

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Ethics and Elections Committee

BILL: SB 216

INTRODUCER: Senators Justice and Gaetz

SUBJECT: Campaign Financing; Local Government Expenditures; Issue or Referendum Elections

DATE: March 12, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Rubinas	EE	Favorable
2.			CA	
3.			JU	
4.				
5.				
6.				

I. Summary:

Senate Bill 216 prohibits a local government or person acting on its behalf from spending, and prohibits any person or group from accepting, public money for a political advertisement or electioneering communication in connection with an issue, referendum, or amendment that the public will vote on at an election.

Senate Bill 216 takes effect on July 1, 2009.

This bill creates sections 106.113 of the Florida Statutes.

II. Present Situation:

Currently, local governments are not prohibited from making expenditures¹ to advocate for the passage or defeat of an issue, referendum, or amendment the outcome of which will be decided at an election.

Political Advertisements

Section 106.011, F.S., defines a political advertisement as a paid expression in any communications media,² whether radio, television, newspaper, magazine, periodical, campaign

¹ An "expenditure" means "a purchase, payment distribution, loan, advance, transfer of funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account or certificate of deposit, or gift of money or anything of value made for the purpose of influencing the results of an election or making an electioneering communication." Section 106.011(4), F.S. There is a specific statutory exemption for certain internal newsletters of pre-existing organizations. Id.

literature, direct mail, or display or by any other means except by the spoken word in direct conversation, which *expressly advocates* the election or defeat of a candidate or the approval or rejection of an issue.³

Electioneering Communications

An electioneering communication on an issue to be voted at an election means a paid expression in any communications media⁴ by means other than the spoken word in direct conversation that: 1) contains a clear reference that an issue is to be voted on at an election without expressly advocating the passage or defeat of the issue; and, 2) is published after the issue is designated a ballot position or 120 days before the date of the election on the issue, whichever occurs first.⁵

III. Effect of Proposed Changes:

Senate Bill 216 prohibits a local government or person acting on its behalf from spending or authorizing, and prohibits a person or group from accepting, public funds for a political advertisement or electioneering communication that involves an issue, referendum, or amendment that the public will vote on at an election. The bill exempts electioneering communications that are limited to factual information. The bill further clarifies that a local government elected official is not prohibited from expressing an opinion on any issue at any time as long as it does not violate the aforementioned prohibition.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

² “Communications media” means “broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies; however, with respect to telephones, an expenditure shall be deemed an expenditure for the use of communications media only if made for the costs of telephones, paid telephonists, or automatic telephone equipment to be used by a candidate or political committee to communicate with potential voters ...; however, with respect to the Internet, an expenditure shall be deemed an expenditure for use of communications media only if made for the cost of creating or disseminating a message on a computer information system accessible by more than one person but excluding the internal communications of a campaign or of any group.” (emphasis added). Section 106.011(13), F.S.

³ There are specific statutory exemptions for certain internal newsletters of pre-existing organizations and editorial endorsements by recognized news media. Section 106.011(17), F.S.

⁴ See *infra* note 2 (defining “communications media”).

⁵ Section 106.011(18), F.S. There are specific statutory exemptions for certain internal newsletters of pre-existing organizations, editorial endorsements by recognized news media, and public debates. *Id.*

D. Other Constitutional Issues:

In Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning, 2008 WL 4791004 at *7 (N.D. Fla. 2008), *clarified by*, Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning, 2008 WL 4878917 (N.D. Fla. 2008), the Federal District Court for the Northern District of Florida recently enjoined the State of Florida from enforcing the electioneering communications provisions of Chapter 106, Florida Statutes, as they relate to *candidate* electioneering ads except for the “functional equivalent” of express advocacy,⁶ which it held the State may properly regulate.⁷

The Broward Condominiums court also enjoined, completely and without exception, the enforcement of all Chapter 106 regulations of *issue-only* electioneering ads. The court held:

The Supreme Court’s (U.S.’s) explanation of the functional equivalent of express advocacy does not allow for “express advocacy made about ballot issues.” The Supreme Court’s guidance on the functional equivalent of express advocacy is confined to communications that advocates (sic) for a candidate. Therefore, ***to the extent that a communication only addresses a ballot issue*** and does not, through the ballot issue, advocate a listener, reader, or hearer to vote for a particular candidate, then ***that communication is issue advocacy and it constitutes protected political speech that cannot be regulated.***⁸

(emphasis added).

The case is currently on appeal to the federal Eleventh Circuit Court of Appeals.

⁶ The court characterized the “functional equivalent of express advocacy” as a “very narrowly drawn category.” Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning, 2008 WL 4791004 at *7 (N.D. Fla. 2008), *clarified by*, Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning, 2008 WL 4878917 (N.D. Fla. 2008). In order for speech to fall into this category, it must:

1. Be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a *specific candidate*,” and,
2. Be a “broadcast, cable, or satellite communication that refers to a *clearly identified candidate* within sixty days of a general election or thirty days of a primary election.”

Id. The court found that this two-pronged analysis was consistent with the First Amendment's command that “when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to ... a ban ... we give the benefit of the doubt to speech, not censorship.” Id. (citing Fed. Elec. Comm. v. Wisconsin Right to Life, Inc., 127 S.Ct.2652, 2674 (2007)).

⁷ Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning, 2008 WL 4791004 (N.D. Fla. 2008), *clarified by*, Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning, 2008 WL 4878917 (N.D. Fla. 2008).

⁸ Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning, 2008 WL 4878917, at 1 (N.D. Fla. 2008).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The prohibition against expenditures for local advertising may result in fewer dollars going to media outlets such as newspapers, radio, and television stations. The precise economic impact cannot be determined at this time and will likely vary on an issue-by-issue basis.

C. Government Sector Impact:

Although Senate Bill 216 would not result in higher local revenues, prohibiting local government expenditures on political issues would mean that more money is available to be spent on other local programs. The precise economic impact on local government cannot be determined at this time and will likely vary on an issue-by-issue basis.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Florida Supreme Court has upheld the use of public funds by local government to advocate with respect to a local referendum. In People Against Tax Revenue Mismanagement, Inc. v. County of Leon,⁹ Leon County voters passed an optional sales tax in a local referendum. After the referendum passed, plaintiffs argued that the sales tax election was invalid because local governmental agencies used public funds and public resources to mount an informational campaign supporting the referendum. Plaintiffs described the agencies' actions as "violat[ing] the 'neutral forum' of the election."¹⁰ In response, the Florida Supreme Court held:

Such a position, however, is tantamount to saying that governmental officials may never use their offices to express an opinion about the best interests of the community simply because the matter is open to debate. A rule to that effect would render government *feckless*. One duty of a democratic government is to lead people to make informed choices through fair persuasion.

* * *

. . . [L]ocal governments are not bound to keep silent in the face of a controversial vote that will have profound consequences for the community. Leaders have both a *duty and a right* to say which course of action they think best, and to make fair use of their offices for this purpose. The people elect governmental leaders precisely for this purpose.¹¹

⁹ 583 So. 2d 1373, 1374 (Fla. 1991).

¹⁰ Id. at 1374-1375.

¹¹ Id. at 1375 (footnote omitted).

(emphasis added).

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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