

**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 Rules

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BILL: CS/CS/SB 856

INTRODUCER: Community Affairs Committee; Regulated Industries Committee; and Senator Hutson

SUBJECT: Express Preemption of Fuel Retailers and Related Transportation Infrastructure

DATE: April 19, 2021

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sharon	Imhof	RI	<b>Fav/CS</b>
2.	Hackett	Ryon	CA	<b>Fav/CS</b>
3.	Sharon	Phelps	RC	<b>Pre-meeting</b>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 856 centralizes transportation energy infrastructure regulation by expressly preempting transportation energy infrastructure regulation to the state.

The bill defines “fuel retailer” as a fuel station or retail establishment that sells fuel to provide power to vehicles, and “related transportation infrastructure” as underground storage tanks, pipelines, or any related equipment that is necessary to dispense fuel at a fuel retailer.

The bill prohibits local governments from adopting a law, ordinance, regulation, policy, or resolution which:

- Prohibits the siting, development, or redevelopment of a fuel retailer or related transportation infrastructure necessary to provide fuel to a retailer throughout the local government’s jurisdiction;
- Results in the de facto prohibition of a fuel retailer or related transportation throughout the local government’s jurisdiction; or
- Requires a fuel retailer to install or invest in a particular kind of fueling infrastructure, such as electric vehicle charging stations.

The bill takes effect upon becoming a law.

## II. Present Situation:

### Local Government Authority

The Florida Constitution grants local governments home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.<sup>1</sup> Those counties operating under a county charter have all powers of local self-government not inconsistent with general law or special law approved by the vote of the electors.<sup>2</sup> Likewise, municipalities 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.<sup>3</sup>

In Florida, special districts are separate governmental entities created for a special purpose that have jurisdiction to operate within a limited geographic boundary.<sup>4</sup> Special districts are created by general law, special act, local ordinance, or by rule of the Governor and Cabinet.<sup>5</sup> Throughout the state there are over 1,770 active special districts encompassing more than 80 specialized governmental functions.<sup>6</sup> Types of special districts vary and can include anything from mosquito control districts to gas districts.<sup>7</sup> In Florida, there are currently four special natural gas districts.<sup>8</sup>

### *Interlocal Cooperation and the Florida Municipal Power Agency*

The Florida Interlocal Cooperation Act of 1969 (act) allows local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage.<sup>9</sup> The act provides that local governmental entities may jointly exercise their powers by entering into a contract in the form of an interlocal agreement.<sup>10</sup> Under such an agreement, the local governmental units may create a separate legal or administrative entity “to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.”<sup>11</sup>

In 1978, the Florida Municipal Power Agency (FMPA) was created through a series of interlocal agreements under s. 163.01, F.S., to provide wholesale power supply to municipal electric

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

<sup>2</sup> FLA. CONST. art. VIII, s. 1(g).

<sup>3</sup> FLA. CONST. art. VIII, s. 2(b). *See also* s. 166.021(1), F.S.

<sup>4</sup> Section 189.012(6), F.S.

<sup>5</sup> *Id.*

<sup>6</sup> *See* Florida Department of Economic Opportunity, *Introduction to Special Districts*, <https://floridajobs.org/community-planning-and-development/special-districts/special-district-accountability-program/florida-special-district-handbook-online/introduction-to-special-districts> (last visited Mar. 5, 2021).

<sup>7</sup> *See* Florida Department of Economic Opportunity, *Official List of Special Districts*, <http://specialdistrictreports.floridajobs.org/webreports/websitelist.aspx> (last visited Mar. 5, 2021).

<sup>8</sup> *See* Florida Public Service Commission, *Facts & Figures of the Florida Utility Industry*, <http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Factsandfigures/April%202020.pdf> (last visited Mar. 5, 2021).

<sup>9</sup> Section 163.01(2), F.S.

<sup>10</sup> Section 163.01(5), F.S.

