

**STORAGE NAME:** h3321.grr  
**DATE:** March 14, 1998

**HOUSE OF REPRESENTATIVES  
AS REVISED BY THE COMMITTEE ON  
GOVERNMENTAL RULES AND REGULATIONS  
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #:** CS/HB 3321

**RELATING TO:** Condominiums and Cooperatives

**SPONSOR(S):** Committee on Real Property & Probate & Representative Crow

**COMPANION BILL(S):** Compare SB 1054

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) REAL PROPERTY & PROBATE 4 YEAS 0 NAYS
  - (2) GOVERNMENTAL RULES AND REGULATIONS
  - (3)
  - (4)
- 

**I. SUMMARY:**

CS/HB 3321 generally provides the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation [hereinafter the *Division*] with more rulemaking authority. "Division" is defined within the chapter.

The bill provides that a buyer may elect to close on a condominium during the fifteen-day voidability period. The developer must retain proof of the agreement to close early for five years after the closing date.

The bill provides that if a developer-controlled association has maintained all required insurance coverage, in the event of a natural disaster, the developer and owners shall be responsible for a pro-rata share of the expenses not covered by insurance proceeds. A developer-controlled association must use "due diligence" in obtaining and maintaining adequate insurance.

The bill provides that a single association may operate two or more condominium associations if their declaration was recorded prior to January 1, 1977. An association of two or more condominiums may provide for a consolidated financial operation by amending its declaration or bylaws if the amendment is approved by at least two-thirds of the voting interests.

The bill provides that a board member or committee member may join a vote by written agreement or disagreement, but such agreement may not be used to create a quorum. A board or committee member may vote by telephone and may be counted as present for purposes of obtaining a quorum if a speaker phone is utilized. The bill provides that a candidate for a board membership must meet the requirements set forth in the condominium declaration and be eligible to vote in the jurisdiction of his or her residence.

The bill prohibits a developer from closing on a contract for sale or on a contract for lease for more than five years until the developer prepares and delivers to the purchaser and to the Division those documents complying with chapter 718, Florida Statutes, and Division rules, and the Division notifies the developer that the filing is proper.

This bill will not have a fiscal impact.

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**Representative Crow has filed a strike-everything amendment to CS/HB 3321, which is discussed in the AMENDMENT SECTION on page 14 of this bill research document.**

I. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. Condominium Associations

Section 718.111(6), Florida Statutes, Operation of Phase Condominiums, permits a condominium to operate more than one condominium within a phase development.

A condominium development started prior to the enactment of section 711.64, Florida Statutes, Phase Condominiums, in October, 1974, however, is required to allocate common association expenses either on a square footage basis or on a unit basis and the financial records for each condominium must be separately maintained. If a development contains different types of units, i.e., garden units, elevator building units, townhouses, etc., each phase of the development must have its own allocated condominium assessments. For example, there will be more maintenance for a unit within a high-rise elevator building than for a unit within a single-story building.

Innisbrook is an upscale resort condominium development in Tarpon Springs which began construction in approximately 1970, prior to enactment of the phase condominium statutes. Presently, there are twenty-eight separate condominiums in Innisbrook. The declarations of condominiums provided that while the condominium property was to be separately owned, all of the condominiums which had been built between 1970 and 1985 were to operate under a single association, known as the "Innisbrook Condominium Association." The Innisbrook Condominium Association petitioned the Division for a declaratory statement that the Association was in compliance with the statutes. In October, 1993, the Division, after review of the declarations of condominiums within Innisbrook, concluded that the Innisbrook Condominium Association was required to maintain separate budgets and financial records for each condominium that it operates. Until that ruling, Innisbrook Condominium Association had not maintained separate accounting records for each condominium. All expenses had been shared within the single association and allocated to each unit according to the type of unit within the condominium. All rental income had been paid into the single association, expenses were paid, and income was shared according to the type of unit within the condominium. There are only four types of units at Innisbrook and the units vary little within the various types of condominium buildings. There had been no difference as to location or difference in the actual maintenance costs of a building. Innisbrook Condominium Association now must maintain twenty-eight separate budgets, with costs and rental income shared only within the individual condominium association. There apparently is a consensus at Innisbrook that the present arrangement is unfair as well as contrary to the disclosures signed when each person purchased a unit. Some units apparently have substantially increased costs and expenses, whereas other units presumably have decreased costs. This matter is scheduled to be presented at their annual board meeting in March, 1998.

2. Insurance Costs

Section 718.116(9)(a)(2), Florida Statutes, permits developers to be excused from payment of assessments for unsold units if the developer is operating under a guarantee and operating the condominium association. Presently, if an insurance loss occurs

during the developer guarantee period, the developer may be responsible for all costs for common expenses in excess of the insurance proceeds.

Section 718.111(11), Florida Statutes, requires a condominium association to use its "best efforts to obtain and maintain adequate insurance to protect the association, the association property, the condominium property. . . ."

### 3. Rulemaking Authority

The Legislature amended the Administrative Procedures Act (APA) during the 1996 Session. The revised APA imposes a stricter rulemaking standard by requiring more specific agency rulemaking authority in statutes to accomplish the stated purpose of enabling statutes.

Pursuant to subsection 120.536(2), Florida Statutes, by October 1, 1997, all agencies were required to notify the Joint Administrative Procedures Committee of all existing rules, or portions thereof, adopted before October 1, 1996, which exceeded the agency's statutory rulemaking authority under the stricter APA rulemaking standards. If the agency does not secure specific legislative authority during the 1998 regular session, the agency must initiate rulemaking by January 1, 1999, to repeal the identified rules. Effective July 1, 1999, the JAPC or any substantially affected person has standing to petition the agency to repeal identified rules that have not yet been repealed by the agency.

