SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Regulated Industries Committee

BILL:	CS/SB 1308
SPONSOR:	Regulated Industries Committee
SUBJECT:	Enclosed Indoor Workplace/Smoking
DATE:	February 25, 2005 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.			CM	
3.			CJ	
4.			GA	
5.				
6.				

I. Summary:

The bill amends s. 386.203, F.S., to provide that the term "person" has the same meaning as in the rule of statutory construction in s. 1.01, F.S. The bill amends s. 386.204, F.S., to provide that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace. The bill also amends the penalty provisions in s. 561.695, F.S., to apply the penalty provisions for stand-alone bars to alcoholic beverage vendors who permit smoking in alcoholic beverage licensed establishments. Under current law these penalties only apply to alcoholic beverage vendors who have received a stand-alone bar designation from the Division of Alcoholic Beverages and Tobacco (DABT) within the Department of Business and Professional Regulation (DBPR).

The bill amends s. 386.208, F.S., to provide that a law enforcement officer may issue a citation to any person who violates the provisions of the Clean Indoor Air Act. It specifies the minimum information that a citation must contain. It provides that if any person refuses to comply with a proprietor's request to stop smoking, a law enforcement officer may remove the violator from the premises.

The bill amends s. 561.695, F.S., to provide that an alcoholic beverage licensee is subject to revocation or suspension of its alcoholic beverage license under s. 561.29, F.S., if the licensee knowingly makes a false statement on the annual affidavit. The bill also amends s. 561.695, F.S., to eliminate the required agreed upon procedures report that designated stand-alone bars must file with the DABT every three years after their initial designation.

The bill deletes subsection (1) of s. 386.206, F.S., which expires on July 1, 2005, and requires that any person in charge of an enclosed indoor workplace who was required before the adoption

of the smoking ban in the Florida Constitution to conspicuously post a sign wherever smoking is permitted.

The bill would take effect July 1, 2005.

This bill substantially amends the following sections of the Florida Statutes: 386.203, 386.204, 386.2045, 386.205, 386.206, 386.208, and 561.695.

II. Present Situation:

Florida Constitution

On November 5, 2002, the voters of Florida approved constitutional Amendment 6 to prohibit tobacco smoking in enclosed indoor workplaces. Codified as art. X, section 20 of the Florida Constitution, the amendment defines an "enclosed indoor workplace," in part, as "any place where one or more persons engages in work, and which place is predominantly or totally bounded on all sides and above by physical barriers…without regard to whether work is occurring at any given time." It defines "work" as "any person's providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part-time, whether legally or not." The constitutional amendment provides limited exceptions for private residences "whenever they are not being used commercially to provide child care, adult care, or health care, or any combination thereof," retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars.

The constitutional amendment directs the Legislature to implement the "amendment in a manner consistent with its broad purpose and stated terms." The constitutional amendment requires that the implementing legislation have an effective date of no later than July 1, 2003. The amendment requires that the implementing legislation must also provide civil penalties for violations; provide for administrative enforcement; and require and authorize agency rules for implementation and enforcement. It further provides that the Legislature may enact legislation more restrictive of tobacco smoking than that provided in the State Constitution.

Florida's Clean Indoor Air Act

The Legislature implemented the smoking ban by enacting ch. 2003-398, L.O.F., effective July 1, 2003, which amended pt. II of ch. 386, F.S., and created a new s. 561.695, F.S., of the Beverage Law. Part II of ch. 386, F.S., constitutes the Florida Clean Indoor Air Act (the "act"). The act, as amended, implements the constitutional amendment's prohibition. Specifically, s. 386.204, F.S., prohibits smoking in an enclosed indoor workplace, unless the act provides an exception. The act adopts and implements the amendment's definitions and adopts the amendment's exceptions for private residences whenever not being used for certain commercial purposes[1], stand-alone bars,[2] designated smoking rooms in hotels and other public lodging

[1] Section 386.2045(1), F.S. *See also* definition of the term "private residence" in s. 386.203(1), F.S.
[2] Section 386.2045(4), F.S. *See also* definition of the term "stand-alone bar" in s. 386.203(11), F.S.

establishments,[3] and retail tobacco shops, including businesses that manufacture, import or distribute tobacco products and tobacco loose leaf dealers.[4]

Section 386.207, F.S., provides for enforcement of the act by the Department of Health (DOH) and the Department of Business and Professional Regulation (DBPR) within each department's specific areas of regulatory authority. Sections 386.207(1) and 386.2125, F.S., grant rulemaking authority to the DOH and the DBPR and require that the departments consult with the State Fire Marshal during the rulemaking process.

