

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1641 Regulation of Auxiliary Containers
SPONSOR(S): Agriculture, Conservation & Resiliency Subcommittee, Yeager
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1126

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture, Conservation & Resiliency Subcommittee	11 Y, 7 N, As CS	Gawin	Moore
2) Local Administration, Federal Affairs & Special Districts Subcommittee			
3) Infrastructure Strategies Committee			

SUMMARY ANALYSIS

The United Nations has estimated that the world consumes between 1 trillion and 5 trillion plastic bags (a form of auxiliary container) per year. Additionally, in the United States, fewer than 10 percent of plastics packaging, including plastic bags, are recycled per year. In Florida, the Department of Environmental Protection (DEP) estimated that about 5 to 6 million tons of collected municipal solid waste per year are single use carryout packaging (SUCP). Improperly managed SUCP can result in litter in the environment, along roads, and in stormwater collection systems and freshwater resources. Plastic has been documented as the most abundant anthropogenic material in marine ecosystems, where it causes harm to wildlife.

In response to growing concerns regarding the impact of retail plastic bags on the environment, the Legislature passed HB 7135 in 2008, which, in part, required 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. The initial report was submitted in 2010, and in 2021, the Legislature directed DEP to review and update its 2010 report and submit it to the Legislature by December 31, 2021. DEP submitted the updated report with its conclusions and recommendations to the Legislature on December 27, 2021. Local governments, local governmental agencies, and state government agencies are prohibited from enacting any rule, regulation, or ordinance regarding the use, disposition, sale, prohibition, restriction, or tax of auxiliary containers, wrappings, or disposable plastic bags until the Legislature adopts DEP's recommendations. To date, the Legislature has not adopted any recommendations contained in the report.

The bill defines "auxiliary container" to mean a reusable or single-use bag, cup, bottle, can, or other packaging that is made of cloth; paper; plastic, including, but not limited to, foamed plastic, expanded plastic, or polystyrene; cardboard; corrugated material; molded fiber; aluminum; glass; postconsumer recycled material; or similar material or substrates, including coated, laminated, or multilayer substrates and is designed for transporting, consuming, or protecting merchandise, food, or beverages from or at a public food service establishment, a food establishment, or a retailer.

The bill removes the provision requiring DEP to update the 2010 retail bags report. The bill also removes the provision that prohibits a local government, local government agency, or state government agency from enacting any rule, regulation, or ordinance regarding the use, disposition, sale, prohibition, restriction, or tax of auxiliary containers until the Legislature adopts DEP's recommendations in the updated retail bags report. Additionally, the bill expressly preempts the regulation of auxiliary containers to the state.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

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 plastics packaging, including plastic bags, are recycled per year.² In Florida, the Department of Environmental Protection (DEP) estimated that about 5 to 6 million tons of collected municipal solid waste per year are single use carryout packaging (SUCP).³ Improperly managed SUCP can result in litter in the environment, along roads, and in stormwater collection systems and freshwater resources.⁴ Plastic has been documented as the most abundant anthropogenic material in marine ecosystems, where it causes harm to wildlife.⁵ Due to these concerns, some local governments in the state have attempted to enact regulations regarding the use of SUCP.⁶

DEP Retail Bags Report

In response to growing concerns regarding the impact of retail plastic bags on the environment, the Legislature passed HB 7135 in 2008,⁷ which, in part, required 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.⁸ The initial report was submitted in 2010,⁹ and in 2021, the Legislature directed DEP to review and update its 2010 report and submit it to the Legislature by December 31, 2021.¹⁰ DEP submitted the updated report with its conclusions and recommendations to the Legislature on December 27, 2021.¹¹ Current law prohibits 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 auxiliary containers, wrappings, or disposable plastic bags until the Legislature adopts DEP's recommendations.¹² To date, the Legislature has not adopted any recommendations contained in the report, and the prohibition remains in effect.¹³

State Preemption

¹ United Nations Environment Programme, *Single-Use Plastics: A Roadmap for Sustainability*, March 26, 2018, viii, available at <https://www.unep.org/resources/report/single-use-plastics-roadmap-sustainability> (last visited Jan. 18, 2024).

