

STORAGE NAME: h3211s2.ca

DATE: April 7, 1998

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
COMMUNITY AFFAIRS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/CS/HB 3211 (PCB BRCA 98-01)

RELATING TO: Real Estate

SPONSOR(S): Committee on Community Affairs, Committee on Real Property & Probate, Committee on Business Regulations and Consumer Services, Representatives Ogles and others

COMPANION BILL(S): 2nd ENG/HB 2011(c), CS/SB 340 (s), SB 318 (c)

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

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS YEAS 6 NAYS 0
- (2) REAL PROPERTY & PROBATE YEAS 5 NAYS 0
- (3) COMMUNITY AFFAIRS YEAS 8 NAYS 0
- (4) GENERAL GOVERNMENT APPROPRIATIONS

I. SUMMARY:

The bill makes a variety of changes to the real estate broker, salespersons, and schools' laws in the areas of business entity registration, salesperson and broker licensure qualifications, inactive license invalidation after a certain period of time, instructor qualifications, broker commissions procedures, and the extent to which bankruptcy may relieve the licensee from having to make restitution to the Real Estate Recovery Fund. The bill provides the board with the authority to impose administrative fines of up to \$5,000 against appraisers.

The bill exempts real estate licensees from provisions of the "snitch law," wherein other licensed professionals are required to report violations by other professionals in their field. The bill also provides exemptions under the state's construction and electrical and alarm system contracting laws.

The bill makes a number of changes to the real estate appraiser law in various areas.

The bill also makes changes to the Florida Building Energy-Efficiency Rating Act, a statewide system that exists for rating energy efficiencies and providing disclosure to prospective purchasers.

The bill restricts the existing requirements to disclose all known facts that materially affect the value of the property being bought or sold to residential properties only. Thus, commercial transactions would have no disclosure requirements.

The bill excludes property owners and their agents from the definition of "first contact." Thus, property owners or their agents will not be required to complete the disclosure of non-representation to potential buyers as required by ss. 475.272 and 475.276, Florida Statutes.

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

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The regulation of real estate brokers, salespersons, and schools

Regulation of real estate brokers, salespersons, and schools is established under part I of chapter 475, Florida Statutes. Regulation is administered by the Florida Real Estate Commission (Commission), under the Department of Business and Professional Regulation.

Currently, the Commission has authority to administer examinations and reexaminations. Limited liability partnerships and limited liability companies are presently ineligible to register as brokers. Under s. 475.17, Florida Statutes, broker applicants with out-of-state salesperson or broker experience may sit for the Florida broker examination, although confusion exists as to whether those applicants must still satisfy salesperson post-licensure education requirements. No exemption from the salesperson experience requirement presently exists for state-employed real estate investigators desiring licensure as brokers.

Persons with involuntarily inactive licenses have four years before their licenses expire and the department is required to provide notice two years prior to license expiration.

The board presently has the authority to assess fines up to \$1,000. Section 455.227(1)(I), Florida Statutes, requires all licensees to report to the department known violations of chapter 455 or 475, Florida Statutes. This "snitch provision" is considered by some professionals to undermine the effectiveness of local ethics committees of the local Boards of Realtors.

"School instructor" is currently defined, but is ambiguous as to whether a license or permit is required and what requirements exist for that certification.

Brokers that receive advance fees for the listing of real property are required to follow guidelines with regard to the deposit and accounting of those funds. Brokers receiving fees in advance of an auction are currently required to comply with this section, although common industry practice is to outline in a written agreement how advance funds will be spent.

Currently, if payment is made from the Real Estate Recovery Fund due to the settlement of a claim against a broker, the broker's license is suspended and may not be reinstated until the broker has repaid the amount paid from the fund.

Under current provisions in chapters 455 and 475, Florida Statutes, the department has no clear authority to inspect or audit brokers, appraisers, and their respective offices.

