

FINAL BILL ANALYSIS

BILL #: CS/CS/CS/HB 45

FINAL HOUSE FLOOR ACTION:

85 Y's 33 N's

SPONSOR: Rep. Gaetz

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/CS/CS/SB 402

SUMMARY ANALYSIS

CS/CS/CS/HB 45 passed the House on April 26, 2011, and subsequently passed the Senate on April 28, 2011. The bill was approved by the Governor on June 2, 2011, chapter 2011-109, Laws of Florida, and becomes effective October 1, 2011.

Section 790.33, F.S., currently preempts local governments from regulating firearms and ammunition unless expressly authorized to do so by general law. Subsection (2) of the statute provides such express authorization by giving counties the authority to adopt an ordinance requiring a waiting period of up to three working days between the purchase and delivery of a handgun.

The bill removes the statutory language that authorizes counties to adopt an ordinance requiring a waiting period of up to three working days between the purchase and delivery of a handgun (counties still have the authority, pursuant to Art. VIII, Section 5(b) of the Florida Constitution to require a criminal history records check and a 3 to 5-day waiting period in connection with the sale of any firearm occurring within such county). The bill replaces this provision with language prohibiting specified local governmental entities from regulating or attempting to regulate firearms or ammunition in any manner (except as specifically authorized by s. 790.33, F.S., by general law, or by the Florida Constitution) and provides exceptions to this prohibition.

The bill sets forth various penalties for violating s. 790.33, F.S., including provisions that:

- Require the court to declare ordinances, regulations, or rules that violate s. 790.33, F.S., invalid and issue a permanent injunction against the local government from enforcing such ordinance, regulation, or rule. It is not a defense that, in enacting the ordinance, regulation or rule, the local government was acting in good faith or upon advice of counsel;
- Require the court to assess a civil fine of up to \$5,000 against the elected or appointed local government official or administrative agency head under whose jurisdiction a violation occurred if the court determines that a violation was knowing and willful;
- Specify that a knowing and willful violation of the statute by a person acting in an official capacity is cause for immediate termination of employment; and
- Authorize a person or organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or enforced in violation of the statute to file suit for declaratory and injunctive relief and for all actual damages attributable to the violation.

The damages and attorney's fees which may be awarded to prevailing plaintiffs could have a negative fiscal impact on state and local governmental entities who willfully violate the statute.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Preemption

Section 790.33, F.S., known as the Joe Carlucci Uniform Firearms Act, became law in 1987¹ and expressly preempts the field of regulation of firearms and ammunition to the state, except as expressly provided by general law.² The intent of the act states:

It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.³

Local governments may use their home rule powers to enact ordinances not inconsistent with general law.⁴ Local governments may legislate concurrently with the Legislature on any subject that has not been expressly preempted to the state.⁵ Florida law recognizes both express and implied preemption, and express preemption must be made through a specific legislative statement, using clear language.⁶ A municipality may not forbid what the Legislature has expressly authorized, nor may it authorize what the Legislature has expressly forbidden.⁷ The Legislature has preempted regulation of numerous areas of law to the state, including operation of the state lottery,⁸ use of electronic communication devices in motor vehicles,⁹ and interdistrict transfers of groundwater.¹⁰ In cases determining the validity of ordinances enacted in the face of state preemption, the effect has been to find such ordinances null and void.¹¹

In 2000, the City of South Miami passed City Ordinance Number 14-00-1716, which required locking devices on firearms stored within the city. In 2002, Florida's Third District Court of Appeal held the ordinance null and void, stating that local governments were preempted from regulating firearms by section 790.33, F.S.¹² Despite the express preemption stated in section 790.33, F.S., and the court's decision in the City of South Miami case, local governments have regulated or considered regulating firearms in a variety of ways, including measures that would prohibit concealed carry permit holders

¹ Chapter 87-23, L.O.F.

² Section 790.33, F.S.

³ Section 790.33(3), F.S.

⁴ Art. VIII, s. 1(f, g), Fla. Const.; *see also Sarasota v. Browning*, 28 So.3d 880, 885-86 (Fla. 2010).

⁵ *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006).

⁶ *Sarasota*, 28 So.3d at 886.

⁷ *Rinzler v. Carson*, 262 So.2d 661, 668 (Fla. 1972).

⁸ Section 24.122, F.S.

⁹ Section 316.0075, F.S.

¹⁰ Section 373.2295(10), F.S.

¹¹ *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

¹² *Id.*

from lawfully carrying their firearms on municipal or county property¹³ or ban high-capacity ammunition clips.¹⁴

Section 790.33(1), F.S., preempts local governments from regulating firearms and ammunition unless expressly authorized to do so by general law. The statute specifies that regulation includes the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation of firearms and ammunition. The statute does not currently specify that the storage of firearms is included within the term “regulation.”

