

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Regulated Industries Committee

BILL: CS/SB 1444

INTRODUCER: Judiciary Committee and Senator Justice

SUBJECT: Home Court Advantage Pilot Program

DATE: April 10, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	Fav/CS
2.	Oxamendi	Imhof	RI	Pre-meeting
3.			CA	
4.			JA	
5.				
6.				

I. Summary:

This bill creates the Home Court Advantage Pilot Program in Hillsborough and Pinellas Counties. The purpose of this one-year pilot program is to establish a simplified court procedure for property owners and community associations to resolve disputes.

This bill creates unnumbered sections of the Florida Statutes.

II. Present Situation:

The growth in the number of residential associations in the United States has been “explosive” since 1962.¹ Florida has also experienced this rise in residential associations, and many of these condominiums, cooperatives, residential neighborhoods, and community development districts are deed-restricted communities. Property purchased in a deed-restricted community is subject to certain limitations or restrictions on the use or design of the property. Restrictions are often seen as an integral part of a common interest community, used to preserve the stable, planned environment that shared ownership aims to foster.² These restrictions are usually described in a

¹ David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 764-65 (1995). In 1992, there were approximately 150,000 homeowners’ associations in the United States, covering 32 million people, or roughly 12 percent of the population. *Id.* at 765. This number was considered an underestimate due to the fact that reporting membership to the national Community Associations Institute, the organization that supplies these statistics, is voluntary. *Id.* at n.23.

² Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U.J.L. & POL’Y 663, 671 (2000).

declaration of covenants (for example, the declaration of condominium) that is agreed upon by the property owners when they purchase property within the deed-restricted community.³

Most deed-restricted communities have associations for the purpose of carrying out the management responsibilities of the community.⁴ These duties typically include maintenance of the common elements and enforcement of all covenants or deed restrictions. The association, through its governing documents, is typically granted the authority to enforce any deed-restrictions, which can include imposing fines and placing liens on property for failure to pay the fines for violating the covenants or deed restrictions.

Disputes between property owners and their association are common, and usually arise out of the violation of a deed restriction, the penalty imposed for such violation, or an allegation that the association is selectively enforcing a restriction or covenant.⁵ The laws governing condominiums, cooperatives, and homeowners' associations provide a means for resolving these disputes through arbitration and mediation programs maintained within the Department of Business and Professional Regulation (DBPR).⁶ Where mediation and arbitration are unsuccessful, a lawsuit may be filed in a court of competent jurisdiction.⁷ Chapter 44, F.S., also provides for a mediation and arbitration program within the state court system.

III. Effect of Proposed Changes:

This bill creates a Home Court Advantage Pilot Program (Pilot Program) in Hillsborough and Pinellas Counties for the purpose, as stated in the bill, of establishing an inexpensive, expedient, and simplified court procedure as an independent venue for community associations or parcel owners to informally resolve disputes relating to covenants or restrictions. This bill provides that the Pilot Program be carried out for one year.

This bill defines the following terms:

- “Community association” means an association responsible for the operation of a condominium as defined by s. 718.103, F.S.; an association responsible for the operation of a cooperative as defined by s. 719.103, F.S.; a timeshare condominium or cooperative association regulated by chapters 718 and 721, F.S.; and a homeowners' association as defined by s. 720.301, F.S., except that the term does not include any such association if a developer elects or appoints a majority of the members of the board of directors of the association. A community association within the meaning of this act includes only those community associations operating residential communities partially or totally situated in Pinellas County or in Hillsborough County. An association operating a commercial community is not subject to this act. A mixed-use condominium as defined by s. 718.404,

³ *Id.* at 672.

⁴ For example, *see* ss. 718.103(2), 719.103(2), and 720.301(9), F.S.

⁵ *See generally*, Kennedy, *supra* note 1, at 761 (“As the number of residential associations has increased, the consequent litigation has arisen largely in the context of disputes between residential associations and their members over the content of frequently intrusive rules and regulations”); *see also*, James L. Winokur, *Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 63-64 (1989).