² United States Environmental Protection Agency, *Advancing Sustainable Materials Management: 2016 and 2017 Tables and Figures*, November, 2019, 47, available at https://www.epa.gov/sites/default/files/2019-11/documents/2016_and_2017_facts_and_figures_data_tables_0.pdf (last visited Jan. 18, 2024).

³ DEP, *Update of the 2010 Retail Bags Report*, December 2021, 3, available at <https://floridadep.gov/sites/default/files/FDEP%20Plastic%20Bag%20Report%20Final%20v4.pdf> (last visited Jan. 18, 2024). SUCP refers to auxiliary containers, wrappings, and disposable plastic bags. *Id.* at 2.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

⁶ 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 by 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 3rd District Court of Appeal ruled the ordinance was preempted by the state.

⁷ Chapter 2008-227, s. 96, L.O.F.

⁸ Section 403.7033, F.S.

⁹ Chapter 2008-227, s. 96, L.O.F.

¹⁰ Section 403.7033, F.S.

¹¹ DEP, *Retail Bags Report Cover Letter*, available at <https://floridadep.gov/sites/default/files/Plastic%20Bag%20Report%20Cover.pdf> (last visited Jan. 18, 2024); DEP, *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 Jan. 18, 2024).

¹² *Id.*

¹³ DEP, *Update of the 2010 Retail Bags Report*, December 2021, 10, available at <https://floridadep.gov/sites/default/files/FDEP%20Plastic%20Bag%20Report%20Final%20v4.pdf> (last visited Jan. 18, 2024).

There are two ways that a local regulation can be inconsistent with state law and therefore unlawful. First, a local government may not 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 may not enact an ordinance that directly conflicts with the state statute.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷

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.¹⁸ Counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by vote of the electors.¹⁹ 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.²⁰

County governments have the 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.²¹ 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.²²

Effect of the Bill

The bill defines “auxiliary container” to mean a reusable or single-use bag, cup, bottle, can, or other packaging that is:

- Made of cloth; paper; plastic, including, but not limited to, foamed plastic, expanded plastic, or polystyrene; cardboard; corrugated material; molded fiber; aluminum; glass; postconsumer recycled material; or similar material or substrates, including coated, laminated, or multilayer substrates; and
- Designed for transporting, consuming, or protecting merchandise, food, or beverages from or at a public food service establishment, a food establishment, or a retailer.

The bill removes the provision requiring DEP to update the 2010 retail bags report. The bill also removes the provision that prohibits a local government, local government agency, or state government agency from enacting any rule, regulation, or ordinance regarding the use, disposition, sale, prohibition, restriction, or tax of auxiliary containers until the Legislature adopts DEP’s recommendations in the

¹⁴ *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 Jan. 18, 2024).

¹⁵ *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Brevard, Inc.*, 3 So. 3d at 1018.

¹⁶ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

¹⁷ 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 s. 790.33, F.S.).

¹⁸ FLA. CONST., art. VIII, s. 1.(f).

¹⁹ FLA. CONST., art. VIII, s. 1.(g).

²⁰ FLA. CONST., art. VIII, s. 2.(b); see also s. 166.021(1), F.S.

²¹ Section 125.01(1), F.S.

²² Section 166.021(3), F.S.

updated retail bags report. Additionally, the bill expressly preempts the regulation of auxiliary containers to the state.

B. SECTION DIRECTORY:

Section 1. Amends s. 403.703, F.S., related to recycling definitions.

Section 2. Amends s. 403.7033, F.S., related to preemption of regulation for auxiliary containers.

Section 3. Amends s. 403.707, F.S., related to permits, to conform cross references.

Section 4. Provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 24, 2024, the Agriculture, Conservation & Resiliency Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment revised the definition of auxiliary container.

This analysis is drafted to the committee substitute as approved by the Agriculture, Conservation & Resiliency Subcommittee.