

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 CS Community Associations
SPONSOR(S): Kottkamp and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>5 Y, 0 N, w/CS</u>	<u>Blalock</u>	<u>Bond</u>
2) <u>Judiciary Committee</u>	<u>12 Y, 0 N, w/CS</u>	<u>Thomas</u>	<u>Hogge</u>
3) <u>Economic Development, Trade & Banking Committee</u>	<u>10 Y, 0 N, w/CS</u>	<u>Olmedillo</u>	<u>Carlson</u>
4) <u>Justice Council</u>	<u>11 Y, 0 N</u>	<u>Blalock</u>	<u>De La Paz</u>
5) _____	_____	_____	_____

SUMMARY ANALYSIS

A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located. A declaration of condominium may be amended as provided in the declaration.

This bill provides that in certain situations condominium associations will not be required to receive joinder or consent from mortgagees before amending their governing documents.

This bill revises condominium association powers and provides that leaseholds and other possessory and use interests can only be acquired by means provided in the declaration of condominium or by approval of 3/4 of the voting interest instead of 2/3 of the voting interest provided in current law.

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 a mandatory condition of parcel ownership, and which is authorized to impose assessments.

This bill increases the regulation of homeowners' associations and establishes conformity in the laws regulating homeowners' associations and condominium associations by: revising the requirements for the inspection and copying of records; revising what must be included in the associations' annual budget and providing for reserve accounts; revising the financial reporting requirements and extending the time limit for reporting from 60 days to 90 days after the end of the fiscal year; and providing for guarantees of common expenses when they are not included in the declaration.

This bill places limits on a homeowners association's ability to enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether the policy is uniformly applied or not.

This bill also eliminates mediation of disputes between homeowners' associations and members from the jurisdiction of the Department of Business of Professional Regulation. The mandatory mediation of such disputes will have to be conducted by private mediators.

The bill appears to have a minimal negative fiscal impact on state revenues. This bill does not appear to have a fiscal impact on local governments.

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

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provides limited government -- This bill increases regulation of homeowners' associations. 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 the power of parcel owners in making improvements under architectural control covenants.

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".¹ A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.² 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.³

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.⁴ 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.⁵

A homeowners' association is an entity responsible for the operation of a community or mobile home 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.⁶ 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.⁷

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

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

⁴ Section 718.104(5), F.S.

⁵ Section 718.110(1)(a), F.S.

⁶ Section 720.301(9), F.S.

⁷ Section 720.302(1), F.S.

Homeowners' associations were first regulated by statute in 1992 when laws regarding homeowners' associations were placed in ch. 617, F.S., which chapter regulates not for profit corporations.⁸ By placing the regulation in a chapter that regulates corporations, the implication was that a homeowners' 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.⁹ In 2000, the regulation of homeowners' associations was moved out of the chapter on not for profit corporations, and into its own chapter, ch. 720, F.S.

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

Currently, s. 720.303(1), F.S., provides that a homeowners' 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.¹⁰ "Governing documents" means the recorded declaration of covenants for a community and all duly adopted and recorded amendments, supplements, and recorded exhibits,¹¹ the articles of incorporation and bylaws of the homeowners' association and any adopted amendments.¹² 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.

Effect of Bill

Covenant Revitalization

Proposed Changes

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

Allowing Public Access to Beaches Adjacent to Condominiums

Proposed Changes

This bill creates s. 718.106(5), F.S., to restrict local governments from establishing a local ordinance that forbids a unit owner, an association's guests, licensees, members or invitees to use or access their units or common elements for the purpose of accessing a public beach or private beach adjacent to the condominium.

Amendments to Condominium Documents

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

⁸ See sections 33 through 39 of ch. 92-49, L.O.F.

⁹ See section 54 of ch. 95-274, L.O.F.

¹⁰ Section 720.303(1), F.S.

¹¹ Section 720.303(6)(a), F.S.

¹² Section 720.303(6)(b), F.S.

