



# Local Government Preemptions in the Legislature and CRC

**Florida League of Cities  
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# State & Local Gov't Tension is Not New\*

- History of larger gov'ts delegating responsibilities to smaller gov'ts; often without sufficient resources
- Increase in mandates; decrease in flexibility to meet them
- Gridlock at federal and state level - local gov'ts are left to solve their own problems
  - Policy vacuum: local gov't steps in to respond to constituent needs and desires
  - Local policy experimentation and innovation have flourished
  - Interest groups opposed to local policies turn to higher level of gov't for redress

\*See Riverstone-Newell, "The Rise of State Preemption Laws in Response to Local Policy Innovation,"

47 J. Federalism 3, 403-425 (2017).



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# State Preemption of Local Government

- Preemption is clearly authorized by Florida Constitution
- Preemption (state law prohibits action) distinguished from Conflict (state law sets standards or minimums and local regulation cannot be inconsistent)
- Traditionally, preemption used when policy necessitated a statewide regulatory scheme (e.g., uniform traffic laws, water permits, building code, fire code)
- New trend is “special interest preemption”



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# Special Interest Preemption – A National Trend

- 1980s – successful national effort by Big Tobacco to preempt local smoking restrictions and bans
- People noticed.....
- NRA soon followed suit and obtained preemptions in majority of states on local gun regulations
- Special interest preemptions are now the most predominant type of preemption we see in Florida
  - Fertilizer industry
  - Telecommunications & Utilities (cell towers, substations, small cell wireless)
  - Agribusiness (Right to Farm Act, Agritourism)
  - Retail & Restaurant industry (polystyrene, shopping carts, franchise conflicts)
  - Homebuilders and Realtors (septic tank inspections and permitting)



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# Special Interest Preemption – A National Trend

- Powerful special interest groups have the ear of state legislators and national political organizations
- Large corporate interests realized preemption can eliminate unwanted regulation efficiently and covertly
  - Efficient – ready access to and influence on small group of decision-makers
  - Covert -- less public scrutiny of legislative action (dwindling Capitol Press Corps, Tallahassee is miles away); avoids facing the public at a town hall meeting
- National political groups realized preemption can squelch hot button or “progressive” issues taken up by larger metropolitan localities (e.g., sanctuary cities; LGBTQ issues; minimum wage regulations)
  - For legislators attuned to these issues, “Home Rule” is equated with a partisan or progressive agenda



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# 2018 Preemptions in the Legislature

Vegetable Gardens SB 1776 <b>FAILED</b>	Municipal Election Dates CS/CS/SB 1262 <b>FAILED</b>	Vacation Rentals CS/CS/SB 1400 <b>FAILED</b>	Tree Trimming & Removal CS/CS/HB 521 <b>FAILED</b>	Interruption of Services CS/CS/HB 971 <b>FAILED</b>
<p>Would have preempted local governments from enacting local ordinances or regulations of vegetable gardens on residential properties.</p>	<p>Would have prohibited municipalities from selecting the dates for their municipal elections.</p>	<p>Would have preempted all regulation of vacation rentals to the state. The bill would have grandfathered local ordinances adopted on or before June 1, 2011, and allowed “grandfathered” cities to amend as long as they are less restrictive.</p>	<p>would have prohibited local governments from regulating tree trimming undertaken by water management districts, &amp; other special districts within rights-of-way for drainage and flood control purposes.</p>	<p>If a regularly scheduled service such as garbage pickup was interrupted the bill would require a credit to customers, pro rata, in correlation to the number of days the service was interrupted. Failure to provide a credit or refund would result in a fine for the provider.</p>



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# 2018: Constitutional Revision Commission

- Once every 20 years a body of 37 commissioners convene to review the State Constitution for potential adjustments and additions.
- The Commissioners are appointed by: the Governor (15), the Speaker of the House (9), the President of the Senate (9), the Chief Justice of the Supreme Court (3), and automatically includes the Attorney General.
- The body of Commissioners meet for approximately a year, and hold public hearings across the state. Citizens and commissioners formulate proposals that are vetted in committees. Proposals that pass the committee process and that pass a vote by the full Commission will go directly to the voter's ballots.
- There are only 5 ways to change the Florida Constitution; this process is one of the ways and is the only method that produces straight to ballot proposals



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# 2018 CRC Preemption: Proposal 95 - Preempting the Regulation of Commerce, Trade, and Labor

- Provided that a regulation enacted by a county municipality or special district could not impede commerce, trade, or labor across the entity's boundary.
- Potentially broad impact, e.g.: inability to regulate an activity within the city, a reasonable nexus between the activity and its citizens' health, safety and welfare had been established
- Proposal 95 ultimately failed to pass committee and was withdrawn by the sponsor.



