**The Florida Senate**

# *COMMITTEE MEETING EXPANDED AGENDA*

**RULES**
**Senator Thrasher, Chair**
**Senator Alexander, Vice Chair**

**MEETING DATE:** Wednesday, March 16, 2011
**TIME:** 8:00 —9:30 a.m.
**PLACE:** *Toni Jennings Committee Room,* 110 Senate Office Building

**MEMBERS:** Senator Thrasher, Chair; Senator Alexander, Vice Chair; Senators Bullard, Flores, Gaetz, Gardiner, Jones, Margolis, Negron, Richter, Siplin, Smith, and Wise

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 1 | **SB 410**<br>Bennett<br>(Similar H 7021) | Impact Fees; Reenacts a provision relating to the burden of proof required by the government in an action challenging an impact fee. Provides for retroactive operation of the act. Provides for an exception under specified circumstances.<br><br>CA 02/08/2011 Favorable<br>JU 03/09/2011 Favorable<br>RC 03/16/2011 | |
| 2 | **SB 418**<br>Flores<br>(Identical H 103) | State Lotteries; Requires each retailer of lottery tickets to provide assistance to any individual who is blind or visually impaired and has requested assistance in filling out his or her lottery ticket. Provides that a retailer or an employee of the retailer is not liable under certain circumstances, etc.<br><br>RI 02/07/2011 Favorable<br>CM 03/09/2011 Favorable<br>RC 03/16/2011 | |
| 3 | **SB 462**<br>Latvala<br>(Similar H 259) | Beverage Law; Exempts performance arts centers from obtaining approval from the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation of volunteer officers or directors of the performing arts center or of changes in such positions.<br><br>RI 02/22/2011 Favorable<br>CM 03/09/2011 Favorable<br>RC 03/16/2011 | |

**The Florida Senate**

# BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Rules Committee

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|---|---|
| BILL: | SB 410 |
| INTRODUCER: | Senator Bennett |
| SUBJECT: | Impact Fees |
| DATE: | March 14, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Wolfgang | Yeatman | CA | **Favorable** |
| 2. | O'Connor | Maclure | JU | **Favorable** |
| 3. | O'Connor | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

In response to ongoing litigation,[1] this bill reenacts the section of law created by Chapter 2009-49, Laws of Florida, (HB 227 (2009 Regular Session)) that created the "preponderance of the evidence" standard of review for the government in cases challenging the imposition or amount of an impact fee.

This bill reenacts section 163.31801, Florida Statutes.

## II. Present Situation:

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.[2] Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.[3] Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.[4]

[1] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).

[2] FLA. CONST. art VIII, s. 1(f).

[3] FLA. CONST. art VIII, s. 1(g).

[4] FLA. CONST. art VIII, s. 2(b). *See also* s. 166.021(1), F.S.

The Florida Statutes enumerate the powers and duties of all county governments, unless preempted on a particular subject by general or special law.[5] Those powers include the provision of fire protection, ambulance services, parks and recreation, libraries, museums and other cultural facilities, waste and sewage collection and disposal, and water and alternative water supplies. Municipalities are afforded broad home rule powers except: annexation, merger, exercise of extraterritorial power, and subjects prohibited by the federal, state, or county constitutions or law.[6]

Given these constitutional and statutory powers, local governments may use a variety of revenue sources to fund services and improvements without express statutory authorization.[7] Special assessments, impact fees, franchise fees, and user fees or service charges are examples of these home rule revenue sources.[8]

**Impact Fees**

Impact fees are enacted by local home rule ordinance. These fees require total or partial payment to counties, municipalities, special districts, and school districts for the cost of additional infrastructure necessary as a result of new development. Impact fees are tailored to meet the infrastructure needs of new growth at the local level. As a result, impact fee calculations vary from jurisdiction to jurisdiction and from fee to fee. Impact fees also vary extensively depending on local costs, capacity needs, resources, and the local government's determination to charge the full cost of the fee's earmarked purposes.

**Statutory Authority for Impact Fees**

In 2006, the Legislature enacted s. 163.31801, F.S., to provide requirements and procedures to be followed by a county, municipality, or special district when it adopts an impact fee. By statute, an impact fee ordinance adopted by local government must, at a minimum:

- Require that the calculation of the impact fee be based on the most recent and localized data;
- Provide for accounting and reporting of impact fee collections and expenditures; if a local government imposes an impact fee to address its infrastructure needs, the entity must account for the revenues and expenditures of such impact fee in a separate accounting fund;
- Limit administrative charges for the collection of impact fees to actual costs; and
- Require that notice be provided at least 90 days before the effective date of a new or amended impact fee.[9]

