

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 280

SPONSOR: Criminal Justice Committee and Senators Cowin and Webster

SUBJECT: Public Lodging Establishments

DATE: March 18, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kruse</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable</u>
2.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate 280 does the following:

- ▶ Provides that an individual, agent, contractor, or volunteer who acting on behalf of an individual, business, company, or food service establishment and who, without permission, delivers, distributes, or places a handbill in a public lodging establishment, or attempts to do the same, commits a second degree misdemeanor.
- ▶ Provides that a person who, without permission, directs another person to commit those acts commits a first degree misdemeanor.
- ▶ Defines the terms “handbill” and “without permission.”
- ▶ Provides that handbilling is unauthorized when the owner, manager, or agent of the owner or manager of a public lodging establishment does not expressly permit the handbilling or posts a sign prohibiting advertising or solicitation in the manner prescribed in the CS, which specifies what the sign must include and where it must be posted, and requires that the sign be clearly noticeable.

This CS creates s. 509.144, F.S.

II. Present Situation:

Public Lodging Establishment

Chapter 509, F.S., governs the regulations for public lodging establishments through the Division of Hotels and Restaurants of the Department of Business and Professional Regulation. Section

509.013(4)(a), F.S., defines the term “public lodging establishment” as “any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings, which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.” Section 509.013(3), F.S., defines the term “guest” as “any patron, customer, tenant, lodger, boarder, or occupant of a public lodging establishment.”

Sections 509.141-509.143, F.S., address the behavior of guests on public lodging establishment property. Section 509.141(1), F.S., authorizes the operator of a public lodging establishment, among other things, to remove intoxicated guests or guests using profanity or who are involved in a brawl. Section 509.142, F.S., authorizes an operator of a public lodging establishment to refuse service to an intoxicated guest or to a guest who is using profane language or brawling, and s. 509.143(1), F.S., authorizes that operator to take a guest into custody, through reasonable means, when the owner believes the guest is in violation of s. 877.03, F.S. (breach of the peace or disorderly conduct), provided that the conduct is threatening the life or safety of the guest or other persons.

State Trespass Law

Section 810.08(1), F.S., provides that a person who, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits a trespass in a structure or conveyance.

The offense of trespass in a structure or conveyance in s. 810.08(1), F.S., is divided into two parts. The first part requires no warning be given to a person to leave the structure or conveyance prior to an arrest for trespass in a structure or conveyance. This situation occurs only when a person enters or remains in a structure or conveyance without being authorized, licensed, or invited. The second part, which relates to a person who *is* authorized, licensed, or invited into the structure or conveyance, requires that a warning be given to the person to leave the premises, and that the person refuse to do so, before the person may be arrested for trespass.

With exceptions, trespass in an unoccupied structure or conveyance is a second degree misdemeanor. Trespass in an occupied structure or conveyance is a first degree misdemeanor. (Armed trespass is not relevant to or described in this analysis.)

As used in s. 810.08, F.S., the term “person authorized” means “any owner or lessee, or his or her agent, or any law enforcement officer whose department has received written authorization from the owner or lessee, or his or her agent, to communicate an order to depart the property in the case of a threat to public safety or welfare.”

Section 810.09(1), F.S., provides, in part, that a person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in s. 810.011, F.S., commits a trespass on property other than a structure or conveyance. (Trespass in a dwelling, trespass by

propelling a projectile across private property to kill or endanger an animal, trespass on certain specified sites, and armed trespass are not relevant to or described in this analysis.)

Criminal liability does not attach to unauthorized, willful entry upon or remaining in any property other than a structure or conveyance unless notice against entering or remaining is given, either by actual communication to the offender or in the manner prescribed in the section.

With exceptions, trespass on property other than a structure or conveyance is a second degree misdemeanor. If the offender defies an order to leave, personally communicated to the offender by the owner of the premises or by an authorized person, or if the offender willfully opens any door, fence, or gate or does any act that exposes animals, crops, or other property to waste, destruction, or freedom; unlawfully dumps litter on property; or trespasses on property other than a structure or conveyance, the offender commits a first degree misdemeanor.

As used in s. 810.09, F.S., the term “authorized person” or “person authorized” means “any owner, or his or her agent, or any law enforcement officer whose department has received written authorization from the owner, or his or her agent, to communicate an order to leave the property in the case of a threat to public safety or welfare.”

