The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: CS/SB 2604

INTRODUCER: Regulated Industries Committee and Senator Gardiner

SUBJECT: Residential Properties

DATE: April 14, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Rhea	RI	**Fav/CS**
2.			BI	
3.			JU	
4.			FT	
5.			GA	
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS........................		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill revises laws related to community associations, including condominium, homeowners', and cooperative associations. Regarding condominium associations, the bill requires a post-election certification by each newly elected or appointed director that he or she has read the declaration of condominium, the association's articles of incorporation, bylaws, and rules and current written policies. The newly elected board member must certify that he or she will work to uphold such documents and policies to the best of his or her ability, and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. A similar certification is currently also required for candidates to the condominium board.

Regarding homeowners' associations, the bill also:

- Permits closure of certain board meetings at which proposed or pending litigation is discussed with the association's attorney;
- Revises the notice requirements for financial reports regarding reserve accounts;
- Prohibits directors, officers or committee members from receiving any salary or compensation from the association for the performance of their duties, with limited exceptions;

- Permits fines of $1,000 or more to become a lien on a parcel;
- Revises proxy voting and elections requirements; and
- Provides additional disclosure to prospective purchasers.

The bill revises requirements for special assessments in homeowners' associations before the turnover of the association by the developer. The developer-controlled association may not pass more than one special assessment during a calendar year. The special assessment may not exceed20 percent of the current year's regular annual assessment. The developer-controlled board cannot pursue members for non-payment of assessments if it has failed to pursue the developer for nonpayment of the special assessment in the same manner and at the same time it pursues members for nonpayment.

The bill also creates the Home Court Advantage Dispute Resolution Act to provide for mandatory presuit mediation or arbitration of homeowners' association disputes, including election disputes. The bill repeals the responsibility of the Division of Condominium, Timeshares, and Mobile Homes to arbitrate election and recall disputes in homeowners' associations.

The bill provides an effective date of July 1, 2009.

This bill substantially amends the following sections of the Florida Statutes: 34.01, 718.112, 720.302, 720.303, 720.305, 720.306, 720.315, and 720.401. This bill repeals section 720.311, Florida Statutes. This bill creates part IV of chapter 720, Florida Statutes, consisting of the following sections of the Florida Statutes: 720.501, 720.502, 720.503, 720.504, 720.505, 720.506, 720.507, 720.508, 720.509, and 720.510.

II. Present Situation:

Condominiums

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

> [S]trictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[3]

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[4] A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for

[1] Section 718.103(11), F.S.
[2] Section 718.104(2), F.S.
[3] *Neuman v. Grand View at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003).
[4] Section 718.104(5), F.S.

amendment, it generally may be amended as to any matter by a vote of two-thirds of the units.[5] Condominiums are administered by a board of directors referred to as a board of administration.[6]

Condominiums are regulated by the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) of the Department of Business and Professional Regulation (department), in accordance with ch. 718, F.S.

Condominium – Elections

Section 718.112(2)(d)3., F.S., requires a person desiring to be a candidate for election to the board of administration of a condominium association to qualify for office at least 40 days before the election. One condition of qualifying is that the candidate must certify that he or she has read and understands, to the best of his or her ability, the governing documents of the association and the provisions of ch. 718, F.S., and any applicable administrative rules. This signed certification must be included with the ballot.

Homeowners' Associations Background

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.[7]

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.[8]

Homeowners' associations are administered by a board of directors whose members are elected.[9] 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.[10] The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.[11]

[5] Section 718.110(1)(a), F.S.
[6] Section 718.103(4), F.S.
[7] *See,* s. 720.302, F.S.
[8] Section 720.302(5), F.S.
[9] *See,* ss. 720.303 and 720.307, F.S.
[10] *See,* ss. 720.301 and 720.303, F.S.
[11] Section 720.303, F.S.

Homeowners' Associations-Meetings

Section 720.303(2), F.S., provides procedures for homeowners' 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 meetings between the board and its attorney relating to proposed or pending litigation. Members also have the right to attend all board meetings and speak for at least three minutes on any matter placed on the agenda by petition of the voting interests.[12]

The open meetings requirement does not apply to meetings between the board or a committee and the association's attorney, with respect to meetings of the board held for the purpose of discussing personnel matters.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to a meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice of the board meeting must be mailed or delivered to each association member at least 7 days prior to the meeting, except in an emergency. For associations with more than 100 members, the bylaws may provide a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision for schedules of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[13]

Homeowners' Associations-Assessments

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.[14] 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 also are not allowed when a final decision will be made regarding approving or disapproving architectural decisions with respect to a specific parcel of residential property owned by a member of the community.[15]

Homeowners' Associations-Budgets

Section 720.303(6)(a), F.S., requires homeowners' associations to prepare an annual budget that sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year.