Section 386.207(3), F.S., provides penalties for violations of the act by proprietors or persons in charge of an enclosed indoor workplace.[5] The penalty for a first violation is a fine of not less than $250 and not more than $750. The act provides fines for subsequent violations in the amount of not less than $500 and not more than $2,000. Penalties for individuals who violate the act are provided in s. 386.208, F.S., which provides penalties in the amount of not more than $100 for a first violation and not more than $500 for a subsequent violation. The penalty range for an individual violation is identical to the penalties for violations of the act before the implementation of the constitutional smoking prohibition.

Stand-Alone Bar Provisions

Section 561.695, F.S., implements the exception for stand-alone bars. The constitutional amendment established three requirements for stand-alone bars. First, a stand-alone bar must be "devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises." Second, the serving of food, if any, must be "merely incidental" to the consumption of any alcoholic beverages. Third, the business must not be "located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue."

The constitutional amendment does not define the term "merely incidental." Section 561.695(5), F.S., defines "merely incidental" to limit a stand-alone bar from deriving more than 10 percent of its gross revenue from the sale of food. The constitutional amendment also does not define what is meant by "predominately" serving alcoholic beverages. The act does not define how much alcoholic beverage service would satisfy the predominant service of alcoholic beverages requirement.

In order to permit tobacco smoking in its business location, a stand-alone bar must receive a designation as a stand-alone bar from the Division of Alcoholic Beverages and Tobacco (DABT or division), within the DBPR. To qualify for a stand-alone bar designation, an establishment must have an active alcoholic beverage license permitting consumption on the premises and must notify the division of its intent to allow smoking.[6] There is no fee for this designation.

[3] Section 386.2045(3), F.S. *See also* definition of the term "designated guest smoking room" in s. 386.203(4), F.S.
[4] Section 386.2045(2), F.S. *See also* definition of the term "retail tobacco shop" in s. 386.203(8), F.S.
[5] The applicable penalties for violations by designated stand-alone bars are set forth in s. 561.695(8), F.S.
[6] An applicant for the stand-alone bar designation must file DBPR form DBPR ABT-6039, "Notification of Election to Permit Tobacco Smoking in the Licensed Premises," with the Division of Alcoholic Beverages and Tobacco.

Triennial Reports Requirement for Stand-Alone Bars

Every third year after the initial designation, a stand-alone bar that serves food, other than pre-packaged items, must file a procedures report prepared by a Certified Public Accountant with the DABT attesting to the percentage of food sales on or before the annual license renewal.[7] The first triennial report will be due by September 30, 2006, which is the first applicable renewal date for designated stand-alone bars.

Penalties for Stand-Alone Bars

Section 561.695(8), F.S., provides specific penalties for violations by stand-alone bars that range from a warning for a first violation to revocation of the ability to allow smoking on the premises for a fourth violation. The applicable fines range from $500 to $2,000.

The division enforces the Beverage Law in chs. 562, 563, 564, 565, 567, and 568, F.S. The Beverage Law prohibits, as a third degree felony, a person from willfully and knowingly making false entries in records required by the Beverage law concerning the excise tax.[8] However, there is no comparable provision in s. 561.29, F.S., which provides the grounds for suspension or revocation of an alcoholic beverage license, for willfully or knowingly making false and misleading statements in regards to other reports required under the Beverage Law.

DBPR rulemaking

The DBPR has not completed its rulemaking process to implement the act. The DABT and the Division of Hotels and Restaurants are the principal agencies within the DBPR that are responsible for the enforcement of the act. Section 561.695(8), F.S., grants the DABT the authority to adopt rules governing the designation process, criteria for qualification, required recordkeeping, auditing, and other rules necessary for the effective enforcement and administration of the act.

