

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 45 Regulation of Firearms and Ammunition

**SPONSOR(S):** Criminal Justice Subcommittee, Gaetz and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 402

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 4 N, As CS	Cunningham	Cunningham
2) Community & Military Affairs Subcommittee		Shuler	Hoagland
3) Judiciary Committee			

### SUMMARY ANALYSIS

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.

CS/HB 45 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. CS/HB 45 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.

Counties would likely 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.

CS/HB 45 also sets forth various penalties for violating s. 790.33, F.S., including provisions that:

- Make it a 3<sup>rd</sup> degree felony for any person or entity to knowingly and willfully violate s. 790.33, F.S.;
- Specify that a governmental entity in whose service or employ a provision of the statute is violated may be assessed a fine of no more than \$5 million if the court determines that the violation was willful and that any person at the governmental entity with oversight of the person knew or in the exercise of ordinary care should have known the act was a violation;
- 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 declarative and injunctive relief and for all actual and consequential damages attributable to the violation.

The Criminal Justice Impact Conference has not yet met to consider the prison bed impact of this bill. However, because the bill creates a new 3<sup>rd</sup> degree felony, it could have a negative fiscal impact on the Department of Corrections. The bill also requires governmental entities who willfully violate the statute to pay a \$5 million fine. The fines, 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 bill is effective upon becoming a law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### **Preemption**

Section 790.33, F.S., known as the Joe Carlucci Uniform Firearms Act, became law in 1987<sup>1</sup> and expressly preempted the field of regulation of firearms and ammunition to the state, except as expressly provided by general law.<sup>2</sup> 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.<sup>3</sup>

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

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.<sup>12</sup> 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 from lawfully carrying their firearms on municipal or county property<sup>13</sup> or ban high-capacity ammunition clips.<sup>14</sup>

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<sup>1</sup> Ch. 87-23, L.O.F.

<sup>2</sup> S. 790.33, F.S.

<sup>3</sup> S. 790.33(3), F.S.

<sup>4</sup> Art. VIII, s. 1(f, g), Fla. Const.; see also *Sarasota v. Browning*, 28 So.2d 880, 885-86 (Fla. 2010).

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

<sup>6</sup> *Sarasota*, 28 So. 2d at 886.

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

<sup>8</sup> S. 24.122, F.S.

<sup>9</sup> S. 316.0075, F.S.

<sup>10</sup> S. 373.2295(10), F.S.

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

<sup>12</sup> *Id.*

<sup>13</sup> 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.

<sup>14</sup> 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>.

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.<sup>15</sup> 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 sale<sup>16</sup> of any firearm occurring within such county.<sup>17</sup> 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.

### Immunity for Legislative Acts

The general rule under the common law is that legislators enjoy absolute immunity from liability for performance of legislative acts.<sup>18</sup> Absolute immunity for legislators has historically been recognized as a “venerable tradition” which has withstood the development of the law since pre-colonial days.<sup>19</sup> Courts have upheld absolute immunity for legislators at all levels of law-making, including federal, state, and local government levels.<sup>20</sup> 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.<sup>21</sup> Furthermore, courts fear that allowing personal liability could distort legislative discretion, undermine the public good by

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<sup>15</sup> 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.

<sup>16</sup> 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.

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

<sup>18</sup> See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

<sup>19</sup> *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)

<sup>20</sup> *Bogan*, 523 U.S. 44.

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

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.<sup>22</sup>

When unlawful ordinances have been enacted, the freedom from personal liability does not make the legislative product itself valid.<sup>23</sup> 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.<sup>24</sup>

Courts have found that legislators may be subject to personal liability when they lack discretion.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> In the absence of such authorization, a writ of mandamus is “the only vehicle for enforcing judgment against the government.”<sup>28</sup> Thus, the Legislature may authorize the satisfaction of an award of damages by seizure of municipal property.

### **Effect of the Bill**

#### **Intent**

The bill clarifies the intent as currently expressed, and strengthens and clarifies the intent with additional language. 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 or general law, and, additionally, as provided by the Florida Constitution. The bill also adds the following legislative intent language to s. 790.33(3), 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, CS/HB 45 adds additional details about the entities which fall under the preemption and the methods by which such entities 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 general law, local governments will be preempted from regulating how firearms and ammunition are stored.

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<sup>22</sup> *Id.* at 52.

<sup>23</sup> *Tenney v. Brandhove*, 341 U.S. at 379.

<sup>24</sup> *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.

<sup>25</sup> *Bogan*, 523 U.S. at 51-52.