Regarding reserve accounts, s. 720.303(6)(b), F.S., provides:

[12] Section 720. 301(13), F.S., defines "voting interest" to mean the voting rights distributed to the members of the homeowners' association, pursuant to the governing documents.
[13] Section 720.303(2)(c)1, F.S.
[14] Section 720.303(2)(c)2., F.S.
[15] Section 720.303(2)(c)3., F.S.

> In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the governing documents do not limit increases in assessments, including reserves. If the budget of the association includes reserve accounts, such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts in the budget, the association shall thereafter determine, maintain, and waive reserves in compliance with this subsection.

If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so by an affirmative vote of a majority of the total voting interests. Once established, the reserve accounts must be funded, maintained, or have their funding waived.[16] If the association's budget does not provide for reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, s. 720.303(6)(c), F.S., requires that the association's financial reports include a notice that the budget does not provide for reserve accounts for capital expenditures and deferred maintenance that may result in special assessments.

Funding formulas for reserves can be based on either a separate analysis for each of the required assets or a pooled analysis of two or more of the required assets. If the association maintains a pooled account, then the amount of the contribution to the pooled reserve account must not be less than required to ensure the balance on hand at the beginning of the period for which the budget will go into effect, plus the projected annual cash inflows over the remaining estimated useful life of the assets. The projected annual cash inflows may include earning statements from investment principle.

Homeowners' Associations-Financial Reporting

Section 720.303(7), F.S., sets forth the financial reporting responsibilities of homeowners' associations. Homeowners' associations have 90 days after the end of the fiscal year to prepare and complete a financial report for the preceding fiscal year. The type of financial statements or information that must be provided is based on the association's total annual revenues. Section 720.303(7)(a), F.S., provides, in part, that if the total annual revenue is $400,000 or more, the association must prepare audited financial statements.[17] If the total annual revenue is less than $100,000, then a report of cash receipts must be prepared. An association with less than 50 parcels, regardless of annual revenue, may prepare a report of cash receipt and expenditures instead of financial statements, unless the governing documents provide otherwise.[18] If the association has a total annual revenue of $100,000 or more, but less than $200,000, the association must prepare compiled financial statements.[19] If the association has total annual revenue of at least $200,000 and not less than $400,000, the association must prepare reviewed financial statements.[20] The amounts of total annual revenue and the type of financial statement

[16] Section 720.03(6)(d), F.S.
[17] *See,* note 12, *supra*.
[18] Section 720.303(7)(a)2.,F.S.
[19] *See,* note 10, *supra*.
[20] *See,* note 11, *supra*.

required under s. 720.303(7), F.S., are identical to the financial reporting requirements for condominium associations in s. 718.111(13), F.S.

Homeowners' Associations-Remedies at Law

Section 720.305(1), F.S., provides that the association members and their tenants, guests and invitees must adhere to association rules and that the association may take legal action for failure or refusal to comply. The prevailing party in such litigation is entitled to attorney's fees and costs.

Section 720.305(2), F.S., provides that the association may levy a fine not to exceed $100 for each day for a violation. The fine cannot exceed $1,000, unless otherwise provided by the governing documents. However, a fine cannot become a lien against a parcel. The association must provide only a single notice and opportunity to be heard.

Section 720.305(2)(a), F.S., provides that, to impose a fine or suspension, the association must give at least 14 days notice to the member and an opportunity for a hearing before a committee of at least three members appointed by the board. The members cannot be officers, directors, or employees of the association or close relatives of such persons. If the committee does not approve the fine, then it cannot be imposed. Section 720.305(2)(b), F.S., provides that committee-approval provisions in s. 720.305(2), F.S., do not apply to fines for nonpayment of assessments.

Homeowners' Associations-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.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours before the meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice 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 this posting or mailing requirement. These alternatives include publication of notice, provision of a schedule of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[21]

Section 720.306(2), F.S., requires an annual meeting of the members. Special meetings of members must be held when called by the board of directors, or by at least ten percent of the total voting interest of the association, unless a different percentage is supplied by the governing documents.[22]

[21] Section 720.303(2)(c)1., F.S.
[22] Section 306(3), F.S.