The Department of Business and Professional Regulation identified numerous rules within the Division of Florida Land Sales, Condominiums and Mobile Homes as lacking the necessary rulemaking authority pursuant to the new rulemaking standards.

Rules, or portions of rules, identified by the Division and addressed by this bill include:

- Rule 61B-17.003, F.A.C. (imposes filing requirements relating to phase condominium);
- 61B-17.005, F.A.C. (sets forth procedures for examining developers' documents);
- Subsection (6) of Rule 61B-17.006, F.A.C. (sets forth a time frame for amendments to developers' documents);
- Subsection (3) of Rule 61B-18.001, F.A.C. (provides restrictions on a developer closing on a sales or lease contract and requires specified record keeping);
- Subsections (2) and (4) of Rule 61B-18.001, F.A.C. (imposes requirements for board meetings);
- Subsections (2) and (4) of Rule 61B-23.001, F.A.C. (provides that an association board member who was not present at a meeting may submit written agreements or disagreements with action taken, but such documentation may not be used to create a quorum and provides that a board member may vote by telephone for purpose of obtaining a quorum if a speaker phone is used);

- Subsection (10) of Rule 61B-23.002, F.A.C. (requires that certain association rules be in writing); and
- Rule 61B-23.003, F.A.C. (relates to the transition of an association from developer control to unit owner control).

#### 4. Delegation

To avoid unlawful delegation, there must be specificity in the rulemaking authority granted to an agency. All delegation must comply with the requirements of the Administrative Procedure Act, Chapter 120, Florida Statutes.

Case law interpreting whether authority has been unlawfully delegated addresses the specificity in carrying out the legislative intent. "The crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislative intent." Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So. 2d 815, 819 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S. Ct. 1673, 80 L. Ed. 2d 149 (1984). "The specificity of standards and guidelines required from the legislature depends on the subject matter dealt with and the degree of difficulty involved in articulating finite standards." Apalachee Regional Planning Council v. Brown, 546 So.2d 451, 453 (Fla. 1st DCA 1989), approved by, 560 So. 2d 782 (Fla. 1990). "If the subject matter requires the expertise and flexibility of the agency to deal with complex and fluid conditions, the legislature will not be required to draft more detailed or specific legislation." Id.

Thus, "statutes are not unlawful delegations of legislative power when the power sought to be exercised under their auspices is simply a technical issue of implementation and not a fundamental policy decision." Id.

#### B. EFFECT OF PROPOSED CHANGES:

##### 1. Condominium Associations

The condominium associations should be more readily able to conduct business with the provision to permit voting by telephone.

For those multiple condominium associations which presently are required to maintain separate budgets and financial records for each condominium, there should be costs savings for combined accounting and other services.

The bill also increases a buyer's option to close during the fifteen-day voidability period.

##### 2. Insurance Costs

The developer will be limited in responsibility to pay for the uninsured expenses for damages resulting from a natural disaster or Act of God, for units other than those units owned by the developer. The developer will have the ability to pass on expenses

incurred to replace or repair common elements if he or she has maintained adequate insurance. Condominium owners will be required to pay for a pro-rata share of the difference between insurance proceeds and the actual damage to common property.

The change appears to reduce the risk to a developer, while increasing the risk of the unit owners. This may be problematic where a developer-controlled association may use less than the required due diligence in purchasing adequate insurance, particularly where the developer is potentially not as much at risk and the condominium owners bear the majority of the risk of under-insurance.

### 3. Rulemaking Authority

The Division is given more rulemaking authority. Many of the changes are a codification of rules already in existence. According to the Division, there will be no fiscal impact or affect on their workload.

## C. APPLICATION OF PRINCIPLES:

### 1. Less Government:

#### a. Does the bill create, increase or reduce, either directly or indirectly:

##### (1) any authority to make rules or adjudicate disputes?

Yes, the bill increases the rulemaking authority of the Division.

##### (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

##### (3) any entitlement to a government service or benefit?

N/A

#### b. If an agency or program is eliminated or reduced:

##### (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/a

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Section 718.501(2)(a), Florida Statutes, provides that each condominium association that operates more than two units shall pay to the Division a fee equal to \$4.00 per residential unit operated by the condominium association.

Section 718.502(3)(a), Florida Statutes, provides that a developer shall pay to the Division \$20.00 for each residential condominium to be sold by the developer and described in the documents filed with the Division.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. CS/HB 3321 increases a buyer's option to be able to close during the fifteen-day voidability period and facilitates voting by committee and board members of associations by permitting voting by speaker phone.

The bill permits condominium associations established before 1977 the freedom to operate under a single association. Those condominium associations will be permitted to amend their declaration or bylaws to provide for consolidated financial operations. In the example of the Innisbrook Condominium Association, this will permit all investor owners from different condominiums who join in the rental pool to share income and expenses on an equal basis, with the only difference being between the type of unit.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A



(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

**D. STATUTE(S) AFFECTED:**

CS/HB 3321 amends sections 718.103, 718.111, 718.112, 718.116, 718.301, 718.501, 718.502, 718.503, 718.504, 718.506, 719.106, 719.301, 719.501, 719.502, 719.503, Florida Statutes, and creates sections 718.621, and 719.621 Florida Statutes.

**E. SECTION-BY-SECTION RESEARCH:**

**Section 1.**

Section 718.103, Florida Statutes, is amended to define the "Division" as the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation.

**Section 2.**

Section 718.111 (6), Florida Statutes, is amended to remove the terminology of "Phase" as being the requisite for one condominium association to be authorized to operate two or more separate condominiums as a single association. Phase condominiums are provided for directly in section 718.403, Florida Statutes, and were also referred to within this section. The section is amended to provide that if the "initial condominium declaration was recorded prior to January 1, 1977", the condominium association may

operate more than one condominium as if it were a single condominium . The Division estimates that there may be twenty to twenty-five condominiums that meet this criteria.

