

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 165 Homeowner's Associations/Condominiums  
**SPONSOR(S):** Mack  
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Billmeier	Havlicak
2) Commerce			
3) Commerce and Local Affairs Apps. (Sub)			
4) Appropriations			
5)			

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### SUMMARY ANALYSIS

HB 165 makes changes to statutes relating to homeowners' associations, condominium associations, and cooperative associations. It amends the term "mortgage" to ensure that the dismissal of a foreclosure action to secure payment of liens created pursuant to the recorded covenants of a homeowners' association also acts to reinstate the mortgage.

This bill gives civil immunity to a condominium or cooperative association or its agent if the association or agent provides information to persons, such as unit owners, potential buyers, or mortgage lender, if the information is provided in good faith and accompanied by a disclaimer stating that the information might contain errors. This bill does not provide protection against lawsuits based on information that is not given in good faith.

This bill requires the use of limited proxies, rather than general proxies, for votes taken to waive the financial reporting. It does not prohibit in-person voting.

This bill will give certain condominiums the option to forego retrofitting the buildings to comply with requirements relating to retrofitting buildings to install sprinkler systems upon a two-thirds vote of the unit owners.

This bill provides that actions involving condominium or cooperative associations are not actions for specific performance. Therefore, actions under those sections would not be governed by the one year statute of limitations.

This bill clarifies that corporations not for profit that operate homeowners' associations are governed by the provisions of chapter 617, F.S.

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

This bill will take effect upon becoming law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0165.ju.doc  
**DATE:** March 4, 2003

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

N/A

#### B. EFFECT OF PROPOSED CHANGES:

##### Section 1

##### 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. Section 702.08, F.S., provides that when a decree of foreclosure is rescinded, vacated, or set aside and the foreclosure proceedings have been dismissed, the mortgage is “fully restored in all respects to the original status” and “shall be for all purposes whatsoever legally of force and effect just as if foreclosure proceeding had never been instituted and a decree of foreclosure had never been made.” 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.<sup>1</sup>

Section 702.09, F.S., defines “mortgage” for purposes of ss. 702.07-702.08, F.S. “Mortgage” means “any written instrument securing the payment of money or advances and includes liens to secure payment of assessments arising under chapters 718 and 719.”<sup>2</sup>

##### Effect of Proposed Changes:

This bill amends the term “mortgage” in s. 702.09, F.S., to include “liens created pursuant to the recorded covenants of a homeowners’ association as defined in s. 712.01”. This ensures that the dismissal of a foreclosure action to secure payment of liens created pursuant to the recorded covenants of a homeowners’ association also acts to reinstate the mortgage.

##### Sections 2 and 5

##### Present Situation:

A condominium association is required to make certain information available to unit owners and prospective purchasers. Section 718.111(12)(b), F.S., requires condominium associations to maintain

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<sup>1</sup> “Res judicata” is the rule that a “final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and ... as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.” Black’s Law Dictionary (West, 6<sup>th</sup> Edition).

<sup>2</sup> Chapter 718, F.S., relates to condominiums and Chapter 719, F.S., relates to cooperatives.

official records<sup>3</sup> within the state and make the records available to a unit owner for inspection or copying. Associations are also required to prepare a question and answer sheet, described by s. 718.504, F.S., which contains information relevant to purchasing a condominium.<sup>4</sup> A party can recover damages if a condominium association fails to comply with statutory provisions relating to official records.<sup>5</sup> In addition to these statutory requirements, condominium associations can also provide other information. Representatives of condominium associations have reported that associations are often asked, usually by mortgage lenders, to provide information such as the number of units that are owner-occupied versus the number of units that are rented. Association representatives say that although unit owners are often required to keep the association informed of such information, owners do not always provide timely information. Accordingly, associations are concerned that information they provide may not be accurate. Association representatives are concerned that an association could be subjected to liability for information provided in good faith that is ultimately found to be inaccurate. Associations are sometimes advised not to provide such information to avoid the possibility of a lawsuit.<sup>6</sup>

Persons who provide false information can be held liable for negligent misrepresentation in certain situations. In Gilchrist Timber Company v. ITT Rayonier,<sup>7</sup> the court held that “the party who negligently transmitted the false information may be held liable if the recipient is able to establish a negligent misrepresentation cause of action as set forth in the Restatement (Second) of Torts section 522, and that the doctrine of comparative negligence applies.”