After adopting its initial emergency rules,[9] the DBPR initiated rulemaking for rules 61A-7.001 through 61A.7.015 on September 29, 2003.[10] These proposed rules pertained to the implementation of the stand-alone bar exception, and established a methodology for determining the percentages of food and alcoholic beverages sold in a purported stand-alone bar, record keeping requirements, penalty guidelines, and investigative and enforcement procedures.

Challenged Rules

Bowling Centers of Florida, Inc., (Bowling Centers), an association representing bowling establishments in Florida, challenged the department's proposed rules 61A-7.003, 61A-7.007, 61A-7.008, and 61A-7.009 as an invalid exercise of delegated legislative authority before the

[7] Section 561.695(6), F.S.
[8] *See* s. 562.45, F.S.
[9] *See* Emergency Rule 61AER03-1 as noticed in Florida Administrative Weekly, Volume 29, no. 26, June 27, 2003.
[10] Proposed Rules 61A-7.001 through 61A.7.015 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

Division of Administrative Hearing (DOAH). On March 26, 2004, the Administrative Law Judge (ALJ) issued a final order granting Bowling Centers' challenge of proposed rules 61A-7.007, 61A-7.008, and 61A-7.009 and holding that the DBPR had exceeded its grant of rulemaking authority, that the rules enlarge, modify, or contravene the specific provisions of law implemented, and are arbitrary.[11] The Final Order dismissed the challenge of rule 61A-7.003, which in effect upheld the validity of the rule.

The invalidated rules related to the methods for calculating the percentage of gross alcohol and food sales revenue in a designated stand-alone bar. Proposed rule 61A-7.007 provided the formula for determining the required percentage of gross food sales. The formula divided gross food revenue, which includes revenue from non-alcoholic beverages, by gross total sales revenue in any consecutive six month period. Proposed rule 61A-7.008 provided the formula for determining the percentage of gross alcohol sales revenue. It divided gross alcohol sales revenue by gross total sales revenue in any consecutive six month period.

Proposed rule 61A-7.009, which was also held invalid, provided the method for determining whether an establishment is predominantly dedicated to the serving of alcoholic beverages. Under this rule's method, if the percentage of its gross alcohol sales revenue was greater than that of its gross food sales revenue, the establishment was dedicated predominantly to the serving of alcoholic beverages. Neither the act nor the constitutional amendment define the meaning of the term "predominantly or totally dedicated to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof" in the definition of stand-alone bar.[12]

The department's proposed rule 61A-7.003 prescribes 25 types of alcoholic beverage licensed premises that cannot be designated as a stand-alone bar because the licensees are dedicated predominantly to activities other than the service of alcoholic beverages. These exempted licenses are known as special licenses because they are exceptions to the limitation in s. 561.20, F.S., which limits the number of alcoholic beverage licenses that permit the sale of beer, wine and liquor that may be issued per county. Licenses issued under s. 561.20, F.S., are known as quota licenses. They are limited per county on the basis of the county's population. The licenses that are not qualified for the stand-alone bar designation per the proposed rule include special restaurant licenses (SRX),[13] special bowling licenses (SBX),[14] special golf clubs licenses,[15] and

[11] *Bowling Center's of Florida, Inc., v. Dept. of Business and Professional Regulation*, DOAH Case No. 03-4776RP, dated March 26, 2004.
[12] *See* s. 386.203(11), F.S.
[13] Section 561.20(2)(a)4., F.S., is an exception for restaurants to the number of alcoholic beverages licenses that may be issued in a county that permit the sale of beer, wine, and liquor. Section 561.20(2)(a)4., F.S., establishes square footage requirements and provides that a restaurant must discontinue the service of alcoholic beverages if it discontinues food service, and requires that a restaurant maintain food sales of at least 51 percent of its gross revenue.
[14] Section 561.20(2)(c), F.S., is another exception to the limitation on the number of alcoholic beverages licenses that permit the sale of beer, wine, and liquor that may be issued in a county. To qualify for this special license a bowling establishment must have at least twelve lanes. This license does not limit the gross amount of alcoholic beverage sales. It does not preclude a bowling establishment from holding any other type of beverage license, including a quota license.
[15] Section 561.20(7)(b), F.S., pertaining to a special alcoholic beverage license for golf clubs is another exception to the limitation on the number of full alcoholic beverages licenses that may be issued in a county. This license does not limit the percentage of gross sales of alcoholic beverages.