[5] Section 125.01, F.S.
[6] Section 166.021, F.S.
[7] The exercise of home rule powers by local governments is constrained by whether an inconsistent provision or outright prohibition exists in the constitution, general law, or special law regarding the power at issue. Counties and municipalities cannot levy a tax without express statutory authorization because the constitution specifically prevents them from doing so. *See* FLA. CONST. art. VII, s. 1. However, local governments may levy special assessments and a variety of fees absent any general law prohibition, provided such home rule source meets the relevant legal sufficiency tests.
[8] For a catalogue of such revenue sources, see the most recent editions of the Florida Legislature's *Local Government Financial Information Handbook* and the *Florida Tax Handbook*.
[9] Section 163.31801, F.S. Other sections of law also address the ability of local governments or special districts to levy impact fees. *See* ss. 163.3202(3), 191.009(4), and 380.06, F.S.

**Dual Rational Nexus Test**

Impact fees have their roots in the common law. There have been a number of court decisions that address impact fee challenges.[10] For example, in *Hollywood, Inc. v. Broward County,*[11] the Fourth District Court of Appeal addressed the validity of a county ordinance that required a developer, as a condition of plat approval, to dedicate land or pay a fee for the expansion of the county level park system to accommodate the new residents of the proposed development. The court found that a reasonable dedication or impact fee requirement is permissible if (1) it offsets needs that are sufficiently attributable to the new development and (2) the fees collected are adequately earmarked for the benefit of the residents of the new development.[12] These two requirements are called the dual rational nexus test. In order to show the impact fee meets those requirements, the local government must demonstrate a rational nexus between the need for additional public facilities and the proposed development. In addition, the local government must show the funds are earmarked for the provision of public facilities to benefit the new residents.[13] Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court's validation of the impact fee ordinance.[14]

The Florida Supreme Court addressed the application of impact fees for school facilities in *St. Johns County v. Northeast Florida Builders Association, Inc.*[15] The ordinance at issue conditioned the issuance of a new building permit on the payment of an impact fee. Those fees that were collected were placed in a trust fund for the school board to expend solely "to 'acquire, construct, expand and equip the educational sites and educational capital facilities necessitated by new development.'"[16] Also, the ordinance provided for a system of credits to fee-payers for land contributions or the construction of educational facilities. This ordinance required funds not expended within six years to be returned, along with interest on those funds, to the current landowner upon application.[17] The court applied the dual rational nexus test and found the county met the first prong of the test, but not the second.

The builders in *Northeast Florida Builders Association, Inc.* argued that many of the residences in the new development would have no impact on the public school system. The court found the county's determination that every 100 residential units would result in the addition of 44 students in the public school system was sufficient and, therefore, concluded the first prong of the test was satisfied. However, the court found that the ordinance did not restrict the use of the funds to sufficiently ensure that such fees would be spent to the benefit of those who paid the fees.[18]

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[10] *See, e.g., Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976); *Home Builders and Contractors' Association v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140 (Fla. 4th DCA 1983).
[11] *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983).
[12] *Id.* at 611.
[13] *Id.* at 611-12.
[14] *Id.* at 614.
[15] *St. Johns County v. Northeast Florida Builders Association, Inc*., 583 So. 2d 635 (Fla. 1991).
[16] *Id.* at 637 (quoting St. Johns County, Fla., Ordinance 87-60, s. 10(B) (Oct. 20, 1987)).
[17] *Id.* at 637.
[18] *Id.* at 639. Because the St. Johns County ordinance was not effective within a municipality absent an interlocal agreement between the county and municipality, there was the possibility that impact fees could be used to build a school for development within a municipality that is not subject to the impact fee.

In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court ruled that when a residential development has no potential to increase school enrollment, public school impact fees may not be imposed.[19] In *City of Zephyrhills v. Wood*, the district court upheld an impact fee on a recently purchased and renovated building, finding that structural changes had corresponding impacts on the city's water and sewer system.[20]

As developed under case law, a legally sufficient impact fee has the following characteristics:

- The fee is levied on new development, the expansion of existing development, or a change in land use that requires additional capacity for public facilities;
- The fee represents a proportional share of the cost of public facilities needed to serve new development;
- The fee is earmarked and expended for the benefit of those in the new development who have paid the fee;
- The fee is a one-time charge, although collection may be spread over a period of time;
- The fee is earmarked for capital outlay only and is not expended for operating costs; and
- The fee-payers receive credit for the contributions toward the cost of the increased capacity for public facilities.

**Burden of Proof and Standard of Review**

The obligation to prove a material fact in issue is known as the "burden of proof." Generally, in a legal action the burden of proof is on the party who asserts the proposition to be established, and the burden can shift between parties as the case progresses. The level or degree of proof that is required as to a particular issue is referred to as the standard of proof or "standard of review." In most civil actions, the party asserting a claim or affirmative defense must prove the claim or defense by a preponderance of the evidence.[21] The preponderance of the evidence (also known as the "greater weight of evidence") standard of proof requires that the fact finder determine whether a fact sought to be proved is more probable than not.

