Civil Justice Committee Meeting

Revised

March 22nd, 2006
10:15 AM - 12:00 PM
24 House Office Building

Allan G. Bense
Speaker

Mark Mahon
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Civil Justice Committee

Start Date and Time:	Wednesday, March 22, 2006 10:15 am
End Date and Time:	Wednesday, March 22, 2006 12:00 pm
Location:	24 HOB
Duration:	1.75 hrs

Consideration of the following bill(s):

HB 135 CS Charter Schools by Greenstein
HB 637 Consumer Protection by Seiler
HB 957 Homeowners' and Community Associations by Anderson
HB 1009 Real Estate Profession Regulation by Cretul
HB 1077 CS Motor Vehicle Dealers by Russell
HB 1341 Fiduciary Lawyer-Client Privilege by Joyner
HB 1527 Parental Notification of Termination of a Minor's Pregnancy by Stargel
HB 1537 Legal Actions by Llorente
HB 1621 Coastal Properties Disclosure Statements by Mayfield

NOTICE FINALIZED on 03/20/2006 16:11 by Hay.Tracey

HB 135

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 135 CS Charter Schools
SPONSOR(S): Greenstein
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1030

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Choice & Innovation Committee	7 Y, 0 N, w/CS	Hunker	Kooi
2) Civil Justice Committee		Shaddock	Bond
3) Education Appropriations Committee			
4) Education Council			
5)			

SUMMARY ANALYSIS

This bill provides that a district school board sponsor of a charter school will not be held liable for civil damages for actions or omissions committed by the charter school's governing board, its officers, or employees.

This bill also provides that the sponsor's duty to monitor a charter school may not be used as the basis for a lawsuit against the sponsor. However, a school district sponsor remains subject to tort liability for acts or omissions under the sponsor's direct authority. This bill further insulates a school district from assumption of contractual debts of the charter school to cover all contracts made between the charter school governing body and a third party.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill reduces the contractual liability of school district sponsors for the contracts of charter schools.

B. EFFECT OF PROPOSED CHANGES:

Background

Charter schools are public schools that operate under a performance contract, or a "charter," entered into with a sponsoring school district. The charter school statute (s. 1002.33, F.S.) frees a charter school from many regulations created for traditional public schools while holding such a charter school accountable for academic and financial results.

Current Law

School Board Sponsor Liability

Section 1002.33, F.S. is silent with respect to whether a sponsor school district can be held liable for the acts and omissions of charter schools or their agents, employees or governing board. In *P.J. v. Gordon*, the United States District Court for the Southern District of Florida ruled that the school board's statutory responsibilities for approving the school's charter and monitoring its implementation do not subject it to civil liability for actions and omissions relating to the day-to-day management of the charter school.[1] The court noted the district sponsor's statutory duties involve ensuring academic accountability, monitoring revenues and expenditures, and approving and monitoring the provisions of the charter agreement. The court specifically ruled that s.1002.33, F.S. imposes no duty on the school board sponsor to monitor or supervise the hiring, training or supervision of the charter school's employees or to ensure that the charter school maintains adequate procedures for ensuring the safety and welfare of its students.[2]

Sovereign Immunity

"Article X, section 13 of the Florida Constitution provides 'absolute immunity for the state and its agencies absent waiver by legislative enactment or a constitutional amendment.'"[3] Section 768.28(5), F.S., provides a limited waiver of the state's sovereign immunity by making the state and its agencies and subdivisions liable for tort claims in the same manner and to the same extent as a private individual under the circumstances. Florida's Fourth District Court of Appeal recently affirmed that certain discretionary, planning-level decisions of a school board remain immune from tort liability.[4]

Contract Liability

In the event of a non-renewal or termination of a charter, s. 1002.33, F.S. currently prevents a district from assuming any of the charter school's debts for service contracts, except where the district and the

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[1] *P.J. v. Gordon*, 359 F.Supp. 2d 1347, 1351 (SD Fla. 2005).
[2] *Id.* at 1349-50.
[3] *Orlando v. Broward County*, 920 So. 2d 54 (Fla. 4th DCA 2005) (quoting *Cir Ct. of the Twelfth Jud. Cir. v. Dep't of Natural Resources*, 339 So. 2d 1113, 1114 (Fla. 1976).
[4] *Id.* (citing *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022 (Fla. 1979)(holding that although s. 768.28 evinces the intent of the legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability)).

charter school governing board previously agreed in detail in writing that the district would assume the debt.

Effect of Bill

This bill codifies the court's ruling in *P.J.* with regard to the district's immunity from suit for day-to-day operations (acts and omissions) of a charter school as well as employment actions of a charter school. The bill further provides the district with protection from any private cause of action based on the monitoring responsibilities of the district with regard to any charter school it sponsors.

In the context of charter schools, to the extent a sponsor school district's monitoring duties may be properly characterized as "discretionary" or "planning-level," they may already be immune from tort liability under the doctrine of sovereign immunity. The bill serves as legislative intent *not* to waive sovereign immunity for such duties.

This bill expands the contract limitation to include all contractual debts of the charter school, not just those for services. Finally, the bill includes a provision that school district sponsors remain subject to liability for acts or omissions under the sponsor's direct authority as described in s. 1002.33, F.S.

C. SECTION DIRECTORY:

Section 1, amends s. 1022.33, F.S. relating to charter schools.

Section 2, provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Access to Courts

Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[5] In *Kluger v. White*,[6] the Florida Supreme Court held that where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show an overpowering public necessity to abolish the right and no alternative method of meeting such public necessity.[7]

Based on the ruling by the court in *P.J. v. Gordon* it does not appear that a person has a cause of action to sue a school board for the torts of a charter school. To the extent that this bill merely codifies existing law, it may not implicate the access to court provision.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 7, 2006, the Choice and Innovation Committee adopted one amendment and reported the bill favorably with a Committee Substitute (CS). The amendment narrowed the scope of the expression of intent not to waive sovereign immunity.

[5] *See generally* 10A Fla. Jur. 2d, Constitutional Law, ss. 360-69.
[6] *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).
[7] *Kluger* at 4.

CHAMBER ACTION

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1 The Choice & Innovation Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to charter schools; amending s. 1002.33,
7 F.S.; providing that the sponsor of a charter school shall
8 not be liable for civil damages for certain actions;
9 providing that the duty to monitor a charter school shall
10 not be the basis for a private cause of action;
11 prescribing limits on immunities of a charter school
12 sponsor; expanding a school district's immunity from
13 assumption of contractual debts; providing an effective
14 date.
15
16 Be It Enacted by the Legislature of the State of Florida:
17
18 Section 1. Paragraph (b) of subsection (5) and paragraph
19 (f) of subsection (8) of section 1002.33, Florida Statutes, are
20 amended to read:
21 1002.33 Charter schools.--
22 (5) SPONSOR; DUTIES.--
23 (b) Sponsor duties.--

24 1.a. The sponsor shall monitor and review the charter
25 school in its progress toward the goals established in the
26 charter.
27 b.~~2.~~ The sponsor shall monitor the revenues and
28 expenditures of the charter school.
29 c.~~3.~~ The sponsor may approve a charter for a charter
30 school before the applicant has secured space, equipment, or
31 personnel, if the applicant indicates approval is necessary for
32 it to raise working capital.
33 d.~~4.~~ The sponsor's policies shall not apply to a charter
34 school.
35 e.~~5.~~ The sponsor shall ensure that the charter is
36 innovative and consistent with the state education goals
37 established by s. 1000.03(5).
38 f.~~6.~~ The sponsor shall ensure that the charter school
39 participates in the state's education accountability system. If
40 a charter school falls short of performance measures included in
41 the approved charter, the sponsor shall report such shortcomings
42 to the Department of Education.
43 g. The sponsor shall not be liable for civil damages under
44 state law for personal injury, property damage, or death
45 resulting from an act or omission of an officer, employee,
46 agent, or governing body of the charter school.
47 h. The sponsor shall not be liable for civil damages under
48 state law for any employment actions taken by an officer,
49 employee, agent, or governing body of the charter school.
50 i. The sponsor's duties to monitor the charter school
51 shall not constitute the basis for a private cause of action.

52 2. Immunity for the sponsor of a charter school under
53 subparagraph 1. applies only with respect to acts or omissions
54 not under the sponsor's direct authority as described in this
55 section.
56 3. Nothing contained in this paragraph shall be considered
57 a waiver of sovereign immunity by a district school board.
58
59 A community college may work with the school district or school
60 districts in its designated service area to develop charter
61 schools that offer secondary education. These charter schools
62 must include an option for students to receive an associate
63 degree upon high school graduation. District school boards shall
64 cooperate with and assist the community college on the charter
65 application. Community college applications for charter schools
66 are not subject to the time deadlines outlined in subsection (6)
67 and may be approved by the district school board at any time
68 during the year. Community colleges shall not report FTE for any
69 students who receive FTE funding through the Florida Education
70 Finance Program.
71 (8) CAUSES FOR NONRENEWAL OR TERMINATION OF CHARTER.--
72 (f) If a charter is not renewed or is terminated, the
73 charter school is responsible for all debts of the charter
74 school. The district may not assume the debt from any contract
75 ~~for services~~ made between the governing body of the school and a
76 third party, except for a debt that is previously detailed and
77 agreed upon in writing by both the district and the governing
78 body of the school and that may not reasonably be assumed to
79 have been satisfied by the district.

80 Section 2. This act shall take effect July 1, 2006.

HB 637

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 637 Consumer Protection
SPONSOR(S): Seiler
TIED BILLS: None **IDEN./SIM. BILLS:** SB 202

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Agriculture Committee	9 Y, 0 N	Blanchette	Reese
2) Civil Justice Committee		Shaddock	Bond
3) Judiciary Appropriations Committee			
4) State Resources Council			
5)			

SUMMARY ANALYSIS

The bill amends the Florida Deceptive and Unfair Trade Practices Act by changing obsolete dates and allowing an action to be brought in the name of and on behalf of a defendant.

This bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Current Law

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")[1] was enacted "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."[2]

Businesses and individuals are afforded broad protection from unfair or deceptive acts or practices under FDUTPA. FDUTPA states a broad proscription, which applies through civil enforcement across industries and business conduct generally in any medium. FDUTPA, Part II of ch. 501, F.S., provides remedies and penalties for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce..."[3]

Under FDUTPA, the Attorney General or other enforcing authority may bring an action on behalf of a consumer[4] and seek the appointment of a receiver[5] or fiduciary to seek redress. A receiver only has the powers given to him or her by statute or by order of appointment.[6] Under most circumstances, it is the receiver's duty to safeguard the property in his or her custody and to protect the rights and interests of all claimants while still maintaining neutrality.[7]

A receivership allows the court to accomplish "complete justice," with the goal of providing protection to the property at issue until the final disposition of the matter.[8] An appointment of a receiver is an equitable question and not a matter of right.[9] Typically, the appointment of a receiver is an ancillary remedy and can only be obtained in connection with some other action to obtain a specific relief.[10]

It is unclear whether a receiver or other court appointed person has standing to bring a proceeding on behalf of defendants against a third party who may have an involvement in the wrongdoing.

Effect of Bill

The bill amends authorizes a court to permit actions "in the name of and on behalf of the defendant enterprise." The effect is to allow a receiver or other court appointed person to bring an action on behalf of a defendant against a third party who played some role in the alleged wrongdoing.

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[1] Sections 501.201-501.213, F.S.
[2] Section 501.202(2), F.S.
[3] Section 501.204, F.S.
[4] Section 501.207(1)(c), F.S.
[5] A "receiver" is defined as "[a] disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims." Black's Law Dictionary 1275 (7th ed. 1999).
[6] 44 Fla. Jur. 2d Receivers s. 49 (2005).
[7] *Id.*
[8] 44 Fla. Jur. 2d Receivers s. 2 (2005).
[9] 44 Fla. Jur. 2d Receivers s. 3 (2005).
[10] *Id.*

The bill amends ss. 501.203 and 501.204, F.S., to capture changes in federal law from 2001 to 2006.[11]

C. SECTION DIRECTORY:

Section 1 amends s. 501.203, F.S., to change a date to capture changes in federal law up to July 1, 2006.

Section 2 amends s. 501.204, F.S., to change a date to capture changes in federal law up to July 1, 2006.

Section 3 amends s. 501.207, F.S., to allow the court to enter orders to bring actions 'in the name of and on behalf of the defendant enterprise."

Section 4 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

[11] To directly link the statute to the interpretation of the federal courts and the Federal Trade Commission would be an unlawful delegation of legislative power. Therefore, the dates in the statute must be periodically updated.

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

1 A bill to be entitled
2 An act relating to consumer protection; amending ss.
3 501.203 and 501.204, F.S.; changing obsolete dates;
4 reenacting and amending s. 501.207, F.S., relating to
5 remedies of the enforcing authority under the Florida
6 Deceptive and Unfair Trade Practices Act; providing that
7 the court may order actions brought under that act on
8 behalf of an enterprise; providing an effective date.
9
10 Be It Enacted by the Legislature of the State of Florida:
11
12 Section 1. Subsection (3) of section 501.203, Florida
13 Statutes, is amended to read:
14 501.203 Definitions.--As used in this chapter, unless the
15 context otherwise requires, the term:
16 (3) "Violation of this part" means any violation of this
17 act or the rules adopted under this act and may be based upon
18 any of the following as of July 1, 2006 ~~2001~~:
19 (a) Any rules promulgated pursuant to the Federal Trade
20 Commission Act, 15 U.S.C. ss. 41 et seq.;
21 (b) The standards of unfairness and deception set forth
22 and interpreted by the Federal Trade Commission or the federal
23 courts;
24 (c) Any law, statute, rule, regulation, or ordinance which
25 proscribes unfair methods of competition, or unfair, deceptive,
26 or unconscionable acts or practices.
27 Section 2. Subsection (2) of section 501.204, Florida
28 Statutes, is amended to read:

29 501.204 Unlawful acts and practices.--
30 (2) It is the intent of the Legislature that, in
31 construing subsection (1), due consideration and great weight
32 shall be given to the interpretations of the Federal Trade
33 Commission and the federal courts relating to s. 5(a)(1) of the
34 Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July
35 1, 2006 ~~2001~~.
36 Section 3. Subsection (1) of section 501.207, Florida
37 Statutes, is reenacted, and subsection (3) of that section is
38 amended to read:
39 501.207 Remedies of enforcing authority.--
40 (1) The enforcing authority may bring:
41 (a) An action to obtain a declaratory judgment that an act
42 or practice violates this part.
43 (b) An action to enjoin any person who has violated, is
44 violating, or is otherwise likely to violate, this part.
45 (c) An action on behalf of one or more consumers or
46 governmental entities for the actual damages caused by an act or
47 practice in violation of this part. However, damages are not
48 recoverable under this section against a retailer who has in
49 good faith engaged in the dissemination of claims of a
50 manufacturer or wholesaler without actual knowledge that it
51 violated this part.
52 (3) Upon motion of the enforcing authority or any
53 interested party in any action brought under subsection (1), the
54 court may make appropriate orders, including, but not limited
55 to, appointment of a general or special magistrate or receiver
56 or sequestration or freezing of assets, to reimburse consumers

57 or governmental entities found to have been damaged; to carry
58 out a transaction in accordance with the reasonable expectations
59 of consumers or governmental entities; to strike or limit the
60 application of clauses of contracts to avoid an unconscionable
61 result; to bring actions in the name of and on behalf of the
62 defendant enterprise; to order any defendant to divest herself
63 or himself of any interest in any enterprise, including real
64 estate; to impose reasonable restrictions upon the future
65 activities of any defendant to impede her or him from engaging
66 in or establishing the same type of endeavor; to order the
67 dissolution or reorganization of any enterprise; or to grant
68 ~~legal, equitable, or~~ other appropriate relief. The court may
69 assess the expenses of a general or special magistrate or
70 receiver against a person who has violated, is violating, or is
71 otherwise likely to violate this part. Any injunctive order,
72 whether temporary or permanent, issued by the court shall be
73 effective throughout the state unless otherwise provided in the
74 order.
75 Section 4. This act shall take effect July 1, 2006.

HB 957

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 957 Homeowners' and Community Associations
SPONSOR(S): Anderson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 546

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) State Administration Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located. A declaration of condominium may be amended as provided in the declaration. This bill revises condominium association powers and provides that leaseholds and other possesory and use interests can only be acquired by means provided in the declaration of condominium or by approval of 3/4 of the voting interest instead of 2/3 of the voting interest provided in current law.

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. This bill increases the regulation of homeowners' associations by:

- Providing that non-regulated homeowners' associations may use statutory provisions to revive expired covenants.
- Revising provisions pertaining to board meetings to lessen notice requirements regarding regular assessments.
- Revising the requirements for providing information about a homeowners' association to a prospective purchaser or lienholder.
- Expanding the deadline for preparing an annual financial report.
- Allowing a fine to become a lien if it is for violating governing documents that have been recorded in the public record.
- Specifying that merger or consolidation of associations is not a material or adverse alteration of the voting interest.

This bill also repeals the dispute resolution provisions relating to homeowners' associations.

This bill appears to have a negative recurring fiscal impact on state revenues of approximately $250,000, commencing in FY 2006-2007, affecting the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill eliminates the responsibility of the Department of Business and Professional Regulation (DBPR) to provide alternate dispute resolution services regarding disputes between homeowners' associations and individual members.

Promote personal responsibility -- This bill increases personal responsibility by allowing a fine for violating the governing documents of a homeowners' association to become a lien on member's parcel under certain circumstances.

B. EFFECT OF PROPOSED CHANGES:

Background

A condominium is a "form of ownership of real property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements".[1] A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.[2] A declaration is like a constitution in that it:

> "Strictly governs the relationships among condominium units owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community."[3]

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[4] A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of two-thirds of the units.[5]

A homeowners' association is a Florida corporation responsible for the operation of a subdivision in which voting membership is made up of parcel ownership and in which membership is mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.[6] Homeowners' associations are regulated under chapter 720, F.S.

Effect of Bill

Covenant Revitalization

The governing documents in some Florida homeowners' associations provide for an expiration of the community covenants after a specified number of years. The Marketable Record Title Act, s. 712.05, F.S., will cause covenants to lapse by operation of law either where the covenants are silent as to expiration, or where the Marketable Record Title Act period is shorter than the stated expiration time. Residents in these communities have the option to revive the covenants after the expiration by following the procedural steps found in ss. 720.403 - 720.407, F.S. Currently, the covenant revitalization procedures contained in ss. 720.403 - 720.407, F.S., are not available to any

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[1] Section 718.103(11), F.S.
[2] Section 718.104(2), F.S.
[3] *Neuman v. Grand View at Emerald Hills*, 861 So.2d 494, 496-497 (Fla. 4th DCA 2003)
[4] Section 718.104(5), F.S.
[5] Section 718.110(1)(a), F.S.
[6] Section 720.301(9), F.S.

homeowners' association not governed by ch. 720, F.S., such as associations governing communities that are comprised of property primarily intended for commercial, industrial, or other non-residential use. Chapter 720, F.S. governs only residential homeowners' associations where membership is a mandatory condition for the owners of property upon which assessments are required and may become a lien on the parcel[7], thus, non-mandatory associations may not revive covenants pursuant to ss. 702.403 - 702.407, F.S.

This bill creates s. 712.11, F.S., to provide that a homeowner's association that is not subject to ch. 720, F.S. may use the procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of chapter 712, F.S. This bill would allow homeowners' associations that are not regulated by ch. 720, F.S., to utilize the covenant revitalization procedures available to mandatory homeowners' associations.

Condominium Association Powers

Section 718.114, F.S., provides for the powers of a condominium association. Among other powers, an association has the authority to enter into agreements and acquire leaseholds, memberships, and other possesory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. All leaseholds, memberships, and other possesory or use interests existing or created at the time the declaration was recorded must be stated and fully described in the declaration. Following the recording of the declaration, the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possesory or use interests except as authorized by the declaration. If the declaration does not provide this authority, then the declaration can be amended if the amendment is approved by the owners of not less than 2/3 of the units[8].

This bill amends s. 718.114, F.S., to provide that acquiring these leaseholds, memberships, or other possesory or use interests is a material alteration or substantial addition to association property, and the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possesory or use interests except as authorized by the provisions in s. 718.113, F.S. Section 718.113(2), F.S., provides that there can be no material alteration or substantial additions to the common elements or to real property that is association property, except as provided in the declaration. If the declaration does not specify the procedure for approval of material alterations or substantial additions, 75% of the total voting interests of the association must approve the alterations or additions. Therefore this bill provides that acquiring leaseholds, memberships, or other use interest is a material alteration or substantial addition, and therefore, where the declaration is silent regarding the procedure for acquiring these leaseholds, memberships, or other use interest, there must be approval by 3/4 of the total voting interest of the association instead of only 2/3 as required if it were not a material alteration or substantial addition.

Purpose, Scope, and Application of Homeowners' Association Statutes

Section 720.302, F.S., pertains to the purposes, scope, and application for ch. 720, F.S. Section 720.302(3), F.S., provides that ch. 720, F.S., does not apply to the following:

- A community that is composed of property primarily intended for commercial, industrial, or other nonresidential use; or
- The commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use.

Section 720.302(5), F.S, provides that unless expressly stated to the contrary, corporations not for profit that operate residential homeowners' associations in this state are to be governed by and subject to ch. 617, F.S. and ch. 720, F.S.

[7] Section 720.301(8) and (11), F.S.
[8] Section 718.110(1)(a), F.S.

This bill amends s. 720.302(3), F.S., to provide that "except as specifically provided in ch. 720, F.S.", ch. 720, F.S, does not apply to the type of communities stated above.

This bill amends s. 720.302(5), F.S., to provide that non-profit corporations that operate homeowners' associations in Florida must be governed by and subject to ch. 617, F.S. (non-profit corporations) "or ch. 607, F.S. (corporations) if incorporated under that chapter". (See drafting comments section below).

Homeowners' Association Board Meetings

Section 720.303(2), F.S., provides requirements regarding homeowners association board meetings. Section 720.303(2)(c)2., F.S., provides that a board may not levy general or special assessments at a meeting unless the notice of the meeting includes the nature of those assessments and a statement that the assessments will be considered at the meeting.[9] A general assessment is a share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner.[10] A special assessment is any assessment levied against a unit owner other than the assessment required by a budget adopted annually.[11]

This bill amends s. 720.303(2)(c)2., F.S., by changing the word "assessment" to "special assessment", and therefore, eliminates the requirement that a general assessment may not be levied at a board meeting unless notice of a board meeting states that regular assessments will be considered. This bill provides that such notice is only required when a special assessment will be considered.

Homeowners' Association Inspection and Copying of Records

Section 720.303(5), F.S., requires that a homeowners' association allow its members to inspect and copy its official records within 10 days of a written request for access. A failure to comply with such a request in a timely fashion creates a rebuttable presumption that the association failed to do so, and entitles the requesting party to actual damages, or to a minimum of $50 per calendar day, commencing on the eleventh business day. A homeowners' association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not impose a requirement that a parcel owner demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the associations copy machine. If the association does not have a copy machine available where the records are kept, or if the records requested to be copied exceed 25 pages, then the association may have copies made by an outside vendor and may charge the actual cost of copying.

Current law expressly exempts the following from inspection by a member or parcel owner:

- Any record protected by attorney-client or work-product privilege;
- Information obtained in association with the lease, sale or transfer of a parcel that is otherwise privileged by state or federal law; disciplinary, health, insurance and personnel records of the association's employees; or
- Medical records of parcel owners or other community residents.[12]

This bill amends s. 720.303(5), F.S., to provide that an association or its agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association unless required by ch. 720, F.S., to be made available or disclosed. This bill also provides that an association or agent may charge a reasonable fee to a prospective purchaser or lienholder or

[9] Section 720.303(2)(c)2, F.S.
[10] Section 720.103(1), F.S.
[11] Section 720.103(24), F.S.
[12] Section 720.303(1), (2), (3), (4), F.S.

the current parcel owner or member for providing good faith responses to requests for information, except for information required by law. The fee cannot exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

This bill provides that an association and its agent are not liable for providing information in good faith if the person providing the information includes a written statement in the following form: "The responses herein are made in good faith and to the best of my ability as to their accuracy."

Homeowners' Association Financial Reporting

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

This bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year, the association must provide each member with a copy of the annual financial report. Homeowners' associations and condominium associations are generally operated and managed in a similar manner. The changes made by this bill will make financial reporting for homeowners associations the same as financial reporting for condominium associations. See s. 718.111(13), F.S.

Homeowners' Association Levy of Fines and Suspension of Use Rights

Section 720.305(2), F.S., provides that an association may suspend, for a reasonable period of time, the rights of a member or a member's tenants, guests, or invitees, or both to use common areas and facilities for failing or refusing to comply with the governing documents of the community. An association can also levy reasonable fines, not to exceed $100 per violation, against any member or tenant, guest, or invitee for failing or refusing to comply with the governing documents of the association. The fine can be levied each day that the violation continues, however, no fine can exceed $1,000 unless it is allowed in the governing documents. A fine cannot become a lien against a parcel.

This bill amends s. 720.305(2), F.S., to provide an exception to the provision that a fine cannot become a lien against a parcel. This bill provides that a fine may become a lien against a parcel if it is levied for a violation of the governing documents which have been recorded in the public records of the county where the property is located. The fine cannot exceed $1,000.

Mergers

Section 720.306(1)(c), F.S., provides that an amendment may not materially and adversely alter the proportionate voting interest attached to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association, unless all owners and lienholders join in the execution of the amendment.

This bill amends s. 720.306(1)(c), F.S., to provide that the merger or consolidation of associations under ch. 607, F.S. (regulating corporations) or ch. 617, F.S. (regulating non-profit corporations), is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Member Participation in Meetings

Section 720.306(6), F.S., provides that members and parcel owners have the right to attend all membership meetings and to speak at any meeting. A member and a parcel owner have the right to speak for at least 3 minutes on any agenda item, if the member or parcel owner submits a written request to speak prior to the meeting.

This bill amends s. 720.306(6), F.S., to limit members of an association, who wish to speak at a membership meeting, to speaking only to items on the agenda.