<sup>11</sup> Section 163.01(2), F.S.

utilities. FMPA is currently owned by 31 municipalities.<sup>12</sup> Through various joint power supply projects,<sup>13</sup> the FMPA supplies all of the electrical power needs of 13 member utilities and a part of the power needs for seven other member utilities.<sup>14</sup> Through these projects, FMPA members maintain ownership interests in various electrical power plants throughout Florida. FMPA manages the transmission of electrical power over facilities owned by FMPA or its members.<sup>15</sup>

### **Federal Regulation**

The Clean Air Act requires U.S. Environmental Protection Agency (EPA) to regulate fuels and fuel additives for use in motor vehicle, motor vehicle engine, if the fuel, fuel additive or any emission products causes or contributes to air or water pollution that may endanger the public health or welfare. The EPA is required to also address emission products of fuel or fuel additives that may impair any emission control devices used on vehicles or engines.<sup>16</sup>

The Office of Underground Storage Tanks in the EPA (OUST) regulates underground storage tanks (USTs) All portions of a UST system must be compatible with the fuel being stored. Demonstrations of compatibility must be provided for tank, piping, containment sumps, pumping equipment, release detection equipment, spill equipment, and overfill equipment.<sup>17</sup> The single largest source of energy information available is the Department of Energy's Energy Information Administration (EIA). The EIA publishes extensive reports on natural gas and other energy sources.<sup>18</sup>

Domestic natural gas markets are regulated in part by the Federal Energy Regulatory Commission. The commission's chief area of concern is the interstate natural gas market.

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<sup>12</sup> Currently, FMPA serves the following municipalities: Alachua, Bartow, Blountstown, Bushnell, Chattahoochee, Clewiston, Fort Meade, Fort Pierce, Gainesville, Green Cove Springs, Havana, Homestead, Jacksonville Beach, Key West, Kissimmee, Lake Worth, Lakeland, Leesburg, Moore Haven, Mount Dora, New Smyrna Beach, Newberry, Ocala, Orlando, Quincy, St. Cloud, Starke, Vero Beach, Wauchula, Williston, and Winter Park. Florida Municipal Power Agency, *Members*, <http://fmpa.com/about/members/> (last visited Mar. 5, 2021).

<sup>13</sup> Section 361.12, F.S., authorizes any electric utility, or any organization, association, or separate legal entity whose membership consists only of electric utilities, to join with any other such entity to finance, acquire, construct, manage, operate, or own an electric power supply project for the joint generation or transmission of electrical energy, or both. Further, s. 361.13, F.S., authorizes any such entity to purchase capacity or energy, or both, in an agreed upon quantity from any project in which the purchaser has an ownership interest.

<sup>14</sup> See Florida Municipal Power Agency, *Projects*, <https://fmpa.com/power-supply-projects/> (last visited Mar. 5, 2021).

<sup>15</sup> See Florida Municipal Power Agency, *Value of Public Power*, <https://fmpa.com/value-of-public-power/> (last visited Mar. 5, 2021).

<sup>16</sup> See Federal Gasoline Regulations, available at <https://www.epa.gov/gasoline-standards/federal-gasoline-regulations>, (last visited March 10, 2021). Gasoline regulations are under 40 CFR Part 80 ("Regulation of Fuels and Fuel Additives"): subparts A (general provisions, applying to all 40 CFR Part 890 fuels programs), B (controls and prohibitions), C (oxygenated gasoline), D & E (reformulated gasoline), G (detergent gasoline program), H & O (gasoline sulfur) and J & L (gasoline toxics).

<sup>17</sup> Ethanol Code, Standards and Safety, available at [https://afdc.energy.gov/fuels/ethanol\\_codes.html](https://afdc.energy.gov/fuels/ethanol_codes.html), (last visited March 10, 2021).