Presently, s. 475.15, Florida Statutes, provides that each corporation or partnership which acts as a broker shall register with the Commission, but it does not specifically identify limited liability partnerships or limited liability companies. Currently, s. 475.15, Florida Statutes, provides that the registration of a partnership is canceled automatically during any period that the license or registration of any partner is not in force.

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Property owners of new construction and their sales agents are presently required to comply with the notice requirement of s. 475.276, Florida Statutes, and to provide notice of nonrepresentation to any potential seller or buyer at first contact.

Additionally, existing law does not authorize a designated salesperson to act as a single agent, for different customers in the same real estate transaction other than a residential sale.

The regulation of real estate appraisers

Currently, the Florida Real Estate Appraisal Board does not have authority to adopt a seal.

Presently, the fees for real estate appraisers are set in rule, rather than statute.

Chapter 475, part II, Florida Statutes, does not authorize the Commission to require submission of fingerprint cards during the licensure application process.

The current requirement for a registered appraiser is up to 75 hours of approved academic courses. For a licensed appraiser the current experience requirement is two years. For a certified residential appraiser, the current standard is two years of experience and up to 165 classroom hours of academic courses. For a certified general appraiser, the current experience requirement is two years.

At present the board cannot discipline licensees who have been convicted of a crime of "moral turpitude".

Presently, there are no exemptions from the so called 'snitch law' for those persons licensed under chapter 475, part II, Florida Statutes.

Construction contracting and electric and alarm system contracting exemptions

Part I of chapter 475, Florida Statutes, establishes the regulations for real estate brokers, salespersons, schools, and appraisers. Part I of chapter 489, Florida Statutes, provides for the regulation of construction contracting. Section 489.103, Florida Statutes, specifically provides a list of exemptions to construction contracting. Such exemptions include contractors who work on bridges, public utilities, and owners of property when acting as their own contractor under certain conditions.

Currently, only contractors and homeowners can contract with construction contractors. As such, real estate brokers or salespersons who manage or prepare a homeowner's property for sale cannot legally contract with a contractor to make those repairs or improvements on behalf of the property owner. Section 489.103, Florida Statutes, does not provide for an exemption, for such persons to perform contracting for repairs, maintenance, remodeling, or improvements by any person licensed as a real estate agent, while acting as the property owner's representative. In addition, where all work requires a contractor to perform the work and who holds a current valid certificate or registration as a construction contractor the work may be performed if the aggregate contract for labor, materials, and all other items is less than \$5,000, unless the construction, repair, remodeling, or improvement is part of a larger or major operation. However, such an exemption reasonably allows real estate agents

to legally contract for the necessary repairs or improvements of the property on behalf of the owner.

Part II of chapter 489, Florida Statutes, governs electrical and alarm system contracting. This part specifically provides exemptions from its electrical and alarm system contracting requirements. Such exemptions include, employees who are supervised by an electrical or alarm system contracting certificate, registration, or authorization, public utilities, and owners of property when acting as their own contractor under certain conditions.

Currently, only contractors and homeowners can contract with electrical and alarm system contractors. As such, real estate agents who manage or prepare a homeowner's property for sale cannot legally contract with a contractor to make repairs or improvements on behalf of the property owner. Section 489.503, F. S., does not provide for an exemption for such persons contracting for repairs, maintenance, remodeling, or improvements by any person licensed as a real estate agent, while acting as the property owner's representative. In addition, where all work requires a contractor to perform the work and who holds a current valid certificate or registration as an electrical contractor the work may be performed if the aggregate contract for labor, materials, and all other items is less than \$5,000, unless the construction, repair, remodeling, or improvement is part of a larger or major operation. However, such an exemption reasonably allows real estate agents to legally contract for the necessary repairs or improvements on the property on behalf of the owner.