Section 720.306(5), F.S., provides that homeowners' association bylaws must provide for giving notice of meetings to members, and if the bylaws do not, then the following is deemed by operation of law to be included in the bylaws:

- The board must give actual notice to all parcel owners and members of meetings;
- The notice must be mailed, delivered, or electronically transmitted not less than 14 days prior to the meeting; and
- Evidence of compliance with the notice must be made by an affidavit executed by the person providing the notice and filed in the official association records.

Homeowners' Associations-Proxy Voting

Section 720.306(8), F.S., provides that the members have a right to vote in person or by proxy. A proxy is effective only for the specific meeting for which it was originally given. If the meeting is lawfully adjourned and reconvened, the proxy automatically expires 90 days after the date of the meeting for which it was originally given. A proxy is revocable at any time at the pleasure of the person who executes it.

Homeowners' Associations-Elections

Section 720.306(9), F.S., provides that elections of the board of directors must be conducted as set forth in an association's governing documents. All members of the association are eligible to serve on the board of directors, and a member may nominate himself or herself. The board of directors must be elected by plurality of votes. Any election dispute between the association and a member must be submitted to mandatory arbitration.

Homeowners' Associations-Cash Funding Requirement During Guarantee

While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association.[23]

Section 720.308(4)(a), F.S., provides that, if the funds collected from member assessments are at the guaranteed level and other revenues collected by the association are not sufficient to provide payment, on a timely basis, of all assessments, including the funding of reserves, the guarantor must advance sufficient cash to the association when the payments are due.

Homeowners' Associations-Prospective Purchaser Disclosures

Section 720.401, F.S., requires that prospective parcel owners must be given a “disclosure summary” form before the contract for sale is executed. The “disclosure summary” must be substantially similar to the form provided in s. 720.401(1)(a), F.S., which provides notice, in part that:

[23] Section 720.308(1)(b), F.S.

- A purchaser will be required to be a member of the homeowners' association;
- There are restrictive covenants;
- The purchaser will have to pay assessments;
- The purchaser may have to pay special assessments;
- Failure to pay assessments could result in a lien; and
- The developer may have the right to amend restrictive covenants without association approval.

Alternative Dispute Resolution

Chapter 44, F.S., provides for the arbitration and mediation of legal disputes in Florida, i.e, resolving legal disputes outside of the courtroom and without the involvement of a trial judge. Arbitration and mediation are commonly referred to as alternative dispute resolution (ADR). The Florida Supreme Court establishes the minimum standards and procedures for qualifications, certification, professional conduct, and discipline of mediators and arbitrators.[24]

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:
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> (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.
>
> (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.

(*Emphasis supplied*.)

The critical difference between mediation and arbitration is that in the mediation process the parties to the dispute make all the decisions and resolve the disputes. The mediator only facilitates this resolution. Under arbitration, the neutral third-party arbitrator resolves the dispute.

[24] Section 44.106, F.S.; Fla.R.Med. 10.100 *et seq* and Fla.R.Arb 11.010 *et seq*.

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.

Generally, the arbitrator participates in the proceedings to a greater degree than trial judges participate in court proceedings. Arbitrators often ask questions and can require the production of documents. Arbitrators typically have a level of expertise in the subject of the dispute and are expected to apply their knowledge and experience.[25] Judges may refer cases to mediation or arbitration. [26]

Alternative Dispute Resolution for Homeowners' Associations

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.[27] 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.[28] Chapter 720, F.S., also provides an option to litigation.

The Legislature has recognized the role of alternative dispute resolution in reducing court dockets and trials and offering a more efficient, cost effective alternative to litigation.[29] Section 720.311, F.S., establishes ADR procedures for homeowners’ associations and their members. It provides for mandatory binding arbitration and presuit mediation of certain disputes. These procedures were adopted during the 2007 Regular Session.[30]

Section 720.311(1), F.S., requires that election recall disputes must be resolved by binding arbitration conducted by the division. Any recall dispute filed with the division must be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors and dispute resolution procedures for condominiums.[31]

Section 720.311(1), F.S., also requires that the division conduct mandatory binding arbitration for election disputes in accordance with s. 718.1255, F.S.[32] A $200 filing fee is required for

