The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/CS/SB 880
INTRODUCER:	Judiciary Committee, Regulated Industries Committee, and Senators Fasano and Ring
SUBJECT:	Community Associations
DATE:	April 23, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Rhea	RI	**Fav/CS**
2.	Molloy	Yeatman	CA	**Fav/1 amendment**
3.	Oxamendi	Maclure	JU	**Fav/CS**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill revises laws related to community associations, including condominium, homeowners', and cooperative associations. The bill permits condominium, cooperative, and homeowners' associations to demand payment of any future regular assessments from the tenant of a unit or parcel owner. Regarding condominium associations, the bill:

- Requires intent to cause harm to the association or one or more of its members in order for a person to knowingly or intentionally fail to create or maintain accounting records;
- Expands the forms of information in the association's records that are not accessible to unit owners to include disciplinary, health, insurance, personnel records, and passwords;
- Revises the requirements related to financial reporting by the association;
- Includes communication services, information services, and Internet services within the scope of the types of bulk contracts that may be considered common expenses;
- Revises requirements related to the election of board members, the terms of board offices, vacancies on the board, and the qualifications of board members. It provides for a post-election certification by each newly elected or appointed director, and permits completion of the educational curriculum as an alternative to a written certification; and

- Authorizes the suspension of a unit owner's rights to use certain association facilities if he or she is more than 90 days delinquent for a regular or special assessment.

Regarding homeowners' associations, the bill also:

- Permits closure of certain board meetings at which proposed or pending litigation is discussed with the association's attorney;
- Revises the notice requirements for financial reports regarding reserve accounts;
- Prohibits directors, officers, or committee members from receiving any salary or compensation from the association for the performance of their duties;
- Permits the association to charge reasonable costs for copying records, including personnel fees and charges at an hourly rate for employee time to cover the administrative costs;
- Authorizes condominium associations to suspend a unit owner's use rights if the unit owner is delinquent for more than 90 days in the payment of a regular of special assessment;
- Permits fines of $1,000 or more to become a lien on a parcel;
- Revises proxy voting and elections requirements;
- Provides additional disclosure to prospective purchasers;
- Revises requirements for special assessments in homeowners' associations before the turnover of the association by the developer.
- Provides that flagpoles that homeowners are entitled to erect are subject to all building codes, zoning setbacks, noise and lighting ordinances, and other government regulations.

The bill permits homeowners' associations to acquire leaseholds, memberships, or other possessory interests in recreational facilities, including country clubs, golf courses, marinas. The bill creates the "Distressed Condominium Relief Act" to define the extent to which successors to the developer, including the construction lender after a foreclosure and other bulk buyers and bulk assignees of condominium units, may be responsible for implied warranties.

The bill revises the rights and obligations of mobile home park owners and mobile home owners when the park owner intends to offer or receives an offer for the sale of the mobile home park. It requires the park owner to sell the park to the home owners if the home owners' meet the price and terms and conditions of the mobile home park owner.

The bill repeals the requirement for emergency generated power for elevators in high-rise multifamily dwellings over 75 feet in height.

The bill provides an effective date of July 1, 2009.

This bill substantially amends the following sections of the Florida Statutes: 718.103, 718.110, 718.111, 718.112, 718.115, 718.116, 718.301, 718.303, 719.108, 720.303, 720.304, 720.305, 720.306, 720.3085, 720.31, 720.315, 721.05, and 723.071. This bill creates the following sections of the Florida Statutes: 718.701, 718.702, 718.703, 718.704, 718.705, 718.706, 718.707, 718.708, and 720.315. This bill repeals section 553.509(2), Florida Statutes.

II. Present Situation:

Condominiums

A condominium is a "form of ownership of real property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements."[1] A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.[2] A declaration is like a constitution in that it:

> [S]trictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[3]

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[4] A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it generally may be amended as to any matter by a vote of two-thirds of the units.[5] Condominiums are administered by a board of directors referred to as a board of administration.[6]

Condominiums are regulated by the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) of the Department of Business and Professional Regulation (department), in accordance with ch. 718, F.S.

Condominiums – Assessments

Section 718.103(1), F.S., defines an "assessment" as the "share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner." Section 718.103(24), F.S., defines a "special assessment" to mean "any assessment levied against a unit owner other than the assessment required by a budget adopted annually."

Condominiums – Official Records

Section 718.111(12), F.S., requires that the official records of a condominium association must be maintained within the state for at least 7 years. The records must be made available to the unit owner within 45 miles of the condominium property or within the county in which the condominium property is located. The records must be made available within 5 working days after a written request is received by the governing board of the association or its designee. The records may be made available by having a copy of the official records of the association available for inspection or copying on the condominium property or association property. Alternatively, the association may offer the option of making the records of the association

[1] Section 718.103(11), F.S.
[2] Section 718.104(2), F.S.
[3] *Neuman v. Grand View at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003).
[4] Section 718.104(5), F.S.
[5] Section 718.110(1)(a), F.S.
[6] Section 718.103(4), F.S.

available to a unit owner electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request.

Section 718.111(12)(a)11, F.S., requires the association to maintain accounting records and separate accounting records for each condominium which the association operates. All accounting records must be maintained for a period of not less than 7 years. This section prohibits any person from knowingly or intentionally defacing or destroying accounting records required to be maintained by ch. 718, F.S. It also prohibits knowingly or intentionally failing to create or maintain accounting records required to be maintained by ch. 718. F.S. Persons who violate this provision are personally subject to a civil penalty pursuant to s. 718.501(1)(d), F.S.

Condominiums – Assessments and Foreclosures

Section 718.103(1), F.S., defines an "assessment" as the "share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner." Section 718.103(24), F.S., defines a "special assessment" to mean "any assessment levied against a unit owner other than the assessment required by a budget adopted annually."

A unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.[7]

Section 718.116(1)(b), F.S., provides that if a first mortgagee, e.g., the mortgage lending bank, or its successor or assignee, acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure, the first mortgagee's liability for unpaid assessments is limited to the amount of assessments that came due during the 6 months immediately preceding the acquisition of title or 1 percent of the original mortgage debt, whichever is less. However, this limitation applies only if the first mortgagee is joined by the association as a defendant in the foreclosure action. This gives the association the right to defend its claims for unpaid assessments in the foreclosure proceeding. A first mortgagee who acquires title to a foreclosed condominium unit is exempt from liability for all unpaid assessments if the first mortgage was recorded prior to April 1, 1992.

The successor or assignee, in respect to the first mortgagee includes only a subsequent holder of the first mortgage.

Homeowners' Associations – Background

Chapter 720, F.S., provides statutory recognition to corporations that operate residential communities in this state, provides procedures for operating homeowners' associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.[8]

Section 720.301(9), F.S., defines a "homeowners' association" as a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting

[7] Section 718.116(1), F.S.
[8] *See*, s. 720.302, F.S.

membership is made up of parcel owners or their agents, or a combination thereof, 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. Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 617, F.S., relating to not for profit corporations.[9]

Homeowners' associations are administered by a board of directors whose members are elected.[10] The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents.[11] The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.[12]

Homeowners' Associations – Meetings

Section 720.303(2), F.S., provides procedures for homeowners' association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for meetings between the board and its attorney relating to proposed or pending litigation. Members also have the right to attend all board meetings and speak for at least three minutes on any matter placed on the agenda by petition of the voting interests.[13]

The open meetings requirement does not apply to meetings between the board or a committee and the association's attorney, with respect to meetings of the board held for the purpose of discussing personnel matters.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to a meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice of the board meeting must be mailed or delivered to each association member at least 7 days prior to the meeting, except in an emergency. For associations with more than 100 members, the bylaws may provide a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision for schedules of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[14]

[9] Section 720.302(5), F.S.
[10] *See*, ss. 720.303 and 720.307, F.S.
[11] *See*, ss. 720.301 and 720.303, F.S.
[12] Section 720.303, F.S.
[13] Section 720. 301(13), F.S., defines "voting interest" to mean the voting rights distributed to the members of the homeowners' association, pursuant to the governing documents.
[14] Section 720.303(2)(c)1, F.S.

