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HOUSE OF REPRESENTATIVES
COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY
ANALYSIS

BILL #: HB 931

RELATING TO: Adult Entertainment Establishments

SPONSOR(S): Representative(s) Joyner

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 6 NAYS 0
(2) COMMITTEE ON JUDICIAL OVERSIGHT
(3) COUNCIL FOR HEALTHY COMMUNITIES
(4)
(5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

Section 847.0134 prohibits adult entertainment establishments from locating within 2,500 feet of a school. The bill amends s. 847.0134 and changes the prohibited distance to 2,000 feet. Adult entertainment establishments operating prior to the effective date of s. 847.0134 will no longer be exempt from the 2,000 feet prohibition. Further, counties and municipalities are no longer permitted to grant exceptions within the 2,000 feet buffer zone.

[A STRIKE-EVERYTHING AMENDMENT IS TRAVELING WITH THE BILL. SEE SECTION VI.]

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes [x]	No []	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No [x]	N/A []
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

The bill prohibits adult entertainment establishments from locating within 2,000 feet of schools without exception.

B. PRESENT SITUATION:

The 2001 Legislature enacted Chapter 2001-177, Laws of Florida, which prohibits the location of an adult entertainment establishment that sells, rents, loans, distributes, transmits, shows, or exhibits any obscene material, as described in s. 847.0133, within 2,500 feet of a school.

- For purposes of s. 847.0133, "obscene material" is defined as any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose. The term "obscene" has the same meaning as set forth in s. 847.001.
- Section 847.001(10) defines "obscene" as the status of material which:
  - The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
  - Depicts or describes, in a patently offensive way, sexual conduct as specifically defined in s. 847.001(16); and
  - Taken as a whole, lacks serious literary, artistic, political, or scientific value.
- "Sexual conduct," as defined in s. 847.001(16), is actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, butoocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. This definition excludes a mother's breastfeeding of her baby.

The law also prohibits adult entertainment establishments that offer live entertainment or a motion picture, slide, or other exhibit that, in whole or in part, depicts nudity, sexual conduct, sexual excitement, sexual battery, sexual bestiality, or sadomasochistic abuse and that is harmful to minors, as described in s. 847.001, within 2,500 feet of a school. (Please reference the definition of "sexual conduct" above.) s. 847.0134, F.S.

An "adult entertainment establishment" as set forth in s. 847.001(2), F.S., is defined as: Any commerical establishment, business, or service, or portion thereof, that offers sexually-oriented material, devices, paraphernalia, or specific sexual activities, services, or performances in any combination or in any other form, whether printed, filmed, recorded, or live. The term includes the following:

- "Adult bookstore" is defined as any business that restricts or purports to restrict admission only to adults, which has as part of its stock, books, magazines, other periodicals, videos, discs, or other graphic media and which offers, sells, provides, or rents for a fee any sexually oriented material.
- "Adult theater" is defined as an enclosed building or an enclosed space within a building used for presenting either films, live plays, dances, or other performances that are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specific sexual activities for observation by patrons, and which restricts or purports to restrict admission only to adults.
- "Special Cabaret" is defined as any business that features persons who engage in specific sexual activities for observation by patrons, and which restricts or purports to restrict admission only to adults.
- "Unlicensed massage establishment" is defined as any business or enterprise that offers, sells, or provides, or that holds itself out as offering, selling, or providing, massages that include bathing, physical massage, rubbing, kneading, anointing, stroking, manipulating, or other tactile stimulation of the human body by either male or female employees or attendants, by hand or by any electrical or mechanical device, on or off the premises. The term does not include an establishment licensed under s. 480.43 which routinely provides medical services by state-licensed health care practitioners and massage therapists licensed under s. 480.041.

The law under s. 847.0134 includes two exceptions to the adult entertainment establishment prohibition. First, an establishment that is legally operating or has been granted a permit from a local government to operate as an adult entertainment establishment on or before July 1, 2001 is exempt. Second, the county or municipality can approve the location of the adult entertainment facility under the proceedings required in s. 125.66(4), F.S., or s. 166.041(3), F.S., for municipalities.