The bill is amended to provide that an association for two or more condominiums may provide for a consolidated financial operation by amending its declaration, or by amending its bylaws if the amendment is approved by at least two-thirds of the voting interests.

Innisbrook is an upscale resort condominium development in Tarpon Springs which began construction in approximately 1970, prior to enactment of the phase condominium statutes. Presently, there are twenty-eight separate condominiums in Innisbrook. The declarations of condominiums provided that while the condominium property was to be separately owned, all of the condominiums which had been built between 1970 and 1985 were to operate under a single association known as the "Innisbrook Condominium Association." The Innisbrook Condominium Association petitioned the Division for a declaratory statement that the Association was in compliance with the statutes. In October, 1993, the Division, after review of the declarations of condominiums within Innisbrook, concluded that the Innisbrook Condominium Association was required to maintain separate budgets and financial records for each condominium that it operates. Until that ruling, Innisbrook Condominium Association had not maintained separate accounting records for each condominium. All expenses had been shared within the single association and allocated to each unit according to the type of unit within the condominium. All rental income had been paid into the single association, expenses were paid, and income was shared according to the type of unit within the condominium. There are only four types of units at Innisbrook and the units vary little within the various types of condominium buildings. There had been no difference as to location or difference in the actual maintenance costs of a building. Innisbrook Condominium Association now must maintain twenty-eight separate budgets, with costs and rental income shared only within the individual condominium association. There apparently is a consensus at Innisbrook that the present arrangement is unfair as well as contrary to the disclosures signed when each person purchased a unit. Some units apparently have substantially increased costs and expenses, whereas other units presumably have decreased costs. This matter is scheduled to be presented at their annual board meeting in March, 1998.

Section 718.111(11), Florida Statutes, is amended to provide that while a unit-owner controlled association is required to use its "best efforts" to obtain and maintain adequate insurance, a developer-controlled association shall be required to "exercise due diligence" to obtain and maintain such insurance. The failure to obtain and maintain adequate insurance while under developer control will be a "breach of fiduciary responsibility" by the developer appointed members of the board of directors, unless said members can show that in spite of the failure, they exercised "due diligence."

### **Section 3.**

Section 718.112(b), Florida Statutes, is amended to provide that a board member or committee member who was not present at a meeting may submit his or her agreement or disagreement with any action taken at a meeting, but such agreement or disagreement may not be used to create a quorum.

According to the Division, the provision for adding a written agreement or disagreement is intended to correct the misconception within condominium associations that a later written concurrence could correct the lack of a quorum and create retroactively a legal meeting in an example where a meeting had been held, the meeting had insufficient members to create a quorum, and, thus, any action would have been illegal.

Additionally, a board member or committee member may vote by telephone for purposes of obtaining a quorum, if a speaker phone is used in order that everyone present at the meeting can hear the vote.

There is no provision to ensure identification of the person on the telephone, i.e., a relative or another condominium owner could call, state the owner's name, and vote in place of the owner unless some measure to ensure proper identification is provided. It is unclear whether there will be sufficient protections provided within the bylaws or condominium rules to protect the integrity of the vote by telephone. According to the Division, this rule has been in effect for more than four years and it has not received complaints insofar as the identification because committee and board members are small groups and generally know each other.

Section 718.112(d), Florida Statutes, is amended to provide that a candidate for a board membership must meet the requirements set forth in the condominium declaration and be eligible to vote in the jurisdiction of his or her residence. This provision is intended to prevent convicted felons (who have not had their rights restored) from serving on boards.

#### **Section 4.**

Section 718.116, Florida Statutes, is amended to provide that if a developer-controlled association has maintained all insurance coverage required by section 718.111(11), Florida Statutes, in the event of a natural disaster or Act of God, the developer and owners shall be responsible for a pro-rata share of expenses not covered by the proceeds of insurance. Section 718.111(11), Florida Statutes, does not require a specific amount of insurance and also provides that an association may self-insure.

Section 718.111(11), Florida Statutes, as amended, will provide that a developer-controlled association shall be required to "exercise due diligence" to obtain and maintain such insurance. Black's Law Dictionary defines due diligence as:

Such measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

The bill does not provide notice to the individual condominium owners in the case where a developer-controlled association has been unable to obtain insurance or less than what should be obtained under due diligence.

#### **Section 5.**

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Section 718.301, Florida Statutes, is amended to authorize the Division to adopt rules to ensure the efficient and effective transition from developer-control of a condominium to establishment of a unit-owner controlled association.

**Section 6.**

Section 718.501, Florida Statutes, is amended to authorize the Division to establish time frames for and require information related to the creation, merger and termination of condominiums and dissolution of condominium associations.

**Section 7.**

Section 718.502, Florida Statutes, provides that the Division shall receive copies of documents required to be furnished to the Buyer in sections 718.503 and 718.504, Florida Statutes.

Section 718.117, Florida Statutes, relating to termination, provides that "Upon recordation of the instrument evidencing consent of all of the unit owners to terminate the condominium, the association shall notify the Division within 30 working days of the termination and the date the document was recorded, the county where the document was recorded, and the book and page number of the public records where the document was recorded."

Section 718.11 (7), Florida Statutes, provides that condominiums may be merged to form a single condominium. There is no requirement to notice the Division within this section.

Section 718.502, Florida Statutes, is amended to prohibit a developer from closing on a contract for sale or a contract for lease for a period of more than five years until the developer prepares and delivers to the purchaser and to the Division documents that comply with section 718.502, Florida Statutes, and rules adopted by the Division and the Division notifies the developer that the filing is proper. This section is amended to permit the Division to develop filing and review programs and timetables necessary to ensure compliance with the notice and disclosure provisions of this chapter.

**Section 8.**

Section 718.503, Florida Statutes, is amended to provide that a buyer may close during the fifteen days following execution of a purchase agreement if the buyer agrees in writing to close during the fifteen-year voidability period. The developer must retain proof of such agreement to close early for five years after the closing date.