For impact fee cases, the dual rational nexus test states that *the government* must prove: (1) a rational nexus between the need for additional capital facilities and the growth in population generated by the development and (2) a rational nexus between the expenditures of the funds collected and the benefits accruing to the development.[22] Although the challenger has to plead its case and allege a cause of action, beyond the pleading phase the courts' language seems to place the burden of proof on the local government. Some parties have argued that prior to 2009 the standard being adopted by Florida courts was that an impact fee will be upheld if it is "fairly debatable" that the fee satisfies the dual rational nexus test.[23] In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court rephrased the standard as a "reasonableness" test.[24]

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[19] *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 134 (Fla. 2000). Volusia County had imposed a school impact fee on a mobile home park for persons age 55 and older.
[20] *City of Zephyrhills v. Wood*, 831 So. 2d 223, 225 (Fla. 2d DCA 2002).
[21] 5 Fla. Prac., Civil Practice s. 16:1 (2009 ed.).
[22] *See St. Johns County v. Northeast Florida Builders Ass'n, Inc.*, 583 So. 2d 635 (Fla. 1991).
[23] *See* FLORIDA IMPACT REVIEW TASK FORCE, February 1, 2006, Final Report & Recommendations, 15, *available at* http://www.floridalcir.gov/taskforce.cfm.
[24] *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).

Although the standard was not clearly defined, prior to 2009 the courts generally did not require a local government to defend its impact fee by as high of a standard as preponderance of the evidence.

House Bill 227 (2009 Regular Session) amended s. 163.31801, F.S., to codify the burden of proof for impact fee ordinance challenges.[25] The bill placed the burden of proof on the government to prove by a preponderance of the evidence that the imposition or amount of the fee meets the requirements of state legal precedent or s. 163.31801, F.S. The bill also prohibited the courts from applying a deferential standard.

**Litigation**

A number of counties and the Florida Association of Counties sued the Florida House and Senate claiming the bill was unconstitutional.[26] The complainants are making the following arguments:

- The law violates the Separation of Powers Clause because it:
  - Changes the burden of proof,[27] and
  - Disallows a deferential standard of review.

- The law violates Section 18, Art. VII of the Florida Constitution, both:
  - Subsection (a) because the complainants argue that it requires local governments that want to levy impact fees to take action requiring the expenditure of funds because "they must assume additional burdens which would not normally exist prior to the adoption of that provision,"[28] and
  - Subsection (b) because the complainants argue that HB 227 reduced local governments' authority to raise revenues in the aggregate.

***Separation of Powers***

House Bill 227 is being challenged on separation of powers grounds. The complainants are alleging that Chapter 2009-49, Laws of Florida, (HB 227 (2009 Regular Session)), which directs courts not to apply a deferential standard in impact fee challenges cases, violates the separation of powers provision in Section 3, Art. II of the Florida Constitution. They argue that the deference afforded to the legislative acts of local governments by the courts is derived from the Florida Constitution and specifically the home rule authority[29] granted to counties and municipalities, and therefore, the Legislature cannot by statute direct the courts not to apply a deferential standard to the validity of impact fee ordinances since that deference is derived from the Constitution itself.[30]

[25] Chapter 2009-49, Laws of Fla.
[26] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).
[27] In fact, HB 227 simply codified existing case law providing that the local government had the burden of proving whether an impact fee was valid. *See, e.g. Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).
[28] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).
[29] FLA. CONST. art VIII, s. 2.
[30] *Id.*

Section 2, Art. V of the Florida Constitution gives the Supreme Court the power to adopt rules relating to practice and procedure of the courts. The complainants in the pending lawsuit challenging House Bill 227 argue that the bill (1) changed the burden of proof and (2) changing the burden of proof violated the courts' exclusive right to adopt rules relating to practice and procedure. House Bill 227 did not change the burden of proof, just the standard of review. Moreover, it does not appear that the burden of proof and the standard of review are procedural issues falling squarely in the domain of the judiciary. Rather, the standard of review is often related to the underlying substantive issue and is often specified by statute.[31]

Section 3, Art. II of the Florida Constitution states that the "powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided [in the Florida Constitution]." However, courts have held that "if a power is not exclusive to one branch, the exercise of that non-exclusive power is not unconstitutional."[32] Complainants argue that the provision in HB 227 prohibiting the courts from applying a deferential standard of review to the validity of impact fees infringes on the power of the judiciary.

