

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill increases the probability that condominium unit owners will have increased flexibility in terminating the condominium for economic waste or impossibility.

B. EFFECT OF PROPOSED CHANGES:

Condominiums are creatures of statute, and are thereby subject to the control and regulation of the legislature, which has broad discretion in its regulatory efforts, especially in fashioning remedies necessary to protect the interests of those persons involved. "The condominium concept must operate within the applicable statutory and constitutional provisions."¹

Basically, a condominium is a parcel of real estate that has been subdivided into contiguous lots. The area above the land can be "subdivided into a number of three-dimensional air spaces, each susceptible of being separately conveyed and encumbered."²

Condominium unit owners operate as a democracy, of necessity more restrictive in the use of condominium property than might be acceptable given traditional forms of property ownership. Thus, a condominium owner "relinquishes some degree of freedom of choice and agrees to subordinate some of his traditional ownership rights when he elects condominium ownership. While a titleholder of a condominium unit has fundamental property rights, he enjoys them coextensively with other members of the condominium project, and thus does not have an exclusive interest in the condominium property."³

A "declarant" is a grantor that establishes or joins in the creation of a declaration of condominium. A "unit" refers to the physical portion of a condominium designated for separate ownership or occupancy. An individual who purchases or owns an apartment in a condominium is generally referred to as a "unit owner."⁴

Current Law Regarding Termination

Chapter 718, F.S., the "Condominium Act," governs condominium associations. Section 718.117, F.S. provides the general rules and procedures relating to the termination of a condominium, and those provisions are set forth below.

Termination

In order to terminate a condominium, the consent of all the unit owners and all the holders of the recorded liens affecting any of the condo parcels is required.⁵

Vacancy on the Board

Unless provided otherwise, a vacancy in the board during a winding up proceeding, resulting from the resignation or expiration of term of any director, can be filled by a majority vote of the unit owners.⁶

¹ 31 CJS § 193, Estates.

² *Id.*

³ *Id.*

⁴ 15a Am. Jur. 2d s. 1, Condo.

⁵ See s. 718.117(1), F.S., unless the declaration provides otherwise.

⁶ Section 718.117(3), F.S.

Natural Disaster

If, after a natural disaster, the identity of the directors or their right to hold office is in doubt, or if they are deceased or unable to act, or if they fail or refuse to act, or their whereabouts cannot be ascertained, any interested person may petition the circuit court to determine the identity of the directors, or, if determined to be in the best interest of the unit owners, to appoint a receiver to wind up the affairs of the association after hearing upon such notice to such persons as the court may direct.

The receiver will be vested with the powers of the board of directors, as provided in the declaration and bylaws and statute and such other powers that are necessary to wind up the affairs of the association. The order appointing the receiver will provide for the payment of a reasonable fee for the services of the receiver from the sources identified in the order, which may include rents, profits, incomes, maintenance fees, or special assessments collected from the condominium property.⁷

Terminated Association

An association that has been terminated continues to exist, however, for the limited purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, to dispose of and convey its property, and to collect and divide its assets"⁸

Distribution of Assets

After determining that all known debts and liabilities of an association in the process of winding up have been paid or provided for, all remaining assets must be distributed.⁹ If the winding up is pursuant to a court proceeding, the distribution may not be made until after any prescribed period ordered by the court for the presentation of claims.¹⁰

Assets held by an association upon a valid condition requiring return which condition has occurred or will occur need to be returned in accordance with the condition.¹¹ The remaining assets are to be distributed in the following manner: (1) if the declaration or bylaws provides the manner of disposition, the assets are to be disposed of in that manner; and (2) if the declaration or bylaws do not provide the manner of disposition, the assets are to be distributed among the unit in the same shares as each owner previously owned in the common elements.¹² All liens must be transferred to the share in the condominium property attributable to the unit originally encumbered by the lien in its same priority

The distribution of the assets can be made by money, property, or securities, and the distribution can be in installments or as a whole. But distribution must be made as soon as reasonably consistent with the beneficial liquidation of the assets.¹³

Effect of the Bill

The bill amends s. 718.117, F.S. regarding the method and process for termination of a condominium. Section 718.117(1), F.S. provides legislative findings that: "condominiums are created as authorize by statute;" "in circumstances that may create economic waste, areas of blight or obsolescence of the condominium property for its intended use, and lower property tax values...it is the public policy of this state to provide by statute a method to preserve the value of the property interests and the rights of

⁷ Section 718.117(4), F.S.