Publication of False and Misleading Information

Section 720.402, F.S., creates a cause of action to rescind the contract for sale or for damages against a developer for false or misleading material statements. After closing, the purchaser has a cause of action against the developer for one year after the date upon which the last of the following events takes place:

- The closing of the transaction;
- The issuance of a certificate of occupancy or other evidence to allow lawful occupancy of the residence;
- The date of lawful occupancy in counties or municipalities in which certificates of occupancy or other evidence of lawful occupancy are not customarily issued;
- The completion by the developer of the common areas and recreational facilities, whether or not they are common areas, which the developer is obligated to complete or provide under the terms of the written contract;
- The completion by the developer of the common areas and such recreational facilities, whether or not they are common areas, that the developer is obligated to complete under any rule of law if there is no written contract.

Section 720.402, F.S., also limits any cause of action brought under this provision to five years after the closing of the transaction, provides that the prevailing party may recover reasonable attorney's fees, and prohibits the developer from using association funds to defend a suit brought under this section.

This bill amends s. 720.402, F.S., to provide that this section does not limit any rights provided by common law. This section as currently written does not limit the right to sue under other legal theories. It is unclear what effect, if any, this change makes.

Proposed Revived Declaration

The governing documents in some Florida homeowners' associations provide for an expiration of the community covenants after a specified number of years. Residents in these communities have the option to revive the governing documents after the expiration date by following the procedural steps found in ch. 720, F.S. The proposal to revive the community documents must be initiated by an organizing committee of at least 3 parcel owners in the community. Section 720.405, F.S., provides certain procedures and requirements that the organizing committee must follow when seeking to revive a declaration and other governing documents.

Section 720.405(4), F.S., provides that the proposed revived declaration and governing documents must:

- Provide that the voting interest of each parcel owner is the same as the voting interest of the parcel owner under the previous governing documents;
- Provide that the proportional-assessment obligation of each parcel owner is the same as proportional-assessment obligation of the parcel owner under the previous governing documents;
- Contain the same respective amendment provisions as the previous governing documents or, if there were no amendment provisions in the previous governing document, amendment provisions that require approval of not less than two-thirds of the affected parcel owners;
- Contain no covenants that are more restrictive on the affected parcel owners than the covenants contained in the previous governing documents, except as allowed under s. 720.404(3), F.S.; and
- Comply with the other requirements for a declaration of covenants and other governing documents as specified in ch. 720, F.S.

This bill amends section 720.405(4), F.S., by removing the requirement that a proposed revived declaration and other governing documents of the community must contain no covenants that are more restrictive on the affected parcel owners than the covenants contained in the previous governing documents, except as permitted under s. 720.404(3), F.S. This requirement already exists in s. 720.404(3), F.S., which provides that "the revived declaration may not contain covenants that are more restrictive on the parcel owners than the covenants contained in the previous declaration".

Dispute Resolution

This bill repeals s. 720.311, F.S., pertaining to dispute resolution for disputes between homeowners and the homeowners' association, and therefore removes the requirement that the Department of Business and Professional Regulation implement and carry out the provisions of s. 720.311, F.S. The intent language at s. 720.302(2), F.S., is amended to reflect this change.

Jurisdiction of County Courts

County courts have jurisdiction over disputes specifically provided in the statute.

Section 34.01, F.S., provides that county courts have original jurisdiction[13] in the following cases:

- In all misdemeanor cases not cognizable by the circuit courts;
- Of all violations of municipal and county ordinances;
- Of all actions at law in which the matter in controversy does not exceed the sum of $15,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts; and
- Of disputes occurring in the homeowners' associations as described in s. 720.311(2)(a), which shall be concurrent with jurisdiction of the circuit courts.

Section 720.311(2)(a), F.S. provides for all of the different disputes occurring in homeowners' associations that must go through mandatory mediation. Section 34.01, F.S., provides that the county courts will have original jurisdiction over these same disputes. This bill repeals s. 720.311, F.S., which would remove from s. 34.01, F.S., the specific disputes that the county courts would have jurisdiction over. This change would make it unclear whether homeowners' association disputes should be brought in the circuit court or county court.

This bill amends s. 34.01, F.S., to change the reference to s. 720.311(2)(a) in s. 34.01(1)(d) to s. 720.311(2)(a), "Florida Statutes 2005", so that the county courts will still be able to base their jurisdiction over the specific homeowners' association disputes provided in s. 720.311(2)(a), F.S.

C. SECTION DIRECTORY:

Section 1 creates s. 712.11, F.S., to provide that homeowners' associations may use procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of Chapter 712, F.S.

Section 2 amends s. 718.114, F.S., to revise condominium association powers pertaining to agreements acquiring possesory or use interests after recording the declaration.

Section 3 amends s. 720.302, F.S., to revise the purpose, scope, and application of ch. 720, F.S. and to remove the reference to s. 720.311, F.S.

Section 4 amends s. 720.303, F.S., to revise the provisions for homeowners' association board meetings. This section also amends 720.303(5), F.S., relating to the copying and inspection of

[13] The original jurisdiction of a court refers to matters on which the court rules in the first instance, as opposed to matters in which it reviews the decision of another court.

homeowners' association records. This section amends 720.303(7), F.S., revising the time period for when an association must prepare and complete a financial report for the preceding fiscal year.

Section 5 amends s. 720.305, F.S., to revise provisions related to the levy of fines and suspension of use rights.

Section 6 amends s. 720.306, F.S., revising provisions pertaining to meetings of members and amendments providing that merger or consolidation of associations is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel, and providing that members and parcel owners have the right to speak at any meeting in reference to all agenda items.

Section 7 amends s. 720.402, F.S., to add a provision that the section does not limit any rights provided by common law.

Section 8 amends s. 720.405, F.S., to remove language provided elsewhere in ch. 720, F.S.

Section 9 repeals s. 720.311, F.S., pertaining to alternative dispute resolution

Section 10 amends s. 34.01, F.S., to revise provisions related to the jurisdiction of county courts to conform to other changes made in the bill.

Section 11 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT[14]

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

REVENUE			
	FY 2006-07	FY 2007-08	FY 2008-09
License Fees:	0	0	0
Taxes:	0	0	0
Other (identify): Mediation Fees	(264,000)	(264,000)	(264,000)
TOTAL:	(264,000)	(264,000)	(264,000)

2. Expenditures:

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Recurring Effects	FY 2006-07	FY 2007-08	FY 2008-09
Salaries/Benefits # of FTE's	0	0	0
Expenses	0	0	0
Other (identify)	0	0	0
Subtotal	0	0	0

Non-Operating Expenditures	FY 2006-07	FY 2007-08	FY 2008-09
Service Charges (to General Revenue)	(19,272)	(19,272)	(19,272)
Other Indirect Costs	0	0	0
Subtotal	(19,272)	(19,272)	(19,272)

[14] Fiscal analysis provided by the Department of Business and Professional Regulation on March 9, 2006.

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Non-Recurring Effects	FY 2006-07	FY 2007-08	FY 2008-09
Operating Capital Outlay	0	0	0
Other Personal Services	0	0	0
Other (identify)	0	0	0
Subtotal	0	0	0

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

By repealing s. 720.311, F.S., this bill will allow members and homeowners' associations in a dispute from paying the $200 fee to the Department of Business and Professional Regulation. The costs of going straight to court and not resolving disputes through alternative dispute resolution are indeterminate.

D. FISCAL COMMENTS:

Comments from the Department of Business and Professional Regulation

The bill will eliminate the department's homeowners' association mandatory mediation and arbitration programs contained in Chapter 720, Florida Statutes, and the corresponding homeowners' association fees collected by the department. There were no positions or funding provided to administer the homeowners' association program when it began in FY 2004-05. Currently, the department utilizes two condominium mediators to hear homeowner mediation cases and one condominium arbitrator to hear homeowner association disputes, in addition to their condominium case workloads. Elimination of the programs would end the $200 per case filing fee currently collected for these cases.

From the homeowners' association arbitration and mediation programs' effective date on October 1, 2004 up to November 22, 2005, the division received 11 petitions for arbitration, 1,007 petitions for mediation, and approximately $203,600 in related filing fees. Approximately 63 mediations were assigned to division mediators and the remaining petitions were referred to private mediators. Departmental arbitrators performed all arbitrations. Approximately $49,348.45 was assessed to parties for reimbursement of division expenses involved in these proceedings. The department projects homeowners' association mediation and arbitration filing fees in FY 2006-07 of $264,000. The bill will reduce fees collected by the division since the homeowners' association mediation and arbitration programs are funded based on user fees.

Comments by the Civil Justice Committee

The fiscal analysis prepared by DBPR does not appear to have adequately addressed the reduction in responsibility, and corresponding reduction in expenses, that would result from this bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

This bill provides that a fine cannot become a lien against a parcel "unless it is levied for a violation of governing documents that have been recorded in the public records of the county where the property is located." This exception could possibly be a violation of the Contract Clause of the Florida Constitution. Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[15] "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[16] [17]

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[18] The *Pomponio* Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable in this state." *Pomponio*, 378 So. 2d at 780. When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.*

In other words, "[t]his method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." *U.S. Fidelity and Guar. Co. v. Department of Ins.*, 453 So. 2d 1355, 1360-61 (1984). What should be reviewed when considering this balancing test?

> [T]he United States Supreme Court recently outlined the main factors to be considered in applying this balancing test. The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.

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[15] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "

[16] 10a Fla. Jur. s. 414, Constitutional Law.

[17] The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

[18] The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

U.S. Fidelity and Guar. Co., 453 So.2d at 1360-61 (Fla. 1984) (internal citations and quotations omitted).

B. RULE-MAKING AUTHORITY:

The bill will require the repeal of Ch. 61B-80, F.A.C., containing the arbitration procedural rules regarding election and recall disputes; Ch. 61B-81, F.A.C., the substantive rules for recalls in homeowners' associations; Ch. 61B-82, F.A.C., containing the mediation rules of procedure, and Ch. 61B-83 governing the certification of community association mediators and arbitrators.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill provides that not for profit corporations that operate homeowners' associations are governed by ch. 720, F.S. (homeowners' association), ch. 617, F.S. (not for profit corporations), and ch. 607 (for profit corporations). It is unclear why this section references for profit corporations when the section is only pertaining to not for profit corporations.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

1 A bill to be entitled
2 An act relating to homeowners' and community associations;
3 creating s. 712.11, F.S.; authorizing certain associations
4 to revive lapsed covenants; amending s. 718.114, F.S.;
5 providing that certain leaseholds, memberships, or other
6 possessory or use interests shall be considered a material
7 alteration or substantial addition to certain real
8 property; amending s. 720.302, F.S.; revising certain
9 purposes for regulation; amending s. 720.303, F.S.;
10 revising notice requirements relating to the levy of
11 special assessments; authorizing associations to charge
12 specified fees for providing certain information to
13 prospective purchasers or lienholders; limiting liability
14 for providing such information; revising certain time
15 requirements relating to annual reports of associations;
16 amending s. 720.305, F.S.; prohibiting a fine levied by an
17 association from becoming a lien unless the governing
18 documents claimed to have been violated are recorded in
19 the public records; amending s. 720.306, F.S.; providing
20 that certain mergers or consolidations do not alter
21 specified voting interests; limiting the right of members
22 to speak at membership meetings; amending s. 720.402,
23 F.S., relating to publication of false or misleading
24 information; clarifying that the section does not limit
25 common-law rights; amending s. 720.405, F.S.; deleting a
26 requirement that a proposed revived governing document not
27 contain certain restrictive covenants; repealing s.
28 720.311, F.S., relating to an alternative dispute

29 resolution process; amending s. 34.01, F.S.; conforming a
30 cross-reference; providing an effective date.
31
32 Be It Enacted by the Legislature of the State of Florida:
33
34 Section 1. Section 712.11, Florida Statutes, is created to
35 read:
36 712.11 Covenant revitalization.--A homeowners' association
37 that is not subject to chapter 720 may use the procedures in ss.
38 720.403-720.407 to revive covenants that have lapsed pursuant to
39 this chapter.
40 Section 2. Section 718.114, Florida Statutes, is amended
41 to read:
42 718.114 Association powers.--An association has the power
43 to enter into agreements, to acquire leaseholds, memberships,
44 and other possessory or use interests in lands or facilities
45 such as country clubs, golf courses, marinas, and other
46 recreational facilities. It has this power whether or not the
47 lands or facilities are contiguous to the lands of the
48 condominium, if they are intended to provide enjoyment,
49 recreation, or other use or benefit to the unit owners. All of
50 these leaseholds, memberships, and other possessory or use
51 interests existing or created at the time of recording the
52 declaration must be stated and fully described in the
53 declaration. Subsequent to the recording of the declaration,
54 agreements acquiring these leaseholds, memberships, or other
55 possessory or use interests shall be considered a material
56 alteration or substantial addition to the real property that is

57 association property, and the association may not acquire or
58 enter into agreements acquiring these leaseholds, memberships,
59 or other possessory or use interests except as authorized by the
60 declaration as provided in s. 718.113. The declaration may
61 provide that the rental, membership fees, operations,
62 replacements, and other expenses are common expenses and may
63 impose covenants and restrictions concerning their use and may
64 contain other provisions not inconsistent with this chapter. A
65 condominium association may conduct bingo games as provided in
66 s. 849.0931.
67 Section 3. Section 720.302, Florida Statutes, is amended
68 to read:
69 720.302 Purposes, scope, and application.--
70 (1) The purposes of this chapter are to give statutory
71 recognition to corporations not for profit that operate
72 residential communities in this state, to provide procedures for
73 operating homeowners' associations, and to protect the rights of
74 association members without unduly impairing the ability of such
75 associations to perform their functions.
76 (2) The Legislature recognizes that it is not in the best
77 interest of homeowners' associations or the individual
78 association members thereof to create or impose a bureau or
79 other agency of state government to regulate the affairs of
80 homeowners' associations. ~~However, in accordance with s.~~
81 ~~720.311, the Legislature finds that homeowners' associations and~~
82 ~~their individual members will benefit from an expedited~~
83 ~~alternative process for resolution of election and recall~~
84 ~~disputes and presuit mediation of other disputes involving~~

85 ~~covenant enforcement and authorizes the department to hear,~~
86 ~~administer, and determine these disputes as more fully set forth~~
87 ~~in this chapter.~~ Further, the Legislature recognizes that
88 certain contract rights have been created for the benefit of
89 homeowners' associations and members thereof before the
90 effective date of this act and that ss. 720.301-720.407 are not
91 intended to impair such contract rights, including, but not
92 limited to, the rights of the developer to complete the
93 community as initially contemplated.
94 (3) Except as specifically provided in this chapter, this
95 chapter does not apply to:
96 (a) A community that is composed of property primarily
97 intended for commercial, industrial, or other nonresidential
98 use; or
99 (b) The commercial or industrial parcels in a community
100 that contains both residential parcels and parcels intended for
101 commercial or industrial use.
102 (4) This chapter does not apply to any association that is
103 subject to regulation under chapter 718, chapter 719, or chapter
104 721; or to any nonmandatory association formed under chapter
105 723.
106 (5) Unless expressly stated to the contrary, corporations
107 not for profit that operate residential homeowners' associations
108 in this state shall be governed by and subject to chapter 617
109 and this chapter or chapter 607 if incorporated under that
110 chapter. This subsection is intended to clarify existing law.
111 Section 4. Subsections (2), (5), and (7) of section
112 720.303, Florida Statutes, are amended to read:

113 720.303 Association powers and duties; meetings of board;
114 official records; budgets; financial reporting; association
115 funds; recalls.--
116 (2) BOARD MEETINGS.--
117 (a) A meeting of the board of directors of an association
118 occurs whenever a quorum of the board gathers to conduct
119 association business. All meetings of the board must be open to
120 all members except for meetings between the board and its
121 attorney with respect to proposed or pending litigation where
122 the contents of the discussion would otherwise be governed by
123 the attorney-client privilege.
124 (b) Members have the right to attend all meetings of the
125 board and to speak on any matter placed on the agenda by
126 petition of the voting interests for at least 3 minutes. The
127 association may adopt written reasonable rules expanding the
128 right of members to speak and governing the frequency, duration,
129 and other manner of member statements, which rules must be
130 consistent with this paragraph and may include a sign-up sheet
131 for members wishing to speak. Notwithstanding any other law, the
132 requirement that board meetings and committee meetings be open
133 to the members is inapplicable to meetings between the board or
134 a committee and the association's attorney, with respect to
135 meetings of the board held for the purpose of discussing
136 personnel matters.
137 (c) The bylaws shall provide for giving notice to parcel
138 owners and members of all board meetings and, if they do not do
139 so, shall be deemed to provide the following:
140 1. Notices of all board meetings must be posted in a

141 conspicuous place in the community at least 48 hours in advance
142 of a meeting, except in an emergency. In the alternative, if
143 notice is not posted in a conspicuous place in the community,
144 notice of each board meeting must be mailed or delivered to each
145 member at least 7 days before the meeting, except in an
146 emergency. Notwithstanding this general notice requirement, for
147 communities with more than 100 members, the bylaws may provide
148 for a reasonable alternative to posting or mailing of notice for
149 each board meeting, including publication of notice, provision
150 of a schedule of board meetings, or the conspicuous posting and
151 repeated broadcasting of the notice on a closed-circuit cable
152 television system serving the homeowners' association. However,
153 if broadcast notice is used in lieu of a notice posted
154 physically in the community, the notice must be broadcast at
155 least four times every broadcast hour of each day that a posted
156 notice is otherwise required. When broadcast notice is provided,
157 the notice and agenda must be broadcast in a manner and for a
158 sufficient continuous length of time so as to allow an average
159 reader to observe the notice and read and comprehend the entire
160 content of the notice and the agenda. The bylaws or amended
161 bylaws may provide for giving notice by electronic transmission
162 in a manner authorized by law for meetings of the board of
163 directors, committee meetings requiring notice under this
164 section, and annual and special meetings of the members;
165 however, a member must consent in writing to receiving notice by
166 electronic transmission.
167 2. A special ~~An~~ assessment may not be levied at a board
168 meeting unless the notice of the meeting includes a statement

169 that special assessments will be considered and the nature of
170 such ~~the~~ assessments. Written notice of any meeting at which
171 special assessments will be considered or at which amendments to
172 rules regarding parcel use will be considered must be mailed,
173 delivered, or electronically transmitted to the members and
174 parcel owners and posted conspicuously on the property or
175 broadcast on closed-circuit cable television not less than 14
176 days before the meeting.
177 3. Directors may not vote by proxy or by secret ballot at
178 board meetings, except that secret ballots may be used in the
179 election of officers. This subsection also applies to the
180 meetings of any committee or other similar body, when a final
181 decision will be made regarding the expenditure of association
182 funds, and to meetings of any body vested with the power to
183 approve or disapprove architectural decisions with respect to a
184 specific parcel of residential property owned by a member of the
185 community.
186 (d) If 20 percent of the total voting interests petition
187 the board to address an item of business, the board shall at its
188 next regular board meeting or at a special meeting of the board,
189 but not later than 60 days after the receipt of the petition,
190 take the petitioned item up on an agenda. The board shall give
191 all members notice of the meeting at which the petitioned item
192 shall be addressed in accordance with the 14-day notice
193 requirement pursuant to subparagraph (c)2. Each member shall
194 have the right to speak for at least 3 minutes on each matter
195 placed on the agenda by petition, provided that the member signs
196 the sign-up sheet, if one is provided, or submits a written

197 request to speak prior to the meeting. Other than addressing the
198 petitioned item at the meeting, the board is not obligated to
199 take any other action requested by the petition.
200 (5) INSPECTION AND COPYING OF RECORDS.--The official
201 records shall be maintained within the state and must be open to
202 inspection and available for photocopying by members or their
203 authorized agents at reasonable times and places within 10
204 business days after receipt of a written request for access.
205 This subsection may be complied with by having a copy of the
206 official records available for inspection or copying in the
207 community. If the association has a photocopy machine available
208 where the records are maintained, it must provide parcel owners
209 with copies on request during the inspection if the entire
210 request is limited to no more than 25 pages.
211 (a) The failure of an association to provide access to the
212 records within 10 business days after receipt of a written
213 request creates a rebuttable presumption that the association
214 willfully failed to comply with this subsection.
215 (b) A member who is denied access to official records is
216 entitled to the actual damages or minimum damages for the
217 association's willful failure to comply with this subsection.
218 The minimum damages are to be $50 per calendar day up to 10
219 days, the calculation to begin on the 11th business day after
220 receipt of the written request.
221 (c) The association may adopt reasonable written rules
222 governing the frequency, time, location, notice, records to be
223 inspected, and manner of inspections, but may not impose a
224 requirement that a parcel owner demonstrate any proper purpose

225 for the inspection, state any reason for the inspection, or
226 limit a parcel owner's right to inspect records to less than one
227 8-hour business day per month. The association may impose fees
228 to cover the costs of providing copies of the official records,
229 including, without limitation, the costs of copying. The
230 association may charge up to 50 cents per page for copies made
231 on the association's photocopier. If the association does not
232 have a photocopy machine available where the records are kept,
233 or if the records requested to be copied exceed 25 pages in
234 length, the association may have copies made by an outside
235 vendor and may charge the actual cost of copying. The
236 association shall maintain an adequate number of copies of the
237 recorded governing documents, to ensure their availability to
238 members and prospective members. Notwithstanding the provisions
239 of this paragraph, the following records shall not be accessible
240 to members or parcel owners:
241 1. Any record protected by the lawyer-client privilege as
242 described in s. 90.502 and any record protected by the work-
243 product privilege, including, but not limited to, any record
244 prepared by an association attorney or prepared at the
245 attorney's express direction which reflects a mental impression,
246 conclusion, litigation strategy, or legal theory of the attorney
247 or the association and was prepared exclusively for civil or
248 criminal litigation or for adversarial administrative
249 proceedings or which was prepared in anticipation of imminent
250 civil or criminal litigation or imminent adversarial
251 administrative proceedings until the conclusion of the
252 litigation or adversarial administrative proceedings.

253 2. Information obtained by an association in connection
254 with the approval of the lease, sale, or other transfer of a
255 parcel.
256 3. Disciplinary, health, insurance, and personnel records
257 of the association's employees.
258 4. Medical records of parcel owners or community
259 residents.
260 (d) The association is not required to give a prospective
261 purchaser or lienholder information about the subdivision or the
262 association other than that required to be disclosed under this
263 chapter. It may charge the prospective purchaser, lienholder, or
264 current parcel owner or member a reasonable fee not to exceed
265 $150 to provide such information, other than information
266 required by law, plus the reasonable cost of photocopying and
267 attorney's fees incurred by the association in connection with
268 the response.
269 (e) An association is not liable for providing such
270 information in good faith pursuant to a written request if the
271 person providing the information includes a written statement in
272 substantially the following form: "The responses herein are made
273 in good faith and to the best of my ability as to their
274 accuracy."
275 (7) FINANCIAL REPORTING.--The association shall prepare an
276 annual financial report by a date specified in the bylaws or
277 within 90 ~~60~~ days after the close of the fiscal year. The
278 association shall, within 21 days after the report is prepared
279 but not later than 120 days after the end of the fiscal year ~~the~~
280 ~~time limits set forth in subsection (5)~~, provide each member

281 with a copy of the annual financial report or a written notice
282 that a copy of the financial report is available upon request at
283 no charge to the member. Financial reports shall be prepared as
284 follows:
285 (a) An association that meets the criteria of this
286 paragraph shall prepare or cause to be prepared a complete set
287 of financial statements in accordance with generally accepted
288 accounting principles. The financial statements shall be based
289 upon the association's total annual revenues, as follows:
290 1. An association with total annual revenues of $100,000
291 or more, but less than $200,000, shall prepare compiled
292 financial statements.
293 2. An association with total annual revenues of at least
294 $200,000, but less than $400,000, shall prepare reviewed
295 financial statements.
296 3. An association with total annual revenues of $400,000
297 or more shall prepare audited financial statements.
298 (b)1. An association with total annual revenues of less
299 than $100,000 shall prepare a report of cash receipts and
300 expenditures.
301 2. An association in a community of fewer than 50 parcels,
302 regardless of the association's annual revenues, may prepare a
303 report of cash receipts and expenditures in lieu of financial
304 statements required by paragraph (a) unless the governing
305 documents provide otherwise.
306 3. A report of cash receipts and disbursement must
307 disclose the amount of receipts by accounts and receipt
308 classifications and the amount of expenses by accounts and

309 expense classifications, including, but not limited to, the
310 following, as applicable: costs for security, professional, and
311 management fees and expenses; taxes; costs for recreation
312 facilities; expenses for refuse collection and utility services;
313 expenses for lawn care; costs for building maintenance and
314 repair; insurance costs; administration and salary expenses; and
315 reserves if maintained by the association.
316 (c) If 20 percent of the parcel owners petition the board
317 for a level of financial reporting higher than that required by
318 this section, the association shall duly notice and hold a
319 meeting of members within 30 days of receipt of the petition for
320 the purpose of voting on raising the level of reporting for that
321 fiscal year. Upon approval of a majority of the total voting
322 interests of the parcel owners, the association shall prepare or
323 cause to be prepared, shall amend the budget or adopt a special
324 assessment to pay for the financial report regardless of any
325 provision to the contrary in the governing documents, and shall
326 provide within 90 days of the meeting or the end of the fiscal
327 year, whichever occurs later:
328 1. Compiled, reviewed, or audited financial statements, if
329 the association is otherwise required to prepare a report of
330 cash receipts and expenditures;
331 2. Reviewed or audited financial statements, if the
332 association is otherwise required to prepare compiled financial
333 statements; or
334 3. Audited financial statements if the association is
335 otherwise required to prepare reviewed financial statements.
336 (d) If approved by a majority of the voting interests

337 present at a properly called meeting of the association, an
338 association may prepare or cause to be prepared:
339 1. A report of cash receipts and expenditures in lieu of a
340 compiled, reviewed, or audited financial statement;
341 2. A report of cash receipts and expenditures or a
342 compiled financial statement in lieu of a reviewed or audited
343 financial statement; or
344 3. A report of cash receipts and expenditures, a compiled
345 financial statement, or a reviewed financial statement in lieu
346 of an audited financial statement.
347 Section 5. Subsection (2) of section 720.305, Florida
348 Statutes, is amended to read:
349 720.305 Obligations of members; remedies at law or in
350 equity; levy of fines and suspension of use rights; failure to
351 fill sufficient number of vacancies on board of directors to
352 constitute a quorum; appointment of receiver upon petition of
353 any member.--
354 (2) If the governing documents so provide, an association
355 may suspend, for a reasonable period of time, the rights of a
356 member or a member's tenants, guests, or invitees, or both, to
357 use common areas and facilities and may levy reasonable fines,
358 not to exceed $100 per violation, against any member or any
359 tenant, guest, or invitee. A fine may be levied on the basis of
360 each day of a continuing violation, with a single notice and
361 opportunity for hearing, except that no such fine shall exceed
362 $1,000 in the aggregate unless otherwise provided in the
363 governing documents. A fine shall not become a lien against a
364 parcel <u>unless it is levied for a violation of governing</u>

