

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 Committee on Judiciary

BILL: CS/SB 120

INTRODUCER: Regulated Industries Committee and Senator Latvala

SUBJECT: Condominiums

DATE: March 11, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/CS
2.	Shankle	Cibula	JU	Favorable
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/SB 120 amends the Florida Condominium Act to clarify that regardless of any requirement or description that a declaration of condominium may provide regarding when a condominium is created, condominium units are created when the declaration is recorded.

For the following procedural time periods, the bill substitutes the recording date of the certificate of a surveyor and mapper, or the recording of an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit (known as the first unit owner deed), rather than the recording of the declaration of condominium:

- The deadline to bring an action to correct an omission or error in a declaration, which must be brought within 3 years after the recording of the first event;
- The beginning of the 2-year time period, during which the developer and unit owners, when the developer has not turned over control of the association, may vote to waive the financial reporting requirement;
- The date when the developer’s right to waive or reduce the funding of reserves expires;

- The beginning date for the 12-month period during which an association may enter into agreements for leasehold interests or membership rights before such an agreement or leasehold is considered a material alteration or substantial addition to the association property which would require a majority vote of the total voting interests or as authorized by the declaration; and
- The beginning date for the time periods for the turnover of association control from the developer to the unit owners.

These changes allow a developer to record a declaration, and thus be able to provide a description of the property to a prospective buyer in compliance with the Interstate Land Sales Full Disclosure Act without beginning the running of any of the above time periods.

The bill extends to 5 years from 3 years the period of time that the county clerk is required to hold funds deposited by a developer who has not prepared and provided the surveyors certificate of the land which will be a part of the condominium. This provides additional time for developers to provide the surveyor's certificate of the land to the county clerk.

The bill revises the 7-year period for completion of all phases of a condominium project to provide that the 7-year period runs from the date the surveyor's affidavit of substantial completion is recorded, or 7 years from the date the sale of a unit to a non-developer is recorded in the initial phase of the condominium. The bill deletes from the current provision that counted the beginning of the 7-year period from the date the declaration was recorded. The bill also creates a mechanism to extend the seven-year time period for an additional 3 years.

This bill substantially amends the following sections of the Florida Statutes: 718.104, 718.105, 718.110, 718.111, 718.112, 718.114, 718.301, and 718.403.

II. Present Situation:

Creation of 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 where the condominium is located.² A declaration:

strictly 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

Section 718.116(1), F.S., provides that a unit owner is liable for all assessments which come due while he or she is the unit owner. Section 718.103(12), F.S., defines the term "unit" as:

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

³ *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003).

a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration.

Upon recordation of the declaration or an amendment to an existing declaration that adds a phase to the condominium, all units described in the declaration or amendment as being located in or on the land then being submitted to condominium ownership comes into existence, regardless of the state of completion of planned improvements in which the units may be located. Upon recordation, the developer must file the recording information with the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation within 120 days.⁴

Units in Unconstructed Condominiums

Condominium units that are created when the declaration of condominium is recorded before the construction of the condominium is completed are known as “phantom condominium units.” There is conflicting case law regarding the extent to which the owners of phantom units are subject to assessments on those units.

In *Hyde Park Condominium Association v. Estero Island Real Estate, Inc.*,⁵ the Florida Second District Court of Appeal held that the owner of unimproved lots in an unconstructed condominium was liable for unpaid assessments for common expenses on that property because the property was subject to a recorded declaration of condominium, and therefore a condominium had been created.

In *Winkelman v. Toll*,⁶ the Florida Fourth District Court of Appeal also held that the owner of unimproved land that was subject to a recorded declaration of condominium was liable for assessments on that property.

However, in *R.I.S. Investment Group, Inc. v. Department of Business and Professional Regulation*,⁷ the Fourth District Court of Appeal held that undeveloped “raw” land did not constitute a condominium unit which was subject to assessment. The court noted the detailed description of the unit in the declaration, which referenced boundaries of the unit to include a floor, a ceiling, and walls. The court relied on the “clear” intent of the scrivener of the declaration that undeveloped land did not constitute a unit.

Recording of the Declaration of a Condominium

A declaration is required to have a survey of the land and a graphic description of the improvements.⁸ When the developer attempts to record the declaration with a clerk of courts, if

⁴ Section 718.104(2), F.S.

⁵ *Hyde Park Condominium Association v. Estero Island Real Estate, Inc.*, 486 So. 2d 1, (Fla. 2nd DCA 1986). *See also*, *Estancia Condominium Association v. Sunfield Homes, Inc.*, 619 So. 2d 1008 (Fla. 2nd DCA 1993), holding that unimproved land that was subject to a recorded declaration of condominium was subject to assessments on that property.

