HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 CS Homeowners' Associations
SPONSOR(S): Kottkamp; Baxley; Davis, D.; Ross; Zapata
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N, w/CS	Blalock	Bond
2) Judiciary Committee			
3) Economic Development, Trade & Banking Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. This bill revises the powers and duties of a homeowners' association by:

- Requiring that homeowners' associations be incorporated in the state of Florida;
- Limiting an association to only those powers and duties of the association specifically established in the governing documents;
- Decreasing the amount in controversy limit from $100,000 to $50,000 for when an association must get member approval to bring an action against any party in the name of the association;
- Providing that an association cannot restrict a member's freedom of association and may not limit the number of guests a member can have in a 24-hour period;
- Providing that officers and directors can be held personally liable for actions designed to harass a member; and
- Providing that a member's plans for building on his or her property cannot be denied unless they violate a specific provision of the declaration of covenants.

This bill increases the regulation of homeowners' associations and establishes conformity in the laws regulating homeowners' associations and condominium associations by:

- Revising what must be included in the associations' annual budget;
- Revising the financial reporting requirements; and
- Providing for guarantees of common expenses when they are not included in the declaration.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill increases regulation of homeowners' associations.

Ensure lower taxes -- This bill appears to require currently unincorporated homeowner's associations to pay the state for initial registration and for annual registration fees.

B. EFFECT OF PROPOSED CHANGES:

Background

A homeowners' association is an entity responsible for the operation of a subdivision in which voting membership is made up of parcel ownership and in which membership is mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.[1] Homeowners' associations are regulated under ch. 720, F.S.

The purposes of the statutory provisions relating to homeowners' associations are to give statutory recognition to corporations that operate residential communities in Florida, to provide procedures for operating a homeowners' association, and to protect the rights of association members without unduly impairing the ability of the association to perform its functions.[2]

Effect of Bill

Section 720.303, F.S., regulates several aspects of a homeowners' association including the powers and duties of the homeowners' association, the homeowners' association budget, and financial reporting requirements.

Incorporation of Homeowners' Associations; Multiple Communities

Homeowner's associations were first regulated by statute in 1992 when laws regarding homeowner's associations were placed in ch. 617, F.S., which chapter regulates not for profit corporations.[3] By placing the regulation in a chapter that regulates corporations, the implication was that a homeowner's association must be incorporated; however, this was not specifically required. In 1995, the regulation was amended to specifically require that an association be incorporated, and that the initial governing documents of the association be recorded in the public records.[4] In 2000, the regulation of homeowner's associations was moved out of the chapter on not for profit corporations, and into its own chapter, ch. 720, F.S.

Currently, s. 720.303(1), F.S., provides that a homeowner's association must be operated by an association that is a Florida corporation, and provide that after October 1, 1995, the association must be incorporated and the initial governing documents of an association must be recorded in the official records of the county in which the community is located.[5] "Governing documents" means the recorded declaration of covenants for a community and all duly adopted and recorded amendments, supplements, and recorded exhibits,[6] the articles of incorporation and bylaws of the homeowners'

[1] Section 720.301(9), F.S.
[2] Section 720.302(1), F.S.
[3] See sections 33 through 39 of ch. 92-49, L.O.F.
[4] See section 54 of ch. 95-274, L.O.F.
[5] Section 720.303(1), F.S.
[6] Section 720.303(6)(a), F.S.

association and any adopted amendments.[7] It appears that associations created before October 1, 1995 are grandfathered in and thus are not required to be incorporated in Florida and are not required to record their governing documents in the public records. Section 720.303(1), F.S., also provides that an association may operate more than one community.

This bill amends s. 720.303(1), F.S., by removing the language "after October 1, 1995 an association must be incorporated". This change appears to require any association created before October 1, 1995, and not required to be incorporated in Florida, to now become incorporated in Florida. This bill also requires all homeowner's associations to record their governing documents in the public records. This change should only affect those associations formed prior to October 1, 1995, and that have not already recorded their governing documents.

