

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Trespass is defined generally as an unlawful act committed against the person or property of another.¹

Various specific acts in the nature of trespass are made punishable by statute. Such acts include:

- The unauthorized entry into any structure or conveyance of another;
- The unauthorized entry into the property of another other than a structure or conveyance;
- The removal or mutilation of notices posted by an owner on his or her land²;
- The breaking or injuring of fences³;
- The unauthorized placing of signs adjacent to public highways⁴;
- The unauthorized entry onto school property⁵; and
- The unauthorized entry onto school property with a firearm or other weapon⁶.

Section 810.08(1), F.S., provides that "whoever, 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 to depart, and that person refuses to do so, commits the offense of trespass in a structure or conveyance".⁷ The penalty for this offense is a misdemeanor of the second degree.⁸ Where there is a human being in the structure or conveyance at the time, it is a misdemeanor of the first degree⁹, and it is a felony of the third degree if the offender is armed with a firearm or other dangerous weapon or thus arms himself while in the structure or conveyance.¹⁰

The term "structure", in s. 810.08, F.S., means a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof".¹¹ Curtilage of a structure primarily includes the adjoining land or yard. Curtilage of a structure for the purpose of trespass law also includes a parking lot, but only where the parking lot is enclosed in some manner.¹²

Section 810.09, F.S., provides that it is a first-degree misdemeanor to enter, uninvited, onto property that is not a structure or conveyance¹³ if prior notice against entering has been given by verbal communication, or by posting, fencing or cultivation.¹⁴ In other words, it is not trespassing where an

¹ *Black's Law Dictionary*, 720 (2nd Pocket Ed. 1996)

² Section 810.10, F.S.

³ Section 810.115, F.S.

⁴ Section 810.11, F.S.

⁵ Section 810.097, F.S.

⁶ Section 810.095, F.S.

⁷ Section 810.08(1), F.S.

⁸ Section 810.08(2)(a), F.S.

⁹ Section 810.08(2)(b), F.S.

¹⁰ Section 810.08(2)(c), F.S.

¹¹ Section 810.011(1), F.S.

¹² *L.K.B. v. State*, 677 So.2d 925 (Fla. 5th DCA)

¹³ "Conveyance" means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car; and "to enter a conveyance" includes taking apart any portion of the conveyance. Section. 810.011, F.S.

¹⁴ Trespass in a dwelling, structure or conveyance is considered a more serious offense.

uninvited or unauthorized person wanders onto land that is undeveloped, and that person has no idea that the land is privately owned because he or she was not given any prior notice to that affect.

Effect of Bill

This bill creates s. 810.091, F.S., to provide that, for the purposes of the trespassing laws at ss. 810.08 and 810.09, F.S., a person may not lawfully remain on any commercial property or structure after the owner or owner's agent orders the person to leave the premises on the ground that the person is engaged in activity deemed by the owner or owner's agent to be detrimental to the commercial purposes for which the premises is held open to the public.

C. SECTION DIRECTORY:

Section 1 creates 801.091, F.S., relating to trespass on commercial property.

Section 2 provides an effective date of October 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

The question of whether a person's free speech rights are stronger than another person's private property rights when a person chooses to exercise his or her free speech rights on private

commercial property held open to the public, has been a topic for debate in this state and around the country since the U.S. Supreme Court decided *Marsh v. Alabama* in 1946.¹⁵ On one side a person might think that they should be able to conduct free speech activities wherever they like, whereas another person might believe that an owner of private commercial property should be able to have them removed from their property, regardless of whether the property is open to the public or not. This is an issue of private property rights vs. free speech rights.

Federal Court Decisions

Freedom of speech is guaranteed under Article 1, Section 4 of the Florida Constitution. The First Amendment of the U.S. Constitution protects the exercise of free speech in public forums against interference by the state. The U.S. Constitution generally prohibits only *government* infringement of constitutional rights. Thus, to find some action unconstitutional it is generally necessary to attribute the action to the state, which includes government agencies and officials acting under the color of state law. However, this does not mean that the act must be directly by a government actor. "State action" can also be found in actions of seemingly private individuals who perform exclusive public functions, or have significant state involvement in their activities.

