The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL:	CS/SB 1374
INTRODUCER:	Regulated Industries Committee and Senator Jones
SUBJECT:	Vacation and Timeshare Plans
DATE:	March 26, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Imhof	RI	**Fav/CS**
2.	Daniell	Maclure	JU	**Favorable**
3.			GA	
4.				
5.				
6.				

I. Summary:

This bill makes the following substantial changes to the Florida Vacation Plan and Timesharing Act, ch. 721, F.S.:

- Amends the formula for funding reserve accounts for capital expenditures and deferred maintenance;
- Amends the purchaser to accommodation ratio from "one-to-one purchaser to accommodation ratio" to "one-to-one use right to use night requirement ratio";
- Allows a seller to offer out of state timeshare interests in a real property timeshare plan without filing a public offering statement under certain circumstances;
- Deletes the provisions requiring a public offering statement to include a description of developer financing;
- Amends advertising restrictions to prohibit misrepresentations implying that the resale service provider is affiliated with or obtained personal contact information from a developer, managing entity, or exchange company and misrepresentations regarding the availability of resale or rental opportunities;
- Increases security and protection of personal information of timeshare owners and creates recordkeeping requirements for resale service providers and lead dealers;
- Amends the insurance requirements of the managing entity and removes the requirement that the amount of insurance coverage be equal to the replacement cost of the accommodations and facilities;
- Amends the rights and obligations of the managing entity by providing that reserve accounts may be waived by a majority vote, that the managing entity can forecast anticipated

reservation and use of accommodations, and that copies related to determining reserving accommodations be maintained for five years;
- Amends provisions regarding insurance costs as common expenses or assessments;
- Provides that the Governor may appoint commissioners of deeds to take acknowledgements, proofs of execution, or oaths in international waters.

This bill substantially amends the following sections of the Florida Statutes: 721.03, 721.05, 721.07, 721.075, 721.11, 721.13, 721.15, 721.165, 721.55, 721.552 and 721.97. It creates s. 721.121, F.S.

II. Present Situation:

Background of the Florida Vacation Plan and Timesharing Act

The Florida Vacation Plan and Timesharing Act, ch. 721, F.S., establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers.[1] A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods[2] or a condominium unit in which timeshare estates have been created.[3] A timeshare plan is any arrangement, plan, scheme, or similar device whereby a purchaser gives consideration for ownership rights in, or a right to use, any accommodations and facilities for less than a full year during any given year, but not necessarily for consecutive years.[4]

A timeshare plan developer must file a public offering statement with the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation (division), prior to offering the timeshare plan to the public.[5]

According to an economic impact report prepared by PricewaterhouseCoopers, Florida, with 378 timeshare resorts and approximately 47,400 timeshare units, attracts more timeshare travelers than any other state.[6] In total, "the Florida timeshare industry supported an estimated $14.3 billion of consumer and business spending, 161,000 full- and part-time jobs, $5.4 billion in salaries, wages, and related income, and $2.1 billion in tax revenues in 2005."[7]

Formula for Funding Reserve Accounts

A timeshare plan that is subject to ch. 718, F.S., the Condominium Act, and ch. 719, F.S., the Cooperative Act, is exempt from part VI of chs. 718 and 719, F.S, relating to conversion of existing improvements to the condominium or cooperative form of ownership, provided that a developer converting existing improvements to a timeshare condominium or timeshare

[1] Section 721.02(2) and (3), F.S.
[2] A timeshare period is the period of time when a purchaser of a timeshare interest is afforded the opportunity to use the accommodations of a timeshare plan. s. 721.05(38), F.S.
[3] *See* ss. 721.05(41) and 718.103(26), F.S.
[4] Section 721.05(39), F.S.
[5] Section 721.07, F.S.
[6] ARDA International Foundation, *Economic Impact of the Timeshare Industry on the Florida Economy* (2006 ed.).
[7] *Id.*

cooperative comply with certain requirements.[8] Where the existing improvements received a certificate of occupancy more than 18 months before such conversion, a developer must either:

1. Renovate and improve the accommodations to meet certain standards; or
2. Fund reserve accounts for capital expenditures and deferred maintenance for the roof, plumbing, air-conditioning, and any component of the structure the useful life of which is less than the useful life of the overall structure. The amount that a developer must fund a reserve account is determined using the following formula:

> [T]he product of the estimated current replacement cost of such component as of the date of such conversion … multiplied by a fraction, the numerator of which shall be the remaining life of the component in years … and the denominator of which shall be the total useful life of the component in years … .[9]

Alternatively, the reserve accounts may be funded for each component in an amount equal to the amount that would be required to be maintained pursuant to ss. 718.618(1) or 719.618(1), F.S.[10]

Limiting the Number of Timeshare Interests a Developer can Offer

Section 721.03(10), F.S., provides that a developer or seller may not offer timeshare units if it would cause the total number of timeshare interests offered to exceed a one-to-one purchaser to accommodation ratio. The purpose of this provision is to ensure that timeshare projects are not oversold.

The term "one-to-one purchaser to accommodation ratio" is defined in s. 721.05(25), F.S., as the ratio of the number of purchasers eligible to use the accommodations of a timeshare plan on a given day to the number of accommodations available for use within the plan on that day, such that the total number of purchasers eligible to use the accommodations of the timeshare plan during a given calendar year never exceeds the total number of accommodations available for use in the timeshare plan during that year.

Selling Out-of-State Timeshare Plans without Filing a Public Offering Statement

Under current law, a person cannot sell a timeshare or provide information to a prospective purchaser about a timeshare unit that is located outside the State of Florida, unless the timeshare plan has been filed and approved by the division. According to representatives from the timeshare industry, this is a current problem because while a person is staying at a timeshare located inside the state of Florida the developer of the timeshare may want to provide the person with information about other timeshares for sale by that developer, including ones located outside the state.

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[8] Section 721.03(3)(e), F.S.
[9] Section 721.03(3)(e)2., F.S. In other words, (a x b/c = x), where a is the replacement cost of the component, b is the remaining life of the component, c is the total life of the component, and x is the required funding of the reserve account.
[10] *Id.*

Public Offering Statements

A developer that seeks to offer a potential purchaser an interest in a timeshare plan must first submit a filed public offering statement to the division for approval. Sellers of out-of-state timeshare plans offering to in-state residents must also file a public offering statement with the division for examination and approval. Section 721.07, F.S., provides what information and disclosures a developer must include in the public offering statement in order for it to be approved by the division.

Currently, a public offering statement must include a description of any financing to be offered to the purchaser by the developer, and a disclosure that the description of such financing may be changed by the developer and that any change offered to the purchaser will not be deemed to be a material change.

According to industry representatives, the public offering requirements often prevent out-of-state timeshare companies from being able to talk to their current owners about projects that are part of their timeshare portfolios but that are not registered in Florida.

Advertising of Timeshares

Section 721.11, F.S., provides that sellers of timeshare interests are prohibited from using false or misleading advertising or making false oral statements. Misrepresentation of the availability of a resale or rental program offered by or on behalf of the developer is prohibited.

The Managing Entity

For each timeshare plan, the developer must provide for a managing entity, which must be the developer, a separate manager or management firm, or an owners' association.[11] Section 721.13(3), F.S., sets forth the duties of the managing entity:

- Management and maintenance of all accommodations and facilities;
- Collection of assessments for common expenses;
- Providing each purchaser an itemized annual budget;
- Maintenance of all books and records concerning the timeshare plan;
- Arranging for an annual audit of the financial statements of the timeshare plan;
- Making available for inspection any books and records of the timeshare plan;
- Scheduling occupancy of the timeshare units;
- Performing any other functions and duties that are necessary and proper to maintain the accommodations and facilities;
- Entering into an ad valorem tax escrow agreement prior to the receipt of any ad valorem taxes; and
- Entering into contracts for any paid television programming service or bulk rate services agreement.

[11] Section 721.13(1)(a), F.S.

Currently, pursuant to rule 61B-40.0062, FAC, reserve accounts may be reduced or waived for condominium timeshare plans pursuant to s. 718.112(2)(f), F.S., but waivers are prohibited for non-condominium timeshare plans.