This bill also removes the specific provision granting homeowners' associations the authority to operate more than one community. It is unclear whether removing the language specifically allowing operation of more than one community would eliminate the ability of a homeowners' association from being able to operate more than one community. There are no provisions under current law that specifically prohibit a homeowners' association from operating more than one community. However, this change could have a significant impact on homeowners' associations if a court ruled that the legislative intent of this change was to disallow a homeowners' association from operating more than one community.

Expressed Powers and Duties of a Homeowners' Association

Section 720.303(1), F.S., provides that the powers and duties of an association include the powers and duties provided in ch. 720, F.S., except as expressly limited by ch. 720, F.S., and include the powers and duties included in the governing documents.[8]

This bill amends s. 720.303(1), F.S., by removing the provision, "except as expressly limited or restricted in ch. 720, F.S.", and adds that the powers and duties of an association only include those "specifically" set forth in the governing documents. This change limits the powers and duties of an association to only those powers and duties provided in ch. 720, F.S. and those expressly provided in the governing documents.

This bill also amends s. 720.303(1), F.S., to provide that the officers and directors of the association may not take any action that is inconsistent with the declaration of covenants. This provision in the bill also limits the power of the association by not allowing the officers and directors of the association to take any action that is not expressly granted in the declaration of covenants. It is unclear how this provision will be applied where the declaration of covenants conflict with applicable federal, state and local laws.

Powers and Duties after Control of the Association is Obtained by Members

Section 720.303(1), F.S., provides that after control of the association is obtained by members other than the developer (commonly known as "turnover"), the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning matters of common interest to the members.[9]

This bill amends s. 720.303(1), F.S., to provide that an association "may institute, maintain, or settle on appeal action in its name on behalf of the members . . . ." One reading of this change is that the phrase "on appeal" modifies all of the previous words, which would mean that an association would only be able to prosecute or defend lawsuits in the appellate stage, and not in the trial court. However, homeowners' associations that are incorporated are also governed by ch. 617, F.S., and s. 617.0302,

[7] Section 720.303(6)(b), F.S.
[8] Section 720.303(1), F.S.
[9] Section 720.303(1), F.S.

F.S., grants powers to sue and be sued and appear and defend in all actions and proceedings in its corporate name to the same extent as a natural person. Therefore, incorporated homeowners' associations would not be limited in bringing or defending any causes of action due to changes made in this bill to s. 720.303(1), F.S.

Authority to Commence Litigation

Section 720.303(1), F.S., provides that before commencing litigation against any party in the name of the association involving amounts in controversy in excess of $100,000, the association must obtain the approval of a majority of the voting interests at a meeting at which a quorum has been attained.

This bill decreases the applicable amount in controversy from $100,000 to $50,000.

Limiting an Individual Member's Statutory and Common Law Remedies

Section 720.303(1), F.S., provides that "this subsection does not limit any statutory or common law right of any individual member or class of members from bringing any action without the participation by the association".

This bill removes this entire provision from s. 720.303(1), F.S.

Entering into Contracts

Under current law, one implied power of a homeowner's association is the power to contract for the benefit of the association and its members.

This bill also adds language to s. 720.303(1), F.S., which specifically grants the association the power to enter into contracts for the benefit of the members of the association such as contracts for maintaining, repairing, or improving the common areas of the association.

Classes of Membership

Section 720.303(1), F.S., provides that a homeowner's association may have more than one class of members, and may issue membership certificates.

This bill deletes the provisions regarding classes of members and the issuance of membership certificates. These provisions are already provided for in other statutes and this bill is removing the redundant language. As stated above, incorporated homeowners' associations are governed by ch 617, F.S., and s. 617.0601, F.S., provides that a corporation may have one or more classes of members or may have no members, and a corporation may issue certificates of membership. However, if the homeowners' association is not incorporated in Florida and if this provision is interpreted to prevent classes of memberships, then this change could have the effect of prohibiting continuing control of an association by a developer during the construction and sales phase. Also, it is unclear how this might affect a homeowners' association that has different classes of members due to the mixed nature of the association, such as where condominium units, commercial units, and townhouses and single family homes are all part of a homeowners' association that provides some common benefit to all of the members, each of whom may be in a different class because of the different levels of service provided.

