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PREEMPTING LOCAL GOVERNMENT AUTHORITY
IN FLORIDA

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ICON OF COMPREHENSIVE PLANNING BOTH
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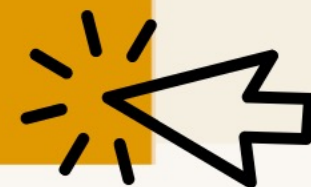
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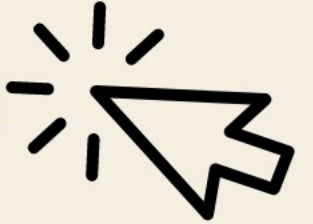


- **2022 FLORIDA LEGISLATIVE PREVIEW**
WEDNESDAY, DECEMBER 8, 2021, 12:00 P.M. – 1:30 P.M., EST
- **2022 FLORIDA LEGISLATIVE UPDATE**
WEDNESDAY, FEBRUARY 16, 2022, 12:00 P.M. – 1:30 P.M., EST
- **2022 FLORIDA LEGISLATIVE WRAP UP**
WEDNESDAY, MARCH 23, 2022, 12:00 P.M. – 1:30 P.M., EST
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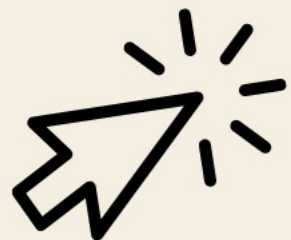
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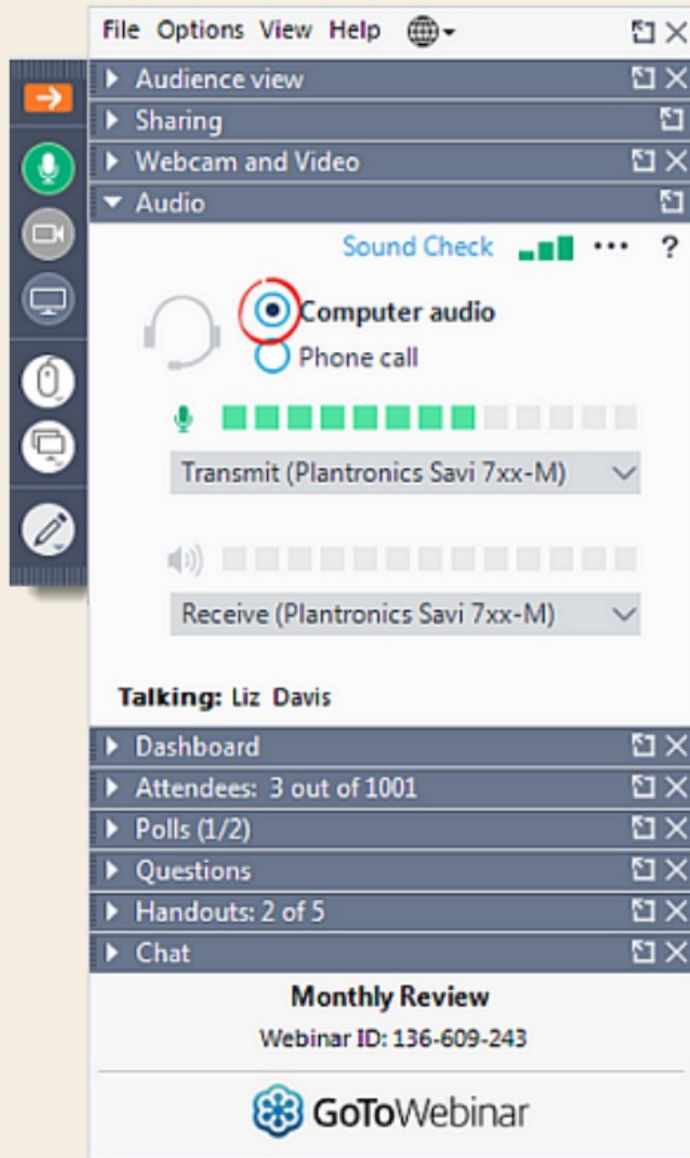
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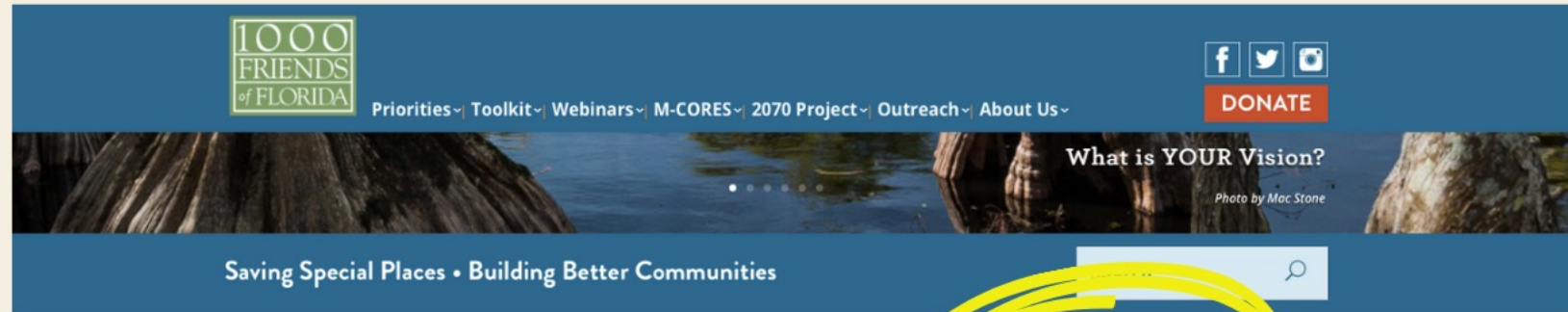
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1000 Friends of Florida Model Property Rights Element

See Our Model Property Rights Element

With the passage of HB 59 during the 2021 session, each community in Florida is required to adopt a property rights element into its comp plan.

[Find out more](#)



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1000 Friends has a 4-star rating from Charity Navigator and is ranked Platinum by GuideStar. These are the highest rankings possible and attest to 1000 Friends' commitment to sound financial management.

