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DATE: February 5, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 843
RELATING TO: Condominiums
SPONSOR(S): Representatives Mack and Gottlieb
TIED BILL(S): None

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

- (1) JUDICIAL OVERSIGHT
 - (2) BUSINESS REGULATION
 - (3) COUNCIL FOR SMARTER GOVERNMENT
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill amends various provisions in Chapter 718, F.S., relating to condominiums, to:

- Codify a court decision which provides a properly enacted amendment to a declaration of condominium binds all unit owners.
- Clarify a 2000 enactment regarding the limited right of a condominium unit owner to transfer appurtenances to another condominium unit.
- Extend from 90 to 120 days the time that a condominium association has to prepare the annual financial statement that is provided to unit owners.
- Require that mandatory arbitration of controversies regarding condominium association election of a director of the board of administration must be resolved on an expedited basis.
- Remove the requirement for a nondeveloper unit owner to provide a question and answer sheet as a part of the transaction documents.
- Make grammar and style changes to the condominium statutes.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. PRESENT SITUATION:

Chapter 718, F.S., the “Condominium Act,” governs condominium associations. A condominium is “that form of ownership of real property which is created pursuant to the provisions of this chapter, which is comprised 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.” The term “multicondominium” is defined in Chapter 718, F.S., to mean a real estate development containing two or more condominiums, all of which are operated by the same association.”

See “Section-By-Section Analysis” for a discussion of the present situation applicable to each section of this bill.

C. EFFECT OF PROPOSED CHANGES:

See “Section-By-Section Analysis” for a discussion of the effect of proposed changes applicable to each section of this bill.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 702.09, F.S., regarding mortgage foreclosures.

Present Situation: Sections 702.07 and 702.08, F.S., provide that a dismissal of a mortgage foreclosure action acts, in part, as a reinstatement of the mortgage. This provision eliminates any argument that a subsequent mortgage foreclosure action foreclosing the same mortgage is barred by any procedural rule, such as res judicata.

Effect of Proposed Changes: This bill amends s. 702.09, F.S., to amend the definitions applicable to ss. 702.07 and 702.08, F.S., to additionally provide that dismissal of a foreclosure action to secure payment of assessments arising under chapters 718 (condominium assessments), 719 (cooperative assessments), and 720 (homeowner’s association assessments), F.S., also acts to reinstate the mortgage. This bill also clarifies that “foreclosure proceedings” may include proceedings in county court.

Section 2. Amends s. 718.104, F.S., regarding the creation of condominiums and the contents of a declaration of condominium (“declaration”).

Present Situation: Section 718.104(4)(h), F.S., requires that a declaration recorded on or after July 1, 2000, in which the developer reserves the right to create a multicondominium development, must state, or provide a specific formula for determining, the fractional or percentage shares of liability for common expenses and of ownership of the common surplus to be allocated to the units in each condominium to be operated by the association. If the declaration does not set forth such information, then the share of liability for the common expenses of the association and ownership of the common surplus of the association allocated to each unit shall be a fraction of the whole where the numerator is 1 and the denominator is the total number of units in the condominiums operated by the association. This later provision is intended to cure the problem of poorly drafted multicondominium documents that fail to provide a formula for apportionment of expenses.

Effect of Proposed Changes: This bill limits the apportionment cure to only those declarations of condominium recorded after July 1, 2000; thus, this change limits the applicability of cure.

Present Situation: The declaration has been referred to as a condominium's constitution. See *Woodside Village Condominium Association, Inc. v. Jahren and McClernan*, No. SC00-1030 (Fla. January 3, 2002), slip op. at 8. The declaration strictly governs the relationships between condominium owners and the condominium association. *Woodside*, Slip Op. at 8. Section 718.104(5), F.S., provides that a declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units. Section 718.110, F.S., provides broad authority to amend a declaration. In *Woodside*, the Florida Supreme Court held that a declaration of condominium may be amended to impose lease restrictions on condominium units. The court rejected the concept of "vested rights", holding that a properly enacted amendment to a declaration of condominium binds all condominium units, including units owned by an owner who purchased a unit prior to the amendment and objected to the amendment. See *Woodside*, Slip Op. at 11-12, 17-18, 28.