⁶ *See* ss. 718.1255, 719.1255, and 720.311, F.S.

⁷ *Id.*

- F.S., is a community association for purposes of this act to the extent that the dispute involves the association and the amount of a residential unit.
- “Parcel owner” means the owner of legal title to a parcel governed by a community association.
 - “Dispute” means a disagreement between a community association and a parcel owner concerning the validity or enforcement of restrictions contained in the documents governing the community, including any declaration of restrictions and covenants, declaration of condominium, deed restrictions, the articles of incorporation, and bylaws of the community association, or any rules governing the community, which dispute arises in the Thirteenth or Sixth Judicial Circuits. The term also includes the failure of the association or parcel owner to comply with the requirements of chs. 718, 719, 720, or 721, F.S., as applicable.
 - “Petitioner” means the party filing a petition pursuant to this act. Respondent is the party responding to the petition.
 - “Developer” means the entity creating the community operated by the association or any entity that offers residential parcels for sale or lease in the ordinary course of its business within that community.

This bill provides that the Pilot Program will be implemented and administered by the chief judges of the Sixth and Thirteenth Judicial Circuits, in Pinellas and Hillsborough Counties respectively, and is subject to the supervision of the Florida Supreme Court. The bill directs the chief judges of these circuits to adopt simplified rules and procedures for operating the Pilot Program, including rules allowing lay representatives, including community association managers,⁸ to represent a party and to file petitions, answers, or other pleadings with the court. The bill provides that the rules are to be liberally construed and that parties should be encouraged to engage in these proceedings without legal counsel. The bill also provides that the chief judges must report to the Florida Supreme Court within 60 days following the conclusion of the program and provide an analysis of results. The Chief Justice of the Supreme Court must then review the reports and make determinations and recommendations to the Legislature by February 1, 2009, on whether it is feasible to implement this Pilot Program statewide.

The jurisdiction of the Pilot Program will consist of any dispute regarding the enforceability or validity of those documents governing the operation of the community association, the reasonableness of any action of the board of directors of a community association involving those documents, any dispute in which an association seeks enforcement of its documents, and any dispute alleging the failure of a community association or parcel owner to comply with the requirements of chs. 718, 719, 720, or 721, F.S. Only disputes between a community association and a parcel owner are within the jurisdiction of the program.⁹ The bill grants parcel owners and associations authority to commence proceedings under this act regardless of whether this authority exists in the documents governing the community association. The bill is not clear on whether guests and tenants have standing to be a party to the proceedings of a home court.

⁸ Chapter 468, F.S., provides licensing requirements to become a community association manager.

⁹ Subsection (2) of section 4 of the proposed act provides that officers and directors of the community association cannot be parties to the proceedings in the pilot program. Tenants or guests of parcel owners are only subject to the act if the tenant is alleged to have violated the documents governing the community. The pilot program does not have jurisdiction over disagreements relating to the imposition, reasonableness, or collection of fines, assessments, special assessments, or other fees owed by a parcel owner, lien foreclosure actions, or disagreements regarding the enforcement of a judgment.

This bill provides that if a dispute described by this act is also subject to the mandatory binding or nonbinding arbitration and mandatory mediation programs described in ss. 718.1255, 719.1255, or 720.311, F.S., the dispute is to be filed pursuant to this act and is not permitted to be filed pursuant to chapters 718, 719, or 720, F.S.

An applicant for the position of magistrate must be a member in good standing of The Florida Bar with at least five years of experience in the area of community association disputes, or be a member in good standing of The Florida Bar and licensed as a community association manager pursuant to part VIII of chapter 468, F.S.¹⁰ This bill provides that a magistrate in the Pilot Program serves without compensation and at the pleasure of the chief judge of the judicial circuit in which he or she hears cases. However, magistrates are entitled to immunity as provided by s. 44.107, F.S. Magistrates under the Pilot Program are subject to the standards of professional conduct contained in the Florida Rules for Court-Appointed Arbitrators.¹¹ Additionally, a magistrate is prohibited from presiding over a dispute involving a party currently represented by the magistrate.

