

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1978

SPONSOR: Comprehensive Planning Committee and Senator Lynn

SUBJECT: Homeowners' Associations

DATE: April 7, 2003

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Herrin</u>	<u>Yeatman</u>	<u>CP</u>	<u>Fav/CS</u>
2.	<u>                    </u>	<u>                    </u>	<u>BI</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>JU</u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

The committee substitute (CS) amends statutes relating to homeowners' associations, condominium associations, and cooperatives. The term "mortgage" is amended for the purpose of a decree of foreclosure and this allows for service of process for persons outside the state by registered mail in a foreclosure proceeding. In addition, the CS clarifies what areas of a condominium must be covered under a hazard insurance policy provided to the condominium association and what areas must be covered by an individual unit owner's policy. The CS also requires that limited proxies be used to waive the financial reporting requirements of s. 718.111(13), F.S.

Further, this CS provides cooperatives and condominium associations the option to forego retrofitting the buildings with enhanced fire protection systems if approved by a two-thirds vote of all voting interests. Also, the CS prohibits a high-rise building owner from foregoing the retrofitting of common areas. It defines "high-rise building" and "common areas." Further, it contains notice provisions for cooperatives and condominium associations in buildings that vote affirmatively to forego retrofitting. It also restricts the use of proxies in such vote and specifies such vote must occur biannually or at the next annual meeting on a vote of the majority of the board. The CS has reporting requirements regarding the number of associations voting to forego the retrofitting and the cost per unit for associations that retrofit with enhanced fire protection systems.

The committee substitute allows cooperatives and condominium associations to charge a fee for providing information that is not required by law to a prospective purchaser or lienholder. Under this CS, actions for failure to follow applicable statutes, the governing documents of condominium or cooperative associations, or documents creating those entities are not actions

for specific performance. Therefore, actions under those sections would be governed by a five-year statute of limitations.

This CS clarifies that corporations are not for profit that operate homeowners' associations and are governed by portions of ch. 720, F.S., are also subject to the provisions of chapter 617, F.S.

This CS substantially amends the following sections of the Florida Statutes: 702.09, 718.111, 718.112, 718.303, 719.104, 719.303, 720.302, and 719.1055.

## **II. 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." The definition of "mortgage" for the purposes of ss. 702.07 and 702.08, F.S., is cross-referenced in s. s. 48.194(2), F.S., which allows service of process outside the state, where the address of the person to be served is known, to be made by registered mail when rem or quasi in rem relief is sought in a foreclosure proceeding.

### **Proxy Voting**

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 person holding the proxy the power to vote on a specific issue while a "general proxy" gives 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.

### **Safety and Fire Codes**

Section 633.0215(2), F.S., incorporates by reference the National Fire Protection Association's (NFPA's) Fire Prevention Code Life Safety and Fire Codes which require all buildings (including condominiums) in excess of 75 feet tall to be retrofitted with fire sprinkler systems. In 2000, the State Fire Marshall adopted the Florida Fire Prevention Code by administrative rule, to be effective July 1, 2001. Chapter 2001-186, L.O.F., delayed the effective date of the Florida Fire Prevention Code to January 1, 2002. However, the department adopted an amendment to the code which extends the retrofitting requirement for 12 years after the effective date of the act. The effect of this rule is to require some older buildings, including condominiums, to complete installation of fire sprinkler systems by January 1, 2014, unless a change is made in the standards. The National Fire Prevention Association has data that demonstrates fire sprinklers substantially reduce the loss of life and property associated with fires.

### **Statute of Limitations**

Section 718.303(1), F.S., provides that each condominium unit owner, tenant and other invitee, and association is required to comply with the ch. 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 similar provisions for cooperative associations.

There is some question as to whether an action to enforce association or cooperative bylaws is a legal or equitable action on a contract or whether it is, in substance, a claim for specific performance and, depending upon the type of action, the statute of limitations will vary. 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 a recent decision, *Sheoah Highlands, Inc. v. Daugherty*, 873 So. 2d 579 (Fla. 5th DCA 2003), the Fifth District Court of Appeal found reasonable arguments supporting either statute of limitations for an action against a condominium's governing association for the enforcement of a declaration. The unit owner, Daugherty, brought an action against Sheoah Highlands, Inc., alleging that the association failed to enforce the condominium declaration relating to building screened enclosures.<sup>1</sup> The association argued that Daugherty's claim for injunctive relief was, in essence, a claim for specific performance and, therefore, barred by the one year statute of limitations in s. 95.11(5)(a), F.S.<sup>2</sup> The court applied the five-year statute of limitations because "where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time."<sup>3</sup>