Assessments for Common Expenses

When calculating the obligation of a developer under a developer's guarantee that the assessment of common expenses imposed upon the owners would not increase over a stated dollar amount, depreciation expenses related to real property shall be excluded from common expenses incurred during the guarantee period, except that for real property that is used for the production of fees, revenues, or other income, depreciation expenses shall be excluded only to the extent that they exceed the net income from the production of other fees, revenues, or other income.[12]

Obtaining Insurance for the Accommodations and Facilities

Timeshare sellers, and thereafter the managing entity, are responsible for obtaining insurance to protect the accommodations and facilities in an amount equal to replacement cost. Failure to obtain and maintain the insurance during any period of control of the managing entity is a violation of s. 721.13(2)(a), F.S., unless the managing entity can show that it exercised due diligence. According to the Department of Business and Professional Regulation (department), insuring in an amount equal to replacement cost has become more problematic over the past few years.

Timeshare Commissioner of Deeds

Section 721.97, F.S., provides that the Governor may appoint commissioners of deeds to take acknowledgments, proofs of execution, or oaths in any foreign country or any possession, territory, or commonwealth of the United States outside the 50 states.

III. Effect of Proposed Changes:

Formula for Funding Reserve Accounts

This bill amends s. 721.03(3), F.S., by revising the formula used to determine the amount required to be placed in the reserve accounts for capital expenditures and deferred maintenance. This bill changes the numerator of the fraction used in the funding formula from "the remaining life of the component in years" to "the age of the component in years." This conforms to the formula in ch. 718, F.S., for condominiums.

This change in the formula will require the developer, at the time of the conversion, to put more money into the reserve accounts when the component is older and not as much in the reserves when the component is new. Under the current formula, the older a component is, and thus more likely to fail, the less amount of money the developer must put in the reserve account. Yet, for a

[12] Section 721.15(2)(c), F.S.

new component, the developer must put more money into the reserve accounts. By way of example:[13]

Current Law (a x b/c = x) a = replacement cost of component b = remaining life of component c = total life of component x = required funding of reserve account		**Proposed Bill** (a x b/c = x) a = replacement cost of component b = age of component c = total life of component x = required funding of reserve account	
New Component (2 years old)	$10,000 x (10/12) = $8,333.33	New Component (2 years old)	$10,000 x (2/12) = $1,666.66
Old Component (10 years old)	$10,000 x (2/12) = $1,666.66	Old Component (10 years old)	$10,000 x (10/12) = $8,333.33

Limiting the Number of Timeshare Interests a Developer can Offer

This bill amends s. 721.03(10), F.S., to provide that a developer or seller may not offer timeshare units if it would cause the total number of timeshare interests offered to exceed a one-to-one "use right" to "use night requirement" ratio. According to the department, this change in terminology is to standardize language between states regulating timeshare plans.

The bill defines the one-to-one use right to use night requirement ratio as "the sum of the nights that owners are entitled to use in a given 12-month period shall not exceed the number of nights available for use by those owners during the same 12-month period. No individual timeshare unit may be counted as providing more than 365 use nights per 12-month period or more than 366 use nights per 12-month period that includes February 29. The use rights of each owner shall be counted without regard to whether the owner's use rights have been suspended for failure to pay assessments or otherwise."

Selling Out-of-State Timeshare Plans without Filing a Public Offering Statement

This bill creates s. 721.03(11), F.S., to allow a seller to offer timeshare interests in a real property timeshare plan located outside the state of Florida without filing a public offering statement, provided all of the following criteria have been satisfied:

1. The seller must provide a disclosure statement to each prospective purchaser of an out-of-state timeshare. The disclosure statements for single-site and multi-site timeshare plans must contain information and exhibits that are substantially equivalent to the disclosures required for single-site timeshare and multi-state timeshare public offering statements under current law.[14]

[13] Figures in chart are hypothetical to illustrate proposed changes in the law.
[14] More specifically, out-of-state single-site timeshare plans must contain the information required under s. 721.07(5)(e) – (cc), F.S., and the exhibits in s. 721.07(5)(ff)1., 2., 3., 4., 5., 7., 8., and 20., F.S. Out-of-state multi-site timeshare plans must contain the required information in s. 721.55(4) and (5), F.S., and the exhibits in s. 721.55(7), F.S.

