

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 27 Residential Properties
SPONSOR(S): Insurance, Business & Financial Affairs Policy Committee; Ambler; and Bovo
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2604

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	20 Y, 0 N, As CS	Tanner	Cooper
2)	Civil Justice & Courts Policy Committee		Bond	De La Paz
3)	General Government Policy Council			
4)	Finance & Tax Council			
5)				

SUMMARY ANALYSIS

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments for violations of the governing documents. This bill:

- Revises the requirements for the inspection and copying of records for homeowners' associations.
- Requires additional disclosure to members of a homeowners' association if the association budget does not budget for deferred expenditures.
- Prohibits a director, officer or committee member of a homeowners' association from receiving compensation for service to the association. However, reimbursement for out of pocket expenses, recovery of insurance proceeds, or compensation authorized in advance by a majority vote of the owners are not prohibited.
- Provides that a fine greater than \$1,000 by a homeowners' association against a parcel owner may become a lien on the property.
- Revises the procedure and requirements for board meetings and elections.
- Requires that an elected director of a condominium association or a homeowners' association must certify in writing within 30 days of being elected that he or she has read the governing documents of the association.
- Provides for additional disclosure to prospective purchasers.
- Repeals current law providing for pre-suit mediation for disputes between a homeowners' association and a parcel owner before the dispute may be filed in court.
- Maintains the Department of Business and Professional Regulation's current responsibility of arbitrating homeowners' association recall election disputes but eliminates funding by repealing the department's authority to collect a \$200 filing fee.
- Provides for pre-suit mediation or pre-suit arbitration for disputes between homeowners' associations and a parcel owner or owners and parcel owners within the same homeowners' association before a complaint may be filed in court.

This bill appears to have a negative fiscal impact on state government revenues of \$12,000 recurring payable to the Division of Florida Condominiums, Timeshares and Mobile Homes Trust Fund. This bill does not appear to have a fiscal impact on local governments.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

A condominium association is an association responsible for operating and managing a condominium property for the benefit of the owners. Condominium associations are governed by ch. 718., F.S. The state regulates condominium associations through the Division of Condominiums, Timeshares and Mobile Homes, a division within the Department of Business and Professional Regulation.

A homeowners association is an association of residential property owners in which voting membership is made up of parcel ownership, in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.¹ Homeowners' associations are governed by ch. 720, F.S. There is no state regulatory agency that regulates the conduct of homeowners associations.

Effect of Bill

Condominium Associations -- Election Procedures

Current law requires a person desiring to be a candidate for election to the board of administration of a condominium association must qualify for office at least 40 days prior to the election. One condition of qualifying is that the candidate must certify that he or she has read and understands, to the best of his or her ability, the governing documents of the association and the provisions of ch. 718 and any applicable administrative rules. The board of administration of a condominium association is analogous to the board of directors of a typical corporation.

This bill amends the condominium election procedures at s. 718.112(2)(d), F.S., to

- Move the certification related to reading of the condominium documents and laws until after the election.
- Specify that the governing documents of the association are the articles of incorporation, bylaws, and current written policies.
- Eliminate the requirement to certify that the director has read the condominium statutes and the administrative code.

¹ Section 720.301(9), F.S.

- Require the director to certify that he or she will uphold the governing documents and policies and that he or she will faithfully discharge the fiduciary duties owed to the association.

A director that fails to file the certification statement with the secretary of the association within 30 days after election is "disqualified" from service on the board. The secretary is required to maintain the certificate for 5 years after the election.

The provisions erroneously refer to the "board of directors" rather than the "board of administration." One possible interpretation is that the failure to timely file the certification after an election may forever disqualify a person from service on the board of administration. The requirement does not appear to apply to persons appointed to the board to fill a vacancy.

Homeowners' Associations -- Board and Committee Meetings

Current law at s. 720.303(2), F.S., provides procedures for all homeowners' association board meetings and some committee meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. In general, board meetings are open to all members unless the meeting is to discuss pending or proposed litigation. Additionally, any committee meeting where a final decision is made regarding the expenditure of funds, architectural control, or personnel matters is similarly open to members unless meeting the association's attorney to discuss pending or proposed litigation.

This bill amends s. 720.303(2)(b), F.S., to provide that all board meetings related to personnel matters may be closed to the members, regardless of whether the association attorney is present.

Homeowners' Associations -- Member Access to Records

Current law requires a homeowners' association to provide members of the association access to the records of the association within 10 business days of a written request for inspection or copying of the records. A member may sue the association for failure to timely provide the required access. This bill amends s. 720.303(5)(a), F.S., to require that a member request for access to records must be sent by certified mail, return receipt requested, if the member wishes to sue for failure to provide the required access.

