

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 139 w/CS Public Lodging Establishments

SPONSOR(S): Homan and McInvale

TIED BILLS: **IDEN./SIM. BILLS:** SB 280

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|-------------------------------|-----------------------|----------------|------------------|
| 1) <u>Business Regulation</u> | <u>38 Y, 0 N w/CS</u> | <u>Gallen</u> | <u>Liepshutz</u> |
| 2) <u>Judiciary</u> | <u></u> | <u>DeJesus</u> | <u>Havlicak</u> |
| 3) <u></u> | <u></u> | <u></u> | <u></u> |
| 4) <u></u> | <u></u> | <u></u> | <u></u> |
| 5) <u></u> | <u></u> | <u></u> | <u></u> |

SUMMARY ANALYSIS

This bill creates the "Tourist Safety Act of 2004" to prohibit the distribution of handbills, without permission, on private property controlled or owned by any public lodging establishment upon which it is posted that advertising or solicitation is prohibited. The term "handbill" is defined as any flier, leaflet, pamphlet, or other written material that seeks to advertise, promote, or inform persons about an individual or business, and does not include employee communications permissible under the National Labor Relations Act.

This bill makes it a first degree misdemeanor to violate this prohibition. Additionally, it is a first degree misdemeanor with a \$500 minimum fine for those that direct a person to violate this prohibition.

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

The bill takes effect July 1, 2004.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0139b.ju.doc

DATE: March 23, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

This bill decreases individual freedom by prohibiting any individual, agent, contractor, or volunteer acting on behalf of an individual, business, company, or food service establishment from attempting to or successfully delivering, distributing or placing handbills, without permission, at or in the premises of a public lodging establishment.

B. EFFECT OF PROPOSED CHANGES:

PUBLIC LODGING ESTABLISHMENTS

Chapter 509, F.S., sets out the regulations for public lodging establishments through the Division of Hotels and Restaurants of the Department of Business and Professional Regulation. A public lodging establishment is defined as “any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings, which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.”¹ The term “guest” includes any patron, customer, tenant, lodger, boarder, or occupant of a public lodging establishment.²

Additionally, Chapter 509, F.S., addresses the behavior of guests on public lodging establishment property. The owner of a public lodging establishment may, among other things, remove intoxicated guests or guests using profanity or who are involved in a brawl.³ An owner may refuse service to an intoxicated guest or to a guest who is using profane language or brawling.⁴ An owner of an establishment may take a guest into custody, through reasonable means, when the owner believes the guest is in violation of s. 877.03, F.S., (breach of the peace or disorderly conduct) if that conduct is threatening the life or safety of that person or others.⁵

TRESPASS IN STRUCTURE

Chapter 810, F.S., provides that whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure,⁶ or, having been authorized, is warned by the owner or lessee, or a person authorized by the owner or lessee, to depart and refuses to do so, commits a second degree misdemeanor.⁷ A person authorized to warn someone to depart includes any law enforcement officer whose department has received written authorization to communicate an order to depart the property in

¹ See s. 509.013(4)(a), F.S.

² See s. 509.013(3), F.S.

³ See s. 509.141(1), F.S.

⁴ See s. 509.142, F.S.

⁵ See s. 509.143(1), F.S.

⁶ See s. 810.011(1), F.S., defining the term “structure” to mean a building of any kind, whether temporary or permanent, which has a roof over it, together with the cartilage thereof.” This section also applies to trespass in a conveyance.

⁷ See s. 810.08(1) and (2)(a), F.S.

the case of a threat to public safety or welfare.⁸ If a human being is in the structure at the time that the offender trespassed, the offense is a first degree misdemeanor, punishable by up to one year of incarceration.⁹

TRESPASS ON PROPERTY OTHER THAN STRUCTURE

A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given, either by actual communication to the offender or by posting or fencing commits a first degree misdemeanor, punishable by up to one year of incarceration.¹⁰

“Posted land” is land upon which signs are placed not more than 500 feet apart along, and at each corner of, the boundaries of the land.¹¹ They must be posted in a manner and in a position as to be clearly noticeable from outside the boundary line.¹² The signs must have the words “no trespassing” displayed prominently, in letters no less than 2 inches in height, as well as the name of the owner, lessee, or occupant of the land.¹³

“Fenced land” is land which has been enclosed by a fence of substantial construction which stands at least 3 feet in height.¹⁴

PROPOSED CHANGES

This bill amends part I of chapter 509, F.S., relating to the regulation of public lodging establishments, to define the term “handbill” and to make it unlawful to distribute without permission a handbill on private property controlled by any public lodging establishment upon which it is posted that advertising or solicitation is prohibited.

“Without permission” means without the expressed written or oral permission of the owner or manager, and where a sign is posted that prohibits advertising or solicitation.

A “handbill” is defined as any flier, leaflet, pamphlet, or other written material that advertises, promotes, or informs persons about an individual, business, company, or food service establishment. Employee communications permissible under the National Labor Relations Act are not included in this definition.

This bill makes it unlawful to deliver, distribute, place, or attempt to do so, without permission, a handbill at or in the private property controlled by any public lodging establishment upon which it is posted “no advertising” or “no solicitation” or terms that indicate the same meaning.

This bill creates a first degree misdemeanor offense, punishable by up to 1 year in prison and a fine up to \$1,000, which would require proof of the following elements:

1. An individual, agent, contractor, or volunteer acting on behalf of any individual, business, company or food service establishment;¹⁵

⁸ See s. 810.08(3), F.S.