Local Regulation of Handbill Distribution

To deal with persons distributing handbills on public lodging establishment property, on vehicles or under room doors, some cities have passed ordinances prohibiting individuals or businesses from distributing handbills. For example, the city of Tampa passed an ordinance in 1997 (Tampa Code s. 6-171(a)) stating that it “is unlawful for any individual to deliver, distribute or place, or attempt to deliver, distribute or place, handbills on private property upon which is posted a reasonably conspicuous sign reading ‘No Advertising’ or ‘No Solicitation’.” The ordinance also states that it “is unlawful for any business advertising by means of handbills to direct, encourage or allow any individual, employee or independent contractor distributing handbills on behalf of the business to deliver, distribute or place handbills on private property upon which is posted a reasonably conspicuous sign reading ‘No Advertising’ or ‘No Solicitation’.” *Id.* at s. 6-171(b).

Other State Laws

California law (Cal. Bus. & Prof. Code s. 17210 (West 2004)) regulates the distribution of handbills on public lodging establishments in its Business and Professions Code, under unfair competition. “Handbill” means, and is specifically limited to, any tangible commercial solicitation to guests of the hotel urging that they patronize any commercial enterprise. *Id.* at s. 17210(b). Regarding the distribution of handbills, the law states:

Every person (hereinafter “distributor”) engages in unfair competition for purposes of this chapter who deposits, places, throws, scatters, casts, or otherwise distributes any handbill to any individual guest rooms in any hotel, including, but not limited to, placing, throwing, leaving, or attaching any handbill adjacent to, upon, or underneath any guest room door, doorknob, or guest room entryway, where either the innkeeper has expressed objection to handbill distribution, either orally to the distributor or by the posting of a sign or other notice in a conspicuous place within the lobby area and at all points of access from the exterior of the premises to guest room areas indicating that handbill distribution is prohibited, or

the distributor has received written notice pursuant to subdivision (e) that the innkeeper has expressed objection to the distribution of handbills to guest rooms in the hotel.

Id. at s. 17210(c).

California's law also penalizes a person who directs another person to distribute handbills, but requires that the person directing the distributor be informed in writing that the establishment objects to the distribution of handbills in the hotel. *Id.* at s. 17210(d). A person who violates the law may be subject to a civil fine not to exceed \$2,500. Cal. Bus. & Prof. Code s. 17206(a) (West 2004). If an injunction prohibiting the distribution of handbills is disregarded, a person may be liable for a penalty not to exceed \$6,000 per violation. Cal. Bus. & Prof. Code s. 17207(a) (West 2004).

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 280 creates s. 509.144, F.S., which provides that an individual, agent, contractor, or volunteer who acting on behalf of an individual, business, company, or food service establishment and who, without permission, delivers, distributes, or places a handbill in a public lodging establishment, or attempts to do the same, commits a second degree misdemeanor.

The CS also provides that a person who, without permission, directs another person to commit those acts commits a first degree misdemeanor.

The CS defines "handbill as "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."

The CS defines "without permission" as "without the expressed permission of the owner, manager, or agent of the owner or manager of the public lodging establishment or the posting of a sign that prohibits advertising or solicitation in the manner provided in subsection (4)."

Subsection (4) provides the following requirements regarding the sign and posting of the sign:

- ▶ There must appear prominently on any sign, in letters of not less than 2 inches in height, the terms "no advertising" or "no solicitation" or terms that indicate the same meaning.
- ▶ The sign must be clearly noticeable.
- ▶ If the main office of the public lodging establishment is immediately accessible by entering the office through a door from a street, parking lot, grounds, or other area outside the establishment, the sign must be placed on a part of the main office, such as a door or window, and the sign must face the street, parking lot, grounds, or other area outside the establishment.

- ▶ If the main office of the public lodging establishment is not immediately accessible by entering the office through a door from a street, parking lot, grounds, or other area outside the establishment, the sign must be placed in the immediate vicinity of the main entrance to the establishment, and the sign must face the street, parking lot, grounds, or other area outside the establishment.

The CS takes effect July 1, 2004.

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:

“As a general matter, a private person may exclude certain speakers from his or her property without violating the First Amendment, *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976)...” *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 116 S.Ct. 2374, 2405 (1996).

In *Lloyd Corp. v. Tanner*, 92 S.Ct. 2219 (1972), the Supreme Court “... dealt with the question whether under the Federal Constitution a privately owned shopping center may prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center’s operations.” *PruneYard Shopping Center v. Robins*, 100 S.Ct. 2035, 2040 (1980) (citation omitted). The United States Supreme Court “stated that property does not ‘lose its private character merely because the public is generally invited to use it for designated purposes,’ and that ‘[t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.’ 407 U.S., at 569, 92 S.Ct., at 2229[,]” *id.* at 2040, and the Court “held that when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law. *See also Hudgens v. NLRB* ... at 517-521, 96 S.Ct., at 1035-1037[,]” *id.* at 2041.