Effect of Proposed Changes: This bill modifies s. 718.104(5), F.S., to specify that an amendment to a declaration of condominium, other than one modifying unit appurtenances pursuant to s. 718.110(4), F.S.¹, applies to all of the condominium units, including units whose owners did not consent to the amendment. This bill would have the effect of codifying the *Woodside* holding that the declaration of condominium may be amended, and that such amendment is binding on owners who did not agree to the amendment. This change is stated to "clarify existing law" and applies to all associations in existence when the bill becomes effective.

Section 3. Amends 718.106, F.S., regarding the transfer of limited common elements.

Present Situation: A condominium unit is a real property interest. When a condominium unit is sold, certain legal rights must be sold with the unit, known as appurtenances. Section 718.107, F.S., prohibits a unit owner from transferring the rights in common elements separate from sale or transfer of the appurtenant condominium unit. In *Brown v. Rice*, 716 So. 2d 807 (Fla. 5th DCA 1998), the Fifth District Court of Appeal ruled that s. 718.107, F.S., prohibits the transfer of appurtenances separate from the condominium unit. Section 718.106(2)(b), F.S., was amended in

¹ Section 718.110(4), F.S., states, in pertinent part:

Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium unless the record owner of the unit and all record owners of liens on the unit join in the execution of the amendment and unless all the record owners of all other units in the same condominium approve the amendment.

2000 to provide, in part, that a unit owner may transfer appurtenances to a condominium unit to another unit owner, if such transfer is otherwise permitted by the declaration. The intent of the change was to statutorily change the limitation on transfer set forth in *Brown v. Rice*.

The most common appurtenances that unit owners seek to transfer among themselves are parking spaces, storage units, and boat slips.

Effect of Proposed Changes: This bill provides that amendments to a declaration that provide for the transfer of use rights with respect to limited common elements are not amendments that materially modify unit appurtenances. Thus, a declaration of condominium may be amended to allow for the transfer of use rights with respect to limited common elements. The bill specifies this section is intended to “clarify existing law” and applies retroactively to associations in existence at the time of enactment of the changes to these provisions.

This bill further provides that a transfer of an interest in an appurtenance must utilize the formalities of a deed. A transfer of use rights for limited common elements must be allowed by the declaration and must include an appropriate legal description. In addition, any first mortgagee with respect to both the unit that is transferring the use rights and the unit that is receiving the use rights must also consent to the transfer, and the consents must be recorded with the instruments of transfer.

Section 4. Amends s. 718.110, F.S., regarding amendment to a declaration of condominium.

Present Situation: Section 718.110(4), F.S., prohibits an amendment to a declaration of condominium, which amendment materially alters or modifies the appurtenances to any units, without the consent of the affected unit owner. It is arguable that this provision prohibits an association from amending its declaration of condominium to provide for the transfer of appurtenances to units.

Effect of Proposed Changes: This bill amends s. 718.110(4), F.S., to specifically provide that an amendment to the declaration of condominium providing for the right to transfer appurtenances, or an amendment imposing lease restrictions, is not prohibited by s. 718.110(4), F.S. This bill also provides an amendment to the declaration binds all condominium units, including those units owned by persons who did not consent to the amendment.

Section 5. Amends s. 718.111, F.S., regarding management of a condominium association.

Present Situation: Section 718.111(4), F.S., provides that a condominium association has the power to make and collect assessments to lease, maintain, repair, and replace the common elements. It is facially arguable that the assessment power only extends to common elements, and does not encompass the power to make assessments to lease, maintain, repair, or replace, association property.²

Effect of Proposed Changes: Assessments may also be made to lease, maintain, repair, or replace association property.