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.¹³

Proposed Changes

The bill provides that the state has a compelling interest in enabling the members of a condominium association to approve amendments to the documents through legal means as follows:

- As to any mortgage recorded only on or after October 1, 2006, any provision in the condominium documents that requires the consent or joinder of some or all mortgagees of any portion of the condominium property, including mortgagees of units, to amend any such documents or for any other matter shall be enforceable only as to the following matters:
 - Amendments regarding the configuration or size of any unit in any material fashion, a material alteration or modification of the appurtenances to the unit or change in the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium;
 - Amendments to the declaration permitting the creation of timeshare estates in any unit; and
 - Amendments that materially affect the rights and interests of the mortgagees;
- As to mortgages recorded before October 1, 2006, provisions in the governing documents requiring mortgagee consent are enforceable. In securing required consent or joinder, the association shall be entitled to rely on the recorded mortgage, assignment or modification of record. In addition, the association shall, in writing, request each unit owner/mortgagor the name and address of the person to whom mortgage payments are currently being made, and send a notice to such address if it differs from the one listed in the public record.
- The association shall send all required notices under this paragraph to all available addresses and it shall be deemed to have complied with this requirement if it makes a request of the unit owners/mortgagors in writing.
- The association shall send all required notices by a method that establishes proof of delivery and any mortgagee who fails to respond within 60 days after the date of mailing shall be deemed to have consented to the amendment.
- Any amendment adopted without the required consent or joinder and without the required notice and opportunity to consent, shall be voidable within 5 years from discovery of an amendment that materially affects the rights and interest of the mortgagee, or within 5 years from the time of recordation of such amendment. This provision of the bill applies to all mortgages regardless of its date of recordation.

Retrofitting Common Areas of Condominiums with Fire Sprinkler Systems

Current Law

In 2003 the Legislature passed SB 592 providing that after 2014 the local government authority could require condominiums to complete the retrofitting of its common areas with a fire sprinkler system.

Proposed Changes

This bill extends the date from which a local authority can require a condominium to complete retrofitting of the common areas with fire sprinkler systems to 2025.

¹³ Section 718.110(11), F.S.

Condominium Association's Powers

Current Law

Section 718.114, F.S., provides for the powers of a condominium association. Among other powers, an association has the authority to enter into agreements and acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. All leaseholds, memberships, and other possessory or use interests existing or created at the time the declaration was recorded must be stated and fully described in the declaration. Following the recording of the declaration, the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possessory or use interests except as authorized by the declaration. If the declaration does not provide this authority, then the declaration can be amended if the amendment is approved by the owners of not less than 2/3 of the units¹⁴.

Proposed Changes

This bill defines that a material alteration or substantial addition to the association's real property includes any agreements acquiring leaseholds, memberships, or other possessory or use interests entered into 12 months following the recording of the declaration.

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.

Equity Facilities Club

The bill creates a definition of "equity facilities club" applicable to ch. 719 (Cooperatives), to mean:

A club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or any other accommodation designed for overnight occupancy for one or more individuals.

The bill also extends current limitations related to zoning and building laws, ordinances and regulations concerning cooperatives, to include equity facilities club form of ownership.

¹⁴ Section 718.110(1)(a), F.S.

Scope of Ch. 720, F.S., Pertaining to 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.

Homeowner's 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.¹⁵

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.¹⁶

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

¹⁵ Section 720.303(2)(c)1, F.S.

¹⁶ Section 720.303(2)(c)2, F.S.

decisions with respect to a specific parcel of residential property owned by a member of the community.¹⁷

Proposed Changes

The bill specifies that the provisions of the subsection related to condominium board meetings shall also apply to the meetings of any committee or other similar body when a final decision will be made regarding the expenditure 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.

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.

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.¹⁸

Proposed Changes

The bill provides that an association is not required to provide prospective purchasers or lienholders any information related to the residential subdivision or the association, unless such information is required by chapter 720. Moreover, the bill authorizes the association to charge a reasonable fee, not to exceed \$150 plus reasonable cost of copies and attorney's fees associated with the response, to the prospective purchaser, lienholder, parcel owner or member for providing responses to requests for information, other than those required by law.

Homeowners' Association Budgets

Current Law

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

¹⁷ Section 720.303(2)(c)3, F.S.

¹⁸ Section 720.303(1), (2), (3), (4), F.S.