Prohibited Legal Defense

This bill creates s. 720.303(1)(g), F.S., to provide that "in any action between a member and the association, it shall not be a defense by the association that the association's actions, although inconsistent with the declaration of covenants, have been uniformly applied".

Prohibiting Restrictions on Number of Guests and Freedom of Association

This bill creates s. 720.303(1)(h), F.S., to provide that an association cannot "restrict a member's freedom of association or limit the number of guests a member can have over a 24-hour period".

Enforcing Deed Restrictions

Section 720.303(1), F.S., provides that "an association of 15 or fewer parcel owners" may enforce only the requirements of those deed restrictions established prior to the purchase of each parcel upon an affected parcel owner or owners. As more than one person may own a real estate parcel, the applicability of this provision may vary.

This bill amends s. 720.303(1), F.S., to replace the phrase "parcel owners" with the more accurate "parcels".

Personal Liability of Officers and Directors

This bill creates s. 720.303(1)(j), F.S., to create a cause of action against the officers and directors of the association. The bill provides that the officers and directors may be personally liable to a member if their actions "demonstrate a pattern of behavior designed harass a member of the association." There is no definition of harassment or pattern of harassment provided.

Limitations on Use of a Member's Property

This bill creates s. 720.303(1)(k), F.S., to provide that any action of the association that is inconsistent with the declaration of covenants and which limits the use of a member's property entitles the member to compensation for the fair market value of the property being restricted. This bill appears to allow property owners to bring a form of an inverse condemnation claim against the association for limiting their use of property in a way that is inconsistent with the declaration of covenants.[10]

Front Setback Requirements

This bill creates s. 720.303(1)(l), F.S., to provide that in any association with more than 50 but less than 75 parcels, for the purpose of setting setbacks, any parcel of 1 acre or less must be deemed to have one front for the purpose of determining the required front setback, if any. This bill also provides that the association can enforce only setbacks specifically provided for in the declaration of covenants, and county or municipal setback provisions will apply when the covenants are silent. It is unclear whether the second clause regarding enforcement of setbacks applies to all associations or just those of between 50 and 75 parcels.

Denial of a Member's Building Plans

The covenants and restrictions of a homeowner's association typically require prior approval of the association before commencing construction of a home on the parcel.

This bill creates s. 720.303(1)(m), F.S., to provide that when a member seeks to build on his or her property, the association cannot deny or refuse to approve the member's plans for building unless the plan under consideration violates a specific provision of the declaration of covenants.

[10] Inverse condemnation is court remedy for a private land owner whose interest or ownership in land has been interfered with or taken away outright by a governmental body.

Homeowners' Association Budgets

Section 720.303(6), F.S., provides that an association must prepare an annual budget. This bill amends s. 720.303(6), F.S., to require that the annual budget provide for the annual operating expenses.

This bill also amends 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. The amount to be reserved must be computed by using a formula estimating the remaining useful life and replacement cost or deferred maintenance expense of each reserve item. This subsection does not apply to a budget where a majority of the members of an association has 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. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves.

Homeowners' Association Financial Reporting

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.

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.

Transition of Homeowners' Association Control

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 a majority of the board of directors, the developer must deliver various documents to the board.

This bill amends s. 720.307, F.S., to provide additional documents 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 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 the homeowners' associations and the condominium associations.

Guarantees of Common Expenses

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.[11]

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:

- 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.

C. SECTION DIRECTORY:

Section 1 amends s. 720.303(1), F.S., to revise provisions related to the powers and duties of an association. This section amends s. 720.303(6), F.S., to require the annual budget of an association to set out the annual operating expenses and include reserve accounts for capital expenditures and deferred maintenance. This section amends 720.303(7), F.S., to revise the time period for when an association must prepare and complete a financial report for the preceding fiscal year.

