



# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: This bill eliminates the current requirement that certain disputes between homeowners and homeowners associations be referred to the Department of Business and Professional Regulation for assignment of a mediator.

Safeguard Individual Liberty: This bill decreases restrictions on condominium associations when amending declarations of condominium, articles of incorporation, or bylaws. This bill increases regulation of homeowners' associations.

### B. EFFECT OF PROPOSED CHANGES:

#### **Background**

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>1</sup> A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.<sup>2</sup> A declaration is like a constitution in that it:

strictly governs the relationships among condominium units 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>3</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>4</sup> A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of two-thirds of the units.<sup>5</sup>

Homeowners' association means a Florida corporation responsible for the operation of a subdivision in which voting membership is made up of parcel ownership and 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>6</sup> Homeowners' associations are regulated under chapter 720, F.S.

#### **Effect of Bill**

##### Covenant Revitalization

##### *Proposed Changes*

This bill creates s. 712.11, F.S., to provide that a homeowner's association that is not subject to chapter 720 may use the procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of chapter 712, F.S.

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<sup>1</sup> Section 718.103(11), F.S.

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

<sup>3</sup> *Neuman v. Grand View at Emerald Hills*, 861 So.2d 494, 496-497 (Fla. 4th DCA 2003)

<sup>4</sup> Section 718.104(5), F.S.

<sup>5</sup> Section 718.110(1)(a), F.S.

<sup>6</sup> Section 720.301(9), F.S.

## Mortgagee Consent or Joinder of Amendments to Declaration of Condominium

### *Current Law*

Section 718.110(11), F.S., provides that any declaration of condominium recorded after April 1, 1992, may not require the consent or joinder of mortgagees in order for an association to pass an amendment to the declaration. This is limited to amendments which do not materially affect the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. Current law provides that such consent may not be unreasonably withheld. In the event mortgagee consent is provided other than by properly recorded joinder, such consent must be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded.<sup>7</sup>

### *Proposed Changes*

This bill amends s. 718.110(11), F.S., to provide that any provision in the declaration of condominium, articles of incorporation, or bylaws that requires the association to obtain consent or joinder of mortgagees to amend the declaration of condominium, articles of incorporation, or bylaws are void. This provision is not limited to amendments materially affecting the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. This bill also provides that consent or joinder are not to be unreasonably withheld, and that it is presumed that amendments to the declaration of condominium, articles of incorporation, or bylaws do not materially affect the rights or interests of mortgagees.

This bill provides findings by the Legislature that consent or joinder to amendments that do not materially affect the rights or interests of mortgagees is unreasonable and is a substantial burden on the condominium owners and association. This bill also provides that there is a compelling state interest in enabling condominium association members to approve amendments.

This bill provides that any holder of a mortgage on any portion of a condominium, which is recorded after October 1, 2006, and where the declaration of condominium, articles of incorporation, or bylaws require consent or joinder of a mortgagee to pass an amendment, must provide written notice by certified mail to the association of the address where the mortgagee may be contacted in regard to any proposed amendments.

The association must keep the names and addresses of the mortgagees, which the association must use when sending a request for such consent or joinder. A request for consent or joinder must be mailed to a mortgagee by certified mail to the address provided by the mortgagee. For a mortgage recorded after October 1, 2006, consent to an amendment is deemed to have been given by a holder of a mortgage who fails to provide the required written notice and consent information. In addition, any mortgagee who fails to respond by certified mail within 30 days after the date the association mails a request for consent or joinder is deemed to have consented to the proposed amendment.

For mortgages in existence prior to October 1, 2006, and where consent or joinder is required for amendments, and where mortgagees are not required to provide notice to the association of their contact information in order to be eligible to receive notices regarding proposed amendments, associations can modify provisions in the declaration of condominium, articles of incorporation, or bylaws. The Association must notify all mortgagees who have mortgages on any part of the condominium and mortgagees must provide the same contact information as for mortgages that are recorded after October 1, 2006. Any mortgagee who does not provide contact information as required will be deemed to have consented to all future proposed amendments. In addition, failure of any mortgagee to respond to a request for the consent or joinder to a proposed amendment within 30 days after the date that a request is sent to the mortgagee by certified mail is deemed to have consented to the amendment.