<sup>18</sup> Natural Gas Regulation – Other Gas-Related Information Sources, available at <https://www.energy.gov/fe/natural-gas-regulation-other-gas-related-information-sources>, (last visited March 10, 2021). Code of Federal Regulation (CFR) Title 40 Subtitle 1 Subchapter 1 Parts 280-282. The federal UST regulation was updated in October 2015 with section CFR 280.32 to specify additional compatibility requirements for owners and operators who store regulated substances, including gasoline containing greater than 10% ethanol (E10) and diesel containing greater than 20% biodiesel (B20).

Natural gas moves for the most part by pipeline in the United States. The safety of those pipelines is the concern of the Department of Transportation's Office of Pipeline Safety.

Renewable fuels include liquid and gaseous fuels, and electricity derived from renewable feedstock sources.<sup>19</sup>

Advanced biofuels (D5) are produced from any type of renewable biomass (sugarcane, biobutanol, bionaphtha) except corn starch ethanol. Required life cycle GHG emissions reduction is at least 50% compared to the petroleum baseline. Biomass-based diesel (D4) includes biodiesel and renewable diesel produced from biomass such as soybean oil, canola oil, waste oil, or animal fats. Required life cycle GHG emissions reduction is at least 50% compared to the diesel baseline. Cellulosic biofuel (D3 or D7) produced from cellulose or hemicellulose of corn stover, wood chips, *Miscanthus*, or biogas. To be eligible for D7 RINs the fuel must be cellulosic diesel. Required life cycle GHG emissions reduction is at least 60% compared to the petroleum baseline. Conventional renewable biofuel (D6) includes ethanol derived from corn starch, or any other qualifying renewable fuel. Required life cycle GHG emissions reduction is at least 20% compared to the average petroleum baseline.<sup>20</sup>

## **Local Authority to Regulate Energy Infrastructure**

### ***Local Regulation of Oil and Gas Exploration and Production***

While cities and counties do not operate oil and gas permitting programs in Florida, some, through their land use regulations or zoning ordinances, require special exceptions for oil and gas activities or limit oil and gas activities to certain zoning classifications.<sup>21</sup> When authorizing oil and gas exploration and production activities, local governments consider factors such as consistency with their comprehensive plan, injuries to communities or the public welfare, and compliance with zoning ordinances.<sup>22</sup>

In certain instances, the Department of Environmental Protection (DEP) may not issue a permit without specified approval. The DEP may not issue permits to drill a gas or oil well:

- Within the corporate limits of a municipality without a resolution approving the permit from the governing authority;<sup>23</sup>
- In tidal waters abutting or immediately adjacent to the corporate limits of a municipality or within three miles of such corporate limits extending from the line of mean high tide into such waters without a resolution approving the permit from the governing authority;<sup>24</sup> or
- On any improved beach, located outside of an incorporated town or municipality, or at a location in the tidal waters abutting or immediately adjacent to an improved beach, or within three miles of an improved beach extending from the line of mean high tide into such tidal waters without a resolution approving the permit from the county commission.<sup>25</sup>

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<sup>19</sup> Renewable Fuel, available at <https://www.sciencedirect.com/topics/engineering/renewable-fuel>, (last visited March 10, 2021).

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

<sup>21</sup> See, e.g., Lee County's Land Development Code §§ 34-1651 and 34-145(c).

<sup>22</sup> *Id.*

<sup>23</sup> Section 377.24(5), F.S.

<sup>24</sup> Section 377.24(6), F.S.

<sup>25</sup> Section 377.24(7), F.S.

If the proposed oil or gas well is on lands owned by the Board of Trustees of the Internal Improvement Trust Fund, it may not grant a lease for gas, oil, or mineral rights:

- Within the corporate limits of a municipality without a resolution approving the lease from the governing authority;<sup>26</sup>
- In tidal waters abutting or immediately adjacent to the corporate limits of a municipality or within 3 miles of such corporate limits extending from the line of mean high tide into such waters without a resolution approving the lease from the governing authority;<sup>27</sup>
- On any improved beach, located outside of an incorporated town or municipality, or at a location in the tidal waters abutting or immediately adjacent to an improved beach, or within 3 miles of an improved beach extending from the line of mean high tide into such tidal waters without a resolution approving the lease from the county commission;<sup>28</sup> or
- In Florida's territorial waters in the Gulf of Mexico or Atlantic Ocean.<sup>29</sup>

