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****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 2002-50, Laws of Florida

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

BILL #: HB 177 (COMPARIBLE PROVISIONS PASSED IN CS/SB 148)

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:

On March 7, 2002, CS/SB 148 was substituted for HB 177, which was laid on the table. On March 12, 2002, the House passed CS/SB 148. On April 18, 2002, CS/SB 148 became law as Chapter 2002-50, Laws of Florida ("act"). The effective date of this act is "upon becoming law," which was April 18, 2002. This analysis is of the act.

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 act 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.

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

See "OTHER COMMENTS" for concerns.

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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 720.304, F.S., provides that all common areas and recreational facilities serving any homeowners' association shall be available to parcel owners in the homeowners' association and that no entity shall unreasonably restrict any parcel owner's right to peaceably assemble or to invite public officers or candidates for public office to appear and speak in common areas and recreational facilities. Section 720.304, F.S., also provides that a homeowner prevented from exercising these rights may bring a court action and that upon favorable adjudication, the court shall enjoin the homeowners' association from enforcing any provision that deprives the homeowner of such rights.

Section 720.3075(3), F.S., prohibits a homeowners' association from precluding the display of one United States flag by each property owner. 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 act amends s. 720.304, F.S., to allow a homeowner to display one portable, removable United States flag in a respectful manner, regardless of any, declaration rules, or requirements dealing with flags or decorations.

This act also amends s. 720.3075(3), F.S., providing that homeowners may display one "portable, removable" United States flag and removes the provision of the statute that allows homeowners' associations to determine reasonable standards for size, placement, and safety.

This act 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 act 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 act 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 act 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.

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.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

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

This act limits the display of the flag to one portable, removable United States flag; however, it 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 appear to remain unaffected. Under current law homeowners cannot be prevented from displaying the United States flag. Similarly, under this act homeowners cannot be prevented from displaying the United States flag.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Josh White

Staff Director:

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

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

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

Staff Director:

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.