

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 Regulated Industries Committee

BILL: CS/SB 998

INTRODUCER: Regulated Industries Committee and Senator Ring

SUBJECT: Condominium and Homeowners' Associations

DATE: April 2, 2009

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|---------------|
| 1. | Oxamendi | Rhea | RI | Fav/CS |
| 2. | _____ | _____ | CA | _____ |
| 3. | _____ | _____ | BI | _____ |
| 4. | _____ | _____ | JU | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|-----------------------------------------|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill provides an exemption from the requirement to retrofit a condominium with fire alarm systems or smoke-detection systems. The exemption applies to condominiums that have one and one-half hour or higher fire-rated walls and are not a high-rise building.

The bill revises the provisions related to the liability of the first mortgagee or its successor or assignee for unpaid assessments in a condominium association and a homeowners' association. The bill requires the payment of unpaid assessment liability before the first mortgagee or its success or assignee acquires title to the property. The unpaid assessment must be paid one year after a foreclosure action is filed. The amount of the unpaid assessment liability is the lesser of the amount accrued during the immediately preceding 6 months for a condominium unit or 12 months for a parcel in a homeowners' associations. Alternatively, the liability may be 1 percent of the original mortgage debt. This liability after the foreclosure or recorded deed in lieu of foreclosure is limited to the amount paid before the title is acquired. The amount of liability is the same that is required under current law.

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

This bill substantially amends the following sections of the Florida Statutes: 718.112, 718.116, and 720.3085.

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 Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation (department), in accordance with ch. 718, F.S.

Condominium – Retrofitting Common Elements

However, a condominium association may not vote to forego the retrofitting with a fire sprinkler system of common areas in a high-rise building. A “high-rise building” is defined as a building that is greater than 75 feet in height where the building height is measured from the lowest level of fire department access to the floor of the highest occupiable story.

The local authority with jurisdiction over firesafety cannot require completion of retrofitting of common areas with a sprinkler system before the end of 2014.

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.

Condominium – 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 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

⁷ Section 718.116(1), F.S.

⁸ See s. 720.302, F.S.

⁹ Section 720.302(5), F.S.

¹⁰ See ss. 720.303 and 720.307, F.S.

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 – Assessments and Foreclosures

Section 720.301(1), F.S., defines an “assessment” or “amenity fee” to mean:

a sum or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.

Section 720.3085(2), F.S., provides a limitation on the liability of a first mortgagee, e.g., the mortgage lending bank, for unpaid assessments by a parcel owner that is similar to that provided in s. 718.116, F.S., for condominiums. If a first mortgagee acquires title to a parcel 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.

Section 720.3085(1), F.S., limits the priority of any lien, mortgage, or certified judgment of record on July 1, 2008, to the priority it had before July 1, 2008.

III. Effect of Proposed Changes:

Condominium – Retrofitting Common Elements

The bill amends s. 718.112(2), F.S., to provide an exemption from the requirement to retrofit a condominium with fire alarm systems or smoke-detection systems. The exemption applies to condominiums that have one and one-half hour or higher fire-rated walls and are not a high-rise building.

Condominium – Assessments and Foreclosures

The bill amends s. 718.116(1)(b), F.S., to require the payment of unpaid assessment liability before the first mortgagee or its success or assignee acquires title to the condominium unit. The unpaid assessment must be paid one year after a foreclosure action is filed. The amount of the unpaid assessment liability is the lesser of the amount accrued during the immediately preceding 6 months or 1 percent of the original mortgage debt. This liability after the foreclosure or

¹¹ See ss. 720.301 and 720.303, F.S.

¹² Section 720.303, F.S.

recorded deed in lieu of foreclosure is limit to the amount payment made before the title is acquired. This is the same liability that is required under current law.

Homeowners' Associations – Assessments and Foreclosures

The bill amends s. 720.3085(1), FS, to require the payment of unpaid assessment liability before the first mortgagee or its success or assignee acquires title to the parcel in a homeowners' association. The unpaid assessment must be paid one year after a foreclosure action is filed. The amount of the unpaid assessment liability is the lesser of the amount accrued during the immediately preceding 12 months or 1 percent of the original mortgage debt. This liability after the foreclosure or recorded deed in lieu of foreclosure is limit to the amount payment made before the title is acquired. This is the same liability that is required under current law.

Effective Date

The bill provides an effective date of October 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 amends ss. 718.116, and 720.3085, F.S., to require the payment of unpaid assessment liability before the first mortgagee or its successor or assignee acquires title to the condominium unit parcel in a homeowners' associations, respectively.

