

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Budget Committee

BILL: CS/SB 366

INTRODUCER: Commerce and Tourism Committee and Senator Altman

SUBJECT: Handbill Distribution

DATE: March 13, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Favorable
2.	<u>Hrdlicka</u>	<u>Cooper</u>	<u>CM</u>	Fav/CS
3.	<u>Sadberry</u>	<u>Meyer, C.</u>	<u>BC</u>	Pre-meeting
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/SB 366 amends current law related to distribution of handbills at public lodging establishments and public food service establishments.

Under the CS, handbills may only be distributed with written permission of the public lodging establishment. The CS increases the penalties for violation of the handbill statute by:

- Increasing the fines for persons who direct others to unlawfully distribute handbills from \$500 to \$1,000;
- Imposing new fines for persons who unlawfully distribute handbills and who direct others to unlawfully distribute handbills for subsequent violations of the statute (\$2,000 for the second violation, and \$3,000 for the third and any subsequent violations);
- Expanding the property that is subject to seizure or forfeiture under the Florida Contraband Forfeiture Act to include property used in violation of a person's third or subsequent violation of the handbill distribution statute; and
- Permitting law enforcement officers to make a warrantless arrest of violations of the handbill statute.

Additionally, the CS preempts matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments to the state – thereby prohibiting local governments from enacting such ordinances.

The CS clarifies that completion, rather than attendance, is required at remedial education programs for violating ch. 509, F.S., or rules of the Division of Hotels and Restaurants of the Department of Business and Professional Regulation, operating without a license, or operating with a revoked or suspended license. In addition, such educational programs are to be administered by a food safety training program provider whose program has been approved by the Division of Hotels and Restaurants, rather than programs sponsored by the Hospitality Education Program.

This CS substantially amends the following sections of the Florida Statutes: 509.032, 509.144, 509.261, 901.15, and 932.701.

II. Present Situation:

The Division of Hotels and Restaurants (division) within the Department of Business and Professional Regulation (DBPR) is the state agency charged with enforcing the provisions of ch. 509, F.S., and all other applicable laws relating to the inspection and regulation of public lodging establishments and public food service establishments for the purpose of protecting the public health, safety, and welfare. According to DBPR, there are 82,600 licensed public lodging and food service establishments.¹

Public Lodging and Food Service Establishments – State Regulation

Regulation of public lodging establishments and public food service establishments is specifically preempted to the state.² This includes, but is not limited to:

- Inspection of public lodging establishments and public food service establishments for compliance with the sanitation standards; and
- Regulation of food safety protection standards for required training and testing of food service establishment personnel.

However, such preemption does not limit the authority of a local government or local enforcement district to conduct inspections of public lodging and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code.

Public Lodging Establishments – Unlawful Handbilling

Under Florida law, it is illegal to deliver, distribute, or place, or attempt to deliver, distribute, or place, a handbill³ at or in a public lodging establishment⁴ without either written or oral permission when the public lodging establishment has posed a sign.⁵

¹ For FY 2009-2010, there were 37,273 licensed public lodging establishments and 45,327 licensed public food service establishments. *Annual Report, Fiscal Year 2009-2010*, Division of Hotels and Restaurants, Department of Business and Professional Regulation. A copy is available at:

http://www.myfloridalicense.com/dbpr/hr/reports/annualreports/documents/ar2009_10.pdf (last visited 3/10/2011).

² Section 509.032(7), F.S.

Any individual, agent, contractor, or volunteer who is acting on behalf of an individual, business, company, or food service establishment and engages in prohibited handbill distribution commits a first degree misdemeanor.⁶ There is no statutorily imposed fine for violation of this provision.

