

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1373 Community Associations

**SPONSOR(S):** Robaina and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 2816

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Business Regulation</u>	<u>9 Y, 0 N</u>	<u>Liepshutz</u>	<u>Liepshutz</u>
2) <u>Jobs &amp; Entrepreneurship Council</u>	<u></u>	<u></u>	<u></u>
3) <u>Policy &amp; Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

**SUMMARY ANALYSIS**

This legislation contains significant regulatory changes for condominium associations and homeowner associations. The bill creates a new regulatory division within the Department of Business and Professional Regulation, to be named the Division of Mandated Properties. This new division is authorized to collect fees from homeowner associations, but requires that these fees be deposited into the Florida Division of Land Sales, Condominiums, and Mobile Homes Trust Fund (renamed in the bill as the Florida Division of Land Sales, Condominiums, Homeowners Associations, and Mobile Homes). Thus, this new division appears to be unfunded. Instead, the fees will be used by the existing and renamed Florida Division of Land Sales, Condominiums, Homeowner Associations, and Mobile Homes to fund the costs of reviewing and approving HOA deed restrictions prior to recording, and to pay for various educational, enforcement, and investigative activities.

The bill also makes significant changes to the office of the Condominium Ombudsman by empowering the office to issue orders and engage in enforcement type activities.

The bill also creates an Advisory Council on Mandated Properties, and provides for the functions of the Council.

According to the department, the proposed legislation will increase state revenues by \$11.2 million in Fiscal Year 2007-08 and by approximately \$8.2 million in future years. The bill will also increase the department’s expenditures by approximately \$15 million in Fiscal Year 2007-08, with a recurring negative impact of approximately \$11.5 million in future years. The department also estimates 102 full-time equivalent (FTE) positions will be needed to handle the anticipated workload increase.

The effective date of the bill is July 1, 2007.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government - The bill significantly increases the regulatory responsibilities of the Department of Business and Professional Regulation (DBPR) over homeowners' associations and, therefore, will require additional funding. The bill creates a new Division of Mandated Properties and a new Advisory Council on Mandated Properties within the DBPR. The bill also increases the investigatory and enforcement responsibilities of the condominium ombudsman.

Ensure Lower Taxes - The bill creates a \$4 fee per homeowner association member effective July 1, 2008.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation:

Chapter 718, Florida Statutes, the Condominium Act (Act) is a comprehensive statute that regulates residential condominium living throughout the state. The Act contains myriad regulations dealing with condominium elections, finances, communication with unit owners, repair and maintenance, and meetings of the condominium's governing board which is elected from among the condominium's unit owners. Currently, there are 3 million unit owners spread among 20,000 condominium associations across the State with approximately 70 per cent of these associations located in Palm Beach, Broward, Miami-Dade, and Monroe County.

The Department of Business and Professional Regulation's Florida Division of Land Sales, Condominiums and Mobile Homes (division) is charged with carrying out this regulatory responsibility under the provisions of the Act. The division's mission is to provide consumer protection to condominium residents through education, developer disclosure, enforcement, and alternative dispute resolution.

Chapter 720, Florida Statutes, generally describes how homeowner associations (HOA's) organize and operate themselves. Although the division provides alternative dispute resolution services for residents of HOA's, no state agency is responsible for regulating HOA's. Chapter 720 specifically provides that it is the legislature's intent that HOA's not be regulated.

Section 718.50151, F.S., establishes the Condominium Advisory Council and generally authorizes the council to gather public input regarding condominium living and advise the division. Since its inception the council has conducted numerous public meetings and received the testimony of hundreds of condominium unit owners.

Sections 718.5011 and 718.5012, F.S., establish the office of the Condominium Ombudsman who is appointed by the Governor and serves at the pleasure of the Governor. The principle role of the Ombudsman is to act as a neutral liaison between the division and unit owners in resolving condominium unit owner issues and to provide election monitoring services to condominium associations. Under the current law, the Ombudsman does not "enforce" any provisions of the act, but can recommend that the division take enforcement action with respect to condominium problems encountered or reported to the Ombudsman's office.

At the present time, there is no advisory council for HOA's comparable to the Condominium Advisory Council.

Chapter 190, Florida Statutes, provides for the creation and operation of Community Development Districts (CDD's). However, by law a CDD is a special purpose unit of local government that is not regulated by the Department of Business and Professional Regulation.

### **Effect of Proposed Changes**

Sections 1. – 3. Changes the name of the Division of Land Sales, Condominiums and Mobile Homes to “The Division of Land Sales, Condominiums, Homeowners’ Associations, and Mobile Homes,” and creates a new division named “The Division of Mandated Properties.” It is not clear how these two divisions would interact with each other.

Section 4. Chapter 190, F.S., is amended to require certain sales disclosures related to community development districts, imposes fines that are payable to purchasers if the seller fails to make the disclosures, and requires the developer and sales agent to submit annual reports to the Department of Community Affairs certifying compliance with the law.

Sections 5. – 20. Conforming amendments to chapters 190, 192, 213, 215, 326, 380, 455, 475, 498, 509, 559, and 718, F.S., to reflect the addition of Homeowners’ Associations to the division’s name.

Section 21. For condominiums created after April 1, 2007, the ownership share of the common elements, and proportion of sharing expenses must be based solely on the relative size of the unit in relation to the total size of each other unit in the condominium. Under the current law, the proportionate share of condominium ownership must either be equal fractional shares or based on the relative size of the units.

Section 22. Conforming amendment to reflect the addition of Homeowners’ Associations to the division’s name.

Section 23. Amends s. 718.110(1), F.S., to require that notice of proposed amendments to the declaration of condominium be provided to unit owners by certified mail.

Section 24. Section 718.111(5), F.S., is amended to provide that, except in the case of an emergency, condominium associations must give the unit owner 24 hours advance written notice of intent to access the unit, and requires that such access must include two persons, one of whom must be a board member.

- Section 718.111(12)(b), F.S., is amended to require that association records be made available within 30 miles driving distance of the condominium property for the purpose of allowing records access to unit owners. Social security numbers, driver’s license numbers, credit card numbers, and other personal identifying information of unit owners, occupants or tenants would not be available for inspection by unit owners or their appointed representatives.
- Section 718.111(13), F.S., is amended to delete a requirement that a unit owner must make a written request to receive a copy of the financial statement and instead provides that condominium associations must deliver a copy of the financial statements to each unit owner.
- Section 718.111(15), F.S., is created to provide for reconstruction in the event of a casualty. Where condominium property is damaged the board must obtain reliable and detailed estimates of the cost to repair the damaged property to substantially the same condition existing immediately prior to the casualty and substantially in accordance with the original plans and specifications as soon as possible and not later than 60 days after the casualty. If the damage exceeds 50 percent of the property’s value, the condominium may be terminated unless, within 90 days after the casualty, 75 percent of the unit owners agree to reconstruction. The board must engage the services of a registered architect and knowledgeable construction specialists to prepare any necessary plans, receive and approve bids for reconstruction, arrange for

disbursement of construction funds, approve the work and all other matters pertaining to the repair and reconstruction.

At any time during reconstruction, or if the insurance proceeds are insufficient to pay the estimated costs, assessments must be made against all unit owners according to their ownership interests set forth in the declaration. Assessments must be made against unit owners for damage to their units according to the cost of reconstruction or repair of their respective units and the assessments must be levied and collected as all other assessments are provided in the Condominium Act. Thus, the cost to repair damage to a unit may be assessed solely against that unit and may be foreclosed as with an assessment foreclosure.