365 documents that have been recorded in the public records of the
366 county where the property is located. In any action to recover a
367 fine, the prevailing party is entitled to collect its reasonable
368 attorney's fees and costs from the nonprevailing party as
369 determined by the court.
370 (a) A fine or suspension may not be imposed without notice
371 of at least 14 days to the person sought to be fined or
372 suspended and an opportunity for a hearing before a committee of
373 at least three members appointed by the board who are not
374 officers, directors, or employees of the association, or the
375 spouse, parent, child, brother, or sister of an officer,
376 director, or employee. If the committee, by majority vote, does
377 not approve a proposed fine or suspension, it may not be
378 imposed.
379 (b) The requirements of this subsection do not apply to
380 the imposition of suspensions or fines upon any member because
381 of the failure of the member to pay assessments or other charges
382 when due if such action is authorized by the governing
383 documents.
384 (c) Suspension of common-area-use rights shall not impair
385 the right of an owner or tenant of a parcel to have vehicular
386 and pedestrian ingress to and egress from the parcel, including,
387 but not limited to, the right to park.
388 Section 6. Subsections (1) and (6) of section 720.306,
389 Florida Statutes, are amended to read:
390 720.306 Meetings of members; voting and election
391 procedures; amendments.--
392 (1) QUORUM; AMENDMENTS.--

393 (a) Unless a lower number is provided in the bylaws, the
394 percentage of voting interests required to constitute a quorum
395 at a meeting of the members shall be 30 percent of the total
396 voting interests. Unless otherwise provided in this chapter or
397 in the articles of incorporation or bylaws, decisions that
398 require a vote of the members must be made by the concurrence of
399 at least a majority of the voting interests present, in person
400 or by proxy, at a meeting at which a quorum has been attained.
401 (b) Unless otherwise provided in the governing documents
402 or required by law, and other than those matters set forth in
403 paragraph (c), any governing document of an association may be
404 amended by the affirmative vote of two-thirds of the voting
405 interests of the association.
406 (c) Unless otherwise provided in the governing documents
407 as originally recorded or permitted by this chapter or chapter
408 617, an amendment may not materially and adversely alter the
409 proportionate voting interest appurtenant to a parcel or
410 increase the proportion or percentage by which a parcel shares
411 in the common expenses of the association unless the record
412 parcel owner and all record owners of liens on the parcels join
413 in the execution of the amendment. For purposes of this section,
414 a change in quorum requirements is not an alteration of voting
415 interests. <u>The merger or consolidation of associations under a</u>
416 <u>plan of merger or consolidation pursuant to chapter 607 or</u>
417 <u>chapter 617 is not a material or adverse alteration of the</u>
418 <u>proportionate voting interest appurtenant to a parcel.</u>
419 (6) RIGHT TO SPEAK.--Members and parcel owners have the
420 right to attend all membership meetings and to speak at any

421 meeting with reference to all items ~~opened for discussion or~~
422 included on the agenda. Notwithstanding any provision to the
423 contrary in the governing documents or any rules adopted by the
424 board or by the membership, a member and a parcel owner have the
425 right to speak for at least 3 minutes on any agenda item, if
426 ~~provided that~~ the member or parcel owner submits a written
427 request to speak prior to the meeting. The association may adopt
428 written reasonable rules governing the frequency, duration, and
429 other manner of member and parcel owner statements, which rules
430 must be consistent with this subsection.
431 Section 7. Subsection (3) is added to section 720.402,
432 Florida Statutes, to read:
433 720.402 Publication of false and misleading information.--
434 (3) This section does not limit any rights provided by
435 common law.
436 Section 8. Subsection (4) of section 720.405, Florida
437 Statutes, is amended to read:
438 720.405 Organizing committee; parcel owner approval.--
439 (4) The proposed revived declaration and other governing
440 documents for the community shall:
441 (a) Provide that the voting interest of each parcel owner
442 shall be the same as the voting interest of the parcel owner
443 under the previous governing documents;
444 (b) Provide that the proportional-assessment obligations
445 of each parcel owner shall be the same as proportional-
446 assessment obligations of the parcel owner under the previous
447 governing documents;
448 (c) Contain the same respective amendment provisions as

449 the previous governing documents or, if there were no amendment
450 provisions in the previous governing document, amendment
451 provisions that require approval of not less than two-thirds of
452 the affected parcel owners; and
453 ~~(d) Contain no covenants that are more restrictive on the~~
454 ~~affected parcel owners than the covenants contained in the~~
455 ~~previous governing documents, except as permitted under s.~~
456 ~~720.404(3); and~~
457 (d) ~~(e)~~ Comply with the other requirements for a
458 declaration of covenants and other governing documents as
459 specified in this chapter.
460 Section 9. Section 720.311, Florida Statutes, is repealed.
461 Section 10. Subsection (1) of section 34.01, Florida
462 Statutes, is amended to read:
463 34.01 Jurisdiction of county court.--
464 (1) County courts shall have original jurisdiction:
465 (a) In all misdemeanor cases not cognizable by the circuit
466 courts;
467 (b) Of all violations of municipal and county ordinances;
468 (c) Of all actions at law in which the matter in
469 controversy does not exceed the sum of $15,000, exclusive of
470 interest, costs, and attorney's fees, except those within the
471 exclusive jurisdiction of the circuit courts; and
472 (d) Of disputes occurring in the homeowners' associations
473 as described in s. 720.311(2)(a), Florida Statutes 2005, which
474 shall be concurrent with jurisdiction of the circuit courts.
475 Section 11. This act shall take effect July 1, 2006.

HB 1009

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1009 Real Estate Profession Regulation
SPONSOR(S): Cretul; Goodlette
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1816

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation Committee	17 Y, 0 N	Livingston	Liepshutz
2) Civil Justice Committee		Shaddock	Bond
3) State Administration Appropriations Committee			
4) Commerce Council			
5)			

SUMMARY ANALYSIS

This bill makes a number of changes to the statutes addressing real estate brokers, sales associates and schools. Some of the significant changes are below.

- The bill provides licensure of a real estate broker or sale associate as a professional limited liability company.
- The bill increases the time limit for certification of an applicant from one to two years.
- The bill creates grounds for broker discipline while limiting the time period for the filing of an administrative complaint against a sales associate.
- The bill requires the Department of Business and Professional Regulation to notify a licensee's broker or employer in writing when a formal complaint has been filed.
- The bill removes the "Important Notice" header and warning language about disclosure of confidential information in the required agency disclosure forms.
- The bill repeals the prohibition against charging advance fees for listing real property, except for timeshares, and removes criminal penalties for failure to follow advance fee procedures.

The bill modifies commercial real estate sales and leasing commission liens. The significant changes include: defining "Owner's Net Proceeds;" providing that generally a commission notice expires one year after recording; and providing that leases mentioned in a notice of commercial lien are not a recorded conveyance under the relevant provisions of the marketable record title act.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- The bill eliminates the restrictions on advance fees or commissions, and eliminates the corresponding misdemeanor offense.

Personal responsibility -- The bill increases the administrative fine that may be imposed on practitioners from $1,000 to $5,000.

Safeguard individual liberty -- This bill eliminates restrictions on advance fees.

B. EFFECT OF PROPOSED CHANGES:

Real Estate Brokers, Sales Associates, and Schools

The general regulation of real estate brokers and salespersons is established under part I of ch. 475, F.S. The Florida Real Estate Commission[1] ("commission") under the Division of Real Estate of the Florida Department of Business and Professional Regulation ("DBPR") administers this program. Regulation is designed to assure the minimal competency of real estate practitioners in order to protect the public from financial harm.

Section 1

Current Law

Several real estate terms are used in chapter 475, F.S., including the following:

- "Broker" is defined as a person who for compensation buys, sells, or leases real property or negotiates the transaction for others. The definition includes a general partner, officer, or director of a partnership or corporation which acts as a broker.
- "Broker associate" means "a person who is qualified to be issued a license as a broker but who operates as a sales associate in the employ of another."
- "Sales associate" means "a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or management of another person."
- A broker associate or sales associate may be organized and licensed to operate as a "professional corporation" or a "limited liability company."
- Partnerships, limited liability partnerships, limited liability companies, and corporations that act as a broker must register with the commission. Pursuant to s. 475.15, F.S., the commission requires every partnership to be registered and at least one of its partners to be licensed or registered as an active broker.

[1] "The Florida Real Estate Commission (FREC) consists of seven members and meets monthly in Orlando. The commission meeting is usually the third Wednesday of the month. The FREC administers and enforces the real estate license law, Chapter 475, Part I, Florida Statutes. The Commission is also empowered to pass rules that enable it to implement its statutorily authorized duties and responsibilities." Florida Real Estate Commission (last visited Mar. 20, 2006) <http://www.myflorida.com/dbpr/re/frec_welcome.shtml>.

Effect of Bill

The bill authorizes a professional limited liability company to be licensed as a broker or sales associate.

Section 2

Current Law

Applicants for licensure must meet character and educational requirements, submit to a background check, and pass an examination. The commission is authorized to require satisfactorily completion of one or more approved educational courses before a person may become licensed.

When the commission certifies that a person qualifies to take the licensure examination, the applicant has 1 year to take the examination. If the exam is not taken within that 1 year the licensure expires and a new application process must be completed and approved by the commission.

Effect of Bill

The bill specifies that the application for licensure expires in 2 years if the applicant fails to pass the examination, and the applicant's successful course completion is rendered invalid.

Section 3

Current Law

Section 475.182, F.S., requires the DBPR to adopt rules establishing a renewal of licenses procedure at least every 4 years. The Florida Administrative Code requires that a licensee to biennially renew a license upon application and payment of the renewal fee by the practitioner.[2] The renewal application must include proof that the licensee has, since the issuance or renewal of the license, satisfactorily completed at least 14 classroom hours of continuing education during each license period. Failure to renew before the expiration of the term of the license causes the licensee to be in involuntary inactive status. Any license which has been involuntarily inactive for more than 2 years automatically expires.

The bill

The bill authorizes a licensee to reactivate a license that has been involuntarily inactive for 12 months or less by completing at least 14 hours of continuing education. A licensee may reactivate a license that has been involuntarily inactive for more than 12 months but fewer than 24 months by completing 28 hours of education courses.

Section 4

Current Law

Section 475.25, F.S. prescribes disciplinary guidelines for violations of the provisions of part I of ch. 475.

Effect of Bill

The bill increases the administrative fine that may be imposed on practitioners from $1,000 to $5,000. The bill creates additional violations if a broker fails to reasonably manage or supervise any broker or sales associate whose license is affiliated with that broker or if a broker has failed to review the brokerage's trust accounting practices. When a formal complaint is filed against a licensee, the bill requires the DBPR or the commission to notify a licensee's broker or employer.

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[2] Section 61J1-2.002, F.A.C.

Section 5

Current Law

The term "agency" describes the legal relationship between two persons when one person, known as the agent, acts on behalf of, or represents, the other person. The term "real estate agency law" (or "agency law") refers to laws regulating the legal relationship between real estate licensees and buyers and sellers of real estate.

A "transaction broker" is a broker who facilitates a brokerage transaction between a buyer and a seller. The transaction broker does not affirmatively represent either the buyer or seller as an agent. A "single agent" is a broker who represents either the buyer or seller but not both in the same transaction.

A real estate licensee may enter into a brokerage relationship as either a transaction broker or as a single agent with potential buyers and sellers. Florida is a "presumption of transaction brokerage" state; s. 475.278(1)(b), F.S. specifies "[i]t shall be presumed that all licensees are operating as transaction brokers unless a single agent or no brokerage relationship is established, in writing, with a customer."

Effect of Bill

The bill deletes language in the disclosure requirements for a transaction broker, single agent, and where there is no brokerage relationship. Also removed is the disclosure that the buyer or seller should not assume that a licensee represents them.

Section 6

Amends s. 475.42, F.S., to correct a cross-reference to conform to changes made by the bill.

Section 7

Current Law

Each person, school, or institution, except approved and accredited colleges, universities, community colleges, and career centers in this state, conducting or teaching any course of study in real estate practice for licensure as a broker or sales associate, or teaches any course designed or represented to enable or assist applicants for licensure to pass examinations is required to obtain a permit from the DBPR.[3] An applicant for a permit to operate a proprietary real estate school, to be a chief administrator of a such a school, or to be an instructor at such a school, must meet statutory qualifications for practice set forth in s. 475.17(1), F.S.

Effect of Bill

The bill requires each person, school, or institution to keep registration records, course rosters, attendance records, a file copy of each examination and progress test, and all student answer sheets for a period of at least 3 years. A copy of the classroom course roster of courses that require satisfactory completion of an examination is required to be delivered to the DBPR within 30 days after the course was completed.

Section 8

Current Law

[3] The exemption for colleges, universities, community colleges, and career centers is limited to transferable college credit courses offered by such institutions.

Each broker or sales associate who attempts to negotiate a rental, or who furnishes rental information to a prospective tenant for a fee must provide the prospective tenant with a contract or receipt. The contract or receipt must conform to guidelines so disclosure of material information is effectively disclosed to a prospective tenant.

Effect of Bill

The bill limits the disclosure documents only to brokers or sales associates who provide a rental information "list" to a prospective tenant.

Commercial Real Estate Sales Commission Lien Act

Part III of ch. 475, F.S., is the Commercial Real Estate Sales Commission Lien Act enacted in 2005. The Act addresses various aspects of a broker's lien for a sales commission and describes a closing agent's obligations. The Act provides a sales broker with the power to place a lien on an owner's proceeds from a commercial real estate transaction when there is a dispute over the broker's commission. The proceeds are placed in the registry of the court until the dispute is resolved, but the closing may proceed and the buyer may take clean title to the commercial property.

Section 9

Current Law

Section 475.701, F.S. specifies that the closing agent does not subtract the amount secured by a mortgage or lien that the buyer agrees to remain on the property. However, the buyer will receive credit against the purchase price for the amount of that lien thus reducing the amount to be paid to close. If the closing agent does not also subtract the continuing lien, then the closing agent may be reserving against net proceeds that are not a part of the transaction.

Effect of Bill

The bill provides that, when calculating the owner's net proceeds that are subject to a lien, the closing agent must subtract the amount of all prior liens, not just the ones that are paid off at closing. Also see Section 14.

Section 10

Current Law

Section 475.707, F.S. provides that when there is a dispute over the broker's commission the proceeds are placed in the registry of the court until the dispute is resolved, but the closing may proceed and the buyer may take clean title to the commercial property. A commission notice recorded under this part expires 1 year after the date of recording, unless the brokerage agreement remains effective after the expiration date of the commission notice and the broker records an extension notice.

Effect of Bill

The bill specifies that a commission notice will not expire in 1 year if the owner remains obligated to pay a commission to the broker and deletes reference to the term of the brokerage agreement.

Section 11

Current Law

Current law provides conditions that must be met by the closing agent prior to the release of reserved funds to the broker

Effect of Bill

The bill amends s. 475.709, F.S. to provide that all of the conditions specified in each of the sections must be met by the closing agent to release the reserved funds to the broker

Section 12

Current Law

The law provides that a closing agent may initiate legal action to determine the rights of the parties to disputed funds if the owner disputes the release of the reserved proceeds, if the owner and broker have not agreed in writing within 5 days, and if neither the owner nor the broker have initiated a civil action.

Effect of Bill

The bill amends s. 475.711, F.S. to provide that all of the conditions specified must be met in before an action seeking adjudication of the rights of the parties to the disputed funds may be filed.

Section 13

Current Law

In civil actions involving commissions, the non-prevailing party is required to pay the costs and reasonable attorney's fees incurred in the action by the prevailing party.[4] However if a court determines that neither the owner nor the broker is the prevailing party, the costs and attorney's fees of the prevailing party and the closing agent will be divided equally between and paid by the owner and broker.[5]

Effect of Bill

The bill amends s.475.713, F.S., to revise the award of costs and attorney's fees in civil actions over a commission. Specifically, the bill provides that if a court determines that neither the owner nor the broker is the prevailing party, the costs and attorney's fees of the closing agent and the amount of any costs, recording charges, and service charges of the court of court that were deducted from the disputed reserve proceeds will be divided equally between and paid by the owner and broker.

Section 14

Effect of Bill

Amends s.475.715, F.S., to provide, when calculating the owner's net proceeds that are subject to a lien, the closing agent must subtract the amount of all prior liens, not just the ones that are paid off at closing. *Also see* section 9, above.

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[4] Section 475.713(5)(a), F.S.
[5] Section 475.713(5)(b), F.S.

Commercial Real Estate Leasing Commission Lien Act

Part IV of ch. 475, F.S. is the "Commercial Real Estate Leasing Commission Lien Act," and provides a broker in a lease transaction with the power to place a lien on an owner's interest in commercial real estate for any commission earned by a broker under a brokerage agreement. The lien is on the commercial real estate itself. The Act provides legal procedures and requirements for filing a lawsuit to enforce a lien, resolve payment of commission owed, and release parties from liens. These provisions were enacted in 2005.

Section 15

Effect of Bill

Amends s.475.719, F.S., to delete a duplicative reference.

Section 16

Current Law

A lien notice recorded under this part expires 10 years after the date of recording, unless the brokerage agreement remains effective after the expiration date of the commission notice and the broker records an extension notice.

Effect of Bill

The bill specifies that an owner remains obligated to pay a commission to the broker and deletes reference to the term of the brokerage agreement. Moreover, the bill specifies that neither the recording of a broker's lien notice or an extension nor the recording of any lis pendens[6] to foreclose a broker's lien constitutes notice to a creditor or subsequent purchaser of the existence of the lease.

Section 17

Effect of Bill

Amends s. 721.20, F.S., to correct a reference.

Advance Fees

Section 18

Current Law

Section 475.452, F.S. provides the procedures for advance fees collected by a broker in all situations. The commission is authorized to adopt rules to regulate the method of accounting to be complied with by brokers. The requirements of the section do not apply to real estate brokers who have entered into a written agreement providing how anticipated expenses are to be incurred and paid. The section also provides that anyone who violates the provisions is guilty of a misdemeanor of the first degree.

[6] Lis pendens is defined as "[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." Black's Law Dictionary 943 (7th ed. 1999).

Effect of Bill

Repeals s, 475.452, F.S., relating to the advance fees, the deposit of those fees, and accounting procedures for the fees.

Section 19

Provides an effective date of July 1, 2006.

C. SECTION DIRECTORY:

Section 1 amends s. 475.161, F.S. to a professional limited liability company to be licensed as a broker or sales associate.

Section 2 amends s. 475.181, F.S. dealing with expired licenses.

Section 3 amends s. 475.183, F.S. regarding reactivation of involuntary inactive licenses.

Section 4 amends s. 475.25, F.S. by increasing an administrative fine.

Section 5 amends s. 475.278, F.S. by deleting language in a broker disclosure agreement.

Section 6 amends s. 475.42, F.S. to correct a cross-reference.

Section 7 amends s. 475.451, F.S. relating to the retention of broker education records.

Section 8 amends s. 475.453, F.S. by limiting the disclosure documents only to brokers or sales associates who provide a rental information "list" to a prospective tenant.

Section 9 amends s. 475.701, F.S. relating to the calculation of an owner's net proceeds.

Section 10 amends s. 475.707, F.S. relating to the expiration of a commission notice.

Section 11 amends s. 475.709, F.S. regarding what conditions must be met before a closing agent may release reserved funds.

Section 12 amends s. 475.711, F.S. to provide that all of the conditions specified must be met in before an action seeking adjudication of the rights of the parties to the disputed funds may be filed.

Section 13 amends s.475.713, F.S., to correct references.

Section 14 amends s.475.715, F.S. relating to a closing agent's calculation of an owner's net proceeds.

Section 15 amends s.475.719, F.S. to delete a duplicative reference.

Section 16 amends s. 475.807, F.S. regarding an owner's obligation to pay a commission.

Section 17 amends s. 721.20, F.S., to correct a reference.

Section 18 repeals s, 475.452, F.S., relating to advance fee accounting procedures.

Section 19 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill increases the administrative responsibilities for education providers and instructors related to the retention of education documentation. There may be a minimal effect on how certain licensees structure their business entities by allowing the licensure of a limited liability company or professional limited liability company. This would enable certain licensees to take advantage of certain tax benefits available to these business entities. The bill would also enable licensee to take advantage of certain professional protections against liability.

D. FISCAL COMMENTS:

The Florida Department of Business and Professional Regulation projects, "[i]t is not possible to estimate the increase in workload but the presumption is that any increase in workload will be minimal and can be handled within existing resources."

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The Department of Business and Professional Regulation notes, the bill "may require rule making by the FREC to carry out the additional duties prescribed."

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

1 A bill to be entitled
2 An act relating to real estate profession regulation;
3 amending s. 475.161, F.S.; providing for broker associate
4 or sales associate licensure as a professional limited
5 liability company; amending s. 475.181, F.S.; revising and
6 adding conditions for licensure; amending s. 475.183,
7 F.S.; providing continuing education requirements for
8 certain license renewal; requiring the Florida Real Estate
9 Commission to prescribe certain continuing education
10 courses; amending s. 475.25, F.S.; increasing a maximum
11 disciplinary administrative fine; providing additional
12 grounds for discipline for brokers; providing filing
13 limitations for administrative complaints against sales
14 associates; requiring the Department of Business and
15 Professional Regulation or the commission to provide
16 notification to certain persons upon the department's or
17 commission's filing of a formal complaint against a
18 licensee; amending s. 475.278, F.S.; revising the required
19 information on a transaction broker notice, a single agent
20 notice, and a no brokerage relationship notice; amending
21 s. 475.42, F.S.; removing a cross-reference to conform to
22 changes made by the act; amending s. 475.451, F.S.;
23 requiring schools teaching real estate practice to keep
24 certain records and documents and make them available to
25 the department; requiring certain personnel of schools
26 teaching real estate practice to deliver course rosters to
27 the department by a certain date; specifying the
28 information required in a course roster; amending s.

29 475.453, F.S.; revising a provision relating to rental
30 information given by a broker or sales associate to a
31 prospective tenant; amending s. 475.701, F.S.; revising
32 definitions; amending s. 475.707, F.S.; revising a
33 provision relating to commission notice recording;
34 amending s. 475.709, F.S.; clarifying provisions relating
35 to claim of commission; amending s. 475.711, F.S.;
36 clarifying provisions relating to actions involving
37 disputed reserved proceeds; amending s. 475.713, F.S.;
38 revising the award of costs and attorney's fees in civil
39 actions concerning commission; amending s. 475.715, F.S.;
40 revising the method by which an owner's net proceeds are
41 computed; amending s. 475.719, F.S.; removing an exception
42 from a buyer's broker provision shielding the rights and
43 remedies available to an owner, a buyer, or a buyer's
44 broker; amending s. 475.807, F.S.; revising a provision
45 relating to the recordation of lien notices; providing
46 that the recording of a broker's lien notice or any
47 extension thereof and any lis pendens shall not constitute
48 notice of the existence of any lease; amending s. 721.20,
49 F.S.; removing a cross-reference to conform to changes
50 made by the act; repealing s. 475.452, F.S., relating to
51 advance fees, deposit, accounting, penalty, and damages;
52 providing an effective date.
53
54 Be It Enacted by the Legislature of the State of Florida:
55

56 Section 1. Section 475.161, Florida Statutes, is amended
57 to read:
58 475.161 Licensing of broker associates and sales
59 associates.--The commission shall license a broker associate or
60 sales associate as an individual or, upon the licensee providing
61 the commission with authorization from the Department of State,
62 as a professional corporation, limited liability company, or
63 professional limited liability company. A license shall be
64 issued in the licensee's legal name only and, when appropriate,
65 shall include the entity designation. This section shall not
66 operate to permit a broker associate or sales associate to
67 register or be licensed as a general partner, member, manager,
68 officer, or director of a brokerage firm under s. 475.15.
69 Section 2. Subsection (2) of section 475.181, Florida
70 Statutes, is amended to read:
71 475.181 Licensure.--
72 (2) The commission shall certify for licensure any
73 applicant who satisfies the requirements of ss. 475.17, 475.175,
74 and 475.180. The commission may refuse to certify any applicant
75 who has violated any of the provisions of s. 475.42 or who is
76 subject to discipline under s. 475.25. The application shall
77 expire 2 years ~~1 year~~ after the date received if the applicant
78 does not pass ~~fails to take~~ the appropriate examination.
79 Additionally, if an applicant does not pass the licensing
80 examination within 2 years after the successful course
81 completion date, the applicant's successful course completion is
82 invalid for licensure.

