

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 559 Private Property Rights  
**SPONSOR(S):** Economic Expansion & Infrastructure and Brown  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1920

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Ethics &amp; Elections</u>	<u>9 Y, 0 N</u>	<u>Brown</u>	<u>Mitchell</u>
2) <u>Economic Expansion &amp; Infrastructure Council</u>	<u>10 Y, 4 N, As CS</u>	<u>Brown</u>	<u>Tinker</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

The bill states that no provision of the Florida Election Code shall prohibit an owner of private property from excluding persons who undertake activities supporting or opposing initiatives. The bill does not affect other political activities or otherwise modify existing federal and state caselaw; it is specifically directed toward signature-gathering for citizen ballot initiatives.

The bill is effective upon becoming a law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Safeguard Individual Liberty** – The bill protects the rights of commercial property owners.

#### B. EFFECT OF PROPOSED CHANGES:

##### Constitutional Ballot Initiatives

The Florida Constitution allows voters to approve state constitutional amendments proposed by citizen initiative petition.<sup>1</sup> The procedure for placing an initiative on the ballot is provided in s. 100.371, F.S. In order to obtain ballot position:

- The sponsor of an amendment must register as a political committee pursuant to s. 106.03, F.S., and submit the text of the amendment with the form on which the signatures will be obtained;
- The Secretary of State must approve the submitted form before signatures are obtained;
- After signatures are obtained, the Secretary of State must determine the total number of valid signatures (signatures are valid for four years from the date when made) and the distribution from congressional districts;
- The certification of ballot position must be completed by February 1 of the year the general election is held; and
- The Florida Supreme Court must approve the validity of the proposal pursuant to s. 101.161(1), F.S.

##### Signature Gathering on Private Property

Nationwide, political activities such as handbill distribution and signature-gathering have generated legal conflicts when entities seek to gather signatures on the private property of others, particularly store-fronts and shopping malls.<sup>2</sup>

There is an inherent tension between the First, Fifth, and Fourteenth Amendments to the U.S. Constitution in regard to an entity's political activities taking place on another entity's private property. In 1972, the U.S. Supreme Court stated:<sup>3</sup>

It must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state action, not on action by the owner of private property...* The Due Process clauses of the Fifth and Fourteenth Amendments are also relevant... They provide that 'no person shall be deprived of life, liberty, or property, without due process of law.' *There is a further proscription in the Fifth Amendment against the taking of 'private property... for public use, without just compensation.'*

(Emphasis added.)

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<sup>1</sup> Art. XI, s. 3, Fla. Const.

<sup>2</sup> See, e.g., *Batchelder v. Allied Stores International, Inc.*, 388 Mass. 83 (1983) (A "free elections" provision in Massachusetts constitution protected signature gatherers at a private mall (but see *Commonwealth v. Hood*, 452 N.E.2d 188 (Mass. 1983) in which the same court declined to extend state protection to speech unrelated to a pending election that was expressed on private property)); and *New Jersey Coalition Against the War in the Middle East v. JMB Realty Corp.*, 138 N.J. 326 (New Jersey's state constitution contained 'enhanced' free speech rights entitling pamphleteers to distribute materials in shopping center subject to reasonable restrictions).

<sup>3</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

To simplify a large body of case law, the fundamental issue revolves around whether a given private property owner has, by virtue of allowing the public to come onto the property, converted that property into a public forum, and thus is barred from excluding an individual or group from exercising their First Amendment rights. In the landmark case of *Marsh v. State of Alabama*, 326 U.S. 501 (1946), the U.S. Supreme Court determined that where a private party built and owned an entire “company town,”<sup>4</sup> a religious pamphleteer could not be ejected or arrested on the grounds that she was trespassing on private property. The Court opined:

The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. [Citations omitted]. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm.<sup>5</sup>

In the case of an entire “company town,” the Court determined that allowing the property owner/employer to bar certain First Amendment activities curtailed the citizen/employees’ ability to participate in their civic duties. “These people, just as residents of municipalities, are free citizens of their State and country.... To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored....”<sup>6</sup>

Entities engaging in subsequent political activities have attempted to apply the concepts laid out in *Marsh v. State of Alabama* to other private property owners. In the frequently-cited *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551 (1972), the U.S. Supreme Court refused to extend the *Marsh* concept to a common shopping mall. The mall was permitted to eject pamphleteers on the grounds that the mall’s open invitation to the public is to come to the mall in order to patronize the tenants in the mall. The mall allows certain “meetings and promotional activities,” but the

obvious purpose, recognized widely as a legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes....<sup>7</sup>

In at least one state, the concept of *Marsh* was extended to smaller areas such as shopping centers. The California case of *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) makes this extension, but the rationale for such extension rests solely on the California constitution, which contained a freedom-of-speech protection exceeding the federal protection against government interference found in the First and Fourteenth Amendments.<sup>8</sup> A 2004 court ruling from Connecticut concisely summarizes the concepts of both *Lloyd* and *Pruneyard*:

It is well established that there is no right under the first amendment of the United States constitution for a person to use a privately owned shopping center as a forum to communicate without the permission of the property owner. *Lloyd Corp. v. Tanner* [additional citations omitted]. A state, however, may adopt greater

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<sup>4</sup> Gulf Shipbuilding Corporation owned and operated the private town of Chickasaw, AL, consisting of “residential buildings, a system of sewers, a sewage disposal plant and a ‘business block’ on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as town’s policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office.... The town and the surrounding neighborhood, which cannot be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled and according to all indications the residents use the ‘business block’ as their regular shopping center.” *Marsh v. Alabama*, 326 U.S. 501, 502-503.