Six municipalities (Estero, Bonita Springs, Coconut Creek, Cape Coral, Dade, and Zephyrhills) and thirteen counties (Alachua, Bay, Brevard, Broward, Citrus, Indian River, Martin, Miami-Dade, Osceola, Pinellas, St. Lucie, Volusia, Wakulla, and Walton) have banned one or more forms of well stimulation techniques, commonly referred to as "fracking," by ordinance.<sup>30</sup>

Additionally, many other counties and cities have passed resolutions supporting various types of bans and moratoriums relating to fracking.<sup>31</sup>

## **State Regulation of Energy Infrastructure**

### ***Florida Department of Environmental Protection***

The DEP possesses the authority to issue permits:

- For drilling, exploring, or production of oil, gas, or other petroleum products that are to be extracted from below the surface of the land, including submerged land, only through the well hole drilled for oil, gas, and other petroleum products.<sup>32</sup>

<sup>26</sup> Section 253.61(1)(a), F.S.

<sup>27</sup> Section 253.61(1)(b), F.S.

<sup>28</sup> Section 253.61(1)(c), F.S.

<sup>29</sup> Section 253.61(1)(d), F.S.

<sup>30</sup> See Village of Estero, Ordinance No. 2015-19; Bonita Spring's Land Development Code, Chapter 4, Article VI, Division 15, Section 4-1380; Coconut Creek's Land Development Code, Article IV, Section 13-1000; City of Cape Coral, Ordinance §3.23; City of Dade, Ordinance No. 2016-08; City of Zephyrhills, Ordinance No. 1310-16; Alachua County's Code of Ordinances, §77.13.5; Bay County's Land Development Regulation, §311; Brevard County's Code of Ordinances, §46-375; Citrus County's Code of Ordinances, §66-133; Indian River County's Code of Ordinances, §317.03; Osceola County's Land Development Code, §4.12.3; Broward County's Code of Ordinances, §27-193; Martin County's Code of Ordinances, §67.441; Miami-Dade County's Code of Ordinances, §33-437; Pinellas County's Code of Ordinances, §58-489; St. Lucie County's Code of Ordinances, Policy 6.1.5.7; Volusia County's Code of Ordinances, §50-42; Wakulla County's Code of Ordinances, §6-34; Walton County's Code of Ordinances, §9-156.

<sup>31</sup> See Food & Water Watch, *Local Regulations Against Fracking*, <https://www.foodandwaterwatch.org/insight/local-resolutions-against-fracking> (last visited Mar. 5, 2021) (listing of local governments nationwide that passed resolutions against fracking).

<sup>32</sup> Section 377.242(1)(a), F.S.

- To explore for and extract minerals that are subject to extraction from the land by means other than through a well hole.<sup>33</sup>
- To establish natural gas storage facilities or construct wells for the injection and recovery of any natural gas for storage in natural gas storage reservoirs.<sup>34</sup>

However, DEP may not permit drilling for, or production of, oil, gas, or other petroleum products within:

- Florida's territorial waters in the gulf of Mexico or Atlantic Ocean;<sup>35</sup>
- In bays or estuaries;<sup>36</sup>
- Within one mile of coastline;<sup>37</sup>
- Within one mile of seaward boundary of any local, state, or federal park or aquatic or wildlife preserve;<sup>38</sup> and
- Within one mile inland from the shoreline of the Gulf of Mexico, the Atlantic Ocean, or any bay or estuary or within 1 mile of any freshwater lake, river, or stream unless the department is satisfied that the natural resources of such bodies of water and shore areas of the state will be adequately protected in the event of accident or blowout.<sup>39</sup>

The DEP monitors and inspects drilling operations, producing wells, or injecting wells.<sup>40</sup> Each permit issued by DEP must contain an agreement that the permit holder will not prevent inspection by division personnel at any time.<sup>41</sup>