83 Section 3. Subsection (2) of section 475.183, Florida
84 Statutes, is amended to read:
85 475.183 Inactive status.--
86 (2)(a) A licensee may reactivate a license that has been
87 involuntarily inactive for 12 months or less by satisfactorily
88 completing at least 14 hours of a commission-prescribed
89 continuing education course. Notwithstanding the provisions of
90 s. 455.271, a licensee may reactivate a license that has been
91 involuntarily inactive for more than 12 months but fewer than 24
92 months by satisfactorily completing 28 hours of a commission-
93 prescribed education course.
94 (b) Any license that ~~which~~ has been involuntarily inactive
95 for more than 2 years shall automatically expire. Once a license
96 expires, it becomes null and void without any further action by
97 the commission or department. Ninety days prior to expiration of
98 the license, the department shall give notice to the licensee.
99 The commission shall prescribe by rule a fee not to exceed $100
100 for the late renewal of an involuntarily inactive license. The
101 department shall collect the current renewal fee for each
102 renewal period in which the license was involuntarily inactive
103 in addition to any applicable late renewal fee.
104 Section 4. Subsections (1) and (5) of section 475.25,
105 Florida Statutes, are amended, subsection (6) is renumbered as
106 subsection (7), and a new subsection (6) is added to that
107 section, to read:
108 475.25 Discipline.--
109 (1) The commission may deny an application for licensure,
110 registration, or permit, or renewal thereof; may place a

111 licensee, registrant, or permittee on probation; may suspend a
112 license, registration, or permit for a period not exceeding 10
113 years; may revoke a license, registration, or permit; may impose
114 an administrative fine not to exceed $5,000 ~~$1,000~~ for each
115 count or separate offense; and may issue a reprimand, and any or
116 all of the foregoing, if it finds that the licensee, registrant,
117 permittee, or applicant:
118 (a) Has violated any provision of s. 455.227(1) or s.
119 475.42. However, licensees under this part are exempt from the
120 provisions of s. 455.227(1)(i).
121 (b) Has been guilty of fraud, misrepresentation,
122 concealment, false promises, false pretenses, dishonest dealing
123 by trick, scheme, or device, culpable negligence, or breach of
124 trust in any business transaction in this state or any other
125 state, nation, or territory; has violated a duty imposed upon
126 her or him by law or by the terms of a listing contract,
127 written, oral, express, or implied, in a real estate
128 transaction; has aided, assisted, or conspired with any other
129 person engaged in any such misconduct and in furtherance
130 thereof; or has formed an intent, design, or scheme to engage in
131 any such misconduct and committed an overt act in furtherance of
132 such intent, design, or scheme. It is immaterial to the guilt of
133 the licensee that the victim or intended victim of the
134 misconduct has sustained no damage or loss; that the damage or
135 loss has been settled and paid after discovery of the
136 misconduct; or that such victim or intended victim was a
137 customer or a person in confidential relation with the licensee
138 or was an identified member of the general public.

139 (c) Has advertised property or services in a manner which
140 is fraudulent, false, deceptive, or misleading in form or
141 content. The commission may adopt rules defining methods of
142 advertising that violate this paragraph.
143 (d)1. Has failed to account or deliver to any person,
144 including a licensee under this chapter, at the time which has
145 been agreed upon or is required by law or, in the absence of a
146 fixed time, upon demand of the person entitled to such
147 accounting and delivery, any personal property such as money,
148 fund, deposit, check, draft, abstract of title, mortgage,
149 conveyance, lease, or other document or thing of value,
150 including a share of a real estate commission if a civil
151 judgment relating to the practice of the licensee's profession
152 has been obtained against the licensee and said judgment has not
153 been satisfied in accordance with the terms of the judgment
154 within a reasonable time, or any secret or illegal profit, or
155 any divisible share or portion thereof, which has come into the
156 licensee's hands and which is not the licensee's property or
157 which the licensee is not in law or equity entitled to retain
158 under the circumstances. However, if the licensee, in good
159 faith, entertains doubt as to what person is entitled to the
160 accounting and delivery of the escrowed property, or if
161 conflicting demands have been made upon the licensee for the
162 escrowed property, which property she or he still maintains in
163 her or his escrow or trust account, the licensee shall promptly
164 notify the commission of such doubts or conflicting demands and
165 shall promptly:

166 a. Request that the commission issue an escrow
167 disbursement order determining who is entitled to the escrowed
168 property;
169 b. With the consent of all parties, submit the matter to
170 arbitration;
171 c. By interpleader or otherwise, seek adjudication of the
172 matter by a court; or
173 d. With the written consent of all parties, submit the
174 matter to mediation. The department may conduct mediation or may
175 contract with public or private entities for mediation services.
176 However, the mediation process must be successfully completed
177 within 90 days following the last demand or the licensee shall
178 promptly employ one of the other escape procedures contained in
179 this section. Payment for mediation will be as agreed to in
180 writing by the parties. The department may adopt rules to
181 implement this section.
182
183 If the licensee promptly employs one of the escape procedures
184 contained herein and abides by the order or judgment resulting
185 therefrom, no administrative complaint may be filed against the
186 licensee for failure to account for, deliver, or maintain the
187 escrowed property. Under certain circumstances, which the
188 commission shall set forth by rule, a licensee may disburse
189 property from the licensee's escrow account without notifying
190 the commission or employing one of the procedures listed in sub-
191 subparagraphs a.-d. If the buyer of a residential condominium
192 unit delivers to a licensee written notice of the buyer's intent
193 to cancel the contract for sale and purchase, as authorized by

194 s. 718.503, or if the buyer of real property in good faith fails
195 to satisfy the terms in the financing clause of a contract for
196 sale and purchase, the licensee may return the escrowed property
197 to the purchaser without notifying the commission or initiating
198 any of the procedures listed in sub-subparagraphs a.-d.
199 2. Has failed to deposit money in an escrow account when
200 the licensee is the purchaser of real estate under a contract
201 where the contract requires the purchaser to place deposit money
202 in an escrow account to be applied to the purchase price if the
203 sale is consummated.
204 (e) Has violated any of the provisions of this chapter or
205 any lawful order or rule made or issued under the provisions of
206 this chapter or chapter 455.
207 (f) Has been convicted or found guilty of, or entered a
208 plea of nolo contendere to, regardless of adjudication, a crime
209 in any jurisdiction which directly relates to the activities of
210 a licensed broker or sales associate, or involves moral
211 turpitude or fraudulent or dishonest dealing. The record of a
212 conviction certified or authenticated in such form as to be
213 admissible in evidence under the laws of the state shall be
214 admissible as prima facie evidence of such guilt.
215 (g) Has had a broker's or sales associate's license
216 revoked, suspended, or otherwise acted against, or has had an
217 application for such licensure denied, by the real estate
218 licensing agency of another state, territory, or country.
219 (h) Has shared a commission with, or paid a fee or other
220 compensation to, a person not properly licensed as a broker,
221 broker associate, or sales associate under the laws of this

222 state, for the referral of real estate business, clients,
223 prospects, or customers, or for any one or more of the services
224 set forth in s. 475.01(1)(a). For the purposes of this section,
225 it is immaterial that the person to whom such payment or
226 compensation is given made the referral or performed the service
227 from within this state or elsewhere; however, a licensed broker
228 of this state may pay a referral fee or share a real estate
229 brokerage commission with a broker licensed or registered under
230 the laws of a foreign state so long as the foreign broker does
231 not violate any law of this state.
232 (i) Has become temporarily incapacitated from acting as a
233 broker or sales associate with safety to investors or those in a
234 fiduciary relation with her or him because of drunkenness, use
235 of drugs, or temporary mental derangement; but suspension of a
236 license in such a case shall be only for the period of such
237 incapacity.
238 (j) Has rendered an opinion that the title to any property
239 sold is good or merchantable, except when correctly based upon a
240 current opinion of a licensed attorney at law, or has failed to
241 advise a prospective purchaser to consult her or his attorney on
242 the merchantability of the title or to obtain title insurance.
243 (k) Has failed, if a broker, to immediately place, upon
244 receipt, any money, fund, deposit, check, or draft entrusted to
245 her or him by any person dealing with her or him as a broker in
246 escrow with a title company, banking institution, credit union,
247 or savings and loan association located and doing business in
248 this state, or to deposit such funds in a trust or escrow
249 account maintained by her or him with some bank, credit union,

250 or savings and loan association located and doing business in
251 this state, wherein the funds shall be kept until disbursement
252 thereof is properly authorized; or has failed, if a sales
253 associate, to immediately place with her or his registered
254 employer any money, fund, deposit, check, or draft entrusted to
255 her or him by any person dealing with her or him as agent of the
256 registered employer. The commission shall establish rules to
257 provide for records to be maintained by the broker and the
258 manner in which such deposits shall be made. A broker may place
259 and maintain up to $5,000 of personal or brokerage funds in the
260 broker's property management escrow account and up to $1,000 of
261 personal or brokerage funds in the broker's sales escrow
262 account. A broker shall be provided a reasonable amount of time
263 to correct escrow errors if there is no shortage of funds and
264 such errors pose no significant threat to economically harm the
265 public. It is the intent of the Legislature that, in the event
266 of legal proceedings concerning a broker's escrow account, the
267 disbursement of escrowed funds not be delayed due to any dispute
268 over the personal or brokerage funds that may be present in the
269 escrow account.
270 (l) Has made or filed a report or record which the
271 licensee knows to be false, has willfully failed to file a
272 report or record required by state or federal law, has willfully
273 impeded or obstructed such filing, or has induced another person
274 to impede or obstruct such filing; but such reports or records
275 shall include only those which are signed in the capacity of a
276 licensed broker or sales associate.

277 (m) Has obtained a license by means of fraud,
278 misrepresentation, or concealment.
279 (n) Is confined in any county jail, postadjudication; is
280 confined in any state or federal prison or mental institution;
281 is under home confinement ordered in lieu of institutional
282 confinement; or, through mental disease or deterioration, can no
283 longer safely be entrusted to competently deal with the public.
284 (o) Has been found guilty, for a second time, of any
285 misconduct that warrants her or his suspension or has been found
286 guilty of a course of conduct or practices which show that she
287 or he is so incompetent, negligent, dishonest, or untruthful
288 that the money, property, transactions, and rights of investors,
289 or those with whom she or he may sustain a confidential
290 relation, may not safely be entrusted to her or him.
291 (p) Has failed to inform the commission in writing within
292 30 days after pleading guilty or nolo contendere to, or being
293 convicted or found guilty of, any felony.
294 (q) Has violated any provision of s. 475.2755 or s.
295 475.278, including the duties owed under those sections.
296 (r) Has failed in any written listing agreement to include
297 a definite expiration date, description of the property, price
298 and terms, fee or commission, and a proper signature of the
299 principal(s); and has failed to give the principal(s) a legible,
300 signed, true and correct copy of the listing agreement within 24
301 hours of obtaining the written listing agreement. The written
302 listing agreement shall contain no provision requiring the
303 person signing the listing to notify the broker of the intention
304 to cancel the listing after such definite expiration date.

305 (s) Has had a registration suspended, revoked, or
306 otherwise acted against in any jurisdiction. The record of the
307 disciplinary action certified or authenticated in such form as
308 to be admissible in evidence under the laws of the state shall
309 be admissible as prima facie evidence of such disciplinary
310 action.
311 (t) Has violated any standard for the development or
312 communication of a real estate appraisal or other provision of
313 the Uniform Standards of Professional Appraisal Practice, as
314 defined in s. 475.611, as approved and adopted by the Appraisal
315 Standards Board of the Appraisal Foundation, as defined in s.
316 475.611. This paragraph does not apply to a real estate broker
317 or sales associate who, in the ordinary course of business,
318 performs a comparative market analysis, gives a broker price
319 opinion, or gives an opinion of value of real estate. However,
320 in no event may this comparative market analysis, broker price
321 opinion, or opinion of value of real estate be referred to as an
322 appraisal, as defined in s. 475.611.
323 (u) Has failed, if a broker, to reasonably manage or
324 supervise any broker associate or sales associate whose license
325 is affiliated with such broker.
326 (v) Has failed, if a broker, to review the brokerage's
327 trust accounting practices in order to ensure compliance with
328 this chapter.
329 (5) An administrative complaint against a broker, ~~or~~
330 broker associate, or sales associate shall ~~must~~ be filed within
331 5 years after the time of the act giving rise to the complaint

332 or within 5 years after the time the act is discovered or should
333 have been discovered with the exercise of due diligence.
334 (6) The department shall promptly notify a licensee's
335 broker or employer, as defined in this part, in writing any time
336 the department files a formal complaint against a licensee. The
337 notice required in this subsection shall be provided by the
338 commission in those instances where the commission files a
339 formal complaint against a licensee.
340 (7) ~~(6)~~ The commission shall promptly report to the proper
341 prosecuting authority any criminal violation of any statute
342 relating to the practice of a real estate profession regulated
343 by the commission.
344 Section 5. Paragraph (c) of subsection (2), paragraph (c)
345 of subsection (3), and paragraph (c) of subsection (4) of
346 section 475.278, Florida Statutes, are amended to read:
347 475.278 Authorized brokerage relationships; presumption of
348 transaction brokerage; required disclosures.--
349 (2) TRANSACTION BROKER RELATIONSHIP.--
350 (c) Contents of disclosure.--The required notice given
351 under paragraph (b) must include the following information in
352 the following form:
353
354 ~~IMPORTANT NOTICE~~
355
356 ~~FLORIDA LAW REQUIRES THAT REAL ESTATE LICENSEES PROVIDE THIS~~
357 ~~NOTICE TO POTENTIAL SELLERS AND BUYERS OF REAL ESTATE.~~
358

359 ~~You should not assume that any real estate broker or sales~~
360 ~~associate represents you unless you agree to engage a real~~
361 ~~estate licensee in an authorized brokerage relationship, either~~
362 ~~as a single agent or as a transaction broker. You are advised~~
363 ~~not to disclose any information you want to be held in~~
364 ~~confidence until you make a decision on representation.~~
365
366 TRANSACTION BROKER NOTICE
367
368 ~~FLORIDA LAW REQUIRES THAT REAL ESTATE LICENSEES OPERATING AS~~
369 ~~TRANSACTION BROKERS DISCLOSE TO BUYERS AND SELLERS THEIR ROLE~~
370 ~~AND DUTIES IN PROVIDING A LIMITED FORM OF REPRESENTATION.~~
371
372 As a transaction broker, (insert name of Real Estate Firm and
373 its Associates) , provides to you a limited form of
374 representation that includes the following duties:
375 1. Dealing honestly and fairly;
376 2. Accounting for all funds;
377 3. Using skill, care, and diligence in the transaction;
378 4. Disclosing all known facts that materially affect the
379 value of residential real property and are not readily
380 observable to the buyer;
381 5. Presenting all offers and counteroffers in a timely
382 manner, unless a party has previously directed the licensee
383 otherwise in writing;
384 6. Limited confidentiality, unless waived in writing by a
385 party. This limited confidentiality will prevent disclosure that
386 the seller will accept a price less than the asking or listed

387 price, that the buyer will pay a price greater than the price
388 submitted in a written offer, of the motivation of any party for
389 selling or buying property, that a seller or buyer will agree to
390 financing terms other than those offered, or of any other
391 information requested by a party to remain confidential; and
392 7. Any additional duties that are entered into by this or
393 by separate written agreement.
394
395 Limited representation means that a buyer or seller is not
396 responsible for the acts of the licensee. Additionally, parties
397 are giving up their rights to the undivided loyalty of the
398 licensee. This aspect of limited representation allows a
399 licensee to facilitate a real estate transaction by assisting
400 both the buyer and the seller, but a licensee will not work to
401 represent one party to the detriment of the other party when
402 acting as a transaction broker to both parties.
403

_____ _____

Date Signature

404

_____

Signature

405
406 This paragraph expires July 1, 2008.
407 (3) SINGLE AGENT RELATIONSHIP.--
408 (c) Contents of disclosure.--

409 1. Single agent duties disclosure.--The notice required
410 under subparagraph (b)1. must include the following information
411 in the following form:
412
413 ~~IMPORTANT NOTICE~~
414
415 ~~FLORIDA LAW REQUIRES THAT REAL ESTATE LICENSEES PROVIDE THIS~~
416 ~~NOTICE TO POTENTIAL SELLERS AND BUYERS OF REAL ESTATE.~~
417
418 ~~You should not assume that any real estate broker or sales~~
419 ~~associate represents you unless you agree to engage a real~~
420 ~~estate licensee in an authorized brokerage relationship, either~~
421 ~~as a single agent or as a transaction broker. You are advised~~
422 ~~not to disclose any information you want to be held in~~
423 ~~confidence until you make a decision on representation.~~
424
425 SINGLE AGENT NOTICE
426
427 FLORIDA LAW REQUIRES THAT REAL ESTATE LICENSEES OPERATING AS
428 SINGLE AGENTS DISCLOSE TO BUYERS AND SELLERS THEIR DUTIES.
429
430 As a single agent, (insert name of Real Estate Entity and
431 its Associates) owe to you the following duties:
432 1. Dealing honestly and fairly;
433 2. Loyalty;
434 3. Confidentiality;
435 4. Obedience;
436 5. Full disclosure;

437 6. Accounting for all funds;
438 7. Skill, care, and diligence in the transaction;
439 8. Presenting all offers and counteroffers in a timely
440 manner, unless a party has previously directed the licensee
441 otherwise in writing; and
442 9. Disclosing all known facts that materially affect the
443 value of residential real property and are not readily
444 observable.
445

_____ _____

Date Signature

446
447 2. Transition disclosure.--To gain the principal's written
448 consent to a change in relationship, a licensee must use the
449 following disclosure:
450
451 CONSENT TO TRANSITION TO
452 TRANSACTION BROKER
453
454 FLORIDA LAW ALLOWS REAL ESTATE LICENSEES WHO REPRESENT A BUYER
455 OR SELLER AS A SINGLE AGENT TO CHANGE FROM A SINGLE AGENT
456 RELATIONSHIP TO A TRANSACTION BROKERAGE RELATIONSHIP IN ORDER
457 FOR THE LICENSEE TO ASSIST BOTH PARTIES IN A REAL ESTATE
458 TRANSACTION BY PROVIDING A LIMITED FORM OF REPRESENTATION TO
459 BOTH THE BUYER AND THE SELLER. THIS CHANGE IN RELATIONSHIP
460 CANNOT OCCUR WITHOUT YOUR PRIOR WRITTEN CONSENT.
461

462 As a transaction broker, (insert name of Real Estate Firm and
463 its Associates) , provides to you a limited form of
464 representation that includes the following duties:
465 1. Dealing honestly and fairly;
466 2. Accounting for all funds;
467 3. Using skill, care, and diligence in the transaction;
468 4. Disclosing all known facts that materially affect the
469 value of residential real property and are not readily
470 observable to the buyer;
471 5. Presenting all offers and counteroffers in a timely
472 manner, unless a party has previously directed the licensee
473 otherwise in writing;
474 6. Limited confidentiality, unless waived in writing by a
475 party. This limited confidentiality will prevent disclosure that
476 the seller will accept a price less than the asking or listed
477 price, that the buyer will pay a price greater than the price
478 submitted in a written offer, of the motivation of any party for
479 selling or buying property, that a seller or buyer will agree to
480 financing terms other than those offered, or of any other
481 information requested by a party to remain confidential; and
482 7. Any additional duties that are entered into by this or
483 by separate written agreement.
484
485 Limited representation means that a buyer or seller is not
486 responsible for the acts of the licensee. Additionally, parties
487 are giving up their rights to the undivided loyalty of the
488 licensee. This aspect of limited representation allows a
489 licensee to facilitate a real estate transaction by assisting

490 both the buyer and the seller, but a licensee will not work to
491 represent one party to the detriment of the other party when
492 acting as a transaction broker to both parties.
493
494 _____I agree that my agent may assume the role
495 and duties of a transaction broker. [must be initialed or
496 signed]
497 (4) NO BROKERAGE RELATIONSHIP.--
498 (c) Contents of disclosure.--The notice required under
499 paragraph (b) must include the following information in the
500 following form:
501
502 ~~IMPORTANT NOTICE~~
503
504 ~~FLORIDA LAW REQUIRES THAT REAL ESTATE LICENSEES PROVIDE THIS~~
505 ~~NOTICE TO POTENTIAL SELLERS AND BUYERS OF REAL ESTATE.~~
506
507 ~~You should not assume that any real estate broker or sales~~
508 ~~associate represents you unless you agree to engage a real~~
509 ~~estate licensee in an authorized brokerage relationship, either~~
510 ~~as a single agent or as a transaction broker. You are advised~~
511 ~~not to disclose any information you want to be held in~~
512 ~~confidence until you decide on representation.~~
513
514 NO BROKERAGE RELATIONSHIP NOTICE
515

516 FLORIDA LAW REQUIRES THAT REAL ESTATE LICENSEES WHO HAVE NO
517 BROKERAGE RELATIONSHIP WITH A POTENTIAL SELLER OR BUYER DISCLOSE
518 THEIR DUTIES TO SELLERS AND BUYERS.
519
520 As a real estate licensee who has no brokerage relationship
521 with you, (insert name of Real Estate Entity and its
522 Associates) owe to you the following duties:
523
524 1. Dealing honestly and fairly;
525 2. Disclosing all known facts that materially affect the
526 value of residential real property which are not readily
527 observable to the buyer.
528 3. Accounting for all funds entrusted to the licensee.
529
530 (Date) (Signature)
531
532 Section 6. Paragraph (n) of subsection (1) of section
533 475.42, Florida Statutes, is amended to read:
534 475.42 Violations and penalties.--
535 (1) VIOLATIONS.--
536 (n) A broker or sales associate may not enter into any
537 listing or other agreement regarding her or his services in
538 connection with the resale of a timeshare period unless the
539 broker or sales associate fully and fairly discloses all
540 material aspects of the agreement to the owner of the timeshare
541 period ~~and fully complies with the provisions of s. 475.452~~.
542 Further, a broker or sales associate may not use any form of
543 contract or purchase and sale agreement in connection with the

544 resale of a timeshare period unless the contract or purchase and
545 sale agreement fully and fairly discloses all material aspects
546 of the timeshare plan and the rights and obligations of both
547 buyer and seller. The commission is authorized to adopt rules
548 pursuant to chapter 120 as necessary to implement, enforce, and
549 interpret this paragraph.
550 Section 7. Subsections (8) and (9) are added to section
551 475.451, Florida Statutes, to read:
552 475.451 Schools teaching real estate practice.--
553 (8) Beginning October 1, 2006, each person, school, or
554 institution permitted under this section is required to keep
555 registration records, course rosters, attendance records, a file
556 copy of each examination and progress test, and all student
557 answer sheets for a period of at least 3 years subsequent to the
558 beginning of each course and make them available to the
559 department for inspection and copying upon request.
560 (9)(a) Each school permitholder of a proprietary real
561 estate school, each chief administrative person of such an
562 institution, or each course sponsor shall deliver to the
563 department, in a format acceptable to the department, a copy of
564 the classroom course roster of courses that require satisfactory
565 completion of an examination no later than 30 days beyond the
566 end of the calendar month in which the course was completed.
567 (b) The course roster shall consist of the institution or
568 school name and permit number, if applicable, the instructor's
569 name and permit number, if applicable, course title, beginning
570 and ending dates of the course, number of course hours, course
571 location, if applicable, each student's full name and license

572 number, if applicable, each student's mailing address, and the
573 numerical grade each student achieved. The course roster shall
574 also include the signature of the school permitholder, the chief
575 administrative person, or the course sponsor.
576 Section 8. Subsection (1) of section 475.453, Florida
577 Statutes, is amended to read:
578 475.453 Rental information; contract or receipt; refund;
579 penalty.--
580 (1) Each broker or sales associate who ~~attempts to~~
581 ~~negotiate a rental, or who~~ furnishes a rental information list
582 to a prospective tenant, for a fee paid by the prospective
583 tenant, shall provide such prospective tenant with a contract or
584 receipt, which contract or receipt contains a provision for the
585 repayment of any amount over 25 percent of the fee to the
586 prospective tenant if the prospective tenant does not obtain a
587 rental. If the rental information list provided by the broker or
588 sales associate to a prospective tenant is not current or
589 accurate in any material respect, the full fee shall be repaid
590 to the prospective tenant upon demand. A demand from the
591 prospective tenant for the return of the fee, or any part
592 thereof, shall be made within 30 days following the day on which
593 the real estate broker or sales associate has contracted to
594 perform services to the prospective tenant. The contract or
595 receipt shall also conform to the guidelines adopted by the
596 commission in order to effect disclosure of material information
597 regarding the service to be provided to the prospective tenant.
598 Section 9. Subsections (10) and (12) of section 475.701,
599 Florida Statutes, are amended to read:

600 475.701 Definitions.--As used in this part:
601 (10) "Disputed reserved proceeds" means the portion of the
602 owner's net proceeds reserved by a closing agent under s.
603 475.709 that the owner disputes the broker's right to receive
604 ~~such reserved proceeds~~ under s. 475.709(5).
605 (12) "Owner's net proceeds" means the gross sales proceeds
606 that the owner is entitled to receive from the disposition of
607 any commercial real estate specified in a brokerage agreement,
608 less all of the following:
609 (a) The amount of ~~Any~~ money secured by ~~that is required to~~
610 ~~pay~~ any encumbrance, claim, or lien that has priority over the
611 recorded commission notice as provided in s. 475.715 ~~other than~~
612 ~~an encumbrance, claim, or lien that the buyer of the commercial~~
613 ~~real estate authorizes to remain after the disposition~~.
614 (b) Any costs incurred by the owner to close the
615 disposition, including, but not limited to, real estate transfer
616 tax, title insurance premiums, ad valorem taxes and assessments,
617 and escrow fees payable by the owner pursuant to an agreement
618 with the buyer.
619 Section 10. Subsection (3) of section 475.707, Florida
620 Statutes, is amended to read:
621 475.707 Recording commission notice; effectiveness.--
622 (3) A commission notice recorded under this part expires 1
623 year after the date of recording, unless the owner remains
624 obligated to pay a commission to the broker ~~brokerage agreement~~
625 ~~remains effective~~ after the expiration date of the commission
626 notice and the broker records an extension notice in the same
627 public records within the last 60 days before such expiration

628 date. An extension notice shall refer to the recording
629 information of the original commission notice, shall state that
630 the owner remains obligated to pay a commission to the broker
631 ~~brokerage agreement remains effective~~, and shall include the
632 information and be executed in the manner as required by s.
633 475.705(1) for the original commission notice. A timely recorded
634 extension notice shall extend the expiration date of the
635 original recorded commission notice by 1 additional year.
636 Successive extension notices may be recorded for so long as the
637 owner remains obligated to pay a commission to the broker
638 ~~brokerage agreement remains effective between the broker and the~~
639 ~~owner~~. Within 10 days after recording an extension notice, the
640 broker shall deliver a copy thereof to the owner.
641 Section 11. Subsection (6) of section 475.709, Florida
642 Statutes, is amended to read:
643 475.709 Duties of closing agent; reservation of owner's
644 net proceeds.--
645 (6) The commission claimed in the commission notice shall
646 be deemed confirmed by the owner, and the closing agent shall
647 release the reserved proceeds to the broker, if the closing
648 agent is required pursuant to subsection (1) to reserve any or
649 all of the owner's net proceeds~~,~~ and if all of the following
650 conditions have been met:
651 (a) Five days have passed after the closing.
652 (b) The owner has neither confirmed nor disputed the
653 claimed commission to the closing agent.

