

STORAGE NAME: h0169s1.rpp
DATE: February 13, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 169

RELATING TO: The Florida Uniform Land Sales Practices Law

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

STATUTE(S) AFFECTED: Sections 498.005, 498.007, 498.011, 498.017, 498.022, 498.023, 498.024, 498.025, 498.027, 498.029, 498.031, 498.033, 498.035, 498.037, 498.039, 498.041, 498.047, and 498.059, Florida Statutes

COMPANION BILL(S):

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

- (1) REAL PROPERTY & PROBATE 7 YEARS 0 DAYS
- (2) FINANCE & TAXATION
- (3) GENERAL GOVERNMENT
- (4)
- (5)

I. SUMMARY:

CS/HB 169 substantially revises the Florida Uniform Land Sales Practices Law. The bill revises definitions, and revises language with respect to the general powers and duties of the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business & Professional Regulation. The bill authorizes the Division to apply to the circuit court for orders of restitution and to seek the imposition of civil penalties under specified circumstances.

The bill updates the statutes relating to fees to reflect current practice according to rule. The bill provides that it is unlawful, and a violation of the act for a person to dispose of, conceal, or divert any funds or assets of any person so as to substantially and adversely affect the interest of a purchaser.

Provisions relating to reservations, exemptions, applications for registration, advertising, public offering statements, trust and escrow accounts, and investigations are revised. The bill provides for a termination of registration, which is not existing in current law, but is provided for by rule.

Finally, the bill provides a third degree felony penalty for making any material misrepresentation or concealing any material fact in any written communication with the Division and for failing to comply with the provisions of the act concerning the deposit of funds into trust or escrow accounts or the withdrawal of funds from trust or escrow accounts.

The act will take effect October 1, 1997.

This bill may have some fiscal impact, however, the impact is expected to be minimal.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Section 498.003, Florida Statutes, provides legislative recognition that the disposition of any interest in subdivided lands has a vital impact on Florida's economy and that such land sales constitute a major industry within Florida. The Legislature expressed an intent to provide safeguards regulating the disposition of any interest in subdivided lands, including financial operations entered into by companies and persons regulated by the Florida Uniform Land Sales Practices Law, to prevent fraudulent and misleading methods and unsound financing techniques which could detrimentally affect remote land purchasers, as well as the land sales industry, the public, and the state's economic well-being.

The Florida Uniform Land Sales Practices Law was enacted in 1963. The law retains its original structure, however, the nature of the land sales industry has changed significantly since its original enactment.

The Department of Business and Professional Regulation (DBPR), Bureau of Land Sales Registration administers the provisions of Chapter 498, Florida Statutes, relating to the offer and disposition of subdivided lands to the public. According to DBPR, the vast majority of marketeers promoting the sale of subdivided lands are not registered with the Division of Florida Land Sales, Condominiums, and Mobile Homes. Therefore, a principal component of the Department's regulatory enforcement involves the pursuit of unregulated marketeers.

The Secretary of DBPR created a task force in April of 1996, which was charged with streamlining the regulatory process to bring it up-to-date with respect to the development and sale of Florida real estate and to further enhance the agency's authority to provide meaningful and effective enforcement. The task force included both private and public interests. This bill reflects efforts of the task force.

B. EFFECT OF PROPOSED CHANGES:

The bill is essentially a rewrite of the Florida Uniform Land Sales Practices Law. The bill should reduce governmental regulation, and updates the law to reflect changing circumstances and amendments to the law over the past several years.

For a complete review of CS/HB 169, see the Section-By-Section Analysis.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

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

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

The bill includes eight subsections providing for rulemaking authority by the Department of Business & Professional Regulation. According to the Department, the number of rulemaking provisions is a result of the new requirement that there be "specific" authority for rulemaking.

The bill permits the Department to seek restitution as an additional remedy. The bill provides for imposition of a civil penalty through the circuit court for specified violations. The penalty will be no less than \$500 and no more than \$10,000 for each violation. Prevailing costs and attorney's fees may be awarded, as well as reasonable costs of investigation if the Division prevails.