Section 25. Section 718.112, F.S., is amended by the bill as follows:

- Allow condominium association board members to determine the number of board members if the bylaws are silent, and to require a board member to be a unit owner;
- Associations would be required to respond to unit owner inquiries using certified mail and provisions in current law that authorize associations to adopt reasonable rules regarding the frequency and manner of responding to unit owner inquiries are deleted;
- Board action could not be taken on a resolution adopted without an open meeting of the board and the board must address agenda items proposed by a petition of 20 percent of the unit owners, a unit owner's faxed signature would be sufficient for any matter that requires the signature of a unit owner, correspondence from the board to unit owners must be accomplished by the same delivery method used by the owner, items could be taken up at a board meeting on an emergency basis without being originally included on the agenda pursuant to a petition of 20 percent of the unit owners;
- If a board meeting is held to consider regular or special assessments, the notice of the meeting must include a description of the nature, cost, and breakdown of any such assessments;
- The bill deletes provisions authorizing associations to establish alternative election procedures in their bylaws; the only prohibition against eligibility for board membership is conviction of a felony by any court of record in the United States, without the restoration of civil rights;
- The association, or its representative would continue to carry out the duties related to notice of election; however, an association could no longer use both sides of the paper when printing candidate information sheets. All ballot envelopes would have to be secured in a sealed ballot box immediately upon receipt and could not be opened in advance of the election meeting;
- Owners would have the right to have items placed on the agenda of the annual meeting and voted upon if a written request is made by 20 percent or more of all voting interests at least 90 days before the date of the annual meeting;
- The association's annual budget would have to both include estimated revenues and expenses, the budget from the prior year would remain in effect until the association has adopted the new budget for the current year. In addition, the budget would have to include reserves for structural repairs;
- Associations would have to include a disclaimer on all ballots involving waiver or reallocation of reserves stating that waiver or reallocation of existing reserves may result in unanticipated special assessments, reserve waiver votes would have to be taken at the annual meeting; the division would be required to promulgate a ballot form for waiving or reducing reserves. The association, after turnover from the developer's control could use reserves for non-scheduled purposes in the case of a catastrophic event;

- Except in the case of an emergency, or unless otherwise specified in the bylaws, the board could not obtain a loan or line of credit in an amount that exceeds 10 percent of the association's current year budget. After the declaration of condominium is recorded and until such time as the association has been created, all common expenses shall be paid by the developer. Assessments must be levied based on the adopted budget or authorized special assessment and accelerated assessments are due and payable after a claim of lien has been filed.
- Effective January 1, 2008, the current arbitration program for recall disputes is removed from the division and replaced with a program to be operated by the condominium ombudsman. A recall of the board would be effective immediately, and the board may submit rebuttal arguments to the Ombudsman within 5 business days of service of the agreement. The Ombudsman must certify or not certify the recall within 10 business days after receipt of the written agreement. If the Ombudsman does not certify the agreement, the Ombudsman shall notify the member or members of the board and the board president of the reasons for not doing so, and the unit owners will have an additional 5 business days to correct the deficiency. The board members would then have an additional 5 business days to submit rebuttal argument and supporting evidence.
- The requirement that the bylaws include a provision for mandatory nonbinding arbitration as provided in s. 718.1255, F.S, is repealed.

Section 26. Amends s. 718.113(1), F.S., to provide that maintenance of limited common elements must either be performed by the unit owners entitled to exclusive use of the limited common elements or assessed against those unit owners if the association performs the maintenance.

Requires the board to restate hurricane shutter specifications at each annual meeting, and specifies that the board may, subject to unit owner approval, install, maintain, repair or replace hurricane shutters or other hurricane protection that complies with the applicable building code.

The board would be required to have the condominium buildings inspected every 5 years by a professional engineer or architect for the purpose of determining whether the building is structurally and electrically safe. Detailed reporting requirements would be required of the engineer or architect and would become an official record of the association.

Section 718.113(7), F.S., is created to prohibit the board from adopting any rule impairing any rights guaranteed by the First Amendment to the Constitution of the United States, or s. 3 of Article I of the Florida Constitution, including, but not limited to, the free exercise of religion. The bill expressly prohibits rules that fail to accommodate reasonable religious practices or the attachment of religiously mandated objects to the front-door area of a condominium unit.

Section 27. The bill limits the association to contracting for basic cable TV service when such service is to be charged as a common expense.

Section 28. Section 718.1123, F.S., is created to provide unit owners protection against abuse. Any complaint of abuse filed with the division must immediately be investigated, and where the division has reasonable cause to believe that abuse has occurred against a unit owner, the division must institute enforcement proceedings. Abuse is broadly defined as any willful act or threatened act by a member of the board or any member of a committee or subcommittee appointed by the board, any employee, volunteer, or agent purporting to act on behalf of the board, or any officer, director, employee, or agent of any management company acting on behalf of a condominium association who denies or is likely to deny a protection afforded to the unit owner or dweller under applicable state and federal laws, administrative rules, and the governing documents of the condominium association.

Section 29. Section 718.1224, F.S., is created prohibiting strategic lawsuits against public participation, otherwise known as SLAPP suits, against unit owners. Governmental entities, business organizations, and individuals in Florida would be prohibited from filing or causing to be filed through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against a condominium unit owner without merit and solely because such condominium unit owner has exercised the right to petition for redress of grievances on matters relating to the condominium association. A condominium unit owner sued in violation of this section would have a right to an expeditious resolution. The court may award actual damages and as much as treble damages to a prevailing unit owner as well as attorney's fees and costs. A condominium association cannot expend association funds in prosecuting a SLAPP suit against a unit owner.

Section 30. Section 718.1255(4)(e), F. S., is amended to allow the division to promptly refer an arbitration case to mediation and removes the ability of the parties in mediation to seek to recover any costs and attorney's fees as part of the costs and attorney's fees that may be recovered by the prevailing party in any subsequent litigation.

Section 31. Section 718.302(1), F.S., is amended to include services and products in the list of grants and reservations made by an association prior to turnover that must be fair and reasonable and which may be canceled by unit owners other than the developer.

Section 32. Section 718.3025(1), F.S., is amended to require that in order for a written contract providing for the operation, maintenance or management of the association or condominium property to be enforceable, it must contain provisions that all obligations be complete within one year and must prohibit automatic renewal of the contract.

Section 33. Section 718.3026, F.S., is amended to provide that a contract with a service provider shall not be for a term in excess of three years and shall not contain an automatic renewal clause, and a contract for construction or repair of the property that exceeds 10 percent of the total annual budget must have the approval of an attorney hired by the association.

Section 34. Clarifies that the committee presiding over the hearing required before a fine can be imposed on a unit owner must be made up of unit owners who are not members of the board, and provides that anyone subject to an action under this section must be notified of the violation by certified mail, return receipt requested. Except in the case of imminent danger to person or property, the person noticed has 30 days in which to respond in writing.

Section 35. Section 718.501(1)(e), F.S., is amended to provide that the division must prepare and disseminate a prospectus and other information as provided in this section.

Section 718.501(1)(j), F.S., is amended to provide that the division must work in conjunction with the recommendations of the Ombudsman when providing training and education programs for board members and unit owners.

Upon a finding that any association has committed a violation within the jurisdiction of the division, the association must mail and post a notice to all owners setting forth the facts and findings and the corrective action required. The association must also participate in an educational training program directly related to the violation, taught by a division-approved provider, and completed within 90 days from the notification of the finding to the board members. Failure of the association to comply with these provisions will subject the association to penalties in the amount of \$500 for each week that the notice is not provided to the unit owners or the educational training is not completed.

Section 718.501(2)(a), F.S., is amended to provide that one-fifth of all fees deposited to the division's trust fund must be allocated to the office of the Condominium Ombudsman. The bill language provides for the deposit of one-fifth of all fees, not just condominium fees. Other fees would include fees from timeshare, cooperatives, subdivided lands, and mobile homes.