Proposed Change

This bill amends s. 720.303(6), F.S., to require that:

- The annual budget provide for the annual operating expenses and the budget must set out all fees or charges paid for by the association.
- The annual budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the association's governing documents do not limit increases in assessments.
- If the budget of the association does not provide for reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in special assessments if reserves are not provided, each financial report for the preceding fiscal year must contain a statement in conspicuous type as provided by the bill.
- An association is deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. Once established, the reserve accounts must be funded, maintained or waived.
- The amount to be reserved must be computed by using a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item.
- Once a reserve account or reserve accounts are established, the membership of the association may provide for no reserves or less reserves.
- After the turnover, a developer may vote its voting interest to waive or reduce the funding of reserves.
- Reserve funds and any interest shall remain in the reserve account, and may be used only for authorized reserve expenditures.
- Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association may not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all non-developer voting interests.

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.

Architectural Control Covenants; Parcel Owner Improvements; Rights and Privileges

Proposed Changes

This bill creates s. 720.3035, F.S., to provide that:

- An association may review and approve plans and specifications for the location, size, type or appearance of any structure, or enforce such standards, only to the extent as specifically stated or reasonably inferred in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- An association may only restrict the right of a parcel owner to select from options for the use of material, the size or design of the structure or improvement, or the location of the structure or improvement on the parcel, as provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- Unless specifically stated in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel may be deemed to have only one front for purposes of determining the required front setback. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants does not provide for specific setback lines, the applicable county or municipal setback lines shall apply.
- Each parcel owner is entitled to the rights and privileges provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably impaired by the association.
- An association may not enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether the policy is uniformly applied or not.

Remedies at law or in equity

Current Law

Section 720.305, F.S., provides that the association or member may file an action at law and/or in equity to redress the alleged failure or refusal to comply with ch. 720, the governing documents of the community and the rules of the association. In addition, the law provides that the prevailing party is entitled to attorney's fees and costs.

Proposed Changes

This bill provides that in an action between a member and the association, a court may order an association to reimburse a member for his or her share of assessments the association levied to fund its expenses of the litigation.

Amendments that Materially and Adversely Alter the Proportionate Voting Interest of an Association

Current Law

Section 720.306, F.S., provides that generally, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association.

Proposed Changes

This bill specifies that a merger or consolidation of one or more associations under a plan or merger or consolidation under chapter 607 or chapter 617 shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

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

Proposed Changes

This bill amends s. 720.307, F.S., to include additional documents 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.

The provisions added by this section of the bill apply only to associations incorporated after December 31, 2006.

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.¹⁹

Proposed Changes

This bill amends s. 720.308, F.S., to provide for the guarantee of assessments 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;

¹⁹ Section 718.116, F.S.

- 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 paid when the revenue collected by the association is not sufficient to provide payment for all assessments; 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 assessments. If expenses attributable to non-assessment revenues exceed non-assessment revenues, then the guarantor must only fund the excess expenses.

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).

Proposed Changes

The bill deletes the mandatory mediation requirement through the Department of Business and Professional Regulation (DBPR) and it provides that DBPR is no longer responsible for certification programs for mediators or education programs for homeowner's associations.

The bill includes pre-suit mediation, rather than a petition for mediation, as a form of dispute resolution authorized under chapter 720 for certain disputes and it provides for a number of required procedures and forms. However, it authorizes a party to file a motion for temporary injunctive relief with the court prior to complying with presuit mediation requirements; thereafter, the court shall require that the parties attend in mediation. The bill removes the requirement that the mediator be certified by DBPR and states that a certified mediator or arbitrator is one that has been certified as a circuit court civil mediator or arbitrator respectively.

The bill requires that an aggrieved party serve on the responding party, by certified mail, return receipt requested, a written offer (Statutory Offer to Participate in Presuit Mediation) to participate in presuit mediation substantially similar to the form the bill provides.

The Statutory Offer to Participate in Presuit Mediation form includes a detailed description of the required procedures and rules for presuit mediation and provides the responding party an opportunity to agree or waive mediation within 20 days from the date of mailing.

The bill also provides for events and actions which will result in an impasse.

The bill provides that in an arbitration or litigation subsequent to a presuit mediation to resolve unsettled issues or enforce a mediation settlement, a prevailing party may recover attorney's fees incurred in the presuit mediation process.

C. SECTION DIRECTORY:

Section 1 amends s. 712.11, F.S., relating to homeowners' associations' covenant revitalization.

Section 2 amends s. 718.106, F.S., relating to condominium parcels, appurtenances, possession and enjoyment.