### **Effect of Proposed Changes:**

Under this bill, a condominium association or its agent is not required to provide information to a prospective purchaser or lienholder except for the information that is required to be provided under law. If the association opts to give information other than information required by law, it may do so. If the association provides information in good faith and accompanies the information with a disclaimer noting that the information is provided without warranty or certification and encouraging the person seeking the information to attempt to obtain the information from other sources, this bill gives the association immunity from civil liability if the information is later found to be inaccurate. This bill does not provide protection against lawsuit based on information that is not given in good faith.

This bill also permits the association to charge a reasonable fee, not to exceed \$150, costs, and attorney’s fees, for its time in supplying the requested information.

**Section 5** of this bill makes analogous changes to s. 719.104(2), F.S., relating to cooperatives. Pursuant to the bill, cooperative associations will have the same protection from civil liability as condominium associations if the association provides the information in good faith and provides a similar disclaimer. Cooperative associations will have the same ability to charge fees, costs, and attorney’s fees for the time spent supplying the requested information.

### **Section 3**

#### **Present Situation:**

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<sup>3</sup> “Official records” are defined in s. 718.111(12)(a), F.S., and include such things as plans, the declaration of condominium, bylaws, articles of incorporation of the association, rules, minutes of association meetings, a roster of unit owners, copies of insurance policies, bills of sale, and accounting records.

<sup>4</sup> The sheet must include information about the name and location of the condominium, the maximum number of units that will use common areas, the use of recreational facilities and the costs involved, restrictions on sale of the units, and other information.

<sup>5</sup> See s. 718.111(12)(c), F.S.

<sup>6</sup> Telephone interviews with Paul Wean, attorney, and Mary Rivera, association manager, conducted on February 28, 2003.

<sup>7</sup> 696 So. 2d 334, 339 (Fla. 1997)

## **Bylaws**

Section 718.112, F.S., requires that condominium associations be governed pursuant to articles of incorporation, if the association is incorporated, and bylaws. Certain provisions such as provisions relating to administration, quorum, voting requirements, proxies, board of administration meetings, unit owner meetings, budget meetings, assessments, amendments to bylaws, transfer fees, and common elements, are required to be in the bylaws.<sup>8</sup>

Proxy voting, where a unit owner designates someone else to vote for him or her during association meetings, is permitted in condominium associations. A "limited proxy" gives the proxy the power to vote on a specific issue while a "general proxy" gives the proxy the power to vote on all issues. Section 718.112(2)(b)2., F.S., limits the situations in which general proxies may be used and requires the use of limited proxies:

for votes taken to waive or reduce reserves;

for votes taken to amend the declaration; and

for votes taken to amend the articles of incorporation or bylaws.

## **Retrofitting with Fire Sprinkler Systems**

Section 633.0215, F.S., requires the State Fire Marshall to adopt the Florida Fire Prevention Code. The Code is contained in Chapter 4A-60, Florida Administrative Code and became effective on January 1, 2002. The effect of the Florida Fire Prevention Code could be to require condominiums taller than 8 stories to be retrofitted with fire sprinkler systems.<sup>9</sup>

### **Effect of Proposed Changes:**

## **Bylaws**

Section 718.111(13), F.S., requires the condominium association to complete a financial report and provide a copy of the report to unit owners with specified times. This bill amends s. 718.112(2)(b)2., F.S., to require the use of limited proxies, as opposed to general proxies, for votes taken to waive the financial reporting requirements of s. 718.111(13), F.S. The bill does not prohibit in-person voting.

## **Retrofitting with Fire Sprinkler Systems**

This bill will give certain condominiums the option to forego retrofitting the buildings to comply with the Florida Fire Prevention Code relating to sprinkler systems. This bill provides that no condominium, association, or unit owner will be required to retrofit their buildings if:

- (1) the building has been certified for occupancy by the applicable governmental entity; and
- (2) the unit owners have voted, by a two-thirds vote, to forego retrofitting.

This bill requires condominium associations to report the vote on this issue to the Division of Florida Land Sales, Condominiums, and Mobile Homes and requires the division to annually report the number of condominiums that have elected to forego retrofitting to the State Fire Marshal.

## **Sections 4 and 6**

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<sup>8</sup> See s. 718.112(2), F.S.

<sup>9</sup> Since 1994, condominiums taller than three stories have been required to have sprinkler systems.