**Section 9.**

Section 718.504, Florida Statutes, is amended to change terminology from purchaser to buyer within the section.

**Section 10.**

Section 718.506, Florida Statutes, is amended to provide for the changed terminology within the section from purchaser to buyer.

**Section 11.**

Section 718.621, Florida Statutes, is added to provide the Division rulemaking authority to implement and ensure compliance with the developer's "obligations" to residents during conversion: requirements to file and notice intended condominium conversions, provide rental agreement extensions, right of first refusal, disclosure and post-disclosure protections regarding the conversion.

**Section 12.**

Section 719.106, Florida Statutes, is amended to provide that a board of administration member or committee member who was not present at a meeting may submit, in writing, his or her agreement or disagreement with any action taken at a meeting, but such concurrence may not be used to create a quorum.

According to the Division, the provision for adding a written agreement or disagreement is intended to correct the misconception within associations that a later written concurrence could correct the lack of a quorum and create retroactively a legal meeting in an example where a meeting had been held, the meeting had insufficient members to create a quorum, and, thus, any action would have been illegal.

Additionally, a board member or committee member may vote by telephone for purposes of obtaining a quorum, if a speaker phone is used in order that everyone present at the meeting can hear the vote.

There is no provision to ensure identification of the person on the telephone, i.e., a relative or another cooperative owner can call, state the owner's name, and vote in place of the owner unless any measure to ensure proper identification is provided. It is unclear whether there will be sufficient protections provided within the bylaws or cooperative rules to protect the integrity of the vote by telephone. According to the Division, this rule has been in effect for more than four years and it has not received complaints insofar as the identification because committee and board members are small groups and generally know each other.

**Section 13.**

Section 719.301, Florida Statutes, is amended to provide the Division with the authority to adopt rules pursuant to the Administrative Procedure Act to ensure the efficient and effective transition from developer control of a cooperative to the establishment of a unit-controlled association.

**Section 14.**

Section 719.501, Florida Statutes, is amended to provide the Division with the authority to adopt rules pursuant to the Administrative Procedure Act to establish timeframes and require information relating to the creation, merger, and dissolution of cooperative associations.

**Section 15.**

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Section 719.502, Florida Statutes, is amended to prohibit a developer from closing on a contract for sale or a contract for lease for a period of more than five years until the developer prepares and delivers to the purchaser and to the Division documents that comply with section 719.502, Florida Statutes, and rules adopted by the Division and the Division notifies the developer that the filing is proper.

**Section 16.**

Section 719.503, Florida Statutes, is amended to provide that a buyer may close during the fifteen days following execution of a purchase agreement if the buyer agrees in writing to close during the fifteen-year voidability period. The developer must retain proof of such agreement to close early for five years after the closing date.

**Section 17.**

Section 719.621, Florida Statutes, is added to provide the Division rulemaking authority to implement and ensure compliance with the developer's "obligations" to residents during conversion: requirements to file and notice intended cooperative conversions, provide rental agreement extensions, right of first refusal, disclosure and post-disclosure protections regarding the conversion.

**Section 18.**

Provides that the bill will take effect upon becoming a law.

II. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

According to the Division, any effect will be minimal.

3. Long Run Effects Other Than Normal Growth:

According to the Division, any effect will be minimal.

4. Total Revenues and Expenditures:

According to the Division, any effect will be minimal.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:**

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

**D. FISCAL COMMENTS:**

N/A

**III. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:**

**A. APPLICABILITY OF THE MANDATES PROVISION:**

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

**B. REDUCTION OF REVENUE RAISING AUTHORITY:**

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

**C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:**

This bill does not reduce the percentage of state tax shared with counties or municipalities.

COMMENTS:

**VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

Representative Crow has filed a strike-everything amendment to CS/HB 3321. This proposed amendment will not have a fiscal impact.

**PRESENT SITUATION:**

1. Condominium Associations

Section 718.111(6), Florida Statutes, Operation of Phase Condominiums, permits a condominium to operate more than one condominium within a phase development.

A condominium development started prior to the enactment of section 711.64, Florida Statutes, Phase Condominiums, in October, 1974, however, is required to allocate common association expenses either on a square footage basis or on a unit basis and the financial records for each condominium must be separately maintained. If a development contains different types of units, i.e., garden units, elevator building units, townhouses, etc., each phase of the development must have its own allocated condominium assessments. For example, there will be more maintenance for a unit within a high-rise elevator building than for a unit within a single-story building.

Innisbrook is an upscale resort condominium development in Tarpon Springs which began construction in approximately 1970, prior to enactment of the phase condominium statutes. Presently, there are twenty-eight separate condominiums in Innisbrook. The declarations of condominiums provided that while the condominium property was to be separately owned, all of the condominiums which had been built between 1970 and 1985 were to operate under a single association, known as the "Innisbrook Condominium Association." The Innisbrook Condominium Association petitioned the Division for a declaratory statement that the Association was in compliance with the statutes. In October, 1993, the Division, after review of the declarations of condominiums within Innisbrook, concluded that the Innisbrook Condominium Association was required to maintain separate budgets and financial records for each condominium that it operates. Until that ruling, Innisbrook Condominium Association had not maintained separate accounting records for each condominium. All expenses had been shared within the single association and allocated to each unit according to the type of unit within the condominium. All rental income had been paid into the single association, expenses were paid, and income was shared according to the type of unit within the condominium. There are only four types of units at Innisbrook and the units vary little within the various types of condominium buildings. There had been no difference as to location or difference in the actual maintenance costs of a building. Innisbrook Condominium Association now must maintain twenty-eight separate budgets, with costs and rental income shared only within the individual condominium association. There apparently is a consensus at Innisbrook that the present arrangement is unfair as well as contrary to the disclosures signed when each person purchased a unit. Some units apparently have



substantially increased costs and expenses, whereas other units presumably have decreased costs. This matter is scheduled to be presented at their annual board meeting in March, 1998.