Homeowners' Associations – Budgets

Section 720.303(6)(a), F.S., requires homeowners' associations to prepare an annual budget that sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year.

Regarding reserve accounts, s. 720.303(6)(b), F.S., provides:

> In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the governing documents do not limit increases in assessments, including reserves. If the budget of the association includes reserve accounts, such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts in the budget, the association shall thereafter determine, maintain, and waive reserves in compliance with this subsection.

If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so by an affirmative vote of a majority of the total voting interests. Once established, the reserve accounts must be funded, maintained, or have their funding waived.[15] If the association's budget does not provide for reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, s. 720.303(6)(c), F.S., requires that the association's financial reports include a notice that the budget does not provide for reserve accounts for capital expenditures and deferred maintenance that may result in special assessments.

Funding formulas for reserves can be based on either a separate analysis for each of the required assets or a pooled analysis of two or more of the required assets. If the association maintains a pooled account, then the amount of the contribution to the pooled reserve account must not be less than required to ensure the balance on hand at the beginning of the period for which the budget will go into effect, plus the projected annual cash inflows over the remaining estimated useful life of the assets. The projected annual cash inflows may include earning statements from investment principle.

Homeowners' Associations – Display of Flag

Section 720.304(2)(a), F.S., permits homeowners to display one portable, removable United States flag or official flag of the State of Florida in a respectful manner, and one portable, removable official flag, in a respectful manner, not larger than 4½ feet by 6 feet, which represents the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, or a POW-MIA flag. This right exists, regardless of any covenants, restrictions, bylaws, rules, or requirements of the association.

Section 720.304(2)(b), F.S., permits homeowner to also erect a freestanding flagpole no more than 20 feet high on any portion of the homeowner's real property, regardless of any covenants,

[15] Section 720.03(6)(d), F.S.

restrictions, bylaws, rules, or requirements of the association, if the flagpole does not obstruct sightlines at intersections and is not erected within or upon an easement. Homeowners may display the same flags that specified under s. 720.304(2)(a), F.S.

Alternate Power Generators for Elevators

During the 2006 Regular Session, s. 553.509(2)(a), F.S.,[16] was enacted to require that any person, firm, or corporation that owns, manages, or operates a residential multi-family dwelling, including a condominium, which is at least 75 feet high (high-rise residential buildings) and contains a public elevator, have at least one elevator capable of operating on alternate generated power. In the event of a general power outage, this elevator must ensure that residents have building access for an unspecified number of hours each day over a five-day period following a natural or manmade disaster, emergency, or other civil disturbance. The alternate generated power source must be capable of powering any connected fire alarm system in the building.

The alternate generated power requirements of s. 553.509(2), F.S., do not apply to high-rise buildings that were in existence on October 1, 1997, or which were either under construction or under contract for construction on October 1, 1997.[17] Newly constructed residential multi-family dwellings meeting the criteria of this section must meet the engineering, installation, and verification requirements of s. 553.509(2), F.S., before occupancy.[18]

Section 553.509(2)(b), F.S., provides that, at a minimum, the elevator must be appropriately pre-wired and prepared to accept alternate generated power. The power source must be capable of powering the elevator, a connected building fire alarm system, and emergency lighting in the internal lobbies, hallways, and other internal public portions of the building. The dwellings must either have a generator and fuel source on the property or proof of a current guaranteed service contract providing such equipment and fuel source within 24 hours of a request. Proof of a current service contract for such equipment and fuel must be posted in the elevator machine room or other place conspicuous to the elevator inspector.

Verification Requirements – Section 553.509(2)(b), F.S., requires that the person, firm, or corporation that owns, manages, or operates a building affected by this requirement must provide to the local building inspection agency verification of engineering plans for alternate generated power capability by December 31, 2006. The local building inspectors must verify the installation and operational capability of the alternate generated power source and report to the county emergency management director by December 31, 2007.

Posting Requirements – The owner, manager, or operator of the high-rise residential building must keep written records of any contracts for alternative power generation equipment and fuel source.[19] Quarterly inspection records of lifesafety equipment and alternate power generation

[16] Section 12, ch. 2006-71, L.O.F.
[17] Section 553.507, F.S., exempts such buildings, structures, and facilities from the provisions of ss. 553.501-553.513, F.S., the "Florida Americans with Disabilities Implementation Act."
[18] Section 553.509(2)(c), F.S.
[19] Section 553.509(2)(b), F.S.

equipment must also be posted in the elevator machine room or other place conspicuous to the elevator inspector.[20]

Emergency Operations Plan Requirements **–** Section 553.509(2)(d), F.S., requires that each person, firm, or corporation that is required to maintain an alternate power source must also maintain a written emergency operations plan that details the sequence of operations before, during, and after a natural or manmade disaster or other emergency situation. The plan must include, at a minimum, a lifesafety plan for evacuation, maintenance of the electrical and lighting supply, and provisions for the health, safety, and welfare of the residents.

The written emergency operations plan and inspection records must be open for periodic inspection by local and state government agencies.[21] The owner or operator must keep a generator key in a lockbox posted at or near any installed generator unit.[22]

Residential Dwellings for Persons Age 62 and Older **–** Section 553.509(2)(e), F.S., requires that multi-story affordable residential dwellings for persons age 62 and older that are financed or insured by the United States Department of Housing and Urban Development must make every effort to obtain grant funding from the Federal Government or the Florida Housing Finance Corporation to comply with the requirements of s. 553.509(2), F.S. It provides that, if an owner of such a residential dwelling cannot comply with the requirements of this subsection, the owner must develop a plan with the local emergency management agency to ensure that residents are evacuated to a place of safety in the event of a power outage resulting from a natural or manmade disaster or other emergency situation that disrupts the normal supply of electricity for an extended period of time. A place of safety may include, but is not limited to, relocation to an alternative site within the building or evacuation to a local shelter.

Inspections **–** Section 553.509(2)(f), F.S., requires that certified elevator inspectors confirm that all installed generators are in working order, the elevators have current inspection records posted, and a generator key located near the generator. If there is no installed generator, the inspector is required to confirm that the appropriate pre-wiring and switching capabilities are present and that the guaranteed contingent service contract is posted.

Interim Report 2009-125 – Review of Elevator Safety and Regulation **-** The October 2008 interim report prepared by the Regulated Industries Committee also studied the extent of compliance with s. 553.509(2), F.S., and reviewed the problems that citizens and governmental agencies have had in implementing these requirements. Senate professional staff recommended that the Legislature consider the repeal of s. 553.509(2), F.S. The repeal recommendation was based upon the following findings and conclusions:

- The requirement may pose a threat to public safety, i.e., the availability of emergency power for elevators during the five days after a declared state of emergency may encourage persons to stay in high-rise buildings and areas that are not safe and do not have the necessary infrastructure for safe habitation;

[20] Section 553.509(2)(d), F.S.
[21] *Id.*
[22] *Id.*

- The requirement does not have a clearly defined state or local agency that is responsible for its on-going enforcement;
- Enforcement of the requirement by a state agency would carry a fiscal burden without a clearly defined benefit that may out-weigh the public safety concerns;
- The requirement does not appear to have any clearly defined impact on elevator safety;
- It is not clear what penalty, if any, should be imposed on building owners who cannot comply with the requirement because they cannot afford the expense; and
- To the extent that an alternate emergency power for elevators provides a public benefit, the Florida Building Code currently requires emergency power for elevators in new high-rise residential construction.

