

**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.)

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Prepared By: The Professional Staff of the Committee on Regulated Industries

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BILL: SB 1466

INTRODUCER: Senators Lee and Evers

SUBJECT: Residential Communities

DATE: March 19, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	<b>Pre-meeting</b>
2.			JU	
3.			AP	

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**I. Summary:**

SB 1466 expands the services that may be performed by community association managers on behalf of condominiums, cooperatives, and homeowners' associations. The bill permits community association managers to:

- Determine the number of days required for statutory notices;
- Determine the amounts due the association;
- Collect amounts due to the association before filing a civil action;
- Calculate the votes required for a quorum or to approve a proposition or amendment;
- Complete forms related to the management of a community association that have been created by statute or by a state agency;
- Draft demand letters, pre-lien letters, and letters of intended action;
- Draft meeting notices and agendas;
- Calculate and prepare certificates of assessment;
- Respond to requests for estoppel letters;
- Negotiate monetary or performance terms of a contract subject to approval by an association;
- Draft prearbitration demands;
- Prepare statutory construction lien documents for association projects;
- Coordinate or perform maintenance for real or personal property and other routine services involved in the operation of a community association; and
- Comply with the association's governing documents and the requirements of law as necessary to perform such practices.

The bill provides the claim of lien form and the release of lien form for condominiums, cooperatives, and homeowners' associations.

The bill provides that the claim of lien of a cooperative association is not effective one year after the claim of lien was recorded unless, within that time, an action to enforce the lien is

commenced. It provides that the one-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. This conforms the requirements for a claim of lien by cooperative associations with the claim of lien requirements for condominium associations.

The bill provides an effective date of July 1, 2014.

## **II. Present Situation:**

### **Community Association Management**

Community association managers (CAM's) are regulated and licensed pursuant to part VIII of ch. 468, F.S. To be licensed, a community association manager must satisfactory complete an examination for licensure.

Section 468.431(2), F.S., defines "community association management" to mean:

any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of \$100,000: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

A license is not required for persons who perform clerical or ministerial functions under the direct supervision and control of a licensed manager or who only perform the maintenance of a community association and do not assist in any of the management services.<sup>1</sup>

Community association managers are regulated by the seven-member Regulatory Council of Community Association Managers. Five of the members must be licensed CAMs, one of whom must be a CAM for a timeshare. The other two must not be CAMs. Members are appointed to 4-year terms by the Governor and confirmed by the Senate.<sup>2</sup>

To become licensed as a CAM, a person must apply to the department to take the licensure examination and submit to a background check. Upon determination that the applicant is of good moral character, the applicant must attend a department-approved in-person training prior to taking the examination.<sup>3</sup> Licensed community association managers are required to complete continuing education hours as approved by the council.<sup>4</sup>

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<sup>1</sup> Section 468.431(2), F.S.

<sup>2</sup> Section 468.4315(1), F.S.

<sup>3</sup> Section 468.433, F.S.

<sup>4</sup> Sections 468.4336 and 468.4337, F.S.

## Unlicensed Practice of Law

The Florida Bar has a Standing Committee that focuses on the unlicensed practice of law.<sup>5</sup> The Unlicensed Practice of Law Standing Committee (Standing Committee) held hearings in 1995 to determine if certain practices by CAMs constituted the unlicensed practice of law.

The Standing Committee determined that performance of the following activities by CAMs were ministerial in nature and did not constitute the unlicensed practice of law: completing the Secretary of State form CR2EO45 (Statement of Change of Registered Office or Registered Agent or Both for Corporations), and drafting certificates of assessments first notices of date of election, second notices of date of election, ballots, written notices of annual meeting, annual meeting agendas, affidavits of mailing notices of board meetings, and board meeting agendas.<sup>6</sup>

The standing committee determined that the following other duties commonly performed by CAMs did constitute the unlicensed practice of law:

- Completing department form BPR 33-032 (Frequently Asked Question and Answers Sheet);
- Drafting a Claim of Lien, Satisfaction of Claim of Lien, and Notice of Commencement form;
- Determining the timing, method, and form of giving notice of meetings;
- Determining the votes necessary for certain actions which would entail interpretation of certain statutes and rules; and
- Answering a community association's question about the application of law to a matter being considered or advising a community association that an action or course of action may not be authorized by law or rule.<sup>7</sup>

The Standing Committee determined the following actions may or may not involve the unlicensed practice of law, depending on the circumstances:

- Modifying form BPR 33-033 (Limited Proxy Form);
- Drafting a limited proxy form; and
- Drafting documents required to exercise the community association's right of approval or right of first refusal on the sale or lease of a parcel.

The Standing Committee provided a proposed advisory opinion to the Supreme Court for consideration. The Supreme Court reviewed the proposed advisory opinion of the Standing Committee's recommendations the following year.<sup>8</sup>

The Supreme Court noted that there is no generally comprehensive definition of what constitutes the unlicensed practice of law, and relied on the following to guide its opinion:

It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations

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<sup>5</sup> See Florida Supreme Court, Standing Committees, Unlicensed Practice of Law, at: <https://www.floridabar.org/DIVEXE/BD/CMStanding.nsf/2021e58ed0c7505585256e45004b060d/494974ec1e28b2a785256c5b0055481e?OpenDocument> (Last visited March 19, 2014).

