

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Commerce Committee

BILL: CS/SB 1920

INTRODUCER: Commerce Committee and Senator Fasano

SUBJECT: Ballot Initiatives

DATE: April 23, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Rubinas</u>	<u>EE</u>	Fav/1 amendment
2.	<u>Earlywine/Hinely</u>	<u>Cooper</u>	<u>CM</u>	Fav/CS
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Committee Substitute (CS) provides that a person lawfully exercising control over any privately owned property may prohibit all activities regarding supporting or opposing amendment initiatives.

This CS amends section 100.371 of the Florida Statutes.

II. Present Situation:

Generally

There is an inherent tension between the First, Fifth, and Fourteenth Amendments to the U.S. Constitution in regard to an entity's political activities taking place on another entity's private property.

In 1972, the U.S. Supreme Court stated:¹

[I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state action*, *not on action by the owner of private property*... The Due Process clauses of the Fifth and Fourteenth Amendments are also relevant... They provide that 'no person shall be deprived of life, liberty, or property, without due process of law.' *There is a*

¹ *Lloyd Corp Ltd. v. Tanner*, 407 U.S. 551 (1972).

*further proscription in the Fifth Amendment against the taking of 'private property... for public use, without just compensation.'*²

(Emphasis added.)

To simplify a large body of case law, the fundamental issue revolves around whether a given private property owner has, by virtue of allowing the public to come onto the property, converted that property into a 'quasi-public' or public forum, and thus is barred from excluding an individual or group from exercising their First Amendment rights.

In the landmark case of *Marsh v. State of Alabama*, 326 U.S. 501 (1946), the U.S. Supreme Court determined that where a private party built and owned an entire "company town,"³ a religious pamphleteer could not be ejected or arrested on the grounds that she was trespassing on private property. The Court opined:

The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. [Citations omitted]. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm.⁴

In the case of an entire "company town," the Court determined that allowing the property owner/employer to bar certain First Amendment activities curtailed the citizen/employees' ability to participate in their civic duties. "These people, just as residents of municipalities, are free citizens of their State and country.... To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored."⁵

Entities engaging in subsequent political activities have attempted to apply the concepts laid out in *Marsh v. State of Alabama* to other private property owners. In the oft-cited *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551 (1972), the U.S. Supreme Court refused to extend the *Marsh* concept to a common shopping mall. The mall was permitted to eject pamphleteers on the grounds that the mall's open invitation to the public is to come to the mall in order to patronize the tenants in the mall. The mall allows certain "meetings and promotional activities," but the:

... [O]bvious purpose, recognized widely as a legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes....⁶

² Id. at 557.

³ Gulf Shipbuilding Corporation owned and operated the private town of Chickasaw, AL, consisting of "residential buildings, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office.... The town and the surrounding neighborhood, which cannot be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled and according to all indications the residents use the 'business block' as their regular shopping center." *Marsh v. Alabama*, 326 U.S. 501, 502-503.

⁴ Id. at 506.

⁵ Id. at 508.

⁶ *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 565.

In at least one state, the concept of *Marsh* was extended to smaller areas such as shopping centers. The California case of *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) makes this extension, but the rationale for such extension rests solely on the California constitution, which contained a freedom-of-speech protection exceeding the federal protection against government interference found in the First and Fourteenth Amendments.⁷ A 2004 court ruling from Connecticut concisely summarizes the concepts of both *Lloyd* and *Pruneyard*:

It is well established that there is no right under the first amendment of the United States constitution for a person to use a privately owned shopping center as a forum to communicate without the permission of the property owner. *Lloyd Corp. v. Tanner* [additional citations omitted]. A state, however, may adopt greater protection for free expression on private property, so long as such protection does not conflict with any federally protected property rights of the owners of private shopping centers. See *Pruneyard v. Robins* [additional citations omitted].⁸

Florida Case Law

The extent to which a property owner may regulate political activity on his or her property is not well established under Florida law. Committee staff has located only two circuit court opinions discussing the issue in Florida.