654 (c) The closing agent receives reasonably satisfactory
655 evidence that the broker delivered a copy of the commission
656 notice to the owner in accordance with s. 475.705.
657 Section 12. Subsection (1) of section 475.711, Florida
658 Statutes, is amended to read:
659 475.711 Interpleader or other proceedings; deposit of
660 reserved proceeds in court registry; discharge of closing agent
661 from further liability.--
662 (1) The closing agent shall, by interpleader action or
663 other legal proceeding, seek adjudication of the rights of the
664 parties with respect to disputed reserved proceeds by the county
665 court or circuit court, whichever may have jurisdiction of
666 controversies in the amount of the disputed reserved proceeds,
667 in a county where all or a portion of the commercial real estate
668 is located if, after the closing of a transaction for the
669 disposition of the commercial real estate, all of the following
670 conditions are met:
671 (a) The closing agent has reserved all or a portion of the
672 owner's net proceeds pursuant to s. 475.709 and the owner
673 disputes the release to the broker of all or any portion of the
674 reserved proceeds.
675 (b) The owner and the broker have not agreed in writing,
676 within 5 days after the closing, regarding the closing agent's
677 release of the disputed reserved proceeds.
678 (c) Neither the owner nor the broker have commenced a
679 civil action to determine the rights of the parties with respect
680 to the disputed reserved proceeds.

681 Section 13. Subsection (5) of section 475.713, Florida
682 Statutes, is amended to read:
683 475.713 Civil action concerning commission; order to show
684 cause; hearing; release of proceeds; award of costs and
685 attorney's fees.--
686 (5)(a) In a civil action commenced by the owner or the
687 broker under this section or in an interpleader action or other
688 proceeding commenced by the closing agent under s. 475.711, the
689 owner or the broker that is not the prevailing party shall be
690 required to pay:
691 1. The costs and reasonable attorney's fees incurred in
692 the action by the prevailing party.
693 2. The costs and reasonable attorney's fees incurred in
694 the action by the closing agent.
695 3. The amount of any costs, recording charges, and service
696 charges of the clerk of court that were deducted from the
697 disputed reserved proceeds under s. 475.711(2) in determining
698 the net amount thereof deposited into the registry of the court.
699 (b) If the court determines that neither the owner nor the
700 broker is the prevailing party, the amounts set forth in
701 subparagraphs (a)2.~~1.~~ and 3.~~2.~~ shall be divided equally between
702 and paid by the owner and the broker.
703 Section 14. Section 475.715, Florida Statutes, is amended
704 to read:
705 475.715 Priority of recorded commission notice.--All
706 statutory liens, consensual liens, mortgages, deeds of trust,
707 assignments of rents, and other encumbrances, including all
708 advances or charges made or accruing thereunder, whether

709 voluntary or obligatory, and all modifications, extensions,
710 renewals, and replacements thereof, recorded prior to the
711 recording of a commission notice pursuant to the provisions of
712 s. 475.707, have priority over the commission notice. The
713 closing agent shall compute the owner's net proceeds by
714 subtracting from the gross sales proceeds~~, and~~ the amount
715 required to discharge any such prior recorded lien and the
716 amount of money secured by any such prior recorded lien that
717 ~~liens shall be subtracted from gross sales proceeds in computing~~
718 ~~the owner's net proceeds unless~~ the buyer permits ~~the same~~ to
719 remain a lien against the title to the commercial real estate. A
720 prior recorded lien includes, without limitation, a valid
721 construction lien claim that is recorded after the recording of
722 the broker's commission notice but which relates back to a
723 notice of commencement recorded under s. 713.13 prior to the
724 recording date of the broker's commission notice.
725 Section 15. Subsection (3) of section 475.719, Florida
726 Statutes, is amended to read:
727 475.719 Buyer's broker.--As used in this section, the term
728 "buyer's broker" means a broker that is entitled to receive
729 payment from the buyer of commercial real estate of any fee or
730 other compensation for licensed services, as specified in a
731 written contract made between the buyer and the broker on or
732 after the effective date of this act relating to the buyer's
733 purchase of the commercial real estate.
734 (3) No such notice given by the buyer's broker pursuant to
735 subsection (2) shall constitute a tortious interference with the
736 sale or disposition or financing of the commercial real estate~~,~~

737 ~~except this section shall not affect the rights and remedies~~
738 ~~otherwise available to the owner, the buyer, or the buyer's~~
739 ~~broker under other applicable law~~.
740 Section 16. Paragraph (b) of subsection (8) of section
741 475.807, Florida Statutes, is amended, and subsection (9) is
742 added to that section, to read:
743 475.807 Recording lien notice; effectiveness.--
744 (8)
745 (b) To the extent that a lien notice recorded by a broker
746 under this part claims an automatic renewal commission that is
747 earned but not then payable, the lien notice expires 10 years
748 after the date of recording, unless within that time the broker
749 commences an action to foreclose the lien under s. 475.809 and
750 records a notice of lis pendens in the public records of the
751 county where the lien notice was recorded. If the owner remains
752 obligated to pay a commission to the broker ~~brokerage agreement~~
753 ~~remains effective~~, the broker may extend the expiration date of
754 a lien notice for an automatic renewal commission by recording
755 an extension notice in the same public records within the last 6
756 months before such expiration date. An extension notice shall
757 refer to the recording information of the original lien notice,
758 shall state that the owner remains obligated to pay a commission
759 to the broker ~~brokerage agreement remains effective~~, and shall
760 include the same information and be executed in the same manner
761 as required by s. 475.805(1) for the original lien notice. A
762 timely recorded extension notice shall extend the expiration
763 date of the original recorded lien notice by 10 additional
764 years. Successive extension notices may be recorded for so long

765 as the owner remains obligated to pay a commission to the broker
766 ~~brokerage agreement remains effective between the broker and the~~
767 ~~owner~~. Within 10 days after recording an extension notice, the
768 broker shall deliver a copy thereof to the owner.
769 (9) Neither the recording of a broker's lien notice or any
770 extension thereof nor the recording of any lis pendens to
771 foreclose a broker's lien thereunder shall constitute notice to
772 any creditor or subsequent purchaser pursuant to s. 695.01 or
773 chapter 712 of the existence of any lease described in the lien
774 notice, extension notice, or lis pendens.
775 Section 17. Subsection (6) of section 721.20, Florida
776 Statutes, is amended to read:
777 721.20 Licensing requirements; suspension or revocation of
778 license; exceptions to applicability; collection of advance fees
779 for listings unlawful.--
780 (6) ~~Notwithstanding the provisions of s. 475.452,~~ It is
781 unlawful for any real estate broker, broker associate, or sales
782 associate to collect any advance fee for the listing of any
783 timeshare estate or timeshare license.
784 Section 18. Section 475.452, Florida Statutes, is
785 repealed.
786 Section 19. This act shall take effect July 1, 2006.

HB 1077

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1077 CS Motor Vehicle Dealers
SPONSOR(S): Russell
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2682

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Transportation Committee	13 Y, 0 N, w/CS	Pugh	Miller
2) Civil Justice Committee		Blalock	Bond
3) State Infrastructure Council			
4)			
5)			

SUMMARY ANALYSIS

A manufacturer, distributor, or importer of motor vehicles must have a license in order to conduct business in Florida. Manufacturers, distributors, and importers enter into contractual agreements with franchised motor vehicle dealers to sell particular vehicles which they manufacture, distribute, or import. A franchised motor vehicle dealer is any person who engages in the business of repairing, servicing, buying, selling, or dealing in motor vehicles pursuant to an agreement between a manufacturer, distributor, or importer, and a franchised motor vehicle dealer:

This bill provides that a franchised motor vehicle dealer that has been licensed continuously for 2 years and is in good standing with the Department of Highway Safety and Motor Vehicles is exempt from the pre-licensing training requirement when seeking a new franchised motor vehicle dealer license.

This bill revises the following provisions pertaining to the contractual relationship between a "licensee" (manufacturers, distributors, or importers) and a franchised motor vehicle dealer:

- Requires a licensee to repurchase certain inventory and business-related equipment from franchised motor vehicle dealers whose franchises have been terminated, and provides for sanctions if these provisions are not followed.
- Specifies new requirements for a licensed manufacturer to open or reopen a dealership without being subject to protest by motor vehicle dealers.
- Limits a licensed manufacturer's ability to prohibit a franchised dealer from selling his or her dealership to a new owner who plans to relocate it, if certain requirements are followed.
- Revises the definition of "demonstrator" vehicle.
- Provides for the measurement of geographic boundaries.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill creates additional requirements and obligations for automobile manufacturers regarding aspects of their agreements with franchised motor vehicle dealers in Florida.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Chapter 320, F.S., provides for the licensing of automobile dealers and automobile manufacturers and regulates the franchise relationship between franchised dealers and the manufacturers. Section 320.605, F.S., states:

> It is the intent of the Legislature to protect the public health, safety, and welfare of citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers.

Section 320.27, F.S. defines a "franchised motor vehicle dealer" as "any person engaged in the business of buying, selling, or dealing in motor vehicles or offering or displaying motor vehicles for sale at wholesale or retail, or who may service and repair motor vehicles pursuant to an agreement as defined in s. 320.60(1)." Section 320.27(4), F.S., provides the requirements that must be met in order for a franchised motor vehicle dealer to receive a license certificate, which must be renewed every 2 years.

Section 320.642, F.S., provides that a dealer who seeks to establish another motor vehicle dealership or relocate a dealership to a location within a community where the same line-make vehicle is presently represented must give written notice by certified mail to the Department of Highway Safety and Motor Vehicles (DHSMV).

Manufacturers, distributors, and importers enter into contractual agreements with franchised motor vehicle dealers to sell particular vehicles which they manufacture, distribute, or import. The requirements regulating the business relationship between franchised motor vehicle dealers and automobile manufacturers, distributors, and importers are primarily in ss. 320.60 -320.071, F.S. These sections of law specify:

- The conditions and situations under which the DHSMV may deny, suspend, or revoke a vehicle manufacturer's license;
- The process, timing, and notice requirements for licensed manufacturers wanting to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the DHSMV may deny such a change;
- The procedures a licensed manufacturer must follow if it wants to add a dealership in an area already served by a franchised dealer, the protest process, and the DHSMV's role in these circumstances;
- The circumstances under which a licensed manufacturer, distributor, or importer may temporarily operate as a licensed vehicle dealer;
- Amounts of damages and fines that can be assessed against licensed manufacturers in violation of statutes;
- The ability of licensed vehicle dealers to seek administrative hearings; and
- DHSMV's authority to promulgate rules to implement these sections of law.

Effect of Bill

This bill amends s. 320.27(4), F.S., to provide that a franchised motor vehicle dealer that has been licensed continuously for 2 years and is in good standing with the Department of Highway Safety and Motor Vehicles is exempt from the pre-licensing training requirement when seeking a new franchise motor vehicle dealer license.

This bill amends s. 320.60(3), F.S., to clarify the existing definition of "demonstrator" by specifying that new vehicles which have been "driven" by prospective customers qualify as demonstrators.

This bill amends s. 320.64, F.S., to create a new cause for a licensee to have its license denied, suspended, or revoked by DHSMV. A licensee can have its license denied, suspended, or revoked by DHSMV for failing to repurchase, within a specific time frame, certain vehicles and other property from a dealer upon the voluntary or involuntary termination of that dealer's franchise. Specifically, licensed manufacturers would be required to:

- Buy back, at net cost, new vehicles with a mileage of 2,000 miles or less, not counting the mileage placed on the vehicle before it was delivered to the dealer;
- Repay the cost of new, unused, undamaged, and unsold parts and accessories in their original packaging and in unbroken lots, with exceptions for sheet metal;
- Pay fair market value for signs, special tools, and other equipment that meet certain conditions; and
- Pay the costs related to packing, storing, loading and shipping these items eligible for repurchase.

The dealer would have 90 days to return the property to the manufacturer, who would have 60 days upon receipt of the items to pay the dealer. These repurchase provisions do not apply in cases where the dealer's franchise is being terminated as a result of dealer selling his or her assets or stock.

This bill amends s. 320.642(1), F.S., to remove the requirement that notice must be sent to DHSMV by "certified mail".

This bill amends s. 320.642(5), F.S., to make it more difficult for a licensee to relocate an existing franchised dealership, and then open a new dealership at the old location without notice or the opportunity for other dealers to protest. The bill provides that the opening or reopening of the same or successor motor vehicle dealer within 12 months will not be considered an additional motor vehicle dealer subject to protest if:

- There is no motor vehicle dealer within 25 miles of the proposed location; or
- The opening or reopening is within 6 miles of the prior location and, if an existing dealer of the same line-make is located within 15 miles of the former location, the proposed location is not closer to an existing dealer of the same line-make "within 15 miles of the proposed location.

This bill also specifies that if the opening or reopening is not considered an additional motor vehicle dealer, then the manufacturer cannot open a new dealership for 2 years if it is within 4 miles of the old site.

This bill creates s. 320.642(7), F.S., to require that all measurements required for the purposes of determining the locations of existing and proposed new dealerships be based on the "geometric centroid." "Geometric centroid" is a mathematical term that basically means the center point of, in this case, the dealership's property.

This bill creates s. 320.642(8), F.S., to provide that DHSMV is not obligated to determine the accuracy of any distance asserted by any party in a notice submitted to it. Any dispute concerning a distance measurement must be resolved by a hearing conducted in accordance with the Administrative Procedures Act.

C. SECTION DIRECTORY:

Section 1 amends s. 320.27, F.S., to provide that under certain circumstances a motor vehicle dealer is exempt from the pre-licensing training requirement when seeking to renew a certification license.

Section 2 amends s. 320.60, F.S., to amend the definition of "demonstrator."

Section 3 amends s. 320.64, F.S., to specify the types of costs owed to a motor vehicle dealer whose contract has been terminated by a manufacturer.

Section 4 amends s. 320.642, F.S., to amend criteria determining when a proposed opening or reopening of a motor vehicle dealership is subject to protest.

Section 5 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill amends s. 320.642, F.S., by removing a provision requiring licensees to give certain notices to DHSMV by certified mail. The cost of certified mail according to the USPS is $2.40 in addition to postage. Therefore, this bill will save licensees that must give notice under s. 360.642(1), F.S., $2.40 per mailing.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At its March 14, 2006, meeting, the House Transportation Committee adopted a strike-all amendment to conform to the Senate companion. The amendment made the following revisions to the original bill:

- It amended s.320.27, F.S., to delete the requirement that applicants for new franchised dealer licenses attend training seminars if they have held an existing license continuously for the past two years and are in good standing with the DHSMV.
- It amended s.320.642, F.S., to specify that the DHSMV is not obligated to check the accuracy of the measurements in the applications, and that any dispute about distance measurements in an application shall be resolved by an administrative hearing in accordance with ss. 120.569 and 120.57, F.S.
- It deleted the proposed changes to s. 320.643, F.S., related to criteria and circumstances in which a licensed manufacturer can prohibit a franchised dealer from selling his or her dealership to a new owner who plans to relocate it.

The bill was then reported favorably with a committee substitute.

CHAMBER ACTION

1 The Transportation Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to motor vehicle dealers; amending s.
7 320.27, F.S.; exempting certain applicants for a new
8 franchised motor vehicle dealer license from certain
9 training requirements; amending s. 320.60, F.S.; revising
10 the definition of "demonstrator" for purposes of
11 provisions relating to manufacturing, importing, and
12 distributing motor vehicles; amending s. 320.64, F.S.;
13 prohibiting specified licensees from failing to pay
14 certain compensation amounts to a motor vehicle dealer
15 after termination of the dealer's franchise agreement;
16 providing exceptions; providing procedures for payment of
17 the compensation amounts; providing for certain remedies,
18 procedures, and rights of recovery; amending s. 320.642,
19 F.S.; deleting a requirement that certain notices be sent
20 by certified mail; revising conditions under which an
21 opening or reopening of the same or a successor dealer
22 within 12 months is not considered an additional dealer
23 subject to protest; prohibiting for a certain time

24 proposals for a dealer of the same line-make after the
25 opening or reopening of the dealer; providing criteria for
26 measurements of distance between dealer locations;
27 providing that the Department of Highway Safety and Motor
28 Vehicles is not obligated to determine the accuracy of any
29 distance submitted in a notice; providing for resolution
30 of disputed distances by a hearing in accordance with
31 specified provisions; providing an effective date.
32
33 Be It Enacted by the Legislature of the State of Florida:
34
35 Section 1. Paragraph (a) of subsection (4) of section
36 320.27, Florida Statutes, is amended to read:
37 320.27 Motor vehicle dealers.--
38 (4) LICENSE CERTIFICATE.--
39 (a) A license certificate shall be issued by the
40 department in accordance with such application when the
41 application is regular in form and in compliance with the
42 provisions of this section. The license certificate may be in
43 the form of a document or a computerized card as determined by
44 the department. The actual cost of each original, additional, or
45 replacement computerized card shall be borne by the licensee and
46 is in addition to the fee for licensure. Such license, when so
47 issued, entitles the licensee to carry on and conduct the
48 business of a motor vehicle dealer. Each license issued to a
49 franchise motor vehicle dealer expires annually on December 31
50 unless revoked or suspended prior to that date. Each license
51 issued to an independent or wholesale dealer or auction expires

52 annually on April 30 unless revoked or suspended prior to that
53 date. Not less than 60 days prior to the license expiration
54 date, the department shall deliver or mail to each licensee the
55 necessary renewal forms. Each independent dealer shall certify
56 that the dealer principal (owner, partner, officer of the
57 corporation, or director) has completed 8 hours of continuing
58 education prior to filing the renewal forms with the department.
59 Such certification shall be filed once every 2 years commencing
60 with the 2006 renewal period. The continuing education shall
61 include at least 2 hours of legal or legislative issues, 1 hour
62 of department issues, and 5 hours of relevant motor vehicle
63 industry topics. Continuing education shall be provided by
64 dealer schools licensed under paragraph (b) either in a
65 classroom setting or by correspondence. Such schools shall
66 provide certificates of completion to the department and the
67 customer which shall be filed with the license renewal form, and
68 such schools may charge a fee for providing continuing
69 education. Any licensee who does not file his or her application
70 and fees and any other requisite documents, as required by law,
71 with the department at least 30 days prior to the license
72 expiration date shall cease to engage in business as a motor
73 vehicle dealer on the license expiration date. A renewal filed
74 with the department within 45 days after the expiration date
75 shall be accompanied by a delinquent fee of $100. Thereafter, a
76 new application is required, accompanied by the initial license
77 fee. A license certificate duly issued by the department may be
78 modified by endorsement to show a change in the name of the
79 licensee, provided, as shown by affidavit of the licensee, the

80 majority ownership interest of the licensee has not changed or
81 the name of the person appearing as franchisee on the sales and
82 service agreement has not changed. Modification of a license
83 certificate to show any name change as herein provided shall not
84 require initial licensure or reissuance of dealer tags; however,
85 any dealer obtaining a name change shall transact all business
86 in and be properly identified by that name. All documents
87 relative to licensure shall reflect the new name. In the case of
88 a franchise dealer, the name change shall be approved by the
89 manufacturer, distributor, or importer. A licensee applying for
90 a name change endorsement shall pay a fee of $25 which fee shall
91 apply to the change in the name of a main location and all
92 additional locations licensed under the provisions of subsection
93 (5). Each initial license application received by the department
94 shall be accompanied by verification that, within the preceding
95 6 months, the applicant, or one or more of his or her designated
96 employees, has attended a training and information seminar
97 conducted by a licensed motor vehicle dealer training school.
98 Any applicant for a new franchised motor vehicle dealer license
99 who has held a valid franchised motor vehicle dealer license
100 continuously for the past 2 years and who remains in good
101 standing with the department is exempt from the prelicensing
102 training requirement. Such seminar shall include, but is not
103 limited to, statutory dealer requirements, which requirements
104 include required bookkeeping and recordkeeping procedures,
105 requirements for the collection of sales and use taxes, and such
106 other information that in the opinion of the department will

107 promote good business practices. No seminar may exceed 8 hours
108 in length.
109 Section 2. Subsection (3) of section 320.60, Florida
110 Statutes, is amended to read:
111 320.60 Definitions for ss. 320.61-320.70.--Whenever used
112 in ss. 320.61-320.70, unless the context otherwise requires, the
113 following words and terms have the following meanings:
114 (3) "Demonstrator" means any new motor vehicle that ~~which~~
115 is carried on the records of the dealer as a demonstrator and is
116 used by, being inspected or driven by the dealer or his or her
117 employees, or driven by prospective customers for the purpose of
118 demonstrating vehicle characteristics in the sale or display of
119 motor vehicles sold by the dealer.
120 Section 3. Subsection (36) is added to section 320.64,
121 Florida Statutes, to read:
122 320.64 Denial, suspension, or revocation of license;
123 grounds.--A license of a licensee under s. 320.61 may be denied,
124 suspended, or revoked within the entire state or at any specific
125 location or locations within the state at which the applicant or
126 licensee engages or proposes to engage in business, upon proof
127 that the section was violated with sufficient frequency to
128 establish a pattern of wrongdoing, and a licensee or applicant
129 shall be liable for claims and remedies provided in ss. 320.695
130 and 320.697 for any violation of any of the following
131 provisions. A licensee is prohibited from committing the
132 following acts:
133 (36)(a) Notwithstanding the terms of any franchise
134 agreement, in addition to any other statutory or contractual

135 rights of recovery after the voluntary or involuntary
136 termination of a franchise, failing to pay the motor vehicle
137 dealer, within 90 days after the effective date of the
138 termination, cancellation, or nonrenewal, the following amounts:
139 1. The net cost paid by the dealer for each new motor
140 vehicle in the dealer's inventory with mileage of 2,000 miles or
141 less, exclusive of mileage placed on the vehicle before it was
142 delivered to the dealer.
143 2. The current price charged for each new, unused,
144 undamaged, or unsold part or accessory that:
145 a. Is in the current parts catalogue and is still in the
146 original, resalable merchandising package and in an unbroken
147 lot, except that sheet metal may be in a comparable substitute
148 for the original package; and
149 b. Was purchased by the dealer directly from the
150 manufacturer or distributor or from an outgoing authorized
151 dealer as a part of the dealer's initial inventory.
152 3. The fair market value of each undamaged sign owned by
153 the dealer which bears a trademark or trade name used or claimed
154 by the applicant or licensee or its representative which was
155 purchased from or at the request of the applicant or licensee or
156 its representative.
157 4. The fair market value of all special tools, data
158 processing equipment, and automotive service equipment owned by
159 the dealer which:
160 a. Were recommended in writing by the applicant or
161 licensee or its representative and designated as special tools
162 and equipment;

163 b. Were purchased from or at the request of the applicant
164 or licensee or its representative; and
165 c. Are in usable and good condition except for reasonable
166 wear and tear.
167 5. The cost of transporting, handling, packing, storing,
168 and loading any property subject to repurchase under this
169 section.
170 (b) This subsection does not apply to a termination,
171 cancellation, or nonrenewal that is implemented as a result of
172 the sale of the assets or stock of the dealer. The dealer shall
173 return the property listed in this subsection to the licensee
174 within 90 days after the effective date of the termination,
175 cancellation, or nonrenewal. The licensee shall supply the
176 dealer with reasonable instructions regarding the method by
177 which the dealer must return the property. The compensation for
178 the property shall be paid by the licensee within 60 days after
179 the tender of inventory and other items, if the dealer has clear
180 title to the inventory and other items and is in a position to
181 convey that title to the manufacturer or distributor. If the
182 inventory or other items are subject to a security interest, the
183 licensee may make payment jointly to the dealer and the holder
184 of the security interest.
185
186 A motor vehicle dealer who can demonstrate that a violation of,
187 or failure to comply with, any of the preceding provisions by an
188 applicant or licensee will or can adversely and pecuniarily
189 affect the complaining dealer, shall be entitled to pursue all

190 of the remedies, procedures, and rights of recovery available
191 under ss. 320.695 and 320.697.
192 Section 4. Subsections (1) and (5) of section 320.642,
193 Florida Statutes, are amended, and subsections (7) and (8) are
194 added to that section, to read:
195 320.642 Dealer licenses in areas previously served;
196 procedure.--
197 (1) Any licensee who proposes to establish an additional
198 motor vehicle dealership or permit the relocation of an existing
199 dealer to a location within a community or territory where the
200 same line-make vehicle is presently represented by a franchised
201 motor vehicle dealer or dealers shall give written notice of its
202 intention ~~by certified mail~~ to the department. Such notice shall
203 state:
204 (a) The specific location at which the additional or
205 relocated motor vehicle dealership will be established.
206 (b) The date on or after which the licensee intends to be
207 engaged in business with the additional or relocated motor
208 vehicle dealer at the proposed location.
209 (c) The identity of all motor vehicle dealers who are
210 franchised to sell the same line-make vehicle with licensed
211 locations in the county or any contiguous county to the county
212 where the additional or relocated motor vehicle dealer is
213 proposed to be located.
214 (d) The names and addresses of the dealer-operator and
215 principal investors in the proposed additional or relocated
216 motor vehicle dealership.
217

218 Immediately upon receipt of such notice the department shall
219 cause a notice to be published in the Florida Administrative
220 Weekly. The published notice shall state that a petition or
221 complaint by any dealer with standing to protest pursuant to
222 subsection (3) must be filed not more than 30 days from the date
223 of publication of the notice in the Florida Administrative
224 Weekly. The published notice shall describe and identify the
225 proposed dealership sought to be licensed, and the department
226 shall cause a copy of the notice to be mailed to those dealers
227 identified in the licensee's notice under paragraph (c).
228 (5)(a) The opening or reopening of the same or a successor
229 motor vehicle dealer within 12 months is ~~shall~~ not ~~be~~ considered
230 an additional motor vehicle dealer subject to protest within the
231 meaning of this section, if:
232 1.~~(a)~~ The opening or reopening is within the same or an
233 adjacent county and~~,~~ is within 2 miles of the former motor
234 vehicle dealer location;~~,~~
235 2.~~(b)~~ There is no dealer within 25 miles of the proposed
236 location or the proposed location is further from each existing
237 dealer of the same line-make than the prior location is from
238 each dealer of the same line-make within 25 miles of the new
239 location;~~,~~
240 3.~~(c)~~ The opening or reopening is within 6 miles of the
241 prior location and, if any existing motor vehicle dealer of the
242 same line-make is located within 15 miles of the former
243 location, the proposed location is no closer to any existing
244 dealer of the same line-make within 15 miles of the proposed
245 location;~~,~~ or

246 4. ~~(d)~~ The opening or reopening is within 6 miles of the
247 prior location and, if all existing motor vehicle dealers of the
248 same line-make are beyond 15 miles of the former location, the
249 proposed location is further than 15 miles from any existing
250 motor vehicle dealer of the same line-make.
251 (b) Any other such opening or reopening shall constitute
252 an additional motor vehicle dealer within the meaning of this
253 section.
254 (c) If a motor vehicle dealer has been opened or reopened
255 pursuant to this subsection, the licensee may not propose a
256 motor vehicle dealer of the same line-make to be located within
257 4 miles of the previous location of such dealer for 2 years
258 after the date the relocated dealership opens.
259 (7) Measurements of the distance between proposed or
260 existing dealer locations required by this section shall be
261 taken from the geometric centroid of the property that
262 encompasses all of the existing or proposed motor vehicle dealer
263 operations.
264 (8) The department shall not be obligated to determine the
265 accuracy of any distance asserted by any party in a notice
266 submitted to it. Any dispute concerning a distance measurement
267 asserted by a party shall be resolved by a hearing conducted in
268 accordance with ss. 120.569 and 120.57.
269 Section 5. This act shall take effect July 1, 2006.