What's New?

1000 Friends' Model Property
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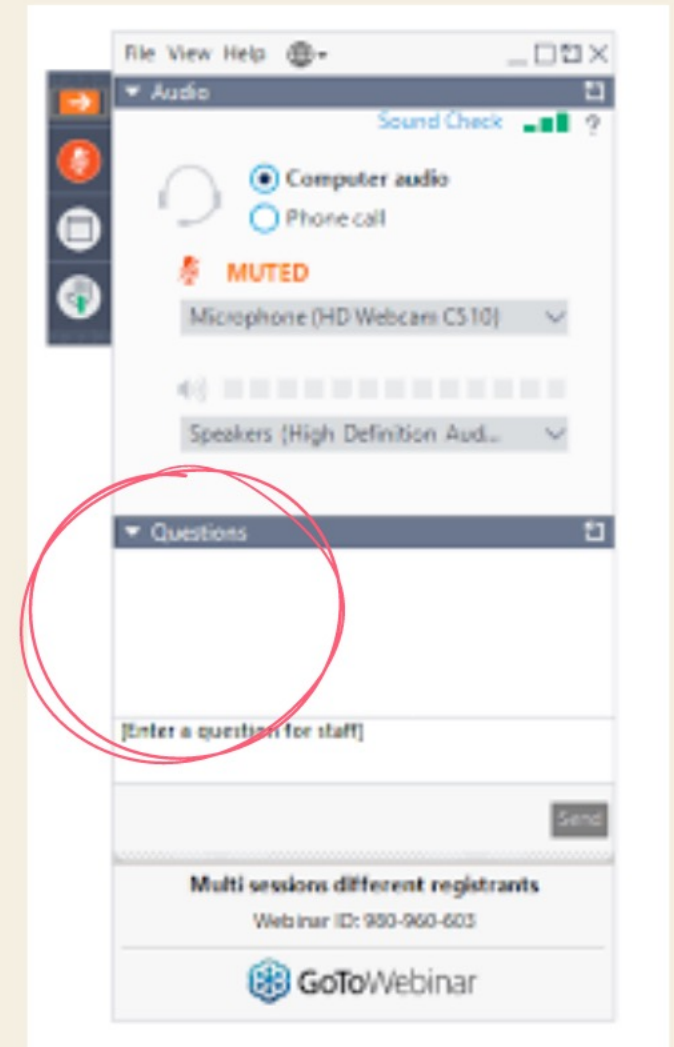
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PRESENTERS





JANE WEST, J.D.

POLICY & PLANNING DIRECTOR

1000 FRIENDS OF FLORIDA

Works with citizens, providing guidance on critical growth and development issues facing communities across Florida, advocates before the Florida legislature, and coordinates legal advocacy efforts related to growth management

Has practiced law for 21 years, for the past 7 years owning Jane West Law, P.L., focusing on precedent-setting public interest land use and environmental cases throughout Florida
AV-rated attorney admitted to the U.S. Supreme Court, the 7th and 11th U.S. Court of Appeals and the Southern and Middle Districts of Florida

Previously practiced law in Portland, Maine at Conservation Law Foundation, and Jupiter and West Palm Beach, Florida
Law degree from the Shepard Broad Law Center at Nova Southeastern University and B.A.s in both International Relations and Fine Arts from the University of South Florida



REBECCA A. O'HARA

DEPUTY GENERAL COUNSEL FLORIDA LEAGUE OF CITIES

Rebecca has over 20 years' experience representing private and public sector clients in local government, environmental, land use and administrative law. As Deputy General Counsel for the Florida League of Cities, Rebecca provides legal counsel and legislative advocacy on variety of municipal issues. She advises the League's Utilities, Natural Resources & Public Works Legislative Policy Committee and serves as Executive Secretary of the Florida Municipal Attorneys Association.

Rebecca is a member of Leadership Florida Class 28, is Florida Bar Board Certified in City, County, and Local Government Law, and serves on the Florida Bar's Governmental and Public Policy Advocacy Committee. She graduated with High Honors from the Florida State University College of Law.



VIRGINIA "GINGER" DELEGAL

EXECUTIVE DIRECTOR FLORIDA ASSOCIATION OF COUNTIES

Ginger is an honors graduate of the Mercer University School of Law and a summa cum laude graduate of Salem College in North Carolina. She spent the first 10 years of her legal career in private practice with Nabors, Giblin & Nickerson where she was a shareholder and a member of the General Governmental Law Group. Ms. Delegal has continued her close relationship with local governments, joining the team at the Florida Association of Counties as General Counsel in April of 2003, and in 2017 assuming the role of Executive Director.

Ms. Delegal is a member of the Florida Bar and the State Bar of Georgia. Ms. Delegal is also the recipient of the Florida Bar's City, County, Local Government Section's 2017 Ralph A. Marsicano Award. Ms. Delegal is married to Mark Delegal, also a lawyer. They have three daughters.

JANE WEST



Preemption Primer

Jane West, Esq.
Policy & Planning Director



What is preemption?

- In the United States, preemption is a legal doctrine that allows upper levels of government to restrict or even prevent a lower-level government from self-regulating. While it is most often thought of in the context of the federal government preventing state regulation, preemption is increasingly used as a tool by states to limit cities, counties, and other lower-level municipalities from legislating across a broad array of issues.



Dillon's Rule or Home Rule?

The extent of a state's ability to preempt local government depends on a variety of factors. These include whether the state grants local governments the power to govern (known as Home Rule) or whether the state follows Dillon's Rule, which only permits local governments to legislate where a state has expressly allowed.



Dillon's Rule

- Local Governments can exercise the following powers and NO OTHERS:
- Those granted in express works;
- Those necessarily implied and incident to the powers expressly granted;
- Those indispensable to accomplishment of the purposes of the corporation



Judge John Dillon

History of local government control in Florida

- Prior to the 1968 revision of the Florida Constitution, local governments had only those powers expressly granted them by law.

Constitution or Form of Government for the People of Florida.