The United States Supreme Court has found that certain activities are so traditionally the exclusive prerogative of the state that they constitute state action even when undertaken by a private individual or organization. The owner of a "company town" with all of the attributes of a public town cannot deny a person's First Amendment right to distribute religious literature in the town, since the privately owned town is equivalent to a public town.¹⁶ However, the court refused to extend this notion to the owner of a shopping mall, even though it may be "quasi-public" in nature. The court has ruled that a shopping center does not have all the attributes of a town, and that therefore the United States Constitution does not protect free-speech activities in privately owned shopping centers.¹⁷

State Court Decisions

The United States Supreme Court ruled in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), that states are free to interpret their constitutions to confer more expansive protection of free speech than that required by the federal constitution. Accordingly, Florida's Constitution must also be reviewed to determine whether it affords a stronger protection of free speech which would allow a person to exercise this right on private commercial property.¹⁸

In general, the Florida Supreme Court has held that the scope of the protection accorded to freedom of speech in Florida is the same as is required under the First Amendment of the U.S. Constitution¹⁹, and the free speech provisions of the Florida Constitution are to be analyzed in the same manner as the First Amendment of the U.S. Constitution.²⁰ However, later lower court decisions are not so clear.

In *Publix Super Markets, Inc. v. Tallahasseeans For Practical Law Enforcement (TPLE)*, 2005 WL 3673662 (2nd Fla. Cir. Ct. 2005), TPLE members were seeking signatures for a petition outside of a Publix grocery store, in a shopping center strip mall. Customers complained to the Publix store manager about being approached by TPLE members, and the store managers asked them to leave the store property. The TPLE members refused to leave, and when Publix called the police to have the members of TPLE removed from the property or give them trespassing warnings, the police responded that they were uncertain about the legality of taking such action. The Second Judicial Circuit Court ruled that Publix had the right to exclude persons who seek to use its private property

¹⁵ *Marsh v. Alabama*, 326 U.S. 501 (1946)

¹⁶ *Marsh v. Alabama*, 326 U.S. 501 (1946)

¹⁷ *Hudgens v NLRB*, 424 US 507 (1976)

¹⁸ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, (2003)

¹⁹ *Dept. of Education v. Lewis*, 416 So.2d 455 (Fla. 1982)

²⁰ *Dept. of Education v. Lewis*, 416 So.2d 455 (Fla. 1982)

for purposes other than shopping, including the solicitation of signatures on political initiatives. The court reasoned that "the First Amendment to the U.S. Constitution and Article I, Section 4 of the Florida Constitution only protect against governmental infringement of an individual's right to engage in free speech, or similarly protected conduct, and the Publix shopping center in question is not considered a 'town center' and therefore not analogous to government infringement of free speech". The court concluded that Publix could remove people from their property even if they are exercising their constitutionally protected right to freedom of speech.

On the other hand, in *Wood v. State*, 2003 WL 1955433 (14th Fla. Cir. Ct. 2003), Wood was arrested for trespassing at the Panama City Mall after he was asked to leave because he was on mall property soliciting signatures to get his name on an election ballot. That trial court held that Florida's Constitution is more expansive than the U.S. Constitution and Florida's Constitution does protect free-speech activities in privately owned shopping malls. The court held that malls and other shopping centers are still private property but have a "quasi-public" nature, and therefore, the Constitution of Florida prohibits a private owner of a "quasi-public" place from using state trespass laws to exclude peaceful political activity.

These two circuit court cases appear to be in conflict with one another, and until a higher court rules on this issue there will remain a question as to whether a private commercial property owner in a shopping mall or shopping center can constitutionally use Florida's trespass laws to have people removed from their private commercial property when such action may be seen as an infringement of that person's First Amendment rights.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

In many instances, commercial businesses lease the retail space that their stores occupy. This bill only allows the owner or owner's agent of the commercial property to order a person to leave the premises. This could lead to problems for a business trying to enforce this law, if the actual owner of a shopping mall or commercial building is not located locally or even in the state of Florida.

This bill could potentially add another element to the trespass law that must be proven beyond a reasonable doubt in order for a person to be arrested under s. 810.08 and s. 810.09, F.S. Under current law, an authorized or invited person who enters any structure and is asked to leave, but refuses, can be arrested for trespass. There is no distinction between commercial or non-commercial private property. This bill could now require all owners of commercial property to show beyond a reasonable doubt that the reason they asked a person to leave the property was for reasons they deemed to be detrimental to the commercial purpose of the property.

In addition, it is possible that issues may arise in enforcing this law on persons who are in the parking lot of commercial property. The court in *L.K.B. v. State*, 677 So.2d 925 (Fla. 5th DCA 1996), held that the parking lot of a convenience store was not enclosed and thus was not part of the curtilage of the store, and therefore, defendant could not be convicted of trespass in structure or conveyance based on his presence in the parking lot. The court also stated that for areas around a structure to be considered part of the curtilage of the structure for the purpose of trespass, that the area must be enclosed in some manner. Therefore, even if the current bill passed it is unclear that for the purpose of s. 810.08, F.S., whether a commercial property owner would be able to have a person forcibly removed from the parking lot of the store.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A