Alternatively, the professional staff recommended that the Legislature could continue to require emergency generated power pursuant to s. 553.509(2), F.S., but, to ensure uniform compliance, provide funding for the Bureau of Elevator Safety within the Division of Hotels and Restaurants, Department of Business and Professional Regulation, for the enforcement of this provision.

Condominiums – Implied Warranties

One of the effects of the downturn in the housing market is the large number of uncompleted condominium buildings, some of which have outstanding purchase contracts, for some or all of the units, and some of which are in a completed building with a large number of unfinished units. Generally, these assets, typically condominium units, are acquired by investors as bulk acquisitions and the acquisitions take place in one of two forms:

- The assets are purchased from developers or banks that have foreclosed on the development loan or on the property, or
- The assets are acquired through the purchase of discounted debt from lenders.

The purchase and sale of condominium units can involve additional expenses, construction delays, rescinded purchase contracts, regulatory and legal actions, slower sales, third-party claims, reduced rental rates, failed financial models, and the retention of developer rights by the bulk acquisition agent.

The purchasers of condominium units must also consider the liabilities and obligations that the purchaser may be incurring for construction defects and warranty claims.[23] Section 718.203, F.S., provides that the developer of a condominium is deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for 3 years beginning with the completion of the building containing the unit, and a warranty for the same period that is provided by the manufacturer for personal property transferred with or appurtenant to the unit. For all other improvements, the implied warranty is for 3 years beginning with the date of completion of the improvements. For the roof and structural components of a building or other improvements, or for the mechanical, electrical, and plumbing elements serving a building or improvement, the warranty is for a 3-year period beginning with the completion of construction

[23] See "Legal and Practical Considerations for Purchasers of "Broken" or Distressed Condominiums," written by Brian Belt, Duane Morris LLP, January 30, 2009 and available at http://www.informlegal.com/articles/view.php?article_id=1125 (last visited April 17, 2009)

of the building or improvement, or for 1 year after the developer transfers control of the condominium association. In no event may the warranty extend for more than 5 years. Unit owners have a right to bring an action for an implied warranty claim[24] and the association has a right to act on behalf of the unit owners in matters of common interest.[25]

In *Chotka v. Fieldco Growth Investors*,[26] a condominium residents association sued the construction lender which had foreclosed against the developer for defaulting on the construction loan, for damages and defects or omissions relating to construction of the condominium building and common areas. The trial court dismissed the cause of action based on implied warranty. The Second District Court of Appeals reversed and found that:

> where the lender took title to the condominium project, completed construction, and while holding itself out as the developer and owner of the project, advertised and sold units to purchasers, the lender became a developer of the project to the extent that it might be held liable for performance of express representations made to buyers, for patent construction defects in the entire condominium project, and for breach of any applicable warranties due to defects in the portions of the project completed by it.

Mobile Homes Parks – Right of First Refusal

The Mobile Home Act in ch. 723, F.S.,[27] was created due to the unique relationship between a mobile home owner and a mobile home park owner. Section 723.004, F.S., provides in part that:

> Once occupancy has commenced, unique factors can affect the bargaining position of the parties and can affect the operation of market forces. Because of those unique factors, there exists inherently real and substantial differences in the relationship which distinguish it from other landlord-tenant relationships. The Legislature recognizes that mobile home owners have basic property and other rights which must be protected. The Legislature further recognizes that the mobile home park owner has a legitimate business interest in the operation of the mobile home park as part of the housing market and has basic property and other rights which must be protected.

In order to evict mobile home owners due to a change in the use of the land on which the mobile home park is located, the park owner is required to give the tenants affected by the change at least six months' notice of the projected change in land use, in order to give tenants time to find other accommodations.[28] The notice of a change in land use must be in writing and posted on the premises and sent to the mobile home tenant or occupant.[29]

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[24] *Rogers & Ford Construction Corporation, etc., et al v. Carlandia Corporation,* 626 So.2d 1350 (Fla. 1993).
[25] *Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Association, Inc.,* 658 So.2d 922 (Fla. 1995).
[26] *Chotka v. Fieldco Growth Investors,* 383 So.2d 1169 (Fla. 1980).
[27] See ss. 723.061-723.0612, F.S.
[28] Section 723.061(1)(d), F.S.
[29] Section 723.061(5), F.S.

The mobile home park owner does not have to disclose the proposed land use designation for the park.[30]

A mobile home park owner who offers his or her park for sale to the general public must notify the officers of the homeowners' association of the offer, asking prices, and the terms and conditions of sale.[31] The mobile homeowners' association must be given 45 days from the date the notice is mailed to meet the price and terms and conditions through the execution of a contract with the park owner. If the homeowners' association and the park owner fail to execute a contract within the 45-day timeframe, the park owner has no further obligation unless he or she agrees to accept a lower price.[32] However, if the park owner agrees to sell the park at a lower price than specified in the notice to the association, then the homeowners' association has an additional 10 days to execute a contract.[33]

If a mobile home park owner receives an unsolicited offer to purchase the park that he or she wishes to consider or make a counteroffer to, the park owner is required to notify the mobile homeowners' association of the offer and disclose the price and material terms and conditions upon which the park owner would consider selling the park.[34] Although the park owner must consider subsequent offers by the homeowners' association, he or she is free to execute a contract to sell the park to a party other than the association at any time.[35]

Section 723.071(3)(a), F.S., defines the term "notify" to mean the placing of a notice in the United States mail addressed to the officers of the homeowners' association. The notice is deemed to have been given upon mailing.

Section 723.071(3)(b), F.S., defines the term "offer" to mean any solicitation by the park owner to the general public.

III. Effect of Proposed Changes:

Amendment of Declaration

The bill amends s. 718.110, F.S., to clarify that an amendment to a condominium declaration that prohibits unit owners from renting their units or alters the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to the amendment and owners who acquire title to their unit after the effective date of the amendment.

[30] *See Harris v. Martin Regency, Ltd.*, 576 So. 2d 1294, 1296 (Fla. 1991).
[31] Section 723.071(1)(a), F.S.
[32] Section 723.071(1)(b), F.S.
[33] Section 723.071(1)(c), F.S.
[34] Section 723.071(2), F.S.
[35] Section 723.071(2), F.S.

Condominium Association Official Records

The bill amends s. 718.111(12)(a)11. and (c), F.S., to clarify that a person who knowingly or intentionally defaces or destroys accounting records required to be created or maintained for a required period as provided in ch. 718, F.S., or who knowingly or intentionally fails to create or maintain accounting records as required with the intent of causing harm to the association or one or more its members is subject to a civil penalty as provided in s. 718.501(1)(d), F.S.

The bill provides that the association is not responsible for the use or misuse of the information provided pursuant to the compliance requirements of ch. 718, F.S, unless the association has an affirmative duty not to disclose such information.

The bill also amends s. 718.111(12)(c), F.S., to add the following additional information to the list of information that is not accessible to unit owners:

- Disciplinary, health, insurance, and personnel records of the association's employees;
- Email addresses;
- Electronic security measures used to safeguard data, including passwords; and
- Data generated by software used by the association which allows manipulation of data.

The bill permits access to the following personal identifying information: the person's name, lot or unit designation, mailing address, property address, and other contact information.

Financial Reporting

The bill amends s. 718.111(13), F.S., to provide that association rules must include a standard for presenting a summary of association reserves that includes, but is not limited to, a good faith estimate disclosing the annual amount of reserves necessary for the association to fully fund the reserves for each reserve item. The disclosure does not apply to reserves funded via the pooling method.