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<sup>7</sup> Section 718.110(11), F.S.

This bill provides that in order to properly notify holders of existing mortgages the condominium association conducts a diligent search to identify all existing mortgagees and an address for the required notice to be sent to each mortgagee. Service of the notice must be on the mortgagee's registered agent. Where there is no registered agent, the notice must be sent to the address in the original recorded mortgage unless there is a different address in a more recently recorded assignment or in the records maintained by the condominium association. All notices are sent by certified mail and if the mortgagee fails to provide the contact information requested within 30 days after the date of mailing of the letter from the association, then the mortgagee is deemed to have consented to the proposed amendment. A representative of the condominium association must execute an affidavit confirming that a diligent search was conducted to identify all outstanding mortgages on the condominium. The affidavit must summarize the steps that were taken in connection with the search and the notification of all mortgagees. The affidavit must be placed in the association's minute book as an attachment to the minutes of the meeting in which the board of directors considers the affidavit.

After October 1, 2006, no new declaration of condominium, articles of incorporation, or bylaws may require the consent or joinder of more than 51 percent of the eligible mortgagees in connection with any proposed amendment unless a higher percentage is required by the FNMA or FHLMC. A new declaration of condominium, articles of incorporation, or bylaws must also require mortgagees to provide to the condominium association the address to which notices may be sent, in order for the mortgagees to have the right to be contacted in connection with any proposed amendments.

This bill provides that a provision requiring consent or joinder of holders of mortgages is enforceable only by mortgagees of record as of the date an amendment is recorded and only by mortgagees who have complied with providing the notice and contact information as required above. Any amendment adopted without the required consent of a mortgagee is deemed voidable by any mortgagee who was entitled to notice and the opportunity to consent.

This bill also provides that in order to establish that a mortgagee is not unreasonably withholding consent, he or she must include in his or her reply to the condominium association's request for consent or joinder a statement of the specific reasons the proposed amendment is claimed to materially and adversely affect the rights and interests of such mortgagee.

In connection with any litigation between a condominium association and a lender with regard to whether consent has been unreasonably withheld, the prevailing party is entitled to recover his or her costs and reasonable attorney's fees.

### Mixed-Use Condominiums

#### *Current Law*

Section 718.404, F.S., pertains to mixed-use condominiums, which are condominiums where there are both residential and commercial units. Section 718.404(1), F.S., provides that for mixed-use condominiums, the owner of a commercial unit does not have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. Section 718.404(2), F.S., is also amended to provide that when the number of residential units is equal to or greater than 50% of the total number of units operated by the association, owners of the residential units are entitled to vote for a majority of the seats on the board of administration.

#### *Proposed Changes*

This bill amends subsections (1) and (2) of s. 718.404, F.S., to provide that these subsections are intended to be applied retroactively as a remedial measure.

### Homeowners' Associations

## *Current Law*

Current law regulates homeowner associations in ch. 720, F.S., and s. 720.302, F.S., provides that ch. 720, F.S. does not apply to condominium associations. This bill amends s. 720.302, F.S., to provide an exception to the current law providing that chapter 720, which regulates homeowners' associations, does not apply to condominium associations.

## *Proposed Changes*

This bill amends s. 720.302(4), F.S. to provide that ch. 720, F.S. does not apply to any association regulated under chapters 718 (condominiums), 719 (cooperatives), 721 (timeshares), or 723 (mobile home parks), except to the extent that a provision of ch. 718, 719, or 721, F.S. is expressly incorporated into ch. 720, F.S. for the purpose of regulating homeowners' associations.

This bill amends s. 720.302(5), F.S., to remove the phrase "not for profit" to conform to the other changes in this section. This bill also amends s. 720.302(5), F.S., to provide that corporations operating residential homeowners' associations in Florida are to be governed by and subject to ch. 607, F.S. (corporations), if the association was incorporated under the provisions of that chapter, or to ch. 617, F.S. (not for profit corporations), if the association was incorporated under the provisions of that chapter.