Any person who directs another person to deliver, distribute, or place, or attempts to deliver, distribute, or place, a handbill at or in a public lodging establishment commits a first degree misdemeanor. Any person sentenced under this provision shall be ordered to pay a minimum fine of \$500 in addition to any other penalty imposed by the court.⁷

Florida Contraband Forfeiture Act

The Florida Contraband Forfeiture Act (act) provides that any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the act, or in, upon, or by means of which any violation of the act has taken or is taking place, may be seized and shall be forfeited subject to the provisions of the act.⁸

Section 932.701(2)(a), F.S., defines the term “contraband article” to include:

- Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893, if the totality of the facts presented by the state is clearly sufficient to meet the state’s burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband article can be traced to a specific narcotics transaction.
- Any gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, was attempted, or intended to be used in violation of the gambling laws of the state.
- Any equipment, liquid or solid, which was being used, is being used, was attempted to be used, or intended to be used in violation of the beverage or tobacco laws of the state.
- Any motor fuel upon which the motor fuel tax has not been paid as required by law.
- Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

³ Section 509.144(1)(a), F.S., defines “handbill” to mean “a flier, leaflet, pamphlet, or other written material that advertises, promotes, or informs persons about an individual, business, company, or food service establishment, but shall not include employee communications permissible under the National Labor Relations Act.”

⁴ Section 509.144(1)(c), F.S., defines “at or in a public lodging establishment” to mean “any property under the sole ownership or control of a public lodging establishment.” The term “public lodging establishment” is defined in s. 509.013, F.S.

⁵ Section 509.144(1)(b), F.S., defines “without permission.” Section 509.144(4), F.S., sets forth the requirements that a posted sign must meet in order to prohibit advertising or solicitation under the statute.

⁶ Section 509.144(2), F.S. A first degree misdemeanor is punishable by up to 1 year in a county jail, a fine up to \$1,000, or both. *See* ss. 775.082 and 775.083, F.S.

⁷ Section 509.144(3), F.S.

⁸ Sections 932.701 – 932.706, F.S.

- Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
- Any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, currency, or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c), F.S.
- Any motor vehicle offered for sale in violation of s. 320.28, F.S.
- Any motor vehicle used during the course of committing an offense in violation of s. 322.34(9)(a), F.S.
- Any photograph, film, or other recorded image, including an image recorded on videotape, a compact disc, digital tape, or fixed disk, that is recorded in violation of s. 810.145, F.S., and is possessed for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person.
- Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920, F.S., or s. 409.9201, F.S.; any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, or currency; or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920, F.S., or s. 409.9201, F.S.

The current definition of the term “contraband article” does not include property that was used as an instrumentality in the commission of a violation of s. 509.144, F.S., relating to handbill distribution.

Relevant to the bill, there are indications that forfeitures may or do occur in some misdemeanor cases. For example, one Florida court has indicated (in dicta) that the definition of “contraband article” in s. 932.701(2)(a), F.S., would apparently apply to the seizure of “money as suspected contraband connected with narcotics activity, regardless of whether the crimes constitute felonies.”⁹ Additionally, the Florida Supreme Court has held that the Florida Contraband Forfeiture Act “does not preempt to the Legislature the field of vehicle seizure and forfeiture, much less impoundment, for misdemeanor offenses.”¹⁰ Therefore, a municipality may adopt “an ordinance that authorizes the seizure and impoundment of vehicles used in the commission of certain misdemeanors.”¹¹

Warrantless Arrest

Section 901.15, F.S., sets forth the instances in which a law enforcement officer can arrest a person without a warrant. For misdemeanor offenses, the general rule is that law enforcement officers must witness the occurrence of the offense in order to make an arrest without a warrant. If the officer does not witness the offense, the officer must obtain an arrest warrant.

⁹ *Shuler v. State*, 984 So.2d 1274, 1275 (Fla. 2d DCA 2008) (footnote omitted).

¹⁰ *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1246 (Fla.2006).