<sup>5</sup> *Id.* at 506.

<sup>6</sup> *Id.* at 508.

<sup>7</sup> *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 564-565.

<sup>8</sup> In *Pruneyard*, the U.S. Supreme Court upheld the California Supreme Court’s findings that (i) the California Constitution expressly protects speech and petitioning, reasonably exercised, in shopping centers even when the center is privately owned, and (ii) this state law does not infringe a mall owner’s federally-protected property rights.

protection for free expression on private property, so long as such protection does not conflict with any federally protected property rights of the owners of private shopping centers. See *Pruneyard v. Robins* [additional citations omitted].<sup>9</sup>

### Recent Florida Caselaw

One of the most recent cases to address this issue is *Publix Super Markets, Inc. v. Tallahasseeans for Practical Law Enforcement, et al.*, 2005 WL 3673662 (Fla. 2d Cir. 2005). Tallahasseeans for Practical Law Enforcement were members of a political action committee seeking decriminalization of marijuana laws, and were engaged in signature-gathering on the private property of a Publix grocery store in Tallahassee.

The court framed the case as follows:

The issue presented in this litigation is whether Publix, which invites the public onto its premises primarily for the purpose of grocery-shopping... has the right to exclude persons in a non-discriminatory manner where such persons seek to use the property for purposes other than shopping.

The court answered this question in the affirmative, summarily noting that the First Amendment of the U.S. Constitution and Art. I, s. 4 of the Florida Constitution “only protect against government infringement of an individual’s right to engage in free speech.”<sup>10</sup> Because Publix stores are located on privately-owned or leased properties, the court determined that it “can find no authority to support Defendants’ contention that they have a constitutional right to solicit at such properties over Publix’s objection.”<sup>11</sup>

The court recognized that a state “may provide greater protection under its state constitution for free expression on private property, so long as such protection does not conflict with... federally protected... rights” of the owner.<sup>12</sup> In *New Jersey Coalition Against the War in the Middle East v. JMB Realty Corp.*, 138 N.J. 326 (1994), and the California case of *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the relevant state constitution was deemed to have ‘enhanced’ free speech rights beyond those contained in the federal Constitution. However, the circuit court noted that “the Florida Supreme Court has held that the scope of the Florida Constitution’s protection of freedom of speech is the same as that required under the First Amendment [citation omitted],”<sup>13</sup> and that Florida courts “must apply the principles of freedom of speech announced in the decisions of the United States Supreme Court [citations omitted].”<sup>14</sup>

In finalizing its review of the relevant case law in Florida, other states, and the Supreme Court, the Court states:

Owners of private property have the right to allow... periodic use of their premises by civic groups without waiving or otherwise forfeiting their right to exclude other groups seeking to use the premises for political speech, solicitation of petition signatures, or other non-shopping purposes. [Previous case law has] rejected claims that the retailers were improperly discriminating based on such action....

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<sup>9</sup> *United Food and Commercial Workers’ Union, Local 919, AFL-CIO v. Crystal Mall Associates, L.P.*, 852 A.2d 659, 666 (2004).

<sup>10</sup> *Publix Super Markets, Inc. v. Tallahasseeans for Practical Law Enforcement, et al.*, at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Defendants are not entitled under the First Amendment or the Florida Constitution to solicit signatures... on Publix's privately owned property without Publix's permission.<sup>15</sup>

### Proposed Changes

The bill recognizes the *Publix Super Markets* case by codifying the result in s. 100.371, F.S. The bill states that no provision of the Florida Election Code shall prohibit any private person lawfully exercising control over private property from excluding persons who undertake activities supporting or opposing initiatives.

The bill does not affect other political activities or otherwise modify existing federal and state caselaw; it is specifically directed toward signature-gathering for citizen ballot initiatives.

#### C. SECTION DIRECTORY:

**Section 1.** Amends s. 100.371, F.S., providing that no provision of the Florida Election Code shall prohibit an owner of private property from excluding persons who undertake activities supporting or opposing initiatives.

**Section 2.** Provides that the bill is effective upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

#### D. FISCAL COMMENTS:

None.

## III. COMMENTS

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<sup>15</sup> Id. at 5.

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Pursuant to Art VII, s. 18(d), Fla. Const., as it relates to election laws, this bill is exempt from the unfunded mandate provisions of Art. VII, s. 18(a), Fla. Const.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

N/A

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 8, 2007, the Committee on Ethics and Elections adopted a traveling amendment streamlining the substance of the bill. On April 12, 2007, the Economic Expansion & Infrastructure Council favorably reported the bill and traveling amendment as a council substitute. This analysis is drawn to the council substitute.