

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 Regulated Industries

BILL: SB 856

INTRODUCER: Senator Hutson

SUBJECT: State Preemption of Energy Infrastructure Regulations

DATE: March 8, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|----------------|-----------|--------------------------|
| 1. | Sharon _____ | Imhof _____ | RI _____ | Pre-meeting _____ |
| 2. | _____ | _____ | CA _____ | _____ |
| 3. | _____ | _____ | RC _____ | _____ |

I. Summary:

SB 856 centralizes energy infrastructure regulation by expressly preempting energy infrastructure regulation to the state. The bill defines “energy infrastructure” infrastructure used to support the production, import, storage, and distribution of natural gas; petroleum; petroleum products; electricity; biomass; renewable fuels; hydrogen; or solar, wind, or geothermal energy.

The bill prohibits local governments from implementing any law, ordinance, regulation, policy, or resolution that prohibits, restricts, or requires, or that has the effect of prohibiting, restricting, or requiring, the construction of new energy infrastructure or the expansion, upgrading, or repair of existing energy infrastructure, or imposing any requirement regulating energy infrastructure that is more stringent than state law or rule. The bill also voids any local laws, ordinances, regulations, policies, or resolutions enacted before the effective date.

The bill is effective July 1, 2021.

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.¹ 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.² Likewise, municipalities have those governmental, corporate, and proprietary powers

¹ FLA. CONST. art. VIII, s. 1(f).

² FLA. CONST. art. VIII, s. 1(g).

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.³

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

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.⁹ The act provides that local governmental entities may jointly exercise their powers by entering into a contract in the form of an interlocal agreement.¹⁰ 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.”¹¹

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 utilities. FMPA is currently owned by 31 municipalities.¹² Through various joint power supply projects,¹³ 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.¹⁴ Through these projects, FMPA members

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

⁴ Section 189.012(6), F.S.

⁵ *Id.*

⁶ *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).

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

⁸ *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).

⁹ Section 163.01(2), F.S.

¹⁰ Section 163.01(5), F.S.

¹¹ Section 163.01(2), F.S.

¹² 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).

¹³ 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.

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

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.¹⁵

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.¹⁶ 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.¹⁷

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;¹⁸
- 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;¹⁹ 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.²⁰

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;²¹
- 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;²²
- 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

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

¹⁶ See, e.g., Lee County's Land Development Code §§ 34-1651 and 34-145(c).

¹⁷ *Id.*

¹⁸ Section 377.24(5), F.S.

¹⁹ Section 377.24(6), F.S.

²⁰ Section 377.24(7), F.S.

²¹ Section 253.61(1)(a), F.S.

²² Section 253.61(1)(b), F.S.

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;²³ or

- In Florida’s territorial waters in the Gulf of Mexico or Atlantic Ocean.²⁴

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.²⁵

Additionally, many other counties and cities have passed resolutions supporting various types of bans and moratoriums relating to fracking²⁶

Other Examples of Local Authority Related to Energy Infrastructure

Chapter 403, F.S., provides for the regulation of air and water pollution control in Florida and delegates specific authority to local governments.²⁷ For example, part II of ch. 403, F.S., provides a participatory role to local governments related to power plant and transmission line siting,²⁸ including a consistency determination with local land use plans, zoning ordinances, local environmental regulations, and other standards,²⁹ and part VIII of ch. 403, F.S., provides a participatory role to local governments related to the siting of natural gas transmission pipelines.³⁰

Additionally, general law provides specific authority for certain local governments to:

- Prepare and enforce comprehensive plans for the development of the county.³¹

²³ Section 253.61(1)(c), F.S.

²⁴ Section 253.61(1)(d), F.S.

²⁵ 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.

²⁶ 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).

²⁷ See ss. 403.021(4) and 403.061(18), F.S.

²⁸ Section 403.506(3), F.S. (stating that licenses, permits, or approvals issued by any state, regional, or local agency for a facility will be incorporated by the Department of Environmental Protection into a final certification upon completion of construction).