In a similar case, *Pond Apple Place III Condo. Ass'n v. Russo*, No. 4D02-1502 (Fla. 4th DCA Feb. 26, 2003), a condominium association brought suit to enforce a covenant that prohibited pets. The pet owner argued that the one year statute of limitations applied. The 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>4</sup>

## Chapter 720

Chapter 720, F.S., relates to 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-.312, F.S., to ch. 720, F.S. Those provisions are now located in ss. 720.301-720.312, F.S. This change may have created some confusion. Under the law prior to 2000, ch. 617, F.S., applied unless provided otherwise in the provisions of ch. 617, F.S., specifically governing homeowners' associations. Now that those sections governing homeowners' associations have been transferred

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<sup>1</sup> See *id.* at 580-81.

<sup>2</sup> See *id.* at 581. The association relied on *Ferola v. Blue Reef Holding Corp.*, 719 So. 2d 389 (Fla. 4th DCA 1998), wherein the Fourth District Court of Appeal held a suit against a developer for violating restrictions and covenants by constructing townhouses on a designated recreation area, failing to provide recreational amenities and to maintain common areas was a claim for specific performance that is barred by one-year limitation period).

<sup>3</sup> See *Sheoah Highlands, Inc.*, 837 So. 2d at 582, citing *Baskerville-Donovan Eng'rs, Inc. v. Pensacola Executive House Condominium Ass'n*, 581 So. 2d 1301, 1303 (Fla. 1991).

<sup>4</sup> See *id.* at 1 (case citation omitted).

to ch. 720, F.S., some have argued that current law is not clear as to what statute applies if ch. 720 is silent on a particular issue.

### III. Effect of Proposed Changes:

**Section 1** of the CS amends s. 702.09, F.S., to add liens created under the recorded covenants of a homeowners' association to the definition of "mortgage" for the purposes of ss. 702.707 and 702.08, F.S., which address the setting aside of a decree of foreclosure. This definition of "mortgage" is also cross-referenced in s. 48.194(2), F.S., which would allow service of process outside the state, where the address of the person to be served is known, to be made by registered mail when rem or quasi in rem relief is sought in a foreclosure proceeding.

**Section 2** amends s. 718.111, F.S., to provide that a declaration of a condominium (declaration), as originally recorded or amended, may allow freestanding property with not more than one building in or on such unit to be insured by the unit owner, rather than the association, if the unit owner is required to obtain adequate insurance. This adequate insurance may include reasonable deductibles notwithstanding the requirements of the declaration. Further, the CS supersedes certain coverage requirements for hazard insurance policies provided to the association, covering a condominium building, and requires, instead, that every policy issued or renewed on or after January 1, 2004 to provide primary coverage for the following:

- All portions of condominium property located outside the units;
- Condominium property located inside the units if initially installed or replaced with like kind and quality in accordance with original plans or, if those plans are not available, as they existed in the unit at the time of conveyance; and
- All portions of the condominium property required to be covered under the declaration.

However, there are exclusions from coverage in existing law and the CS expands the list to include all floor, wall, and ceiling coverings, water filters, countertops, and window treatments and air conditioning compressors that serve only one unit. The CS clarifies the property and casualty insuring responsibilities of the association provided in the CS do not affect any insurance contract provided to a unit owner. Also, the CS deletes a requirement that the unit owner be considered an additional insured under a casualty or property insurance policy. This CS gives an association the authority to amend the declaration with regard to insurance requirements without mortgagee approval to conform to the insurance requirements of s. 718.111, F.S.

The CS addresses information provided to a prospective lienholder or purchaser by the association or its authorized agent. Under the CS, an association or its agent is not required to provide the prospective purchaser or lienholder with information about the condominium or association other than as required by ch. 718, F.S. An association or authorized agent may charge a reasonable fee not to exceed \$150 for responding to requests for information, by or on behalf of a prospective purchaser or lienholder, other than required by law, plus the cost of photocopying and any attorney's fees incurred by the association in connection with the association's response.

In addition, the CS clarifies that an insurance policy issued to a unit owner shall be without subrogation rights against the condominium association. It also requires real or personal property excluded from coverage under a s. 718.111(11)(b), F.S., to be insured by the unit owner. The CS

applies the above provisions relating to insurance to every condominium in the state regardless of the date of its declaration.

**Section 3** amends s. 718.112, F.S. to require the use of limited proxies for votes taken to waive the financial reporting requirements of s. 718.111(13), F.S.