⁶ *Winkelman v. Toll*, 661 So. 2d 102 (Fla. 4th DCA 1995),

⁷ *R.I.S. Investment Group, Inc. v. Department of Business and Professional Regulation*, 695 So. 2d 357 (Fla. 4th DCA 1997).

⁸ Section 718.104(4)(e), F.S.

the deceleration does not have the required survey of the land and graphic description of the improvements, the developer is required to deliver to the clerk of court a deposit in the amount of an estimate of the cost of the final survey or graphic description.⁹ The clerk is to hold the sum of money until an amendment to the declaration is recorded that complies with the certificate requirements. Then the sum of money is returned to the developer or to the person presenting the amendment.¹⁰ If the clerk does not pay the sum within 3 years after the date the declaration was originally recorded, the clerk may notify the registered agent of the association that the sum is still available and the reason it was originally deposited.¹¹

Amending the Declaration of a Condominium

Section 718.110(10), F.S., provides that if there is an omission or error in a declaration or any other document which would affect the valid existence of the condominium, and if no action is taken to determine whether the declaration or other document complies with the mandatory requirements for the formation of a condominium within 3 years after the date of the recordation of the declaration, the declaration and other documents shall serve as effective enough to create a condominium as of the date the declaration was recorded, whether or not the documents substantially comply with the mandatory requirements of law.

Application of the Interstate Land Sales Full Disclosure Act to Condominium Sales

The federal Interstate Land Sales Full Disclosure Act (ILSFDA or act)¹² provides consumer protections to persons who purchase or lease lots in large, uncompleted housing developments, including condominiums. The act applies to both the conveying of a unit or lot and to all related marketing and sales promotional efforts.

The act specifies the information that the developers must provide to prospective purchasers or lessees. If the developer fails to provide this information, the purchaser or lessee has the right to revoke the purchase contract or lease agreement for two years from the date of the signing of the contract or agreement.¹³

The act permits buyers and lessees to revoke their purchase or lease agreements within a prescribed time if certain conditions are met, including the failure of the developer to make the required disclosures.¹⁴ In relevant part, the developer must provide prospective purchasers or lessees with:

- (1) a description of the lot which makes such lot clearly identifiable and which is in a form acceptable for recording by the appropriate public official responsible for maintaining land records in the jurisdiction in which the lot is located;¹⁵

⁹ Section 718.105(4)(a), F.S.

¹⁰ Section 718.105(4)(b), F.S.

¹¹ Section 718.105(4)(c), F.S.

¹² 15 U.S.C. ss. 1701-20

¹³ See 15 U.S.C. s. 1703(d)

¹⁴ See 15 U.S.C. s. 1703

¹⁵ 15 U.S.C. s. 1703(d)(1)

Of concern to condominium developers, according to the Real Property, Probate, and Trust Law Section of The Florida Bar, is the application of ILSFDA to the sale, or offering for sale, of pre-construction condominium units.

State and federal court decisions have addressed the issue of what is an acceptable description of the property under ILSFDA.

In *Bacolitsas v. 86th & 3rd Owner, LLC*,¹⁶ the United State Court of Appeals for the Second Circuit (New York) held that the description requirement in ISLFDA was satisfied where the purchaser was provided a plan with a detailed description of the unit that identified the dimensions and locations of all rooms and windows, the floor plan, the location of the unit within the building, and the direction the unit faced. The purchaser was also provided a draft declaration that included a metes and bounds description of the condominium and indicated the specific tax lots on which the building was to be erected. The court held that the description itself and not the agreement had to be in a form acceptable for record.

In *Boynton Waterways Investment Associates, LLC v. Bezkorovainus*,¹⁷ the Fourth District Court of Appeals held that the developer had complied with ISLFDA by providing the buyer a copy of the proposed declaration of condominium, which was included in the prospectus, the unit number, address, development name, site map, and floor plans. The court found that this information, which was incorporated into the contract, made the property purchased “clearly identifiable” and “in a form acceptable for recording.”

In *Taplett v. TRG Oasis (Tower Two), Ltd, L.P.*,¹⁸ the United States District Court for the Middle District of Florida also found that ISLFDA disclosure requirement was not violated when the developer provided a purchase contract that designated the condominium unit and the name of the development. The court held that ISLFDA requirement that the description must be in “recordable form” does not mean that the developer must provide “recording data identifying [the] declaration” as is required by s. 718.109, F.S., i.e., the developer is not required to give the purchaser the identifying reference number when the declaration is recorded.