Before filing a petition with the clerk, the petitioner must send the respondent a written demand identifying the nature of the dispute, demanding the relief sought, and stating that the dispute will be filed in the courts if the relief is not provided. The petitioner must provide the respondent a reasonable period of time to provide the relief sought. Failure to provide written notice to the respondent will result in dismissal of the petition.

A petitioner must file a dispute with the clerk of the court in the county in which the community governed by the community association is located. The filing fee for petitions under this Pilot Program is \$225, payable to the clerk of the court, which is to be used by the court to defray the costs of administering the program. At the time the petition is filed, the petitioner shall provide a copy of the petition, any attachments,¹² and a copy of the demand letter to the respondent by certified mail. The clerk of the court in which the petition is filed shall direct an order to the respondent by certified mail providing that the respondent has 14 days in which to file an answer. The answer may only address the dispute stated in the petition. The magistrate may abate the proceeding and allow the petitioner to file for a temporary injunction in court upon a showing that the party is entitled to immediate emergency injunctive relief. The bill is unclear if, in order to seek injunctive relief, a party will have to pay the \$255 filing fee to the home court, as well as a filing fee to the circuit court in which the injunctive action will be heard.

The magistrate may enter all orders necessary, including the imposition of sanctions and fines, against a party that refuses to comply with a lawful nonfinal order of the magistrate, but may not

¹⁰ Section 468.433, F.S., provides the requirements for licensure by examination for a community association manager. This section requires that a person desiring to be a community association manager must pass a licensure examination administered by the Department of Business and Professional Regulation and be of good moral character in order to be licensed in the State of Florida. The applicant must demonstrate that he or she has a fundamental knowledge of (a) state and federal laws relating to the operation of all types of community associations, (b) state laws relating to corporations, (c) preparation of community association budgets, (d) procedures for community association meetings, (e) insurance relating to community associations, and (f) managerial skills.

¹¹ See part II, Fla.R.Arb., s. 11.030-11.120.

¹² The bill provides that the petition must include portions of the governing documents relied upon in the petition.

hold a person in contempt. A magistrate may issue subpoenas to compel the attendance and production of persons and documents. A magistrate may grant all relief necessary for the disposition of the dispute, including:

- Finding that a provision contained in the documents is invalid and unenforceable;¹³
- Entering an order enforcing the provisions of the documents and statute;
- Entering an order requiring an association or parcel owner, tenant, or guest to comply with the documents or statute;
- Entering an order finding that the association has selectively enforced its documents; or
- Awarding reasonable prevailing party costs and attorney's fees.

After the filing requirements have been met, the magistrate shall conduct a final hearing, unless waived by both parties, within 60 days after the filing of the petition. Within 14 days after the final hearing, the magistrate shall issue a final order, which is only binding on the parties if an appeal by trial de novo is not filed in the circuit court within 30 days after the rendition of the final order. A final order, which has not been timely appealed, may be enforced by filing a petition for enforcement in circuit court. If no timely appeal is filed, the magistrate retains jurisdiction to impose fines against a party who was ordered by the final order to take some action or refrain from taking some action and who does not comply within 30 days after rendition of the final order. The bill provides that the fine may not exceed \$100 per violation; however a fine may be levied on the basis of each day of a continuing violation which may not, in the aggregate, exceed \$1,000 per violation. A fine may not be imposed until notice is given and a proceeding in which the parties have an opportunity to be heard is conducted by the magistrate. If a fine is imposed on a parcel owner, the association is entitled to one-half of the amount of the fine imposed, while the other half is paid to the clerk of the circuit court to defray the costs of administering the Pilot Program. An order imposing a fine may be appealed to the circuit court within 30 days after rendition of the order.

The bill authorizes the magistrate to grant any relief necessary for the disposition of the dispute. It also permits the magistrate to award attorney's fees to the prevailing party.

