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DATE: February 21, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 177
RELATING TO: Homeowners' Associations/U.S. Flag
SPONSOR(S): Representative(s) Sobel and others
TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 3 NAYS 0
 - (2)
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

Current law allows a homeowner to display one United States flag in a respectful manner which may be subject to reasonable limitations found in homeowners' association documents, including declarations of covenants, articles of incorporation, or homeowners' association by-laws.

This bill allows a homeowner to display one portable, removable United States flag in a respectful way regardless of any documents, declarations of covenants, articles of incorporation, or bylaws of the association dealing with flags or decorations.

Proponents assert that this bill recognizes the right of all homeowners to display the American flag.

This bill does not appear to have a fiscal impact on state or local governments.

See "OTHER COMMENTS" for concerns.

The Committee on State Administration adopted one strike-all amendment, which is traveling with the bill. Please see "AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES" section.

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II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

Recognizing homeowners' rights to display the American flag increases individual freedom.

B. PRESENT SITUATION:

Homeowners' Associations

Section 720.3075(3), F.S., which relates to prohibited clauses in homeowners' association documents, allows a homeowner to display one United States flag in a respectful way and prohibits homeowners' associations from precluding the display of one United States flag by property owners. The display of the flag is subject to reasonable standards for size, placement, and safety, as adopted by the homeowner's association, consistent with federal law and any local ordinances.

Condominium Association

Section 718.113(4), F.S., which in part relates to the display of the flag, allows a condominium unit owner to display one portable, removable, United States flag in a respectful way, regardless of any declaration rules or requirements dealing with flags or decorations.

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 720.3075(3), F.S., to allow a homeowner to display one portable, removable United States flag in a respectful way regardless of any documents, declarations of covenants, articles of incorporation, or bylaws of the association dealing with flags or decorations.

This bill takes effect upon becoming a law.

D. SECTION-BY-SECTION ANALYSIS:

Please see "EFFECT OF PROPOSED CHANGES."

III. 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.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES

Right to display Flag

A relevant case concerning the display of the United States Flag is *Gerber v. Longboat Harbour North Condominium, Inc.* In that case, a condominium association regulation prohibited the flying of

an American flag except on designated occasions.¹ One of the plaintiffs was an Air force Veteran who challenged the regulation as a violation of his constitutional right to display the flag.² The United States District Court, Middle District of Florida, granted summary judgment to the plaintiffs and held that enforcement of private agreements by the judicial branch is sufficient to implicate state action and therefore the defendant's actions deprived the plaintiffs of the rights, privileges, and immunities secured by the First and Fourteenth Amendments to the United States Constitution.³ The Court stated in dicta that the Florida Legislature, in enacting s. 718.113, F.S., had merely recognized the plaintiffs' previously existing federal constitutional right to display the flag; it had not created rights and therefore not impaired existing contract rights.⁴

On a motion to reconsider, the federal District Court found that there were material issues of fact and partially vacated its earlier judgment.⁵ The condominium association argued that it did not object to the plaintiffs flying the American flag, rather it objected to the manner in which the flag was displayed.⁶ The Court reaffirmed the portion of its earlier decision dealing with state action but vacated the remainder of its previous decision and held that there were material issues of fact that needed to be decided by the trier of fact.⁷ This case is relevant in that it confirms that there is an existing federal constitutional right to display the United States flag.

Impairment of Contract

Article I, Section 10, of the Constitution of the United States prohibits states from passing laws which substantially impair contract rights (Contract Clause).⁸ Also, common law provides that the government cannot adversely affect substantive rights once such rights have vested.⁹ Courts use a balancing test to determine whether a particular regulation violates the Contract Clause. Courts measure the severity of contractual impairment against the importance of the interest advanced by the regulation and also look at whether the regulation is reasonable and narrowly tailored to the state's interest.¹⁰ This bill may impair existing contractual rights because many homeowners have contractually agreed to abide by certain regulations¹¹ and have relied on the enforcement of these regulations in choosing their homes. This bill may invalidate, in part, such contractual agreements. Accordingly, this bill may implicate the Contract Clause of the United States Constitution.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The substance of this bill passed as HB 21B in 2001 special session B. It died in the Senate Committee on Comprehensive Planning, Local and Military Affairs at the end of that session.

¹ *Gerber v. Longboat Harbour North Condominium, Inc.* 724 F. Supp. 884, 885 (D. Fla. 1989).

² *Id.*

³ *Id.* at 887.

⁴ *Id.*

⁵ *Gerber v. Longboat Harbour North Condominium, Inc.*, 757 F. Supp. 1339, 1342 (D. Fla. 1991).

⁶ *Id.* at 1341-1342.

⁷ *Id.* at 1342.

⁸ *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1923).

⁹ *Bitterman v. Bitterman*, 714 So. 2d 356 (Fla. 1998).

¹⁰ *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978).

¹¹ When purchasing a home, the contract includes references to the restrictive covenants that regulate the property. Restrictive covenants are recorded in the official records in the county the property is located.

This bill limits the display of the flag to one portable, removable United States flag. This bill does not address the use of flagpoles in violation of homeowners' association documents, which is at the heart of the controversy behind this bill.¹² Accordingly, the homeowners' association documents that govern the placement and size of items placed in the yard or on the home would remain unaffected. This bill does not change the ability of homeowners to fly the flag. Under current law homeowners cannot be prevented from displaying the United States flag. Similarly, under this bill homeowners cannot be prevented from displaying the United States flag.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 21, 2002, the Committee on State Administration adopted one strike-all amendment, which is travelling with the bill. The strike-all amendment provides that a homeowner may display one United States flag in a respectful manner. It eliminates the reference to "portable, removable"; changes the section of law amended; and removes current law regarding reasonable placement requirements. The strike-all amendment provides for retroactive application; the bill does not.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Josh White

J. Marleen Ahearn, Ph.D., J.D.

¹² Randall Murray, *Group Insists Fight is Over Flagpole, not Flag*, Ft. Lauderdale Sun Sentinel, Oct. 27, 2001.