

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 871 Display of United States Flags
SPONSOR(S): Thompson and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Military & Veterans' Affairs</u>	<u>5 Y, 0 N</u>	<u>Shaffer</u>	<u>Camechis</u>
2) <u>Government Efficiency & Accountability Council</u>	<u>15 Y, 0 N</u>	<u>Camechis</u>	<u>Cooper</u>
3) <u>Policy & Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

This bill creates ss. 125.564 and 166.081, F.S., to prohibit counties and municipalities from enacting or enforcing any ordinance or regulation that would prohibit the display of a United States flag by a property owner or tenant in a respectful manner or require a permit or payment of any fee to authorize such display. Displays of other flags remain subject to local regulation and permitting requirements.

The bill does not appear to exempt property owners from compliance with the Florida Building Code, or exempt property owners from obtaining a building permit as required by the Florida Building Code. Therefore, if a property owner wishes to construct a flag pole that is considered a "structure" under the Florida Building Code, it appears the property owner will be required to obtain a building permit even if this bill passes.

This bill appears to reduce county or municipal authority to adopt and enforce land use ordinances regulating the construction of flag pole structures, including ordinances pertaining to set-back requirements, height restrictions, and historical preservation. The bill also appears to reduce county or municipal authority to enact building codes that are more stringent than the Florida Building code to address local conditions.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: This bill prohibits counties and municipalities from enacting or enforcing any ordinance or regulation that prohibits the display of a United States flag by a property owner or tenant in a respectful manner, requires a permit, or requires payment of any fee to authorize such display.

B. EFFECT OF PROPOSED CHANGES:

CURRENT SITUATION

Regulation of the U.S. Flag in General

Either Congress or a state legislature may, under the police power, prohibit or regulate the use of the U.S. flag. Federal statutory provisions cover the design of the United States flag, as well as its display and use. The Federal Flag Code, however, is merely advisory and is not intended to proscribe conduct.

Content-neutral time, place and manner flag statutes or ordinances which advance substantial government interests are valid. Accordingly, a city flag ordinance, regulating the size of flags and the height of flagpoles, is a valid content-neutral time, place and manner restriction as applied to the display of American flags, where it advanced substantial government interest in preservation of the aesthetic environment, was reasonably well tailored to serve that goal, and left open ample alternative avenues of expression.¹

Local Land Use Restrictions and Zoning in General

In Florida, all zoning and development permitting must be consistent with the comprehensive plan of the city or county in question.² Adopted by the 1985 Legislature, Florida's Growth Management Act (Chapter 163, Part II, Florida Statutes, The Local Government Comprehensive Planning and Land Development Regulation Act) requires all of Florida's 67 counties and 410 municipalities to adopt Local Government Comprehensive Plans that guide future growth and development. Comprehensive plans contain chapters or "elements" that address future land use, housing, transportation, infrastructure, coastal management, conservation, recreation and open space, intergovernmental coordination, and capital improvements. The comprehensive plan has been likened to a "constitution" and has been described as "a limitation on a local government's otherwise broad zoning powers."³

Land use restrictions must substantially advance some legitimate state interest or they are invalid. Assuming regulation is necessary for welfare of public, and is not physically invasive or confiscatory of some existing property right, it is probably within government's police power to enact it. However, assuming a regulation is necessary for the welfare of the public, and is not physically invasive or confiscatory of some existing property right, it is probably within the government's "police power" to enact it.⁴

Florida Building Code

The statewide Florida Building Code ("Code"), which became effective March 1, 2001, supersedes all local codes and ordinances; however, when distinctive local conditions are not specifically addressed or

¹ 36A C.J.S. Flags § 3

² See § 163.3161(5), Fla.Stat. (1991).

³ Lee County v. Sunbelt Equities, II, Ltd. Partnership, 619 So.2d 996 (Fla. 2nd DCA 1993); Machado v. Musgrove, 519 So.2d 629, 632 (Fla.3d DCA 1987), rev. denied, 529 So.2d 693 (Fla.1988).