⁸ Section 718.117(9), F.S.

⁹ 10 Fla. Jur. 2d s. 43, Condominiums, Etc., (referencing s. 718.117(5), F.S.).

¹⁰ Section 718.117(5), F.S.

¹¹ Section 718.117(6), F.S.

¹² Section 718.117(6)(a), (b), (7), F.S.

¹³ 10 Fla. Jur. 2d s. 43, Condominiums, Etc. (citing s. 718.117(8), F.S.).

alienation;" and "it is contrary to the public policy of this state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation." This section, further, provides that it will apply to all condominiums in Florida in existence or after the effective date of this act.¹⁴

Termination Condominium

This bill provides, notwithstanding any contrary provision in the declaration, a condominium may be terminated by a plan of termination (hereinafter "plan of termination" or "plan") approved by either the lesser of a majority of the total voting interests or as otherwise provided in the declaration, in the following circumstances: (1) when the total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or (2) when it becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.¹⁵

Condominiums that are Timeshares

Notwithstanding the provisions above, a condominium in which 75% or more of the units are timeshare units may only be terminated by a plan of termination that is approved by 80% of the total voting interests of the association and the holders of 80% of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium (unless the declaration provides for a lower voting percentage).¹⁶

Optional Termination

Except as provided elsewhere in this bill¹⁷ or unless the declaration provides for a lower percentage, a condominium may be terminated by a plan of termination approved by at least 80% of the total voting interests of the condominium.¹⁸

Jurisdiction of Court

If 80% of the total voting interests fail to approve a plan of termination but fewer than 20% of the total voting interests vote to disapprove a plan, the circuit court will have jurisdiction to entertain a petition by the association or by one or more unit owners and approve the plan of termination.¹⁹ This action may be a class action.²⁰

All unit owners and the association must be parties to the action, and the action may be brought against the nonconsenting unit owners. Service of process on unit owners may be by publication, but the plaintiff must furnish each unit owner not personally served with process a copy of the petition and plan of termination, and after entry of judgment, a copy of the final decree of the court, by mail at the owner's last known address.²¹

¹⁴ Section 718.117(1), F.S.

¹⁵ Section 718.117(2)(a), F.S.

¹⁶ Section 718.117(2)(b), F.S.

¹⁷ See ss. 718.117(2) and (4), F.S.

¹⁸ Section 718.117(3), F.S. This portion does not apply to condominiums in which 75% or more of the units are timeshare units.

¹⁹ Section 718.117(4)(a), F.S.

²⁰ *Id.*

²¹ Section 718.117(4)(b), F.S.

Mortgage Lienholders

After the consideration of whether the rights and interests of unit owners are equitably addressed in the plan, the plan of termination may be approved or rejected by the court. The court may modify the plan to provide for an equitable distribution of the interests of unit owners prior to approving the plan.^{22 23}

Associations Powers of Termination

Notwithstanding any contrary provision in the declaration or chapter 718, F.S.,²⁴ approval of a plan by the holder of a recorded mortgage lien affecting a condominium parcel in which fewer than 75% of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien. Additionally, should approval be required and not given and the lienholder objects to the plan of termination, the lienor may object to the plan by following statutory procedures and have the lien assigned to the appropriate property upon sale.

The condominium association will continue in existence following approval of the plan, with all powers it had before. Notwithstanding any contrary provision, after approval of the plan, the board has essentially the same powers and duties currently provided for in s. 718.117(2).²⁵

Natural Disaster

The bill provides a contingency framework, s. 718.117(8), F.S., for the directors of the association in the event of a natural disaster. That framework is essentially identical to the existing one contained in s. 718.117(4), F.S.