One of the primary powers of the court is to interpret the constitution.[33] In a federal or state constitutional case, standards of review and burdens of proof can become constitutional issues. An impact fee is open to being challenged on a number of state and federal constitutional grounds including: federal and state takings claims,[34] challenges that it is an improperly enacted tax,[35] and challenges that it violates the state constitutional requirement for free public schools.[36] While decreasing the standard of review might be viewed as a separation of powers problem, increasing the standard of review further protects the constitutional rights raised in these cases. Increasing constitutional protections is a function within the jurisdiction of the Legislature.

Furthermore, the Florida Supreme Court has held that a statute that attempts to control a court's judgment is valid where it merely establishes rebuttable presumptions, rather than setting forth mandatory guidelines.[37] While HB 227 does not allow a deferential standard, it still allows the court to come to its own judgment regarding the validity of the impact fee. In summary, the separation of powers challenge to the Legislature's delineation of the standard of review in

[31] *See, e.g.*, ss. 39.206, 39.407, 39.827, 57.105, 61.13001, 61.14, 68.09, 98.075, 101.048, 112.1815, 112.534, 120.56, 120.57, 163.3177, 163.31777, 163.3184, 163.3187, 163.32465, 194.301, 222.21, 287.133, 287.134, 320.6412, 322.2615, 322.2616, 322.64, 363.06, 376.305, 376.308, 379.337, 379.502, 390.01114, 400.023, 400.121, 403.121, 403.519, 403.706, 403.727, 408.08, 409.2558, 415.1045, 429.29, 440.104, 443.101, 448.110, 456.032, 552.40, 556.107, 556.116, 559.77, 560.123, 560.125, 569.23, 608.441, 627.062, 627.0628, 627.0651, 648.525, 655.50, 709.08, 732.805, 744.301, 765.109, 768.28, 768.81, and 775.082, F.S. (all applying the preponderance of evidence standard of review in different situations); s. 617.0126, F.S. (applying de no review standard to suits challenging certain action by the Department of State); and s. 120.57(1)(e), F.S. (providing a clearly erroneous standard of review related to an unadopted rule).

[32] *Simms v. Dep't of Health & Rehabilitative Servs.*, 641 So. 2d 957 (Fla. 3d DCA 1994) (citing *Dep't of Health & Rehabilitative Servs. v. Hollis*, 439 So. 2d 947, 948 (Fla. 1st DCA 1983)); *see also Florida House of Representatives v. Crist*, 999 So. 2d 601, 611 (Fla. 2008) (finding that a branch of government has the inherent right to accomplish all objects naturally within its orbit, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution).

[33] *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992).

[34] U.S. CONST. amend. V; FLA. CONST. art. I, s. 9.

[35] FLA. CONST. art. VII, s. 1.

[36] FLA. CONST. art. IX, s. 1.

[37] *Department of Agriculture and Consumer Services v. Bonanno*, 568 So. 2d 24 (Fla. 1990).

impact fee cases will ultimately turn on a court's determination of whether this delineation of the standard of review infringes upon the judiciary's authority over practice and procedure.

***Mandates***

House Bill 227 (2009 Regular Session) has been challenged as an unconstitutional mandate. Article VII, Section 18(a) of the Florida Constitution states that no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds with certain exceptions and exemptions. Although the complaint argues that HB 227 violated this provision, the bill does not require any action from the local governments. The complaint does not specify what "additional burdens" it is alleging local governments are required to carry out. Therefore, it is unlikely that HB 227 violated Article VII, Section 18(a) of the Florida Constitution.

Section 18(b), Art. VII of the Florida Constitution provides that except upon approval by two-thirds of the members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989. House Bill 227 did not qualify for the exemptions provided in s. 18(d), Art. VII of the Florida Constitution and did not receive a two-thirds vote in the Senate. Versions of both the Senate and House staff analyses in 2009 stated that the bill reduced local governments' authority to raise revenues.[38] However, the bill did not restrict local governments from levying impact fees nor did it change the test by which impact fees are evaluated (the dual rational nexus test). Arguably, an impact fee that is valid under case law and statutory law should be upheld both before and after HB 227 became law. The bill only should affect local governments that levy invalid impact fees, which they never had the authority to levy. To the extent that the standard of review is determined by a court to reduce the authority of the government to raise revenues in the aggregate, the bill could be deemed an unfunded mandate. Practically, the bill may lead to more impact fees being struck down as invalid. Therefore, there are logical arguments on both sides. Creating a preponderance of the evidence standard of review for impact fee challenges *may* or *may not* reduce a local government's authority to raise revenues under the Florida Constitution.[39] In order to eliminate the uncertainty regarding whether the subsection of law enacted by HB 227 was an unconstitutional mandate, SB 410 requires approval of each house of the Legislature by two-thirds of the membership.[40]

[38] House Economic Development and Community Affairs Policy Council, Staff Analysis for CS/CS/HB 227 (2009 Reg. Sess.); Senate Transportation and Economic Development Appropriations Committee, Bill Analysis for CS/SB 580 (2009 Reg. Sess.).