Unless the mortgage instrument provides for the application of laws that are enacted after the date the mortgage is entered into, the retroactive application of the provision in s. 720.3085, F.S., to the foreclosure of a parcel in a homeowners' association may violate the Contract Clause,¹³ the prohibition against ex post facto laws,¹⁴ and the Due Process clauses¹⁵ 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.¹⁶

¹³ Article I, s. 10, U.S. Constitution.

¹⁴ Article I, s. 9, U.S. Constitution.

¹⁵ Fifth and Fourteenth Amendments, U.S. Constitution.

¹⁶ *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).

The Contract Clause prohibits states from passing laws which impair contract rights. It only prevents substantial impairments of contracts.¹⁷ 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.¹⁸ Generally, courts accord considerable deference to legislative determinations relating to the need for laws which impair private obligations.¹⁹ 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.²⁰

In regards to foreclosure of a condominium unit, the application of the provision for early payment in s. 718.116, F.S., may not unconstitutionally impair contract rights if the declaration of condominium or articles of incorporation expressly provide that the condominium is bound by future changes to the laws governing condominiums.²¹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

First mortgagees or their successors or assignees of property in a condominium or homeowners' associations would be required to pay unpaid assessments before they acquire title to the property in a foreclosure on a recorded deed in lieu of foreclosure. The unpaid assessment must be paid one year after a foreclosure action is filed. The amount of the unpaid assessment liability is the lesser of the amount accrued during the immediately preceding 6 months for a condominium unit or 12 months for a parcel in a homeowners' associations. Alternatively, the liability may be 1 percent of the original mortgage debt. This liability after the foreclosure or recorded deed in lieu of foreclosure is limited to the amount paid before the title is acquired. The amount of liability is the same that is required under current law.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

¹⁷ *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1923).

¹⁸ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

¹⁹ *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945).

²⁰ *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).

²¹ *Century Village, Inc. v. Wellington*, 361 So.2d 128 (Fla. 1978).

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 by Regulated Industries on April 1, 2009:**

The committee substitute (CS) does not amend the following provisions:

- Section 718.110(13), F.S., relating to the rental of condominium units;
- Section 718.111(12)(b), F.S., relating to the official records of the condominium association;
- Section 718.112(2)(d), F.S., to revise the condominium election procedures and the qualifications of condominium association board members;
- Section 718.113(5)(a), F.S., relating to the installation of code-compliant impact glass by the condominium association;
- Section 718.116(5)(b), FS, relating to the unit owners collection costs for the association's claim of lien
- Section 718.116(8), F.S., relating to collection of fees for estoppels certificates;
- Section 718.303(3), F.S., relating to the suspension of the right to use common elements, common facilities, or any other association property by a unit owner or a unit owner's occupant, licensee, or invitee's; and
- Section 720.303(5), F.S., relating to the inspection and copying of homeowners' association records.

The CS amends ss. 718.112(2)(l), F.S., to provide for the retrofitting of fire alarm systems or smoke-detection systems.

The CS amends s. 718.116(1)(b), F.S., to revise the provisions related to the liability of the first mortgagee or its successor or assignee for unpaid assessments in a condominium association. However, it revises these provisions in a different manner than that provide in the bill. The CS does not:

- Limit the liability for unpaid assessments only if the first mortgagee acquires title to the unit within 1 year following the date on which the foreclosure action is filed;
- Provide for the automatic extension of the one-year limit upon the filing of a bankruptcy petition by the unit owner;
- Require that the mortgagee diligently pursues stay relief in the bankruptcy proceeding; or
- Clarify the meaning of the term "successor or assignee" of the first mortgagee.

The CS amends s. 718.116(1)(b), F.S., to provide for the payment of unpaid assessment liability before the first mortgagee or its successor or assignee acquires title to the condominium unit.

The CS amends s. 720.3085, F.S., to revise the provisions related to the liability of the first mortgagee or its successor or assignee for unpaid assessments in a homeowners' association. However, it revises these provisions in a different manner than that provide in the bill. The CS does not:

- Limit the liability for unpaid assessments only if the first mortgagee acquires title to the unit within 1 year following the date on which the foreclosure action is filed;
- Provide for the automatic extension of the one-year limit upon the filing of a bankruptcy petition by the unit owner; or
- Require that the mortgagee diligently pursues stay relief in the bankruptcy proceeding.

The CS amends s. 720.3085, F.S., to provide for the payment of unpaid assessment liability before the first mortgagee or its successor or assignee acquires title to the parcel in the homeowners' association.

The bill does not create s. 720.3076, F.S., to provide a process for amending the governing documents of homeowners' associations that are no longer controlled by the developer and turned over to the parcel owners.

B. Amendments:

None.