HB 1341

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1341 Fiduciary Lawyer-Client Privilege
SPONSOR(S): Joyner
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2190

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill creates the fiduciary lawyer-client privilege. This privilege provides that when a client acts as a fiduciary any communication between the client and lawyers is privileged and protected from disclosure.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill serves the purpose of fostering a confidential relationship between lawyer and client that enables the lawyer to understand and accurately assess the client's situation and render frank and unvarnished advice.

B. EFFECT OF PROPOSED CHANGES:

Current Law

The Lawyer-Client Privilege[1]

Florida recognizes a lawyer-client privilege applicable to confidential communications between a lawyer and client.[2] The lawyer-client privilege is the oldest of the privileges for confidential communications known in the common law and existed as part of the common law of Florida until its codification.[3] The privilege was first codified in 1976 and remains so to this day.

A client is defined in the evidence code as "any person, public officer, corporation, association or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer."[4] A person, bank, or trust company who serves as a trustee or personal representative is unquestionably a "client" as that term is defined.[5]

Fiduciary Obligations Owed to Beneficiary

A trustee is charged with a fundamental duty to administer a trust diligently for the benefit of the beneficiaries.[6] A personal representative has a similar duty to administer an estate diligently for the benefit of the beneficiaries and creditors.[7] A trustee has an array of duties owed to a beneficiary in addition to the duties of good faith and loyalty in administering the trust for the benefit of the beneficiaries.[8] Because the fiduciary's efforts must be driven and circumscribed by these duties, courts have come to differing conclusions about whether the lawyer-client privilege overrides the fiduciary's duties to a beneficiary.

The existing statute does not expressly address whether the privilege applies to communications between a client, who is acting as a fiduciary by a written instrument in administering fiduciary property, and an attorney. A few recent cases on this issue are discussed below.

In *Tripp v. Salkovitz*, 919 So. 2d 716 (Fla. 2d DCA 2006) the court ruled that the trial court could not entirely preclude the guardian and the attorney from raising the attorney-client privilege at a deposition.

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[1] The bulk of this analysis is derived from materials graciously supplied by the Real Property Probate & Trust Law Section of the Florida Bar and a Florida Bar Journal article by Jack A. Falk, Jr. entitled *The Fiduciary's Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*
[2] Section 90.502, F.S.
[3] Jack A. Falk, Jr., *The Fiduciary's Lawyer-Client Privilege: Does It Protect Communications from Discovery by a Beneficiary?*, Florida Bar Journal, Volume LXXVII, No. 3, 18 citing (*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *American Tobacco Co. v. State*, 697 So. 2d 1249, 1252 (Fla. 4th D.C.A. 1997); s. 2.01, F.S. (1849); *Keir v. State*, 152 Fla. 389, 11 So. 2d 886, 888 (1943)).
[4] Section 90.502(1)(b), F.S.
[5] Falk, *supra*.
[6] Section 737.301, F.S.
[7] Section 733.602, F.S.
[8] Falk, citing (*Griffin v. Griffin*, 463 So. 2d 569 (Fla. 1st D.C.A. 1985); *Van Dusen v. Southeast First Nat'l Bank of Miami*, 478 So. 2d 82, 92 (Fla. 3d D.C.A. 1985) ("The duty of loyalty owed by trustees is of the highest order.")).

Furthermore, *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. 2d DCA 2004), states that if the beneficiary is the person "who will ultimately benefit from the legal work" the fiduciary has instructed the attorney to perform, the beneficiary may be considered the "real client." When the beneficiary is determined to be the real client, the beneficiary holds the privilege and is entitled to communications between the fiduciary and the attorney.

Other cases have discussed the fiduciary's lawyer-client privilege in administering fiduciary property. The Second District Court of Appeal appeared to embrace an exception to the privilege in *Barnett Banks Trust Co. v. Compson,* 629 So. 2d 849 (Fla. 2d DCA 1993), even though the court refused to permit the beneficiary access to communications between the fiduciary and lawyer. There, the court employed the analysis set forth in the seminal case decided in 1976 in Delaware, *Riggs National Bank v. Zimmer*, 355 A. 2d 709 (Del. Ch. 1976), which held that communications between the fiduciary and lawyer about administering fiduciary property were not privileged. The *Compson* court did not permit the beneficiary to avail herself of the rule in *Riggs* because she sought to deplete, rather than return, trust assets. Her interests in the litigation were found to be antagonistic to the trust, unlike the beneficiary in *Riggs*.

The First District Court of Appeal noted in *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 185-86 (Fla. 1st DCA 2001), that usually a lawyer retained by a trust represents the trustee, not the beneficiary. *See also Compson*, 629 So. 2d at 851. The court in *In re Estate of Gory*, 570 So. 2d 1381 (Fla. 4th DCA 1990), addressed an alleged conflict involving the personal representative's lawyer and determined that the lawyer did not have a lawyer-client relationship with the beneficiaries.

The court in *First Union Nat'l Bank v. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001), side-stepped a determination of whether to apply an exception to the fiduciary privilege by instead applying the crime fraud exception to permit discovery. The court therefore did not have to decide whether a "fiduciary exception to the attorney-client privilege existed in Florida." *Turney*, 824 So. 2d at 186.

Effect of Bill

The bill provides that communications between a fiduciary, who is acting under a written instrument to administer fiduciary property, and a lawyer, are privileged to the same extent as other clients who seek legal advice.

C. SECTION DIRECTORY:

Section 1 creates s. 90.5021, F.S.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

1 A bill to be entitled
2 An act relating to the fiduciary lawyer-client privilege;
3 creating s. 90.5021, F.S.; providing that a client acts as
4 a fiduciary when serving in certain positions; providing
5 that a communication between a lawyer and a client acting
6 as a fiduciary is privileged and protected from
7 disclosure; providing construction in application;
8 providing an effective date.
9
10 Be It Enacted by the Legislature of the State of Florida:
11
12 Section 1. Section 90.5021, Florida Statutes, is created
13 to read:
14 90.5021 Fiduciary lawyer-client privilege.--
15 (1) For the purpose of this section, a client acts as a
16 fiduciary when serving as a personal representative or a trustee
17 as defined in s. 731.201, an administrator ad litem as described
18 in s. 733.308, a curator as described in s. 733.501, a guardian
19 or guardian ad litem as defined in s. 744.102, a conservator as
20 defined in s. 710.102, or an attorney in fact as described in
21 chapter 709.
22 (2) A communication between a lawyer and a client acting
23 as a fiduciary is privileged and protected from disclosure under
24 s. 90.502 to the same extent as if the client were not acting as
25 a fiduciary. In applying s. 90.502 to a communication under this
26 section, the person or entity acting as a fiduciary is
27 considered the only, real client of the lawyer.
28 Section 2. This act shall take effect July 1, 2006.

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

HB 1527

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1527 Parental Notification of Termination of a Minor's Pregnancy
SPONSOR(S): Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Parental Notice of Abortion Act requires the physician performing or inducing the termination of the pregnancy of a minor to give at least 48 hours' actual notice to one parent or the legal guardian of the minor. If actual notice is not possible, the physician may give constructive notice by sending the notice certified mail return receipt requested. The Act permits a minor to seek a judicial waiver of the notice requirement.

This bill increases the notice requirements for a physician prior to performing or inducing the termination of the minor's pregnancy. The bill provides specific factors a court must consider in determining whether to grant a judicial waiver.

The bill increases the evidentiary threshold, to clear and convincing, that the evidence must meet before a court will permit a waiver of the notice requirement for the minor's best interest. The bill also prohibits a court from looking to the financial best interest of the minor, or the potential financial impact on the minor or her family, if she does not terminate her pregnancy in this best interest standard.

Finally, the bill increases the time limits for a court to rule on a request for judicial waiver of the notice requirement.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill increases the notice requirements for a physician to provide a pregnant minor's parent or guardian before performing or inducing the termination of the minor's pregnancy.

Empower families -- This bill provides specific factors a court must consider in determining to permit a pregnant minor to avoid notifying her parent or guardian prior to the termination of a minor's pregnancy.

B. EFFECT OF PROPOSED CHANGES:

The Florida Constitution provides in part:

> [T]he Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.[1]

The legislature has codified the requirement for notification in the "Parental Notice of Abortion Act"[2] ("Act"), which requires that a physician that intends on performing or inducing the termination of the pregnancy of a minor give notice to one of the parents of the pregnant minor before performing or inducing the termination. A physician's violation of the notice requirements is grounds for disciplinary action.[3] Alternatively, prior notice is not required in a medical emergency, or where the minor seeks and obtains a judicial waiver of the notice requirement under limited circumstances.

Actual Notice to a Parent

Section 390.01114(3), F.S., requires that the physician give at least 48 hours' actual notice to one parent or the legal guardian of the minor. Section 390.01114(2)(a), F.S., defines "actual notice" as notice "that is given directly, in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files."

This bill amends s. 390.01114(3)(a), F.S. to add that, if actual notice is given by telephone, the notice must be confirmed in writing, signed by the physician, and mailed to the last known address of the parent both by regular mail and by certified mail, return receipt requested, delivery restricted.

Constructive Notice to a Parent

If actual notice is not possible, the physician may give constructive notice by sending the notice certified mail return receipt requested.[4] Section 390.01114(2)(c), F.S., defines "constructive notice" as "notice that is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After the 72 hours have passed, delivery is deemed to have occurred."

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[1] Article X, s. 22, Fla.Const.
[2] Section 390.01114, F.S.
[3] Section 390.01114(3)(c), F.S. The applicable disciplinary provisions are found at ss. 458.331 and 459.015, F.S.
[4] Section 390.01114(3)(a), F.S.

This bill amends the definition of constructive notice in s. 390.01114(2)(c), F.S., to add a requirement that a copy of the written notice also be sent by regular mail.

Waiver of Notice - Medical Emergency

Notice is not required if a medical emergency exists and there is insufficient time to comply with the notice requirements. If a medical emergency exists, the physician may terminate the pregnancy but must document the reason for the medical necessity and provide notice after performing the procedure.

"Medical emergency" is defined as "a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function."[5]

This bill amends s. 390.01114(3)(b), F.S., to add that, in the event of a medical emergency, the physician must:

- Make reasonable attempts to contact the parent or legal guardian
- Provide notice directly, in person, or by telephone, to the parent or guardian of the minor, detailing the medical emergency and any additional risks to the minor.
- If the physician is unable to contact the parent or guardian within 24 hours after the termination, the physician must sign and mail a notice detailing the medical emergency to the parent or guardian by certified mail and by regular mail, return receipt requested, and delivery restricted to the parent or guardian.

Waiver of Notice - Prior Waiver by Parent

Section 390.01114(3)(b)2., F.S., provides that a person entitled to notice may waive the requirement of receiving notice from the physician provided the waiver is in writing.

This bill amends s. 390.01114(3)(b)2., F.S., to add a requirement that any such waiver must be specific, in writing, notarized, and dated not more than 30 days before the termination of the pregnancy.

Judicial Waiver - Jurisdiction

The Act allows a minor seeking a judicial waiver to file the petition in any circuit court within the jurisdiction of the District Court of Appeal in which she resides. There are five appellate divisions in the state. The district with the least number of counties contains 2 counties,[6] and the district with the most number of counties contains 32.[7]

This bill amends s. 390.01114(4)(a), F.S., to allow the minor to petition any circuit court in the judicial circuit that she resides in. There are 20 judicial circuits in the state, ranging in size from 1 to 7 counties.

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[5] Section 390.01114(2)(d), F.S.
[6] The Third District contains Dade and Monroe counties.
[7] The First District is bounded by Escambia County in the West, Duval County in the East, and Levy County in the South.

Judicial Waiver - Time Limits

Section 309.01114(4)(b), F.S., provides that a court must rule on a petition for judicial waiver within 48 hours unless the minor requests an extension of time.[8] If the court does not rule on the petition within the 48 hour period, the petition is granted and the notice requirement is waived.[9]

This bill amends s. 390.01114(4)(b), F.S., to provide that a court must rule on the petition within 5 days unless the minor requests an extension of time. If the court fails to rule in that 5 days and no extension has been granted, the petition is not granted and the notice requirement is not waived.

Additionally, this bill provides, if the court has failed to rule within the 5 days, the minor may immediately petition the chief judge of the circuit for a hearing within 48 hours of the expiration of the 5 day period. The chief judge must ensure that a hearing is held within 48 hours after the receipt of the minor's petition to the chief judge, and that an order granting or denying the waiver is issued with 24 hours after such hearing.

This bill also adds that a court's ruling need not be a final order if the court deems that it needs more information. In such case, the court must enter a final order within 14 days after the petition by the minor has been filed. If the petition is not granted, the minor has a right to an appeal. The appellate court must rule within 7 days after receipt of the appeal, but the appellate court may remand the case with further instructions to the trial court for a ruling within 7 days after the remand.[10] This bill specifies that the standard of review by the appellate court is "abuse of discretion," accordingly the appellate court may not base its opinion on the weight of the evidence.[11]

Judicial Waiver - Maturity

Section 309.01114(4)(c), F.S., provides that the court must issue a judicial waiver (allowing termination of the pregnancy without notice to a parent or guardian) if the court finds, by clear and convincing evidence,[12] that the minor is sufficiently mature to make the decision to terminate her pregnancy. At the hearing, the court must hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor, must provide for a written transcript, and must issue written and specific factual findings and legal conclusions.[13]

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[8] Section 390.01114(4)(b), F.S.
[9] Section 390.01114(4)(b), F.S.
[10] In the case of *In re: Doe*, 30 Fla. L. Weekly D2575 (Fla. 2nd DCA 2005), the Second District Court of Appeal concluded that the trial court had not properly prepared a final order detailing the evidence and the court's reasoning. Due to the time constrains within the Act the court ordered the immediate issuance of a judicial waiver rather than remand for a new hearing.
[11] In the case of *In re: Doe*, 31 Fla. L. Weekly D560 (Fla. 1st DCA 2006), Judge Hawkes noted in dissent:

> The majority acknowledges a trial court's findings of fact that are supported by competent, substantial evidence are due great deference. However, most of the majority opinion outweighs the facts found by the trial court to reach a different conclusion. Because appellate courts are not permitted to reweigh the trial court's factual findings, I would affirm.

[12] "Clear and convincing evidence" is described as:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Davey, 645 So. 2d 398 (Fla. 1994).
[13] Section 390.01114(4)(e), F.S.

This bill amends s. 309.01114(4)(c), F.S., to specify the factors that a court must consider when making a determination regarding maturity. The factors include: age; overall intelligence; emotional stability; credibility and demeanor as a witness; ability to accept responsibility; ability to assess the future impact of her present choices; and her ability to understand and explain the medical consequences of the abortion and apply that understanding to her decision. The court must also consider whether there has been any undue influence by another on the minor's decision to abort her pregnancy.

Judicial Waiver - Best Interest Standard

Section 309.01114(4)(d), F.S., provide that the court must issue a judicial waiver (allowing termination of the pregnancy without notice to a parent or guardian) if the court finds, by a preponderance of the evidence, that there is evidence of child abuse or sexual abuse of the minor by one or more parents or by a guardian. The court must also issue a judicial waiver if the court finds that "notification of a parent or guardian is not in the best interest" of the minor.

This bill amends s. 309.01114(4)(d), F.S., regarding the best interest standard, to require that evidence of the best interest of the minor must be "clear and convincing." The bill also limits the best interest provision to provide that it "must not include financial best interest or considerations, or the potential financial impact on the minor or her family if she does not terminate her pregnancy."[14]

State Reporting

Section 309.01114(6), F.S., requires the Supreme Court, through the office of the State Courts Administrator, to report each year by February 1st to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of petitions filed for judicial waiver for the prior year, and the timing and manner of disposal of those petitions by each circuit court.

This bill amends the reporting requirement to require that the reason for each waiver granted be included in the report.

Mandatory Child Abuse Reporting

Section 39.201, F.S., requires that any person who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare, must report such knowledge or suspicion to the Department of Children and Families. Certain professionals must give their name when making the report; that is, they cannot make an anonymous report. Judges are included in the list of such professionals. The Parental Notice of Abortion Act does not currently contain any specific requirement regarding the mandatory reporting of child abuse. The fact that a minor is pregnant will, in some instances, lead to a finding that such pregnancy is a result of abuse that warrants prosecution.

This bill creates subsection (7) in s. 309.01114, F.S., to reaffirm the requirement in current law that any person who knows or has reasonable cause to suspect that a child has been abused must report that information to the Department of Children and Families pursuant to the mandatory reporting requirements of s. 39.201, F.S.

C. SECTION DIRECTORY:

Section 1 amends s. 390.01114, F.S., relating to parental notice of the termination of a minor's pregnancy.

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[14] In the case of *In re: Doe*, 30 Fla. L. Weekly D2575 (2nd DCA 2005), the Second District Court of Appeal reversed a trial court and ordered that a minor be granted a judicial waiver. In part, the minor alleged that it was in her best interest to not notify her parents of the pregnancy because she believed that they would ostracize her from the home, thereby causing her financial harm.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   In general, parental notification laws do not violate the United States Constitution.[15]

   Florida previously enacted a statutory parental notification law. The Florida Supreme Court ruled that the law violated the right to privacy in the Florida Constitution.[16] In response to the ruling, the 2004 Legislature passed HJR 1, proposing an amendment to the Florida constitution that specifically allows the legislature to enact a statute regarding parental notification. The joint resolution, adopted by the electorate in the November 2004 general election,[17] provides:

   > ARTICLE X SECTION 22. Parental notice of termination of a minor's pregnancy.--The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23

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[15] *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2006)
[16] *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).
[17] The vote was 64.7% in favor of the amendment. See http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/2004&DATAMODE=

of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

Timeframe for Review

The bill provides that a minor seeking judicial waiver of the notice requirement may petition any circuit court in the judicial circuit in which she resides. Further, the bill provides that a court must rule on the petition within 5 days unless the minor requests an extension of time.

The bill further provides that a court's ruling need not be a final order if the court deems it needs more information, but the court must enter a final order within 14 days after the petition by the minor has been filed. If the petition is not granted, the minor has a right to an appeal. The appellate court must rule within 7 days after receipt of the appeal, but the appellate court may remand the case with further instructions to the trial court for a ruling within 7 days after the remand. The standard of review of the trial court on appeal is an abuse of discretion standard, and the trial court may not be reversed based on the weight of the evidence presented to the circuit court.

The Supreme Court in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) addressed a situation in which 5 days were permitted by the trial court in ruling on a petition for a judicial waiver, and overall the process could have taken 22 days from filing of petition to ruling by an appellate court to resolve. The Court concluded that 22 days was "plainly insufficient to invalidate the statute on its face."[18]

It may be possible under this bill for there to be 28 days from the filing of petition to final ruling by an appellate court.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

In several places in the bill regarding mailing of notice, the requirement is changed to "certified mail and by regular mail, return receipt requested, and delivery restricted to the parent or legal guardian." Return receipt service and restricted delivery services are not available for regular mail, only for certified mail. It is suggested that these provisions be amendment for clarity.

Line 135 is in the section of the bill that provides that it is the chief judge's duty to ensure a hearing is held within 48 hours of the expiration of the 5 day period (for ruling on a waiver petition). A hearing will then be held within 48 hours after the receipt of the minor's petition and an order "granted" within 24 hours after the hearing. It is unclear if this order is an order granting the petition for waiver of the notice requirement, or if this means that an order will be entered within that 24 hour timeframe. This is also true for the language in line 138.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

[18] *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990).

1 A bill to be entitled
2 An act relating to parental notification of termination of
3 a minor's pregnancy; amending s. 390.01114, F.S.; amending
4 a definition; providing procedural requirements for actual
5 notice given by telephone; providing procedural
6 requirements for certain waivers of notice; revising the
7 procedures for judicial waiver of notice; revising
8 evidentiary standards for a court determining judicial
9 waiver of notice; providing factors with which a court
10 determines whether a minor is sufficiently mature;
11 revising the best interest standard; requiring the Supreme
12 Court to include in reports reasons for judicial waiver of
13 notice; providing for the application of mandatory child
14 abuse reporting provisions; providing an effective date.
15
16 Be It Enacted by the Legislature of the State of Florida:
17
18 Section 1. Section 390.01114, Florida Statutes, is amended
19 to read:
20 390.01114 Parental Notice of Abortion Act.--
21 (1) SHORT TITLE.--This section may be cited as the
22 "Parental Notice of Abortion Act."
23 (2) DEFINITIONS.--As used in this section, the term:
24 (a) "Actual notice" means notice that is given directly,
25 in person or by telephone, to a parent or legal guardian of a
26 minor, by a physician, at least 48 hours before the inducement
27 or performance of a termination of pregnancy, and documented in
28 the minor's files.

29 (b) "Child abuse" has the same meaning as s. 39.0015(3).
30 (c) "Constructive notice" means notice that is given in
31 writing, signed by the physician, and mailed at least 72 hours
32 before the inducement or performance of the termination of
33 pregnancy, to the last known address of the parent or legal
34 guardian of the minor, by certified mail and by regular mail,
35 return receipt requested, and delivery restricted to the parent
36 or legal guardian. After the 72 hours have passed, delivery is
37 deemed to have occurred.
38 (d) "Medical emergency" means a condition that, on the
39 basis of a physician's good faith clinical judgment, so
40 complicates the medical condition of a pregnant woman as to
41 necessitate the immediate termination of her pregnancy to avert
42 her death, or for which a delay in the termination of her
43 pregnancy will create serious risk of substantial and
44 irreversible impairment of a major bodily function.
45 (e) "Sexual abuse" has the meaning ascribed in s. 39.01.
46 (f) "Minor" means a person under the age of 18 years.
47 (3) NOTIFICATION REQUIRED.--
48 (a) Actual notice shall be provided by the physician
49 performing or inducing the termination of pregnancy before the
50 performance or inducement of the termination of the pregnancy of
51 a minor. The notice may be given by a referring physician. The
52 physician who performs or induces the termination of pregnancy
53 must receive the written statement of the referring physician
54 certifying that the referring physician has given notice. If
55 actual notice is not possible after a reasonable effort has been
56 made, the physician performing or inducing the termination of

57 pregnancy or the referring physician must give constructive
58 notice. Notice given under this subsection by the physician
59 performing or inducing the termination of pregnancy must include
60 the name and address of the facility providing the termination
61 of pregnancy, the name of the physician providing notice. Notice
62 given under this subsection by a referring physician must
63 include the name and address of the facility where he or she is
64 referring the minor and the name of the physician providing
65 notice. If actual notice is provided by telephone, the physician
66 must actually speak with the parent or guardian, and must record
67 in the minor's medical file the name of the parent or guardian
68 provided notice, the phone number dialed, and the date and time
69 of the call. If constructive notice is given, the physician must
70 document that notice by placing copies of any document related
71 to the constructive notice, including, but not limited to, a
72 copy of the letter and the return receipt, in the minor's
73 medical file. Actual notice given by telephone shall be
74 confirmed in writing, signed by the physician, and mailed to the
75 last known address of the parent or legal guardian of the minor,
76 by certified mail and by regular mail, return receipt requested,
77 and delivery restricted to the parent or legal guardian.
78 (b) Notice is not required if:
79 1. In the physician's good faith clinical judgment, a
80 medical emergency exists and there is insufficient time for the
81 attending physician to comply with the notification
82 requirements. If a medical emergency exists, the physician must
83 make reasonable attempts to contact the parent or legal
84 guardian, may proceed but must document reasons for the medical

85 necessity in the patient's medical records, and must provide
86 notice directly, in person, or by telephone, to the parent or
87 legal guardian, with details of the medical emergency and any
88 additional risks to the minor. If the parent or legal guardian
89 has not been notified within 24 hours of the termination of the
90 pregnancy, the physician must provide notice in writing
91 including details of the medical emergency and any additional
92 risks to the minor, signed by the physician, to the last known
93 address of the parent or legal guardian of the minor, by
94 certified mail and by regular mail, return receipt requested,
95 and delivery restricted to the parent or legal guardian;
96 2. Notice is waived in writing by the person who is
97 entitled to notice and such waiver is notarized, dated not more
98 than 30 days before the termination of pregnancy, and contains a
99 specific waiver of the right of the parent or legal guardian to
100 notice of the minor's termination of pregnancy;
101 3. Notice is waived by the minor who is or has been
102 married or has had the disability of nonage removed under s.
103 743.015 or a similar statute of another state;
104 4. Notice is waived by the patient because the patient has
105 a minor child dependent on her; or
106 5. Notice is waived under subsection (4).
107 (c) Violation of this subsection by a physician
108 constitutes grounds for disciplinary action under s. 458.331 or
109 s. 459.015.
110 (4) PROCEDURE FOR JUDICIAL WAIVER OF NOTICE.--
111 (a) A minor may petition any circuit court in the ~~a~~
112 judicial circuit ~~within the jurisdiction of the District Court~~

113 ~~of Appeal~~ in which she resides for a waiver of the notice
114 requirements of subsection (3) and may participate in
115 proceedings on her own behalf. The petition may be filed under a
116 pseudonym or through the use of initials, as provided by court
117 rule. The petition must include a statement that the petitioner
118 is pregnant and notice has not been waived. The court shall
119 advise the minor that she has a right to court-appointed counsel
120 and shall provide her with counsel upon her request at no cost
121 to the minor.
122 (b)1. Court proceedings under this subsection must be
123 given precedence over other pending matters to the extent
124 necessary to ensure that the court reaches a decision promptly.
125 The court shall rule, and issue written findings of fact and
126 conclusions of law, within 5 days ~~48 hours~~ after the petition is
127 filed, except that the 5-day ~~48-hour~~ limitation may be extended
128 at the request of the minor. If the court fails to rule within
129 the 5-day ~~48-hour~~ period and an extension has not been
130 requested, the petition is not granted, and the notice
131 requirement is not waived. The minor may then immediately
132 petition for a hearing within 48 hours of the expiration of the
133 5-day period to the chief judge of the circuit, who must ensure
134 a hearing is held within 48 hours after receipt of the minor's
135 petition and an order granted within 24 hours after the hearing.
136 2. A court's ruling need not be a final order if the court
137 deems it needs more information, but a final order must be
138 granted within 14 days after the petition is filed. If the
139 circuit court does not grant judicial waiver of notice, the
140 minor has the right to appeal. An appellate court must rule

141 within 7 days after receipt of appeal, but a ruling may be
142 remanded with further instruction for a ruling within 7 days
143 after the remand. The reason for overturning a ruling on appeal
144 must be based on abuse of discretion by the circuit court and
145 may not be based on the weight of the evidence presented to the
146 circuit court since the proceeding is a nonadversarial
147 proceeding.
148 (c) If the court finds, by clear and convincing evidence,
149 that the minor is sufficiently mature to decide whether to
150 terminate her pregnancy, the court shall issue an order
151 authorizing the minor to consent to the performance or
152 inducement of a termination of pregnancy without the
153 notification of a parent or guardian. If the court does not make
154 the finding specified in this paragraph or paragraph (d), it
155 must dismiss the petition. Factors a court shall consider when
156 determining whether a minor is sufficiently mature include, but
157 are not limited to:
158 1. The minor's:
159 a. Age.
160 b. Overall intelligence.
161 c. Emotional stability.
162 d. Credibility and demeanor as a witness.
163 e. Ability to accept responsibility.
164 f. Ability to assess the future impact of her present
165 choices.
166 g. Ability to understand and explain the medical
167 consequences of abortion and apply that understanding to her
168 decision.