It appears that the fining authority, for failure to comply with the final order, of the magistrate prescribed in section 7, subsection (3) of this bill is a form of contempt sanction, which section 7, subsection (1) of the bill prohibits.

Proceedings under the Pilot Program shall be conducted with simplified rules of procedure adopted by the chief judge of the court in which the petition is filed. Discovery rights are restricted to cases in which manifest injustice to a party is shown to result from a denial of discovery. Additionally, the magistrate is not bound by the formal rules of evidence during proceedings under this act. A magistrate shall follow and apply the applicable statute and controlling case law when deciding a dispute.

This act shall take effect July 1, 2007.

¹³ The bill provides, however, that a magistrate may not reform the documents governing the community.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill creates a “home court” that is headed by a judicial officer entitled a magistrate. The magistrate is appointed by the chief judge of the circuit. The position of magistrate may be a full-time or part-time position and a nonlawyer may be appointed as a magistrate. The rules of court used by the magistrate are set by the chief judge of the circuit. The magistrate has the apparent power to issue final judgments that may be appealed to a higher court. Based on these observations, it is possible that this bill may be affected by one or more of the following constitutional provisions:

Article V, s. 1 of the Florida Constitution, creates the Supreme Court, the district courts of appeal, the circuit courts, and the county courts. The section provides that “no other courts may be established by the state, any political subdivision or any municipality.” It is not clear if this bill, in creating a home court, is creating a separate division of courts, or if the bill is using the term “court” to name an activity within the current circuit court system. To the extent the bill creates a new level of courts, it may violate Article V, s. 1 of the Florida Constitution.

The legislatures of Connecticut and New Hampshire have created pilot programs without any objection.¹⁴ However, both states’ constitutions explicitly provide that the legislature can create such lower courts as required.¹⁵ Florida’s Constitution does not have a reciprocal provision.

In *Jones v. Seminole County*, 670 So. 2d 95, 96 (Fla. 5th DCA 1996), the court found that the Legislature did not violate the Constitution and cross the line between “quasi-judicial” and “judicial” when it enacted ch. 162, F.S. This chapter creates administrative boards which may impose fines for code violations, assert a lien against real or personal property, and provide for fundamental due process requirements of notice and a hearing,

¹⁴ See Public Act No. 04-159, at <http://www.cga.ct.gov/2004/act/Pa/2004PA-00159-R00SB-00129-PA.htm> (last visited March 20, 2007); *In re Jesse*, 143 N.H. 192, 196 (N.H. 1998) (the legislature created a family court pilot program at Laws 1995 152:1,:2).

¹⁵ See Article V, s. 1 of the Constitution of the State of Connecticut, at <http://www.sots.ct.gov/RegisterManual/SectionI/ctconstit.htm> (last visited March 20, 2007); Part Second, Article 72-a of the New Hampshire State Constitution, at <http://www.nh.gov/constitution/constitution.html> (last visited March 20, 2007).

making a record, and appeal, although the appeal is not *de novo*.¹⁶ These “administrative boards” have passed constitutional muster, and perform almost identical duties as the proposed pilot program.

Article V, s. 2 of the Florida Constitution, gives the Florida Supreme Court exclusive rulemaking authority over Florida courts. This bill provides that the chief judge of the circuit, rather than the Supreme Court, would promulgate the rules for the home court.

Article V, s. 8 of the Florida Constitution, contains certain requirements for persons to be appointed to the position of judge. This section provides, in part:

No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court. . . . No person is eligible for the office of justice of the supreme court or judge of a district court of appeal unless the person is, and has been for the preceding ten years, a member of the bar of Florida. No person is eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, no person is eligible for the office of county court judge unless the person is, and has been for the preceding five years, a member of the bar of Florida.

This bill appears to create a judicial office that can be filled by a person not eligible to be a judge.

