

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 277 w/CS Timeshare Plans

**SPONSOR(S):** Mealor

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 1208

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| REFERENCE  | ACTION                | ANALYST           | STAFF DIRECTOR   |
|--|-----------------------|-------------------|------------------|
| 1) <u>Trades, Professions, &amp; Reg. Business (Sub)</u> | <u>7 Y, 0 N</u>       | <u>Livingston</u> | <u>Liepshutz</u> |
| 2) <u>Business Regulation</u>                            | <u>31 Y, 0 N w/CS</u> | <u>Livingston</u> | <u>Liepshutz</u> |
| 3) <u>Judiciary</u>                                      | <u></u>               | <u>Birtman</u>    | <u>Havlicak</u>  |
| 4) <u>Commerce &amp; Local Affairs Apps. (Sub)</u>       | <u></u>               | <u></u>           | <u></u>          |
| 5) <u>Appropriations</u>                                 | <u></u>               | <u></u>           | <u></u>          |

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### SUMMARY ANALYSIS

The bill amends chapter 721, F.S., Florida's "Vacation Plan and Timesharing Act." The revisions to chapter 721, F.S., permit the regulation of "personal property" timeshares. Personal property timeshares are timeshare interests in personal property, such as cruise ships, houseboats, and vehicles. Chapter 721, F.S., provides for regulation of the offering, sale, management and operation of real and personal property timeshare plans. However, the current statutory framework is based solely upon the characteristics of real estate timeshare plans and does not clearly address personal property plans.

This bill:

- amends several current definitions and adds new definitions applicable to the regulation of personal property timeshares;
- clarifies that automatic renewal provisions apply as part of the term of the timeshare for purposes of establishing whether chapter 721, F.S., is applicable;
- creates disclosure provisions in sales contracts that are applicable to personal property timeshares;
- creates disclosure provisions in resale contracts that are applicable to personal property timeshares;
- provides that filing advertising materials for review with the Department of Business and Professional Regulation (DBPR) is voluntary;
- clarifies that participation in exchange programs is voluntary and provides for disclosures of fees relating to participation in exchange programs;
- provides that current law relating to the advance fee resale prohibition applies to personal property timeshares;
- makes conforming changes.

The bill will require increased filings with DBPR which is not anticipated to necessitate increased staffing. The bill appears to have no economic impact on local governments or the private sector.

The bill provides an effective date with amended provisions for implementation.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0277c.ju.doc

**DATE:** March 16, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |  |   |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

The net effect is neither an increase nor a decrease. The division already has authority to regulate personal property timeshare plans but it lacks the specific framework to fully implement its personal property jurisdiction. The increase in filings is not anticipated to necessitate increased staffing.

#### B. EFFECT OF PROPOSED CHANGES:

The bill amends chapter 721, F.S., Florida’s “Vacation Plan and Timesharing Act” to place similar regulation on personal property timeshares as are placed on real property timeshares. Traditionally, a timeshare plan is a plan where a purchaser buys an ownership interest in real property accommodations and facilities that gives the purchaser the right to use the accommodations and facilities for a specified period of time. Accordingly, chapter 721, F.S., is written to regulate real property interests. Attempts to apply chapter 721, F.S., to “personal property” timeshares, such as timeshare interests in cruise ships, houseboats, or yachts, have proven to be difficult because many terms applicable to real property do not apply to personal property. Timeshare plans are regulated by the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) of the DBPR.

#### **Section 1**

The bill amends the “purposes” section of chapter 721 to show that chapter 721 is also intended to regulate “personal property” timeshare plans.

#### **Section 2**

The bill adds language to chapter 721, F.S., to make clear that the division has authority to make rules relating to the regulation of personal property timeshare plans. It provides that the chapter 721 regulations on personal property timeshares apply only to personal property timeshares that are offered in Florida.

The bill also adds language to make clear that “automatic renewal” provisions will be counted when determining the term of the plan. Chapter 721 only applies to timeshare plans consisting of at least three years. Under the bill, automatic renewal plans where a plan is automatically renewed unless the owner stops the renewal process will be included as part of the term of the plan.