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[25] The Florida Bar, *Business Litigation in Florida*, *Fifth Edition,* 2007
[26] Rule 1.700, Fla.R.Civ.P.
[27] Section 720.305(1), F.S.
[28] Section 720.305(2), F.S.
[29] Section 720.311, F.S.
[30] Chapter 2007-173, L.O.F.
[31] Sections 720.303(10)(d), F.S., and 720.311(1), F.S.
[32] Section 720.311(1), F.S., provides that election and recall disputes are not eligible for mediation.

arbitration and the division may assess the parties an additional fee in an amount adequate to cover the division's costs and expenses. The non-prevailing party must pay the other side's costs and attorney's fees in an amount found reasonable by the arbitrator.

Section 720.311(2), F.S., provides that the following disputes between an association and a parcel owner are subject to presuit mediation before the dispute can be 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 following disputes are not subject to presuit mediation:

- 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; and
- Any dispute where emergency relief is required.

Section 720.311, F.S., provides a form for the written demand for presuit mediation. The form is entitled "Statutory Offer to Participate in Presuit Mediation"[33] and must be substantially followed by the aggrieved party and served on the responding party. The form gives notice that if 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 the procedure for mediation of disputes, and the 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.[34]

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

Section 720.311, F.S., also requires that:

- Persons 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;

[33] 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.
[34] The Supreme Court provides lists of certified mediators through the Florida Dispute Resolution Center. These lists may be accessed via the Internet at http://www.flcourts.org/gen_public/adr/brochure.shtml (last visited September 26, 2007).

- 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;
- If presuit mediation cannot be conducted within 90 days after the offer to participate, impasse will be deemed, unless both parties agree to extend the deadline;
- 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; 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.

If the presuit mediation is not successful in resolving all of the issues between the parties, the parties may file any remaining disputes in a court of competent jurisdiction or enter the disputes into binding or nonbinding arbitration to be conducted by the division or private arbitrator pursuant to the procedures set forth in s. 718.1255, F.S. A final order resulting from nonbinding arbitration is final and enforceable in the courts if a complaint for a trial de novo is not filed in a court of competent jurisdiction within 30 days after entry of the arbitration order. These presuit mediation procedures may be used by non-mandatory homeowners' associations.[35] Persons 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.[36]

Section 720.311(2)(c), F.S., provides that the mediator or arbitrator authorized to conduct proceedings under this section must be certified by the Florida Supreme Court. Presently, there is no statewide arbitrator certification process.[37] Arbitrators are made eligible by placement on a list by the chief judge of the circuit in which the arbitrator will practice.[38] A petition for mediation or arbitration tolls the applicable statute of limitations.[39]

III. Effect of Proposed Changes:

Condominium – Elections

The bill amends s. 718.112(2)(d), F.S., to require a post-election certification by each newly elected or appointed director. The written certification must be submitted to the secretary of the association within 30 days after being elected or appointed to the board. The new board member must certify that he or she has read the declaration of condominium for all condominiums operated by the association and the association's articles of incorporation, bylaws, and rules and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability, and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members.

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[35] Section 720.311(2)(e), F.S.
[36] Section 720.311(2)(c), F.S.
[37] *See,* Florida Rules for Court-Appointed Arbitrators, http://www.flcourts.org/gen_public/adr/index.shtml (last visited April 14, 2007).
[38] *Id.*; *see also,* FLA. R. CIV. P. 1.810(a).
[39] Section 720.311(1), F.S.

A board member is automatically disqualified if he or she fails to timely file the written certification or educational certificate. The secretary of the association must keep the written certification or educational certificate for inspection by the members for 5 years after a director's election or appointment. The bill also provides that the validity of any appropriate action is not affected by the association's failure to have certification on file.

Homeowners' Associations Board Meetings

The bill amends s. 720.303(2)(b), F.S., to provide that meetings between the board or a committee and the association's attorney in which proposed or pending litigation is discussed are exempt from the open meetings requirement in s. 720.303(2)(b), F.S.

Homeowners' Associations-Inspection and Copying of Records

The bill amends s. 720.303(5)(a), F.S., which creates a rebuttable presumption that the association has willfully failed to comply with the a member's written request to inspect its records if the association does not provide the member access to the records within ten days of the request. The bill provides that the member's request must be submitted by certified mail, return receipt requested.