special dog or horse track, and Jai Alai fronton licenses.[16] Bowling Centers also challenged this rule because it argued that there was no consistent correlation, with the exception of the SRX license, between the special licenses and the qualifications for a stand-alone bar designation. They argued that, all other factors being equal, a bowling establishment with a quota license or a beer and wine license could receive the designation as a stand-alone bar, but an establishment with an SBX license could not. An SBX licensee may be unable to obtain a quota license either because it could not afford one, or because one is not available due to their limited number per county. The Administrative Law Judge dismissed the rule challenge and upheld the proposed rule 61A-7.003 because these special licenses are issued according to the nature of the businesses, and as such are inconsistent with a stand-alone bar designation.[17] The decision was appealed to the Second District Court of Appeals, which affirmed the ALJ's decision upholding the rule in a *per curiam* opinion.[18]

Rules Not Challenged

Proposed rule 61A-7.001 defines terms used in the act and proposed rules. These definitions incorporate the definitions in the act. The rule also defines some terms that are not defined in the constitutional amendment or the act. Section 561.695(3), F.S., prohibits designated stand-alone bars from providing free food to patrons, but it permits them to serve customary bar snacks. The rule defines the term "customary bar snacks" to mean "popcorn and any ready to eat food item, commercially prepared and packaged off the premises, served without additions or preparations, that is not a potentially hazardous food."[19]

The proposed rule establishes two classifications for the stand-alone bar designation. The classifications are "stand-alone smoking (ss)," in which the stand-alone bar's food service is limited to nonperishable snack food items, and "stand-alone smoking with food (ssf)," in which the stand-alone bar's on-premises food service is limited to ten percent of its gross revenue.

Proposed rule 61A-7.001 defines the term "noncommercial activity." The act limits the activities that may be performed in membership association facilities to noncommercial activities. The rule defines "noncommercial activities" to mean "social gatherings, which encompass activities in compliance with s. 849.0931, Florida Statutes, [bingo] meetings, dining, dances, and the services performed in furtherance of these activities which can only be conducted by members, whether compensated or not." The DBPR's proposed rule would permit membership associations to pay their members for services conducted in furtherance of noncommercial activities, including bingo.

Proposed rule 61A-7.002[20] establishes the criteria for a stand-alone bar designation. The rule provides that the premises must meet the definition of stand-alone bar in s. 386.203(11), F.S.,

[16] Section 565.02(5), F.S., provides that a caterer at a facility may obtain a license to sell liquor at a racetrack or Jai Alai fronton. The alcoholic beverages are allowed to be served only ten days before to ten days after approved racing or Jai Alai dates. This license does not limit the percentage of gross sales of alcoholic beverage.
[17] Supra at n. 10.
[18] *Bowling Centers Association v. Dept. of Business and Professional Regulation*, No. 2D04-1789 (Fla. 2nd DCA), per curiam opinion filed on December 3, 2004. Smoke Free For Health, Inc., filed a brief of Amicus Curiae in this appeal.
[19] Proposed rule 61A-7.001(1) as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.
[20] Proposed rule 61A-7.002 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

and requires that the licensee submit a "notice of election" to the division. The "notice of election" may be submitted through the division's internet page, by mail, or in person to the division.

Proposed rule 61A-7.006[21] also sets forth the record keeping and reporting requirements for stand-alone bars. Proposed rule 61A-7.004[22] requires that a designated stand-alone bar must file an annual certification that no more than 10 percent of its total gross revenue is derived from the sale of food for consumption on the licensed premises.

Proposed rule 61A-7.005[23] establishes the requirements for the triennial renewal reports required by s. 561.695(6), F.S., which requires that stand-alone bars must file an agreed upon procedures report prepared by a Certified Public Accountant (CPA). The proposed rules do not define the term "procedures report." Moreover, s. 561.695(6), F.S., uses the term "agreed upon procedures report," but it too does not define the term. Proposed rule 61A-7.005 requires that the report must provide the actual percentage of food sales for consumption on the premises for the preceding 36-month period from the renewal date, the actual annual percentage for each of the three years, the year total, and the total gross sales revenue from food consumption for each year and the total during that period. The proposed rule does not require that a CPA attest, in the agreed upon procedures report, that the establishment has maintained all of the records required by the rule, nor must the CPA attest to the accuracy and completeness of the records used to make the report. The Florida Institute of Certified Public Accountants (FICPA) has expressed the concern that requiring that CPA's attest to the accuracy and completeness of the records would be extremely costly for the affected businesses.