However, in a recent case, *Berkovich v. Vue-North Carolina, L.L.C.*,¹⁹ the United States District Court for the Western District of North Carolina concluded that the purchasers had the right to revoke the contract because it did not contain a recordable legal description that included the information contained in the filing of the declaration. Consistent with North Carolina law, the developer provided the purchaser with a contract that included a legal description of the unit in which the unit was identified by number and the name of the condominium building as described in the declaration of condominium. However, the description did not include recording data from the filing recording of the declaration because North Carolina law did not permit the declaration to be filed until the construction of the condominium was substantially completed. (Florida law does not prohibit the filing of a declaration before the condominium construction is completed.) Although North Carolina law made it impractical or impossible to provide a description for the

¹⁶ *Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673 (C.A.2 (N.Y.)) December 19, 2012.

¹⁷ *Boynton Waterways Investment Associates, LLC v. Bezkorovainus*, 82 So. 3d 924 (Fla. 4th DCA 2011)

¹⁸ *Taplett v. TRG Oasis (Tower Two), Ltd, L.P.*, 755 F.Supp.2d 1197 (M.D. Fla. 2009).

¹⁹ *Berkovich v. Vue-North Carolina, L.L.C.*, 2011 WL 5037124 (W.D.N.C. 2011).

unit that included “recording data”, the court held that the purchasers were entitled to the “prophylactic measure Congress granted purchasers deprived of a recordable legal description.”

Financial Reporting

Section 718.111(13), F.S., provides the financial reporting requirements for condominium associations. Within 90 days after the end of the fiscal year (or annually on a date provided in the bylaws), the association must prepare and complete a financial report for the preceding year. Within 21 days after completion, but no later than 120 days after the end of the fiscal year, the association must mail or hand deliver to each unit owner, a copy of the financial report or a notice that it will be mailed or hand delivered.²⁰ The financial reports must be prepared if approved by a majority of the voting interests present at a properly called meeting of the association, and may be done by one of these methods:

- A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;
- A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or
- A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.²¹

The meeting and approval must occur before the end of the fiscal year and is effective only for the fiscal year in which the vote was taken, except that the approval may also be effective for the following fiscal year.²²

If turnover of the association from the developer to the unit owners has not occurred, all unit owners including the developer may vote on issues relating to the preparation of financial reports for the first 2 fiscal years of the association’s operation, beginning with the fiscal year in which the declaration was recorded.²³ Thereafter, only unit owners may vote on such issues until turnover occurs.²⁴

Annual Budget Requirement

Section 718.112(2)(f), F.S., requires that the condominium associations bylaws must provide for a proposed annual budget that contains detailed estimates of revenues and expenses and show the amounts budgeted by accounts and expense classifications.

In addition to the annual operating expenses, the budget must include reserve accounts for capital expenditures and deferred maintenance. These requirements do not apply to an adopted budget in which a majority vote of the unit owners determined to waive reserves or provide less reserves than required by law.²⁵

²⁰ Section 718.111(13), F.S.

²¹ Section 718.111(13)(d), F.S.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Section 718.112(2)(f)2, F.S.

Prior to turnover, a developer may vote to waive the reserves or reduce funding of reserves for the first 2 fiscal years of the association's operation, beginning with the fiscal year in which the initial declaration is recorded. Thereafter, only the unit owners may vote on such issues by a majority vote.²⁶

Association Powers

Under Section 718.114, F.S., if the declaration allows, an association may enter into agreements for leasehold interests or membership rights and may obtain these benefits for the enjoyment of unit owners even if they are not contiguous to the lands of the condominium. All of these agreements must be fully described in the declaration.

After the 12 months following the recording date of the declaration, agreements acquiring interests are considered a material alteration to the association property, and the association may not acquire or enter into such agreements except by a vote of a majority of the total voting interests or as authorized by the declaration.²⁷

Transfer of Association Control

Section 718.301(1), F.S., delineates the process for transfer of association control from the developer to the unit owners. The latest that turnover of control of an association may occur is 7 years after the recording of a declaration when the association will operate a single condominium. In the case of an association that may ultimately operate more than one condominium, the time period is 7 years after the recordation of the declaration for the first condominium that it operates.²⁸

After the turnover occurs, the developer must relinquish all control of the association and deliver to the association all property of the unit owners.²⁹

Phase Condominiums

Section 718.403, F.S., permits a developer to develop a condominium in phases if the declaration allows, or if an amendment to the original declaration was approved by all of the unit owners. However, the final phase must be completed within 7 years from the date of the recording of the initial declaration.

III. Effect of Proposed Changes:

Section 1. Creation of Condominiums

The bill amends s. 718.104(2), F.S., to clarify that regardless of any requirement or description that a declaration may provide regarding when a condominium is created, condominium units are

²⁶ *Id.*

²⁷ Section 718.114, F.S.

²⁸ Section 718.301(1)(g), F.S.