¹¹ *Id.*

In certain instances the Legislature has deemed particular misdemeanor offenses to be of such a nature that they should be exceptions to the above rule. Some examples include violations of injunctions for protection in domestic violence, repeat violence, sexual violence, and dating violence situations; violations of pretrial release conditions in domestic and dating violence cases; misdemeanor battery; and criminal mischief or graffiti-related offenses. For these offenses, an officer does not have to witness the crime in order to make a warrantless arrest – the officer only needs to have probable cause to believe the person committed the crime.

Public Food Service Establishments – licensure

The division is responsible for inspecting public food service establishments to ensure that they meet the requirements of ch. 509, F.S., and division rules.¹² Each public food service establishment must obtain a license and meet the standards set by the division to maintain that license.¹³

Any public food service establishment that has operated or is operating in violation of ch. 509, F.S., or the rules of the division, operating without a license, or operating with a suspended or revoked license may be subject by the division to:

- Fines not to exceed \$1,000 per offense;
- Mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program;¹⁴ and
- The suspension, revocation, or refusal of a license issued pursuant to ch. 509, F.S.

III. Effect of Proposed Changes:

The CS amends current law related to distribution of handbills at public lodging establishments and public food service establishments.

Section 1 states that this act may be cited as the “Tourist Safety Act.”

Section 2 amends s. 509.144, F.S., which deals with prohibited handbill distribution in a public lodging establishment.

Currently, s. 509.144, F.S., prohibits delivering, distributing, or placing a handbill at or in a public lodging establishment without the expressed written or oral permission of the owner, manager, or agent of the owner or manager of the establishment where a sign is posted prohibiting advertising or solicitation as specified in the statute.

The CS amends the statute as follows:

- Modifies the definition of ‘handbill’ to indicate that the term does not include communication protected by the First Amendment to the United States Constitution or

¹² Section 509.032, F.S.

¹³ Section 509.241, F.S.

¹⁴ Section 509.302, F.S. This program was not funded in FY 2010-2011.

communications that relate to the public health, safety, or welfare which are distributed by a federal, state, or local governmental entity or a public or private utility.

- Restricts permission to distribute handbills to written permission, by striking “oral permission” from the definition of the term “without permission.”
- Increases the fine for persons who unlawfully direct another to distribute handbills from \$500 to \$1,000.
- Imposes new fines for persons who unlawfully distribute handbills and who direct others to unlawfully distribute handbills for subsequent violations of the statute:
 - For a second violation, a minimum fine of \$2,000.
 - For a third or subsequent violation, a minimum fine of \$3,000.
- Provides for seizure and forfeiture under the Florida Contraband Forfeiture Act of any personal property that was used or was attempted to be used as an instrumentality in the commission of, or aiding and abetting in the commission of, a person’s third or subsequent violation of the statute, whether or not comprising an element of the offense.
 - Personal property includes, but is not limited to, any vehicle of any kind, item, object, tool, device, weapon, machine, money, securities, books, or records.

Section 3 amends s. 901.15, F.S., to add another exception to the general rule that officers must witness a misdemeanor offense in order to make a warrantless arrest. Specifically, the CS provides that an officer may arrest a person without a warrant:

- If there is probable cause to believe that a violation of s. 509.144, F.S., has been committed; and
- Where the owner or manager of the public lodging establishment in which the violation occurred signs an affidavit containing information that supports the probable cause determination.

Section 4 amends the definition of the term “contraband article” in s. 932.701, F.S., to indicate the term also includes the property specified in s. 509.144, F.S., which is subject to seizure and forfeiture upon a person’s third or subsequent offense of that statute.

Section 5 amends s. 509.032, F.S., to preempt matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments to the state. This prohibits local governments from enacting such ordinances.

Section 6 amends s. 509.261, F.S., related to revocation or suspension of public food service establishment licenses. The CS clarifies that completion, rather than attendance, is required at remedial education programs for violating ch. 509, F.S., or rules of the division, operating without a license, or operating with a revoked or suspended license. In addition, such educational programs are to be administered by a food safety training program provider whose program has been approved by the division, rather than programs sponsored by the Hospitality Education Program.

