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 428

SPONSOR: Comprehensive Planning, Local and Military Affairs Committee and Senator Miller

SUBJECT: Adult Entertainment Facilities

DATE: February 12, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bowman	Yeatman	CA	Favorable/CS
2.				
3.				
4.				
5.				
6.				

I. Summary:

The Committee Substitute (CS) requires the approval of the district school board, in addition to approval by the county or municipality under procedures for changing the list of permitted uses within a zoning category, before an adult entertainment facility can be located within 2,500 feet of a public or private elementary school, middle school or secondary school.

The CS amends s. 847.0134, Florida Statutes.

II. Present Situation:

The definition of "adult entertainment establishment" is set forth in s. 847.001(2), F.S., as: "Adult entertainment establishment" is defined as any commercial establishment, business or service, or portion thereof, which offers sexually-oriented material, devices, paraphernalia, or specific sexual activities, services or performances in any combination or in any other form, whether printed, filmed, recorded or live. The term also includes the following:

- "Adult bookstore" is defined as any business that restricts or purports to restrict admission to adults, which has as part of its stock, books or magazines and which sells or rents for a fee:
  - Any sexually oriented material;
  - Any sexually oriented material that is available for viewing by patrons by use of movie machines, VCRs or slide projectors;
  - Any sexually oriented material that has a substantial portion of its contents devoted to the pictorial depiction of sadism, masochism or bestiality; or

- Any sexually oriented material that has as its principal theme the depiction of sexual activity by, or lascivious exhibition of, the uncovered genitals, public region, or buttocks of children who are or appear to be under the age of 18.

- "Adult theater" is defined as an enclosed space used for presenting either films, live plays, dances or other performances that are distinguished or characterized by an emphasis on matter depicting, describing or relating to specific sexual activities for observation by patrons.
- "Unlicensed massage establishment" is defined as a business or enterprise which offers, sells or provides, or which holds itself out as offering, selling or providing massages that include bathing, physical massage, rubbing kneading, anointing, stroking, manipulating, or other tactile stimulation of the human body by either male or female employees, by hand or by any electrical or mechanical device, on or off the premises. The term does not include an establishment licensed under s. 480.43, F.S., that routinely provides medical services by state-licensed health care practitioners and massage therapists licensed under s. 480.041, F.S.
- "Special Carabaret" is defined as any business that features persons who engage in specific sexual activities for observation by patron, and which restricts or purports to restrict admission only to adults.

The 2001 Legislature enacted Chapter 2001-177, Laws of Florida, which prohibits the location of an adult entertainment establishment that displays, sells or distributes materials harmful to minors within 2,500 feet of a school. The law includes two exceptions to this prohibition. First, an establishment that is legally operating or has been granted a permit from a local government to operate as an adult entertainment establishment on or before July 1, 2001 is exempt. Second, the county or municipality can approve the location of the adult entertainment facility under the proceedings required in s. 125.66(4), F.S., or s. 166.041(3), F.S., for municipalities.

Section 125.66(4), F.S., governs the procedure for counties enacting ordinances or resolutions that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances initiated by the county that change the actual zoning map designation of a parcel or parcels of land. There are two procedures that differ based on the amount of land at issue:

- If the proposed ordinance or resolution changes the actual zoning map designation for a parcel of land involving less than 10 continuous acres, public notice must include newspaper notice at least 10 days prior to the meeting and notification by mail of each real property owner whose land the governmental agency will redesignate by enactment of the ordinance. The notice must be given at least 30 days prior to the public hearing. The board of commissioners must hold a public hearing on the proposed ordinance and upon completion of the hearing, may immediately adopt the ordinance or resolution.
- If the proposed ordinance or resolution changes the list of permitted, conditional, or prohibited uses within a zoning category, or changes the zoning map designation of a parcel of land involving 10 contiguous acres or more, the board of county commissioners must hold two advertised public hearings on the proposed ordinance or resolution. The first public hearing must be held at least 7 days after the day that the first advertisement is published, and the second hearing must be held at least 10 days after the first hearing and must be advertised at least 5 days before the hearing. In addition, the size and content of the advertisement is prescribed.