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# 2018 CRC Preemption: Proposal 51 – Rights of Electricity Customers

- Provided electricity customers could choose from multiple electric providers in a competitive market, and are not be restricted to purchase service from one provider.
- Provided that electricity customers may sell, trade, or dispose of their electricity as they please.
- Backed by Walmart and groups that include the Florida Retail Federation and the Florida Restaurant and Lodging Association.
- Could have impacted the approximately \$1.3 billion annually in franchise fees and Public Service Utility Taxes Florida's municipalities receive from electric utilities.
- Proposal 51 failed to pass the CRC General Provision Committee. Could return as a ballot initiative in 2020.



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# 2017 Preemption in the Legislature: Mini-Cell Towners in Public Rights-of-Way

- Substantially amended section 337.401, Florida Statutes, relating to the use of public (municipal or county) right-of-way, and structures located within the right-of-way, for broadband or wireless facility infrastructure.
- With various limited exceptions, the Act provides for the collocation of small wireless facilities on government owned poles and other poles and structures located in the right-of-way, installation of ground mounted equipment in the right-of-way, installation of new poles in the right-of-way, and installation of micro wireless facilities.
- The Act did not apply to collocations on privately owned utility poles or utility poles owned by electric cooperatives or municipal electric utilities.



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# Federal Preemption Pending: Mini-Cell Towners in Public Rights-of-Way

- Last month, Senators John Thune (R-SD) and Brian Schatz (D-HI) introduced the "Streamlining The Rapid Evolution And Modernization of Leading-edge Infrastructure Necessary to Enhance (STREAMLINE) Small Cell Deployment Act" (S. 3157)
- The bill is focused, much like the recent FCC rulemaking efforts have, on limiting the actions local governments can take on small cell wireless facility siting, in an effort to make deployments cheaper, faster, and more consistent across jurisdictions (the major complaints raised by providers and tower companies).
- There are substantial differences between the Florida Statute and the proposed federal bill. Currently, does not carve out collocations on privately owned utility poles or utility poles owned by electric cooperatives or municipal electric utilities.



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## What's Next? "Super Preemptions"

- National trend – state preempts multiple areas with a single law or imposes financial penalties for violation by local gov't\*
  - AZ law allows withholding funds from local gov'ts that pass regulations that contradict state law
  - TX sanctuary city bill provided financial penalties such as withholding grant money and removal of officials from office
  - OK bill prohibited local regulations that do not conform to state law
- Super Preemptions provide political "cover" – targets local regulations that may be popular with constituents (minimum wage laws, LGBTQ regs, Styrofoam bans) under broad, general preemption

\*See Riverstone-Newell, 47 J. Federalism at 408-18.



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## What Can YOU Do?

- Establish & foster relationships with your legislative delegation
- Engage key influencers in your community as allies
- Counter hyperbole and anecdotes with FACTS
- If your city retains lobbyists – ensure they help, not harm (some lobbyists represent private interests AND your city)
- Keep your city focused on municipal purposes and functions
- Educate – yourself and others
- Avoid partisanship but understand your audience



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## Stay Focused on Core Municipal Issues

- Just because the state or federal government is not acting on something does not make it a municipal issue
- Be responsive with your services and judicious with your regulations
- Ask:
  - **IS THERE A NON-REGULATORY MEANS TO ACHIEVE THE OBJECTIVE?**
  - Does this issue directly concern core municipal services or functions?
  - Is the action requested by a special interest group? Is it a credible source?
  - Is there a factual or scientific basis for the action?
  - Does the action provide adequate standards to those affected?
  - **Is it possible to do a cost-benefit analysis to determine impacts to property values, impacts on businesses or commercial activity?**



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