Section 36. Section 718.5011, F.S., is amended to provide that the Ombudsman shall exercise policymaking and other functions authorized in the Condominium Act independently of the Department of Business and Professional Regulation and without approval or control of the department. The department must render administrative support to the office in matters pertaining to budget, personnel, office space, equipment, and supplies. All revenues collected for the office by the department shall be deposited in a separate fund or account from which the department may not use or divert the revenues. The bill also repeals the current prohibition on the Ombudsman's staff actively engaging in any other business or profession, serving as the representative of any political party, serving as an executive, officer, or employee of a political party, receiving remuneration for activities on behalf of any candidate for public office, or engaging in soliciting votes or other activities on behalf of a candidate for public office, or becoming a candidate for election to public office unless first resigning from the office or employment.

Section 37. Section 718.5012, F. S., is amended to remove the requirement that the Ombudsman develop policies and procedures; require the division to process the Ombudsman's recommendations and petitions in an expedited manner and to require the department to defer to the Ombudsman's findings.

The bill provides the Ombudsman with authority to administer oaths, subpoena witnesses, take evidence and require production of any matter that is relevant to an inquiry, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts or any other matter reasonably calculated to lead to the discovery of material evidence, and may apply to the circuit court for an order compelling compliance. The Condominium Ombudsman would be authorized to investigate any matter that relates to the fulfillment of the duties of the Ombudsman. The Ombudsman would have authority to order meetings between unit owners, boards, board members, community association managers and other affected parties.

The Ombudsman would have authority to make recommendations to the division to pursue enforcement action in circuit court on behalf of a class of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution against any developer, association, officer, or board member or its assignees or agents when there is reasonable cause to believe misconduct has occurred. The division must process the Ombudsman's recommendations and petitions in an expedited manner and defer to the Ombudsman's findings.

Section 718.5012(1)(j), F.S., is created to replace the current recall arbitration program under s. 718.112(2)(j), F.S., with a program to be operated by the Ombudsman, as described in section 25., above.

The Ombudsman would have authority to order any aspect of the election process to be conducted by an election monitor. No association or person could reject an election monitor appointed by the Ombudsman or interfere with an election monitor in the performance of the Ombudsman's duties. The Ombudsman may order an association to implement a known division remedy for a procedural violation of s. 718.112(2)(d)3., F.S., prior to and during a monitored election.

Any unit owner or association acting in good faith on the advice of the Ombudsman shall be immune from any penalties or actions.

The Ombudsman would have authority to issue an order requiring any developer, association, officer, board member, or its assignees or agents, to cease and desist from unlawful practices and to take affirmative action to carry out the purposes of the Condominium Act, if the Ombudsman has reasonable cause to believe that a violation of any provision of the Act or administrative rules has occurred.

Section 38. Conforming language to reflect the addition of Homeowners' Associations to the division name.

Section 39. Section 718.504(21), F.S., is amended to require a developer to prepare the condominium budget in good faith, include estimated revenues in the budget, and to delete the provision of the law that allows the budget to be stated in terms of more than one annual period, or distinguish between the periods prior to and after turnover of developer control.

Sections 40. – 43. Conforming language to reflect the addition of Homeowners' Associations to the division name.

Section 44. Section 719.1055(7), F.S., is created to provide that any amendment to cooperative documents that restricts the owner's rights related to rental of units applies only to those unit owners who consent to the amendment or who purchase their units after the effective date of the amendment.

Sections 45. – 50. Conforming language to reflect the addition of Homeowners' Associations to the division name.

Section 51. Several definitions in s. 720.301, F.S., are amended to remove the portion of property dedicated for use or maintenance by the association from the definition of common areas in chapter 720, F.S., to limit covenants to those contained in the recorded plat, and to exclude associations in which association representatives, rather than parcel owners, are members of the association from having jurisdictional control of land subject to covenants.

This section also includes within the definition of declaration of covenants, a substantive requirement that after the sale of the first lot, a declaration may not be amended without the vote of approval of two thirds of the owners of residential parcels that have been purchased, except for those amendments that solely address the identification of additional phases of the development.

The definition of governing documents is amended to provide that when different sets of documents exist those covenants shall only apply to the plat for which they are recorded and specified; amends the definition of a homeowners' association to include language that the association is administered in compliance with applicable federal, state and local law, and the governing documents; deletes from the definition a Florida corporation in which the voting membership is made up of agents or a combination of parcel owners and their agents; and requires any homeowners' association or other named association that administers a residential community where membership is mandatory must comply with the chapter unless exempted. A definition of the Homeowners' Association Advisory Council is created to mean a group of persons appointed to recommend changes in laws that affect the administration of homeowners' associations.

Section 52. Section 720.302, F.S., is amended to provide that the purpose of the law is to provide regulations for operating homeowners' associations, and to establish government regulation of homeowners' associations. The bill requires the "department" to create the Division of Mandated Properties, and requires that no later than July 1, 2008, the new division will establish a process for collecting an annual fee, not to exceed \$4 per association member in communities administered by the association during each of the following two years, and thereafter, not exceeding the cost of living index, meaning that the fee cannot be increased for two years, and then the increase is limited to the inflation rate established by the cost of living index. The fees are to be deposited in the current division trust fund and shall be utilized for the review and approval of deed restrictions before recording, education, enforcement, investigation, and prosecution of policies and procedures related to mandated properties.

Upon turnover from the developer to the parcel owners, all amendments, alterations, or modifications to the governing documents must be approved by two-thirds of the parcel owners or homeowners' association members. The governing documents may not contain provisions that reduce the



percentage for approval of changes to the governing documents. The Ombudsman may not engage the services of industry partisans with a vested interest in the administration of deed-restricted communities or in the mandatory homeowners' association to implement its powers, who have practiced in this field within the past three years.

Legislative findings are established that homeowners' associations and their members will benefit from alternative dispute resolution regarding disputes relating to the turnover from developer control and that ss. 720.301 – 720.407, F.S., are not intended to impair existing contract rights as long as they are accepted by two-thirds of the homeowners' association members.

Section 53. Several amendments to s. 720.303, F.S., are provided as follows:

- A homeowners' association must be incorporated in Florida, and it cannot operate or administer more than one community. Officers and directors may not take any action inconsistent with the declaration of covenants. After turnover of association control from the developer, the association may take action in the name of all members, but is limited to commencing legal action regarding amounts in controversy in excess of \$50,000, unless approved by a majority of the members of the association;
- In civil or criminal actions the association is precluded from using the defense that its actions although incompatible with the covenants, have been uniformly applied;
- The association cannot restrict a member's freedom of association and may not limit the number of guests a member may have within a 24-hour period;
- The officers and directors may be personally liable for damages to a member if their actions demonstrate a pattern of behavior intended to harass a member of the association;
- Any action by the officers and directors that limits the use of any portion of a member's property that is incompatible with the covenants entitles the member to compensation for the fair market value of that portion of the member's property;
- In any association with more than 50, but fewer than 75 parcels, for the purpose of setback limits, any parcel of one acre or less is deemed to have one front for the purposes of determining the required front setback, if any;
- The agenda for an upcoming board meeting must be posted along with the notice of the meeting, the use of secret ballots for election of officers at a board meeting is prohibited, the percentage required for a unit owner petition to include an item on the board meeting agenda is lowered from 20 percent to 10 percent, and the board is required to address all items on the agenda. Detailed agendas for board meetings, with specific items must be published and made available to all members at least seven days prior to the meeting;
- The association is required to maintain copies of recorded plats, and if such documents are not available, the association must obtain them or forfeit the right to assess any fees to maintain the common areas of property. Contracts to maintain property that is not owned by and deeded to the association are not allowed;
- Interpretations of governing documents, as provided by any attorney are part of the association records as long as they are not part of a pending lawsuit, and architectural requests and approvals or denials must be perpetually maintained;
- Official records must be maintained in the county in which the governing documents are recorded, the association must allow for the members to bring their own copying devices, the rules governing access to records can no longer address the frequency or manner of inspection,

the association may only charge the actual costs of copying, and the amount an association may charge for copying is lowered from 50 cents per page to 5 cents per page;