The Florida Building Energy-Efficiency Rating Act

Under the Florida Building Energy-Efficiency Rating Act, a statewide system exists for rating energy efficiencies and providing disclosure to prospective purchasers. The Department of Community Affairs is required to develop and maintain a training and certification program for raters. The department must also prepare and provide energy efficiency information brochures for all types of buildings. In addition, the energy efficiency rating of a residential or commercial building shall be provided upon the request of the prospective purchaser. Thermal efficiencies of new or renovated buildings must already be disclosed under the provisions of the Florida Thermal Efficiency Code, section 553.900, Florida Statutes. According to representatives of the industry, the cost to rate existing buildings is high; thus, few owners and purchasers seek the rating.

On March 24, 1998, the House Committee on Community Affairs HB 4181 as a committee substitute. CS/HB 4181 is a major and complex piece of legislation as it authorizes the adoption and subsequent updates of a statewide unified building code called the Florida Building Code.

Although chapter 553, Florida Statutes, provides for the Florida Building Energy-Efficiency Rating Act, this bill's changes to the act do not affect the provisions in CS/HB 4181. Neither does CS/HB 4181 affect this bill.

B. EFFECT OF PROPOSED CHANGES:

The bill makes various changes to the regulation of real estate brokers, real estate appraisers and the Florida Building Energy-Efficiency Rating Act. Some significant changes include:

- 1) Removing the requirement that real estate brokers and real estate appraisers report any violation committed by other licensees;
- 2) Limiting the requirement that real estate brokers must disclose all known facts that materially affect the value of the property being sold to *residential* (not *commercial*) properties; and
- 3) Adopting a seal to authenticate certified letters of licensure and similar documents.
- 4) Adding an exemption to the construction contracting and electrical and alarm system contracting laws.
- 5) Authorizing, under certain conditions, a designated salesperson to act as a single agent for different customers in the same transaction. Such designated persons must have the duties of a single agent as provided by law. The bill also requires a disclosure notice prohibiting a designated salesperson from disclosing confidential information.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

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

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

Yes. The bill establishes regulatory provisions, thereby expanding instances in which rules may be promulgated.

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

No.

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

No.

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?

No.

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

No. The bill *appears* to institute fees. However, the "appearance" of newly instituted appraiser fees is merely the result of placing into statutes the fee limits that are presently in rule.

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

No.

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

No.

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?

No.

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

N/A

4. Individual Freedom:

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

Yes. The bill establishes an exception (for real estate brokers and real estate appraisers) from the requirement that licensees must report known violations by other licensees. The bill allows the existing industry local grievance process to work for those licensees who are members of Boards of Realtors, although the majority of licensees do not have the ability to go through this grievance procedure (as it is a membership service).

In that process, several licensees mediate disputes between the consumer and the licensee. If the injured party is satisfied with the result of the process, the state is saved the cost of investigation and prosecution. If the aggrieved party is not satisfied, he or she can then file a complaint.

Under current law, certain designated licensees act as mediators in disputes and they are required to immediately report the possible violation.

However, real estate licensees are not required to belong to the local Boards of Realtors, and thus, the majority of licensees do not participate in any "existing industry local grievance process." According to the Florida Board of Realtors, approximately 65,000 of the approximate 350,000 real estate licensees belong to one of the 75 boards within Florida. Thus, less than 20 percent of licensees have the ability to participate in any "existing industry grievance process."

Finally, the bill offers an exemption for certain persons involving particular areas of construction contracting and electrical and alarm system contracting.

- 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. STATUTE(S) AFFECTED:

Chapters 475 , 489, and 553, Florida Statutes

E. SECTION-BY-SECTION RESEARCH:

Sections 1. Amends s. 475.01, Florida Statutes, makes technical changes to reflect that the licensure category "registered appraiser" is now called "registered assistant appraiser"; and excludes property owners of new construction and their agents from the definition of "first contact":

By excluding them from the definition of "first contact," these property owners and agents will not be required to complete the disclosure required of other sales agents dealing with the public. It appears contrary to the intent of section 475.272 and 475.276, Florida Statutes, to exclude property owners of new construction and their sales agents from the notice requirement which requires that all real estate licensees, with very limited exceptions, must provide to any potential seller or buyer at first contact the notice of nonrepresentation. The existing exceptions are limited to circumstances where the encounter between the buyer and agent is very casual or preliminary encounters.