The bill deletes provisions requiring that the rules include a uniform accounting principle and standard for stating the disclosure of at least a summary of the reserves, including information as to whether the reserves are funded at a level sufficient to prevent the need for a special assessment, and if not, the amount necessary to bring reserves up to a level that will avoid a special assessment, and that the person preparing the financial reports is entitled to rely on an inspection report prepared for or by the association to meet the fiscal and fiduciary standards of ch. 718, F.S.

Bylaws – Board Members

The bill amends s. 718.112(2)(d)1., F.S., to provide that board members whose terms have expired become automatically eligible for reappointment and need not stand for reelection if the number of board member whose terms have expired exceeds the exceeds the number of eligible members showing interest in or demonstrating an intention to run for the vacant positions. Current law provides for automatic reappointment to the board.

The bill provides that persons who are delinquent in the payment of a fine or special or regular assessment are not eligible for board membership. Current law only disqualifies persons from board membership who are delinquent in the payment of a fee or assessment.

The bill also amends s. 718.112(2)(d)3., F.S., to delete the requirement for a pre-election certification by candidates to the condominium board. The bill requires a post-election certification by newly elected board members. A new board member must certify that he or she:

- Has read the declaration of condominium for all condominiums operated by the association and the association's articles of incorporation, bylaws, and rules and regulations;
- Will work to uphold such documents and policies to the best of his or her ability; and
- Will faithfully discharge his or her fiduciary responsibility to the association's members.

As an alternative to a written certification, the newly elected or appointed director may submit a certificate of satisfactory completion of the educational curriculum administered by a division-approved condominium education provider. This course must have been completed within one year before the 90-day deadline.

The bill provides that a board member is automatically disqualified from service on the board if he or she fails to timely file the written certification or educational certificate. The secretary of the association must keep the written certification or educational certificate for inspection by the members for five years after a director's election or appointment. The bill also provides that the validity of any appropriate action is not affected by the association's failure to have certification on file.

The bill also amends s. 718.112(2), F.S., as follows:

- Paragraph (n) is amended to add nonpayment of any fee, fine, or special assessment to the list of criteria for which a director or an officer may be deemed to have abandoned office when such director or officer is more than 90 days delinquent in the payment of the fee, fine, or special assessment.
- Paragraph (o) is amended to provide that a director or officer who is charged with a felony theft or embezzlement offense involving the association's funds or property must be removed from office. The bill clarifies that the charge of a felony is by information or indictment.

Common Expenses and Common Surplus

The bill amends s. 718.115(1)(d), F.S., to provide that communication services as defined in ch. 202, F.S.,[36] information services, or Internet service are included in the scope of the types of bulk contracts which are deemed a common expense. References to master antenna television system or duly franchised cable television services are deleted.

[36] Chapter 202, F.S., is the Communications Services Tax Simplification Law.

The bill also amends s. 718.115(1)(d), F.S., to clarify that cable or video service are the types of common expense services that may be discontinued by a hearing impaired or legally blind person, or by a person receiving supplemental security income or food stamps, without incurring a common expense charge, and adds video services in place of the current term "television" in regards to the type of expense, including cable, that must be shared equally by all participating unit owners if fewer than all unit owners share the expense. The bill also permits the association to make an assessment for video as well as cable services.

Condominiums – Assessments and Foreclosures

The bill amends s. 718.116(5)(b), F.S., to provide that costs to a unit owner which are secured by the association's claim of lien as to any delinquent installment of an assessment may not exceed $75 unless the collection management company prepares a letter or estoppel certificate required under ch. 718, F.S., and charges a reasonable fee related to the preparation of same.

Condominiums – Assessment Payments by Tenants

The bill creates s. 718.116(11), F.S., to authorize the association to demand payment of any future regular assessments from the tenant of a unit owner if the unit owner is delinquent in payment. These provisions are identical to the provisions in ss. 719.108(10) and 720.3085(8), F.S., for tenants in cooperative associations and homeowners' associations, respectively.

The bill does not require that the tenant pay any unpaid past assessments. The tenant is required to pay regular assessments to the association until the tenant is released by the association or by the terms of the lease, and is liable for increases in the regular assessment only if given a notice of the increase before the rent is due. The landlord (i.e., unit owner) must provide the tenant a credit against rent payments to the unit owner in the amount of assessments paid to the association. The tenant's liability to the association may not exceed the amount due from the tenant to his or her landlord. If a tenant fails to pay the association may act as a landlord to evict the tenant under the procedures in ch. 83, F.S. The tenant's payment of regular assessments does not give the tenant voting rights or the right to examine the books and records of the association. If a court appoints a receiver, the effects of s. 718.116(11), F.S., may be superseded.

Condominiums – Transfer of Association Control

The bill amends s. 718.301(1)(f), F.S., to provide that unit owners other than the developer are entitled to elect not less than a majority of the members of the association board except when a court determines within 30 days after appointment of a receiver for the developer that transfer of control to the owners would be detrimental to the association or its members.

Condominiums – Sanctioning Units Owners

The bill amends s. 718.303(3), F.S., to authorize condominium associations to suspend a unit owner's use rights if the unit owner is delinquent for more than 90 days in the payment of a regular of special assessment. The suspension may be, for a reasonable period of time, for the right of a unit owner or a unit's occupant, licensee, or invitee, to use common elements, common facilities, or any other association property. The association cannot suspend the right to use

limited common elements intended to be used only by that unit, common elements that must be used to access the unit, utility services provided to the unit, parking spaces, or elevators. The declaration of condominium or the bylaws of the association must authorize the suspension. As with fines, notice and a hearing must be provided.

The bill provides that the fines and suspensions authorized by s. 718.303(3), F.S., do not apply to failure by the unit owner to pay any amount due to the association. The bill also authorizes associations to provide in their bylaws or declaration of condominium that a unit owner's voting rights may be suspended due to nonpayment of assessments, fines, or other charges payable to the association which are delinquent in excess of 90 days.

Condominiums – Bulk Buyers

The bill creates part VII of ch. 718, F.S., consisting of ss. 718.701, 718.702, 718.703, 718.704, 718.705, 718.706, 718.707, and 718.708, F.S. Section 718.701, F.S., provides that part VII of ch. 718, F.S., may be cited as the "Distressed Condominium Relief Act."

The bill creates s. 718.702, F.S., to provide legislative findings and legislative intent. It provides that potential successor purchasers of condominium units are unwilling to accept the risk of purchase because the potential liabilities inherited from the original developer are imputed to the successor purchaser, including the foreclosing mortgagee. The bill provides the statement of legislative intent that it is public policy of this state to protect the interests of developers, lenders, unit owners, and condominium associations with regard to distressed condominiums.

Definitions

In order to incorporate the creation of the bulk buyer provision in part VII of ch. 718, F.S., the bill revises the definition of "developer" s. 718.103(16), F.S., to include a bulk assignee, or a bulk buyer.

The bill creates s. 718.703, F.S., to define "bulk assignee" as a person who acquires more than seven condominium parcels as provided in s. 718.707, F.S., and receives an assignment of some or all of the rights of the developer under specified recorded documents.

It also defines "bulk buyer" as a person who acquires more than seven condominium parcels but who does not receive an assignment of developer rights other than the right to conduct sales, leasing, and marketing activities within the condominium.

Assignment and Assumption of Developer Rights

Creates s. 718.704, F.S., relating to the assignment and assumption of developer rights, to provide that a bulk assignee assumes all liability of the developer except for:

- Implied warranties for work not requested by the bulk assignee;
- The obligation to fund converter reserves for a unit not acquired by the bulk assignee, or
- The obligation to provide converter warranties on any portion of the condo property except as provided in a contract for sale between the assignee and a new purchaser.