## 2. Insurance Costs

Section 718.116(9)(a)(2), Florida Statutes, permits developers to be excused from payment of assessments for unsold units if the developer is operating under a guarantee and operating the condominium association. Presently, if an insurance loss occurs during the developer guarantee period, the developer may be responsible for all costs for common expenses in excess of the insurance proceeds.

Section 718.111(11), Florida Statutes, requires a condominium association to use its "best efforts to obtain and maintain adequate insurance to protect the association, the association property, the condominium property. . . ."

## 3. Official Records

Section 718.111(12), Florida Statutes, currently provides that the official records of a condominium association are public record and open to inspection by any association member or authorized representative of such member at all reasonable times. However, the law does not specifically provide for the request of official records by mail. In addition, this section provides that a unit owner who is denied access to official records is entitled to actual damages or minimum damages for the association's willful failure to comply with the records request. This section establishes minimum damages at \$50 per day for up to 10 days, with the calculation beginning on the 11th working day after receipt of the written request.

## 4. Rulemaking Authority

The Legislature amended the Administrative Procedures Act (APA) during the 1996 Session. The revised APA imposes a stricter rulemaking standard by requiring more specific agency rulemaking authority in statutes to accomplish the stated purpose of enabling statutes.

Pursuant to subsection 120.536(2), Florida Statutes, by October 1, 1997, all agencies were required to notify the Joint Administrative Procedures Committee of all existing rules, or portions thereof, adopted before October 1, 1996, which exceeded the agency's statutory rulemaking authority under the stricter APA rulemaking standards. If the agency does not secure specific legislative authority during the 1998 regular session, the agency must initiate rulemaking by January 1, 1999, to repeal the identified rules. Effective July 1, 1999, the JAPC or any substantially affected person has standing to petition the agency to repeal identified rules that have not yet been repealed by the agency.

The Department of Business and Professional Regulation identified the following rules within the Division of Florida Land Sales, Condominiums and Mobile Homes as lacking the necessary rulemaking authority pursuant to the new rulemaking standards:

- Rule 61B-17.001 (3) and (4), F.A.C.

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- Rule 61B-17.003, F.A.C.
- Rule 61B-17.005, F.A.C.
- Rule 61B-17.006 (6), F.A.C.
- Rule 61B-18.001, F.A.C.
- Rule 61B-23.001 (2) and (4), F.A.C.
- Rule 61B-23.002 (7) and (10), F.A.C.
- Rule 61B-23.003, F.A.C.
- Rule 61B-24.003, F.A.C.
- Rule 61B-24.004, F.A.C.
- Rule 61B-24.005, F.A.C.
- Rule 61B-24.007, F.A.C.

These rules currently implement various provisions of Chapter 718, relating to Condominiums.

Currently, Chapters 718 (condominiums) and 719 (cooperatives) are very similar. The Division indicates that it was in the process of promulgating rules relating to cooperatives when it conducted the rule review required by section 120.536, Florida Statutes, in which the Division identified several condominium rules as lacking the necessary statutory authority.

The Division is seeking to obtain the necessary statutory authority for the above-mentioned condominium rules and to extend this same authorization to cooperatives, so that the Division has the proper statutory authority to promulgate rules implementing these provisions. The proposed amendment incorporates some rule content into statute and provides rulemaking authority for other provisions.

In addition to the authorization of Division rules, the proposed amendment also provides that a buyer may elect to close on a condominium during the fifteen-day voidability period. The developer must retain proof of the agreement to close early for five years after the closing date.

## 5. Delegation

To avoid unlawful delegation, there must be specificity in the rulemaking authority granted to an agency. All delegation must comply with the requirements of the Administrative Procedure Act, Chapter 120, Florida Statutes.

Case law interpreting whether authority has been unlawfully delegated addresses the specificity in carrying out the legislative intent. "The crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislative intent." Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So. 2d 815, 819 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S. Ct. 1673, 80 L. Ed. 2d 149 (1984). "The specificity of standards and guidelines required from the legislature depends on the subject matter dealt with and the degree of difficulty involved in articulating finite standards." Apalachee Regional Planning Council v. Brown, 546 So.2d 451, 453 (Fla. 1st DCA 1989), approved by, 560 So. 2d 782 (Fla. 1990). "If the subject matter requires the expertise and flexibility of the agency to deal with complex and

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fluid conditions, the legislature will not be required to draft more detailed or specific legislation.” Id.

Thus, “statutes are not unlawful delegations of legislative power when the power sought to be exercised under their auspices is simply a technical issue of implementation and not a fundamental policy decision.” Id.

#### **EFFECT OF PROPOSED CHANGES:**

The proposed strike-everything amendment to CS/HB 3321 amends Chapter 718 relating to Condominiums and Chapter 719 relating to Cooperatives to provide the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation [hereinafter the *Division*] with rulemaking authority. “Division” is defined within the chapter.

The proposed amendment addresses the rules identified by the Division as lacking the necessary statutory authority by incorporating some rule content into statute and providing rulemaking authority for other provisions.

The proposed amendment also states that a buyer may elect to close on a condominium during the fifteen-day voidability period. The developer must retain proof of the agreement to close early for five years after the closing date.

The proposed amendment stipulates that if a developer-controlled association has maintained all required insurance coverage, in the event of a natural disaster, the developer and owners shall be responsible for a pro-rata share of the expenses not covered by insurance proceeds. A developer-controlled association must use “due diligence” in obtaining and maintaining adequate insurance.