Exceptions to Preemption

Florida law and the Florida Constitution contain exceptions to the general rule that firearm regulation is preempted to the state. Currently, Section 790.33, F.S., contains a limited exception allowing local governments to enact ordinances governing a three-day handgun purchase waiting period.¹⁵ The following are exempt from waiting period ordinances under the Joe Carlucci Act:

- Individuals who are licensed to carry concealed firearms under the provisions of s. 790.06, F.S., or who are licensed to carry concealed firearms under any other provision of state law and who show a valid license;
- Individuals who already lawfully own another firearm and who show a sales receipt for another firearm, who are known to own another firearm through a prior purchase from the retail establishment, or who have another firearm for trade-in;
- Law enforcement or correctional officers as defined in s. 943.10, F.S.;
- Law enforcement agencies as defined in s. 934.02, F.S.;
- Sales or transactions between dealers or between distributors or between dealers and distributors who have current federal firearms licenses; or
- Any individual who has been threatened or whose family has been threatened with death or bodily injury, provided the individual may lawfully possess a firearm and provided such threat has been duly reported to local law enforcement.

Adopted in 1998, Article VIII, s. 5(b) of the Florida Constitution authorizes counties to require a criminal records check and a 3 to 5-day waiting period in connection with the sale¹⁶ of any firearm occurring within such county.¹⁷ Section 790.0655, F.S. adopted the exceptions from the waiting period for concealed weapons permit holders and handgun trade-ins as required by the 1998 amendment to the Constitution. The Constitution prevails over all local ordinances. Because the Joe Carlucci Act predates the Constitutional provision, and the exemptions listed in the Act were not specified in the Constitution, the exemptions are null and void.

¹³ Lee County Ordinance 06-26 banned firearms from county parks. On October 26, 2010, the county passed ordinance 10-41 which repealed the 2006 ban.

¹⁴ Palm Beach County considered an ordinance banning high capacity ammunition clips, but rescinded from consideration because of the preemption. Andy Reid, *PBC Gun Control Advocates Suffer More Setbacks*, SUNSENTINEL.COM, Feb. 15, 2011, <http://www.palmbeachpost.com/news/palm-beach-county-commissioner-presses-for-ban-on-1216890.html>.

¹⁵ Section 790.33(2), F.S. (1988). Note: At the time of enactment in 1987, the Act provided the exception for a 48-hour waiting period.

¹⁶ The term “sale” is defined as “the transfer of money or other valuable consideration for any firearm when any part of the transaction is conducted on property to which the public has the right of access.” Art. VIII, s. 5(b), Fla. Const.

¹⁷ Concealed weapons permit holders do not have to comply with the waiting periods when purchasing a firearm. Art. VIII, s. 5(b), Fla. Const.

Immunity for Legislative Acts

The general rule under the common law is that legislators enjoy absolute immunity from liability for performance of legislative acts.¹⁸ Absolute immunity for legislators has historically been recognized as a “venerable tradition” which has withstood the development of the law since pre-colonial days.¹⁹ Courts have upheld absolute immunity for legislators at all levels of law-making, including federal, state, and local government levels.²⁰ The courts’ reasoning behind such holdings is that when legislators hold legislative powers, they use them for the public good, and are exempt from liability for mistaken use of their legislative powers.²¹ Furthermore, courts fear that allowing personal liability could distort legislative discretion, undermine the public good by interfering with the rights of the people to representation, tax the time and energy of frequently part-time citizen-legislators, and deter service in local government.²²

When unlawful ordinances have been enacted, the freedom from personal liability does not make the legislative product itself valid.²³ In such instances, affected citizens have been able to challenge the validity of such ordinances by suing to have them declared invalid or have a court enjoin enforcement.²⁴

Courts have found that legislators may be subject to personal liability when they lack discretion.²⁵ Such situations typically exist when legislators are subject to an affirmative duty, such as when a law or court order has directed them to levy a tax. Such acts are labeled “ministerial,” as opposed to “legislative,” acts.²⁶ Arguably, an express and clear preemption would remove discretion from local government officials seeking to engage in lawmaking in the preempted field.

Liens on Municipal Property in Satisfaction of Judgments

Section 55.11, F.S., states that “[n]o money judgment or decree against a municipal corporation is a lien on its property nor shall any execution or any writ in the nature of an execution based on the judgment or decree be issued or levied.” In other words, while a party may be awarded money damages in a suit against a municipality, municipal property may not be subject to a lien to satisfy such an award in the absence of express statutory authorization.²⁷ In the absence of such authorization, a writ of mandamus is “the only vehicle for enforcing judgment against the government.”²⁸ Thus, the Legislature may authorize the satisfaction of an award of damages by seizure of municipal property.