A bulk assignee is not liable for:

- Providing the condo association with a cumulative audit of the association's finances from the date of formation.
- The developer's failure to fund previous assessments or resolve budget deficits, but must provide an audit for the period in which the assignee elects a majority of the board members, except when the bulk assignee receives the assignment of rights of the developer to guarantee assessment levels and fund budget deficits.

An acquirer of condominium parcels is not considered a bulk assignee or a bulk buyer if the transfer of parcels was done to hinder, delay, or defraud any purchaser, unit owner, or the association, or if the acquiring person or entity is considered an insider for purposes of fraudulent trading under s. 726.102(7), F.S.

Development rights may be assigned to a bulk assignee by the developer, by a previous bulk assignee, or by a court of competent jurisdiction acting on behalf of the developer or previous bulk assignee.

- There may be more than one bulk buyer but not more than one bulk assignee within a condominium at any particular time.
- If more than one acquirer receives an assignment of development rights from the same person, the bulk assignee is the acquirer who first records the assignment in the applicable public records.

Transfer to Unit Owner-Controlled Board

The bill creates s. 718.705, F.S., relating to the transfer of control of the condominium board of administration.

The bill provides that for purposes of transfer of control of the condominium association board of administration to unit owners other than the developer, if a bulk owner is entitled to elect a majority of the board members, a condominium parcel acquired by the bulk assignee is not deemed to be conveyed to a buyer, or to be owned by anyone other than the developer, until the parcel is conveyed to a buyer who is not the bulk assignee.

All items required under s. 718.301(4), F.S., must be delivered by the bulk assignee to the board of administration (includes, but is not limited to, the recorded condominium declaration and all amendments, certified copy of the association's articles of incorporation, bylaws, minutes, financial records, association funds or control of such funds, association tangible personal property, plans and specifications used in the construction of the condominium, insurance contracts, and a common elements turnover inspection report under seal of a state licensed architect or engineer).

If the bulk assignee is not in possession of such documents and materials during the period in which the assignee owned the majority of the condominium parcels, the assignee must undertake a good faith effort to obtain and deliver such documents and materials, and must certify in writing to the association an itemized list of documents and materials that could not be obtained

by the assignee. The delivery of the certified list relieves the bulk assignee of all responsibility to deliver such documents and materials.

In a conflict between the provisions of the Relief Act and the requirements of s. 718.301, F.S., relating to transfer of association control, the provisions of part VII of ch. 718, F.S., prevail.

If a bulk assignee or a bulk buyer fails to comply with the provisions of the Relief Act, all protections and exemptions provided in the act are lost.

Sale or Lease of Units by a Bulk Assignee or a Bulk Buyer

The bill creates s. 718.706, F.S., relating to the sale or lease of units by a bulk assignee or a bulk buyer: Prior to the sale or lease of units for a term of more than 5 years, a bulk assignee or a bulk buyer must file the following documents with the Division of Florida Condominiums, Timeshares and Mobile Homes in the Department of Business and Professional Regulation:

- Updated prospectus of offering circular, or a supplement, which must include the form of contract for purchase and sale;
- Updated Frequently Asked Questions and Answers sheet;
- Executed escrow agreement if required under s. 718.202, F.S., relating to sales or reservation deposits prior to closing; and
- Financial information required under s. 718.111(13), F.S. (association financial report for preceding fiscal year), unless the report does not exist for the previous fiscal year prior to acquisition by bulk assignee or accounting records cannot be obtained in good faith, in which case notice requirements must be met.

Prior to the sale or lease of units for a term of more than 5 years, a bulk assignee must file with the Division of Florida Condominiums, Timeshares and Mobile Homes in the Department of Business and Professional Regulation, a disclosure statement that includes, but is not limited to, the following:

- A description of any rights of the developer assigned to the bulk assignee;
- A statement relating to the seller's limited liability for warranties of the developer; and
- If the condominium is subject to conversion, a statement relating to the seller's limited obligation to fund converter reserves or to provide converter warranties under s. 718.618, F.S., relating to converter reserve accounts.

Prior to the sale or lease of a unit for a term of more than 5 years, the bulk assignee or bulk buyer must comply with the nondeveloper disclosure requirements of s. 718.503(2), F.S., relating to disclosures by unit owners prior to the sale of a unit.

The waiver of reserves or reduction of reserve funding and the use of reserve expenditures for other purposes is restricted unless approved by a majority of the voting interests not under the control of the developer, the bulk assignee, and the bulk buyer.

A bulk assignee in control of the association board of administration must comply with the requirements imposed on developers to transfer control of the association as required under s 718.301, F.S.

A bulk assignee or a bulk buyer must comply with the requirements of s. 718.301, F.S., regarding contracts entered into by the association during the period the assignee or buyer maintains control of the association board of administration.

Unit owners must be afforded all of the protections contained in s. 718.302, F.S., regarding certain agreements.

A bulk buyer must comply with the requirements of the declaration regarding the transfer of any unit by sale, lease or sublease. No exemptions afforded to a developer regarding the sale, lease, sublease, or transfer of a unit are afforded to a bulk buyer.

Limitations

The bill creates s. 718.707, F.S., to provide a time limitation for classification as a bulk assignee or bulk buyer. A person acquiring condominium parcels may not be classified as a bulk assignee or a bulk buyer unless the parcels were acquired prior to July 1, 2011. Provisions are made for determining the date of acquisition.

Liabilities of Developers and Others

The bill creates s. 718.708, F.S., to provide that an assignment of developer rights does not release the developer from any liabilities under the condominium declaration or ch. 718, F.S. The developer's liability is not limited for claims brought by unit owners, bulk assignees, or bulk buyers for violations of ch. 718, F.S.

Nothing in the act waives, releases, compromises, or limits the liability of contractors, subcontractors, materialmen, manufacturers, architects, engineers, or any participant in the design or construction of a condominium for any claim brought by the association, unit owners, bulk assignees, or bulk buyers relating to the design, construction defects, misrepresentations, or violations of ch. 718, F.S., except as provided in the act.

Cooperatives – Assessments and Foreclosures

The bill amends s. 719.108(3), F.S., to provide that a cooperative unit owner's cost may not exceed $75 for collection letters or any other collection efforts by management companies or licensed managers related to the claim of lien. However, reasonable fees may be charged for preparation by the management company of any letter or estoppel certificate required by ch. 718, F.S. Any payment received by the cooperative association must be applied to the costs for collection services for which the association has contracted before the payment is applied to the delinquent assessment. The association may file a lien for authorized administrative late fees and reasonable collection costs for which the association has contracted.

The bill creates subsection (10) in s. 719.108, F.S., to provide for the payment of unpaid regular assessments by the tenant of a unit owner in a cooperative association. These provisions are identical to the provisions in ss. 718.116(11) and 720.3085, F.S., for tenants in condominium associations and homeowners' associations, respectively. The cooperative association is authorized to demand payment of any future regular assessments from the tenant of the unit owner. However, the tenant is not required to pay any unpaid past assessments.

The tenant must make continual regular assessment payments to the association until released of this requirement by the association, and is only liable for increases in the regular assessment if given a notice of the increase before the rent is due. The tenant may credit his or her rental payment to the unit owner by the amount of the assessment payment. The association may act as a landlord under ch. 83, F.S., to evict a tenant for nonpayment. The tenant's payment of regular assessments does not give the tenant voting rights or the right to examine the books and records of the association. If a court appoints a receiver, the effects of s. 719.108(10), F.S., may be superseded.