The case of *PruneYard* involved an appeal by a shopping center (*PruneYard*) owner from a judgment of the California Supreme Court (*Robins v. PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979)), in which the California Supreme Court held that California’s constitution protects speech and petitioning, reasonably exercised, in privately owned

shopping centers. The United States Supreme Court described PruneYard as a large, privately owned shopping center with parking lots, walkways, plazas, sidewalks, and buildings containing numerous specialty shops, restaurants, and a movie theater, which were open to the public. *Id.* at 2038. The shopping center had "... a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purpose." *Id.* The case before the California Supreme Court arose from an incident in which security at the shopping center told a group of high school students that they would have to leave the shopping center because the students, while at the shopping center, were distributing pamphlets and requesting signatures on a petition in violation of the shopping center's policy. *Id.*

The First Amendment issues in the *PruneYard* case before the United States Supreme Court did not involve the First Amendment rights of the high school students but rather the First Amendment rights of the shopping center owner. The Court rejected the owner's First Amendment arguments, concluding that the California Supreme Court's decision did not infringe on the owner's First Amendment rights. *Id.* at 2044.

Regarding the *Lloyd* case, which was a case the owner used as support for one of his First Amendment arguments, the Court indicated that its reasoning in *Lloyd* did not by its own force

limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967). *See also* 407 U.S., at 569- 570, 92 S.Ct., at 2229. In *Lloyd*, ... , there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here. It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

Id. at 2040-2041.

Florida's constitution contains freedom of speech and assembly provisions (Sections 4 and 5, Art. I of the State Constitution). One circuit court recently reversed the conviction of a man (Wood) who was convicted in county court of trespass for staying in the Panama City Mall after having been told by mall security that his solicitation of signatures in the mall to appear on a ballot for political office violated the mall's rules and was told to stop the solicitation in the mall or leave. *Wood v. State*, 20003 WL 1955433 (Fla.Cir.Ct., February 26, 2003) (not published in So.2d). After determining that the mall was private property of a "quasi-public nature," the circuit court held that the State Constitution "prohibits a private owner of a 'quasi-public' place from using state

trespass laws to exclude peaceful political activity.” *Id.* at 2. The circuit court appears to have applied a type of balancing test similar to the balancing test in *Robins*.

There is little in Florida case law of relevance to the issue identified in *Wood*: whether the State Constitution affords Florida citizens a right to peaceful expressive activity in the open areas of a shopping center. The *Wood* court stated that the issue was one of first impression in Florida. *Id.* at 2. Also, while the *Wood* court indicated that Florida courts “have recognized this generally accepted principle that malls are still private property, but have a ‘quasi-public’ nature[,]” *id.*, the court only cited to *State v. Woods*, 624 So.2d 739 (Fla. 5th DCA 1993), a case in which the court simply stated that it was certain that a mall is a “quasi-public” place.

Without a more developed body of case law on the *Wood* issue, it cannot be said the *Wood* decision puts that issue to rest, that other Florida courts would agree with the *Wood* analysis and holding, or that the decision in *Wood* is indicative of how a Florida court would rule on any First Amendment challenge to the bill’s restrictions on handbilling at public lodging establishments. (The *Miami Herald* recently reported that a three-judge panel of the First District Court of Appeal “affirmed” and “unanimously upheld” the circuit court’s decision in *Wood*. See “Court: Mall can’t ban politicking,” *Miami Herald* (February 6, 2004). Staff contacted the Office of the Clerk of the Florida First District Court of Appeals (DCA). The Clerk’s office informed staff that the First DCA issued a per curiam denial on February 4, 2004 (Case No. 13-1553); this denial does not serve as precedent on the *Wood* issue and does not bind any Florida court considering a similar issue. Further, there are pending motions to issue a written opinion and to certify the case to the Florida Supreme Court as a matter of great public importance.)

Finally, staff notes that the *Wood* case arose from political activity in a mall. No Florida court decision appears to have addressed whether the State Constitution affords citizens the right to distribute handbills in a public lodging establishment.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The placing of handbills on private property controlled by a public lodging establishment without permission where a no-advertising-or-solicitation sign is posted in a reasonably conspicuous manner is prohibited by the provisions of the bill. Patrons and guests may encounter fewer solicitations while staying in a public lodging establishment. Businesses which previously advertised in this manner may be subject to a penalty under the bill’s provisions.

C. Government Sector Impact:

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

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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