[39] Additionally, in 2009 the revenue estimating conference estimated that the bill would have a negative but indeterminate affect on local governments. Section 18(d), Art. VII of the Florida Constitution has an exemption for insignificant fiscal impacts. The Legislature interprets insignificant fiscal impact to mean an amount not greater than the average statewide population for the applicable fiscal year times 10 cents; the average fiscal impact, including any offsetting effects over the long term, is also considered. Therefore, if a court did find that the bill was a mandate, the impact of the bill's change in the standard of review would have to have an impact greater than $18.6 million in the applicable fiscal year to be an unconstitutional mandate.

[40] If provisions of a law were unconstitutionally enacted, the Legislature can reenact those provisions using proper constitutional methods so long as the substance of the law is constitutional. *See Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991); *see also State v. Johnson*, 616 So. 2d 1 (Fla. 1993).

## III. Effect of Proposed Changes:

In response to litigation, the bill reenacts the section of the Florida Statutes that states that the government has the burden of proving by a preponderance of the evidence that an impact fee meets the standards set out in statute or in case law. The section, s. 163.31801, F.S., prohibits the courts from using a more deferential standard. To remove any doubt regarding whether this section is an unconstitutional mandate, this bill requires approval by each house of the Legislature by two-thirds of the membership.

The bill provides that it shall become effective upon becoming a law, and shall operate retroactively to June 1, 2009. If such retroactive application is held by a court of last resort to be unconstitutional, the bill states that this act should then apply prospectively from the date that the act becomes a law.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None. See the discussion of mandates issues in the "Present Situation" section of this bill analysis.

### B. Public Records/Open Meetings Issues:

None.

### C. Trust Funds Restrictions:

None.

### D. Other Constitutional Issues:

This bill specifically applies its provisions retroactively to June 1, 2009, the effective date of HB 227 (2009 Regular Session). Retroactive operation is disfavored by courts, and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[41] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person's right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?[42]

[41] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).
[42] *Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[43]

Notwithstanding a determination of whether the provisions in the bill are procedural or substantive, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[44] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[45] A court would be unlikely to bar the retroactive application of this section as impairing vested rights, creating new obligations, or imposing new penalties because it reenacts current law. As an additional protection, the bill specifies that if retroactive application were held unconstitutional by a court of last resort, it would then apply prospectively.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[43] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[44] *Weingrad*, 29 So. 3d at 410.
[45] *Id.* at 411.

B. Amendments:

None.

**The Florida Senate**

# BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Rules Committee

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|---|---|
| BILL: | SB 418 |
| INTRODUCER: | Senator Flores |
| SUBJECT: | State Lotteries |
| DATE: | March 14, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Young/Harrington | Imhof | RI | **Favorable** |
| 2. | Pugh/Gault | Cooper | CM | **Favorable** |
| 3. | Pugh/Gault | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
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| 6. | | | | |

## I. Summary:

Florida requires state lottery retailers to make their retail locations accessible to disabled patrons, and Department of the Lottery rules require retailers to be compliant with the federal Americans with Disabilities Act. Current Department of the Lottery rules also give players, disabled or not, the option to tell lottery retailers their selections, rather than mark play slips.

SB 418 will require lottery retailers to assist blind or visually impaired players, at their request, in filling out a lottery ticket. The bill also specifies that a retailer or a retailer's employee will not be held liable for a scrivener's error causing a mismarked ticket, absent a court finding of intentional fraud or malice.

The bill takes effect July 1, 2011.

SB 418 amends s. 24.112, F.S.

## II. Present Situation:

General Background

The Department of the Lottery (department) is authorized by s. 15, Art. X, Florida Constitution. Chapter 24, F.S., was enacted by ch. 87-65, L.O.F., to establish the state lottery. Section 24.102, F.S., provides legislative purpose and intent in regard to the lottery.

It specifies, in part:

> "The purpose of this act is to implement s. 15, Art. X of the State Constitution in a manner that enables the people of the state to benefit from significant

> additional moneys for education and also enables the people of the state to play the best lottery games available."

That section also specifies that the intent of the Legislature was "[t]hat the lottery games be operated by a department of state government that functions as much as possible in the manner of an entrepreneurial business enterprise." Additionally, it requires the department to be a self-supporting, revenue-producing enterprise.

Another provision, s. 24.104, F.S., requires the department to operate the state lottery "so as to maximize revenues in a manner consonant with the dignity of the state and the welfare of its citizens."