Section 125.66(4), F.S., governs the procedure for counties enacting ordinances or resolutions that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances initiated by the county that change the actual zoning map designation of a parcel or parcels of land. There are two procedures that differ based on the amount of land at issue:

- If the proposed ordinance or resolution changes the actual zoning map designation for a parcel of land involving less than 10 contiguous acres, public notice must include newspaper notice at least 10 days prior to the meeting. Then board of commissioners must also notify by mail each real property owner whose land the governmental agency will redesignate by enactment of the ordinance at least 30 days prior to the public hearing. The board of commissioners must hold a public hearing on the proposed ordinance and, upon completion of the hearing, may immediately adopt the ordinance or resolution.
- If the proposed ordinance or resolution changes the list of permitted, conditional, or prohibited uses within a zoning category, or changes the zoning map designation of a parcel of land involving 10 contiguous acres or more, the board of county commissioners must hold two advertised public hearings on the proposed ordinance or resolution. The first public hearing must be held at least 7 days after the day that the first advertisement is published, and the second hearing must be held at least 10 days after the first hearing and must be

advertised at least 5 days before the hearing. In addition, the size and content of the advertisement is prescribed.

The hearing and notice requirements in s. 166.01(3), F.S., for municipalities, parallel the requirements described above for counties.

Subsection 2 of s. 847.0134, F.S., provides that a violation of the section constitutes a third degree felony punishable by a jail term not exceeding 5 years under s. 775.082(3)(d) and a fine of up to $5,000 under s. 775.083(1)(c).

C. EFFECT OF PROPOSED CHANGES:

The bill reduces the radius around the school within which an adult entertainment establishment can be located from 2,500 feet to 2,000 feet. The bill eliminates two exceptions to the distance prohibition that are currently provided in s. 847.0134, F.S. First, the bill eliminates the exception for establishments that are legally operating or have been granted a permit from a local government to operate as adult entertainment establishments on or before July 1, 2001. Second, the bill eliminates the discretion of the county or municipality to approve the location of an establishment as provided in s. 125.66(4), F.S., or s. 166.041(3)(c), F.S.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

State government may incur litigation costs associated with the taking claims of adult entertainment businesses that lose their “grandfather status.” Additional litigation costs may be incurred if an adult entertainment establishment challenges the statute in an instance where the 2,000 feet prohibition effectively bans all adult entertainment establishments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

Local governments may incur litigation costs associated with the taking claims of adult entertainment businesses that lose their “grandfather status.” Additional litigation costs may be incurred if an adult entertainment establishment challenges the statute in an instance where the 2,000 feet prohibition effectively bans all adult entertainment establishments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will affect adult entertainment facilities that were permitted by a local government to operate in a specific location prior to July 1, 2002 that are located within 2,000 feet of a school. Such facilities would lose their grandfather status under the terms of the bill. In addition, as local governments lose the ability to permit exceptions to the 2,000 feet prohibition, an adult entertainment business would never, under any circumstances, be permitted to be located within 2,000 feet of a school.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or taken an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The United States Supreme Court has upheld legislation and ordinances restricting the location of adult entertainment establishments as "content-neutral" time, place, or manner restrictions. In *City of Renton v. Playtime Theatres*,[1] the City of Renton, Washington, enacted a zoning ordinance that prohibited adult motion picture theatres from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school. The Court recognized that the ordinance did not ban adult theatres altogether, and therefore the regulation could be analyzed "as a form of time, place, and manner regulation."[2] The Renton ordinance was aimed at the "secondary effects of such theatres on the surrounding community," not the content of the films shown at the theatres.[3] The ordinance was designed to "prevent crime, protect the city's retail trade, maintain property values, and generally 'protect and preserve the quality of the city's neighborhoods, commerical districts, and the quality of urban life [and] not to suppress the expression of unpopular views.'"[4] The proper inquiry was whether the ordinance was designed to serve a substantial government interest and allowed for reasonable alternative avenues of communication.

The last criterion, whether the regulation allows for reasonable alternative avenues of communication, is critical in determining the constitutionality of the bill. The United States Supreme

1 City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S.Ct. 925 (1986).
2 *Id*. at 928.
3 *Id*.at 929.
4 *Id*.

Court characterizes the fourth criterion as requiring that the restriction be no greater than is essential to further the governmental interest. A governmental entity may not ban adult entertainment establishments. According to this bill, a situation could arise wherein the 2,000 feet prohibition acts to unconstitutionally ban all adult entertainment establishments in a locality.