¹⁸ See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

¹⁹ *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). For additional examples of where absolute immunity of legislative acts has been recognized, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Hough v. Amato*, 269 So.2d 537 (Fla. 1st DCA 1972); *Jones v. Loving*, 55 Miss. 109 (1877); *Ross v. Gonzales*, 29 S.W.2d 437 (Tex. Ct. App. 1930).

²⁰ *Bogan*, 523 U.S. 44.

²¹ *Id.* at 50-51 (citing *Jones v. Loving*, 55 Miss. 109).

²² *Id.* at 52.

²³ *Tenney v. Brandhove*, 341 U.S. at 379.

²⁴ See, e.g., *Bogan*, 523 U.S. 44; *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Tenney*, 341 U.S. 367.

²⁵ *Bogan*, 523 U.S. at 51-52.

²⁶ See *id.*

²⁷ See *Berek v. Metro. Dade County*, 396 So.2d 756, 759 n.4 (Fla. 3d DCA 1981).

²⁸ *N. Coats v. Metro. Dade County*, 588 So.2d 1016, 1017 (Fla. 3d DCA 1991).

Effect of the Bill

Intent

The bill preserves current language that the intent of the Legislature is to occupy the whole field of regulation of firearms and ammunition except as expressly provided by general law, or as provided by the Florida Constitution. The bill adds the following legislative intent language to s. 790.33, F.S.:

It is further the intent of this section to deter and prevent the violation of this section and the violation of rights protected under the constitution and laws of this state related to firearms, ammunition, or components thereof, by the abuse of official authority that occurs when enactments are knowingly passed in violation of state law or under color of local or state authority.

Clarification of Preemption

In order to clarify the preemption, the bill adds additional details about the methods by which local governments or agencies may violate the preemption. The bill amends s. 790.33(1), F.S., to expand the preemption of regulation to also include the storage of firearms and ammunition. Thus, unless expressly authorized by the Constitution or general law, local governments will be preempted from regulating how firearms and ammunition are stored.

In subsection (4) of s. 790.33, F.S., as created by the bill, a provision excepting certain zoning ordinances in the original Carlucci Act has been relocated and other exceptions to the prohibitions are set forth in the bill. Specifically, the bill does not prohibit:

- Zoning ordinances that encompass firearms businesses along with other businesses (zoning ordinances that are designed for the purpose of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition are prohibited);
- Law enforcement agencies from enacting and enforcing firearm-related regulations within their agencies;
- The entities subject to the bill's prohibitions from regulating or prohibiting employees from carrying firearms or ammunition during the course of their official duties, except as provided in s. 790.251, F.S.;
- A court or administrative law judge from resolving a case or issuing an order or opinion on any matter within the court or judge's jurisdiction; or
- The Florida Fish and Wildlife Conservation Commission from regulating the use of firearms or ammunition as a method of taking wildlife and regulating the shooting ranges managed by the Commission.

The bill strikes subsection (2) of 790.33, which is the section regarding waiting periods and waiting period exemptions. Because these sections of the Joe Carlucci Act predate the relevant language in the Constitution and 790.0655, F.S., striking this language clarifies current state law.

Penalties

The bill prohibits a person, county, agency, municipality, district, or other entity from enacting or causing to be enforced local ordinances or administrative rules or regulations that violate the preemption statute and provides penalties.

If any county, city, town, or other local government violates the above prohibition, the bill requires the court to declare the improper ordinance, regulation, or rule invalid and issue a permanent injunction against the local government from enforcing such ordinance, regulation, or rule. It is not a defense that, in enacting the ordinance, regulation or rule, the local government was acting in good faith or upon advice of counsel.

The bill also requires the court to assess a civil fine of up to \$5,000 against the elected or appointed local government official or administrative agency head under whose jurisdiction a violation occurred if the court determines that a violation was knowing and willful. Except as required by law, public funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated the preemption statute.

The bill provides that a knowing and willful violation by a person acting in an official capacity for any entity enacting or causing to be enforced a local ordinance or administrative rule or regulation shall be grounds for termination of employment or contract or removal from office by the Governor.

The bill also allows for civil actions. A person or organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of the preemption statute may sue any county, agency, municipality, district or other entity for declaratory and injunctive relief and for all actual damages caused by the violation. In such suits, courts shall award the prevailing plaintiff:

- Reasonable attorneys fees and costs, in accordance with the laws of the state, including a contingency fee multiplier as authorized by law; and
- The actual damages incurred, but not more than \$100,000.

The bill provides that interest on awarded sums will accrue at the legal rate from the date of which suit was filed.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The damages and attorney's fees which may be awarded to prevailing plaintiffs could have a negative fiscal impact on state and local governmental entities who willfully violate the statute.