169 2. Whether there has been any undue influence by another
170 on the minor's decision to have an abortion.
171 (d) If the court finds, by a preponderance of the
172 evidence, that there is evidence of child abuse or sexual abuse
173 of the petitioner by one or both of her parents or her guardian,
174 or by clear and convincing evidence that the notification of a
175 parent or guardian is not in the best interest of the
176 petitioner, the court shall issue an order authorizing the minor
177 to consent to the performance or inducement of a termination of
178 pregnancy without the notification of a parent or guardian. The
179 best interest standard must not include financial best interest
180 or considerations, or the potential financial impact on the
181 minor or her family if she does not terminate her pregnancy. If
182 the court finds evidence of child abuse or sexual abuse of the
183 minor petitioner by any person, the court shall report the
184 evidence of child abuse or sexual abuse of the petitioner, as
185 provided in s. 39.201. If the court does not make the finding
186 specified in this paragraph or paragraph (c), it must dismiss
187 the petition.
188 (e) A court that conducts proceedings under this section
189 shall provide for a written transcript of all testimony and
190 proceedings and issue written and specific factual findings and
191 legal conclusions supporting its decision and shall order that a
192 confidential record be maintained, as required under s.
193 390.01116. At the hearing, the court shall hear evidence
194 relating to the emotional development, maturity, intellect, and
195 understanding of the minor, and all other relevant evidence. All
196 hearings under this section, including appeals, shall remain

197 confidential and closed to the public, as provided by court
198 rule.
199 (f) An expedited appeal shall be available, as the Supreme
200 Court provides by rule, to any minor to whom the circuit court
201 denies a waiver of notice. An order authorizing a termination of
202 pregnancy without notice is not subject to appeal.
203 (g) No filing fees or court costs shall be required of any
204 pregnant minor who petitions a court for a waiver of parental
205 notification under this subsection at either the trial or the
206 appellate level.
207 (h) No county shall be obligated to pay the salaries,
208 costs, or expenses of any counsel appointed by the court under
209 this subsection.
210 (5) PROCEEDINGS.--The Supreme Court is requested to adopt
211 rules and forms for petitions to ensure that proceedings under
212 subsection (4) are handled expeditiously and in a manner
213 consistent with this act. The Supreme Court is also requested to
214 adopt rules to ensure that the hearings protect the minor's
215 confidentiality and the confidentiality of the proceedings.
216 (6) REPORT.--The Supreme Court, through the Office of the
217 State Courts Administrator, shall report by February 1 of each
218 year to the Governor, the President of the Senate, and the
219 Speaker of the House of Representatives on the number of
220 petitions filed under subsection (4) for the preceding year, and
221 the timing and manner of disposal of such petitions by each
222 circuit court. <u>For each petition resulting in a waiver of</u>
223 <u>notice, the reason for the waiver shall be reported.</u>

224 (7) MANDATORY CHILD ABUSE REPORTING.--The requirements of
225 s. 39.201 relating to mandatory reports of child abuse apply to
226 this section.
227 Section 2. This act shall take effect July 1, 2006.

HB 1537

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1537 Legal Actions
SPONSOR(S): Llorente
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2298

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) Transportation & Economic Development Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

No court may preside over a case unless the court has jurisdiction over the persons and the subject matter involved. A court bases personal jurisdiction on the acts of the party involved. This bill increases the types of acts that will subject a person to the jurisdiction of Florida courts by providing that under certain circumstances a court will have personal jurisdiction of a person who enters into a contract with a choice of law agreement.

Current law provides for those individuals that can be served process on behalf of a corporation. This bill adds that the Secretary of State can be served process in the case of a domestic corporation or a registered foreign corporation if all other efforts required by statute have been exhausted.

This bill expands the scope of a "foreign judgment" to include judgments of any court that is entitled to full faith and credit in Florida.

This bill expands the types of contracts that can have Florida choice of law agreements in the contracts.

This bill appears to have an indeterminate, but likely minimal, recurring fiscal impact on state government. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the types of acts which will subject a person to the jurisdiction of Florida courts, increases the types of contracts which can have choice of law agreements in Florida, and increases the responsibilities and duties of the Secretary of State.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Section 48.193(1), F.S., provides that state courts have personal jurisdiction over any person, whether or not a citizen or resident of the state, who personally or through an agent does any of the following acts:

- Operating, conducting, engaging in, or carrying on a business in this state, or having an office or agency in this state;
- Committing a tort within the state.
- Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.
- Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.
- Contracting to insure any person, property, or risk located within this state at the time of contracting.
- Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if:
    - The defendant was engaged in solicitation or service activities within this state; or
    - Products, materials, or things processed, serviced, or manufactured by the defendant were used or consumed within this state in the ordinary course of commerce, trade, or use.

Sections 685.101 and 685.102, F.S., also pertain to the jurisdiction of Florida courts. Section 685.101, F.S., provides that any party to a contract involving at least $250,000 can agree that the law of Florida will govern whether or not the contract bears any relation to the state. This provision does not apply to any contract:

- Regarding any transaction that does not bear a substantial or reasonable relation to the state of Florida in which every party is either a resident or citizen of the United States, but not this state, or incorporated or organized under the laws of another state and does not maintain a place of business in Florida.
- For labor or employment.
- Relates to any transaction for personal, family, or household purpose, unless the contract concerns a trust where at least one trustee resides or transacts business as a trustee in this state.

Section 685.102, F.S., provides that any person can file in the state of Florida any action or proceeding against a person or entity residing or located outside this state, if the action or proceeding arises out of or relates to any contract for which a choice of the law of agreement in Florida has been made pursuant to the provisions described above in s. 685.101, F.S.

Section 48.081, F.S., provides the manner in which service of process can be served on a corporation. Service of process is the formal delivery of the first legal notice to a defendant that the defendant is

being sued. Since a corporation is not an individual that can be personally served, this section provides the individuals within a corporation that can be served on behalf of the corporation. Process can be served on the president, vice president, cashier, treasurer, secretary, general manager, any director, or business agent residing in Florida. Process may also be served on the person designated by the corporation for receipt of process, known as the "registered agent".

Section 55.502, F.S., provides for the definition of a "foreign judgement" under the "Florida Enforcement of Foreign Judgments Act". The general purpose of the Florida Enforcement of Foreign Judgments Act is to make uniform the law with respect to enforcing foreign judgments among the states enacting it. The Act provides the method by which foreign judgments, entitled to full faith and credit under constitutional standards, may become Florida judgments for enforcement purposes. Subject to the judgment debtor's right to file an action within a specified time challenging the validity of the foreign judgment, the Act permits the enforcement of the foreign judgment without the filing of a separate action. A "foreign judgment" is any judgment, decree, or order of a court of any other state or of the United States if such judgment, decree, or order is entitled to full faith and credit in this state.

Effect of Bill

This bill amends s. 48.193(1), F.S., to provide that entering into a contract where there is a choice of Florida law agreement, pursuant to s. 685.101, F.S., will subject a person to the jurisdiction of Florida courts, whether or not they are a citizen or resident of Florida.

This bill amends s. 685.101(2), F.S. to expand the types of contracts that can have choice of law agreements. This bill removes the provision that this section does not apply to "any contract regarding any transaction that does not bear a substantial or reasonable relation to the state of Florida in which every party is either a resident or citizen of the United States, but not this state, or incorporated or organized under the laws of another state and does not maintain a place of business in Florida". Therefore, parties that are not citizens or residents of Florida and whose contract is not substantially or reasonably related to Florida would be able to agree that the law of Florida will govern the contract.

This bill also amends s. 685.101(2), F.S., to remove the provision that choice of law agreements pursuant to s. 685.101, F.S., will not apply to contracts relating to any transaction for personal, family, or household purpose, "unless the contract concerns a trust where at least one trustee resides or transacts business as a trustee in this state". Therefore, it appears that a contract or agreement that concerns a trust where at least one trustee resides or transacts business as a trustee in Florida will not be allowed to have a Florida choice of law agreement.

This bill also amends ss. 685.101(4) and 685.102(3) F.S., to provide that this section applies to contracts entered into on or before June 30, 2006. This bill removes language in both sections providing that the two sections apply to "contracts entered into prior to June 27 1989, if an action or proceeding relating to the contract is commenced on or after June 27, 1989".

This bill amends s. 48.081, F.S., to provide that when all other persons that can be served process on behalf of a corporation as provided in current law are unavailable, process can be served on the Secretary of State in the case of a domestic corporation or a registered foreign corporation.

This bill amends s. 55.502, F.S., to revise the definition of a "foreign judgment". This bill provides that a foreign judgment is any judgment, decree, or order of a court of the United States or any other court that is entitled to full faith and credit in this state. The change in the definition that a foreign judgment consists of an judgment of the United States or "any other court" which is entitled to full faith and credit in this state allows judgments from courts in U.S. territories and other places under U.S. jurisdiction that are not states. Current law provides that a foreign judgment only pertains to courts of "any other state, or of the United States".

C. SECTION DIRECTORY:

Section 1 amends s. 48.081, F.S., to provide that the Secretary of State can be served process on behalf of a domestic corporation or a registered foreign corporation.

Section 2 amends s. 48.193, F.S., to provide that entering into a contract that complies meets certain requirements will subject a person to the jurisdiction of Florida courts.

Section 3 amends s. 55.502, F.S., to revise the definition of "foreign judgment".

Section 4 amends s. 685.101, F.S., to revise the types of contracts where a choice of law agreement in Florida is permitted.

Section 5 amends s. 685.102, F.S., to revise the timeframe that contracts must be entered to apply to the provisions of the section.

Section 6 provides an effective date of June 30, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill allows the Secretary of State to be served on behalf of a domestic corporation or registered foreign corporation. The filing fee for each service of process collected by the department is $8.75. This would have an indeterminate increase on state government revenues.

2. Expenditures:

   This bill, by allowing persons to serve process on the Department of State on behalf of domestic corporations and registered foreign corporations, will cause an indeterminate increase of state government expenditures, related to filing and forwarding service of process papers.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

1 A bill to be entitled
2 An act relating to legal actions; amending s. 48.081,
3 F.S.; providing for service of process on the Secretary of
4 State for certain corporations under certain
5 circumstances; amending s. 48.193, F.S.; specifying an
6 additional act subjecting a person to state court
7 jurisdiction; amending s. 55.502, F.S.; revising
8 construction of the term "foreign judgment" under the
9 Florida Enforcement of Foreign Judgments Act; amending ss.
10 685.101 and 685.102, F.S.; revising application of choice
11 of law and jurisdiction provisions to certain contracts,
12 agreements, or undertakings; providing an effective date.
13
14 Be It Enacted by the Legislature of the State of Florida:
15
16 Section 1. Subsection (1) of section 48.081, Florida
17 Statutes, is amended to read:
18 48.081 Service on corporation.--
19 (1) Process against any private corporation, domestic or
20 foreign, may be served:
21 (a) On the president or vice president, or other head of
22 the corporation;
23 (b) In the absence of any person described in paragraph
24 (a), on the cashier, treasurer, secretary, or general manager;
25 (c) In the absence of any person described in paragraph
26 (a) or paragraph (b), on any director; ~~or~~

27 (d) In the absence of any person described in paragraph
28 (a), paragraph (b), or paragraph (c), on any officer or business
29 agent residing in the state; or
30 (e) In the absence of any person described in paragraph
31 (a), paragraph (b), paragraph (c), or paragraph (d), in the case
32 of a domestic corporation or a registered foreign corporation on
33 the Secretary of State in accordance with s. 48.151.
34 Section 2. Paragraph (i) is added to subsection (1) of
35 section 48.193, Florida Statutes, to read:
36 48.193 Acts subjecting person to jurisdiction of courts of
37 state.--
38 (1) Any person, whether or not a citizen or resident of
39 this state, who personally or through an agent does any of the
40 acts enumerated in this subsection thereby submits himself or
41 herself and, if he or she is a natural person, his or her
42 personal representative to the jurisdiction of the courts of
43 this state for any cause of action arising from the doing of any
44 of the following acts:
45 (i) Entering into a contract that complies with s.
46 685.102.
47 Section 3. Subsection (1) of section 55.502, Florida
48 Statutes, is amended to read:
49 55.502 Construction of act.--
50 (1) As used in ss. 55.501-55.509, the term "foreign
51 judgment" means any judgment, decree, or order of a court ~~of any~~
52 ~~other state or~~ of the United States or any other court which ~~if~~
53 ~~such judgment, decree, or order~~ is entitled to full faith and
54 credit in this state.

55 Section 4. Section 685.101, Florida Statutes, is amended
56 to read:
57 685.101 Choice of law.--
58 (1) The parties to any contract, agreement, or
59 undertaking, contingent or otherwise, in consideration of or
60 relating to any obligation arising out of a transaction
61 involving in the aggregate not less than $250,000, the
62 equivalent thereof in any foreign currency, or services or
63 tangible or intangible property, or both, of equivalent value,
64 including a transaction otherwise covered by s. 671.105(1), may,
65 to the extent permitted under the United States Constitution,
66 agree that the law of this state will govern such contract,
67 agreement, or undertaking, the effect thereof and their rights
68 and duties thereunder, in whole or in part, whether or not such
69 contract, agreement, or undertaking bears any relation to this
70 state.
71 (2) This section does not apply to any contract,
72 agreement, or undertaking:
73 ~~(a) Regarding any transaction which does not bear a~~
74 ~~substantial or reasonable relation to this state in which every~~
75 ~~party is either or a combination of:~~
76 ~~1. A resident and citizen of the United States, but not of~~
77 ~~this state; or~~
78 ~~2. Incorporated or organized under the laws of another~~
79 ~~state and does not maintain a place of business in this state;~~
80 (a) ~~(b)~~ For labor or employment;
81 (b) ~~(c)~~ Relating to any transaction for personal, family,
82 or household purposes~~, unless such contract, agreement, or~~

83 ~~undertaking concerns a trust at least one trustee of which~~
84 ~~resides or transacts business as a trustee in this state, in~~
85 ~~which case this section applies~~;
86 (c) ~~(d)~~ To the extent provided to the contrary in s.
87 671.105(2); or
88 (d) ~~(e)~~ To the extent such contract, agreement, or
89 undertaking is otherwise covered or affected by s. 655.55.
90 (3) This section does not limit or deny the enforcement of
91 any provision respecting choice of law in any other contract,
92 agreement, or undertaking.
93 (4) This section applies to~~:~~
94 ~~(a)~~ contracts entered into on or after June 30, 2006 ~~27,~~
95 ~~1989; and~~
96 ~~(b) Contracts entered into prior to June 27, 1989, if an~~
97 ~~action or proceeding relating to such contract is commenced on~~
98 ~~or after June 27, 1989~~.
99 Section 5. Section 685.102, Florida Statutes, to read:
100 685.102 Jurisdiction.--
101 (1) Notwithstanding any law that limits the right of a
102 person to maintain an action or proceeding, any person may, to
103 the extent permitted under the United States Constitution,
104 maintain in this state an action or proceeding against any
105 person or other entity residing or located outside this state,
106 if the action or proceeding arises out of or relates to any
107 contract, agreement, or undertaking for which a choice of the
108 law of this state, in whole or in part, has been made consistent
109 with ~~pursuant to~~ s. 685.101 and which contains a provision by
110 which such person or other entity residing or located outside

111 this state agrees to submit to the jurisdiction of the courts of
112 this state.
113 (2) This section does not affect the jurisdiction of the
114 courts of this state over any action or proceeding arising out
115 of or relating to any other contract, agreement, or undertaking.
116 (3) This section applies to~~:~~
117 ~~(a)~~ contracts entered into on or after June 30, 2006 ~~27,~~
118 ~~1989; and~~
119 ~~(b) Contracts entered into prior to June 27, 1989, if an~~
120 ~~action or proceeding relating to such contract is commenced on~~
121 ~~or after June 27, 1989~~.
122 Section 6. This act shall take effect June 30, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1621 Coastal Properties Disclosure Statements
SPONSOR(S): Mayfield
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1948

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) Agriculture & Environment Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

The Department of Environmental Protection has established coastal construction control lines along the sand beaches of the state fronting on the Atlantic Ocean, Gulf of Mexico, and the Straits of Florida. The purpose of these lines is to define the portions of the beach-dune system that are subject to severe erosion, and to prohibit new construction seaward of this line unless granted a special permit by the Department of Environmental Protection.

This bill requires the seller of property subject to the coastal construction control line to present a prospective purchaser with a specific disclosure statement providing that the property is subject to erosion and to federal, state, or local regulations.

The bill also provides that failure to deliver the disclosure will not effect the enforcement of the sale and purchase contract, create a right of recession, or impair the property's title.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the disclosure requirements that a seller of coastal property must provide to a prospective purchaser.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

The Department of Environmental Protection (department) has established coastal construction control lines, as required by statute, on a county basis along the sand beaches of the state fronting on the Atlantic Ocean, Gulf of Mexico, and the Straits of Florida.[1] The purpose of these lines is to define that portion of the beach-dune system that is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions.[2] Upon the recording of the survey showing the location of a beach erosion control line, title to all lands seaward of the erosion control line are deemed to be vested in the state by right of its sovereignty.[3] Property seaward of the coastal construction control line can be subject to coastal erosion and to federal, state, or local regulations that govern coastal property, such rigid coastal protection structures[4], beach nourishment, and protection of marine turtles.

Current law requires that a seller of real property located partially or totally seaward of the coastal construction control line provide to the purchaser an affidavit, or a survey, that discloses to the purchaser the location of the coastal control line on the property being conveyed.[5] This disclosure requirement was established by the legislature to ensure that purchasers in coastal areas were aware that such lands are subject to frequent and severe fluctuations due to erosion.[6] Critical erosion affects the value of property a great deal more than is often acknowledged. The amount of depression of coastal property values due to erosion over the next twenty years for properties along the Atlantic coast of the United States has been estimated at between $1.7 and $2.7 billion.[7]

There also exists in the common law a general duty to disclose when a seller is aware of facts materially affecting value or desirability of property, which are not readily observable and are not known to the buyer.[8] Several provisions in current law require the seller to provide specific disclosure statements prior to the sale of real property. A seller must disclose:

- The amount of ad valorem taxes on real property;[9]
- Whether there are homeowners' association covenants;[10]
- Energy performance level for each new residential building[11]; and

---

[1] Section 161.053(1)(a), F.S.
[2] Section 161.053(1)(a), F.S.
[3] Section 161.191(1), F.S.
[4] Rigid coastal protection structures are man-made structures or devices in or near the coastal system for the purpose of preventing erosion of the beach or the upland dune system or to protect upland structures from the effects of coastal wave and current activity.
[5] Section 161.57(2), F.S.
[6] Section 161.57(1), F.S.
[7] *Evaluation of Erosion Hazards Summary* A Collaborative Project of The H. John Heinz III Center for Science, Economics and the Environment, (Prepared for the Federal Emergency Management Agency, Contract EMW-97-CO-0375, April 2000) at: http://www.heinzctr.org/NEW_WEB/PDF/erosnsum.pdf#zoom=100 (last visited March 16, 2006).
[8] *Johnson v. Davis*, 449 So.2d 344 (Fla. 3rd DCA 1984)
[9] Section 689.261, F.S.
[10] Section 720.401, F.S.
[11] Section 553.9085, F.S.

- The possibility of increased levels of radon gas.[12]

Contracts for the sale and purchase of a condominium, cooperative, and timeshare interest have several disclosure requirements as well. [13,14,15]

Effect of Bill

The bill amends s. 161.57, F.S., pertaining to the "Coastal Properties Disclosure Statement", to require an additional disclosure of a seller of coastal real property that is seaward of the coastal construction control line as defined s. 161.053, F.S. At or prior to closing the seller is required to disclose that:

> The property being purchased may be subject to coastal erosion and certain federal, state, or local regulations that regulate coastal property, including the delineation of the coastal construction control line, rigid coastal protection structures, beach nourishment, and the protection of marine turtles. Additional information can be obtained from the Department of Environmental Protection (DEP), including whether there are significant erosion conditions associated with the shore line of the property being purchased.

The disclosure may be set forth in the contract or in a separate writing.

The bill also provides that failure to deliver the disclosure, affidavit, or survey required by s. 161.57, F.S., shall not effect the enforcement of sale and purchase contract by either party, create a right of recession by the purchaser, or impair the property's title.

C. SECTION DIRECTORY:

Section 1 amends s. 161.57, F.S., to provide disclosure requirements for property located seaward of the coastal construction control line.

Section 2 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

---

[12] Section 404.056, F.S.
[13] Section 718.503, F.S.
[14] Section 719.503, F.S.
[15] Section 721.06, F.S.

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

1 A bill to be entitled
2 An act relating to coastal properties disclosure
3 statements; amending s. 161.57, F.S.; requiring sellers of
4 certain coastal properties to provide a disclosure
5 statement to prospective purchasers; providing language
6 for the disclosure statement; preserving the
7 enforceability of certain contracts and title conveyances;
8 providing an effective date.
9
10 Be It Enacted by the Legislature of the State of Florida:
11
12 Section 1. Section 161.57, Florida Statutes, is amended to
13 read:
14 161.57 Coastal properties disclosure statement.--
15 (1) The Legislature finds that it is necessary to ensure
16 that the purchasers of interests in real property located in
17 coastal areas partially or totally seaward of the coastal
18 construction control line as defined in s. 161.053 are fully
19 apprised of the character of the regulation of the real property
20 in such coastal areas and, in particular, that such lands are
21 subject to frequent and severe fluctuations.
22 (2) At or prior to the time a seller and a purchaser both
23 execute a contract for the sale and purchase of any interest in
24 real property located either partially or totally seaward of the
25 coastal construction control line as defined in s. 161.053, the
26 seller shall provide to the prospective purchaser the following
27 disclosure, which may be set forth in the contract or in a
28 separate writing:

29
30 The property being purchased may be subject to coastal
31 erosion and to federal, state, or local regulations that
32 govern coastal property, including the delineation of the
33 coastal construction control line, rigid coastal protection
34 structures, beach nourishment, and protection of marine
35 turtles. Additional information can be obtained from the
36 Florida Department of Environmental Protection, including
37 whether there are significant erosion conditions associated
38 with the shoreline of the property being purchased.
39
40 (3) ~~(2)~~ Unless otherwise waived in writing by the
41 purchaser, at or prior to the closing of any transaction where
42 an interest in real property located either partially or totally
43 seaward of the coastal construction control line as defined in
44 s. 161.053 is being transferred, the seller shall provide to the
45 purchaser an affidavit, or a survey meeting the requirements of
46 chapter 472, delineating the location of the coastal
47 construction control line on the property being transferred.
48 (4) A seller's failure to deliver the disclosure,
49 affidavit, or survey required by this section shall not impair
50 the enforceability of the sale and purchase contract by either
51 party, create any right of rescission by the purchaser, or
52 impair the title to any such real property conveyed by the
53 seller to the purchaser.
54 Section 2. This act shall take effect October 1, 2006.