## Homeowners' Association Board Meetings

### *Current Law*

Section 720.303(2), F.S., provides procedures for association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for those meetings between the board and its attorney relating to proposed or pending litigation. Members also have the right to attend all board meetings and speak on any matter on the agenda for at least 3 minutes.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to a meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice of the board meeting must be mailed or delivered to each association member at least 7 days prior to the meeting, except in an emergency. For associations that have more than 100 members, the bylaws may provide for a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision of a schedule of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.<sup>8</sup>

A board may not levy assessments at a meeting unless the notice of the meeting includes the nature of those assessments and a statement that the assessments will be considered at the meeting.<sup>9</sup>

Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. This also applies to meetings of any committee or similar body when a final decision will be made regarding the spending of association funds. Proxy voting or secret ballots are also not allowed when a final decision will be made on approving or disapproving architectural decisions with respect to a specific parcel of residential property owned by a member of the community.<sup>10</sup>

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<sup>8</sup> Section 720.303(2)(c)1, F.S.

<sup>9</sup> Section 720.303(2)(c)2, F.S.

<sup>10</sup> Section 720.303(2)(c)3, F.S.

## *Proposed Changes*

This bill amends s. 720.303(2), F.S., as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida,<sup>11</sup> as follows:

- This bill amends s. 720.303(2)(a), F.S., to provide that provisions of this subsection also apply to the meetings of any committee or other similar body when a final decision is made regarding the spending of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.
- This bill amends s. 720.303(2)(c)1., F.S. to change the phrase "for communities with more than 100 members" to the more accurate phrase "for communities with more than 100 parcels". This bill also amends s. 720.303(2)(c)1., F.S., to remove the requirement that the agenda be broadcast along with the notice when broadcast notice of a board meeting is provided.
- This bill amends s. 720.303(2)(c)2., F.S., by changing the word "assessment" to "special assessment". This bill eliminates the provision that an assessment may not be levied at a board meeting unless notice of a board meeting states that regular assessments will be considered. This bill provides that such notice is only required when a special assessment will be considered.
- This bill amends s. 720.303(2)(c)3., F.S., to provide that directors may vote by proxy or by secret ballot during meetings of any committee or other similar body when a final decision will be made regarding the spending of association funds and when any body is vested with the power to approve or disapprove architectural decisions.
- This bill also repeals s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, to remove conflicting versions of this subsection.

## Homeowners' Association Inspection and Copying of Records

### *Current Law*

Section 720.303(5), F.S., requires that a homeowners' association allow its members to inspect and copy its official records within 10 days of a written request for access. A failure to comply with such a request in a timely fashion creates a rebuttable presumption that the association failed to do so, and entitles the requesting party to actual damages, or to a minimum of \$50 per calendar day, commencing on the eleventh business day. A homeowners' association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not impose a requirement that a parcel owner demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the associations copy machine. If the association does not have a copy machine available where the records are kept, or if the records requested to be copied exceed 25 pages, then the association may have copies made by an outside vendor and may charge the actual cost of copying.

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<sup>11</sup> In 2004 the Legislature passed SB 1184, which amended s. 720.303(2), F.S., in section 2 and section 18 of the bill. In 2004, the Legislature passed SB 2984, which also amended s. 720.303(2), F.S., in section 15 of the bill. This bill is amending s. 720.303(2), F.S., as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, and is repealing s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida.

Current law expressly exempts the following from inspection by a member or parcel owner: any record protected by attorney-client or work-product privilege; information obtained in association with the lease, sale or transfer of a parcel that is otherwise privileged by state or federal law; disciplinary, health, insurance and personnel records of the association's employees; or medical records of parcel owners or other community residents.<sup>12</sup>

### *Proposed Changes*

This bill amends s. 720.303(5), F.S., to provide that an association or its agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association unless required by this chapter to be made available or disclosed. This bill also provides that an association or agent may charge a reasonable fee to a prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information, except for information required by law. The fee cannot exceed \$150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

This bill provides that an association and its agent are not liable for providing information in good faith if the person providing the information includes a written statement in the following form: "The responses herein are made in good faith and to the best of my ability as to their accuracy."

### Homeowners' Association Budgets

#### *Current Law*

Section 720.303(6), F.S., provides that an association must prepare an annual budget.

#### *Proposed Changes*

This bill amends s. 720.303(6), F.S., to require that the annual budget set out the annual operating expenses.