This CS also amends s. 718.112(2)(l), F.S., to allow unit owners, an association, or condominium to forego retrofitting of the common elements or units of a residential condominium with a fire sprinkler system or other enhanced fire protection system in a building that is certified for occupancy by the applicable governmental entity if approved by a two-thirds vote of all voting interests. Also, the committee substitute prohibits a high-rise building owner from foregoing the retrofitting of common areas. It defines “high-rise building” and “common areas.” The vote may occur at a duly noticed meeting or by written consent and is effective when the executed certificate is recorded. Further, it contains notice provisions for condominium and cooperative associations in buildings that vote affirmatively to forego retrofitting. It also restricts the use of proxies in such vote and specifies such vote must occur biannually or at the next annual meeting on a vote of the majority of the board. Also, the CS requires the association to report the membership vote and recording of the certificate to the Division of Land Sales and Mobile Homes of the Department of Professional Regulation and the number of associations voting to forego the retrofitting will be reported by the division annually to the State Fire Marshall’s Office. Alternatively, if the retrofitting has been undertaken, the association must report the per-unit cost of such work to the division.

**Section 4** amends s. 718.303, F.S., to provide that actions under the section for failure to comply with ch. 718, F.S., the documents creating the association, or the association’s bylaws shall not be deemed to be actions for specific performance. This would extend the statute of limitations for actions under this section to five years pursuant to s. 95.11(2)(b), F.S.

**Section 5** amends s. 719.104, F.S., to address information provided to a prospective lienholder or purchaser by cooperatives. Under the CS, an association or its authorized agent is not required to provide the prospective purchaser or lienholder with information about the condominium or association other than as required by ch. 718, F.S. An association or authorized agent may charge a reasonable fee not to exceed \$150 for responding to requests for information, by or on behalf of a prospective purchaser or lienholder, other than required by law, plus the cost of photocopying and any attorney’s fees incurred by the association.

**Section 6** amends s. 719.303, F.S. to provide that actions under the section for failure to comply with ch. 719, F.S., the cooperative documents, the documents creating the associations, or the association’s bylaws shall not be deemed to be actions for specific performance. This would operate to extend the statute of limitations for actions under this section to five years pursuant to s. 95.11(2)(b), F.S.

**Section 7** amends s. 720.302, F.S., to clarify that corporations not for profit that operate residential communities remain subject to ch. 617, F.S. notwithstanding the transfer of these provisions in 2000 from ch. 617, F.S., to ch. 720, F.S.

**Section 8** amends s. 719.1055, F.S., to allow unit owners, an association, or cooperative to forego retrofitting of the common elements or units of a residential cooperative with a fire sprinkler system or other enhanced fire protection system in a building that is certified for occupancy by the applicable governmental entity if approved by a two-thirds vote of all voting interests. Also, the committee substitute prohibits a high-rise building owner from foregoing the retrofitting of common areas. It defines “high-rise building” and “common areas”. The vote may occur at a duly noticed meeting or by written consent and is effective when the executed certificate is recorded. Further, it contains notice provisions for the associations in buildings that vote affirmatively to forego retrofitting. It also restricts the use of proxies in such vote and specifies such vote must occur biannually or at the next annual meeting on a vote of the majority of the board. Also, the CS requires the association to report the membership vote and recording of the certificate to the Division of Land Sales and Mobile Homes of the Department of Professional Regulation and the number of cooperatives voting to forego the retrofitting will be reported by the division annually to the State Fire Marshall’s Office. Alternatively, if the retrofitting has been undertaken, the association must report the per-unit cost of such work to the division.

**Section 9** provides the act shall take effect upon becoming a law.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Prospective purchasers and lienholders may be required to pay an association up to \$150 plus the cost of photocopying for information they request.

C. Government Sector Impact:

The Division of Land Sales and Mobile Homes is required under this CS to develop a form for associations to report whether the unit owners voted by a two-thirds vote to forego retrofitting the common elements or units of a residential condominium with a fire

sprinkler system or other enhanced fire protection system or the per unit costs provided by the associations that have elected to comply with the retrofitting requirement. This would require the development of a form for the associations and adoption by rule.

**VI. Technical Deficiencies:**

The Department of Business and Professional Regulation has raised concerns about portions of this CS. Section 2 of the CS 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. Section 3 of the CS assumes incorrectly that the Division of Land Sales and Mobile Homes within the department currently collects information from associations on an annual basis. Also, the CS may create an inefficiency by requiring the division, rather than the associations, to provide an annual report to the 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.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.