The bill also amends s. 720.303(5)(c), F.S., which authorizes the association to charge the member for the actual cost of copying records, to provide that the actual cost of copying records includes reasonable costs involving personnel fees and charges at an hourly rate for employee time to cover the administrative costs to the association.

Homeowners' Associations-Budgets

The bill amends s. 720.303(6)(b), F.S., to permit the termination of reserve accounts upon the approval of the majority of the voting interests.[40] The reserve account must be removed from the budget upon approval of the termination.

The bill amends s. 720.303(6)(c)1., F.S., to revise the notice requirement for financial reports for associations that do not provide for reserve accounts. The revised notice would clarify that the vote to provide for reserve account is attained by vote of the members at a meeting or by written consent. The bill maintains the current notice that the vote to provide for reserve account requires approval of not less than a majority of the total voting interests of the association.

The bill creates s. 720.303(6)(c)2., F.S., to provide an additional disclosure for financial reports for reserve accounts that are created or established pursuant to s. 720.303(6)(d), F.S., which requires the approval of the majority of the association members at a duly called meeting of the members or by written consent. The notice states that reserve funds are not subject to the restrictions on use of such funds in s. 720.303(6), F.S., and are not calculated in accordance with that statute because the owners have not elected to provide for reserve accounts pursuant to the provisions of s. 720.303(6), F.S.

[40] Section 720.301(13), F.S., defines "voting interest" to mean "the voting rights distributed to the members of the homeowners' association, pursuant to the governing documents."

The bill amends s. 720.303(6)(g)2., F.S., to revise the accounting requirements for pooled reserve accounts. It permits the association to include accounts receivable minus the allowance for doubtful accounts in the reserve account's projected annual cash inflows. Current law only permits the association to include estimated earnings from investment of principal in the reserve account's projected annual cash inflows.

Homeowners' Associations-Compensation

The bill creates s. 720.303(12), F.S., to provide that a director, officer or committee member may not receive any salary or compensation from the association for the performance of his or her duties and may not benefit in any other way financially from service to the association. This bill provides that this does not prohibit:

- Participation in a financial benefit accruing to all or a significant number of members as a result of lawful actions taken by the board including in part maintenance or repair of community assets;
- Reimbursement for out-of-pocket expenses subject to approval in accordance with procedures established by the governing documents; or
- Recovery of insurance proceeds from a policy maintained by the association for the benefit of its members.

Homeowners' Associations-Remedies at Law

This bill amends s. 720.305(2)(a), F.S., to provide that fines less than $1,000 shall not become a lien on a parcel. Therefore, if a fine is for $1,000 or more, the fine can become a lien against a parcel. Currently, fines cannot become a lien against a parcel.

Homeowners' Associations-Proxy Voting

The bill amends s. 720.306(8), F.S., to provide that, if secret ballots are required under the governing documents, then an absentee ballot must be enclosed inside a blank envelope and placed inside another envelope with the required information and signature on the outer envelope. Once the eligibility to vote is verified, but before the ballots are counted, the blank envelope must be removed and added to the ballots of members voting in person or by proxy. The bill also provides that absentee ballots must be hand delivered or mailed to the place specified in the notice no later than on the date specified in the notice.

Homeowners' Associations-Elections

The bill amends s. 720.306(9), F.S., to allow a member to nominate himself or herself if the election process allows voting by absentee ballot. However, the member must do so in advance of the balloting.

The bill creates s. 720.306(9)(b), F.S., to provide that, within 30 days of being elected to the board of directors, the director must certify in writing to the association secretary that he or she has read the governing documents and that he or she will uphold and discharge the fiduciary responsibility of the members to the best of his or her ability. The bill provides that, if the

statement is not filed timely, then the member is automatically disqualified from serving on the board of directors. The bill provides that the association secretary must keep the certification for five years after a director's election. However, the bill provides that failure to keep the certification on file does not affect the validity of any appropriate action.

Special Assessments by Developer-Controlled Boards

The bill creates s. 720.315, F.S., to revise requirements for special assessments in homeowners' associations before the turnover of the association by the developer. The developer-controlled association may not pass more than one special assessment during a calendar year. The special assessment may not exceed 20 percent of the current year's regular annual assessment.

The special assessment must be adopted at a board meeting that is conducted solely for the purpose of discussing and adopting the assessment. The meeting must be in the same county in which the association is located. The bill specifies notice requirements for the meeting, which include at least 30 days' notice.

