

MEMORANDUM

TO: Tandra Davis, Town Manager, Town of Dundee, Florida

FROM: Frederick J. Murphy, Jr., Esquire, Town Attorney
W. A. “Drew” Crawford, Esquire, Assistant Town Attorney
Seth B. Claytor, Esquire, Assistant Town Attorney

DATE: September 26, 2023

IN RE: Chapter 2023-309, Laws of Fla. (CS/CS/SB 170 (2023))
Business Impact Estimate Requirements and Challenges to Local Ordinances

Summary

Chapter 2023-309, Laws of Florida (the “Act”) adjusts the general requirements for local ordinance adoption by Florida cities. Beginning October 1, 2023, local ordinances adopted in Florida may be subject to challenge based upon the government’s failure to produce a “business impact estimate” document as part of its ordinance adoption process. A “business impact estimate” is a summary containing various staff- or consultant-produced figures that reflect how a local government believes a proposed new ordinance will impact local businesses in the community. The estimate must be published on the local government’s website and include certain required information, such as the proposed ordinance’s purpose, estimated economic impact on businesses, and compliance costs.

Additionally, the Act imposes certain conditions on lawsuits brought by any party to challenge the legal validity of local ordinances as preempted by state law, arbitrary, or unreasonable. In these cases, the Act:

- Requires the local government to suspend enforcement of an ordinance subject to such legal challenge, under certain circumstances;
- Requires the court to give those cases in which enforcement of the ordinance is suspended priority over other pending cases and render a preliminary or final decision as expeditiously as possible; and,

- Provides that a court may award up to \$50,000 in attorney fees to a prevailing plaintiff who successfully challenges an ordinance as arbitrary or unreasonable.

If a court invalidates an ordinance for being arbitrary or unreasonable, or potentially, for the government's failure to generate a business impact estimate, this ruling may result in imposition of attorneys' fees against a city if an ordinance is later determined to be arbitrary or unreasonable.

The Act also provides that properly noticed consideration of a proposed ordinance may be continued to a subsequent meeting under certain circumstances without further publication, mailing, or posted notice. This part of the Act countermands a recent Fourth District Court of Appeals ruling requiring re-advertising under the prior law.

Specific Bill Analysis

Section 1: Prevailing plaintiff attorney fees authorized in certain actions challenging local ordinances (modifies § 57.112, F.S.)

- Courts may award attorney fees, costs, and damages to a prevailing plaintiff who challenges an ordinance for being arbitrary or unreasonable.
- Fees, costs, and damages are capped at \$50,000. No recovery of fees for litigating amount of fees. No double recoveries for claims involving the same ordinance. This section applies only to ordinances adopted on or after October 1, 2023. Amendments to existing ordinances are subject to this section only to the extent the amendatory language gives rise to the claim.
- Does not appear to change standing requirements for challenging ordinances enacted pursuant to a local government's police powers. *See Boucher v. Novotny*, 102 So. 2d 132, 134-35 (Fla. 1958) (requiring special damages differing in kind from damages suffered by the community as a whole); *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972); *Jack Eckerd Corp. v. Michels Island Village Pharmacy, Inc.*, 322 So. 2d 57 (Fla. 2d DCA 1975).
- Does not appear to change the standard of judicial review or the required burden of proof. (Ordinances are presumed valid and constitutional. An ordinance that is within the legislative power of a county or municipality is presumed to be valid. *See Panama City Beach Community Redevelopment Agency v. State*, 831 So. 2d 662, 669 (Fla. 2002); *Orange County v. Costco Wholesale Corp.*, 823 So. 2d 732, 736 (Fla. 2002); *Lowe v. Broward County*, 766 So. 2d 1199, 1203-04 (Fla. 4th DCA 2000). A court is required to indulge every reasonable presumption in favor of an ordinance's constitutionality. *Miami Dade County v. Malibu Lodging Investments, LLC*, 64 So 3d 716, 719 (Fla. 3d DCA 2011); *Hoesch v. Broward County*, 53 So. 3d 1177, 1180 (Fla. 4th DCA 2011); *City of Kissimmee v. Florida Retail Federation*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005).)

- Where an ordinance is challenged on the grounds of unreasonableness or unconstitutionality, the burden is on the person alleging its invalidity to establish that fact. *Orange County v. Costco Wholesale Corp.*, 823 So. 2d 732, 736 (Fla. 2002).
- Fee award appears to be discretionary ("may").
- Does not appear to change the definition or application of the legal term of art "arbitrary or unreasonable."