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

The bill should result in less regulation of private organizations or individuals.

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

N/A

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

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

N/A

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

N/A

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

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

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

The bill appears to increase fees in s. 498.017(2), F.S., however, the fee in question was increased by rule, approximately ten years ago. Therefore, this is a codification of an existing rule.

Similarly, s. 498.017(4), F.S., appears to permit the Department to collect expenses associated with inspections for in-state properties. The existing law appears to permit the expense reimbursement only for out-of-state inspections. However, s. 498.011, F.S., has permitted expense reimbursement for both in-state as well as out-of-state properties since 1993. Therefore, this is merely an update of the statutes.

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

No.

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

The bill should not affect fees.

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

No.

3. Personal Responsibility:

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

N/A

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

The beneficiaries of this bill include registrants who should incur less regulation. They already pay fees to the Department. The Department does not think there will be a fiscal impact as a result of this bill.

4. Individual Freedom:

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

Since the bill attempts to reduce government regulation, this would appear to provide private organizations/associations greater flexibility.

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

No

5. Family Empowerment:

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

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

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

N/A

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

N/A

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

No.

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

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1.

Section 498.005, Florida Statutes, is amended to remove the definition of "Active registration", "Broker", "Inactive registration", and "Salesman."

The term "Closing" is added, and is defined to mean the transfer of ownership or lease of an interest in subdivided lands to a purchaser as evidenced by the delivery of a deed to the purchaser or to the clerk of the court for recording in the official records of the county in which the subdivided lands are located.

The term "Escrow" is added, and is defined to mean the delivery to, or deposit with, an escrow agent of funds or property to be held and disbursed by such escrow agent consistent with the provisions of this act.

The term "Escrow agent" is added, and is defined to mean a savings and loan association or bank, an attorney, a real estate broker, or a title insurance agent.

The term "Governing documents" is added, and is defined to mean the recorded declaration of covenants for a community, and all duly adopted and recorded amendments thereto; and the articles of incorporation and bylaws of the homeowners' association, and any duly adopted amendments thereto.

The term "Homeowners' association" or "association" is added, and is defined to mean a Florida Corporation responsible for the operation of a community in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is mandatory, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. These terms do not include a community development district or other similar special taxing district created pursuant to statute.

The term "Homesite" is added, and is defined to mean a lot, parcel, unit, or interest contained within a subdivision which is physically accessible by a public or private road at the time of deeding and usable by the purchaser for constructing or installing a single family residential building without draining, filling, or other improvement, except for reasonable preparation for construction or installation, and that no fact or circumstance exists which prohibits the immediate use of the lot for the purpose upon deeding.

The definition of the term "Subdivider" is amended to include persons who own an interest in subdivided lands or who is engaged in the disposition of subdivided lands either directly, indirectly, or through the services of an employee, agent, or independent contractor. Currently, the statute does not include "indirect" interests or acts. In addition, the current statute includes services of a "broker or salesman", as opposed to an "employee, agent, or independent contractor."

Section 2.

Section 498.007, Florida Statutes, is amended to permit a receiver or conservator to take action to implement the provisions of the court order, to ensure the performance of the order, and to remedy any breach thereof. The section provides that in addition to current provisions for enforcement of an injunction or temporary restraining order, the circuit court may impound or sequester the books, papers, documents, and records of a party defendant, and allow the examination and use of those documents by the Division and a court-appointed receiver or conservator. This section also places venue in any county where the venue is proper under Chapter 47, Florida Statutes, or in Leon County.

This section provides for additional remedies which may be sought by DBPR, including the ability to seek restitution, and imposition of a civil penalty of not less than \$500 and not more than \$10,000 for each violation. The court may also award prevailing party court costs and reasonable attorney's fees. If the Division prevails, the court may also award reasonable costs of investigation.

Section 3.

Technical change in language.

Section 4.

This section is amended to change the registration fee from \$300 for each renewal plus 50 cents for each of the first 1,000 undeeded lots, parcels, units or interests and 20 cents for each additional undeeded lot, parcel, unit or interest, to \$300 for each renewal plus 75 cents for each undeeded lot, parcel, unit, or interest. However, the current provision permitting the Division to increase the per lot fees up to 75 cents is deleted. The Department set the fee at 75 cents pursuant to Rule 61B-3.001 F.A.C.