The DEP is vested with the authority to adopt rules and issue orders that must “ensure that all precautions are taken to prevent the spillage of oil or any other pollutant in all phases of the drilling for, and extracting of, oil, gas, or other petroleum products, or during the injection of gas into and recovery of gas from a natural gas storage reservoir.”<sup>42</sup>

The DEP's Oil and Gas Program (program) oversees permitting for oil and gas production in the state.<sup>43</sup> The program regulates the conservation of oil and gas resources, drilling of wells, health and human safety, and environmental protection.<sup>44</sup> The program is governed by part 1 of ch. 377, F.S. and Florida Administrative Code Rules 62C-25 through 62C-30.<sup>45</sup>

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<sup>33</sup> Section 377.242(2), F.S.

<sup>34</sup> Section 377.242(3), F.S.

<sup>35</sup> Sections 377.24(9) and 377.242(1)(a)5., F.S.

<sup>36</sup> Section 377.242(1)(a)1., F.S.

<sup>37</sup> Section 377.242(1)(a)2., F.S.

<sup>38</sup> Section 377.242(1)(a)3., F.S.

<sup>39</sup> Section 377.242(1)(a)4., F.S.

<sup>40</sup> Section 377.22(2)(g), F.S.

<sup>41</sup> Section 377.242, F.S.

<sup>42</sup> Section 377.22(2), F.S. *See also* ss. 377.22(2)(a)-(y), F.S., (listing additional, but not all, purposes of rules and orders issued by DEP).

<sup>43</sup> Florida Department of Environmental Protection, *Oil and Gas Program*, <https://floridadep.gov/water/oil-gas> (last visited Mar. 5, 2021).

<sup>44</sup> *Id.*

<sup>45</sup> The Oil and Gas Program is governed by part 1 of ch. 377, F.S., and Fla. Admin. Code R. 62C-25 through 62C-30.

### ***Well Stimulation and Fracking***

Well stimulation refers to any action taken by a well operator to increase the inherent productivity of an oil or gas well.<sup>46</sup> Common examples of well stimulation treatments are hydraulic fracturing, commonly referred to as “fracking,” and acid fracturing.<sup>47</sup> Both hydraulic fracturing and acid fracturing involve the pressurized injection of fluids and chemicals to create fractures within a rock formation.<sup>48</sup> The fractures then allow for more oil and gas to escape the rock formation and migrate up the well.<sup>49</sup>

The DEP’s rules currently require an operator to notify the DEP before beginning any workover operation on an oil or gas well.<sup>50</sup> A workover is defined as “an operation involving a deepening, plug back, repair, cement squeeze, perforation, hydraulic fracturing, acidizing, or other chemical treatment which is performed in a production, disposal, or injection well in order to restore, sustain, or increase production, disposal, or injection rates.”<sup>51</sup>

### ***Florida Public Service Commission***

The Florida Public Service Commission (PSC) is an arm of the legislative branch of government.<sup>52</sup> The role of the PSC is to ensure that Florida’s consumers receive some of their most essential services – electric, natural gas, telephone, water, and wastewater – in a safe, affordable, and reliable manner.<sup>53</sup> In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.<sup>54</sup> The PSC monitors the safety and reliability of the electric power grid<sup>55</sup> and may order the addition or repair of infrastructure as necessary.<sup>56</sup> Further, the PSC reviews application to determine the need for certain new electrical power plants<sup>57</sup> and certain large transmission lines as part of the DEP’s siting process.<sup>58</sup>

In 2020, the PSC regulated

- 5 investor-owned electric utilities;
- 8 investor-owned natural gas utilities; and
- 147 investor-owned water and/or wastewater utilities.<sup>59</sup>

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<sup>46</sup> Keith B. Hall, *Recent Developments in Hydraulic Fracturing Regulation and Litigation*, 29 J. LAND USE & ENVTL. L. 29, 22 (2013).