Plan of Termination

The plan must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee.²⁶ A copy of the proposed plan must be given to all unit owners in the same manner as for notice of an annual meeting. That notice must be provided at least 14 days prior to the meeting during which the plan is to be voted upon. Or notice must be provided prior to or simultaneously with the distribution of the solicitation seeking execution of the plan or written consent to or joinder in the plan.²⁷ A unit owner may agree to the plan by executing the plan or by consent to or joinder in the plan in the manner of a deed. A plan of termination and the consents or joinders of unit owners and, if required, consents or joinders of mortgagees must be recorded in the public records of each county in which any portion of the condominium is located. The plan is effective only upon recordation or at a later date specified in the plan.²⁸

²² Section 718.117(4)(c), F.S.

²³ Nevertheless, this subsection does not apply to condominiums in which 75% or more of the units are timeshare units, s. 718.117(4)(d), F.S.

²⁴ Section 718.117(6), F.S.

²⁵ Section 718.117(7), F.S. Those powers and duties include the ability to: employ directors, agents, attorneys, and other professionals to liquidate or conclude its affairs; conduct the affairs of the association as necessary for the liquidation or termination; carry out contracts and collect, pay, and settle debts and claims for and against the association; defend suits brought against the association; sue in the name of the association for all sums due or owed to the association or to recover any of its property; perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes; sell at public or private sale or to exchange, convey, or otherwise dispose of assets of the association for an amount deemed to be in the best interests of the association, and to execute bills of sale and deeds of conveyance in the name of the association; collect and receive rents, profits, accounts receivable, income, maintenance fees, special assessments, or insurance proceeds for the association; and contract and do anything in the name of the association which is proper or convenient to terminate the affairs of the association.

²⁶ Section 718.117(9), F.S.

²⁷ *Id.*

²⁸ *Id.*

A plan must specify:²⁹

- The name, address, and powers of the termination trustee;
- A date after which the plan of termination is void if it has not been recorded;
- The interests of the respective unit owners in the association property, common surplus, and other assets of the association, which will be the same as the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided;
- The interests of the respective unit owners in any proceeds from any sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property). If, condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms; and
- Any interests of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction. Unless the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property).³⁰

The plan may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.³¹

In the case of a conditional termination, the plan must specify the conditions for termination. A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded.³²

Allocation of Proceeds of Sale of Condominium Property

Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination.³³ The market values are to be determined by one or more independent appraisers selected by the association or termination trustee.³⁴

The portion of proceeds allocated to the units will be further apportioned among the individual units. The apportionment is deemed fair and reasonable if it is determined by any of the following methods: 1) the respective values of the units based on the fair-market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee; 2) the respective values of the units based on the most recent market value of the units before the termination, as provided in the county property appraiser's records; or 3) the respective

²⁹ Section 718.117(10), F.S.

³⁰ *Id.*

³¹ Section 718.117(11)(a), F.S.

³² Section 718.117(11)(b), F.S.

³³ Section 718.117(12)(a), F.S.

³⁴ *Id.*

interests of the units in the common elements specified in the declaration immediately before the termination.³⁵

The three methods of apportionment listed above do not prohibit any other method of apportioning the proceeds of sale allocated to the units agreed upon in the plan of termination. However, the portion of the proceeds from the common elements will be divided among the units based upon their respective interests in the common elements as provided in the declaration.³⁶

Liens that encumber a unit are transferred to the proceeds of the sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property.³⁷

Termination Trustee

The association will serve as termination trustee unless another person is appointed in the plan of termination. If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. Upon recording or at a later date specified in the plan, title to the condominium property vests in the trustee. Unless prohibited by the plan, the termination trustee will be vested with the powers given to the board.³⁸

If the association does not serve as the termination trustee, the trustee's powers are coextensive with those of the association to the extent not prohibited in the plan or the order of appointment. If the association is not the termination trustee, the association will transfer any association property to the trustee. If the association is dissolved, the trustee will also have the powers necessary to conclude the affairs of the association.³⁹

Title Vested in Termination Trustee

If termination is pursuant to a plan, the unit owners' rights and title as tenants in common in undivided interests in the condominium property vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property, but the contract is not binding on the unit owners until the plan is approved.⁴⁰

Notice

Within 30 days after a plan has been recorded, the termination trustee must deliver by certified mail, return receipt requested, notice to all unit owners, lienors of the condominium property, and lienors of all units at their last known addresses that a plan has been recorded. The notice must include the book and page number of the public records in which the plan was recorded, notice that a copy of the plan must be furnished upon written request, and notice that the unit owner or lienor has the right to contest the fairness of the plan.⁴¹

³⁵ Section 718.117(12)(b), F.S.