- The association may establish and fund reserve accounts for capital expenditures and items of deferred maintenance, and provide for calculating reserves, maintaining reserves, and waiving reserves if the association determines that reserves will be included in the budget;
- Specified disclosures must be included in the annual financial report should the association decide not to include reserves in the budget when such expenditures are applicable;
- Extends the deadline for homeowners' associations completing their annual financial reports, to 90 days from the end of the reporting period. The reports must be provided to the homeowners within 21 days after completion of the statements, but not less than 120 days from the end of the reporting period; and shall be prepared in accordance with generally accepted accounting principles as adopted by the Board of Accountancy, and prohibit the commingling of association funds with those of a corporation for profit created by the developer; and,
- Only the registered and recorded owners may vote in a recall, and a recall may take place at a special meeting of the owners, notwithstanding that it is not provided for in the governing documents.

Section 54. Section 720.304, F.S., is amended to provide that members may display a stationary or portable flag of the United States, from a free standing, portable, removable, or telescoping flagpole not to exceed 20 feet. Association members are allowed to place a sign provided by security services companies on their property.

All common areas must be available to the members for the purposes intended, the association rules pertaining to such areas must protect the constitutional rights of the members, and any owners prevented from exercising their rights may bring an action in the appropriate court.

Section 55. Section 720.305, F.S., is amended to remove the authority for an association to levy a fine against a parcel owner for violating the governing documents.

Section 56. Section 720.3055, F.S., is amended to specify that contracts with managers do not have to be competitively bid.

Section 57. Section 720.306(1), F.S., is amended to provide that, unless otherwise provided by law, and except for amendments changing the proportionate share of expenses that a parcel owner will pay, the covenants may only be amended by approval of two-thirds of the voting interests of the association. Within 12 months of the enactment of this subsection all duly registered covenants and restrictions must be complete and set forth in plain, easily understandable English. The authority for an association to change the proportionate share of expenses appurtenant to a parcel if authorized in the governing documents is removed.

Any amendment to the governing documents that restricts the parcel owner's rights related to rental of parcels applies only to those parcel owners who consent to the amendment or who purchase their units after the effective date of the amendment.

The annual election must take place at or in conjunction with the annual meeting, the notice of any special meetings must include the agenda for the meeting, that parcel owners have the right to speak at any meeting with reference to any items on the agenda for at least 3 minutes on each agenda item, adjournment of an annual or special meeting of the members must be announced at the meeting before an adjournment is taken.

Election procedures for homeowners' associations are established. The election procedures mirror those for condominiums. The procedures call for a first notice of election, notice of intent to be a candidate, candidate information sheets, and second notice together with ballots that must remain secret. Additionally, all terms expire at the time of the annual meeting. Members may stand for re-election, co-owners of a parcel may not serve on the board at the same time, and a person who has been convicted of a felony by any court of record in the United States and whose right to vote has not been restored in the jurisdiction of their residence is ineligible for board membership. The association cannot restrict parcel owners from electronically recording meetings.

Section 58. Section 718.307, F.S., relating to turnover from developer control is amended. The amendment lowers the percentage of sell-out that triggers turnover from 90 percent to 75 percent. The developer is required to convey title to common areas to the association immediately after its incorporation and any additional common areas acquired by the developer must be conveyed immediately to the association. The timeframe for turning over the association records and funds is reduced from 90 days to 30 days. The developer is required to pay for a turnover audit from inception until turnover within 30 days; this requirement applies only to those associations incorporated after December 31, 2007.

Section 59. Section 720.3071, F.S., is created requiring the division to provide mandatory training, at association expense, for newly elected board members and those already serving who have not previously attended training.

Section 60. Section 720.3075, F.S., is amended to add to the list of prohibited clauses in the governing documents language that would result in the association's functioning in conflict with federal, state and local laws, restricting homeowners from installing hurricane shutters or other hurricane protection, or from mounting temporary or permanent shutters or other hurricane protection during any time that a hurricane warning has been declared, evacuation ordered, or for seven days after the conclusion of the watch or evacuation, or for 14 days in the case of a category 4 storm or greater.

If a local government restricts homeowners' employing temporary or permanent shutters the local government may also authorize associations to adopt and enforce equal or lesser restrictions. The association may adopt restrictions governing the color or form of shutters or other permanent exterior window coverings. Associations may not restrict the time or duration for shutters or other hurricane protection to be open or closed during any period.

Section 61. Section 720.3086, F.S., is amended to provide that the developer or other owner of common areas or recreational facilities serving the parcel owners must mail a copy of the annual financial report to the parcel owners upon written request from a parcel owner. The owner may go to circuit court if the financial report is not made available, and the court may award attorney fees and costs to such parcel owner. Any restrictions within the covenants that allow guests of the developer or facility owner the right to use facilities that are reserved for the exclusive use of the parcel owners are void.

Section 62. Section 720.401, F.S., is amended to require full disclosure of covenants and restrictions to prospective purchasers. If the developer or the association willfully and knowingly fail to disclose material facts that negatively affect the value of the parcel purchased by an association member, the individual board members or developer are held liable under applicable federal and state civil and criminal laws. The exemption for subdividers registered under Chapter 498, is removed.

Section 63. Section 720.501, F.S., is created to provide the same authority to the Division of Florida Land Sales, Condominiums, Homeowners' Associations, and Mobile Homes, in order to enforce and ensure compliance with chapter 720, F.S., as is currently provided under the Condominium Act. Generally, the division may impose a fine of up to \$5,000 per violation, and may bring an action in circuit court on behalf of a class of lot owners, lessees or purchasers for declaratory or injunctive relief or restitution, shall provide notice of declaratory statements, maintain a toll-free number, provide

training programs, develop a program to certify volunteer and paid mediators and provide a list of such mediators to any association, lot owner or other participant in arbitration proceedings under s. 720.311, F.S. This section of the bill contains details regarding how the division is to process complaints.

This language may conflict with the language in section 52 of the bill which also creates a new division of mandated properties with investigative authority over chapter 720.

Section 64. Section 720.505, is created to provide for the Advisory Council on Mandated Properties. The Council is to be made up of seven members, two appointed by the President of the Senate, two by the Speaker of the House of Representatives, and three appointed by the Governor. This section specifies the functions of the Council, which are to receive input from the public, advise the division concerning revisions and the adoption of rules, and to recommend improvements, if needed, in the division's educational programs.

Sections 65. – 74. Conforming language to reflect the addition of Homeowners' Associations to the division name.

Section 75. provides that every homeowner or renter in Florida shall have the right to own a companion animal and to have such animal live with them in their home if such companion animal is deemed helpful to the person's physical or psychological well-being as attested to by at least two qualified health care professionals. Any municipal or county code or ordinance or any restrictive covenant in the governing documents of any condominium, cooperative, mobile home park, homeowner, or other common interest ownership community association that is contrary to the rights provided in this section is deemed unconscionable, invalid and of no legal effect. This section also provides for recovery of attorney fees and costs to a prevailing owner or renter if it becomes necessary for the owner or renter to enforce this provision in court.

Section 76. provides that the developer of a condominium who rents or leases any unsold units in a condominium must pay all monthly maintenance fees on those units as if the units were owned by individual unit owners. This provision is enforceable notwithstanding that the declaration of condominium, bylaws, or other documents may provide otherwise.