This bill also amends s. 720.303(6), F.S., to provide that the annual budget must include reserve accounts for capital expenditures and deferred maintenance, in addition to annual operating expenses. This bill provides that these accounts must provide for items such as roof replacement, building painting, and pavement resurfacing, and for any other item for which the expense or cost is more than \$10,000. This subsection does not apply to a budget where a majority of the members of an association have voted to provide no reserves or fewer reserves required by this subsection. This bill also provides that prior to turning over control of an association to the unit owners, the developer may vote to waive or reduce the reserves for the first 2 fiscal years of the association's operation. After this time, reserves can be waived or reduced by a majority vote of all nondeveloper voting interests at an association meeting.

This bill amends s. 720.303(6), F.S., to provide for how the reserve accounts will be funded. This bill provides for funding formulas for reserves and requires that the funding formulas be based on either a separate analysis of each required asset or a pooled analysis of two or more required assets.<sup>13</sup> This bill also provides that reserve funds and any interest accruing must stay in the reserve account, and can only be used for reserve expenditures unless another use is approved by a majority vote of the association members.

The language used in this section of the bill to amend s. 720.303(6), F.S. is identical in form to the language used in s. 718.112(2)(f), F.S., regarding the annual budgets of condominium associations.

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<sup>12</sup> Section 720.303(1), (2), (3), (4), F.S.

<sup>13</sup> Required assets are the assets that this bill requires to be included in the reserve accounts including, but not limited to, roof replacement, building painting, pavement resurfacing, and any item for which maintenance expense or replacement cost exceeds \$10,000.

## Homeowners' Association Financial Reporting

### *Current Law*

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

### *Proposed Changes*

This bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year, the association must provide each member with a copy of the annual financial report. Homeowners' associations and condominium associations are generally operated and managed the same way, and the language used in this bill is identical in form to language contained in s. 718.111(13), F.S., regarding financial reporting for condominium associations.

This bill amends s. 720.303(7)(a), F.S., to provide that financial statements are to be completed in accordance with the accounting principles adopted by the Florida Board of Accountancy.

## Attorney's Fees for Actions between an Association and a Member

### *Current Law*

Section 720.305, F.S., provides that an action to enforce the rules and provisions established by the homeowners' association can be brought by the association or by any member against the association, a member, any director of the association, and any tenants, guests, or invitees occupying a parcel or common area. This section also provides that the prevailing party in any litigation is entitled to recover reasonable attorney's fees and costs. A member that has successfully sued his or her association must, under current law, return a portion of those fees back to the association. Thus, under current law a member cannot be fully compensated for his or her attorney's fees.

### *Proposed Changes*

This bill amends s. 720.305, F.S., to provide that any member who prevails against an association and is awarded attorney's fees may also be awarded an amount sufficient to cover the member's pro-rata portion of those fees.

## Meetings of Association Members; Amendments

### *Current Law*

Section 720.306(1)(c), F.S., provides that an amendment may not materially and adversely alter the proportionate voting interest attached to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association, unless all owners and lienholders join in the execution of the amendment. A change in quorum requirements is not an alteration of voting interests.

Section 720.306(6), F.S., provides that members and parcel owners have the right to attend all membership meetings and to speak at any meeting. A member and a parcel owner have the right to speak for at least 3 minutes on any agenda item if the member or parcel owner submits a written request to speak prior to the meeting.

### *Proposed Changes*



This bill amends s. 720.306(1)(c), F.S., adding the provision that the merger or consolidation of associations under ch. 607, F.S. (regulating corporations) or ch. 617, F.S. (regulating non-profit corporations), is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

This bill also amends s. 720.306(6), F.S., removing the phrase "opened for discussion". This change provides that members and parcel owners have the right to speak at any meeting with reference to all items on the agenda and not to all items opened for discussion or on the agenda.

### Transition of Homeowners' Association Control

#### *Current Law*

Section 720.307, F.S., provides procedures for turning over control of an association from the developer to parcel owners. The transition of association control begins with the election of the board of directors of the homeowners' association by the members. At the time the members elect the board of directors, the developer must deliver various documents to the board.