#### **Section 3**

Section 3 of the bill amends many of the definitions in s. 721.05, F.S., to make those definitions relevant to personal property timeshare plans. The following definitions are added or amended:

- “accommodation” is amended to add examples of personal property timeshare plans and specify that the property must be designed for overnight occupancy;

- “agreement for transfer” is added related to written contract for the sale of personal property interests where legal title is not transferred until the contract price is paid in full;
- “common expenses” is amended to include fees and taxes associated with the maintenance and operation of a personal property timeshare plan;
- “completion of construction” is amended to address personal property accommodations;
- “filed public offering statement” is added to distinguish between a public offering statement filed with the division versus a public offering statement intended for purchasers. The bill deletes the definition of “registered public offering statement” and amends the statute in various places to reflect the new definition;
- “interestholder” is amended to add an owner of underlying property;
- “memorandum of agreement” is amended to add personal property related provisions regarding public notice of all timeshare license plans;
- “owner of underlying property” is amended to address ownership of personal property accommodations;
- “owners association” is amended to clarify that the term includes all owners of timeshare interests in all types of plans;
- “personal property timeshare interest” is added relating to accommodations not permanently affixed to real property;
- “timeshare estate” is amended to provide that a timeshare estate plan may not include a personal property timeshare interest;
- “timeshare interest” is amended to include a personal property timeshare interest;
- “timeshare license” is amended to exclude a personal property timeshare interest;
- “timeshare plan” is amended to include a “personal property timeshare plan” and a “real property timeshare plan”;
- “vacation ownership plan” and “vacation membership plan” are deleted because the terms are not used anywhere in the statute.

#### **Section 4**

The bill amends s. 721.06, F.S., which requires certain information to be included in timeshare sales contracts. The statute currently requires that estimated annual assessments be included in the contract. The bill adds similar provisions for personal property timeshares.

The bill amends cancellation provisions in timeshare contracts to permit cancellation within 10 days after a purchaser signs a contract or within 10 days after the purchaser receives disclosure documents required by s. 721.07, F.S.

#### **Section 5**

Section 721.065, F.S., requires certain disclosure language, including disclosures about assessments for common expenses, fees, and taxes, in resale purchase agreements. The bill requires similar disclosures in resale agreements involving personal property timeshares.

## **Section 6**

Section 721.07, F.S., requires the developer to submit a filed public offering statement to the division for approval prior to offering a timeshare plan. This bill makes various changes to make clear that disclosures apply to personal property timeshares and makes numerous changes to reflect the “filed public offering” definitional change. The bill changes s. 721.07, F.S., by:

- adding provisions for cancellation;
- adding pertinent disclosures to the public offering statement related to the offering of personal property timeshare plans;
- adding disclosures related to any changes in valuation of point in a points-based timeshare plan;
- adding disclosures related to the vehicle identification number or other identifying registration number if accommodations are part of a personal property timeshare plan;
- adding disclosures relating to any special fire safety requirements for personal property timeshare accommodations;
- adding disclosures related to the status of title, including liens, defects, judgments, or other encumbrances, as to underlying personal property timeshare accommodations;
- specifying that reserves for personal property timeshare plans must be disclosed if applicable and require a disclosure if they are not applicable;
- requiring the filing of any lease of personal property associated with the personal property timeshare plan;
- requiring the filing of the certificate of ownership and documentation or registry of specified vessels;
- requiring an affidavit that the timeshare instrument complies with specified provisions pursuant to the laws of the jurisdiction in which the vessel is registered;
- requiring that purchasers receive a fully executed paper copy of the purchase contract;
- requiring the filing of a letter by the filing attorney or escrow agent confirming the independence of the escrow agent and its officers, directors, or other partners.

## **Section 7**

Pursuant to s. 721.05(17), F.S., an incidental benefit is an “accommodation, product, service, discount, or other benefit which is offered to a prospective purchaser of a timeshare plan prior to the expiration of his or her initial voidability period”. Incidental benefits are benefits that might not be available for the entire term of the timeshare. Section 721.075, F.S., requires specific disclosures to purchasers so those purchasers will know not to base a purchasing decision on the continued availability of incidental benefits. The bill amends s. 721.075, F.S., to require that the source of incidental benefits be disclosed as part of those disclosures.