Section 77. provides and effective date of July 1, 2007.

#### C. SECTION DIRECTORY:

Section 1: Amending s. 20.165(2) relating to the Department of Business and Professional Regulation Division of Florida Land Sales, Condominiums, and Mobile Homes.

Section 2: Amending s. 73.073(2) relating to condominium eminent domain procedure.

Section 3: Amending s. 190.009(2) relating to disclosure of public financing.

Section 4: Amending s. 190.048 relating to the required disclosure to purchaser for sale of real estate within a district.

Section 5: Amending s. 190.0485 relating to notice of establishment.

Section 6: Amending s. 192.037(6) relating to fee timeshare real property.

Section 7: Amending s. 213.053(8) relating to confidentiality and information sharing.

Section 8: Amending s. 215.20(4) relating to certain income and certain trust funds contributing to the General Revenue Fund.

Section 9: Amending s. 326.002(2) relating to definitions as used in Chapter 326.

Section 10: Amending s. 326.006(2) relating to the powers and duties of the Division of Florida Land Sales, Condominiums, and Mobile Homes.

Section 11: Amending s. 380.0651(4) relating to statewide guidelines and standards.

Section 12: Amending s. 455.116(5) relating to regulation trust funds.

Section 13: Amending s. 475.455 relating to the exchange of disciplinary information.

Section 14: Amending s. 498.005(5) relating to definitions as used in Chapter 498.

Section 15: Amending s. 498.019 relating to the Division of Florida Land Sales, Condominiums, and Mobile Homes.

Section 16: Amending s. 498.047(8) relating to investigations.

Section 17: Amending s. 498.049(5) relating to suspensions, revocations, and civil penalties.

Section 18: Amending s. 509.512 relating to timeshare plan developer and exchange company exemption.

Section 19: Amending s. 559.935(1) relating to exemptions.

Section 20: Amending s. 718.103(17) relating to definitions as used in Chapter 718.

Section 21: Amending s. 718.104(4) relating to creation of condominiums and contents of declaration.

Section 22: Amending s. 718.105(4) relating to recording of declaration.

Section 23: Amending s. 718.110(1) relating to amendment of declaration and correction of error or omission in declaration by circuit court.

Section 24: Amending s. 718.110 relating to the association as pertaining to condominiums.

Section 25: Amending s. 718.112(2) relating to bylaws of the association.

Section 26: Amending s. 718.113 relating to maintenance, limitation upon improvement, display of flag, and hurricane shutters.

Section 27: Amending s. 718.115(1) relating to common expenses and common surplus.

Section 28: Creating s. 718.1123 relating to protection against abuse.

Section 29: Creating s. 718.1224 relating to prohibition against SLAPP suits.

Section 30: Amending s. 718.1255(4) relating to alternative dispute resolution, voluntary mediation, mandatory nonbinding arbitration, and legislative findings.

Section 31: Amending s. 718.302(1) relating to agreements entered into by the association.

Section 32: Amending s. 718.3025(1) relating to agreements for operation, maintenance, or management of condominiums and specific requirements.

Section 33: Amending s. 718.3026(2) relating to contracts for products and services, in writing, bids, and exceptions.

Section 34: Amending s. 718.303(3) relating to obligations of owners, waiver, and levy of fine against unit by association.

Section 35: Amending s. 718.501 relating to powers and duties of the Division of Florida Land Sales, Condominiums, and Mobile Homes.

Section 36: Amending s. 718.5011 relating to the ombudsman, appointment, and administration.

Section 37: Amending s. 718.5012 relating to the ombudsman, powers, and duties.

Section 38: Amending s. 718.502(2) relating to filings prior to sale or lease.

Section 39: Amending s. 718.504 relating to the prospectus or offering circular.

Section 40: Amending s. 718.508 relating to regulation by Division of Hotels and Restaurants.

Section 41: Amending s. 718.509 relating to the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund.

Section 42: Amending s. 718.608(2) relating to a notice of intended conversion, time of delivery, and content.

Section 43: Amending s. 719.103(17) relating to definitions as used in Chapter 719.

Section 44: Amending s. 719.1055(7) relating to amendment of cooperative documents, alteration and acquisition of property.

Section 45: Amending s. 719.1255 relating to alternative resolution of disputes.

Section 46: Amending s. 719.501 relating to powers and duties of Division of Florida Land Sales, Condominiums, and Mobile Homes.

Section 47: Amending s. 719.502(2) relating to filing prior to sale or lease.

Section 48: Amending s. 719.504 relating to prospectus or offering circular.

Section 49: Amending s. 719.508 relating to regulation by the Division of Hotels and Restaurants.

Section 50: Amending s. 719.608(2) relating to notice of intended conversion, time of delivery, and content.

Section 51: Amending s. 720.301 relating to definitions as related to Chapter 720.

Section 52: Amending s. 720.302 relating to purposes, scope, and application.

Section 53: Amending s. 720.303 relating to association powers and duties, meetings of board, official records, budgets, financial reporting, association funds, and recalls.

Section 54: Amending s. 720.304 relating to right of owners to peaceably assemble, display of flag, and SLAPP suits prohibited.

Section 55: Amending s. 720.305 relating to obligations of members, remedies at law or in equity, levy of fines and suspension of use rights, failure to fill sufficient number of vacancies on board of directors to constitute a quorum, and appointment of receiver upon petition of any member.

Section 56: Amending s. 720.3055 relating to contracts for products and services in writing, bids, and providing exceptions.

Section 57: Amending s. 720.306 relating to meetings of members, voting and election procedures, and amendments.

Section 58: Amending s. 720.307 relating to transition of association control in a community.

Section 59: Creating s. 720.3071 relating to board member training.

Section 60: Amending s. 720.3075 relating to prohibited clauses in association documents.

Section 61: Amending s. 720.3086 relating to financial reporting.

Section 62: Amending s. 720.401 relating to prospective purchasers subject to association membership requirement, disclosure requirements, covenants, assessments, and contract cancellation.

Section 63: Creating s. 720.501 relating to powers and duties of the Division of Florida Land Sales, Condominiums, Homeowners' Associations, and Mobile Homes.

Section 64: Creating s. 720.505 relating to advisory council and membership functions.

Section 65: Amending s. 721.05(11) relating to definitions used in Chapter 721.

Section 66: Amending s. 721.07(2) relating to the public offering statement.

Section 67: Amending s. 721.08(8) relating to escrow accounts, nondisturbance instruments, alternate security arrangements, and transfer of legal title.

Section 68: Amending s. 721.26(5) relating to regulation by division.

Section 69: Amending s. 721.28 relating to Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund.

Section 70: Amending s. 721.301(1) relating to Florida Timesharing, Vacation Club, and Hospitality Program.

Section 71: Amending s. 723.003(1) relating to definitions as used in Chapter 723.

Section 72: Amending s. 723.006(5) relating to powers and duties of division.

Section 73: Amending s. 723.009 relating to Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund.

Section 74: Amending s. 723.0611(2) relating to Florida Mobile Home Relocation Corporation.

Section 75: Creates an unnumbered section relating to emotional support animals.

Section 76: Creates an unnumbered section requiring condominium developers to pay monthly maintenance fees on unsold condominium units that are rented.