The bill requires that the developer controlled lots or units must be subject to the same payment requirements or deadlines as those owned by members. The developer cannot delay payment of a special assessment based on the use of a developer's guarantee.

The developer-controlled boards must simultaneously initiate or authorize collection efforts against members and any developer-owned units or property if the special assessment has not been paid. The developer-controlled board cannot pursue members for non-payment of assessments if it has failed to pursue the developer for nonpayment of the special assessment in the same manner and at the same time it pursues members for nonpayment. The bill creates a presumption of selective enforcement that constitutes a complete defense to nonpayment of the special assessment by a member if the association does not also pursue the developer for non-payment of the special assessment.

Homeowners' Associations-Prospective Purchaser Disclosure

The bill amends s. 720.401(1)(a), F.S., to clarify a current disclosure and to provide two additional disclosures to the "disclosure summary" form. The bill provides that the developer may have the right to amend restrictive covenants without association approval if the association is still under the developer's control.

The bill provides the following additional disclosures on the "disclosure summary" form:

- There may be an obligation to pay assessments to a residential community development district for retiring bond obligations used to construct the infrastructure or other improvements.
- The purchaser is jointly and severally liable with the previous owner for all unpaid assessments up to the time of the transfer of title.

Home Court Advantage Dispute Resolution Act

The bill creates the Home Court Advantage Dispute Resolution Act (act) to provide for the mediation and arbitration of homeowners' association disputes. The bill repeals s. 720.311, F.S., which provides the current procedures for the mediation of homeowners' association disputes.

The bill creates part IV of ch. 720, F.S., consisting of ss. 720.501, 720.502, 720.503, 720.504, 720.505, 720.506, 720.507, 720.508, 720.509, and 720.510, F.S. Section 720.501, F.S., provides that part IV, of ch. 720, F.S., may be cited as the "Home Court Advantage Dispute Resolution Act."

Section 720.503, F.S., provides the applicability of the act. The bill requires that specified disputes between an association and a parcel owner or owners must be subject to non-binding arbitration or mediation before the dispute may be filed in court. It provides that the aggrieved party who initiates the first formal action of alternative dispute has the option of selecting whether to resolve the dispute by arbitration or mediation.

The following types of disputes are subject to the pre-suit alternative dispute resolution requirement:

- Disputes regarding the use of or changes to the parcel or the common areas under the governing documents;
- Disputes involving violations of the recorded declaration of covenants or other governing documents; and
- Disputes arising concerning enforcement of the governing documents or any amendments thereto, and disputes involving access to the official records of the association.

These disputes are substantively similar to the types of disputes that are currently subject to presuit mediation under s. 720.311, F.S.

The following types of disputes are *not* subject to the pre-suit alternative dispute resolution requirement:

- Disputes concerning title to any parcel or common area, interpretation or enforcement of any warranty;
- The levy of a fee or assessment;
- The collection of an assessment levied against a party;
- The eviction or other removal of a tenant from a parcel;
- Alleged breaches of fiduciary duty by one or more directors; or
- Any action to collect mortgage indebtedness or for foreclosure of a mortgage shall not be subject to the provisions of this part.

Section 720.311, F.S., currently exempts disputes involving fines from the mediation requirement. The bill would require that disputes involving fines must be subject to the presuit alternative dispute resolution procedures in the bill.

Section 720.503(3), F.S., provides that election and recall disputes are subject to the arbitration procedures in s. 720.507, F.S., and are not subject to presuit mediation. This provision would remove the division's responsibility to arbitrate election and recall disputes. However, the bill does not amend other provisions in ch. 720, F.S., which direct the division to arbitrate such disputes. The bill does not delete the requirement in s. 720.306(9), F.S., that any election dispute between a member and an association must be submitted to mandatory binding arbitration with the division, and conducted in the manner provided by s. 718.1255, F.S., and the procedural rules adopted by the division. The bill also does not amend s. 720.303(10)(d), F.S., which requires the division to arbitrate homeowners' association recall election disputes.

Sections 720.303(10)(d), 720.306(9), and 720.311, F.S., currently provide for binding arbitration of election disputes. However, s. 720.507, F.S., does not provide for binding arbitration of such disputes.