Current Proposed Rules

The new proposed rule 61A-7.007,[24] which sets forth the formula for determining the required percentage of gross food sales revenue,[25] requires that compliance with the 10 percent food limitation must be demonstrated for any consecutive two month period. The earlier invalidated rule required a six-month period of compliance. The constitutional amendment and the act do not specify the period of time during which the incidental sale of food percentage must be calculated.

The new proposed rule 61A-7.008 provides the formula for determining the percentage of gross alcohol sales revenue.[26] This rule also uses a consecutive two-month reporting period. It divides gross revenue from the sale of alcoholic beverages for consumption on the premises by gross total sales revenue.

The DBPR has developed, and noticed for formal rulemaking, a further revision of its proposed rule 61A-7.009.[27] Under the new proposed rule, the formula for determining whether an

[21] Proposed rule 61A-7.006 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.
[22] Proposed rule 61A-7.004 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.
[23] Proposed rule 61A-7.005 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.
[24] *See* proposed rule 61A-7.007 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.
[25] The rule states that the formula is the gross food sales revenue for consumption on the premises (including non-alcoholic beverages), divided by the gross total sales revenue for any consecutive two month period.
[26] *See* proposed rule 61A-7.008 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.
[27] *See* proposed rule 61A-7.009 as noticed in Florida Administrative Weekly, Volume 31, No. 4, January 28, 2005.

establishment is predominantly dedicated for the service of alcoholic beverages on the licensed premises is dependent on type of smoking designation received.

For an "ss" designated establishment in which food service is limited to non-perishable snack foods, an establishment is predominantly dedicated to the service of alcoholic beverages if gross alcohol sales revenue established pursuant to proposed rule 61A-7008, is greater than the revenue from each of the following categories:

- the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises where the purchaser is required to enter the premises.
- the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises where the purchaser is not required to enter the premises, and
- the percentage of gross revenue from any source not included in the alcohol categories above.

For an "ssf" designated establishment in which food service is limited to ten percent of gross revenue, an establishment is predominantly dedicated to the service of alcoholic beverages if gross alcohol sales revenue is greater than the revenue from each of the following categories:

- the percentage of gross food sales revenue from the sale of food the licensee sells for consumption on premises,
- the percentage of gross food sales revenue from the sale of food the licensee sells for consumption off premises,
- the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises, and
- the percentage of gross revenue from any source not included in the food and alcohol categories above.

Proposed rule 61A-7.006[28] requires that each designated stand-alone bar must maintain separately documented records of all purchases of food, all gross retail sales of alcoholic beverages for consumption on the licensed premises, all gross retail sales of alcohol for consumption off the licensed premises, all gross retail sales of food for consumption on the premises, all gross retail sales of food for consumption off the premises, and gross revenue from all other sales. The proposed rule permits designated stand-alone bars to use Department of Revenue sales tax returns as an acceptable record of total monthly sales revenue.

Certified Public Accountant Concerns

The Florida Institute of Certified Public Accountants (FICPA) has expressed the concerns regarding the proposed rules. According to the FICPA, proposed rule 61A-7.005 should define the term "procedures report." According to the FICPA, in an agreed-upon procedures engagement or report, a certified public accountant (CPA) does not render an opinion regarding the sufficiency of the records provided by the client, including the accuracy and completeness of the records. In the context of the proposed rules, a CPA could only certify that the records

[28] *See* proposed rule 61A-7.006 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.

provided by the stand-alone bar to a CPA reflect a stated percentage of gross food sales. In an agreed upon procedures report, the CPA would not attest to the completeness or accuracy of the records provided. The FICPA recommends that the department's proposed rule should be amended to define the term "procedures report" in a manner consistent with how the term "agreed upon procedures engagement" is defined by the American Institute of Certified Public Accountants Statement on Standards for Attestation Engagements.