## **Section 8**

Section 8 of this bill deals with the conditions under which purchase deposits may be lawfully released from escrow to ensure that timeshare accommodations are available in the manner portrayed and protected from future encumbrances that would endanger the use rights of purchasers. Section 721.08, F.S., is amended:

- to clarify that property other than funds can be the subject of escrow;
- to provide that lengthy provisions related to release of funds or other property from escrow do not have to be recited in the escrow agreement itself;
- to organize section 721.08, F.S., by the type of timeshare plan such that conditions for release of escrow are addressed according to the type of plan;
- to provide, as to a nondisturbance and notice to creditors (NDNC) instrument, that a purchaser's rights will be honored by an interestholder so long as the purchaser remains in good standing under the timeshare instrument, that the NDNC instrument will be recorded as to real property timeshare plans and will be attached as an exhibit to a security agreement or other agreement executed by the interestholder which agreement will be made public via the requirement of the Uniform Commercial Code, chapter 679, F.S.;
- to provide that the division director may approve alternate means of protecting purchaser rights in lieu of escrowing purchaser deposits or in lieu of the NDNC instrument and required public notice;
- to provide that purchasers of a personal property timeshare interest will receive an instrument from the developer evidencing transfer of legal title to the purchaser;
- to provide that violations of the trust or owners association provisions in section 721.08, Florida Statutes, constitute a third degree felony; and
- to provide that as to timeshare estate plans, accommodations may be ensured via evidence of ownership free and clear, nondisturbance by all interestholders, or transfer into a trust that meets the requirements of chapter 721, F.S. As to a personal property timeshare plan, the availability of accommodations may be ensured by transfer of the legal title of accommodations into a trust or owners association that complies with the requirements of chapter 721, F.S.

### **Section 9**

This section makes a conforming change to s. 721.09, F.S., by changing the phrase "registered public offering" to "filed public offering".

### **Section 10**

Section 721.11, F.S., requires a developer to file advertising materials with the division but does not require the division to review such material unless requested by the developer. The bill makes filing the materials with the division voluntary but requires the division to review all materials submitted and notify the developer of any deficiencies.

### **Section 11**

Section 721.12, F.S., requires a seller to keep a copy of each contract for the sale of a timeshare until a deed of conveyance, agreement for deed, or lease is recorded. The bill creates a provision for personal

property timeshares that requires a seller to keep a copy of the contract until an instrument of transfer is delivered to the purchaser.

### **Section 12**

Section 721.13, F.S., requires a developer to provide for a managing entity for each timeshare plan. The bill makes changes to the requirements placed on managing entities including:

- providing that the final adopted timeshare plan budget need not be delivered to purchasers if the proposed budget was previously delivered to purchasers and any changes made to the proposed budget are disclosed and provided to purchasers along with the assessment notice and a reminder that purchasers have the right to receive a copy of the adopted budget;
- clarifying existing law relating to the division's duty to review the final budgets and audits filed with the division annually;
- providing that any reserves existing at the end of a timeshare license plan will be refunded to purchasers;
- providing that the managing entity may not furnish electronic mail addresses to any purchaser or agent thereof without approval of affected purchasers;
- providing that notices and other information sent by a board may be delivered via electronic mail provided the purchaser first consents to use of electronic mail, including proxies or written consents provided that signatures are authenticated through password, cryptography, or other reasonable means and proof of authentication is made available to the board; and
- providing that personal property timeshare plans are subject only to certain provisions of 721.13, F.S., because such personal property accommodations are not affixed to real property and are most typically not physically located in Florida and are therefore inherently difficult to regulate as to management and operational functions.

### **Section 13**

The bill exempts personal property timeshare plans from provisions in s. 721.14, F.S., relating to the discharge of the managing entity. The DBPR explained this provision by stating that the exemption is based upon the fact that Florida is not asserting jurisdiction or control over most management-related duties because those functions are taking place outside the state.

### **Section 14**

Section 14 of the bill amends s. 721.15, F.S., to provide that, for purposes of calculating the developer guarantee, depreciation expenses for real property used to generate fees, revenues, or other income shall be excluded only to the extent that they exceed the net income from the generation of those fees, revenues, or other income. The bill provides that section 721.15, F.S., does not apply to personal property timeshare plans.

### **Section 15**

The bill amends s. 721.16, F.S., to provide that lien provisions relating to real property timeshare plans will not be applicable to personal property timeshare plans. The DBPR commented that the "section presupposes the ability to place liens on real property timeshare interests and foreclose on such liens, which would not typically be possible in a personal property scenario."

## **Section 16**

Section 721.17, F.S., places restrictions on a developer's ability to transfer his or her interest in the property underlying the timeshare. This section makes clear that the interests of purchasers of timeshares must be protected. The bill amends s. 721.17, F.S., to place similar restrictions on the owners of an underlying property in a personal property timeshare.