According to the department, the agency will have to continue to conduct arbitrations of election and recall disputes if ss. 720.306(9) and 720.303(10)(d), F.S., are not also amended. The division asserts that it would have to continue the responsibility without funding because its authority to assess the $200 fee to conduct the arbitrations is eliminated by the repeal of s. 720.311, F.S.

Section 720.504, F.S., requires the aggrieved party to provide the other party, which is termed in the bill as the "responding party," with a notice of the dispute in which the nature of the dispute is detailed with specificity, the relevant governing documents are provided, and the parties are afforded an opportunity to resolve the dispute before the dispute is subject to the alternative dispute resolution procedures in the bill.

The alternative dispute resolution procedures in the bill are similar to the procedures in s. 720.311, F.S., for mediation. The bill provides a form for the written notice of presuit mediation or arbitration. Section 720.505, F.S, provides the form for presuit mediation. The form is titled "Statutory Notice of Presuit Mediation." Section 720.507, F.S, provides the form for presuit arbitration. The form is titled "Statutory Notice of Presuit Arbitration." These forms must be substantially followed by the aggrieved party and served on the responding party. The form gives notice of procedure for mediation of disputes, and the rights and obligations of the parties. The notices of mediation and arbitration are similar to the notice provided in s. 720.311, F.S. The party sending the notice must list five mediators or arbitrators, as appropriate, from which the responding party must select a mediator or arbitrator, or offer an alternative mediator or arbitrator.

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;
- The presuit alternative dispute resolution requirements do not apply to any dispute where emergency relief is required;
- Service of the notices must be 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 offer 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 offer;
- The mediator or arbitrator may require advance payment of fees and costs;
- The parties must share the cost of mediation or arbitration, unless the parties agree otherwise;
- The mediator may schedule the mediation proceeding without taking into consideration the schedule and convenience of a party that fails to respond to the mediator with a list of dates and times in which the party is available for the proceeding;
- Failure of either party to appear or participate at a mediation or arbitration proceeding, respond to the notice, agree on a mediator or arbitrator, 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 or arbitration 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 or arbitration, 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.

If a party fails to participate in the alternative dispute resolution process, the other party is entitled to file a law suit in court and seek an award of costs and attorney’s fees associated with the mediation. Persons who fail to participate may recover attorney’s fees and costs in subsequent litigation relating to the same dispute between the parties. The bill does not specify what actions or inactions by a party would constitute a failure to participate in the proceeding. Nor does the bill specify whether the mediator or the arbitrator is supposed to make that determination.

According to the Office of the State Courts Administrator,[41] the requirement of participation in the mediation process and the authority of the mediator to schedule the mediation proceeding without taking into consideration the schedule and convenience of a party that failed to respond to the mediator with a list of dates and times may violate the Supreme Court rules governing the mediator ethics. The mediator is required to preserve the parties’ rights to self determination, e.g., the decisions made during the mediation are made by the parties and not the mediator. [42]

Section 720.505((2)(e), F.S., requires the mediator to approve the mediation agreement. According to the Office of the State Court’s Administrator, this provision may also violate mediator ethics because it contradicts the requirement that the decisions in the mediations are made by the parties.[43]

[41] The Office of the State Courts Administrator, within the Florida Supreme Court, oversees the operation of the Supreme court’s alternative dispute and mediation program.
[42] Rules 10.300 and 10.310, Rules for Certified and Court-Appointed Mediators.
[43] *Id.*

Regarding the arbitration procedure, s. 720.507(2)(c)3., F.S., provides that, if the arbitration hearing is not completed within the required time limits, the arbitrator may issue an arbitration award unless the time for a hearing is extended by mutual written agreement of all the parties. This provision is inconsistent because it permits the arbitrator to issue an award before the arbitration hearing has completed. It would require the arbitrator to issue an award without a complete record upon which to base his or her decision.

The bill uses the term “arbitration award” which the notice in s. 720.507(1), F.S., defines as the decision of the arbitrator. According to an arbitrator with experience in community association disputes, the use of the term “arbitration award” is common terminology for the decision of the arbitrator.

The bill requires that the final arbitration award must be sent to the parties no later than 30 days after the date of the arbitration hearing. The arbitration award is final unless a lawsuit is filed seeking a trial de novo in a court of competent jurisdiction within 30 days of the date of the arbitration award. If the judgment at the trial de novo is not more favorable than the final arbitration award, the party filing a motion for a trial de novo must be assessed the other party's arbitration costs, court costs, and other reasonable costs, including attorney's fees, investigation expenses, and expenses for expert or other testimony or evidence incurred after the arbitration hearing.