The proposed amendment provides that official records of an association may be inspected either in person or by mail at the reasonable expense of the association member. The amendment also requires an association of more than 50 units to copy and deliver requested copies of official records upon written request. The association may charge the actual costs associated with such service. A postmark shall be evidence of the delivery date for purposes of this section. The proposed amendment also provides that an association may be fined \$100 per day for up to 10 days for any subsequent willful failure to comply with a written request for an official record.

The proposed amendment states that a single association may operate two or more condominium associations if their declaration was recorded prior to January 1, 1977. An association of two or more condominiums may provide for a consolidated financial operation by amending its declaration or bylaws if the amendment is approved by at least two-thirds of the voting interests.

The proposed amendment also provides that a board member or committee member may join a vote by written agreement or disagreement, but such agreement may not be used to create a quorum. A board or committee member may vote by telephone and may be counted as present for purposes of obtaining a quorum if a speaker phone is utilized. The bill provides that a candidate for a board membership must meet the requirements set forth in the condominium declaration and be eligible to vote in the jurisdiction of his or her residence.

The proposed amendment prohibits a developer from closing on a contract for sale or on a contract for lease for more than five years until the developer prepares and delivers to the purchaser and to the Division those documents complying with chapter 718, Florida Statutes, and Division rules, and the Division notifies the developer that the filing is proper.

## **SECTION-BY-SECTION RESEARCH:**

The proposed strike-everything amendment contains the following provisions:

### **Section 1.**

Amends section 718.103, Florida Statutes, to define "Buyer" as a person who purchases a condominium, and provides that the term "purchaser" is interchangeable with the term "buyer". This section is also amended to define the "Division" as the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation.

### **Section 2.**

Amends section 718.104, Florida Statutes, to provide that upon recording documents creating a condominium, the developer shall also file this information with the Division within 30 business days on a form prescribed by the Division.

**Subsection (7) of Rule 61B-23.002, F.A.C.**, provides that the board of directors of condominium association must notify the Division prior to taking any action to terminate or merge the condominium or the association. It also provides that after recording a termination notice, the association shall provide the Division with a copy of the recorded notice within 30 days. Section 2 of the bill incorporates the provisions of this rule into s. 718.104, F.S., regarding procedures for the creation of a condominium association. This provision, together with section 6 of the bill, is sufficient to authorize subsection (7) of Rule 61B-23.002, F.A.C., without otherwise expanding the division's current rulemaking authority.

### **Section 3.**

Amends section 718.111(6), Florida Statutes, to remove the terminology of "Phase" as being the requisite for one condominium association to be authorized to operate two or more separate condominiums as a single association. Phase condominiums are provided for directly in section 718.403, Florida Statutes, and are also referred to within this section. The section is amended to provide that if the "initial condominium declaration was recorded prior to January 1, 1977", the condominium association may operate more than one condominium as if it were a single condominium . The Division estimates that there may be twenty to twenty-five condominiums that meet this criteria.

The proposed amendment also provides that an association for two or more condominiums may provide for a consolidated financial operation by amending its declaration, or by amending its bylaws if the amendment is approved by at least two-thirds of the voting interests.

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Amends section 718.111(11), Florida Statutes, to provide that while a unit-owner controlled association is required to use its best efforts to obtain and maintain adequate insurance, a developer-controlled association shall be required to exercise due diligence to obtain and maintain such insurance. The failure to obtain and maintain adequate insurance while under developer control will be a breach of fiduciary responsibility by the developer appointed members of the board of directors, unless said members can show that in spite of the failure, they exercised due diligence.

Amends section 718.111(12)(c), Florida Statutes, to provide that official records of an association may be inspected either in person or by mail at the reasonable expense of the association member. The amendment also requires an association of more than 50 units to copy and deliver requested copies of official records upon written request. The association may charge the actual costs associated with such service. A postmark shall be evidence of the delivery date for purposes of this section. Current law does not require an association to provide official records by mail.

Section 718.111(12)(c), Florida Statutes, presently states that an association may be fined \$50 per day up to 10 days for failure to comply with a written request for an official record. This section is amended to provide that an association may be fined \$100 per day for up to 10 days for any subsequent willful failure to comply.

#### **Section 4.**

Currently, s. 718.112, F.S., authorizes the Division to adopt rules related to the tape recording or videotaping of meetings, voting procedures, and procedures for filling vacancies created by a recall election. The Division has no other specific rulemaking authority to establish rules relating to the conduct of meetings of condominium unit owners. Therefore, subsections (2) and (4) of Rule 61B-23.001, F.A.C., and subsection (10) of Rule 61B-23.002, F.A.C. were identified as lacking specific statutory authority.

Section 4 of the amendment incorporates the provisions of those rules into s. 718.112, F.S. The amendment allows a board member of a condominium association to join by written concurrence in any action taken at a meeting. It allows a board member to attend a board or committee meeting by telephone conference but requires that a telephone speaker be used so that the member can be heard by any unit owners present at the meeting. This section also requires that the association adopt written rules regulating the frequency, duration and manner of unit owner statements at association meetings. This provision is sufficient to authorize **subsections (2) and (4) of Rule 61B-23.001, F.A.C.** and **subsection (10) of 61B-23.002, F.A.C.**, without otherwise expanding the division's current rulemaking authority.

Section 718.112(d), Florida Statutes, is amended to provide that a candidate for a board membership must meet the requirements set forth in the condominium declaration and be eligible to vote in the jurisdiction of his or her residence. This provision is intended to prevent convicted felons (who have not had their rights restored) from serving on boards.

#### **Section 5.**

Amends section 718.116, Florida Statutes, to provide that if a developer-controlled association has maintained all insurance coverage required by section 718.111(11), Florida

Statutes, in the event of a natural disaster or Act of God, the developer and owners shall be responsible for a pro-rata share of expenses not covered by the proceeds of insurance.