Current law allows an association to charge a member for copies of records of the association. The association may charge up to 50 cents a page or, if the copies are made by an outside vendor, the association may charge the actual cost charged by the vendor. This bill amends s. 720.303(5)(c), F.S., to provide that an association copying more than 25 pages may charge a member the actual cost of copying, including reasonable costs for employees.

Homeowners' Associations -- Reserve Accounts

Current law allows, but does not require, a homeowners association to provide for reserve accounts.² A reserve account is in effect a savings account whereby an association collects periodic advance payments to cover future anticipated capital expenditures and deferred maintenance items. Monies in a reserve account may only be spent for maintenance, repair and replacement of the reserve item. A reserve account, once established, must remain in existence.

This bill amends s. 720.303(6), F.S., to allow the members of an association to terminate a reserve account. This bill also allows an association to create funding accounts that are not formal reserve accounts, and creates a disclosure that informs members that such funding accounts are not protected from being used by the association for expenditures that are unrelated to the reserve item.

² Probably the most common reserve account applicable to a homeowners association is for repaving of private roads.

Homeowners' Associations - Compensation of Directors

There is no prohibition in current law on compensation of the directors, officers, or committee members of a homeowners' association. This bill creates s. 720.303(12), F.S., to provide that a director, officer or committee member may not receive any salary or compensation from the association for the performance of his or her duties and may not benefit in any other way financially from service to the association. This bill also creates exceptions to this limitation, which exceptions provide that this limitation does not prohibit:

- Participation in a financial benefit accruing to all or a significant number of members as a result of lawful actions taken by the board including in part maintenance or repair of community assets;
- Reimbursement for out-of-pocket expenses subject to approve in accordance with procedures established by the governing documents;
- Recovery of insurance proceeds which are derived from a policy of insurance maintained by the association for the benefit of its members;
- Any fee or compensation authorized in the governing documents; or
- Any fee or compensation authorized in advance by a vote of a majority of the voting interests voting in person or by a proxy at the meeting of the members.

Homeowners' Association -- Fines as a Lien

Current law requires members and their tenants, guests and invitees to comply with association governing documents. Among other remedies available to associations for a violation of the governing documents, an association may levy a reasonable fine of up to \$100 per violation. A fine for a continuing violation may not exceed \$1,000 unless the governing documents specifically allow a larger fine. A fine may not become a lien against a parcel.

This bill amends s. 720.305(2), F.S., to provide that a fine in excess of \$1,000 may become a lien against a parcel.

Homeowners' Association -- Proxy Voting

Current law generally allows proxy voting in elections where the parcel owners may vote. A proxy is a written authorization allowing one person to cast another's vote. Current law does not allow nor does it prohibit an association from utilizing absentee balloting.

This bill amends s. 720.306(8), F.S. to create a format for absentee balloting. The bill provides that if a governing documents allow a parcel owner who is not in attendance at a meeting to cast a secret ballot, the ballot must be placed in an inner envelope with no identifying markings and delivered to the association in an outer envelope with the required information. The outer envelope must include the name of the owner, the lot or parcel for which the vote is being cast, and the signature of the parcel owner casting the ballot. Once the eligibility to vote is verified and it is confirmed that there are no other ballots submitted for that lot or parcel, the inner envelope must be removed and added to the ballots of members who voted personally and must be opened when the ballots are counted. If there is more than one ballot submitted for a lot or parcel, the ballots for that lot or parcel are disqualified. No ballot received after the close of balloting by a vote of the membership will be considered.

Homeowners' Association -- Director Certification

Current law provides criteria for persons seeking to be elected to the board of directors to a homeowners association. This bill amends homeowner association election law at s. 720.306(9), F.S., to add a requirement that a newly elected director must certify that he or she has read and will uphold the governing documents of the association and that the director will faithfully discharge the director's fiduciary obligations to the association. A director that fails to file the certification with secretary of the association within 30 days after election is disqualified from service on the board of directors. The secretary of the association must maintain the certification for 5 years from election. The failure of the association to have a certification on file does not affect the validity of any action of the association.

One possible interpretation is that the failure to timely file the certification after an election may forever disqualify a person from service on the board of directors. The requirement does not appear to apply to persons appointed to the board to fill a vacancy.