## Present Situation:

Section 718.303(1), F.S., provides that each condominium unit owner, tenant and other invitee, and association is required to comply with the condominium act (chapter 718, F.S.), the declaration, the documents creating the condominium association, and the association bylaws. The statute permits actions for injunctive relief or damages for failure to comply with the statutory provisions and provides for prevailing party attorney's fees in certain situations. Section 719.303(1), F.S., contains analogous provisions relating to cooperative associations.

Section 95.11(5)(a), F.S., provides that an action for specific performance of a contract must be commenced within one year. However, section 95.11(2)(b), F.S., provides that a legal or equitable action on a contract must be commenced within five years.

In Sheoah Highlands, Inc. v. Daugherty<sup>10</sup> and Pond Apple Place III Condominium Association, Inc. v. Russo<sup>11</sup>, the courts held that the five year statute of limitations applied in actions to enforce condominium declarations. In Sheoah Highlands, Daugherty, a unit owner, brought an action against a condominium association alleging that the association failed to enforce the condominium declaration relating to building screened enclosures.<sup>12</sup> The association argued that Daugherty's claim was barred by the one year statute of limitations in s. 95.11(5)(a), F.S.<sup>13</sup>

The Sheoah Highlands court considered two arguments: (1) that an injunction against the breach of a contract is a remedy by way of negative specific performance and that the one year statute of limitations relating to specific performance should apply; and (2) that the action is a legal or equitable action on a contract so the five year statute of limitations relating to contracts should apply.<sup>14</sup> The court found "reasonable" arguments on both side, relying on Florida Supreme Court case law,<sup>15</sup> held that because there was a doubt as to which statute should apply, the longer statute of limitations period should apply. Accordingly, it applied the five year period in s. 95.11(2)(b), F.S.

In Pond Apple Place III, a condominium association brought suit to enforce a covenant that prohibited pets in the condominium. The pet owner argued that the one year statute of limitations applied. The Pond Apple Place III court held that "[w]here the contractual provision sought to be enforced is negative in nature, injunctive relief is the proper vehicle for judicial enforcement. The applicable statute of limitations for injunction proceedings of the type here under consideration is five years. § 95.11(2)(b), Fla. Stat (2002)."<sup>16</sup>

These cases hold that actions to enforce condominium declarations are governed under the five year statute of limitations applicable to contract actions. However, both of these cases are still subject to rehearing in their respective courts and review by the Florida Supreme Court.

In Ferola v. Blue Reef Holding Corp., Inc.<sup>17</sup>, the court held an action to enforce covenants and restrictions in developments were actions for specific performance and governed by the one year statute of limitations. Parties used this case to argue that the one year statute of limitations should apply in cases relating to condominium associations.

## Effect of Proposed Changes:

<sup>10</sup> 2003 WL 328430 (Fla. 5<sup>th</sup> DCA February 14, 2003)

<sup>11</sup> 2003 WL 470247 (Fla. 4<sup>th</sup> DCA February 26, 2003)

<sup>12</sup> Sheoah Highlands, 2003 WL 328430 at 1.

<sup>13</sup> Sheoah Highlands, 2003 WL 328430 at 1.

<sup>14</sup> Sheoah Highlands, 2003 WL 328430 at 2.

<sup>15</sup> Bakersville-Donovan Eng'rs, Inc. v. Pensacola Executive House Condo Ass'n, Inc., 581 So. 2d 1301 (Fla. 1991), and J.B. v. Sacred Heart Hospital of Pensacola, 635 So. 2d 945 (Fla. 1994).

<sup>16</sup> Pond Apple Place III, 2003 WL 470247 at 1 (case citation omitted).

<sup>17</sup> 719 So. 2d 389 (Fla. 4<sup>th</sup> DCA 1998).

This bill amends s. 718.303(1), F.S., and s. 719.303(1), F.S., to provide that actions under those sections are not actions for specific performance. Therefore, actions under those sections would not be governed by the one year statute of limitations in s. 95.11(5)(a), F.S. It would make clear that the Ferola holding would not apply in situations under ss. 718.303(1) and 719.303(1), F.S. **Section 4** of this bill deals with condominium associations. **Section 6** of this bill deals with cooperative associations.