### Section 6.

Section 6 of the amendment incorporates the provisions of **subsection (7) of Rule 61B-23.002, F.A.C.**, into s. 718.117, F.S., regarding procedures for termination of condominium associations (just as section 2 incorporates the rule provisions into s. 718.104, F.S., regarding procedures for creating condominium associations). These provisions are sufficient to authorize subsection (7) of Rule 61B-23.002, F.A.C., without otherwise expanding the division's current rulemaking authority.

### Section 7.

Creates subsection (6) of section 718.301, Florida Statutes, to provide the procedures for when there is a transfer of control of a condominium association from the developer to the unit owners.

Rule 61B-23.003, F.A.C., was adopted to clarify and specify certain duties and responsibilities with regard to these procedures. The rule establishes that the developer shall pay the costs for the preparation or duplication of certain documents including accountant's fees incurred in preparing financial statements. It requires that association funds be used exclusively for this purpose and specifically prohibits the use of these funds for certain other activities. The rule provides that within 10 days after the election of a unit owner to the board of administration, the developer is to submit, in writing, the unit owner's name and mailing address to the Division. It requires the developer or developer's agent to maintain a receipt of the transfer for a period of 7 years. It provides the method for computing the percentage of units conveyed to purchasers for purposes of determining when control of the association can be transferred to the unit owners. In determining the computation the terms "bulk transfer" and "assignment of developer rights" are used and defined in this rule. Finally, the rule limits a developer's ability to vote on certain issues and requires that the unit owners elect a majority of the association's board members within 7 years after a recordation of declaration. While the Division has broad rulemaking authority, it does not have specific authority to implement any of these provisions of s. 718.301, F.S.

Section 7 authorizes the Division to adopt rules tailored to administer the provisions of s. 718.301, F.S. These provisions are sufficient to authorize **subsection (7) of Rule 61B-23.002, F.A.C.**, without expanding the Division's current rulemaking authority.

### Section 8.

Creates subsection (8) of section 718.403, Florida Statutes. This section incorporates the provisions of **Rule 61B-17.001, F.A.C.** into section 718.403, Florida Statutes, regarding phase condominiums. Rule 61B-17.001, F.A.C. provides that the developer, upon recording the declaration of condominium or amendments adding phases to a condominium, shall file with the Division such recording information on a specific form, within 30 days.

### Section 9.

Section 718.502, F.S., provides that a purchaser may void a contract for sale or a contract for a lease of more than 5 years if certain documents are not filed with the Division. **Rule**

**17.001, F.A.C.**, provides even further restrictions on a developer, by requiring that a developer can not close on any contract for sale or contract for a lease period of more than 5 years if the developer has not been notified by the Division that all documents submitted by the developer are in compliance with the chapter 718, F.S. Additionally, **Rules 61B-17.003, 17.005, and 17.006, F.A.C.**, provide time frames by which the developer must file certain documents to the Division. These same rules also require the Division to provide certain notices and responses within an established time frame to the developer. These rules also define the terms "commencement" and "complete accounting" to further clarify the time frames imposed on developers in filing such documents. The Division lacks the authority to impose these time frames or to require that a developer may not close on a contract unless all these filings have been made and the Division has proved notice of such filings to the developer.

Section 9 of the bill amends to s. 718.502, F.S., to reflect the Division's current practices and protects a prospective purchaser from a developer that has not received the approval for its documents from the Division. It provides that a developer may not close on any contract for sale or on any contract for a lease of more than 5 years until the developer receives notification from the Division that it is in compliance with the requirements of chapter 718, F.S. It also provides specific authority that the Division may adopt rules regarding filing, review, and examination requirements and relevant timetables to ensure compliance with notice and disclosure requirements in s. 718.502, F.S. This provision is sufficient to authorize subsection Rules 61B-17.001, 61B-17.003, 61B-17.005, and 61B-17.006, F.A.C., without otherwise expanding the division's current rulemaking authority.

#### **Section 10.**

Section 718.503, F.S., provides requirements for developer disclosure prior to the sale of a condominium. Specifically, it allows a buyer to terminate a contract by written notice within 15 days after receiving all of the documents in this section. The Division adopted **Rule 61B-18.001, F.A.C.**, prohibiting a developer from closing for 15 days following the signed execution of the contract for sale unless the buyer is informed of the 15 day period to terminate and agrees to close prior to the expiration of the 15 days. The rule also requires the developer to maintain proof of the buyer's agreement to close for a period of 5 years. The Division lacks authority to require the developer to maintain the agreement for a specified number of years and has no authority to prohibit a developer from closing.

Section 10 of the bill provides that a developer may not close on a contract for a sale of a condominium for 15 days after the execution of the contract and delivery of the documents to the buyer unless the buyer has been informed of the 15 day period to terminate and has agreed to close prior to the expiration of the 15 days. The developer is required to keep proof of the buyer's agreement to close before the expiration period for 5 years after the closing date. This provision is sufficient to authorize Rule 61B-18.001, F.A.C., without otherwise expanding the division's current rulemaking authority.

#### **Section 11.**

Creates section 718.621, Florida Statutes, which authorizes the Division to adopt rules to administer and ensure compliance of the developers' obligations with respect to condominium conversions. The rulemaking authority is limited to issues of condominium conversions regarding the filing and noticing of intended conversions, rental agreement extensions, the period of right of first refusal, and the issuance and disclosure of post

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purchase protections issued or established by the developer. This grant of rulemaking authority will authorize Rules 61B-24.002, 61B-24.003, 61B-24.004, 61B-24.005, and 61B-24.007, F.A.C.

Part VI of Chapter 621, F.S., is related to the conversion of existing improvements into condominiums. The Division has broad rulemaking authority granted in s. 718.501, F.S., but only has specific authority respect to the publication of any economic information that will assist tenants in making a decision and which the Division makes available to the developer. In enforcing and implementing the provisions of this chapter the Division adopted a series of rules that were intended to clarify and carry out the provisions in part VI of chapter 621, F.S.