Section 77: Providing an effective date of July 1, 2007.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The department estimates the following revenues:

REVENUE			
	<u>FY 2007-08</u>	<u>FY 2008-09</u>	<u>FY 2009-10</u>
License Fees:	0	0	0
Taxes:	0	0	0
Other: Annual Fees	5,200,000	5,200,000	5,200,000
Other: Board Member Education	6,000,000	3,000,000	3,000,000

TOTAL:	11,200,000	8,200,000	8,200,000
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2. Expenditures:

The department estimates the following expenditures:

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
<b>Non-Recurring Effects</b>	<u>FY 2007-08</u>	<u>FY 2008-09</u>	<u>FY 2009-10</u>
Expenses – State Standard	342,057	0	0
Expenses - Postage	55,800		
Operating Capital Outlay – State Standard	132,600	0	0
Operating Capital Outlay - Laptop	2,449	0	0
Other: Contracted Services – Board Member Education	3,000,000	0	0
Subtotal	3,532,906	None	None

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
<b>Recurring Effects</b>	<u>FY 2007-08</u>	<u>FY 2008-09</u>	<u>FY 2009-10</u>
Salaries/Benefits – 102 FTE	5,437,099	5,437,099	5,437,099
Expenses – State Standard	643,593	643,593	643,593
Expenses – Travel for Senior Attorneys	15,000	15,000	15,000
Other: Contracted Services – Board Member Education	3,000,000	3,000,000	3,000,000
Other: DMS/HR Services	40,902	40,902	40,902
Subtotal	9,136,594	9,136,594	9,136,594

<b>Non-Operating Expenditures</b>	<u>FY 2007-08</u>	<u>FY 2008-09</u>	<u>FY 2009-10</u>
Service Charges (to General Revenue)	817,600	598,600	598,600
Other Indirect Costs – Administrative Assessment	1,551,792	1,551,792	1,551,792
Subtotal	2,369,392	2,369,392	2,369,392

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Unknown.

2. Expenditures:

Unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides state regulation for a currently unregulated industry and limits commercial freedoms currently available to developers.

D. FISCAL COMMENTS:

According to the department, the proposed legislation will increase state revenues by \$11.2 million in Fiscal Year 2007-08 and by approximately \$8.2 million in future years. The bill will also increase the department's expenditures by approximately \$15 million in Fiscal Year 2007-08, with a recurring negative impact of approximately \$11.5 million in future years. The department also estimates 102 full-time equivalent (FTE) positions will be needed to handle the anticipated workload increase.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

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

None.

##### 2. Other:

The Department of Business and Professional Regulation in its analysis of the bill has raised the following issues:

Section 23, creating a new subsection 718.111(15), F.S., if applied retroactively, may impair contract rights already established in many declarations of condominium. If the intent is to apply this provision retroactively, the intent should be expressed. Further clarification as to a shortfall of proceeds would be helpful where the shortfall is caused by a high deductible. Further clarification of unit damages in light of those portions a unit covered by the association's insurance policy under section 718.111(11) and those portions insured by the unit owner would harmonize these two provisions.

Section 26, amending section 718.113(1), F.S., repealing the association's authority to assess the repair costs of a limited common element it is required to maintain, if applied retroactively, would raise a constitutional impairment of contract issue and leave the association with an obligation to repair but no funds with which to do so.

Perhaps. sections 26 and 54, amending sections 718.113(7) and 720.304(7), F.S., engrafts First Amendment rights into the association's rules on the use of the common elements.

One question is whether the state may legislate that all community associations are "state actors" for purposes of imposing constitutional restrictions on what is otherwise private actions. Under Shelley v. Kramer, 334 U.S. 1 (1948), constitutional challenges may only be brought against private organizations where such organizations are performing public functions or where there is significant state involvement. Constitutional challenges to association covenants are private actions not based on constitutional rights. See Sabghir v. Eagle Trace Community Ass'n, Inc., 1997 WL 33635315 (S.D.Fla. 1997) (resident's constitutional challenge to restrictive covenant against placement of election signs on property would not be dismissed until court determined whether state action existed).

Corporations are creatures of statute and have those rights and obligations imposed by law, so the second part of the question is whether the legislature may impose constitutional restrictions on corporations.

The religious assembly and religiously mandated display statutory impositions on associations and unit owners will overturn Neuman v. Grandview at Emerald Hills, Inc., 861 So. 2d 494 (Fla. 4th DCA 2003), which held that under section 718.123, Florida Statutes, an association may prohibit religious services on the common elements without violating the statutory right of peaceful assembly, and similar line of cases. See also Tower Forty-One Ass'n, Inc. v. Levitt, 426 So. 2d 1290 (Fla. 3d DCA



1983) (upholding injunction against association for violation of bylaw prohibiting religious display). Clarification of how this will harmonize with the Religious Freedom Restoration Act of 1998, chapter 761, Florida Statutes, would be desirable.

It is unclear if this provision would be challenged under the establishment of religion clauses in the federal and state constitutions.

Section 53, amending section 720.303, F.S., repeals common law rights of action a unit owner might have, which may raise challenges to abridgement of rights under the access to courts provision, article I, section 21, of the Florida Constitution.

Section 57, amending section 720.306, F.S., repeals "quorum" requirements. It is unknown if this is to be retroactively applied to existing bylaws and whether, if so, an impairment of contract rights issue might be raised.

Section 58, amending section 720.307(5), F.S., applying developer transfer of association control to all "existing" associations and repealing the grandfathering provision raises a question of retroactive application and impairment of contract rights under article I, section 10, of the Florida Constitution.

Section 61, amending section 720.3086, F.S., revoking developer rights of use in association property raises a question of retroactive application and impairment of contract rights under article I, section 10, of the Florida Constitution.

#### B. RULE-MAKING AUTHORITY:

The bill requires the division to adopt a form for use in voting to waive or reduce reserve funding. Section 63 of the bill which creates s. 720.501, F.S. establishes agency regulation over homeowner associations and requires the division to adopt rules by January 1, 2007, which date is before the effective date of the act and therefore would require an amendment.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

In its analysis of the bill, the Department of Business and Professional Regulation noted the following legal issues:

The authority to prosecute unit owner abuse cases under other federal and state laws may conflict with the prosecution authority granted to other agencies. It is also uncertain as to the division's prosecutorial authority where the abuse rises to the level of a criminal abuse, such as the case where an association employee or board member commits an aggravated assault on a unit owner, or an independent contractor working on the condominium commits a violent crime against a unit owner. It is unclear if torts, such as defamation, will constitute an abuse for which the division must take action.

Further, the definition of abuse in this context with a broad reference to state and federal laws and condominium documents might be challenged as overbroad and vague. Review *Simmons v. State*, 944 So. 2d 317 (Fla. 2006), which upheld prohibited Internet solicitation of minors. This case provides the constitutional standards for these challenges to statutes. Vagueness arises where a law does not give fair notice to a person that his contemplated conduct is forbidden or if it encourages arbitrary enforcement. Over breadth concerns the application of a law to conduct that is constitutionally protected in addition to prohibited conduct.

Because abuse is defined, courts may well uphold it under existing standards. Over breadth is a due process notice provision. All persons are deemed to know all laws and their own documents. So, this might also pass the test. We would spend untold hours trying to figure out under which law if any a unit owner had been abused.

It is unclear how the abuse provision will interact with the SLAPP suit defense if the division brings an action against a unit owner board member for abusing another unit owner in statements made to a

public official, such as the Ombudsman. The division will be required to defer to the Ombudsman's findings and direction to initiate suit in circuit court against unit owner members of the board, which may subject it to treble damages under the SLAPP suit provision, particularly where the ombudsman's findings are based on inadmissible hearsay. It is also uncertain how a SLAPP suit defense will interact with the division's authority to hold individual board members liable for knowingly and willfully violating the Condominium Act under section 718.501(1)(d)4, F.S.

The bill creates a right to own a companion animal, so it is unknown how this harmonizes with state and federal Fair Housing and disability laws.