We, the people of the State of Florida by our delegates in Convention assembled, in the city of Tallahassee, on the 25th day of October, in the year of our Lord 1865, and of the Independence of the United States, the 90th year, in order to secure to ourselves and our posterity the enjoyment of all the rights of life, liberty and property, and the pursuit of happiness, do mutually agree each with the other, to form the following constitution and form of government in and for the said State.

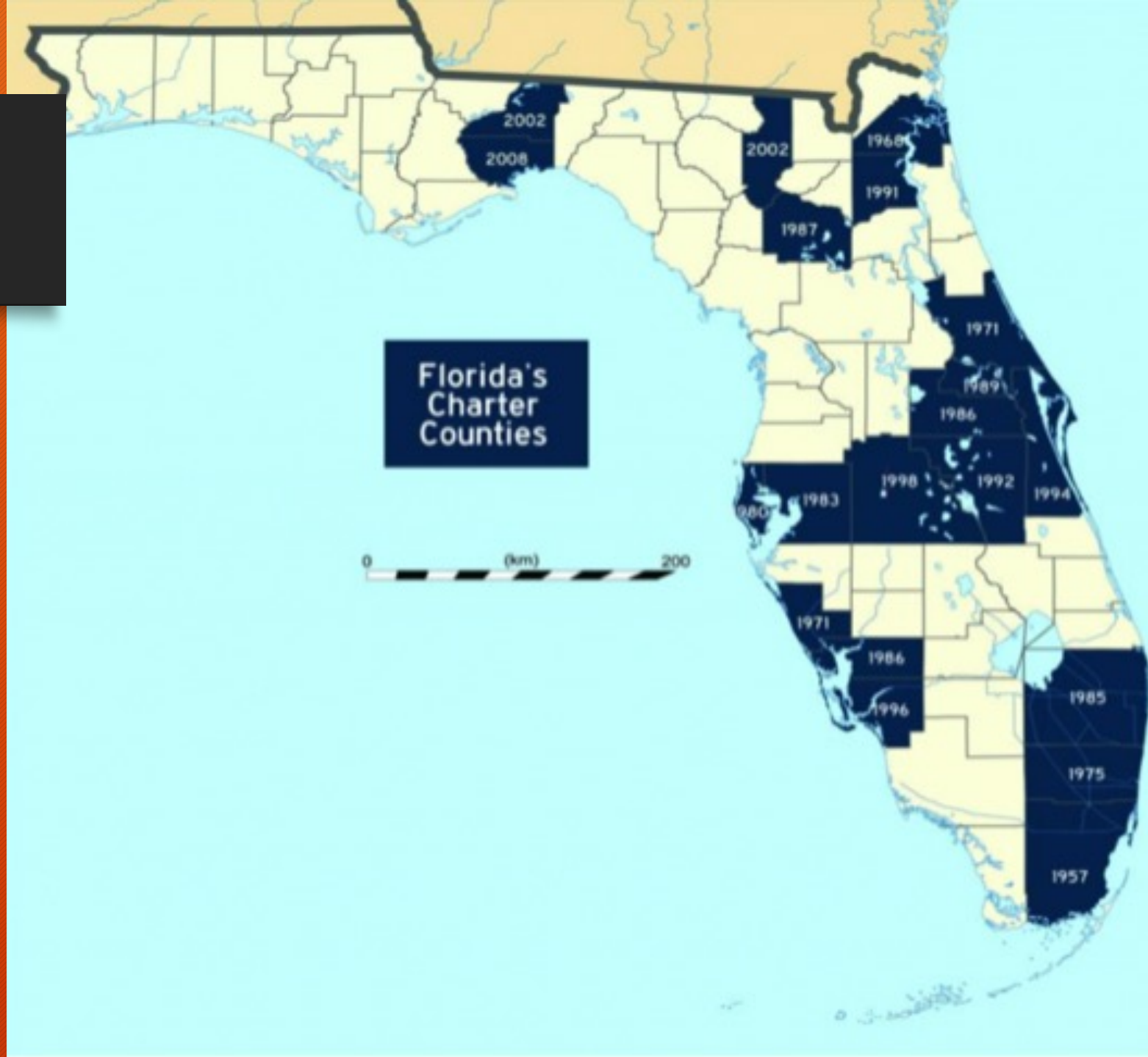
Article I. Declaration of Rights.

That the great and essential principles of liberty and free government may be recognized and established, we

1968 Constitutional Amendment Article VIII, Sec. 2(b)

“Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise power for municipal purposes except as otherwise provided by law.”

The Constitutional Amendment authorized local home rule powers for both cities and charter counties, except for fiscal Home Rule. The state reserves all taxing authority unto itself.



The Florida Supreme Court limits Home Rule

The first Florida Supreme Court case discussing the 1968 amendment significantly narrowed the amendment's application and suggested that, unless a city's action was clearly reasonable, any dispute regarding the action should be resolved *against the local government*. On the heels of this decision, the legislature, in 1973, enacted the Municipal Home Rules Power Act (MHRPA), now codified in Ch. 166 of the Florida Statutes.



Municipal Home Rules Power Act (MHRPA)

The MHRPA guarantees that local governments retain governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services. This power may not be curtailed except as otherwise provided by law.

The MHRPA effectively foreclosed the preexisting presumption that local government action must be narrowly confined to only the immediate needs of the residents. The act further dictated that local governments should be allowed to act if not clearly directed otherwise by the state. Both the Florida Constitution and state statutes express a preference that, absent some necessity for a statewide enactment, local officials should deal with problems relating to the health and welfare of their citizens.

The MHRPA specifically states that local governments should be able to act unless otherwise provided by law. In Florida, courts have interpreted this provision to mean that local government action should only be prohibited if the action is either:

- 1) preempted by state law; or
- 2) in conflict with state law.



- State preemption precludes a local government from exercising authority in a particular area and involves inconsistency with the state constitution or state statute. Preemption may exist in one of two ways: it may be either expressed or implied.



Express Preemption

- Express preemption occurs when a federal or state law expressly states that it is intended to preempt a state or local government law.
- Example: A state cannot pass its own air and water regulations if they interfere with existing state federal laws enforced by the EPA.



