

STORAGE NAME: h3321s1.rpp

DATE: March 9, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
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) GOVERNMENT RULES & REGULATION
 - (3)
 - (4)
-

I. SUMMARY:

The bill 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.

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 after 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 Division reviewed its rules pursuant to section 120.536, Florida Statutes, the Administrative Procedure Act. The Division expressed concern that there are gaps in the present statute which must be filled in order to protect the public. The Division presently has rules existing for which the Division has not specifically been granted rulemaking authority.

4. Delegation

To avoid unlawful delegation, there must be specificity in the rule-making 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 increases a buyer's option to close during the fifteen-day voidability period, although this may result in more litigation.

The removal of the fifteen-day voidability period, designed to protect the buyer and provide ample time to review complicated and unfamiliar documents, is a significant departure from the existing law.

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. Conversely, the 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 in order to keep the monthly overhead low, 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 will be given more rulemaking authority and some additional responsibility. Many of the changes are a codification of the existing rules already in existence. According to the Division, there will be no fiscal impact or affect on their workload.

The bill will permit a developer to sell condominiums during the fifteen-day voidability period. Purchasers who want to purchase and close on a condominium or cooperative during the fifteen-day period will be able to do so; however, some purchasers may not understand the reason for the voidability period and the importance of reviewing the documents before closing.

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 rulemaking authority of the division.

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

Yes, the division will have more responsibility.

- (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?

The bill 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. However, the removal of the fifteen-day voidability period, designed to protect the buyer and provide ample time to review complicated and unfamiliar documents, may create problems if the buyer does not have an opportunity to properly investigate the condominium documents.

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. Conversely, the owners within a smaller condominium may have less control and freedom as a smaller part of a single combined association of many associations.

- 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:

The bill amends sections 718.103, 718.111, 718.112, 718.116, 718.301, 718.501, 718.502, 718.503, 719.106, 719.501, 719.502, 719.503, Florida Statutes. The bill creates section 718.621, 719 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.

This bill appears to provide an opportunity for a developer-controlled association to provide minimal insurance, thereby shifting the burden of risk to the individual condominium owners. This would appear to benefit the developer, particularly if the developer is taking advantage of provisions of section 718.116, Florida Statutes (being excused from making payments of common expenses and assessments during a "guarantee" period if provided for in the condominium declaration).

According to the Division, developers commonly set association fees at a very low rate in order to attract buyers who generally have a fear of high assessments. Although the condominium documents will explain that the condominium association fees "may" increase after the "guarantee period" is over, many buyers do not notice this provision. Thus, developers whose main incentive is to sell units are often motivated to set the association fees at unrealistically low levels in order to sell units. In these situations, if the developer is running a deficit during the guarantee period, the developer may be more motivated to cut costs wherever possible.

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.

Section 718.301, Florida Statutes, is amended to authorize the Division to establish rules to ensure the efficient and effective transition from developer-control of a condominium to establishment of a unit-owner controlled association. This delegation of rule-making authority appears to be within the intent of the Administrative Procedure Act, chapter 120, Florida Statutes.

Section 6.

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

Establishing timeframes and requiring information may be too broad a delegation to the Division without more specific guidance. According to the Division, this authority is intended to require that the Division must receive "notice" of the creation, termination and merger. Similarly, the timeframes would be only related to timeframes for receiving such notice by the Division.

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. This is the area where the Division requires the most authority to require information and establish timeframes to ensure compliance.

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.

The language may be too broad a delegation to the Division without more specificity. The language amending section 718.502 (Section 8. below) provides the Division with authority to develop review programs and relevant timetables necessary to ensure compliance and notice requirements of this chapter.

According to the Division, it specifically needs this language to meet its needs, but it is unclear that this authority complies with the Administrative Procedure Act, chapter 120, Florida Statutes.

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. This authority to ensure compliance is a different terminology than timeframes and appears to be authorized by the Administrative Procedure Act, chapter 120, Florida Statutes.

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 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.

The waiver of the fifteen-day voidability period, designed to protect the buyer and provide ample time to review complicated and unfamiliar documents, is a significant departure from the existing law.

It is also unclear whether the buyer may still thereafter void the contract and closing during the fifteen-day voidability period. An example of the potential conflict is where a buyer closes on day three, but then changes his mind on day ten, and attempts to void the closing. Similarly, it is unclear if a buyer signs an agreement to close during the fifteen-day voidability period, yet decides to revoke the agreement prior to the closing within the fifteen-day period.

According to Division, there are occasions when the closing has been delayed because of multiple amendments, possibly single word changes, which have prevented buyers (sophisticated and not) from closing after they have actually had the majority of the required documents for months. By the time amendments have been completed, the buyers may be impatient and not recognize the public policy behind the fifteen-day voidability period.

While circumstances described by the Division where the buyer may have had ample time to review all but minor changes to the documents may occur and represent a legitimate concern, this change equally applies to the many developers attempting the sell existing units and which are likely to represent the majority of sales. In this circumstance, the buyer's first exposure to the documents will be when they sign the contract to purchase and the buyer may not have sufficient time to appreciate the necessity of reviewing the documents.

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.

There may be unlawful delegation considerations if this rulemaking authority is intended to extend to making decisions regarding what the developer's "obligations" are in condominium conversions, beyond the specific implementation of rules to ensure compliance with the existing obligations. According to the Division, the obligations referred to are those obligations specifically enumerated in sections 718.604 - 718.622, Florida Statutes.

