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 902
INTRODUCER:	Regulated Industries Committee and Senator Jones
SUBJECT:	Community Associations
DATE:	February 27, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.			CA	
3.			JU	
4.				
5.				
6.				

I. Summary:

The bill defines the term "equity facilities club" to mean a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, and prohibits any law, ordinance, or regulation that establishes certain requirements on the equity facilities club form of ownership that are not applicable to other forms of ownership.

The bill provides the following provisions and requirements regarding the rights, powers, and duties of condominium associations and their members:

- Prohibits local ordinances or regulations that limit access to a public or private beach adjacent to the condominium for the condominium or its members and guests;
- Limits the enforcement of provisions in the governing documents recorded on or after October 1, 2007, or amendments thereto, that require the consent or joinder of some or all mortgagees of units or any other portion of the condominium property for those mortgages;
- Prohibits the acquiring or entering into agreements acquiring leaseholds, memberships, or other possessory or use interests within 12 months after a declaration; and

The bill provides the following provisions and requirements regarding the powers and duties of a homeowners' association:

- The bill provides procedures for the revival of the declaration of covenants for non-mandatory homeowners' associations in which the covenants have lapsed;
- The bill authorizes for-profit homeowner's associations;

- All meetings of a homeowner's association regarding a final decision for the spending of association funds, and to approve or disapprove architectural decisions with respect to a specific parcel of residential property must be open to all members;
- Provides for the charging of a reasonable fee not to exceed $150 plus photocopying and attorney's fees to a prospective purchaser or lienholder or the current parcel owner for providing good faith responses to requests for information, unless required by law;
- Any member who prevails in an action against an association and is awarded attorney's fees may be awarded an amount sufficient to cover the member's share of assessments levied to fund the association's litigation expenses;
- Permits the merger or consolidation of one or more associations;
- Establishes for the maintenance of reserve accounts in the annual budget, including how to calculate reserves and conditions for waiving the maintenance of reserve accounts;
- It provides for guarantees of assessments of parcel owners that are not included in the purchase contract or declaration;
- An association may review and approve building plans only to the extent that it is specifically stated or reasonably inferred in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants;
- An association can only enforce setbacks specifically provided for in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, and cannot enforce setback requirements that are inconsistent with applicable county or municipal setback standards;
- Each parcel owner's rights and privileges as provided in the declaration of covenants cannot be unreasonably impaired concerning the use of the parcel, and the construction of permitted structures and improvements;
- An association cannot enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants, whether the policy is uniformly applied or not;
- It increases from 60 days to 90 days the period after each fiscal year that an association must prepare and complete the annual financial report; and
- It specifies additional records and documents that the developer must provide to the association's board of directors upon the creation of the association. It also provides procedures for determining the developer's financial obligation to the homeowner's association upon the creation of the association.

This bill repeals the mediation of disputes between homeowners' associations and members by the Department of Business and Professional Regulation. Such disputes would be mediated by private mediators. The mediator may require advance payment of fees and costs. The bill deletes the $200 filing fee requirement and provisions providing for the payment of fees for a department mediator.

The bill provides an effective date of July 1, 2007.

This bill substantially amends the following sections of the Florida Statutes: 718.106, 718.110, 718.114, 718.404, 719.103, 719.507, 720.302, 720.303, 720.305, 720.306, 720.307, 720.308, and 720.311. This bill creates sections 712.11 and 720.3035, Florida Statutes.

II. Present Situation:

Reviving Association Covenants and Restrictions

Some Florida homeowners' associations have governing documents that provide for an expiration of the community covenants after a specified number of years. The Marketable Record Title Act,[1] may cause covenants to lapse by operation of law if the covenants are silent as to expiration, or if a 30-year period in the Marketable Record Title Act is shorter than the stated expiration time. Residents in these communities have the option to revive the covenants after the expiration by following the procedure in ss. 720.403 - 720.407, F.S. The covenant revitalization procedures in ss. 720.403 - 720.407, F.S., are not available to homeowners' association not governed by ch. 720, F.S., e.g., those in which membership is not a mandatory condition of parcel ownership and assessments, if not paid, cannot become a lien on the parcel.[2] Non-mandatory associations may not revive covenants pursuant to ss. 720.403 - 720.407, F.S., because ch. 720, F.S., relates to residential homeowners' associations where membership is a mandatory condition for the owners of property.

Section 712.02, F.S., provides that:

> Any person having the legal capacity to own land in this state, who, alone or together with her or his predecessors in title, has been vested with any estate in land of record for 30 years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in s. 712.03.

Section 712.02, F.S., provides the process for revival of covenants and restrictions for condominium associations with extinguished covenants and restrictions. Parcel owners in a community may revive a declaration of covenants with the approval of the Department of Community Affairs, if the following requirements are satisfied:

- All parcels to be governed by the revived declaration must have been once governed by a previous declaration that has ceased to govern some or all of the parcels in the community;
- The revived declaration must be approved in the manner provided in s. 720.405(6), F.S.; and
- The revived declaration may not contain covenants that are more restrictive on the parcel owners than the covenants contained in the previous declaration, except that the declaration may:
    - Have an effective term of longer duration than the term of the previous declaration;
    - Omit restrictions contained in the previous declaration;
    - Govern fewer than all of the parcels governed by the previous declaration;
    - Provide for amendments to the declaration and other governing documents; and

[1] *See* s. 712.05, F.S.,
[2] Section 720.301(9) and (11), F.S.

- Contain provisions required by this chapter for new declarations that were not contained in the previous declaration.[3]

Section 720.405(6), F.S., requires that a community must form an organizing committee to draft or obtain the correct documents to revive extinguished covenants. A majority of the affected parcel owners must agree in writing to the revived declaration of covenants and governing documents or approve the revived declaration and governing documents by a vote at a meeting of the affected parcel owners noticed and conducted in the manner prescribed by s. 720.306, F.S.

The organizing committee must submit the documents to the Department of Community Affairs within 60 days of the parcel owners' approval. The department must determine within 60 days of submittal whether the documents comply or do not comply with the requirements of the statute, and inform the organizing committee in writing of its decision.

No later than 30 days after receiving approval from the department, the organizing committee must file the articles of incorporation of the association with the Division of Corporations of the Department of State if the articles have not been previously filed with the division. No later than 30 days after receiving approval from the division, the president and secretary of the association must execute the revived declaration and other governing documents approved by the department in the name of the association and have the documents recorded with the clerk of the circuit court in the county where the affected parcels are located.[4]

Condominiums

A condominium is the form of ownership of real property created under ch. 718, F.S., "which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements."[5] A condominium association may be a corporation for profit or a corporation not for profit.[6] The board of administration of a condominium is the board of directors or other representative body which is responsible for the administration of the association.[7]

Condominium Association Bylaws

A condominium association's bylaws provide the specific powers and duties of an association. Section 718.112(2), F.S., provides items that must be included in an association's bylaws, and provides that, if not included, are deemed by operation of law to be included in the bylaws. Required provisions include:

- The powers, duties and the appointment of a condominium board;

[3] Section 720.404, F.S.
[4] Section 720.407(1) and (2), F.S.

[5] Section 718.103(11), F.S.
[6] Section 718.104(4)(i) and 718.111(1)(a), F.S.
[7] Section 718.103(4), F.S.

- A board meeting notice must include an agenda and must be posted conspicuously on the condominium property at least 48 continuous hours before the meeting except in an emergency.

If the notice cannot be posted on condominium or association property, notices of board meetings must be mailed, delivered, or electronically transmitted at least 14 days before the meeting to the owner of each unit.[8]

Amending a Declaration of Condominium

Section 718.110(11), F.S., provides that any declaration of condominium recorded after April 1, 1992, may not require the consent or joinder of mortgagees in order for an association to pass an amendment to the declaration. This prohibition is limited to amendments which do not materially affect the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. Such consent may not be unreasonably withheld. If a mortgagee's consent is provided by other than a properly recorded joinder, such consent must be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded.[9]

Section 718.114, F.S., provides that a condominium association has the authority to enter into agreements and acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. All leaseholds, memberships, and other possessory or use interests existing or created at the time the declaration was recorded must be stated and fully described in the declaration. After the recording of the declaration, an association may not acquire or enter into agreements for these possessory or use interests, except as authorized by the declaration. If the declaration does not provide this authority, it can be amended by approval of not less than two-thirds of the unit owners.[10]

Cooperative Associations

Section 719.103(12), F.S., defines a "cooperative" as:

> that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

A cooperative differs from a condominium because, in a cooperative, no unit is individually owned. Instead, an apartment unit's occupants receive an exclusive right to occupy the unit. The cooperative holds the legal title to the unit and all common elements. The cooperative association may assess costs for the maintenance of common expenses.[11]

[8] Section 718.112(c), F.S.
[9] Section 718.110(11), F.S.
[10] Section 718.110(1)(a), F.S.
[11] *See* ss. 719.106(1)(g) and 719.107, F.S.

Equity Ownership

Facilities such as golf and tennis clubs often sell membership interests as “equity ownership.” Such memberships offer the use of the facilities, and can include other amenities. For example, some forms of equity membership provide access to the facility and the assets would be distributed to the equity members. If the member resigns, his or her membership is bought by the club and resold. Members can receive refunds from their membership contributions.[12]

Homeowners’ Associations

Chapter 720, F.S., provides statutory recognition to corporations that operate residential communities in this state, provides procedures for operating homeowners’ associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.[13]

Section 720.301(9), F.S., defines a "homeowners’ association" as a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. Unless specifically stated to the contrary, homeowners’ associations are also governed by ch. 617, F.S., relating to not for profit corporations.[14]

Homeowners’ associations are administered by a board of directors whose members are elected.[15] The powers and duties of homeowners’ associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents.[16] The officers and members of a homeowners’ association have a fiduciary relationship to the members who are served by the association.[17]

Section 720.301(3), F.S., defines the term “community” to mean:

> the real property that is or will be subject to a *declaration of covenants* which is recorded in the county where the property is located. The term "community" includes all real property, including undeveloped phases, that is or was the subject of a development-of-regional-impact development order, together with any approved modification thereto. (emphasis supplied)

Section 720.301(4), F.S., defines the terms "declaration of covenants," or "declaration," to mean:

[12] Crystal Thornton, Case Note, *Akron Management Corporation v. Zano*, 29 Ohio N.U.L. Rev. 735 (2003).
[13] *See* s. 720.302, F.S.
[14] Section 720.302(5), F.S.
[15] *See* ss. 720.303 and 720.307, F.S.
[16] *See* ss. 720.301 and 720.303, F.S.
[17] Section 720.303, F.S.

> a recorded written instrument in the nature of covenants running with the land which subjects the land comprising the community to the jurisdiction and control of an association or associations in which the owners of the parcels, or their association representatives, must be members.

Section 720.301(10), F.S., defines the term “member" to mean “a member of an association, and may include, but is not limited to, a parcel owner or an association representing parcel owners or a combination thereof.” Section 720.301(12), F.S., defines the term "parcel owner" to mean the record owner of legal title to a parcel. Section 720.301(13), F.S., defines the term "voting interest" to mean “the voting rights distributed to the members of the homeowners' association, pursuant to the governing documents.”

Homeowner’s Association Board Meetings

Section 720.303(2), F.S., provides procedures for association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for those meetings between the board and its attorney relating to proposed or pending litigation. Members have the right to attend all board meetings and to speak on any matter on the agenda for at least three minutes.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours before a meeting. Shorter notice periods may be provided in case of an emergency. If notice of the board meeting is not posted in a conspicuous place, the notice of the board meeting must be mailed or delivered to each association member at least seven days before the meeting, except in an emergency. For associations that have more than 100 members, the bylaws may provide for a reasonable alternative to posting or mailing requirements, including publication of notice, providing a schedule of board meetings, conspicuous posting and repeated broadcasting of a notice on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[18]

A board may not levy assessments at a meeting unless the notice of the meeting includes the nature of those assessments and a statement that the assessments will be considered at the meeting.[19]

Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. This also applies to meetings of any committee or similar body when a final decision will be made regarding the spending of association funds. Proxy voting or secret ballots are also not allowed when a final decision will be made on approving or disapproving architectural decisions with respect to a specific parcel of residential property owned by a member of the community.[20]

[18] Section 720.303(2)(c)1., F.S.
[19] Section 720.303(2)(c)2., F.S.
[20] Section 720.303(2)(c)3., F.S.

Access to Homeowners' Associations Records

Section 720.303(4) and (5), F.S., requires that associations maintain a copy of their governing documents and records, and to provide parcel owners with copies requested, if a copy machine is available, during an inspection if the entire request is limited to no more than 25 pages. It requires associations to adopt reasonable rules that govern the inspection of the associations' records. It also establishes financial reporting requirements and the format of financial statements.

Inspection and Copying of Homeowners' Association Records

Section 720.303(5), F.S., requires that a homeowners' association permit members to inspect and copy its official records within 10 days of a written request for access. Any failure to comply with such a request in a timely fashion creates a rebuttable presumption that the association willfully failed to do so, and entitles the requesting party to actual damages, or a minimum fine of $50 per calendar day, for up to 10 calendar days, commencing on the eleventh business day. A homeowners' association may adopt reasonable written rules regarding the frequency, time, location, notice, records to be inspected, and manner of inspections. An association may not require that a parcel owner demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records to less than one eight-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the association's copy machine. If the association does not have a copy machine available where the records are kept, or if the records requested to be copied exceed 25 pages, the association may have an outside vendor make copies and may charge the actual cost of copying.

Section 720.303, F.S., expressly exempts the following records from inspection by a member or parcel owner:

- Any record protected by attorney-client or work-product privilege;
- Information obtained in association with the lease, sale or transfer of a parcel that is otherwise privileged by state or federal law;
- Disciplinary, health, insurance and personnel records of the association's employees; or
- Medical records of parcel owners or other community residents.

Budgets

Section 720.303(6), F.S., requires that homeowner's association prepare an annual budget that reflects the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year. Fees or charges for recreational amenities, whether owned by the association, the developer, or another person must be set out separately in the budget. Each member of the association must be provided with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. The current provisions are silent concerning the establishment of reserve accounts.

The financial report must include a complete set of financial statements in compliance with generally accepted accounting principles. The association must prepare a compiled financial statement if the association has total annual revenues of $100,000 or more, but less than $200,000. It must prepare a reviewed financial statement if the total annual revenues are $200,000 or more, but less than $400,000. The association must prepare an audited financial statement if it has total annual revenues of $400,000 or more. An association with less than $100,000 in total annual revenue is required to prepare a report of cash receipts and expenditures.[21]

If 20 percent of the parcel owners petition the board for a level of financial reporting greater than required then a meeting must be held within 30 days of the receipt of the petition to vote on the increased level. If approved by a majority of the voting interests, the types of financial statements may be changed either at this special meeting or at a properly called meeting of the association.

Financial Reporting

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

Homeowner's Association Dispute Resolution

Section 720.311, F.S., provides dispute resolution procedures for homeowners' associations and their members. It requires that recall disputes must be resolved by binding arbitration conducted by the Department of Business and Professional Regulation (department). Any recall dispute filed with the department must be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S. Section 718.112(2)(j), F.S., establishes the procedures for the removal of condominium directors and dispute resolution procedures for condominiums, and requires that arbitration proceedings relating to the recall of a condominium director must be conducted pursuant to the arbitration procedures in s. 718.1255, F.S. It also provides that, if the condominium association fails to comply with the final order of arbitration, the department may take action pursuant to s. 718.501, F.S., which authorizes the department to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties.

Section 718.1255, F.S., provides for alternative dispute resolution, voluntary mediation, and mandatory nonbinding arbitration and mediation of disputes.

[21] According to information provided by FICPA, a compilation of financial statements does not provide an expression of assurance regarding the financial statements and whether modifications to the financial statements are necessary. A review of financial statements provides the accountant with a reasonable basis for expressing a limited assurance that there are no material modifications that should be made to the statements for them to be in conformity with Generally Accepted Accounting Principals (GAAP). An audit of financial statements permits the accountant to provide a reasonable basis for expressing an opinion regarding all material respects of the financial statements.

Section 720.311(1), F.S., requires the department to conduct mandatory binding arbitration for election disputes in accordance with s. 718.1255, F.S. However, s. 720.311(1), F.S., also provides that election and recall disputes are not eligible for mediation. A $200 filing fee is required and the department may assess the parties an additional fee in an amount adequate to cover the department's costs and expenses The prevailing party must be paid its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. Section 720.311(1), F.S., also provides that any petition for mediation or arbitration tolls the applicable statute of limitations.

Section 720.311(2)(a), F.S., provides that the following disputes must be filed with the department for mandatory mediation by the division before the dispute is filed in court:

- Disputes between an association and a parcel owner regarding use of, or changes to, the parcel or the common areas and other covenant enforcement disputes;
- Disputes regarding amendments to the association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings not including election meetings; and
- Disputes regarding access to the official records of the association.

The mediation is conducted under the applicable Florida Rules of Civil Procedure. Mediation proceedings are privileged and confidential to the same extent as court-ordered mediation. Persons who are not a party to the suit may not attend the mediation conference without the consent of all the parties.

If the mandatory mediation is not successful, the parties may file the dispute in a court or enter the dispute into binding or non-binding arbitration to be conducted by the department or private arbitrator. Section 720.311(2)(d), F.S., provides that the mediation procedure may be used by non-mandatory homeowners' associations.

Section 720.311(2)(c), F.S., provides standards to department certification and training of mediators and arbitrators and requires that department-certified mediators must be certified by the Florida Supreme Court.

Section 720.311(3), F.S., requires that the department develop an education program to assist homeowners, associations, board members, and managers in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. It also provides for the funding of the certification program for arbitrators and mediators and the education program by moneys and filing fees generated by the arbitration and mediation proceedings.

Dispute Resolution

Chapter 44, F.S., provides for arbitration and mediation. The Florida Supreme Court establishes the minimum standards and procedures for qualifications, certification, professional conduct, discipline of mediators.[22]

[22] Section 44.106, F.S.

Section 44.1011(1), F.S., defines the term "arbitration" to mean:

> A process whereby a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding as provided in this chapter.

Section 44.1011(2), F.S., defines the term "mediation" to mean, in pertinent part:

> A process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives. "Mediation" includes:
>
> (a) "Appellate court mediation," which means mediation that occurs during the pendency of an appeal of a civil case.
>
> (b) "Circuit court mediation," which means mediation of civil cases, other than family matters, in circuit court. If a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court.
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> (c) "County court mediation," which means mediation of civil cases within the jurisdiction of county courts, including small claims. Negotiations in county court mediation are primarily conducted by the parties. Counsel for each party may participate. However, presence of counsel is not required.

Enforcement

Any legal action to redress the alleged failure or refusal to comply with the provisions of ch. 720, F.S., may be brought by the association or any member of the association against the association itself, a member, or a director or officer of an association who willfully and knowingly fails to comply with these provisions, or a tenant, guest, or invitee occupying a parcel or using the common areas. The prevailing party in the action is entitled to reasonable attorney's fees and costs.[23] If the governing documents provide that an association may suspend rights to use the common areas or levy fines not to exceed $1,000, fines cannot become a lien against a parcel, but in an action to recover a fine, the prevailing party is entitled to reasonable attorney's fees and costs.[24] Chapter 720, F.S., also provides an option to litigation. The Legislature recognized the role of alternative dispute resolution in reducing court dockets and trials and offering a more

[23] Section 720.305(1), F.S.
[24] Section 720.305(2), F.S.

efficient, cost effective alternative to litigation. Accordingly, at any time after a complaint is filed relating to a dispute under ch. 720, F.S., the court may order mediation or arbitration.[25]

Assessments and Charges

For any community created after October 1, 1995, the governing documents must describe the manner by which expenses are to be shared and specify the member's proportional share of the expenses. Any assessments levied in the annual budget or by special assessments must be in the member's proportional share as determined in the governing documents. The share may be different between different classes of parcels. While the developer is in control of the association, the developer may be excused from payment of its share of the operating expenses and assessments for its parcels. To be excused, the developer must have obligated itself in the declaration to pay any operating expenses incurred that exceed the assessments received from other members and other income of the association. This provision does not apply to any community that is included in an effective development-of-regional-impact development order.[26]

State Regulation

Homeowners' associations are not regulated by a state agency. Regarding state regulation of homeowners' associations, s. 720.302(2), F.S., provides:

> The Legislature recognizes that it is not in the best interest of homeowners' associations or the individual association members thereof to create or impose a bureau or other agency of state government to regulate the affairs of homeowners' associations. Further, the Legislature recognizes that certain contract rights have been created for the benefit of homeowners' associations and members thereof before the effective date of this act and that ss. 720.301-720.312 are not intended to impair such contract rights, including, but not limited to, the rights of the developer to complete the community as initially contemplated.

The number of homeowners' associations or persons living in homeowners' associations in Florida is unknown. Although homeowners' associations are required to file articles of incorporation with the Division of Corporations (division) in the Department of State, the division cannot identify corporations that are homeowners' associations under ch. 720, F.S.[27]

Veto of HB 391 (CS/SB 2358)

During the 2006 Regular Session, HB 391 (CS/SB 2358 by Regulated Industries Committee; and Senator Bennett), relating to community associations amended many of the same provisions in condominiums and homeowner's associations in chs. 718 and 720, F.S., as this bill. The bill passed both houses but was vetoed by the Governor. The Governor's veto of HB 391 was based on his objections to these two provisions in that bill:

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[25] Section 720.311, F.S.
[26] Section 720.308, F.S.
[27] Homeowners' Association Task Force, *Final Report of the Homeowners' Association Task Force*, February 2004, page 5. A copy of the report is available on the internet at http://www.myflorida.com/dbpr/os/hot_topics/hoa_taskforce (Website last visited on March 30, 2006.)

- The extension of the date after which local authorities may require the retrofit of applicable residential condominium common areas with a fire sprinkler system from 2014 until 2025 in s. 718.112, F.S.; and
- The bill repealed the provisions of s. 720.311, F.S., relating to mandatory mediation of disputes between associations and a parcel owner, and repealed the mediation of such disputes by the Department of Business and Professional Regulation.

Regarding the repeal of mandatory dispute mediation by the Department of Business and Professional Regulation, the Governor stated in his veto message that, under the bill voluntary mediation scheme, disputes could be filed in the courts without the requirement for mediation. The Governor stated that the return to voluntary mediation reduces the benefits of time and money that mandatory mediation saves over protracted court proceedings for typical owner-association disputes.

The Governor's veto message stated that he was directing to the department to initiate a project to study and make recommendation of:

- Ways to improve and/or expand existing alternative dispute mediation and education programs to accommodate stricter association requirements;
- The extent to which the protections afforded to members of mandatory homeowner's associations can approach parity with the protection afforded condominium owners while maintaining the legislative intent that homeowner's associations not be regulated; and
- Whether the state should move toward establishing a comprehensive common interest realty law by using the Uniform Common Interest Ownership Act[28] as a starting point and analyzing the laws of other states.

The department's study resulted in the following recommendations:

> 1. The division's existing alternative dispute resolution program can be expanded. Greater utilization of private mediators can be expanded, and more in-house mediators could be employed by the division. The division's website and education program should be expanded to assist board members in homeowner and condominium associations in better understanding their responsibilities with the goal of minimizing complaints.
>
> 2. The protections afforded to members of mandatory homeowners' associations can approach parity with those afforded to members of condominium associations in some ways. This should be done by enacting laws that:

[28] This model act was originally promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws. The Uniform Common Interest Ownership Act (UCIOA) is a comprehensive model act that governs the formation, management, and termination of a common interest community, including condominiums, planned communities, and real estate cooperatives. This model act is intended to supersede the earlier Uniform Condominium Act (1977) (1980), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981).

a. Define the use of reserve funds.
b. Define the use of developer guarantees.
c. Establish purchaser warrantees.
d. Enhance the voting rights of members.
e. Adopt a similar election method to that provided for condominiums.
f. Restrict the use of general proxies.
g. Clarify the financial reporting requirements and due dates to those found in the condominium laws.
h. Restrict the use of association funds to legitimate association expenses.
i. Require that expenses be apportioned in a manner that limits the circumstances in which a parcel may pay a different proportionate share of expenses to those based on stages of development.
j. Remove the current restrictions on the right of an association to bring legal action.

3. Florida should not adopt the [Uniform Common Interest Ownership Act][29] because the existing common interest realty laws in Florida are more comprehensive than those of other states and have a greater emphasis on consumer protection than UCIOA.

III. Effect of Proposed Changes:

Revival of Homeowner's Association Covenants

The bill creates s. 712.11, F.S., to provide that homeowners' associations that are not otherwise subject to ch. 720, F.S., may use the procedures provided in ss. 720.401 through 720.407, F.S., to revive a declaration of covenants and restrictions which were extinguished pursuant to ch. 712, F.S.

This provision would subject homeowners who purchase property in the community after the covenants that have lapsed to covenants that a majority of the affected parcel owners have agreed in writing to revive pursuant to 720.405(6), F.S. These post-lapse homeowners would be subject to the covenants even if they have not agreed to the revival of the covenants.

Access to Public Beaches

The bill amends s. 718.106, F.S., to provide that local governments may not prohibit condominium unit owners or an association from permitting its guests, licensee, or invitees access to a public beach adjacent or adjoining the condominium property.

Amending Condominium Documents

The bill amends s. 718.110, F.S., to provide the legislative findings that procurement of consent or joinder to amendments that do not materially affect the rights or interests of mortgagees is unreasonable and is a substantial burden on the condominium owners and association. This bill

[29] *Id.*.

provides that there is a compelling state interest in enabling condominium association members to approve amendments. The bill provides an effective date of October 1, 2007, for this section.

The bill limits the enforceability of any mortgage or any provision in declarations, articles of incorporation, or bylaws of a condominium association recorded on or after October 1, 2007, or amendments thereto, that require the consent or joinder of some or all mortgagees of units or any other portion of the condominium property for those mortgages. Any such provisions or amendments recorded prior to October 1, 2007, would remain enforceable. The bill provides that provisions requiring consent or joinder are enforceable only as to the following:

- Matters described in s. 718.110(4)[30] and (8),[31] F.S.; and
- Amendments to the declaration, articles of incorporation, or bylaws that adversely affect the priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien or otherwise materially affect the rights and interests of the mortgagees.

The bill provides a process for obtaining addresses of mortgagees and contacting them to obtain their consent or joinder. Failure of any mortgagee to respond to a request for the consent or joinder to a proposed amendment within 60 days after the date that a request is sent to the mortgagee is deemed to have consented to the amendment.

An amendment may be voidable by any mortgagee who was entitled to notice and an opportunity to consent. An action to void an amendment is subject to a five year statute of limitations from the date of discovery or the date or recordation. This provision applies to all mortgages, regardless of the date of recordation of the mortgage.

The bill provides that any amendment intended to conform a declaration of condominium to the insurance coverage provisions of s. 718.111(11), F.S., may be made as provided in that section. Section 718.111(11), F.S., requires the maintenance of adequate insurance by condominium associations and permits a condo association to amend the declaration of condominium to conform to the insurance coverage requirements in this section without regard to any requirement for mortgagee approval of any amendments affecting insurance requirement.

Leaseholds, Membership, or Other Possessory or Use Interests

The bill amends s. 718.114, F.S., to provide that a leasehold, membership, or other possessory or use interest not entered into within 12 months after a declaration is recorded is a material alteration or substantial addition to association property, and the association may not acquire or

[30] Section 718.110(4), F.S., pertains to declaration amendments related to the alteration or modification of a unit or its appurtenances, or changes to the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium.
[31] Section 718.110(8), F.S., prohibits amendments to the declaration that permits timeshare estates to be created in any unit of the condominium, unless the record owner of each unit of the condominium and the record owners of liens on each unit of the condominium join in the execution of the amendment, and unless otherwise provided in the declaration as originally recorded.

enter into agreements acquiring these leaseholds, memberships, or other possessory or use interests except as provided in s. 718.113, F.S.[32]

Mixed-Use Condominiums

The bill amends s. 718.404(1) and (2), F.S., to provide that these provisions apply retroactively as a remedial measure. Section 718.404(1), F.S., provides that the owner of a commercial unit in a mixed-use condominium does not have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. Section 718.404(2), F.S., provides that when the number of residential units is equal to or greater than 50 percent of the total number of units operated by the association, owners of the residential units are entitled to vote for a majority of the seats on the board of administration.

Equity Facilities Clubs

The bill creates s. 719.103(18), F.S., to define the term “equity facilities club”[33] to mean a club comprised of recreational facilities in which proprietary membership interests are sold to individuals. The membership interests entitle the individuals to use certain physical facilities, excluding residential units or accommodations, owned by the equity club. The bill defines the term "accommodation" to include any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or any other accommodation designed for overnight occupancy for one or more individuals.

The bill amends s. 719.507, F.S., to prohibit any law, ordinance, or regulation that establishes any requirement concerning the use, location, placement, or construction of buildings or other improvements which are, or may be subject to, the equity facilities club form of ownership, unless the same requirement is applicable to other forms of ownership.

Scope of Chapter 720, F.S.

The bill amends s. 720.302(4), F.S. to provide that ch. 720, F.S. does not apply to any association regulated under chs. 718 (condominiums), 719 (cooperatives), 721 (timeshares), or 723 (mobile home parks), F.S., except to the extent that a provision of ch. 718, 719, or 721, F.S., is expressly incorporated into ch. 720, F.S., for the purpose of regulating homeowners' associations.

The bill also amends s. 720.302(5), F.S., to provide that corporations operating residential homeowners' associations in Florida are to be governed by and subject to ch. 607, F.S., relating to corporations, if the association was incorporated under the provisions of that chapter, or to ch. 617, F.S., relating to not for profit corporations, if the association was incorporated under the

[32] Section 718.113(2), F.S., provides that there can be no material alteration or substantial additions to the common elements or to real property that is association property, except as provided in the declaration. If the declaration does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions.

[33] *See Community Associations: Statutory Changes And Appellate Law*, 26 Nova Law Review 1, footnote 104, Fall, 2001, which stated that the term "equity club" currently had no statutory definition and generally involved property interests and use rights with respect to recreational amenities (golf courses, country clubs, etc.) that are not tied to the ownership of real estate, and which do not involve mandatory membership in a community association.

provisions of that chapter. The bill removes the term "not for profit," in the context of corporations that operate residential homeowner's associations, to conform to the other changes in this subsection.

Homeowner's Association Board Meetings

The bill amends s. 720.303(2)(a), F.S., relating to open meeting requirements for homeowner's association boards. The bill provides that this subsection applies to meetings of any committee or other similar body when a final decision is made regarding the spending of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

The bill also republishes subparagraph 2. of s. 720.303(2)(c), F.S. In 2004 the Legislature passed CS/CS/CS/SB 1184 (s. 18, ch. 2004-345, L.O.F.) and CS/CS/SB 2984 s. 15, ch. 2004-353, L.O.F.), which both amended s. 720.303(2)(c)2., F.S. The bill republishes the version in s. 18, ch. 2004-345, L.O.F. Section 10 of the bill also repeals s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345, L.O.F., and section 15 of chapter 2004-353, L. O.F. This would remove any conflicting versions of this subsection.

Inspection and Copying of Homeowner's Association Records

The bill amends s. 720.303(5), F.S., to provide that an association, or its agent, is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association unless ch. 720, F.S., requires that the information must be made available or disclosed. The bill provides that an association, or its agent, may charge a reasonable fee to a prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information, except for information required by law. The fee cannot exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

Annual Accounting of Reserve Expenses by Homeowner's Associations

The bill amends s. 720.303(6), F.S., which requires that an association prepare an annual budget that sets out the annual operating expenses. It clarifies that the fees and charges paid for by the association for recreational amenities must be separately set out.

The bill provides that, in addition to annual operating expenses, the annual budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the association's governing documents do not limit increases in assessments.

The bill requires that, if the budget of the association includes reserve accounts, the reserves must be determined, maintained, and waived in the manner provided in s. 720.303(6), F.S. If an association provides for reserve accounts in its budget, the association must from then on continue to comply with the procedures in s. 720.303(6), F.S.

The bill creates s. 720.303(6)(c), F.S., to require that an association must provide notice in each financial report for the preceding fiscal year if the association's budget that does not include reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in special assessments if reserves are not provided. The bill specifies the form for this required notice. The notice must be in conspicuous type and state that the association does not provide for reserve accounts for capital expenses and deferred maintenance that may result in special assessments. The notice must also state that the members may, by approval of not less than the majority of the association's voting interest, provide a reserve account pursuant to s. 720.303(6), F.S.

The bill creates s. 720.303(6)(d), F.S., to provide that an association is deemed to provide for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. The bill provides procedures for an association to elect to provide for reserve accounts. The approval may be by a majority at a duly called meeting of the membership or upon written consent executed by a majority of the total voting interests in the community. Once established, the reserve accounts must be funded and maintained, unless the funding is waived pursuant to the procedure in s. 720.303(6)(f), F.S.

The bill creates s. 720.303(6)(e), F.S., to provide that the reserved amount must be computed by using a formula that estimates the remaining useful life and replacement cost or deferred maintenance expense of each reserve item.

The bill creates s. 720.303(6)(f), F.S. to provide that unit owners may vote to waive or reduce the reserves by majority vote once a reserve account is established. If there is no quorum at the meeting, the reserves go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken to waive reserves is applicable for only one budget year.

The bill creates s. 720.303(6)(g), F.S., to provide the funding formula for reserves. The funding formula may be based either as a separate or pooled accounting of each of the required assets. It provides the formula for determining the amount of contribution to each reserve when the association maintains separate reserves. The reserve account is the amount necessary to bring a negative account to zero and the estimated deferred maintenance expense or estimated replacement cost of a component minus the balance of the reserve divided by the remaining useful life of the component. The formula may be adjusted annually, and the contribution cannot include any type of reserve payments.

The bill creates s. 720.303(6)(h), F.S., to provide that the reserves may only be used for the authorized reserve expenditure, unless another use of the expenditure is approved by a majority of the members at a meeting where a quorum is present. A developer controlled association may not use reserves for other purposes unless approved by a majority of nondeveloper voting interests.

Homeowner's Association Financial Reporting

The bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association

has to prepare and complete an annual financial report after the close of the fiscal year. The report may be due annually on the date provided in the association's bylaws. The association must complete, or contract for the preparation and completion of the financial report for the preceding fiscal year. The bill requires that the association must provide each member with a copy of the annual financial report within 21 days after the final financial report is completed by the association or received from a third party, but no later than 120 days after the end of the fiscal year or other date provided in the bylaws.

The bill amends s. 720.303(7)(a), F.S., to provide that financial statements are to be completed in accordance with the accounting principles adopted by the Florida Board of Accountancy.

Architectural Control Covenants

The bill creates s. 720.3035, F.S., to provide that an association may review and approve plans and specifications for the location, size, type or appearance of any structure, or enforce such standards, only to the extent that it is specifically stated or reasonably inferred in the declaration of covenants.

It provides that an association may only restrict the right of a parcel owner to select from options for the use of material, the size or design of the structure or improvement, or the location of the structure or improvement on the parcel, to the extent provided in the declaration of covenants, or other published guidelines and standards authorized by the declaration of covenants.

It limits an association's ability to enforce setbacks to only those specifically provided for in the declaration of covenants. It provides that, unless specifically stated in declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel shall be deemed to have one front for the purpose of determining the required front setback even if the parcel is bounded by a roadway or easement on more that one side. It also prohibits the association to enforce setback requirements that are inconsistent with applicable county or municipal setback standards.

It provides that each parcel owner is entitled to the rights and privileges provided in the declaration of covenants, or other published guidelines and standards authorized by the declaration of covenants, concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges cannot be unreasonably impaired by the association.

It prohibits associations from enforcing any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants, or other published guidelines and standards authorized by the declaration of covenants, whether the policy is uniformly applied or not.

According to information provided by one real estate attorney, many communities do not specify setbacks in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants. Instead, they give their architectural review boards the authority to establish setbacks by applying criteria related to issues like visual privacy and harmony of design, but do not set forth a specific numerical setback. According to this attorney, in some

communities, specific, strict setback requirements may be unworkable and pose a hardship to some communities because applying a strict set back may be unworkable in some instances, e.g., to save trees or for irregularly shaped parcels.

According to this attorney, it is also common for communities, through their architectural review boards, to restrict the options authorized by the declaration of covenants or other published documents in order to maintain the character of the community. For example, communities may wish to maintain a wide variety of home designs or paint colors, and may wish to limit the number of homes with the same design or color within a certain proximity to each other.

According to another real estate attorney, these concerns can be resolved by communities by providing improved notice to their members in their governing documents and published documents.

Attorney's Fee

The bill amends s. 720.305, F.S., to provide that any member who prevails against an association and is awarded attorney's fees may be awarded an amount sufficient to cover the member's share of those assessments levied to fund the association's expenses of the litigation. Current law provides that the prevailing party in any litigation is entitled to recover reasonable attorney's fees and costs.

Merger of Consolidation of Associations

The bill amends s. 720.306(1)(c), F.S., to provide that the merger or consolidation of one or more associations under ch. 607, F.S., relating to corporations, or ch. 617, F.S., relating to non-profit corporations, is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.[34]

Records – Transition of Association Control

The bill amends s. 720.307, F.S., which provides procedures for turning over control of an association from the developer to parcel owners for associations with a date of incorporation after December 31, 2007. The required procedures include additional records and documents that the developer must provide to the board of directors. It requires that these documents and records are due when the members are entitled to elect a majority of the board of directors. The bill provides that the financial records must include the statements of the association, and the source documents from the incorporation of the association through the date of turnover. The bill requires that an independent certified public accountant must audit the records and determine that the developer was charged with, and paid, the proper amounts of assessments.

[34] Under current law, an amendment may not materially and adversely alter the proportionate voting interest attached to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association, unless all owners and lienholders join in the execution of the amendment.

Assessments and Charges

The bill amends s. 720.308, F.S., to provide procedures for determining the developer's financial obligation to the homeowner's association upon the creation of the association. It provides for guarantees of assessments of parcel owners that are not included in the purchase contract or declaration. It provides that a guarantee is effective only upon approval of a majority of the voting interests of the members other than the developer.

The bill also provides that:

- The time period of a guarantee must have a specific beginning and ending date or event;
- The ending date must be the same for all members of the association;
- The guarantee may provide for different times during the guarantee period and dollar amounts during the time periods;
- After the initial period, the guarantee may provide that the developer may extend the guarantee for a stated period;
- The dollar amount of the guarantee must be an exact dollar amount for each parcel identified in the declaration;
- The developer must make cash payments to the association when the revenue collected by the association are not sufficient to provide payment for all common expenses;
- The expenses incurred in the production of non-assessment revenues that do not exceed non-assessment revenues must not be included in the common expenses;
- Interest earned on the investment of the association may be used to pay income tax expense, but such expense may not be charged to the guarantor, and the net investment income must be retained by the association;
- Any portion of the parcel assessment that is budgeted for designated capital contributions cannot be used to pay operating expenses;
- The guarantor's total financial obligation to the association at the end of the guarantee period is determined on an accrual basis using the following formula: any deficits paid by the guarantor that exceed the guaranteed amount less the total regular periodic assessments earned by the association from other members; and
- The developer must only fund the excess expenses if the expenses attributable to non-assessment revenues exceed non-assessment revenues.

Dispute Resolution

The bill amends the homeowner's association dispute resolution procedures in s. 720.311, F.S., to change all references to mediation to "presuit" mediation. The bill deletes the department's authority to resolve disputes between associations and a parcel owner.

The bill also deletes the department's duty to provide certification programs for mediators and educational programs for homeowners' associations.

The bill provides a form for the written demand for presuit mediation. The form is titled "Statutory Offer to Participate in Presuit Mediation"[35] and must be substantially followed by the aggrieved party and served on the responding party. The form gives notice that the party receiving the notice fails to agree to presuit mediation, a law suit may be brought without further warning. The notice also provides notice of procedure for mediation of disputes, and rights and obligations of the parties.

The notice must include a listing of five mediators. The party receiving the demand may select a mediator from that list. The notice also advises that the Florida Supreme Court can provide a list of certified mediators.[36]

The bill also provides that:

- Disputes subject to presuit mediation do not include:
  - The collection of any assessments, fines, or other financial obligations, including attorney's fees and costs, or any action to enforce a prior mediation settlement;
  - Any dispute where emergency relief is required; and
  - Enforcement of a mediated settlement agreement.
- Person's who fail or refuse to participate in the entire presuit mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute.
- Service of the statutory demand notice is made by sending the form, or a letter that conforms substantially to the statutory form, by certified mail. An additional copy must be sent by regular first-class mail to the address of the responding party as it appears on the books and records of the association;
- A responding party must serve a written response within 20 days from the date the demand is mailed. The response must be served by certified mail, and an additional copy must be sent by regular first-class mail to the address shown on the demand;
- The mediator may require advance payment of fees and costs. The bill deletes the $200 filing fee requirement and provisions providing for the payment of fees for a department mediator;
- Failure of either party to appear for mediation, respond to the offer, agree on a mediator, or pay the fees and costs will entitle the other party to seek an award of the costs and fees associated with mediation;
- If presuit mediation cannot be conducted within 90 days after the offer to participate, an impasse will be deemed, unless both parties agree to extend the deadline; and
- Regarding any issue or dispute that is not resolved at presuit mediation, the prevailing party is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process in any subsequent arbitration or litigation proceeding.

Effective Date

The bill provides that this act takes effect upon become law.

[35] The title of the notice uses the term "offer" to characterize the notice. However, the language of the notice repeatedly refers to the "demand" to participate in presuit mediation.

[36] The Supreme Court provides lists of certified mediators through the Florida Dispute Resolution Center. These lists may be accesses via the Internet at: http://www.flcourts.org/gen_public/adr/brochure.shtml (Last visited March 7, 2007).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Homeowner's associations may incur additional costs to comply with the accounting requirements in the bill relating to the preparation of the annual budget, accounting of reserves, and the accounting of assessments.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The provisions of this bill were contained in HB 391 (CS/SB 2358 by Regulated Industries Committee; and Senator Bennett), which passed both houses during the 2006 Regular Session, but was vetoed by the Governor. The Governor's veto of HB 391 was based on his objections to these two provisions in that bill:

- The extension of the date after which local authorities may require the retrofit of applicable residential condominium common areas with a fire sprinkler system from 2014 until 2025 in s. 718.112, F.S.; and
- The bill repealed the provisions of s. 720.311, F.S., relating to mandatory mediation of disputes between associations and a parcel owner, and repealed the mediation of such disputes by the Department of Business and Professional Regulation.

CS/SB 902 does not amend the sprinkler provision in s. 718.112, F.S. However, the bill does amend the mediation provisions of s. 720.311, F.S.

VIII. Summary of Amendments:

None.