Implied Preemption

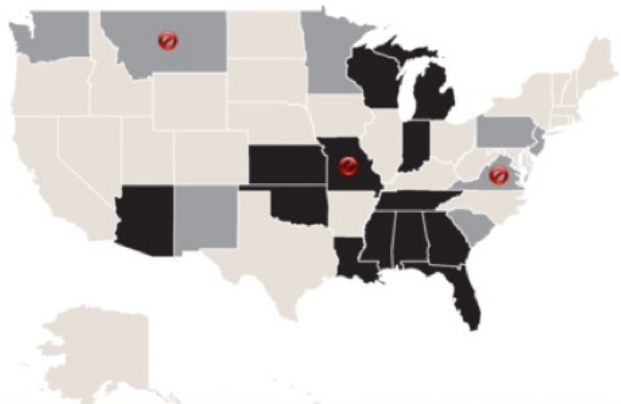
- Implied preemption happens when a court finds that a law is preemptive even in the absence of an express preemption clause. The only way to guarantee that a federal or state law will not preempt state or local laws is to include a non-preemption clause (aka a “savings clause”)





Paid Sick Days Preemption Bills 2015

- State with no preemption law or bill
- State with preemption law
- State with preemption law vetoed by the governor but overridden in 2015
- State with preemption law and bill in 2015 (gray mouseover)
- State with preemption bill in 2015
- State with preemption bill in 2015 and previous years (orange mouseover)
- State with preemption bill vetoed by the governor in 2015



Arguments in favor of state control

- Statewide policy, particularly in terms of the regulation of businesses, creates a better business climate by reducing uncertainty.
- Allows states to grant authority to local governments to be the lead agencies on local scale issues (e.g. planning, zoning) and to experiment with new approaches at minimum risk.
- Provides local officials “cover” for not acting on the desires of the community when what the community wants is bad for the jurisdiction.
- Allows state governments to curb the worst aspects of irresponsible, corrupt, or uncooperative local governments.
- Permits states to protect individual rights that could too easily be trampled by the parochial nature of local communities.

What is Home Rule?

Local autonomy, or Home Rule, means: “the power of local government to act in a ‘purposeful goal-oriented’ fashion, without the need for a specific grant of power and ‘the power of localities to act without fear of the oversight authority of higher tiers of the state.’”



Arguments in favor of Home Rule

- Local communities should be allowed to vary in order to promote experimentation and strengthen innovation laboratories.
- Empowering local governments to run their own local affairs frees state officials to focus on state-level matters.
- Citizens will be more engaged in local affairs as they can see the effects of their participation.
- Local officials will be more responsive to citizen demands than state officials who are far removed from the community.
- A “one-size-fits-all” state approach fails to recognize that different communities have different needs, values, and priorities.

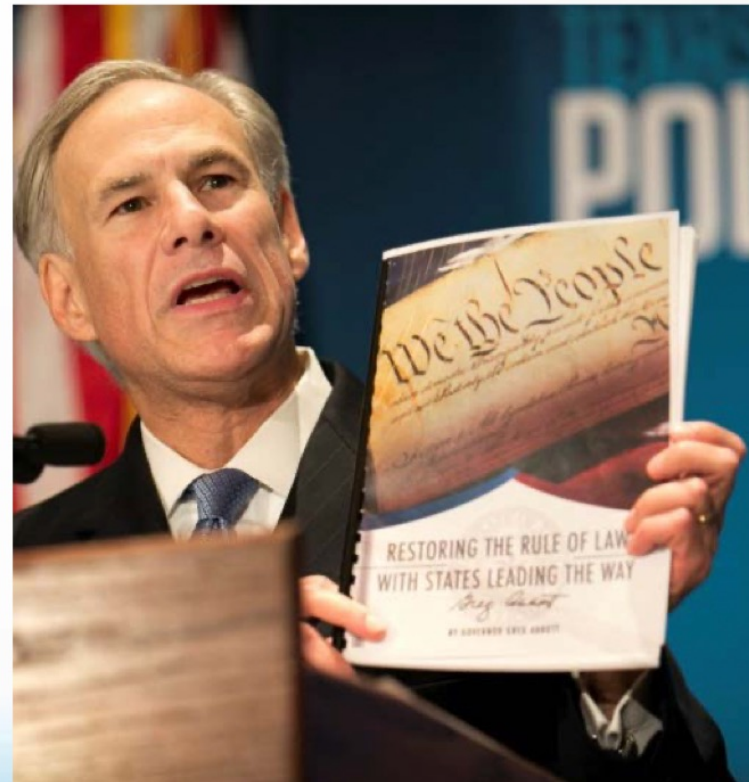
Who knows best what the community needs?

- “It’s been touted that they [the legislators] know better than we do. Wrong. Absolutely wrong. We know what’s best for our neighborhoods. We know what’s best for our constituency. We live it every day.” Lake Clarke Shores, FL Town President Pro Tem, Robert Shalhoub



“As opposed to the state having to take multiple rifle-shot approaches at overriding local regulations, I think a broad-based law by the state of Texas that says across the board, the state is going to pre-empt local regulations, is a superior approach.”