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 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.

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 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.

It is also unclear whether the buyer may still thereafter void the contract and closing during the fifteen-day voidability period. An example of the potential conflict is where a buyer closes on day three, but then changes his mind on day ten and attempts to void the closing. Similarly, it is unclear if a buyer signs an agreement to close during the fifteen-day voidability period, yet decides to revoke the agreement prior to the closing within the fifteen-day period.

According to the Division, there are occasions when the closing has been delayed because of multiple amendments, possibly single word changes, which have prevented buyers (sophisticated and not) from closing after they have actually had the majority of the required documents for months. By the time amendments have been completed, the buyers may be impatient and not recognize the public policy behind the fifteen-day voidability period.

While circumstances described by the Division where the buyer may have had ample time to review all but minor changes to the documents may be a legitimate concern, this change equally applies to the many developers attempting the sell existing units. In this circumstance, the buyer's first exposure to the documents will be when they sign the contract to purchase and the buyer may not have sufficient time to appreciate the necessity of reviewing the documents.

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.

There may be unlawful delegation considerations if this rulemaking authority is intended to extend to making decisions regarding what the developer's "obligations" are in condominium conversions, beyond the specific implementation of rules to ensure compliance with the existing obligations. According the Division, the obligations referred to are those obligations specifically enumerated in sections 718.604 - 718.622, Florida Statutes.

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:

The bill defines Division to mean "The Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation" within chapter 718. However, within chapter 719, the term "Division" is not defined.

Section 4.

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 obtains insurance coverage that is less than what should be obtained under due diligence. Without timely notice to the condominium owners, it may be difficult to prove whether a developer actually used due diligence several years after the fact. Insurance companies may not retain records of what may have been available at a specific date, and the result may be that the evidence presented may be limited to the developer's word that he used "due diligence." This may be more problematic the developer is taking advantage of provisions of section 718.116, Florida Statutes (being excused from making payments of common expenses and assessments during a "guarantee" period if provided for in the condominium declaration) and may have an incentive be very "cost conscious" in the developer's selection of insurance.

Section 8.

The potential waiver of the fifteen-day voidability period, designed to protect the buyer and provide ample time to review complicated and unfamiliar documents related to a condominium, is a significant departure from the existing law.

According to the Division, there are occasions when the closing has been delayed because of multiple amendments, possibly single word changes, which have prevented buyers (sophisticated and not) from closing after they have actually had the majority of the required documents for months. By the time amendments have been completed, the buyers may be impatient and may not recognize the public policy behind the fifteen-day voidability period.

While circumstances described by the Division where the buyer may have had ample time to review all but minor changes to the documents may be a legitimate concern, this change equally applies to the many developers attempting the sell existing units. In this circumstance, the buyer's first exposure to the documents will be when they sign the contract to purchase and the buyer may not have sufficient time to appreciate the necessity of reviewing the documents.

It is also unclear whether the buyer may still thereafter void the contract and closing during the fifteen-day voidability period. An example of the potential conflict is where a buyer closes on day three, but then changes his mind on day ten and attempts to void the closing. Similarly, it is unclear if a buyer signs an agreement to close during the fifteen-day voidability period, yet decides to revoke the agreement prior to the closing within the fifteen-day period.

Section 16.

As described in Section 5 relating to condominiums, this bill appears to provide an opportunity for a developer-controlled association to provide minimal insurance, thereby shifting the burden of risk to the individual cooperative owners. This does not appear, however, to be as likely to happen as it would in a condominium situation where a developer is actively selling cooperative units and utilizing a guarantee period of low assessments to promote sells.

The bill also does not provide notice to the individual cooperative owners in the case where a developer-controlled association has been unable to obtain insurance or obtains insurance coverage that is less than what should be obtained under due diligence. Without timely notice to the cooperative owners, it may be difficult to prove whether a developer actually used due diligence several years after the fact. Insurance companies may not retain records of what may have been available at a specific date, and the result may be that the evidence presented may be limited to the developer's word that he used "due diligence."

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Real Property & Probate adopted a strike everything amendment which was incorporated into a committee substitute.

Changes from HB 3321 include:

- The terminology of "resort condominiums" was removed from the criteria necessary for an association to operate more than one condominiums within a single association.
- A definition of "Division" was added.

- A “due diligence” provision was added relating to obtaining and maintaining adequate insurance by a developer-controlled association. The failure by a developer-controlled association to obtain and maintain adequate insurance 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.”
- The definition of the terms: developer, employer and ordinary course of business, as the terms are used within the Division, was deleted from the bill.
- Proof of a buyer’s waiver of the voidability period was changed to require that the waiver be in writing.
- The provision relating to the ability of absent board or committee members to provide written concurrences was clarified to provide that a written agreement or disagreement may be provided, but that the vote will not count toward a quorum.
- Provisions of the bill which had been applied to condominiums were added to chapter 719, Florida Statutes, relating to cooperatives in order to:
 - a) provide the Division with authority to adopt rules pursuant to the Administrative Procedure Act and authority to implement and ensure compliance by a developer during a cooperative conversion;
 - b) prohibit a developer from closing on a contract for sale or lease for five years until complying with section 719.502, Florida Statutes; and
 - c) permit a buyer to waive the 15-day voidability period and close during that period.

IV. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Legislative Research Director:

Jeanne Slizyk

P. K. Jameson