Homeowners' Association -- Prospective Purchaser Disclosure

Under current law, a prospective purchasers of a home in a homeowners association must be given a disclosure summary before the contract for sale is executed. It must be substantially similar in form to the one provided in s. 720.401, F.S. Statements on the form must declare in part that:

- A purchaser will be required to be a member of the homeowners' association;
- There are restrictive covenants;
- The purchaser will have to pay assessments;
- The purchaser may have to pay special assessments;
- Failure to pay assessments could result in a lien; and
- The developer may have the right to amend restrictive covenants without association approval.

This bill amends the disclosure form to provide that the developer may only amend the covenants without association approval if the association is still under developer control. This bill also adds two new disclosures:

- That there may be an obligation to pay assessments to a community development district for the purpose of retiring bond obligations used to construct the infrastructure or other improvements.
- The purchaser is jointly and severally liable with the previous owner for all unpaid assessments up to the time of the title transfer.

Homeowners' Association – Dispute Resolution Procedures - In General

Current law at s. 720.311, F.S., requires that certain disputes related to homeowners associations are subject to pre-suit mediation or to arbitration. A party that fails to initiate the mediation procedure, or who fails to participate in the procedure, may not recover attorney's fees in any subsequent litigation regarding the dispute.

Effective July 1, 2010, this bill repeals s. 720.311, F.S., and creates a new Part IV of ch. 720, F.S., entitled "Dispute Resolution." The following sections discuss the changes in detail.

Homeowners' Association - Dispute Resolution - Applicability

In general, ch. 720, F.S., only applies to mandatory homeowners associations, that is, an association that has mandatory periodic assessments and the right to impose a lien against a parcel for the failure

of a parcel owner to pay an assessment.³ The current dispute resolution procedures also apply to non-mandatory associations.⁴ This bill changes a legislative intent section at s. 720.302(2), F.S., to state an intent for dispute resolution procedures to apply to "deed-restricted communities," which appears to reference non-mandatory associations. However, the provisions in the new Part IV only reference homeowners associations, a defined term that only applies to mandatory associations.

Current law at s. 720.311(2)(a), F.S., provides that the dispute resolution procedures of the section are applicable to certain disputes between an association and a member. This bill provides that disputes between parcel owners are also subject to mediation if such disputes are otherwise within the categories of disputes subject to mediation under the new Part IV.

Current law details what kinds of disputes are required to participate in the ch. 720, F.S., dispute resolution procedures. Any dispute not included is not required to utilize the procedures. In addition, current law specifies disputes that are not subject to dispute resolution, namely: elections, collections, emergency relief, and enforcement of a prior agreement. This bill adds disputes that are not required to be mediated, namely: title to real property, warranty claims, eviction, breach of fiduciary duty, and mortgage foreclosure.

Current law provides that cases requiring emergency relief are not required to participate in statutory dispute resolution requirements. This bill provides that, after the court has dealt with the emergency, the court may refer the remainder of the case to the mediation or arbitration requirements.

Homeowners Associations -- Dispute Resolution - Elections

Section 720.303(10)(d), F.S., requires the parties to a dispute regarding a recall election to refer the matter to arbitration by the Department of Business and Professional Regulation. Section 720.306(9), F.S., similarly requires the parties to a dispute regarding a general election to refer the matter to arbitration by the department. Section 720.311(1), F.S., requires the department to charge an initial filing fee of \$200 for such arbitrations, and requires the department to charge the parties the actual cost of the arbitration. To date, the department has not developed a means to collect any more than the \$200 initial fee, and the operation operates at a deficit.

This bill requires the parties to any election dispute to refer the matter to private arbitration under new s. 720.507. The bill does not amend or repeal the provisions of ss. 720.303(10)(d) or 720.306(9), F.S.; thus, parties may be required to arbitrate the same issue twice.

Homeowners Associations -- Dispute Resolution - Statutes of Limitation

Current law at s. 720.311(1), F.S., provides that the filing of a petition for arbitration or a demand for mediation tolls any applicable statute of limitation. A statute of limitation is a bar to the filing of a lawsuit that occurs after a certain period of time has elapsed since the event that gives rise to the lawsuit. Tolling of a statute of limitations is a day for day extension of the statute of limitations deadline based on the occurrence or nonoccurrence of some event. Current law does not specify when the tolling concludes. This bill provides that the tolling of the statute of limitations ends upon the conclusion of the arbitration or mediation and for 30 days thereafter.

Homeowners Associations -- Dispute Resolution - Notice Before Mediation

Current law at s. 720.311, F.S., allows a party to immediately proceed to the applicable dispute resolution procedure (arbitration or mediation). This bill creates a new s. 720.504 that requires an aggrieved party to first give notice to the other party of the dispute. Notice must be by certified mail.

³ Section 720.301(9), F.S.

⁴ Section 720.311(2)(e), F.S.