Homeowners' Associations – Board Meetings

The bill amends s. 720.303(2)(b), F.S., to provide that meetings between the board or a committee and the association's attorney in which proposed or pending litigation is discussed are exempt from the open meetings requirement in s. 720.303(2)(b), F.S.

Homeowners' Associations – Inspection and Copying of Records

The bill amends s. 720.303(5)(a), F.S., which creates a rebuttable presumption that the association has willfully failed to comply with the a member's written request to inspect its records if the association does not provide the member access to the records within ten days of the request. The bill provides that the member's request must be submitted by certified mail, return receipt requested.

The bill also amends s. 720.303(5)(c), F.S., which authorizes the association to charge the member for the actual cost of copying records, to provide that the actual cost of copying records includes reasonable costs involving personnel fees and charges at an hourly rate for employee time to cover the administrative costs to the association.

Homeowners' Associations – Budgets

The bill amends s. 720.303(6)(b), F.S., to permit the termination of reserve accounts upon the approval of the majority of the voting interests.[37] The reserve account must be removed from the budget upon approval of the termination.

The bill amends s. 720.303(6)(c)1., F.S., to revise the notice requirement for financial reports for associations that do not provide for reserve accounts. The revised notice would clarify that the vote to provide for reserve account is attained by vote of the members at a meeting or by written

[37] Section 720.301(13), F.S., defines "voting interest" to mean "the voting rights distributed to the members of the homeowners' association, pursuant to the governing documents."

consent. The bill maintains the current notice that the vote to provide for reserve account requires approval of not less than a majority of the total voting interests of the association.

The bill creates s. 720.303(6)(c)2., F.S., to provide an additional disclosure for financial reports for reserve accounts that are created or established pursuant to s. 720.303(6)(d), F.S., which requires the approval of the majority of the association members at a duly called meeting of the members or by written consent. The notice states that reserve funds are not subject to the restrictions on use of such funds in s. 720.303(6), F.S., and are not calculated in accordance with that statute because the owners have not elected to provide for reserve accounts pursuant to the provisions of s. 720.303(6), F.S.

The bill amends s. 720.303(6)(g)2., F.S., to revise the accounting requirements for pooled reserve accounts. It permits the association to include accounts receivable minus the allowance for doubtful accounts in the reserve account's projected annual cash inflows. Current law only permits the association to include estimated earnings from investment of principal in the reserve account's projected annual cash inflows.

Homeowners' Associations – Compensation

The 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 provides that this 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 approval in accordance with procedures established by the governing documents.
- Recovery of insurance proceeds from a policy maintained by the association for the benefit of its members.
- Any fee or compensation authorized in the governing documents.
- Any fee or compensation authorized in advance by a vote of a majority of the voting interests.
- The developer or its representative from serving as director, officer, or committee member of the association and benefiting financially from service to the association.

Homeowners' Associations – Display of Flag

The bill amends s. 720.304(2)(b), F.S., regarding flagpoles in homeowners' associations, to provide that flagpoles are subject to all building codes, zoning setbacks, and other applicable government regulations. The other applicable government regulation include, but are not limited to, noise and lighting ordinances.

Homeowners' Associations – Sanctioning Parcel Owners

The bill amends s. 720.305(2), F.S., to authorize condominium associations to suspend a unit owner's use rights if the unit owner is delinquent for more than 90 days in the payment of a regular of special assessment. The suspension of the parcel owner's right to use association property does not apply to common areas that provide access or utility services to the parcel. Any fine or suspension must be imposed at a properly noticed board meeting. The owner, and, if applicable, the owners occupant, licensee, or invitee must be notified of the fine or suspension by mail or hand delivery.

The bill provides that a fine of less than $1,000 may not become a lien against a parcel. Current law prohibits any fine to become a lien on a parcel.

Homeowners' Associations – Proxy Voting

The bill amends s. 720.306(8), F.S., to provide that, if secret ballots are required under the governing documents, then an absentee ballot must be enclosed inside a blank envelope and placed inside another envelope with the required information and signature on the outer envelope. Once the eligibility to vote is verified, but before the ballots are counted, the blank envelope must be removed and added to the ballots of members voting in person or by proxy. The bill also provides that absentee ballots must be hand delivered or mailed to the place specified in the notice no later than on the date specified in the notice.

Homeowners' Associations – Elections

The bill amends s. 720.306(9), F.S., to allow a member to nominate himself or herself if the election process allows voting by absentee ballot. However, the member must do so in advance of the balloting.

Homeowners' Associations – Assessments and Foreclosures

The bill creates s. 720.3085(8), F.S., to authorize the association to demand that the tenant pay future unpaid regular assessments related to the condominium parcel. These provisions are identical to the provisions in ss. 718.116(11) and 719.108(10), F.S., for tenants in condominium associations and cooperative associations, respectively.

Section 720.3085(8), F.S., authorizes the homeowners' association to demand payment of any future regular assessments from the tenant of the unit owner. However, the tenant is not required to pay any unpaid past assessments. The tenant must make continual regular assessment payments to the association until released of this requirement by the association. The tenant is only liable for increases in the regular assessment if the tenant is given a notice of the increase before the rent is due. The tenant may credit his or her payment to the unit owner by the amount of the assessment payment. The association may act as a landlord under ch. 83, F.S., to evict the tenant. The tenant's payment of regular assessments does not give the tenant the right voting rights or the right to examine the books and records of the association. If a court appoints a receiver, the effects of s. 720.3085(8), F.S., may be superseded.

Homeowners' Associations – Recreational Leaseholds

The bill creates s. 720.31(6), F.S., to permit homeowners' associations to acquire leaseholds, memberships, or other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. The land or facility being acquired does not have to be land or facilities contiguous to the association property, or provide enjoyment, recreation, or other uses or benefits to the owners.

The bill requires that the leaseholds, memberships, or other possessory interest must be stated and fully described in the declaration of the association if the association is created or exists at the time the declaration is recorded. Once the declaration is recorded, agreements to acquire leaseholds, memberships, or other possessory or use interests not entered into within 12 months following the recording of the declaration may be entered into only if authorized by the declaration for material alterations or substantial additions to the common areas or association property. If the declaration does not provide for such material alterations or additions, then the approval of 75 percent of the total voting interests is required.

The declaration of material alterations or substantial additions may provide that the rental, membership fees, operations, replacements, or other expenses are common expenses; may impose covenants and restrictions concerning the use; and contain other provisions not inconsistent with the subsection. The association may join with other associations that are part of the same development or master association in the acquisition of the interest.

Special Assessments by Developer-Controlled Boards

The bill creates s. 720.315, F.S., to revise requirements for special assessments in homeowners' associations before the turnover of the association by the developer. The developer controlled board may not levy a special assessment unless the majority of non-developer parcel owners approve of the special assessment at a duly called special meeting of the membership at which a quorum is present.

Timeshares – Facilities

The bill amends s. 721.05(17), F.S., to clarify the term "facility" means any permanent amenity.

Mobile Homes Parks – Right of First Refusal

The bill amends s. 723.071(1)(a), F.S., to revise the rights and obligations of mobile home park owners and mobile home owners when the park owner receives an offer for the sale of the mobile home park. The bill requires the park owner to notify the officers of the homeowners' associations and the Florida Housing Finance Corporation of the offer if the park owner intends to offer the park for sale or if the park owner receives a bona fide offer to purchase the park which the park owner intends to consider or to make a counteroffer to the offer. The bill requires that the notice to the officers of the homeowners' associations be made by certified mail. Current law only requires that the officers of the homeowners' associations be notified of the offer if the park owner offers the park for sale.

The bill does not define what actions by the park owner would constitute intent to offer the park for sale. The bill also does not define what would constitute a bona fide offer to purchase.

