

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.)

BILL: CS/SB 44A

SPONSOR: Regulated Industries Committee and Senator Diaz de la Portilla

SUBJECT: Florida Clean Indoor Air Act

DATE: May 20, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill implements Article X, Section 20, of the Florida Constitution, which prohibits tobacco smoking in enclosed indoor workplaces.

The bill amends the “Florida Indoor Clean Air Act” (“the act”) to implement the constitutional amendment. It also adopts and implements the definitions in subsection (c) of the constitutional amendment. It clarifies that designated smoking rooms and facilities of membership associations are not workplaces.

The bill prohibits tobacco smoking in enclosed indoor workplaces. The bill maintains the prohibition under current law that bars tobacco smoking in public places. The bill permits the designation of a smoking room in an in-transit lounge in a customs area of an airport. The bill provides requirements for these designated smoking rooms intended to protect persons from the hazards of second-hand smoke.

The bill adopts and implements the exceptions in subsection (b) of the constitutional amendment. The bill implements the exceptions in the constitutional amendment for private residences whenever not being used for certain commercial purposes, stand-alone bars, designated smoking rooms in hotels and other public lodging establishments, and retail tobacco shops, including businesses that manufacture, import or distribute tobacco products and tobacco loose leaf dealers. A stand-alone bar must maintain at least 10 percent of its gross revenue from the sale of food.

The bill provides an exception for tobacco smoking to the extent it is that tobacco smoking is an integral part of a smoking cessation program, medical research, and scientific research. It

provides an exception for tobacco smoking that is an integral part of a theatrical, commercial, advertising, music video, television, or motion picture performance.

The bill provides for enforcement of the act by the Department of Health and the Department of Business and Professional Regulation. It changes the penalties for violations of the act by proprietors for a first violation to not less than \$250 and not more than \$750. It changes the penalty provisions for subsequent violations by proprietors to not less than \$500 and not more than \$2,000.

The bill has an effective date of July 1, 2003.

This bill substantially amends the following sections of the Florida Statutes: 386.202, 386.203, 386.204, 386.205, 386.206, 386.207, 386.208, and 386.211.

This bill creates the following sections of the Florida Statutes: 386.2045, 386.2125, and 386.213.

This bill reenacts the following sections of the Florida Statutes: 386.209, and 386.212.

II. Present Situation:

On November 5, 2002, the voters adopted Amendment 6 which amended article X of the Florida Constitution to add section 20, which prohibits tobacco smoking in enclosed indoor workplaces (“constitutional amendment”). The constitutional amendment defines an “enclosed indoor workplaces” 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.” The constitutional amendment 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 implementing legislation must also provide civil penalties for violations; provide for administrative enforcement; and require and authorize agency rules for implementation and enforcement. The constitutional amendment further provides that the Legislature may enact legislation more restrictive of tobacco smoking than that provided in the State Constitution.

Part II of chapter 386, F.S., constitutes the "Florida Clean Indoor Air Act," which regulates tobacco smoking in public places. The Florida Clean Indoor Air Act (“the Act”) does not regulate enclosed indoor workplaces in a manner consistent with the constitutional amendment.

The President of the Senate appointed the Select Committee on Constitutional Amendment Implementation, chaired by Senator Lee, charging it with the responsibility of gathering information and developing recommendations on the implementation of constitutional amendments, including Amendment 6 dealing with Smoking in the Workplace. The committee met, received testimony, and discussed the issues relating to the implementation of the amendment. The select committee made the following recommendations:

Stand-alone bars: The language relating to stand-alone bars which limits their service to food that is “merely incidental” to the service of alcohol is ambiguous, and the Legislature must establish some standard for what food products the amendment allows these bars to serve. Two possible standards were suggested: 1) an exhaustive list of food items that may be served in such bars; and 2) a percentage limitation on the amount of food that may be served.

The percentage approach is more practical. The allowable percentage of food service should be some percentage not to exceed 20 percent, should be measured against gross revenue from sales of alcoholic beverages, and should include a time period for measurement which is sufficiently long to establish an accurate picture of the bar’s overall business and income stream. However, even with a percentage limitation, the types of food served should be within the spirit of the amendment. Stand-alone bars should not be serving the same full menu of food items as restaurants.