Subsections 498.017(4), (5), and (13), Florida Statutes, are amended to remove the current provisions providing for fees for applications for exemptions. According to DBPR, this is a clean-up of the statutes, to remove obsolete provisions.

Subsection (4), as amended, requires the application for registration be accompanied by the initial fee, and when an inspection is to be made of the subdivided lands, the application must be accompanied by an amount sufficient to cover the cost of travel to and from the location of the lands, and additional expenses of the inspection. Currently, this provision applies to applications for registration where the subdivided lands are outside the state and are being disposed of or offered for disposition in Florida. However, since 1993, s. 498.011, F.S., has permitted recoupment of expenses for both in-state as well as out-of-state inspections. Therefore, this section is being revised to be consistent with current law.

Section 5.

Section 498.022(1)(f), Florida Statutes, is amended to provide that it is unlawful to offer or dispose of 25 lots, parcels, units, or interests in a subdivision, and to dispose of, conceal, or divert any funds or assets of any person so as to substantially and adversely affect the interest of a purchaser. This section currently lists several additional acts which are unlawful. The existing unlawful acts will remain in law.

Section 498.022(4), Florida Statutes, is a new subsection, providing that notwithstanding any other provision of this chapter, the term "subdivision" or "subdivided lands" as used in this section means any contiguous land which is divided or is proposed to be divided for the purpose of disposition into 25 or more lots, parcels, units, or interests and also includes any land, whether contiguous or not, which is divided or proposed to be divided into 25 or more lots, parcels, units, or interests which are offered as a part of a common promotional plan.

Section 6.

Section 498.023, Florida Statutes, relates to prohibitions on dispositions of interests in subdivided lands, unless exempt. Subsection (c) is amended to change the cancellation period from "until midnight of the seventh day after he executes the contract", to "until midnight of the seventh business day after execution.

This section is amended to provide, in newly created paragraph (d), that public offering statements, contracts, notes, mortgages, deeds, or other sales documents, delivered to a purchaser, must be in the language in which the sales campaign was conducted, unless an accurate translation is attached to the document.

Section 7.

Section 498.024, Florida Statutes, relates to reservations. This section is amended to remove language relating to applications for exemptions, and is amended to include the new term "escrow agent" instead of trust company or a bank having trust powers.

Subsection (3)(a) is further amended to increase the time allotted for the subdivider to provide a receipt to the prospective purchaser and to deposit reservation deposits into an escrow account, from 3 to 5 days after receipt.

Subsection (3)(b) clarifies that the notification time for the escrow agent to notify the prospective purchaser that the reservation deposit was received is 7 business days after receipt, as opposed to 7 days which is current law.

Subsection (3)(c) is amended to require that funds be placed in accounts and financial institutions that are insured by an agency of the U.S. Government.

Subsection (3)(d) is amended to require the subdivider to maintain books and records with "good accounting practices", as opposed to "generally accepted accounting standards."

Subsection (3)(g) is amended to allow a reservation program to be extended with the written approval of the Division after notice to the purchasers that they have a right to a refund if they so request. Without an extension, the reservation deposit can be held by the escrow agent for a maximum of 180 days.

Subsection (5) is deleted. This subsection provided for right of rescission for a period of 7 days when there was a requirement for delivery of a public offering statement or an onsite inspection.

Section 8.

Section 498.025, Florida Statutes, relates to exemptions. This section was amended to provide additional exemptions. These additional exemptions include persons who sell fewer than 25 home sites located within the State, provided the grantor holds marketable title in the subdivided lands to be conveyed and a personal inspection of the homesite is made by the potential purchaser prior to the execution of the contract or lease.

Another exemption was created in paragraph (k), for the sale of a homesite together with the sale of a mobile home or manufactured home. This section further provides additional specifications in order to qualify for the exemption.