The Department of Business and Professional Regulation, in its analysis of the bill, expressed the following comments and concerns:

Section 1 of the bill creates a new division within the department called the Division of Mandated Properties, and adds Homeowners' Associations to the Division of Florida Land Sales, Condominiums, and Mobile Homes. However, the bill does not provide the new division with any authority, instead placing homeowners' association regulation within the newly renamed division.

Section 21 has an effective date of April 2007, which is prior to the effective date of the bill. The amendment requires all condominiums to create ownership interests based on the relative size of the unit to the total size of all units, while this may be desirable in condominiums where there are units of different sizes, it is less complicated to base assessments on an equal fractional basis when all units are configured the same, even if the exact size of the units may differ. For example, a developer may create a condominium in which all of the units are two bedrooms, but they are not exactly the same size.

Section 23, amending section 718.110(1), F.S., requires associations to provide a notice of proposed amendments to the declaration of condominium to be provided to unit owners by certified mail, and amendments to section 718.112(2)(a)2., F.S., (Section 25) requiring responses to unit owner inquiries by certified mail may be expensive, and may not be available to contact unit owners who reside outside of the United States. The amendment to section 718.111(13), F.S., prohibiting the waiver of financial reporting requirements is worded in a way that implies the vote may be taken by the board, which conflicts with other language in the same section of the law. This section of the bill also creates section 718.111(15)(a) – (d), FS, addressing reconstruction after casualty, allows termination where the damage to the property exceeds 50% of its worth. The bill does not indicate how the association should determine the "worth" of the condominium. Termination under these circumstances is discretionary (the bill says "may be terminated"), but the bill does not explain how procedurally this exercise of discretion is to occur, except to say that the condominium may be terminated "unless 75% of the owners agree to reconstruction and repair." Therefore, a number of questions are raised. Can the board itself decide to terminate, or not to repair, when the 50% damage threshold is achieved, subject to any vote of 75% of the owners to rebuild? Is the 75% vote a minimum threshold? Is a vote of the owners required to terminate once 50% is achieved; what vote is required? The intended operation of this new section is obscure and uncertain. The bill further does not explain if the new procedures apply to pre-existing condominiums. This section also requires the association to make assessments against unit owners for the damage to their units, and may use the association's lien authority to enforce collection. Damage to the unit that is covered by the association's insurance policy, but not paid due to the deductible, should be assessed as a common expense, and damage to the unit that is covered by the unit owner's policy should be the responsibility of the unit owner. This amendment also requires the board to gather estimates and effect repairs within 60 days after the casualty. This timeframe is not realistic, currently there are some associations that have not been able to obtain insurance settlements or find contractors to do the repair work from damage incurred over a year ago.

Section 25, amending section 718.112(2)(a), F.S., to delete the association's ability to adopt reasonable rules and regulations regarding the frequency and timing of responding to written inquiries

from owners. Without limitations imposed in the statute itself or without the ability of an association to pass reasonable rules and regulations, it will be possible for an owner to send an unlimited number of inquiries and the association shall be obligated to substantively respond to each one. The amendment to section 718.112(2)(d), F.S., to repeal the election procedures opt will impose greater costs on those associations that opt out of the procedure, which will result in an increase in assessments.<sup>1</sup> The amendment to section 718.112(2)(f)2., F.S., requires associations to include a reserve for structural repairs in the budget. It is unclear what should be included in this category, which appears to require a reserve for every component of structures. The amendment to section 718.113(1), F.S., providing that the cost of maintenance of limited common elements cannot be a common expense and must be shared by those entitled to use the limited common elements creates a situation in which an association may assess common expenses based on the size of the unit, and assess the limited common element maintenance costs equally between all of the units. This does not make sense when all of the units have the same type of limited common element, and may encourage developers to draft documents with more limited common elements in order to assess the units on amore equal basis. For example, the documents could be drafted to make the building a limited common element in order to assess the cost of building maintenance equally.

The amendment to the recall provisions raises due process concerns for unit owners and board members alike, the time lines surrounding the determinations are unrealistic. Also, this bill raises an issue in that authorizing the Ombudsman to make determinations on recalling board members arguably subjects the decision to being classified as final agency action subject to review by the DCA.

Sections 26 and 54 of the bill engrafting First Amendment rights into a private association's rules on the use of the common elements may have unintended consequences. For example, many associations restrict the placement of For Sale signs, designate pet walk areas, prohibit religious displays or meetings, and impose hours of operation for recreational facilities. Competing interests of owners who wish to use the common elements may lead to conflicts over who gets to use the common elements for what purpose, for how long, and embroil the association in litigation over competing First Amendment rights. See *Neuman v. Grandview at Emerald Hills, Inc.*, 861 So. 2d 494 (Fla. 4th DCA 2003).

Defining what is a "mandated" religious display would assist in the application of this section. For example, is a Santa Claus display permitted under this language? Is an Easter Bunny permitted? Is a wreath permitted?

The amendments to section 718.113, F.S., require associations to engage an architect or engineer every five years for the purpose of determining if the building is structurally and electrically safe. It is unclear if the benefit of this requirement outweighs the cost involved.

Section 28, creating section 718.1123, requiring the division to immediately investigate complaints of abuse by elderly persons appears to require the division to take civil and criminal actions that are under the jurisdiction of other agencies. The reference to rights and protections under applicable state and federal laws is very broad and does not provide the needed guidance for the division in cases of jurisdiction provided by these laws to other agencies or private enforcement. See fiscal and work load analysis above.

Section 35, amending section 718.501(1)(e), F.S., conflicts with section 718.504, F.S., which provides that the developer of "more than 20 residential units, shall prepare a prospectus." The change requires the division to prepare the prospectus, and includes all condominiums whether 2-unit or 200-unit. It also requires the division to disseminate the prospectus, but to whom and how is not discussed. This would add an unknowable cost burden to the division. The amendments creating section 718.501(1)(n), F.S., will likely reduce the number of unit owners who desire to be candidates for the board as any violation, intentional or not, will required the board member to attend training within 90

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<sup>1</sup> In contrast to this comment, another opinion would maintain that these costs are confined to copying costs, and would better be described as minimal or insignificant; consequently, an additional assessment would not result.

days of notification of the violation. Also, if there are repeat violations it doesn't make sense to continue to send the board members to mandatory training that they have already attended. The amendment to section 718.501(2)(e), F.S., requires one-fifth of all fees deposited to the division trust fund be transferred to the Ombudsman's office. This should have stated that it only applied to condominium fees as the Ombudsman does not perform any functions for the other areas that the division regulates. Amendments to section 718.5012, F.S., regarding the Ombudsman's authority to issue orders for violations of the chapter and create a duplication or conflict with the Division's authority to issue orders. At this time, the sole authority for enforcement of the Condominium Act is the division. It is unclear if the cease and desist orders issued by the Ombudsman are subject to the due process procedures in Chapter 120, FS, or immediately appealable to the circuit court.

Section 51, amending section 720.301(4), F.S., contains substantive restrictions on amendments to the declaration of covenants within the definition of that term. This may be confusing as to whether this is part of the definition, and the restrictions will adversely affect developers, who typically reserve the right to amend the documents through turnover. The amendments to section 720.301(9), F.S., change the definition of a homeowners' association to exclude those associations in which the parcel owners are represented by an agent, typically a board member from a sub-association. It is unclear if this is the intent of the amendment.

Section 52, amending section 720.302(2), references the "ombudsman" but does not have a provision creating the ombudsman's office or her authority in the chapter.

Section 53, amending section 720.303(1)(c), grants powers under the act but omits to include corporate powers under chapter 617. Compare to section 718.111(2), Florida Statutes. The provisions amending section 720.303(4)(i) to prohibit a contract from maintaining property not owned by the association needs to be harmonized with the amendments to 720.303(6) requiring the association to budget for association charges related to recreational amenities owned by others.