Note: All ordinances enacted pursuant to an exercise of a local government's police power must be reasonable and not arbitrary. *Classy Cycles, Inc. v. Panama City Beach*, 301 So. 3d 1046, 1051 (Fla. 1st DCA 2019) ("The modern test [of the validity of an ordinance] is an application of the rational basis test, which requires that the ordinance in question be reasonable and not arbitrary."); *Bal Harbour Village v. Welsh*, 879 So. 2d 1265, 1267 (Fla. 3d DCA 2004). Courts use the "fairly debatable" test in determining the reasonableness of an ordinance. *D.R. Horton, Inc. - Jacksonville v. Peyton*, 959 So. 2d 390, 398 (Fla. 1st DCA 2007); *Martin County v. Section 28 Partnership, Ltd.*, 772 So. 2d 616, 619 (Fla. 4th DCA 2000), *cert. denied* 534 U.S. 1114 (2002). This is a highly deferential standard because citizens of a municipality should be able to determine through the city's proper officials "what rules are necessary for their own local government." *State v. Sawyer*, 346 So. 2d 1071, 1072 (Fla. 3d DCA 1977), *cert. denied* 436 U.S. 914 (1978); *Sarasota County v. Walker*, 144 So. 2d 345, 348 (Fla. 2d DCA 1962). If the object of an ordinance is one that reasonable people would find fairly debatable as to its reasonableness, the ordinance will be upheld. *Id.*; *Hardage v. City of Jacksonville Beach*, 399 So. 2d 1077, 1079 (Fla. 1st DCA 1981). If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. *City of Miami v. Kayfetz*, 92 So. 2d 798 (Fla. 1957).

Sections 2 (counties) & 5 (municipalities): Continuance of properly noticed ordinance to a subsequent meeting.

- Creates a new subsection 7 in § 125.66 and new paragraph (d) in § 166.041(3), F.S., to clarify that consideration of a proposed ordinance at a meeting properly noticed under § 125.66 and § 166.041 may be continued to a subsequent meeting if, at the meeting, the date, time, and place of the subsequent meeting is publicly stated. No further publication, mailing, or posted notice is required but the continued consideration must be listed in an agenda or similar communication produced for the subsequent meeting.
- The bill specifies this clarification is remedial in nature. This revision was prompted by a recent decision by the Fourth District Court of Appeal in *Testa v. Town of Jupiter Island*, 360 So. 3d 722 (Fla. 4th DCA 2023).

Sections 3 (counties) & 6 (municipalities): Requires counties and municipalities to prepare a "Business Impact Estimate" prior to enacting ordinances:

- Requires cities and counties to prepare a "business impact estimate" before adoption of an ordinance.
- The use of an accountant or other financial professional is not required.
- The estimate must be posted on the local government's website no later than the date the ordinance is published.
- The estimate must include:
 - A summary of the ordinance and its public purpose;
 - A reasonable estimate of the direct economic impact of the ordinance on private, for-profit businesses in the local government, including any direct compliance costs the businesses may incur;
 - Identification of any new charge or fee on the businesses;
 - An estimate of the local government's regulatory costs including any revenues associated with any new charges or fees;
 - The estimated number of businesses impacted; and
 - Any additional information the local government deems useful.
- Exemptions from business impact estimate requirements appear broad but are undefined and will be subject to judicial interpretation as the law matures. Exemptions include:
 - Ordinances required to comply with federal or state laws or regulations;
 - Ordinances relating to the issuance or refinancing of debt;
 - Ordinances relating to the adoption of budgets or budget amendments, including revenue sources necessary to fund the budget;
 - Ordinances required to implement a contract or agreement, including grants or financial assistance;
 - Emergency ordinances;
 - Ordinances relating to procurement;
 - Ordinances enacted to implement Part II, Ch. 163, including land development regulations, zoning, development orders, development agreements, and development permits;

