

WHITE PAPER

PROPOSED AMENDMENT TO F.S. 689.01 (No witnesses needed for leases)

I. SUMMARY

This proposed legislation will modify Section 689.01 of the Florida Statutes (known as the Statute of Conveyances) to remove the requirement for two subscribing witnesses on any instrument creating, making, granting, conveying, transferring, releasing, assigning or surrendering a leasehold estate.

II. CURRENT SITUATION

Section 689.01(1) F.S. requires that certain instruments affecting interests in real property must be made in writing and be signed in the presence of two subscribing witnesses, including any instrument creating, making, granting, conveying, transferring, releasing, assigning or surrendering a leasehold estate having a term of more than one year. Historically with respect to deeds, “The manifest object of requiring an attestation of subscribing witnesses is to enable the grantee to prove the execution by the grantor of the deed, and to show the circumstances attending the sealing and delivery.” quoting from Richbourg v. Rose, 53 Fla. 173, 44 So. 69, text 72, the Supreme Court of Florida. This same reasoning applied to leases to protect the tenant from bogus transactions.

The current statute concerning subscribing witnesses as written is not without issue: “Although the provisions of Section 689.01, Florida Statutes, F.S.A., require that such an instrument be executed in the presence of two subscribing witnesses, the Statute does not require that such witnesses shall subscribe in the presence of the grantors, or in the presence of each other. Likewise, the Statute does not by express terms require that subscribing witnesses shall sign the document before the delivery thereof is accomplished.” Medina v. Orange County, 147 So. 2d 556, 557 (Fla. Dist. Ct. App. 1962).

Furthermore, the statute does not seem to require the tenant’s signature to be witnessed although some would argue that it does due to the reconveyance of the leasehold at the end of the term. Although the statute is unclear on this issue, almost all leases in Florida have witness blanks for both the landlord and tenant as lawyers are unwilling to advise their clients regarding a requirement or lack of requirement that a tenant’s signature be witnessed.

Most residential leases in Florida are written for a term of one year and therefore do not require two subscribing witnesses. Commercial leases, on the other hand, are usually written for longer terms. As a result, the witnessing requirement in FS 689.01(1) rarely applies to the landlord’s signature on a Florida residential lease but almost always applies to a landlord’s signature on a Florida commercial lease.

Historically, the requirement for two subscribing witnesses for the conveyance of real property is similar to the statutory requirement that the conveyance must be made in a written

instrument, and the statutory requirement that the instrument must be acknowledged by the grantor before a notary public in order to be recordable in the public records. It serves as an additional means of verifying that the deal is real, and to protect the property owner against bogus claims that the property had been conveyed or (in this case) leased. In the modern era of communications, electronic documents and the transmission of leasing documents via email or other electronic means, the witnessing requirement always proves burdensome to both the landlord and the tenant, even though this formality was originally intended to *protect* the tenant.

In the case of commercial real property, leasing is essential to realizing its value through the creation of a stream of rental income. When a landlord signs a lease with a tenant, the landlord has not parted with ownership of the property, but has only surrendered the right of possession in exchange for the tenant's obligation to pay rent. A lease simply does not present the same opportunity for fraud as in the case of a deed transferring ownership of the property, even though both qualify as instruments transferring rights in real property, because the tenant incurs obligations to the landlord under the lease.

Florida is among the minority of American states that still require subscribing witnesses for conveyances or leases of real property. Thirty-nine states require no witnesses. Of the remaining 11 states that require a witness:

- Four (4) require only one witness;
- One state requires two witnesses for greater than 20 years (Alabama); and
- One state requires witnesses for an interest greater than five years (Virginia).

The National Association of Industrial and Office Properties ("NAIOP") is a proponent of streamlining the execution of commercial leases in Florida by eliminating the requirement that the landlord's signature be witnessed by two subscribing witnesses. As a representative of landlords in the real estate industry, NAIOP argues that landlords find the witnessing requirement more burdensome than protective of tenants' interests.

The RPPTL Section filed an amicus brief in a 2009 case concerning the lack of subscribing witnesses on a commercial lease, *Skylake Insurance Agency, Inc. v. NMB Plaza, LLC*, 23 So.3d 175 (Florida 3d DCA 2009). In that case, a landlord's signature on a ten-year pre-construction lease was not witnessed by subscribing witnesses, and the landlord repudiated the lease on that ground as the construction of the premises neared completion. The tenant sued for specific performance of the lease and alternatively claimed damages for fraud. The Third DCA refused the tenant's claim for specific performance, holding that the lease was not a valid conveyance of the leasehold because it failed to comply with the two-witness requirement in FS 689.01. However, the appellate court remanded the case for consideration of the tenant's damage claim because the written lease was otherwise validly executed by the landlord in accordance with the LLC statute and therefore constituted a binding contract. The Third DCA expressly declined to permit the landlord in that case to profit from its own failure to comply with the witnessing formality.

III. EFFECT OF PROPOSED CHANGE

If the requirement of two witnesses for a lease had been eliminated from FS 689.01 when the *Skylake* case was decided, the tenant in that case might have been able to obtain specific performance of the lease and there would have been no need for an amicus brief by the Section. With the elimination of the witnessing requirements on leases, all of the confusion and vagueness of the Statute of Conveyances regarding leases will be gone.

Going forward, if the witnessing requirement for leases is removed from the statute, controversies like the one in the *Skylake* case will no longer be possible. Further, commercial leasing will be more streamlined for Florida properties, as there will be one less formality required in order to create a valid contract *and* a conveyance of the leasehold. Landlords and tenants and their lawyers will not need to waste valuable time dealing with this subject and the obligation to obtain subscribing witnesses.