Excluding property owners of new construction and their agents appears to be a substantial departure from the provisions of sections 475.272 and 475.276, Florida Statutes, as well as a substantial extension of the present exceptions presently authorized under the notice requirement.

Section 2. Amends s. 475.011, Florida Statutes, makes technical changes to reflect that the licensure category "registered appraiser" is now called "registered assistant appraiser."

Section 3. Amends s. 475.15, Florida Statutes, authorizes the registration of limited liability companies and limited liability partnerships as brokers; and deletes the existing provision of s. 475.15, Florida Statutes, that requires that the registration of a partnership is canceled automatically during any period that the license or registration of any partner is not in force.

Section 4. Amends s. 475.17, Florida Statutes, :

- 1) clarifies that a person licensed as a real estate salesperson who applies for broker licensure must complete salesperson post-licensure education requirements;
- 2) permits investigators holding a current salesperson's license for at least 12 months to sit for the broker's examination, if the investigators have been employed by the Division of Real Estate for at least 24 months; and
- 3) provides an exemption for investigators employed by the Division who currently do not meet the existing experience requirements.

Section 5. Amends s. 475.183, Florida Statutes, provides that licenses automatically expire after two years of involuntary inactive status; and requires the department to provide notice to the licensee 90 days prior to expiration of inactive license.

Section 6. Amends s. 475.25, Florida Statutes, :

- 1) provides that the provisions requiring real estate licensees to report violations by any fellow professionals (hereinafter the "snitch provisions") are not applicable to real estate licensees.

It is unclear why real estate and appraiser licensees should be exempt from the "snitch" provisions, while other professionals listed in chapter 455, who presumably also have professional associations, must comply with the "snitch" provision. Real estate licensees are not required to belong to the local Boards of Realtors, and thus,

the majority of the licensees who do not belong to the boards cannot participate in any "existing industry local grievance process." According to the Florida Board of Realtors, approximately 65,000 of the approximately 350,000 real estate licensees belong to one of the seventy-five boards within Florida. Thus, no more than 20 per cent of licensees have the ability to participate in any "existing industry grievance process";

- 2) provides that violation of "any standard for the development or communication of a real estate appraisal" or other provision of the Uniform Standards for Professional Appraisal Practice is a disciplinable offense and to clarify that brokers and salespersons performing comparative market analyses are *not* violating any standard.

A violation of "any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards Board of Appraisal Foundation" appears to be both broad and vague. While the provisions may be easily ascertainable, "any standard for the development or communication of a real estate appraisal" appears imprecise and does track the exact language used in the Uniform Standards Board of Appraisal Foundation.

Section 7. Reenacts ss. 475.180, 475.181, 475.22, 475.422, and 475.482, Florida Statutes; incorporates the changes to s. 475.25, Florida Statutes.

Section 8. Amends s. 475.272, Florida Statutes, removes the provision limiting the options of licensed brokers to be either the agent of one of the parties to the sale (single agent) or the agent of neither party (transaction broker). This is not a substantive change because the provisions added last year specifically address the either/or option.

Section 9. Amends s. 475.274, Florida Statutes, provides cross-reference to s. 475.2755.

Section 10. Creates s. 475.2755, Florida Statutes, authorizes, under certain conditions, a designated salesperson to act as a single agent for different customers in the same real estate transaction; and requires a disclosure notice prohibiting a designated salesperson from disclosing confidential information.

Section 11. Amends s. 465.278, Florida Statutes, restricts existing requirements to disclose all known facts that materially affect the value of the property being bought or sold to *residential* properties only (the disclosure requirements would not apply to commercial transactions).

In 1985, the Florida Supreme Court proclaimed the rule that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. In 1997, the Florida Supreme Court applied this doctrine in a commercial setting. Based upon the supreme court's decision, the bill appears to be a departure from that decision.