Governor Greg Abbott
March 21, 2017



Over the last decade - Preemption on the rise

- Research has found a steady increase in bills interfering with local autonomy across the country since 2011. A 2018 survey by the National League of Cities Found:
 - 41 states preempted ride sharing
 - 28 preempted minimum wage
 - 23 preempted paid leave policies
 - 20 states restricted municipal broadband authority



2021 - Preemption on Steroids

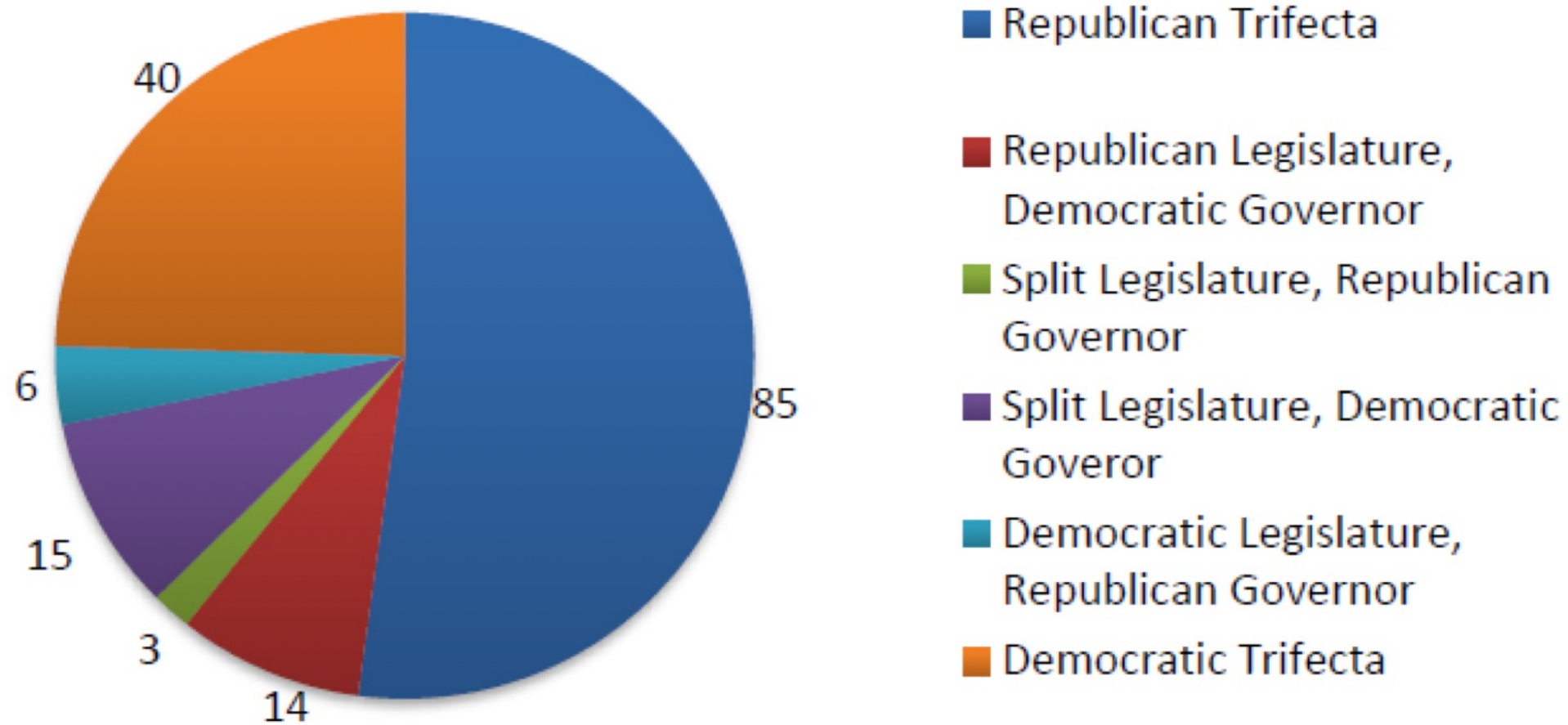


- The 2021 state legislative sessions resulted in over 400 preemption bills - more than twice the number of bills tracked during the 2019 session (the last full session year prior to the pandemic)*
- Case-by-case evidence suggests that preemption impedes economic, social and racial equity and local innovation.

• *Local Solutions Support Center



State Actions by Party Control





Jane West Law and
North Florida Coastal Caretakers present

St. Augustine Beach Plastic Bag Ban



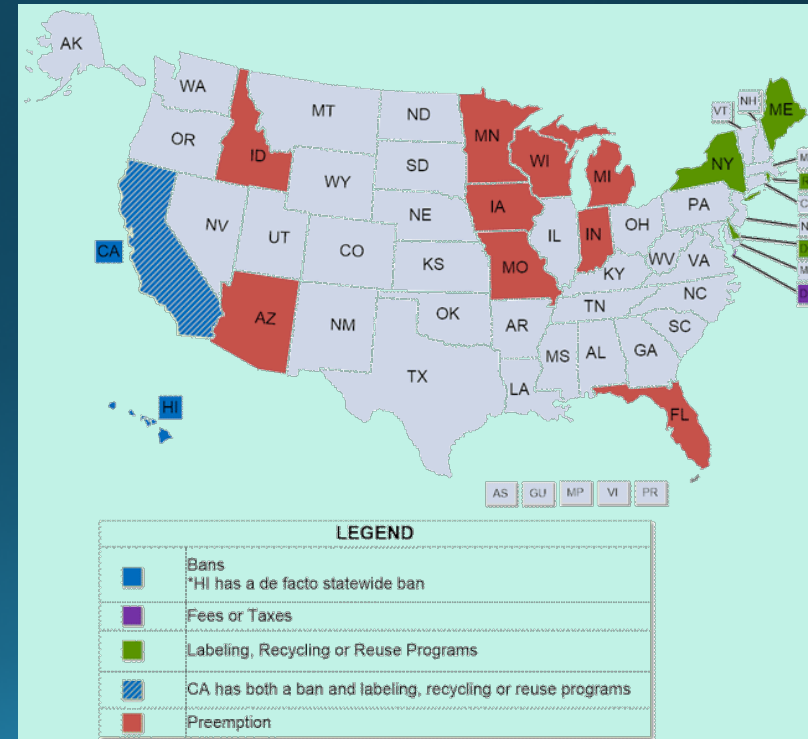
Ordinance Overview

- Prohibits sale, use or distribution of single-use carryout plastic bags by retailers within the City
 - Exempt bags – compostable carryout bags, bags used to protect food, prescription medication bags, dry cleaning bags, door hanger bags, newspaper bags, pet waste bags, yard waste bags, bags previously owned by consumer
- Allows for 1-year implementation period for transition time and the opportunity for businesses to find what works best for their establishment
- Encourages retail establishments to educate staff and consumers to use reusable bags



Existing Bag Bans

- Coral Gables
- Austin
- Cambridge
- Chicago
- Los Angeles
- San Francisco
- Seattle
- District of Columbia





Statistics

- In the U.S. alone, an estimated 380 billion plastic bags are used yearly
 - Due to the cost, less than 5% of plastic is recycled (EPA 2016)
- More than 10% of washed up debris on U.S. coastline (National Marine Debris Monitoring Program)
- **Over 250 plastic bags were collected in just 5 major cleanups hosted by NFCC (2016)**





Environmental Impacts

- Lightweight and cannot biodegrade easily
- When it rains, litter is transported to rivers eventually carrying the plastic bags into lakes or oceans
- Birds and other wildlife can become entangled in bags
- Sea turtles often mistake plastic bags for jellyfish and ingest them leading to starvation of the sea turtles



FRF threatened to sue the City of St. Augustine Beach unless the ordinance was revoked.