Section 2 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 3 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 4 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[11] Section 718.116, F.S.

1. Revenues:

   This bill may have an unknown positive nonrecurring and recurring fiscal impact on state revenue. This bill appears to require certain associations to be incorporated, although there is no known means for determining the number of such associations.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill appears to require associations created before October 1, 1995 to be incorporated in Florida, and to require all associations to record their governing documents in the public records (associations formed after October 1, 1995 should have already recorded their governing documents). The following costs are associated with these requirements:

Initial filing of a corporation:	$70.00[12]
Legal fees (estimated)	$500.00[13]
Annual filing of a corporation:	$61.25[14]
Estimated cost of recording:	$256.50[15]

This bill requires that an accountant audit the financial records at the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association. It is unclear in the bill whether the developer or the members of the association are responsible for the cost of the audit. The cost of such an audit cannot be estimated as it would depend on the amount of time and effort required.

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.

[12] Sections 617.0122(1) and 617.0122(5), F.S.
[13] Legal fees are not required. The Secretary of State provides forms for use by the public. See http://www.dos.state.fl.us/doc/pdf/cr2e006.pdf
[14] Section 617.0122(17), F.S.
[15] Assuming 30 pages at $10.00 for first page and $8.50 each for subsequent pages. See s. 28.24(12), F.S.

2. Other:

This bill requires that homeowners' associations, which contain between 50 and 75 parcels and are 1 acre or less, must be deemed to have one front for the purpose of determining setbacks. It is possible that this provision may be challenged as a substantive due process violation. Substantive due process is a doctrine that "requires legislation to be fair and reasonable in content as well as application."[16] Substantive due process guarantees that laws will be reasonable and arbitrary or irrational. Because the provision is only being applied to such a narrow group of homeowners' associations, this provision could be held to be arbitrary and capricious, and not rationally related to an important government interest.

It is also possible that certain provisions in the bill may be challenged as violating the Contract Clause of the Florida Constitution. 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."[17] "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."[18] [19]

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.[20] 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

[16] Blacks Law Dictionary, 1429 (8th ed. 2004)
[17] 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 . . . . "
[18] 10a Fla. Jur. s. 414, Constitutional Law.
[19] 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.
[20] 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.

> 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 may perhaps impair existing contract rights between parcel owners and a homeowners' association, in that the changes required by this bill apply to existing associations.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill provides that the powers and duties of an association only include those set forth in ch. 720, F.S. and those specifically set forth in the governing documents. By only granting powers and duties expressly provided in the governing documents this bill appears to require the drafters of governing documents to try to provide for each circumstance that might arise where the association might need to act. If some circumstance arose, where an association needed to act, but the power to act or the duty to act was not specifically provided for and set forth in ch. 720, F.S., then the association could only act if the association is able to convince the membership to amend the covenants.

This bill entitles owners to be compensated fair market value when the association limits the use of their property by enforcing a restriction not provided for in the declaration of covenants. An issue that could possible arise pertaining to this provision is whether an association will be required to compensate a member whose use of property is temporarily limited by an association action. In addition, it is unclear under this bill what kind of association actions would constitute "limiting" the use of a member's property. Furthermore, it is unclear how this provision is applicable under current law. Under current law, a homeowners' association cannot limit the use of a parcel owner's property if the association is not granted this power in the declaration of covenants.

This bill requires that homeowners' associations set up reserve accounts. However, like all other regulation of homeowner's associations, there is currently no government entity to enforce or oversee this requirement. It is unclear whether a property owner who has moved out of the homeowners association would be liable for inadequately funding past reserves if an association that has not implemented this provision is later forced to provide funds for reserve accounts.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 8, 2006, the Civil Justice Committee adopted one amendment to this bill. The amendment revises s. 720.308, F.S., by adding titles and rearranging the paragraphs and sub-paragraphs in order to clarify the bill. The bill was then reported favorably with a committee substitute.