Section 12. Creates s. 475.279, Florida Statutes, permits the utilization of facsimile transmissions when a signature is required within Part 1 of chapter 475, Florida Statutes.

Section 13. Amends s. 475.2801, Florida Statutes, provides cross-reference to s. 475.2755.

Section 14. Amends s. 475.451, Florida Statutes, revises provisions relating to the permitting of instructors for proprietary real estate schools or state institutions and to provide permit renewal requirements for those instructors.

Section 15. Amends s. 475.452, Florida Statutes, specifies requirements for the receipt of advance fees by real estate brokers auctioning real property; exempts brokers auctioning property from the required trust accounting if a written agreement between broker and seller provides for anticipated expenses to be incurred and paid; and requires brokers to comply with this subsection in the event funds are received in advance of the auction. This does not exempt trust funds received by the broker.

Section 16. Amends s. 475.484, Florida Statutes, provides that a discharge in bankruptcy may relieve a licensee from the penalties and disabilities of this section, except to the extent that this paragraph conflicts with 11 U.S.C. s. 525.

Section 17. Amends s. 475.5015, Florida Statutes, provides cross-reference to s. 476.2755.

Section 18. Creates s. 475.5016, Florida Statutes, provides clear authority for the department to inspect or audit a broker or brokerage office to determine if a disciplinable violation has occurred.

Sections 19 and 20. Amend ss. 475.611 and 475.612, Florida Statutes, makes technical changes to reflect that the licensure category "registered appraiser" is now called "registered assistant appraiser." The registration and licensure requirements change the use of the direction of "shall" to "does."

Section 21. Creates s. 475.6145, Florida Statutes, authorizes the Florida Real Estate Appraisal Board to adopt a seal and provide that the authentication of the seal shall be prima facie evidence of the proceedings, acts and records of the board.

Section 22. Creates s. 475.6147, Florida Statutes, to establish in statute various fees that are statutorily authorized, but whose exact amount is presently specifically established *in rule* by the board. The cost of the initial application shall not exceed \$150 for each year of duration of the license; the combined cost of the application and examination shall not exceed \$300. These fees are intended to ensure the continued operation of the board and are based upon estimates of the revenue necessary to implement provisions of the law related to real estate appraisers. Application may be made for a refund of the fees if: (1) it is determined that the board is not entitled to the fees, (2) the costs expended in processing the application the fees are much less than the fee, or (3) an application is not completely processed.

Section 23. Amends s. 475.615, Florida Statutes, adds a new subsection (4) to authorize the Florida Real Estate Appraisal Board to require that fingerprints through law enforcement agencies must accompany all applications. If a currently registered assistant appraiser or licensed or certified appraiser applies for a different status of licensure within 180 days of renewal, the charge for the application will be the costs established in section 475.6147, Florida Statutes.

Section 24. Amends s. 475.616, Florida Statutes, makes a technical change and changing several references from “this section” to “this part.”

Section 25. Amends section 475.617, Florida Statutes, makes changes to the required education and experience for the categories of: assistant appraisers, appraisers, certified residential appraisers, and general appraisers. An assistant appraiser must have completed at least 75 classroom hours; this education requirement cannot be increased to more than 100 classroom hours. An appraiser must have two years experience and have completed at least 90 classroom hours; this education requirement cannot be increased to more than 120 classroom hours. To be certified as a residential appraiser, the appraiser must have at least 2,500 hours of experience obtained over a 24-month period and have completed at least 120 hours of classroom hours; this education cannot be increased to be more than 165 hours. To be certified as a general appraiser, an appraiser must have at least 3,000 hours of experience obtained over a 30-month period and have completed at least 180 hours of classroom hours; this education cannot be increased to be more than 225 hours.

Sections 26-30. Amend ss. 475.618, 475.619, 475.620, 475.622, and 475.623, Florida Statutes, makes technical changes to reflect that the licensure category “registered appraiser” is now called “registered assistant appraiser,” and changing several references from “this section” to “this part.”