## **Section 7**

### **Present Situation:**

Chapter 720, F.S., creates homeowners' associations in Florida. Chapter 617, F.S., governs not for profit corporations in Florida. Prior to 2000, provisions relating to homeowners' associations and provisions relating to not for profit corporations were contained in Chapter 617, F.S. Chapter 2000-258, L.O.F., moved the sections relating to homeowners' associations (ss. 617.301-617.312, F.S. (1999)) to chapter 720. Those provisions are now found in ss. 720.301-720.312, F.S. This change generated some confusion. Under the law prior to 2000, there was no confusion - if the homeowners' association section of chapter 617 did not address a question, the remainder of chapter 617 would address it. Under current law, it might not be clear what statute applies if chapter 720 is silent.<sup>18</sup>

### **Effect of Proposed Changes:**

This bill clarifies that corporations not for profit that operate homeowners' associations are governed by the provisions of chapter 617, F.S. Chapter 617, F.S., governs all not for profit corporations. This bill does not change other provisions of statute so homeowners' associations operated by corporations not for profit would still be subject to other statutes relating to homeowners' associations. This bill states that the intent is to clarify existing law.

**Section 8** provides that this bill will take effect upon becoming law.

## **C. SECTION DIRECTORY:**

Section 1. Amends s. 702.09, F.S., relating to foreclosures.

Section 2. Amends s. 718.111, F.S., relating to liability of condominium associations.

Section 3. Amends s. 718.112, F.S., relating to limited proxy voting and compliance with fire safety requirements.

Section 4. Amends s. 718.303, F.S., relating to civil actions involving condominium associations.

Section 5. Amends s. 719.104, F.S., relating to liability of cooperative associations.

Section 6. Amends s. 719.303, F.S., relating to civil actions involving cooperative associations.

Section 7. Amends s. 720.302, F.S., relating to corporations not for profit that operate homeowners' associations.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

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<sup>18</sup> Telephone interview with Paul Wean, attorney, March 2, 2003.

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

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 3 of the bill refers to the Department of Insurance, State Fire Marshal's office. Pursuant to the cabinet reorganization, the State Fire Marshal is housed under the Department of Financial Services.<sup>19</sup> The sponsor will offer an amendment to address this concern.

Section 7 of the bill states that corporations not for profit that govern homeowners' association are subject the chapter 617, F.S. It says that provision is intended to clarify existing law. Amendments to a statute that clarify, rather than change, a meaning can be used as guide as to the legislative interpretation of the original law.<sup>20</sup>

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<sup>19</sup> See s. 20.121(2), F.S.

<sup>20</sup> See *Lowry v. Probation and Parole Com'n*, 473 So. 2d 1248, 1250 (Fla. 1985) ("When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that

In a bill analysis, the Department of Business and Professional Regulation raised concerns about portions of this bill:

Section 2 of the bill is unclear in that it is difficult to determine the intent of the amendment as to what records are currently required to be provided to lienholders and prospective purchasers. Without clarification, an association does not know where to draw the line in deciding whether to provide additional records.

Section 3 of the bill raises two concerns. The bill assumes the Division currently collects information from associations on an annual basis. This is not the case. Also, the bill may create an inefficiency by requiring the Division, rather than the associations, to provide an annual report to the Division of Insurance, State Fire Marshall's office regarding the number of associations electing to forego retrofitting of sprinkler equipment. The responsibility to collect and report information regarding retrofitting can be accomplished within existing resources.<sup>21</sup>

In addition, the Department noted the bill did not give sufficient rulemaking authority:

Rulemaking is required to clarify the Division's authority to require more than 18,000 associations to file an annual report regarding the election not to retrofit fire safety equipment. The Division would need to adopt a form, that contained the information required by the amendment, and require it to be filed. The Division would also need authority to adopt procedures and deadlines for filing. The bill provides sufficient guidance as to the information required, but does not authorize the Division to adopt rules to implement the legislation.<sup>22</sup>

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

N/A

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amendment as a legislative interpretation of the original law and not as a substantive change thereof."); See also Justice Wells' dissent in Thompson v. State, 695 So. 2d 691, 694 (Fla. 1997)("subsequent amendments to a statute, which serve to clarify rather than change existing law, are entitled to substantial weight in construing the earlier law.").

<sup>21</sup> Department of Business and Professional Regulation Legislative Analysis, March 3, 2003.

<sup>22</sup> Department of Business and Professional Regulation Legislative Analysis, March 3, 2003.