Section 7 provides that the terms and provisions of the act do not affect or impede provisions of s. 790.251, F.S. (rights to keep and bear arms in motor vehicles for self-defense and other lawful purposes), or any other protection or right guaranteed by the Second Amendment to the United States Constitution.

Section 8 provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The rights of private property owners to prohibit certain activities versus a person's right to free expression on that private property has been addressed by the U.S. Supreme Court. In one example, the Court allowed picketers to protest on shopping mall property because the characteristics of the shopping mall were more like a public forum than private property.¹⁵ The Court generally gives greater deference to free expression over property rights when a public forum is involved. Later, the Court revised its position, stating that a relationship must exist between the speech and the property when it upheld a ban against anti-war protesters on mall property.¹⁶ The current position of the Court appears to be that the right to free expression on private property is not guaranteed in the U.S. Constitution when the property owner objects.¹⁷

However, the U.S. Supreme Court has found that state constitutions may expand upon existing federal rights.¹⁸ For example, a Florida 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."¹⁹ The court 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. However, in a later Florida circuit court case, the court held that "there is no right under the First Amendment to the United States Constitution to engage in free speech or other political activity on private property without the property owner's permission."²⁰ This case involved a citizen and political action

¹⁵ *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

¹⁶ *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

¹⁷ *Hudgens v. NLRB*, 424 U.S. 507 (1976) (finding no right of free expression for picketers wishing to demonstrate on mall property when the mall owner objected).

¹⁸ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

¹⁹ *Wood v. State*, 2003 WL 1955433 (Fla.Cir.Ct., 2003) (not reported in So.2d).

²⁰ *Publix Supermarkets, Inc. v. Tallahasseeans for Practical Law Enforcement*, 2005 WL 3673662 (Fla.Cir.Ct., 2005) (not reported in So.2d)(citations omitted).

committee soliciting signatures for a political petition on the private property of a Publix supermarket in Tallahassee.

Most cases have only applied to a situation involving a “quasi-public” forum of a shopping mall. This bill only addresses public lodging establishments, which unlike shopping malls are generally open only to paying patrons.²¹ The bill amends the definition of “handbill” in s. 509.144(1)(a), F.S., to specify that it does not include communication protected by the First Amendment to the United States Constitution. As a result, if a court or law were to hold that sliding pizza delivery pamphlets under hotel room doors without permission is constitutionally protected free speech, the bill’s provisions would not apply to such activity.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons or businesses violating s. 509.144, F.S., will be faced with increased financial penalties. Additionally, for the third and any subsequent offenses, personal property may be seized and forfeited.

C. Government Sector Impact:

The Criminal Justice Impact Conference met on March 2, 2011, and determined that this bill would have no prison bed impact.

Local governments may see increased revenues because the bill increases the fines for violations of s. 509.144, F.S., and provides for seizure and forfeiture of personal property.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Local governments may not enact ordinances that relate to nutritional content and marketing of foods offered in public lodging or public food service establishments.

²¹ The prohibition of handbill distribution in public lodging establishments has only been specifically permitted by Florida law since 2005. Ch. 2005-183, L.O.F.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on March 9, 2011:

The CS differs from the bill as filed in the following ways:

- Expands the definition of handbill to include “communications that relate to the public health, safety, or welfare which are distributed by a federal, state, or local governmental entity or a public or private utility.”
- Preempts matters related to the nutritional content and marketing of foods offered in public lodging establishments and public food service establishments to the state.
- Clarifies that completion, rather than attendance, is required at remedial education programs for violating ch. 509, F.S., or rules of the division, operating without a license, or operating with a revoked or suspended license. In addition, such educational programs are to be administered by a food safety training program provider whose program has been approved by the Division of Hotels and Restaurants, rather than programs sponsored by the Hospitality Education Program.

- B. **Amendments:**

None.