Section 31. Amends s. 475.624, Florida Statutes, provides authority for the Commission to levy a \$5,000 administrative fine, and providing an exemption for appraisers from the “snitch law” (section 455.227(1)(i), Florida Statutes) similar to the exemption provided in this bill to real estate brokers.

Section 475.624, Florida Statutes, is amended to authorize the board to impose administrative fines for up to \$5,000.00 for each count or offense. Although this provision conforms with the existing provision of section 455.225, Florida Statutes, Department of Business & Professional Regulation, potential fines of \$5,000.00 per count may exceed administrative authority.

It is unclear, as discussed above, why real estate and appraiser licensees should be exempt from the “snitch” provisions, while other professionals listed in chapter 455, who presumably also have professional associations, must comply with the snitch provision. Real estate licensees are not required to belong to the local Boards of Realtors, and thus, the majority who do not belong to the boards do not have the ability to participate in any “existing industry local grievance process.” According to the Florida Board of Realtors, approximately 65,000 of the approximately 350,000 real estate licensees belong to one of the seventy-five boards within Florida. Thus, less than twenty percent of licensees have the ability to participate in any “existing industry grievance process.”

Sections 32-35. Amend ss. 475.626, 475.627, 475.628, and 475.629, Florida Statutes, makes technical changes to reflect that the licensure category “registered appraiser” is now called “registered assistant appraiser.”

Section 36. Creates s. 475.6295, Florida Statutes, clarifies the Division’s authority to inspect and audit appraisers and appraisal offices pursuant to Chapters 475 and 455, Florida Statutes

Section 37. Amends s. 475.630, Florida Statutes, makes technical changes to reflect that the licensure category “registered appraiser” is now called “registered assistant appraiser.”

Section 38. Amends s. 489.103, Florida Statutes, provides for an exemption, with exceptions, under the construction contracting regulations.

Section 39. Amends s. 489.503, Florida Statutes, provides for an exemption, with exceptions, under the electrical and alarm system contracting regulations.

Section 40. Amends s. 553.991, Florida Statutes, deletes a provision that states that the purpose of the Florida Building Energy-Efficiency Rating Act is to ensure that energy ratings are disclosed to prospective purchasers at their request.

Section 41. Amends s. 553.994, Florida Statutes, provides a technical change deleting obsolete language.

Section 42. Amends s. 553.996, Florida Statutes, deletes the requirement that an energy-efficiency rating report be provided to prospective purchasers at their request. Provides for an information brochure to be provided to prospective purchasers of all real property upon which a building for occupancy exists at the time of or before the execution of the purchase contract. The brochure shall be prepared and made available for distribution by the department and provided at no charge.

Section 43. Provides an effective date of July 1 of the year in which enacted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None, except that licensed real estate brokers can now be subject to a greater fine.

2. Direct Private Sector Benefits:

None.

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

None.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

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

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

V. COMMENTS:

Section 1.

Section 475.01, Florida Statutes, is amended to exclude property owners of new construction and their agents from the definition of "first contact." By excluding them from the definition of "first contact," these property owners and agents will not be required to complete the disclosure required of other sales agents dealing with the public. It appears contrary to the intent of section 475.272 and 475.276, Florida Statutes, to exclude property owners of new construction and their agents from the notice requirement which requires that all real estate licensees, with very limited exceptions, must provide to any potential seller or buyer at first contact the notice of nonrepresentation. The existing exceptions are limited to circumstances where the encounter between the buyer and agent is very casual or preliminary encounters.

Excluding property owners of new construction and their agents appears to be a substantial departure from the provisions of sections 475.272 and 475.276, Florida Statutes, as well as a substantial extension of the present exceptions presently authorized under the notice requirement.

Section 5.