Present Situation: Section 718.111(7)(a), F.S., provides that a condominium association cannot acquire, convey, lease, or mortgage association real property except as provided in the declaration. If the declaration does not address the issue of the vote required, such action requires approval by a vote of 75 percent of the voting interests.

² For example, the common areas might include a gym, and a gym would typically include a weight machine. The weight machine is association property. In practice, associations would repair or replace a weight machine out of regular assessments.

Effect of Proposed Changes: This bill amends s. 718.111(7)(a), F.S., to remove “lease” from the requirement of 75% approval if the declaration is silent.

Present Situation: Section 718.111(13), F.S., requires a condominium association to prepare and complete, or cause to be prepared and completed, the annual financial report within 90 days after the end of a fiscal year. The association must then either mail or hand deliver a copy of the financial report to all unit owners within 21 days after the association receives or completes the report. The 90-day time period was extended from 60 days in 2000.³

Effect of Proposed Changes: This bill amends s. 718.111(13), F.S., to extend the 90 days to 120 days.

Section 6. Amends s. 718.112, F.S., regarding the bylaws of a condominium association.

Present Situation: The operation of a condominium association is governed by the declaration of condominium, the articles of incorporation of the association if the association is incorporated, and the bylaws of the association. In general, the bylaws cover the more mundane and day-to-day types of management issues; and thus are generally easier to amend than are the declaration of condominium or articles of incorporation.

Effect of Proposed Changes: This bill provides, in conformity to the changes regarding amendment of the declaration, that an amendment to the bylaws applies to all condominium units, including units whose owners did not consent to the amendment. This section of the bill also appears to codify the *Woodside* holding.

Section 7. Amends s. 718.113, F.S., relating to material alterations or substantial additions to the condominium property.

Present Situation: Section 718.113(2)(a), F.S., provides that there can be no material alteration or substantial additions to the common elements or to real property which is association property except as provided in the declaration. Similar provisions govern the alteration or additions to common elements and real property of multicondominiums. See ss. 718.113(2)(b) and (c), F.S. If the declaration is silent on these issues, alterations or additions can be made upon the vote of 75 percent of the voting interests.

Prior to 1992, material alterations or substantial additions to common elements or association real property were prohibited unless provided for in the declaration. In 1992, this section was amended to provide that 75 percent of the total voting interests of the association could approve such alterations if not contained in the declaration. *See* s. 3, Ch. 92-49, L.O.F. In 2000, this was made applicable to multicondominium associations. *See* s. 53, Ch. 2000-302, L.O.F. Case law holds, however, that declarations recorded prior to the 1992 statute that are silent regarding material alterations cannot be subsequently amended. *See, Wellington Property Management v. Parc Corniche Condominium Association*, 755 So.2d 824 (Fla. 5 DCA 2000). In *Wellington*, unit owners attempted to amend their declaration based upon a general power in the declaration that allowed for amendment by a 51% vote of the owners. The Court held that the amendment would defeat the vested contract rights of pre-amendment owners and that retroactive application of the 1992 amendments to s. 718.113, F.S.~ would be a substantive change that would unconstitutionally interfere with the unit owners' vested contractual rights regarding the original use of the common elements. *Wellington*, at 828. In light of the later decision of the Florida Supreme Court in

³ Chapter 2000-302, Laws of Florida.

Woodside Village Condominium Association, Inc. v. Jahren and McClernan, No. SC00-1030 (Fla. January 3, 2002), it is questionable whether *Wellington* has any value as precedent.

Effect of Proposed Changes: The bill amends s. 718.113(2)(b) and (c), F.S., to again specify that a declaration of condominium may be amended, and that such amendment applies to all condominium units.

Section 8. Amends s. 718.115, F.S., relating to the common expenses of a condominium association.