In *Wood v. State*, Mr. Wood was attempting to gather signatures in a mall to qualify for office by petition.⁹ He was arrested for trespassing after he declined to leave the mall premises or stop soliciting signatures.¹⁰ The *Wood* court held that a mall is a “quasi-public” place in which peaceful political activity was protected, in part, by the State Constitution’s right to petition the government for redress of grievances.¹¹

In *Publix Super Markets, Inc., v. Tallahasseeans for Practical Law Enforcement*, Publix sought to prohibit petition gatherers from collecting signatures on its property.¹² Tallahasseeans for Practical Law Enforcement were members of a political action committee seeking decriminalization of marijuana laws, and were engaged in signature-gathering on the private property of a Publix grocery store in Tallahassee.

The *Publix* court framed the case as follows:

⁷ In *Pruneyard*, the U.S. Supreme Court upheld the California Supreme Court’s findings that (i) the California Constitution expressly protects speech and petitioning, reasonably exercised, in shopping centers even when the center is privately owned, and (ii) this state law does not infringe a mall owner’s federally-protected property rights.

⁸ *United Food and Commercial Workers’ Union, Local 919, AFL-CIO v. Crystal Mall Associates, L.P.*, 852 A.2d 659, 666 (2004).

⁹ *Wood v. State*, 2003 WL 1955433 (Fla. Cir. Ct. 2003).

¹⁰ *Id.* at *1.

¹¹ *Id.* at *2-3; see also Art. I, s. 5, FLA. CONST.

¹² *Publix Supermarkets, Inc., v. Tallahasseeans for Practical Law Enforcement*, 2005 WL 3673662 (Fla. 2nd Cir. 2005). The petition gatherers sought to propose an amendment to the Tallahassee Municipal Charter. The proposed amendment would have required “law enforcement authorities to make cases involving an adult’s personal use of marijuana within the City of Tallahassee the ‘lowest law enforcement priority.’” *Id.* at *1.

The issue presented in this litigation is whether Publix, which invites the public onto its premises primarily for the purpose of grocery-shopping... has the right to exclude persons in a non-discriminatory manner where such persons seek to use the property for purposes other than shopping.¹³

The court answered this question in the affirmative, summarily noting that the First Amendment of the U.S. Constitution and Art. I, s. 4 of the Florida Constitution “only protect against government infringement of an individual’s right to engage in free speech.”¹⁴ Because Publix stores are located on privately-owned or leased properties, the court determined that it “can find no authority to support Defendants’ contention that they have a constitutional right to solicit at such properties over Publix’s objection.”¹⁵

The court recognized that a state “may provide greater protection under its state constitution for free expression on private property, so long as such protection does not conflict with... federally protected... rights” of the owner.¹⁶ The *Publix* court noted, however, that “the Florida Supreme Court has held that the scope of the Florida Constitution’s protection of freedom of speech is the same as that required under the First Amendment [citation omitted],”¹⁷ and that Florida courts “must apply the principles of freedom of speech announced in the decisions of the United States Supreme Court [citations omitted].”¹⁸

In finalizing its review of the relevant case law in Florida, other states, and the Supreme Court, the Court states:

Owners of private property have the right to allow... periodic use of their premises by civic groups without waiving or otherwise forfeiting their right to exclude other groups seeking to use the premises for political speech, solicitation of petition signatures, or other non-shopping purposes. [Previous case law has] rejected claims that the retailers were improperly discriminating based on such action....

Defendants are not entitled under the First Amendment or the Florida Constitution to solicit signatures... on Publix’s privately owned property without Publix’s permission.¹⁹

III. Effect of Proposed Changes:

Section 1 creates subsection (7) of s. 100.371, F.S., to provide that a person lawfully exercising control over any privately owned property may prohibit all activities regarding supporting or opposing amendment initiatives.

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

¹³ *Publix Super Markets, Inc. v. Tallahasseeans for Practical Law Enforcement*, 2005 WL 3673662 at 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 5.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