The reduction in the period of time from the present four year provision to a period of two years before an involuntarily inactive license terminates may violate the vested property interests of present licensees and thus deprive them of due process. Typically, Florida case law addresses this issue where due process notice is required before a license is revoked. See Robinson v. Treasurer of State Dept. of Ins., 676 So.2d 1378, 1379 (Fla. 2d DCA 1996) "A license to sell insurance is a valuable property interest and it cannot be taken away without due process of law. (citing Barry v. Barchi, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed.2d 365 (1979)). "Ordinarily, unless waived, due process requires an appropriate hearing and opportunity to contest the charges prior to the suspension or revocation of a license to sell insurance." (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed.2d 494 (1985); Robinson v. Florida Bd. of Dentistry, 447 So.2d 930 (Fla. 3d DCA 1984)).

It appears reasonable for a licensee to argue that they were unconstitutionally denied their vested property right in maintaining a license (although involuntarily inactive) if the shorter time frame is not postponed beyond due process concerns for those licensees who presently have inactive licenses. Notice alone does not appear to provide sufficient constitutional protection. The notice provision does not appear to specify certified mail or heightened protection in order that the inactive license holder receives the notice and recognizes its relationship to the potential of loss of his or her inactive license and the ability to reactivate the license. The Division stated that it mails the notices via regular first class mail, to the licensee's last known address and that the licensee is required to provide the Division with a current address.

Similarly, it is unclear how this provision would be applied to present inactive license holders.

Section 11.

It is unclear why the required disclosure of all known facts that would materially affect the value of the property should be excluded for non-residential property. Although section 475.276, Florida Statutes, defines "residential sales," for the purpose of requiring written disclosure, the definition is limited to that section and may not apply here. It is also unclear if residential property is intended to include an apartment building, which is normally referred to as commercial property. The definition and use of residential often varies from community to community.

In Johnson v. Davis, 480 So. 2d 625 (1985), the Florida Supreme Court proclaimed a broad-based rule, rooted in notions of modern justice and fair dealing, that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." Id. at 629. The court applied this duty of disclosure "to all forms of real property, new and used." See Id. This holding, derived from other jurisdictions, effectively placed a "harness" on the doctrine of caveat emptor within the context of the sale of a home and "resulted in the seller of a home being liable for failing to disclose material defects of which he is aware." Id. at 628.

Following Johnson, the appellate courts generally refused to hold that nondisclosure of known facts materially affecting the value of commercial property was actionable under Florida law. See Wasser v. Sasoni, 652 So. 2d 411 (Fla. 3d DCA 1995) Green Acres, Inc. v. First Union Nat'l Bank of Fla., 637 So. 2d 363 (Fla. 4th DCA 1994); Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372 (Fla. 2d DCA), review denied, 626 So. 2d 207 (Fla. 1993); Futura Realty v. Lone Star Bldg. Ctrs. (Eastern), Inc., 578 So. 2d 363 (Fla. 3d DCA), review denied, 591 So. 2d 181 (Fla. 1991). In these cases, the courts held that the doctrine of caveat emptor, or "buyer beware," was still the common law rule applied to purchasers of commercial property.

In 1997, however, the Florida Supreme Court, specifically applied Johnson in a commercial setting when it considered a question certified from federal court regarding the duty of a vendor in the misrepresentation of a purchase of a 22,641 acre tract of timberland. The purchaser's known intent in purchasing the 22,641 acres was to harvest and sell the timber on the land and then subdivide the cleared land into residential lots. See Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334 (Fla. 1997). ITT provided Gilchrist a one-year-old appraisal of the property that listed the property as being zoned agricultural, which allowed residential use. In reality, the vast majority of the property was zoned "preservation," which permitted no residential use. Thus, the zoning prevented Gilchrist from cutting down the timber on the property and then selling the land for residential use. The question certified to the supreme court related to ITT's alleged negligent misrepresentation and its liability for such a misrepresentation where Gilchrist had relied upon the erroneous information, despite the fact that an investigation by Gilchrist would have revealed the falsity of the information. The Gilchrist court affirmatively found that the party who transmitted the false information may be held liable for negligent misrepresentation, although holding that the doctrine of comparative negligence may apply if the buyer fails to use reasonable care. In the federal case, the jury decided in favor of the buyer, but the district court thereafter granted the defendant a judgment notwithstanding the verdict. See Gilchrist Timber Co. v. ITT Rayonier, Inc., 95 F. 3d 1033 (11th Cir. 1996). The supreme court's affirmation in Gilchrist