The bill provides that the park owner is obligated to sell the park to the home owners if the home owners meet the price and terms and conditions of the mobile home park owner by executing a contract with the park owner within 45 days. The bill increases from 10 days to 21 days the additional time period in which the homeowners' associations may respond to a higher or lower price than what was specified in the original notice. The homeowners' associations has 21 says to meet the price and terms of any counteroffer.

The park owner is not required to notify the officers of the homeowners' associations and the Florida Housing Finance Corporation unless the homeowners' association has informed the mobile home park owner that they are ready and willing to purchase the park. The homeowners' associations must annually renew its expression of readiness and willingness to purchase the park by certified mail to the park owner. The park owner has no obligation to comply with the notice requirements and to offer the park for sale to the home owners if the homeowners' association has not substantially complied with these requirements. The home owner expression of readiness and willingness to purchase the park must include:

- Information about the number of homeowners concurring;
- The date, time, and place of the homeowners' association meeting authorizing the notice to be sent; and
- Information concerning the ability of the homeowners to purchase the park using the income approach method to estimate the property value.

The deletes the definitions for the terms "notify" and "offer" in ss. 723.071(3)(a) and (b), F.S., respectively.

The bill also deletes the current notice requirements in s. 723.071(2), F.S. It also deletes the requirement that the park owner consider subsequent offers by the homeowners' association, and the provision that the park owner is free to execute a contract to sell the park to a party other than the association at any time.

Alternate Power Generators for Elevators

The bill repeals the requirement for emergency generated power for elevators in high-rise multifamily dwellings over 75 feet in height in s. 553.509(2), F.S.

Effective Date

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill creates ss. 718.116(11), 719.108(10) and 720.3085(8), F.S., to authorize condominium associations, cooperative associations, and homeowners' associations, respectively, to demand payment of any unpaid regular assessments from tenants of the unit or parcel owner. The bill authorizes these associations to evict the tenant for non-payment of the assessment and provides a credit to the tenant lease payments for any assessment payments the tenant makes to the association. These provisions implicate constitutional concerns relating to the impairment of contract.

The retroactive application of these provisions may violate the Contract Clause,[38] the prohibition against ex post facto laws,[39] and the Due Process clauses[40] of the U.S. Constitution. The common law also provides that the government, through rule or legislation, cannot adversely affect substantive rights once such rights have vested.[41]

The Contract Clause prohibits states from passing laws which impair contract rights. It only prevents substantial impairments of contracts.[42] The courts use a balancing test to determine whether a particular regulation violates the contract clause. The courts measure the severity of contractual impairment against the importance of the interest advanced by the regulation. Also, courts look at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest.[43] Generally, courts accord considerable deference to legislative determinations relating to the need for laws which impair private obligations.[44] However, courts scrutinize the impairment of public contracts in a stricter fashion. They exhibit less deference to findings of the Legislature, because the Legislature may stand to gain from the outcome.[45]

Although the retroactive application of condominium laws to preexisting lease agreements between condominium associations and third parties may be constitutionally applied,[46] it is not clear whether condominium laws may be retroactively applied to pre-existing lease agreements between a unit owner and his or her tenant.

[38] Article I, s. 10, U.S. Constitution.
[39] Article I, s. 9, U.S. Constitution.
[40] Fifth and Fourteenth Amendments, U.S. Constitution.
[41] *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).
[42] *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1923).
[43] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).
[44] *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945).
[45] *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). *See generally*, Leo Clark, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183 (1985).
[46] *Century Village, Inc. v. Wellington*, 361 So.2d 128 (Fla. 1978).

In *Pomponio v. Claridge of Pompano Condominium, Inc*.,[47] the court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The Florida Supreme Court invalidated as an unconstitutional impairment of contract a statute that provided for the deposit of rent into a court registry during litigation involving obligations under a contract lease. In *Pomponio*, the court set forth several factors in balancing whether the state law has in fact operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court stated that if there is minimal alteration of contractual obligations the inquiry can end at its first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the state legislation. The factors to be considered are:

. Whether the law was enacted to deal with a broad, generalized economic or social problem;
i. Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
ii. Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive.[1]

The court in *United States Fidelity & Guaranty Co. v. Department of Insurance,*[48] also adopted the method used in *Pomponio.* The court stated that the method required a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power.

Adopting the method of analysis used by the U.S. Supreme Court, the court outlined the main factors to be considered in applying this balancing test.

- The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."[2] The severity of the impairment increases the level of scrutiny.
- In determining the extent of the impairment, the court considered whether the industry the complaining party entered has been regulated in the past. This is a consideration because if the party was already subject to regulation at the time the contract was entered, then it is understood that it would be subject to further legislation upon the same topic.[3]
- If the state regulation constitutes a substantial impairment, the state needs a significant and legitimate public purpose behind the regulation.[4]

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[47] *Pomponio v. Claridge of Pompano Condominium, Inc*., 378 So. 2d 774, 776 (Fla. 1979).
[1] *Pomponio*, 378 So. 2d at 779.
[48] *United States Fidelity & Guaranty Co. v. Department of Insurance*, 453 So. 2d 1355 (Fla. 1984).
[2] *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spannaus*, 438 U.S. 234, 244 (1978)).
[3] *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).
[4] *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (citing *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)).

- Once the legitimate public purpose is identified, the next inquiry is whether the adjustment of the rights and responsibilities of the contracting parties are appropriate to the public purpose justifying the legislation.[5]

The bill provides that the mobile home park owner is obligated to sell the park to the home owners if the home owners meet the price and terms and conditions of the park owner for the sale of the mobile home park. This requirement may implicate prohibitions contained in the Sixth Amendment of the U.S. Constitution if applied to deny an application for a change in land use because there are no affordable and comparable, adequate mobile home parks or other suitable facilities existing within the same county. The Sixth Amendment prohibits the taking of private property for public use without just compensation. A regulatory taking may occur when government regulation "does not substantially advance a legitimate state interest, but instead singles out mobile home park owners to bear an unfair burden, and therefore constitutes an unconstitutional regulatory taking of their property."[49]

In *Aspen-Tarpon Springs v. Stuart*, the First District Court of Appeals held that s. 723.061(2), F.S., constituted an unconstitutional as a regulatory taking of property without compensation.[50] This provision, since amended,[51] required a mobile home park owner who wished to change the land use of a park to either pay to have the tenants moved to another comparable park within 50 miles or purchase the mobile home from the tenants at a statutorily determined value. In *Aspen-Tarpon Springs*, the court found that neither the "buy" or "relocation" options were economically feasible, and were, as a practical matter, confiscatory because it authorized a permanent physical occupation of the owner's property. This issue has not been addressed by the Florida Supreme Court.

Based on the analysis in *Aspen-Tarpon Springs*, it is not clear whether the requirement that the home park owner sell the park to the home owners if they meet his or her price, terms, and conditions of sale would be economically feasible, and if not economically feasible, whether the requirement would be an unconstitutional taking under the Sixth Amendment of the U.S. Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill repeals the alternate emergency generated power requirement for elevator in high-rise residential dwelling in s. 553.509, F.S., The repeal of this provision may save the owners of such building the costs of compliance with the requirement. It is estimated

[5] *Id*.
[49] *Aspen-Tarpon Springs v. Stuart*, 635 So.2d 61 (Fla. 1st DCA 1994).
[50] *Id*.
[51] Section 6, ch. 2001-227, L.O.F.

by industry representatives that the cost to engineer and install the appropriate generator wiring, coupling, and transfer switch is approximately $4,000 to $6,000 per location.

Options to power an elevator by portable generator include purchase and guaranteed services contracts in which a second party provides the generator, maintenance, and servicing for a fee. Costs for purchasing a generator are dependent on each individual application. As an approximate general rule, standby generators cost $300 to $500 per kilo-watt. Thus, a 20 KW standby generator would cost between $6,000 and $10,000. A 100 KW generator would cost between $30,000 and $50,000.