⁴ Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

a jurisdiction believes that code provisions need to be updated, local governments may adopt amendments if the amendments are more stringent than the Code.⁵

Building codes establish minimum safety standards for the design and construction of buildings and structures by addressing such issues as structural integrity, mechanical, plumbing, electrical, lighting, heating, air conditioning, ventilation, fireproofing, exit systems, safe materials, energy efficiency, and accessibility by persons with physical disabilities. The Code establishes minimum requirements to protect buildings and their occupants from wind, rain, flood and storm surge based on well-researched and continually-evolving engineering standards for buildings and the products that go into their construction.⁶

Section 553.72, F.S., declares that the legislative intent of the Florida Building Code is “to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single, unified state building code, to be called the Florida Building Code, which consists of a single set of documents that apply to the design, construction, erection, alteration, modification, repair, or demolition of public or private buildings, structures, or facilities in this state and to the enforcement of such requirements and which will allow effective and reasonable protection for public safety, health, and general welfare for all the people of Florida at the most reasonable cost to the consumer...The Florida Building Code shall be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction...The Florida Building Code shall establish minimum standards primarily for public health and lifesafety, and secondarily for protection of property as appropriate.” It is also the intent of the Legislature that “local governments shall have the power to inspect all buildings, structures, and facilities within their jurisdictions in protection of the public health, safety, and welfare pursuant to chapters 125 and 166.”

Section 553.73, F.S., requires the Florida Building Commission (“Commission”) to adopt the Florida Building Code, by rule, which contains or incorporates by reference all laws and rules which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities and enforcement of such laws and rules, except as otherwise provided in this section. The section vests responsibility for enforcement, interpretation, and regulation of the Florida Building Code in a specified local board or agency.

Local Amendments to the Florida Building Code

Section 553.73(4)(b), F.S., authorizes a local government to adopt amendments to the technical provisions of the Florida Building Code once every 6 months that apply solely within that local government’s jurisdiction and provide more stringent requirements than those specified in the Florida Building Code. A local government may adopt technical amendments that address local needs if:

The local governing body determines, following a public hearing which has been advertised in a newspaper of general circulation at least 10 days before the hearing, that there is a need to strengthen the requirements of the Florida Building Code. The determination must be based upon a review of local conditions by the local governing body, which review demonstrates by evidence or data that the geographical jurisdiction governed by the local governing body exhibits a local need to strengthen the Florida Building Code beyond the needs or regional variation addressed by the Florida Building Code, that the local need is addressed by the proposed local amendment, and that the amendment is no more stringent than necessary to address the local need.

A local amendment to the Florida Building Code is effective only until the adoption by the Commission of the new edition of the Florida Building Code every third year. At such time, the Commission reviews each amendment for consistency with the criteria for amendments having statewide or regional

⁵ TOP TEN FLORIDA RESIDENTIAL BUILDING CODE VIOLATIONS, FINAL REPORT, Prepared By Robert F. Cox, Ph.D.; R. Raymond Issa, Ph.D., J.D., P.E.; Jessica Ligator, MSBC; M.E. Rinker, Sr. School of Building Construction, University of Florida, Gainesville, FL 32611-5703, June 2006.

⁶ The Florida Building Commission Report to the 2007 Legislature, p.27

application. The Commission may adopt or rescind the local amendment. After receiving notice of a rescission, the local government may readopt the rescinded amendment.

Local Government Enforcement of the Florida Building Code

The Florida Building Code is administered and enforced by local government building and fire officials.⁷ Section 125.01(1)(cc), F.S., grants the governing body of a county the power to enforce the Florida Building Code, as provided in s. 553.80, F.S., and adopt and enforce local technical amendments to the Florida Building Code, pursuant to ss. 553.73(4)(b) and (c), F.S.

Section 553.79(2), F.S., prohibits the construction, erection, alteration, modification, repair, or demolition of any structure until the local building code administrator or inspector has reviewed the plans and specifications required by the Florida Building Code.

Section 553.80(1), F.S., authorizes local governments to assess fees to fund the enforcement of the code. However, such fees “shall be used solely for carrying out the local government’s responsibilities in enforcing the code.”