**Rule 61B-24.002, F.A.C.**, requires a developer to provide notice to a tenant of an intended conversion and prescribes the specific manner by which such notices must be mailed. **Rule 61B-24.003, F.A.C.**, provides the classes of tenants that are entitled to a rental agreement extension and the maximum duration of a rental agreement extension. It provides time frames within which a tenant must decide to extend his or her rental agreement. It also requires the developer to continue to charge the same rent during the period of the rental agreement extensions.

Section 718.616, F.S., sets forth generally the information that must be disclosed and the components for disclosure. **Rule 61B-24.004, F.A.C.**, contains more detailed provisions regarding those disclosures. The rule specifies how certain components will be measured, the basis for replacement cost information and states other disclosures requirements that must be included in the building condition statement.

Section 718.612, F.S., provides that a tenant shall have the right of first refusal to purchase the unit in which the tenant resides. The statute provides specific time frames for when the developer must make an offer and when the tenant must respond. **Rule 61B-24.005, F.A.C.**, allows a developer to offer the unit to the tenant at more than one price, provided that the prices are offered during the period of right of first refusal. Also, the rule provides that the developer may not require a close on a purchase prior to the termination of the existing rental agreement or a rental agreement extension.

Section 718.618, F.S., requires that a developer of a condominium conversion either establish reserve accounts for capital expenditures and deferred maintenance, offer warranties, or post a surety bond. The section details the types of reserve accounts that must be established, the kinds of warranties that must be offered, and the procedures for establishing a surety bond. **Rule 61B-24.007, F.A.C.**, specifies what is included in the term "roof," and provides the basis for measuring the age of any component or structure for which a reserve account is to be established. The rule specifies the term of an implied warranty, if the developer issues such in lieu of a reserve account. Finally, the rule requires complete disclosure by the developer to the purchaser of the method of post-purchase protection.

### **Section 12.**

Amends section 719.103, Florida Statutes, to include a definition of the term "buyer", and re-orders the remaining subsections to place the existing terms contained in this section in the proper sequence.

### **Section 13.**



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Amends section 719.1035, Florida Statutes, to provide that upon creation of a cooperative, the developer or association shall file the recording information with the Division within 30 working days on a form prescribed by the Division.

This language parallels section 2 of the proposed amendment relating to the creation of condominiums. This provision essentially allows the Division to adopt rules governing cooperatives that are similar to the Division's existing rules governing condominiums.

**Section 14.**

Creates subsection (10) of section 719.104, Florida Statutes, to require a cooperative association's board of directors to notify the Division prior to taking action to dissolve or merge the cooperative association.

This language parallels section 6 of the proposed amendment relating to termination of condominiums. This provision essentially allows the Division to adopt rules governing cooperatives that are similar to the Division's existing rules governing condominiums.

**Section 15.**

Amends section 719.106, Florida Statutes, to provide that a board of administration member or committee member who was not present at a meeting may submit, in writing, his or her agreement or disagreement with any action taken at a meeting, but such concurrence may not be used to create a quorum.

This language parallels section 4 of the proposed amendment relating to the bylaws of condominiums. This provision essentially allows the Division to adopt rules governing cooperatives that are similar to the Division's existing rules governing condominiums.

**Section 16.**

Creates subsection (6) of section 719.301, Florida Statutes, to authorize the Division to adopt rules to administer the provisions of section 719.301, Florida Statutes, relating to the transfer of association control.

This language parallels section 7 of the proposed amendment relating to the transfer of association control in condominiums. This provision essentially allows the Division to adopt rules governing cooperatives that are similar to the Division's existing rules governing condominiums.

**Section 17.**

Creates subsection (7) of section 719.403, Florida Statutes, to provide that upon recording cooperative documents or amendments adding phases, the developer or association must file the recording information with the Division within 30 working days on a form prescribed by the Division.

This language parallels section 8 of the proposed amendment relating to phase condominiums. This provision essentially allows the Division to adopt rules governing

phase cooperatives that are similar to the Division's existing rules governing phase condominiums.

**Section 18.**

Amends section 719.502(1), Florida Statutes, to prohibit a developer from closing on a contract for sale or a contract for lease for a period of more than five years until the developer prepares and delivers to the purchaser and to the Division documents that comply with section 719.502, Florida Statutes, and rules adopted by the Division and the Division notifies the developer that the filing is proper.

This language parallels section 9 of the proposed amendment relating to the filing prior to sale or lease for condominiums. This provision essentially allows the Division to adopt rules governing cooperatives that are similar to the Division's existing rules governing condominiums.

**Section 19.**

Amends section 719.503(1)(b), Florida Statutes, to provide that a buyer may close during the fifteen days following execution of a purchase agreement if the buyer agrees in writing to close during the fifteen-year voidability period. The developer must retain proof of such agreement to close early for five years after the closing date.

This section authorizes the Division to develop filing, review and examination requirements and relevant timetables to ensure compliance with the notice and disclosure provisions of this section.

This language parallels section 10 of the proposed amendment relating to developer disclosure for condominiums. This provision essentially allows the Division to adopt rules governing cooperatives that are similar to the Division's existing rules governing condominiums.

**Section 20.**

Creates section 719.621, Florida Statutes, to authorize the Division to adopt rules to administer and ensure compliance with the developer's obligations to residents during cooperative conversions regarding the filing and noticing of intended conversions, rental agreement extensions, right of first refusal, and disclosure and post-purchase protections.

This language parallels section 11 of the proposed amendment which grants rulemaking authority to condominiums.

**Section 21.**

Amends section 721.05(28), Florida Statutes, to correct a cross-reference.

**Section 22.**

Provides that the bill will take effect upon becoming a law.

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IV. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Legislative Research Director:

Jeanne Slizyk

P. K. Jameson

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:

Legislative Research Director:

Angela Price

David M. Greenbaum