



# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty -- This bill increases restrictions on condominium and homeowner's associations.

### B. EFFECT OF PROPOSED CHANGES:

#### **Background**

A condominium is a "form of ownership of real property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements".<sup>1</sup> A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.<sup>2</sup> A declaration is like a constitution in that it:

strictly governs the relationships among condominium units owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.<sup>3</sup>

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.<sup>4</sup> A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of two-thirds of the units.<sup>5</sup>

Homeowners' association means a Florida corporation responsible for the operation of a subdivision in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.<sup>6</sup> Homeowners' associations are regulated under chapter 720, F.S.

#### **Effect of Bill**

##### Condominium Association -- Obtaining Insurance

###### *Current Law*

A unit-owner-controlled association must use its' *best efforts* to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the property required by statute to be insured by the association.

If the association is developer controlled, then the association must exercise *due diligence* to obtain and maintain insurance. Appointed members of a developer-controlled board commit a breach of fiduciary responsibility by not obtaining and maintaining insurance, unless they can show they exercised *due diligence*.

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<sup>1</sup> Section 718.103(11), F.S.

<sup>2</sup> Section 718.104(2), F.S.

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

<sup>4</sup> Section 718.104(5), F.S.

<sup>5</sup> Section 718.110(1)(a), F.S.

<sup>6</sup> Section 720.301(9), F.S.

## *Proposed Changes*

This bill changes the current law standard of "due diligence" in developer-controlled associations to "best efforts," which is a lesser standard.

## Condominium Association -- Hazard and Casualty Insurance

### *Current Law*

Hazard insurance provides coverage for specific natural hazards such as fire, wind, earthquakes and vandalism. Every hazard insurance policy that was obtained or renewed on or after January 1, 2004 to protect the condominium must provide primary coverage for:

- All portions of the condominium property located outside the units.
- Condominium property located inside the units as initially installed or replacements of like kind and quality.
- All portions of the condominium property for which the declaration of the condominium requires coverage by the association.

Every hazard insurance policy issued or renewed on or after January 1, 2004 to an individual unit owner must provide that the coverage is excess over the amount recoverable under any other policy covering the same property. Each insurance policy issued to an individual unit owner providing such coverage must be without rights of subrogation against the condominium association. All real or personal property within the boundaries of the unit owner's unit, which is excluded from the association's coverage, must be insured by the individual unit owner.

The casualty insurance an association must obtain excludes all floor, wall and ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built in cabinets and countertops, and window treatments including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the above. However, declarations may require that condominium property consisting of freestanding buildings, where there is no more than one building in or on such unit, does not have to be insured by the association.

### *Proposed Changes*

This bill provides that adequate hazard insurance, regardless of the condominium declaration, must be based on the replacement costs of the property as determined by an independent insurance appraisal or an update of a prior appraisal which must occur every 36 months. The association may provide hazard insurance through a self-insurance fund as long as it complies with the requirements of the self-insurance fund.<sup>7</sup> The association may provide adequate hazard insurance coverage individually or for a group of not less than 3 communities if it is created and operating under chapters 718, 719, 720, or 721. Deductibles may be considered in determining hazard insurance.

Hazard insurance that is issued or renewed after January 1, 2009 must contain primary coverage for all parts of the condominium property as originally installed or replacement of like kind and quality and all alterations or additions pursuant to s. 718.113(2), F.S.<sup>8</sup> Association coverage excludes:

- All personal property within the unit,
- Floors,
- Walls,

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<sup>7</sup> Section 624.460-624.488, F.S.

<sup>8</sup> Section 718.113(2), F.S., provides in part there should be no material alteration or substantial addition to the common elements of any condominium operated by a multicondominium association, except as provided in the declaration, articles of incorporation, or the bylaws.

- Ceiling coverings,
- Electrical fixtures,
- Appliances,
- Water heaters,
- Water filters,
- Built-in cabinets and countertops, and
- Windows.

The bill provides that every hazard insurance policy issued or renewed on or after January 1, 2009 to an individual unit owner must include special assessment coverage of not less than \$2,000 per occurrence.

This bill provides that improvements or additions which do not benefit ALL unit owners must be insured by the unit owner or owners who use the improvement or addition. Otherwise, the association may insure the improvements or additions at the expense of the unit owners who use it.

Unit owners are responsible for reconstruction costs of any part of property for which they must have casualty insurance. An association may charge the unit with an enforceable assessment for any work the association has undertaken under s. 718.116, F.S. This bill provides that the association is an additional named insured and loss payee on all casualty insurance policies of unit owners.

This bill requires that reconstruction work be undertaken by the association except as otherwise permitted. A unit owner may not perform reconstruction on portions of the unit without prior written consent of the board of administration. The board of administration can rely on repair methods, qualification of the proposed contractor, and the contract used as conditions of giving consent. Furthermore, the bill requires that the unit owner obtain all the required permits before beginning reconstruction.

The bill provides that multicondominium associations may elect to operate as one condominium by majority vote for insurance purposes including hazard insurance and deductibles and damages that exceed coverage. The election to do this must be treated as an amendment to the declaration of all the condominiums involved and recorded according to s. 718.110, F.S.<sup>9</sup> Furthermore, the cost of insurance must be placed in the association budget.

The association may amend the declaration of the condominium without regard to any requirement for mortgagee approval of amendments affecting insurance requirements in order to conform to the requirements of this section.

Any portion of condominium property that the association requires to be insured for casualty insurance which is damaged by casualty must be reconstructed, repaired or replaced as necessary by the association as a common expense. Hazard insurance, deductibles, uninsured losses, and other damages in excess of hazard insurance coverage is a common expense as well. However:

- A unit owner is responsible for the cost of repair or replacement of condominium property which is not paid for by insurance when damage is caused by intentional conduct, neglect, or failure to comply with the terms of the declaration or association rules by a unit owner, his or her family, tenants, guests or invitees. Furthermore, the unit owner is without subrogation rights.
- The unit owner is also financially responsible under this bill for the cost of repair or replacement of personal property of another unit owner or the association when the damage is caused by intentional conduct, neglect, or failure to comply with the terms of the declaration or association rules.

<sup>9</sup> Section 718.110, F.S., provides that if the declaration does not provide for the process of amending, then it can be amended if approved by more than four-fifths of the voting interests.

- If the unit owner is reimbursed by insurance proceeds that go to the association, then the association must reimburse the unit owner without a waiver of any subrogation rights.
- The association is not obligated to pay for reconstruction or repays of casualty losses when losses were known or should have been known to a unit owner and were not reported to the association until after the insurance claim had been settled or is untimely filed and considered denied on that basis by the insurance company.

An association may opt out of hazard insurance, deductibles, uninsured losses and other damages covered by common expenses by a majority vote. The association may allocate instead and perform repair or reconstructions as originally provided in the declaration. The vote may be approved by voting interests of the association without regard to any mortgagee consent requirements.

If a multicondominium association has not consolidated its financial operations as discussed previously, any condo operated by the association may opt out of the provisions above with approval of the majority of total voting interests in that condominium. Such a vote may be approved by the voting interests without regard to any mortgagee consent requirements.

Any association or condominium voting to opt out of the above provision, must record the notice with the date of opt out vote and the official records book and page where the declaration is recorded. Opt out is effective on the date of recording of notice in public records of the association. An association that opted out may reverse that decision by the same majority vote required and record it in the official records.

An association will not have to pay for reconstruction or repair due to casualty loss for any improvements installed by a current or former unit owner or developer where it benefits the unit owner only and is not a part of the standard improvements.

Furthermore, policies may include deductibles as determined by the board. Florida case law defines a "deductible" as "a clause in an insurance policy that relieves the insurer of responsibility for an initial specified loss of the kind insured against."<sup>10</sup> The deductibles:

- Must be consistent with industry standards and practices,
- May be based on available funds, including reserve accounts or predetermined assessment authority, and
- Must established by the board the level of deductibles based on available funds and predetermined assessment at a board meeting that is open to all unit owners. Notice of meeting must state the proposed deductible, available funds and assessment authority used by the board, and an estimate of any potential assessment amount for each unit if there is any.

### Condominium Association -- Liability Insurance

#### *Current Law*

An association may obtain and maintain liability insurance for directors and officers, insurance for association employees, and flood insurance for common elements, association property, and units. Adequate insurance coverage by the association may include reasonable deductibles determined by the board based on available funds or predetermined assessment authority at the time the insurance is obtained. The association must obtain and maintain adequate insurance or fidelity bonding for everyone who controls or disburses association funds. The policy or bond must cover the maximum amount of funds that will be in the custody of the association or its management agent at one time. The term "persons in control" includes but is not limited to individuals authorized to sign checks, the association president, the secretary, or the treasurer.

<sup>10</sup> General Star Indem. Co. v. West Florida Village Inn, Inc., 874 So.2d 26 (Fla. 2nd DCA 2004), Citing *Merriam-Webster's Collegiate Dictionary* 471 (deluxe ed. 1998).

An association or a group of associations may self-insure against claims against the association. A copy of each policy in effect must be made available for inspection by unit owner's at all reasonable times.

### *Proposed Changes*

The association must require unit owners provide evidence of a current, effective hazard and liability insurance policy upon request. The request cannot occur more than annually. If a unit owner fails to provide evidence within 30 days of a written request, then the association may purchase a policy on the owner's behalf and collect the payment for the policy according to s. 718.116, F.S., which provides in part for a payment of interest not to exceed \$25 or 5% of each fee that is late.

### Common Expenses

#### *Current Law*

Various expenses of a condominium are considered common expenses, which are paid for jointly by condominium members.<sup>11</sup> These include in part the operation, maintenance, repair, replacement, or protection of all common elements of the association property. These also include reasonable transportation services, insurance for directors and officers, road maintenance, and security services.<sup>12</sup>

#### *Proposed Changes*

This bill provides that unless the manner of payment or allocation of expenses are addressed elsewhere in the declaration, condominium expenses or items required by the federal, state or local government, including fire safety equipment and water and sewer service, are common expenses. Therefore, this bill provides that the members of the association are jointly responsible for the costs of such expenses.

### Estoppel Certificates in Condominium Associations

#### *Current Law*

Within 15 days of receipt of a written request from a unit owner purchaser or unit mortgagee, the association must provide a certificate signed by an officer or agent of the association which states all assessments and other monies which are owed to the association by the unit owner. The association or its agent may charge a reasonable fee for the preparation of the certificate.

#### *Proposed Changes*

This bill provides that a unit owner or mortgagee or *a designee of a unit owner or mortgagee* must provide the certificate signed by an officer. Furthermore, this bill provides that the fee for the certificate must be set forth in the certificate. This bill provides that the authority to charge a fee must be established by a written resolution adopted by the board in advance of the charge or provided by written management, bookkeeping, or maintenance contract. This bill provides that the fee must be payable upon the preparation of the certificate, and if the certificate is requested along with the sale or mortgage of the unit and the closing does not take place, the fee must be refunded upon written notice from the person requesting the certificate. This bill further provides that the fee for a certificate in conjunction with a sale or mortgage that is not effectuated and a refund that is paid to the party requesting the certificate must be collected in the same manner as an assessment provided by s. 718.116, F.S.

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<sup>11</sup> Section 718.115, F.S.

<sup>12</sup> *Id.*

## Condominium Termination

### *Current Law*

The sale of any condominium property or association property and any remaining condominium property or association property, common surplus, and other assets must be distributed in the following priority:

- To pay the reasonable termination trustee's fees and costs.
- To lienholders of liens recorded prior to the recording of the declaration.
- To purchase-money lienholders on units to the extent necessary to satisfy their liens.
- To lienholders of liens of the association which have been consented to under s. 718.121(1), F.S.
- To creditors of the association as their interests appear.
- To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor.
- To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, unless objected to by a unit owner or a lienor.
- To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other association assets, subject to satisfaction of liens on each unit in their order of priority, unless object to by a unit owner or lienor.

### *Proposed Changes*

This bill provides that the distribution to purchase-money lienholders on units must not exceed a unit's share of the proceeds.

## Estoppel Certificates in Homeowners' Associations

Chapter 718 provides for estoppel certificates for condominiums.<sup>13</sup> This bill creates s. 720.3087, F.S., regarding estoppel certificates for homeowners' associations. This bill provides that the association must provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the parcel owner within 15 days after receiving a written request from a parcel owner or a parcel mortgagee or the parcel mortgagee's designee. This bill provides that any person other than the parcel owner who relies upon the certificate shall be protected. Furthermore, this bill provides that a summary proceeding may be brought to compel compliance with s. 720.3087, F.S.

This bill provides that the prevailing party in such an action is entitled to reasonable attorney's fees. This bill also provides that the authority to charge a fee under this section must be established by written resolution adopted by the board in advance of the charge or provided by written management, bookkeeping, or maintenance contract. This bill provides that the fee be payable upon preparation of the certificate and that if the certificate is requested in conjunction with the sale or mortgage of the parcel and the closing does not occur, the fee must be refunded upon written notice from the person requesting the certificate. This bill also provides that the fee for a certificate in conjunction with a sale or mortgage that is not effectuated and a refund that is paid to the party requesting the certificate must be an obligation of the parcel owner and must be collectable as an assessment under ch. 720, F.S.

### C. SECTION DIRECTORY:

Section 1 amends s. 718.111, F.S., relating to condominium insurance.

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<sup>13</sup> Section 718.116(8), F.S.

Section 2 amends s. 718.115, F.S., relating to common expenses and common surplus.

Section 3 amends s. 718.116, F.S., relating to assessments, liability, and lien and priority.

Section 4 amends s. 718.117, F.S., relating to termination of condominium.

Section 5 creates s. 720.3087, F.S., relating to estoppel certificates.

Section 6 provides an effective date of July 1, 2008.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Per the Office of Insurance Regulation, there is no impact on the private sector.<sup>14</sup>

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

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

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### **2. Other:**

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<sup>14</sup> Office of Insurance Regulation's Analysis of HB 1249, on file with Committee on Courts, March 14, 2008.



None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 19, 2008, the Committee on Courts adopted two amendments to this bill. The amendments made the following revisions:

- Added that any policy providing hazard insurance coverage under windstorm pool agreements which are *renewed* after July 1, 2008, must be approved by the Office of Insurance Regulation before the coverage is deemed adequate.
- Added that the insurance provisions in this bill do not apply to timeshare condominium associations.

The bill was then reported favorably with amendments.