2. The seller must give each purchaser of an out-of-state timeshare plan a copy of a purchase contract that contains the following statement located immediately prior to the space provided for the purchaser's signature:

> You may cancel this contract without any penalty or obligation within 10 days after the date you sign this contract. If you decide to cancel this contract, you must notify the seller in writing of your intent to cancel. Your notice of cancellation shall be effective upon the date sent and shall be sent to the seller at (address). Any attempt to obtain a waiver of your cancellation rights is void and of no effect. While you may execute all closing documents in advance, the closing, as evidenced by delivery of the deed or other document, before expiration of your 10-day cancellation period, is prohibited.

The purchase contract must also include the purchase price and any additional costs that may be incurred, including but not limited to financing charges or annual assessments for common expenses.

3. All purchase contracts for out-of-state timeshare plans offered must also contain the following statements in conspicuous type:[15]

- This timeshare plan has not been reviewed or approved by the State of Florida.
- The timeshare interest you are purchasing requires certain procedures to be followed in order for you to use your interest. These procedures may be different from those followed in other timeshare plans. You should read and understand these procedures prior to purchasing.

4. The out-of-state timeshare plan may only be offered by the seller on behalf of:

- The developer of a timeshare plan that has been approved by the division within the preceding seven years and has never had the plan terminated or withdrawn; or
- A developer under common ownership or control with a developer described above, provided that any common ownership shall constitute at least a 50-percent ownership interest.

5. An out-of-state timeshare plan may only be offered to a person who already owns a timeshare interest in a timeshare plan filed by a developer noted above.

[15] Section 721.05(8), F.S., defines conspicuous type to mean: "(a) Type in upper and lower case letters two point sizes larger than the largest nonconspicuous type, exclusive of headings, on the page on which it appears but in at least 10-point type; or (b) Where the use of 10-point type would be impractical or impossible with respect to a particular piece of written advertising material, a different style of type or print may be used, so long as the print remains conspicuous under the circumstances." The type must be separated on all sides from other type and print and may be used in contracts for purchase or public offering statements only where required by law or as authorized by the division.

6. The seller must provide notice of an out-of-state timeshare plan to the division, along with payment of a one-time fee not to exceed $1,000 per filing.

Out-of-state timeshare plans that meet these requirements are exempt from the requirements for in-state timeshare plans found in ss. 721.06,[16] 721.065,[17] 721.07,[18] 721.27,[19] 721.55,[20] and 721.58, F.S.[21]

This bill also provides that an escrow account established for an out-of-state timeshare plan can be maintained in the jurisdiction where the timeshare property is located, as long as the escrow agent submits to personal jurisdiction in this state in a manner satisfactory to the division.

Public Offering Statements

The bill deletes the requirement in s. 721.07(5), F.S., that a public offering statement must include a description of any financing offered to the purchaser by the developer, and deletes the requirement for disclosure to the purchaser that the financing can be changed and the change will not be deemed a material change.

This bill also provides that a schedule of estimated closing expenses to be paid by a purchaser or lessee of a timeshare interest does not have to be included in a public offering statement for any timeshare plan where purchasers of timeshare interests are subject to the Real Estate Settlement Procedures Act (RESPA).[22] According to the department, this provision eliminates duplication since the federal act already requires these disclosures to purchasers.

This bill adds a provision that provides authorization for the division and another state to agree on a unified timeshare disclosure statement (a public offering statement) that may be offered and accepted in both localities. According to the department, its staff is currently engaged with California regulators of timeshare plans in an effort to develop a public offering statement that would be suitable for filing in both California and Florida.

Advertising of Timeshares

Section 721.11(4)(k), F.S., is amended to broaden the prohibition against misrepresenting the availability of a resale or rental program to include resale or rental opportunity. According to the department, deleting the modifying phrase “offered by or on behalf of other developers” broadens the prohibition to others such as resale service providers.

The bill also adds a prohibition against misrepresenting or falsely implying that the resale service provider is affiliated with, or obtained personal contact information from, a developer, managing entity, or exchange company.

[16] Section 721.06, F.S., provides for contracts for the purchase of timeshare interests.
[17] Section 721.065, F.S., provides for resale purchase agreements of timeshares.
[18] Section 721.07, F.S., provides for timeshare public offering statements.
[19] Section 721.27, F.S., provides for the annual fee for each timeshare unit in plan.
[20] Section 721.55, F.S., provides for multi-site timeshare plan public offering statements.
[21] Section 721.58, F.S., provides for filing fees and annual fees.
[22] 12 U.S.C. s. 2601, *et seq*.

