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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
COMMUNITY AFFAIRS
ANALYSIS**

BILL #: HB 475

RELATING TO: Fair Housing Act

SPONSOR(S): Representative Greenstein

COMPANION BILL(S): SB 690 (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMUNITY AFFAIRS
- (2) REAL PROPERTY & PROBATE
- (3) ELDER AFFAIRS & LONG-TERM CARE
- (4)
- (5)

I. SUMMARY:

This bill effectively allows certain communities (homeowners' associations) to qualify as "housing for older persons" under the Florida Fair Housing Act. The provisions of this bill appear to have a positive indeterminate fiscal impact or benefit to the state by indirectly assisting the state in meeting its elderly housing needs.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Chapter 760, Florida Statutes, relates to discrimination against persons and minority representation in the areas of civil rights, housing, and the environment. Florida's Fair Housing Act (act) is codified as part II of chapter 760, Florida Statutes.

There are several exemptions to the act. Among them is the "housing for older persons" exemption. The act identifies three categories of housing that may qualify for the "housing for older persons" exemption. Communities, owners, and operators of housing that qualify for the exemption may lawfully exclude families with children under 18 years of age from residency.

Pursuant to s. 760.29(4)(b), Florida Statutes, the three categories of exempt "housing for older persons" are:

- (1) Housing provided under any state or federal program that the Florida Commission on Human Relations determines is specifically designed and operated to assist elderly persons;
- (2) Housing intended for, and solely occupied by persons 62 years of age or older; and
- (3) Housing intended and operated for occupancy by persons 55 years of age or older that meet the following requirements (hereafter referred to as *exemption requirements*):
 - a. At least 80 percent of the occupied units are occupied by at least one person 55 years of age or older.
 - b. The housing facility or community publishes and adheres to policies and procedures that demonstrate the intent under s. 760.29(4)(b), Florida Statutes, to maintain housing required under s. 760.29(4)(b)(3), Florida Statutes.
 - c. The housing facility or community complies with certain federal rules.

Exemption Requirement

Prior to 1989, some communities restricted application of their declarations of covenants running with the land to permanent residents 16 years of age or older with the intention of creating a community primarily for older persons. However, the federal government effectively voided such restrictions by prohibiting discrimination against families with children (referred to as "familial status"). Later, as an exemption, the law recognized the rights of older persons to establish housing for older persons. In response, the 1989 Florida Legislature amended its Fair Housing Act to prevent discrimination on "familial status," and in concert with the federal law provided an exemption for housing for older persons. Currently, familial status in Florida is based on the domicile circumstances of an individual who has not attained the age of 18 years.

As a result, these "older persons" communities meet the 80 percent occupancy requirement and certain federal verification requirements for the fair housing exemption. However, these communities do not meet the publishing of intent requirement of s. 760.29(4)(b)(3)(b), Florida Statutes. These communities fail to publish in their declaration of covenants or governing documents that the intent of the community is to provide housing for older persons and therefore do not comply with the exemption requirements.

In order to meet the publishing requirement, these communities need to amend their governing documents to reflect their intent to qualify for housing for older persons, per federal and state law, as well as implement relevant housing policies. However, the federal government did not allow these communities to make such amendments even when it was clearly their original intent to provide housing for older persons.

This refusal was based on restrictive amendment requirements adopted in these communities' governing documents. It is not uncommon for communities who intended, as evidenced by their original recorded governing documents, to effectively qualify for housing for older persons to place

restrictions on amendments until a certain future date. These amending restrictions have unwittingly prevented these communities from qualifying for housing for older persons

To cure this situation, some of these communities amended their declaration of covenants, pursuant to s. 617.306(1)(b), Florida Statutes. This section states in part:

Unless otherwise provided in the governing documents or required by law . . . any governing document of an association may be amended by the affirmative vote of two-thirds of the voting interests of the association [emphasis added].

However, this statutory provision applies to governing documents that are silent to any amendment requirements, not to those documents that **do** “otherwise provide.” These communities in the instant situation otherwise provide that amendments are restricted until a specified future date. For example, some communities prohibit amending their documents for 50 years.

Consequently, communities originally intended for housing for older persons may eventually be phased out by that time. If they are not able to comply with the publishing requirement, current residents may sell their property to persons under 55 years of age in such numbers as to lose the communities’ 80 percent status. It is generally held, that once the 80 percent status is lost for such communities, it is almost impossible to re-establish.

Many communities affected by the inability to overcome this perceived glitch are located in Broward County. According to a real estate lawyer representing communities in this predicament, the City of Tamarac has at least a dozen such communities facing this amendment problem. Each community contains about 250 homes.