The notice must specifically describe the offense, state the date time and location of the offense, and the text of any provision in the governing documents that applies. The offending party has 10 days to resolve the dispute, after which the aggrieved party may seek arbitration or mediation. A copy of the notice and any responses thereto must be included in any demand for arbitration or mediation. The statute of limitations is not tolled during this 10 day reply period.

Homeowners Associations -- Dispute Resolution - Mediation Required

Current law at s. 720.311, F.S., requires an aggrieved party to serve a statutory offer to participate in presuit mediation. This bill creates a new s. 720.505 that requires the parties to refer the dispute to presuit mediation by use of a similar form entitled "Statutory Notice of Presuit Mediation." Alternatively, this bill also allows the parties to refer the dispute to presuit arbitration.

The form of the Statutory Notice of Pre-suit Mediation is set in new s. 720.505(1), F.S. Service of the form must be by personal service according to ch. 48, F.S., or by certified mail, return receipt requested. An additional copy of the form must be sent by first-class mail to the responding party's address as it last appears in the association records, or if not available, then as it last appears in the official records of the county property appraiser. The notice informs the offending party that:

- The aggrieved party demands pre-suit mediation.
- Notice of the dispute was previously sent (note that a copy of the previous notice must be attached).
- This notice is required before a lawsuit may be filed.
- The party receiving the notice may opt for arbitration.
- The mediation process will be conducted under specified terms.
- Failure to participate in mediation will result in a bar on collecting attorney's fees should the dispute go to trial.
- The aggrieved party has selected 5 mediators, whose name and rate are stated, and that the party receiving the notice may select one of the five.
- The recipient must reply within 20 days by certified mail.

The form then provides room for the respondent to fill out an Agreement to Mediate, in which the respondent indicates that he or she will participate, the name of the mediator chosen, and three dates within the next 90 days that he or she is available.

The mediator is required to set the mediation within 10 days of notice of selection, and must complete mediation within 90 days unless the parties all agree to an extension.

Homeowners Associations -- Dispute Resolution - Arbitration (not related to election)

Current law does not provide an alternative to the mandatory pre-suit mediation of certain disputes. This bill creates new s. 720.506 that allows the party served with a Statutory Notice of Pre-Suit Mediation to reply by requesting pre-suit arbitration instead.

Homeowners Associations -- Dispute Resolution - Arbitration

Current law requires election disputes to be referred to arbitration through DBPR, and provides no means for other homeowners' association disputes to be referred to arbitration. Current law has little statutory guidance for the arbitration process. This bill requires elections disputes to be referred to private arbitration and allows other disputes to be referred to arbitration. The new arbitration procedures at new s. 720.507 apply to all pre-suit arbitration.

Arbitration is different from mediation in that mediation involves a trained intermediary who guides the parties towards a mutually agreeable settlement, whereas arbitration is a hearing similar to trial in which the parties present evidence and the arbitrator makes a ruling.

A party that elects to pursue pre-suit arbitration must serve the other party a written notice of pre-suit arbitration. The statute creates a specific "Statutory Notice of Presuit Arbitration" at new s. 720.507(1). The notice must be served by personal service according to ch. 48, F.S., or by certified mail, return receipt requested. An additional copy must be sent by first-class mail to the responding party's address as it appears on the official records of the association, or if not available, as it appears on the official records for the county appraiser. The form, similar to the mediation form, notifies the party that:

- Arbitration is requested related to a dispute described in the notice.
- Arbitration is required before the filing of a lawsuit.
- The arbitration will be conducted according to the procedures set forth in the notice.
- The parties may settle the case before arbitration.
- Failure to participate will result in a loss of the party's right to recover attorney's fees should a lawsuit be filed.
- The party has selected 5 arbitrators for the other party to select from.
- A response to the notice is required within 20 days.

The form then provides room for the recipient to fill out an Agreement to Arbitrate, in which the recipient indicates that he or she will participate, the name of the arbitrator chosen, and three dates within the next 90 days that he or she is available.

The arbitrator is required to set the arbitration within 10 days of notice of selection, and must complete arbitration within 90 days unless the parties all agree to an extension.

An arbitrator may issue subpoenas for the attendance of witnesses and the production of documents or things. A final arbitration award must be issued within 30 days of the hearing. If the parties agreed to binding arbitration, then the award is final; otherwise, any party may file for a trial de novo within 30 days of the award. A party filing a motion for trial de novo will be assessed the other party's costs and attorney's fees if the trial court award is not more favorable than the arbitration award.