The cost of a guaranteed services contract would be subject to many variables and is unknown. However, it is likely to be considerably less than the cost of a purchased generator.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 21, 2009:
The committee substitute (CS) does not amend the following paragraphs in s. 718.112(2), F.S.:

- Paragraph (c) to provide that the board of the condominium association is not required to take action on items that are placed on a board meeting agenda by petition of the unit owners.
- Paragraph (d) to provide exemptions for the terms of board members in timeshare condominiums. It also does not provide that board members who are delinquent in the payment of any fee, fine, or special or regular assessment by more than 90 days are not eligible for board membership. It does not require the approval of a majority of the total voting interests for amending the bylaws to provide for staggered terms.

The CS amends s. 718.112(2)(d), F.S., to revises requirements related to the election of board members, the terms of board offices, vacancies on the board, and the qualifications of board members. It provides for a post-election certification by each newly elected or

appointed director, and permits completion of the educational curriculum as an alternative to a written certification.

The CS amends s. 718.116(5)(b), F.S., includes the term "estoppel" to describe the term "certificate."

The CS amends s. 718.116(11), F.S., to clarify that the tenant's landlord must provide the tenant with a credit against any assessment payments made by the tenant to the association. It also clarifies that the tenant's liability to the association may not exceed the amount due from the tenant to his or her landlord.

The CS amends s. 718.301(1)(f), F.S., to provide that unit owners other than the developer are entitled to elect not less than a majority of the members of the association board except when a court determines within 30 days after appointment of a receiver for the developer that transfer of control to the owners would be detrimental to the association or its members.

The CS amends s. 718.303(3), F.S., to authorize condominium associations to suspend a unit owner's use rights if the unit owner is delinquent for more than 90 days in the payment of a regular or special assessment.

The CS creates part VII of ch. 718, F.S., consisting of ss. 718.701, 718.702, 718.703, 718.704, 718.705, 718.706, 718.707, and 718.708, F.S., which may be may be cited as the "Distressed Condominium Relief Act."

The CS amends s. 719.108(3), F.S., includes the term "estoppel" to describe the term "certificate."

The CS amends s. 720.303(2)(b), F.S., to provide that meetings between the board or a committee and the association's attorney in which proposed or pending litigation is discussed are not required to be open to the members.

The CS amends s. 720.303(5)(a), F.S., to create a rebuttable presumption that the association has willfully failed to comply with the a member's written request to inspect its records if the association does not provide the member access to the records within 10 days of a written request submitted by certified mail, return receipt requested.

The CS also amends s. 720.303(5)(c), F.S., to provide that the actual cost of copying records includes reasonable costs involving personnel fees and charges at an hourly rate for employee time to cover the administrative costs to the association.

The CS amends the following paragraphs in s. 720.303(6), F.S., relating to homeowners' association budgets:

- Paragraph (b) provide for the termination of reserve accounts upon the approval of the majority of the voting interests.

- Subparagraph (c)1. to revise the notice requirement for financial reports for associations that do not provide for reserve accounts.
- Subparagraph (c)2. to provide an additional disclosure for financial reports for reserve accounts.
- Subparagraph (g)2. to revise the accounting requirements for pooled reserve accounts.

The CS 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, and to provide exceptions.

The CS amends s. 720.305, F.S., to authorize condominium associations to suspend a unit owner's use rights if the unit owner is delinquent for more than 90 days in the payment of a regular of special assessment. It also permits homeowners' associations to place a lien a parcel for a fine of $1,000 or more.

The CS amends s. 720.306(8), F.S., to provide a procedure for absentee ballots.

The CS amends s. 720.306(9), F.S., relating to the election of homeowners' association board members.

The CS amends s. 720.3085(8), F.S., to correct a scrivener's error that referenced the term "condominium" in the context of future regular assessment on a parcel.

The CS creates s. 720.315, F.S., to revise requirements for special assessments in homeowners' associations before the turnover of the association by the developer.

The CS amends s. 723.071(1)(a), F.S., to revise the rights and obligations of mobile home park owners and mobile home owners when the park owner intends to offer or receives an offer for the sale of a mobile home park.

The CS changes the effective date from October 1, 2009, to July 1, 2009.

CS by Regulated Industries on April 1, 2009:
The committee substitute (CS) deletes provisions creating s. 627.714, F.S., relating to loss assessment insurance coverage for condominium units, and removes provisions amending s. 718.111(11), F.S., relating to condominium insurance.

The CS amends s. 718.111(12), F.S., to clarify that the association may be responsible for the use or misuse of the information if it has an affirmative duty not to disclose such information pursuant to ch. 718, F.S., to provide that the email addresses of any person in the association's records are not accessible to unit owners, to provide that members do not have a right to access data generated by software used by the association which allows manipulation of data, and to delete the current language that prohibits access to the functionality of software used by the association which allows manipulation of data.

The CS deletes provisions or the original bill relating to the expiration of board member terms in s. 718.112(2)(d), F.S., and amends that subsection to provide that associations that do not include timeshare units may not permit co-occupants and co-owners of a unit to serve together on the board unless one of them owns more than one unit. A person who is more than 90 days delinquent of any fee, fine, or assessment is ineligible for board membership.

The CS does not delete the pre-election certification requirement in s. 718.112(2)(d)3., F.S., and does not require a written pre-election notice of intent to be a candidate that includes the attestation of knowledge required under current law. The CS also amends s. 718.112(2)(d)3., F.S., to require newly elected board members to submit a post-election written certification or educational certificate.

The CS amends s. 718.112(2)(n), F.S., to include any fee or fine among the types of payments that, if delinquent more than 90 days, would deem an officer or director to have abandoned the office.

The CS amends s. 718.115(1)(d), F.S., to reference communication services as defined in ch. 202, F.S., information services, and Internet service within the scope of the types of bulk contracts that the board may enter into and the cost for which are considered common expenses.. It does not reference broadband services. The CS also amends s. 718.115(1)(d)2., F.S., to replace the term "television" with the term "video cable services."

The CS does not amend s. 718.116(1)(b), FS, to revise the limitation for first mortgagee's liability for unpaid assessments upon acquisition of title. The CS does not provide that a lien may not be filed by the association against a unit until 30 days after the date a notice of intent to file a lien is delivered to the owner.

The CS does not create s. 718.116(6), F.S., to specify the methods for proper service of the condominium association's notice of lien. The CS also does not repeal s. 718.121(4), F.S., which provides the current methods for proper service of the condominium association's notice of lien.

The CS amends s. 718.116(5)(b), FS, to limit to $75 the unit owners cost for collection letters and other collection efforts by the management company, creates s. 718.116(11), F.S., to provide for the payment of unpaid regular assessments by the tenant of a unit owner in a condominium, amends s. 718.303(3), F.S., to provide for the suspension of the right to use common elements, common facilities, or any other association property, and does not repeal s. 718.121(4), F.S.

The CS amends s. 719.108, FS, relating to a cooperative association's claim of lien, and the payment of unpaid regular assessments by the tenant of a unit owner in a cooperative association, amends s. 720.305(2), F.S., relating to the imposition of fines and suspension-of-use rights in homeowners' associations, creates s. 720.3085(8), F.S., to provide for the payment of unpaid regular assessments by the tenant of a unit owner in a

condominium, creates s. 720.31(6), F.S., relating to recreational leaseholds, and amends s. 721.05(17), F.S., to clarify the term "facility."

The CS extends the effective date from July 1, 2009 to October 1, 2009.

B. Amendments:

None.