Recordkeeping by Resale Service Providers and Lead Dealers

This bill creates the following definitions to be used in ch. 721, F.S.:

- "Lead dealer" means any person who sells or otherwise provides a resale service provider or any other person with personal contact information for five or more owners of timeshare interests. In the event a lead dealer is not a natural person, the term shall also include the natural person providing personal contact information to a resale service provider or other person on behalf of the lead dealer entity. The term does not include developers, managing entities, or exchange companies to the extent they provide others with personal contact information about owners of timeshare interests in their own timeshare plans or members of their own exchange programs.

- "Personal contact information" means any information that can be used to contact the owner of a specific timeshare interest, including, but not limited to, the owner's name, address, telephone number, and e-mail address.

- "Resale Service Provider" means any person who uses unsolicited telemarketing, direct mail, or e-mail in connection with the offering of resale brokerage or resale advertising services to owners of timeshare interests. The term does not include developers, managing entities, or exchange companies to the extent they offer resale brokerage or resale advertising services to owners of timeshare interests in their own timeshare plans or members of their own exchange programs.

The definition for "lead dealer" provides that if a lead dealer is not a natural person, the term also includes the natural person providing personal contact information to the resale service provider. The department expressed concerns with this part of the definition because it appears to pierce the corporate veil that would otherwise protect principals and employees. A corporation is generally regarded as a legal and distinct entity from its owners, shareholders, and employees.[23] Florida courts are generally reluctant to pierce the corporate veil and have only done so in extreme cases of abuse of the corporate form.[24] Accordingly, it is unknown whether the phrasing of the definition of "lead dealer" will succeed in piercing the corporate veil.

This bill creates s. 721.121(1), F.S., to require resale service providers and lead dealers to maintain specific and extensive records for a period of five years on the lead dealer. The information required includes the name, home and work address, and home, work, and cellular telephone numbers. It requires a copy of a current government issued photographic identification, canceled checks, copies of all personal contact information in the exact form and media in which they were received, sources of the personal contact information, methodologies used for researching and assembling, photo identification and contact information for the individuals doing the research and assembling.

[23] 18 C.J.S. CORPORATIONS s. 6 (2007).
[24] *Resolution Trust Corp. v. Latham & Watkins*, 909 F.Supp. 923, 930 (S.D.N.Y. 1995) (interpreting Florida law on piercing the corporate veil).

This bill also creates s. 721.121(2), F.S., which provides that in any civil or criminal action relating to wrongful possession or use of personal contact information by a resale service provider or lead dealer, any failure by a resale service provider or lead dealer to produce the records identified above shall lead to a presumption that the personal contact information was wrongfully obtained. According to the department, it would add clarity if this subsection stated that this provision provides a private right of action and is not within the regulatory authority of the division.

Section 721.121(3), F.S., is also created to provide that any use of personal contact information by a resale service provider or lead dealer that is wrongfully obtained shall be considered wrongful use. Any party who establishes that an owner's personal contact information was wrongfully obtained by a resale service provider or lead dealer is entitled to recover $1,000 from that resale service provider or lead dealer for each owner about whom personal contact information was wrongfully obtained. Upon prevailing, the plaintiff shall be entitled to recover reasonable attorney's fees and costs.

Because of the terminology used in the bill ("any party"), it is unclear whether *any* person who realizes that an owner's personal contact information was wrongfully obtained can go to court, tell the court that personal information was wrongfully obtained, and then recover $1,000. The intended wording may have meant that "any party who has standing" can go to court and recover $1,000.

Managing Entity

This bill amends s. 721.13(2), F.S., to provide that failure by a managing entity to obtain and maintain insurance coverage as required under s. 721.165, F.S., during any period of developer control of the managing entity shall constitute a breach of the managing entity's fiduciary duty. It is unclear whether this section only creates a private right of action, or if it creates an administrative enforcement action as well, which would have an impact on the department.

This bill amends s. 721.13(3), F.S., to provide that reserves may be waived or reduced by a majority vote of the voting interests that are present, in person or by proxy, at a duly called meeting of the owners' association. The reserves as included in the budget go into effect if a vote is not obtained or a quorum is not attained.

According to the department, s. 721.13(3)(c)(3), F.S., will require rule 61B-40.0062(2), FAC, to be repealed.