<sup>6</sup> *The Florida Bar re Advisory Opinion – Activities of Community Association Managers*, 681 So.2d 1119, 1122 (Fla. 1996).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1122.

under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.<sup>9</sup>

In determining whether a CAM activity constituted the unlicensed practice of law, the Court considered the potential harm to the public and the degree to which substantial rights of persons may be affected. Regarding the Frequently Asked Questions and Answers Sheet, the Court noted that completion of the form requires the interpretation of community association documents, and that the form could significantly affect an individual's legal rights because purchasers rely on the form when making a decision to purchase. Consequently, misleading or incorrect information could harm the purchaser. The Court stated that the initial completion of this form requires the assistance of a licensed attorney. However, it held that subsequent updates to the form that do not modify the form can be completed without the assistance of an attorney.<sup>10</sup>

The Supreme Court found that the drafting of both a claim of lien and satisfaction of claim of lien requires a legal description of the property, establishes rights of the community association with respect to the lien, the lien's duration, renewal information, the action to be taken on it, and the lien acts as an encumbrance on the property until it is satisfied. Drafting these documents must be completed with the assistance of a licensed attorney because they determine substantial rights. The Supreme Court held that the drafting of a notice of commencement form also constitutes the practice of law because failure to complete or prepare this form accurately could result in serious legal and financial harm to the property owner.<sup>11</sup>

Regarding determining the timing, method, and form of giving notices of meetings, the court held that these duties require the interpretation of statutes, administrative rules, governing documents, and rule 1.090(a) and (e), Florida Rules of Civil Procedure, and therefore constitutes the practice of law.<sup>12</sup>

On May 13, 2013, the Standing Committee proposed a subsequent advisory opinion to clarify the Court's earlier opinion regarding CAMs. The proposed advisory opinion requested that the 1996 Court opinion remain in effect, but also requested that the Court consider other common practices by CAMs that were not fully addressed in the 1996 opinion. Specifically, the Standing Committee proposed advisory opinion suggests that the following should constitute the unlicensed practice of law:

- Drafting amendments to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members;
- Determining the number of days to be provided for statutory notice;
- Modifying limited proxy forms promulgated by the state if there is any discretion involved;
- Preparing documents concerning the right of the association to approve new prospective owners;
- Determining the votes needed to pass a proposition or amendment to recorded documents;

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<sup>9</sup> *Id.* at 1123, quoting *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587, 591 (Fla.1962), vacated on other grounds, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963).

<sup>10</sup> *Id.* at 1123.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

- Determining the number of owners' votes needed to establish a quorum;
- Preparing construction lien documents;
- Preparing, reviewing, drafting, and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.;
- Determining who is the owner of a property that is to receive a statutory pre-lien letter; and
- Any activity that requires statutory or case law analysis to reach a legal conclusion.<sup>13</sup>

The Florida Supreme Court has not issued an opinion regarding the Standing Committee's proposed advisory opinion.

### **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."<sup>14</sup> A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.<sup>15</sup> A declaration is like a constitution in that it:

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.<sup>16</sup>

A declaration "may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property."<sup>17</sup> A declaration of condominium may be amended as provided in the declaration.<sup>18</sup> If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of not less than the owners of two-thirds of the units.<sup>19</sup> Condominiums are administered by a board of directors referred to as a "board of administration."<sup>20</sup>

### **Cooperative Associations**

Section 719.103(12), F.S., defines a "cooperative" to mean:

That form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

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<sup>13</sup> The Florida Bar Standing Committee on the Unlicensed Practice of Law, FAO #2012-2, *Activities of Community Association Managers*, Proposed Advisory Opinion, May 15, 2013.

<sup>14</sup> Section 718.103(11), F.S.

<sup>15</sup> Section 718.104(2), F.S.

<sup>16</sup> *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).

<sup>17</sup> Section 718.104(5), F.S.

<sup>18</sup> *See* s. 718.110(1)(a), F.S.

<sup>19</sup> Section 718.110(1)(a), F.S. *But see*, s. 718.110(4) and (8), F.S., which provides exceptions to the subject matter and procedure for amendments to a declaration of condominium.

<sup>20</sup> Section 718.103(4), F.S.

A cooperative differs from a condominium because, in a cooperative, no unit is individually owned. Instead, a cooperative unit's occupants receive an exclusive right to occupy the unit. The cooperative holds the legal title to the unit and all common elements. The cooperative association may assess costs for the maintenance of common expenses.<sup>21</sup>

Section 719.108(4), F.S., provides that the cooperative association has a lien on each cooperative parcel for any unpaid rents and assessments, plus interest, and any authorized administrative late fees. If the cooperative documents attorney's fees, the lien also secures reasonable attorney's fees incurred by the association incident to the collection of the rents and assessments or enforcement of the lien. The lien is effective from and after recording a claim of lien in the public records in the county in which the cooperative parcel is located which states the description of the cooperative parcel, the name of the unit owner, the amount due, and the due dates. The association's lien expires if a claim of lien has not been filed within one year after the date the assessment was due. The lien also does not continue for longer than one year after the claim of lien has been recorded unless, within that time, an action to enforce the lien has been commenced. The association must wait 30 days after the date a notice of intent to file a lien has been delivered to the owner before it can file a lien against a cooperative parcel.

