

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 19, 1998 Revised: 04/21/98 _____

Subject: Polls; Solicitation of Voters

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Fox</u>	<u>Bradshaw</u>	<u>EE</u>	<u>Fav/2 amendments</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill expands the no-solicitation zone around polling places from 50 to 100 feet, with no exceptions.

This bill substantially amends section 102.031 of the Florida Statutes.

II. Present Situation:

Presently, s. 102.031, F.S., restricts solicitation within 50 feet of the entrance to any polling place, or polling room where the polling place is also a polling room. However, this section also provides a number of exceptions to the restriction. The restriction does not apply if the solicitation of voters is occurring in a marked area that does not disturb, hinder, impede, obstruct or interfere with voter access to the polling place, and the solicitation activities and subject matter are easily identifiable by the voters as an activity in which they may voluntarily participate. In addition, the restriction does not apply if the solicitation activity is conducted at a residence, an established business, private property, a sidewalk, a park or property traditionally utilized as a public area for discussion within the 50-foot zone.

The various exceptions to the 50-foot no-solicitation zone have created a lot of confusion and make the zone difficult, if not impossible, to apply. First, the exceptions are so numerous that there is almost no area or activity that can be restricted. Second, the law contains conflicting provisions. For example, while paragraph (3)(c)1.c. states that solicitation on a sidewalk *cannot* be restricted, paragraph (3)(c)2. provides that solicitation on the sidewalk *can* be restricted if it is determined that the solicitation is impeding, obstructing or interfering with voter access to the polling place or room. This leaves a lot of discretion in the hands of the poll workers and has the potential to be applied inconsistently and in an arbitrary manner.

The State of Florida has a vital interest in preserving the integrity of the election process. The solicitation of voters in close proximity to polling places, in many cases, leads to voter intimidation and interferes with the maintenance of order at the polls. Supervisors of elections have complained that the current law does not give them the adequate authority to restrict solicitation around polling locations. They have also noted that many voters have objected to the proximity and intensity of solicitors, finding the practice intimidating and coercive, and a disincentive to vote.

III. Effect of Proposed Changes:

The bill increases the no-solicitation zone around polling places from 50 feet to 100 feet. In addition, the bill removes the current exceptions which allow for solicitation within the 50-foot zone under a variety of circumstances, including activities conducted on private property, residences, and established businesses.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Section 102.031, F.S., in its present form was drafted in conformity with three court decisions: *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985); *News-Press Pub. Co., Inc. v. Firestone*, 527 So.2d 223 (Fla. 2nd DCA 1988), *modified on other grounds*, 538 So.2d 457 (Fla. 1989) and; *Florida Comm. for Liability Reform v. McMillan*, 682 F.Supp. 1536 (M.D. Fla. 1988). In *Clean-Up '84*, the United States 11th Circuit Court of Appeals reviewed s. 104.36, F.S., making it a misdemeanor to solicit voters within 100 yards of a polling location. The court determined that while the state had a significant interest in maintaining order at the polls, the law was not narrowly tailored as required where fundamental first amendment rights were at stake. The court held that the statute was unconstitutionally overbroad and facially invalid for a number of reasons, including the fact that the 100-yard radius at certain polling sites would encompass private homes and businesses posing little or no threat to the voting process. The Legislature subsequently repealed s. 104.36, F.S., in 1987 (see Ch. 87-184, s. 5, Laws of Florida).

In 1988, the Florida Second District Court of Appeals in *News-Press* was faced with the constitutionality of s. 101.121, F.S., which prohibited non-voters from coming within 50 feet of any polling place, but which exempted commercial businesses and private property from the restriction. The *News Press* court held the statute unconstitutionally overbroad, because the 50-foot restriction would: encompass traditional public forums for free speech (i.e., streets, sidewalks), and; prohibit the presence of individuals within the restricted area who in no way interfere with the orderly process of voting or the secrecy of the ballot. The Legislature subsequently repealed s. 101.121, F.S. (see ch. 89-338, s. 37, Laws of Florida).

Also in 1988, the United States District Court for the Middle District of Florida in *McMillan*, for many of the same reasons cited in *Clean Up '84* and *News Press*, struck down s. 102.031(3), F.S., which prohibited any voter solicitation, without exception, within 150 feet of any polling place or room.

In 1989, the Legislature amended s. 102.031, F.S., to conform with the rulings of the above three cases. Specifically, the Legislature decreased the restricted zone from 150 feet to 50 feet and added a number of exceptions for when solicitation would be permissible. The changes were intended to create a no-solicitation zone that would pass constitutional muster. In 1992 the United States Supreme Court upheld a Tennessee statute that created a 100-foot, no exceptions “campaign-free zone.” *Burson v. Freeman*, 112 S.Ct. 1846 (1992) The statute at issue in *Burson* provided:

Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position ... on a question are prohibited. . . .

Burson, 112 S.Ct. at 1848. A plurality of the *Burson* Court held that while this zone clearly affected fundamental first amendment rights, Tennessee’s interest in protecting against voter intimidation and election fraud was sufficiently compelling and that the law was sufficiently narrowly tailored to achieve this objective (“strict scrutiny” test). The Court went into great detail analyzing the state’s interests in creating no-solicitation zones and determined that, “[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter.” *Burson*, 112 S.Ct. at 1856. With respect to the choice of making the zone 100 feet, the Court did not employ a litmus paper test that separated valid from invalid restrictions. The Court did note, however, that “the state of Tennessee has decided that the last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice.” *Burson*, 112 S.Ct. at 1857.

However, the “no-solicitation zone” authorized in SB 1904 is far broader than Tennessee’s campaign-free zone at issue *Burson*, raising questions of whether Florida’s zone would pass constitutional muster under the “narrowly-tailored” prong of the strict scrutiny test. The bill defines “solicitation” to include, but not be limited to:

[S]eeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item.

(emphasis added) SB 1904, s. 1 (1998) (to be codified at s. 102.031(3)(c), F.S.). Such a broad definition would encompass the typical activities of private businesses, among others. A court might find that Florida's broad no-solicitation zone is not narrowly-tailored to further the state's compelling interests in preventing fraud, maintaining the secret ballot, and promoting the integrity of the electoral process.

Likewise, it is conceivable that a court would view the 100-foot no-solicitation zone as constitutionally *overbroad*. A statute is overbroad if it "seeks to control activities properly subject to regulation by means that sweep too broadly into areas of constitutionally-protected freedoms." *News-Press Publishing Co., Inc. v. Firestone*, 527 So.2d 223 (Fla. 2nd DCA 1988). It is true that the definition of "solicitation" in the bill essentially re-adopts current law. But, current law authorizes a 50-foot zone with *numerous exceptions*, including ones for activities on private property, residences, and established businesses. The bill allows for *no exceptions*. Under a plain reading of the bill, an auto dealership, a grocery store, a gas station, or any other business located within 100 feet of a polling place would be prohibited from selling *any* goods or services (cars, food, gas, etc.) while the polls are open. It is quite possible that such infringements on the free speech and property rights of business owners who are in no way associated with an election (other than to have the misfortune to be located near a polling place) may render the bill constitutionally overbroad.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Executive Business, Ethics and Elections:

Narrows the definition of “solicitation” to allow for the sale of non-political and non-campaign-related items in the 100-foot restricted zone.

#2 by Executive Business, Ethics and Elections:

Allows the governing board of a charter county to provide for solicitation within the 100-foot restricted zone.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