The select committee also addressed the issue of enforcement. It recommended that:

For stand-alone bars, enforcement should be accomplished through a complaint-driven system, similar to the special restaurant liquor license process, and no new bureaucracy should be established. For other situations, the amendment should be enforced by the same agencies, in the same manner, and using the same penalties used under the existing Florida Clean Indoor Air Act.

Another issue of interest to the select committee concerned the definition of enclosed indoor workplaces. The select committee’s report noted that:

Because the amendment applies only to workplaces, the Legislature should implement legislation to clarify those situations where no work is performed and where a non-workplace may be designated. Consistent with the spirit and purpose of the amendment, the Legislature should enact measures to protect people from involuntary exposure to second-hand tobacco smoke from any such designated area: designation (signage), reserved times for cleaning and maintenance, separate ventilation systems and negative pressure ventilation, and complete enclosure to avoid the escape of second-hand tobacco smoke into common areas.

The amendment does not specify standards for when an enclosed indoor workplace is predominantly or totally bounded by physical barriers. The detail associated with defining these architectural standards is more appropriately a matter for consideration by the standing committees, rather than by this select

committee. However, any standards should be set within the spirit of the amendment.

Regarding tobacco shops, the select committee found that:

Retail tobacco shops are expressly excepted from the constitutional amendment. It is a logical extension of this exception to conclude that smoking which is integral to the operation of the cigar manufacturing and loose-leaf tobacco industries in this state is not prohibited under the amendment.

In conclusion, the select committee heard testimony that the amendment needed clarification on the constitutional amendment's effect on the activities of certain member-driven, non-profit organizations. The select committee recommended:

[T]hat consideration be given to clarifying that work does not include non-commercial activities conducted exclusively by the membership of community service or social organizations, such as religious, veterans, fraternal, charitable, and other non-profit groups. Legislation to provide this clarification should be drafted within the spirit of the amendment.

III. Effect of Proposed Changes:

Definitions

Subsection (14) of s. 386.203, F.S., defines a workplace as a room where one or more persons performs work. This section further clarifies the definition of the term workplace to provide that the term does not include facilities owned or leased by a membership association "and used exclusively for non-commercial activities performed by the members and guests of a membership association, including social gatherings, meetings, dining, and dances; if no person or persons are engaged in work as defined in s. 386.203(13)." Section 386.203(9), F.S., defines membership associations as charitable, nonprofit, veterans' organization, or religious organization that holds an exemption from federal taxation under the Internal Revenue Code. This bill does not exempt these facilities from the smoking prohibition for enclosed indoor workplaces. Instead, it clarifies that these places are not subject to the prohibition because they are not workplaces. A membership association facility is not a workplace if it is used exclusively for non-commercial activities.

Subsection (c)(3) of the constitutional amendment 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." This provision clarifies that work performed by a volunteer is still work. However, the definition of work in the constitutional amendment does not mean that all activities performed by volunteers, or by any of the other persons listed in the definition, also constitute work. Section 386.2045(7), F.S., clarifies that social gatherings, meetings of membership organizations, dances, and dinners are not work activities as the term is defined in subsection (c)(3) of the constitutional amendment and in s. 386.203, F.S.

Section 386.203(13), F.S., also clarifies that designated smoking rooms are not included within the meaning of the term “workplace.”

Subsection (c)(4) of the Constitutional Amendment defines an “enclosed indoor workplace” as a place that “is predominantly or totally bounded on all sides and above by physical barriers...” The term “predominantly or totally bounded on all sides and above” is subject to legislative determination. The bill amends s. 386.203(5), F.S., to define an “enclosed indoor workplace” as not including:

[A] workplace without physical barriers of any kind from above; a workplace that is totally or partially bounded from above with at least 25 percent of the contiguous surface area of the sides without a physical barrier; or a workplace that is bounded on all sides and above by physical barriers consisting of no more than 50 percent of the total bounded surface area of the workplace.