²⁹ Section 718.301(4), F.S.

created when the declaration is recorded. According to the Real Property, Probate, and Trust Law Section of The Florida Bar, this change addresses the conflicting case law regarding whether condominium units are created when a declaration is recorded for condominium that has not been constructed and regarding the extent to which the owners of unconstructed units are subject to assessments on those units. Regardless of any description that a declaration provides, a unit owner can be subject to assessments from the date of recording of the declaration.

Section 2. Recording of Declaration

The bill amends s. 718.105(4)(c), F.S., to extend to 5 years from 3 years the period of time that the county clerk is required to hold funds deposited by a developer who has not prepared and provided the surveyors certificate of the land which will be a part of the condominium.

Section 3. Amending the Declaration of Condominium

The bill amends s. 718.110(10), F.S., to provide that an action to correct an omission or error in a declaration must be brought within 3 years after the first of these events to occur:

- The recording date of the certificate of a surveyor and mapper, or
- The recording of an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit (known as the first unit owner deed).

If the action is not brought within the 3-year period, the declaration and other documents would effectively create the condominium on the date the declaration was recorded.

The bill deletes the current requirement that the action be brought within 3 years after the recording of the declaration.

In effect, this provision also permits the developer to provide a prospective condominium unit purchaser with a recorded legal description of the condominium unit at a time before the initial declaration is actually recorded. According to the Real Property, Probate and Trust Law Section of The Florida Bar, this change provides an acceptable legal description of condominium units during the pre-sale period which will comply with the federal Interstate Lands Full Disclosure Act

Section 4. Financial Reporting

The bill amends s. 718.111(13)(d), F.S., to allow the developer and unit owners, when the developer has not turned over control of the association, to vote to waive the financial reporting requirement from the date of incorporation of the association through the end of the second fiscal year after the fiscal year in which the certificate of a surveyor and mapper is recorded, or the recording of the first owner's deed, whichever occurs first. The bill deletes the current provision that the two year period begins on the date the declaration was recorded.

Section 5. Annual Budget

The bill amends s. 718.112(2)(f), F.S., to allow the developer to vote to waive or reduce the funding of reserves through the period expiring at the end of the second fiscal year after the fiscal year in which the certificate of a surveyor and mapper is recorded, or the recording of the first owner's deed, whichever occurs first. The bill deletes the current provision that the 2-year period begins on the date the initial declaration was recorded.

Section 6. Association Powers

The bill amends s. 718.114, F. S., to provide that the 12 months in which acquiring leaseholds, memberships, or other possessory or use interests is not considered a material alteration begins either on the date of the recording of a certificate of a surveyor and mapper, or the date of the recording of first owner's deed, whichever occurs first. The bill deletes the current provision that the 12-month period run from the date the initial declaration was recorded.

Section 7. Transfer of Association Control

The bill amends s. 718.301(1)(g), F.S., to change the beginning date for the time periods for the turnover of association control. Instead of commencing on the date the declaration is recorded, the effect periods run from the date of the recording of the certificate of a surveyor and mapper, or the first owner's deed, whichever occurs first.

The bill also creates paragraph 718.301(4)(q), F.S. to require that the developer provide the association a copy of the surveyor and mapper certificate recorded pursuant to s. 718.104(4)(e), F.S., or the recorded instrument that transfers title to a unit that is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first.

Section 8. Phase Condominiums

The bill amends s. 718.403(1), F.S., so that the period for completion of all phases of a condominium project runs from the date that the surveyor's affidavit of substantial completion is recorded, or 7 years from the date the sale of a unit to a non-developer is recorded in the initial phase of the condominium. The bill deletes the current provision that counted the beginning of the 7-year period from the date the declaration was recorded.

The bill also creates a mechanism to extend the 7-year time period for an additional 3 years, if the unit owners approve the extension during the last 3 years of the 7-year period.³⁰ The completion of all phases may not exceed 10 years.

An amendment that extends the 7-year period is not subject to the requirements of s. 718.110(4), F.S., which requires the record owner of units and all record owners of liens on the unit to join in the execution of an amendment to the declaration and unless all the record owners of all other units in the same condominium approve the amendment.

³⁰ The approval must be by "not less than two-thirds of the unit owners" which is the same as that required to amend the declaration of condominium under s. 718.110(1)(a), F.S.

Effective Date

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Developers of condominium will be subject to the cost of recoding the certificate of a surveyor and mapper, or an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit (known as the first unit owner deed).

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 by Regulated Industries on January 24, 2013:

The committee substitute reinstated the current statutory language in s. 718.112(2)(f)2., F.S., which requires the members of a condominium association to determine, by a majority vote at a duly called association meeting, whether to have no budget reserves or budget reserves less than the budget reserves required by statute. These reserves are for the deferred maintenance expense or replacement cost for roof replacement, painting, pavement resurfacing, and similar maintenance issues.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