- Ordinances implementing Sections 190.005 and 190.046 (relating to community development districts);
 - Ordinances implementing Section 553.73 of the Florida Building Code; and
 - Ordinances implementing Section 633.202 of the Florida Fire Prevention Code.
- The bill does not appear to provide a legal mechanism or cause of action for a person to challenge the sufficiency of the business impact estimate, other than a direct challenge to the ordinance's sufficiency alleging arbitrariness or unreasonableness.
 - The bill uses the term "reasonable" as a modifier in several places, suggesting the local government simply make a reasonable good faith (i.e., honest) effort to address the law's minimum criteria.
 - The Act does not expressly specify consequences for failure to prepare a business impact estimate when required. The requirement to prepare the estimate is established as a new Paragraph (4) in Section 166.041, entitled "Procedures for adoption of ordinances and resolutions", and Paragraph (3) in Section 125.66 entitled "Ordinances; enactment procedure." Presumably then, preparation and posting of the business impact estimate should be treated by local governments as a mandatory procedural requirement that is essential to the validity of the ordinance, *See, e.g., Parsons v. City of Jacksonville*, 295 So. 2d 892 (Fla. 1st DCA 2020); *Coleman v. City of Key West*, 807 So. 2d 84 (Fla. 3d DCA 2001); *Healthsouth Doctors' Hospital, Inc. v. Hartnett*, 622 So. 2d 146 (Fla. 3d DCA 1993).
 - The Act does not appear to require use of a specific form or method (other than stating minimum requirements to be included) and it does not appear to specify the level of detail that must be provided for each criterion. In the absence of express requirements for detail, a set of brief concise statements with relevant information that a reasonable mind would consider sufficient to make basic conclusions regarding the various subjects should be enough. *See, e.g., Hayes v. Monroe County*, 337 So. 3d 442, 445-46 (Fla. 3d DCA 2022); *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

Note: Regarding municipal staff's role in preparing a business impact estimate, it seems to be well settled in Florida that words spoken or written by public servants in legislative activities are protected by absolute privilege from liability, nor is it questioned in Florida that such absolute immunity extends to county and municipal officials in legislative or quasi-legislative activities. *McNayr v. Kelly*, 184 So. 2d 428 (Fla. 1966); *Hauser v. Urchin*, 231 So. 2d 6 (Fla. 1970). Staff should feel free to express appropriate information regarding economic impacts.

- The bill does not prevent local governments from providing additional information in the business impact estimate, such as potential positive fiscal impacts on other constituent groups.

Sections 4 (counties) and 7 (municipalities): Suspension of ordinance enforcement

- The local government must suspend enforcement of an ordinance that is the subject of an action alleging the ordinance is expressly preempted, arbitrary, or unreasonable if:
 - *The action is filed no later than 90 days after ordinance adoption;*
 - *The plaintiff requests suspension in the initial complaint or petition; and*
 - *The local government has been served a copy of the complaint or petition.*
- If the local government prevails in the action and the plaintiff appeals, the local government may begin enforcing the ordinance 45 days after entry of the lower court order unless the plaintiff obtains a stay.
- Directs courts to "prioritize" cases in which ordinance enforcement has been suspended.
- Authorizes a court, on its own or upon motion of a party, to impose sanctions if a pleading, motion, or other paper is signed or filed for an improper purpose.
- Certain ordinances are exempt from the new suspension rule:
 - Ordinances required to comply with federal or state laws or regulations;
 - Ordinances relating to the issuance or refinancing of debt;
 - Ordinances relating to the adoption of budgets or budget amendments, including revenue sources necessary to fund the budget;
 - Ordinances required to implement a contract or agreement, including grants or financial assistance;
 - Emergency ordinances;
 - Ordinances relating to procurement;
 - Ordinances enacted to implement Part II, Ch. 163, including land development regulations, zoning, development orders, development agreements, and development permits;
 - Ordinances implementing Sections 190.005 and 190.046 (relating to community development districts);
 - Ordinances implementing Section 553.73 of the Florida Building Code; and

- Ordinances implementing Section 633.202 of the Florida Fire Prevention Code.

Ultimate Advice

Given the background of this act, the lack of judicial interpretations, and the potential exposure for attorneys' fees, we recommend the following be implemented for ordinances to be adopted on or after October 1, 2023:

- (a) Perform a business impact statement for all ordinances falling outside of the law's express exemption categories.
- (b) Designate an appropriate member of the City's staff to generate business impact statements or consider contracting with either a private consultant or the appropriate regional planning council to generate business impact statements.
- (c) Ensure that each new ordinance expressly references and includes therein the business impact statement generated for the same. For exempt ordinances, ensure that any possible exemption from the impact statement requirement be recited in the ordinance's recitals or "whereas" clauses.
- (d) Adopt a resolution implementing the statute as a matter of municipal policy, acknowledging and not waiving exemption from the statute, and include a user fee to recoup the costs of preparing business impact statements from private parties that may seek adoption of certain ordinances.

Please let us know if you have any questions.