<sup>47</sup> *Id.* at 1-2.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2.

<sup>50</sup> Fla. Admin. Code R. 62C-29.006(1).

<sup>51</sup> Fla. Admin. Code R. 62C-25.002(61).

<sup>52</sup> Section 350.001 F.S.

<sup>53</sup> See Florida Public Service Commission, *The PSC’s Role*, <http://www.psc.state.fl.us> (last visited Mar. 5, 2021).

<sup>54</sup> *Id.*

<sup>55</sup> Section 366.04(5) and (6), F.S.

<sup>56</sup> Section 366.05(1) and (8), F.S.

<sup>57</sup> Section 403.519, F.S.

<sup>58</sup> Section 403.537, F.S.

<sup>59</sup> Florida Public Service Commission, *Annual Report*, (2020) available at <http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Annualreports/2020.pdf> (last visited Mar. 5, 2021).

The PSC does not fully regulate publicly owned municipal or cooperative electric utilities.<sup>60</sup> However, it does have jurisdiction over 35 municipally owned electric systems and 18 rural electric cooperatives with regard to rate structure, territorial boundaries, bulk power supply operations, and planning.<sup>61</sup> Additionally, the PSC has jurisdiction over 27 municipally owned natural gas utilities and four gas districts with regard to territorial boundaries, safety, and safety authority over all electric and natural gas systems operating in the state.<sup>62</sup>

### ***Florida Department of Agriculture and Consumer Services***

The Florida Department of Agriculture and Consumer Services (DACS) is responsible for the administration of a number of programs relating to energy infrastructure and houses the Office of Energy.<sup>63</sup> Moreover, the DACS is responsible for the administration of a number of programs relating to energy infrastructure, including the Renewable Energy and Energy-Efficient Technologies Grants Program,<sup>64</sup> the Energy Efficiency and Conservation Clearinghouse,<sup>65</sup> the Florida Green Government Grants Act,<sup>66</sup> the Natural Gas Fuel Fleet Vehicle Rebate Program.<sup>67</sup> Additionally DACS has as the statutory authority to allocate federal energy conservation bonds<sup>68</sup> and to post information on its website relating to alternative fueling stations or electric vehicle charging stations that are available for public use.<sup>69</sup>

### **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.<sup>70</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See s. 377.805, F.S.

<sup>64</sup> Section 377.804, F.S. (establishing within DACS the Renewable Energy and Energy-Efficient Technologies Grants Program “to provide renewable energy matching grants for demonstration, commercialization, research, and development projects relating to renewable energy technologies . . .”).

<sup>65</sup> Section 377.805, F.S., (requiring the development of a clearinghouse of “information regarding cost savings associated with various energy efficiency and conservation measures” by the Office of Energy in consultation with the Public Service Commission, the Florida Building Commission, and the Florida Energy Systems Consortium).

<sup>66</sup> Section 377.808, F.S., (directing DACS to use appropriated funds to award grants that assist local governments and school districts with development and implementation of programs aimed at achieving green standards).

<sup>67</sup> Section 377.810, F.S., (establishing the program within DACS to help reduce transportation costs and encourage freight mobility investments contributing to the state’s economic growth).

<sup>68</sup> Section 37.816, F.S.

<sup>69</sup> Section 377.815, F.S.

<sup>70</sup> See James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 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 Mar. 5, 2021).



Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.<sup>71</sup> Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.<sup>72</sup> In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.<sup>73</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>74</sup> In one case, the court stated that implied preemption “is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.”<sup>75</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>76</sup> Implied preemption is found where the local legislation would present the danger of conflict with the state’s pervasive regulatory scheme.<sup>77</sup>

### III. Effect of Proposed Changes:

The bill creates s. 377.707, F.S., relating to state preemption of fuel retailers and related transportation infrastructure.

The bill defines “fuel retailer” as a fuel station or retail establishment that sells fuel to provide power to vehicles, and “related transportation infrastructure” as underground storage tanks, pipelines, or any related equipment that is necessary to dispense fuel at a fuel retailer.