²⁹ Sections 403.50655, 403.507(2)(a)3., 403.526(2)(a)5., F.S.

³⁰ Section 43.9405, F.S. (stating that “the exemption of a natural gas transmission pipeline under ss. 403.9401-403.9425 does not constitute an exemption for the natural gas transmission pipeline from other applicable permitting processes under other provisions of law or local government ordinances) (emphasis added). See also, s. 403.941, F.S., (providing that the “local government in which the natural gas transmission pipeline or natural gas transmission pipeline corridor will be located shall prepare a report as to the impact . . . on matters within its jurisdiction . . .”).

³¹ Section 125.01(1)(g), F.S.

- Establish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public.³²
- Enter into contracts with utility companies or others for the supplying by such utility companies or others of water, electricity, or telephone service to or in connection with any project.³³
- Construct, operate and maintain gas plants and distribution systems for domestic, municipal and industrial uses;³⁴ construct such other buildings and facilities as may be required to properly and economically operate and maintain such works;³⁵ and make all necessary rules or regulations governing the use, control and operation of such works;³⁶
- Contract with private companies for the right to construct, operate and maintain gas plants and distribution systems for domestic, municipal and industrial uses, including the privilege or franchise of exercising its corporate powers for such terms of years and upon such conditions and limitations as may be deemed expedient and for the best interest of the municipality, for up to thirty years, provided that the rates or charges to be made by the private company to the individual users of the utility are fixed by the municipality.³⁷
- Provide and regulate roads, rights-of-way, and related transportation facilities.³⁸
- Enforce the Florida Building Code and adopt and enforce local technical amendments thereto.³⁹
- To adopt, revise, and amend, from time to time, appropriate ordinances, rules, and regulations reasonably necessary to maintain air quality standards established pursuant to state and federal law, including the federal Clean Air Act.⁴⁰
- License the use of gas and power lines in right-of-ways.⁴¹
- Issue development permits and orders.⁴²
- Provide code enforcement.⁴³

Interlocal Service Boundary Agreements

As an alternative process for annexation, the respective governing bodies of counties, municipalities, or independent special districts may enter into an interlocal service boundary agreement, jointly determining how services are provided to residents and property.⁴⁴ Current law creates a process for adjusting municipal boundaries and addressing the effects of

³² Section 125.01(1)(h), F.S.

³³ Section 125.012(19), F.S.

³⁴ Section 180.06(8), F.S.

³⁵ Section 180.06(9), F.S.

³⁶ Section 180.13, F.S.

³⁷ Section 180.14, F.S.

³⁸ Section 125.01(1)(m), F.S.

³⁹ Section 125.01(1)(bb), F.S.

⁴⁰ Section 125.275, F.S.

⁴¹ Section 125.42, F.S.

⁴² Sections 125.022 and 166.033, F.S.

⁴³ Section 166.0415, F.S.

⁴⁴ See ch. 171, part II, F.S.

annexation.⁴⁵ The purpose is to encourage intergovernmental coordination in planning, service delivery, and boundary adjustments and to reduce conflicts and litigation between local entities.⁴⁶

The interlocal service boundary agreement may address other issues related to service delivery and include the transfer of services and infrastructure, fiscal compensation to one county, municipality, or independent special district from another local government or special district, and provide for the joint use of facilities and colocation of services.⁴⁷ The agreement may require the municipality to send the county a report on its planned service delivery.⁴⁸ Finally, an interlocal service boundary agreement may be valid for up to twenty years, must include a provision requiring periodic review, and must require renegotiations to begin at least eighteen months before the termination date.⁴⁹

The ability of counties and municipalities to negotiate interlocal service boundary agreements does not impair any existing franchise agreement or contract without the consent of the franchisee or contracting party.⁵⁰ Local governments retain their authority to negotiate franchise agreements for the use of public rights-of-way and providing service.⁵¹

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.⁵²
- To explore for and extract minerals that are subject to extraction from the land by means other than through a well hole.⁵³
- 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.⁵⁴

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

⁴⁵ Chapter 377, Part I, F.S.