Civil Justice Committee Amendment Packet

March 22nd, 2006
10:15 AM - 12:00 PM
24 House Office Building

Allan G. Bense
Speaker

Mark Mahon
Chair

Bill No. **0957**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	_____	

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative Anderson offered the following:
3
4 **Amendment (with title amendment)**
5 Remove everything after the enacting clause and insert:
6 Section 1. Section 712.11, Florida Statutes, is created to
7 read:
8 712.11 Covenant revitalization.--A homeowners' association
9 that is not subject to chapter 720 may use the procedures in ss.
10 720.403-720.407 to revive covenants that have lapsed pursuant to
11 this chapter.
12 Section 2. Section 718.114, Florida Statutes, is amended
13 to read:
14 718.114 Association powers.--An association has the power
15 to enter into agreements, to acquire leaseholds, memberships,
16 and other possessory or use interests in lands or facilities
17 such as country clubs, golf courses, marinas, and other
18 recreational facilities. It has this power whether or not the
19 lands or facilities are contiguous to the lands of the
20 condominium, if they are intended to provide enjoyment,
21 recreation, or other use or benefit to the unit owners. All of
22 these leaseholds, memberships, and other possessory or use

23 interests existing or created at the time of recording the
24 declaration must be stated and fully described in the
25 declaration. Subsequent to the recording of the declaration,
26 agreements acquiring these leaseholds, memberships, or other
27 possessory or use interests not entered into within 12 months
28 following the recording of the declaration shall be considered a
29 material alteration or substantial addition to the real property
30 that is association property, and the association may not
31 acquire or enter into agreements acquiring these leaseholds,
32 memberships, or other possessory or use interests except as
33 authorized by the declaration as provided in s. 718.113. The
34 declaration may provide that the rental, membership fees,
35 operations, replacements, and other expenses are common expenses
36 and may impose covenants and restrictions concerning their use
37 and may contain other provisions not inconsistent with this
38 chapter. A condominium association may conduct bingo games as
39 provided in s. 849.0931.
40 Section 3. Subsections (3) and (5) of section 720.302,
41 Florida Statutes, are amended to read:
42 720.302 Purposes, scope, and application.--
43 (3) Except as specifically provided in this chapter, this
44 chapter does not apply to:
45 (a) A community that is composed of property primarily
46 intended for commercial, industrial, or other nonresidential
47 use; or
48 (b) The commercial or industrial parcels in a community
49 that contains both residential parcels and parcels intended for
50 commercial or industrial use.
51 (5) Unless expressly stated to the contrary, corporations
52 ~~not for profit~~ that operate residential homeowners' associations
53 in this state shall be governed by and subject to chapter 617

54 and this chapter <u>or chapter 607 if incorporated under that</u>
55 <u>chapter</u>. This subsection is intended to clarify existing law.
56 Section 4. Subsections (5), (6), and (7) of section
57 720.303, Florida Statutes, are amended to read:
58 720.303 Association powers and duties; meetings of board;
59 official records; budgets; financial reporting; association
60 funds; recalls.--
61 (5) INSPECTION AND COPYING OF RECORDS.--The official
62 records shall be maintained within the state and must be open to
63 inspection and available for photocopying by members or their
64 authorized agents at reasonable times and places within 10
65 business days after receipt of a written request for access.
66 This subsection may be complied with by having a copy of the
67 official records available for inspection or copying in the
68 community. If the association has a photocopy machine available
69 where the records are maintained, it must provide parcel owners
70 with copies on request during the inspection if the entire
71 request is limited to no more than 25 pages.
72 (a) The failure of an association to provide access to the
73 records within 10 business days after receipt of a written
74 request creates a rebuttable presumption that the association
75 willfully failed to comply with this subsection.
76 (b) A member who is denied access to official records is
77 entitled to the actual damages or minimum damages for the
78 association's willful failure to comply with this subsection.
79 The minimum damages are to be $50 per calendar day up to 10
80 days, the calculation to begin on the 11th business day after
81 receipt of the written request.
82 (c) The association may adopt reasonable written rules
83 governing the frequency, time, location, notice, records to be
84 inspected, and manner of inspections, but may not impose a

85 requirement that a parcel owner demonstrate any proper purpose
86 for the inspection, state any reason for the inspection, or
87 limit a parcel owner's right to inspect records to less than one
88 8-hour business day per month. The association may impose fees
89 to cover the costs of providing copies of the official records,
90 including, without limitation, the costs of copying. The
91 association may charge up to 50 cents per page for copies made
92 on the association's photocopier. If the association does not
93 have a photocopy machine available where the records are kept,
94 or if the records requested to be copied exceed 25 pages in
95 length, the association may have copies made by an outside
96 vendor and may charge the actual cost of copying. The
97 association shall maintain an adequate number of copies of the
98 recorded governing documents, to ensure their availability to
99 members and prospective members. Notwithstanding the provisions
100 of this paragraph, the following records shall not be accessible
101 to members or parcel owners:
102 1. Any record protected by the lawyer-client privilege as
103 described in s. 90.502 and any record protected by the work-
104 product privilege, including, but not limited to, any record
105 prepared by an association attorney or prepared at the
106 attorney's express direction which reflects a mental impression,
107 conclusion, litigation strategy, or legal theory of the attorney
108 or the association and was prepared exclusively for civil or
109 criminal litigation or for adversarial administrative
110 proceedings or which was prepared in anticipation of imminent
111 civil or criminal litigation or imminent adversarial
112 administrative proceedings until the conclusion of the
113 litigation or adversarial administrative proceedings.

114 2. Information obtained by an association in connection
115 with the approval of the lease, sale, or other transfer of a
116 parcel.
117 3. Disciplinary, health, insurance, and personnel records
118 of the association's employees.
119 4. Medical records of parcel owners or community
120 residents.
121 (d) The association is not required to give a prospective
122 purchaser or lienholder information about the subdivision or the
123 association other than that required to be disclosed under this
124 chapter. It may charge the prospective purchaser, lienholder, or
125 current parcel owner or member a reasonable fee not to exceed
126 $150 to provide such information, other than information
127 required by law, plus the reasonable cost of photocopying and
128 attorney's fees incurred by the association in connection with
129 the response.
130 (e) An association is not liable for providing such
131 information in good faith pursuant to a written request if the
132 person providing the information includes a written statement in
133 substantially the following form: "The responses herein are made
134 in good faith and to the best of my ability as to their
135 accuracy."
136 (6) BUDGETS.--
137 (a) The association shall prepare an annual budget that
138 sets out the annual operating expenses. The budget must reflect
139 the estimated revenues and expenses for that year and the
140 estimated surplus or deficit as of the end of the current year.
141 The budget must set out separately all fees or charges paid for
142 by the association for recreational amenities, whether owned by
143 the association, the developer, or another person. The
144 association shall provide each member with a copy of the annual

145 budget or a written notice that a copy of the budget is
146 available upon request at no charge to the member. The copy must
147 be provided to the member within the time limits set forth in
148 subsection (5).
149 (b) In addition to annual operating expenses, the budget
150 may include reserve accounts for capital expenditures and
151 deferred maintenance for which the association is responsible to
152 the extent that the governing documents do not limit increases
153 in assessments, including reserves. If the budget of the
154 association includes reserve accounts, such reserves shall be
155 determined, maintained, and waived in the manner provided in
156 this subsection. Once an association provides for reserve
157 accounts in the budget, the association shall thereafter
158 determine, maintain, and waive reserves in compliance with the
159 provisions of this subsection.
160 (c) If the budget of the association does not provide for
161 reserve accounts governed by this subsection and is responsible
162 for the repair and maintenance of capital improvements that may
163 result in a special assessment, each financial report for the
164 preceding fiscal year required by subsection (7) shall contain
165 the following statement in conspicuous type: THE BUDGET OF THE
166 ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL
167 EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL
168 ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS
169 PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA
170 STATUTES, UPON THE APPROVAL OF NOT LESS THAN A MAJORITY OF THE
171 TOTAL VOTING INTERESTS OF THE ASSOCIATION.
172 (d) An association shall be deemed to have provided for
173 reserve accounts when reserve accounts have been initially
174 established by the developer or when the membership of the
175 association affirmatively elects to provide for reserves. If

176 reserve accounts are not initially provided for by the
177 developer, the membership of the association may elect to do so
178 upon the affirmative approval of not less than a majority of the
179 total voting interests of the association. Such approval may be
180 attained by vote of the members at a duly called meeting of the
181 membership or upon a written consent executed by not less than a
182 majority of the total voting interests in the community. The
183 approval action of the membership shall state that reserve
184 accounts shall be provided for in the budget and shall designate
185 the components for which the reserve accounts are to be
186 established. Upon approval by the membership, the board of
187 directors shall provide for the required reserve accounts to be
188 included in the budget in the next fiscal year following the
189 approval and in each year thereafter. Once established as
190 provided in this paragraph, the reserve accounts shall be
191 funded, maintained, or have their funding waived in the manner
192 provided in paragraph (f).
193 (e) The amount to be reserved in any account established
194 shall be computed by means of a formula that is based upon
195 estimated remaining useful life and estimated replacement cost
196 or deferred maintenance expense of each reserve item. The
197 association may adjust replacement reserve assessments annually
198 to take into account any changes in estimates of cost or useful
199 life of a reserve item.
200 (f) Once a reserve account is established, the membership
201 of the association, upon a majority vote at a meeting at which a
202 quorum is present, may provide for no reserves or less reserves
203 than required by this section. If a meeting of the unit owners
204 has been called to determine whether to waive or reduce the
205 funding of reserves and no such result is achieved or a quorum
206 is not attained, the reserves as included in the budget shall go

207 into effect. After the turnover of control of an association by
208 a developer to parcel owners, the developer may vote its voting
209 interest to waive or reduce the funding of reserves. Any vote
210 taken pursuant to this paragraph to waive or reduce reserves
211 shall be applicable only to one budget year.
212 (g) Funding formulas for reserves authorized by this
213 subsection shall be based on either a separate analysis of each
214 of the required assets or a pooled analysis of two or more of
215 the required assets.
216 1. If the association maintains separate reserve accounts
217 for each of the required assets, the amount of the contribution
218 to each reserve account shall be the sum of the following two
219 calculations:
220 a. The total amount necessary, if any, to bring a negative
221 component balance to zero.
222 b. The total estimated deferred maintenance expense or
223 estimated replacement cost of the reserve component less the
224 estimated balance of the reserve component as of the beginning
225 of the period for which the budget will be in effect. The
226 remainder, if greater than zero, shall be divided by the
227 estimated remaining useful life of the component. The formula
228 may be adjusted each year for changes in estimates and deferred
229 maintenance performed during the year and may consider factors
230 such as inflation and earnings on invested funds.
231 2. If the association maintains a pooled account of two or
232 more of the required reserve assets, the amount of the
233 contribution to the pooled reserve account as disclosed in the
234 proposed budget shall be not less than that required to ensure
235 that the balance on hand at the beginning of the period for
236 which the budget will go into effect plus the projected annual
237 cash inflows over the remaining estimated useful lives of all of

238 the assets that make up the reserve pool are equal to or greater
239 than the projected annual cash outflows over the remaining
240 estimated useful life of all of the assets that make up the
241 reserve pool, based on the current reserve analysis. The
242 projected annual cash inflows may include estimated earnings
243 from investment of principal. The reserve funding formula shall
244 not include any type of balloon payments.
245 (h) Reserve funds and any interest accruing thereon shall
246 remain in the reserve account or accounts and shall be used only
247 for authorized reserve expenditures unless their use for other
248 purposes is approved in advance by a majority vote at a meeting
249 at which a quorum is present. Prior to turnover of control of an
250 association by a developer to parcel owners, the developer-
251 controlled association shall not vote to use reserves for
252 purposes other than that for which they were intended without
253 the approval of a majority of all nondeveloper voting interests
254 voting in person or by limited proxy at a duly called meeting of
255 the association.
256 (7) FINANCIAL REPORTING.--The association shall prepare an
257 annual financial report by a date specified in the bylaws or
258 within 90 ~~60~~ days after the close of the fiscal year. The
259 association shall, within the time limits set forth in
260 subsection (5), provide each member with a copy of the annual
261 financial report or a written notice that a copy of the
262 financial report is available upon request at no charge to the
263 member. Financial reports shall be prepared as follows:
264 (a) An association that meets the criteria of this
265 paragraph shall prepare or cause to be prepared a complete set
266 of financial statements in accordance with generally accepted
267 accounting principles as adopted by the Florida Board of

268 Accountancy. The financial statements shall be based upon the
269 association's total annual revenues, as follows:
270 1. An association with total annual revenues of $100,000
271 or more, but less than $200,000, shall prepare compiled
272 financial statements.
273 2. An association with total annual revenues of at least
274 $200,000, but less than $400,000, shall prepare reviewed
275 financial statements.
276 3. An association with total annual revenues of $400,000
277 or more shall prepare audited financial statements.
278 (b)1. An association with total annual revenues of less
279 than $100,000 shall prepare a report of cash receipts and
280 expenditures.
281 2. An association in a community of fewer than 50 parcels,
282 regardless of the association's annual revenues, may prepare a
283 report of cash receipts and expenditures in lieu of financial
284 statements required by paragraph (a) unless the governing
285 documents provide otherwise.
286 3. A report of cash receipts and disbursement must
287 disclose the amount of receipts by accounts and receipt
288 classifications and the amount of expenses by accounts and
289 expense classifications, including, but not limited to, the
290 following, as applicable: costs for security, professional, and
291 management fees and expenses; taxes; costs for recreation
292 facilities; expenses for refuse collection and utility services;
293 expenses for lawn care; costs for building maintenance and
294 repair; insurance costs; administration and salary expenses; and
295 reserves if maintained by the association.
296 (c) If 20 percent of the parcel owners petition the board
297 for a level of financial reporting higher than that required by
298 this section, the association shall duly notice and hold a

299 meeting of members within 30 days of receipt of the petition for
300 the purpose of voting on raising the level of reporting for that
301 fiscal year. Upon approval of a majority of the total voting
302 interests of the parcel owners, the association shall prepare or
303 cause to be prepared, shall amend the budget or adopt a special
304 assessment to pay for the financial report regardless of any
305 provision to the contrary in the governing documents, and shall
306 provide within 90 days of the meeting or the end of the fiscal
307 year, whichever occurs later:
308 1. Compiled, reviewed, or audited financial statements, if
309 the association is otherwise required to prepare a report of
310 cash receipts and expenditures;
311 2. Reviewed or audited financial statements, if the
312 association is otherwise required to prepare compiled financial
313 statements; or
314 3. Audited financial statements if the association is
315 otherwise required to prepare reviewed financial statements.
316 (d) If approved by a majority of the voting interests
317 present at a properly called meeting of the association, an
318 association may prepare or cause to be prepared:
319 1. A report of cash receipts and expenditures in lieu of a
320 compiled, reviewed, or audited financial statement;
321 2. A report of cash receipts and expenditures or a
322 compiled financial statement in lieu of a reviewed or audited
323 financial statement; or
324 3. A report of cash receipts and expenditures, a compiled
325 financial statement, or a reviewed financial statement in lieu
326 of an audited financial statement.
327 Section 5. Subsection (2) of section 720.305, Florida
328 Statutes, is amended to read:

329 720.305 Obligations of members; remedies at law or in
330 equity; levy of fines and suspension of use rights; failure to
331 fill sufficient number of vacancies on board of directors to
332 constitute a quorum; appointment of receiver upon petition of
333 any member.--
334 (2) If the governing documents so provide, an association
335 may suspend, for a reasonable period of time, the rights of a
336 member or a member's tenants, guests, or invitees, or both, to
337 use common areas and facilities and may levy reasonable fines,
338 not to exceed $100 per violation, against any member or any
339 tenant, guest, or invitee. A fine may be levied on the basis of
340 each day of a continuing violation, with a single notice and
341 opportunity for hearing, except that no such fine shall exceed
342 $1,000 in the aggregate unless otherwise provided in the
343 governing documents. A fine shall not become a lien against a
344 parcel <u>unless it is levied for a violation of governing</u>
345 <u>documents that have been recorded in the public records of the</u>
346 <u>county where the property is located</u>. In any action to recover a
347 fine, the prevailing party is entitled to collect its reasonable
348 attorney's fees and costs from the nonprevailing party as
349 determined by the court.
350 (a) A fine or suspension may not be imposed without notice
351 of at least 14 days to the person sought to be fined or
352 suspended and an opportunity for a hearing before a committee of
353 at least three members appointed by the board who are not
354 officers, directors, or employees of the association, or the
355 spouse, parent, child, brother, or sister of an officer,
356 director, or employee. If the committee, by majority vote, does
357 not approve a proposed fine or suspension, it may not be
358 imposed.

359 (b) The requirements of this subsection do not apply to
360 the imposition of suspensions or fines upon any member because
361 of the failure of the member to pay assessments or other charges
362 when due if such action is authorized by the governing
363 documents.
364 (c) Suspension of common-area-use rights shall not impair
365 the right of an owner or tenant of a parcel to have vehicular
366 and pedestrian ingress to and egress from the parcel, including,
367 but not limited to, the right to park.
368 Section 6. Subsection (1) of section 720.306, Florida
369 Statutes, is amended to read:
370 720.306 Meetings of members; voting and election
371 procedures; amendments.--
372 (1) QUORUM; AMENDMENTS.--
373 (a) Unless a lower number is provided in the bylaws, the
374 percentage of voting interests required to constitute a quorum
375 at a meeting of the members shall be 30 percent of the total
376 voting interests. Unless otherwise provided in this chapter or
377 in the articles of incorporation or bylaws, decisions that
378 require a vote of the members must be made by the concurrence of
379 at least a majority of the voting interests present, in person
380 or by proxy, at a meeting at which a quorum has been attained.
381 (b) Unless otherwise provided in the governing documents
382 or required by law, and other than those matters set forth in
383 paragraph (c), any governing document of an association may be
384 amended by the affirmative vote of two-thirds of the voting
385 interests of the association.
386 (c) Unless otherwise provided in the governing documents
387 as originally recorded or permitted by this chapter or chapter
388 617, an amendment may not materially and adversely alter the
389 proportionate voting interest appurtenant to a parcel or

390 increase the proportion or percentage by which a parcel shares
391 in the common expenses of the association unless the record
392 parcel owner and all record owners of liens on the parcels join
393 in the execution of the amendment. For purposes of this section,
394 a change in quorum requirements is not an alteration of voting
395 interests. The merger or consolidation of associations under a
396 plan of merger or consolidation pursuant to chapter 607 or
397 chapter 617 is not a material or adverse alteration of the
398 proportionate voting interest appurtenant to a parcel.
399 Section 7. Paragraph (t) is added to subsection (3) of
400 section 720.307, Florida Statutes, to read:
401 720.307 Transition of association control in a
402 community.--With respect to homeowners' associations:
403 (3) At the time the members are entitled to elect at least
404 a majority of the board of directors of the homeowners'
405 association, the developer shall, at the developer's expense,
406 within no more than 90 days deliver the following documents to
407 the board:
408 (t) The financial records, including financial statements
409 of the association, and source documents from the incorporation
410 of the association through the date of turnover. The records
411 shall be audited by an independent certified public accountant
412 for the period from the incorporation of the association or from
413 the period covered by the last audit if an audit has been
414 performed for each fiscal year since incorporation. All
415 financial statements shall be prepared in accordance with
416 generally accepted accounting principles and shall be audited in
417 accordance with generally accepted auditing standards, as
418 prescribed by the Florida Board of Accountancy, pursuant to
419 chapter 473. The certified public accountant performing the
420 audit shall examine to the extent necessary supporting documents

421 and records, including the cash disbursements and related paid
422 invoices, to determine if expenditures were for association
423 purposes, and the billings, cash receipts, and related records
424 to determine that the developer was charged and paid the proper
425 amounts of assessments. This paragraph applies to associations
426 with a date of incorporation after December 31, 2006.
427 Section 8. Section 720.308, Florida Statutes, is amended
428 to read:
429 720.308 Assessments and charges.--
430 (1) ASSESSMENTS.--For any community created after October
431 1, 1995, the governing documents must describe the manner in
432 which expenses are shared and specify the member's proportional
433 share thereof. Assessments levied pursuant to the annual budget
434 or special assessment must be in the member's proportional share
435 of expenses as described in the governing document, which share
436 may be different among classes of parcels based upon the state
437 of development thereof, levels of services received by the
438 applicable members, or other relevant factors. While the
439 developer is in control of the homeowners' association, it may
440 be excused from payment of its share of the operating expenses
441 and assessments related to its parcels for any period of time
442 for which the developer has, in the declaration, obligated
443 itself to pay any operating expenses incurred that exceed the
444 assessments receivable from other members and other income of
445 the association. This section does not apply to an association,
446 no matter when created, if the association is created in a
447 community that is included in an effective development-of-
448 regional-impact development order as of the effective date of
449 this act, together with any approved modifications thereto.

450 (2) GUARANTEE OF COMMON EXPENSES.--
451 (a) Establishment of a guarantee.--If a guarantee of the
452 assessments of parcel owners is not included in the purchase
453 contracts or declaration, any agreement establishing a guarantee
454 shall be effective only upon the approval of a majority of the
455 voting interests of the members other than the developer.
456 Approval shall be expressed at a meeting of the members, voting
457 in person or by limited proxy, or by agreement in writing
458 without a meeting if provided in the bylaws. Such guarantee
459 shall meet the requirements of this section.
460 (b) Guarantee period.--The period of time for the
461 guarantee shall be indicated by a specific beginning and ending
462 date or event.
463 1. The ending date or event shall be the same for all of
464 the members of a homeowners' association, including members in
465 different phases of the development.
466 2. The guarantee may provide for different intervals of
467 time during a guarantee period with different dollar amounts for
468 each such interval.
469 (c) The guarantee may provide that after the initial
470 stated period the developer has an option to extend the
471 guarantee for one or more additional stated periods. The
472 extension of a guarantee is limited to extending the ending date
473 or event; therefore, the developer does not have the option of
474 changing the level of assessments guaranteed.
475 (3) MAXIMUM LEVEL OF ASSESSMENTS.--The stated dollar
476 amount of the guarantee shall be an exact dollar amount for each
477 parcel identified in the declaration. Regardless of the stated
478 dollar amount of the guarantee, assessments charged to a member
479 shall not exceed the maximum obligation of the member based on

480 the total amount of the adopted budget and the member's
481 proportionate ownership share of the assessments.
482 (4) CASH FUNDING REQUIREMENTS DURING GUARANTEE.--The cash
483 payments required from the guarantor during the guarantee period
484 shall be determined as follows:
485 (a) If at any time during the guarantee period the funds
486 collected from member assessments at the guaranteed level and
487 other revenues collected by the association are not sufficient
488 to provide payment, on a timely basis, of all assessments,
489 including the full funding of the reserves unless properly
490 waived, the guarantor shall advance sufficient cash to the
491 association at the time such payments are due.
492 (b) Expenses incurred in the production of nonassessment
493 revenues, not in excess of the nonassessment revenues, shall not
494 be included in the assessments. If the expenses attributable to
495 nonassessment revenues exceed nonassessment revenues, only the
496 excess expenses must be funded by the guarantor. Interest earned
497 on the investment of association funds may be used to pay the
498 income tax expense incurred as a result of the investment, such
499 expense shall not be charged to the guarantor, and the net
500 investment income shall be retained by the association. Each
501 such nonassessment revenue-generating activity shall be
502 considered separately. Any portion of the parcel assessments
503 that is budgeted for designed capital contributions of the
504 association shall not be used to pay operating expenses.
505 (5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.--The
506 guarantor's total financial obligation to the association at the
507 end of the guarantee period shall be determined on the accrual
508 basis using the following formula: the guarantor shall pay any
509 deficits that exceed the guaranteed amount, less the total
510 regular periodic assessments earned by the association from the

511 members other than the guarantor during the guarantee period,
512 regardless of whether the actual level charged was less than the
513 maximum guaranteed amount.
514 (6) EXPENSES.--Expenses incurred in the production of
515 nonassessment revenues, not in excess of the nonassessment
516 revenues, shall not be included in the operating expenses. If
517 the expenses attributable to nonassessment revenues exceed
518 nonassessment revenues, only the excess expenses must be funded
519 by the guarantor. Interest earned on the investment of
520 association funds may be used to pay the income tax expense
521 incurred as a result of the investment, such expense shall not
522 be charged to the guarantor, and the net investment income shall
523 be retained by the association. Each such nonassessment revenue-
524 generating activity shall be considered separately. Any portion
525 of the parcel assessment that is budgeted for designated capital
526 contributions of the association shall not be used to pay
527 operating expenses.
528 Section 9. Subsection (3) is added to section 720.402,
529 Florida Statutes, to read:
530 720.402 Publication of false and misleading information.--
531 (3) This section does not limit any rights provided by
532 common law.
533 Section 10. This act shall take effect July 1, 2006.
534
535 ========== T I T L E A M E N D M E N T ==========
536 Remove the entire title and insert:
537 A bill to be entitled
538 An act relating to community associations; creating s.
539 712.11, F.S.; authorizing certain associations to revive
540 lapsed covenants; amending s. 718.114, F.S.; providing
541 that certain leaseholds, memberships, or other possessory

542 or use interests shall be considered a material alteration
543 or substantial addition to certain real property; amending
544 s. 720.302, F.S.; revising application; amending s.
545 720.303, F.S.; authorizing associations to charge
546 specified fees for providing certain information to
547 prospective purchasers or lienholders; limiting liability
548 for providing such information; revising what must be
549 included in an association's annual budget; providing for
550 reserve accounts for capital expenditures and deferred
551 maintenance; revising certain time requirements relating
552 to annual reports of associations; amending s. 720.305,
553 F.S.; prohibiting a fine levied by an association from
554 becoming a lien unless the governing documents claimed to
555 have been violated are recorded in the public records;
556 amending s. 720.306, F.S.; providing that certain mergers
557 or consolidations do not alter specified voting interests;
558 amending s. 720.307, F.S.; providing additional documents
559 that the developer must deliver at the time the
560 association members elect the board of directors; amending
561 s. 720.308, F.S.; providing that a guarantee of common
562 expenses shall be effective under certain circumstances;
563 requiring the guarantee to meet certain requirements;
564 authorizing the guarantee to provide certain requirements;
565 requiring the stated dollar amount of the guarantee to be
566 an exact dollar amount for each parcel identified in the
567 declaration; providing payments required from the
568 guarantor to be determined in a certain manner; providing
569 a formula to determine the guarantor's total financial
570 obligation to the association; providing that certain
571 expenses incurred in the production of certain revenues
572 shall not be included in the operating expenses; amending

573 s. 720.402, F.S., relating to publication of false or
574 misleading information; clarifying that the section does
575 not limit common-law rights; providing an effective date.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 1527**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Stargel offered the following:
3
4 **Amendment**
5 On page 5 , line(s) 135 and 138,
6 remove: granted
7
8 and insert: entered
9

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2 (for drafter's use only)

Bill No. **HB 1527**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Stargel offered the following:
3
4 **Amendment**
5 Remove line(s) 34 and insert:
6 guardian of the minor, by regular mail and by certified mail,

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 3 (for drafter's use only)

Bill No. **HB 1527**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Stargel offered the following:
3
4 **Amendment**
5 Remove line(s) 76 and insert:
6 by regular mail and by certified mail, return receipt requested,

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 4 (for drafter's use only)

Bill No. **HB 1527**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Stargel offered the following:
3
4 **Amendment**
5 Remove line(s) 94 and insert:
6 regular mail and by certified mail, return receipt requested,