⁹ See ss. 810.08(2)(b) and 775.082, F.S.

¹⁰ See ss. 810.09(1)(a) and 775.082, F.S.

¹¹ See s. 810.011(5)(a), F.S.

¹² *Id.*

¹³ *Id.*

¹⁴ See s. 810.011(7), F.S., provides that the fence can be constructed with “rails, logs, post and railing, iron, steel, barbed wire, other wire or other material.”

¹⁵ Section 509.013(5), F.S. defines the term “public food service establishment” to mean “any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption.” The section also excludes a number of facilities from the definition

2. a delivery, distribution, or placement or attempt to deliver, distribute, or place;
3. any handbill;
4. on the private property controlled by any public lodging establishment;
5. without permission; and,
6. whereupon a sign is posted with the words "no advertising" or "no solicitation" or words of the same meaning.

Further, this bill makes it a first degree misdemeanor to direct any other person to distribute handbills in the manner described above. Any person found guilty of this offense will be found guilty of a first degree misdemeanor and will additionally be assessed a minimum fine of \$500.¹⁶

This bill will take effect July 1, 2004.

C. SECTION DIRECTORY:

Section 1. Provides popular name "Tourist Safety Act of 2004."

Section 2. Creates s. 509.144, F.S., prohibiting the distribution of handbills without permission; provides penalties; and defines the terms "handbill" and "without permission."

Section 3. Provides an effective date of July 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

The bill is not expected to have a significant fiscal impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

Although this bill creates a prohibition that must be enforced, the fiscal impact should be minimal.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will prohibit private companies and individuals from distributing handbills on the premises of certain public lodging establishments. This may have an undetermined negative economic impact on an individual or business who distributes handbills as well as any business that uses handbills as a method of advertising.

D. FISCAL COMMENTS:

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

of public food service establishment including school cafeterias, eating places maintained by a nonprofit organization and theaters. See s. 509.013(5)(b), F.S.

¹⁶ See s. 775.083(1)(g), F.S., providing that fines assessed in addition to punishment may be for any higher amount if specifically authorized by statute.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision does apply because this bill may require counties to take additional police action to enforce the prohibition; however, an exemption applies because it is a criminal law.

2. Other:

FIRST AMENDMENT

The bill prohibits the distribution of a handbill that seeks to advertise, promote or inform persons about an individual or business on the property of a public lodging establishment where a warning is posted. This could limit the distribution of information regarding a number of topics ranging from political pamphlets to commercial advertisements.

The First Amendment provides that "Congress shall make no law ...abridging the freedom of speech, or of the press ..." The Fourteenth Amendment makes this limitation applicable to the States. The United States Supreme Court considered the issue of whether a privately owned shopping mall could prohibit the distribution of handbills on its property.¹⁷ The respondent argued that because the mall was open to the public, it was essentially a public forum and the private company could therefore not enforce a restriction against handbilling on the premises.¹⁸ In ruling that the respondents were not entitled to exercise their First Amendment rights on the mall property, the Court noted that, "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."¹⁹ The Court also ruled that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes."²⁰ This bill does not impact the right of an individual to distribute handbills on public property. This bill only applies to private property controlled by public lodging establishments and, therefore, does not appear to violate the First Amendment.

Furthermore, in order for a potential plaintiff to succeed on a violation of First Amendment claim, there is a necessity to prove a state action.²¹ Public lodging establishments are privately owned and operated, and receive no government funds. Plaintiffs therefore would not be able to show a nexus type of argument premised on the degree of state involvement in a private activity either.²²

In section 4, Article I of the Florida Constitution, every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. One circuit court recently reversed the conviction of a man (Wood) who was convicted in county court of trespass for staying in the Panama City Mall after having been told by mall security that his solicitation of signatures in the mall to appear on a ballot for political office violated the mall's rules and was told to stop the solicitation in the mall or leave.²³ The circuit court held that the State Constitution "prohibits a private owner of a 'quasi-public' place from using state

¹⁷ Lloyd Corporation v. Tanner, 92 S.Ct. 2219 (1972).

¹⁸ *Id.*

¹⁹ *Id.* at 2228.

²⁰ See *also*, Cape Cod Nursing Home Council v. Rambling Rose Rest Home, 667 F.2d. 238 (1st Cir. 1981)(holding that police action in removing individuals from private nursing homes did not create a first amendment right of access where none would otherwise exist).

²¹ See, e.g., Civil Rights Cases, 109 U.S. 3 (1883); Shelley v. Kraemer, 334 U.S. 1 (1947); see *also* Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

²² See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

²³ See Wood v. State, 2003 WL 1955433 (Fla.Cir.Ct., Feb. 26, 2003).

trespass laws to exclude peaceful political activity.”²⁴ Some Florida courts have expressly held that malls are “quasi-public” places.²⁵

This bill only addresses public lodging establishments and may prohibit political activity.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 10, 2004, the Committee on Business Regulation adopted an amendment to the bill. The amendment eliminates the provisions creating a third degree felony offense for those that commit a battery while in violation of this act and for those that direct another to violate this act and a battery is committed. In addition, the amendment defines “without permission” and imposes a \$500 minimum fine against a person found guilty of directing another to violate this act. Further, the amendment provides that the prohibition found in the bill does not apply to employee communications permissible under the National Labor Relations Act.

²⁴ *Id.* at 2.

²⁵ See State v. Woods, 624 So.2d 739 (Fla. 5th DCA 1993).