Unable to justify the risk of litigation and attorney fees, the City revoked the ordinance.



**Florida
Retail Federation**



What can local governments do in response?

- Defiance: Resist preemption and limitations. Risk litigation.
- Use legal powers to test the limits: take advantage of Home Rule, especially in Charter Counties.
- Referendum: Change state policies.
- Workaround: Find a path that is consistent state policies.
- Request additional power: Seek broad legislative authorization for subject matters that are currently left to state control.
- Advocacy and volunteer effort: Raise awareness through NGOs to create the preferred policy outcome.

Questions?

Thank you!



REBECCA O'HARA



Preempting Local Government Authority – The Recent Past

Rebecca O'Hara, Deputy General Counsel
Florida League of Cities, Inc.



Notable Preemptions – the Recent Past

- The League estimates there are over 150 express preemptions of municipal authority in the Florida Statutes
- Cannot be determined with precision
- Estimate does not include statutes that may be construed as an implied preemption
- Not all preemptions are bad. Example: Regulation of consumptive use of water, s. 373.217, F.S.
- Many older statutory preemptions exist to provide a uniform system of regulation over an area, or because a state agency is charged with having exclusive regulatory authority over something.
 - Florida Election Code
 - Florida Uniform Traffic Code
 - Regulation of the taking or possession of saltwater fish is expressly reserved to FWCC
- Most recent preemptions are intended to simply prevent any regulation at all (vacuum preemption)
 - Polystyrene & plastic bag preemptions
 - Preemption on regulation of residential building design elements

New Preemptions Passed in 2021

- CS/HB 403 Home-based Business
 - Prohibits most regulation of home-based businesses
- CS/CS/HB 839 Fuel Retailers
 - Prohibition on banning gas stations & related fuel infrastructure
- CS/CS/HB 919 Fuel Sources
 - Prohibition on restricting or prohibiting types of fuel sources or sources of energy production
- CS/CS/SB 896 Renewable Energy
 - Mandates that solar farms are a permitted use in all ag land use categories and zoning districts
- CS/SB 60 Code Enforcement
 - Prohibits code investigations based on anonymous complaint
- CS/CS/CS/HB 337 Impact Fees
 - Imposes limits on amount and frequency of impact fee increases
- CS/CS/CS/HB 401 Building Design
 - Prohibits regulation of certain “building design” (architectural) elements for 1- and 2-family homes

Other Recent Preemptions

- CS/SB 712 Environmental Resource Management (2020)
 - Prohibits local governments from granting legal rights to the natural environment
- SB 172 Florida Drug & Cosmetic Act (2020)
 - Preempts the regulation of sunscreen
- CS/HB 1159 Tree Ordinances (2019)
 - Restricts enforcement of tree ordinances against residential property owners that remove “dangerous” trees
- CS/CS/CS/HB 829 Attorney Fees & Costs (2019)
 - Mandatory attorney fees, costs & damages to successful plaintiff challenging an ordinance as being “expressly preempted”
- CS/CS/SB 1000 Communications Services (2017 & 2019)
 - Preempts and otherwise substantially restricts regulation of telecommunication and “5G” facilities on public property
- CS/HB 631 Customary Use (2018)
 - Prohibits ordinances based upon customary use (public’s right to use dry sand area of beach) except as authorized
- CS/CS/HB 1021 Construction (2017)
 - Prohibits imposition of building or design requirements that conflict with corporate or franchise branding or image standards
- CS/HB 7069 Charter Schools
 - Prohibits application of zoning and site development restrictions to charter schools/school conversions

Other Notable Examples & Ongoing Battles

- Short Term (Vacation) Rentals
- Regulation of Pet Stores (puppy mills)
- Fracking

What Can You Do?

- Preemption in a legal sense is state government taking power away from local government
- Preemption in a practical sense is state government taking power away from YOU
 - Citizens have far greater access and influence at local level
 - Compare state open meetings laws for local gov't vs state legislature
 - Compare frequency of meeting – year 'round vs 60 days
 - Compare opportunities for public input in local gov't vs state legislature
 - Compare public notice requirements for ordinances to public notice requirements for passing legislation

What Can You Do?

- Establish & foster relationships with your legislative delegation
- Engage key influencers (HOA's, non-profits, civic groups) as allies
- Avoid partisanship – preemptions arise from special interests; not political parties
- Exercise your power as a consumer – many preemptions are supported by large retailers and grocery stores
- Speak up to protect your own private property rights -- many preemptions are detrimental to the private property rights of the average homeowner
- Instead of “home rule” use terms like “local democracy” “local decision-making” or “local control”
- Instead of “preemption” – use “state interference” instead

Thank You



GINGER DELEGAL



1000 Friends of Florida State Preemption of Local Government



Ginger Delegal
Executive Director
Florida Association of Counties
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850-294-9295
November 10, 2021

Opening Thoughts on Preemption

“New” Preemptions*

Started around turn of 21st century; rapid after 2010

More aggressive form of intentional and extensive preemption of local law making

Nature of new preemptions

Deregulatory and sweeping

Partisan and ideological

Punitive

*Source of phrase: The New Preemption Reader: Legislation, Cases and Commentary on the Leading Challenge in Today's State and Local Government Law; Briffault, Richard, Davidson, Nestor M., Reynolds, Laurie; West Academic Publishing 2019.