Prohibitions

The bill amends section 386.204, F.S., to prohibit tobacco smoking in enclosed indoor workplaces. The bill maintains the prohibition under current law that bars tobacco smoking in certain public places.

Exceptions

The bill implements the exceptions in the constitutional amendment for private residences whenever not being used for certain commercial purposes, stand-alone bars, designated smoking rooms in hotels and other public lodging establishments, and retail tobacco shops.

The bill creates s. 386.2045(2) to implement the exception in subsection (c)(6) of the constitutional amendment for retail tobacco shop. Subsection (c)(6) of the constitutional amendment defines retail tobacco shop as “any enclosed indoor workplace dedicated to or predominantly for the retail sale of tobacco, tobacco products, and accessories for such products, in which the sale of other products or services is merely incidental.” Section 386.2045(2), F.S., adopts the definition of retail tobacco shop in the constitutional amendment. It includes a business that manufactures or distributes tobacco products and accessories and a cigar leaf dealer as meeting the definition of retail tobacco shop.

The bill creates s. 386.2045(4), F.S., to implement the exception in the constitutional amendment for stand-alone bars. Subsection (c)(8) of the constitutional amendment defines a stand-alone bar as

[A]ny place of business 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; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and the licensed premises is not 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.

Section 386.2045(5), F.S., adopts the exception for stand-alone bar in section (c)(8) of the constitutional amendment.

The definition for stand-alone bar in subsection (c)(8) of the constitutional amendment contains several terms and phrases that are subject to legislative determination. The exception for stand-alone bar defines those terms and phrases.

Section 386.2045(4), F.S., also defines the condition in the constitutional amendment that the place of business must be devoted predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors with “the serving of food, if any,” as “merely incidental to the consumption of any such beverage.” The terms “predominantly” and “merely incidental” are subject to legislative determination. It requires that a “business must derive at least 10 percent of its gross revenue from the sale of food. These provisions do not define the types of food that a stand-alone bar may serve. Subsection (c)(8) of the constitutional amendment does not require that the implementing legislation define the types of food that a stand-alone bar may serve. As noted by the select committee, a statutory definition or listing of foods that a stand-alone bar may serve would seem to be impractical, particularly in the context Florida’s rich cultural and ethnic diversity.

Section 386.2045(5), F.S., provides an exception for tobacco smoking to the extent that “tobacco smoking is an integral part of a smoking cessation program, medical research, and scientific research.” This provision further provides that each room in which tobacco smoking is permitted must comply with the signage requirements in s. 386.206, F.S.

Section 386.2045(6), F.S., provides an exception for tobacco smoking that is an integral part of a theatrical, commercial, advertising, music video, television, or motion picture performance. This provision also requires that each room in which tobacco smoking is permitted must comply with the signage requirements in s. 386.206, F.S.

Designated Smoking Rooms in Customs Areas of Airports

Section 386.205, F.S., is amended to provide for designated smoking rooms in an airport in-transit lounge under the control of the Bureau of Customs and Border Protection. The requirements for a designated smoking room are detailed in subsection (1), which provides that “work, other than essential services,” must not be performed in the room at any given time, that “tobacco smoking must not be permitted in the room for at least 30 minutes before any essential services are performed in the room,” that “each smoking room must be enclosed by physical barriers that are impenetrable by second-hand tobacco smoke and prevent the escape of second-hand tobacco smoke into a common area or an enclosed indoor workplace,” and that “each smoking room must comply with signage requirements.” Essential services are defined in s. 386.203(7), F.S., as “those services that are essential to the maintenance of every enclosed indoor room, regardless of whether any room is a workplace, including, but not limited to, janitorial services, repairs, or renovations.” Customs areas designated smoking rooms must:

[E]xhaust tobacco smoke directly to the outside and away from air intake ducts, and be maintained under negative pressure, with respect to surrounding spaces, sufficient to contain tobacco smoke within the designated room.

This provision is consistent with the federal regulations for designated smoking areas of federal facilities in 41 CFR, s. 101-20.105-3.