³⁶ Section 718.117(12)(c), F.S.

³⁷ Section 718.117(12)(d), F.S.

³⁸ Section 718.117(13), F.S.

³⁹ *Id.*

⁴⁰ Section 718.117(14), F.S.

⁴¹ Section 718.117(15)(a), F.S.

Within 90 days after the effective date of the plan, the trustee must provide to the division⁴² a certified copy of the recorded plan, the date the plan was recorded, and the county, book, and page number of the public records in which the plan was recorded.⁴³

Right to Contest

A unit owner or lienor may contest a plan by initiating a summary procedure, pursuant to s. 51.011, F.S., within 90 days after the date the plan is recorded. A unit owner or lienor who fails to contest the plan within that period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property.⁴⁴

In an action contesting a plan, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. However, the apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in s. 718.117(12) (see the discussion above regarding the allocation of property).⁴⁵

The court must adjudge the rights and interests of the parties and order the plan to be implemented if it is fair and reasonable or the court may modify and approve the plan of termination based on findings during the court proceedings, but the court must void a plan that is determined not to be fair and reasonable. In such an action, the prevailing party may recover reasonable attorney's fees and costs.⁴⁶

Distribution

Following termination, the condominium property, association property, common surplus, and other assets of the association are held by the termination trustee, as trustee for unit owners and holders of liens on the units, in their order of priority.⁴⁷

Not less than 30 days prior to the first distribution, the termination trustee must deliver by certified mail, return receipt requested, a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit at their last known addresses stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount.⁴⁸ The deadline must be at least 15 days after the date the notice was mailed.⁴⁹

If a unit owner or lienor files a timely objection with the termination trustee, the trustee does not have to distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim.⁵⁰ In the alternative, the trustee may interplead the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs and court costs.⁵¹

⁴² Division refers to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation. Section 718.103(17), F.S.

⁴³ Section 718.117(15)(b), F.S.

⁴⁴ Section 718.117(16), F.S.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Section 718.117(17)(a), F.S.

⁴⁸ Section 718.117(17)(b), F.S.

⁴⁹ Section 718.117(17)(b), F.S.; the notice may be sent with or after the notice required by s. 718.117(15).

⁵⁰ Section 718.117(17)(b), F.S.

⁵¹ *Id.*

The proceeds of any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets must be distributed in the following priority:⁵²

1. To pay the costs of implementing the plan, including demolition, removal, and disposal fees, termination trustee's fees and costs, accounting fees and costs, and attorney's fees and costs;
2. To lienholders of liens recorded prior to the recording of the declaration;
3. To lienholders of liens of the association which have been consented to;⁵³
4. To creditors of the association, as their interests appear;
5. To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor;
6. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor;
7. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor.

After determining that all known debts and liabilities of an association in the process of termination have been paid or adequately provided for, the termination trustee will distribute the remaining assets pursuant to the plan.⁵⁴ If the termination is by court proceeding, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed.⁵⁵

Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, will be returned, transferred, or conveyed in accordance with the condition. The remaining association assets shall be distributed pursuant to the priority order above.⁵⁶

Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets.⁵⁷

Association Status

The termination of a condominium does not change the corporate status of the association that operated the condominium property. The association continues to exist to conclude its affairs, prosecute and defend actions by or against it, collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not to act except as necessary to conclude its affairs.⁵⁸

⁵² Section 718.117(17)(c), F.S.

⁵³ Section 718.121(1), F.S., requires the unanimous consent of the unit owners before a lien is valid against the condominium as a whole.