By eliminating the "grandfather clause," the bill also raises several takings issues. If a local government attempts to close down an adult entertainment business that it had previously permitted prior to July 1, 2001, the business owner may have a claim that he or she has a "vested right" that is being taken by the government action. The Fifth Amendment to the United States Constitution guarantees that citizens' private property shall not be taken for public use without just compensation. The Fifth Amendment is applicable to the states through the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Florida Constitution, in Article I, section 2, also guarantees all natural persons the right to "acquire, possess and protect property" and further provides that no person shall be deprived of property without due process of law. Article X, section 6 of the Florida Constitution is complimentary to the Fifth and Fourteenth Amendments to the United States Constitution. It provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefore paid to each owner . . . ."

In 1995, the Harris Act was enacted by the Legislature to provide an alternative means of relief to private property owners whose property has been "inordinately burdened" by state and local government action.[5] The inordinate burden applies either to an existing use of real property or a vested right to a specific use, as determined by application of the rules of equitable estoppel.[6] Under s. 70.001(4)(a), F.S., a property owner seeking compensation must present, within one year of the governmental action, a written claim to the head of the government agency whose action caused the inordinate burden, along with a valid appraisal that shows the loss of the fair market value.

The governmental entity then has 180 days to make a written settlement offer that may include:[7]

- An adjustment of land development or permit standards or other provisions controlling the development or use of the land;
- Increases or modifications in the density, intensity, or use of areas of development;
- The transfer of development rights;
- Land swaps and exchanges;
- Mitigation, including payments in lieu of on-site mitigation;
- Location of the least sensitive portion of the property;
- Conditioning of the amount of development permitted;
- A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development;
- Issuance of the development order, a variance, special exception, or other extraordinary relief;
- Purchase of the real property, or an interest therein, by an appropriate governmental agency;
- No changes to the action of the governmental entity.

5 See s. 70.001(2)(3), F.S.
6 Section 70.001(2), (3)(a), F.S.
7 Section 70.001(4)(c)(1.-11.), F.S.

If the property owner accepts the settlement offer then the government implements it pursuant to s. 70.001(4)(c), F.S. If the settlement offer is declined, the govenrment must issue within the 180-day period a written ripeness decision, which must contain identification of allowable uses on the affected land. This ripeness decision serves as the last prerequisitie to judicial review, thus allowing the landowner to file a claim in circuit court pursuant to s. 70.001(5)(a-b), F.S.

Under s. 70.001(6)(a), F.S., the court decides if there was an existing use of the property or a vested right to a specific use, and if so, whether the governmental action inordinately burdened the property. Private property is inordinately burdened if the owner is left with existing or vested uses which are unreasonable such that the owner would permanently bear a disproportionate share of a burden imposed for the public good which should be borne by the public at large.

If more than one governmental entity is involved the court will decide the percentage of the burden for which each agency is responsible. The court then impanels a jury to decide the monetary value, pursuant to s. 70.001(6)(b), F.S., based upon the loss in fair market value attributable to the governmental action. The prevailing party is entitled to reasonable costs and attorney's fees, pursuant to s. 70.001(6)(c)(1.-2.1), F.S., if the losing party did not make, or rejected, a bona fide settlement offer.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

A strike-everything amendment was adopted by the Committee on Crime Prevention, Corrections & Safety on February 21, 2002. As amended, the bill retains current language in the statute that prohibits adult entertainment establishments from locating within 2,500 feet of a school. The provision retains language in the statute that exempts adult entertainment establishments, operating prior to the effective date of s. 847.0134, from complying with the 2,500 feet prohibition. This portion of the amendment prevents the takings issues discussed in Section V, Constitutional Issues above. Further, counties and municipalities still have the ability to grant exceptions to adult entertainment establishments, enabling them to locate within 2,500 feet of a school. However, the county or municipality is required to obtain the consent of the local school board in a public meeting pursuant to s. 230.16, F.S.

VII. SIGNATURES:

COMMITTEE ON COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by: Staff Director:

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