Paragraphs 721.13(12)(a) and (b), F.S., are created to provide that managing entities are given authorization to manage the reservation and use of accommodations using those processes, analyses, procedures, and methods that are in the best interests of the owners as a whole. The managing entity shall have the right to forecast anticipated reservations and use of accommodations using a variety of data and pertinent factors. It also is authorized to reserve accommodations, in the best interests of the owners as a whole, for the purposes of depositing the reserved use with an affiliated exchange program or renting the reserved accommodations in order to facilitate the use or future use of the accommodations or other benefits made available

through the timeshare plan. A statement to this effect must be conspicuously disclosed in the public offering statement.

Section 721.13(12)(c), F.S., is created to provide that the managing entity must maintain copies for five years of all pertinent data utilized by the managing entity in its determination to reserve accommodations. If the division investigates the managing entity for failure to comply with s. 721.13(12), F.S., the managing entity must make all records, data, and information available for inspection. The records, data, and information are considered a trade secret if the managing entity complies with s. 721.071, F.S., which deals with trade secrets.

Assessments for Common Expenses

Section 721.15(2)(c), F.S., is amended to provide that for purposes of calculating the obligation of a developer's guarantee, the cost of insurance shall be excluded from common expenses, but that any special assessment imposed for amounts excluded from the developer guarantee shall be paid proportionately by all the timeshare owners, including the developer for those timeshare interests owned by the developer.

According to the department, s. 721.15(2)(c), F.S., will require rules 61B-40.005(4)(a) and 61B-40.005(5), FAC, to be amended.

Section 721.15(11), F.S., is created to provide that in determining whether assessments exceed 115 percent of assessments for the prior year, the cost of insurance will be excluded from the calculation. Both the Condominium Act and the Cooperative Act provide that if assessments exceed 115 percent of assessments for the prior fiscal year, the owners have the right, if 10 percent of the voting interests request a special meeting, to consider a substitute budget.[25]

Obtaining Insurance for the Accommodations and Facilities

This bill deletes the requirement in s. 721.165(1), F.S., which provides that insurance must be in an amount equal to the replacement cost of the accommodations and facilities. Rather, the bill requires that the managing entity use due diligence to obtain adequate casualty insurance against all reasonably foreseeable perils, subject to reasonable exclusions and reasonable deductibles. This provision is similar to the due diligence standard applicable to condominiums as provided in s. 718.111(11), F.S.

The bill creates s. 721.165(2), F.S., which provides the factors taken into account when a managing entity must make a determination as to whether adequate insurance is obtained. The factors include:

- Available insurance coverages and related premiums in the marketplace;
- Amounts of any related deductibles, types of exclusions, and coverage limitations, provided that a deductible of 5 percent or less is deemed to be reasonable;
- The probable maximum loss relating to the insured timeshare property during the policy term;

[25] *See* ss. 718.112(2)(e), and 719.106(1)(e), F.S.

- The extent to which a given peril is insurable under commercially reasonable terms;
- Amounts of any deferred maintenance or replacement reserves on hand;
- Geography and any special risks associated with the location of the timeshare property; and
- The age and type of construction of the timeshare property.

Section 721.165(3), F.S., is created to provide that the cost of insurance is a common expense maintained by the managing entity for the timeshare property. The cost is subject to reasonable deductions or reasonable exclusions as may be required by:

- An institutional lender to a developer, for as long as the lender holds a mortgage encumbering any interest in or lien against a portion of the timeshare property; or
- Any holder or pledgee of, or any institutional lender having a security interest in, a pool of promissory notes secured by mortgages or other security interests relating to the timeshare plan, executed by purchasers in connection with the purchasers' acquisition of timeshare interests in the timeshare property, or any agent, underwriter, placement agent, trustee, servicer, custodian, or other portfolio manager acting on behalf of such holder, pledgee, or institutional lender, for so long as any such notes and mortgages or other security interests remain outstanding.

This bill creates s. 721.165(4), F.S., which provides that the managing entity is authorized to apply any existing reserves for deferred maintenance and capital expenditures toward payment of insurance deductibles or the repair or replacement of the timeshare property after a casualty without regard to the purposes which the reserves were originally established.

According to the department, s. 721.165(4), F.S., will require rule 61B-40.0061(2), FAC, to be amended.