According to the FICPA, a CPA could be disciplined by the Board of Accountancy[29] within the DBPR for a violation of professional standards if, in the course of preparing an agreed upon procedures report, the CPA observes irregularities in the client's records, e.g., that the client is intentionally withholding records from the CPA, or the CPA determines that the client may have committed fraud or other malfeasance, e.g., tax evasion, and does not note them in the report. Moreover, the FICPA asserts that the department should clarify whether a CPA may be disciplined by the board if he or she fails to report fraud or other malfeasance that may be observed by the CPA in the process of preparing the report.

According to the FICPA, the division's rules are not sufficiently clear regarding the specific records a stand-alone bar is required to maintain under the rules. According to the FICPA, the division's rules do not require that a CPA document the findings in the report. According to the FICPA, CPA standards of professional conduct require greater specificity regarding the form in which the records must be kept, e.g., whether a CPA rely upon records maintained in an electronic format. The FICPA maintains that the rules also need greater specificity regarding the steps or procedures that a CPA must take to address any apparent lack of internal controls that can result in unreliable records.

Without an adequate resolution of these matters, the FICPA believes that a CPA's performance of an agreed upon procedures report would most likely be a violation of professional standards, and, consequently, the FICPA would be compelled to advice its CPA members to refrain from performing the service for stand-alone bars. The FICPA further asserts that the determination of a stand-alone bar's compliance with the requirements of the act is a function that should more appropriately be performed by the department's own inspectors and auditors.

According to the department, the proposed rules have been presented to the Board of Accountancy. The department further notes that its rules remain in the adoption process, and that it intends to consider any concerns and recommendations of the board or the FICPA.

Smoking Violations by Patrons and Employees

A recent Division of Administrative Hearings (DOAH) decision has raised concerns regarding whether the DBPR has sufficient authority to sanction the proprietor or other person in charge of an enclosed indoor workplace with a violation of the act, if a person other than the proprietor or other person in charge of the location is smoking. Section 386.204, F.S., provides that a person may not smoke in an enclosed indoor workplace. Section 386.204, F.S., is the substantive smoking prohibition. Section 386.207(3), F.S., requires that the DBPR or the DOH, upon notification of observed violations of the act, issue to the proprietor or other person in charge of

[29] The Board of Accountancy regulates the practice of public accountancy pursuant to ch. 473, F.S.

the enclosed indoor workplace a notice to comply with the act. Section 386.207(3), F.S., provides fines for subsequent violations of the act.

In *DBPR v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*,[30] the DBPR attempted to discipline Old Cutler Oyster Co., an alcoholic beverage licensee in Miami, for permitting several patrons to smoke in the licensed premises in violation of s. 386.204, F.S. The licensee did not hold a stand-alone bar designation under s. 561.695, F.S. The Administrative Law Judge (ALJ), in his Recommended Order, held that there is no requirement in the statute that a proprietor or other person in charge of an enclosed indoor workplace must take any specific action when he or she observes a patron (or other non-employee) smoking in the enclosed indoor workplace. The ALJ also questioned whether the civil penalties in s. 386.207(3), F.S., which may be assessed against "the person" who fails to comply with a previously issued "notice to comply," apply to corporate or other non-human juridical entities. The ALJ held that, in the context of s. 386.207(3), F.S., the term "person" appears to be limited to an individual human being. The Recommended Order does not reference the rule of statutory construction in s. 1.01, F.S., which provides that, where the context permits, the term person "includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."

The division rejected the ALJ's determination that the term "person" did not include a corporation. However, due to the criteria and limitations in s. 120.57(1)(l), F.S., for agency review of an ALJ's findings of fact, conclusions of law, and recommended disposition, the division adopted the recommendations of the ALJ and dismissed the case.[31]

Old Cutler Oyster Co., Inc., does not address the issue of whether the division can sanction an alcoholic beverage licensee under the division's disciplinary authority in s. 561.29, F.S., which authorizes discipline of alcoholic beverage licensees for violations of any law in this state or permits another person on the licensed premises to violate the laws of this state or the United States,[32] and for maintaining a nuisance on the licensed premises.[33] Although the licensee in *Old Cutler Oyster Co., Inc.*, is an alcoholic beverage licensee, the division did not seek to discipline the licensee pursuant to s. 561.29, F.S. The division has previously utilized s. 561.29, F.S., to successfully sanction alcoholic beverage licensees for violations of state law by patrons and other non-employees on the licensed premises.[34] In order to sanction a licensee for the conduct of