Assistance for Disabled

Section 24.112(13), F.S., currently specifies that lottery retailers must make their retail locations accessible for disabled persons. It specifies that there must be ramps, wide aisles, turnaround areas, parking spaces, and other such facilities to ensure accessibility for disabled persons to participate in the Florida Lottery.

Inspections and enforcement of the provisions of s. 24.112(13), F.S., are under the enforcement authority of the Florida Building Code under s. 553.80, F.S.

The department has indicated that, currently, department game rules[1] specify that tickets in terminal-generated games—those that can be initiated by means of a play slip—also can be initiated by the player verbally giving his or her desired numbers to the retailer. The verbally requested numbers can then be manually selected on the ticket terminal by the retailer to produce a ticket with the player's desired numbers.

The department expects retailers to comply with applicable accessibility requirements and these requirements are included in the department's contracts with the retailers. Retailers also are subject to the federal Americans with Disabilities Act.

There are approximately 13,200 lottery retailers in Florida, according to the department's estimates.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was enacted in 1990. Congress indicated that the ADA was enacted in part to address the finding that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem" and that disabled individuals were relegated to "lesser services, programs, activities, benefits, jobs, or other opportunities."[2]

The overarching purpose of the ADA was to provide a "national mandate" to end discrimination based on disabilities, provide a national and enforceable standard that addresses discrimination,

[1] For example, the Florida Department of the Lottery rule 53 ER 10-39 (1)(c)(1), F.A.C., states that a person may choose to play the Cash 3 game by making a verbal communication to the retailer instructing them on which selections to make.
[2] 42 U.S.C. s. 12101(a).

to ensure that the Federal Government plays a central role in enforcement against discrimination, and to invoke the power of the United State Congress to address the areas of discrimination against disabled persons.[3]

Section 12132 of the ADA provides: "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Under this provision, disabled persons are not to be discriminated against and retailers who sell Florida Lottery tickets must be accessible to customers who have disabilities, including visual impairments.

Legal interpretations of "malice" and "intentional fraud"
When a word is not specifically defined by statute, reviewing courts apply its plain and ordinary meaning. Florida courts have recognized the ordinary meaning of the word "malice" to be synonymous with its legal definition, which is "wrongfully, intentionally, without legal justification or excuse."[4]

Florida courts have not specifically defined intentional fraud, but "intent" is an element of actual fraud, which they have defined. Fraud requires that four elements be met: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induces another to act on it; and (4) consequent injury by the party acting in reliance on the representation.[5]

## III. Effect of Proposed Changes:

Section 1: Amends s. 24.112(13), F.S., to expand the statutory accessibility requirements beyond physical access to include help in filling out and purchasing tickets for blind and visually impaired customers who request such assistance.

Additionally, the bill specifies that neither the retailer nor the employee of a retailer will be liable for any actual or alleged scrivener's error unless there is a finding by a court of intentional fraud or malice.

Section 2: Specifies an effective date of July 1, 2011.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

[3] 42 U. S. C. s. 12101(b).
[4] Seese v. State, 955 So.2d 1145, 1149 (Fla. App. 4 Dist., 2007).
[5] Townsend v. Morton, 36 So.3d 865, 868 (Fla. App. 5 Dist., 2010).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

**The Florida Senate**

# BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | SB 462 |
| INTRODUCER: | Senator Latvala |
| SUBJECT: | Beverage Law |
| DATE: | March 14, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Oxamendi | Imhof | RI | **Favorable** |
| 2. | McCarthy | Cooper | CM | **Favorable** |
| 3. | McCarthy | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill revises the alcoholic beverage license qualification requirements for a performing arts center by providing an exemption from the requirement that all persons with an interest, directly or indirectly, in an alcoholic beverage license must obtain the approval of the Division of Alcoholic Beverage and Tobacco (division) within the Department of Business and Professional Regulation. The exemption applies to the performing arts center's volunteer officers or directors or any change of such positions or interests.

The bill would permit volunteer officers or directors of a performing arts center to continue to serve without having to be fingerprinted as part of the alcoholic beverage license application process. The bill does not affect the requirement that the performing arts center must disclose the identity of the volunteer officers or directors. Those persons would not have to submit separate applications and a set of fingerprints for the division's approval of their qualifications.

This bill substantially amends sections 561.15 and 561.17, Florida Statutes.

## II. Present Situation:

The Division of Alcoholic Beverages and Tobacco (division) within the Department of Business and Professional Regulation (department) is the agency authorized to enforce the provisions of the Beverage Law in chs. 561, 562, 563, 564, 565, 567, and 568, F.S.[1]

[1] *See* s. 561.08, F.S.

**Definitions**

Section 561.01, F.S., defines "alcoholic beverages" as "distilled spirits and all beverages containing one-half of one percent or more alcohol by volume."

Section 561.01(17), F.S., provides the following definition for the term "performing arts center":

> "Performing arts center" means a facility consisting of not less than 200 seats, owned and operated by a not-for-profit corporation qualified as an exempt organization under the provisions of s. 501(c)(3) of the Internal Revenue Code of 1986 or of the corresponding section of a subsequently enacted federal revenue act, which is used and occupied to promote development of any or all of the performing, visual, or fine arts or any or all matters relating thereto and to encourage and cultivate public and professional knowledge and appreciation of the arts through:
> (a) The preparation, production, public presentation, or public exhibition of dramatic or musical works, dance, opera, motion pictures, television, music, recordings, or works of fine, performing, or visual arts of any nature;
> (b) The conducting of lectures, seminars, classes, or workshops for development of skills or techniques related to the practice or appreciation of any or all of these arts;
> (c) The broadcast or telecast of the performing or visual arts through whatever means is desirable, including, but not limited to, television, radio, cable, or the latest state-of-the-art media, equipment, or techniques;
> (d) The reproduction of the performing, visual, or fine arts through motion pictures, videotapes, video disks, delayed presentations, sound recordings, or whatever in the future becomes a viable means or state-of-the-art;
> (e) The provision of banquet, concession, or other on-premises food and alcoholic and nonalcoholic beverage activities;
> (f) The conduct of retail activities reasonably related to the other uses of the facility;
> (g) The conduct of fundraising activities reasonably related to the arts;
> (h) The provision of auxiliary services for performing or visual artists, educators, students, or the public which are necessary or desirable to promote or facilitate the foregoing uses, including, but not limited to, the publication and dissemination of any or all materials related to the foregoing;
> (i) The conduct of rehearsals, conventions, meetings, or commercial or other activities; or
> (j) Such other activities for the promotion and development of the arts not described in paragraphs (a)-(i) as the not-for-profit corporation determines, provided that no such activity is inconsistent with or otherwise violates any applicable statute, ordinance, or regulation.

**License Application Requirements**

Section 561.15, F.S., sets forth the basic qualifications for holding an interest in an alcoholic beverage license. These include being of good moral character and being 21 years of age or

older. If a corporation applies for an alcoholic beverage license, its officers must be of good moral character and not less than 21 years of age.[2]

The beverage law also restricts the issuance of an alcoholic beverage to persons with a specified criminal history, including corporations whose officers possess the disqualifying criminal history. Section 561.15(2), F.S., provides:

> No license under the Beverage Law shall be issued to any person who has been convicted within the last past 5 years of any offense against the beverage laws of this state, the United States, or any other state; who has been convicted within the last past 5 years in this state or any other state or the United States of soliciting for prostitution, pandering, letting premises for prostitution, or keeping a disorderly place or of any criminal violation of chapter 893 or the controlled substance act of any other state or the Federal Government; or who has been convicted in the last past 15 years of any felony in this state or any other state or the United States; or to a corporation, any of the officers of which shall have been so convicted. The term "conviction" shall include an adjudication of guilt on a plea of guilty or nolo contendere or the forfeiture of a bond when charged with a crime.

If a corporation is unable to qualify for or continue to hold an alcoholic beverage license because an officer is disqualified due to a prior criminal conviction, the corporation must terminate its relationship with the officer so convicted.[3]

Section 561.17(1), F.S., authorizes the division to require an applicant for an alcoholic beverage license to submit a set of fingerprints as a condition for approval of the application.[4] The fingerprint requirement in s. 561.17(1), F.S., is permissive. Section 561.17(1), F.S., provides in relevant part:

> Before any application is approved, the division <u>may</u> require the applicant to file a set of fingerprints on regular United States Department of Justice forms for herself or himself and for any person or persons interested directly or indirectly with the applicant in the business for which the license is being sought, when required by the division.
> *(Emphasis supplied.)*

To determine whether the applicant meets the requirements for licensure, applicants for an alcoholic beverage license must disclose all persons with a direct or indirect interest in the alcoholic beverage license, and the applicant's officers, shareholders, and directors. The disclosure is performed by filing with the division a sworn application, and a personal questionnaire for each person required to be disclosed, and a set of fingerprints.

[2] *See* s. 561.15(1),F.S.
[3] *See* s. 561.15(4), F.S.
[4] See 61A-2.014 F.A.C.

**Performing Arts Center Alcoholic Beverage License**

The beverage law provides an alcoholic beverage license for performing arts centers.[5] The license permits the sale of alcoholic beverages for consumption only on the licensed premises and provided that any consumption of alcoholic beverages, except as part of food and beverage service for banquets or receptions, may occur only in conjunction with an artistic, educational, cultural, promotional, civic, or charitable event occurring on the premises under the authorization of or offered directly by the performing arts center.