Special Session 2021B

- SB2B/HB1B: Reject COVID-19 Vaccine Mandates
 - Private Employers
 - Public Employers
 - Parental Decisions
 - Fines & Parent Cause of Action
- SB 4B/HB 3B: Pubic Records Exemption of Certain Private Health Care/Religious Info
- SB 6B/HB 5B: Begin Withdrawing from OSHA
- SB 8B/HB 7B: Remove Authority of State Health Officer to Order Vaccinations

2022 Legislative Session: SB 280/HB 403

Requires a **business impact statement** adoption before enactment

- Public purpose
- Reasonable connection between the public purpose of the ordinance's impacts
- Estimated economic effect of the ordinance on businesses inside and outside the city/county; adverse and beneficial; direct and indirect
- Estimate of the ## of businesses likely impacted
- Analysis ordinance is likely to deter/encourage formation of new businesses
- Analysis of the extent the ordinance will impede the ability of businesses to compete statewide and other domestic markets
- Scientific basis of ordinance
- Alternatives considered
- Other

2022 Legislative Session: SB 280/HB 403

City/county must **suspend enforcement** of the ordinance when it is challenged as

- Preempted by state law
- Is arbitrary or unreasonable
- Is otherwise prohibited by law

IF

- Action is filed no later than 20 days after effectiveness;
- Petitioner requests suspension; and
- City/county has been served

Attorneys fees and costs can be awarded

2022 Legislative Session: SB 280/HB 403

Judicial Proceeding

- Court must prioritize case over other pending cases and issue a preliminary or final decision expeditiously
- In determining arbitrary/unreasonableness, court must use, at least, the following factors:
 - Extent to which ordinance protects health, welfare, safety and quality of life of residents;
 - Impact of the ordinance on the personal rights/privileges of residents;
 - Total economic impact of the ordinance;
 - The business impact statement

2022 Legislative Session: SB 280/HB 403

Does not apply to:

- Emergency ordinances
- Ordinances under Chapter 163, F.S., Part II (growth policy, county/municipal planning; LDRs)
- Florida Building Code
- Florida Fire Prevention Code

2022 Legislative Session: SB 280/HB 403

Examples

- Vacation rentals
- Transportation network companies
- Prohibition of retail sale of puppies/kittens
- Alcohol sales
- City of Key West cruise ship restrictions
- Home based businesses

2022 Legislative Session: SB 620

Claim for **business damages**:

- Business has engaged in a lawful business in Florida for at least three years
- City/county ordinance or charter amendment
- Will cause a reduction of at least 15% of the business' revenue or profit

Except:

- Ordinance/charter required to comply with state/federal law
- Emergency ordinances, declarations, orders under State Emergency Management Act
- Temporary emergency ordinance effective only 90 days
- Ordinance/charter that increases economic freedom

2022 Legislative Session: SB 620

Presuit procedures

- Offers/counteroffers
- If case is settled pre trial, the business still gets attorney fees and costs

Trial by jury unless business elects bench trial

Enactments or amendments on or after July 1, 2022

Not applicable to business damages in eminent domain
(Chapter 73)

2022 Legislative Session: SB 620

Examples

- Similar to SB 280
- Alcohol sales
- Key West cruise ships
- Tax & finance area
- Utilities

2022 Legislative Session: Others

HB 75 - Limiting COVID-19 Restrictions

SB 592 - Face Covering Mandates

SB 594 - Discrimination On The Basis Of Covid-19 Vaccination Or
Postinfection Recovery Status

HB 259 - Photovoltaic Solar Installations

HB 325/SB 512 - Vacation Rentals

HB 445/SB 696 - Transportation Network Companies

SB 518 - Residential Home Protection

2022 Legislative Session: Repealers

- HB 105/ SB 224: Regulation of Smoking by Counties and Municipalities/ Regulation of Smoking in Public Places
- SB 152: Supermajority Vote for Legislative Preemption
- SB 316/HB 6025: Preemption of Tree Pruning, Trimming, and Removal
- SB 580/HB 6017: Rent Control Measures
- HB 6033: Preemption of the Regulation of Vacation Rentals
- SB 496/HB 6049: Preemption of Firearms and Ammunition
- HB 6003: Legal Rights of the Natural Environment