[30] *See* Recommended Order in *Dept. Business and Professional Regulation v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*, DOAH Case No. 03-4681, Recommended Order issued September 24, 2004.
[31] Final Order No. BPR-2005-00162, Department of Business and Professional Regulation, January 13, 2005.
[32] Section 561.29(a), (b), and (e), F.S.
[33] Section 561.29(c), F.S.
[34] Regarding s. 561.29, F.S., an alcoholic beverage licensee is not an absolute insurer against violations on the licensed premises by patrons or employees, but where the licensee fails to exercise reasonable care or diligence in supervising or maintaining surveillance over the licensed premises, and violations occur in a flagrant, persistent and recurring manner then the licensee may be held culpable. *See Pauline v. Lee*, 147 So.2d 359 (Fla. 2nd DCA 1962); *G & B of Jacksonville, Inc. v. Department of Business Regulation*, 366 So.2d 877 (Fla. 1st DCA 1978); *Woodbury v. State Beverage Department*, 219 So.2d 47 (Fla. 1st DCA 1969); *Taylor v. State Beverage Department*, 194 So.2d 321 (Fla. 2d DCA) *cert. den.*, 201 So.2d 464 (Fla. 1967); *Golden Dolphin #2, Inc. v. Division of Alcoholic Beverages and Tobacco*, 403 So.2d 1372 (Fla. 5th DCA 1981); *Jones v. Division of Alcoholic Beverages and Tobacco*, 448 So.2d 1109 (Fla. 1st DCA 1984); *Pic N' Save v. Division of Alcoholic Beverages and Tobacco*, 601 So.2d 245 (Fla. 1st DCA 1992); and *Ganter v. Department of Insurance*, 620 So.2d 202 (Fla. 1st DCA 1993).

a patron or other non-employee, the division would have to show that the licensee failed to exercise reasonable care or diligence in supervising or maintaining surveillance over the licensed premises, and that the violations occurred in a flagrant, persistent, and recurring manner such that the licensee knew or should have known that the state law violation was occurring. The licensee's failure to act could then be shown as evidence that the licensee either fostered, condoned, or otherwise negligently permitted others to violate state law on the licensed premises.[35]

The DOAH decision in *Old Cutler Oyster Co., Inc.*, is also relevant to the Department of Health's (DOH) enforcement of the act. It creates uncertainty regarding the extent to which the DOH can sanction proprietors and persons in charge of an enclosed indoor workplace for smoking violations by patrons or other non-employees.

Signage Requirement

Section 386.206, F.S., (2002), required the posting of a sign in any area that was designated as a smoking area prior to the effective date of ch.2003-398, L.O.F. Section 386.206(1), F.S., (2004), maintains this requirement. It requires that any person in charge of an enclosed indoor workplace who was required before the adoption of the smoking ban in the Florida Constitution to post a sign under s. 386.206, F.S., to continue to conspicuously post such a sign. Section 386.206(5), F.S., provides that s. 386.206(1), F.S., expires on July 1, 2005.

Local Law Enforcement

According to the DBPR, certain unidentified local law enforcement agencies have expressed a reluctance to enforce the smoking ban by issuing the non-criminal citation authorized by s. 386.208, F.S., because they believe that the act does not grant local law enforcement officers sufficient jurisdiction to enforce the prohibition in s. 386.204, F.S.

Section 386.212, F.S., which prohibits smoking within 1,000 feet of school property, specifically authorizes law enforcement officers to issue a citation to any person violating this provision. Section 386.212(2), F.S., also specifies the minimum information that a citation must contain.

Interim Project 2005-156

The Senate President approved interim project no. 2005-156 to evaluate the implementation of the smoking ban. [36]The purpose of the project was to study the implementation of the smoking ban to determine any inconsistent or contradictory enforcement provisions and the need to clarify the act to provide necessary guidance to the agencies on meaning of terms. Another purpose of the study was to identify any unintended consequences of the implementation of the act, including problems and costs to various businesses, and to determine if additional legislative changes are necessary to correct any problems or ambiguity in the law.