⁴⁶ *Id.*

⁴⁷ See ss. 171.203(6)(g)-(h), F.S.

⁴⁸ Section 171.203(6)(i), F.S.

⁴⁹ Section 171.203(12), F.S.

⁵⁰ Section 171.203(19)-(20), F.S.

⁵¹ Section 171.203(19), F.S.

This part does not impair any existing franchise agreement without the consent of the franchisee, any existing territorial agreement between electric utilities or public utilities under chapter 366, or the jurisdiction of the Public Service Commission to resolve a territorial dispute involving electric utilities or public utilities in accordance with s. 366.04 In addition, an interlocal agreement entered into under this section has no effect in a proceeding before the Public Service Commission involving a territorial dispute. A municipality or county shall retain all existing authority, if any, to negotiate a franchise agreement with any private service provider for use of public rights-of-way or the privilege of providing a service.

Id.

⁵² Section 377.242(1)(a), F.S.

⁵³ Section 377.242(2), F.S.

⁵⁴ Section 377.242(3), F.S.

- Florida’s territorial waters in the gulf of Mexico or Atlantic Ocean;⁵⁵
- In bays or estuaries;⁵⁶
- Within one mile of coastline;⁵⁷
- Within one mile of seaward boundary of any local, state, or federal park or aquatic or wildlife preserve;⁵⁸ 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.⁵⁹

The DEP monitors and inspects drilling operations, producing wells, or injecting wells.⁶⁰ Each permit issued by DEP must contain an agreement that the permit holder will not prevent inspection by division personnel at any time.⁶¹

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.”⁶²

The DEP’s Oil and Gas Program (program) oversees permitting for oil and gas production in the state.⁶³ The program regulates the conservation of oil and gas resources, drilling of wells, health and human safety, and environmental protection.⁶⁴ The program is governed by part 1 of ch. 377, F.S. and Florida Administrative Code Rules 62C-25 through 62C-30.⁶⁵

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.⁶⁶ Common examples of well stimulation treatments are hydraulic fracturing, commonly referred to as “fracking,” and acid fracturing.⁶⁷ Both hydraulic fracturing and acid fracturing involve the pressurized injection of fluids and chemicals to create

⁵⁵ Sections 377.24(9) and 377.242(1)(a)5., F.S.

⁵⁶ Section 377.242(1)(a)1., F.S.

⁵⁷ Section 377.242(1)(a)2., F.S.

⁵⁸ Section 377.242(1)(a)3., F.S.

⁵⁹ Section 377.242(1)(a)4., F.S.

⁶⁰ Section 377.22(2)(g), F.S.

⁶¹ Section 377.242, F.S.

⁶² 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).

⁶³ Florida Department of Environmental Protection, *Oil and Gas Program*, <https://floridadep.gov/water/oil-gas> (last visited Mar. 5, 2021).

⁶⁴ *Id.*

⁶⁵ 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.

⁶⁶ Keith B. Hall, *Recent Developments in Hydraulic Fracturing Regulation and Litigation*, 29 J. LAND USE & ENVTL. L. 29, 22 (2013).

⁶⁷ *Id.* at 1-2.

fractures within a rock formation.⁶⁸ The fractures then allow for more oil and gas to escape the rock formation and migrate up the well.⁶⁹

The DEP's rules currently require an operator to notify the DEP before beginning any workover operation on an oil or gas well.⁷⁰ 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."⁷¹

Florida Public Service Commission

The Florida Public Service Commission (PSC) is an arm of the legislative branch of government.⁷² 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.⁷³ 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.⁷⁴ The PSC monitors the safety and reliability of the electric power grid⁷⁵ and may order the addition or repair of infrastructure as necessary.⁷⁶ Further, the PSC reviews application to determine the need for certain new electrical power plants⁷⁷ and certain large transmission lines as part of the DEP's siting process.⁷⁸

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.⁷⁹

The PSC does not fully regulate publicly owned municipal or cooperative electric utilities.⁸⁰ 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.⁸¹ 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.⁸²

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

⁷⁰ Fla. Admin. Code R. 62C-29.006(1).