Conforming Provisions

This bill amends ss. 721.075, 721.55 and 721.552, F.S, to conform to the changes made to the formula for funding reserve accounts, and to the ratio for determining the number of timeshare interests a developer can offer.

Timeshare Commissioner of Deeds

This bill amends s. 721.97, F.S., to provide that the Governor may appoint the commissioner of deeds to take acknowledgements, proofs of execution, or oaths in international waters. According to the representatives from the timeshare industry, this provision would allow the commissioner of deeds to operate on cruise lines that offer timeshares.

Effective Date

This act shall take effect July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

According to the Department of Business and Professional Regulation (department), only allowing developers who have previously filed plans with the department to offer out-of-state timeshare plans may raise equal protection challenges from developers who have not previously filed and are therefore unable to offer out-of-state plans.

In Florida, regulations which do not limit fundamental rights or promulgate suspect classifications will generally be upheld under the rational basis test.[26] This test requires that the law be rationally related to a legitimate state interest.[27] The rational basis test is "really just another way of saying that the State had a legitimate reason for acting and that its actions were a reasonable means to achieve the desired result."[28] Additionally, Florida courts have held that "[d]ifferent treatment of dissimilarly situated persons does not constitute an equal protection violation."[29]

According to representatives from the timeshare industry, the State has a legitimate interest in all real property being offered in the state, as well as in protecting its consumers.

Because this bill does not affect developers' fundamental rights, developers are not part of a protected class, and the State has a legitimate interest for the law, it is unknown whether an equal protection claim is supportable.

[26] *Herring v. Singletary*, 879 F.Supp. 1180, 1185 n. 11 (N.D. Fla. 1995) (legislation infringing nonfundamental rights are subject to rational basis scrutiny).
[27] *Id.* at 1186.
[28] *Meola v. Dep't of Corrections*, 732 So. 2d 1029, 1036 (Fla. 1998).
[29] *Id*. at 1037; *see also*, *Herring* 879 F.Supp. at 1186.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

See "Private Sector Impact" below.

B. Private Sector Impact:

According to the Department of Business and Professional Regulation (department), there will be recordkeeping costs for resale service providers and lead dealers. This bill will also require sellers of out-of-state timeshare plans to file notice of their plan to the department along with payment of a $1,000 filing fee.

C. Government Sector Impact:

According to the department, this bill may effect the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) within the department. Section 721.03, F.S., will exempt developers from registering certain out-of-state timeshare plans. The division will therefore not be receiving registration fees ($2/timeshare week) for those exempted timeshare plans. This will be partially off-set by the one-time fee of $1,000 payable to the division by the developer for the developer's exercising this exemption from filing.

The department further provides that there are currently 92 out-of-state timeshare projects (217,012 timeshare weeks) filed with the division. During FY 2005-06, 13 projects (59,091 timeshare weeks) were approved. The division is unable to determine the number of projects that would have been entitled to this exemption. The division estimates that, based upon FY 2005-06 filings and if all 13 projects were entitled to this exemption, the division would receive $13,000 in exemption fees instead of $118,182 in filing fees and $88,284 in annual fees (since not all the out-of-state unit weeks were part of a multistate timeshare plan).

According to representatives from the timeshare industry, the projections listed above are a worst case scenario. Representatives from the industry and the department indicate the bill will not decrease the number of developers already licensed by the division, or the annual fees associated with those developers.

Section 721.13(2)(c), F.S., creates an action for breach of fiduciary duty by a managing entity for not properly insuring the property. According to the department, if this action is found to create an administrative enforcement action in addition to the tort action for breach of fiduciary duty, then one additional attorney and one additional administrative assistant will be required.

VI. Technical Deficiencies:

None.

VII. Related Issues:

According to the Department of Business and Professional Regulation (department), out-of-state developers may challenge any application of this bill to their Florida offerings. Currently, *Stroman Realty, Inc. v. Jim Antt, Jr.*, 20 F.Supp.2d 1050 (S.D. Tex. 1998), is being heard on appeal in the Fifth Circuit Court of Appeals (case no. H-980283), regarding an injunction entered finding that Florida and California cannot impose state regulations on a Texas broker whose presence in the state is only through communication media.

VIII. Summary of Amendments:

None.