This exception for designated smoking rooms in airport in-transit lounges is based on the assumption that every enclosed indoor space requires the performance of essential services. Absent such recognition, every nonresidential enclosed indoor space would necessarily be considered an enclosed indoor workspace without regard to whether the enclosed indoor space was otherwise exclusively dedicated to the performance of non-work activities. Every enclosed nonresidential indoor space, except those spaces specified in the constitutional amendment, would therefore be subject to the tobacco smoking prohibition.

This provision for designated smoking rooms in airport in-transit lounges protects the persons who perform essential services from second hand smoke by requiring that tobacco smoking must not be permitted in the room for at least 30 minutes before any essential services are performed. The provision for designated smoking rooms also protects other persons from second hand smoke by requiring that “each smoking room must be enclosed by physical barriers that are impenetrable by second-hand tobacco smoke and prevent the escape of second-hand tobacco smoke into a common area or an enclosed indoor workplace.”

Enforcement and Penalties

The bill amends s. 386.207, F.S., to provide for enforcement of the act by the Department of Health and the Department of Business and Professional Regulation. This section authorizes the departments to adopt rules in consultation with the Department of Agriculture and Consumer Services and the State Fire Marshal.

The bill amends the current ss. 386.207 and 386.208, F.S., to provide for enforcement of the act by the Department of Health and the Department of Business and Professional Regulation. It changes the penalties for violations of the act by proprietors for a first violation to not less than \$250 and not more than \$750. It changes the penalty provisions for subsequent violations by proprietors to not less than \$500 and not more than \$2,000. It maintains the provisions under the current Clean Indoor Air Act for violations by individuals.

The bill creates s. 386.213, F.S., to provide that if any exception or definition of the act is declared invalid is severable from the rest of the act and shall not affect the validity other provisions.

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:

Airports with in-transit lounges in the customs area that opt to designate smoking rooms may incur financial costs incident to retrofitting current facilities or construction of new facilities to meet the requirements for designated smoking rooms.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The rules that govern statutory construction are generally applicable to construction of constitutional provisions. *Coastal Florida Police Benevolent Association, Inc., v. Williams*, 2003 WL 193464 (Fla.). Therefore, constitutional construction should begin by construing the plain meaning of the words actually used in the constitution, and the plain meaning of the words must be used if the language is clear, unambiguous, and addresses the matter at issue.

There are two basic principles of constitutional construction. First, constitutional provisions “receive a broader and more liberal construction than statutes.” *Coastal Florida Police Benevolent Association, Inc.*, quoting *Fla. Soc’y of Ophthalmology v. Fla. Optometric Ass’n*, 489 So.2d 1118, 119 (Fla. 1986). The second basic principal of constitutional construction is that constitutional provisions should not be construed in a manner that defeats the provision’s underlying objectives.

Constitutions are “living documents,” not easily amended, which demand greater flexibility in interpretation than that required by legislatively enacted statutes. Consequently, courts are far less circumscribed in construing language in the area of constitutional construction than in the realm of statutory construction. When adjudicating constitutional issues, the principles, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of the provision.

Coastal Florida Police Benevolent Association, Inc.

As noted in *Coastal Florida Police Benevolent Association, Inc.*, “when adjudicating constitutional issues, the principles, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of the provision.”

Furthermore, as noted by the Supreme Court in *Plante v. Smathers*, 372 So.2d 933 (Fla. 1979):

[A]n interpretation of a constitutional provision which will lead to an absurd result will not be adopted when the provision is fairly subject to another construction which will accomplish the manifest intent and purpose of the people.

The case law further demonstrates that it is unlikely that the courts would compel the Legislature to adopt Amendment 6 in any particular manner. Such a directive from a court would likely violate the separation of powers doctrine in article II, section 3 of the state constitution. However, if the Legislature does not act within a reasonable period of time to implement the provisions of Amendment 6, the courts may act to provide appropriate guidelines. See *Dade County Classroom Teachers Association, Inc. v. The Legislature*, 269 So.2d 684 (Fla. 1972); and *Advisory Opinion to the Attorney General Re Florida Locally Approved Gaming*, 656 So.2d 1259 (Fla. 1995).

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of The bill's sponsor or the Florida Senate.