#### *Proposed Changes*

This bill amends s. 720.307, F.S., to provide an additional document that the developer must provide to the board of directors. Along with the documents that must be provided by the developer under current law, this bill requires that the developer to also provide the board of directors the financial records, including the statements of the association, and source documents from the incorporation of the association through the date of turnover. This bill also provides that an independent certified public accountant must audit the records and determine that the developer was charged with, and paid, the proper amounts of assessments.

The language in this section of the bill is taken from language found in s. 718.301(4)(c), F.S., of the Condominium Act. The current law for homeowners' associations pertaining to transition of association control is very similar to the current Condominium Act and this bill provides conformity between homeowners' associations and the condominium associations.

### Guarantees of Common Expenses

#### *Current Law*

The developer of a community is responsible for paying the costs of the common expenses of the community until the sale of the parcels to a purchaser in which time the developer pays a proportionate share of the common expenses with the parcel owners. Condominium law allows a developer to be excused from payment of common expenses if the common expenses of all unit owners are guaranteed not to increase and the developer agrees to pay all common expenses incurred but not covered by unit owner payments during the period of the guarantee.<sup>14</sup>

#### *Proposed Changes*

This bill amends s. 720.308, F.S., to incorporate the guarantees of common expenses provision found in condominium law into homeowners' association law. Currently, s. 720.308, F.S., provides for guarantees of common expenses if it is provided for in the declaration. This bill amends s. 720.308, F.S., to provide for guarantees of common expenses if a guarantee is not included in the purchase contract or declaration. This bill provides that a guarantee is effective only upon approval of a majority of the voting interests of the members other than the developer. This bill also provides that:

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<sup>14</sup> Section 718.116, F.S.

- The time period of a guarantee must have a specific beginning and ending date or event;
- The dollar amount of the guarantee must be an exact dollar amount for each parcel identified in the declaration;
- The cash payments required from the developer must be when the revenue collected by the association are not sufficient to provide payment for all common expenses; and
- The expenses incurred in the production of non-assessment revenues, not in excess of the non-assessment revenues, must not be included in the common expenses. If expenses attributable to non-assessment revenues exceed non-assessment revenues, then the developer must only fund the excess expenses.

This section of the bill mirrors what is currently contained in s. 718.116(9)(a)2, F.S., of the Condominium Act and provides conformity between condominium associations and homeowners' associations.

## Dispute Resolution

### *Current Law*

Section 720.311, F.S., established dispute resolution procedures for homeowners' associations and their members. Current law requires that recall disputes must be resolved by binding arbitration conducted by the Department of Business and Professional Regulation (DBPR). Any recall dispute filed with the DBPR must be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors, and dispute resolution procedures for condominiums. Section 718.1255, F.S., requires that arbitration proceedings relating to the recall of a condominium director must be conducted pursuant to the arbitration procedures in s. 718.1255, F.S., and provides that, if the condominium association fails to comply with the final order of arbitration, the DBPR may take action pursuant to s. 718.501, F.S. Section 718.501, F.S., establishes the powers and duties of the DBPR, which include the power to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties.

Section 720.311(1), F.S., provides that the DBPR must conduct mandatory binding arbitration of election disputes in accordance with s. 718.1255, F.S. Election and recall disputes are not eligible for mediation. Current law requires a \$200 filing fee and authorizes the DBPR to assess the parties an additional fee in an amount adequate to cover the DBPR's costs and expenses. The fee paid to the DBPR must be a recoverable cost in the arbitration proceeding and the prevailing party must be paid its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. Section 720.311(1), F.S., provides that any petition for mediation or arbitration shall toll the applicable statute of limitations. The statute authorizes the DBPR to adopt rules to implement this section.

Section 720.311(2)(a), F.S., provides that the following disputes must be filed with the DBPR for mandatory mediation by the division before the dispute is filed in court:

- Disputes between an association and a parcel owner regarding use of, or changes to, the parcel or the common areas and other covenant enforcement disputes;
- Disputes regarding amendments to the association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings not including election meetings; and
- Disputes regarding access to the official records of the association.