Present Situation: Section 718.115, F.S., defines common expenses of a condominium association, places limits on how certain funds may be used, and specifies that collection of the funds necessary for common expenses are by assessment. Sections 718.115(1)(b) and (1)(c), F.S., provide that common expenses of a multicondominium association are those not directly attributable to the operation of a specific condominium. The common expenses may include categories of expenses related to property within a specific condominium if all members of the association have use rights therein or receive a tangible economic benefit, and requires that such common expenses be identified in the declaration or bylaws.

Effect of Proposed Changes: The bill amends ss. 718.115 (1)(b) and (c), F.S., to specify that these paragraphs are intended to “clarify existing law” and apply retroactively to associations in existence at the time of enactment of the changes to these provisions.

Section 9. Amends s. 718.1255, F.S., regarding mandatory arbitration of condominium controversies.

Present Situation: Arbitration of certain disputes involving condominium (or cooperative) associations and unit owners is required before an action in court may be pursued. Section 718.1255(1)(b)1., F.S., provides that the failure of a condominium association to “properly conduct elections” is one of the types of dispute that must be referred to arbitration.

Section 718.1255(4)(c), F.S., provides that, upon receipt of a petition for arbitration, the petition must be promptly reviewed by the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation to determine the existence of a dispute and compliance with filing requirements. If emergency relief is required and is not available through arbitration, a motion to stay the arbitration may be filed. A verified petition alleging facts that, if proven, would support entry of a temporary injunction must accompany the motion. If an appropriate motion and supporting papers are filed, the division may place the arbitration on hold pending a court hearing and disposition of a motion for temporary injunction.

An arbitration decision may not be a final adjudication of the issues presented. Section 718.1255(4)(k), F.S., provides that, within 30 days of an arbitration decision, any party may file an action in state court regarding the dispute that had been presented for arbitration. If no party files a state court action within 30 days of the arbitration decision, the decision is final and may be enforced.

Effect of Proposed Changes: This bill creates s. 718.1255(5), F.S. This new subsection provides that a challenge to the legality of the election of a director of the board of administration of a condominium received by the division in a petition for arbitration must be handled on an expedited basis. The division is required to respond to the challenge in the same manner as provided in division rule for recall arbitration disputes.

Section 10. Amends s. 718.405, F.S., relating to multicondominiums, making grammar and style changes only.

Section 11. Amends s. 718.503, F.S., regarding the disclosures that a condominium seller is required to provide a condominium purchaser.

Present Situation: Section 718.503, F.S., specifies the contents of disclosures that must be provided to a buyer of a condominium from a developer owner of a condominium, as well as, a nondeveloper seller. A nondeveloper seller must provide copies of certain documents to a buyer upon request. These documents include a current copy of the declaration of condominium, articles of incorporation of the association, bylaws, rules of the association, specified financial information, and the question and answer sheet provided for by s. 718.504, F.S.

Section 718.504, F.S., provides that "each buyer shall be furnished a separate page entitled "Frequently Asked Questions and Answers," which shall be in accordance with a format approved by the division..." In practice these sheets may not be timely updated or an association may not have prepared the information in the first place.

Effect of Proposed Changes: This bill removes the requirement for a nondeveloper unit owner to provide a question and answer sheet as a part of the documents to be provided to a buyer and deletes references to the question and answer sheet in the disclosure statements required under this section.

Section 12. Amends s. 718.504, F.S., regarding the prospectus or offering circular, specifying that the multicondominium provisions only apply to multicondominium associations created after July 1, 2000 (the effective date of ch. 2000-302, L.O.F., the act that first recognized multicondominiums).

Section 13. Provides an effective date of July 1, 2002.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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 spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities 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:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill was filed before the Supreme Court decision in *Woodside Village Condominium Association, Inc. v. Jahren and McClernan*, No. SC00-1030 (Fla. January 3, 2002), which opinion reversed a district court of appeal opinion that restricted the ability of a condominium association to amend its declaration to institute unit leasing restrictions. The *Woodside* opinion appears to make much of this bill unnecessary.

It is unclear why it is necessary to extend the 90-day time for preparation of annual financial statements that was just extended from 60 days in 2000.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

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VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

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