An exemption is created in paragraph (l), for the disposition of subdivided lands within the boundaries of special dependent or independent taxing districts if certain conditions are met. An exemption is created in paragraph (m) for the offer of disposition of an interest in subdivided lands to an accredited investor, as defined by the Department of Banking & Finance.

An exemption is created in paragraph (n), for sales of interests in subdivisions which have received a development order pursuant to s. 380.06 or s. 380.061, F.S. Sections 380.06 and 380.061, Florida Statutes, relate to developments of regional impact and The Florida Quality Developments program, respectively.

An exemption is created in paragraph (o), for the sale of industrial or commercial lots. According to DBPR, this is similar to an exemption under the Federal Interstate Land Sales Act. Finally, an exemption is created in paragraph (p), for the offer of disposition of condominium or cooperative parcels pursuant to Chapters 718 or 719, Florida Statutes.

The bill expands several exemptions contained in s. 498.025(2), F.S. for fully improved subdivisions meeting specified criteria.

Subsection 498.025(4), Florida Statutes, is amended to provide that the Department may issue letters of no action where an offering may not be able to obtain an exemption under the statutes, however, there are adequate safeguards and assurances with respect to a particular offer or disposition.

Subsection 498.025(6), Florida Statutes, is created to provide rulemaking authority.

Section 9.

Section 498.027, Florida Statutes, relates to applications for registration. This section is amended to remove some current requirements regarding registration for properties either inside or outside of Florida. The provisions are stricken that require, in addition to being acceptable to the appropriate local governing body where the property is located (which will remain in law), that required specifications be acceptable to the Division. In addition, the requirements relating to minimum size lots or parcels are removed.

Section 498.027(5), Florida Statutes, is created to provide rulemaking authority.

Section 10.

Section 498.029, Florida Statutes, relates to notice of filing and registration. This section is deleted.

Section 11.

Section 498.031, Florida Statutes, relates to inquiry and examination. This section is amended to require examination only if the application for registration is subject to the provisions of s. 498.039, F.S. Section 498.039, Florida Statutes, provides the requirements for registrants offering property subject to an encumbrance, including the establishment and maintenance of an account with an escrow agent. Section 498.031, Florida Statutes, is amended to require an examination to determine: whether the subdivider can convey marketable title to the lands; whether all obligations contained in the offering will be complied with; whether the general promotional plan is not false or misleading and complies with Division rules; and whether the subdivided lands are or will be made usable as home sites. Paragraphs (d), (e), and (f) remain unchanged.

A new s. 498.031(4), F.S., is created to provide that an application for registration that is not subject to provisions of s. 498.039, F.S., will become effective within 10 days, and requires the Division to issue an order of registration, unless the Division finds the application incomplete or the plan of sale deceptive or misleading.

A new s. 498.031(5), F.S., is created to provide rulemaking authority.

Section 12.

Section 498.033, Florida Statutes, relates to registration of subdivided lands. This section is amended to require registrants to provide financial statements unless certain specified conditions are met. Under the amended section, the registrant would have to provide audited financial statements unless: all promised improvements have been completed as of the end of the registrant's fiscal year; and all registered property is free and clear of any encumbrance, or the encumbrance contains a specified subordination provision. If promised improvements are not completed, the Division may require the registrant to provide the Division with a current estimate of the cost to complete the promised improvements, certified by a licensed professional engineer.

Section 498.033(8), Florida Statutes, is created to provide rulemaking authority.

Section 13.

Section 498.035, Florida Statutes, relates to advertising material. This section is amended to authorize, rather than require, the Division to approve advertising material and provides that the advertising must comply with standards adopted by the Division. Subsection (4) also provides rulemaking authority.

Section 14.

Section 498.037, Florida Statutes, relates to public offering statements. A provision requiring a map be provided to the purchaser with the public offering statement is deleted. As well, a provision requiring notice in the event of a waiver is removed.

Section 15.

Section 498.039, Florida Statutes, relates to trust and escrow accounts and reporting requirements. This section was streamlined and reduced to provide that a registrant offering property subject to an encumbrance must establish and maintain an escrow account with an escrow agent in a financial institution unless the encumbrance contains a subordination provision with certain specified requirements. The Division will require each registrant offering property in which all promised improvements have not been completed to establish reasonable assurances to ensure that all obligations imposed by the offering will be fulfilled.