The mediation is conducted under the applicable Florida Rules of Civil Procedure, and the proceeding is privileged and confidential to the same extent as court-ordered mediation. Current law provides that persons not a party to the suit may not attend the mediation conference without the consent of all the parties. Current law also requires a \$200 fee to defray the costs of the mandatory mediation, authorizes the DBPR to charge additional fees to cover the costs of the mandatory mediation, and

requires that the parties share the costs of mediation equally, unless the parties agree otherwise. If the mandatory mediation is not successful, the parties may file the dispute in a court or enter the dispute into binding or non-binding arbitration to be conducted by the DBPR or private arbitrator. Section 720.311(2)(d), F.S., provides that the mediation procedure may be used by non-mandatory homeowners' associations.

Section 720.311(2)(c), F.S., provides standards to DBPR certification and training of mediators and arbitrators, and DBPR-certified mediators must also be certified by the Florida Supreme Court.

Section 720.311(3), F.S., currently provides that the DBPR must develop an education program to assist homeowners, associations, board members, and managers in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Current law also provides that the certification program for arbitrators and mediators and the education program for homeowners' associations and their members would be funded by moneys and filing fees generated by the arbitration and mediation proceedings.

### *Proposed Changes*

This bill amends s. 720.311, F.S., to provide:

- That all references to mediation be changed to "presuit" mediation;
- That disputes subject to presuit mediation do not include the collection of any assessments, fine, or other financial obligation, including attorney's fees and costs, or any action to enforce a prior mediation settlement;
- That the presuit mediation requirements of s. 720.311, F.S., do not apply to any dispute where emergency relief is required;
- A form for the written offer to participate in presuit mediation that must be substantially followed by the aggrieved party and which is served on the responding party. The form is titled "Statutory Offer To Participate In Presuit Mediation" and is a boilerplate form that a party must use or substantially follow when making an offer to participate in presuit mediation. The form provides that the party may waive presuit mediation so that this matter may proceed directly to court;
- That service of the statutory offer is effected by sending the statutory form, or a letter that conforms substantially to the statutory form, by certified mail, with an additional copy being sent regular first-class mail, to the address of the responding party as it appears on the books and records of the association;
- That dispute resolution to resolve disputes between associations and a parcel owner is no longer within the jurisdiction of the Department of Business and Professional Regulation;
- That the responding party will have 20 days from the date the offer is mailed to serve a response in writing. The response is to be served by certified mail, with an additional copy being sent by regular first-class mail to the address shown on the offer;
- That the mediator may require advance payment of fees and costs. This bill removes the \$200 filing fee requirement, and other language providing for the fees for a DBPR mediator.
- That failure of either party to appear for mediation, respond to the offer, agree on a mediator, or pay the fees and costs will entitle the other party to seek an award of the costs and fees associated with mediation;
- That if presuit mediation cannot be conducted within 90 days after the offer to participate then an impasse will be deemed unless both parties agree to extend the deadline;
- That any issue or dispute that is not resolved at presuit mediation, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process;
- That DBPR is no longer responsible for certification programs for mediators or education programs for homeowners' associations.

### C. SECTION DIRECTORY:

Section 1 creates s. 712.11, F.S., to provide that homeowners' associations may use procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of Chapter 712, F.S.

Section 2 amends s. 718.110, F.S., providing for certain procedures for amending declarations of condominium, articles of incorporation, or bylaws, where the declarations of condominium, articles of incorporation, or bylaws requires the association to obtain consent and joinder of mortgagees.

Section 3 amends s. 718.404, F.S., to provide that subsections (1) and (2) are intended to be applied retroactively as a remedial measure.

Section 4 amends s. 720.302, F.S., to provide an exception to the current law that ch. 720, F.S., does not apply to any association under ch. 718, F.S., ch. 719, F.S., or ch. 721, F.S.

Section 5 amends s. 720.303, F.S., to provide that provisions under s. 720.303(2), F.S. also apply to committee meetings when a decision will be made on spending association funds, and to meetings of any body that has the power to make architectural decisions. This section also amends s. 720.303(5), F.S., to provide for when an association is not required to provide information about the residential subdivision or the association, that the association may charge a fee up to \$500 for providing this information, and for when an association is not liable for providing such information. This section amends 720.303(7), F.S., revising the time period for when an association must prepare and complete a financial report for the preceding fiscal year. This section amends s. 720.303(6), F.S., requiring the annual budget of an association to set out the annual operating expenses and include reserve accounts for capital expenditures and deferred maintenance.

Section 6 repeals s. 720.303(2), F.S.