The bill prohibits local governments<sup>78</sup> from adopting a law, ordinance, regulation, policy, or resolution which:

- Prohibits the siting, development, or redevelopment of a fuel retailer or related transportation infrastructure necessary to provide fuel to a retailer throughout the local government’s jurisdiction;
- Results in the de facto prohibition of a fuel retailer or related transportation throughout the local government’s jurisdiction; or
- Requires a fuel retailer to install or invest in a particular kind of fueling infrastructure, such as electric vehicle charging stations.

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<sup>71</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).

<sup>72</sup> *Mulligan*, 934 So. 2d at 1243.

<sup>73</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). Examples of activities “expressly preempted to the state” include: operator use of commercial mobile radio services and electronic communications devices in motor vehicles, s. 316.0075, F.S.; regulation of the use of cameras for enforcing provisions of the Florida Uniform Traffic Control Law, s. 316.0076, F.S.; and, the adoption of standards and fines related to specified subject areas under the purview of the Department of Agriculture and Consumer Services, s. 570.07, F.S.

<sup>74</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>75</sup> *Phantom of Clearwater, Inc.*, 894 So. 2d at 1019.

<sup>76</sup> *Id.*

<sup>77</sup> *Sarasota Alliance for Fair Elections, Inc.*, 28 So. 3d at 886.

<sup>78</sup> Enumerated in the bill as a municipality, county, special district, or political subdivision.

The bill provides for clarification that it does not preempt local governments from adopting and implementing requirements not otherwise inconsistent with general law related to the siting, development, or redevelopment of fuel retailers or related transportation infrastructure so long as such requirement does not result in a de facto prohibition of fuel retailers or related transportation infrastructure within the entirety of the jurisdictional boundaries of the local government.

The bill takes effect upon becoming a law.

**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:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 377.707 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/CS by Community Affairs on March 16, 2021:**

The committee substitute incorporates an alternative framework to preempt local governments from regulating fuel retailers and related transportation infrastructure. The effect of the committee substitute is substantially similar to the first committee substitute.

The committee substitute:

- Defines the terms “fuel retailer” and “related transportation infrastructure.”
- Provides that a local government may not adopt an ordinance, regulation, policy, or resolution that prohibits the siting, development, or redevelopment of a fuel retailer or necessary related transportation infrastructure.
- Prohibits a local government from requiring a fuel retailer to install or invest in a particular kind of fueling infrastructure, such as electric vehicle charging stations.
- Clarifies that the bill does not preempt local governments from adopting and implementing requirements not otherwise inconsistent with general law.

**CS by Regulated Industries on March 9, 2021:**

The committee substitute:

- Narrows the scope of the bill to transportation energy infrastructure.
- Moves the legislative findings from a preamble to a subsection within s. 377.707, F.S., and expands the findings to include the importance of consumer choice in the energy market.
- Deletes the definition of energy infrastructure.
- Defines “fuel,” as including petroleum fuel, petroleum products, gasoline, diesel fuel, motor fuel, marine fuel, aviation fuel, renewable fuel, alternative fuel, natural gas fuel, hydrogen fuel, and electricity, when such fuel sources are used for transportation.
- Defines “transportation energy infrastructure” to mean infrastructure supporting the production, importation, storage, and distribution of fuel.
- Preempts the regulation of transportation energy infrastructure to the state.
- Prohibits local governments from adopting laws that prohibit, restrict, or require the construction of new transportation energy infrastructure or the expansion, upgrading, or repair of existing transportation energy infrastructure.
- Prohibits local governments from imposing requirements regulating transportation energy infrastructure that are more stringent than state law or rule, with the exception

of local ordinances regulating petroleum storage system construction, operation, and maintenance, pursuant to s. 376.317(3)(a), F.S.

- Prohibits local governments from amending comprehensive plans, land use maps, zoning districts, or land development regulations in a way that would render existing transportation energy infrastructure to be nonconforming.

**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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