<sup>26</sup> *See id.*

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

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

CS/HB 45 lists specific entities which are prohibited from regulating or attempting to regulate firearms or ammunition. The specified entities include:

- Local governments,
- Special districts,
- Political subdivisions,
- Governmental authorities, commissions, or boards,
- State governmental agencies,
- Any official, agent, employee, or person, whether public or private, who works or contracts with any state or other governmental entity,
- Any entity that serves the public good when such service is provided in whole or in part by any governmental entity or utilizes public support or public funding,
- Any body to which authority or jurisdiction is given by any unit or subdivision of any government or that serves the public good in whole or in part with public support, authorization, or funding or that has the authority to establish rules or regulations that apply to the public use of facilities, property, or grounds, and
- Any public entity other than those specified above, including, but not limited to, libraries, convention centers, fairgrounds, parks, and recreational facilities.

The bill also specifies the methods which the listed entities are prohibited from using in regulating or attempting to regulate firearms or ammunition. These include the enactment or enforcement of any:

- ordinance,
- regulation,
- measure,
- directive,
- rule,
- enactment,
- order,
- policy, or
- exercise of proprietary authority, or
- by any other means, except as specifically authorized by law, or by the Florida Constitution.

In subsection (5) 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:

- Law enforcement agencies from enacting and enforcing firearm-related regulations within their agencies;
- The entities listed above 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. ; or
- 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.

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 Constitution and 790.0655, F.S., striking this language clarifies current state law.

### **Penalties**

The bill provides penalties for enactment or enforcement actions taken in violation of the stated preemption.

The bill creates a 3rd degree felony for any person or entity who knowingly and willfully violates s. 790.33, F.S. The bill provides that a fine of no more than \$5 million may be assessed against a governmental entity in whose service or employ a provision of the statute is violated if the

court determines that the violation was willful and that any person at the governmental entity with oversight of the offending official, designee, contractee, or employee knew or in the exercise of ordinary care should have known the act was a violation;

The bill specifies that the state attorney is responsible for the investigation and prosecution of violations of the preemption law, and provides that he or she may be held accountable under the rules of professional conduct if his or her duties are not carried out. The bill also prohibits the use of public funds, other than for the services of the public defender or conflict counsel, in defense of a criminal prosecution.

The bill provides that a knowing and willful violation by a person acting in official capacity of the specified entities shall be grounds for immediate termination by the Governor.

The bill also allows for civil actions. An affected person or organization may sue for declarative or injunctive relief and for all actual and consequential damages. In such suits, courts shall award the prevailing plaintiff attorney's fees at the rate used by federal courts, liquidated damages three times the attorney's fees, and litigation costs.

The bill states that interest on awarded sums will accrue at 15 percent per annum from the date on which suit was filed. Payment may be secured by the seizure of vehicles used by elected officeholders or officials in the appropriate jurisdiction if the fees, costs, and damages are not paid within 72 hours of the court's ruling having been filed.

The usual remedy in a successful challenge to the validity of a law or ordinance within a preempted field is a declaration by a court that such law or ordinance is invalid. A court also may enjoin enforcement of the preempted provision. Because of the reasoning that the doctrine of absolute immunity is integral to a democratic system of government, courts have been reluctant to impose personal liability upon legislators who pass unlawful laws or ordinances. The personal liability imposed upon individuals involved in legislative acts in violation of this bill would appear to go against this body of law. However, because this is a common law doctrine, the Legislature maintains the power to establish law that overrides the doctrine. Additionally, as mentioned above, courts have found that legislators are subject to personal liability when they lack discretion and are performing ministerial acts. The strengthened preemption expressed by this bill, as well as the "knowing and willful" standard for violations, would appear to remove any discretion in the regulation of firearms.

#### **B. SECTION DIRECTORY:**

**Section 1.** Amends s. 790.33, F.S., relating to preemption of field of regulation of firearms and ammunition.

**Section 2.** This bill is effective upon becoming a law.

## **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:

CJIC has not yet met to consider the prison bed impact of this bill. However, because the bill creates a new 3<sup>rd</sup> degree felony, it could have a negative fiscal impact on the Department of Corrections.

The bill also requires governmental entities who willfully violate the statute to pay a \$5 million fine. This, in addition to possible awards of fees, damages, and costs in successful challenges, could have a negative fiscal impact on state and local governmental entities who willfully violate the statute.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Currently, the bill is effective upon becoming a law. Generally, bills that impose criminal penalties are effective on October 1 so as to give adequate notice to the public, state attorneys, public defenders, etc.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 8, 2011, the Criminal Justice Subcommittee adopted three amendments to the bill and reported the bill favorably as a Committee Substitute. The amendments:

- Provide that firearm regulation is preempted to the state except as expressly provided by *the Florida Constitution* and general law;
- Remove language specifying that the \$5 million fine should be deposited into the administrative account of the state attorney and the court in the jurisdiction in which the offense occurred;
- Clarify language relating to how interest accrues on sums awarded in any lawsuit filed relating to a violation of the section; and
- Clarify language relating to the seizure of vehicles used by persons who violate the section.

This analysis is drafted to the committee substitute.