⁵⁴ Section 718.117(17)(d), F.S.

⁵⁵ *Id.*

⁵⁶ Section 718.117(17)(e), F.S.

⁵⁷ Section 718.117(17)(f), F.S.

⁵⁸ Section 718.117(18), F.S., this section is essentially s. 718.117(9), F.S.

Creation of Another Condominium

The termination of a condominium does not bar the creation, by the termination trustee, of another condominium affecting any portion of the same property.⁵⁹

Exclusion

This section does not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums under s. 718.110(7), F.S.⁶⁰

C. SECTION DIRECTORY:

Section 1: Amends s. 718.117, F.S., to provide for termination of a condominium.

Section 2: Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill provides increased opportunity for condominium owners who are a part of an uneconomic condominium to terminate that condominium; thereby allowing for greater flexibility in the investment or reinvestment of capital.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

⁵⁹ Section 718.117(19), F.S., is essentially s. 718.117(10), F.S.

⁶⁰ Section 718.117(20), F.S., is essentially s. 718.117(11), F.S.

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:

The bill with CS adopted in Business Regulation Committee addressed the concerns noted below.

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."⁶¹ "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."^{62 63} While the right to contract and use one's property as an individual sees fit is a "fundamental right" guaranteed by both the United States and Florida constitutions, the "degree of such guarantees must be determined in the light of social and economic conditions which prevail at a given time."⁶⁴

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.⁶⁵ 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?

[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.

⁶¹ 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"

⁶² 10a Fla. Jur. s. 414, Constitutional Law.

⁶³ 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.

⁶⁴ *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 884 (Fla. 1974).

⁶⁵ 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.

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).

The language of the proposed s. 718.117, F.S., specifically the requirement that "this section shall apply to all condominiums in this state in existence on or after the effective date of this act,"⁶⁶ would seem to qualify under the Florida Supreme Court's definition of impairment of contract.⁶⁷ Therefore, the critical inquiry would seem to be the balancing test performed by the courts to determine the permissibility of the impairment. While not an exhaustive list, this bill would seem to have at least two significant factors which would mitigate in its favor. First, all condominiums are created by statute and subject to the control of the legislature.⁶⁸ Second, the bill makes a legislative finding that the public policy of this state is driving the changes in this bill.⁶⁹

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 25, 2006, the Civil Justice Committee adopted two amendments which modified the bill in the following manner:

- To require that the plan of termination specify any interest of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction at the time of termination.
- To provide that when the portion of proceeds allocated to the units will be further apportioned among the individual units, that apportionment is deemed to be fair and reasonable if it is determined by the unit owners who are approving the plan of termination provided that is by one of three delineated methods.

⁶⁶ Section 718.117(1), F.S.

⁶⁷ As the Fourth District Court of Appeal noted it is only the retroactive application of a statute "which gives rise to questions of unreasonable impairment of contract obligations and remedies." *Cenville Investors, Inc. v. Condominium Owners Org. of Century Village East, Inc.*, 556 So. 2d 1197, 1200 (Fla. 4th DCA 1990).

⁶⁸ Section 718.104, F.S. provides "[e]very condominium created in this state shall be created pursuant to this chapter." See *Winkelman v. Toll*, 661 So. 2d 102, 105 (Fla. 4th DCA 1995)(stating "[a] condominium is strictly a create of statute.").

⁶⁹ The Supreme Court of Florida referenced *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) which cited to *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) for the proposition that "laws intended to regulate existing contractual relationships must serve a legitimate public purpose . . . Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Pomponio*, 378 So. 2d at 778.

The bill was then reported favorably with a committee substitute.

On February 21, 2006, the Business Regulation Committee adopted three amendments and voted the bill favorably with CS. The changes include the following:

- additional intent language was adopted to be responsive to the balancing test under the Supreme Court's definition of impairment of contract;
- clarified the rights of lienholders by specifying that a lienholder may object to the plan of termination by following statutory procedures and have the lien assigned to the appropriate property upon sale; and
- expanded authority for the court to modify and approve the plan of termination based on findings during court proceedings.