Section 54, amending section 720.304, references "common elements," which is a term of art applying to condominiums and may create confusion with "common areas," which is a term of art relating to homeowner associations defined in section 720.301(2).

Section 57, amending section 720.306, repealing "quorum" requirements may result in association's relying on general corporate law quorum requirements. It is unknown if this is to be retroactively applied to existing bylaws and whether, if so, an impairment of contract rights issue might be raised.

Section 57, amending section 720.306(9), incorporates the present election procedures in 718.112(2), but not the amendments being made to the condominium procedures by this bill. Compare page 145 with page 187. Under the condominium procedure, an association may no longer use both sides of the paper for candidate sheets, but homeowner associations will be permitted to under this bill. Adopting the condominium election requirements for homeowners associations will substantially change existing procedures and increase costs substantially for some associations.

Section 55 of the bill repeals the association's authority to impose a fine under section 720.305(2), but section 57 of the bill imposes a fine against a unit owner for allowing another person to cast his or her vote under section 720.306(9). Compare page 178 with page 188.

Section 57, amending section 720.306(9), authorizing the division to appoint election monitors to conduct board elections raises questions of conflict of interests under section 63 of the bill, authorizing the division to investigate complaints of violations of the act. If a complaint is received about an election conducted by the division, the division would have a conflict of interest. Compare page 189 with page 202-205.

Section 58, amending section 720.307(5), applying developer transfer of association control to all "existing" associations, but not all those that will be "created" may cause doubt as to its applicability.

The amendment to section 720.307(4), F.S., requiring the preparation of a turnover audit within 30 days following the turnover election is unrealistic, and will result in violations the cause of which may be beyond the control of the developer.

Section 59, requiring all homeowners' association board members to attend training will be expensive and impractical. It is unknown how many associations exist in Florida, but there could be at least 60,000 board members that would be required to attend training.

Section 62, amending section 720.401, F.S., providing that association documents are "recorded" in Tallahassee may create confusion between the official recorded property records, which are maintained in the county clerk's office and the "filed" proposed documents that maintained by the Division. The filed documents may not be identical to the recorded documents and homeowners should not rely on filed copies for assertion of their property rights.

Section 63, creating section 720.501, F.S., imposing agency regulation on associations, requires the division to adopt rules by January 1, 2007, which date is before the effective date of the act.

Section 75, addressing the right to own a companion animal indicates that it applies to every homeowner or renter in Florida, but it isn't clear what laws are being amended to accomplish that objective.

Section 76, requiring that condominium developers must pay assessments on unsold units that are rented, notwithstanding anything to the contrary in the documents conflicts with section 718.116(9), F.S., which provides that no owner, including the developer, may be excused from assessments. The developer may be excused from assessments on unsold units only if there is a valid guarantee agreement, which may be found in the declaration, prospectus or contracts. If the intent is to eliminate the developer guarantee, it would be less confusing to amend that section of the law.

#### D. STATEMENT OF THE SPONSOR

### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 22, 2007, the Committee on Business Regulation adopted a strike-all amendment, as amended, and reported the bill favorably. The amendment made the following changes to the bill:

- Removed all changes proposed by the bill to Chapter 719 relating to Cooperatives.
- Removed all proposed changes to Chapter 720 relating to Homeowners' Associations, except some of those changes contained in Section 53. of the bill (now Section 19. in the amendment) relating to Homeowner Association budgets and financial reporting. Also, remaining in the amendment are the changes to s. 720.307 F.S., contained in Section 58. of the bill (now Section 20. in the amendment) relating to turnover from developer control to a Homeowner Association.
- Removed all changes proposed related to conforming provisions of the statutes to the renaming of the Division of Land Sales, Condominiums, and Mobile Homes in DBPR and deleted provisions creating the new Division of Mandated Properties and the Advisory Council on Mandated Properties.
- Removed changes proposed by the bill to Chapter 190 relating to Community Development Districts except those contained in Sections 4. and 5. of the bill (now Sections 1. and 2. in the amendment) which amend ss. 190.048 and 190.0485 F.S. to create detailed disclosure requirements in a contract for the sale of real property or a residential unit located in a district and also to conform the real property recording requirements to the disclosure changes.

- The amendment modifies the changes made to Chapter 718 relating to Condominiums as follows:
  - Regarding access to a unit, removes language requiring that one of the two people accessing the unit must be a board member;
  - Limits the waiver of certain financial reporting to two consecutive years rather than a total of two years;
  - Removes a change which would have prohibited board action on a resolution without an open meeting;
  - Changes the new provision requiring that the board must address agenda items proposed by a petition of 20 percent of the unit owners to require the petition be submitted 48 hours in advance of the meeting to enable posting of the updated agenda.
  - Reinstates the current law allowing associations to adopt reasonable rules concerning the frequency and manner of responding to unit owner inquiries but specifies that a response to two inquiries within a 30-day period rather than one inquiry is a minimum for a reasonable rule;
  - Changes the new requirement that the board respond to unit owner correspondence by the same delivery method used by the owner to the same method or more secure method.
  - Removes a requirement proposed in the bill that unless bylaws provide otherwise, parliamentary procedures must be used by the board of administration when conducting association meetings;
  - Removes a change in the bill that would have prevented associations from using both sides of the paper when printing candidate information sheets;
  - Changes the new provision requiring the board of administration to vote on items placed on the agenda by 20 percent of the unit owners' voting interests to the placement on the agenda of items other than budget items;
  - Removes the requirement that the division develop a ballot form for the new requirement that a vote for no financial reserves or a percentage of reserves be taken at the annual meeting;
  - Removes from the bill changes that would have taken effect January 1, 2008 replacing the arbitration program for recall disputes currently operated by the division with a program operated by the Ombudsman;
  - Changes the new requirement that condominium buildings be inspected by a professional engineer or architect every 5 years for structural and electrical safety to also include a determination of the short term and long term maintenance needed and requires that long term maintenance be presented as a reserve plan containing an executive summary that must be distributed to all unit owners;
  - Removes language in the bill broadly prohibiting the adoption of rules by the board that impair certain rights guaranteed by specified provisions of the state and federal constitutions and instead specifically prohibits the association from forbidding the attachment of religious items at the door or at the entrance of a unit. However, the board may adopt reasonable size restrictions for such items.
  - Removes from the bill a change that would have limited associations to contracting only for basic cable TV service when such service is to be charged as a common expense;
  - Removes all new provisions related to the protection of unit owners from abuse defined as actions likely to deny a protection afforded under state or federal law, administrative rules, or governing documents;
  - Changes the new language requiring that a contract for construction or repair of the property in excess of 10 percent of the annual budget should have the written *approval* of an attorney to "should occur under the written *advisement* of an attorney;"
  - Removes new provisions requiring the division to mandate the participation of an association in educational training related to the particular violation and the civil penalties for failing to comply with conditions of noticing unit owners of violations or to complete training;
  - Removes a new provision requiring the allocation and transfer of one-fifth of all fees deposited into the division's trust fund to the Ombudsman;
  - Reinstates the existing law that was deleted by the bill prohibiting an officer or employee of the Ombudsman's office from other professional or business activities or certain political activities;

- Removes language from the bill requiring the division to defer to the findings of the Ombudsman and for the Ombudsman to administer oaths and subpoena witnesses etc.
- Removes new language authorizing the Ombudsman upon petition to order extensive election monitoring;
- Removes new language authorizing the Ombudsman to issue cease and desist orders to developers, associations, or officers or members of the board of administration;
- Removes new “prepared in good faith” language added to the existing law requiring a prospectus to contain an estimated operating budget for the condominium and association;
- Changes the language relating to the rights of homeowners and renters to have companion animals to limit its application to condominium unit owners and renters of condominium units.