Section 718.116(5)(a), F.S., provides that the claim of lien is not effective one year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. It provides that the one-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel.

### **Homeowners' Associations**

Florida law provides statutory recognition to corporations that operate residential communities in this state and procedures for operating homeowners' associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.<sup>22</sup>

A "homeowners' association" is defined 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.<sup>23</sup>

Homeowners' associations are also governed by ch. 607, F.S., relating to for-profit corporations, or by ch. 617, F.S., relating to not-for-profit corporations.<sup>24</sup>

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<sup>21</sup> See ss. 719.106(1)(g) and 719.107, F.S.

<sup>22</sup> See s. 720.302(1), F.S.

<sup>23</sup> Section 720.301(9), F.S.

<sup>24</sup> Section 720.302(5), F.S.

Section 720.301(4), F.S., defines the terms "declaration of covenants," or "declaration," to mean:

a recorded written instrument in the nature of covenants running with the land which subjects the land comprising the community to the jurisdiction and control of an association or associations in which the owners of the parcels, or their association representatives, must be members.

Homeowners' associations are administered by a board of directors whose members are elected.<sup>25</sup> 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.<sup>26</sup> The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.<sup>27</sup>

### **Division of Florida Condominiums, Timeshares, and Mobile Homes**

The division is afforded complete jurisdiction to investigate complaints and enforce compliance with ch. 718, F.S., and ch. 719, F.S., with respect to condominium and cooperative associations that are still under developer control.<sup>28</sup> The division also has the authority to investigate complaints against developers involving improper turnover or failure to turnover, pursuant to s. 718.301, F.S. After control of the condominium is transferred from the developer to the unit owners, the division's jurisdiction is limited to investigating complaints related to financial issues, elections, and unit owner access to association records pursuant to s. 718.111(12), F.S.<sup>29</sup>

In regards to homeowners' associations, the division's authority is limited to arbitration of recall election disputes.<sup>30</sup>

### **III. Effect of Proposed Changes:**

The bill amends s. 468.431(2), F.S., to expand the list of duties or activities that constitute "community association management." The bill permits CAM's to provide the following additional services to residential communities:

- Determine the number of days required for statutory notices;
- Determine the amounts due the association;
- Collect amounts due to the association before filing a civil action;
- Calculate the votes required for a quorum or to approve a proposition or amendment;
- Complete forms related to the management of a community association that have been created by statute or by a state agency;
- Draft demand letters, pre-lien letters, and letters of intended action;

<sup>25</sup> See ss. 720.303 and 720.307, F.S.

<sup>26</sup> See ss. 720.301 and 720.303, F.S.

<sup>27</sup> Section 720.303(1), F.S.

<sup>28</sup> Section 718.501(1), F.S., and s. 719.501(1), F.S., respectively.

<sup>29</sup> Section 718.501(1), F.S. See Peter M. Dunbar, *The Condominium Concept: A Practical Guide for Officers, Owners, Realtors, Attorneys, and Directors of Florida Condominiums*, 12 ed. (2010-2011) s. 14.2.

<sup>30</sup> See s. 720.303(10)(d), F.S.

- Draft meeting notices and agendas;
- Calculate and prepare certificates of assessment;
- Respond to requests for estoppel letters;
- Negotiate monetary or performance terms of a contract subject to approval by an association;
- Draft prearbitration demands;
- Prepare statutory construction lien documents for association projects;
- Coordinate or perform maintenance for real or personal property and other routine services involved in the operation of a community association; and
- Complying with the association's governing documents and the requirements of law as necessary to perform such practices.

The bill amends ss. 718.116(5)(b), 719.108(4)(b), and 720.3085(1)(a), F.S., to provide a claim of lien form for a condominium, cooperative, and homeowners' association, respectively.

The bill amends s. 719.108(4), F.S., to delete the provision that the cooperative association's lien expires if a claim of lien has not been filed within one year after the date the assessment was due, and that the lien also does not continue for longer than one year after the claim of lien has been recorded unless, within that time, an action to enforce the lien has been commenced.

The bill amends s. 719.108(4)(b), F.S., to provide that a cooperative association's claim of lien is not effective one year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. It provides that the one-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. This conforms the requirements for a claim of lien for cooperative associations with the requirements in s. 718.116(5)(a), F.S., for a claim of lien by condominium associations.

The bill amends ss. 718.116(5)(d), and 720.3085(1)(d), F.S., and creates s. 719.108(4)(d), F.S., to provide a release of lien form for a condominium, homeowners' association, and cooperative, respectively.

The bill provides an effective date of July 1, 2014.

#### **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:

None.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 468.431, 718.116, 719.108, and 720.3085.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

## B. Amendments:

None.