Article V, s. 13 of the Florida Constitution, requires judicial officers to devote full time to their judicial duties. It appears that this bill would make it difficult for the appointed magistrate in the home court program to devote full time to his or her judicial duties considering the position is uncompensated. Moreover, the bill provides that a magistrate can serve full time or part time.¹⁷

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

In order to participate in the court services provided by this Pilot Program, a property owner or community association must pay a \$75 filing fee. Any fine imposed by the home court magistrate must be paid to and retained by the home court program, unless the action is for dues or special assessments. In that situation, the amount of the dues or

¹⁶ *Jones*, 670 So. 2d at 96.

¹⁷ See s. 9 of the proposed bill.

special assessments shall be paid to the community association, minus 10 percent of the fine, which is to be retained by the home court program.

The bill does not provide for who bears the cost of the court-ordered mediation; however, in other contexts, mediation costs are generally split by both parties.

C. Government Sector Impact:

This bill requires a filing fee of \$75 and provides that any fine imposed by the home court magistrate must be paid to and retained by the home court program, unless the action is for dues or special assessments. In that situation, the amount of the dues or special assessments shall be paid to the community association, minus 10 percent of the fine, which is to be retained by the home court program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The definitions section of the bill is not clear on which community associations should or should not be covered under the bill. For example, the bill never specifically mentions condominiums or cooperatives, two major forms of deed-restricted communities. The bill uses the term “civic association” in section 2, subsection 4, but there is no definition for what a civic association actually is.

This bill empowers a magistrate to decide whether a restriction imposed by a covenant or restricted deed, or the fine imposed for failure to comply with a restriction, is reasonable.¹⁸ Reasonableness, however, may not be the proper standard to use in every case. The court in *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639 (Fla. 4th DCA 1981), identified two categories of cases that usually arise in deed-restricted communities: (1) those dealing with the validity of the restrictions found in the declaration of covenant, and (2) those involving the validity of rules promulgated or denied by the association’s board of directors. In describing the standard for these two categories, the court said:

In the first category, the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. Thus, although case law has applied the word “reasonable” to determine whether such restrictions are valid, this is not the appropriate test. ... [A] use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions

¹⁸ The bill does not define a standard for reasonableness.

found in the declaration of condominium, since such restrictions would be in a potential condition of continuous flux.

The rule to be applied in the second category of cases, however, is different. In those cases where a use restriction is not mandated by the declaration of condominium per se, but is instead created by the board of directors of the condominium association, the rule of reasonableness comes into vogue. The requirement of “reasonableness” in these instances is designed to somewhat fetter the discretion of the board of directors. By imposing such a standard, the board is required to enact rules and make decisions that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners.¹⁹

This bill also provides that a magistrate must issue an order requiring the complainant and the defendant to appear for a final hearing within 60 days after receipt of service of the complaint, and that the defendant must serve a response to the notice to comply²⁰ within 10 days of the final hearing. However, the bill provides in the next paragraph that within 30 days after the issuance of the order requiring the final hearing, the parties must attend mediation. The way the bill is currently drafted could result in a conflict between these timing requirements. For example, a magistrate could set a hearing for two or three weeks from the receipt of service and this would result in a hearing being completed before the expiration of the mediation deadline. Additionally, the parties could attend mediation without the complainant having received the defendant’s response, since the response is not due until 10 days prior to the final hearing.

This bill provides in section 7 that a home court magistrate must be a member of the Florida Bar with at least five years of relevant experience, or be a community association manager. There is a possible conflict of interest with a *community association manager* being a magistrate for cases involving disputes between a *community association* and property owners. Additionally, any attorney wishing to be a magistrate under this bill, and who is likely the most qualified because of the required relevant experience, would have to stop his or her practice of law in that area under section 9.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

¹⁹ *Hidden Harbour Estates, Inc.*, 393 So. 2d at 639-40; *see also*, *Woodside Village Condo. Assoc., Inc. v. Jahren*, 806 So. 2d 452, 457 (Fla. 2002).

²⁰ The complaint must specify whether a notice to comply was delivered to the defendant and, if so, when it was provided and if it was in writing.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