EFFECT OF PROPOSED CHANGES

This bill creates ss. 125.564 and 166.081, F.S., to prohibit counties and municipalities from enacting or enforcing any ordinance or regulation that would prohibit the display of a United States flag by a property owner or tenant in a respectful manner or require a permit or payment of any fee to authorize such display.

The bill does not appear to exempt property owners from compliance with the Florida Building Code, or exempt property owners from obtaining a building permit as required by the Florida Building Code. Therefore, if a property owner wishes to construct a flag pole that is considered a “structure” under the Florida Building Code, it appears the property owner will be required to obtain a building permit even if this bill passes.

This bill appears to reduce county and municipal authority to adopt and enforce land use ordinances regulating the construction of flag pole structures, including ordinances pertaining to set-back requirements, height restrictions, and historical preservation. The bill also appears to reduce county and municipal authority to enact stringent building codes that are more stringent than the Florida Building code to address local conditions.

C. SECTION DIRECTORY:

Section 1. Designates the act as the “Florida Flies the Flag Act”.

Section 2. Creates s. 125.564, F.S., prohibiting a county from enacting or enforcing an ordinance or regulation that would prohibit the display of a United States flag by certain persons in a respectful manner or require a permit or payment of any fee to authorize such display.

Section 3. Creates s. 166.0481, F.S., prohibiting a municipality from enacting or enforcing an ordinance or regulation that would prohibit the display of a United States flag by certain persons in a respectful manner or require a permit or payment of any fee to authorize such display.

Section 4. Provides an effective date of July 1, 2007.

⁷ s. 553.80, F.S.

II. 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: See Fiscal Comments.
2. Expenditures: See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: This bill may exempt certain property owners from local ordinances requiring permits for flag displays.

D. FISCAL COMMENTS: This bill may reduce the amount of revenues collected by counties and municipalities through the issuance of permits for construction of flag structures; however, the reduction in the cost of issuing permits appears to offset any reduction in revenues.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The mandates provision may apply because the bill may reduce revenues of certain municipalities and counties by prohibiting local ordinances that require permits and fees for flag displays; however, the bill appears to be exempt from the mandates provision because the fiscal impact of the bill on cities and counties appears to be insignificant and the reduction in the number of permits issued may reduce costs associated that were funded through permit fees.

2. Other: This bill prohibits counties and municipalities from enacting or enforcing any ordinance or regulation that would prohibit the display of a United States flag by a property owner or tenant in a respectful manner or require a permit or payment of any fee to authorize such display. The prohibition does not, however, apply to other types of flags, banners, displays, or other forms of noncommercial speech. Therefore, displays other than displays of U.S. flags remain subject to county and municipal regulations and permit requirements.

Subjecting all displays other than U.S. flag displays to local regulation and permitting requirements may be considered a "content-based" restriction on speech under the First Amendment of the U.S. Constitution.

A content-based restriction on speech is constitutional under the First Amendment only if it constitutes the least restrictive means of advancing a compelling government interest.⁸ A regulation may be a content-based restriction on speech for purposes of First Amendment analysis if it exempts from regulation some categories of displays, based on their content, but not others, and may be facially unconstitutional if not narrowly tailored to accomplish a compelling state interest.⁹ In Metromedia, Inc., v. City of San Diego¹⁰, a plurality opinion of the U.S. Supreme Court found that exemptions for religious

⁸ Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005).

⁹ Id.

¹⁰ 453 U.S. 490, 516 (1981).

signs, time and temperature signs, government signs, and political signs amounted to a content-based criteria for permitting. In Florida, a federal court concluded that local regulations allowing flags only if they represented a governmental entity was an impermissible content-based regulation.¹¹

B. RULE-MAKING AUTHORITY: This bill does not grant any agency a specific power, impose a duty to be implemented by an agency, or require an agency to adopt rules to facilitate implementation.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

D. STATEMENT OF THE SPONSOR: The sponsor did not submit a statement

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.

¹¹ Dimmitt v. City of Clearwater, 985 F.2d 1565, 1569 (11th Cir. 1993).