Section 3 amends s. 718.110, F.S., relating to amendments to declarations.

Section 4 amends s. 718.112, F.S., relating to a condominium's bylaws.

Section 5 amends s. 718.114, F.S., relating to a condominium association's powers.

Section 6 amends s. 718.404, F.S., relating to mixed-used condominiums.

Section 7 amends s. 719.103, F.S., creating a definition for equity facilities club.

Section 8 amends s. 719.507, F.S., relating to zoning and buildings laws, ordinances, and regulations in regards to cooperatives.

Section 9 amends s. 720.302, F.S., relating to the purpose, scope and applicability of ch. 720.

Section 10 amends s. 720.303, F.S., relating to association powers and duties.

Section 11 repeals subsection (2) of s. 720.303, F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, relating to a homeowner's association's board meetings.

Section 12 creates s. 720.3035, F.S., relating to architectural control covenants and parcel owner improvements.

Section 13 amends s. 720.305, F.S., relating to available remedies.

Section 14 amends s. 720.306, F.S., relating to amendments and quorum.

Section 15 amends s. 720.307, F.S., relating to the transition of association control.

Section 16 amends s. 720.308, F.S., relating to assessments and charges by the association.

Section 17 amends s. 720.311, F.S. relating to dispute resolution.

Section 18 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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.²⁰

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. Expenditure:

DBPR 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

²⁰ The fiscal impact on state government was provided by Matilde Phillips of the Department of Business and Professional Regulation on April 3, 2006.

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:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill requires that a certified public 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.

This bill may allow increased costs to purchasers or sellers of homes 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.

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:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

This bill may implicate the Contract Clause of the Florida Constitution, since some of the changes in this bill apply to existing associations. 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."²¹

"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."²² The Supreme Court of Florida held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.²³ The Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable.²⁴ 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."²⁵

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:

This bill requires that a certified public 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.

²¹ 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"

²² 10a Fla. Jur. s. 414, Constitutional Law. 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.

²³ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979). 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.

²⁴ *Pomponio*, 378 So. 2d at 780.

²⁵ *Id.*

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

CIVIL JUSTICE COMMITTEE

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.

JUDICIARY COMMITTEE

On March 22, 2006, the Judiciary Committee adopted one amendment to this bill. The amendment differs from the bill by creating a new section of Florida Statutes to specifically address architectural control covenants and parcel owner improvements. This section also authorizes the review and approval of plans and specifications and provides for rights and privileges of parcel owners as set forth in the declaration of covenants.

The amendment also provides reference to the Florida Board of Accountancy for the generally accepted accounting principles; provides that reserves are not mandatory; and provides that the waiver of reserves requires a majority vote at a meeting of the association in which a quorum is present.

Finally, the amendment provides that the provisions addressing turnover audits would apply to associations with a date of incorporation after December 31, 2006.

ECONOMIC DEVELOPMENT, TRADE & BANKING COMMITTEE

On April 5, 2006, the Economic Development, Trade & Banking Committee adopted a strike-all amendment and two amendments to the strike-all that made the following changes:

- Consolidated the provisions of the original bill relating to the authority of the board of directors to review and approval architectural improvements into a single new section in Chapter 720.
- Made technical changes to Chapter 720 to correct duplicate portions of the Chapter enacted in 2004.
- Permitted communities without a mandatory homeowners' association to revitalize their covenants; it simplifies the amendment process for condominium associations when mortgagee consents are required; it will permit condominium unit owners to vote on country club memberships before the board can impose mandatory fees on the owners; it extends the installation deadline for the installation of fire sprinklers in condominiums; it will clarify the legislature policy concerning participation by residential unit owners in mixed use condominiums; it will permit a prevailing homeowner to recover fees when they are successful in a law suit against their homeowners' association; and it modifies the pre-suit mediation process and removes it from the supervision of the Division of Lands Sales, Condominiums and Mobile Homes.
- Clarified that condominium unit owners have the right of access to public beaches adjacent to the condominium like all other private landowners in Florida.
- Extended the non-discrimination provisions of the Cooperative Act to non-residential cooperatively owned equity clubs and provides for a narrow and specific definition of what qualifies as a cooperative equity club.

The bill was then reported favorably with a committee substitute.