B. EFFECT OF PROPOSED CHANGES:

The bill corrects a situation created by a federal government preemption. The situation prevents housing facilities or communities originally intended for housing for older persons from fully qualifying so that they can housing for older persons.

The bill provides that any housing facility or community can qualify anytime as housing for older persons even though their declaration of restrictions or other such document governing deed restrictions:

- (1) Does not have amending procedures,
- (2) Prohibits amendments, or
- (3) Places a restriction on amendments until a specified future date.

The bill’s provisions apply retroactively and validate any amendments to a declaration of restrictions or similar documents enacted prior to the effective date of this bill. The documents, which heretofore complied with the requirements of s. 760.60, Florida Statutes, qualifying as housing for older persons, contained no amendment procedures, prohibition of amendments or restrictions on amendments. The bill provides that the purpose of the bill is to affirm existing legislative intent.

The bill raises some technical and significant concerns. The bill does not:

- (1) Define “declaration of restrictions.” The term that is used in the Florida Statutes is “declaration of covenants.”
- (2) Identify the “existing legislative intent” being “reaffirmed.”
- (3) Provide clarity as to whether or not the bill intends to allow certain communities to amend their declarations of restrictions even in direct contradiction to existing declaration of restrictions amendment standards. In subparagraph (1) of the bill, housing facilities or communities can simply overlook amendment restrictions and

qualify as housing for older persons; however, subparagraph (2) of the bill provides for the retroactive validation of any amendments made to a declaration of restrictions before the effective date of the bill.

- (4) Clarify that its provision to preempt amendment restrictions **only** applies to the housing for older persons exemption requirements.
- (5) Clarify that its provisions apply only to housing facilities or communities that:
 - (a) Have at least 80 percent of their occupied units, occupied by at least one person 55 years of age or older; and
 - (b) Comply with federal verification of housing for older persons requirements.

Otherwise, it appears that **any** housing facility or community may qualify as housing for older persons under this bill.

Perhaps a different legal approach is needed to cure these communities' problem; one that may not readily invite constitutional or other lawful challenges. It may be in the states interest to invest in resolving this situation. If these communities can qualify for housing for older persons, it assists the state in meeting its elderly housing needs.

The bill also provides that its provisions do not void any contracts or deeds for sale executed prior to the effective date of this bill.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

- (1) any authority to make rules or adjudicate disputes?

This bill will allay legal challenges against communities attempting to comply with the exemption requirements by amending their governing documents in contravention with s. 617.306(1)(b), Florida Statutes.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

- (3) any entitlement to a government service or benefit?

This bill entitles certain communities to be designated as housing for older persons notwithstanding their governing documents' amendment limitations.

b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill allows housing facilities or communities (homeowner associations) to qualify for housing for older persons notwithstanding the absence of an amending procedure, an express prohibition of amendments; or a restriction on amendments until a specified future date.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 760.29, Florida Statutes.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 760.29, Florida Statutes, adds a provision qualifying certain housing facilities or communities as housing for older persons, notwithstanding that their governing documents lack amending procedures, prohibit amendments, or restrict amendments until a specified future date; validates, retroactively, any amendments made to a declaration of restrictions by a certain date; and assures that such qualification does not void any contracts or deeds for sale executed before the effective date of this bill.

Section 2: Provides that the bill is effective upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

This bill attempts to allow certain persons 55 years of age and older to exercise their federal and state rights to live in a community established for older persons.

3. Effects on Competition, Private Enterprise and Employment Markets:

There are some affordable housing representatives who believe that older person communities compete with families for affordable housing.

D. FISCAL COMMENTS:

If these communities can qualify for housing for older persons, it assists the state in meeting its elderly housing needs. Chapter 420, Florida Statutes, establishes a program to help provide affordable housing for the elderly in Florida.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds or take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

One approach to address the technical and significant concerns listed in the "Effect of Proposed Changes" section of the bill analysis is to amend the bill to provide that housing facilities and communities complying with the 80 percent occupancy and federal verification requirements, **and** whose governing documents, as originally recorded, restricts residents under 16 years of age and was interrupted because of federal law, must be legally construed as providing housing for older persons." Further, if the governing documents provide a prohibition against residents 16 years of age or younger, that provision must be construed, for the purposes of the Fair Housing Act, to only apply to residents 18 years of age and younger, in order to conform with federal law requirements.

Such an approach may avoid potential constitutional impairment of contract issues relating to the amendment of certain governing documents and more clearly narrows the housing facilities and communities who may be eligible for such a housing designation. Parties to the bill have agreed to work on language to address the concerns surrounding the bill.

VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

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