Section 7 amends s. 720.305, F.S., to provide that a member who prevails in an action against an association may recover additional amounts for his or her member share of the assessment that she will have to pay for the associations legal fees and costs.

Section 8 amends s. 720.306, F.S., revising provisions pertaining to meetings of members and amendments providing that merger or consolidation of associations is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel and providing that members and parcel owners have the right to speak at any meeting in reference to all agenda items.

Section 9 amends s. 720.307, F.S., to require that at the time the members are entitled to elect at least a majority of the board of directors, the developer must deliver the financial records of the association.

Section 10 amends s. 720.308, F.S., to establish guarantees of common expenses if a guarantee is not included in the purchase contract or declaration.

Section 11 amends s. 720.311, F.S., revising the dispute resolution provisions for disputes between an association and a parcel owner. This section also provides a statutory form to be used as the written offer to participate in presuit mediation and provides that service of the offer be accomplished by sending the offer in a certain manner.

Section 12 provides an effective date of July 1, 2006, except as otherwise expressly provided in this bill.

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

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

#### **1. Revenues:**

The Department of Business and Professional Regulation (DBPR) estimates that this bill will result in a reduction of \$126,018 in mediation filing fees and expenses received by the DBPR. It will also result in a reduction of \$9,199 in service charges provided to General Revenue.<sup>15</sup>

The DBPR's reassignment of the staff who have been conducting both homeowner's association and condominium mediations to condominium mediations full-time as described in "Expenditures", below, will not result in additional revenues because unlike in the homeowner's association mediation program, the condominium mediation program does not charge for the cost of the mediation.

2. Expenditures:

The Department of Business and Professional Regulation will experience decreased workload as a result of no longer being required to perform homeowner association mediations. The department states, however, that it did not receive additional FTE's to perform homeowner's association mediations when the DBPR was originally assigned those responsibilities in FY 2004-05. The staff who have been conducting homeowner's association mediations also perform condominium mediations and the DBPR states they would return to those responsibilities full-time.

According to the Legislative Analysis Form provided by DBPR, "The change from mandatory mediation of homeowner's association disputes to voluntary mediation and the stated ability of an association to file the dispute in the court for injunctive relief instead of using the alternate pre-suit offer to participate in mediation may make it less likely that disputes will be mediated before filing in court." This may result in increased court filings. Currently, the department allows request for emergency injunctive relief to be filed in the courts prior to exhausting the mediation process on a case-by-case basis." During the roughly 12-month period from October 1, 2004 through November 22, 2005, the DBPR states that it received 1,007 petitions for mediation. Approximately 560 or 56% of these were settled and did not result in court filings.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may allow increased costs to purchasers or sellers of homes that are in a homeowner's association since the association may charge a fee for providing information requested by prospective purchasers. The fee cannot exceed \$150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

The bill provides for the recovery of costs and reasonable attorney's fees in regard to litigation between a condominium association and a lender with regard to whether consent has been improperly or unreasonably withheld for proposed amendments to declaration of condominium, articles of incorporation, or bylaws.

This bill amends s. 720.305, F.S., to provide that any member who prevails against an association and is awarded attorney's fees may also be awarded an amount sufficient to cover the member's pro-rata portion of those fees.

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<sup>15</sup> The fiscal impact on state government was provided by Matilde Phillips of the Department of Business and Professional Regulation on April 3, 2006.

It is unclear whether this bill will increase or decrease the cost to homeowners and homeowner's associations relating to mediation of disputes. Under current law, a fee of \$200 is charged for filing to hear a dispute. Some such disputes are mediated by the Department of Business and Professional Regulation at a cost as is necessary to cover all DBPR expenses incurred in the mediation. From October 1, 2004, through November 22, 2005, for the 63 cases mediated by the DBPR, the average cost was \$783 per case. However, during this period of time, the DBPR referred the vast majority of cases (93%) to private mediators whose fees were paid by the parties. This bill eliminates the \$200 fee and the DBPR's provision of this service but provides for private mediation, if pursued, at a cost to be negotiated between the parties.

Additionally, according to the DBPR, the bill's requirement that private mediators for homeowner's association disputes be certified in circuit court mediation would mean that those mediators certified to mediate county court disputes would no longer be eligible to conduct homeowner's association disputes.

