

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 175 Condominiums
SPONSOR(S): Civil Justice Subcommittee; Fitzenhagen
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 120

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Cary	Bond
2) Business & Professional Regulation Subcommittee	10 Y, 0 N	Morton	Luczynski
3) Judiciary Committee			

SUMMARY ANALYSIS

A condominium is created by the filing of a declaration of condominium in the county property records. Industry practice has been to wait to record the declaration until construction was completed, or just before the first closing. This allows flexibility for changes during construction. A recent federal case has caused concern that the declaration must be filed and disclosed to preconstruction purchasers in order to comply with the federal Interstate Land Sales Full Disclosure Act, which allows purchasers to rescind contracts within 2 years that do not contain certain disclosures.

The bill amends the condominium law to facilitate recording the declaration of condominium before construction by amending the start times of the various statutory deadlines to commence on the recording of a certificate of a surveyor and mapper certifying the final as-built dimensions of the units or the first closing, rather than upon the recording of the declaration of condominium.

The bill also clarifies that a condominium unit comes into existence upon the recording of the declaration, regardless of any provisions in the declaration to the contrary.

The bill does not appear to have a fiscal impact on state or local governments.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Formation of Condominiums

Current Situation

A condominium is a form of ownership of real property created pursuant to ch. 718, F.S., comprised of units which are individually owned, but have an undivided share of access to common facilities.¹ A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.² A declaration is similar to a constitution in that it governs the relationships among condominium unit owners and the condominium association. Specifically, a declaration of condominium may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.³ Further, it delineates condominium association bylaws, which governs the administration of the association, including, but not limited to, quorum, voting rights, and election and removal of board members.⁴

All persons who have record title to the interest in the land being submitted to condominium ownership must join in the execution of the declaration. Upon recordation, the developer must file the recording information with the Division of Florida Condominiums, Timeshares and Mobile Homes in the Department of Business and Professional Regulation within 120 days.⁵

The declaration of condominium must contain a certificate of a surveyor and mapper and a graphic description of the improvements in which units are located and a plot plan thereof. Together with the declaration, this information must be in sufficient detail to identify the common elements and each unit and their relative locations and approximate dimensions.⁶

Interstate Land Sales Full Disclosure Act

The federal Interstate Land Sales Full Disclosure Act (ILSFDA)⁷ provides consumer protections to individuals who purchase or lease real property in large, uncompleted housing developments, including condominiums. The act applies to both the conveying of a unit or lot and to all related marketing and sales promotional efforts.

ILSFDA requires developers to register the subdivision with the federal Bureau of Consumer Financial Protection.⁸ The developer must file a "statement of record" that contains the information required by ILSFDA and its regulations and pay a registration fee of no more than \$1,000.⁹ The Act provides several exceptions. For example, ILSFDA does not apply to the sale or lease of lots in a subdivision that contains 25 or fewer lots.¹⁰

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

³ Section 718.104(5), F.S.

⁴ Section 718.112, F.S.

⁵ Section 718.104(2), F.S.

⁶ Section 718.104(4)(e), F.S.

⁷ 15 U.S.C. ss. 1701-20.

⁸ The Dodd-Frank Wall Street Reform and Consumer Protection Act transferred to the federal Bureau of Consumer Financial Protection all of the consumer protection functions of the Department of Housing and Urban Development (HUD) relating to the ILSFDA.

⁹ See 15 U.S.C. s. 1704 for the registration requirement and 15 U.S.C. s. 1705 for the listing of the information that must be provided in the statement of record.