Subsection 498.039(11), Florida Statutes, was created to provide rulemaking authority.

Section 16.

Section 498.041, Florida Statutes, relates to annual renewals, and is amended to relate also to termination of registration. Each registrant is required to annually renew each order of registration. The provision requiring certain identifying information is deleted.

Section 498.041(3), Florida Statutes, is created to provide a mechanism for termination, upon application, if certain conditions are met.

Section 498.041(4), Florida Statutes, is created to provide that if, at the time of application for termination, title has not been delivered to all purchasers from whom unpaid balances are due, the termination will be deemed a material change. In that event, the registrant must comply with all of the provisions in subsection (3), in addition to certain provisions in this section.

If the Division subsequently finds that the order of termination was granted upon false information or, as a matter of law, that the registrant was not entitled to an order of termination, the order may be revoked by the Division after due notice to the registrant.

Subsection 498.041(8), Florida Statutes, provides for terminating a registration if no dispositions of interests in subdivided lands have occurred, or any made have been legally rescinded, and the registrant will not offer or dispose of the property in a manner subject to this chapter. This section provides requirements for the petition for termination under these circumstances.

This section substantially codifies what is currently existing by rule. See Rule 61B 5.012, F.A.C.

Section 17.

Section 498.047, Florida Statutes, relates to investigations. According to DBPR, this section has been expanded as a result of the Division's frequent involvement with law enforcement agencies regarding criminal proceedings.

Section 498.047(5)(e), Florida Statutes, provides immunity from civil liability to persons who furnish information or evidence to the Division, unless the person acts in bad faith or with malice.

Section 498.047(5), Florida Statutes, is further expanded to provide for admission of evidence, and provides rulemaking authority.

Section 18.

Section 498.059, Florida Statutes, provides for penalties. This section has been amended to provide that those persons who make any material misrepresentation or conceal a material fact in any written communication with the Division or who fails to comply with the provisions of the law concerning the deposit of funds into escrow or trust accounts or withdrawal of funds placed in a trust when required, constitutes prima facie evidence of an intentional and purposeful violation of this act. The penalty in current law is a third-degree felony.

NOTE: Section 921.001(9)(b), Florida Statutes, requires the Criminal Justice Estimating Conference (CJEC) to review any legislation that creates or modifies a criminal penalty to determine the bill's impact on the state prison system. The CJEC will review this bill.

Section 19.

This act will take effect October 1, 1997.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See 2. below.

2. Recurring Effects:

According to the Department of Banking & Finance, and the Department of Business & Professional Regulation, this bill should have no fiscal impact.

However, this bill does provide additional acts which would subject the actor to a charge of a third-degree penalty. Section 921.001(9)(b), Florida Statutes, requires the Criminal Justice Estimating Conference (CJEC) to review any legislation that creates or modifies a criminal penalty to determine the bill's impact on the state prison system. The CJEC will review this bill.

3. Long Run Effects Other Than Normal Growth:

None anticipated.

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None anticipated.

2. Recurring Effects:

None anticipated, contingent upon the findings of the Criminal Justice Estimating Conference.

3. Long Run Effects Other Than Normal Growth:

None anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

According to DBPR, due to the streamlining of the registration process, registration will be made easier for the marketeer and there may be a corresponding increase in the number of licensees. The increase, however, is indeterminable.

2. Direct Private Sector Benefits:

According to DBPR, the private sector should benefit from less regulation, and a streamlined process.

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

Unknown.

D. FISCAL COMMENTS:

See Section III, A. 2. above.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

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

N/A

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The CS/HB 169 removes a provision in HB 169 which would have created a public records exemption. In order for the Legislature to create an exemption to the public records law, this bill must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the law. Laws enacted pursuant to this subsection must relate to one subject and must contain only exemptions or provisions governing enforcement.

There was a technical error on page 23, line 26 of HB 169. The cite to s. 380.060, should be to s. 380.06. This is corrected in the CS/HB 169.

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VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

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