quoted the language in Johnson that "[o]ne should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance," apparently extending the broad-based rule to a commercial setting. Gilchrist, 696 So.2d at 339. Similarly, the court concluded that "[t]he law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it." Id. (citing Johnson, 480 So. 2d at 628). The federal court of appeals reversed and remanded the district court decision, after receipt of the Florida Supreme Court's answer to their certified question. See Gilchrist Timber Co. v. ITT Rayonier, Inc., 127 F. 3d 1390 (11th Cir. 1997) (Affirming that "[t]he Florida Supreme Court stated that the law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.") Id. at 1398.

In McCarthy v. So. States Utilities, 698 So. 2d 590 (Fla. 5th DCA 1997), the appellate court reversed the trial court's grant of summary judgment where the buyer had relied upon erroneous information provided by the utility company in the buyer's decision to purchase an apartment building from the Resolution Trust Corporation. Citing Gilchrist, the court found that there may be liability in tort for the utility company's negligence in giving false information related to the property and relied upon by the buyer in the purchase decision.

Based upon Gilchrist and McCarthy, the bill appears to be a departure from the current direction of the law.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Committee on Real Property & Probate

The Committee on Real Property & Probate passed this bill with four amendments which are incorporated into the committee substitute.

Amendment 1, changed the amount of the administrative fine for real estate brokers that the Division may impose for each count to \$1,000, from \$5,000. Current law provides for fines of \$1,000.

Amendment 2, permits the utilization of facsimile transmissions when a signature is required within Part 1 of chapter 475, Florida Statutes, relating to real estate brokers. By limiting the utilization of facsimile transmissions in the manner to Part 1, this method is not authorized in Part II relating to Appraisers.

Amendment 3, specifies: the maximum hours to be 100 classroom hours for the required courses for an assistant appraiser; increases the hours required to be licensed as an appraiser to 90 classroom hours, increases the minimum hours required to be certified as a residential appraiser to 180 classroom hours, and limits the maximum hours to become certified as a residential appraiser to 225 classroom hours.

Amendment 4, specifies that "first contact" does not include sales of new construction by the owner of the property or by the owner's agents.

Committee on Community Affairs

On March 30, 1998, the House Committee on Community Affairs adopted two substitute amendments to amendments 1 and 2. Amendments 3, 4, and 5 failed to pass the committee. The adopted amendments were incorporated into the committee substitute for CS/HB 3211. The adopted amendments do the following:

- Substitute amendment to amendment # 1 creates an exemption with exceptions to the electrical and alarm system contracting requirements and duplicates the exemption in s. 489.103, Florida Statutes; and
- Substitute amendment to amendment # 2 authorizes designated salespersons to perform certain duties, establishes criteria for designation, clarifies duties of the designated salesperson, and adds provisions relating to disclosure requirements.

The committee moved to allow staff to make technical changes to the bill if necessary. Consequently, staff included new sections 9, 13, and 17 to include cross-references arising out of the creation of s. 474.2755.

According to the House Committee on Business Regulation and Consumer Affairs, on page 47, line 30, of CS/CS/HB 3211, the term "construction" was inadvertently left in the bill and should have been removed. The relevant provision should be amended to correct the oversight in the next committee of reference.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

Prepared by:

Legislative Research Director:

Gip Arthur

Lucretia Shaw Collins

AS REVISED BY THE COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Legislative Research Director:

Jeanne Slizyk

P.K. Jameson

AS FURTHER REVISED BY THE COMMITTEE ON COMMUNITY AFFAIRS:

Prepared by:

Legislative Research Director:

Nayola R. Frazier

Joan Highsmith-Smith