#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."<sup>16</sup> "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."<sup>17 18</sup>

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.<sup>19</sup> The *Pomponio* Court indicated that the "well-accepted principle in this state is that virtually no degree of contract impairment is tolerable in this state." *Pomponio*, 378 So. 2d at 780. When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.*

In other words, "[t]his method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." *U.S. Fidelity and Guar. Co. v. Department of Ins.*, 453 So. 2d 1355, 1360-61 (1984). What should be reviewed when considering this balancing test?

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<sup>16</sup> Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

<sup>17</sup> 10a Fla. Jur. s. 414, Constitutional Law.

<sup>18</sup> The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

<sup>19</sup> The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

[T]he United States Supreme Court recently outlined the main factors to be considered in applying this balancing test. The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

*U.S. Fidelity and Guar. Co.*, 453 So.2d at 1360-61 (Fla. 1984) (internal citations and quotations omitted).

This bill amends s. 718.110, F.S., to provide that any provision in the declaration of condominium, articles of incorporation, or bylaws that requires consent or joinder of mortgagees to be obtained to pass an amendment to either of these documents "shall be void to the extent not limited to amendments materially affecting the rights or interests of the mortgagees". This bill could be interpreted as pertaining to all declarations, articles of incorporation, or bylaws that have consent or joinder requirements, existing before the effective date of the bill and after. This bill also provides that, for mortgages in existence prior to the effective date of this bill, associations can modify their declarations, articles of incorporation, or bylaws to require mortgagees to provide notice to the association of their contact information in order to be eligible to receive notices regarding proposed amendments.

A mortgage is a contract between a lender and a property owner. It is possible that a lender may have agreed to lend money to a condominium or community owner only if the lender would receive certain notifications and have the opportunity to object to amendments that could adversely affect the lender. To the extent that a lender relied on such provisions, this bill may affect the lender's ability to enforce such contract terms. If so, this bill may perhaps impair the obligation of a contract and this portion of the bill may not be enforced by a court.

There could also be some possible constitutional problems with the changes made in this bill to subsections (1) and (2) of s. 718.404, F.S. This bill amends this section to make these subsections apply retroactively. This could lead to contract clause violations if it were found to impair existing contracts.

## B. RULE-MAKING AUTHORITY:

None. However, the bill may require the repeal of Ch. 61B-82, F.A.C., containing the mediation rules of procedure.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 25, 2006, the Civil Justice Committee adopted 9 amendments to this bill. The amendments made the following revisions to the bill:

- Provides for the use of accounting principles as adopted by the Florida Board of Accountancy.
- Provides that the annual budget of homeowners' associations include the annual operating expenses and reserve accounts for capital expenditures and deferred maintenance.
- Provides that complete financial records of homeowners' associations be included with the documents that the developer must deliver at the time the members of the association are entitled to elect at least a majority of the board of directors.
- Provides for guarantees of common expenses when a guarantee is not included in the purchase contract or declaration. The amendment provides for the guarantee time period, maximum level of assessments, cash funding requirements during the guarantee, calculations of guarantor's final obligation, and for funding of expenses incurred in the production of non-assessment revenues.
- Provides that any member who prevails against an association and is awarded attorney's fees may also be awarded an amount sufficient to cover the member's pro-rata portion of those fees.
- Provides that in s. 718.404, F.S., regarding mixed-use condominiums, the following provisions are intended to apply retroactively as a remedial measure: (1) In mixed-use condominiums, the commercial unit owner cannot veto condominium documents; and (2) Where there are 50% residential units, the residential owners are entitled to vote for a majority of the seats on the board of administration.
- Removes section 8 of the bill regarding requirements for proposed revived declarations and other governing documents.
- Removes the phrase "not for profit" from s. 720.302(5), F.S., regarding the purpose and scope of ch. 720, F.S., so that it is in conformity with other revisions in the bill.
- Changes the phrase "100 members" to the more correct "100 parcels"<sup>20</sup> in s. 720.303(2)(c)1., F.S.

The bill was then reported favorably with a committee substitute.

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<sup>20</sup> This change was necessary because the use of members could vary if you had several members per parcel or if every parcel only had one member. By using 100 parcels, there is a determined set number that will not vary.