¹⁰ The exemptions are provided in 15 U.S.C. s. 1702. For a discussion of the various exemptions in the act, see Jennifer L. Dolce and William P. Sklar, *The Interstate Land Sales Full Disclosure Act's Two-Year Completion Exemption From the Condominium D*, The Florida Bar Journal, February 1999, Volume LXXIII, No. 2. A copy of this article is available at:

The Act specifies the information that the developers must provide to prospective purchasers or lessees. If the developer fails to provide this information, the purchaser or lessee has the right to revoke the purchase contract or lease agreement for two years from the date of the signing of the contract or agreement.¹¹ The developer must provide prospective purchasers or lessees with a description of the property which makes such lot clearly identifiable and which is *in a form acceptable for recording* by the appropriate public official responsible for maintaining land records in the jurisdiction in which the lot is located.¹²

Of concern to condominium developers, according to the Real Property, Probate, and Trust Law Section of The Florida Bar, is the application of ILSFDA to the sale, or offering for sale, of pre-construction condominium units.

State and federal court decisions have addressed the issue of what is an acceptable description of the property under ILSFDA:

In *Bacolitsas v. 86th & 3rd Owner, LLC*, the United States Court of Appeals for the Second Circuit (New York) held that the description requirement in ISLFDA was satisfied where the purchaser was provided a plan with a detailed description of the unit that identified the dimensions and locations of all rooms and windows, the floor plan, the location of the unit within the building, and the direction the unit faced. The purchaser was also provided a draft declaration that included a metes and bounds description of the condominium and indicated the specific tax lots on which the building was to be erected. The court held that the description itself and not the agreement had to be in a form acceptable for record.¹³

In *Boynton Waterways Investment Associates, LLC v. Bezkorovainus*, the Fourth District Court of Appeals held that the developer had complied with ISLFDA by providing the buyer a copy of the proposed declaration of condominium, which was included in the prospectus, the unit number, address, development name, site map, and floor plans. The court found that this information, which was incorporated into the contract, made the property purchased “clearly identifiable” and “in a form acceptable for recording.”¹⁴

In *Taplett v. TRG Oasis (Tower Two), Ltd, L.P.*, the United States District Court for the Middle District of Florida also found that ISLFDA disclosure requirement was not violated when the developer provided a purchase contract that designated the condominium unit and the name of the development. The court held that ISLFDA requirement that the description must be in “recordable form” does not mean that the developer must provide “recording data identifying [the] declaration” as is required by s. 718.109, F.S., i.e., the developer is not required to give the purchaser the identifying reference number when the declaration is recorded.¹⁵

However, in a recent case, *Berkovich v. Vue-North Carolina, LLC*, the United States District Court for the Western District of North Carolina concluded that the purchasers had the right to revoke the contract because it did not contain a recordable legal description that included the “recording data.” Consistent with North Carolina law, the developer had provided the purchaser with a contract that included a legal description of the unit in which the unit was identified by number

<http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/6b94f229434c8f3885256adb005d6240?OpenDocument> (Last visited February 4, 2013).

¹¹ See 15 U.S.C. s. 1703(d).

¹² 15 U.S.C. s. 1703(d)(1).

¹³ *Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673 (C.A.2 (N.Y.) 2012).

¹⁴ *Boynton Waterways Investment Associates, LLC v. Bezkorovainus*, 82 So. 3d 924 (Fla. 4th DCA 2011).

¹⁵ *Taplett v. TRG Oasis (Tower Two), Ltd, L.P.*, 755 F.Supp.2d 1197 (M.D. Fla. 2009).

and the name of the condominium building as described in the declaration of condominium. The description did not include recording data from the filing of the declaration because North Carolina law did not allow the declaration to be filed until the construction of the condominium was substantially completed. (Florida law does not prohibit the filing of a declaration before the condominium construction is completed.) Although North Carolina law made it impractical or impossible to provide a description for the unit that included “recording data” the court held that the purchasers were entitled to the “prophylactic measure Congress granted purchasers deprived of a recordable legal description.”¹⁶

Of concern to developers and legal practitioners is difficulty of satisfying the requirement of a recordable legal description, i.e., the description provided in the declaration of condominium, before the actual construction and completion of the condominium. They advise that practical necessity prevents the recording of declarations until construction is nearly complete because accurate dimensions of the building and the units cannot be determined until that point. They also advise that the historical practice has been to clearly identify in the contract the property that is being sold by use of a unit identification linked to an accompanied sketch in the sales contract and offering prospectus.

Proposed Changes

This bill conforms Florida condominium law to federal law with respect to the pre-sale period of a condominium development by facilitating recording the declaration before construction. Essentially, the bill allows the declaration to be filed early without triggering statutory timeframes for completion and turnover. The bill accomplishes this by shifting these statutory timeframes to begin upon the first of two events:

- The recording of a certificate of a surveyor and mapper, pursuant to s. 718.104(4)(e), F.S., or
- The recording of an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit.

In each of the following circumstances, the time is currently measured by the recording of the declaration; the bill changes the law to measure the time by the earlier of the recording of the surveyor’s certificate or the first closing, as discussed above.

Challenging the Creation of Condominium

If an action to determine whether the condominium documents comply with mandatory requirements for formation is not brought within 3 years of the recording of the surveyor’s certificate or the first closing, whichever occurs first, the documents are deemed effective to create the condominium, regardless of whether they comply with the requirements.¹⁷

Financial Reporting

In developer controlled condominiums, all unit owners, including the developer, may vote on issues relating to the preparation of the association’s financial reports for the first two fiscal years after the fiscal year in which the surveyor’s certificate was recorded or the first closing occurred, whichever occurred first.¹⁸

Reserves

In developer controlled condominiums, the developer may vote to waive reserves or reduce funding of reserves for the first two fiscal years after the after the fiscal year in which the surveyor’s certificate was recorded or the first closing occurred, whichever occurred first.¹⁹

Association Property Acquisitions

¹⁶ *Berkovich v. Vue-North Carolina, LLC*, 2011 WL 5037124 (W.D.N.C. 2011).

¹⁷ Section 718.110(10), F.S.

¹⁸ Section 718.111(13), F.S.

¹⁹ Section 718.112(2)(f), F.S.

The association may acquire leaseholds, memberships and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. Any such acquisitions after the first 12 months of the recording of the surveyor's certificate or the first closing, whichever occurs first, require a vote, or written consent, of a majority of the total voting interests of the association.²⁰

Transfer of Association Control

Control of associations must be turned over to the nondeveloper unit owners upon the earliest of the following events:

- Three years after 50 percent of the units that will ultimately be operated by the association have been conveyed.
- Three months after 90 percent of the units that will ultimately be operated by the association have been conveyed.
- When all the units that will ultimately be operated by the association have been completed, some of them have been conveyed, and none of the others are being offered for sale by the developer.
- When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business;
- When the developer files a petition seeking bankruptcy protection.
- When a receiver for the developer is appointed by the circuit court and the receivership is not dismissed within 30 days of the appointment.
- Seven years after the date of the recording of the surveyor's certificate or the first closing, whichever occurs first; or, in the case of an association that may ultimately operate more than one condominium, seven years after the date of the recording of the surveyor's certificate or the first closing, whichever occurs first, for the first condominium it operates; or for a phase condominium, 7 years after the recording of the surveyor's certificate or the first closing, whichever occurs first, for the initial phase.²¹

Phase Condominiums

All phases of a phase condominium must be added to the condominium within 7 years of the recording of the surveyor's certificate or the first closing, whichever occurs first.

The bill also adds copies of the recording of a certificate of a surveyor and mapper, pursuant to s. 718.104(4)(e), F.S., or the recording of an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever comes first, to the list of documents the developer is required to provide to the association when control is transferred to the unit owners.

Phase Condominiums

Current Situation

Condominiums may be developed in phases, if the original declaration of condominium provides for and describes in detail all anticipated phases, the impact of future phases on the initial phase and the time period within which all phases must be added. All phases must be added within 7 years of the creation of the condominium.

Proposed Changes

The bill allows unit owners to vote to approve an amendment extending the 7-year period for adding phases to a phase condominium during the final 3 years of the 7-year period. The total time to add all phases may not exceed 10 years from the creation of the condominium, measured by the recording of the surveyor's certificate or the recording of an instrument that transfers title to a unit in the

²⁰ Section 718.114, F.S.