## **Section 17**

Exchange programs are "any method, arrangement, or procedure for the voluntary exchange of the right to use and occupy accommodations and facilities among purchasers," as specified in s. 721.05(15), F.S. These programs allow persons who purchase a timeshare at one location to exchange it for the ability to use facilities and accommodations at another location. This bill amends s. 721.18, F.S., and makes clear that the purchaser's participation in an exchange program must be voluntary unless the exchange program is one that is functioning as a reservation program of a multisite timeshare plan (a reservation program is mandatory for multisite purchasers). It requires disclosure of membership or participation fees including any conversion or other fees payable to third parties by the purchaser. It deletes the requirement to disclose the name and address of each individual accommodation or facility in participating timeshare plans and limit that disclosure to the plans themselves.

The bill clarifies that the exchange filing information must be reviewed by the division and requires the filing of additional information. It provides timeframes for the review, deficiency, response, and approval process between the division and the exchange company.

## **Section 18**

Current law provides that contract provisions requiring the owner's association or purchaser to lease any portion of the timeshare property are invalid unless approved by a majority vote of the purchasers. The bill amends section 721.19, F.S., to apply the law to personal property timeshares.

## **Section 19**

Section 721.20, F.S., prohibits a broker, salesperson, or broker-salesperson from collecting an advance fee for the listing of any timeshare estate or timeshare license. The bill extends that prohibition to personal property timeshares.

## **Section 20**

Section 721.24, F.S., contains fire safety provisions relating to real property timeshares. The bill exempts personal property timeshares from those provisions.

## **Section 21**

Section 721.26, F.S., relates to the division's power to regulate timeshares. The bill makes conforming changes to make clear that this power applies to personal property timeshares.

## **Section 22**

Part II of chapter 721, F.S., regulates vacation clubs, or multisite timeshare plans. The bill amends definitions applicable to part II of chapter 721, F.S. The definition of:

- "multisite timeshare plan" is amended to provide that automatic renewal of the membership contract is counted for purposes of determining jurisdictional thresholds, unless the

purchaser can terminate the membership at any time with a pro rata refund or receives notice of no less than 30 days and no more than 60 days prior to renewal as to the right to terminate prior to automatic renewal;

- “nonspecific multisite timeshare plan” is added to include personal property timeshare plans and multisite timeshare license plans for which the purchaser receives a right to use all accommodations through the reservation system but no right to use particular accommodations in the event of termination of the plan;
- “specific multisite timeshare plan” is added to include a multisite timeshare license plan or personal property timeshare plan for which the purchaser receives a specific right to use accommodations at a particular component site with use rights in the other accommodations through a reservation system.

### **Section 23**

The section amends s. 721.53, F.S., to require that developers must comply with applicable provisions of s. 721.08, F.S. (relating to nondisturbance of accommodations and facilities), relating to personal property timeshares in multisite timeshare plans.

### **Sections 24 - 28**

These sections make conforming changes so the sections will conform with definition changes made elsewhere in the bill. These sections amend ss. 721.54, 721.55, 721.551, 721.552, and 721.56, F.S.

### **Section 29**

This section amends s. 721.57, F.S., to clarify that trust timeshare estate plans are governed by s. 721.08, F.S., and not s. 721.57, F.S.

### **Section 30 - 34**

These sections make conforming changes to ss. 721.84, 721.96, 721.97, 475.011, and 718.103 F.S., to make these sections applicable to personal property timeshares.

**Section 35** provides the bill effect date with amendment to delay implementation of certain provisions.

## C. SECTION DIRECTORY:

Section 1. Amends s. 721.02, F.S., relating to the purposes of Chapter 721.

Section 2. Amends s. 721.03, F.S., relating to the scope of Chapter 721.

Section 3. Amends s. 721.05, F.S., relating to definitions contained in Chapter 721.

Section 4. Amends s. 721.06, F.S., relating to disclosures required in sales contracts.

Section 5. Amends s. 721.065, F.S., relating to disclosures required in resale purchase agreements.

Section 6. Amends s. 721.07, F.S., relating to public offering statements.

Section 7. Amends s. 721.075, F.S., relating to incidental benefits.

Section 8. Amends s. 721.08, F.S., relating to escrow accounts.