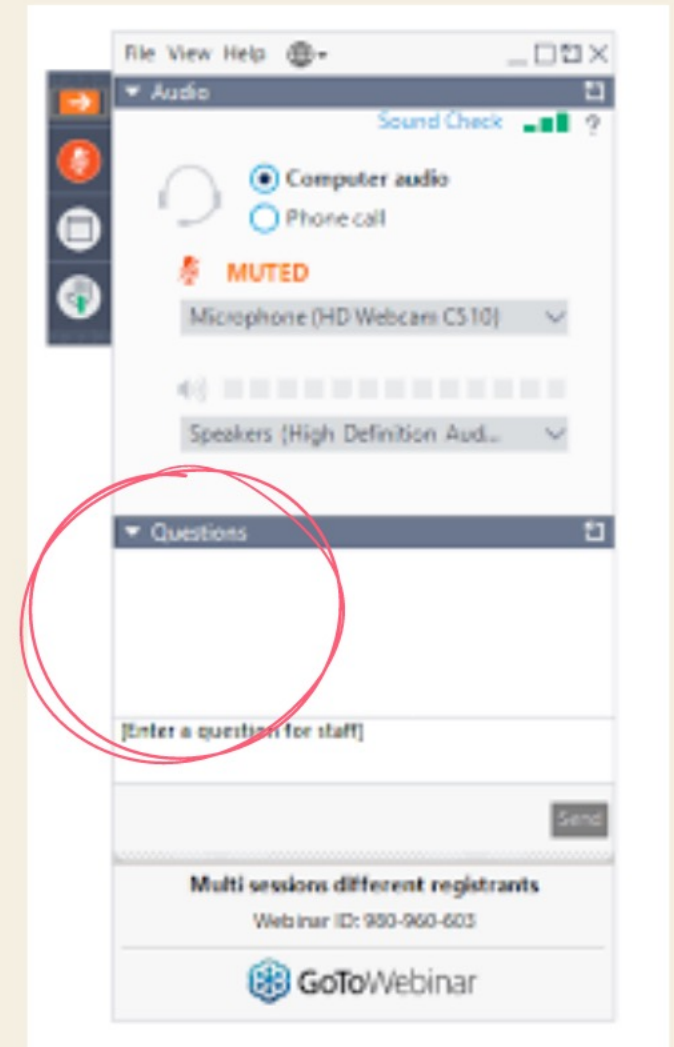
Questions & Comments

QUESTIONS & ANSWERS

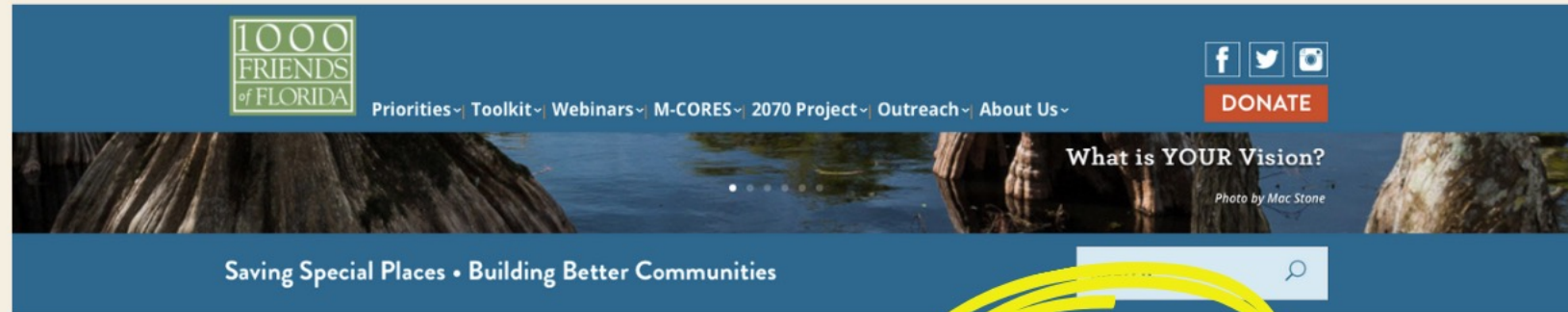


PLEASE ASK QUESTIONS!

- CLICK ON ARROW AT TOP RIGHT OF YOUR SCREEN TO MAXIMIZE CONTROL PANEL
- CLICK ARROW NEXT TO "QUESTIONS" TO MAXIMIZE THE QUESTIONS BOX AND TYPE YOUR QUESTION
- PLEASE REFER TO SLIDE NUMBER AND/OR SPEAKER WHEN YOU POST YOUR QUESTION
- PLEASE KEEP YOUR QUESTIONS SUCCINCT.
- STAFF WILL ASK THE PRESENTERS QUESTIONS, AS TIME PERMITS.



POWERPOINT WILL BE POSTED UNDER "WHAT'S NEW" AT WWW.1000FOF.ORG



Find Out More . . .

**1000 Friends
of Florida**

**Model Property
Rights Element**

See Our Model Property Rights Element

With the passage of HB 59 during the 2021 session, each community in Florida is required to adopt a property rights element into its comp plan.

[Find out more](#)



Did you know?

1000 Friends has a 4-star rating from Charity Navigator and is ranked Platinum by GuideStar. These are the highest rankings possible and attest to 1000 Friends' commitment to sound financial management.

What's New?

1000 Friends' Model Property
Rights Element

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Braverman](#)



PROFESSIONAL CERTIFICATION CREDITS

- 1.5 AICP CM LEGAL CREDITS FOR PLANNERS (#9219024)
- 2 CLE FOR FLORIDA ATTORNEYS (#210633IN)
- 1 CEC FOR CERTIFIED FLOODPLAIN MANAGERS
- 1.5 CREDITS FOR FLORIDA LANDSCAPE ARCHITECTS
(DBPR #0012534, PVD 151)

FOLLOW-UP EMAIL TO THE **LIVE WEBINAR** WILL INCLUDE:

- A **LINK TO A SURVEY** TO HELP US IMPROVE FUTURE WEBINARS
- A **CERTIFICATE OF ATTENDANCE** (USE GOOGLE CHROME TO DOWNLOAD)

CREDITS FOR PAST WEBINARS ARE AVAILABLE AT
1000FOF.ORG/UPCOMING-WEBINARS/CREDITS



PROFESSIONAL CERTIFICATION CREDITS (FOR LANDSCAPE ARCHITECTS)

ADD THIS TO YOUR CERTIFICATE FOR TODAY'S WEBINAR:
DBPR COURSE (DBPR #0012534, PVD 151) YOUR DBPR # _____

CERTIFICATE PROUDLY PRESENTED TO

Haley Busch

State Initiatives for Community Resilience
in Florida

October 20, 2021

Date of Completion

1000 Friends of Florida

Organizer

DBPR COURSE #0012533
PVD #151
DBPR #(your number here)



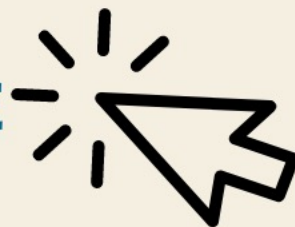
1. RECEIVE CERTIFICATE OF ATTENDANCE IN FOLLOW-UP EMAIL (DOWNLOAD USING GOOGLE CHROME)
2. ADD THE COURSE #, PROVIDER #, AND YOUR DBPR # TO THE CERTIFICATE
3. EMAIL THE CERTIFICATE TO 1000 FRIENDS AT HBUSCH@1000FOF.ORG





SUPPORT 1000 FRIENDS!

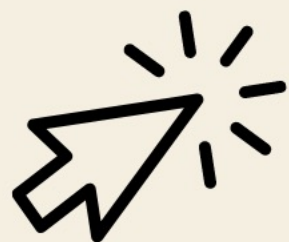
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