[35] *Id.*
[36] See Committee on Regulated Industries, *Evaluate the Implementation of the Smoking Ban*, report no. 2005-156, November 2004.

The interim project resulted in the following staff recommendations:

- The Clean Indoor Air Act (act) should be amended to clarify that local law enforcement officers have jurisdiction to enforce the smoking prohibition in s. 386.204, F.S.
- The smoking prohibition in s. 386.204, F.S., should be amended to clarify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person, including patrons and employees, to smoke in the workplace.
- The act should be amended to clarify that the term "person," as used in the act, has the same meaning as in the rule of statutory construction in s. 1.01, F.S.
- The Legislature should delay the implementation of the triennial renewal reports required by s. 561.695(6), F.S., by one year in order to permit affected stand-alone bars to adjust the recordkeeping and reporting requirements which have yet to be adopted as rules of the Department of Business and Professional Regulation.

III. Effect of Proposed Changes:

Defining the term "person."

The bill amends s. 386.203, F.S., to provide that the term "person" has the same meaning as in the rule of statutory construction in s. 1.01, F.S.

Smoking prohibition.

The bill amends s. 386.204, F.S., to provide that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace. The bill requires that the proprietor or other person in charge who observes a smoking violation or has notice of a violation must request that the violator stop smoking and, if the violator does not comply, the bill requires that the violator must be required to leave the premises. The bill provides that the proprietor or other person in charge who fails to comply with this provision is subject to the penalties in ss.386.207 and 561.695, F.S., as applicable.

Penalty provisions for stand-alone bars.

The bill amends the penalty provisions in s. 561.695(8), F.S., to apply the penalty provisions for stand-alone bars to alcoholic beverage vendors who permit smoking in alcoholic beverage licensed establishments. Under current law these penalties only apply to alcoholic beverage vendors who have received a stand-alone bar designation from the DABT.

Enforcement by local law enforcement.

The bill amends s. 386.208, F.S., to provide that a law enforcement office may issue a citation to any person who violates the provisions of the Clean Indoor Air Act. It specifies the minimum information that a citation must contain, including: the facts constituting the violation, and the procedures to follow in order to pay the fine, contest the citation, or appear in court. The bill provides that any person who fails to comply with the citation shall be deemed to have waived his or her right to contest the citation and the court may issue an order to show cause. It also

provides that if any person refuses to comply with a proprietor's request to stop smoking, a law enforcement officer may remove the violator from the premises.

Enforcement of annual reporting requirement for stand-alone bars.

The bill amends s. 561.695, F.S., to provide that a stand-alone bar is subject to revocation or suspension of its vendor license under s. 561.29, F.S., if the licensee knowingly makes a false statement on the annual compliance affidavit that stand-alone bar must submit to certify that no more than 10 percent of the business' gross revenue is from the sale of food consumed on the premises.

Delay of the triennial reporting requirement for stand-alone bars.

The bill eliminates the required agreed upon procedures report that designated stand-alone bars must file with the DABT every three years after their initial designation.

Signage requirement.

The bill amends s. 386.206, F.S., to delete subsection (1), which pursuant to s. 386.206(5), F.S., expires on July 1, 2005.

Effective date.

The bill would take effect July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill amends s. 561.695, F.S., to provide that a stand-alone bar is subject to revocation or suspension of its vendor license under s. 561.29, F.S., if the licensee knowingly makes a false statement on the annual compliance affidavit. It is not clear that this provision is sufficient to subject a vendor to discipline because s. 561.29, F.S., does provide a basis for discipline based upon knowingly making a false statement on any report to the division.

Section 561.29, F.S., sets forth several specific grounds for revocation or suspension. Section 561.29(1)(b), F.S., subjects a vendor to discipline if he or she violates any law of this state. However, s. 561.695, F.S., does not specifically prohibit a vendor from knowingly making a false statement on the annual compliance affidavit. Without an express prohibition in s. 561.695, F.S., or an applicable basis for discipline in s. 561.29, F.S., it is not clear whether a vendor could be subjected to discipline under s. 561.29, F.S., for knowingly making a false statement on the annual compliance affidavit.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.