

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 1126

INTRODUCER: Senator Martin

SUBJECT: Regulation of Auxiliary Containers

DATE: January 16, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Baird	McKay	CM	Fav/CS
2.			CA	
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1126 preempts to the state the regulation of auxiliary containers, defined by the bill as reusable or single-use bag, cup, bottle, or other packaging designed for transporting, consuming, or protecting merchandise, food, or beverages from or at a food service establishment or retailer.

The bill takes effect July 1, 2024.

II. Present Situation:

Auxiliary Containers

The United Nations has estimated that the world consumes between 1 trillion and 5 trillion plastic bags (a form of auxiliary container) per year.¹ Additionally, in the United States fewer than 10 percent of plastic bags are recycled per year.² In Florida, the Department of

¹ United Nations Environment Programme, *Single-Use Plastics: A Roadmap for Sustainability*, (March 26, 2018), available at <https://www.unep.org/resources/report/single-use-plastics-roadmap-sustainability> (last visited January 16, 2024).

² United States Environmental Protection Agency, *Advancing Sustainable Materials Management: 2016 and 2017 Tables and Figures*, (November, 2019), available at https://www.epa.gov/sites/default/files/2019-11/documents/2016_and_2017_facts_and_figures_data_tables_0.pdf (last visited January 16, 2024).

Environmental Protection estimated that about 5-6 million tons of collected municipal solid waste per year are single use carryout packaging.³

Subsequently, environmentalists across the world have targeted auxiliary containers and their consumption to try and limit their use and harmfulness to the environment. This has been manifested through many local governments in Florida, as well as across the world, trying to impose their own local regulations on auxiliary containers and their use.

In recent years some of these local ordinances have been challenged in the court system.⁴

State Preemption

There are two ways that a local enactment can be inconsistent with state law and therefore unconstitutional. First, a local government cannot legislate in a field if the subject area has been preempted to the state. Second, in a field where both the state and local government can legislate concurrently, a local government cannot enact an ordinance that directly conflicts with the state statute.⁵

State law recognizes two types of state preemption: express and implied. Express preemption requires a specific legislative statement of intent to preempt a specific area of law; it cannot be implied or inferred.⁶ In contrast, implied preemption exists if the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.⁷ Courts determining the validity of local government ordinances enacted in the face of state preemption, whether express or implied, have found such ordinances to be null and void.⁸

Home Rule Authority

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.⁹ Counties operating under a county charter have all powers of self-

³ Townsend, *Update of the 2010 Retail Bags Report*, (December, 2021), available at <https://floridadep.gov/sites/default/files/FDEP%20Plastic%20Bag%20Report%20Final%20v4.pdf> (last visited January 16, 2024).

⁴ See *Florida Retail Federation, Inc. v. City of Coral Gables*, 282 So. 3d 889 (Fla. 3d Dist. Ct. App. 2019) where originally the ordinance prohibited the use of expanded polystyrene to restaurants and businesses as well as city vendors/contractors and special events permittees and their subcontractors. After the Florida Retail Federation challenged the ordinance the courts declared the part of the ordinance regarding private restaurants and businesses unconstitutional.

⁵ *Orange County v. Singh*, 268 So. 3d 668, 673 (Fla. 2019) (citing *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008)); see also James Wolf & Sarah Bolinder, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 FLA. BAR J. 92 (2009), available at <https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/> (last visited January 16, 2024).

⁶ *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Brevard, Inc.*, 3 So. 3d at 1018.

⁷ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

⁸ See, e.g., *National Rifle Association of America, Inc. v. City of South Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002) (concluding that a City of South Miami local government ordinance, which purported to provide safety standards for firearms, was null and void because the Legislature expressly preempted the entire field of firearm and ammunition regulation when it enacted section 790.33, F.S.).

⁹ FLA. CONST., art. VIII, s. 1.(f).

government not inconsistent with general law or special law approved by vote of the electors.¹⁰ Likewise, municipalities have governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform municipal functions and provide services, and exercise any power for municipal purposes except as otherwise provided by law.¹¹

County governments have authority to provide fire protection, ambulance services, parks and recreation, libraries, museums and other cultural facilities, waste and sewage collection and disposal, and water and alternative water supplies.¹² Municipalities are afforded broad home rule powers with the exception of annexation, merger, exercise of extraterritorial power, or subjects prohibited or preempted by the Federal or State Constitution, county charter, or statute.¹³

Department of Environmental Protection Retail Bag Report

In response to growing concerns regarding the impact of retail plastic bags on the environment, the Legislature enacted s. 403.7033, F.S., in 2008 to require the Department of Environmental Protection (DEP) to analyze “the need for new or different regulation of auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments.” DEP was required to submit a report with its conclusions and recommendations to the Legislature by December 31, 2021.¹⁴

Additionally, s. 403.7033, F.S., includes a prohibition on local governments, local governmental agencies, and state government agencies from enacting any rule, regulation, or ordinance regarding the use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags until the Legislature adopts the DEP’s recommendations.¹⁵ To date, the Legislature has not adopted any recommendations contained in the report and the prohibition on any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags remains in effect.¹⁶

III. Effect of Proposed Changes:

The bill creates a definition for the term “auxiliary container” defining it as “a reusable or single-use bag, cup, bottle, or other packaging that meets” the following requirements:

- Is made of cloth; paper; plastic, including, but not limited to, foamed plastic, expanded plastic, or polystyrene; cardboard; molded fiber; corrugated material; aluminum; glass; postconsumer recycled material; or similar material or substrates, including coated, laminated, or multilayer substrates.

¹⁰ FLA. CONST., art. VIII, s. 1.(g).

¹¹ FLA. CONST., art. VIII, s. 2.(b); *see also* s. 166.021(1), F.S.

¹² Sections 125.01(1)(d)(e)(f) and (k)1., F.S.

¹³ Section 166.021(3), F.S.

¹⁴ Section 403.7033, F.S.

¹⁵ *Id.*

¹⁶ The 2021 report created by the DEP is available online at

<https://floridadep.gov/sites/default/files/FDEP%20Plastic%20Bag%20Report%20Final%20v4.pdf>.

- Is designed for transporting, consuming, or protecting merchandise, food, or beverages from or at a public food service establishment as defined in s. 509.013(5), F.S., a food establishment as defined in s. 500.03(1), F.S., or a retailer as defined in s. 212.02(13), F.S.

The bill places the authority of any regulating of auxiliary containers to be made at the state level as opposed to the local level.

The bill also removes the following language in s. 403.7033, F.S., that:

- Emphasized legislative intent that “prudent regulation of recyclable materials is crucial to the ongoing welfare of Florida’s ecology and economy”;
- The DEP needed to review and update their 2010 report on retail bags that included input from stakeholders analyzing the need for new or different regulation of auxiliary containers;
- No local or state government agency enact any rule, regulation, or ordinance, until the Legislature adopts the recommendations of the DEP.

Additionally, the bill makes conforming changes to section 403.707 of the Florida Statutes.

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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 403.703, 403.7033, and 403.707.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on January 16, 2024:

The committee substitute clarifies the requirements of what an auxiliary container can be made of, adding foamed plastic, expanded plastic, polystyrene, and molded fiber. Additionally, the amendment provides that the included list of materials that auxiliary containers can be made of is not the exclusive list. The amendment also includes a statutory reference definition for a public food service establishment, a food service establishment, and a retailer. Finally the amendment more clearly states that the regulation of auxiliary containers is expressly preempted to the state.

B. Amendments:

None.