

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – The bill increases the ability of public lodging establishments statewide to control the business activities conducted on their premises by providing penalties for persons who do not receive prior permission for distribution of handbills or who ignore signs prohibiting such distribution. Likewise, the bill decreases individual liberty by prohibiting individuals, businesses or companies from attempting to or successfully delivering, distributing or placing handbills, without permission, at or on the premises of a public lodging establishment.

Promote personal responsibility – The bill increases personal accountability by providing a uniform system for informing businesses and individuals of what constitutes unacceptable behavior in the distribution of handbills and the consequences for violation of distribution requirements noted below.

Maintain public security – The bill increases the physical security of guests in the public lodging establishments and increases the security of the property as well. The bill empowers the public lodging establishment to play a greater role in such security efforts.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

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

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.

whose department has received written authorization to communicate an order to depart the property in 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

Local Regulation of Handbill Distribution

Some cities and counties have passed ordinances prohibiting individuals or businesses from distributing handbills on specified public or private property and on vehicles. Some of the ordinances provide for prohibition on property that posts a “No Solicitation” or “No Advertising” sign that is posted at the entrance of a building. In 1997, the city of Tampa passed an ordinance stating that it “is unlawful for any individual to deliver, distribute or place, or attempt to deliver, distribute or place, handbills on private property upon which is posted a reasonably conspicuous sign reading ‘No Advertising’ or ‘No Solicitation’.”¹⁵ The ordinance also prohibits any business advertising by means of handbills to direct, encourage or allow any individual, employee or independent contractor distributing handbills on behalf of the business to deliver, distribute or place handbills on private property upon which is posted in a reasonably conspicuous ‘No Advertising’ or ‘No Solicitation’ sign.¹⁶ The municipal code violation is punishable by a fine and/or imprisonment and/or probation. The fine cannot exceed \$500, the imprisonment cannot exceed 60 days, and the probation cannot exceed six months.¹⁷

Other State Laws

California law regulates the distribution of handbills on public lodging establishments in its Business and Professions Code, under unfair competition.¹⁸ “Handbill” means, and is specifically limited to, any tangible commercial solicitation to guests of the hotel urging that they patronize any commercial enterprise.¹⁹ Regarding the distribution of handbills, s. 17210(c) of the code states:

Every person (hereinafter “distributor”) engages in unfair competition for purposes of this chapter who deposits, places, throws, scatters, casts, or otherwise distributes any handbill to any individual guest rooms in any hotel, including, but not limited to, placing,

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 Code of Ordinances City of Tampa, Chapter 6, s. 6-171(a).

¹⁶ *Id.* at Sec. 6-17(b).

¹⁷ Code of Ordinances City of Tampa, Chapter 1, ss. 1-16 and 1-161.1.

¹⁸ Cal. Bus. & Prof. Code, s. 17210 (West 2005).

¹⁹ *Id.* at s. 17210(b).

throwing, leaving, or attaching any handbill adjacent to, upon, or underneath any guest room door, doorknob, or guest room entryway, where either the innkeeper has expressed objection to handbill distribution or by the posting of a sign or other notice in a conspicuous place within the lobby area and at all points of access from the exterior of the premises to guest room areas indicating that handbill distribution is prohibited, or the distributor has received written notice pursuant to subdivision (e) that the innkeeper has expressed objection to the distribution of handbills to guest rooms in the hotel.

California's law also penalizes a person who directs another person to distribute handbills, but requires that the person directing the distributor be informed in writing that the establishment objects to the distribution of handbills in the hotel.²⁰ A person who violates the law may be subject to a civil fine not to exceed \$2,500.²¹ If an injunction prohibiting the distribution of handbills is disregarded, a person may be liable for a penalty not to exceed \$6,000 per violation.²²

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;²³
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.

²⁰ *Id.* at s. 17210(d).

²¹ Cal. Bus. & Prof. Code, s. 17206(a) (West 2005).

²² Cal. Bus. & Prof. Code, s. 17207(a) (West 2005).

²³ 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 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.

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 \$500.²⁴

This bill will take effect July 1, 2005.

C. SECTION DIRECTORY:

Section 1. Provides popular name "Tourist Safety Act of 2005."

Section 2. Creates s. 509.144, F.S., prohibiting the distribution of handbills without permission; defining the terms "handbill" and "without permission;" providing requirements for posting of signs prohibiting distribution of handbills; and providing penalties.

Section 3. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill is not expected to have a significant fiscal impact. See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Although this bill creates a prohibition that must be enforced, the fiscal impact is expected to be minimal. See "Fiscal Comments."

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. Since the bill provides for only misdemeanor penalties, there will not be a state prison bed impact. It is unknown if the bill would have any jail bed impact, since the offenses in the bill are new offenses.

²⁴ 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:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution 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.²⁵ 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.²⁶ 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."²⁷ 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."²⁸ 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.²⁹ 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.³⁰ 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.³¹ The circuit court held that the State Constitution "prohibits a private owner of a 'quasi-public' place from using state trespass laws to exclude peaceful political activity."³² Some Florida courts have expressly held that malls are "quasi-public" places.³³

²⁵ Lloyd Corporation v. Tanner, 92 S.Ct. 2219 (1972).

²⁶ *Id.*

²⁷ *Id.* at 2228.

²⁸ 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).

²⁹ 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).

³⁰ See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

³¹ See Wood v. State, 2003 WL 1955433 (Fla.Cir.Ct., Feb. 26, 2003).

³² *Id.* at 2.

³³ See State v. Woods, 624 So.2d 739 (Fla. 5th DCA 1993).

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

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES