Tab 1	**SB 1028** by **Stewart**; (Identical to H 00489) Professional Licensing Requirements for Barbers and Cosmetologists

Tab 2	**SB 1162** by **DiCeglie**; (Identical to H 00821) Renewable Energy Cost Recovery					
973390	D		S	RI, DiCeglie	Delete everything after	03/20 02:23 PM
Tab 3	**SB 1364** by **Collins (CO-INTRODUCERS) Burgess, Calatayud**; (Identical to H 01333) Interstate-Mobility and Universal-Recognition Occupational Licensing Act					
123964	D		S L	RI, Collins	Delete everything after	03/20 03:29 PM
Tab 4	**SB 1366** by **Collins**; (Compare to H 01333) Fees/Interstate-Mobility and Universal-Recognition Occupational Licensing Act					
560406	A		S L	RI, Collins	Delete L.10 - 19:	03/20 03:30 PM
Tab 5	**SB 1432** by **Trumbull**; (Identical to H 01153) Communications Services Tax					
889486	A		S	RI, Trumbull	btw L.42 - 43:	03/20 11:03 AM
Tab 6	**SB 1380** by **Martin**; (Compare to H 01331) Municipal Electric Utilities					
943324	D		S	RI, Martin	Delete everything after	03/20 11:01 AM
Tab 7	**SB 408** by **Perry**; (Compare to CS/CS/H 00327) Fire Sprinkler System Project Permitting					
938568	A		S L	RI, Perry	Delete L.30 - 40:	03/21 08:55 AM

Tab 8	**SB 1450** by **Gruters**; (Identical to H 00451) Valuation of Timeshare Units

Tab 9	**SB 1454** by **Gruters**; (Compare to CS/H 00437) Homeowners' Right to Display Flags					
515914	A		S	RI, Gruters	Delete L.86:	03/20 01:37 PM
Tab 10	**SB 194** by **Hooper**; (Similar to CS/H 00125) Utility System Rate Base Values					
189256	D		S	RI, Hooper	Delete everything after	03/20 01:34 PM

The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

REGULATED INDUSTRIES
Senator Gruters, Chair
Senator Hooper, Vice Chair

MEETING DATE: Tuesday, March 21, 2023
TIME: 2:30—5:00 p.m.
PLACE: *James E. "Jim" King, Jr Committee Room,* 401 Senate Building

MEMBERS: Senator Gruters, Chair; Senator Hooper, Vice Chair; Senators Bradley, Brodeur, Davis, Hutson, Jones, Osgood, Perry, and Simon

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 1028** Stewart (Identical H 489, Compare H 1443, S 1124)	Professional Licensing Requirements for Barbers and Cosmetologists; Providing a period of time when a conviction, or any other adjudication, for a crime may not be grounds for denial of licensure as a barber or cosmetologist; requiring the applicable board to approve certain educational program credits offered to inmates in certain institutions or facilities for purposes of satisfying training requirements for licensure as a barber or cosmetologist, etc. RI 03/21/2023 CJ RC	
2	**SB 1162** DiCeglie (Identical H 821)	Renewable Energy Cost Recovery; Revising the types of contracts which are eligible for cost recovery by a public utility under certain circumstances; authorizing a public utility to recover prudently incurred renewable natural gas and hydrogen fuel infrastructure project costs through the appropriate Public Service Commission cost-recovery mechanism; specifying eligible renewable natural gas and hydrogen fuel infrastructure projects, etc. RI 03/21/2023 CA RC	
3	**SB 1364** Collins (Identical H 1333, Linked S 1366)	Interstate-Mobility and Universal-Recognition Occupational Licensing Act; Designating the “Interstate-Mobility and Universal-Recognition Occupational Licensing Act”; requiring certain agencies, boards, departments, and other governmental entities to issue an occupational license or government certification to persons under certain circumstances; providing a presumption that the applications of certain individuals will be approved; requiring such entities to provide a written decision to an applicant within a specified timeframe; authorizing the Governor to take certain actions relating to occupational licenses during declared states of emergency, etc. RI 03/21/2023 AEG FP	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 1366** Collins (Compare H 1333, Linked S 1364)	Fees/Interstate-Mobility and Universal-Recognition Occupational Licensing Act; Authorizing applicable boards to charge a fee for applications under the Interstate-Mobility and Universal-Recognition Occupational Licensing Act, etc. RI 03/21/2023 AEG FP	
5	**SB 1432** Trumbull (Identical H 1153)	Communications Services Tax; Decreasing the tax rate on the retail sale of communications services; requiring a certain tax remain the same rate as it was on a specified past date until a specified future date; specifying the fees, taxes, charges, and other impositions that the a specified tax replaces, etc. RI 03/21/2023 CA AP	
6	**SB 1380** Martin (Compare H 1331)	Municipal Electric Utilities; Revising the definition of the term “public utility” to include a municipality supplying electricity to any electric retail customer receiving service at a physical address located outside its corporate boundaries; requiring certain municipalities to be treated as public utilities for a specified timeframe, etc. RI 03/21/2023 AEG FP	
7	**SB 408** Perry (Compare CS/CS/H 327)	Fire Sprinkler System Project Permitting; Defining terms; requiring replacement fire sprinkler system components to meet certain criteria; requiring local enforcement agencies to perform at least one inspection for a fire sprinkler system project; requiring contractors to keep certain documentation available at a worksite for a fire sprinkler system project and make such documentation available for inspection, etc. CA 03/07/2023 Favorable RI 03/21/2023 RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**SB 1450** Gruters (Identical H 451)	Valuation of Timeshare Units; Specifying the methodology by which certain timeshare units must be valued in certain tax appeals; providing that the methodology meets the constitutional mandate for just valuation, etc. RI 03/21/2023 FT AP	
9	**SB 1454** Gruters (Compare H 437)	Homeowners' Right to Display Flags; Authorizing homeowners to display no more than a certain number of specified flags regardless of certain prohibitions in the governing documents of the homeowners' association; prohibiting homeowners' associations from restricting parcel owners or tenants from displaying items on a parcel which are not visible from the parcel's frontage; prohibiting certain homeowners' association documents from precluding property owners from displaying a certain number of specified flags, etc. RI 03/21/2023 CA RC	
10	**SB 194** Hooper (Similar CS/H 125)	Utility System Rate Base Values; Establishing an alternative procedure by which the Public Service Commission may establish a rate base value for certain acquired utility systems; requiring the approved rate base value to be reflected in the acquiring utility's next general rate case for ratemaking purposes; establishing a procedure for appraisal of the acquired utility system; providing the contents required for a petition to the commission for approval of the rate base value of the acquired utility system, etc. RI 03/21/2023 AEG FP	
	Other Related Meeting Documents		

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 Committee on Regulated Industries

BILL:	SB 1028
INTRODUCER:	Senator Stewart
SUBJECT:	Professional Licensing Requirements for Barbers and Cosmetologists
DATE:	March 20, 2023 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Pre-meeting**
2.			CJ	
3.			RC	

I. Summary:

SB 1028 prohibits a regulatory board within the Department of Business and Professional Regulation (DBPR) from considering a criminal conviction, or any other adjudication, for crimes more than three years before the date the application is received by a board, as grounds for denial of a barber or cosmetologist or cosmetology specialist license. However, this prohibition does not apply if the applicant was convicted of a crime at any time during the three-year period immediately preceding the application. Current law prohibits the DBPR's regulatory boards from considering a conviction, or any other adjudication, as an impairment to licensure for a crime more than five years before an application is received by a board.

Under current law and the bill, a DBPR regulatory board may consider a criminal background older than three years if the background includes a sexual predator crime under s. 775.21, F.S., or a forcible felony under s. 776.08, F.S., or is related to the profession's practice.

The bill requires the DBPR's regulatory boards to approve education program credits offered to inmates in any correctional institution or correctional facility as vocational training or through an industry certification program for the purpose of satisfying applicable training requirements for licensure as a barber or cosmetologist.

The bill takes effect on July 1, 2023.

II. Present Situation:

Department of Business and Professional Regulation

Section 20.165, F.S., establishes the organizational structure of the DBPR, which has 11 divisions tasked with the regulation of several professions and businesses.[1]

Division of Professions

Chapter 455, F.S., provides the general powers of the DBPR and sets forth the procedural and administrative framework for all of the professional boards housed under the DBPR as well as the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation.[2] The DBPR may engage in the regulation of professions "only for the preservation of the health, safety, and welfare of the public under the police powers of the state."[3] Regulation is required when:

- The potential for harming or endangering public health, safety, and welfare is recognizable and outweighs any anticompetitive impact that may result;
- The public is not effectively protected by other state statutes, local ordinances, federal legislation, or other means; and
- Less restrictive means of regulation are not available.[4]

However, "neither the department nor any board may create a regulation that has an unreasonable effect on job creation or job retention," or a regulation that unreasonably restricts the ability of those who desire to engage in a profession or occupation to find employment.[5]

When a person is authorized to engage in a profession or occupation in Florida, the DBPR issues a "permit, registration, certificate, or license" to the licensee.[6]

In Fiscal Year 2021-2022, there were 506,210 active licensees in the Division of Professions, including:[7]

- Architects and interior designers;
- Asbestos consultants and contractors;
- Athlete agents;
- Auctioneers;
- Barbers (27,073 active and 97 inactive);[8]

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[1] *See* s. 20.165, F.S, creating the divisions of Administration; Alcoholic Beverages and Tobacco; Certified Public Accounting; Drugs, Devices, and Cosmetics; Florida Condominiums, Timeshares, and Mobile Homes; Hotels and Restaurants; Professions; Real Estate; Regulation; Service Operations; and Technology.
[2] *See* s. 455.203, F.S. The DBPR must also provide legal counsel for boards within the DBPR by contracting with the Department of Legal Affairs, by retaining private counsel, or by providing DBPR staff counsel. *See* s. 455.221(1), F.S.
[3] Section 455.201(2), F.S.
[4] *Id.*
[5] Section 455.201(4)(b), F.S.
[6] Section 455.01(4) and (5), F.S.
[7] *See* Department of Business and Professional Regulation, *Annual Report, Fiscal Year 2021-2022*, at http://www.myfloridalicense.com/DBPR/os/documents/Division%20Annual%20Report%20FY%2021-22.pdf (last visited Mar. 13, 2023).
[8] *Id.*

- Building code administrators and inspectors;
- Community association managers;
- Construction industry contractors;
- Cosmetologists (281,228 active and 1,295 inactive);[9]
- Electrical contractors;
- Employee leasing companies;
- Geologists;
- Home inspectors;
- Harbor pilots;
- Landscape architects;
- Mold-related services;
- Talent agencies; and
- Veterinarians.

Sections 455.203 and 455.213, F.S., establish general licensing authority for the DBPR, including the authority to charge license fees and license renewal fees. Each board within the DBPR must determine by rule the amount of license fees for each profession, based on estimates of the required revenue to implement the regulatory laws affecting the profession.[10]

Barbering

The term "barbering" in ss. 476.014 through 476.254, F.S, (the Barbers' Act) includes any of the following practices when done for payment: shaving, cutting, trimming, coloring, shampooing, arranging, dressing, curling, or waving the hair or beard or applying oils, creams, lotions, or other preparations to the face, scalp, or neck, either by hand or by mechanical appliances.[11]

An applicant for licensure as a barber must pass an examination. To be eligible to take the examination, the applicant must:

- Be at least 16 years of age;
- Pay the application fee; and
- Have held an active valid license in another state for at least one year,[12] or have a minimum of 900 hours of specified training.[13]

Alternatively, a person may apply for and receive a "restricted license" to practice barbering, which authorizes the licensee to practice only in areas in which he or she has demonstrated competency pursuant to rules of the Barbers' Board.[14]

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[9] *Id.*
[10] Section 455.219(1), F.S.
[11] *See* s. 476.034(2), F.S. The term does not include those services when done for the treatment of disease or physical or mental ailments.
[12] Licensure by endorsement may also allow a practitioner holding an active license in another state or country to qualify for licensure in Florida. *See* s. 476.144(5), F.S.
[13] *See* s. 476.114(2), F.S. The training must include, but is not limited to the completion of services directly related to the practice of barbering at a licensed school of barbering, a public school barbering program, or a government-operated barbering program in Florida.
[14] *See* s. 476.144(6), F.S.

Cosmetology

Chapter 477, F.S., governs the licensing and regulation of cosmetologists, nail specialists, facial specialists, full specialists, and related salons in the state. The Board of Cosmetology, within the DBPR's Division of Professions, processes license applications, reviews disciplinary cases, and conducts informal administrative hearings relating to licensure and discipline.[15]

A "cosmetologist" is a person who is licensed to engage in the practice of cosmetology.[16] "Cosmetology" is "the mechanical or chemical treatment of the head, face, and scalp for aesthetic rather than medical purposes, including, but not limited to, hair shampooing, hair cutting, hair arranging, hair coloring, permanent waving, and hair relaxing for compensation. This term also includes performing hair removal, including wax treatments, manicures, pedicures, and skin care services."[17]

Certain persons who apply cosmetic products (makeup) are exempt from ch. 477, F.S., under limited conditions, including application of such products in photography studio salons, in connection with certain retail sales, or during the production of qualified films.[18] In addition, persons who provide makeup in a theme park or entertainment complex to actors and others or the general public are exempt from licensing requirements.[19]

An applicant for a cosmetologist license must pass a licensure examination and:
- Be at least 16 years of age;
- Submit an application with the applicable fee and examination fee; and
- Be licensed in another state or country for at least one year, or received 1,200 hours training, including completion of an education at an approved cosmetology school or program.[20]

A "specialist" is "any person holding a specialty registration in one or more of the specialties registered under [ch. 477, F.S.]."[21] The term "specialty" is defined as "the practice of one or more of the following:
- Manicuring, or the cutting, polishing, tinting, coloring, cleansing, adding, or extending of the nails, and massaging of the hands. This term includes any procedure or process for the affixing of artificial nails, except those nails which may be applied solely by use of a simple adhesive.
- Pedicuring, or the shaping, polishing, tinting, or cleansing of the nails of the feet, and massaging or beautifying of the feet.
- Facials, or the massaging or treating of the face or scalp with oils, creams, lotions, or other preparations, and skin care services."[22]

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[15] *See* Department of Business and Professional Regulation, *Cosmetology*, available at http://www.myfloridalicense.com/DBPR/cosmetology/ (last visited Feb. 7, 2018).
[16] *See* s. 477.013(3), F.S.
[17] *See* s. 477.013(4), F.S. A licensed cosmetologist is not required to register separately as a hair braider, hair wrapper, body wrapper, or specialist. *See* note 40, *supra*.
[18] *See* ss. 477.013(11), 477.0135(1)(f), and 477.0135(5), F.S.
[19] *See* s. 477.0135(6), F.S.
[20] *See* ss. 477.019(2) and (4), F.S.
[21] *See* s. 477.013(5), F.S.
[22] *See* s. 477.013(6), F.S.

An applicant for a specialist license must:

- Be at least 16 years of age;
- Obtain a certificate of completion from an approved specialty education program; and
- Submit an application for registration to the DBPR with the registration fee.[23]

Licensing and Criminal Background

Section 112.011, F.S., outlines general guidelines for considering criminal convictions during licensure determinations. Generally, a person may be denied a professional license based on his or her prior conviction of a crime if the crime was a felony or first-degree misdemeanor that is directly related to the standards determined by the regulatory authority to be necessary and reasonably related to the protection of the public health, safety, and welfare for the specific profession for which the license is sought.[24] Notwithstanding any law to the contrary, a state agency may not deny an application for a license based solely on the applicant's lack of civil rights.[25]

License Applicant's Criminal Background

The DBPR's regulatory boards, or the DBPR if there is no board, may deny a license application for any person whom it finds guilty of any of the grounds for discipline set forth in s. 455.227(1), F.S., or set forth in the profession's practice act.[26] Specifically, the regulatory board, or the DBPR if there is no board, may deny a license application for any person having been:

> convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession.[27]

Chapter 476, F.S., relating to barbers, and ch. 477, F.S., for cosmetology, do not directly reference the criminal background of an applicant as a basis for a license denial. These practice acts reference the criminal background provisions in s. 455.227(1), F.S., as a basis for a license denial.[28]

Section 455.227, F.S., does not specifically require the DBPR or the applicable regulatory board to consider the passage of time since the disqualifying criminal offense before denying or granting a license.

However, s. 455.213(3), F.S., limits the period for which a regulatory board may consider an applicant's criminal conviction,[29] or any other adjudication, as an impairment to licensure to five

[23] *See* s 477.0201, F.S.
[24] Section 112.011(1)(b), F.S.
[25] Section 112.011(1)(c), F.S.
[26] Section 455.227(2), F.S.
[27] Section 455.227(1)(c), F.S.
[28] *See* s. 476.204(1)(h), F.S., relating to barbers, and s. 477.029(1)(h), F.S., relating to cosmetology.
[29] Section 455.213(3)(b)1., F.S., defines the term "conviction" to mean a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld.

years before an application is received by a board. A regulatory board may consider a criminal conviction or other adjudication older than five years if the background:

- Includes a sexual predator crime under s. 775.21, F.S., or a forcible felony under s. 776.08, F.S.; or
- Is related to the profession's practice.

The DBPR's boards must list on their websites the crimes that, if committed by an applicant, do not impair a person's qualifications for licensure, and update the list annually. Beginning October 1, 2019, the boards were required to compile a list of crimes that, although reported by a license applicant, are not used as a basis for denial. The list must identify the crime reported and the date of conviction, finding of guilt, plea, or adjudication entered, or the date of sentencing for each such license application.[30]

Each DBPR board must also compile a list of crimes that have been used as a basis for a license denial during the previous two years. Starting October 1, 2019, with quarterly updating, the boards must compile a list indicating each crime used as a basis for a license denial. For each crime listed, the board must identify the date of conviction, finding of guilt, plea, or adjudication entered, or date of sentencing. Such denials must be available to the public upon request.[31]

Section 455.213, F.S., also:

- Permits a person to apply for a license while under criminal confinement (incarceration) or supervision;[32]
- Requires a licensing agency to permit an applicant who is incarcerated or under supervision to appear by teleconference or video conference at a board or agency license application hearing;[33] and
- Requires the Department of Corrections to cooperate and coordinate with the board or agency to facilitate the applicant's hearing appearance in person, by teleconference, or by video conference.[34]

Vocational Training in Correctional Facilities

The Florida Department of Corrections Bureau of Education partners with state colleges, technical colleges, and community education organizations to provide vocational training in 37 trades to incarcerated inmates.[35] Included in these vocational programs are barbering programs at

[30] Section 455.213(3)(d), F.S. The Barber's Board and the Board of Cosmetology have posted this information on the DBPR's website. The information for each profession is under the "Apply for a License" below the heading "Prior Criminal Offenses" at the following Internet links. *See*, the Barber's Board, http://www.myfloridalicense.com/DBPR/barbers/#apply (last visited Mar. 16, 2023). *See*, the Board of Cosmetology, http://www.myfloridalicense.com/DBPR/cosmetology/#apply (last visited Mar. 16, 2023).
[31] Section 455.213(3)(e), F.S., and *Id.*
[32] Section 455.213(3)(c)1., F.S.
[33] Section 455.213(3)(c)2., F.S.
[34] Section 455.213(3)(c)3. and 4., F.S.
[35] Florida Department of Corrections, Bureau of Education, http://www.dc.state.fl.us/development/programs.html (last visited Mar. 16, 2023).

Blackwater River Correctional Facility,[36] Graceville Correctional Facility,[37] and Lake City Correctional Facility,[38] as well as cosmetology programs at Lowell Correctional Institution,[39] Homestead Correctional Institution,[40] and Gadsden Correctional Facility.[41]

III. Effect of Proposed Changes:

The bill amends s. 455.213(3), F.S., to prohibit a regulatory board within DBPR from considering a criminal conviction, or any other adjudication, for crimes more than three years before the date of application is received by a board as grounds for denial of a barber or cosmetologist or cosmetology specialist license, unless the applicant was convicted of a crime at any time during the three-year period immediately preceding the application.

Under the bill and current law, a DBPR regulatory board may consider a criminal background older than three years if the background includes a sexual predator crime under s. 775.21, F.S., or a forcible felony under s. 776.08, F.S., or is related to the profession's practice.

The bill requires boards to approve education program credits offered to inmates in any correctional institution or correctional facility as vocational training or through an industry certification program for the purpose of satisfying applicable training requirements for licensure as a barber or cosmetologist.

The bill takes effect on July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

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[36] Florida Department of Corrections, *Blackwater River Correctional Facility*, http://www.dc.state.fl.us/ci/185.html (last visited Mar. 15, 2023).
[37] Florida Department of Corrections, *Graceville Correctional Facility*, http://www.dc.state.fl.us/ci/159.html (last visited Mar. 15, 2023).
[38] Florida Department of Corrections, *Lake City Correctional Facility*, http://www.dc.state.fl.us/ci/219.html (last visited Mar. 15, 2023).
[39] Florida Department of Corrections, *Lowell Correctional Institution*, http://www.dc.state.fl.us/ci/314.html (last visited Mar. 15, 2023).
[40] Florida Department of Corrections, *Homestead Correctional Institution*, http://www.dc.state.fl.us/ci/419.html (last visited Mar. 15, 2023).
[41] Florida Department of Corrections, *Gadsden Correctional Facility*, http://www.dc.state.fl.us/ci/111.html (last visited Mar. 15, 2023). This facility also has on-site testing by the Board of Cosmetology.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Some persons who have a criminal conviction, or other adjudication, that is for a crime committed more than three years before the license application may be able to qualify for a barber or cosmetologist license.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The DBPR notes that some correctional training programs are already accepted for licensure purposes. The DBPR questions whether the correctional training programs and vocation training programs referenced in the bill must meet the same training requirements as non-correctional training programs have to meet. However, the DBPR states that its regulatory boards would treat the programs the same without further direction from the legislature.[42]

Sections 455.213(3)(d) and (e), F.S., require the DBPR's regulatory boards, including the Barber's Board and the Board of Cosmetology, to maintain and publish starting October 1, 2019, information regarding the crimes which may form the basis for a license denial and which have previously been the basis for a license denial. Neither board appears to have complied with these requirements.[43]

VIII. Statutes Affected:

This bill substantially amends section 455.213 of the Florida Statutes.

[42] *See* Department of Business and Professional Regulation, *2023 Agency Legislative Bill Analysis for SB 1028* (Jan. 30, 2023) (on file with the Senate Regulated Industries Committee).
[43] *Supra* notes 30 and 31.

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Stewart

17-01530-23 20231028__

A bill to be entitled

An act relating to professional licensing requirements for barbers and cosmetologists; amending s. 455.213, F.S.; providing a period of time when a conviction, or any other adjudication, for a crime may not be grounds for denial of licensure as a barber or cosmetologist; providing an exception; requiring the applicable board to approve certain educational program credits offered to inmates in certain institutions or facilities for purposes of satisfying training requirements for licensure as a barber or cosmetologist; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (b) of subsection (3) of section 455.213, Florida Statutes, is amended, paragraph (f) is added to that subsection, and paragraph (a) of that subsection is republished, to read:

455.213 General licensing provisions.—

(3)(a) Notwithstanding any other law, the applicable board shall use the process in this subsection for review of an applicant's criminal record to determine his or her eligibility for licensure as:

1. A barber under chapter 476;

2. A cosmetologist or cosmetology specialist under chapter 477;

3. Any of the following construction professions under chapter 489:

17-01530-23 20231028__

a. Air-conditioning contractor;

b. Electrical contractor;

c. Mechanical contractor;

d. Plumbing contractor;

e. Pollutant storage systems contractor;

f. Roofing contractor;

g. Sheet metal contractor;

h. Solar contractor;

i. Swimming pool and spa contractor;

j. Underground utility and excavation contractor; or

k. Other specialty contractors; or

4. Any other profession for which the department issues a license, provided the profession is offered to inmates in any correctional institution or correctional facility as vocational training or through an industry certification program.

(b)1. A conviction, or any other adjudication, for a crime more than 3 years before the date the application is received by the applicable board may not be grounds for denial of a license specified in subparagraph (a)1. or subparagraph (a)2. unless the applicant was convicted of a crime at any time during the 3-year period immediately preceding the application. A conviction, or any other adjudication, for a crime more than 5 years before the date the application is received by the applicable board may not be grounds for denial of a license specified in subparagraph (a)3. or subparagraph (a)4 ~~paragraph (a)~~. For purposes of this paragraph, the term "conviction" means a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld. This paragraph does not limit the applicable board from considering an applicant's criminal

history that includes a crime listed in s. 775.21(4)(a)1. or s. 776.08 at any time, but only if such criminal history has been found to relate to the practice of the applicable profession.

2. The applicable board may consider the criminal history of an applicant for licensure under subparagraph (a)3. if such criminal history has been found to relate to good moral character.

(f) The applicable board shall approve educational program credits offered to inmates in any correctional institution or correctional facility as vocational training or through an industry certification program for purposes of satisfying applicable training requirements for licensure in a profession under subparagraph (a)1. or subparagraph (a)2.

Section 2. This act shall take effect July 1, 2023.

The Florida Senate

Committee Agenda Request

To: Senator , Chair Gruters
Committee on Regulated Industries

Subject: Committee Agenda Request

Date: February 28, 2023

I respectfully request that **Senate Bill #1028,** relating to Professional Licensing Requirements for Barbers and Cosmetologists, be placed on:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Linda Stewart

Senator Linda Stewart
Florida Senate, District 17

File signed original with committee office

S-020 (03/2004)

2023 AGENCY LEGISLATIVE BILL ANALYSIS

AGENCY: Department of Business & Professional Regulation

BILL INFORMATION	
BILL NUMBER:	HB 489
BILL TITLE:	Professional Licensing Requirements for Barbers and Cosmetologists
BILL SPONSOR:	Reps. Chambliss and Plakon
EFFECTIVE DATE:	July 1, 2023

COMMITTEES OF REFERENCE
1) Regulatory Reform & Economic Development Subcommittee
2) Commerce Committee
3) Click or tap here to enter text.
4) Click or tap here to enter text.
5) Click or tap here to enter text.

CURRENT COMMITTEE
Regulatory Reform & Economic Development Subcommittee

SIMILAR BILLS	
BILL NUMBER:	No
SPONSOR:	Click or tap here to enter text.

PREVIOUS LEGISLATION	
BILL NUMBER:	SB 1118, CS/SB 1302, SB 1548, CS/HB 87
SPONSOR:	Sen. Perry, Sen. Burgess, Sen. Perry
YEAR:	2022
LAST ACTION:	Died in Regulated Industries Committee

IDENTICAL BILLS	
BILL NUMBER:	No
SPONSOR:	Click or tap here to enter text.

Is this bill part of an agency package?
No

BILL ANALYSIS INFORMATION	
DATE OF ANALYSIS:	January 30, 2023
LEAD AGENCY ANALYST:	Megan Kachur, Deputy Director, Division of Professions

ADDITIONAL ANALYST(S):	Krista Woodard, Executive Director, Barbers' Board, Board of Cosmetology, Building Code Administrators & Inspectors Board, Regulatory Council of Community Association Managers Ruthanne Christie, Executive Director, Board of Veterinary Medicine, Board of Landscape Architecture, Electrical Contractors' Licensing Board Donald Shaw, Executive Director, Construction Industry Licensing Board W. Justin Vogel (for OGC Rules) Tracy Dixon, Service Operations Robin Jordan, Technology
LEGAL ANALYST:	Click or tap here to enter text.
FISCAL ANALYST:	Garrett Blanton, Office of Planning and Budget

POLICY ANALYSIS

1. EXECUTIVE SUMMARY

The bill revises the time period when a conviction, or any adjudication, for crimes that may not be grounds for denial of licensure as a barber or cosmetologist.

The bill requires applicable boards to approve certain education program credits offered to inmates in certain institutions or facilities as vocational training or through an industry certification program to satisfy training requirements for licensure as a barber or cosmetologist.

2. SUBSTANTIVE BILL ANALYSIS

1. PRESENT SITUATION:

Chapter 455, Florida Statutes (FS), applies to the regulation of professions by the Department of Business and Professional Regulation. Subsection 455.01, FS, defines "profession" as any activity, occupation, profession, or vocation regulated by the department in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulations.

Subsection 455.227(2), FS, as well as the practice acts for each of the professions, provides a board, or the department where there is no board, the discretion to refuse to certify, or certify with restrictions, an application for a license on several grounds, including being convicted of a crime that relates to the practice of, or the ability to practice, a profession. A board or the department where there is no board, reviews the criminal history of applicants on a case-by-case basis and such review is done in the interest of public health, safety, and welfare. Applicants for all professions are required to answer questions pertaining to their criminal history when submitting an application for licensure.

Subsection 455.213(3), FS, specifies that, notwithstanding any other law, the Board of Cosmetology, Barbers' Board, Construction Industry Licensing Board, and Electrical Contractors' Licensing Board, shall use the process specified in this subsection for review of an applicant's criminal record. The current process of review prohibits these boards from considering convictions for crimes more than five years before the date of application as ground for denial of licensure. However, the department or applicable board may consider an applicant's criminal history that includes crimes listed in subsection 775.21(4)(a)1., FS, (also known as the Florida Sexual Predators Act), or section 776.08, FS, (which defines "Forcible Felonies") at any time if such criminal history has been found to relate to the practice of the profession, and any criminal history if it has been found to relate to good moral character if the applicable practice act requires such as standard.

Subsection 455.213(3)(c), FS, states that a person may apply for a license before his or her lawful release from confinement or supervision, and prohibits that applicable board from denying an application for a license solely on the basis of the applicant's current confinement or supervision. However, after a license application is approved, the applicable board may stay the issuance of a license until the applicant is lawfully released from confinement or supervision and the applicant notifies the board of such release.

Subsection 455.213(3)(c), FS, further provides that applicants under confinement or supervision must be permitted by the applicable board to appear via teleconference or video conference, and that the Department of Corrections and the applicable board shall cooperate and coordinate the appearance of such applicants at such hearings.

Subsection 476.114, FS, requires applicants requiring to be licensed as barbers to have received 900 hours of training from a school of barbering licensed pursuant to chapter 1005, a barbering program within the public school system, or a government-operated barbering program in the state.

Subsection 477.019, FS, requires applicants requiring to be licensed as cosmetologists to have received 1,200 hours of training from either a school of cosmetology licensed pursuant chapter 1005, a cosmetology program with the public school system, the Cosmetology Division of the Florida School for the Deaf and the Blind, or a government-operated barbering program in the state.

Subsection 489.111(2)(b), FS, which pertains to the Construction Industry Licensing Board, requires that any person desiring to be certified shall be of good moral character.

Subsection 489.111(3), FS, specifies that the Construction Industry Licensing Board may refuse to certify an applicant for failure to satisfy the requirement of good moral character if there is a substantial connection between the lack of good moral character and the professional responsibility of the certified contractor; and the lack of good moral character is supported by clear and convincing evidence.

Subsection 489.111, FS, also requires that any person desiring to be certified shall meet certain requirements, including either a baccalaureate degree from an accredited 4-year college, four years of active experience, or a combination of college and experience.

Subsection 489.511(1)(b)1., FS, which pertains to the Electrical Contractors' Licensing Board, requires that any person desiring to be licensed as a contractor shall be of good moral character.

Subsection 489.511(3)(a), FS, defines good moral character as a history of honesty, fairness, and respect for the rights of others and for the laws of this state and nation and specifies that the Electrical Contractors' Licensing Board may refuse to certify an applicant for failure to satisfy the requirement of good moral character if certain requirements are met.

Subsection 489.511(1)(b)3.c., FS, also requires that any person desiring to be certified shall have 6 years of experience within the last 12 years, this provision allows for comprehensive training, and technical education to be used to meet experience requirements.

2. EFFECT OF THE BILL:

Section 1.

The bill amends subsection 455.213(3), FS, to prohibit convictions, or any other adjudication, for crimes more than three (3) years before the date of application is received, from being used as grounds for denial of a license for a barber or cosmetologist (subparagraphs 455.213(3)(a)1. or (3)(a)2., F.S.) unless the applicant was convicted of a crime at any time during the 3-year period immediately preceding application.

The bill amends subparagraph 455.213(3)(b)1., F.S. to provide that a conviction, or any other adjudication, for a crime more than 5 years before the date the application is received by the applicable board may not be grounds for denial of a license specified for the professions listed solely in subparagraphs 455.213(3)(a)3. or (3)(a)4., F.S. (Construction Industry Licensing Board and Electrical Contractors' Licensing Board).

The bill amends subsection 455.213(3), FS, and creates a new paragraph (f) to require applicable boards to approve education program credits offered to inmates in any correctional institution or correctional facility as vocational training or through an industry certification program for the purpose of satisfying applicable training requirements for licensure in a profession under subparagraphs 455.213(3)(a)1. or (a)2., (barber or cosmetologist), F.S.

Section 2.

The bill provides for an effective date of July 1, 2023.

3. DOES THE BILL DIRECT OR ALLOW THE AGENCY/BOARD/COMMISSION/DEPARTMENT TO DEVELOP, ADOPT, OR ELIMINATE RULES, REGULATIONS, POLICIES, OR PROCEDURES? Y☐ N☒

If yes, explain:	N/A
Is the change consistent with the agency's core mission?	Y☐ N☐
Rule(s) impacted (provide references to F.A.C., etc.):	Click or tap here to enter text.

4. WHAT IS THE POSITION OF AFFECTED CITIZENS OR STAKEHOLDER GROUPS?

Proponents and summary of position:	Unknown
Opponents and summary of position:	Unknown

5. ARE THERE ANY REPORTS OR STUDIES REQUIRED BY THIS BILL? Y☐ N☐

If yes, provide a description:	N/A
Date Due:	N/A
Bill Section Number(s):	N/A

6. ARE THERE ANY NEW GUBERNATORIAL APPOINTMENTS OR CHANGES TO EXISTING BOARDS, TASK FORCES, COUNCILS, COMMISSIONS, ETC. REQUIRED BY THIS BILL? Y☐ N☐

Board:	N/A
Board Purpose:	N/A
Who Appoints:	N/A
Changes:	N/A
Bill Section Number(s):	N/A

FISCAL ANALYSIS

1. DOES THE BILL HAVE A FISCAL IMPACT TO LOCAL GOVERNMENT? Y☐ N☒

Revenues:	None
Expenditures:	None
Does the legislation increase local taxes or fees? If yes, explain.	N/A
If yes, does the legislation provide for a local referendum or local governing body public vote prior to implementation of the tax or fee increase?	N/A

2. DOES THE BILL HAVE A FISCAL IMPACT TO STATE GOVERNMENT? Y☐ N☐

Revenues:	N/A
Expenditures:	N/A

Does the legislation contain a State Government appropriation?	No
If yes, was this appropriated last year?	N/A

3. DOES THE BILL HAVE A FISCAL IMPACT TO THE PRIVATE SECTOR? Y☐ N☒

Revenues:	N/A
Expenditures:	Indeterminate
Other:	N/A

4. DOES THE BILL INCREASE OR DECREASE TAXES, FEES, OR FINES? Y☐ N☒

If yes, explain impact.	N/A
Bill Section Number:	N/A

TECHNOLOGY IMPACT

1. DOES THE BILL IMPACT THE AGENCY'S TECHNOLOGY SYSTEMS (I.E. IT SUPPORT, LICENSING SOFTWARE, DATA STORAGE, ETC.)? Y☐ N☒

If yes, describe the anticipated impact to the agency including any fiscal impact.	N/A

FEDERAL IMPACT

1. DOES THE BILL HAVE A FEDERAL IMPACT (I.E. FEDERAL COMPLIANCE, FEDERAL FUNDING, FEDERAL AGENCY INVOLVEMENT, ETC.)? Y☐ N☒

If yes, describe the anticipated impact including any fiscal impact.	N/A

ADDITIONAL COMMENTS

Division of Professions: Some correctional training programs are already accepted for licensure purposes. It is not clear as to whether the correctional training programs and vocation training programs mentioned in the bill would have to meet the same training requirements that non-correctional training programs have to meet; however, the boards would treat the programs the same without further direction from the legislature.

OGC Rules: No additional comments.

DSO: The impact to the division is minimal and will be accommodated with existing resources.

Office of Planning and Budget: There is no anticipated fiscal impact.

LEGAL - GENERAL COUNSEL'S OFFICE REVIEW

Issues/concerns/comments:	Click or tap here to enter text.

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 Committee on Regulated Industries

BILL:	SB 1162
INTRODUCER:	Senator DiCeglie
SUBJECT:	Renewable Energy Cost Recovery
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schrader	Imhof	RI	**Pre-meeting**
2.			CA	
3.			RC	

I. Summary:

SB 1162 amends s. 366.91, F.S., relating to Florida's renewable energy policy, in the following ways:

- For a provision in s. 366.91(9), F.S., that allows cost recovery by natural gas companies for the prudent and reasonable purchase of renewable natural gas at a price above the market price for natural gas, the bill removes the restriction that such purchases are limited to natural gas companies.
- The bill revises the test for the approval of the provision in s. 366.91, F.S., from "prudent and reasonable" to meeting the goals as stated in s. 366.91(1), F.S., "by promoting the development or use of renewable energy resources in this state and providing fuel diversification."
- The bill also creates a new s. 366.091(10), F.S., to allow public utilities to recover, through an appropriate cost-recovery mechanism administered by the Florida Public Service Commission, prudently incurred costs for certain renewable natural gas and hydrogen fuel projects.

The bill has an effective date of July 1, 2023.

II. Present Situation:

Florida Public Service Commission

The Florida Public Service Commission (PSC) is an arm of the legislative branch of government.[1] The role of the PSC is to ensure Florida's consumers receive utility services, including electric, natural gas, telephone, water, and wastewater, in a safe, affordable, and reliable manner.[2] In order to do so, the PSC exercises authority over public utilities in one or more of the following areas: rate base or economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.[3]

The PSC monitors the safety and reliability of the electric power grid[4] and may order the addition or repair of infrastructure as necessary.[5] The PSC has broad jurisdiction over the rates and service of investor-owned electric and gas utilities.[6] However, the PSC does not fully regulate municipal electric utilities (utilities owned or operated on behalf of a municipality) or rural electric cooperatives. The PSC does have jurisdiction over these types of utilities with regard to rate structure, territorial boundaries, bulk power supply operations, and planning.[7] Municipally owned utility rates and revenues are regulated by their respective local governments. Rates and revenues for a cooperative utility are regulated by their governing body elected by the cooperative's membership.

There are four investor-owned electric utility companies (electric IOUs) in Florida: Florida Power & Light Company (FPL), Duke Energy Florida (Duke), Tampa Electric Company (TECO), and Florida Public Utilities Corporation (FPUC).[8] In addition, there are eight investor-owned natural gas utility companies (gas IOUs) in Florida: Florida City Gas, Florida Division of Chesapeake Utilities, FPUC, FPUC-Fort Meade Division, FPUC-Indiantown Division, Sebring Gas System, and St. Joe Natural Gas Company. Of these eight gas IOUs, five engage in the merchant function servicing residential, commercial, and industrial customers: Florida City Gas, FPUC, FPUC-Fort Meade Division, Peoples Gas System, and St. Joe Natural Gas Company. Florida Division of Chesapeake Utilities, FPUC-Indiantown Division, and Sebring Gas System are only engaged in firm transportation service.[9]

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[1] Section 350.001, F.S.
[2] *See* Florida Public Service Commission, *Florida Public Service Commission Homepage*, http://www.psc.state.fl.us (last visited Mar 16, 2023).
[3] Florida Public Service Commission, *About the PSC*, https://www.psc.state.fl.us/about (last visited Mar 16, 2023).
[4] Section 366.04(5) and (6), F.S.
[5] Section 366.05(1) and (8), F.S.
[6] Section 366.05, F.S.
[7] Florida Public Service Commission, *About the PSC*, *supra* note 3.
[8] Florida Public Service Commission, *2022 Facts and Figures of the Florida Utility Industry*, pg. 5, Apr. 2022 (available at: https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Reports/General/FactsAndFigures/April%202022.pdf)
[9] *Id.* Firm transportation service is offered to customers under schedules or contracts which anticipate no interruption under almost all operating conditions. *See* Firm transportation service, 18 CFR s. 284.7.

Electric IOU and Gas IOU rates and revenues are regulated by the PSC and the utilities must file periodic earnings reports, which allow the PSC to monitor earnings levels on an ongoing basis and adjust customer rates quickly if a company appears to be overearning.[10]

Section 366.041(2), F.S., requires public utilities to provide adequate service to customers. As compensation for fulfilling that obligation, s. 366.06, F.S., requires the PSC to allow the IOUs to recover honestly and prudently invested costs of providing service, including investments in infrastructure and operating expenses used to provide electric service.[11]

Renewable Energy

Section 366.91, F.S., establishes a number of renewable policies for the state. The purpose of these policies, as established in s. 366.91(1), F.S., states that it is in the public interest to promote the development of renewable energy resources in this state. Further, s. 366.91(1), F.S., is intended to encourage fuel diversification to meet Florida's growing dependency on natural gas for electric production, minimize the volatility of fuel costs, encourages investment within the state, improve environmental conditions, and make Florida a leader in new and innovative technologies.

The section defines "renewable energy" as:

> [E]lectrical energy produced from a method that uses one or more of the following fuels or energy sources: hydrogen produced or resulting from sources other than fossil fuels, biomass, solar energy, geothermal energy, wind energy, ocean energy, and hydroelectric power. The term includes the alternative energy resource, waste heat, from sulfuric acid manufacturing operations and electrical energy produced using pipeline-quality synthetic gas produced from waste petroleum coke with carbon capture and sequestration.[12]

Renewable Natural Gas

Natural gas is a fossil energy source which forms beneath the earth's surface. Natural gas contains many different compounds, the largest of which is methane. [13] Conventional natural gas is primarily extracted from subsurface porous rock reservoirs via gas and oil well drilling and hydraulic fracturing, commonly referred to as "fracking." The term renewable natural gas (RNG) refers to biogas that has been upgraded to use in place of fossil fuel natural gas (i.e. conventional natural gas).[14]

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[10] PSC, *2022 Annual Report*, p. 6, (available at: https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Reports/General/AnnualReports/2022.pdf) (last visited: Mar. 16, 2023).
[11] *Id*.
[12] Section 366.91(2)(e), F.S.
[13] United States Energy Information Administration, *Natural gas explained*, Dec. 27, 2022. https://www.eia.gov/energyexplained/natural-gas/.
[14] Environmental Protection Agency, *Landfill Methane Outreach Program (LMOP): Renewable Natural Gas*, https://www.epa.gov/lmop/renewable-natural-gas (last visited Mar. 17, 2023).

Section 366.91, F.S., identifies sources for producing RNG as a potential source of renewable energy.[15] Section 366.91(2)(f), F.S. specifically defines renewable natural gas as anaerobically generated biogas,[16] landfill gas, or wastewater treatment gas refined to a methane content of 90 percent or greater. Under the definition, such gas may be used as a transportation fuel or for electric generation, or is of a quality capable of being injected into a natural gas pipeline.

Biogas used to produce RNG comes from various sources, including municipal solid waste landfills, digesters at water resource recovery facilities, livestock farms, food production facilities, and organic waste management operations.[17] Raw biogas has a methane content between 45 and 65 percent.[18] Once biogas is captured, it is treated in a process called conditioning or upgrading, which involves the removal of water, carbon dioxide, hydrogen sulfide, and other trace elements. After this process, the nitrogen and oxygen content is reduced and the RNG has a methane content comparable to natural gas and is thus a suitable energy source in applications that require pipeline-quality gas, such as vehicle applications.[19]

RNG meeting certain standards, qualifies as an advanced biofuel under the Federal Renewable Fuel Standard Program.[20] This program was enacted by Congress in order to reduce greenhouse gas emissions by reducing reliance on imported oil and expanding the nation's renewable fuels sector.[21]

Nationally, there were 548 landfill gas facilities in operation as of September 2021, and, as of 2017, 250 anaerobic digester systems operating at commercial livestock farms in the United States.[22] Of the more than 16,000 wastewater treatment plants in operation in the United States, approximately 1,300 have anaerobic digesters on site and 860 of those have the equipment to use their biogas on site.[23]

Hydrogen Fuel

The production of hydrogen involves the separation of the element from other elements in which it occurs. While there are many different sources of hydrogen and methods for producing it as a

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[15] Section 366.91(2)(e), F.S., defines "renewable energy, in part, as energy produced from biomass. Section 366.91(2)(b), F.S., defines "biomass" in part, as "a power source that is comprised of, but not limited to, combustible residues or gases from…waste, byproducts, or products from agricultural and orchard crops, waste or coproducts from livestock and poultry operations, waste or byproducts from food processing, urban wood waste, municipal solid waste, municipal liquid waste treatment operations, and landfill gas." RNG would be such a combustible gas.
[16] Section 366.91(2)(a) defines "biogas" as a mixture of gases produced by the biological decomposition of organic materials which is largely comprised of carbon dioxide, hydrocarbons, and methane gas.
[17] Environmental Protection Agency, *supra* note 14.
[18] *Id.*
[19] United States Department of Energy, *Renewable Natural Gas Production*, https://afdc.energy.gov/fuels/natural_gas_renewable.html (last visited: Mar. 16, 2023).
[20] United States Department of Energy, *Renewable Fuel Standard*, https://afdc.energy.gov/laws/RFS#:~:text=The%20Renewable%20Fuel%20Standard%20(RFS,Act%20of%202007%20(EISA) (last visited: Mar. 16, 2023).
[21] Environmental Protection Agency, *Renewable Fuel Standard Program*, https://www.epa.gov/renewable-fuel-standard-program (last visited Mar. 16, 2023).
[22] United States Department of Energy, *supra* note 19.
[23] *Id.*

fuel, the most common methods used currently are steam-methane reforming and electrolysis.[24] Through either method, hydrogen is not an energy source, per se, since it is produced using other energy sources. Rather, produced hydrogen is an energy carrier.[25]

Steam-Methane Reforming

The most-widely used method for hydrogen production, which accounts for nearly all commercially produced hydrogen in the United States, is steam-methane reforming. With steam-methane reforming, hydrogen atoms are separated from carbon atoms in methane using high temperature (1,300-1,800 degrees Fahrenheit) under 3-25 bar pressure[26] in the presence of a catalyst. The end-result of this process is the production of hydrogen, carbon-monoxide, and a small amount of carbon dioxide.[27]

For industrial facilities and petroleum refineries, natural gas is the typical base material from which to produce hydrogen by steam-methane reforming. Biogas and landfill gas is also a base material to produce hydrogen used by several fuel cell power plants in the United States.

Electrolysis

Electrolysis, in the sense of hydrogen production, means a process where hydrogen is split from water using an electric current. On a large, commercial scale, the process may be referred to as power-to-gas, where power is electricity and gas is hydrogen.[28] This hydrogen is then captured and used or sold as an end product or as a fuel to generate electricity.[29] The electrolysis process itself is emission-free and has no by-products other than hydrogen and oxygen. However, the energy source used to power the electrolysis (which could be from renewables, nuclear, or fossil fuels) may or may not be emission-free or have other byproducts.

Hydrogen Categories

Recently, to distinguish between the energy sources used to power hydrogen production, hydrogen producers, marketers, government agencies, and others have used a color-coded system. The nine commonly used color categories are detailed below:

- Green: Hydrogen produced by water electrolysis and employing renewable electricity as the fuel source. It is so called because the process itself does not produce emissions.

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[24] United States Energy Information Administration, *Hydrogen Explained: Production of Hydrogen*, Jan. 21, 2022, https://www.eia.gov/energyexplained/hydrogen/production-of-hydrogen.php#:~:text=The%20two%20most%20common%20methods,electrolysis%20(splitting%20water%20with%20electricity.

[25] International Renewable Energy Agency, *Hydrogen*, https://www.irena.org/Energy-Transition/Technology/Hydrogen (last visited Mar. 16, 2023).

[26] One bar equals 14.5 pounds per square inch of pressure. For comparison, at sea level, the average air pressure on Earth is 1.0132 bars. National Oceanic and Atmospheric Administration, *Air Pressure*, https://www.noaa.gov/jetstream/atmosphere/air-pressure#:~:text=The%20standard%20pressure%20at%20sea,the%20atmosphere%20decreases%20with%20height (last visited: Mar. 16, 2023).

[27] United States Energy Information Administration, *supra* note 24.

[28] *Id*.

[29] Florida Public Service Commission, *Bill Analysis for SB 1162* (Mar. 14, 2023) (on file with the Senate Regulated Industries Committee).

- Blue: Hydrogen produced from fossil fuels, but the carbon dioxide produced by the process is sequestered underground. Thus, the process is considered carbon neutral.
- Gray: Hydrogen produced by steam-methane reforming and the emissions produced from the burning of fossil fuels in the method are released into the atmosphere.
- Black or Brown: Hydrogen produced from the burning of coal, "black" being from the burning of bituminous coal and "brown" being from the burning of lignite coal. The comparatively large amount of carbon dioxide and carbon monoxide is released into the atmosphere with this type of production.
- Turquoise: This now experimental method of hydrogen production involves the thermal splitting of methane through pyrolysis. Though carbon is formed in this process, it is in a solid state that can be stored and not a carbon dioxide gas.
- Purple: Hydrogen made using nuclear power and heat through combined chemo thermal electrolysis splitting of water.
- Pink: This is the production of hydrogen through electrolysis where the energy source is electricity from a nuclear power plant.
- Red: Hydrogen produced through high-temperature catalytic splitting of water using nuclear power thermal energy as an energy source.
- White: Naturally-occurring hydrogen.[30]

Transmission and Use of Hydrogen Fuel

Due to hydrogen's low volumetric energy density, transportation, storage, and final delivery to the point of use can have a significant impact on the cost of using hydrogen as a fuel carrier. These factors can lead to inefficiencies that increase the farther hydrogen must be transported before reaching its end use.[31] Thus, currently, most hydrogen is produced in close proximity to its end use.[32] However, technology is in development that may bring these costs down and allow for easier transport and transmission of hydrogen.[33]

The two typical methods for transporting hydrogen fuel currently are via pipeline or by truck through the use of cryogenic liquid tanker trucks or gaseous tube trailers. Pipelines are most popular in areas where demand is high and expected to remain stable or grow. Trucking of hydrogen is used in areas with less demand.[34]

Potential uses for hydrogen are in:[35]

- Industrial uses such as powering oil refineries and powering ammonia, methanol, and steel production. Currently, this is the largest use, by far, for hydrogen.
- Transportation, powering hydrogen-fueled vehicles.

[30] Bulletin H2, *Hydrogen Colours Codes*, https://www.h2bulletin.com/knowledge/hydrogen-colours-codes/ (last visited: Mar. 16, 2023).
[31] United States Office of Energy Efficiency and Renewable Energy, *Hydrogen Delivery*, https://www.energy.gov/eere/fuelcells/hydrogen-delivery (last visited: Mar. 16, 2023).
[32] Florida Public Service Commission, *Bill Analysis for SB 1162, supra* note 29.
[33] *See* Florida Public Service Commission, *Bill Analysis for SB 1162, supra* note 29, which describes potential new technologies that can overcome the transportation and transmission cost hurdle for hydrogen.
[34] United States Office of Energy Efficiency and Renewable Energy, *supra* note 31.
[35] International Renewable Energy Agency, *supra* note 25.

- Buildings where hydrogen can be blended into existing natural gas networks. It is possible currently to blend small amounts of hydrogen in existing natural gas transmission systems with little to no changes to infrastructure, equipment, and appliances.
- Power generation where emerging technology is available to use hydrogen as a medium to store renewable energy, such as solar and wind. Hydrogen and ammonia can be used in gas turbines to increase power system flexibility, and ammonia can be used to reduce emissions from coal-fired power plants.

Recently, as part of a 2021 settlement agreement, FPL was authorized by the PSC to develop a green hydrogen pilot project named the Cavendish NextGen Hydrogen Hub. The hub, located in Okeechobee, Florida, uses solar energy to power electrolysis and then, in turn, compresses and stores this hydrogen. The hydrogen then will be blended with natural gas to fuel its nearby natural-gas fired electric generation plant.[36] In this way, energy produced by solar power can be essentially stored for later use.

FPL Woodford Decision

In Citizens of State v. Graham, 191 So. 3d 897 (Fla. 2016), the Florida Supreme Court found that the PSC lacked statutory authority to approve cost recovery for FPL's investment in a natural gas production facility in the Woodford Shale Gas Region in Oklahoma (Woodford Project). The Woodford Project involved exploration and production of natural gas and not the purchase of actual fuel—something that would generally be within the types of activities an electric utility would engage in. The Supreme Court cited to s. 366.02(2), F.S. (2014), which defines an "electric utility" as, "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state," and found that the Woodford Project activities did not fall within this definition.[37]

However, in making its decision, the Supreme Court noted the following:

> This may be a good idea, but whether advance cost recovery of speculative capital investments in gas exploration and production by an electric utility is in the public interest is a policy determination that must be made by the Legislature. For example, in contrast to natural gas exploration and production, the Legislature has authorized the PSC to approve cost recovery for capital investments in nuclear power plants and energy efficient and renewable energy power sources. See ss. 366.8255; 366.92; 366.93, Fla. Stat. (2014). Without statutory authorization from the Legislature, the recovery of FPL's costs and capital investment in the Woodford Project through the fuel clause is overreach.[38]

Thus, while the Supreme Court determined that the PSC could not approve cost recovery for capital electric utility investments in natural gas production, it did provide that the Legislature would have the authority to allow for such if it chose to do so.

[36] Florida Public Service Commission, *Bill Analysis for SB 1162, supra* note 29, and Florida Power & Light, *Welcome to the sunshine energy state*, https://www.fpl.com/landing/sunshine.html?icid=hpherosb (last visited: Mar. 16, 2023).
[37] Citizens of State v. Graham, 191 So. 3d 897, 901-2 (Fla. 2016).
[38] *Id.* at 902.

III. Effect of Proposed Changes:

Section 1 of the bill amends s. 366.91, F.S., regarding renewable energy policy in Florida. The bill revises s. 366.91(9), F.S., which under current law, allows the Florida Public Service Commission (PSC) to approve cost recovery by a gas public utility for renewable natural gas (RNG) contracts where the pricing of the natural gas exceeds the market price of conventional natural gas. The PSC may approve such pricing if it deems the contract otherwise reasonable and prudent.

The bill revises this subsection to remove the restriction limiting its application to gas public utilities. The bill also revises the standards for the PSC's approval of such cost recovery. It removes the requirement that the PSC must find the contract "reasonable and prudent" and, instead, requires that the contract meets the overall goals established in s. 366.091(1), F.S.,[39] for the section by promoting the development or use of renewable energy resources in Florida and providing fuel diversification. It also expands the provisions of s. 366.91, F.S., to the purchase of hydrogen as well.

The bill also creates a new s. 366.091(10), F.S., which allows public utilities to recover, through an appropriate cost-recovery mechanism administered by the PSC, prudently incurred costs for RNG and hydrogen fuel projects. Under the bill, RNG may include mixtures of natural gas and RNG. Eligible projects would include, but not be limited to:

- Capital investment in projects necessary to prepare or produce RNG and hydrogen fuel for pipeline distribution and usage;
- Capital investment in facilities, including pipelines, necessary to inject and deliver RNG and hydrogen fuel throughout this state;
- RNG and hydrogen fuel storage facilities;
- Operation and maintenance expenses associated with any such RNG and hydrogen fuel infrastructure projects; and
- An appropriate return on investment consistent with that allowed for other utility plants used to provide service to customers.

Once approved by the PSC, the project costs are not subject to disallowance or any additional prudence review except where the utility has engaged in fraud, perjury, or intentional withholding of key information.

Section 2 of the bill provides an effective date of July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[39] Section 366.091(1), F.S., provides the intent for the section and states that "the Legislature finds that it is in the public interest to promote the development of renewable energy resources in this state. Renewable energy resources have the potential to help diversify fuel types to meet Florida's growing dependency on natural gas for electric production, minimize the volatility of fuel costs, encourage investment within the state, improve environmental conditions, and make Florida a leader in new and innovative technologies."

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Under the new provisions of the bill, public utilities will likely expand their use and sale of hydrogen and RNG.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Lines 21 and 22 of the bill delete a provision in current law limiting the provisions of s. 366.91, F.S., to gas utilities. It appears that the intention of this revision is to expand the application of s. 366.91, F.S., to all public utilities. However, as currently written, the section no longer explicitly identifies which utility industries it applies to.

For the purposes of cost recovery for natural gas projects under s. 366.91(10), F.S., created by the bill, natural gas may include a mixture of natural gas and renewable natural gas. In its analysis, the PSC stated that this provision appears to allow any injection of natural gas, no matter how small, would make a project eligible under the bill.[40]

[40] Florida Public Service Commission, *Bill Analysis for SB 1162, supra* note 29.

VIII. Statutes Affected:

This bill substantially amends section 366.91 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Regulated Industries (DiCeglie) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsection (9) of section 366.91, Florida Statutes, is amended, and subsections (10) and (11) are added to that section, to read:

366.91 Renewable energy.—

(9) A public utility's ~~The commission may approve cost recovery by a gas public utility for~~ contracts for the purchase

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of renewable natural gas and hydrogen-based fuel in which the pricing provisions exceed the current market price of natural gas are eligible for cost recovery, but only if ~~which are otherwise deemed reasonable and prudent by~~ the commission finds that the contract meets the overall goals of subsection (1) by promoting the development or use of renewable energy resources in this state and providing fuel diversification and that the contract is otherwise reasonable.

(10) A public utility may recover, through an appropriate cost-recovery mechanism administered by the commission, prudently incurred costs for renewable natural gas or hydrogen-based fuel infrastructure projects. If the commission determines that such costs were reasonable, that the incremental bill impact will not result in an undue hardship to customers, and that the project will facilitate achieving the goals of subsection (1), those costs are not subject to disallowance or further prudence review except for fraud, perjury, or intentional withholding of key information by the public utility. For purposes of utility cost recovery pursuant to this subsection only, renewable natural gas may include a mixture of natural gas and renewable natural gas. Eligible renewable natural gas and hydrogen-based fuel infrastructure projects must be located in this state. Types of costs eligible for cost recovery include, but are not limited to, capital investment in projects necessary to prepare or produce renewable natural gas and hydrogen-based fuel for pipeline distribution and usage; capital investment in facilities, including pipelines, necessary to inject and deliver renewable natural gas and hydrogen-based fuel; renewable natural gas and hydrogen-based fuel storage

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facilities; operation and maintenance expenses associated with any such renewable natural gas and hydrogen-based fuel infrastructure projects; and an appropriate return on investment consistent with that allowed for other utility plants that provide service to customers.

(11) Cost recovery for any renewable natural gas or hydrogen-based fuel infrastructure project sought pursuant to this section must be approved by the commission.

(a) In assessing whether cost recovery for any renewable natural gas or hydrogen-based-based fuel infrastructure projects is appropriate, the commission shall consider whether the projected costs for such renewable natural gas or hydrogen-based fuel infrastructure projects are reasonable and consistent with subsection (10).

(b) Recovery of costs incurred by a public utility for a renewable natural gas or hydrogen-based fuel infrastructure project approved for cost recovery under this section may not be allowed until such facility is placed in service. Upon approval of cost recovery by the commission, costs incurred before the facility is placed in service may be deferred on the public utility's books for recovery once the facility is in service. This does not preclude application of any other regulatory accounting rules that are otherwise deemed appropriate, including, but not limited to, normal recovery of costs for construction work in progress.

Section 2. This act shall take effect July 1, 2023.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

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Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to renewable energy cost recovery; amending s. 366.91, F.S.; revising the types of contracts which are eligible for cost recovery by a public utility under certain circumstances; authorizing a public utility to recover prudently incurred renewable natural gas or hydrogen-based fuel infrastructure project costs through an appropriate Florida Public Service Commission cost-recovery mechanism; providing that such costs are not subject to further actions except under certain circumstances; specifying eligible renewable natural gas and hydrogen-based fuel infrastructure projects; requiring that cost recovery for such projects be approved by the commission; providing requirements for the approval determination; prohibiting cost recovery until a facility is placed in service; providing that certain other regulatory accounting rules may apply to such cost recovery; providing an effective date.

By Senator DiCeglie

18-00696A-23 20231162__

A bill to be entitled

An act relating to renewable energy cost recovery; amending s. 366.91, F.S.; revising the types of contracts which are eligible for cost recovery by a public utility under certain circumstances; authorizing a public utility to recover prudently incurred renewable natural gas and hydrogen fuel infrastructure project costs through the appropriate Public Service Commission cost-recovery mechanism; providing that such costs prudently incurred are not subject to further actions except under certain circumstances; specifying eligible renewable natural gas and hydrogen fuel infrastructure projects; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (9) of section 366.91, Florida Statutes, is amended, and subsection (10) is added to that section, to read:

366.91 Renewable energy.—

(9) ~~The commission may approve cost recovery by a gas public utility for~~ Contracts for the purchase of renewable natural gas and hydrogen in which the pricing provisions exceed the current market price of natural gas are eligible for cost recovery, but only if ~~which are otherwise deemed reasonable and prudent by~~ the commission finds that the contract meets the overall goals of subsection (1) by promoting the development or use of renewable energy resources in this state and providing

18-00696A-23 20231162__

fuel diversification.

(10) A public utility may recover, through the appropriate cost-recovery mechanism administered by the commission, prudently incurred costs for renewable natural gas and hydrogen fuel infrastructure projects. If the commission determines that such costs were prudently incurred, those costs are not subject to disallowance or further prudence review except for fraud, perjury, or intentional withholding of key information by the public utility. For purposes of this subsection for utility cost recovery only, renewable natural gas may include a mixture of natural gas and renewable natural gas. Eligible renewable natural gas and hydrogen fuel infrastructure projects include, but are not limited to, capital investment in projects necessary to prepare or produce renewable natural gas and hydrogen fuel for pipeline distribution and usage; capital investment in facilities, including pipelines, necessary to inject and deliver renewable natural gas and hydrogen fuel throughout this state; renewable natural gas and hydrogen fuel storage facilities; operation and maintenance expenses associated with any such renewable natural gas and hydrogen fuel infrastructure projects; and an appropriate return on investment consistent with that allowed for other utility plants used to provide service to customers.

Section 2. This act shall take effect July 1, 2023.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

THE FLORIDA SENATE
SENATOR NICK DICEGLIE
District 18

Kathleen Passidomo
President of the Senate

Dennis Baxley
President Pro Tempore

March 17, 2023

Dear Chair Gruters,

I respectfully request that **SB 1162 – Renewable Energy Cost Recovery** be placed on the agenda of the Regulated Industries Committee at your earliest convenience.
If my office can be of any assistance to the committee please do not hesitate to contact me at DiCeglie.Nick@flsenate.gov or (850) 487-5018. Thank you for your consideration.

Sincerely,

Nick DiCeglie

State Senator, District 18

CC: Staff Director: Booter Imhof
Administrative Assistant: Susan Datres

Proudly Serving Pinellas County

Transportation Committee, Chair ~ Banking and Insurance Committee, Vice Chair ~ Commerce and Tourism Committee ~ Fiscal Policy Committee ~ Judiciary Committee ~ Rules Committee ~ Joint Legislative Auditing Committee

March 14, 2023

Agency Affected:	Public Service Commission	
Program Manager:	Lance Watson	Telephone: 413.6125
Agency Contact:	Katherine Pennington	Telephone: 413.6596
Respondent:	Katherine Pennington	Telephone: 413.6596

RE: SB 1162

I. SUMMARY:

SB 1162 amends Section 366.91(9), Florida Statutes (F.S.), to include, as eligible for cost recovery along with renewable natural gas, contracts for the purchase of hydrogen in which the purchase price exceeds the market price for natural gas. The bill establishes new criteria for the eligibility of such contracts for cost recovery. The bill creates language that provides a public utility may recover, through the appropriate cost-recovery mechanism administered by the commission, prudently incurred costs for renewable natural gas and hydrogen fuel infrastructure projects. This bill takes effect July 1, 2023.

II. PRESENT SITUATION:

Pursuant to Section 366.91, F.S., it is in the public interest to promote the development of renewable energy resources to help diversify fuel types for electric production, minimize the volatility of fuel costs, encourage investment within the state, improve environmental conditions, and make Florida a leader in new and innovative technologies.

Renewable energy is defined in Section 366.91(2)(e), F.S., as energy produced from a method that uses one or more of the following fuels or energy sources: hydrogen produced or resulting from sources other than fossil fuels, biomass, solar energy, geothermal energy, wind energy, ocean energy, and hydroelectric power. The term includes the alternative energy resource, waste heat, from sulfuric acid manufacturing operations and electrical energy produced using pipeline-quality synthetic gas produced from waste petroleum coke with carbon capture and sequestration.

Renewable natural gas is defined in Section 366.91(2)(f), F.S., as anaerobically generated biogas, landfill gas, or wastewater treatment gas refined to a methane content of 90 percent or greater which may be used as a transportation fuel or for electric generation or is of a quality capable of being injected into a natural gas pipeline.

Section 366.91(9), F.S., currently allows the Commission to approve cost recovery by a gas public utility for contracts for the purchase of renewable natural gas in which the pricing provisions exceed the current market price of natural gas, but which are otherwise deemed reasonable and prudent by the commission.

Current rate setting mechanisms include base rates and cost recovery clauses. Base rates allow a utility to recover capital investment in facilities and operating and maintenance expenses used to provide service to customers, along with the opportunity to earn a fair rate of return on its investment. Base rates are set during a general rate case, which is a large evidentiary proceeding where the utility's rate base is investigated and a revenue requirement is established. Base rates are then set to recover that revenue requirement, and will remain fixed until the next rate case.

Cost recovery clauses are the mechanisms by which electric and gas investor-owned utilities may petition the Commission for recovery of specified costs not otherwise recovered in base rates. Typically, cost recovery clauses allow utilities to recover costs that are not easily controlled by the utility, such as the cost of complying with new environmental regulations or fuel costs that rise and fall with the market. Utilities recover such costs by charging customers a usage-sensitive rate (e.g., cents per kWh) that is set on an annual basis. The cost recovery clauses now available to investor-owned utilities in Florida include Fuel and Purchased Power, Capacity, Environmental, Energy and Natural Gas Conservation, the Purchased Gas Adjustment, Nuclear Cost Recovery, and the Storm Protection Plan Cost Recovery Clause. The environmental, energy conservation, nuclear, and storm protection plan cost recovery clauses are established by statute.

The most common method for producing hydrogen is a process called steam-methane reforming. Steam-methane reforming uses high-temperature steam, under pressure, to react with methane in the presence of a catalyst to produce hydrogen, carbon monoxide, and a relatively small amount of carbon dioxide. Natural gas is the main methane source for this type of hydrogen production. Hydrogen can also be produced through a process called electrolysis, which utilizes electricity to separate water into hydrogen and oxygen molecules. Electrolysis itself does not produce any byproducts or emissions other than hydrogen and oxygen. Hydrogen is captured for use as a fuel, similar to natural gas, either for end use or as a fuel used to generate electricity. Hydrogen is not an energy source, but rather an energy carrier, since it is produced using other energy sources.

The overwhelming majority of hydrogen is currently produced using fossil fuels, mostly natural gas. Overall, less than 0.7% of current hydrogen production utilizes renewable energy. In recent years, colors have been used to refer to different sources of hydrogen production. "Black", "grey" or "brown" refer to the production of hydrogen using coal, natural gas and lignite respectively. "Blue" is commonly used for the production of hydrogen from fossil fuels with CO2 emissions reduced by the use of carbon capture. "Green" is a term applied to production of hydrogen using renewable energy.

Most hydrogen is currently produced near to its end use. If hydrogen can be used close to where it is made, production costs could be low. However, if the hydrogen is produced a long distance from its end use, the costs of transmission and distribution could be three times as large as the cost of hydrogen production. Long-distance transmission and local distribution of hydrogen is difficult given its low energy density. Compression, liquefaction or incorporation of the hydrogen into larger molecules are possible options to overcome this hurdle. Each option has advantages and disadvantages, and the cheapest choice will vary according to geography, distance, scale and the required end use.

It is possible to blend small shares of hydrogen in existing natural gas transmission systems with only minor changes to infrastructure, equipment and most end-user appliances, if changes are needed at all. Some new investment in hydrogen injection facilities would be needed, but in general blending at a safe level offers a relatively quick and easy way to transmit hydrogen supplies to end users, as long as hydrogen production is located near the gas transmission or distribution network.

Pipelines are likely to be the most cost-effective long-term choice for local hydrogen distribution if there is sufficiently large, sustained and localized demand. However, distribution today usually relies on trucks carrying hydrogen either as a gas or liquid, and this is likely to remain the main distribution mechanism over the next decade.

As part of a 2021 settlement agreement, Florida Power and Light (FPL) was authorized to develop a Green Hydrogen pilot project. The new hydrogen-hub facility, named the Cavendish NextGen Hydrogen Hub, is located in Okeechobee, Florida. The hydrogen-hub facility uses energy from a solar-powered facility to convert water into green hydrogen through electrolysis, which will then be burned as a fuel in its nereby natural gas-fueled electric generation plant.

III. EFFECT OF PROPOSED CHANGES:

The bill amends Section 366.91(9), F.S., to include contracts for the purchase of hydrogen as eligible for cost recovery. The amendment removes language that cost recovery may be approved for a gas public utility, but does not identify the utilities that are subject to this subsection. It is unclear whether the intent of this language is for this subsection to be applicable to all public utilities (investor-owned electric or natural gas utilities). The bill does not define hydrogen or specify the means by which it must be produced.

The bill establishes new criteria for eligibility of cost recovery for renewable natural gas and hydrogen purchase contracts. The bill deletes existing language that requires the Commission to deem the incurred costs as reasonable and prudent for cost recovery. Contracts for the purchase of renewable natural gas and hydrogen in which the pricing provisions exceed the current market price of natural gas are currently eligible for cost recovery, but only if the commission finds that the contract meets the overall goals of subsection (1) by promoting the development or use of renewable energy resources in this state and providing fuel diversification. Under the bill, it is unclear to what extent the Commission may exercise its authority in reviewing utility costs to ensure rates are fair, just and reasonable. The plain language of the bill appears to constrain the Commission's authority to limit costs to be recovered from customers.

The bill creates Section 366.91(10), F.S., which states that a public utility may recover, through the appropriate cost-recovery mechanism administered by the commission, prudently incurred costs for renewable natural gas and hydrogen fuel infrastructure projects.

Eligible infrastructure projects include, but are not limited to, capital investment in projects necessary to prepare or produce renewable natural gas and hydrogen fuel or pipeline distribution and usage; capital investment in facilities, such as fuel storage; operation and maintenance expenses associated with any such renewable natural gas and hydrogen fuel infrastructure

projects; and an appropriate return on investment consistent with that allowed for other utility plants used to provide service to customers.

It is unclear whether eligibility for cost recovery under this bill only applies to projects located in Florida. Without clarification or additional restrictions, it is unclear whether infrastructure projects to prepare or produce renewable natural gas and hydrogen fuel for pipeline distribution, or storage facilities located in other states could be eligible for cost recovery from Florida ratepayers under the bill.

The bill also allows for the recovery of costs associated with the production of a fuel used to generate electricity or used in the natural gas distribution system for service to end-use customers. This new policy is in contrast with the 2016 Florida Supreme Court reversal of the Commission's approval of the capital investment and expenses associated with Florida Power and Light Company's Woodford Project. The Supreme Court found that the exploration, drilling, and production of fuel falls outside the purview of an electric utility and that costs associated with the exploration and recovery of natural gas were not part of the generation, transmission and distribution of electricity.

It is unclear what methodology should be used as the appropriate cost-recovery mechanism. Currently, costs for fuel infrastructure used in the generation of electricity or in the distribution of natural gas are recovered in base rates. An alternative option for cost-recovery would be through a new or existing clause. Cost-recovery clauses for gas utilities include the Purchased Gas Adjustment Cost Recovery Clause (PGA) and the Natural Gas Conservation Cost Recovery Clause (NGCCR). The PGA is intended to compensate for day-to-day fluctuations in the cost of gas, however, it does not account for costs related to infrastructure. The NGCCR is intended for the recovery of costs associated with conservation programs for natural gas local distribution companies. As such, these two existing clauses may not be compatible with the type of capital cost-recovery addressed in the bill. Therefore, a new clause may need to be established.

This bill states that for the purposes of cost recovery for infrastructure projects, renewable natural gas may include a mixture of natural gas and renewable natural gas. The bill does not provide a ratio of renewable natural gas to regular natural gas in the fuel mixture in order for an infrastructure project to be eligible. As written, it appears any injection of renewable natural gas, no matter how small, would make an infrastructure project eligible under the bill.

IV. ESTIMATED FISCAL IMPACTS ON STATE AGENCIES:

Incremental workload on the Commission is dependent upon utility decisions to seek cost recovery of contracts and infrastructure projects. We expect that the workload can be absorbed.

V. ESTIMATED FISCAL IMPACTS ON LOCAL GOVERNMENTS:

None known at this time.

VI. ESTIMATED IMPACTS ON PRIVATE SECTOR:

Private utility companies will likely expand the use and sale of hydrogen, either through new purchase contracts or new infrastructure projects.

VII. LEGAL ISSUES:

A. Does the proposed legislation conflict with existing federal law or regulations? If so, what laws and/or regulations?

None known at this time.

B. Does the proposed legislation raise significant constitutional concerns under the U.S. or Florida Constitutions (e.g. separation of powers, access to the courts, equal protection, free speech, establishment clause, impairment of contracts)?

None known at this time.

C. Is the proposed legislation likely to generate litigation and, if so, from what interest groups or parties?

None known at this time.

D. Other:

VIII. COMMENTS:

Prepared by: David Frank
Date: March 10, 2023

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 Committee on Regulated Industries

BILL:	SB 1364
INTRODUCER:	Senator Collins and others
SUBJECT:	Interstate-Mobility and Universal-Recognition Occupational Licensing Act
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kraemer	Imhof	RI	**Pre-meeting**
2.			AEG	
3.			FP	

I. Summary:

SB 1364 addresses occupational license portability in the United States by requiring Florida licensing boards that issue occupational licenses or government certifications to individuals under ch. 455, F.S., relating to the regulations of professions by the Department of Business and Professional Regulation (DBPR), or ch. 456, F.S., relating to the regulation of professions by the Department of Health (DOH), to issue an occupational license or government certification (universal license) to eligible applicants, under certain circumstances (universal licensing requirement). The bill provides that this requirement does not apply to occupations regulated by the Florida Supreme Court, certified public accountants, and other credentials, such as those used for medical board certification.

Applicants may seek a universal license through one of three pathways described in the bill:

- Universal licensing if licensed by another licensing entity;
- Universal licensing based on work experience in another state or the military; or
- Universal licensing based on private certification with work experience in a non-licensing state or the military.

Under the bill, an applicant with a valid occupational license or certification in good standing, or who otherwise meets the requirements for an occupational license for a lawful occupation, is presumed to be qualified for the license and must be issued an occupational license or government certification by the appropriate Florida licensing board.

The bill provides that during a declared state of emergency, the Governor may order the recognition of occupational licenses from outside Florida or from a foreign country as if the licenses were issued in Florida, may expand any occupation license scope of practice, and authorize licensees to provide services in Florida in person, telephonically, or by other means for the duration of the emergency.

There may be an impact to state government. See Section V, Fiscal Impact Statement.

The bill is effective July 1, 2023.

II. Present Situation:

Chapter 455, F.S., provides for the regulation of professions by the DBPR, and ch. 456, F.S., provides for the regulation of health professions by the DOH.

Department of Business and Professional Regulation

Organization of the DBPR

Section 20.165, F.S., establishes the organizational structure of the DBPR, which has the following 11 divisions:

- Administration;
- Alcoholic Beverages and Tobacco;
- Certified Public Accounting;
- Drugs, Devices, and Cosmetics;
- Florida Condominiums, Timeshares, and Mobile Homes;
- Hotels and Restaurants;
- Professions;
- Real Estate;
- Regulation;
- Service Operations; and
- Technology.

The Florida Athletic Commission is assigned to the DBPR for administrative and fiscal accountability purposes only.[1] The DBPR also administers the Child Labor Law and Farm Labor Contractor Registration Law.[2]

Powers and Duties of the DBPR

Chapter 455, F.S., applies to the regulation of professions constituting "any activity, occupation, profession, or vocation regulated by the [DBPR] in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation."[3] The chapter also provides the procedural and administrative framework for those divisions and the professional boards within the DBPR.[4]

[1] Section 548.003(1), F.S.
[2] *See* Parts I and III of ch. 450, F.S.
[3] Section 455.01(6), F.S.
[4] *See* s. 455.203, F.S. The DBPR must also provide legal counsel for boards within the DBPR by contracting with the Department of Legal Affairs, by retaining private counsel, or by staff counsel of the DBPR. *See* s. 455.221(1), F.S.

The term "profession" means any activity, occupation, profession, or vocation regulated by the department in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation.[5]

The DBPR's regulation of professions is to be undertaken "only for the preservation of the health, safety, and welfare of the public under the police powers of the state."[6] Regulation is required when:

- The potential for harming or endangering public health, safety, and welfare is recognizable and outweighs any anticompetitive impact that may result;
- The public is not effectively protected by other state statutes, local ordinances, federal legislation, or other means; and
- Less restrictive means of regulation are not available.[7]

However, the DBPR and its boards may not create a regulation that has an unreasonable effect on job creation or job retention or a regulation that unreasonably restricts the ability of those desiring to engage in a profession or occupation from finding employment.[8]

Sections 455.203 and 455.213, F.S., establish general licensing authority for the DBPR, including the authority to charge license fees and license renewal fees. Each board within the DBPR must determine by rule the amount of license fees for each profession, based on estimates of the required revenue to implement the regulatory laws affecting the profession.[9]

Chapter 455, F.S., provides the general powers of the DBPR and sets forth the procedural and administrative framework for all of the professional boards housed under the DBPR as well as the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation.[10]

When a person is authorized to engage in a profession or occupation in Florida, the DBPR issues a "permit, registration, certificate, or license" to the licensee.[11]

Division of Certified Public Accounting

In Fiscal Year 2021-2022, there were 38,541 active licensees in the DBPR's Division of Certified Public Accounting.[12]

[5] Section 455.01(6), F.S.
[6] Section 455.201(2), F.S.
[7] *Id.*
[8] Section 455.201(4)(b), F.S.
[9] Section 455.219(1), F.S.
[10] *See* s. 455.203, F.S. The DBPR must also provide legal counsel for boards within the DBPR by contracting with the Department of Legal Affairs, by retaining private counsel, or by providing DBPR staff counsel. *See* s. 455.221(1), F.S.
[11] Section 455.01(4) and (5), F.S.
[12] *See* Department of Business and Professional Regulation, *Annual Report, Fiscal Year 2021-2022*, at 10, at http://www.myfloridalicense.com/DBPR/os/documents/Division%20Annual%20Report%20FY%2021-22.pdf (last visited Mar. 17, 2023).

Division of Professions

In Fiscal Year 2021-2022, the DBPR's Division of Professions, had 937,960 active licensees (of which 38,541 were licensed accountants; 66,936 were licensed engineers, and 345,026 were real estate-related licensees), including:[13]

- Accountants (CPAs);
- Architects and interior designers;
- Asbestos consultants and contractors;
- Athlete agents;
- Auctioneers;
- Barbers;
- Building code administrators and inspectors;
- Community association managers;
- Construction industry contractors;
- Cosmetologists;
- Electrical contractors;
- Employee leasing companies;
- Engineers;
- Geologists;
- Home inspectors;
- Pilot commissioners;
- Landscape architects;
- Mold-related services;
- Real estate appraisers;
- Real estate (brokers/associates);
- Talent agencies; and
- Veterinarians.

As noted by the DBPR, most professions regulated by the Division of Profession include a governing professional board responsible for ultimate licensing and disciplinary decisions, but the DBPR is responsible for licensing and regulating asbestos consultants and contractors, athlete agents, community association managers, home inspectors, mold-related professionals, and talent agencies.[14]

Unlike most DBPR professions, the administrative, investigative, and prosecutorial services for the Florida Board of Professional Engineering (FBPE) are not provided by the DBPR. The DBPR has contracted with the Florida Engineers Management Corporation (FEMC) to provide such administrative, investigative, and prosecutorial services for the FBPE.[15]

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[13] *Id*.

[14] *See* the DBPR Annual Report at 26, *supra* note 12, noting that the Regulatory Council of Community Association Managers is responsible for adopting rules relating to the licensure examination, continuing education requirements, continuing education providers, fees, and professional practice standards to assist the DBPR in carrying out its duties.

[15] *See* s. 471.038, F.S., the Florida Engineers Management Corporation Act, for the duties and authority of the FEMC. *See* the Annual Report of the FEMC for FY 2021-2022, available at https://fbpe.org/wp-content/uploads/2022/09/FEMC-Annual-Report-2022.pdf (last visited Mar. 18, 2023, and the contract between the DBPR and the FEMC for the period between July 1, 2021 and June 30, 2025 at https://fbpe.org/wp-content/uploads/2021/10/2021-25-DBPR-FEMC-Contract.pdf (last visited Mar. 18, 2023).

Division of Real Estate

In Fiscal Year 2021-2022, there were 345,026 active licensees in the DBPR's Division of Real Estate.[16]

Department of Health

Licensure and Regulation of Health Care Practitioners

The Division of Medical Quality Assurance (MQA), within the DOH, has general regulatory authority over health care professionals (practitioners).[17] The MQA works in conjunction with 22 regulatory boards and four councils to license and regulate ten unique types of health care facilities and more than 40 health care professions.[18] Each profession is regulated by an individual practice act and by ch. 456, F.S., which provides general regulatory and licensure authority for the MQA. The MQA is statutorily responsible for the following boards and professions established within the division and the DOH:[19]

- The Board of Acupuncture, created under ch. 457, F.S.;
- The Board of Medicine, created under ch. 458, F.S.;
- The Board of Osteopathic Medicine, created under ch. 459, F.S.;
- The Board of Chiropractic Medicine, created under ch. 460, F.S.;
- The Board of Podiatric Medicine, created under ch. 461, F.S.;
- Naturopathy, under the DOH as provided under ch. 462, F.S.;
- The Board of Optometry, created under ch. 463, F.S.;
- The Board of Nursing, created under part I of ch. 464, F.S.;
- Nursing assistants, under the Board of Nursing as provided under part II of ch. 464, F.S.;
- The Board of Pharmacy, created under ch. 465, F.S.;
- The Board of Dentistry, created under ch. 466, F.S.;
- Midwifery, as provided under ch. 467, F.S.;
- The Board of Speech-Language Pathology and Audiology, created under part I of ch. 468, F.S.;
- The Board of Nursing Home Administrators, created under part II of ch. 468, F.S.;
- The Board of Occupational Therapy, created under part III of ch. 468, F.S.;
- Respiratory therapy, under the Board of Respiratory Care as provided under part V of ch. 468, F.S.;
- Dietetics and nutrition practice, under the Board of Medicine as provided under part X of ch. 468, F.S.;

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[16] *See* the DBPR Annual Report at 26, *supra* note 12.

[17] Pursuant to s. 456.001(4), F.S., health care practitioners are defined to include acupuncturists, physicians, physician assistants, chiropractors, podiatrists, naturopaths, dentists, dental hygienists, optometrists, nurses, nursing assistants, pharmacists, midwives, speech language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dieticians, athletic trainers, orthotists, prosthetists, electrologists, massage therapists, clinical laboratory personnel, medical physicists, genic counselors, dispensers of optical devices or hearing aids, physical therapists, psychologists, social workers, counselors, and psychotherapists, among others.

[18] Florida Department of Health, Division of Medical Quality Assurance, *Annual Report and Long-Range Plan, Fiscal Year 2021-2022*, at 5, https://www.floridahealth.gov/licensing-and-regulation/reports-and-publications/annual-reports.html (last visited Mar. 17, 2023).

[19] Section 456.001(4), F.S.

- The Board of Athletic Training, created under part XIII of ch. 468, F.S.;
- The Board of Orthotists and Prosthetists, created under part XIV of ch. 468, F.S.;
- Electrolysis, under the Board of Medicine as provided under ch. 478, F.S.;
- The Board of Massage Therapy, created under ch. 480, F.S.;
- The Board of Clinical Laboratory Personnel, created under part I of ch. 483, F.S.;
- Medical physicists, under the DOH as provided under part II of ch. 483, F.S.;
- Genetic Counselors, under the DOH as provided under part III of ch. 483, F.S.;
- The Board of Opticianry, created under part I of ch. 484, F.S.;
- The Board of Hearing Aid Specialists, created under part II of ch. 484, F.S.;
- The Board of Physical Therapy Practice, created under ch. 486, F.S.;
- The Board of Psychology, under the Board of Psychology created under ch. 490, F.S.;
- School psychologists, under the Board of Psychology as provided under ch. 490, F.S.;
- The Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling, created under ch. 491, F.S.; and
- Emergency medical technicians and paramedics, under the DOH as provided under part III of ch. 401, F.S.

The DOH and the practitioner boards have different roles in the regulatory system. Boards establish practice standards by rule, pursuant to statutory authority and directives.[20] The DOH receives and investigates complaints about practitioners and prosecutes cases for disciplinary action against practitioners.

The DOH, on behalf of the professional boards, investigates complaints against practitioners.[21] Once an investigation is complete, the DOH presents the investigatory findings to the boards. The DOH recommends a course of action to the appropriate board's probable cause panel which may include:[22]

- Issuing an emergency order;
- Having the file reviewed by an expert;
- Issuing a closing order; or
- Filing an administrative complaint.

The boards determine the course of action and any disciplinary action to take against a practitioner under the respective practice act.[23] For professions for which there is no board, the DOH determines the action and discipline to take against a practitioner and issues the final orders.[24] The DOH is responsible for ensuring that licensees comply with the terms and penalties

[20] The DOH also establishes these for some professions. *See infra* note 24.
[21] Department of Health, *Investigative Services*, http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/isu.html (last visited Mar. 17, 2023).
[22] Department of Health, *Prosecution Services*, http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/psu.html (last visited Mar. 17, 2023).
[23] Section 456.072(2), F.S.
[24] Professions which do not have a board include naturopathy, nursing assistants, midwifery, respiratory therapy, dietetics and nutrition, electrolysis, medical physicists, genetic counselors, and school psychologists.

imposed by the boards.[25] If a case is appealed, DOH attorneys defend the final actions of the boards before the appropriate appellate court.[26]

The DOH and board rules apply to all statutory grounds for discipline against a practitioner. Under current law, the DOH has disciplinary authority for violations of a practice act only for practitioners that are not regulated by a board. The DOH does not have final disciplinary authority over practitioners for which there is a board.

Health Care Specialties and Florida Licensure

The DOH does not license health care practitioners by specialty or subspecialty. A health care practitioner's specialty area of practice is acquired through the practitioner acquiring additional education, training, or experience in a particular area of health care practice. Practitioners who have acquired additional education, training, or experience in a particular area may also elect to become board-certified in that specialty by private, national specialty boards, such as the American Board of Medical Specialties (ABMS), the Accreditation Board for Specialty Nursing Certification, and the American Board of Dental Specialties.[27] Board certification is not required to practice a medical or osteopathic specialty.

Health Care Practitioner Licensure - Federal Government and United States Military

The federal government does not license health care practitioners, nor does it regulate practitioner behavior in terms of scope of practice, standards of practice, or practitioner discipline. Instead, the federal government relies on state governments to fulfill those functions.

In addition to state licensure requirements, Medicare, Medicaid, and other government reimbursement programs[28] rely on the power of the purse to manage practitioners and facilities providing health care services to persons enrolled in such programs. These programs impose "conditions of participation" and "conditions of payment," which essentially mandate compliance with specified standards. Certification under a federal health care program is an authorization to participate in government payment systems; it is distinct from state licensure or accreditation by a nationally-recognized board.[29]

For example, under federal labor law, the definition of "health care provider" includes, in part, a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices, and others capable of providing health care services, including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse

[25] *Supra* note 22.
[26] *Id.*
[27] Examples of specialties include dermatology, emergency medicine, ophthalmology, pediatric medicine, certified registered nurse anesthetist, clinical nurse specialist, cardiac nurse, nurse practitioner, endodontics, orthodontics, and pediatric dentistry.
[28] Programs such as the federal workers' compensation program for longshoremen and harbor workers found under 20 CFR Subchapter A, available at: https://www.law.cornell.edu/cfr/text/20/chapter-VI/subchapter-A (last visited Mar. 17, 2023).
[29] The Healthcare Law Review: USA, *Spotlight: The Regulation of Healthcare Providers and Professionals in the USA,* Sept. 7, 2020, available at: https://www.lexology.com/library/detail.aspx?g=c3c193d0-753e-4244-914a-fd943e70ec8e (last visited Mar. 17, 2023).

midwives, clinical social workers, and physician assistants who are authorized to practice in the state and performing within the scope of their practice as defined under state law.[30]

Another example is found in federal law is the workers' compensation program for longshoremen and harbor workers.[31] Under this federal program, for the purpose of establishing who may be paid for providing health care services to patients in the program, the term "physician" includes doctors of medicine, surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice, as defined by state law.[32]

Some provisions of federal law distinguish between "physicians" and other practitioners who are included in the "physician" payment provisions above. For example, federal Medicaid law requires that state Medicaid programs "must provide for payment of optometric services as physician services, whether furnished by an optometrist or a physician," thereby differentiating between optometrists and physicians instead of classifying them jointly.[33]

These federal laws do not license or regulate such practitioners in the manner state regulatory laws and practice acts do, and do not define practitioner credentials or scopes of practice outside the applicable state law.

United States Armed Forces Career Fields

The U.S. Armed Forces consists of six military branches: Air Force, Army, Coast Guard, Marine Corps, Navy, and Space Force. The secretary of the U.S. Department of Defense controls each branch, except the Coast Guard, which is under the Department of Homeland Security (DHS). With more than two million civilian and military employees, the U.S. Department of Defense is the world's largest employer.[34]

Joining the U.S. Armed Forces as an enlisted member or an officer has a significant impact on the type of experience and training a new recruit receives. All jobs for enlisted members require a high school diploma, although, with certain exceptions, a passing General Education Development (GED) test score is acceptable. While jobs for enlisted members include infantry roles, most jobs involve hands-on training for mechanical, transportation, human service, or office fields that transfer to the civilian world.

Almost all officer positions require a four-year college degree or equivalent. Officers are the managers of the military, acting in leadership roles that require planning, directing operations, and making critical decisions. Officer positions also include careers that require advanced degrees, such as law and medicine.[35]

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[30] *See* 29 CFR s. 825.125, defining the term "health care provider" in the context of the Family and Medical Leave Act of 1993, as amended.
[31] *Supra* note 28.
[32] *See* 20 CFR s. 702.404.
[33] *See* 42 CFR s. 441.30.
[34] Military.com, *What Are the Branches of the US Military?* at https://www.military.com/join-armed-forces/us-military-branches-overview.html (last visited Mar. 17, 2023).
[35] Today's Military, *Enlisted and Officer Paths*, at https://www.todaysmilitary.com/ways-to-serve/enlisted-officer-paths (last visited Mar. 17, 2023).

The careers available to members of the U.S. Armed Forces are extensive, and depending on the service branch, have been referred to as career management fields (CMF), occupational management fields (OMF), and military occupational specialties (MOS).[36]

Portability of Professional Licenses Held by Servicemembers; Interstate License Compacts

The federal Veterans Auto and Education Improvement Act of 2022,[37] (the federal portability act) which became law on January 5, 2023, addresses the portability of professional licenses held by members of the U.S. Armed Forces (service members) and their spouses, when they move outside the jurisdiction that issued the license due to military orders for military service, under specified circumstances.

Portability is available only for a professional license or certificate in good standing with the issuing licensing authority which has been actively used by the servicemember or spouse during the two years immediately preceding the relocation (covered licenses), and licenses to practice law are expressly not covered.

Under the act, a covered license must be considered valid at a similar scope of practice and in the discipline applied for in the jurisdiction of such new residency for the duration of such military orders if such servicemember or spouse:

- Provides a copy of military orders to the licensing authority in the new jurisdiction;
- Remains in good standing with:
  - The licensing authority that issued the covered license; and
  - Every other licensing authority that has issued to the servicemember or spouse a license with a similar scope of practice and in the discipline applied in the new jurisdiction; and
- Submits to the authority of the licensing authority in the new jurisdiction for the purposes of standards of practice, discipline, and fulfillment of any continuing education requirements.

If the license of a servicemember or spouse is covered by an interstate licensure compact, use of the license is governed by the interstate compact or applicable state law, and the above portability provisions do not apply.

Occupational Licensing Trends

According to the National Conference of State Legislatures (NCSL), "occupational licensing remains a growing area of interest for states, stemming largely from tight labor markets and the race to recruit workers for the large number of job openings nationwide. In 2022, the focus has largely been on improving the accessibility of licensing in order to bolster the workforce and

[36] *See e.g.*, listed careers for the Air Force, Army, Marines, and Navy, respectively, at https://www.airforce.com/careers; https://en.wikipedia.org/wiki/List_of_United_States_Army_careers; https://www.marines.com/about-the-marine-corps/roles/military-occupational-specialty.html; and https://www.navy.com/node/3512 (all last visited Mar. 17, 2023).

[37] *See* s. 19, Pub. Law No. 117-333, H.R. 7939, 117th Cong. (Jan. 5, 2023) at https://www.congress.gov/bill/117th-congress/house-bill/7939/text (last visited Mar. 17, 2023), which amended the Servicemembers Civil Relief Act (SCRA), 42 U.S.C. 4021 *et seq.* by adding Section 705A. The amendment also expands the right to terminate certain types of service contracts and clarifies options for tax residence for a servicemember and his or her spouse.

integrate new employees."[38] The NCSL identified four trends: worker mobility; universal licensure recognition; reducing barriers for veterans and military spouses; and simplifying or eliminating licensing.[39]

III. Effect of Proposed Changes:

SB 1364 requires Florida licensing boards that regulate a lawful occupation and issue occupational licenses or government certifications to individuals under ch. 455, F.S., relating to the regulation of professions by the Department of Business and Professional Regulation (DBPR) and ch. 456, F.S., relating to the regulation of professions by the Department of Health (DOH), to issue an occupational license or government certification (universal license) to an eligible person, under certain circumstances (universal licensing requirement). Pursuant to s. 1.01(3), F.S., the term person includes "individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."

The professions and occupations affected by the universal licensing requirement in the bill are subject to the general regulatory authority of the DBPR and the DOH.

The bill creates s. 455.2135, F.S., and provides that the section may be cited as the "Interstate-Mobility and Universal-Recognition Occupational Licensing Act" (act). The following terms are defined in the act:

- "Board" means an agency, board, department, or other governmental entity that regulates a lawful occupation under ch. 455, F.S., or ch. 456, F.S., and issues an occupational license or government certification (universal license) to an applicant, under certain circumstances (universal licensing requirement);
- "Government certification" means a voluntary, government-granted, and nontransferable recognition granted to an applicant who meets personal qualifications related to a lawful occupation, including a military certification, but excluding credentials,[40] such as those used for medical board certification or held by a certified public accountant, that are prerequisites to working lawfully in an occupation.
- "Lawful occupation" means a course of conduct, pursuit, or profession[41] that includes the lawful sale of goods or services regardless of whether the individual selling them is subject to an occupational license.[42]

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[38] *See NCSL 2022 Occupational Licensing Trends Summary*, https://www.ncsl.org/labor-and-employment/2022-occupational-licensing-trends (last visited Mar. 17, 2023).
[39] *Id*.
[40] The term "credentials" is not defined in the bill, however, *see* the University of Florida Professional and Workforce Development Medical Credentialing Program information at https://pwd.aa.ufl.edu/medical-credentialing-program/ (last visited Mar. 17, 2023). The Florida Certification Board (FCB), a nonprofit organization, indicates it has, over the last 30 years, designed, developed and managed certification programs in Florida for over 30 health and human services professions. *See* https://flcertificationboard.org/credentials/ and https://flcertificationboard.org/about/ (last visited Mar. 17, 2023).
[41] Section 455.01(6), F.S., defines the term "profession" to include any activity, occupation, profession, or vocation regulated by the DBPR in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation, and s. 456.001(6), F.S., defines the term "profession" to include any occupation regulated by the DOH in the MQA.
[42] The language in this definition requires a technical amendment to correct a typographical error and delete the words "to sell" in parentheses. *See* section VII on page 16 of this analysis regarding consideration of an amendment.

- "Military" means the Armed Forces of the United States, including the Air Force, Army, Coast Guard, Marine Corps, Navy, Space Force, National Guard, and all reserve components and auxiliaries, including the military reserves and militia of any United States territory or state.
- "Occupational license"[43] means a nontransferable authorization in law for an individual to exclusively[44] perform a lawful occupation based on meeting personal qualifications, including a military occupational specialty.
- "Other licensing entity" or "another licensing entity" means any United States territory or state in the United States other than Florida, which issues occupational licenses or government certifications, including the military.
- "Private certification" means a voluntary program in which a private organization grants nontransferable recognition to an individual who meets personal qualifications and standards relevant to performing an occupation, as determined by the private organization.
- "Scope of practice" means the procedures, actions, processes, and work that an individual may perform under an occupational license or government certification issued in Florida.

Universal Licensing if Licensed by Another Licensing Entity; License Requirements

Under the bill, notwithstanding any other law, a board must issue a universal license to an applicant licensed by another licensing entity, [45] if all of the following apply (the universal license requirements):

- The applicant holds a current and valid occupational license or government certification issued by another licensing entity in a lawful occupation with a similar scope of practice, as determined by a Florida board.
- The applicant has held the occupational license or government certification issued by another licensing entity for at least one year.
- A board for the other licensing entity required the applicant to pass an examination or meet education, training, or experience standards.
- A board for the other licensing entity holds the applicant in good standing.
- The applicant does not have a disqualifying criminal record, as determined by a Florida board.
- A board for another licensing entity has not revoked the applicant's occupational license or government certification because of negligence or intentional misconduct related to the applicant's work in the occupation.
- The applicant did not surrender an occupational license or government certification, or have such license or certification revoked, because of negligence or intentional misconduct related to the applicant's work in the occupation in another state or in the military.
- The applicant does not have a complaint, allegation, or investigation pending before a board for another licensing entity which relates to unprofessional conduct or an alleged crime;

[43] The term "license" is defined in ch. 120, F.S., Florida's Administrative Procedure Act as "a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act." *See* s. 120.52, F.S.
[44] The qualifier "exclusively" unnecessarily narrows the definition and should be clarified or deleted.
[45] As defined in the bill, the terms "other licensing entity" and "another licensing entity" mean any United States territory or state in the United States other than Florida, which issues occupational licenses or government certifications, including the military. *See* lines 59 to 62.

while such a matter is pending, a board may not issue or deny a universal license to the applicant until the complaint, allegation, or investigation is resolved or the applicant otherwise meets the criteria for a universal license in Florida to the satisfaction of a Florida board.
- The applicant pays all applicable fees in Florida.

If another licensing entity issued the applicant a government certification, but Florida requires an occupational license to work, a board must issue an occupational license to the applicant if the applicant otherwise satisfies the universal license requirements described above.

Universal Licensing Based on Work Experience in Another State or the Military

Under the bill, notwithstanding any other law, issue a universal license to an applicant based on work experience in another state or the military, if all of the following apply:
- The applicant worked in a state that does not use an occupational license or government certification to regulate a lawful occupation or was a member of the military, but an occupational license or government certification is required in Florida for an occupation with a similar scope of practice, as determined by the board.
- The applicant worked for at least three years in the lawful occupation.
- The applicant satisfies the universal license requirements described above for universal licensing if licensed by another licensing entity.[46]

Universal Licensing Based on Private Certification with Work Experience in a Non-licensing State or the Military

Under the bill notwithstanding any other law, a board must issue a universal license to an applicant based on the applicant holding a private certification and having work experience in another state or the military, if all of the following apply:
- The applicant holds a private certification and worked in a state that does not issue an occupational license or government certification to regulate a lawful occupation or was a member of the military, but Florida issues an occupational license or government certification to regulate a lawful occupation with a similar scope of practice, as determined by the board.
- The applicant worked for at least two years in the lawful occupation.
- The applicant holds a current and valid private certification in the lawful occupation.
- The private certification organization holds the applicant in good standing.
- The applicant does not have a disqualifying criminal record as determined by a Florida board.
- A board for another licensing entity has not revoked the applicant's occupational license or government certification because of negligence or intentional misconduct related to the applicant's work in the occupation.
- The applicant did not surrender an occupational license or government certification, or have such license or certification revoked, because of negligence or intentional misconduct related to the applicant's work in the occupation in another state or in the military.

[46] *See* section VII on page 16 of this analysis regarding consideration of an amendment.

- The applicant does not have a complaint, allegation, or investigation pending before a board for another licensing entity which relates to unprofessional conduct or an alleged crime; while such a matter is pending, a board may not issue or deny a universal license to the applicant until the complaint, allegation, or investigation is resolved or the applicant otherwise meets the criteria for a universal license in Florida to the satisfaction of a Florida board.
- The applicant pays all applicable fees in Florida.

Requirements for Issuance of Universal Licenses in Florida

Examination on Florida Law

The bill provides a board may require an applicant to pass a jurisprudential[47] examination specific to relevant Florida laws that regulate the occupation, if an occupational license or government certification under ch. 455, F.S., relating to the regulation of professions by the DBPR or ch. 456, F.S., relating to the regulation of professions by the DOH, requires such examination.

Presumption of Qualification; Time Frame for Board Action; Appeal

Under the bill, unless a board can demonstrate a substantial difference between licensure or certification requirements of another licensing entity and those in Florida, there is a presumption that an applicant who holds a valid occupational license, government certification, or private certification, or otherwise meets the requirements to be credentialed[48] for a lawful occupation, and is in good standing in another state is qualified for an occupational license or government certification in Florida and must be approved by the board. The bill requires a board to provide an applicant with a written decision on the application within 90 days after receipt of a complete application. The applicant may appeal to the Division of Administrative Hearings any of the board's determinations relating to the issuance of a license pursuant to s. 455.2135, F.S., as created by the bill, including:

- Denial of an occupational license or government certification;
- Determination of the occupation; or
- Determination of the similarity of the scope of practice of the occupational license or government certification held by the applicant.

Jurisdiction; Exceptions; Construction

An applicant who obtains an occupational license or a government certification pursuant to s. 455.2135, F.S., is subject to Florida laws regulating the occupation and the jurisdiction of the applicable Florida board.

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[47] The term "jurisprudential" is the adjective form of "jurisprudence," a system or body of law. *See* https://www.merriam-webster.com/dictionary/jurisprudence (last visited Mar. 17, 2023). The qualifier "jurisprudential" unnecessarily narrows the type of examination that is required and should be clarified or deleted. *See* section VII on page 16 of this analysis regarding consideration of an amendment.

[48] The term "credentialed" is not defined in the bill. *See supra* note 40.

Section 455.2135, F.S., does not apply to an occupation regulated by the Florida Supreme Court, certified public accountants, and other credentials, such as those used for medical board certification.[49]

The act may not be construed to:

- Prohibit an individual from applying for an occupational license or a government certification under another law or rule.
- Prevent the State of Florida from entering into a licensing compact or reciprocity agreement with another state, foreign province, foreign country, international organization, or other entity.
- Prevent the State of Florida from recognizing occupational credentials issued by a private certification organization, foreign province, foreign country, international organization, or other entity.
- Require a private certification organization to grant or deny private certification to any individual.

Under the bill, an occupational license or a government certification issued pursuant to s. 455.2135, F.S., is valid only in Florida, and such license or certification does not make the individual eligible to work in another state under an interstate compact or a reciprocity agreement unless otherwise provided in law.

Governor's Licensing Authority During State of Emergency

The bill provides that, during a state of emergency declared by the Governor,[50] the Governor may:

- Order the recognition of occupational licenses from other licensing entities or from a foreign country as if the licenses were issued in Florida;
- Expand any occupational license's scope of practice; and
- Authorize licensees to provide services in Florida in person, telephonically, or by other means for the duration of the emergency.

Annual Report

The bill requires each board to submit an annual report to the President of the Senate and the Speaker of the House of Representatives by December 31 of each year, detailing the number of licenses or certifications issued pursuant to s. 455.2135, F.S., the number of submitted applications that were denied, and the reason for each denial.

Effective Date

The bill is effective July 1, 2023.

[49] The term "credentials" is not defined in the bill. *See supra* note 40.
[50] *See* ss. 252.31-252.60, F.S., known as the "State Emergency Management Act, and s. 252.36, F.S., relating to emergency management powers of the Governor.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Individuals seeking to work in the state may be eligible under the additional pathways created by the bill to obtain a license to work in specified occupations and professions in Florida.

C. Government Sector Impact:

The bill may to impact state government due to the additional pathways created by the bill for eligible individuals to obtain a license to work in specified occupations and professions in Florida. In reviewing the authority related to occupational licensing granted to the Governor during a state of emergency, the Division of Emergency Management has indicated that there is no fiscal impact.[51]

To date, with respect to fiscal impact, the Department of Business and Professional Regulation and the Department of Health have not yet provided their department's analysis of the act on their respective operations, revenue, and expenditures.

[51] *See* Division of Emergency Management, *2023 Agency Legislative Bill Analysis for SB 1364* at 3 (Mar. 13, 2023) (on file with the Senate Committee on Regulated Industries).

VI. Technical Deficiencies:

None.

VII. Related Issues:

Consideration of Amendments:

Clarification, Exceptions, and Rulemaking

The sponsor may wish to consider an amendment to address technical drafting changes and conforming changes, clarify definitions and other language for consistency within the licensing pathways, identify more specifically those individuals who are not covered by the universal licensing requirements created by the bill, and require the DBPR and the DOH to adopt rules to implement the provisions in the bill, as noted below.

Section 455.2135(6), F.S., uses the term "jurisprudential examination" in the state examination requirements. The qualifier "jurisprudential" unnecessarily narrows the type of examination that is required and should be clarified or deleted. See line 149 of the bill.

The requirements for a universal license based on work experience under s. 455.2135(4), F.S., appear to be internally inconsistent. To qualify under this provision, the bill requires the applicant to have worked in another state that does not require a license for the occupation; however, to qualify under this provision, the bill also requires the applicant to meet the requirements s. 455.2135(3)(a), F.S., which require the person to have been licensed by another licensing entity; amendment of the applicable cross-reference should be considered by the sponsor to indicate "paragraph (3)(a)5.-9., rather than the entire paragraph (3)(a). See line 128 of the bill.

The requirements for a universal license based on private certification are limited to work experience in another state or the military, and does not include other experience, such as in a United States territory; amendment of the phrase "experience in another state or the military" to "experience outside of this state or in the military" should be considered by the sponsor. See lines 133 and 134 of the bill.

Cross Reference to Act in Ch. 456, F.S.

The bill creates s. 455.2135, F.S., to provide occupational license portability for professions or occupations regulated by the DBPR and DOH. However, ch. 455, F.S., relates to professions regulated by the DBPR, including procedural requirements for the regulatory boards of the DBPR and the DBPR if there is no board. Chapter 456, F.S, provides a comparable regulatory function for professions regulated by the DOH or its boards.

The sponsor may wish to consider an amendment inserting a provision in ch. 456, F.S., noting the applicability of the act to professions regulated by the DOH, and to provide notice to eligible individuals and the affected boards of the universal licensing requirements.

VIII. Statutes Affected

This bill creates section 455.2135 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Regulated Industries (Collins) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 455.2135, Florida Statutes, is created to read:

455.2135 Interstate-Mobility and Universal-Recognition Occupational Licensing Act.—

(1) SHORT TITLE.—This section may be cited as the "Interstate-Mobility and Universal-Recognition Occupational

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Licensing Act."

(2) DEFINITIONS.—As used in this section, the term:

(a) "Board" means an agency, a board, a department, or another governmental entity that regulates a lawful occupation under this chapter or chapter 456 and issues an occupational license or a government certification to an individual. The term does not include any board that regulates an occupation listed under subsection (10).

(b) "Government certification" means a voluntary, government-granted, and nontransferable recognition granted to an individual who meets personal qualifications related to a lawful occupation. The term includes a military certification for a lawful occupation.

(c) "Lawful occupation" means a course of conduct, pursuit, or profession that includes the lawful sale of goods or services, regardless of whether the individual selling them is subject to an occupational license.

(d) "Military" means the Armed Forces of the United States, including the Air Force, Army, Coast Guard, Marine Corps, Navy, Space Force, National Guard, and all reserve components and auxiliaries. The term also includes the military reserves and militia of any United States territory or state.

(e) "Occupational license" means a nontransferable authorization in law for an individual to perform a lawful occupation based on meeting personal qualifications. The term includes a military occupational specialty.

(f) "Other licensing entity" or "another licensing entity" means any United States territory, state other than this state, private certification organization, foreign province, foreign

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country, international organization, or other entity that issues occupational licenses or government certifications. The term includes the military.

(g) "Private certification" means a voluntary program in which a private organization grants nontransferable recognition to an individual who meets personal qualifications and standards relevant to performing the occupation, as determined by the private organization.

(h) "Scope of practice" means the procedures, actions, processes, and work that an individual may perform under an occupational license or a government certification issued in this state.

(3) OCCUPATIONAL LICENSE OR GOVERNMENT CERTIFICATION.—

(a) Notwithstanding any other law, a board must issue an occupational license or a government certification to an applicant for such license or certification if all of the following apply:

1. The applicant holds a current and valid occupational license or government certification issued by another licensing entity in a lawful occupation with a similar scope of practice, as determined by a board in this state.

2. The applicant has held the occupational license or government certification issued by another licensing entity for at least 1 year.

3. A board for the other licensing entity required the applicant to pass an examination or meet education, training, or experience standards.

4. A board for the other licensing entity holds the applicant in good standing.

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5. The applicant does not have a disqualifying criminal record as determined by a board in this state.

6. A board for another licensing entity has not revoked the applicant's occupational license or government certification because of negligence or intentional misconduct related to the applicant's work in the occupation.

7. The applicant did not surrender an occupational license or a government certification, or have such license or certification revoked, because of negligence or intentional misconduct related to the applicant's work in the occupation outside of this state or in the military.

8. The applicant does not have a complaint, an allegation, or an investigation formally pending before a board for another licensing entity which relates to unprofessional conduct or an alleged crime. If the applicant has such a complaint, allegation, or investigation pending, a board may not issue or deny an occupational license or a government certification to the applicant until the complaint, allegation, or investigation is resolved or the applicant otherwise meets the criteria for an occupational license or a government certification in this state to the satisfaction of a board in this state.

9. The applicant pays all applicable fees in this state.

(b) If another licensing entity issued the applicant a government certification but an occupational license is required in this state to perform a lawful occupation, the applicable board must issue an occupational license to the applicant if the applicant otherwise satisfies paragraph (a).

(4) WORK EXPERIENCE.—Notwithstanding any other law, a board must issue an occupational license or a government certification

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to an applicant for such license or certification based on work experience outside of this state or in the military if all of the following apply:

(a) The applicant worked in a state that does not issue an occupational license or a government certification to regulate a lawful occupation or was a member of the military, but this state issues an occupational license or a government certification to regulate a lawful occupation with a similar scope of practice, as determined by the board.

(b) The applicant worked for at least 3 years in the lawful occupation.

(c) The applicant satisfies subparagraphs (3)(a)5.-9.

(5) PRIVATE CERTIFICATION.—Notwithstanding any other law, a board must issue an occupational license or a government certification to an applicant for such license or certification based on the applicant holding a private certification and the applicant's work experience outside of this state or in the military if all of the following apply:

(a) The applicant holds a private certification and worked in a state that does not issue an occupational license or a government certification to regulate a lawful occupation or was a member of the military, but an occupational license is required in this state for such lawful occupation, as determined by the board.

(b) The applicant worked for at least 2 years in the lawful occupation.

(c) The applicant holds a current and valid private certification in the lawful occupation.

(d) The private certification organization holds the

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applicant in good standing.

(e) The applicant satisfies subparagraphs (3)(a)5.-9.

(6) REQUIRED EXAMINATIONS AND EDUCATION.—

(a) A board may require an applicant to pass an examination specific to relevant state laws that regulate the occupation if an occupational license or a government certification under this chapter or chapter 456 requires such examination.

(b) In addition to the examination described in paragraph (a), a board must require an applicant seeking to be licensed as a general contractor, building contractor, residential contractor, roofing contractor, specialty structure contractor, or glass and glazing contractor to:

1. Successfully complete the examination for licensure described in s. 489.113(1); and

2. Before being issued a certificate or registration, successfully complete the following continuing education courses, either in person or online:

a. The number of required hours, as determined by the Construction Industry Licensing Board, relating to laws and rules related to the construction industry in chapter 455 and part 1 of chapter 489 and the rules of the Construction Industry Licensing Board, and relating to wind mitigation methodology and techniques incorporated in the Florida Building Code; and

b. For applicants seeking to be licensed as a general contractor, building contractor, residential contractor, or roofing contractor, a 2-hour course on the Florida Building Code which includes information on wind mitigation techniques.

(7) PRESUMPTION OF APPROVAL; DECISION.—Unless a board can demonstrate a substantial difference between the licensure or

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certification requirements of another licensing entity and this state, there is a presumption that an applicant who holds a valid occupational license, government certification, or private certification, or otherwise meets the requirements to be issued an occupational license for a lawful occupation, and is in good standing with another licensing entity is qualified for an occupational license or a government certification in this state and must be approved by the board. A board shall provide an applicant with a written decision regarding his or her application within 90 days after receipt of a completed application.

(8) APPEAL.—

(a) The applicant may appeal the board's decision to the Division of Administrative Hearings.

(b) The applicant may appeal the board's:

1. Denial of an occupational license or a government certification;

2. Determination of the validity of an occupational license or a government certification;

3. Determination of the similarity of the scope of practice of the occupational license or government certification held by the applicant; or

4. Determination of a disqualifying criminal record.

(9) STATE LAWS AND JURISDICTION.—An applicant who obtains an occupational license or a government certification pursuant to this section is subject to:

(a) The laws regulating the occupation in this state; and

(b) The jurisdiction of the applicable board in this state.

(10) EXCEPTION.—This section does not apply to an

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occupation regulated by the Florida Supreme Court or any occupation regulated under chapter 473, relating to public accountancy.

(11) CONSTRUCTION.—

(a) This section may not be construed to prohibit an individual from applying for an occupational license or a government certification under another law or rule.

(b) An occupational license or a government certification issued pursuant to this section is valid only in this state. Such license or certification does not make the individual eligible to work outside this state under an interstate compact or a reciprocity agreement unless otherwise provided in law.

(c) This section may not be construed to prevent this state from entering into a licensing compact or reciprocity agreement with another state, United States territory, foreign province, foreign country, international organization, or other entity.

(d) This section may not be construed to prevent boards in this state from recognizing occupational licenses or government certifications issued by a private certification organization, foreign province, foreign country, international organization, or other entity.

(e) This section may not be construed to require a private certification organization to grant or deny private certification to any individual.

(12) EMERGENCY POWERS.—

(a) During a state of emergency declared by the Governor, the Governor may order the recognition of occupational licenses from other licensing entities.

(b) The Governor may expand any occupational license's

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scope of practice and may authorize licensees to provide services in this state in person, telephonically, or by other means for the duration of the emergency.

(13) ANNUAL REPORT.—Each board shall submit an annual report to the President of the Senate and the Speaker of the House of Representatives by December 31 of each year, detailing the number of licenses or certifications issued pursuant to this section, the number of completed applications submitted pursuant to this section which were denied, and the reason for each denial.

(14) RULEMAKING.—The Department of Business and Professional Regulation and the Department of Health, for the boards under their jurisdiction, shall adopt rules to administer this section.

Section 2. Section 456.0365, Florida Statutes, is created to read:

456.0365 Applicability of the Interstate-Mobility and Universal-Recognition Occupational Licensing Act.—Except as provided in s. 455.2135(10), s. 455.2135 applies to professions regulated by the department under this chapter.

Section 3. This act shall take effect July 1, 2023.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to the Interstate-Mobility and Universal-Recognition Occupational Licensing Act;

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creating s. 455.2135, F.S.; providing a short title; defining terms; requiring certain agencies, boards, departments, and other governmental entities to issue an occupational license or a government certification to applicants under certain circumstances; authorizing such entities to require an applicant to pass a specified examination under certain circumstances; requiring such entities to require certain applicants to complete a specified examination and certain education requirements; providing a presumption that the applications of certain individuals will be approved; requiring licensing entities to provide a written decision to an applicant within a specified timeframe; authorizing an applicant to appeal a decision made under the act; specifying that an applicant licensed or certified under the act is still subject to specified laws and entities; providing exceptions; providing construction; authorizing the Governor to take certain actions relating to occupational licenses during declared states of emergency; requiring licensing entities to submit an annual report to the Legislature by a specified date; requiring the Department of Business and Professional Regulation and the Department of Health to adopt rules; creating s. 456.0365, F.S.; providing applicability; providing an effective date.

By Senator Collins

14-01118B-23 20231364__

A bill to be entitled

An act relating to the Interstate-Mobility and Universal-Recognition Occupational Licensing Act; creating s. 455.2135, F.S.; providing a short title; defining terms; requiring certain agencies, boards, departments, and other governmental entities to issue an occupational license or government certification to persons under certain circumstances; authorizing such entities to require a person to pass a specified examination under certain circumstances; providing a presumption that the applications of certain individuals will be approved; requiring such entities to provide a written decision to an applicant within a specified timeframe; authorizing a person to appeal a decision made under the act; specifying that a person licensed or certified under the act is still subject to specified laws and entities; providing construction; authorizing the Governor to take certain actions relating to occupational licenses during declared states of emergency; requiring such entities to submit an annual report to the Legislature by a specified date; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 455.2135, Florida Statutes, is created to read:

455.2135 Interstate-Mobility and Universal-Recognition Occupational Licensing Act.—

14-01118B-23 20231364__

(1) SHORT TITLE.—This section may be cited as the "Interstate-Mobility and Universal-Recognition Occupational Licensing Act."

(2) DEFINITIONS.—As used in this section, the term:

(a) "Board" means an agency, board, department, or other governmental entity that regulates a lawful occupation under this chapter or chapter 456 and issues an occupational license or government certification to an individual.

(b) "Government certification" means a voluntary, government-granted, and nontransferable recognition granted to an individual who meets personal qualifications related to a lawful occupation. The term includes a military certification for a lawful occupation. The term does not include credentials, such as those used for medical board certification or held by a certified public accountant, that are prerequisites to working lawfully in an occupation.

(c) "Lawful occupation" means a course of conduct, pursuit, or profession that includes lawful the sale of goods or services to sell regardless of whether the individual selling them is subject to an occupational license.

(d) "Military" means the Armed Forces of the United States, including the Air Force, Army, Coast Guard, Marine Corps, Navy, Space Force, National Guard, and all reserve components and auxiliaries. The term also includes the military reserves and militia of any United States territory or state.

(e) "Occupational license" means a nontransferable authorization in law for an individual to exclusively perform a lawful occupation based on meeting personal qualifications. The term includes a military occupational specialty.

(f) "Other licensing entity" or "another licensing entity" means any United States territory or state in the United States other than this state which issues occupational licenses or government certifications. The term includes the military.

(g) "Private certification" means a voluntary program in which a private organization grants nontransferable recognition to an individual who meets personal qualifications and standards relevant to performing the occupation, as determined by the private organization.

(h) "Scope of practice" means the procedures, actions, processes, and work that a person may perform under an occupational license or government certification issued in this state.

(3) OCCUPATIONAL LICENSE OR GOVERNMENT CERTIFICATION.—

(a) Notwithstanding any other law, a board must issue an occupational license or government certification to a person applying to a board for such license or certification if all of the following apply:

1. The person holds a current and valid occupational license or government certification by another licensing entity in a lawful occupation with a similar scope of practice, as determined by a board in this state.

2. The person has held the occupational license or government certification by another licensing entity for at least 1 year.

3. A board for the other licensing entity required the person to pass an examination or meet education, training, or experience standards.

4. A board for the other licensing entity holds the person

in good standing.

5. The person does not have a disqualifying criminal record as determined by a board in this state.

6. A board for another licensing entity has not revoked the person's occupational license or government certification because of negligence or intentional misconduct related to the person's work in the occupation.

7. The person did not surrender an occupational license or government certification, or have such license or certification revoked, because of negligence or intentional misconduct related to the person's work in the occupation in another state or in the military.

8. The person does not have a complaint, allegation, or investigation pending before a board for another licensing entity which relates to unprofessional conduct or an alleged crime. If the person has a complaint, allegation, or investigation pending, a board may not issue or deny an occupational license or government certification to the person until the complaint, allegation, or investigation is resolved or the person otherwise meets the criteria for an occupational license or government certification in this state to the satisfaction of a board in this state.

9. The person pays all applicable fees in this state.

(b) If another licensing entity issued the person a government certification but this state requires an occupational license to work, a board must issue an occupational license to the person if the person otherwise satisfies paragraph (a).

(4) WORK EXPERIENCE.—Notwithstanding any other law, a board must issue an occupational license or government certification

to a person applying to the board for such license or certification based on work experience in another state or the military if all of the following apply:

(a) The person worked in a state that does not use an occupational license or government certification to regulate a lawful occupation or was a member of the military, but this state uses an occupational license or government certification to regulate a lawful occupation with a similar scope of practice, as determined by the board.

(b) The person worked for at least 3 years in the lawful occupation.

(c) The person satisfies paragraph (3)(a).

(5) PRIVATE CERTIFICATION.—Notwithstanding any other law, a board must issue an occupational license or government certification to a person applying for such license or certification based on the person holding a private certification and the person's work experience in another state or the military if all of the following apply:

(a) The person holds a private certification and worked in a state that does not use an occupational license or government certification to regulate a lawful occupation or was a member of the military, but this state uses an occupational license or government certification to regulate a lawful occupation with a similar scope of practice, as determined by the board.

(b) The person worked for at least 2 years in the lawful occupation.

(c) The person holds a current and valid private certification in the lawful occupation.

(d) The private certification organization holds the person

in good standing.

(e) The person satisfies subparagraphs (3)(a)5.-9.

(6) STATE EXAMINATION.—A board may require a person to pass a jurisprudential examination specific to relevant state laws that regulate the occupation if an occupational license or government certification under this chapter or chapter 456 requires such examination.

(7) PRESUMPTION OF APPROVAL; DECISION.—Unless a board can demonstrate a substantial difference between licensure or certification requirements of another licensing entity and this state, there is a presumption that an applicant who holds a valid occupational license, government certification, or private certification, or otherwise meets the requirements to be credentialed for a lawful occupation, and is in good standing in another state is qualified for an occupational license or government certification in this state and must be approved by the board. A board shall provide an applicant with a written decision regarding his or her application within 90 days after receiving a complete application.

(8) APPEAL.—

(a) The person may appeal the board's decision to the Division of Administrative Hearings.

(b) The person may appeal the board's:

1. Denial of an occupational license or government certification;

2. Determination of the occupation;

3. Determination of the similarity of the scope of practice of the occupational license or government certification issued; or

4. Other determinations made under this section.

(9) STATE LAWS AND JURISDICTION.—A person who obtains an occupational license or a government certification pursuant to this section is subject to:

(a) The laws regulating the occupation in this state; and

(b) The jurisdiction of the board in this state.

(10) EXCEPTION.—This section does not apply to an occupation regulated by the Florida Supreme Court.

(11) CONSTRUCTION.—

(a) This section may not be construed to prohibit a person from applying for an occupational license or a government certification under another law or rule.

(b) An occupational license or a government certification issued pursuant to this section is valid only in this state. Such license or certification does not make the person eligible to work in another state under an interstate compact or a reciprocity agreement unless otherwise provided in law.

(c) This section may not be construed to prevent this state from entering into a licensing compact or reciprocity agreement with another state, foreign province, foreign country, international organization, or other entity.

(d) This section may not be construed to prevent this state from recognizing occupational credentials issued by a private certification organization, foreign province, foreign country, international organization, or other entity.

(e) This section may not be construed to require a private certification organization to grant or deny private certification to any individual.

(12) EMERGENCY POWERS.—

(a) During a state of emergency declared by the Governor, the Governor may order the recognition of occupational licenses from other licensing entities or from a foreign country as if the licenses were issued in this state.

(b) The Governor may expand any occupational license's scope of practice and may authorize licensees to provide services in this state in person, telephonically, or by other means for the duration of the emergency.

(13) Each board shall submit an annual report to the President of the Senate and the Speaker of the House of Representatives by December 31 of each year, detailing the number of licenses or certifications issued pursuant to this section, the number of applications submitted pursuant to this section which were denied, and the reason for each denial.

Section 2. This act shall take effect July 1, 2023.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR JAY COLLINS
14th District

COMMITTEES:
Agriculture, *Chair*
Appropriations Committee on Education
Appropriations Committee on Transportation, Tourism, and Economic Development
Education Postsecondary
Education Pre-K -12
Fiscal Policy
Military and Veterans Affairs, Space, and Domestic Security

SELECT COMMITTEE:
Select Committee on Resiliency

JOINT COMMITTEE:
Joint Select Committee on Collective Bargaining

March 9, 2023

Senator Joe Gruters
316 Senate Building
404 South Monroe Street
Tallahassee, FL 32399

Chair Gruters,

I respectfully request that SB 1364 and 1366 – Interstate Mobility and Universal Recognition be heard in the Senate Committee on Regulated Industries at your earliest convenience. This bill is crucial in addressing our current workforce shortage and allowing people from the military to use their skills and certifications in private employment.

Should you have any questions or concerns, please feel free to contact my office. Thank you in advance for your consideration.

Thank you,

Jay Collins
Senator, District 14

CC: Booter Imhof, Staff Director
Susan Datres, Committee Administrative Assistant

REPLY TO:
❒ 405 North Reo Street, Suite 170, Tampa, Florida 33609 (813) 281-2538
❒ 305 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 387-4014

Senate's Website: *www.flsenate.gov*

KATHLEEN PASSIDOMO
President of the Senate

DENNIS BAXLEY
President Pro Tempore

2023 AGENCY LEGISLATIVE BILL ANALYSIS
Florida Division of Emergency Management

BILL INFORMATION	
BILL NUMBER:	SB 1364
BILL TITLE:	Interstate-Mobility and Universal-Recognition Occupational Licensing Act
BILL SPONSOR:	Jay Collins
EFFECTIVE DATE:	July 1, 2023

COMMITTEES OF REFERENCE
1) Regulated Industries
2) Appropriations Committee on Agriculture, Environment, and General Government
3) Fiscal Policy
4)
5)

CURRENT COMMITTEE

SIMILAR BILLS	
BILL NUMBER:	
SPONSOR:	

IDENTICAL BILLS	
BILL NUMBER:	HB 1333
SPONSOR:	Traci Koster

PREVIOUS LEGISLATION	
BILL NUMBER:	
SPONSOR:	
YEAR:	
LAST ACTION:	

Is this bill part of an agency package?
No

BILL ANALYSIS INFORMATION			
	Name:	**Signature:**	**Date Reviewed:**
LEAD AGENCY ANALYST:	Amelia Johnson	Amelia Johnson	3/3/23
ADDITIONAL ANALYST(S):			
LEGAL ANALYST:	Matthew Toplak	Matthew Toplak	3/7/23
FISCAL ANALYST:	Susanne McDaniel	Susanne McDaniel	3/10/23

POLICY ANALYSIS

1. EXECUTIVE SUMMARY

The bill creates the Interstate-Mobility and Universal-Recognition Occupational Licensing Act requiring an agency, board, department, or other governmental entity regulating a lawful occupation under Chapter 456 to issue an occupational license or government certification if the following conditions apply:

- The person holds a current and valid occupational license or government certification by another licensing entity in a lawful occupation with a similar scope of practice.
- The person has held the occupational license or government certification by another licensing entity for at least 1 year.
- A board for the other licensing entity required the person to pass an examination or meet education, training, or experience standards.
- A board for the other licensing entity holds the person in good standing.
- The person does not have a disqualifying criminal record.
- A board for another licensing entity has not revoked the person's occupational license or government certification because of negligence or intentional misconduct.
- The person did not surrender an occupational license or government certification, or have such license or certification revoked, because of negligence or intentional misconduct.
- The person does not have a complaint, allegation, or investigation pending before a board for another licensing entity which relates to unprofessional conduct or an alleged crime.
- The person pays all applicable fees in this state.

2. SUBSTANTIVE BILL ANALYSIS

1. PRESENT SITUATION: N/A – The bill creates this Act.

2. EFFECT OF THE BILL:

Section 1 creates s. 455.2135, F.S. to:

- Provide that during a Governor declared state of emergency, the Governor may order the recognition of occupational licenses from other licensing entities or foreign countries as if the licenses were issued in this state.
- Allow the Governor to expand any occupational license's scope of practice and authorize licensees to provide services in in person, telephonically, or by other means for the duration of the emergency.

Section 2 provides an effective date of July 1, 2023.

3. DOES THE LEGISLATION DIRECT OR ALLOW THE AGENCY/BOARD/COMMISSION/DEPARTMENT TO DEVELOP, ADOPT, OR ELIMINATE RULES, REGULATIONS, POLICIES, OR PROCEDURES? Y☐ N☒

If yes, explain:	
Is the change consistent with the agency's core mission?	Y☐N☐
Rule(s) impacted (provide references to F.A.C., etc.):	

4. WHAT IS THE POSITION OF AFFECTED CITIZENS OR STAKEHOLDER GROUPS?

Proponents and summary of position:	Unknown.
Opponents and summary of position:	Unknown.

5. ARE THERE ANY REPORTS OR STUDIES REQUIRED BY THIS BILL? Y☒ N☐

If yes, provide a description:	Each agency, board, department, or other governmental entity regulating a lawful occupation under Chapter 456 must submit an annual report to the President of the Senate and the Speaker of the House detailing the number of licenses or certifications issued, the number of applications submitted which were denied, and the reason for each denial.
Date Due:	12/31
Bill Section Number(s):	Section 1

6. ARE THERE ANY NEW GUBERNATORIAL APPOINTMENTS OR CHANGES TO EXISTING BOARDS, TASK FORCES, COUNCILS, COMMISSIONS, ETC. REQUIRED BY THIS BILL? Y☐ N☒

Board:	
Board Purpose:	
Who Appoints:	
Changes:	
Bill Section Number(s):	

FISCAL ANALYSIS

1. FISCAL IMPACT TO LOCAL GOVERNMENT Y☐ N☒

Revenues:	
Expenditures:	
Does the legislation increase local taxes or fees? If yes, explain.	
If yes, does the legislation provide for a local referendum or local governing body public vote prior to implementation of the tax or fee increase?	

2. FISCAL IMPACT TO STATE GOVERNMENT Y☐ N☒

Revenues:	
Expenditures:	
Does the legislation contain a State Government appropriation?	
If yes, was this appropriated last year?	

3. FISCAL IMPACT TO THE PRIVATE SECTOR Y☐ N☒

Revenues:		
Expenditures:		
Other:		

4. DOES THE BILL INCREASE OR DECREASE TAXES, FEES, OR FINES? Y☐ N☒

If yes, explain impact.	
Bill Section Number:	

TECHNOLOGY IMPACT

1. DOES THE BILL IMPACT THE AGENCY'S TECHNOLOGY SYSTEMS (I.E. IT SUPPORT, LICENSING SOFTWARE, DATA STORAGE, ETC.)? Y☐ N☒

If yes, describe the anticipated impact to the agency including any fiscal impact.	

FEDERAL IMPACT

1. DOES THE BILL HAVE A FEDERAL IMPACT (I.E. FEDERAL COMPLIANCE, FEDERAL FUNDING, FEDERAL AGENCY INVOLVEMENT, ETC.)? Y☐ N☒

If yes, describe the anticipated impact including any fiscal impact.	

ADDITIONAL COMMENTS

LEGAL - GENERAL COUNSEL'S OFFICE REVIEW

Issues/concerns/comments:	None.

Matthew Toplak
Legal Analyst Signature

3/7/2023
Date

APPROVALS

Amelia Johnson	3-10-23	850-591-4813
Lead Program Policy Analyst	**Date**	**Phone Number**
Kendall Kelley	3-13-23	
Office of Communications/External Affairs and Legislative Affairs	**Date**	
Luke Strickland	3-13-23	
Chief of Staff	**Date**	

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 Committee on Regulated Industries

BILL:	SB 1366
INTRODUCER:	Senator Collins
SUBJECT:	Fees/Interstate-Mobility and Universal-Recognition Occupational Licensing Act
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kraemer	Imhof	RI	**Pre-meeting**
2.			AEG	
3.			FP	

I. Summary:

SB 1366 authorizes licensing boards that issue licenses pursuant to the Interstate-Mobility and Universal-Recognition Occupational Licensing Act (act), created by SB 1364, to charge a fee to applicants for an occupational license or government certification, in order to recoup a board's costs, not to exceed $100 for each application.

The affected boards issue licenses pursuant to ch. 455, F.S., relating to the regulations of professions by the Department of Business and Professional Regulation (DBPR), or ch. 456, F.S., relating to the regulation of professions by the Department of Health (DOH).

SB 1364 is a linked bill that creates s. 455.2135, F.S. to address occupational license portability in the United States by requiring Florida licensing boards to issue occupational licenses or government certifications to eligible individuals, under certain circumstances.

See Section V, Fiscal Impact Statement.

The bill is effective on the same date that SB 1364 or similar legislation takes effect, if such legislation is adopted in the same legislative session or any extension and becomes a law.

II. Present Situation:

For each license issued, the DBPR charges an initial license fee and license renewal fee set by the applicable board or by the DBPR if there is no board for the profession.[1] The DBPR also imposes a $5 unlicensed activity fee on each occupational license, in order to fund efforts to combat unlicensed activity.[2] Renewal fees may be imposed for a two-year (biennial) or four-year license, if authorized by the DBPR.[3]

For each license issued, the DOH charges an initial license fee and license renewal fee set by the applicable board or by the DOH if there is no board for the profession.[4] The DOH also imposes a $5 unlicensed activity fee on each occupational license, in order to fund efforts to combat unlicensed activity.[5] Renewal fees may be imposed for a two-year (biennial) or four-year license, if authorized by the DOH.[6]

The linked bill, SB 1364, addresses occupational license portability in the United States by requiring Florida licensing boards that issue occupational licenses or government certifications to individuals under ch. 455, F.S., relating to the regulations of professions by the DBPR, or ch. 456, F.S., relating to the regulation of professions by the DOH, to issue an occupational license or government certification (universal license) to eligible applicants, under certain circumstances (universal licensing requirement), as follows:

- The universal licensing requirement does not apply to occupations regulated by the Florida Supreme Court, certified public accountants, and other credentials, such as those used for medical board certification;
- Applicants may seek a universal license through one of three pathways described in the bill:
  - Universal licensing if licensed by another licensing entity;
  - Universal licensing based on work experience in another state or the military; or
  - Universal licensing based on private certification with work experience in a non-licensing state or the military.
- An applicant with a valid occupational license or certification in good standing, or who otherwise meets the requirements for an occupational license for a lawful occupation, is presumed to be qualified for, and must be issued, an occupational license or government certification by the appropriate Florida licensing board.
- During a declared state of emergency, the Governor may order the recognition of occupational licenses from outside Florida or from a foreign country as if the licenses were issued in Florida, may expand any occupation license scope of practice, and authorize licensees to provide services in Florida in person, telephonically, or by other means for the duration of the emergency.

[1] *See* s. 455.213, F.S.
[2] *See* s. 455.2281, F.S.
[3] *See* s. 455.203(1), F.S.
[4] *See* s. 456.013, F.S.
[5] *See* s. 456.065, F.S.
[6] *See* s. 456.004(1), F.S.

III. Effect of Proposed Changes:

The bill authorizes licensing boards that issue licenses pursuant to the Interstate-Mobility and Universal-Recognition Occupational Licensing Act, created by SB 1364, to charge a fee to applicants for an occupational license or government certification, in order to recoup a board's costs, not to exceed $100 for each application.

The affected boards issue licenses pursuant to ch. 455, F.S., or ch. 456, F.S., pursuant to s. 455.2135, F.S, as created by SB 1364.
SB 1364 is a linked bill that addresses occupational license portability in the United States by requiring Florida licensing boards that issue occupational licenses or government certifications to individuals, under certain circumstances.

Successful applicants who are issued licenses in Florida by the DBPR will be subject to the fees authorized under s. 455.219, F.S., and those licensed by the DOH will be subject to the fees authorized under s. 456.025, F.S.

The bill is effective on the same date that SB 1364 or similar legislation takes effect, if such legislation is adopted in the same legislative session or any extension and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

Section 19, Art. VII of the State Constitution limits the authority of the legislature to enact legislation that imposes or raises a state tax or fee by requiring such legislation to be approved by a 2/3 vote of each chamber of the legislature. Such state tax or fee imposed, authorized, or raised must be contained in a separate bill that contains no other subject.

For purposes of this limitation, the term "fee" is defined, in pertinent part, to mean any charge or payment required by law, including any fee for service, fee or cost for licenses, and charge for service.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill requires certain licensing boards to establish a fee for licensure of eligible applicants licensed or certified to work in occupations or professions outside Florida, to perform such work in this state, as authorized in s. 455.2135, F.S., created by linked bill SB 1364, establishing the Interstate-Mobility and Universal-Recognition Occupational Licensing Act.

B. Private Sector Impact:

Beginning July 1, 2024, persons who are licensed or certified to work in occupations or professions outside Florida, if eligible to do so pursuant to s. 455.2135, F.S., created by the act, will be required to pay an application fee up to $100 to be able to be licensed to perform such work in Florida.

C. Government Sector Impact:

The creation of an additional application procedure for eligible individuals licensed outside Florida may result in a fiscal impact to the DBPR and the DOH. To date, no analysis by the DBPR or the DOH of the impact of the act on their respective operations, revenue, and expenditures has been provided.

VI. Technical Deficiencies:

None.

VII. Related Issues:

As required for all fee bills linked to a substantive bill, a technical amendment is required to insert the number of the linked bill SB 1364. In addition, the subsection number (13) referenced in the fee bill must be revised to conform to the linked bill. *See* line 53 of the fee bill. Staff has prepared the required technical amendment to insert the linked bill number into the bill and correct the subsection reference.

VIII. Statutes Affected:

This bill substantially amends section 455.2135 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.

560406

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Regulated Industries (Collins) recommended the following:

Senate Amendment

Delete lines 10 - 19
and insert:
Section 1. Subsection (15) is added to section 455.2135, Florida Statutes, as created by SB 1364 or similar legislation, to read:
455.2135 Interstate-Mobility and Universal-Recognition Occupational Licensing Act.—
(15) FEE.—A board may charge a fee to an applicant to

560406

recoup the board's costs, not to exceed $100 for each application.

Section 2. This act shall take effect on the same date that SB 1364 or similar legislation takes effect, if such legislation

By Senator Collins

14-02102-23 20231366__

A bill to be entitled

An act relating to fees; amending s. 455.2135, F.S.; authorizing applicable boards to charge a fee for applications under the Interstate-Mobility and Universal-Recognition Occupational Licensing Act; providing a contingent effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (13) is added to section 455.2135, Florida Statutes, as created by SB ___ or similar legislation, to read:

455.2135 Interstate-Mobility and Universal-Recognition Occupational Licensing Act.—

(13) FEE.—A board may charge a fee to an applicant to recoup the board's costs, not to exceed $100 for each application.

Section 2. This act shall take effect on the same date that SB ___ or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR JAY COLLINS
14th District

COMMITTEES:
Agriculture, *Chair*
Appropriations Committee on Education
Appropriations Committee on Transportation, Tourism, and Economic Development
Education Postsecondary
Education Pre-K -12
Fiscal Policy
Military and Veterans Affairs, Space, and Domestic Security

SELECT COMMITTEE:
Select Committee on Resiliency

JOINT COMMITTEE:
Joint Select Committee on Collective Bargaining

March 9, 2023

Senator Joe Gruters
316 Senate Building
404 South Monroe Street
Tallahassee, FL 32399

Chair Gruters,

I respectfully request that SB 1364 and 1366 – Interstate Mobility and Universal Recognition be heard in the Senate Committee on Regulated Industries at your earliest convenience. This bill is crucial in addressing our current workforce shortage and allowing people from the military to use their skills and certifications in private employment.

Should you have any questions or concerns, please feel free to contact my office. Thank you in advance for your consideration.

Thank you,

Jay Collins
Senator, District 14

CC: Booter Imhof, Staff Director
Susan Datres, Committee Administrative Assistant

REPLY TO:
❒ 405 North Reo Street, Suite 170, Tampa, Florida 33609 (813) 281-2538
❒ 305 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 387-4014

Senate's Website: *www.flsenate.gov*

KATHLEEN PASSIDOMO
President of the Senate

DENNIS BAXLEY
President Pro Tempore

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 Committee on Regulated Industries

BILL:	SB 1432
INTRODUCER:	Senator Trumbull
SUBJECT:	Communications Services Tax
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schrader	Imhof	RI	**Pre-meeting**
2.			CA	
3.			AP	

I. Summary:

SB 1432 revises the Communications Services Tax Simplification Law under ch. 202, F.S., to:

- Decrease the state tax rate on the retail sale of communications services;
- Specify that the local discretionary communications services tax, authorized under s. 212.19, F.S., be may not be increased until January 1, 2026;
- Specify that the local discretionary communications services tax under s. 212.19, F.S., shall replace other revenue sources for counties and municipalities and includes specified taxes, charges, fees, and other impositions to the extent that the respective local taxing jurisdictions were authorized to impose those taxes, charges, fees and other impositions before July 1, 2000, and after January 1, 2023; and
- Specify that any increases to discretionary sales tax, levied pursuant to s. 212.055, F.S., may not be added to the local communications services tax under s. 202.19, F.S., before January 1, 2026

The bill takes effect upon becoming a law.

II. Present Situation:

Chapter 202, F.S., is the Communications Services Tax (CST) Simplification Law. The term "communications services" means the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including video services, to a point, or between or

among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method, regardless of the protocol used for such transmission or conveyance.[1]

Section 202.105, F.S., provides the legislative findings and intent related to enactment of the CST simplification law. The law simplified an extremely complicated state and local tax and fee system, by restructuring separate taxes and fees into a revenue-neutral CST centrally administered by the Department of Revenue (DOR), i.e. a single tax to replace multiple taxes and fees previously imposed. Among the Legislature's stated intentions in creating the CST was that it not reduce the authority that municipalities or counties had to raise revenue in the aggregate, as such authority existed on February 1, 1989.

The state CST rate, except for direct-to-home satellite service, is 4.92 percent.[2] Local governments may also levy a discretionary CST:

- Charter counties and municipalities may levy the CST at a rate of up to 5.1 percent for municipalities and charter counties that have not chosen to levy permit fees, and at a rate of up to 4.98 percent for municipalities and charter counties that have chosen to levy permit fees; and
- Noncharter counties may levy the CST at a rate of up to 1.6 percent.[3]

These maximum rates do not include the add-ons, pursuant to s. 337.401, F.S., of up to 0.12 percent for municipalities and charter counties or of up to 0.24 percent for noncharter counties, if those local governments have elected not to require right-of-way permit fees.[4]

The local discretionary CST and add-on rates, if applicable, constitute the total local adopted rate.[5]

The local CST includes and is in lieu of any fee or other consideration, including, but not limited to, application fees, transfer fees, renewal fees, or claims for related costs, to which the municipality or county is otherwise entitled for granting permission to dealers of communications services to use or occupy its roads or rights-of-way for the placement, construction, and maintenance of poles, wires, and other fixtures used in the provision of communications services.[6] Additionally, the term "replaced revenue sources" includes permit fees relating to use of rights-of-way collected from communication services providers; however, if a municipality or charter county elects the option to charge permit fees pursuant to s. 337.401(3)(c), F.S., such fees are not be included as a replaced revenue source.[7]

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[1] Section 202.11(1), F.S. Excluded from this definition is information services; installation or maintenance of wiring or equipment on a customer's premises; the sale or rental of tangible personal property; the sale of advertising, including, but not limited to, directory advertising; bad check charges; late payment charges; billing and collection services; and internet access service, electronic mail service, electronic bulletin board service, or similar online computer services.
[2] Section 202.12(1)(a) and (b), F.S. For direct-to-home satellite service the rate is 9.07 percent.
[3] Section 202.19, F.S.
[4] Section 337.401(3)(c), F.S.
[5] Florida Department of Revenue, *2023 Agency Legislative Bill Analysis for SB 1432*, (Mar. 14, 2023) (on file with the Senate Regulated Industries Committee).
[6] Section 202.19(3)(a), F.S.
[7] Section 202.20(2)(b)1.e, F.S.

Under s. 202.19(5), F.S., any discretionary sales surtax levied by a county or school board under s. 212.055, F.S., is imposed as a local CST. This surtax is added to the adopted local rate at the respective conversion rate, as determined in accordance with methodology and chart in s. 202.20(3), F.S. The total local CST rate is the total adopted rate plus the local option tax (at the converted rate), if applicable. The total local CST rates vary by jurisdiction.

III. Effect of Proposed Changes:

Section 1 of the bill revises s. 202.12(1)(a), F.S., to reduce the CST rate imposed by the state from 4.92 percent to 3.48 percent. The bill does not impact the rate charged under s. 202.12(1)(b), F.S., for direct-to-home satellite service, which will remain at 9.07 percent.

Section 2 of the bill revises s. 202.19, F.S., to require that any local CST rate in effect as of January 1, 2023, cannot be increased before January 1, 2026.

The bill also states that the local CST authorized under s. 202.19, F.S., replaces other revenue sources for municipalities and counties and includes the following taxes, charges, fees, and other impositions to the extent that the respective local taxing jurisdictions were authorized to impose those taxes, charges, fees, and other impositions before July 1, 2000, and after January 1, 2023:

- For charter counties or municipalities:
  - The public service tax on telecommunications authorized by s. 166.231(9), F.S., as published in the 2001 version of the Florida Statutes;
  - Franchise fees on providers of cable television services as authorized by 47 U.S.C. s. 542;[8]
  - The public service tax on prepaid calling arrangements;
  - Franchise fees on dealers of communications services that use the public roads or rights-of-way;
  - Actual permit fees relating to placing or maintaining facilities in or on public roads or rights-of-way collected from providers of long-distance, cable, and mobile communications services for the fiscal year ending September 30, 1999; however, if a municipality or charter county elected to continue charging permit fees as authorized by s. 337.401, F.S., on or before January 1, 2019, the fees may not be included as a replaced revenue source; and
  - Application fees, transfer fees, renewal fees, or claims for related costs to which the municipality or county is otherwise entitled for granting permission to dealers of communications services, including providers of cable television services as authorized by 47 U.S.C. s. 542, to use or occupy its roads or rights-of-way for the placement, construction, and maintenance of poles, wires, and other fixtures used in the provision of communications services.
- For noncharter counties: franchise fees on providers of cable television services as authorized by 47 U.S.C. s. 542;

[8] 47 U.S.C. s. 542, authorizes any governmental entity empowered by Federal, State, or local law to grant a franchise to assess a "franchise fee" (defined as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such") on a cable operator granted a franchise to operate in that authority's jurisdiction.

The bill also provides that any increases to discretionary sales tax, levied pursuant to s. 212.055, F.S., may not be added to the local CST under s. 202.19, F.S., before January 1, 2026.

Section 3 of the bill provides that it shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference has not yet provided a revenue impact for this bill.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Revenue Estimating Conference has not yet provided a revenue impact for this bill.

VI. Technical Deficiencies:

In its analysis, the Department of Revenue (DOR), identified two potential technical deficiencies regarding the provision of the bill that states that any increases to discretionary sales tax, levied pursuant to s. 212.055, F.S., may not be added to the local CST under s. 202.19, F.S., before January 1, 2026 (lines 106-110):

- The provision section does not indicate when a change to the discretionary sales surtax that is levied on or after January 1, 2023, would be included in the local communications services tax.
- While the provision removes the addition of the discretionary sales surtax imposed pursuant to s. 212.055, F.S., to the local tax rate imposed by counties and municipalities, the bill does not appear to account for this by making corresponding revisions to s. 212.054(2)(a), F.S. Currently, s. 212.054(2)(a), F.S., states, in part:

> The tax imposed by the governing body of any county authorized to so levy pursuant to s. 212.055 shall be a discretionary surtax on all transactions occurring in the county which transactions are subject to the state tax imposed on sales, use, services, rentals, admissions, and other transactions by this chapter and communications services as defined for purposes of chapter 202. The surtax, if levied, shall be computed as the applicable rate or rates authorized pursuant to s. 212.055 times the amount of taxable sales and taxable purchases representing such transactions.[9]

VII. Related Issues:

In addition to the technical issues identified above, the DOR provided in its analysis that it is unclear to the agency what is intended by the time period of July 1, 2000, and January 1, 2023, specified in lines 54-60 of the bill, where revenue sources of municipalities and counties are to be replaced by the tax authorized by the proposed s. 202.19(3)(a), F.S. DOR states that local governments have been prohibited from imposing the taxes, charges and fees discussed in this paragraph since July 1, 2000. The DOR asks whether the intent of the bill is for local governments to be able to impose such taxes, charges and fees after January 1, 2023.[10]

The sponsor may also wish to consider the following revisions recommended by the DOR:

- On line 62 of the bill: revise "by s. 166.231(9), Florida Statutes (2001)" to read "by s. 166.231(9), Florida Statutes (2000)."
- On line 67 of the bill: add the phrase ", up to the limit set forth in s. 337.401." after the phrase in the bill that states, "that use the public roads or rights-of-way."
- On line 109 of the bill: change "communication" to "communications."[11]

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 202.12 and 202.19.

IX. Additional Information:

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

None.

[9] Department of Revenue, *supra* note 5.
[10] *Id.*
[11] *Id.*

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Regulated Industries (Trumbull) recommended the following:

Senate Amendment (with directory and title amendments)

Between lines 42 and 43
insert:

(b) At the rate of 7.63 ~~9.07~~ percent applied to the retail sales price of any direct-to-home satellite service received in this state. The proceeds of the tax imposed under this paragraph shall be accounted for and distributed in accordance with s. 202.18(2). The gross receipts tax imposed by chapter 203 shall be collected on the same taxable transactions and remitted with

889486

the tax imposed by this paragraph.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======
And the directory clause is amended as follows:

Delete lines 17 - 18

and insert:

Section 1. Paragraphs (a) and (b) of subsection (1) of section 202.12, Florida Statutes, are amended to read:

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:

Delete lines 3 - 4

and insert:

amending s. 202.12, F.S.; decreasing the tax rates on the retail sale of communications services and direct-to-home satellite services; amending

By Senator Trumbull

2-01665C-23 20231432__

A bill to be entitled

An act relating to communications services tax; amending s. 202.12, F.S.; decreasing the tax rate on the retail sale of communications services; amending s. 202.19, F.S.; revising the name of the discretionary communications services tax; requiring a certain tax remain the same rate as it was on a specified past date until a specified future date; specifying the fees, taxes, charges, and other impositions that the a specified tax replaces; prohibiting a certain tax passed after a certain date from being added to the local communications service tax until a future date; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (1) of section 202.12, Florida Statutes, is amended to read:

202.12 Sales of communications services.—The Legislature finds that every person who engages in the business of selling communications services at retail in this state is exercising a taxable privilege. It is the intent of the Legislature that the tax imposed by chapter 203 be administered as provided in this chapter.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction and is due and payable as follows:

(a) Except as otherwise provided in this subsection, at the rate of 3.48 ~~4.92~~ percent applied to the sales price of the communications service that:

2-01665C-23 20231432__

1. Originates and terminates in this state; ~~,~~ or

2. Originates or terminates in this state and is charged to a service address in this state,

when sold at retail, computed on each taxable sale for the purpose of remitting the tax due. The gross receipts tax imposed by chapter 203 shall be collected on the same taxable transactions and remitted with the tax imposed by this paragraph. If no tax is imposed by this paragraph due to the exemption provided under s. 202.125(1), the tax imposed by chapter 203 shall nevertheless be collected and remitted in the manner and at the time prescribed for tax collections and remittances under this chapter.

Section 2. Subsections (1), (3), and (5) of section 202.19, Florida Statutes, are amended, and paragraph (d) is added to subsection (2) of that section, to read:

202.19 Authorization to impose local communications services tax.—

(1) The governing authority of each county and municipality may, by ordinance, levy a local ~~discretionary~~ communications services tax as provided in this section.

(2)

(d) The local communications services tax rate in effect on January 1, 2023, may not be increased before January 1, 2026.

(3)(a) The tax authorized under this section replaces other revenue sources for municipalities and counties and includes the following taxes, charges, fees, and other impositions to the extent that the respective local taxing jurisdictions were authorized to impose those taxes, charges, fees, and other

impositions before July 1, 2000, and after January 1, 2023:

1. With respect to a charter county or municipality:

a. The public service tax on telecommunications authorized by s. 166.231(9), Florida Statutes (2001).

b. Franchise fees on providers of cable television services as authorized by 47 U.S.C. s. 542.

c. The public service tax on prepaid calling arrangements.

d. Franchise fees on dealers of communications services that use the public roads or rights-of-way.

e. Actual permit fees relating to placing or maintaining facilities in or on public roads or rights-of-way collected from providers of long-distance, cable, and mobile communications services for the fiscal year ending September 30, 1999; however, if a municipality or charter county elected to continue charging permit fees as authorized by s. 337.401 on or before January 1, 2019, the fees may not be included as a replaced revenue source.

f. Application fees, transfer fees, renewal fees, or claims for related costs to which the municipality or county is otherwise entitled for granting permission to dealers of communications services, including providers of cable television services as authorized by 47 U.S.C. s. 542, to use or occupy its roads or rights-of-way for the placement, construction, and maintenance of poles, wires, and other fixtures used in the provision of communications services.

2. With respect to a noncharter county, franchise fees on providers of cable television services as authorized by 47 U.S.C. s. 542 ~~includes and is in lieu of any fee or other consideration, including, but not limited to, application fees, transfer fees, renewal fees, or claims for related costs, to~~

~~which the municipality or county is otherwise entitled for granting permission to dealers of communications services, including, but not limited to, providers of cable television services, as authorized in 47 U.S.C. s. 542, to use or occupy its roads or rights-of-way for the placement, construction, and maintenance of poles, wires, and other fixtures used in the provision of communications services~~.

(b) This subsection does not supersede or impair the right, if any, of a municipality or county to require the payment of consideration or to require the payment of regulatory fees or assessments by persons using or occupying its roads or rights-of-way in a capacity other than that of a dealer of communications services.

(5) In addition to the communications services taxes authorized by subsection (1), a discretionary sales surtax that a county or school board has levied under s. 212.055 is imposed as a local communications services tax under this section, and the rate shall be determined in accordance with s. 202.20(3). However, any increase to the discretionary sales surtax levied under s. 212.055 on or after January 1, 2023, may not be added to the local communication services tax under this section before January 1, 2026.

(a) Except as otherwise provided in this subsection, each such tax rate shall be applied, in addition to the other tax rates applied under this chapter, to communications services subject to tax under s. 202.12 which:

1. Originate or terminate in this state; and

2. Are charged to a service address in the county.

(b) With respect to private communications services, the

tax shall be on the sales price of such services provided within the county, which shall be determined in accordance with the following provisions:

1. Any charge with respect to a channel termination point located within such county;

2. Any charge for the use of a channel between two channel termination points located in such county; and

3. Where channel termination points are located both within and outside of such county:

a. If any segment between two such channel termination points is separately billed, 50 percent of such charge; and

b. If any segment of the circuit is not separately billed, an amount equal to the total charge for such circuit multiplied by a fraction, the numerator of which is the number of channel termination points within such county and the denominator of which is the total number of channel termination points of the circuit.

Section 3. This act shall take effect upon becoming a law.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Commerce and Tourism, *Chair*
Appropriations Committee on Transportation, Tourism, and Economic Development, *Vice Chair*
Appropriations Committee on Agriculture, Environment, and General Government
Banking and Insurance
Fiscal Policy
Judiciary
Transportation

SELECT COMMITTEE:
Select Committee on Resiliency

SENATOR JAY TRUMBULL
2nd District

March 13, 2023

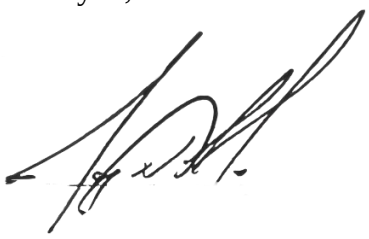
Re: SB 1432

Dear Chair Gruters,

I am respectfully requesting that Senate Bill 1432, related to Communications Service Tax, be placed on the next agenda for your Regulated Industries committee.

I appreciate your consideration of this bill. If there are any questions or concerns, please do not hesitate to call my office at (850) 487-5002.

Thank you,



Senator Jay Trumbull
District 2

REPLY TO:
❒ 840 West 11th Street, Panama City, Florida 32401 (850) 747-5454
❒ 320 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5002

Senate's Website: *www.flsenate.gov*

KATHLEEN PASSIDOMO
President of the Senate

DENNIS BAXLEY
President Pro Tempore

2023 AGENCY LEGISLATIVE BILL ANALYSIS
DEPARTMENT OF REVENUE

BILL INFORMATION	
BILL NUMBER:	SB 1432
BILL TITLE:	Communications Services Tax
BILL SPONSOR:	Senator Trumbull
EFFECTIVE DATE:	Upon becoming a law

COMMITTEES OF REFERENCE
1) Regulated Industries
2) Community Affairs
3) Appropriations
4)
5)

CURRENT COMMITTEE
Regulated Industries

SIMILAR BILLS	
BILL NUMBER:	
SPONSOR:	

IDENTICAL BILLS	
BILL NUMBER:	HB 1153
SPONSOR:	Representative Steele

PREVIOUS LEGISLATION
YEAR/BILL NUMBER/SPONSOR/LAST ACTION:

BILL ANALYSIS INFORMATION	
DATE OF ANALYSIS:	March 14, 2023
AGENCY CONTACT:	Alec Yarger (850) 717-6153

POLICY ANALYSIS

1. ANALYSIS OF EACH SECTION THAT AFFECTS THE DEPARTMENT OF REVENUE.

Section 1. Sales of communications services. (pp. 1-2):

PRESENT SITUATION

Sales of communications services, except direct-to-home satellite service, are subject to a state tax rate of 4.92 percent.

EFFECT OF THE BILL

Decreases the state rate imposed on sales of communications services, except direct-to-home satellite service, to a state tax of 3.48 percent.

Section 2. Authorization to impose local communications services tax. (pp. 2-5):

PRESENT SITUATION

Counties and municipalities have the discretion to levy, by ordinance, a local discretionary communications services tax, which does not include permit fee add-on rates authorized by s. 337.141, F.S.

Charter counties and municipalities not electing to require permit fees are authorized to levy a local rate up to 5.1%, not inclusive of permit fee add-on rates of up to .12 percent, authorized pursuant to s. 337.401, F.S.

Charter counties and municipalities electing to require permit fees are authorized to levy a local rate up to 4.98 percent.

Noncharter counties are authorized to levy a rate of up to 1.6 percent, not inclusive of permit fee add-on rates of up to .24 percent, authorized by s. 337.401, F.S., for those noncharter counties not electing to require permit fees.

The local discretionary communications services tax and add-on rates, if applicable, constitute the total local adopted rate.

Any discretionary sales surtax (local option taxes) imposed by a county or school board under s. 212.055, F.S., is imposed as local communications services tax, pursuant to s. 202.19(5), F.S. The discretionary sales surtax is added to the adopted local rate at the respective conversion rate, as determined in accordance with s. 202.20(3), F.S. The total adopted rate and local option tax (at the converted rate), if applicable, comprise the total local communications services tax rate. The total local communications services tax rates vary by jurisdiction.

EFFECT OF THE BILL

Amends s. 212.19(1), F.S., authorizing counties and municipalities to levy a local communications services tax by ordinance. Provides that the local communication services tax rates in effect as of January 1, 2023, may not be increased prior to January 1, 2026.

Provides that the tax authorized under s. 212.19, F.S., replaces other revenue sources for counties and municipalities and includes the following taxes, charges, fees, and other impositions to the extent that the respective local taxing jurisdictions were authorized to impose those taxes, charges, fees and other impositions before July 1, 2000, and after January 1, 2023:

- The public service tax on telecommunications authorized by s. 166.231(9), Florida Statutes (2001).

- Franchise fees on providers of cable television services as authorized by 47 U.S.C. s. 542.
- Public service tax on prepaid calling arrangements.
- Franchise fees on dealers of communications services that use the public roads or rights-of-way.
- Actual permit fees relating to placing or maintaining facilities in or on public roads or rights-of-way collected from providers of long-distance, cable, and mobile communications services for the fiscal year ending September 30, 1999, excluding permit fees authorized by s. 337.401, F.S., by charter counties and municipalities that elected to continue charging such fees on or before January 1, 2019.
- Application fees, transfer fees, renewal fees, or claims for related costs for granting permission to dealers of communications services, including providers of cable television services as authorized by 47 U.S.C. s. 542, to use or occupy its roads or rights-of-way for the placement, construction, and maintenance of poles, wires, and other fixtures used in the provision of communications services.

Provides that, with respect to a noncharter county, the tax authorized under s. 212.19, F.S., replaces franchise fees on providers of cable television services as authorized by 47 U.S.C. s. 542.

Prohibits any increases to discretionary sales surtax levied under s. 212.055, F.S., on or after January 1, 2023, from being added to the local communications services tax prior to January 1, 2026.

Section 3. (p. 5): This act shall take effect upon becoming a law.

2. DOES THE DEPARTMENT EXPECT TO DEVELOP, ADOPT, MODIFY OR ELIMINATE ANY RULES, REGULATIONS, POLICIES, OR PROCEDURES? ☒ YES ☐ NO

If yes, explain:	This state component rate change will require a TIP, modification of the CST return (DR-700016), the electronic filing programming, rate charts, CST info on web page, and brochures.
Rule(s) impacted (provide references to F.A.C., etc.):	Rule 12A-19.100, F.A.C.

3. WHAT IS THE POSITION OF AFFECTED CITIZENS OR STAKEHOLDER GROUPS? N/A

4. DOES THE BILL REQUIRE THE DEPARTMENT TO SUBMIT, MODIFY OR DELETE ANY REPORTS, STUDIES OR PLANS? ☐ YES ☒ NO

If yes, provide a description:	
Date Due:	
Bill Section Number(s):	

5. ARE THERE ANY GUBERNATORIAL APPOINTMENTS OR CHANGES TO EXISTING BOARDS, TASK FORCES, COUNCILS, COMMISSIONS, ETC. REQUIRED BY THIS BILL? ☐ YES ☒ NO

Board:	
Board Purpose:	
Who Appoints:	
Changes:	
Bill Section Number(s):	

FISCAL ANALYSIS

6. DOES THE BILL HAVE A FISCAL IMPACT TO LOCAL GOVERNMENT? The Department of Revenue does not conduct this analysis. The Revenue Estimating Conference will determine the revenue impact, if any, to local governments.

7. DOES THE BILL HAVE A FISCAL IMPACT TO STATE GOVERNMENT?

Revenues:	The Department of Revenue does not conduct this analysis. The Revenue Estimating Conference will determine the revenue impact, if any, to state government.
Expenditures: ***(Department of Revenue expenditures and operational impacts)***	☐ NO IMPACT ☒ LESS THAN $25,000 ☐ MORE THAN $25,000 ☐ UNABLE TO DETERMINE ☐ OPERATIONAL IMPACT ONLY
Does the legislation contain an appropriation to the Department?	☐ YES ☒ NO

8. DOES THE BILL HAVE A FISCAL IMPACT TO THE PRIVATE SECTOR? The Department of Revenue does not conduct this analysis.

9. DOES THE BILL INCREASE OR DECREASE TAXES, FEES OR FINES? The Department of Revenue does not conduct this analysis. The Revenue Estimating Conference will determine the revenue impact on state and local government, if any.

TECHNOLOGY IMPACT

If any, see attached Fiscal Impact Analysis.

FEDERAL IMPACT

If any, see Additional Comments section below.

ADDITIONAL COMMENTS

10. STATUTE(S) AFFECTED: Sections 202.12 and 202.19, F.S.

11. HAS BILL LANGUAGE BEEN ANALYZED EARLIER THIS SESSION? ☒ YES ☐ NO
If no, go to #12. If yes:

A. Identify bill number or source. HB 1153

B. Were issues/problems identified? ☐ YES ☐ NO

a. If yes, have they been resolved? ☐ YES ☐ NO **If no, briefly explain.**

C. Are new issues/problems created? ☐ YES ☐ NO **If yes, briefly identify.**

12. DOES THE BILL PRESENT DIFFICULTY IN IMPLEMENTATION, ADMINISTRATION OR ENFORCEMENT? ☒ YES ☐ NO

If yes, describe administrative problems, technical errors, or other difficulties:

Section 2. Authorization to impose local communications services tax. (pp. 2-6):

Lines 107-110:

This section does not indicate when a change to the discretionary sales surtax that is levied on or after January 1, 2023, would be included in the local communications services tax. Currently, per s. 202.19(5), F.S., the discretionary sales surtax is part of the local communications services tax and the rate is determined per s. 202.20(3), F.S. Changes in the rate of the discretionary sales surtax affect discretionary sales surtax rate for communications services tax purposes per 202.20(3), F.S.

This bill section removes the addition of the discretionary sales surtax imposed pursuant to s. 212.055, F.S., to the local tax rate imposed by counties and municipalities. However, the bill does not revise section 212.054(2)(a), F.S., referencing the imposition of surtax on communications services. Section 212.054(2), F.S., currently states in part:

> The tax imposed by the governing body of any county authorized to so levy pursuant to s. 212.055 shall be a discretionary surtax on all transactions occurring in the county which transactions are subject to the state tax imposed on sales, use, services, rentals, admissions, and other transactions by this chapter and communications services as defined for purposes of chapter 202. The surtax, if levied, shall be computed as the applicable rate or rates authorized pursuant to s. 212.055 times the amount of taxable sales and taxable purchases representing such transactions. . . .

13. RECOMMENDED CORRECTIONS:

Line 63:

by s. 166.231(9), Florida Statutes (2000 ~~2001~~).

Line 68:

that use the public roads or rights-of-way, up to the limit set forth in s. 337.401.

Line 109:

to the local communications services tax under this section

14. OTHER:

The Department recommends adding the requirement provided on lines 52-53 to s. 202.21, F.S., which relates, in part, to effective dates.

Lines 54-60: It is unclear what is intended by the time period of July 1, 2000, and January 1, 2023, where revenue sources of municipalities and counties are to be replaced by the tax authorized by this section. Local governments have been prohibited from imposing the taxes, charges and fees discussed in this paragraph since July 1, 2000. Is the intent for local governments to be able to impose such taxes, charges and fees after January 1, 2023?

Line 68: The Department recommends adding “up to the limit set forth in s. 337.401” to be consistent with s. 202.20(2)(b)1.d., F.S.

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 Committee on Regulated Industries

BILL:	SB 1380
INTRODUCER:	Senator Martin
SUBJECT:	Municipal Electric Utilities
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schrader	Imhof		**Pre-meeting**
2.				
3.				

I. Summary:

SB 1380 makes revisions to Florida's public utility code to establish that if a municipal electric utility operates outside of the municipality's corporate boundaries, the Florida Public Service Commission (PSC) must regulate that utility as a public utility. This would essentially regulate such a municipal utility as if it was an investor-owned electric utility and give the PSC additional authority over such a municipal utility's rate setting and customer service complaints.

II. Present Situation:

Florida Public Service Commission

The PSC is an arm of the legislative branch of government.[1] The role of the PSC is to ensure Florida's consumers receive utility services, including electric, natural gas, telephone, water, and wastewater, in a safe, affordable, and reliable manner.[2] In order to do so, the PSC exercises authority over public utilities in one or more of the following areas: rate base or economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.[3]

[1] Section 350.001, F.S.
[2] *See* Florida Public Service Commission, *Florida Public Service Commission Homepage*, http://www.psc.state.fl.us (last visited Mar 3, 2023).
[3] Florida Public Service Commission, *About the PSC*, https://www.psc.state.fl.us/about (last visited Mar 16, 2023).

Jurisdiction of the Florida Public Service Commission for Electric Utilities

The PSC monitors the safety and reliability of the electric power grid[4] and may order the addition or repair of infrastructure as necessary.[5] The PSC has broad jurisdiction over the rates and service of investor-owned electric utilities[6]—defined under s. 366.02, F.S., as "public utilities."[7] Excluded from the definition of public utilities, however, are cooperatives organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof.[8] Thus, the PSC does not fully regulate municipal electric utilities or rural electric cooperatives.

However, the PSC does have jurisdiction over these types of utilities with regard to rate structure, territorial boundaries, bulk power supply operations, and planning.[9] Municipally owned utility rates and revenues are regulated by their respective local governments. Rates and revenues for a cooperative utility are regulated by its governing body elected by the cooperative's membership.

Municipal Electric Utilities in Florida

A municipal electric utility is an electric utility owned and operated by a municipality. Chapter 366, F.S., provides the majority of electric and gas utility regulations for Florida. While ch. 366, F.S., does not provide a definition, per se, for a "municipal electric utility," this terminology and the concept of these types of utilities appear throughout the chapter. Currently, Florida has 33 municipal electric utilities that serve over 14 percent of the state's electric utility customers.[10] The unified interests of municipal electric utilities are represented by the Florida Municipal Electric Association (FMEA).[11]

Rural Electric Cooperatives in Florida

At present, Florida has 18 rural electric cooperatives, with 16 of these cooperatives being distribution cooperatives and two being generation and transmission cooperatives. These cooperatives are represented by the Florida Electric Cooperative Association (FECA).[12] These cooperatives operate in 57 of Florida's 67 counties and have more than 2.7 million customers.[13] Florida rural electric cooperatives serve a large percentage of area, but have a low customer density. Specifically, Florida cooperatives serve approximately 10 percent of Florida's total electric utility customers, but their service territory covers 60 percent of Florida's total land

[4] Section 366.04(5) and (6), F.S.
[5] Section 366.05(1) and (8), F.S.
[6] Section 366.05, F.S.
[7] Section 366.02(8), F.S., defines a "public utility," in part, as "every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public in the state."
[8] *Id.*
[9] Florida Public Service Commission, *About the PSC, supra* note 3.
[10] Florida Municipal Electric Association, *About Us,* https://www.flpublicpower.com/about-us (last visited Mar. 17, 2023).
[11] *Id.*
[12] Florida Electric Cooperative Association, *Members*, https://feca.com/members/ (last visited Mar 17, 2023).
[13] Florida Electric Cooperative Association, *Our History*, https://feca.com/our-history/ (last visited Mar 17, 2023).

mass. Each cooperative is governed by a board of cooperative members elected by the cooperative's membership.[14]

Public Electric Utilities in Florida

There are four investor-owned electric utility companies (IOUs) in Florida: Florida Power & Light Company (FPL), Duke Energy Florida (Duke), Tampa Electric Company (TECO), and Florida Public Utilities Corporation (FPUC).[15] IOU rates and revenues are regulated by the PSC, and the utilities must file periodic earnings reports, which allow the PSC to monitor earnings levels on an ongoing basis and adjust customer rates quickly if a company appears to be overearning.[16]

Section 366.041(2), F.S., requires public utilities to provide adequate service to customers. As compensation for fulfilling that obligation, s. 366.06, F.S., requires the PSC to allow the IOUs to recover honestly and prudently invested costs of providing service, including investments in infrastructure and operating expenses used to provide electric service.[17]

Regulatory Assessment Fees

The PSC collects Regulatory Assessment Fees (RAFs) from all of the utilities under its jurisdiction. RAFs, license fees, other fees, and any other charges collected by the PSC are credited to the Florida Public Service Regulatory Trust Fund (Trust Fund).[18] Florida law generally directs the PSC to manage its trust fund in such a manner that each industry funds its own regulation.[19] While the PSC's budget is set annually by the Legislature, as approved by the Governor, Florida general revenue funds are not used to support the PSC's regulatory activities.

Rates for RAFs are set by PSC rule, subject to maximum rates established by statute. RAFs are charged as a percentage of gross operating revenues derived from intrastate business, subject to certain exclusions. Chart 1 below provides the current RAFs for Florida utilities, by industry.

Chart 1: Regulatory Assessment Fees by Florida Utility Industry

Utility Type	Current RAF	Statutory Maximum

[14] *Id.*
[15] Florida Public Service Commission, *2022 Facts and Figures of the Florida Utility Industry*, pg. 5 ,Apr. 2022 (available at: https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Reports/General/FactsAndFigures/April%202022.pdf)
[16] PSC, *2022 Annual Report*, p. 6, (available at: https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Reports/General/AnnualReports/2022.pdf)(last visited: Mar. 16, 2023).
[17] *Id.*
[18] Section 350.113, F.S.
[19] Specifically:

- Section 364.336(2) and (3), F.S., requires the PSC to reduce the RAFs for telecommunications industry after the Regulatory Reform Act of 2011 to reflect the PSC's reduced regulatory oversight of that industry;
- Section 367.145(3), F.S., requires that RAFs collected pursuant to the water and wastewater RAF collection authorization may only be used to cover the cost of regulating water and wastewater systems. Also, fees collected under the electricity utility industry, gas utility industry, and telecommunications industry RAF collection authorizations may not be used to pay for the cost of water and wastewater regulation.
- Section 368.109, F.S., states that the RAFs set by the PSC for the natural gas transmission (i.e. natural gas pipeline) industry must, to the extent practicable, be related to the cost of regulating that industry.

Investor-owned Gas Utilities	0.5%[20]	0.5%[21]
Municipal Gas Utilities	0.1919%[22]	0.25%[23]
Natural Gas Transmission	0.25%[24]	0.25%[25]
Telecommunications Companies	0.16%[26]	0.25%[27]
Water and Wastewater Utilities	4.5%[28]	4.5%[29]
Investor-owned Electric Utilities	0.072%[30]	0.125%[31]
Municipal Electric Utilities and Rural Electric Cooperatives	0.015625%[32]	0.015625%[33]

By a significant margin, municipal electric utilities and rural electric cooperatives have the lowest RAF rates of all Florida utilities (the next closest is investor-owned electric utilities, with RAF rates over 4.5 times that of municipal electric utilities and rural electric cooperatives). These rates reflect the comparatively lower regulatory costs the PSC incurs in regulating these types of utilities due, in large part, to the PSC having limited jurisdiction over them.

Limited Public Service Commission Regulation over Municipal Electric Utilities Nationally

Often, state public service commission jurisdiction over the activities of municipal electric utilities is limited. The typical reasoning for state public service commissions' limited (or no) jurisdiction and regulatory authority over municipal electric utilities is that they are effectively

[20] Fla. Admin. Code R. 25-7.0131, (2013).
[21] Section 366.14, F.S.
[22] Fla. Admin. Code R. 25-7.0131, (2013).
[23] Section 366.14, F.S.
[24] Fla. Admin. Code R. 25-7.101, (2013).
[25] Section 368.109, F.S.
[26] Fla. Admin. Code R. 25-4.0161, (2011).
[27] Section 364.336, F.S.
[28] Fla. Admin. Code R. 25-30.120, (2013).
[29] Section 367.145, F.S.
[30] Fla. Admin. Code R. 25-6.0131, (2013).
[31] Section 366.14, F.S.
[32] Fla. Admin. Code R. 25-6.0131, (2013).
[33] Section 366.14, F.S.

regulated by the residents of the municipalities which own and operate them.[34] Thus, customer complaints can be handled by municipal officials who are accountable to the populace they serve through the local democratic process. Revenues from the utility can be reinvested in the system or be used as additional funds—in addition to tax revenue—to be invested in municipal services, like fire and police, and facilities.[35]

However, municipal electric utilities do not always operate solely within their corporate limits. Thus, utility revenue invested in non-utility municipal services may not actually benefit a person living outside the municipality's corporate boundaries. Also, such persons may also not be able to vote on the municipal officials with control over the utility.

For customers who live outside of the corporate limits of the municipality that owns and operates the municipal utility, the opportunity for redress may be limited as the officials of that municipality may not be directly accountable (at least through the electoral process) to a non-resident. Other concerns about local governance or control of municipal utilities include lack of experience or expertise in utility regulation or governance (at least as compared to state public service commissions), lack of investigative powers and viable procedures for handling of complaints or standards violations, ratemaking influence, and pursuit of other social or political goals over operational efficiency.[36]

Given concerns about the nature of local or self-regulation of municipal utilities, many states fully or partially regulate these utilities' activities.[37] This includes several states that regulate municipal electric utility rates in some manner when those utilities operate outside of the

[34] Paul A. Meyer, *The Municipally Owned Electric Company's Exemption from Utility Commission Regulation: The Consumer's Perspective*, 33 Case W. Rsrv. L. Rev. 294, 312-14 (1983) (Available at: https://scholarlycommons.law.case.edu/caselrev/vol33/iss2/7).
[35] Florida Municipal Electric Association, *Benefits of Public Power*, https://www.flpublicpower.com/benefits-of-public-power (last visited Mar. 15, 2023).
[36] Paul A. Meyer, *supra* note 34.
[37] American Public Power Association, *Authority of State Commissions to Regulate Rates of Public Power Utilities*, June 2014 (available at https://www.publicpower.org/system/files/documents/Rate%20Regulation%20of%20PP%20chart%20412.pdf), and Paul A. Meyer, *supra* note 34.

municipal corporate limits. These states include Colorado,[38] Kansas,[39] Mississippi,[40] New Hampshire,[41] New Jersey,[42] Pennsylvania,[43] South Carolina,[44] and Wyoming.[45]

Current Municipal Electric Utilities Serving Customers Outside of Their Corporate Boundaries in Florida

In August 2018, PSC staff issued a data request to FMEA for information regarding the percentage of customers who are inside and outside of the municipality's city limits or corporate boundaries. Of the 29 counties listed in FMEA's response, FMEA identified 25 municipalities that provided electric services outside of their corporate boundaries.[46]

Florida Office of Public Counsel

The Florida Office of Public Counsel (OPC) is established and regulated pursuant to ss. 350.061 through 350.0614, F.S. The purpose of the OPC is to provide legal representation for the people of the state in utility related matters in proceedings before the PSC, and in proceedings before counties pursuant to s. 367.171(8), F.S. It intervenes in rate proceedings before the PSC and counties involving electric utilities, as well as in proceedings involving gas, water, and wastewater utilities.[47]

[38] Colo. Rev. Stat. s. 40-3.5-102, provides that "in the event that any rate, charge, tariff, or voluntary plan established within the authorized service area which lies outside the jurisdictional limits of the municipality varies from the rate, charge, tariff, or voluntary plan established for the same class of customers or recipients of any such service within the authorized service area which lies inside the jurisdictional limits of the municipality, such rate, charge, tariff, or voluntary plan shall not become effective until reviewed and approved by the commission."
[39] Kan. Stat. s. 66-104, provides that "the term 'public utility' shall also include that portion of every municipally owned or operated electric or gas utility located in an area outside of and more than three miles from the corporate limits of such municipality."
[40] Miss. Code. ss. 77-3-3 and 77-3-3, provides that the Mississippi Public Service Commission has jurisdiction over the portions of municipal utilities operating more than one mile outside of that municipality's boundaries.
[41] N.H. Rev. Stat. s. 362:4-a, provides that "a municipal corporation furnishing electric utility services shall not be considered a public utility under this title if it serves customers outside of its municipal boundaries and charges such customers a rate no higher than that charged to its customers within the municipality, and provides those customers a quantity and quality of electricity equal to that served customers within the municipality."
[42] N.J. Stat. s. 40:62-24, provides that "every municipality in supplying electricity…beyond its corporate limits is hereby declared to be a public utility. The Board of Public Utilities shall have the same supervision and regulation of, and jurisdiction and control over such municipality in respect to its acts in supplying electricity…beyond its corporate limits, and of and over the property, property rights, equipment, facilities and franchises used in supplying electricity…beyond its corporate limits as over other public utilities."
[43] 66 Pa. Stat. and Cons. Stat. s. 1301, provides that "public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same force, and in like manner, as if such service were rendered by a public utility."
[44] S.C. Code s. 58-27-10, provides that the "term 'electrical utility' includes municipalities to the extent of their business, property, rates, transactions, and operations without the corporate limits of the municipality."
[45] Wyo. Stat. s 37-1-101, provides that municipal utilities are exempt from public utility regulation by the Wyoming Public Service Commission except "as may extend services outside the corporate limits of a municipality."
[46] Florida Public Service Commission, *Bill Analysis for SB 1380* (Mar. 17, 2023) (on file with the Senate Regulated Industries Committee).
[47] Florida Office of Public Counsel, *About Us*, https://www.floridaopc.gov/Pages/About.aspx (last visited: Mar. 17, 2023).

III. Effect of Proposed Changes:

Section 1 amends s. 366.02, F.S., to expand the definition of public utility to include a municipality, or any agency thereof, supplying electricity to any retail electric customer receiving service at a physical address located outside that municipality's corporate boundaries. Based on the 2018 data received by the PSC from the FMEA, this could increase the number of public electric utilities under the PSC's jurisdiction from four under current law, to 29.

Section 2 amends s. 366.04, F.S., to expand the PSC's jurisdiction to include the municipal entities defined as "public utilities" in Section 1 of the bill. The bill also provides that such utilities qualify as "public utilities" and shall be regulated under ch. 366, F.S., for a minimum of five years. The section also directs the PSC to adopt rules to implement these provisions.

Section 3 of the bill amends s. 366.11, F.S., to make conforming revisions to changes made by the act.

Section 4 of the bill provides an effective date of July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

As discussed in more detail below, SB 1380 could have an impact on regulatory assessment fees (RAFs) paid by utilities impacted by the bill and may impact the availability of municipal bonds for such utilities. This could have a private sector impact by raising utility rates for the customers of these utilities—at least as a result of these factors. However, this rate impact could be more than offset by the PSC rate setting authority established under the bill and the more stringent rate setting requirements provided in ch. 366, F.S., for public utilities. Thus, how the revised PSC regulation of each of these utilities would impact these utilities' overall rates is unknown at this time.

C. Government Sector Impact:

In its analysis the PSC states that it would anticipate a workload increase as a result of SB 1380 as the number of public electric utilities under its jurisdiction could increase from four to 25. However, such an impact would be based upon newly regulated municipal-owned utilities' decisions regarding the seeking of cost recovery. However, given that any of these newly regulated public utilities must seek PSC approval for any change in rates, the PSC expects the workload impact to be significant and additional staffing and other resources may be needed (the PSC anticipates that the number of rate cases "would immediately sextuple"). Also, as a result of the bill, any service complaints for these newly regulated public utilities would be handled by the PSC instead of, as is currently, members of the municipal Commission or municipal utility board. Any such complaints filed with the PSC would also require a point of entry to request an administrative hearing by the affected customers and utility. This function will also require additional resources for the PSC. [48]

With an increase in rate cases, the OPC, which represents ratepayers in front of the PSC, may also see a significant increase in potential work load. The OPC would also likely require additional staffing and other resources to respond to the revisions pursuant to this bill.

By a significant margin, municipal electric utilities and rural electric cooperatives have the lowest RAF rates of all Florida utilities (the next closest is investor-owned electric utilities, with RAF rates over 4.5 times that of municipal electric utilities and rural electric cooperatives). These rates reflect the comparatively lower regulatory costs the PSC incurs in regulating these types of utilities due, in large part, to the PSC having limited jurisdiction over them. However, municipal electric utilities that fall under the jurisdiction of the PSC as a public utility, as a result of the bill, would pay a RAF rate about 4.5 times higher than they do currently. This increased fee may be passed-through to the customers of those utilities as part of their rates.

Municipalities with electric utilities that would be classified as public utilities under SB 1380 would likely incur additional regulatory costs under the bill as they will have new regulatory responsibilities to the PSC.

[48] Public Service Commission, *supra* note 46.

The PSC also states that it would expect, based on its recent history, that the rules it would adopt pursuant to SB 1380 would face an administrative challenge.[49]

Municipal electric utilities currently benefit from being able to utilize low-cost, tax-exempt, municipal bonds to finance utility improvements. It is unclear whether regulating these utilities as public utilities could impact the availability of these bonds. If such access were to negatively impact the availability of these bonds, it could increase rates for these utilities in the future.[50]

VI. Technical Deficiencies:

None.

VII. Related Issues:

In the proposed revisions to s. 366.02(8), F.S., the definition of public utility is effectively expanded to include municipal electric utilities that operate outside of their respective municipality's corporate boundaries. The revisions to s. 366.04(10), F.S., in setting the revised jurisdiction of the PSC, provide that such utilities "qualify as a public utility and shall be regulated under this chapter for a minimum of 5 years." Chapter 366, F.S., establishes regulations for public utilities, rural electric cooperatives, natural gas utilities, and municipal electric utilities. Thus, it is unclear under the revisions to s. 366.04(10), F.S., if a municipal-owned utility was to cease serving areas outside of its corporate boundaries whether it would immediately be reverted to being regulated as a municipal electric utility or would continue to be regulated as a public utility for at least five years. If the intent is to have these municipal utilities be regulated as public utilities for these five years, this line could be revised to read, "qualify as a public utility and shall be regulated *as such* under this chapter for a minimum of 5 years."

The provisions of SB 1380 potentially make an over seven-fold increase to the number of public electric utilities under the regulation of the PSC. The effective date of July 1, 2023, may not give the PSC adequate time to adjust organizationally in terms of physical plant, staffing, and processes for such a substantial increase in the number of public electric utilities under its rate setting authority. In addition, municipalities may need time to adjust organizationally as they have not previously been subject to PSC rate setting or service complaint authority.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 366.02, 366.04, and 366.11.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[49] *Id.*
[50] *Id.*

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Regulated Industries (Martin) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 166.201, Florida Statutes, is amended to read:

166.201 Taxes and charges.—

(1) A municipality may raise, by taxation and licenses authorized by the constitution or general law, or by user charges or fees authorized by ordinance, amounts of money which

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are necessary for the conduct of municipal government and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law.

(2)(a) A municipality that owns and operates an electric, natural gas, water, or wastewater utility may fund or finance general government functions using a portion of the revenues generated from rates, fees, and charges for the provision of such utility service. The portion of utility revenues that may be used during a fiscal year to fund or finance general government functions, after payment of all utility expenses, may not exceed:

1. For revenues generated from electric utility operations, a transfer rate equal to the amount derived by applying the average of the midpoints of the rates of return on equity approved by the Public Service Commission for each investor-owned electric utility in this state to the municipal electric utility's revenues.

2. For revenues generated from natural gas utility operations, a transfer rate equal to the amount derived by applying the average of the midpoints of the rates of return on equity approved by the Public Service Commission for each investor-owned natural gas utility in this state to the municipal natural gas utility's revenues.

3. For revenues generated from water or wastewater operations, a transfer rate equal to the amount derived by applying the rate of return on equity established by the Public Service Commission under s. 367.081(4)(f) to the municipal water or wastewater utility's revenues.

(b) Except as provided in paragraph (c), the transfer rate

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applied to municipal utility revenues under subparagraphs (a)1., 2., and 3. shall be reduced as follows:

1. If more than 15 percent of a municipal utility's retail customers, as measured by total meters served, are located outside the municipal boundaries, by 150 basis points.

2. If more than 30 percent of a municipal utility's retail customers, as measured by total meters served, are located outside the municipal boundaries, by 300 basis points.

3. If more than 45 percent of a municipal utility's retail customers, as measured by total meters served, are located outside the municipal boundaries, by 450 basis points.

(c) The reductions specified in paragraph (b) do not apply to a municipal utility service if the utility service is governed by a utility authority board that, through the election of voting members from outside the municipal boundaries, provides for representation of retail customers located outside the municipal boundaries approximately proportionate to the percentage of such customers, as measured by total meters served, that receive service from the utility.

Section 2. Subsection (1) of section 180.191, Florida Statutes, is amended to read:

180.191 Limitation on rates charged consumer outside city limits.—

(1) Any municipality within the state operating a water or sewer utility outside of the boundaries of such municipality shall charge consumers outside the boundaries rates, fees, and charges determined in one of the following manners:

(a) It may charge the same rates, fees, and charges as consumers inside the municipal boundaries. ~~However, in addition~~


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~~thereto, the municipality may add a surcharge of not more than 25 percent of such rates, fees, and charges to consumers outside the boundaries.~~ Fixing of such rates, fees, and charges in this manner does ~~shall~~ not require a public hearing except as may be provided for service to consumers inside the municipality.

(b)1. It may charge rates, fees, and charges that are just and equitable and that ~~which~~ are based on the same factors used in fixing the rates, fees, and charges for consumers inside the municipal boundaries. ~~In addition thereto, the municipality may add a surcharge not to exceed 25 percent of such rates, fees, and charges for said services to consumers outside the boundaries. However, the total of all~~ Such rates, fees, and charges for the services to consumers outside the boundaries may ~~shall~~ not be more than 25 ~~50~~ percent greater than ~~in excess of~~ the total amount the municipality charges consumers served within the municipality for corresponding service. ~~No~~ Such rates, fees, and charges may not ~~shall~~ be fixed until after a public hearing at which all of the users of the water or sewer systems; owners, tenants, or occupants of property served or to be served thereby; and all others interested ~~shall~~ have an opportunity to be heard concerning the proposed rates, fees, and charges. Any change or revision of such rates, fees, or charges may be made in the same manner as such rates, fees, or charges were originally established, but if such change or revision is to be made substantially pro rata as to all classes of service, both inside and outside the municipality, a ~~no~~ hearing or notice is not ~~shall be~~ required.

2. Any municipality within this state operating a water or sewer utility that provides service to consumers within the

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boundaries of a separate municipality through the use of a water treatment plant or sewer treatment plant located within the boundaries of that separate municipality may not charge consumers in the separate municipality more than the rates, fees, and charges imposed on consumers inside its own municipal boundaries.

Section 3. This act shall take effect July 1, 2024.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to municipal utilities; amending s. 166.201, F.S.; authorizing certain municipalities to fund or finance general government functions with a specified portion of revenues from certain utility operations; establishing limits on utility revenue transfers for municipal utilities that serve customers located outside the municipal boundaries; amending s. 180.191, F.S.; modifying provisions relating to permissible rates, fees, and charges imposed by municipal water and sewer utilities on customers located outside the municipal boundaries; providing an effective date.

By Senator Martin

33-01359-23 20231380__

A bill to be entitled

An act relating to municipal electric utilities; amending s. 366.02, F.S.; revising the definition of the term "public utility" to include a municipality supplying electricity to any electric retail customer receiving service at a physical address located outside its corporate boundaries; amending s. 366.04, F.S.; requiring certain municipalities to be treated as public utilities for a specified timeframe; requiring the Florida Public Service Commission to adopt rules; amending s. 366.11, F.S.; conforming provisions to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (8) of section 366.02, Florida Statutes, is amended to read:

366.02 Definitions.—As used in this chapter:

(8) "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof, except for a municipality or any agency thereof supplying electricity to any electric retail customer receiving service at a physical address located

33-01359-23 20231380__

outside its corporate boundaries; any dependent or independent special natural gas district; any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers; any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, or owning or operating facilities beyond the outlet of a meter through which natural gas is supplied for compression and delivery into motor vehicle fuel tanks or other transportation containers, unless such person also supplies electricity or manufactured or natural gas.

Section 2. Subsection (10) is added to section 366.04, Florida Statutes, to read:

366.04 Jurisdiction of commission.—

(10) A municipality or any agency thereof supplying electricity to any electric retail customer receiving service at a physical address located outside its corporate boundaries qualifies as a public utility and shall be regulated under this chapter for a minimum of 5 years. The commission shall adopt rules to implement this subsection.

Section 3. Subsection (1) of section 366.11, Florida Statutes, is amended to read:

366.11 Certain exemptions.—

(1) ~~No provision of~~ This chapter does not ~~shall~~ apply in any manner, other than as specified in ss. 366.04, 366.05(7) and (8), 366.051, 366.055, 366.093, 366.095, 366.14, 366.80-366.83,

and 366.91, to utilities owned and operated by municipalities, except those defined as public utilities in s. 366.02 ~~whether within or without any municipality~~, or by cooperatives organized and existing under the Rural Electric Cooperative Law of the state, or to the sale of electricity, manufactured gas, or natural gas at wholesale by any public utility to, and the purchase by, any municipality or cooperative under and pursuant to any contracts now in effect or which may be entered into in the future, when such municipality or cooperative is engaged in the sale and distribution of electricity or manufactured or natural gas, or to the rates provided for in such contracts.

Section 4. This act shall take effect July 1, 2023.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Criminal Justice, *Chair*
Appropriations
Appropriations Committee on Criminal and Civil Justice
Appropriations Committee on Health and Human Services
Community Affairs
Environment and Natural Resources
Ethics and Elections

SELECT COMMITTEE:
Select Committee on Resiliency

SENATOR JONATHAN MARTIN
33rd District

March 13, 2023

The Honorable Joe Gruters
Senate Regulated Industries Committee, Chair
525 Knott Building
404 South Monroe Street
Tallahassee, FL 32399

RE: SB 1380 - An act relating to Municipal Electric Utilities

Dear Chair Gruters:

Please allow this letter to serve as my respectful request to place SB 1380, relating to Municipal Electric Utilities, on the next committee agenda.

Your kind consideration of this request is greatly appreciated. Please feel free to contact my office for any additional information.

Sincerely,

Jonathan Martin
Senate District 33

Cc: Booter Imhof, Staff Director
Susan Datres, Administrative Assistant

REPLY TO:
❒ 2000 Main Street, Suite 401, Fort Myers, Florida 33901 (239) 338-2570
❒ 311 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5033

Senate's Website: *www.flsenate.gov*

KATHLEEN PASSIDOMO
President of the Senate

DENNIS BAXLEY
President Pro Tempore

Date: _____

Agency Affected:	Public Service Commission	
Program Manager:	Lance Watson	Telephone: 413.6125
Agency Contact:	Katherine Pennington	Telephone: 413.6596
Respondent:	Katherine Pennington	Telephone: 413.6596

RE: SB 1380

I. SUMMARY:

SB 1380 amends Section 366.02, Florida Statutes (F.S.), to revise the definition of "public utility" to include a municipality supplying electricity to any electric retail customer receiving service at a physical address located outside its corporate boundaries. The bill amends Section 366.04, F.S., to require certain municipalities to be treated as public utilities for a specified timeframe and to require the Florida Public Service Commission (Commission) to adopt rules. The bill also amends Section 366.11, F.S., conforming to changes made by the act. This bill will take effect on July 1, 2023.

II. PRESENT SITUATION:

Pursuant to Section 366.02(8), F.S., "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" does not include a municipality or any agency thereof.

Pursuant to Section 366.04(1), F.S., the Commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service. Public utilities may seek Commission approval to establish and change rates to recover the costs of electric service through various mechanisms, including: (1) base rates for the recovery of the capital investments associated with generation, transmission or distribution infrastructure, and a reasonable return on investment, operating and maintenance expenses, administrative costs and taxes; (2) cost recovery clauses for variable costs such as fuel and purchased power, and statutorily mandated cost recovery clauses for environmental, storm protection and energy conservation costs; and (3) interim surcharges for specific, time limited purposes such as storm restoration costs. Chapter 366, F.S., also provides the Commission with authority over public utilities regarding: (1) contracts for the purchase of electricity from cogenerators and small power producers; (2) energy conservation goals and programs offered to customers; (3) storm protection plans; (4) pole attachment rates, terms and conditions; (4) interconnection and net metering of customer-owned renewable generation; and (5) resolution of consumer complaints regarding billing or service matters

Pursuant to Section 366.11(1), F.S., no provision of chapter 366 shall apply in any manner, other

than as specified, to utilities owned and operated by municipalities. Currently, the Commission's jurisdiction over municipal utilities is limited to territorial matters, rate structure design, oversight of power conservation and reliability within a coordinated grid, enforcement of safety standards for transmission and distribution facilities, prescribing uniform systems and classifications of accounts, and requiring certain reports necessary to exercise its regulatory authority. The Commission's jurisdiction over municipal utilities does not include setting the rates of or regulating service by municipal utilities.

On August 29, 2018, Commission staff issued a data request to the Florida Municipal Electric Association (FMEA) that sought to identify, for each Florida municipal electric utility, the percentage of customers who are inside and outside of the municipality's city limits or corporate boundaries. According to FMEA's response to staff's 2018 data request, 25 of the 29 Florida municipalities listed were providing electric utility services to customers outside their boundaries.

III. EFFECT OF PROPOSED CHANGES:

SB 1380 amends Section 366.02(8), F.S., to expand the definition of a public utility to include a municipality or any agency thereof supplying electricity to any retail electric customer receiving service at a physical address located outside its corporate boundaries. Based upon the 2018 data request mentioned above, this could apply to as many as 25 municipalities.

The bill amends Section 366.04, F.S, to add subsection (10), which expands the Commission's jurisdiction to include municipalities defined as public utilities under Section 366.02. The Commission will have new authority to set rates and regulate the service of such municipal utilities. The bill also states that municipalities defined as public utilities will be regulated by the Commission for a minimum of 5 years. It is inferred that absent Legislative action, municipal electric utilities will continue to be regulated as a public utility beyond the five year minimum. Municipal electric utilities currently benefit from lower cost, tax-exempt municipal bonds to finance investments in utility infrastructure. It is unclear whether, and to what extent, the bill will impact the status of municipal bonds that are outstanding. The bill may also place upward pressure on the cost of capital and in turn, rates charged to customers, if the bill precludes future access to municipal bonds by these utilities.
This bill will take effect on July 1, 2023.

IV. ESTIMATED FISCAL IMPACTS ON STATE AGENCIES:

(in this section please provide information concerning FTEs. How many positions, if any will be necessary to enact this bill. Also, what specific positions will be needed.)

The workload of the Commission will increase due to the expansion of the Commission's jurisdiction to include municipalities that qualify as public utilities under this act. The incremental impact will depend upon regulated municipalities' decisions to seek cost recovery. However, considering that the majority of municipal utilities would qualify as public utilities under the bill, and the fact that any change in rates by a public utility must be approved by the Commission, along with the other requirements associated with public utilities described in the

analysis, the impact on Commission workload will likely be significant.

Municipal electric utilities pay a regulatory assessment fee to the Commission that is commensurate with current authority and resulting workload. Public electric utilities pay a comparatively higher regulatory assessment fee that reflects the workload associated with the Commission's authority over these utilities. Municipal electric utilities that fall under the jurisdiction of the Commission as a public utility as a result of the bill, would pay a higher regulatory assessment fee. However, additional FTEs and expenses may be needed for the workload associated with approximately 25 utilities.

	(FY 23-24) Amount / FTE	(FY 24-25) Amount / FTE	(FY 25-26) Amount / FTE
A. Revenues			
1. Recurring	$0/0 FTE	$0/0 FTE	$0/0 FTE
2. Non-Recurring	$0/0 FTE	$0/0 FTE	$0/0 FTE
B. Expenditures			
1. Recurring	$0/0 FTE	$0/0 FTE	$0/0 FTE
2. Non-Recurring	$0/0 FTE	$0/0 FTE	$0/0 FTE

V. ESTIMATED FISCAL IMPACTS ON LOCAL GOVERNMENTS:

There will be new regulatory costs for Florida municipalities that qualify as a public utility under this act.

VI. ESTIMATED IMPACTS ON PRIVATE SECTOR:

None known at this time.

VII. LEGAL ISSUES:

A. Does the proposed legislation conflict with existing federal law or regulations? If so, what laws and/or regulations?

No conflicts with existing federal law or regulations have been identified.

B. Does the proposed legislation raise significant constitutional concerns under the U.S. or Florida Constitutions (e.g. separation of powers, access to the courts, equal protection, free speech, establishment clause, impairment of contracts)?

No significant constitutional concerns have been identified. However, it is unknown whether any existing agreements entered into pursuant Section 163.01, F.S., the "Florida

Interlocal Cooperation Act of 1969," would be impaired by this proposed legislation.

The general rule is that "a municipal corporation has no duty or responsibility to supply services to areas outside its municipal boundaries." Allstate Ins. Co. v. City of Boca Raton, 387 So. 2d 478, 479 (Fla. 4th 1980). "[E]xceptions to this general rule do exist. For example, a municipality may be required to extend its services if it has agreed to do so by contract." Allen's Creek Properties, Inc. v. City of Clearwater, 679 So. 2d 1172, 1175 (Fla. 1996). Section 163.01(5), F.S., refers to an interlocal agreement as a contract. Therefore, there is the potential that there exists an interlocal agreement regarding annexation, development, and services that may address the extrajurisdictional provision of electricity that will be impacted by the proposed legislation.

C. Is the proposed legislation likely to generate litigation and, if so, from what interest groups or parties?

Yes.

1. The proposed legislation is likely to increase administrative hearings before the Commission regarding rates, and appeals to the Florida Supreme Court of the final orders entered following such hearings.

Including municipalities with extra-jurisdictional retail electric customers as "public utilities" will mandate that those municipalities seek approval from the Commission for certain utility actions, including all rate setting. Each Commission decision on a request from a public utility provides a point of entry for a person whose substantial interests are affected to file a petition for administrative hearing. Every ratepayer of a municipality that is now a "public utility" will be substantially affected by many Commission decisions on requests by that municipal utility, and may have standing to request an administrative hearing. This expansion of opportunities for administrative petitions to be filed may generate additional litigation in the form of disputed fact hearings before the Commission and appeals to the Florida Supreme Court from Commission decisions.

For reference, Florida has four investor owned electric utilities that recently came before the Commission with rate cases. With potentially as many as 25 municipal utilities qualifying as "public utilities" under the proposed legislation, the number of rate cases would immediately sextuple.

Additionally, regulation of municipal utilities under the proposed legislation would require that any service complaints be resolved by the Commission rather than the elected members of the municipal Commission or municipal utility board. Service complaints filed with the Commission would also require a point of entry to request an administrative hearing by the affected customer(s) and utility.

2. The proposed legislation may result in challenges to rules promulgated under the mandates of the proposed legislation.

Section 2 of SB 1380 at lines 51-52 provides that "[t]he commission shall adopt rules to implement this subsection." The two most recent rule adoptions by the Commission following new legislative mandates have been administratively challenged. See DOAH Case Nos. 19-006137RP (Office of Public Counsel challenge to proposed storm protection plan rules) & 22-000774RP (Bellsouth Communications challenge to proposed pole attachment rules). Based on this recent history, it seems likely that a challenge to rules adopted under SB 1380 would face administrative challenge.

D. Other:

VIII. COMMENTS:

Prepared by: David Frank and Shaw Stiller
Date: 03/16/2023

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 Committee on Regulated Industries

BILL:	SB 408
INTRODUCER:	Senator Perry
SUBJECT:	Fire Sprinkler System Project Permitting
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hunter	Ryon	CA	**Favorable**
2.	Kraemer	Imhof	RI	**Pre-meeting**
3.			RC	

I. Summary:

SB 408 creates a simplified permitting process for certain “fire sprinkler system projects,” as defined in the bill, similar to the current process for fire alarm system projects. Specifically, the bill allows a local enforcement agency to require a fire protection system contractor to submit a permit application and pay a permit fee for a fire sprinkler system project, but may not require the contractor to submit plans or specifications as a condition of obtaining such permit. Such fire sprinkler system project must have at least one inspection to ensure compliance with applicable codes and standards, and a contractor must keep a copy of plans available at inspection. The local enforcement agency must issue a permit for a fire sprinkler system project in person or electronically.

The bill defines a "fire sprinkler system project" to mean a fire protection system alteration of a total of 20 or fewer fire sprinklers, or the installation or replacement of an equal or equivalent sprinkler system component in an existing commercial, residential, apartment, cooperative, or condominium building.

The bill is effective July 1, 2023.

II. Present Situation:

State Fire Marshal and Florida Fire Prevention Code

Florida’s fire prevention and control law, ch. 633, F.S., designates the state’s Chief Financial Officer as the State Fire Marshal. The State Fire Marshal, through the Division of State Fire

Marshal (Division) located within the Department of Financial Services (DFS), is charged with enforcing the provisions of ch. 633, F.S., and all other applicable laws relating to fire safety. The DFS has the responsibility to minimize the loss of life and property in this state due to fire. Pursuant to this authority, the State Fire Marshal regulates, trains, and certifies fire service personnel and fire safety inspectors; investigates the causes of fires; enforces arson laws; regulates the installation of fire equipment; conducts fire safety inspections of state property; and operates the Florida State Fire College.

The State Fire Marshal also adopts by rule the Florida Fire Prevention Code (Fire Code), which contains all fire safety laws and rules that pertain to the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities, and the enforcement of such fire safety laws and rules.

State law requires all municipalities, counties, and special districts with fire safety responsibilities to enforce the Fire Prevention Code as the minimum fire prevention code to operate uniformly among local governments and in conjunction with the Florida Building Code. Each county, municipality, and special district with fire safety enforcement responsibilities must employ or contract with a fire safety inspector (certified by the State Fire Marshal) to conduct all fire safety inspections required by law.

Fire Protection Systems

A "fire protection system" is a system individually designed to protect the interior or exterior of a specific building or buildings, structure, or other special hazard from fire. A fire protection system includes, but is not limited to:[1]

- Water sprinkler systems;
- Water spray systems;
- Foam-water sprinkler systems;
- Foam-water spray systems;
- Carbon dioxide systems;
- Foam extinguishing systems;
- Dry chemical systems; and
- Halon and other chemical systems used for fire protection use.

Fire protection systems also include any tanks and pumps connected to fire sprinkler systems, overhead and underground fire mains, fire hydrants and hydrant mains, standpipes and hoses connected to sprinkler systems, sprinkler tank heaters, air lines, and thermal systems used in connection with fire sprinkler systems.[2]

Fire protection systems must be installed in accordance with the Fire Code and the Florida Building Code. Current law requires local governments to enforce the Fire Code and the Florida Building Code including the permitting, inspecting, and approving the installation of a fire

[1] Section 633.102(11), F.S.
[2] *Id.*

protection system.[3] Owners of fire protection systems are responsible for the maintenance of their fire protection systems, and must contract with a certified fire protection system contractor to regularly inspect such systems.[4]

Fire Protection System Contractors

In order to engage in the business of laying out, fabricating, installing, inspecting, altering, repairing, or servicing a fire protection system in Florida, other than a pre-engineered system, a person must be certified as a fire protection system contractor.[5]

Fire protection system contractors are regulated by ch. 633, F.S., which outlines the law pertaining to fire protection system contractors in Florida. The State Fire Marshal is responsible for licensing and regulating fire system protection contractors in Florida.[6]

There are five levels of certification for fire protection system contractors. A contractor's ability to practice is limited to the category or categories for which the contractor has obtained certification.[7]

- Contractor I - means a contractor whose business includes the execution of contracts requiring the ability to lay out, fabricate, install, inspect, alter, repair, and service *all types of fire protection systems*, excluding pre-engineered systems.
- Contractor II - means a contractor whose business is limited to the execution of contracts requiring the ability to lay out, fabricate, install, inspect, alter, repair, and service water sprinkler systems, water spray systems, foam-water sprinkler systems, foam-water spray systems, standpipes, combination standpipes and sprinkler risers, all piping that is an integral part of the system beginning at the point of service, sprinkler tank heaters, air lines, thermal systems used in connection with sprinklers, and tanks and pumps connected thereto, excluding pre-engineered systems.
- Contractor III - means a contractor whose business is limited to the execution of contracts requiring the ability to fabricate, install, inspect, alter, repair, and service carbon dioxide systems, foam extinguishing systems, dry chemical systems, and Halon and other chemical systems, excluding preengineered systems.
- Contractor IV - means a person who can lay out, fabricate, install, inspect, alter, repair, and service automatic fire sprinkler systems for detached one- and two-family dwellings and mobile homes.
- Contractor V - means a contractor whose business is limited to the execution of contracts requiring the ability to fabricate, install, alter, repair, and service the underground piping for a fire protection system using water as the extinguishing agent beginning at the point of service and ending no more than 1 foot above the finished floor. A Contractor V may inspect underground piping for a water-based fire protection system under the direction of a Contractor I or Contractor II.[8]

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[3] *See generally* chs. 553 and 633, F.S.; ss. 10.1.2 and 10.1.3 of the 7th edition of the Florida Fire Prevention Code (NFPA Standard 1).
[4] Section 633.312, F.S.; *See* s. 10.2.7 of the 7th edition of the Florida Fire Prevention Code (NFPA Standard 1).
[5] Section 633.336(1), F.S.
[6] Sections 633.318 and 633.338, F.S.
[7] Section 633.102(3), F.S.
[8] *Id.*

A fire protection system contractor must have insurance providing coverage for comprehensive general liability for bodily injury and property damages, products liability, completed operations, and contractual liability. A Contractor I, Contractor II, Contractor III, or Contractor V must have insurance in an amount not less than $500,000, and a Contractor IV must have insurance in an amount not less than $250,000.[9]
In order to obtain certification as a fire protection system contractor, a person must submit a written application to the Division, pay a fee of $300, be at least 18 years of age, be of good moral character, provide proof of insurance, and pass a written exam administered by the Division.[10]

In order to sit for an exam for certification as a contractor, a person must provide evidence of experience and/or education levels, depending on the certification sought by the person.[11]

Fire Alarm System Projects

In 2022, the Legislature enacted s. 553.7932, F.S., to create a simplified permitting process for certain fire alarm system projects, streamlining processing time by eliminating any requirement for a local enforcement agency to review plans prior to a contractor starting work.[12] The law prohibits a local enforcement agency from requiring an electrical or alarm system contractor to submit plans or specifications in order to obtain a permit for certain fire alarm system projects, but preserves the agency's authority to require a permit application and permit fee.[13]

A "fire alarm system project" is defined as a fire alarm system alteration of a total of 20 or fewer initiating devices and notification devices, or the installation or replacement of a fire communicator[14] connected to an existing fire alarm control panel[15] in an existing commercial, residential, apartment, cooperative, or condominium building.[16]

A local enforcement agency must:
- Issue a permit for a fire alarm system project in person or electronically.[17]

[9] Section 633.318(4), and (7), F.S.
[10] The Division administers examinations and collects fees for each type of fire protection system certification. *See* ss. 633.318(1), (2), and (4), and 633.132(1)(a), F.S.
[11] Section 633.318(3), F.S.
[12] Ch. 2022-124, Laws of Fla.
[13] Section 553.7932(2), F.S.
[14] A "fire alarm communicator" is a device that sends a coded signal when a fire alarm or abnormal condition occurs to special receivers at a 24-hour central station, to alert station operators to call the appropriate authorities and a building's management or owners. Norris Inc., available at https://norrisinc.com/2016/08/12/alarm-system-communicators/ (last visited March 14, 2023).
[15] A "fire alarm control unit" or fire alarm panel, serves as the brain of the fire alarm system. It is a component of a fire alarm system that receives signals from initiating devices or other fire alarm control units, and processes these signals to determine part or all of the required fire alarm system output. National Fire Protection Association, *A Guide to Fire Alarm Basics*, available at https://www.nfpa.org/News-and-Research/Publications-and-media/Blogs-Landing-Page/NFPA-Today/Blog-Posts/2021/03/03/A-Guide-to-Fire-Alarm-Basics (last visited March 14, 2023).
[16] Section 553.7932(1)(b), F.S.
[17] Section 553.7932(3), F.S.

- Require at least one inspection to ensure the work complies with the applicable codes and standards, and if a fire alarm system project fails an inspection, the contractor must take corrective action to pass inspection.[18]

The contractor must keep a copy of the plans and specifications at the fire alarm system project worksite, and make them available to the inspector at each inspection.[19]

III. Effect of Proposed Changes:

The bill creates s. 553.7953, F.S., to establish a simplified permitting process for certain "fire sprinkler system projects." A "fire sprinkler system project" is a fire protection system alteration of a total of 20 or fewer fire sprinklers, or the installation or replacement of an equal or equivalent sprinkler system component in an existing commercial, residential, apartment, cooperative, or condominium building.

A contractor replacing a fire sprinkler system component must use a component with the same or better characteristics as the component being replaced, including electrical, hydraulic, pressure losses, required listings, and spacings. The bill defines the term "component" to mean "valves, backflow preventers, switches, fire sprinklers, escutcheons [plates that seal the gap between sprinklers and surfaces], hangers, pumps, pump motors and engines, compressors, hydrants, or any other item deemed acceptable by the local enforcement agency."

The bill prohibits local enforcement agencies from requiring a fire protection system contractor to submit plans or specifications as a condition of obtaining a permit for a fire sprinkler system project. However, a local enforcement agency may require a contractor, as a condition of obtaining a permit for a fire sprinkler system project, to submit a completed application and make a payment.

A local enforcement agency must require a fire sprinkler system project to have at least one inspection to ensure compliance with applicable codes and standards. If a fire sprinkler system project fails an inspection, the contractor must take corrective action to pass inspection.

If the purpose of the fire sprinkler system project is to alter a fire sprinkler system, the contractor must keep a copy of the plans or as-built plans at the fire sprinkler system project worksite, and make such plans available to the inspector at each inspection.

If the purpose of the fire sprinkler system project is to replace a component of the fire system, the contractor must keep a copy of the manufacture's installation instructions and any related testing instructions to certify or accept the component at a fire sprinkler system project and make such documents to the inspection at each inspection.

The bill is effective July 1, 2023.

[18] Section 553.7932(4), F.S.
[19] Section 553.7932(5), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Fire system contractors may experience improved workflow and increased efficiency resulting from implementation of the simplified permitting process.

C. Government Sector Impact:

Local governments may experience a reduction in workload and increased administrative and inspection efficiencies due to eliminating review of plans before issuing a permit for fire sprinkler system projects.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 553.7953 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.

938568

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Regulated Industries (Perry) recommended the following:

Senate Amendment

Delete lines 30 - 40
and insert:
(a) "Component" means valves, fire sprinklers, escutcheons, hangers, compressors, or any other item deemed acceptable by the local enforcement agency. For the purposes of this paragraph, the term "valves" does not include pressure-regulating,

938568

pressure-reducing, or pressure-control valves.

(b) "Contractor" means a person qualified to engage in the business of fire sprinkler systems contracting pursuant to a certificate or registration issued by the department under s. 633.318.

(c) "Fire sprinkler system project" means a fire protection system alteration of a total of 20 or fewer fire sprinklers that have the same K-factor which does not result in a change of hazard classification or an increased system coverage area, or the installation or replacement of an equivalent fire

By Senator Perry

9-00412-23 2023408__

A bill to be entitled

An act relating to fire sprinkler system project permitting; creating s. 553.7953, F.S.; defining terms; requiring replacement fire sprinkler system components to meet certain criteria; authorizing local enforcement agencies to require contractors to submit certain documentation and payment for obtaining a permit for a fire sprinkler system project; prohibiting local enforcement agencies from requiring contractors to submit certain documentation and payment for obtaining a permit for a fire sprinkler system project; requiring local enforcement agencies to issue certain permits in person or electronically; requiring local enforcement agencies to perform at least one inspection for a fire sprinkler system project; requiring contractors to keep certain documentation available at a worksite for a fire sprinkler system project and make such documentation available for inspection; requiring contractors to retain instructions for components; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 553.7953, Florida Statutes, is created to read:

553.7953 Simplified permitting process for fire sprinkler system projects.—

(1) As used in this section, the term:

9-00412-23 2023408__

(a) "Component" means valves, backflow preventers, switches, fire sprinklers, escutcheons, hangers, pumps, pump motors and engines, compressors, hydrants, or any other item deemed acceptable by the local enforcement agency.

(b) "Contractor" means a person qualified to engage in the business of fire sprinkler systems contracting pursuant to a certificate or registration issued by the department under s. 633.318.

(c) "Fire sprinkler system project" means a fire protection system alteration of a total of 20 or fewer fire sprinklers, or the installation or replacement of an equal or equivalent fire sprinkler system component, in an existing commercial, residential, apartment, cooperative, or condominium building.

(2) A contractor replacing a fire sprinkler system component must use a component with the same or better characteristics as the component being replaced, including electrical, hydraulic, pressure losses, required listings, and spacings.

(3)(a) A local enforcement agency may require a contractor, as a condition of obtaining a permit for a fire sprinkler system project, to submit a completed application and make a payment.

(b) A local enforcement agency may not require a contractor to submit plans or specifications as a condition of obtaining a permit for a fire sprinkler system project as defined in this section.

(4) A local enforcement agency shall issue a permit for a fire sprinkler system project in person or electronically.

(5) A local enforcement agency shall require a fire sprinkler system project to have at least one inspection to

ensure compliance with applicable codes and standards. If a fire sprinkler system project fails an inspection, the contractor must take corrective action as necessary to pass inspection.

(6) If the fire sprinkler system project is to alter a fire sprinkler system, the contractor must keep a copy of the plans or as-built plans at the fire sprinkler system project worksite and make such plans available to the inspector at each inspection.

(7) If the project is to replace a component of the fire system, the contractor must keep a copy of the manufacturer's installation instructions and any related testing instructions needed to certify or accept the component at a fire sprinkler system project and must make such documents available to the inspector at each inspection.

Section 2. This act shall take effect July 1, 2023.

The Florida Senate

Committee Agenda Request

To: Senator Joe Gruters, Chair
Committee on Regulated Industries

Subject: Committee Agenda Request

Date: March 8, 2023

I respectfully request that **Senate Bill #408**, relating to Fire Sprinklers, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

W. Keith Perry

Senator Keith Perry
Florida Senate, District 9

File signed original with committee office

S-020 (03/2004)

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 Committee on Regulated Industries

BILL:	SB 1450
INTRODUCER:	Senator Gruters
SUBJECT:	Valuation of Timeshare Units
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Pre-meeting**
2.			FT	
3.			AP	

I. Summary:

SB 1450 provides that, upon an appeal of a property appraiser's valuation of timeshare units, the number of resales is deemed to be adequate if the taxpayer provides a reasonable number of resales as supported by the most recent standards adopted by the Uniform Standards of Professional Appraisal Practice.

Current law requires a property appraiser to first look to the resale market to make a valuation of timeshare units. If there is an inadequate number of unit resales for arriving at the valuation, the property appraiser must use the original purchase price of the timeshare and deduct "usual and reasonable fees and costs of the sale."

The bill provides that this method meets the requirement of just valuation of all property, including timeshare units, as required under Art. VII, s. 4, of the State Constitution.

The Revenue Estimating Conference (REC) determined that the bill will reduce local government revenue by at least $208.2 million beginning in Fiscal Year 2023-2024. See Section V., Fiscal Impact Statement.

The bill is effective July 1, 2023.

II. Present Situation:

Timeshares

A timeshare interest is a form of ownership of real and personal property.[1] In a timeshare, multiple parties hold the right to use a condominium unit or a cooperative unit. Each owner of a timeshare interest is allotted a period of time during which the owner has the exclusive right to use the property.

The Florida Vacation Plan and Timesharing Act, ch. 721, F.S., establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers.[2] Chapter 721, F.S., applies to all timeshare plans consisting of more than seven timeshare periods over a period of at least three years in which the accommodations and facilities are located within this state or offered within this state.[3] Part I of ch. 721, F.S., relates to vacation plans and timesharing, and Part II of chapter 721, F.S., relates to multisite vacation and timeshare plans that are also known as vacation clubs.

A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods or a condominium unit in which timeshare estates have been created.[4]

A "timeshare estate" is a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a specified portion thereof.[5] The term also includes an interest in a condominium unit, a cooperative unit, or a trust. Whether the term includes both direct and indirect interests in trusts is not specified. An example of an indirect interest in a trust is the interest of a trust beneficiary's spouse or other dependent.

The "managing entity" for a timeshare property is the person who operates or maintains the timeshare plan pursuant to s. 721.13(1), F.S., which defines the managing entity as either the developer, a separate manager or management firm, or an owners' association.[6]

Tax Assessments

Section 192.037, F.S., governs the ad valorem taxation of fee timeshare real property.[7] The managing entity responsible for operating and maintaining fee timeshare real property is considered the taxpayer as an agent of the timeshare period titleholder.[8]

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[1] *See* s. 721.05(36), F.S.
[2] Section 721.02(2) and (3), F.S.
[3] Section 721.03, F.S.
[4] *See* ss. 721.05(41) and 718.103(26), F.S.
[5] Section 721.05(34), F.S.
[6] *See* s. 721.02(22), F.S., defining the term "managing entity."
[7] Section 192.001(14), F.S., defines the term "fee timeshare real property" to mean "the land and buildings and other improvements to land that are subject to timeshare interests which are sold as a fee interest in real property."
[8] Section 192.037(1), F.S. Section 192.001(15), F.S., defines the term "timeshare period titleholder" to mean "the purchaser of a timeshare period sold as a fee interest in real property, whether organized under ch. 718, F.S., relating to condominium associations, or ch. 721, F.S, relating to timeshares and vacation plans.

The managing entity responsible for operating and maintaining the timesharing plan and each person having a fee interest in a timeshare unit or timeshare period may contest or appeal an ad valorem tax assessment in the same manner as other property owners under ch. 194, F.S., which relates to the administrative and judicial review of property taxes assessed by the property appraiser.[9]

The managing entity is required to collect and remit the taxes and special assessments due on fee timeshare real property. In allocating taxes, special assessments, and common expenses to individual timeshare period titleholders, the managing entity must clearly label the portion of any amounts due which are attributable to ad valorem taxes and special assessments.[10]

A property appraiser must first look to the resale market for determining the value of timeshare property.[11] If the property appraiser finds an inadequate number of resales exists for such a determination, the property appraiser must determine the value by deducting the "usual and reasonable fees and costs of the sale" from the original purchase price.[12]

The term "usual and reasonable fees and costs of the sale" for timeshare real property includes all marketing costs, atypical financing costs, and those costs attributable to the right of a timeshare unit owner or user to participate in an exchange network of resorts.[13] For timeshare real property, the "usual and reasonable fees and costs of the sale" is presumed to be 50 percent of the original purchase price, but that presumption is rebuttable.[14]

Section 4, Art. VII of the State Constitution requires regulations for securing a just valuation of all property to be subject to the provisions of this section.

III. Effect of Proposed Changes:

The bill amends s. 192.037, F.S., to require the property appraiser to defer to the taxpayer for the determination of whether the number of resales is adequate if, on appeal of the tax assessment for a timeshare unit, the taxpayer asserts that there is an adequate number of resales to provide a basis for arriving at a value and provides a reasonable number of resales as would be supported by the Uniform Standards of Professional Appraisal Practice.[15]

The bill provides that this method meets the requirement of just valuation of all property, including timeshare units, as required under s. 4, Art. VII of the State Constitution.

The bill is effective July 1, 2023.

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[9] Section 192.037(4), F.S.
[10] Section 192.037(5), F.S.
[11] Section 192.037(10), F.S.
[12] Section 192.037(11), F.S.
[13] *Id.*
[14] *Id.*
[15] The Uniform Standards of Professional Appraisal Practice provides ethical and performance standards for the appraisal profession in the United States. See The Appraisal Foundation, What is UPAP?, available at: https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/Uniform_Standards_of_Professional_Appraisal_Practice/TAF/USPAP.aspx (last visited Mar. 15, 2023).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Section 18(b), Article VII, of the State Constitution provides that except upon the approval of each house of the Legislature by a two-thirds vote of the membership, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that cities or counties have to raise revenue in the aggregate, as such authority existed on February 1, 1989. However, the mandate requirement does not apply to laws having an insignificant impact.[16]

The Revenue Estimating Conference (REC) determined that the bill will reduce local government revenue by at least $208.2 million beginning in Fiscal Year 2023-2024.[17] Therefore, this bill may be a mandate subject to the requirements of s. 18(b), Art. VII, of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

This bill does not create or raise state taxes or fees. Therefore, the requirements of Art. VII, s. 19 of the State Constitution do not apply.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference determined that the bill will reduce local government revenue by at least $208.2 million beginning in Fiscal Year 2023-2024.

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[16] FLA. CONST. art. VII, s. 18(d). An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year multiplied by $0.10. *See* Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Impact*, (September 2011), *available at*: http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf (last visited Mar. 15, 2023).

[17] Based on the Demographic Estimating Conference's revenue estimating conference for SB 1450 and HB 451 adopted on February 17, 2023. The conference packet is available at: http://edr.state.fl.us/Content/conferences/revenueimpact/archives/2023/_pdf/impact0217.pdf (last visited Mar. 15, 2023).

The REC noted that the fiscal impact may likely be greater because the Uniform Standards of Professional Appraisal Practice appears to provide minimal guidance regarding the adequate number of timeshare property resales.[18]

B. Private Sector Impact:

Persons having an interest in a timeshare unit or timeshare period may benefit from a reduction in assessed ad valorem taxes.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Two recent appeals of a property appraiser's valuation of timeshare properties highlight that the timeshare resale market may not be sufficiently robust to use as the basis of an appraisal for ad valorem valuation.[19]

The appeals involved four timeshare developments. For each development, the property appraiser determined that the resale market for the timeshare developments was insufficient to produce an adequate number of resales for valuation purposes. Consequently, the property appraiser deducted from the original purchase price the usual and reasonable fees and costs of the sale. The property appraiser prevailed in both appeals. There may be additional, related appeals pending that challenge to the property appraiser's valuation of time share properties.[20]

The resale valuation and the original purchase price valuation may produce significantly different results. In these court cases, the resale price valuation method resulted in values that were between 75 percent and 40 percent lower than the purchase price method.[21]

VIII. Statutes Affected:

This bill substantially amends section 192.037 of the Florida Statutes.

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[18] *Id* at 101.
[19] *See Cypress Palms Condominium Association, Inc. v. Scarborough*, Final Judgment, case no. 2012-CA-1293-OC (Fla. 9th Jud. Cir. 2016) (on file with the Senate Committee on Finance and Tax); and *Star Island Vacation Ownership Association, Inc. v. Scarborough*, Final Judgment, case no. 2016-CA-1006-OC (Fla. 9th Jud. Cir. 2019), *aff'd per curiam* 2021 WL 646806 (Fla. 5th DCA) (on file with the Senate Committee on Regulated Industries).
[20] *See Star Island Vacation Ownership Association, Inc.*, n. 1.
[21] *Supra* n. 16.

IX. Additional Information:

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

None.

B. Amendments:

None.

By Senator Gruters

22-00785-23 20231450__

A bill to be entitled

An act relating to valuation of timeshare units; amending s. 192.037, F.S.; specifying the methodology by which certain timeshare units must be valued in certain tax appeals; providing that the methodology meets the constitutional mandate for just valuation; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Present subsection (12) of section 192.037, Florida Statutes, is redesignated as subsection (13), and a new subsection (12) is added to that section, to read:

192.037 Fee timeshare real property; taxes and assessments; escrow.—

(12) In all tax appeals regarding timeshare units in which the taxpayer asserts that there are an adequate number of resales to provide a basis for arriving at value conclusions, the number of resales shall be considered adequate when a reasonable number of resales are provided by the taxpayer and supported by the most recent standards adopted by the Uniform Standards of Professional Appraisal Practice. This methodology meets the requirement of just valuation of all real estate located in this state, including timeshare units, as recognized by and provided in s. 4, Art. VII of the State Constitution.

Section 2. This act shall take effect July 1, 2023.

Datres, Susan

From: Brill, Victoria
Sent: Tuesday, March 14, 2023 10:48 AM
To: Datres, Susan
Cc: Imhof, Booter
Subject: Agenda Requests - 1450/1454

Good Morning Susan and Booter,

Sen. Gruters' would like to officially request that Senate Bill 1450, Valuation of Timeshare Units and Senate Bill 1454, Homeowners' Right to Display Flags be placed on the agenda for the next Regulated Industries meeting.

Thank you,
Vickie

Vickie Brill Keller, MBA
Chief Legislative Aide
Sen. Gruters - FL 22
850-487-5022
941-378-6309

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR OSCEOLA COUNTY, FLORIDA

Consolidated Case Nos: **2012-CA-1293-OC**
2013-CA-1748-OC

CYPRESS PALMS CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation, and **WYNDHAM VACATION MANAGEMENT, INC.**, a foreign corporation,

Plaintiffs,

vs.

KATRINA S. SCARBOROUGH, as Property Appraiser; et al.,

Defendants.
_____/

FINAL JUDGMENT

This consolidated case involves a challenge to the assessed value of the Cypress Palms timeshare resort, which is located just off U.S. 192 in Osceola County. The plaintiffs are Cypress Palms Condominium Association, Inc. (association), which is the homeowner's association, and Wyndham Vacation Management, Inc. (WVM), which is the management company retained by the association. Wyndham Vacation Resorts, Inc. (WVR), is the entity responsible for the sale of timeshare ownership interests within the subject property. The association and WVM are the authorized parties to file suit as agents of the fee timeshare period titleholders pursuant to section 192.037(1), Florida Statutes (2015). The tax years involved are 2011 and 2012.

The plaintiffs retained the services of Michael McElveen, who owns Urban Economics, Inc., to prepare an appraisal of the timeshare resort. His opinion of value for each of the tax years is as follows:

2011	**$24,755,700**
2012	**$16,763,600**

The property appraiser's assessments for the Cypress Palms timeshare resort are as follows:

2011	**$92,853,150**
2012	**$92,853,100**

The property appraiser also retained the services of Steven Marshall, with Clayton, Roper & Marshall, to prepare an appraisal of the timeshare resort. His opinion of value for each of the tax years is as follows:

2011	**$109,500,000**
2012	**$113,700,000**

Background

Both parties have provided pretrial briefs discussing the appellate court decisions addressing the assessment of timeshare developments and the legislature's passage of section 192.037 and amendment thereof in response to these decisions in the late 1980's. The pretrial briefs discuss the same appellate court decisions and, for the most part, are fairly consistent in the analysis of those decisions.

In Florida, a timeshare unit is a form of multiple fee ownership of one parcel of real property where the rights of use, occupancy, and possession of a timeshare unit have been sold and transferred by deed to each of the timeshare owners. Each individual owns an

undivided interest in the property but, regardless of the number of owners, there remains only one parcel and one assessment. *Day v. High Point Condo. Resorts, Ltd.,* 521 So.2d 1064 (Fla. 1988); § 192.037(2), Fla. Stat. (2015). "Without question, the fee time-share concept establishes administrative assessment and collection problems for taxing authorities." *Id.* at 1066. The legislature lawfully addressed these issues with the passage of section 192.037. *See Southards v. Motel Mgmt. Co.*, 610 So.2d 524, 525 (Fla. 3d DCA 1992) (rejecting challenge to constitutionality of section 192.037 as applied); *Day*, 521 So.2d at 1066-67 (rejecting challenges to facial constitutionality of section 192.037).

The earliest decision regarding the assessment of timeshare resorts involved the Orange County Property Appraiser. *Hausman v. VTSI, Inc.*, 482 So.2d 428 (Fla. 5th DCA 1985). For the 1982 tax year, the property appraiser assessed the property on the combined value of each of the timeshare weeks instead of the ordinary condominium unit. Of that total amount, a deduction of five percent was made to reflect the household furnishings and other items of personal property in the sales price. An additional deduction of 25 percent was not specifically supported by evidence at trial but was explained as an effort to be fair. *Id.* at 429.

The district court held that the assessment was invalid because the existing statutes did not authorize the assessment of the timeshare interests created in the condominium interests. The court, however, observed that the decision would have limited precedential value because the legislature amended section 192.037(2) in 1983 to require the assessment of each timeshare resort to be "the value of the combined individual time-share periods or time share estates contained therein." *Id.* at 430.

The district court further held that the assessment exceeded the just value of the property because the evidence at trial indicated that at least 45 percent of the gross sales price

consisted of the usual and reasonable sales and merchandising costs. The court also recognized atypical and unconventional financing added another seven percent to the cost of the timeshare units. Accordingly, the property appraiser's "conclusory" 25 percent reduction was not a valid exercise of discretion under section 193.011(8), Florida Statutes, which requires consideration of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements. *Id.* at 431.

The next cases involving timeshare resorts were decisions from the Fourth District Court. *Spanish River Resort Corp. v. Walker*, 497 So.2d 1299 (Fla. 4th DCA 1986); *Oyster Pointe Resort Condo. Ass'n., Inc. v. Nolte*, 497 So.2d 1306 (Fla. 4th DCA 1986); *Driftwood Mgmt. Co. v. Nolte*, 497 So.2d 740 (Fla. 4th DCA 1986). The lead decision was *Walker*.

Similar to *Hausman*, the question presented in *Walker* was whether a property appraiser should assess the combined value of the individual timeshare interests or whether the assessment must be limited to the value of an ordinary condominium unit not subject to timesharing. For example, a condominium in which no timeshare estates had been created was assessed at $25,000, while a physically identical adjoining unit, in which 51 timeshare estates had been created, was assessed at $236,634. *Walker*, 497 So.2d at 1301.

The district court held that the assessment under the 1983 version of section 192.037 was to reflect the sum of the individual assessments of each timeshare unit. Quoting from the trial court's final judgment, the court stated as follows:

> *The interval owner at Spanish River has all of the 'sticks' which constitute the 'bundle of rights' that is fee ownership of real estate:* the complete right to use (or not to use) the property during the period of ownership; the right to exclude others during that period, and the right to mortgage, lease, sell, bequeath or give away the time-share estate. Every time share period is a unique ownership,

> even if it is located in part within the same physical space as the other time share estates in the same apartment. *In short, it is a parcel of real estate.*

Id. at 1302 (emphasis added); *accord* § 721.05(34), Fla. Stat. (2015) (timeshare estate is a parcel of real property under the laws of this state).

The district court also rejected the developer's argument that the "excessive costs of sale totaling 55% of the purchase price" must be taken into consideration to reach fair market value under section 193.011(8). As the court stated:

> *Arrival at the value of property is a matter of administrative discretion to be exercised by a property appraiser which the courts should not disturb unless it has been fraudulently or illegally exercised.* Here the appraisal was largely based on the purchase prices of the original sales—a time honored approach consistent with the requirement that all property must be assessed at '100% valuation rate.' As yet, the assessments of these time-share units are not based on resales because there have been very few, if any. *If a pattern of lower resale prices emerges, the appraiser will have to react accordingly and reassess downwards.* No such pattern has been established in the record now before us and speculation as to the possible purchase price of future resales is hardly 'probative of present value.'

Id. at 1303-4 (emphasis added, citations omitted).

In 1988, the Florida Supreme Court issued three decisions involving timeshare condominiums. *Spanish River Resort Corp. v. Walker*, 526 So.2d 677 (Fla. 1988); *Oyster Pointe Resort Condo. Ass'n, Inc. v. Nolte*, 524 So.2d 415 (Fla. 1988); *Day v. High Point Condo. Resorts, Ltd.*, 521 So.2d 1064 (Fla. 1988).

Day held that the method for assessment of timeshare developments set forth in section 192.037 was facially constitutional. No valuation issue was involved. *Id.* at 1065.

In *Nolte*, the Court addressed the arguments regarding valuation under the 1983 statute. The Court observed that the uncontroverted testimony at trial was that the sales price of

timeshare units included not only the costs attributable to real property and tangible personal property, "but many other cost components typical of and peculiar to time-share estates (i.e., marketing costs and other intangible values such as the right to participate in an exchange network of resorts and a reservation and front-desk system, together with other services and amenities ordinarily associated with a hotel)." *Id.* at 416.

As in *Hausman* and *Walker*, the developer argued that the assessment should not reflect the combined value of the timeshare estate periods. The Florida Supreme Court rejected the argument, quoting with approval from *Walker* that section 192.037 "is an unmistakable expression of the legislature's intent to bring individual time-share units or 'weeks' within the ambit of ad valorem taxation." *Nolte*, 524 So.2d at 417.

Nolte next addressed whether the property appraiser was required to net from the sales price all elements of the purchase price other than the real property component when valuing time-share units under a market value approach. The developer argued "only the real property component of the sales price (i.e. the land, buildings and improvements thereon) should be used to determine" just valuation and that the excessive marketing costs, atypical financing costs, and other extraordinary costs associated with fee timeshare estates are part of the reasonable fees and costs of sale to be deducted from the sales price under section 193.011(8). *Id.* at 418. Those excessive costs comprised approximately 75-80 percent of the purchase price of the timeshare units. *Id.*

Citing *Walker* again, the Court rejected the argument that such costs were required to be deducted under section 193.011(8). "Until the legislature modifies section 193.011(8), the costs cited by petitioners cannot be deducted from the purchase price of the time-share units as 'reasonable fees and costs of sale.'" *Id.* The Court commented that it was

"mindful of the petitioner's point that an appraisal based on the original purchase price of the units includes the unusually high marketing costs necessary to attract potential buyers" and that those costs are alleged "to never be recouped upon resale." *Id.* at 419. If a pattern of lower resale prices emerges, the property appraiser will have to adjust his appraisals accordingly and reassess the timeshare units. *Id.*[1]

Later that same year, the legislature adopted the assessment mechanism still in effect today. Ch. 88-216, § 15, Laws of Fla. (1988). The following provisions were added to section 192.037:

> *(10) In making his or her assessment of timeshare real property, the property appraiser shall look first to the resale market.*
> *(11) If there is an inadequate number of resales to provide a basis for arriving at value conclusions, then the property appraiser shall deduct from the original purchase price 'usual and reasonable fees and costs of the sale.'* For purposes of this subsection, 'usual and reasonable fees and costs of the sale' for timeshare real property shall include all marketing costs, atypical financing costs, and those costs attributable to the right of a timeshare unit owner or user to participate in an exchange network of resorts. For timeshare real property, such 'usual and reasonable fees and costs of the sale' shall be presumed to be 50 percent of the original purchase price; provided, however, such presumption shall be rebuttable.
> (12) Subsections (10) and (11) apply to fee and non-fee timeshare real property.

§§ 192.037(10)-(12), Fla. Stat. (2015) (emphasis added).

It is a well-settled principle of statutory construction that the "Legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute." *Adler-Built Indus., Inc. v. Metropolitan Dade County*, 231 So.2d 197, 199 (Fla. 1970); *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d. 263, 266 (Fla. 5th

[1] The Florida Supreme Court's decision in *Walker* merely cited *Day* and *Nolte*.

DCA 1987) ("The legislature is presumed to know the existing law at the time it enacts a statute."). The legislature, accordingly, is presumed to have been acquainted with the numerous judicial decisions concerning the assessment of fee timeshare real property in existence at the time of the adoption of the assessment mechanism set forth in section 192.037(10)-(11). Moreover, legislation enacted shortly after a controversy arises should be viewed as the legislature's intent to clarify the law. *G.E.L. Corp., v. Dep't of Envtl. Prot.*, 875 So.2d 1257 (Fla. 5th DCA 2004). The proximity of the legislature's response to the numerous judicial decisions concerning the assessment of fee timeshare real property can be considered a clarification that the property appraiser shall initially determine whether a pattern of resale prices has emerged or, restated, whether an adequate number of resales exists to provide a basis for arriving at credible value conclusions. The legislature's enactment of section 192.037(11) clarified that, in the absence of such a pattern in the resale market, the property appraiser shall deduct from the original purchase price certain enumerated categories of expenses, which constituted the *usual and reasonable fees and costs associated with the sale*. These issues were argued and discussed in the judicial decisions in existence at the time the legislature adopted the language addressing the assessment of fee timeshare real property and reflected its policy decisions regarding the appropriate assessment methodology.

The subject property

The Cypress Palms timeshare resort was constructed in phases between 1995 and 2001. Prior to offering any timeshare plan for sale, the developer must submit a registered public offering statement (POS) to the Department of Business Regulation. § 721.07, Fla. Stat. (2015). The POS is the written explanation of the timeshare plan. § 721.05(29), Fla. Stat. (2015). Until approval is given, a timeshare estate cannot exist and the property may not be assessed as a

timeshare under section 192.037. *Gilreath v. Westgate Daytona, Ltd.*, 871 So.2d 961, 965 (Fla. 5th DCA 2004).

The POS for Cypress Palms was entered into evidence and indicates that the developer is offering for sale undivided tenant-in-common fee interests in each of the units of the condominium coupled with a right to reserve and occupy a living space. (Plaintiff #12) Each of the 15 buildings at Cypress Palms constitutes a "unit" and a "living space" is an area within that unit consisting of at least one bedroom and one bathroom. There are a total of 366 living spaces within the 15 buildings.

For purposes of determining occupancy rights in a unit, each unit is allocated a specific number of points that symbolize the annual occupancy rights in that unit. The ownership interest of purchasers is measured as a fraction of the total occupancy rights for that unit. For example, an annual ownership interest is reflected as follows:

$$\frac{\text{Annual Points Purchased}}{\text{Total Number of Points Allocated to the Unit}}$$

In no event shall the total number of points allocated for ownership interests in a unit exceed 100 percent of the total number of points allocated to that unit for the purposes of symbolizing annual occupancy rights. *Id.* at III.1(1). The timeshare resort is authorized for a total of 2,286,594 points. For comparison purposes, the total weeks are 18,666 (366 x 51 weeks) because one week is reserved for maintenance. The purchaser's ownership interest as a tenant-in-common is conveyed by warranty deed. *Id.*

According to the POS, purchasers have the opportunity to participate in two exchange programs. Exchange programs are defined as "any method, arrangement, or procedure

for the voluntary exchange of the right to use and occupy accommodations and facilities among purchasers." § 721.05(16), Fla. Stat. (2015).

RCI, LLC is the external exchange program affiliated with the timeshare resort. The developer and RCI are both subsidiaries of a common parent company, i.e., Wyndham Worldwide Company. *Id.* at III(8) Owners may not be able to exchange an ownership interest through RCI, however, if the points allocated to that interest are less than the points necessary to reserve a seven-day week. Testimony elicited at trial from Mark Novell, Vice-President of Sales & Marketing for WVR, and the property appraiser's expert, Mr. Marshall, was that owners were charged an additional fee to participate in the RCI exchange program.

In addition, each purchaser of an ownership interest had the *option* of assigning the use and occupancy rights appurtenant to that interest to Club Wyndham Plus, which is an internal exchange company operated by WVR. *Id.* at III(8). The purchaser is responsible for the payment of an annual membership fee to the plan manager for Club Wyndham Plus along with a program fee. *Id.* The POS includes a disclosure that owners not electing to exercise their option "to assign the use rights appurtenant to their ownership interest into Club Wyndham Plus" will "be assigned an available period of occupancy equivalent to such owner's ownership interest" if they did not make reservation requests in a timely manner or receive one of their requested choices of occupancy. *Id.* at IIA.

The property appraiser introduced into evidence answers to interrogatories reflecting that WVR owned 109,388,250 points in Cypress Palms as of January 1, 2011. For 2012, WVR owned 89,055,750 points.

Discussion

Section 192.037(10) commands the property appraiser to "look first to the resale market" in her annual assessment of timeshare real property. If there is an "inadequate number of resales to provide a basis for arriving at value conclusions," the property appraiser is to deduct from the original purchase price "all marketing costs, atypical financing costs, and those costs attributable to the right of a timeshare unit owner or user to participate in an exchange network of resorts" pursuant to section 192.037(11).

I. Whether an adequate number of resales exists to provide a basis for arriving at a value conclusion?

At trial, the principal area of disagreement among the parties was whether there were an adequate number of resales to provide a basis for arriving at a value conclusion for the Cypress Palms timeshare resort. Importantly, both parties agree that those resales must constitute arms length transactions to meet the definition of fair market value, i.e., "the price at which a property, if offered for sale in the open market, with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent, under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other." Fla. Admin. Code R. 12D-1.002(2) (2015). The parties further agree that resales were best described as individual-to-individual sales.

(a) The plaintiffs' evidence regarding resales.

The plaintiffs presented the testimony of Mr. McElveen and Joshua Harris, who has a Ph.D. in Finance and serves as the Director of the Dr. P. Phillips Institute for Research & Education at the University of Central Florida. They opined that there was an active and reliable

resale market to allow for a credible valuation of the Cypress Palms timeshare resort for the 2011 and 2012 tax years.

Dr. Harris testified that he reviewed active Internet listings for timeshare resales in the Orlando market area, which included Orange and Osceola County. His sources included craigslist, ebay, redweek, and the TUG timeshare marketplace, among others. In his opinion, the presence of the active internet listings of resales proved the existence of a resale market for timeshare interests regardless of whether those listings resulted in closed transactions.

Dr. Harris also based his opinion on a spreadsheet containing 4,464 qualified individual transaction records of timeshare resales provided by Mr. McElveen and occurring between January 1, 2008 and December 31, 2013. Dr. Harris utilized this data to prepare charts admitted into evidence depicting the quantity of resales occurring in each quarter during this six-year time period and the volume of those resales in terms of dollars exchanged. (Plaintiff #19-#23) He compared the data relating to timeshare resales with single-family home sales in the same market area and time period. He concluded that, because the property appraiser relied upon single-family home data for assessment purposes, she also should have relied upon timeshare resales for valuation of the Cypress Palms timeshare resort.

Dr. Harris opined that a minimum of three comparable timeshare resales would be reasonable to value the Cypress Palms timeshare resort provided that the selected comparables were close economic substitutes. He based this opinion on the Fannie Mae Selling Guide and the Uniform Residential Appraisal Report.

Mr. McElveen's testimony and analysis of the resale market was far more extensive. He began his analysis by gathering all timeshare sales – developer and resales – within Orange and Osceola counties from January 1, 2007, through June 1, 2014, which

consisted of over 700,000 sales transactions. He then removed all developer sales, all resales of "points-based" timeshare interests, and all resales for nominal documentary stamps. The removal of resales of points-based timeshare interests deleted any resales from the Cypress Palms timeshare resort from his consideration. As a result, he had roughly 8,000 resales of week intervals occurring during this 7½ year time period. For those resales, his staff further reviewed the individual deeds in an effort to qualify the transactions per the Department of Revenue (DOR) sales qualification standards. In his opinion, however, the DOR standards were a lower standard than the verified arms length transactions necessary to establish just value. In the end, his dataset included 3,575 qualified but not verified resale transactions.

To assist him in verifying the 3,575 resales as arms length transactions, Mr. McElveen hired two telephone survey companies. A questionnaire was developed with questions regarding each facet of an arms length transaction. The qualified resale transactions were provided to the survey companies, who researched and obtained telephone numbers for sellers, and eventually buyers, to contact. Responses to each of the questions were recorded in a spreadsheet format as a 1 or a 2, which reflected a yes or no answer to the question. Where the response to a question indicated that it failed the test for an arms length transaction, the survey questionnaire directed the employee conducting the telephone interview to thank the participant and terminate the interview. (Plaintiff #27)

The survey work began with the Survey Research Center (SRC) at the University of Florida. Because of public records requests submitted by the property appraiser's counsel to the University, however, Mr. McElveen terminated the project. The final disposition records were admitted into evidence and revealed that SRC attempted to contact 2,080 individuals and

eventually completed 241 surveys. (Defendant #17) Of that number, Mr. McElveen testified that 32 passed the test for an arms length transaction.

Mr. McElveen subsequently retained SSRS, a firm located in Pennsylvania. SSRS began contacting sellers and, when it was concerned that the qualified resales database would not be sufficient to obtain the necessary number of responses, it obtained permission from Mr. McElveen to contact buyers. Eventually, SSRS provided a spreadsheet containing 72 completed surveys. (Defendant #18)

Mr. McElveen utilized all of the SSRS survey responses that, when added to the 32 verified sales from SRC, totaled 104 verified arms length transactions. (Defendant #20) The next step in his analysis involved the utilization of an "equivalency test" to determine whether the mean sales price of the 104 verified sales fell within an appropriate margin of error as compared to the mean sales price of the 3,575 qualified sales to support a conclusion that both datasets reflected arms length transactions. In the days before trial, Mr. McElveen removed resales between related parties that should not have been included and, as a result, reduced the number to 97 verified sales. (Defendant #19) He recalculated the equivalency test, utilizing a higher margin of error, and concluded that it had been passed. (Defendant #13, #14) He testified that he had to adopt a "more flexible approach" to arms length transactions in reviewing the SSRS survey data because many of the surveys were terminated after the participant responded that the timeshare interest had not been exposed to the open market, a facet of an arms length transaction.

Having deemed the 3,575 resales as verified arms length transactions, Mr. McElveen concluded that an adequate number of resales existed to develop a credible valuation of the timeshare interests at Cypress Palms. He then developed a multiple regression model to

determine just value. For the 2011 tax year, the model included sales from two years prior to January 1 and six months into that year. For the 2012 tax year, the model included sales from three years prior to January 1 and six months into that year. Mr. McElveen testified at length regarding his multiple regression model and the variables impacting the ultimate opinion of value. Because of his opinion that an adequate number of resale transactions existed, Mr. McElveen did not develop an opinion of value utilizing developer sales reflecting the original purchase prices and deductions pursuant to section 192.037(11).

(b) The property appraiser's evidence regarding resales.

Diana Breitenbruck is a Commercial Appraiser in the property appraiser's office and has been responsible for the assessment of timeshare developments since 2003. Based upon her analysis of the resale market, Ms. Breitenbruck concluded that there were an inadequate number of resales to provide a basis for arriving at a value conclusion for the Cypress Palms timeshare resort.

Ms. Breitenbruck testified that there were 32-34 timeshare resorts in Osceola County during 2011 and 2012, comprising approximately 370,000 unit weeks. During each of the calendar years 2010 and 2011, which immediately proceeded January 1 of each tax year, there were approximately 75,000 total sales transactions. Of that total, around 70,000 were developer sales and 5,000 were classified as resales. Significantly, approximately 4,000 of those resales were transacted for nominal documentary stamps. As such, they could not even be considered for valuation purposes. The remaining number of resales constituted less than 1.5 percent of the total timeshare sales market each year. She anecdotally described conversations with buyers that did not understand what they had bought, why they could not use their

timeshare interests, or difficulties accessing certain amenities of the resort because they had purchased on the resale market.

Ms. Breitenbruck further testified regarding her analysis of the resales within the Cypress Palms timeshare resort. In particular, she expressed her concerns regarding the limited number of resales within the resort, both standing alone and as compared to the developer sales. She repeatedly stated that the sales were "all over the place" and showed no consistent trend in pricing per point. Her VAB packets included spreadsheets detailing those resales and was admitted into evidence. (Plaintiff #16, #17; Defendant #11, #12) For the 2011 tax year, she included raw data relating to 27 resales on both an annual and biannual basis occurring during the calendar year 2010. For 2012, there were 23 resales during the calendar year 2011. In her opinion, it was extremely difficult and impracticable to accurately determine which, if any, of those sales could be considered arms length transactions. By comparison, there were hundreds of developer sales each year that clearly qualified as arms length transactions reflective of just value.

Ms. Breitenbruck also testified regarding the volume of resale transactions within the Cypress Palms timeshare resort. For the 2011 tax year, there was $11,368,126 in developer sales but only $79,656 in resales. For 2012, there was only $65,897 in resales. Comparatively, the total sales volume attributable to developer sales far exceeded the value attributable to resales transactions.

In sum, Ms. Breitenbruck believed that there simply were not an adequate number of reliable resale transactions to support an accurate value conclusion. Accordingly, she utilized the developer sales occurring within the timeshare resort, deducting the items set forth in section

192.037(11) from the original purchase price along with a deduction for tangible personal property.

The property appraiser's expert witness, Mr. Marshall, testified regarding his analysis of the resale market. His appraisals for 2011 and 2012 also discussed the resale market and were admitted into evidence. (Defendant #7, #8) During the 2010 calendar year preceding January 1, 2011, there were a total of 3,746 annual resales in Osceola County.[2] Of that number, 3,419 were for $500 or less and constituted 92 percent of the overall resale market. The next year, there were a total of 7,151 annual resales. Of that number, 6,629 were for $500 or less and constituted 93 percent of the overall resale market.

Similar percentages were reflected in the resales occurring within the Cypress Palms timeshare resort. For the 2010 tax year, 93 percent of the total resales were for less than $500. There were only 23 annual resales exceeding $500. The next year, 94 percent of the total resales were for less than $500. There were only 26 resales exceeding $500. Mr. Marshall testified that he obtained telephone numbers of sellers and/or buyers by matching the addresses on the deeds with internet searches and attempted to contact these individuals to ascertain whether a given transaction could be considered an arms length transaction. He was unable to obtain any helpful responses.

Like Ms. Breitenbruck, he observed that resale prices were all over the place. In his opinion, it would be inappropriate to "cherry pick" sales for use in an appraisal. A high price may be just as uninformed as a low price.

Mr. Marshall testified that the exceedingly large number of resales at nominal amounts reflected significant financial distress in the overall market. Distressed sales fail to

[2] Mr. Marshall eliminated biannual sales from both his resale data and developer sales used in his comparable sales analysis.

qualify as arms length transactions and cannot be used to determine just value. He observed that calendar year 2010 was the "worst real estate market of his career" and that 2011 only was slightly better. In addition to the distress in the resale market, he was aware of rampant criminal fraud by timeshare resellers during this time period. These companies and individuals would solicit and obtain an upfront fee to sell a timeshare interest on behalf of an individual owner but take no further action to sell the interest. The Attorney General was investigating these fraudulent activities and news stories of the arrests of individuals involved in these fraudulent schemes were regular events.

Mr. Marshall explained that, in his opinion, it would be inappropriate to use resales from Orange County to appraise timeshare resorts in Osceola County. In his experience, the west U.S. 192 corridor, beginning at SR 535 and extending west until U.S. 27, was a unique submarket. The characteristics and amenities of the submarket were significantly different from Orange County in terms of proximity to the theme parks, types of restaurants, shopping, and outlet malls.

II. Whether the property appraiser complied with section 192.037(11)?

The next area of disagreement between the parties related to the necessary and appropriate deductions from the developer sales used in the property appraiser's assessments for each year pursuant to section 192.037(11). This provision of the statute requires the property appraiser to deduct the usual and reasonable fees and costs of the sale, which are defined as "all marketing costs, atypical financing costs, and those costs attributable to the right of a timeshare unit owner or user to participate in an exchange of network of resorts." § 192.037(11), Fla. Stat. (2015). The statute provides a rebuttable presumption that such costs are 50 percent of the original purchase price. *Id.*

Because Mr. McElveen did not utilize the methodology set forth in section 192.037(11), he did not provide testimony regarding the appropriate sales to consider or the appropriate amount of deductions. He also did not testify as a rebuttal witness and critique the work product of either Ms. Breitenbruck or Mr. Marshall. Rather, his limited testimony regarding the subject was that resales of timeshare interests measured by points inherently involved intangible aspects so that he removed such resales from the database used in determining whether an adequate resale market sufficient for credible valuations existed and from his multiple regression model.

Ms. Breitenbruck testified that her calculation of the appropriate deductions from the developer sales prices under section 192.037(11) began with the statutory presumption of 50 percent. To that figure, she added five percent for tangible personal property, five percent for any miscellaneous costs not captured within the 50 percent, and three percent for the costs attributable to the exchange network. Her deductions totaled 63 percent. In addition, she deducted $2395 from the developer sales prices based upon representations from Wyndham employees in earlier years that the amount was the fee charged owners of timeshare interests to participate in its internal exchange program, CLUB WYNDHAM Plus

Mr. Marshall's appraisal reflected deductions from the developer sales prices, both within the Cypress Palms timeshare resort and in comparable properties, totaling 63.26 percent. However, he benefited from the litigation discovery process and received actual expense information from Wyndham Vacation Ownership, Inc. (WVO), for both its North America operations and its timeshare resorts within the Orlando area for calendar years 2010 and 2011. The financial statements obtained during discovery were discussed during the testimony

of Dean Smith, who is the Accounting Director with WVO, and were admitted into evidence. (Defendant #1-4)

Mr. Marshall also relied upon expense information reported by ARDA, which is a timeshare industry group, in its annual publication for 2010 and 2011. He utilized 18 percent for sales expenses, 23 percent for marketing expenses, and 15 percent for atypical financing expenses, which totaled 56 percent.

Mr. Marshall utilized an additional three percent for closing costs to account for recording fees, attorney's fees, and title insurance fees. Another .25 percent was attributable to tangible personal property and .0062 percent was attributable to the costs related to the participation in the external exchange program through RCI. Lastly, Mr. Marshall attributed four percent to the costs of the right to participate in the internal exchange program with CLUB WYNDHAM Plus. That amount was based on a comparison of the franchise fee (royalty) for a full service hotel as documented in the Host Study published by Smith Travel Research and was intended to reflect the reservation system and staff necessary to facilitate the Club Wyndham program.

Mr. Marshall, however, did not deduct the $2395 fee. Based on his attendance at the deposition of Mr. Novell and review of documents discussed at that deposition, his conclusion was that $2395 was not the fee charged to owners of timeshare interests to participate in CLUB WYNDHAM Plus. Rather, it was a fee to convert unit weeks owned at other, non-Wyndham resorts into points within CLUB WYNDHAM Plus. Accordingly, his opinion was that the fee would not be an appropriate deduction under section 192.037(11).

Findings of Fact and Conclusions of Law

The burden of proof applicable to ad valorem assessment challenges is set forth in section 194.301, Florida Statutes (2015). The statute was extensively revised in 2009 and is applicable to the challenges to the 2011 and 2012 tax years. The statute provides that an assessment will be presumed correct if the property appraiser "proves by a preponderance of the evidence that the assessment was arrived at by complying with s. 193.011, any other applicable statutory requirements relating to classified use values or assessment caps, and professionally accepted appraisal practices, including mass appraisal standards, if appropriate." § 194.301(1), Fla. Stat. (2015). Although section 194.301 does not specifically mention section 192.037, the property appraiser has accepted the burden of proof for demonstrating compliance with sections 192.037(10) and (11) in her assessment, reasoning that these provisions should be read in pari materia with section 193.011, Florida Statutes (2015). The plaintiffs have not disputed this position.

The court finds that the property appraiser has established, by a preponderance of the evidence, that her assessment complied with sections 192.037(10) and (11) along with section 193.011 and professionally accepted appraisal practices.[3] The property appraiser, consistent with section 192.037(10), looked first to the resale market in establishing her assessment. After concluding that there were an inadequate number of resales to support a credible valuation, the property appraiser used the developer sales as the original purchase price and applied the deductions for personal property and costs attributable to marketing, atypical financing, and the right of a timeshare unit owner to participate in an exchange network of

[3] The plaintiffs have not challenged the property appraiser's consideration of section 193.011 or use of professionally accepted appraisal practices. When sales of comparable properties are used to determine just value, the property appraiser performs a standard appraisal and considers all and uses some of the factors in section 193.011. *Nolte*, 524 So.2d at 418.

resorts as set forth in section 192.037(11) from those original purchase prices. The assessments for 2011 and 2012, therefore, are entitled to the presumption of correctness under section 194.301(1).

I. Whether an adequate number of resales exists to provide a basis for arriving at a value conclusion.

With regard to whether an adequate number of resales existed to provide a basis for arriving at a value conclusion for the Cypress Palms timeshare resort, the court finds the testimony elicited by the property appraiser through Ms. Breitenbruck and Mr. Marshall to be more credible and entitled to greater weight than the testimony elicited by the plaintiffs through Dr. Harris and Mr. McElveen. Their research and analysis of the resale market within Osceola County and the Cypress Palms timeshare resort established that vast majority of resale transactions occurred at nominal values and were reflective of a market in distress. The plaintiffs did not challenge Mr. Marshall's testimony regarding the fraudulent activities occurring in the timeshare resale market, the Attorney General's investigation of those activities, and the criminal prosecutions resulting therefrom.

The remaining resale transactions above a nominal value consisted of only a miniscule portion, between one and two percent, of the total sales activity for timeshare interests in either the county or the Cypress Palms timeshare resort. When the sales volume by dollars are considered, the resale activity within the resort was significantly smaller. The evidence demonstrated that there was less than $80,000 in resale transactions in 2011 or 2012 but $11.3 million and $19.8 million in developer sales. (Defendant #7, #8, #11, #12) By way of reference, the bar charts presented by Dr. Harris and discussed during his testimony reflected $5 million in total resale volume for Osceola and Orange County for calendar years 2010 and 2011. (Plaintiff

#19) In that same time period, there was $31.3 million in developer sales at Cypress Palms alone. (Defendant #7, #8)

The court also has considered the prices paid per point for resales within Cypress Palms and reviewed those sales as compared with the similar unit of comparison for the developer sales as the parties requested during closing argument. The court finds that the pricing for resales is quite disparate and gives weight to Mr. Marshall's testimony that it would be inappropriate to select transactions reflecting a low or high price per point as reflecting arms length transactions sufficient for a credible valuation.

The court, moreover, is mindful of the administrative difficulties that would be imposed upon the property appraiser's office if it were to adopt the plaintiffs' approach to determining whether an adequate number of resales existed to support a credible valuation of the Cypress Palms timeshare resort. The application of appraisal principles to any given property requires an exercise of appraisal judgment. "Determination of 'just value' inherently and necessarily requires the exercise of appraisal judgment and broad discretion by Florida property appraisers." *Dep't of Revenue v. Howard*, 916 So.2d 640, 643 (Fla. 2005).

Mr. McElveen testified that his staff expended thousands of hours in researching the resale market transactions occurring during a time period spanning 7½ years. In addition, he retained two survey companies, paying them over a combined $20,000, to conduct telephone surveys involving several thousand calls to sellers and buyers of resales.

The property appraiser is required to assess all property in Osceola County on an annual basis. Although counsel for the plaintiffs briefly argued that the property appraiser should have done something more in researching the resale market, he did not present any expert testimony regarding what action was necessary short of the analysis provided by Dr. Harris and

Mr. McElveen or what useful information would have been revealed. The court rejects the plaintiffs' argument that the property appraiser's diligence in analyzing the resale market was deficient or somehow constituted an abuse of the administrative discretion necessary to accomplish the annual assessment of the timeshare resorts in Osceola County.

There are other more fundamental concerns regarding the validity of the plaintiffs' approach to determining whether an adequate number of resales existed to perform a credible valuation of the Cypress Palms timeshare resort, i.e., the use of resale transactions occurring after the tax years at issue, the reliance upon resales from Orange County, and the failure to analyze the resales occurring within Cypress Palms. As such, very little weight can be placed on the plaintiffs' analysis of the resale market.

To begin with, it is well settled that all real property shall be assessed according to its just value, i.e., fair market value, as of January 1st of each year. § 192.042, Fla. Stat (2015); *Gilreath,* 871 So.2d at 967. Implicit in the just valuation of each parcel on January 1st is the closing of a hypothetical sale transaction on that date. *See Security Mgmt. v. Markham*, 516 So.2d 959 (Fla. 4th DCA 1987) (property appraiser may consider sale after assessment date provided that it is relevant to valuation on January 1); *Bystrom v. Equitable Life Assurance Society*, 416 So.2d 1133 (Fla. 3d DCA 1982) (comparable sale in March of taxable year utilized because sale negotiations had begun prior to January 1); *ITT Cmty. Dev. Corp. v. Seay*, 347 So.2d 1024 (Fla. 1977) (declaring "Pope's law" unconstitutional because, in part, it attempts to value property at least 10 months after the January 1st valuation date).

To support their conclusions that adequate resales existed to support a credible valuation of the Cypress Palms timeshare resort, Dr. Harris and Mr. McElveen relied upon resales that occurred long after January 1 of the respective tax years. When section 192.037(10)

instructs the property appraiser to "look first to the resale market" in her annual assessment of timeshare resorts, such a market must exist as of the January 1 valuation date. The plaintiffs' experts, however, utilized sales as long as 3½ years after the valuation dates. It appears incongruous for the court to find that the property appraiser was deficient in her analysis of the resale market by failing to consider resale activity that had not even occurred, and the plaintiffs' reliance upon these sales is non-compliant.

In a similar manner, reliance upon resale activity occurring in Orange County is problematical. Although section 192.037(10) and (11) does not include any geographic boundary to the existence of the resale market, it stands to reason that the legislature would not task the property appraiser with determining whether a resale market sufficient to support a credible valuation of a timeshare resort exists in another county. The court declines to conclude, as a matter of law, that the resale market must be confined to the county in which the property at issue is located. Instead, the court gives greater weight to the testimony of Mr. Marshall regarding the significant market differences between Osceola and Orange counties. Mr. Marshall has been appraising property in the central Florida area for 40 years and discussed his lengthy experience appraising timeshare developments for lending institutions. His testimony regarding the submarket between U.S. 192 beginning at SR 535 and extending west to U.S. 27 and the reasons for not considering resales of timeshare interests in Orange County is more credible and persuasive than that of the plaintiffs' experts. Location is one of the assessment criteria of section 193.011 and was properly considered by Mr. Marshall.

Lastly, the plaintiffs did not endeavor to conduct any analysis of the resale activity occurring within the Cypress Palms timeshare resort.[4] Since the passage of section 192.037(10)-(12) in 1988, the only case discussing it is the Fifth District Court's decision in *Gilreath*. That case involved whether a condominium could be assessed as a timeshare if the POS was not recorded prior to January 1. The district court answered in the negative. In reaching its decision, the court stated as follows:

> We conclude that the Legislature has clearly expressed its intent that timeshare property be assessed in accordance with section 193.011. *We also conclude, based on our analysis of these provisions, that when the Legislature directed that 'the resale market' be the basis for a proper assessment, it intended that the resale of timeshare properties in the same building be considered as part of the resale market.* Obviously, this requires that the timeshare property be legally established as timeshare property in order to effect a valid resale and hence a resale market.

Id. at 966 (emphasis added). By eliminating all points-based projects from his dataset, Mr. McElveen's analysis failed to address the resale activity occurring within the timeshare resort. The Court finds it rather curious that Mr. McElveen would expend such extreme efforts in verifying resales in two counties over multiple years as arms length transactions but not make any attempt to verify a single resale occurring within the subject property.

II. Whether the property appraiser complied with section 192.037(11)?

The court further finds that property appraiser established that her assessments for 2011 and 2012 complied with section 192.037(11). Ms. Breitenbruck's deductions of 63 percent began with the statutory presumptive 50 percent and included another 13 percent for tangible personal property, miscellaneous costs, and costs attributable to the exchange program. She then

[4] Mr. McElveen acknowledged that only three of his 97 verified sales even occurred in Osceola County.

deducted an additional amount of $2395 based on her conversations with Wyndham's representatives. Mr. Marshall's deductions totaled almost the same amount at 63.26 percent and were based, in part, on actual expense data reported by WVO and industry data.

The court rejects the plaintiffs' argument that the "original purchase price," as contemplated under section 192.037(11), requires use of the sales that occurred when the timeshare resort was initially offered for sale in the late 1990's and early 2000's. Such an argument relies upon a strained reading of the statute that is inconsistent with the annual assessment responsibilities of the property appraiser under section 192.042, Florida Statutes (2015), which requires all property to be assessed according to its just value on January 1 of each year. Ms. Breitenbruck's and Mr. Marshall's use of developer sales of timeshare interests occurring in the calendar years proceeding each January 1 as the original purchase price are appropriate under the statute and reflect the reality that essentially only two types of sales are occurring; developer sales and resales from individual to individual.

The court further rejects the plaintiffs' argument that the deductions from the developer sales inadequately reflect the intangible value inherent in the sale of timeshare interests measured by points as opposed to week intervals. In short, the plaintiff asserts that purchasers of such timeshare interests are buying a vacation experience and the right to exchange points for cruises, airline tickets, housekeeping credits, and even to offset their annual maintenance fees. The real property interest is asserted to be only a small part of the total price with the remainder ascribed to the "nuts, cherries, and whipped cream on top" as described by plaintiffs' counsel. Other than the limited testimony of Mr. McElveen regarding rejection of points-based timeshare resales in his analysis, however, the plaintiffs have not presented any probative evidence on this point.

The ownership of a points-based timeshare interest is simply another way of describing the interval purchased and right to use the accommodation. According to the POS for the Cypress Palms timeshare resort, points reflect the percentage of the tenancy-in-common ownership interest with other owners of timeshare interests. Contrary to the argument of plaintiffs' counsel, purchasers are not buying an interest in a vacation club, which is separately addressed in sections 721.50 through 721.58, Florida Statutes (2015). Rather, they are acquiring an interest in real property as a tenant-in-common with other owners, which is transferred by a warranty deed.

The POS clearly describes that purchasers of such interests have the *option* of "assigning the use and occupancy rights appurtenant to such Ownership Interest into CLUB WYNDHAM Plus, which is an exchange company operated by the Developer." (Plaintiff #12 at III(8)) As the district court observed in *Walker*, the bundle of rights attributable to a timeshare ownership interest is a fee interest in real property and includes the complete right to use or not use the property and the right to mortgage, lease, sell, bequeath, or give away the timeshare estate. A timeshare estate is defined as a parcel of real property. § 721.05(34), Fla. Stat. (2015). A timeshare period titleholder means "the purchaser of a timeshare period sold as a fee interest in real property, whether organized under chapter 718 or chapter 721." § 192.001(15), Fla. Stat. (2015).

Thus, the purchaser's decision to assign the use and occupancy rights appurtenant to his or her ownership interest is the exercise of one of the bundle of rights attributable to real property. Section 192.037(11) does not require a deduction for the exercise of this right. Rather, it requires a deduction for the "costs attributable to the right of a timeshare unit owner or user to participate in an exchange network or resorts." Both Ms. Breitenbruck and Mr. Marshall

included such deductions in their calculations. Mr. Marshall specifically attributed four percent to the costs attributable to CLUB WYNDHAM Plus, and based that amount on the franchise fee or royalty paid by a full service hotel for the central reservation system. In this regard, his deduction comports with the position of the parties in the *Nolte* decision that the "sales price of the time-share units included not only the costs attributable to real property and tangible personal property, but many other cost components typical of and peculiar to time-share estates (i.e., marketing costs and other intangible values such as the right to participate in an exchange network of resorts and a reservation and front-desk system, together with other services and amenities ordinarily associated with a hotel)." 524 So.2d at 416. The legislature essentially codified that position in section 192.037(11).

The legislature has taken similar action regarding the issue of "intangibles," present in the valuation of apartment complexes participating in the Low-Income Housing Tax Credit Program and computer software. *See* §§ 192.001(19), 193.017, Fla. Stat. (2015); *Holly Ridge Ltd. Partnership v. Pritchett*, 936 So.2d 694, 698 (Fla. 5th DCA 2006) (statute reflected "an effort by the legislature to define these tax credits as intangible personal property and thereby exempt from ad valorem taxation"); *Gilreath v. General Elec. Co.*, 751 So.2d 705 (Fla. 5th DCA 2000) (definition of computer software as intangible personal property was constitutional).

The plaintiffs argue that affiliation with the Wyndham brand creates intangible value that must be deducted so that only the real property interest created by the sale of the tenant-in-common ownership interest is valued. That argument, however, is belied by the multiple regression model utilized by their own expert. Mr. McElveen's analysis concluded that the Wyndham brand actually had a negative .0003 impact on sales prices. While other hotel

brands, such as Marriott and Hilton, had positive impacts on sales prices, such was not the case with the Wyndham brand.

Mr. Marshall's comparable sales included in his appraisal report were from the non-branded type timeshare resorts, Silver Lake and Calypso Cay. Only Westgate had any brand influence in his opinion. Accordingly, the court finds that there is no evidence of intangible value present in the sales prices of timeshare interests in the Cypress Palms timeshare resort due to the Wyndham brand.

III. Whether the assessment exceeds just value?

The court finds that the plaintiffs have failed to establish, by a preponderance of the evidence, that the assessments exceed just value for 2011 and 2012. Mr. McElveen's appraisal was solely based on the resale market, and the plaintiffs presented no other testimony or evidence regarding additional deductions necessary under section 192.037(11). Mr. Marshall's testimony and appraisals, which the court finds credible and well reasoned, easily support the property appraiser's assessments.

NOW THEREFORE, it is hereby **ORDERED** and **ADJUDGED** that;

1. The property appraiser has proven, by a preponderance of the evidence, that the assessments of the Cypress Palms timeshare resort complied with section 192.037(10) and (11), section 193.011, and professionally accepted appraisal practices. Therefore, her assessments for 2011 and 2012 are entitled to a presumption of correctness.

2. The plaintiffs have failed to establish, by a preponderance of the evidence, that the assessments exceeded just value for 2011 or 2012.

3. The property appraiser's assessments of $92,853,150 for 2011 and $92,853,100 for 2012 are hereby upheld.

4. Final judgment is hereby entered in favor of the property appraiser and against the plaintiffs.

5. Plaintiffs shall take nothing by this action and the property appraiser shall go hence without day.

6. The court reserves jurisdiction to consider a timely motion to tax costs.

DONE and **ORDERED** in Chambers at Kissimmee, Osceola County, Florida on this 25 day of July 2016.

SCOTT POLODNA, Circuit Judge

Copies furnished via Email to:

Robert E. V. Kelley, Jr., Esquire	*rob.kelley@hwhlaw.com; relitrevk@hwhlaw.com*
Patrick J. Risch, Esquire	*prisch@hwhlaw.com; val@hwhlaw.com*
Loren E. Levy, Esquire	*levytorres@me.com; geri.smith@comcast.net*
Jon F. Morris, Esquire	*jfm.levylaw@comcast.net*

on this 25 day of July 2016.

Lauren Burrows, Judicial Assistant

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR OSCEOLA COUNTY, FLORIDA

CASE NO: 2016-CA-1006-OC
DIVISION: 20

STAR ISLAND VACATION OWNERSHIP ASSOCIATION, INC., a Florida non-profit corporation, and **WYNDHAM VACATION MANAGEMENT, INC.**, a foreign corporation,

Plaintiffs,

vs.

KATRINA S. SCARBOROUGH, as Property Appraiser; **PATSY HEFFNER,** as Tax Collector; and **LEON M. BIEGALSKI**, as Executive Director of the Florida Department of Revenue,

Defendants.
_____/

FINAL JUDGMENT

This ad valorem tax case involves a challenge to the assessed value for the 2015[1] tax year of the Wyndham Star Island Resort, which consists of four buildings within a larger timeshare resort development located just off US 192 in Osceola County. Plaintiffs are Star Island Vacation Ownership Association, Inc., (Star Island), the homeowner's association, and Wyndham Vacation Management, Inc. (WVM), the management company retained by the Association. Plaintiffs are the authorized parties to file suit as agents of the fee timeshare period titleholders pursuant to

[1] There are other pending lawsuits challenging the 2011-2014 and 2016-2017 assessments of Star Island. *Star Island Vacation Ownership Ass'n, Inc. vs. Katrina Scarborough, etc., et al.*, Case Nos. 2012-CA-1292, 2013-CA-1745, 2014-CA-697, 2015-CA-558, 2017-CA-657 and 2018-CA-752.

section 192.037(1), Florida Statutes (2018). The Property Appraiser's assessment of the Wyndham Star Island Resort for tax year 2015 is $71,451,000.

I. Background – The Law

Both parties provided pretrial memoranda discussing key appellate court decisions regarding the assessment of timeshare developments and the legislature's passage of section 192.037, and amendments thereto, in response to these decisions in the 1980's. The memoranda discuss the same appellate court decisions and are generally fairly consistent in the analysis of those decisions.

In Florida, a timeshare unit is a form of multiple fee ownership of one parcel of real property where the rights of use, occupancy, and possession of a timeshare unit have been sold and transferred by deed to each of the timeshare owners. A timeshare estate is a parcel of real property under Florida law. § 721.05(34), Fla. Stat. (2018). Each individual owns an undivided interest in the property but, regardless of the number of owners, there remains only one parcel and one assessment. *Day v. High Point Condo. Resorts, Ltd.,* 521 So.2d 1064 (Fla. 1988); § 192.037(2), Fla. Stat. (2018). The time-share concept presented administrative assessment and collection problems for taxing authorities that the legislature addressed in section 192.037. *See Day*, 521 So.2d at 1066-67 (rejecting challenges to facial constitutionality of section 192.037); *Southards v. Motel Mgmt. Co.*, 610 So.2d 524, 525 (Fla. 3d DCA 1992) (rejecting challenge to constitutionality of section 192.037 as applied).

In 1981, Florida was one of the first jurisdictions in the United States to regulate timeshare ownership by passing Chapter 721, Florida Statutes. R. Freedman, *Timeshare Condominiums*, The Fla. Bar, FL-CLE § 6.1 (2011). A "timeshare plan" is defined as:

> any arrangement, plan, scheme, or similar device, other than an exchange program, whether by membership, agreement, tenancy in

> common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser, for consideration, receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during any given year, but not necessarily for consecutive years. The term 'timeshare plan' includes:
>
> (a) A 'personal property timeshare plan,' which means a timeshare plan in which the accommodations are comprised of personal property that is not permanently affixed to real property; and
>
> *(b) A 'real property timeshare plan,' which means a timeshare plan in which the accommodations of the timeshare plan are comprised of or permanently affixed to real property.*

§ 721.05(39), Fla. Stat. (2018) *(emphasis added)*. Under a timeshare plan, buyers are conveyed a "timeshare estate," which is defined as:

> a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a specified portion thereof, or coupled with an ownership interest in a condominium unit pursuant to s. 718.103, an ownership interest in a cooperative unit pursuant to s. 719.103, or a direct or indirect beneficial interest in a trust that complies in all respects with s. 721.08(2)(c)4. or s. 721.53(1)(e), provided that the trust does not contain any personal property timeshare interests. *A timeshare estate is a parcel of real property under the laws of this state.*

§ 721.05(34), Fla. Stat. (2018) *(emphasis added)*.

Prior to offering any timeshare plan for sale, the developer must submit a registered Public Offering Statement (POS) for approval by the Department of Business & Professional Regulation (DBPR). § 721.07, Fla. Stat. (2018). The POS is the documentation of the timeshare plan. §721.05(29), Fla. Stat. (2018).

In the ad valorem tax context, "fee timeshare real property" is defined as "the land and buildings and other improvements to land that are subject to timeshare interests which are sold as a fee interest in real property." § 192.001(14), Fla. Stat. (2018). "Timeshare period titleholder"

means the "purchaser of a timeshare period sold as a fee interest in real property, whether organized under chapter 718 or chapter 721." § 192.001(15), Fla. Stat. (2018).

The earliest decision discussing the proper assessment of timeshare developments involved the Orange County Property Appraiser. *Hausman v. VTSI, Inc.*, 482 So.2d 428 (Fla. 5th DCA 1985). For the 1982 tax year, the property appraiser assessed the property on the aggregate value of each of the timeshare weeks instead of the actual condominium unit. Of that total amount, a deduction of five percent was made to reflect the household furnishings and other items of personal property in the sales price. An additional deduction of 25 percent was not specifically supported by evidence at trial but was explained as an effort to be fair. *Id.* at 429.

The district court held that the assessment was invalid because the existing statutes did not authorize the assessment of the timeshare interests created in the condominium interests. The court, however, observed that the decision would have limited precedential value because the legislature amended section 192.037(2) in 1983 to require the assessment of each timeshare development to be "the value of the combined individual time-share periods or time share estates contained therein." *Id.* at 430.

The district court further held that the trial court correctly overturned the assessment because it exceeded the just value of the real property. The trial court found that at least 45 percent of the gross sales price consisted of the usual and reasonable sales and merchandising costs. The court also recognized atypical and unconventional financing added another seven percent to the cost of the timeshare units. Accordingly, the property appraiser's "conclusory" 25 percent reduction was not a valid exercise of discretion under section 193.011(8), Florida Statutes, which requires consideration of the usual and reasonable fees and costs of the sale, including the costs

and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements. *Id.* at 431.

The next cases involving timeshare developments were three decisions from Florida's Fourth District Court of Appeal: *Spanish River Resort Corp. v. Walker*, 497 So.2d 1299 (Fla. 4th DCA 1986); *Oyster Pointe Resort Condo. Ass'n., Inc. v. Nolte*, 497 So.2d 1306 (Fla. 4th DCA 1986); *Driftwood Mgmt. Co., Inc. v. Nolte*, 497 So.2d 740 (Fla. 4th DCA 1986). The lead decision was *Walker*.

Similar to *Hausman*, the question presented in *Walker* was whether a property appraiser could assess each individual timeshare interest or whether the assessment must be limited to the value of an ordinary condominium unit not subject to timesharing. For example, a condominium in which no timeshare estates had been created was assessed at $25,000, while a physically identical adjoining unit, in which 51 timeshare estates had been created, was assessed at $236,634. 497 So.2d at 1301.

The district court held that the assessment under the 1983 version of section 192.037 was to reflect the sum of the individual assessments of each timeshare unit. Quoting from the trial court's final judgment, the court stated:

> *The interval owner at Spanish River has all of the 'sticks' which constitute the 'bundle of rights' that is fee ownership of real estate:* the complete right to use (or not to use) the property during the period of ownership; the right to exclude others during that period, and the right to mortgage, lease, sell, bequeath or give away the time-share estate. Every time share period is a unique ownership, even if it is located in part within the same physical space as the other time share estates in the same apartment. *In short, it is a parcel of real estate.*

Id. at 1302 *(emphasis added)*.

The district court also rejected the developer's argument that the "excessive costs of sale totaling 55% of the purchase price" must be taken into consideration to reach fair market value. The court concluded that these exorbitant internal expenditures in marketing timeshare properties were not the type of reasonable fees and costs of sale contemplated by section 193.011(8). As the court stated:

> Further, one reason given by the developers for the unfairness of the assessments is hardly the fault of the property appraiser. *In the time-share unit owners' brief, it is argued that upon resale the 'week' unit owners will never be able to recoup the original purchase price which latter '[did] not represent fair market value but may [have been] inflated by the developer's cost of attracting potential buyers.'* To be sure, the promotional material did not advise the potential buyers of this dismal forecast when they were being persuaded to purchase their time-share 'weeks.' *Regardless, the property appraiser can hardly be faulted for taking the original sales prices prominently into account when assessing the time-share units. That the developers overcharged the purchasers does not make the latter unwilling buyers and most certainly does not cause the developers to be unwilling sellers.* Arrival at the value of property is a matter of administrative discretion to be exercised by a property appraiser which the courts should not disturb unless it has been fraudulently or illegally exercised. Here the appraisal was largely based on the purchase prices of the original sales—a time honored approach consistent with the requirement that all property must be assessed at '100% valuation rate.' *As yet, the assessments of these time-share units are not based on resales because there have been very few, if any. If a pattern of lower resale prices emerges, the appraiser will have to react accordingly and reassess downwards.* No such pattern has been established in the record now before us and speculation as to the possible purchase price of future resales is hardly 'probative of present value.'

Id. at 1303-4 *(emphasis added, citations omitted).*

In 1988, the Florida Supreme Court issued three decisions involving timeshare condominiums. The first of these, released on January 28, 1988, involved the Osceola County Property Appraiser and held that the method for assessment of timeshare developments set forth

in section 192.037 was facially constitutional. No valuation issue was involved. *Day v. High Point Condominium Resorts, Ltd.,* 521 So.2d 1064, 1065 (Fla. 1988).

In the second case, released on March 31, 1988, the Florida Supreme Court addressed the arguments regarding valuation under the 1983 statute. *Oyster Pointe Resort Condominium Assoc., Inc. v. Nolte,* 524 So.2d 415 (Fla. 1988). The Florida Supreme Court observed that the uncontroverted testimony at trial was that the sales price of timeshare units included not only the costs attributable to real property and tangible personal property, "but many other cost components typical of and peculiar to time-share estates (*i.e.*, marketing costs and other intangible values such as the right to participate in an exchange network of resorts and a reservation and front-desk system, together with other services and amenities ordinarily associated with a hotel)." *Id.* at 416.

As in *Hausman* and *Walker*, the developer argued that the assessment should not reflect the combined value of the timeshare estate periods. The Florida Supreme Court rejected that argument, quoting with approval from *Walker* that section 192.037 "is an unmistakable expression of the legislature's intent to bring individual time-share units or 'weeks' within the ambit of ad valorem taxation." *Nolte*, 524 So.2d at 417.

Nolte next addressed whether the property appraiser was required to "net from the sales price all elements of the purchase price other than the real property component when valuing time-share units under a market value approach." *Id.* The developer argued that the excessive marketing costs, atypical financing costs, and other extraordinary costs associated with fee timeshare estates are part of the reasonable fees and costs of sale to be deducted from the sales price under section 193.011(8). These excessive costs comprised approximately 75-80 percent of the purchase price of the timeshare units. *Id.* at 418.

Citing *Walker* again, the Florida Supreme Court rejected the argument that such excessive costs were required to be deducted under section 193.011(8). "Until the legislature modifies section 193.011(8), the costs cited by petitioners cannot be deducted from the purchase price of the time-share units as 'reasonable fees and costs of sale.'" *Id.* The Court commented that it was "mindful of the petitioner's point that an appraisal based on the original purchase price of the units includes the unusually high marketing costs necessary to attract potential buyers" and that those costs are alleged "to never be recouped upon resale." *Id.* at 419. If a pattern of lower resale prices emerged, the property appraiser will have to adjust his appraisals accordingly and reassess the timeshare units.

The third decision released by the Florida Supreme Court in 1988 involving timeshare condominiums was *Spanish River Resort Corporation v. Walker,* 526 So.2d 677 (Fla. 1988), wherein the Supreme Court approved the decision of the 4th DCA in *Walker* on the authority of *Nolte* and *Day*, and answered the two questions certified to the Florida Supreme Court, finding that is was correct for the property appraiser to assess individual time-share weeks (relying on *Nolte*) and that section 192.037, Florida Statutes (1983) was constitutional (relying on *Day).*

Later that same year, the legislature adopted the assessment mechanism still in effect today. Ch. 88-216, § 15, Laws of Fla. (1988). The following provisions were added to section 192.037:

> *(10) In making his or her assessment of timeshare real property, the property appraiser shall look first to the resale market.*
> *(11) If there is an inadequate number of resales to provide a basis for arriving at value conclusions, then the property appraiser shall deduct from the original purchase price 'usual and reasonable fees and costs of the sale.'* For purposes of this subsection, 'usual and reasonable fees and costs of the sale' for timeshare real property shall include all marketing costs, atypical financing costs, and those costs attributable to the right of a timeshare unit owner or user to participate in an exchange network of resorts. For timeshare real property, such 'usual and reasonable fees and costs of the sale' shall

> be presumed to be 50 percent of the original purchase price; provided, however, such presumption shall be rebuttable.
> (12) Subsections (10) and (11) apply to fee and non-fee timeshare real property.

§§ 192.037(10)-(12), Fla. Stat. (2018) *(emphasis added)*. Since 1988, there has not been another significant appellate court decision regarding the assessment of timeshare developments. The statutory assessment language remains unchanged.

The single appellate case even discussing section 192.037 is *Gilreath v. Westgate Daytona, Ltd.*, 871 So.2d 961, 965 (Fla. 5th DCA 2004). That case, however, addressed whether a condominium could be assessed as a timeshare if the POS was not recorded prior to January 1 of the tax year at issue. The district court answered in the negative. In reaching its decision, the court stated as follows:

> We conclude that the Legislature has clearly expressed its intent that timeshare property be assessed in accordance with section 193.011. *We also conclude, based on our analysis of these provisions, that when the Legislature directed that 'the resale market' be the basis for a proper assessment, it intended that the resale of timeshare properties in the same building be considered as part of the resale market. Obviously, this requires that the timeshare property be legally established as timeshare property in order to effect a valid resale and hence a resale market. Moreover, the alternative of deducting the appropriate fees and costs from the sales price effectively requires a valid sale of the timeshare property.* As we have discussed, any contract entered into between a developer and a prospective purchaser is voidable at the option of the purchaser until the POS is approved. Until that time, any title documents and deposit money must be held in escrow on behalf of the purchaser. Once the POS is approved and the contract is no longer voidable at the will of the purchaser, the contract becomes binding and a sale may be closed by releasing the title documents and deposit money. This establishes a valid basis for assessing timeshare property under section 193.011.

Id. at 966-67 *(emphasis added)*.

II. Findings of Fact

The Star Island Resort is located at 5064 Avenue of the Stars, off the south side of U.S. Highway 192, east of Interstate-4 in unincorporated Osceola County, Florida. The Star Island Resort is comprised of three (3) separate condominium developments, all of which have been converted to the timeshare form of ownership. There are a total of 17 buildings and a clubhouse complex located on 85 acres of land. Within the Star Island Resort, there are common areas such as a guest reception area, swimming pools, spa, and tennis courts. A guest within any of the three timeshare developments is entitled to use all portions of the common areas. The three timeshare developments are more particularly described as follows:

- **Vacation Break at Star Island (Vacation Break).** Vacation Break consists of four buildings containing 123 condominium units and 6,396 timeshare estates. The appraisal report of Plaintiffs' expert, Frank Catlett, delineated the assessment per timeshare estate for Vacation Break at $2,403. (PL. Exh. #17 at p. 13)
- **Star Island Resort and Country Club (Star Island).** Star Island consists of nine buildings containing 159 units and 8,268 timeshare estates. The appraisal report of Plaintiffs' expert, Frank Catlett, delineated the assessment per timeshare estate for Star Island at $2,433. (PL. Exh. #17 at p. 13)
- **Wyndham Star Island Resort.** There are four buildings (20, 21, 23 and 25) at Wyndham Star Island Resort and a total of 184 units within the four buildings. The mix of accommodations includes 18 two-bedroom Deluxe units, 148 two-bedroom Plus units, and 18 three-bedroom units. (Def. Exh. #15, p. 36 of 120) The total weeks are 9,384 (184 x 51 weeks) because one week is reserved for maintenance purposes. (*Id.* at p. 98 of 120; Def. Exh. #1 p. 37 of 48). The units in both Vacation Break and Star Island are sold on a

fixed week basis as opposed to the tenant-in-common ownership interest at the Wyndham Star Island Resort. The Wyndham Star Island Resort was assessed in tax year 2015 in the aggregate amount of $71,451,000, equating to an average of $7,800 for a two bedroom plus unit for one week, $6.100 for a two bedroom deluxe unit for one week, and $7,600 for a three bedroom unit for one week. The overall assessment for Wyndham Star Island Resort equates to an average of $7,468 per week equivalent. (PL. Exh. #17 at p. 13)

The POS for Wyndham Star Island Resort indicates that the developer is offering for sale undivided tenant-in-common fee interests in each of the units of the condominium coupled with a right to reserve and occupy a unit. As the POS provides in pertinent part:

> The developer is offering for sale and by deed of conveyance ("Deed") Timeshare Estates *each consisting of an interest in real estate which shall be identified as an undivided tenant-in-common fee interest* in a Phrase of the Resort Facility committed to the Vacation Ownership Plan, whereby such real estate interest is coupled with the right to reserve and occupy a Unit. *The undivided tenant-in-common fee interest of each Owner shall be expressed as a fraction and shall be known as a Vacation Ownership Interest.*
>
> For the purposes of determining both the extent of ownership interest and occupancy rights, each Phase of the Resort Facility shall be allocated a specific total number of Points. *An Owner does not purchase Points as such, but rather Points are allocated to an Owner as a result of the purchase of the Vacation Ownership Interest ("VOI").*

(Def. Exh. #6, § III, 1.a.(1), *emphasis added*) The buyers' purchase of a tenant-in-common fee interest in a phase (building) in the Wyndham Star Island Resort also is reflected in the Purchase and Sale Agreement and the numerous deeds introduced into evidence. (PL. Exh. #3; Def. Exhs. #9-#14)

For purposes of determining occupancy rights, each building is allocated a specific number of points that symbolize the annual occupancy rights in that building. The points are symbolic of

the value of the owner's use rights in the property. (PL. Exh. #3, #4) Points are defined as the "units of symbolic value used as the basis for determining the Valuation Ownership Interest of an Owner and the Owner's occupancy rights in the Resort Facility in a particular Resort Year." (Def. Exh. #1, p. 8 of 191)

The ownership interest is measured as a fraction of the total occupancy rights for the phase (building). For example, an annual ownership interest is reflected as follows:

$$\frac{\text{Points Annually Allocated with the Vacation Ownership Interest Purchased}}{\text{Total Number of Points Allocated to all Units in the subject phase at the Resort Facility}}$$

(*Id.* at p. 16 of 191)

In no event shall the total number of points allocated for ownership interests in a unit exceed 100 percent of the total number of points allocated to that unit. (*Id.* at § III.1.a.(1)) The development is authorized for a total of 1,891,857,000 points. The purchaser's ownership interest is conveyed by warranty deed. *Id.*

The breakdown of the total points allocated to each building, and the number of points, *i.e.*, inventory, still owned by the developer, is as follows:

Phase	**Building**	**Total Points**	**Inventory**
Phase I	Building 21	420,960,000	46,036,000
Phase II	Building 22	490,299,000	47,965,000
Phase III	Building 23	490,299,000	53,004,500
Phase IV	Building 25	490,299,000	52,721,500

(*Id.* at § III.5.a; Def. Exh. 19)

According to the POS, purchasers have the opportunity to participate in two exchange programs. RCI, LLC is the external exchange program affiliated with the condominium. The developer[2] and RCI are both subsidiaries of a common parent company, *i.e.*, Wyndham Worldwide Company. (*Id.* at § III.8.) In addition, each purchaser of an ownership interest has the option of assigning the use and occupancy rights appurtenant to that interest to Club Wyndham Plus, which is an internal exchange company operated by the developer. (*Id.*) The purchaser is responsible for the payment of an additional annual membership fee to the plan manager for Club Wyndham Plus. *Id.* The POS describes these exchange programs as follows:

> An owner has the opportunity to participate in two (2) exchange programs as further described below.
>
> *RCI, LLC ("RCI") is the external exchange program that is affiliated with this Project. Owners may not be able to exchange a VOI through RCI if the points allocated to the Ownership Interest purchased are less than the points necessary to reserve a seven-day week.* The mailing address of RCI is 9998 North Michigan Road, Carmel, Indiana 46032. The Developer and RCI are both subsidiaries of a common parent company; however, Developer makes no representations or warranties as to an Owner's ability to obtain any particular exchange or as to any services, rates or charges of RCI.
>
> *In addition to providing purchasers with the opportunity to join RCI, each purchaser of a VOI will have the option of assigning the use and occupancy rights appurtenant to such VOI to the CLUB WYNDHAM Plus, which is an exchange company operated by the Developer.* The mailing address of CLUB WYNDHAM Plus is 6277 Sea Harbor Drive, Orlando, Florida 32821. *An Owner who elects to join CLUB WYNDHAM Plus will be responsible for the payment of an annual membership fee payable to the CLUB WYNDHAM PLUS Plan Manager, which annual membership fee may include the anticipated amount of the annual Association Fee attributable to the Ownership Interest purchased. The annual membership fee shall also include payment of an annual CLUB WYNDHAM Plus Program Fee ("Program Fee") which is subject to change from time to time.* The Fairshare Vacation Owners Association has entered into an agreement with RCI whereby RCI

[2] Wyndham Vacation Resorts, Inc. is a successor developer to Fairfield Communities, Inc.

> will provide external exchange services to the CLUB WYNDHAM Plus Members. As the RCI membership fee is included in the Program Fee, CLUB WYNDHAM Plus Members are not charged separately for the annual RCI membership fee; however, CLUB WYNDHAM Plus Members are charged for applicable exchange and/or services fees for the RCI services used.

(*Id.*, emphasis added) The option to assign the tenant-in-common use and occupancy rights also is reflected in the Club Wyndham Plus Vacation Ownership Assignment Agreement and Use Restriction and the Buyers Acknowledgment. (PL. Exh. #4, #5)

The POS further notifies purchasers of timeshare estates that their right to reserve or use their timeshare period is subject to the Reservation System Rules and Regulations for the Plan. The reservation system "is a method established by the Association to enable each Owner to utilize his allocated Points to secure a period of occupancy in their applicable Unit." (*Id.* at ¶ 7.c.)

Diana Breitenbruck, the Commercial Appraiser responsible for the assessments of timeshare developments with the Osceola County Property Appraiser's office, testified that she had reduced the assessments for Vacation Break and Star Island because of a meeting with their representatives and information provided at a 2015 meeting showing very little sales activity. For 2015, there were only 3 developer annual sales at Vacation Break and 15 developer annual sales at Star Island. (Def. Exh. #15, p. 3 of 7) By way of comparison, there were 666 developer sales of annual interests at Wyndham Star Island Resort. Ms. Breitenbruck testified that the 2015 assessments for each development was based upon the original purchase prices from the developer occurring within the respective development.

Ms. Breitenbruck further testified that, several years later, she learned that Vacation Break and Star Island had reached an agreement with Wyndham whereby it had the exclusive right to market to owners and visitors at the resort on-site. Her testimony was confirmed by Mark Novell, Vice President for Sales & Marketing, Orlando One World locations. He testified that a

"gentleman's agreement" with the developer for Vacation Break and Star Island had been made whereby Wyndham paid these entities for the exclusive right to market onsite.

A. Whether an adequate number of resales exists to provide a basis for arriving at a value conclusion?

At trial, the principal area of disagreement among the parties was whether there were an adequate number of resales to provide a basis for arriving at a value conclusion for the Wyndham Star Island Resort. Importantly, both parties agree that those resales must constitute arms-length transactions to meet the definition of "fair market" value, *i.e.*, "the price at which a property, if offered for sale in the open market, with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent, under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other." Fla. Admin. Code R. 12D-1.002(2) (2018). The parties generally agree that resales were best described as individual-to-individual sales.[3]

(1) The Plaintiffs' evidence regarding resales.

The Plaintiffs presented their evidence regarding the resale market through the testimony of (i) Frank Catlett (their appraisal expert) and (ii) Judi Kozlowski (a licensed real estate broker specializing in timeshare resales for the past 20 years). Mr. Catlett testified there were an adequate number of resales to utilize in developing his opinion of value. Ms. Kozlowski testified there was an active resale market as of January 1, 2015.

Mr. Catlett described his process in reviewing the resale data for calendar years 2012-2014. In his opinion, owner to owner resales was the best available information for valuation purposes.

[3] The Property Appraiser excluded sales from non-user owners, which were individuals or entities selling more than seven timeshare interests per year. *See* § 721.05(33), Fla. Stat. (2018). The Plaintiffs' appraisal expert made no such distinction.

(PL. Exh. #17, p. 63) He began by reviewing the resales occurring within the Vacation Break, Star Island, and Wyndham Star Island Resorts. He did not go outside of the Star Island development to find additional resales because he believed that he had sufficient data for determining value based solely on the resales occurring within the three resorts.

Mr. Catlett initially reviewed thousands of resales, many of which were for nominal amounts. He utilized a threshold of $1500 in reviewing resales to determine whether they constituted an arms-length transaction. Mr. Catlett did not consider or further research resales at amounts less than $1500 as, in his opinion, those resales were not potential arms-length transactions.

For those resales within the Star Island development, Mr. Catlett and his associate attempted to determine whether they were arms-length transactions by reviewing the face of the deed. After eliminating resales that were disqualified on the face of the deed because of a familial relationship or some other reason, they attempted to contact either the buyer or seller of the remaining resales via telephone and interview them in an effort to qualify the resale as an arms-length transaction. Ultimately, Mr. Catlett was able to qualify a total of seven resales. Of those seven resales, only three involved timeshare interests in Wyndham Star Island Resort. Two of the resales occurred in calendar year 2012, three in 2013, and two in 2014. In arriving at his opinion of value, Mr. Catlett did not make any effort to adjust the resales occurring in 2012 and 2013 to reflect the passage of time and any changing market conditions existing as of January 1, 2015.

Mr. Catlett's opinion was that the determination of an adequate number of resales necessary to provide a basis for arriving at value conclusions was a matter of appraisal judgment. He testified that seven resales were sufficient for his appraisal. Utilizing these resales, Mr.

Catlett's opinion of value for the combined timeshare interests at Wyndham Star Island Resort for the 2015 tax year was $43,085,440.

Ms. Kozlowski described her lengthy experience as a timeshare resale broker, beginning in 1994 when she attempted to sell a timeshare interest owned with her husband. At that time, the entity she approached requested an upfront fee to broker her timeshare interest, which she believed was inappropriate.

Ms. Kozlowski testified that the biggest reason owners of timeshare interests want to sell their interest was the annual, ongoing maintenance fees, which were approximately $1000. Ms. Kozlowski testified that her office had over 500 resales in calendar year 2014 totaling approximately $2.5 million. In calendar year 2015, her office had over 700 resales totaling $3.5 million. These resales were of timeshare properties all over the world and, when asked, she could not specify how many involved resorts in Osceola or Orange counties. The vast majority of these resales were cash transactions as there was very little opportunity to obtain financing. Ms. Kozlowski did not express an opinion as to whether there were an adequate number of resales to provide a basis for arriving at value conclusions or as to the value of the timeshare interests at Wyndham Star Island Resort. Ms. Kozlowski's opinion as to how Wyndham would rank as far as the "sellability" or the attractiveness to a potential buyer was, in general, as follows: (1) Disney Vacation Club; (2) Marriott; (3) Hilton; and (4) Wyndham.

On cross-examination, Ms. Kozlowski thoroughly discussed the significant extent of illegal activity and "scams" occurring in the timeshare resale market. She had devoted half of her career to combating illegitimate activities in the timeshare resale market. She described her assistance to the DBPR, the Florida Attorney General, the City of Orlando police, the Federal Bureau of Investigation (FBI), and the American Resort Development Association (ARDA), which is a trade

group of timeshare developers. She acknowledged that her efforts were not entirely altruistic, as she believed that fewer scammers in the timeshare resale market would result in more resale clients for her.

Ms. Kozlowski testified about the "Viking Ship" scam, whereby the timeshare interest would be conveyed to a homeless or deceased person or "dummy corporation." She testified about the "upfront fee" scam, the vacation club scam, and the private presentation scam made to persuade owners to execute a power of attorney for a timeshare reseller to attempt to convey their timeshare interest for a fee. She identified Project Philanthropy and its principals, Sandy and Sandra Staudenmayer, as being involved in the "charitable contribution scam" in which the owner would donate their timeshare interest to a non-profit organization for the tax write-off. The organization would subsequently convey that timeshare interest on the resale market to an individual buyer.[4]

Ms. Kozlowski testified that for every reputable broker like herself, there were ten (10) scammers. When asked how an owner of a timeshare interest would be able to avoid becoming involved with a scammer instead of obtaining the services of a reputable broker, she replied that it would be very difficult. Ms. Kozlowski even admitted that she had become personally involved in efforts by developers to conceal that they were willing to "take back" timeshare interests from owners that no longer wanted to utilize their property. She was the preferred broker for Wyndham for several years before and after January 1, 2015. In that capacity, she formed Viva Vacation Club at Wyndham's request. Owners were referred to her by Wyndham, and she served as the transactional broker. She would facilitate the sale of the timeshare interest to Viva Vacation Club, which would later convey the interest back to Wyndham. The amount negotiated to be paid by Viva Vacation Club, and the funds necessary to close the transaction, were decided and provided

[4] One of the resales relied upon by Mr. Catlett was from Staudenmayer via Project Philanthropy.

by Wyndham. Ms. Kozlowski received a commission for the closed transaction. She did not inform the owner of her relationship with Viva Vacation Club or Wyndham's involvement.

For a period of time, Ms. Kozlowski had a similar arrangement with Westgate. Specifically, she would acquire the timeshare interest in her own name and later convey it back to Westgate. For each transaction, she received a $500 fee. Westgate used this method so the general public would not know that it was taking back timeshare interests from owners.

(2) The Property Appraiser's evidence regarding resales.

Diana Breitenbruck has been responsible for the assessment of timeshare developments since 2003. Based upon her analysis of the resale market, Ms. Breitenbruck concluded that there were an inadequate number of resales to provide a basis for arriving at a value conclusion for the Wyndham Star Island Resort for the 2015 tax year. In fact, she testified that she had never utilized resales in the assessment of timeshare resorts in her career.

Ms. Breitenbruck testified that there were 36 timeshare resorts in Osceola County during 2015, comprising approximately 375,000 unit weeks. During the calendar year 2014, which immediately proceeded January 1 of the 2015 tax year, there were approximately 25,000 total sales transactions. Of that total, 21,880 were developer sales and 3,790 were classified as resales. Approximately 90 percent of those resales were transacted for nominal documentary stamps. As such, they could not even be considered for valuation purposes. The remaining number of resales constituted less than 1.7 percent of the total timeshare sales market each year. (Def. Exh. #5)

Ms. Breitenbruck testified that when the 2014 county-wide sales were evaluated from the viewpoint of total sales consideration, there were $430,427,468 in developer sales and $3,662,750 in resales. Accordingly, the resale market constituted less than one percent of the total sales.

The data for sales activity within the Wyndham Star Island Resort was similar to the county-wide sales data. For 2014, there were 680 developer sales and 135 resales. (Def. Exh. #4) Again, approximately 90 percent of the resales were transacted for nominal consideration. There were eight resales over $1,000 included in her report prepared for the Value Adjustment Board in 2015. Of those, only four resales were potentially qualified as an arms-length transaction based on a review of the face of the deed. (Def. Exh. #18) In her opinion, it was extremely difficult and impracticable to accurately determine which, if any, of those resales could be considered arms-length transactions.

When viewed by reference to total sales consideration, there was $13,446,520 in developer sales and only $38,393 in resales. Thus, the resale market constituted less than one-half of a percent of the total sales. Ms. Breitenbruck expressed her concerns regarding the limited number of resales within the Wyndham Star Island Resort. By comparison, there were hundreds of developer sales each year that clearly qualified as arms-length transactions reflective of just value. She stated that the resales showed no consistent trend in pricing. The developer sales reflected a far more consistent pricing. In sum, Ms. Breitenbruck believed that there simply were not an adequate number of arms-length transactions to support an accurate, credible, and reliable value conclusion.

The Property Appraiser's expert witness, Steve Marshall, also testified regarding his analysis of the resale market. His appraisal for 2015 discussed the resale market and was admitted into evidence. (Def. Exhs. #14, #15) During the calendar year 2014, preceding January 1, 2015, there were a total of 2,869 annual resales in Osceola County.[5] Of that number, 2,571 were for

[5] Mr. Marshall eliminated biannual sales from both his resale data and developer sales used in his comparable sales analysis.

nominal consideration. There were only 145 resales for greater than $1,000, constituting approximately five percent of the total resales.

Similar percentages were reflected in the resales occurring within the Wyndham Star Island Resort. For the 2014 calendar year, there were a total of 170 resales. Of that number, 142, or 84 percent, were for nominal consideration. There were only 7 annual resales exceeding $1,000. Mr. Marshall testified that he obtained telephone numbers of sellers and/or buyers by matching the addresses on the deeds with internet searches and attempted to contact these individuals to ascertain whether a given transaction could be considered an arms-length transaction. He was unable to obtain any helpful responses.

Mr. Marshall also evaluated the resale activity occurring within Vacation Break and Star Island along with the Wyndham Star Island Resort. For 2013 and 2014, there were a total of 65 resale transactions greater than $1,000 in the three resorts. Of that, 45 transactions (69 percent) could be disqualified from review based on the face of the deed. The remaining 20 could not be qualified or unqualified.

Mr. Marshall testified that the exceedingly large number of resales at nominal amounts reflected significant financial distress in the overall market. Distressed sales fail to qualify as arms-length transactions and cannot be used to determine just value. In addition to the distress in the resale market, he was aware of pervasive criminal fraud and illegitimate scams by timeshare resellers during this time period. The Attorney General was investigating these fraudulent activities and news stories of the arrests of individuals involved in these fraudulent schemes were regular events. He viewed the resale market in Osceola County as the "Wild, Wild West."

Like Mr. Catlett, Mr. Marshall opined that whether an adequate number of resales existed to provide a basis for arriving at value conclusions was a matter of appraisal judgment. In his 25

years of appraising timeshare developments and observing the resale market, Mr. Marshall's conclusion was that the entire market was illegitimate and corrupt and tainted any isolated sales data that may be available. In his opinion, there simply were an inadequate number of resales to provide a basis for arriving at credible and reliable value conclusions.

Upon review of the conflicting evidence presented by the parties, this Court finds that the Property Appraiser's depiction of the resale market in general, and the resale activity within the Wyndham Star Island Resort in particular, is credible, accurate, and based upon reliable data. Mr. Catlett failed to fully consider the impact of illegal and illegitimate activity occurring in the resale market in Osceola and Orange County. At best, Mr. Catlett was able to find a total of seven resales with only 2-3 resales per year capable of being used in his appraisal. It is inescapable that the vast majority of resales occurred at nominal prices and that there was significant illegal and illegitimate activity occurring in the years preceding the 2015 tax year. The Plaintiffs' own expert, Ms. Kozlowski, testified at length about the illegal activity and scams that was imbedded in the resale market.

Although the determination of whether an adequate number of resales existed to provide a basis for arriving at value conclusions may be considered a matter of appraisal judgment, such judgment should be the result of due diligence and fact finding. The testimony of Ms. Breitenbruck and Mr. Marshall reflects their substantial efforts to analyze and understand the resale market and determine whether it could be relied upon to produce a credible and reliable opinion of value. Their opinion that the resale market could not be relied upon to produce an adequate number of resales for valuation purposes is well founded, well explained, and reflects their many years of experience in the valuation of timeshare developments and in-depth understanding of the

difficulties of attempting to use data from the resale market to produce credible and reliable valuations.

B. Whether the Property Appraiser complied with section 192.037(11)?

The next issue relates to whether the Property Appraiser made the necessary and appropriate deductions (pursuant to section 192.037(11)) from the original purchase price from the developers in the Property Appraiser's assessments for each year. Section 192.037(11) requires the Property Appraiser to deduct the usual and reasonable fees and costs of the sale, which are defined as "all marketing costs, atypical financing costs, and those costs attributable to the right of a timeshare unit owner or user to participate in an exchange of network of resorts." § 192.037(11), Fla. Stat. (2015). The statute provides a rebuttable presumption that such costs are 50 percent of the original purchase price. *Id.*

(1) The Plaintiffs' evidence.

Plaintiffs contend the Property Appraiser's deductions under section 192.037(11) fail to account for all extraordinary sales and marketing costs and intangible value inherent in the sale of a timeshare interest. By way of example, Plaintiffs cite to bonus points, which are a one-time award of points to be used within the 18 months following the purchase of a timeshare interest to encourage the purchase of additional timeshare interests. Plaintiffs assert that these intangibles include the right of the owner to exchange the occupancy and use rights for stays at other resorts, airline tickets, cruises, and amenities associated with the Club Wyndham Plus exchange program and the Wyndham brand.

Plaintiffs did not provide any expert testimony utilizing the methodology set forth in section 192.037(11) – either regarding appropriate sales to consider or the appropriate type and amount of deductions to be made. Plaintiff's expert, Mr. Catlett, did testify that the potential

intangible impacts on the real property value were limited to the exchange network, atypical financing, excess marketing fees, and Wyndham branding. He acknowledged that he had no opinion as to the amount of these items and had not investigated whether a timeshare interest at a Wyndham branded resort would sell for more or less than a non-Wyndham timeshare interest. In fact, he relied upon resales of the non-Wyndham timeshare interests at Vacation Break and Star Island to support his opinion of value of the combined timeshare interests for the Wyndham Star Island Resort without any adjustment as it related to brand.

(2) The Property Appraiser's evidence.

Ms. Breitenbruck testified that she deducted sixty percent (60%) from the original purchase price from the developer under section 192.037(11). That figure included fifty-five percent (55%) for the costs delineated in the statute, three percent (3%) for tangible personal property, and two percent (2%) for any miscellaneous costs not otherwise captured. In addition, she deducted $2,395 based upon representations from Wyndham employees in earlier years that the amount was the fee charged to owners of timeshare interests to participate in its internal exchange program, Club Wyndham Plus. After the assessment was completed, and as part of the discovery process, she learned that this information was incorrect. These deductions, along with smaller adjustments to account for the relative square footage size of the units, resulted in a total deduction of sixty-five and one-half percent (65.5%) from the original purchase price from the developer. (Def. Exh. #1, p. 37 of 48)

Mr. Marshall's appraisal reflected deductions from the original purchase price from the developer totaling sixty-three and one-quarter percent (63.25%). However, he benefited from the litigation discovery process and received actual expense information from Wyndham Vacation Ownership, Inc. (WVO), for both its North America operations and its timeshare resorts within

the Orlando area for calendar years 2012-2014. Mr. Marshall also relied upon expense information reported by ARDA, which is a timeshare industry group, in its annual publication for 2011-2014. Based on this data, he utilized eighteen percent (18 %) for sales expenses, twenty-three percent (23%) for marketing expenses, and fifteen percent (15%) for atypical financing expenses, which totaled fifty-six percent (56%).

Mr. Marshall utilized an additional three percent (3%) for closing costs to account for recording fees, attorney's fees, and title insurance fees. Another one-quarter percent (.25 %) was attributable to tangible personal property and .0047 percent was attributable to the costs related to the participation in the external exchange program through RCI. Lastly, Mr. Marshall attributed four percent (4%) to the costs of the right to participate in the internal exchange program with Club Wyndham Plus. That amount was based on a comparison of the franchise fee (royalty) for a full service hotel and was intended to reflect the reservation system and staff necessary to facilitate the Club Wyndham program and any impact of the Wyndham brand.[6]

The Property Appraiser presented the testimony of Dean Smith, Vice President of Accounting for the Wyndham North America operations. Mr. Smith explained the Wyndham VOI Sales income and expense statements introduced as evidence. (Def. Exh. #16, #17) The statements reflected the income and expenses attributable to the sales of VOI interests in the Orlando area for the calendar years ending 2012-2014.

Mr. Smith testified that the cost of any bonus points were included in the Discounts from the Total Vacation Ownership sales to produce Net VOI Sales. The total sales overhead reflected the expense of the sales staff and depreciation of any buildings or property associated with the

[6] Mr. Marshall's comparable sales included in his appraisal report were from the non-branded type timeshare resorts, Silver Lake and Calypso Cay. Only Westgate had any other locations available with the Westgate name and those locations were for less than the Wyndham family of resorts.

sales staff. The cancellation provision reflected the anticipated expense for bad debt resulting from the financing of purchases of timeshare interests. Guest Generation included all marketing and promotional expenses associated with encouraging individuals to attend presentations attempting to sell timeshare interests, such as park tickets, VISA gift cards, and other items. The comissions expense was attributable to the sales staff for closed transactions.

Upon review of the testimony, this Court finds that Ms. Breitenbruck and Mr. Marshall have established they made the necessary deductions from the original purchase price from the developer to account for the items set forth in section 192.037(11). As with their testimony regarding the resale market, the work of Ms. Breitenbruck and Mr. Marshall is well researched and reflects an in-depth understanding of the extraordinary costs associated with selling timeshare interests. Their deductions are supported by industry publications and Wyndham's own data specific to the Orlando market.

III. Conclusions of Law

Section 192.037(10) commands the Property Appraiser to "look first to the resale market" in her annual assessment of timeshare real property. If there is an "inadequate number of resales to provide a basis for arriving at value conclusions," the Property Appraiser is to deduct from the original purchase price "all marketing costs, atypical financing costs, and those costs attributable to the right of a timeshare unit owner or user to participate in an exchange network of resorts" pursuant to section 192.037(11).

A. Whether an adequate number of resales exists to provide a basis for arriving at a value conclusion.

The comparable sales approach analyzes the recent sales of similar properties to arrive at the probable market price of the property being appraised. "Prior to using this approach, the appraiser must determine if there is an active market for the property from which *reliable sales*

data can be obtained." *Havill v. Scripps Howard Cable. Co.*, 742 So.2d 210, 212-3 (Fla. 1998) *(emphasis added)*. The parties agree that the sales data must reflect an arms-length transaction, which means a sale "where the parties involved are not affected by undue stimuli from family, business, financial, or personal factors." Dep't of Revenue, *Fla. Real Property Appraisal Guidelines*, § 3.1.8 (Nov. 2002). "Just value" or "fair market value" is defined as "the price at which a property, if offered for sale in the open market, with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent, under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other." Fla. Admin. Code R. 12D-1.002(2) (2018).

Appraisal is an art, not a science. *Powell v. Kelly*, 223 So.2d 305, 309 (Fla. 1969). The determination of just value necessarily involves the exercise of appraisal judgment. *Dep't of Revenue v. Howard*, 916 So.2d 640, 643 (Fla. 2005). Appraisal judgment is defined as "the process, using imperfect information, of reaching a reasoned conclusion within a reasonable range of alternatives by differentiating between and comparing alternatives." Dep't of Revenue, *Fla. Real Property Appraisal Guidelines*, § 3.2.6 (Nov. 2002).

This Court concludes that the Property Appraiser has proven, by a preponderance of the evidence, that there are an inadequate number of resales to provide a basis for arriving at value conclusions. The resale market does not provide a sufficient basis for obtaining reliable sales data. The Property Appraiser's appraisal judgment in concluding that reliable and credible valuations could not be obtained from the resale market was well researched and supported the evidence adduced at trial.

B. Whether the Property Appraiser complied with section 192.037(11)?

This Court finds the Property Appraiser has proven, by a preponderance of the evidence, that her assessment for 2015 complied with section 192.037(11). This Court rejects the Plaintiffs' argument that the "original purchase price," as contemplated under section 192.037(11), requires use of the sales that occurred when the timeshare resort was initially offered for sale in the late 1990's and early 2000's. Such an argument relies upon a reading of the statute that is inconsistent with the annual assessment responsibilities of the Property Appraiser under section 192.042, Florida Statutes (2018), which requires all property to be assessed according to its just value on January 1st of each year. Ms. Breitenbruck's and Mr. Marshall's use of the original purchase prices from the developer in calendar year 2014 is appropriate under the statute and reflects the reality that essentially only two types of sales are occurring; developer sales and resales from individual to individual.

This Court finds that Plaintiffs' have failed to establish that the deductions from the original purchase price from the developer inadequately reflect the intangible value inherent in the sale of timeshare interests. The ownership of a points-based timeshare interest is simply another way of describing the interval purchased and right to use the accommodation. According to the POS for the Wyndham Star Island Resort, points symbolically reflect the percentage of the tenancy-in-common ownership interest in the building with other owners of timeshare interests.

The POS clearly describes that purchasers of such interests have the *option* of "assigning the use and occupancy rights appurtenant to such Ownership Interest into Club Wyndham Plus, which is an exchange company operated by the Developer." (PL. Exh. #4, Def. Exh. #6 at 35, 36 of 191) As the district court observed in *Walker*, the bundle of rights attributable to a timeshare

ownership interest is a fee interest in real property and includes the complete right to use or not use the property and the right to mortgage, lease, sell, bequeath, or give away the timeshare estate.

A purchaser's decision to assign the use and occupancy rights appurtenant to his or her ownership interest is the exercise of one of the bundle of rights attributable to real property. Section 192.037(11) does not require a deduction for the exercise of this right. Rather, it requires a deduction, among other items, for the "costs attributable to the right of a timeshare unit owner or user to participate in an exchange network or resorts." Both Ms. Breitenbruck and Mr. Marshall included such deductions in their calculations. Mr. Marshall specifically attributed four percent (4%) to the costs attributable to Club Wyndham Plus, and based that amount on the franchise fee or royalty paid by a full service hotel for the central reservation system. In this regard, his deduction comports with the position of the parties in the *Nolte* decision that the "sales price of the time-share units included not only the costs attributable to real property and tangible personal property, but many other cost components typical of and peculiar to time-share estates (*i.e.*, marketing costs and other intangible values such as the right to participate in an exchange network of resorts and a reservation and front-desk system, together with other services and amenities ordinarily associated with a hotel)." 524 So.2d at 416. The legislature essentially codified that position in section 192.037(11). *See also* §§ 192.001(19), 193.017, Fla. Stat. (2015); *Holly Ridge Ltd. P'ship v. Pritchett*, 936 So.2d 694, 698 (Fla. 5th DCA 2006) (statute reflected "an effort by the legislature to define these tax credits as intangible personal property and thereby exempt from ad valorem taxation"); *Gilreath v. General Elec. Co.*, 751 So.2d 705 (Fla. 5th DCA 2000) (definition of computer software as intangible personal property was constitutional).

IV. Burden of Proof

The burden of proof applicable to ad valorem assessment challenges is set forth in section 194.301, Florida Statutes (2018). The statute provides that an assessment will be presumed correct if the Property Appraiser "proves by a preponderance of the evidence that the assessment was arrived at by complying with s. 193.011, any other applicable statutory requirements relating to classified use values or assessment caps, and professionally accepted appraisal practices, including mass appraisal standards, if appropriate." § 194.301(1), Fla. Stat. (2018). Although section 194.301 does not specifically mention section 192.037, the Property Appraiser has accepted the burden of proof for demonstrating compliance with sections 192.037(10) and (11) in her assessment, reasoning that these provisions should be read *in pari materia* with section 193.011, Florida Statutes (2018). The Plaintiffs have not disputed this position.

This Court concludes that the Property Appraiser has established, by a preponderance of the evidence, that her assessment complied with sections 192.037(10) and (11) along with section 193.011 and professionally accepted appraisal practices.[7] The Property Appraiser, consistent with section 192.037(10), looked first to the resale market in establishing her assessment. After concluding that there were an inadequate number of resales to support a credible valuation, the Property Appraiser used the original purchase price from the developer and applied the deductions for personal property and costs attributable to marketing, atypical financing, and the right of a timeshare unit owner to participate in an exchange network of resorts as set forth in section

[7] The Plaintiffs have not challenged the Property Appraiser's consideration of section 193.011 or use of professionally accepted appraisal practices. When sales of comparable properties are used to determine just value, the property appraiser performs a standard appraisal and considers all and uses some of the factors in section 193.011. *Nolte*, 524 So.2d at 418. The Plaintiffs' expert, Frank Catlett, testified that use of a comparable sales approach by relying upon the original purchase price from the developer would constitute a professionally accepted appraisal practice if the appropriate deductions were made under section 192.037(11).

192.037(11). The assessment for 2015, therefore, is entitled to the presumption of correctness under section 194.301(1).

This Court finds that the Plaintiffs have failed to establish, by a preponderance of the evidence, that the assessment exceeds just value for 2015. Mr. Catlett's appraisal was solely based on the resale market, and the Plaintiffs presented no other testimony or evidence regarding additional deductions necessary under section 192.037(11).[8] Mr. Marshall's testimony and appraisal, which the court finds credible and well-reasoned, concluded a fair market value of $95,200,000 easily supports the Property Appraiser's assessment of $71,451,000.

This Court rejects the Plaintiffs' position that the assessment of the Wyndham Star Island Resort should be reduced because of the lower assessment of the timeshare interests at Vacation Break and Star Island. This Court is cognizant of case law concluding that it is "fundamental that property in Florida is legally required to be assessed at 100% of its actual fair market value and a court may not reduce a taxpayer's assessment below 100% on a mere showing that parcels of some other taxpayers are assessed at a lesser amount." *Deltona Corp. v. Bailey*, 336 So.2d 1163, 1167 (Fla. 1976); *see Ozier v. Seminole Cty. Property Appraiser*, 585 So.2d 357, 358 (Fla. 5th DCA 1991) (taxpayer had standing to challenge assessment by relying upon systemic undervaluation of

[8] The Plaintiffs also rely upon Florida Administrative Code Rule 12D-6.006 (2018), as support for their argument that the accuracy of the Property Appraiser's assessment should be evaluated by reference to prices occurring in the resale market. The rule provides that resales should be used as the basis for determining the extent of any deductions and allowances that may be appropriate under section 193.011(8). Fla. Admin. Code R. 12D-6.006(3)(d) (2018). Review of the rule in its entirety, however, reveals that no reference is made to the operative sections 192.037(10) and (11). The rule initially was adopted in 1985, which was prior to passage of sections 192.037(10) and (11) in 1988. An administrative rule is operative until it is modified or superseded by subsequent legislation. *Hulmes v. Div. of Retirement*, 418 So.2d 269 (Fla. 1st DCA 1982). In the event of a conflict between a statute and an administrative rule, the statute governs. *Dep't of Revenue v. A. Duda & Sons, Inc.*, 608 So.2d 881, 884 (Fla. 5th DCA 1992); *see also Garcia v. Andonie*, 101 So.3d 339, 352 (Fla. 2012) (Department of Revenue administrative rule was not controlling authority relative to the constitutional issue of permanent residency). It appears that the rule has been effectively superseded by the intervening statutory enactment.

a substantial number of homes). This Court is not persuaded, however, that the assessment of the Wyndham Star Island Resort should be reduced because of the assessments at Vacation Break and Star Island.

The Plaintiffs' appraisal expert, Mr. Catlett, testified that he had no opinion as to the fair market value of the combined timeshare interests at either Vacation Break or Star Island. In addition, he had no opinion as to whether the timeshare interests at Vacation Break and Star Island should have the same value as the timeshare interests at Wyndham Star Island Resort. The evidence adduced at trial included discussion of an agreement between Wyndham and the developer of Vacation Break and Star Island whereby Wyndham had the exclusive right to market to owners and visitors to the resort. There was an obvious and appreciable difference in the sales activity within the three resorts. In calendar year 2014, there was a total of 18 annual sales of timeshare interests within Vacation Break and Star Island compared to 666 annual sales within Wyndham Star Island Resort. Ms. Breitenbruck testified that she relied upon the original purchase prices from the developer occurring in the respective resorts in 2014 to arrive at the assessment for the 2015 tax year.

This Court declines to speculate that the differences in assessments, number of sales, and consideration paid is caused by the difference between a "fixed week" and "points-based" timeshare interests, the impact of the exclusive marketing agreement, the presence of intangibles, or a difference in the quality or condition of the respective properties. The plaintiff has simply failed to present any evidence or expert opinion that the assessments should be the same or, restated, that the assessment of Wyndham Star Island Resort is excessive.[9]

[9] After review all of the evidence and arguments presented by the parties, this Court's decision is aligned with the prior decision in *Cypress Palms Condo. Ass'n, Inc. v. Scarborough*, No. 2012-CA-1293 (Fla. 10th Jud. Cir. Ct. Jul. 25, 2016), which is considered persuasive.

Based upon the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant Property Appraiser has proven, by a preponderance of the evidence, that the assessment of the Wyndham Star Island Resort for the 2015 tax year complied with section 192.037(10) and (11), section 193.011, and professionally accepted appraisal practices. Therefore, Defendant's assessment for 2015 is entitled to a presumption of correctness.

2. Plaintiffs have failed to establish, by a preponderance of the evidence, that the 2015 assessment exceeded just value for 2015.

3. The Property Appraiser's assessment of $71,451,000 for 2015 is hereby upheld.

4. Final Judgment is hereby entered in favor of Defendant Property Appraiser and against the Plaintiffs.

5. Plaintiffs shall take nothing by this action and shall go hence without day.

6. The Court reserves jurisdiction for a period of one hundred eighty (180) days to consider a timely motion to tax costs.

DONE and **ORDERED** in Chambers at Kissimmee, Osceola County, Florida on this 21ST day of August, 2019.

MARGARET H. SCHREIBER
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic filing by using the Florida Courts E-Filing Portal System on this 21st day of August, 2019, to the following:

Robert E. V. Kelley, Jr., Esquire	*rob.kelley@hwhlaw.com*
Patrick J. Risch, Esquire	*prisch@hwhlaw.com*
Loren E. Levy, Esquire	*service.levylaw@comcast.net*
R. Stephen Miles, Esquire	*smiles@kisslawyer.com*
Timothy E. Dennis, Esquire	*timothy.dennis@myfloridalegal.com*

Wendy Blair
Judicial Assistant

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 Committee on Regulated Industries

BILL:	SB 1454
INTRODUCER:	Senator Gruters
SUBJECT:	Homeowners' Right to Display Flags
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Pre-meeting**
2.			CA	
3.			RC	

I. Summary:

SB 1454 expands the types of flags that a homeowner may display as a portable, removable flag display or on a flagpole, notwithstanding any covenant, restriction, bylaw, or requirement of a homeowners' association. Under the bill, a homeowner may display:

- The United States flag;
- The official flag of the State of Florida;
- A flag that represents the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard;
- A POW-MIA flag; or
- A first responder flag that may incorporate the design of any other flag permitted under this paragraph to form a combined flag.

The bill defines the term "first responder flag" to mean a flag that recognizes and honors the service of any of the following:

- Law enforcement officers;
- Firefighters;
- Paramedics or emergency medical technicians;
- Correctional officers;
- 911 public safety telecommunicators;
- Advanced practice registered nurses, licensed practical nurses, or registered nurses;
- Persons participating in a statewide urban search and rescue program developed by the Division of Emergency Management; or
- Federal law enforcement officers.

Regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, current law permits members of a homeowners' association to display one portable, removable United States flag or official flag of the State of Florida in a respectful manner. Under current law, homeowners may also display one portable, removable official flag, in a respectful manner, not larger than 4.5 feet by 6 feet, which represents the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard, or a POW-MIA flag.

The bill also provides that, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, and unless prohibited by general law or local ordinance, an association may not restrict parcel owners or their tenants from storing or displaying any items on a parcel which are not visible from the parcel's frontage, including, but not limited to, artificial turf, boats, flags, and recreational vehicles.

The bill takes effect July 1, 2023.

II. Present Situation:

Homeowners' Associations

Chapter 720, F.S., provides statutory recognition to nonprofit corporations that operate residential communities in Florida as well as procedures for operating homeowners' associations. These laws protect the rights of association members without unduly impairing the ability of such associations to perform their functions.[1]

A "homeowners' association" is defined as a "Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners[2] or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel."[3] Unless specifically stated to the contrary in the articles of incorporation, homeowners' associations are also governed by ch. 607, F.S., relating to for-profit corporations, or by ch. 617, F.S., relating to not-for-profit corporations.[4]

Homeowners' associations are administered by a board of directors whose members are elected.[5] The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include a recorded declaration of covenants, bylaws, articles of incorporation, and duly-adopted amendments to these documents.[6] The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.[7]

[1] *See* s. 720.302(1), F.S.
[2] Section 720.301(12), F.S., defines the term "parcel owner" to mean the record owner of legal title to a parcel.
[3] Section 720.301(9), F.S.
[4] Section 720.302(5), F.S.
[5] *See* ss. 720.303 and 720.307, F.S.
[6] *See* ss. 720.301 and 720.303, F.S.
[7] Section 720.303(1), F.S.

Homeowners' associations mainly differ from condominiums, in the type of property individually owned. Condominium unit owners essentially own airspace within a building, whereas homeowner association members own a parcel of real property or land.

Unlike condominium and cooperative associations, homeowners' associations are not regulated by a state agency. Section 720.302(2), F.S., expresses the legislative intent regarding the regulation of homeowners' associations:

> The Legislature recognizes that it is not in the best interest of homeowners' associations or the individual association members thereof to create or impose a bureau or other agency of state government to regulate the affairs of homeowners' associations. However, in accordance with s. 720.311, F.S., the Legislature finds that homeowners' associations and their individual members will benefit from an expedited alternative process for resolution of election and recall disputes and presuit mediation of other disputes involving covenant enforcement and authorizes the department to hear, administer, and determine these disputes as more fully set forth in this chapter. Further, the Legislature recognizes that certain contract rights have been created for the benefit of homeowners' associations and members thereof before the effective date of this act and that ss. 720.301-720.407 F.S., are not intended to impair such contract rights, including, but not limited to, the rights of the developer to complete the community as initially contemplated.

For homeowners' associations, the division's authority is limited to the arbitration of recall election disputes.[8]

Display of Flags

Regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, members of a homeowners' association may display one portable, removable United States flag or official flag of the State of Florida in a respectful manner. Homeowners may also display one portable, removable official flag, in a respectful manner, not larger than 4.5 feet by 6 feet, which represents the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard, or a POW-MIA flag.[9]

Additionally, homeowners may erect a freestanding flagpole that is no more than 20 feet high on any portion of the homeowner's real property, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, if the flagpole does not obstruct sightlines at intersections and is not erected within or upon an easement. From the flagpole, the homeowner may display in a respectful manner one official United States flag, not larger than 4.5 feet by 6 feet, and may additionally display one official flag of the State of Florida or the United States Army, Navy, Air Force, Marines, Space Force, or Coast Guard, or a POW-MIA flag.[10]

[8] *See* s. 720.306(9)(c), F.S.
[9] Section 720.304(2)(a), F.S.
[10] Section 720.304(2)(b), F.S.

The additional flag on the flagpole must be equal in size to or smaller than the United States flag. The flagpole and display are subject to all building codes, zoning setbacks, and other applicable governmental regulations, including, but not limited to, noise and lighting ordinances in the county or municipality in which the flagpole is erected and all setback and locational criteria contained in the governing documents.[11]

The right of homeowners in homeowners' associations to display the listed flags applies to all community development districts and homeowners' associations, regardless of whether such homeowners' associations are authorized to impose assessments that may become a lien on the parcel.[12]

Fines

Homeowners' associations may levy fines against an owner, and an owner's tenants, guests, or invitees must comply with ch. 718, F.S., the governing documents[13] of the community, and the rules of the association.[14] A homeowners' association may levy reasonable fines not exceeding $100 per violation against any owner of a parcel or its occupant, licensee, or invitee. A fine may be levied by the board for each day of a continuing violation, with a single notice and opportunity for hearing, except that the fine may not exceed $1,000 in the aggregate if the association's governing documents authorize the fine.[15] A fine by a homeowners' association of less than $1,000 may not become a lien against the parcel. In any action to recover a fine, the prevailing party is entitled to reasonable attorney fees and costs from the nonprevailing party as determined by the court.[16]

An association's board may not impose a fine or suspension unless it gives at least 14 days written notice of the fine or suspension, and an opportunity for a hearing. The hearing must be held before a committee of unit owners who are not board members or residing in a board member's household. The role of the committee is to determine whether to confirm or reject the fine or suspension.[17]

A fine approved by the committee is due five days after notice of an approved fine is sent to the unit or parcel owner and, if applicable, to any tenant, licensee, or invitee of the owner.[18]

[11] *Id.*
[12] Section 720.304(2)(c), F.S.
[13] Section 720.301(8), F.S., defines the term "governing documents" to mean the recorded declaration of covenants for a community and all duly adopted and recorded amendments, supplements, and recorded exhibits thereto; and the articles of incorporation and bylaws of the homeowners' association and any duly adopted amendments thereto.
[14] Section 720.305(1), F.S.
[15] Section 720.305(2), F.S.
[16] Sections 720.305(2), F.S.
[17] Sections 720.305(2)(b), F.S.
[18] *Id.*

III. Effect of Proposed Changes:

Display of Flags

The bill amends s. 720.304(2), F.S., to expand the types of flags that a homeowner may display as a portable, removable flag display or on a flagpole, notwithstanding any covenant, restriction, bylaw, or requirement of a homeowners' association. Under the bill, a homeowner may display:

- The United States flag;
- The official flag of the State of Florida;
- A flag that represents the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard;
- A POW-MIA flag; or
- A first responder flag that may incorporate the design of any other flag permitted under this paragraph to form a combined flag.

The bill defines the term "first responder flag" to mean a flag that recognizes and honors the service of any of the following:

- Law enforcement officers as defined in s. 943.10(1), F.S.[19]
- Firefighters as defined in s. 112.191(1), F.S.[20]
- Paramedics or emergency medical technicians as those terms are defined in s. 112.1911(1), F.S.[21]
- Correctional officers as defined in s. 943.10(2), F.S.[22]
- 911 public safety telecommunicators as defined in s. 401.465(1), F.S.[23]
- Advanced practice registered nurses, licensed practical nurses, or registered nurses as those terms are defined in s. 464.003, F.S.[24]

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[19] Section 943.10(1), F.S., defines the term "law enforcement officer" to mean, in part, "any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state."

[20] Section 112.191(1)(b), F.S., defines the term "firefighter" to mean "any duly employed uniformed firefighter employed by an employer, whose primary duty is the prevention and extinguishing of fires, the protection of life and property therefrom, the enforcement of municipal, county, and state fire prevention codes, as well as the enforcement of any law pertaining to the prevention and control of fires, who is certified pursuant to s. 633.408[, F.S.,] and who is a member of a duly constituted fire department of such employer or who is a volunteer firefighter."

[21] *Id.*

[22] Section 943.10(2), F.S., defines the term "correctional officer" to mean "any person who is appointed or employed full time by the state or any political subdivision thereof, or by any private entity which has contracted with the state or county, and whose primary responsibility is the supervision, protection, care, custody, and control, or investigation, of inmates within a correctional institution; however, the term "correctional officer" does not include any secretarial, clerical, or professionally trained personnel."

[23] Section 401.465(1)(a), F.S., defines the term "911 public safety telecommunicator" to mean "a public safety dispatcher or 911 operator whose duties and responsibilities include the answering, receiving, transferring, and dispatching functions related to 911 calls; dispatching law enforcement officers, fire rescue services, emergency medical services, and other public safety services to the scene of an emergency; providing real-time information from federal, state, and local crime databases; or supervising or serving as the command officer to a person or persons having such duties and responsibilities. However, the term does not include administrative support personnel, including, but not limited to, those whose primary duties and responsibilities are in accounting, purchasing, legal, and personnel."

[24] Section 464.003(2), F.S., defines the term "advanced or specialized nursing practice" to mean, in part, "in addition to the practice of professional nursing, the performance of advanced-level nursing acts approved by the board which, by virtue of postbasic specialized education, training, and experience, are appropriately performed by an advanced practice registered

- Persons participating in a statewide urban search and rescue program developed by the Division of Emergency Management under s. 252.35, F.S.
- Federal law enforcement officers as defined in 18 U.S.C. s. 115(c)(1).[25]

Display and Storage of Items

The bill creates s. 720.3045, F.S., to provide that, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, and unless prohibited by general law or local ordinance, an association may not restrict parcel owners or their tenants from storing or displaying any items on a parcel which are not visible from the parcel's frontage, including, but not limited to, artificial turf, boats, flags, and recreational vehicles.

The bill amends s. 720.3075, F.S., to prohibit a homeowners' association documents from preventing the respectful display of up to two of the authorized flags.

Effective Date

The bill takes effect July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The governing documents of a homeowners' association are a contract. To the extent this bill affects previously recorded governing documents by prohibiting the enforcement of restrictions in those documents related to the display of flags or the storage or display of

nurse." Section 464.003(21), F.S., defines the term "licensed practical nurse" to mean "any person licensed in this state or holding an active multistate license under s. 464.0095[, F.S.,] to practice practical nursing." Section 464.003(21), [F.S.,] defines the term "registered nurse" to mean "any person licensed in this state or holding an active multistate license under s. 464.0095[, F.S.,] to practice professional nursing."

[25] 18 U.S.C. s. 115(c)(1) defines the term "federal law enforcement officer" to mean "any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law."

items, the bill may unconstitutionally impair any contract, under s. 10, Art. I, Fla. Const., which provides in relevant part, "No… law impairing the obligation of contracts shall be passed." This provision empowers the courts to strike laws that retroactively burden or alter contractual relations. Article I, s. 10 of the United States Constitution provides in relevant part that "No state shall . . . pass any . . . law impairing the obligation of contracts."

In *Pomponio v. Claridge of Pompano Condominium, Inc*.,[26] the Florida Supreme Court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The court set forth several factors in balancing whether a state law operates as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court stated that if there is minimal alteration of contractual obligations the inquiry can end at its first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the state legislation. The factors to be considered are:

- Was the law enacted to deal with a broad, generalized economic or social problem;
- Does the law operate in an area that was already subject to state regulation at the time the contract was entered into; and
- Is the law's effect on the contractual relationships temporary or is it severe, permanent, immediate, and retroactive.[27]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[26] *Pomponio v. Claridge of Pompano Condominium, Inc*., 378 So. 2d 774, 776 (Fla. 1979).
[27] *Id*. at 779.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 720.304, 720.3045, and 720.3075.

IX. Additional Information:

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

None.

B. Amendments:

None.

515914

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Regulated Industries (Gruters) recommended the following:

Senate Amendment (with title amendment)

Delete line 86

and insert:

which are not visible from the parcel's frontage or an adjacent parcel, including, but

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 2


515914

and insert:

An act relating to homeowners' right to display and store items;

By Senator Gruters

22-00854A-23 20231454__

A bill to be entitled

An act relating to homeowners' right to display flags; amending s. 720.304, F.S.; authorizing homeowners to display no more than a certain number of specified flags regardless of certain prohibitions in the governing documents of the homeowners' association; defining the term "first responder flag"; creating s. 720.3045, F.S.; prohibiting homeowners' associations from restricting parcel owners or tenants from displaying items on a parcel which are not visible from the parcel's frontage; amending s. 720.3075, F.S.; prohibiting certain homeowners' association documents from precluding property owners from displaying a certain number of specified flags; requiring that such flags be displayed in a specified manner; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (a) and (b) of subsection (2) of section 720.304, Florida Statutes, are amended to read:

720.304 Right of owners to peaceably assemble; display of flags ~~flag~~; SLAPP suits prohibited.—

(2)(a) If any covenant, restriction, bylaw, rule, or requirement of an association prohibits a homeowner from displaying flags permitted under this paragraph, the ~~Any~~ homeowner may still display ~~one portable, removable United States flag or official flag of the State of Florida~~ in a respectful manner up to two of the following~~, and one~~ portable,

22-00854A-23 20231454__

removable flags ~~official flag~~, ~~in a respectful manner,~~ not larger than 4 1/2 feet by 6 feet:~~, which represents~~

1. The United States flag.

2. The official flag of the State of Florida.

3. A flag that represents the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard.~~, or~~

4. A POW-MIA flag.

5. A first responder flag. A first responder flag may incorporate the design of any other flag permitted under this paragraph to form a combined flag. For purposes of this subsection, the term "first responder flag" means a flag that recognizes and honors the service of any of the following:

a. Law enforcement officers as defined in s. 943.10(1).

b. Firefighters as defined in s. 112.191(1).

c. Paramedics or emergency medical technicians as those terms are defined in s. 112.1911(1).

d. Correctional officers as defined in s. 943.10(2).

e. 911 public safety telecommunicators as defined in s. 401.465(1).

f. Advanced practice registered nurses, licensed practical nurses, or registered nurses as those terms are defined in s. 464.003.

g. Persons participating in a statewide urban search and rescue program developed by the Division of Emergency Management under s. 252.35.

h. Federal law enforcement officers as defined in 18 U.S.C. s. 115(c)(1)~~, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association~~.

(b) Regardless of any covenants, restrictions, bylaws,

rules, or requirements of the association, a ~~Any~~ homeowner may erect a freestanding flagpole no more than 20 feet high on any portion of the homeowner's real property as long as~~, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, if~~ the flagpole does not obstruct sightlines at intersections and is not erected within or upon an easement. The homeowner may further display in a respectful manner from that flagpole~~, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association,~~ one official United States flag, not larger than 4 1/2 feet by 6 feet, and may additionally display one other ~~official~~ flag permitted under paragraph (a) ~~of the State of Florida or the United States Army, Navy, Air Force, Marines, Space Force, or Coast Guard, or a POW-MIA flag~~. Such additional flag must be equal in size to or smaller than the United States flag. The flagpole and display are subject to all building codes, zoning setbacks, and other applicable governmental regulations, including, but not limited to, noise and lighting ordinances in the county or municipality in which the flagpole is erected and all setback and locational criteria contained in the governing documents.

Section 2. Section 720.3045, Florida Statutes, is created to read:

720.3045 Display and storage of items.—Regardless of any covenants, restrictions, bylaws, rules, or requirements of the association, and unless prohibited by general law or local ordinance, an association may not restrict parcel owners or their tenants from storing or displaying any items on a parcel which are not visible from the parcel's frontage, including, but not limited to, artificial turf, boats, flags, and recreational

vehicles.

Section 3. Subsection (3) of section 720.3075, Florida Statutes, is amended to read:

720.3075 Prohibited clauses in association documents.—

(3) Homeowners' association documents, including declarations of covenants, articles of incorporation, or bylaws, may not preclude the display of up to two ~~one~~ portable, removable flags as described in s. 720.304(2)(a) ~~United States flag~~ by property owners. However, all flags ~~the flag~~ must be displayed in a respectful manner~~,~~ consistent with the requirements for the United States flag under ~~Title~~ 36 U.S.C. chapter 10.

Section 4. This act shall take effect July 1, 2023.

Datres, Susan

From: Brill, Victoria
Sent: Tuesday, March 14, 2023 10:48 AM
To: Datres, Susan
Cc: Imhof, Booter
Subject: Agenda Requests - 1450/1454

Good Morning Susan and Booter,

Sen. Gruters' would like to officially request that Senate Bill 1450, Valuation of Timeshare Units and Senate Bill 1454, Homeowners' Right to Display Flags be placed on the agenda for the next Regulated Industries meeting.

Thank you,
Vickie

Vickie Brill Keller, MBA
Chief Legislative Aide
Sen. Gruters - FL 22
850-487-5022
941-378-6309

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 Committee on Regulated Industries

BILL:	SB 194
INTRODUCER:	Senator Hooper
SUBJECT:	Utility System Rate Base Values
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schrader	Imhof	RI	**Pre-meeting**
2.			AEG	
3.			FP	

I. Summary:

HB 194 creates s. 367.0811, F.S., to authorize public water and wastewater utilities to utilize an alternative fair market valuation methodology to establish the rate base for an acquired utility using the lesser of either:

- The purchase price paid for the acquired utility; or
- The average of three appraisals of the value of the acquired utility (appraised by three licensed appraisers chosen from a list established by the Florida Public Service Commission).

II. Present Situation:

Challenges for Small Water Utilities

The water and wastewater industry is one of the most capital intensive industries in the United States.[1] As of 2018, the United States Environmental Protection Agency (EPA) estimated that $473 billion was needed to maintain and improve water infrastructure over the next 20 years and that thousands of treatment plants, storage tanks, and other key infrastructure need to be improved or replaced.[2] According to the American Society of Engineers (AASE) there is a water main break in the United States every two minutes and 6 million gallons of treated water is lost,

[1] National Regulatory Research Institute, *A Review of State Fair Market Value Acquisitions Policies for Water and Wastewater Systems*, Sep. 2021 (*available at: https://pubs.naruc.org/pub/ED8E5710-1866-DAAC-99FB-B70190F3D64A*).
[2] Environmental Protection Agency, *Infographic: EPA's 6th Drinking Water Infrastructure Needs Survey and Assessment*, Aug. 2018, https://www.epa.gov/sites/default/files/2018-08/documents/dwinsa_infographic_august_2018_final.pdf.

on average, each day to such breaks.[3] AASE also states that funding for water infrastructure has not kept up with the needs to address aging systems and, in many places, water infrastructure is aging and deteriorating.[4]

Small water systems can especially struggle to make these needed investments. This happens for a number of reasons:

- Lack of expertise, these systems may simply lack the staff or managerial expertise necessary to identify systems in need of maintenance, repair, or replacement.
- Lack of capital, or at least the inability to access to lower-cost capital, to invest in system infrastructure.
- Lack of economies of scale inherent in larger systems.
- System abandonment due to disinterest of owners or management in running a system, death of the owner or operator of the system with no clear plan of succession, or frustration with an inability to meet water standards and other regulatory requirements.[5]

These challenges show up in system violations. Of the 38,853 Safe Drinking Water Act (SDWA)[6] violations in the United States in 2021, 30,153 (77 percent) were in very small systems. For Florida, of the 1,382 SDWA violations, 1,017 (73 percent) were in very small systems.

Fair Market Value Statutes in General

Given the potential issues with small water systems, states have looked into ways to encourage system consolidation. One tool that has been used in other states is a concept called fair market valuation. Fair market valuation (FMV) is a regulatory tool that seeks to incentivize larger water utilities that may be better positioned to make investments in the system and may have better access to economies of scale, lower cost capital, and water and wastewater system expertise.[7] To date, 14 states have passed some sort of FMV legislation: California, Illinois, Indiana, Iowa, Kentucky, Maryland, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, West Virginia, and Virginia.[8]

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[3] American Society of Engineers, *2021 Report Card for America's Future*, https://infrastructurereportcard.org/ (last visited Mar. 18, 2023).
[4] American Society of Engineers, *The Economic Benefits of Investing in Water Infrastructure*, pg. 9-12, 2020 https://www.uswateralliance.org/sites/uswateralliance.org/files/publications/VOW%20Economic%20Paper_0.pdf
[5] National Regulatory Research Institute, *supra* note 1, at 8-11.
[6] The Safe Drinking Water Act, Pub. L. 93-523, is intended to ensure the quality drinking water by regulating public water systems in the United States. Under this Act, the EPA sets standards for drinking water quality and oversees the states, federally-recognized tribes, and territories that implement the United States' drinking water program.
[7] National Regulatory Research Institute, *supra* note 1, at 1-11, and United States Government Accountability Office, *Private Water Utilities: Actions Needed to Enhance Ownership Data*, pgs 38-39, Mar. 2021 (available at: https://www.gao.gov/assets/gao-21-291.pdf).
[8] National Association of Water Companies: Truth from the Tap, *The Many Benefits of Utility Valuation Reform*, https://truthfromthetap.com/the-many-benefits-of-utility-valuation-reform/ (last visited: Mar. 18, 2023).

Valuation of a Water Utility

The traditional basis for determining the rate base of a utility is the original cost minus depreciation (also known as net book value).[9] This type of valuation is typically called "original cost valuation."[10] Two other types of valuation are fair value—which attempts to value at a rate more closely reflecting actual market value—and reproduction cost—which attempts to value at a rate that would permit the reproduction of the property in question.[11] The theory behind original cost valuation is that by applying a required rate of return (i.e. a return on investment) of the depreciated original cost of the investment in utility property devoted to public service, and then accounting for utility operating costs and taxes, the investors in the utility are given reasonable return on their capital put at risk in operating the utility.[12]

Stemming from this original cost methodology, the traditional method for valuing a utility is to use the original rate base value of the utility and deduct any depreciation. The presumption with this methodology is that the value of the system is based on the value of the presumed life left in the system, based off of the original investment.[13] Proponents of FMV state that this methodology can sometimes undervalue a system and make it difficult to acquire as sellers can feel as though they are not getting a fair value for their system.[14] Thus, what FMV statutes attempt to do, is set a rate that attempts to match the "market rate" for the system. This is typically done by requiring multiple appraisals of the system to be acquired and comparing that with the price paid for the system.[15]

Potential Issues with Fair Market Valuation

Generally, the purpose of FMV statutes is to encourage larger utilities (that generally have improved economies of scale and better access to capital) to acquire smaller or distressed systems, with the intent of improving water and wastewater system infrastructure for the acquired utility. However, FMV statutes can present some risks to ratepayers:

- It can encourage utilities to simply swap assets and increase ratepayer costs without any guarantee of improvement of quality of service or increased cost efficiencies.[16]
- Buyers and sellers both have an incentive to raise the purchase price of the acquired utility as high as possible. Typical market forces controlling acquisition prices (i.e. buyer and seller pressuring the acquisition price in opposing directions) do not work the same for monopoly businesses. Buyers can benefit when a premium is reflected in rate base that they can pass along to customers, plus the additional opportunity to service new customers. Sellers can

[9] Florida Public Service Commission, *Bill Analysis for SB 194* (Feb. 10, 2023) (on file with the Senate Regulated Industries Committee).
[10] Walter J, Primeaux, Jr., Edward L. Bubnys, and Robert H. Rasche, *Fair Value Versus Original Cost Rate Base Valuation During Inflation*, The Energy Journal, Vol. 5, No. 2 (Apr. 1984) (available at: https://ipu.msu.edu/wp-content/uploads/2018/12/41321682.pdf).
[11] *Id*.
[12] Florida Public Service Commission, *Bill Analysis for SB 194*, *supra* note 9.
[13] National Regulatory Research Institute, *supra* note 1, at 1.
[14] *Id.* and National Association of Water Companies: Truth from the Tap, *Municipalities and Taxpayers Deserve a Fair Deal for Utility Assets*, https://truthfromthetap.com/wp-content/uploads/2022/01/FMV-Factsheet.pdf (last visited Mar. 18, 2023).
[15] National Regulatory Research Institute, *supra* note 1, at 1.
[16] Florida Public Service Commission, *Bill Analysis for SB 194*, *supra* note 9.

stand to reap a financial windfall from proceeds from the sale, and these proceeds significantly exceed their investment.[17]

- Monopoly assets can be difficult to value because there are not as many comparable available. There may also be a shortage of experts who can do these types of valuations.[18]
- Acquisitions can result in significant "rate shock" for ratepayers, especially in systems that have been historically underinvested in.[19]
- FMV statutes can encourage "bad behavior" in utility owners considering selling their systems as these owners may calculate that they do not need to invest in/properly maintain their system in order to sell it for a profit.[20]
- The hope with most FMV statutes is that struggling and distressed utilities will be acquired by larger, better run utilities. However, what can happen with FMV statutes is that the most lucrative systems to acquire are the ones that are acquired first (or at all), and, potentially, the ones most in need of investment are not.[21]
- Increases in the underlying value of the land upon which the acquired utility is situated can result in significant rate increases solely based on real estate prices.[22]
- Inflated purchase costs can run counter to two of the typical reasons for FMV statutes: lower costs for the consumer and improved performance.[23]

Given these risks, most states that have enacted FMV statutes have placed restrictions on which, and under what circumstances, a water or wastewater utility may be acquired under an FMV statute. These may include:

- Requiring that the acquiring utility be of sufficient size.
- Requiring that the acquired utility be municipal, small, or disadvantaged or distressed.
- Requiring that acquisition benefit from economies of scale.
- Providing an initial moratorium or a limit on rate increases (i.e. "rate shock protection"). This could be through a rate stabilization plan submitted by the acquiring utility or required by the utility regulator.
- Requiring disclosure of anticipated rate impacts in an FMV application.[24]

Other proposed ideas for ratepayer protections include limiting or linking rate increases to cost savings or service improvements, or creating competition amongst potential acquirers and the acquirer with the most value offered to the ratepayer "wins" (this would essentially be an auction of the utility once it puts itself up for sale).[25]

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[17] Janice Beecher, *Water utility consolidation: is fair market value fair?*, Michigan State University Institute of Public Utilities, June 25, 2019 (available at: https://ipu.msu.edu/wp-content/uploads/2019/06/Beecher-Fair-Market-Value-Water-June-2019.pdf), Scott Hempling, *Water Mergers: are they making economic sense?*, Jun. 2019 (available at: https://energiahoy.com/2019/06/02/water-mergers-are-they-making-economic-sense/), and United States Government Accountability Office, *supra* note 7, at 39-40.

[18] National Regulatory Research Institute, *supra* note 1, at 17.

[19] *Id.*

[20] *Id.* at 18.

[21] *Id.* at 18-19.

[22] Florida Public Service Commission, *Bill Analysis for SB 194*, *supra* note 9.

[23] Scott Hempling, *supra* note 17.

[24] National Regulatory Research Institute, *supra* note 1, at 19-31.

[25] Scott Hempling, *supra* note 17.

Florida Public Service Commission

The Florida Public Service Commission (PSC) is an arm of the legislative branch of government.[26] The role of the PSC is to ensure Florida's consumers receive utility services, including electric, natural gas, telephone, water, and wastewater, in a safe, affordable, and reliable manner.[27] In order to do so, the PSC exercises authority over public utilities in one or more of the following areas: rate base or economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.[28]

Florida Public Service Commission Regulation of Water and Wastewater Utilities

Florida's Water and Wastewater System Regulatory Law, ch. 367, F.S., regulates water and wastewater systems in the state. Section 367.011, F.S., states that the PSC has exclusive jurisdiction over each utility with respect to its authority, service, and rates. For the chapter, a "utility" is defined as "a water or wastewater utility and, except as provided in s. 367.022, F.S., includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation." Section 367.022, F.S., exempts certain types of water and wastewater operations from PSC jurisdiction and the provisions of ch. 367, F.S. (except as expressly provided). Such exempt operations include: municipal water and wastewater systems, public lodging systems that only provide service to their guests, systems with a 100-person or less capacity, landlords that include service to their tenants without specific compensation for such service, and mobile home parks operating both as a mobile home park and a mobile home subdivision that provide "service within the park and subdivision to a combination of both tenants and lot owners, provided that the service to tenants is without specific compensation."[29] The PSC also does not regulate utilities that have exempted themselves from regulation pursuant to s. 367.171, F.S.

Currently, the PSC has over 149 water, wastewater, and water and wastewater utilities that are under its regulatory authority.[30] This is in comparison to four investor-owned electric utilities and eight investor-owned gas utilities in the state.[31] Florida's investor-owned water and wastewater utilities are much less consolidated than the state's investor-owned electric and gas utilities. Many of these systems are quite small—currently the United States Environmental Protection Agency (EPA) classifies 83.2 percent of Florida's water systems as very small (meaning that the system serves 500 people or less).[32] PSC data also shows that the vast majority of water and wastewater systems are quite small, with 83 water systems and 58 wastewater in

[26] Section 350.001, F.S.
[27] *See* Florida Public Service Commission, *Florida Public Service Commission Homepage*, http://www.psc.state.fl.us (last visited Mar 3, 2023).
[28] Florida Public Service Commission, *About the PSC*, https://www.psc.state.fl.us/about (last visited Mar 16, 2023).
[29] Section 367.022(2), F.S.
[30] Email from Mark Futrell, Deputy Executive Director—Technical, Florida Public Service Commission, to Senate Regulated Industries Staff (Mar 19, 2023)(on file with the Senate Regulated Industries Committee).
[31] Florida Public Service Commission, *2022 Facts and Figures of the Florida Utility Industry*, pg. 5, Apr. 2022 (available at: https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Reports/General/FactsAndFigures/April%202022.pdf)
[32] Environmental Protection Agency, *Enforcement Compliance History Online*, https://echo.epa.gov/trends/comparative-maps-dashboards/drinking-water-dashboard (last visited Mar. 18, 2023).

Florida having gross annual revenues of $300,000 or less. This means these utilities qualify (due to their small size) to have PSC staff assistance in their rate cases.[33]

Water and Wastewater Ratemaking in Florida

Florida is an "original cost" state in terms of rate base value. The PSC sets rates for all water and wastewater utilities within its jurisdiction and the rates must be "just, reasonable, compensatory, and not unfairly discriminatory."[34] Florida Administrative Code Rule 25-30.115, requires that water and wastewater utilities maintain their accounts and records in conformity with the 1996 National Association of Regulatory Utility Commissioners (NARUC) Uniform Systems of Accounts (USOA).[35] The NARUC USOA states that "'original cost', as applied to a utility plant, means the cost of such property to the person first devoting it to the public service."[36]

As to the "compensatory" aspect of rates, the PSC is required, in each rate-setting proceeding, to consider "cost of providing the service, which shall include, but not be limited to, debt interest; the requirements of the utility for working capital; maintenance, depreciation, tax, and operating expenses incurred in the operation of all property used and useful in the public service; and a fair return on the investment of the utility in property used and useful in the public service."[37] However, the PSC is prohibited from allowing "the inclusion of contributions-in-aid-of-construction[38] in the rate base of any utility during a rate proceeding," nor can the PSC, "impute prospective future contributions-in-aid-of-construction against the utility's investment in property used and useful in the public service; and accumulated depreciation on such contributions-in-aid-of-construction shall not be used to reduce the rate base, nor shall depreciation on such contributed assets be considered a cost of providing utility service."

As to the "a fair return on the investment of the utility in property used and useful in the public service" required under s. 367.081(2)(a)1., F.S., the PSC has consistently interpreted the "investment of the utility" to be the original cost of the property when first dedicated to public service. Florida Administrative Code Rule 25-30.140(1)(r), states that, "[i]n the event that an asset is acquired that is already in public service, the original historic cost of the asset should be recorded in plant in service."

Water and Wastewater Utility Acquisitions in Florida

Section 367.031, F.S., requires that each water and wastewater utility under the PSC's jurisdiction must obtain a certificate of authorization from the PSC. This certificate grants the

[33] Many small water and wastewater utilities struggle with the resources and expertise necessary to properly file for and complete a full rate case. Thus, Fla. Admin. Code R. 25-30.455, authorized pursuant to s. 367.0814, F.S., provides that "water and wastewater utilities whose total gross annual operating revenues are $300,000 or less for water service or $300,000 or less for wastewater service, or $600,000 or less on a combined basis," may apply with the PSC for staff assistance with rate applications. In staff-assisted rate cases (SARCs),

[34] Section 367.081(2)(a)1., F.S.

[35] NARUC USOA is incorporated by reference into Florida Admin. Code Rule 25-30.115.

[36] Florida Public Service Commission, *Bill Analysis for SB 194*, *supra* note 9.

[37] Section 367.081(2)(a)1., F.S.

[38] Section 367.021(3), F.S., defines "Contribution-in-aid-of-construction" as "any amount or item of money, services, or property received by a utility, from any person or governmental authority, any portion of which is provided at no cost to the utility, which represents a donation or contribution to the capital of the utility, and which is used to offset the acquisition, improvement, or construction costs of the utility property, facilities, or equipment used to provide utility services."

utility the authorization to provide water or wastewater service within a defined geographic area. This certificate of authorization, or the corresponding utility's facilities, may not be sold, assigned, or transferred without authorization from the PSC. Pursuant to s. 367.071(1), F.S., the PSC may approve a sale, assignment, or transfer if such is in the public interest. A sale, transfer, or assignment may occur prior to PSC approval, if the contract executing such transaction is made contingent to PSC approval. Section 367.071(5), F.S., provides that the PSC "may establish the rate base for a utility or its facilities or property when the commission approves a sale, assignment, or transfer thereof, except for any sale, assignment, or transfer to a governmental authority."

III. Effect of Proposed Changes:

Section 1 of the bill creates s. 367.0811, F.S., to establish an alternative FMV process for establishing the rate base of a purchased water system to be used for ratemaking purposes in the acquiring utility's next rate case. This method differs, and is an alternative, from the original cost method existing in current statute in s. 367.081, F.S.

The rate base established by the proposed procedure in the bill cannot exceed the lesser of the purchase price negotiated between the parties to the acquisition transaction or the average of three required appraisals. This amount "may not be adjusted for capital in aid of construction used and useful in serving the public."[39] The rate base value established may also include reasonable transaction and closing costs incurred by the acquiring utility and reasonable fees paid to the appraisers. The appraisers used in valuing the utility to be acquired must be paid by the acquiring utility (acquirer), chosen from a list provided by the PSC, and the appraisal they provide must be consistent with the Uniform Standards of Professional Appraisal Practice.

The acquiring utility and the utility system to be acquired (acquiree) must jointly retain a licensed engineer to assess the tangible assets of the acquiree. This assessment must be provided to the appraisers to assist in valuing the acquiree.

A petition filed pursuant to s. 367.0811, F.S., to establish an FMV rate base value must include:

- The requested rate base value for the acquiree.
- Copies of the required appraisals, including the average of the valuations produced by each appraisal.
- A copy of the required assessment of tangible assets.
- A 3-year plan to address each deficiency identified by the assessment of tangible assets. The plan must address impact on quality of service and any planned improvements to water quality.
- The 5-year projected rate impact on the customers of the acquiree, including, but not limited to, the rate impact of all of the following:
  - Any cost efficiencies expected to result from the acquisition transaction.
  - Use of this section, instead of the original cost method pursuant to s. 367.081, F.S., to establish the rate base value.

[39] This portion should likely read "may not be adjusted for contributions in aid of construction or used and useful in serving the public," as those terms are commonly used in Florida and other jurisdictions in regards to setting rate base. *See* Technical Deficiencies, *infra* Section VI, of this analysis.

- The contract of sale.
- The estimated value of fees and transaction and closing costs to be incurred by the acquiring utility.
- A tariff, including rates equal to the rates of the utility system being acquired.

If a completed petition meets all of the filing requirements of the bill, the PSC will have eight months from the date of filing to issue a final order on the petition. In its order, the PSC may grant the petition, in whole or in part, or with modifications in the public interest, or may deny the petition if it is in the public interest. However, the PSC may not approve a rate base value higher than that requested in the petition.

In future rate cases, the bill permits the PSC to, pursuant to ch. 367, F.S., set rates for the acquired utility system in future rate cases and may classify the acquired utility system as a separate entity for ratemaking purposes if it is deemed to be in the public interest.

The acquiring utility under s. 366.0811, F.S., must be engaged in an arms-length transaction with the acquiree and have 10,000 or more customers, or provide 3 million gallons per day of permitted drinking water.

The bill also directs the PSC to adopt rules to implement the section.

Section 2 of the bill provides an effective date of July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

In its analysis of the bill the PSC stated that the alternative utility valuation authorized in the bill will likely cause significant new costs for the private sector. The PSC elaborated that under SB 194, "small utilities will likely see higher valuations, which will increase the purchase price of utilities; this could lead to higher rates for customers." SB 194 may encourage "larger utilities to acquire smaller systems, potentially resulting in better access to low cost capital and improved infrastructure." However, as currently drafted, SB 194 does not require such benefits in order for the PSC to approve a petition. Customers may simply see rate increases due to purchase price valuation,[40] with no required improvement in service. Customers may also see a rate impact from transaction, closing, and appraiser costs allowed to be included in rate base value under the bill.

C. Government Sector Impact:

According to the PSC's analysis, the impact of SB 194 on state agencies is not known at this time. It is unclear how the change to the PSC's cost for transfer and rate proceedings will be affected.[41]

VI. Technical Deficiencies:

Lines 36 and 37 of the bill read, in part, "and may not be adjusted for capital in aid of construction used and useful in serving the public." This portion should likely read "and may not be adjusted for contributions in aid of construction or used and useful in serving the public," as the terms "contributions in aid of construction" and "used and useful in serving the public" are commonly used in Florida and other jurisdictions in regards to setting rate base.

Line 84-86 of the bill reads "the commission may grant the petition, in whole or in part, or with modifications in the public interest, or may deny the petition if it is in the public interest." For clarity, the sponsor may wish to revise the sentence as follows, "the commission may, in the public interest, grant the petition, in whole or in part, or with modifications, or may deny the petition."

VII. Related Issues:

In its analysis of the bill, the PSC stated that it does not have expertise in property appraisers and thus they may be ill-equipped to establish and maintain a list of approved appraisers. The PSC suggested an alternative to have another agency with expertise in the area, such as the Department of Business and Professional Regulation, which regulates appraisers, maintain this list.[42]

SB 194 may generate litigation, as the PSC states that all FMV acquisitions may have to be processed exclusively as s. 120.57, F.S., hearings. In addition, the PSC believes there may be litigation from ratepayers and consumer advocates in regards to assessment of potentially

[40] Florida Public Service Commission, *Bill Analysis for SB 194, supra* note 9.
[41] *Id.*
[42] *Id.*

excessive rates and evaluation costs. The PSC also anticipates that it may have litigation in regards to establishing and maintaining the list of appraisers.[43]

VIII. Statutes Affected:

This bill creates section 367.0811 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.

[43] *Id.*

189256

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Regulated Industries (Hooper) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 367.0811, Florida Statutes, is created to read:

367.0811 Rates; alternative procedure for establishing rate base value of acquired utility system.—

(1) The Legislature finds that it is in the public interest to promote consolidation efforts with water and wastewater

utility systems in order to encourage economies of scale, better access to lower material and supply costs, better access to capital, improvement in utility infrastructure, and improvement in the quality of service overall.

(2) As used in this section, the term "rate stabilization plan" means an acquiring utility's plan to implement rate changes incrementally over a period of time to mitigate rate increases and to predictably achieve consolidated pricing over time.

(3)(a) If a utility acquires an existing utility system, including a system described in s. 367.022(2), the utility may petition the commission to establish a rate base value for the utility system being acquired using the valuation process in this section instead of the cost method pursuant to s. 367.081.

(b) The rate base value established by the commission under this section shall be used for ratemaking purposes in the acquiring utility's next general rate case. The rate base value may not exceed the lesser of the purchase price negotiated between the parties to the acquisition transaction or the average of the three appraisals conducted under subsection (4) and may not be adjusted for contribution-in-aid-of-construction or used and useful in serving the public. However, the rate base value may include reasonable transaction and closing costs incurred by the acquiring utility and reasonable fees paid to the appraisers.

(4)(a) For purposes of this section, the utility system being acquired shall be appraised by three licensed appraisers chosen from a list established by the commission. Appraisals shall be paid for by the buyer. Each appraiser shall provide an

appraisal of the value of the utility system being acquired that is consistent with the Uniform Standards of Professional Appraisal Practice.

(b) The acquiring utility and the utility system being acquired shall jointly retain a licensed engineer to conduct an assessment of the tangible assets of the utility system being acquired, and the assessment shall be provided to the three appraisers for use in determining the value of the utility system being acquired.

(5) A petition filed under this section to establish the rate base value for a utility system being acquired must contain all of the following:

(a) The requested rate base value for the utility system being acquired.

(b) Copies of the appraisals required by this section, including the average of the valuations produced by each appraisal.

(c) A copy of the assessment of tangible assets required by this section.

(d) A 3-year plan to address each deficiency identified by the assessment of tangible assets required by this section. The plan must address impact on quality of service and any planned improvements to water quality.

(e) The 5-year projected rate impact on the customers of the utility system being acquired, including, but not limited to, the rate impact of all of the following:

1. Any cost efficiencies expected to result from the acquisition transaction.

2. Use of this section, instead of the cost method pursuant

to s. 367.081, to establish the rate base value.

(f) The contract of sale.

(g) The estimated value of fees and transaction and closing costs to be incurred by the acquiring utility.

(h) A tariff, including rates equal to the rates of the utility system being acquired, and a rate stabilization plan, if applicable to the acquisition. A rate stabilization plan must be filed if the acquisition would result in a significant individual increase in rates during the period identified in paragraph (e).

(6)(a) If the petition meets the filing requirements of subsection (5), the commission, no later than 8 months after the date the complete petition is filed, shall issue a final order on the petition.

(b) The commission may, in the public interest, grant the petition, in whole or in part, or with modifications or may deny the petition.

(c) The commission may not approve a rate base value higher than that requested in the petition.

(7) Notwithstanding any provision in this section, the commission may, pursuant to this chapter, set rates for the acquired utility system in future rate cases and may classify the acquired utility system as a separate entity for ratemaking purposes if it is deemed to be in the public interest.

(8) This section applies to acquiring utilities that are engaged in an arms-length acquisition of a water or wastewater system, or both, and:

(a) Provide water or wastewater service, or both, to more than 10,000 customers; or

(b) Are permitted to produce at least 3 million gallons per day of drinking water.

(9) At minimum, in considering a rate base value petition pursuant to this section, the commission must consider all of the following in serving the public interest and pursuant to the goals of this section:

(a) Improvements in quality of service.

(b) Improvements in compliance with regulatory requirements.

(c) Rate reductions or rate stability over a long-term period.

(d) Cost efficiencies.

(e) A demonstration that the purchase is being made as part of an arms-length transaction.

(f) Economies of scale to be generated by the transaction.

(g) A comparison of the acquiring utility's net book value, to the extent available, and the proposed rate base value of the utility being acquired.

(h) A demonstration that the acquiring utility has greater access to capital than the utility being acquired.

(10) The commission may set reasonable performance goals based on the standards specified in subsection (9) and review utility performance regarding these standards in a rate proceeding.

(11) The commission shall adopt rules to implement this section.

Section 2. This act shall take effect July 1, 2023.

================ T I T L E A M E N D M E N T ================

189256

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to utility system rate base values; creating s. 367.0811, F.S.; providing legislative findings; defining the term "rate stabilization plan"; establishing an alternative procedure by which the Florida Public Service Commission may establish a rate base value for certain acquired utility systems; requiring that the approved rate base value be reflected in the acquiring utility's next general rate case for ratemaking purposes; establishing a procedure for appraisal of the acquired utility system; providing the contents required for a petition to the commission for approval of the rate base value of the acquired utility system; providing duties of the commission regarding petitions; authorizing the commission to set rates for and classify certain acquired utility systems; providing applicability; requiring the commission to take certain factors into consideration for certain rate base value petitions; requiring the commission to adopt rules; providing an effective date.

By Senator Hooper

21-00480-23 2023194__

A bill to be entitled

An act relating to utility system rate base values; creating s. 367.0811, F.S.; establishing an alternative procedure by which the Public Service Commission may establish a rate base value for certain acquired utility systems; requiring the approved rate base value to be reflected in the acquiring utility's next general rate case for ratemaking purposes; establishing a procedure for appraisal of the acquired utility system; providing the contents required for a petition to the commission for approval of the rate base value of the acquired utility system; providing duties of the commission regarding petitions; authorizing the commission to set rates for and classify certain acquired utility systems; providing applicability; requiring the commission to adopt rules; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 367.0811, Florida Statutes, is created to read:

367.0811 Rates; alternative procedure for establishing rate base value of acquired utility system.—

(1)(a) If a utility acquires an existing utility system, including a system described in s. 367.022(2), the utility may petition the commission to establish a rate base value for the utility system being acquired using the valuation process in this section instead of the cost method pursuant to s. 367.081.

21-00480-23 2023194__

(b) The rate base value established by the commission under this section shall be used for ratemaking purposes in the acquiring utility's next general rate case. The rate base value may not exceed the lesser of the purchase price negotiated between the parties to the acquisition transaction or the average of the three appraisals conducted under subsection (2) and may not be adjusted for capital in aid of construction used and useful in serving the public. However, the rate base value may include reasonable transaction and closing costs incurred by the acquiring utility and reasonable fees paid to the appraisers.

(2)(a) For purposes of this section, the utility system being acquired shall be appraised by three licensed appraisers chosen from a list established by the commission. Appraisals shall be paid for by the buyer. Each appraiser shall provide an appraisal of the value of the utility system being acquired that is consistent with the Uniform Standards of Professional Appraisal Practice.

(b) The acquiring utility and the utility system being acquired shall jointly retain a licensed engineer to conduct an assessment of the tangible assets of the utility system being acquired, and the assessment shall be provided to the three appraisers for use in determining the value of the utility system being acquired.

(3) A petition filed under this section to establish the rate base value for a utility system being acquired must contain all of the following:

(a) The requested rate base value for the utility system being acquired.

(b) Copies of the appraisals required by this section, including the average of the valuations produced by each appraisal.

(c) A copy of the assessment of tangible assets required by this section.

(d) A 3-year plan to address each deficiency identified by the assessment of tangible assets required by this section. The plan must address impact on quality of service and any planned improvements to water quality.

(e) The 5-year projected rate impact on the customers of the utility system being acquired, including, but not limited to, the rate impact of all of the following:

1. Any cost efficiencies expected to result from the acquisition transaction.

2. Use of this section, instead of the cost method pursuant to s. 367.081, to establish the rate base value.

(f) The contract of sale.

(g) The estimated value of fees and transaction and closing costs to be incurred by the acquiring utility.

(h) A tariff, including rates equal to the rates of the utility system being acquired.

(4)(a) If the petition meets the filing requirements of subsection (3), the commission, no later than 8 months after the date the complete petition is filed, shall issue a final order on the petition.

(b) The commission may grant the petition, in whole or in part, or with modifications in the public interest, or may deny the petition if it is in the public interest.

(c) The commission may not approve a rate base value higher

than that requested in the petition.

(5) Notwithstanding any provision in this section, the commission may, pursuant to this chapter, set rates for the acquired utility system in future rate cases and may classify the acquired utility system as a separate entity for ratemaking purposes if it is deemed to be in the public interest.

(6) This section applies to acquiring utilities that provide water or wastewater service, or both, to more than 10,000 customers and are engaged in an arms-length acquisition of a water or wastewater system, or both, or 3 million gallons per day of permitted drinking water.

(7) The commission shall adopt rules to implement this section.

Section 2. This act shall take effect July 1, 2023.

The Florida Senate

Committee Agenda Request

To: Senator Joe Gruters, Chair
Committee on Regulated Industries

Subject: Committee Agenda Request

Date: February 8, 2023

I respectfully request that **Senate Bill # 194**, relating to Utility System Rate Base Values, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Ed Hooper
Florida Senate, District 21

File signed original with committee office

S-020 (03/2004)

From: Mark Futrell <MFutrell@PSC.STATE.FL.US>
Sent: Sunday, March 19, 2023 8:13 AM
To: Schrader, Kurt <Schrader.Kurt@flsenate.gov>
Cc: Katherine Pennington <KPENNING@psc.state.fl.us>; Lance Watson <LWatson@psc.state.fl.us>
Subject: Re: Number of Class A, B, and C Water Utilities in Florida

Kurt,

I don't have access to the precise data, but this is what I could find:

The PSC has authority over 149 W&WW IOUs.

There are 83 water systems and 58 wastewater systems that qualify for a staff assisted rate case.

These utilities have gross annual revenues of $300,000 or less.

So the vast majority of these systems are considered Class C.

Hope this helps for now, and I'll get the precise breakdown asap.

Thanks,
Mark

On Mar 18, 2023, at 5:48 PM, Schrader, Kurt <Schrader.Kurt@flsenate.gov> wrote:

Mark/Katherine/Lance,

Would any of you know/know of a resource that would have the number of Class A, B, and C water utilities, respectively, in Florida? I did check out the PSC's 2022 Facts and Figures report and didn't see anything there and have tried to run a few searches without luck.

Thank You,

Kurt Schrader
Senior Attorney
Florida Senate Committee on Regulated Industries
525 Knott Building
404 South Monroe Street
Tallahassee, FL 32399
Ph: (850) 487-5957

Date: February 10, 2023

Agency Affected:	Public Service Commission	Telephone: 413.6524
Program Manager:	Katherine Pennington	Telephone: 413.6596
Agency Contact:	Katherine Pennington	Telephone: 413.6506
Respondent:		

RE: HB 125

I. SUMMARY:

HB 125 creates Section 367.0811, Florida Statutes (F.S.), to authorize a public water or wastewater utility to petition the Public Service Commission (Commission) to establish the rate base of a purchased system using an alternative valuation methodology based on the lesser of purchase price or appraisals. The Commission must maintain a list of licensed appraisers. The bill provides requirements for the alternative valuation methodology and lists the information the acquiring utility must provide to the Commission. The Commission must make a final determination of the value within eight months after the date a complete petition is filed. The bill takes effect July 1, 2023, and requires the Commission to adopt rules to implement.

II. PRESENT SITUATION:

Pursuant to Section 367.011, F.S., the Commission has exclusive jurisdiction over each water and wastewater utility with respect to its authority, service, and rates. Pursuant to Section 367.021(12), F.S., a "utility" means a water or wastewater system providing service to the public for compensation, except as provided in Section 367.022, F.S. (setting forth a number of regulatory exemptions). Further, the Commission does not regulate utilities in counties where they have exempted themselves from Commission jurisdiction pursuant to Section 367.171, F.S.

Section 367.031, F.S., requires each utility subject to the jurisdiction of the Commission to obtain from the Commission a certificate of authorization to provide water or wastewater service within a defined geographic area. Section 367.071, F.S., provides that no utility shall sell its certificate of authorization or facilities without approval of the Commission that the proposed sale is in the public interest, and that the buyer will fulfill the commitments and obligations of the utility. A sale may occur prior to Commission approval if the contract for sale is made contingent upon Commission approval.

The Commission currently establishes the value of an existing utility's rate base using original cost. Rule 25-30.115, Florida Administrative Code (F.A.C.), requires that all water and wastewater utilities shall, effective January 1, 1998, maintain their accounts and records in conformity with the 1996 National Association of Regulatory Utility Commissioners (NARUC) Uniform Systems of Accounts (USOA), which is incorporated by reference in this rule. The NARUC USOA states that "'original cost', as applied to a utility plant, means the cost of such property to the person first devoting it to the public service." Section 367.081(2)(a)1., F.S., states that the Commission shall consider "a fair return on the investment of the utility in property used and useful in the public service." The Commission has consistently interpreted the "investment of the utility" contained in Section 367.081(2)(a)1., F.S., to be the original cost of the property when first dedicated to public service. Rule 25-30.140, F.A.C., states, "[i]n the event that an asset is acquired that is already in public service, the original historic cost of the asset should be recorded in plant in service."

Under original cost ratemaking, the value of a utility's rate base is determined using the depreciated original cost (net book value) of the property devoted to the public service. By applying the required rate of return to the depreciated original cost of the property devoted to the public service, and accounting for associated operating costs and taxes, investors are provided the opportunity to recover all costs associated with the provision of utility service, including an appropriate return for placing their capital at

risk. Under such a scenario, customers receive service at just and reasonable rates and the utility and its shareholders remain whole. Original cost is the basis upon which the Commission sets rates for all regulated utilities under its jurisdiction.

Rule 25-30.0371, F.A.C., codifies the Commission's current policy on acquisition adjustments for its jurisdictional water and wastewater utilities:

> For the purpose of this rule, an acquisition adjustment is defined as the difference between the purchase price of utility system assets to an acquiring utility and the net book value of the utility assets. A positive acquisition adjustment exists when the purchase price is greater than the net book value. A negative acquisition adjustment exists when the purchase price is less than the net book value.

Pursuant to Rule 25-30.0371(2), F.A.C.:

> A positive acquisition adjustment shall not be included in rate base absent proof of extraordinary circumstances. Any entity that believes a full or partial positive acquisition adjustment should be made has the burden to prove the existence of extraordinary circumstances. In determining whether extraordinary circumstances have been demonstrated, the Commission shall consider evidence provided to the Commission such as anticipated improvements in quality of service, anticipated improvements in compliance with regulatory mandates, anticipated rate reductions or rate stability over a long-term period, anticipated cost efficiencies, and whether the purchase was made as part of an arms-length transaction.

Pursuant to Rule 25-30.0371(3), F.A.C.:

> If the purchase price is greater than 80 percent of net book value, a negative acquisition adjustment will not be included in rate base. When the purchase price is equal to or less than 80 percent of net book value, a negative acquisition adjustment shall be included in rate base and will be equal to 80 percent of net book value less the purchase price.

The Commission has historically found acquisition adjustments to be appropriate in limited circumstances in which the quality of service to customers was threatened or the ability of the utility to maintain operations was in doubt. Underlying the rule and the Commission's implementation is a recognition that if a purchase price above depreciated original cost is used to determine rate base, without the requirement for extraordinary circumstances, it could encourage utilities to "swap assets" and increase costs to customers without a guarantee of improvements in the quality of service or increased cost efficiencies.

Acquisition adjustments found to be appropriate are amortized in rate base for a period set by the Commission, typically 15 to 30 years depending on the size or impact of the adjustment. This amortization is calculated similar to depreciation and is included in amortization expenses to be recovered every year. The accumulated amortization of an acquisition adjustment is also included in rate base to offset the acquisition adjustment's impact on rate base. This allows rate base to slowly increase over time, mitigating some rate shock while making the acquiring utility whole.

Contributions in aid of construction (CIAC) are currently deducted from rate base and offset over the life of the asset with an accumulated amortization. The purpose of deducting CIAC from rate base is to ensure that costs are not imposed on current customers for infrastructure that was contributed to the utility without the utility's direct investment.

Pursuant to Section 367.121(1)(b), F.S., the Commission has the authority "[t]o prescribe, by rule, a uniform system and classification of accounts for all utilities, which rules, among other things, shall establish adequate, fair, and reasonable depreciation rates and charges."

III. EFFECT OF PROPOSED CHANGES:

HB 125 creates an alternative valuation process for establishing rate base value of a purchased water utility system to be used for ratemaking purposes in the acquiring utility's next general rate case. Rather than using original cost and net book value, the bill would allow rate base value to be set based upon the lesser of the purchase price or the average of three appraisals. The rate base value may also include reasonable transaction and closing costs, as well as fees paid to the appraisers. The Commission would be required to establish a list of licensed appraisers for use by the utility. The selling and buying utilities would jointly retain a licensed engineer to conduct an assessment of the tangible assets of the acquired system, which will be provided to the appraisers for use in determining value. A petition to establish rate base value under this section must contain:

- The requested rate base value for the utility system being acquired.
- Copies of the appraisals performed by licensed appraisers, including the average of the valuations.
- A copy of the engineering assessment and a 3-year plan for addressing each deficiency identified in the assessment.
- A 5-year projected rate impact on the acquired utility's customers.
- The contract of sale.
- Estimated valuation fees and transaction and closing costs incurred.
- A tariff, including rates equal to the rates of the selling utility.

The Commission shall issue a final order no later than 8 months after the complete petition is filed. The Commission may grant the petition, in whole or in part, or with modifications. The Commission may also deny the petition if in the public interest. In future rate cases, the Commission may set rates for the acquired utility and classify that system as a separate entity for ratemaking purposes if in the public interest.

The alternative valuation process is only available to utilities that provide water or wastewater service, or both, to more than 10,000 customers, or 3 million gallons per day of permitted drinking water. However, the current bill language applies an arms-length acquisition requirement only to utilities with more than 10,000 customers. Utilities providing 3 million gallons per day of permitted drinking water are not required to engage in arms-length acquisitions.

The alternative valuation process created by the bill could allow eligible purchasing utilities to avoid the current original cost methodology, along with the current acquisition adjustment considerations, when petitioning the Commission to establish rate base for the purpose of setting rates. As such, the rates set for the acquired utility customers could in some instances significantly differ from the rates in existence when purchased because the purchase price of the utility could be significantly greater than original cost or net book value.

Original cost accounting maintains that the investment value of an asset is established when the asset is put into service. By having an appraiser determine the value of the asset over time, that asset could be seen as more or less valuable based on a replacement cost, for example.

It is unclear how the rate base value established in the alternative valuation process prescribed by the bill will be treated in the first rate case. For example, it is unclear whether rate base should revert back to the original cost with an added intangible asset making the difference in original cost and the new valuation. It is also unclear how the rate base value established in the alternative valuation process will be depreciated if it is not based on net book value recorded in the NARUC USOA. Under current methodologies, the net book value of acquired assets would continue to depreciate based upon remaining useful life, while acquisition adjustments are amortized over time. Accounting for the difference between net book value and a valuation based upon appraisals would need to be established.

It is also unclear how additions to rate base, including investment in facilities, made subsequent to the alternative valuation proceeding and prior to the first rate case would be handled. In addition, it is unclear how the 3-year plan to address deficiencies interacts with the alternative valuation. It is unclear whether the costs of any deficiency-related projects are to be included in the valuation, or whether these costs are to be added to rate base when the projects are completed.

The bill does not allow for the initial rate base value to be adjusted for CIAC. It is not clear how current CIAC will be handled after the initial rate base value is determined or how future CIAC contributed to the utility will be recorded.

It is unclear whether the establishment of the alternative rate base valuation is conducted at the time of the Commission's decision on the sale of the certificate of authorization. It is unclear whether a petition for alternative rate base valuation can be filed with the Commission after approval of the sale of the certificate of authorization.

The bill could encourage larger utilities to acquire smaller systems, potentially resulting in better access to low cost capital and improved infrastructure. While these are desirable results, they are not a requirement under the bill or guaranteed to occur. The bill could also result in customer rates increasing simply due to the purchase price valuation.

IV. ESTIMATED FISCAL IMPACTS ON STATE AGENCIES:

(in this section please provide information concerning FTEs. How many positions, if any will be necessary to enact this bill. Also, what specific positions will be needed.)

The impact on state agencies is not known at this time. It is unclear how the change to the Commission's cost for transfer and rate proceedings will be affected.

	(FY 19-20) Amount / FTE	(FY 20-21) Amount / FTE	(FY 21-22) Amount / FTE
A. Revenues			
1. Recurring	$0/0 FTE	$0/0 FTE	$0/0 FTE
2. Non-Recurring	$0/0 FTE	$0/0 FTE	$0/0 FTE
B. Expenditures			
1. Recurring	$0/0 FTE	$0/0 FTE	$0/0 FTE
2. Non-Recurring	$0/0 FTE	$0/0 FTE	$0/0 FTE

V. ESTIMATED FISCAL IMPACTS ON LOCAL GOVERNMENTS:

None known at this time.

VI. ESTIMATED IMPACTS ON PRIVATE SECTOR:

The private sector will likely see significant new costs under this statute. Small utilities will likely see higher valuations, which will increase the purchase price of utilities; this could lead to higher rates for customers. There would also be the added regulatory costs for contracting three appraisers for each acquisition and associated with conducting the alternative rate base valuation proceeding before the Commission. There may be anti-competitive concerns raised by allowing some appraisers on the Commission list, but not others.

VII. LEGAL ISSUES:

A. Does the proposed legislation conflict with existing federal law or regulations? If so, what laws and/or regulations?

None known at this time.

B. Does the proposed legislation raise significant constitutional concerns under the U.S. or Florida Constitutions (e.g. separation of powers, access to the courts, equal protection, free speech, establishment clause, impairment of contracts)?

None known at this time.

C. Is the proposed legislation likely to generate litigation and, if so, from what interest groups or parties?

The bill may require all qualifying acquisitions to be processed exclusively as Section 120.57, F.S., administrative hearings. Further, customers and customer advocates may litigate the assessment of excessive rates and evaluation costs. Litigation may also occur as a result of the process by which the Commission establishes a list of appraisers.

D. Other:

VIII. COMMENTS:

The bill states that it applies exclusively to utilities that "provide water and wastewater service, or both, to more than 10,000 customer and are engaged in an arms-length acquisition of a water or wastewater system, or both, or 3 million gallons per day of permitted drinking water." At this time, only three Commission-regulated utilities are of sufficient size to qualify under the bill. It is unclear whether this requirement applies to utilities with 10,000 customers in the state of Florida or whether out-of-state customers can be used in the calculation.

Unlike the Department of Business and Professional Regulation that regulates appraisers, the Commission has no expertise in property appraisal. An alternative may be to have a more appropriate agency prepare and maintain the list of appraisers required by paragraph (2)(a). If the Commission is required to maintain the list of appraisers, a rulemaking proceeding would need to be conducted to establish requirements and methodologies for the selection of approved appraisers.

In other states with approved fair market value legislation, safe guards have been put into place to protect customers from unnecessary rate increases. Some of these factors include limiting acquisitions to troubled water and wastewater systems or municipal utilities. Other states have required that the acquisition must benefit from economies of scale or regionalization, or have added rate shock protections.

Under current accounting practices, land is included in rate base at the original cost when it was put into service for public use. Appreciation of the land value is not permitted in rate base. A departure from this practice could result in large rate increases based solely on real estate prices.

Prepared by: Matthew A. Vogel, Major Thompson, Mark Cicchetti