²¹ Section 718.301(1), F.S.

condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first.

Creation of Condominium Units

Current Situation

There is a split in the circuits of the Florida District Courts of Appeal (DCA) regarding the point in time when a condominium unit comes into existence.

- The 2nd DCA held that the owner of an unimproved lot in an unconstructed condominium was a unit owner and thus liable for unpaid assessments on the property because the declaration of condominium had been recorded and thus the condominium unit had been created.²²
- The 4th DCA followed the 2nd DCA's reasoning in the 1995 case, *Winkelman v. Toll*,²³ however two years later, the 4th DCA held that the definitions the developer used in its declaration of condominium could control whether an undeveloped parcel was a "unit within the meaning of the condominium statute."²⁴

Proposed Changes

The bill amends s. 718.104(2), F.S., to resolve the circuit split in the District Courts in favor of the 2nd DCA interpretation and provides that a unit comes into existence upon recording the declaration, regardless of any provision in the declaration to the contrary.

Recording the Declaration

Current Situation

The declaration of condominium must contain a survey of the land and a graphic description of the improvements. If construction is not substantially completed, a statement is included to that effect, and upon completion, the declaration is amended to include a certificate of a surveyor and mapper that the construction is substantially complete so as to provide an accurate representation of the condominium property.²⁵

If the declaration doesn't have the graphic description, survey or certificate, the developer must deliver a deposit to the clerk of court in the amount of an estimate of the cost of the final survey or graphic description.²⁶ The clerk is to hold the money until an amendment to the declaration is recorded that complies with the certificate requirements, at which time the sum of money that was held is returned to the person presenting the amendment.²⁷ If the money is not paid within 3 years after the date the declaration was originally recorded, the clerk may notify the registered agent of the association that the sum is still available and the reason it was originally deposited.²⁸

Proposed Changes

This bill amends s. 718.105(4)(c), F.S., to extend the current 3-year time frame for the clerk to hold the money after the date the declaration was recorded to 5 years.

²² *Hyde Park Condominium Assoc. v. Estero Island Real Estate, Inc.*, 486 So.2d 1 (Fla. 2d DCA 1986). See also *Estancia Condominium Ass'n, Inc. v. Sunfield Homes, Inc.*, 619 So.2d 1008 (Fla. 2d DCA 1993).

²³ *Winkleman v. Toll*, 661 So.2d 102 (Fla. 4th DCA 1995).

²⁴ *RIS Inv. Group, Inc. v. Department of Business and Professional Regulation Division of Florida Land Sales Condominiums and Mobile Homes*, 695 So.2d 357 (Fla. 4th DCA 1997).

²⁵ Section 718.104(4)(e), F.S.

²⁶ Section 718.105(4)(a), F.S.

²⁷ Section 718.105(4)(b), F.S.

²⁸ Section 718.105(4)(c), F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 718.104, F.S., relating to creation of condominiums.

Section 2 amends s. 718.105, F.S., relating to recording of declaration.

Section 3 amends s. 718.110, F.S., relating to amendment of declaration.

Section 4 amends s. 718.111, F.S., relating to the association.

Section 5 amends s. 718.112, F.S., relating to bylaws.

Section 6 amends s. 718.114, F.S., relating to association powers.

Section 7 amends s. 718.301, F.S., relating to transfer of association control.

Section 8 amends s. 718.403, F.S., relating to phase condominiums.

Section 9 provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill conflicts with FACR 61B-23.003(9) and will require rulemaking to conform the rule to the bill. Section 718.501(1)(f), F.S., contains the provision authorizing the Department to promulgate rules to administer and enforce the provisions of ch. 718, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

On line 490 of the bill, the language "whichever occurs first" should be in the past tense. The language provides a copy of either the surveyor's certificate or the first recorded instrument transferring title that did not include developer rights to the unit owner-controlled board.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 7, 2013, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment eliminates a technical change that was in the bill and restores current law. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.