⁷¹ Fla. Admin. Code R. 62C-25.002(61).

⁷² Section 350.001 F.S.

⁷³ See Florida Public Service Commission, *The PSC's Role*, <http://www.psc.state.fl.us> (last visited Mar. 5, 2021).

⁷⁴ *Id.*

⁷⁵ Section 366.04(5) and (6), F.S.

⁷⁶ Section 366.05(1) and (8), F.S.

⁷⁷ Section 403.519, F.S.

⁷⁸ Section 403.537, F.S.

⁷⁹ 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).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

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.⁸³ 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,⁸⁴ the Energy Efficiency and Conservation Clearinghouse,⁸⁵ the Florida Green Government Grants Act,⁸⁶ the Natural Gas Fuel Fleet Vehicle Rebate Program.⁸⁷ Additionally DACS has as the statutory authority to allocate federal energy conservation bonds⁸⁸ and to post information on its website relating to alternative fueling stations or electric vehicle charging stations that are available for public use.⁸⁹

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.⁹⁰

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.⁹¹ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.⁹² In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.⁹³

⁸³ See s. 377.805, F.S.

⁸⁴ 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 . . .”).

⁸⁵ 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).

⁸⁶ 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).

⁸⁷ 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).

⁸⁸ Section 37.816, F.S.

⁸⁹ Section 377.815, F.S.

⁹⁰ 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).

⁹¹ 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).

⁹² *Mulligan*, 934 So. 2d at 1243.

⁹³ *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.

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.⁹⁴ 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.”⁹⁵ 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.⁹⁶ Implied preemption is found where the local legislation would present the danger of conflict with the state’s pervasive regulatory scheme.⁹⁷

III. Effect of Proposed Changes:

The bill creates s. 377.707, F.S., relating to state preemption of energy infrastructure regulation.

The bill defines the term “energy infrastructure” to mean infrastructure used to support the production, import, storage, and distribution of natural gas; petroleum; petroleum products; electricity; biomass; renewable fuels; hydrogen; or solar, wind, or geothermal energy.

The bill expressly preempts energy infrastructure regulation to the state. It prohibits local governments from implementing any law, ordinance, regulation, policy, or resolution that prohibits, restricts, or requires, or that has the effect of prohibiting, restricting, or requiring, the construction of new energy infrastructure or the expansion, upgrading, or repair of existing energy infrastructure.

The bill declares any existing or future law, ordinance, regulation, policy, or resolution contrary to the preemption to be void.

Additionally, the bill provides that Legislature recognizes that affordable, reliable, and sustainable energy throughout the state is dependent upon energy infrastructure networks extending beyond local government boundaries and recognizes the importance of consumer choice in the energy market.

The bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

⁹⁴ See, e.g., *Nat’l Rifle Ass’n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002).

⁹⁵ *Phantom of Clearwater, Inc.*, 894 So. 2d at 1019.

⁹⁶ *Id.*

⁹⁷ *Sarasota Alliance for Fair Elections, Inc.*, 28 So. 3d at 886.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Article I, section 10 of the Florida Constitution prohibits the passage of any law which impairs the obligation of contracts. The Florida Supreme Court has held that, relating to the interpretation of substantive changes to statutory law, the general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively but not retroactively. Florida courts have also held that “Even where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty.”

Current law authorizes local governments to provide and contract for certain services related to energy infrastructure. To the extent that the bill may retroactively abrogate such contracts, the bill may impair a local government’s vested rights or contractual obligations or ability to satisfy a contractual obligation.

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 377.6013 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.

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