 (6th ed. 1990) (*accessory use* is "a use which is dependent on or pertains to principal or main use; a use which is subordinate to, clearly incidental to, customary in connection with, and ordinarily located on same lot with, principle use").

²⁷ Jacksonville, FL., Sec. 656.369(c)(1).

²⁸ Orlando, FL., Sec. 58.941.

²⁹ Orlando, FL., Sec. 58.939.

³⁰ Miami, FL., Sec. 622.7.2.

³¹ Miami-Dade County, FL., Sec. 33-25.1(A)4.

³² Winter Park, FL., Sec. 58-71(5).

³³ Clearwater, FL., Sec. 3-1102.A.5 – 7.

³⁴ Tampa, FL., Ch. 27, art. VI, div. 2, s. 27-282.5.

³⁵ Volusia County, FL., Ch. 72, art. II, div. 8, s. 72-283.

- Naples prohibits the conduct of retail, wholesale, or warehousing activities at a home-based business.³⁶
- Gainesville limits a home-based business to no more than one automobile used for the home-based business parked on the premises within view of surrounding properties, and limits the amount and size of the signage on that automobile.³⁷

Another common component of home occupation ordinances is the method of enforcing these restrictions. Typically, local government code enforcement divisions are tasked with the enforcement of home occupation ordinances. Other community residents may report violations to a code enforcement officer, who usually provides the violator with a warning about the behavior. If the restricted behavior continues, local governments have the authority to issue a civil infraction or penalty that the violator may contest in court. Repeated refusal to cease code violations could result in a local government issuing misdemeanor fines as described in s. 775.083, F.S.

Florida Business Address

To establish a formal business organization in Florida, an individual must file specific paperwork with the Florida Department of State, Division of Corporations. Regardless of the corporate business structure, Florida law requires that the business provide the street address of its principal place of business, register agent, and persons owning the business.³⁸ Residential property may be used as a principal place of business for these corporate filings. It is unclear how using a residential home address as a principal place of business for state corporate filings is interpreted in the context of home occupation ordinances.

III. Effect of Proposed Changes:

The bill creates s. 559.955, F.S., to preempt areas of regulation for home-based businesses to the state. The bill forbids counties and municipalities from prohibiting, restricting, regulating, or licensing a home-based business in a manner that is different from other businesses in a local government's jurisdiction. By operation of law, state preemption would cause existing local government ordinances in areas of law restricted by the bill to become null and void.

To be considered a home-based business under the bill, a business must meet the following:

- Be consistent with a dwelling unit's residential character.
- Be subordinate to the use of the dwelling for residential purposes.
- Require no external modifications that detract from the residential appearance.
- Use no equipment or process that creates noise, vibration, heat, smoke, dust, glare, fumes, odors, or electrical or electronic interference detectable by neighbors.

Additionally, a home-based business must meet the following requirements:

- May only have two non-resident employees or independent contractors.
- May only involve activities secondary to the property's use as a residential dwelling.

³⁶ Naples, FL., Ch. 56, art. III, s. 56-92.

³⁷ Gainesville, FL., Ch. 30, art. V, div. 2, s. 30-5.37.

³⁸ See s. 605.0201, F.S. (limited liability company); s. 607.0202, F.S. (corporation); s. 620.1111, F.S. (partnership).

- Comply with all state and local parking regulations.
- Comply with local regulations for hours of operation and business activities conducted outside of the primary residential structure.
- Comply with all relevant local, state, and federal regulations regarding the use, storage, or disposal of any corrosive, combustible, or other hazardous or flammable materials or liquids.

The bill clarifies that local governments may still impose local business taxes on home-based businesses under ch. 205, F.S. The bill also provides that the home-based business state regulations do not supersede any current or future declaration of condominium adopted pursuant to chapter 718, cooperative document adopted pursuant to chapter 719, or declaration of covenants adopted pursuant to chapter 720.

The bill takes effect on July 1, 2021.

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:

Restricting the number and types of persons allowed to engage in otherwise legal activities³⁹ conducted wholly within the confines of a private dwelling may unconstitutionally infringe on an individual's freedom of association⁴⁰ and right to

³⁹ See *Henry v. Board of County Com'rs of Putnam County*, 509 So.2d 1221 (Fla. 5th DCA 1987)(describing that there is a considerable distinction between regulating the use of land and prohibiting the advertising for, and business use of, telephone located on residential property); see also *Coca-Cola Co., Food Division, Polk County v. State, Dept. of Citrus*, 406 So.2d 1079 (Fla.1981)(wherein the Florida Supreme Court discussed first amendment protection of commercial speech).

⁴⁰ "Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one's associates. Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members... The freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy. The right to establish a home is an essential part of the liberty guaranteed by the Fourteenth Amendment. And the Constitution secures to an individual a freedom to satisfy his intellectual and emotional needs in the privacy of his own home." See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974)(Justice Marshall, dissenting; quotations and citations omitted).

privacy.⁴¹ If these fundamental rights are implicated, the judiciary may require the State to demonstrate that limiting the number and types of persons allowed to work at a home-based business serves a compelling State interest and accomplishes its goals through the use of the least intrusive means.⁴²

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

For small and family-owned businesses that operate in a local government jurisdiction with a more severe restriction on home occupations, the bill may provide a net positive fiscal impact by allowing these businesses to avoid the costs associated with commercial property. Notwithstanding, this positive fiscal impact may be negatively correlated to the market demand for small-scale commercial real estate.

C. Government Sector Impact:

The bill may have a negative fiscal impact on local governments that charge fees related to home occupations.

VI. Technical Deficiencies:

The term “only” on line 68 should be removed for clarity.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following section 559.955 of the Florida Statutes.

⁴¹ Courts have long recognized that the boundaries of a home create a constitutionally protected zone of privacy. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The Florida Constitution contains an explicit right to privacy which affords Florida citizens greater protection in the area of privacy than does the federal Constitution. *See State v. J.P.*, 907 So.2d 1101, 1115 (Fla. 2004).

⁴² *See State v. J.P.*, at 1109. *See also Winfield v. Div. of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985)(explaining that where law intrudes on fundamental right to privacy guaranteed in Florida's Constitution, the State must demonstrate that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means).

IX. Additional Information:

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

CS by Community Affairs on March 10, 2021:

The committee substitute revises the criteria and requirements a business must meet to be considered a home-based business and allowed to operate in a residential zone. The committee substitute retains the bill's core elements but makes several technical and substantive changes to provide more detailed and precise descriptions of home-based business restrictions.

It also clarifies that the bill's regulations do not supersede any current or future declaration of condominium adopted pursuant to ch. 718, F.S., cooperative document adopted pursuant to ch. 719, F.S., or declaration of covenants adopted pursuant to ch. 720, F.S.

- B. **Amendments:**

None.