Homeowners Associations -- Dispute Resolution - Procedure for Mediation or Arbitration

Current law has little procedure set forth for the conduct of mediation or arbitration proceedings involving homeowners associations. This bill creates new s. 720.508 to provide that:

- Mediation and arbitration are to be conducted according to ch. 44, F.S., and the Florida Rules of Civil Procedure.
- Mediation confidentiality laws apply.

- Only parties and their attorneys may attend mediation. Other persons may only attend if all parties agree.
- A mediation conference is not a board meeting that must be noticed.
- Settlement agreements are not precedent, but arbitration awards are.
- A person must be a certified circuit court mediator and a member of the Florida Bar in order to qualify as a mediator or arbitrator under Part IV.
- Mediation settlements and arbitration awards may be enforced by the courts.

This bill also amends s. 34.01, F.S. to correct a cross reference to conform to the repeal of s. 720.311, F.S., and the creation of Part IV of ch. 720, F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 718.112 F.S., relating to the bylaws of a condominium association.

Section 2 amends s. 720.303, F.S., relating to homeowners association powers and duties.

Section 3 amends s. 720.305, F.S., relating to obligations of members of a homeowners association, remedies at law or in equity, levy of fines and suspension of use rights.

Section 4 amends s. 720.306, F.S., relating to meetings of members of a homeowners association.

Section 5 amends s. 720.401, F.S., relating to notices given to prospective purchasers of a property within a homeowners association.

Section 6 amends s. 34.01, F.S., relating to the jurisdiction of the county court.

Section 7 amends s. 720.302, F.S., relating to the purpose, scope and application of ch. 720, F.S., regarding homeowners' associations.

Section 8 repeals s. 720.311, F.S., relating to homeowners association dispute resolution, effective July 1, 2010.

Section 9 creates, effective July 1, 2010, ss. 720.501, F.S., 720.502, F.S., 720.503, F.S., 720.504, F.S., 720.505, F.S., 720.506, F.S., 720.507, F.S., 720.508, F.S., 720.509, F.S., and 720.510, F.S., relating to dispute resolution in homeowners associations.

Section 10 provides a conditional effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill will have a negative fiscal impact on revenues of the Department of Business and Professional Regulation that are deposited in the Florida Condominium, Timeshare and Mobile Home Trust Fund. Effective July 1, 2010, the bill repeals s. 720.311, F.S., which provides funding for the department's arbitration program for homeowners associations. The section requires persons who apply for arbitration to pay a \$200 filing fee. At an estimated 60 filings per year, the estimated loss of revenue is \$12,000 recurring.⁵

⁵ DBPR fiscal analysis, undated, received February 5, 2009.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Current law at s. 720.303(10)(b), F.S. (recall elections) and s. 720.306(9), F.S. (general elections), requires the Department of Business and Professional Regulation to arbitrate HOA election disputes. Section 720.311(1), F.S. provides for a \$200 filing fee, and requires DBPR to charge the parties the actual cost of the arbitration. The Division of Florida Condominiums, Timeshares and Mobile Homes conducts the arbitrations. Currently, the department does not have in place any means to assess a fee for arbitration other than the \$200 initial fee. In FY 2005-2006 the division received 60 petitions and \$12,000 in filing fees, in FY 2006-2007, the division received 48 petitions and \$9,600 in filing fees, and in FY 2007-2008, the division received 63 petitions and \$12,600 in filing fees.

By repealing s. 720.311, F.S., the bill eliminates the division's funding for arbitration of election disputes in homeowners associations. The bill also provides for private arbitration funded by the parties, but also keeps the current requirement of arbitration through DBPR. Although the program generates revenue via filing fees, since its inception, the program has operated at a significant deficit. However, if the bill does not amend the requirements for DBPR involvement in ss. 720.303(10)(d) and 720.306(9), F.S., the negative fiscal impact of this program on the division's trust fund will only be increased.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill requires that disputes regarding general elections and recall elections are to be arbitrated by a private arbitrator chosen by the parties. However, this bill does not amend the current law requirements at s. 720.303(10)(b), F.S. (recall elections) or s. 720.306(9), F.S. (general elections), which sections require the parties to submit the dispute to the Department of Business and Professional

Regulation for arbitration. Thus, un-amended provisions of current law appear to be in conflict with the provisions of this bill.

It is unclear how the mediation and arbitration process would proceed if there is more than one respondent.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On February 3, 2009, the Insurance, Business and Financial Affairs Policy Committee adopted an amendment that deleted a new section of law which permitted three or more condominium associations to form self-insurance funds for the purpose of spreading the liabilities arising from deductible losses associated with hurricanes. The bill was then reported favorably with a committee substitute.