The hearing and notice requirements in s. 166.041(3), F.S., for municipalities, parallel the requirements described above for counties.

Section 230.16, F.S., provides for school boards to hold not less than one regular meeting for the transaction of business and sets forth a procedure for calling special meetings.

Subsection 2 of s. 847.0134, F.S., provides that a violation of the section constitutes a third degree felony punishable by a prison term not exceeding 5 years, and a fine of up to $5,000.

III. Effect of Proposed Changes:

The CS changes the exception to the prohibition against the prohibition against the location of an adult entertainment facility within 2,500 feet of a school when a county or municipality approves the location under proceedings as provided in s. 125.66(4), F.S., for counties and s. 166.041(3)(c), F.S., for municipalities, to also require the approval of the school board at a meeting held pursuant to s. 230.16, F.S.

The effective date of the CS is July 1, 2002.

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:

In addition to the "takings" issue described above, legislation restricting the location of an adult entertainment establishment must be narrowly tailored in order to survive a challenge that it violates the First Amendment of the federal constitution. In *City of Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925 (1986), the City of Renton, Washington enacted a zoning ordinance which prohibited adult motion picture theatres from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school. The term "adult motion picture theater" was defined as:

> An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas'….. for observation by patrons therein.

Playtime Theatres challenged the ordinance under a claim that it violated the First and Fourteenth Amendment to the federal constitution. The court stated:

> This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. (citations omitted)

The Supreme Court recognized that the ordinance did not ban adult theatres altogether but merely provided that such theatres could not be located within 1,000 feet of certain specified locations. The court then held that the ordinance could be analyzed "as a form of time, place and manner regulation." *Id*. at 928. The court recognized that the Renton ordinance was not aimed at the content of the films shown at the theatres but on the "secondary effects of such theatres on the surrounding community." *Id*. at 929. The court held that the ordinance was designed to "prevent crime, protect the city's retail trade, maintain property values, and generally 'protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life not to suppress the expression of unpopular views." *Id.* The court further held that the proper inquiry was whether the ordinance was designed to serve a substantial governmental interest and allowed for reasonable alternative avenues of communication. The court found that the ordinance attempted to preserve the quality of life in Renton, a substantial governmental interest, and that the ordinance did not deny Playtime Theatres a reasonable opportunity to open and operate an adult theatre within the city. *Id.* at 932.

In the recent case of *City of Erie v. Pap's A.M. TDBA "Kandyland," 529 U.S* 277.(March 29, 2000), the United States Supreme Court set forth the standard of review for secondary effects legislation; that is, legislation that seeks to regulate the "time, place, and manner" of adult businesses based on the impact of the business on the community (for example, increased crime) rather than on the content of the products they sell. In order to pass constitutional scrutiny, the legislation or ordinance must meet the following criteria:

1) The regulation is within the constitutional power of the government;
2) The regulation is designed to further an important or substantial state interest;
3) The government interest is unrelated to the suppression of free expression; and
4) The regulation is narrowly tailored to further the government interest in preventing the unwanted secondary impact.

The fourth criterion is critical in determining the constitutionality of the bill. The United States Supreme Court characterizes the fourth criterion as requiring that the restriction be no greater than is essential to the furtherance of the governmental interest. In the Pap's case, for example, the court held that the requirement of the City of Erie that exotic dancers wear pasties and G-strings "is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." *Id* at p. 20.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The CS would impose the requirement of obtaining school board approval, in addition to local government approval, before an adult entertainment facility may be located within 2,500 feet of a public or private elementary school, middle school, or secondary school.

C. Government Sector Impact:

The CS would have the effect of involving school boards, in addition to local governments, in land use decisions regarding the location of schools within 2,500 feet of a school.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.