- Section 9. Amends s. 721.09, F.S., to make a conforming change reflecting new definitions.
- Section 10. Amends s. 721.11, F.S., relating to the filing of advertising materials with the division by developers.
- Section 11. Amends s. 721.12, F.S., relating to recordkeeping by the seller of a timeshare.
- Section 12. Amends s. 721.13, F.S., relating to timeshare management.
- Section 13. Amends s. 721.14, F.S., relating to timeshare management.
- Section 14. Amends s. 721.15, F.S., relating to assessments for common expenses.
- Section 15. Amends s. 721.16, F.S., relating to the applicability of liens to personal property timeshares.
- Section 16. Amends s. 721.17, F.S., relating to requirements regarding the transfer of timeshare interests.
- Section 17. Amends s. 721.18, F.S., relating to exchange programs.
- Section 18. Amends s. 721.19, F.S., relating to leasing of personal property timeshares.
- Section 19. Amends s. 721.20, F.S., relating to collection of advance fees for the listing of personal property timeshares.
- Section 20. Amends s. 721.24, F.S., relating to fire safety provisions relating to real property timeshares.
- Section 21. Amends s. 721.26, F.S., relating to the division's ability to regulate timeshares.
- Section 22. Amends s. 721.52, F.S., relating to definitions applicable to multisite timeshare plans.
- Section 23. Amends s. 721.53, F.S., relating to nondisturbance of accommodations and facilities.
- Section 24. Amends s. 721.54, F.S., relating to multisite timeshare plans.
- Section 25. Amends s. 721.55, F.S., relating to multisite timeshare plan offering statements.
- Section 26. Amends s. 721.551, F.S., relating to multisite timeshare plan offering statements.
- Section 27. Amends s. 721.552, F.S., relating to changes to component site accommodations or facilities.
- Section 28. Amends s. 721.56, F.S., relating to management of multisite timeshare plans.
- Section 29. Amends s. 721.57, F.S., relating to offering timeshare estates in multisite timeshare plans.
- Section 30. Amends s. 721.84, F.S., relating to the duties of a registered agent.
- Section 31. Amends s. 721.96, F.S., relating to the timeshare commissioner of deeds.
- Section 32. Amends s. 721.97, F.S., relating to the timeshare commissioner of deeds.
- Section 33. Amends s. 475.011, F.S. relating to exemptions regarding an exchange company.
- Section 34. Amends s. 718.103, F.S. to provide a definition for "residential condominiums."

Section 35. Provides an effective date with amended provisions for implementation.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

A fee of \$100 is imposed for filing each amendment to materially change an approved exchange company filing. Revenues are not anticipated to be significant.

#### 2. Expenditures:

The DBPR anticipates that the net effect is neither an increase nor a decrease. The division already has authority to regulate personal property timeshare plans but it lacks the specific framework to fully implement its personal property jurisdiction. The increase in filings is not anticipated to necessitate increased staffing

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

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

#### 2. Expenditures:

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

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None anticipated.

### D. FISCAL COMMENTS:

## 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, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

**Delegation of legislative powers to the executive branch** - The separation of powers doctrine<sup>1</sup> prevents the Legislature from delegating its constitutional duties.<sup>2</sup> Legislative power involves the exercise of policy-related discretion over the content of law.<sup>3</sup> The Florida Supreme Court has acknowledged that “where the Legislature makes the fundamental policy decision and delegates to

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<sup>1</sup> Article II, section 3 of the State Constitution provides that, “No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”

<sup>2</sup> See Board of Architecture v. Wasserman, 377 So.2d 653 (Fla. 1979).

<sup>3</sup> See State ex rel. Taylor v. City of Tallahassee, 177 So. 719 (Fla. 1937).

some other body the task of implementing that policy under adequate safeguards, there is no violation of the doctrine.”<sup>4</sup> However, the Court warned, “[w]hen legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.”<sup>5</sup> It appears that both current law (s. 721.08(4) and (5), F.S.) and the amendment to s. 721.08(5)(c), F.S., (see lines 2002-2017) made by section 8 of this bill give the Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation discretion to accept alternate means of protecting the continuing rights of purchasers; discretion to permit deposit of the funds in an escrow account; and discretion to accept other assurances. It could be argued that the provisions provide adequate standards and guidelines for the use of executive discretion. Because the personal property involved in timeshare is often mobile (i.e., a cruise ship or airplane), and may be subject to various international and state laws, an argument could be made that based upon the subject matter and the degree of difficulty involved in articulating finite standards in this area of the law, that the guidelines are sufficient.<sup>6</sup>

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

The committee substitute adopted by the Committee on Business Regulation changed the reference in the effective date from 2004 to 2005.

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<sup>4</sup> See *Askew v. Cross Key Waterways*, 372 So.2d 913, 921 (Fla. 1978) (quoting *C.E.E.D., v. California Coastal Zone Conservation Commission*, 43 Cal.App.3d 306, 325 9Cal. App. 4 Dist. 1974).

<sup>5</sup> See *Id.* at 918-919.

<sup>6</sup> See *Id.* at 918.