The performing arts center may transfer the license to a qualified applicant authorized by contract with the performing arts center to provide food and beverage service for the center. However, the license must remain at all times the exclusive property of the performing arts center, and upon termination by any manner of the contract between the performing arts center and the applicant concerning the furnishing of food and beverage service, the license shall revert to the performing arts center by operation of law.[6]

The fee for a performing arts center's alcoholic beverage license cannot exceed $400.[7]

If the license is transferred to a food and beverage service provider with a contract for services with the performing arts center, as provided in s. 561.20(2)(j), F.S., then the persons, officers, shareholders or directors of the food and beverage provider would complete a personal data questionnaire and be fingerprinted. Changes to the persons, officers, shareholders or directors are required to submit a change of officer application and new persons, officers, shareholders or directors would submit a personal data questionnaire and be fingerprinted.[8]

**Exemptions**

Section 561.15(3), F.S., exempts companies regularly traded on a national securities exchange and not over the counter, insurers, banks, and savings and loan associations that have an interest in an alcoholic beverage license from the requirement to obtain the division's approval of their officers, directors, or stockholders or any change of these positions. Because the division is not required to approve the qualifications of these persons, these persons are not required to submit a set of fingerprints.

This exemption does not apply to performing arts centers and their officers, shareholders or directors. They are required to submit a personal data questionnaire and to be fingerprinted.

## III. Effect of Proposed Changes:

The bill amends the qualification requirements for an alcoholic beverage license in s. 561.15(3), F.S., and the license application requirements in s. 561.17(1), F.S., to provide an exemption for performing arts centers from the requirement that all persons with an interest, directly or indirectly, in an alcoholic beverage license must obtain division approval. The exemption applies

[5] Section 561.20(2)(j), F.S
[6] *Id.*
[7] *Id.*
[8] Section 561.32, F.S.

to the performing arts center's volunteer officers or directors or any change of such positions or interests.

The exemption in the bill is similar to the current exemption in ss. 561.15(3) and 561.17(1), F.S., for companies regularly traded on a national securities exchange, insurers, banks, and savings and loan associations.

The bill would permit volunteer officers or directors of a performing arts center to continue to serve without having to be fingerprinted as part of the alcoholic beverage license application process. The bill does not affect the requirement that the performing arts center must disclosure on the application the identity of volunteer officers or directors.

If a performing arts center changed any volunteer officer or director, the division could still require that the center identify the new officer by submitting a change of officer application with the division, but the officer would not have to submit a personal data questionnaire or be fingerprinted.

The bill does not appear to affect the process for food and beverage service providers contracted with the performing arts center.

Because the volunteer officers and directors of a performing arts center would not be subject to division approval as a condition for a license, the division could not suspend, revoke, or refuse to issue an alcoholic beverage license based on any disqualifying criteria associated with any of the volunteer officers or directors of the performing arts center.

The bill uses the undefined term "volunteer" and appears to limit the exemption to officers or directors who are unpaid, do not receive a salary, or are otherwise not compensated for their service.[9]

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

[9] Although, the term "volunteer" is often used in the Florida Statutes without reference to whether the service is provided for compensation, the term is usually presented in the context of a service provided without compensation or specifically described or defined as an uncompensated service. For example, in the context of worker's compensation, s. 440.02(15)(d)6., F.S., specifically excludes volunteers from the definition of an employee by providing that a volunteer is a "person who does not receive monetary remuneration for services is presumed to be a volunteer." In the context of the state employment of volunteers, s. 110.501(1), F.S., defines the term "volunteer" to mean "any person who, of his or her own free will, provides goods or services, or conveys an interest in or otherwise consents to the use of real property pursuant to chapter 260, to any state department or agency, or nonprofit organization, with no monetary or material compensation." Section 766.1115, F.S., relating to "Access to Health Care Act" and providing health services to underserved populations, also provides that volunteer services are not compensated by referencing "volunteer, uncompensated services." In the context of the state's strategy to combat the threat of sexual predators to the public safety, s. 775.21(3)(b)5., F.S., references "prohibiting sexual predators from working with children, either for compensation or as a volunteer."

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There are 49 performing arts centers in Florida that are licensed to serve or sell alcoholic beverages and whose officers and directors would be affected by this bill. A performing arts center and its volunteer officers and directors would save the costs associated with submitting a set of fingerprints for new volunteer officers and directors or any change of volunteer officers or directors. According to the department, that cost ranges from $50 to $55 per individual. The division does not assess a fee for the personal questionnaire for the officers and directors, which the volunteer officers and directors would be exempted by the bill from having to submit to the division for approval of their qualifications.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.