Section 720.506, F.S., permits the party served with the notice of presuit mediation to demand that the dispute proceed under non-binding arbitration. To opt-out of the mediation process, the responding party must answer to notice of presuit mediation with a notice of opting out of presuit mediation and a demand for presuit arbitration under s. 720.507, F.S.

The bill does not permit a party who receives a notice of presuit arbitration under s. 720.507, F.S, to opt-out of presuit arbitration and demand presuit mediation.

Section 720.508, F.S., provides the rules of procedure for presuit mediation and arbitration proceedings, and provides that the proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure and rules governing mediations and arbitrations under ch. 44, F.S. If there is a conflict with the applicable rules or statutes, the bill provides that part IV of ch. 720, F.S., controls. The bill authorizes the arbitrator to shorten any applicable time period and to limit the scope of discovery on request of the parties or within the discretion of the arbitrator.

Section 720.509, F.S., provides the qualifications for mediators and arbitrators who are authorized to conduct proceedings under part IV of ch. 720, F.S. The bill provides that the arbitrator or mediator must be certified as a circuit court civil mediator pursuant to the requirements adopted pursuant to s. 44.106, F.S. This provision is unclear. The bill does not specify the qualifications of an arbitrator. Section 44.106, F.S., does not provide for the certification of arbitrators. It is not clear whether the intent of the bill is that an arbitrator must also be a certified mediator. The bill also requires that the arbitrator or mediator be a member in good standing with The Florida Bar and otherwise meet all other requirements imposed by ch. 44, F.S. This is a higher standard than is provided in ch. 44, F.S., for the qualifications of a mediator, which permits non-attorney’s to act as mediators.

Section 720.510, F.S., provide for the enforcement of mediation settlement and arbitration awards in circuit court. Any costs and attorney's fees incurred in the enforcement of the mediation settlement or arbitration award must be awarded to the prevailing party in the enforcement action.

Effective Date

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill creates the Home Court Advantage Dispute Resolution Act (act) to provide for the mediation and arbitration of homeowners' association disputes. Homeowners' associations and homeowners would incur the costs of participating in the arbitration and/or mediation. However, mediation and arbitration are designed to reduce the costs of litigation, which typically exceed the costs of pre-suit dispute resolution proceedings.

Mediators in Florida charge approximately $250 an hour. Arbitrators typically charge a little more at approximately $275 to $300 an hour. More experienced and better credentialed arbitrators/mediators typically charge more than this. According to an arbitrator with experience in community association disputes, arbitration is a more time consuming process. Mediation of a homeowners' association dispute typically involves a two to four hour process. Arbitration may require four to eight hours if the dispute is settled before a final hearing. However, if a final hearing is required, the process may require 18 or more hours of the arbitrator's time. Consequently, arbitration of a homeowners' association dispute may cost the parties (these costs are typically shared) as

little as $500 or as much as $6,000 or more for the arbitrator's services. Parties represented by an attorney would also have to assume that cost.[44]

C. Government Sector Impact:

Section 720.503(3), F.S., provides that election and recall disputes are subject to the arbitration procedures in s. 720.507, F.S. This provision would remove the division's responsibility to arbitrate election and recall disputes. However, the bill does not amend provisions in ss. 720.306(9) and 720.303(10)(d), F.S, which provide for the division's arbitration of such disputes. According to the division, the agency will have to continue to conduct arbitrations of election and recall disputes if ss. 720.306(9) and 720.303(10)(d), F.S. However, the agency would have to continue the responsibility without funding because its authority to assess the $200 fee to conduct the arbitrations is eliminated by the repeal of s. 720.311, F.S.

If ss. 720.306(9) and 720.303(10)(d), F.S. are also repealed, the bill will eliminate revenues and expenses related to the arbitration of homeowners' association election and recall disputes starting in fiscal year 2010/2011. According to the division, the current filing fee for arbitration of these disputes is insufficient to cover the costs of this program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This CS creates s. 718.112(2)(d)9., F.S., to require a post-election certification by each newly elected or appointed director. CS/SB 880 by the Regulated Industries Committee and Senator Fasano amends s. 718.112(2)(d)3., F.S., to also require a post-election certification. In addition to placing the post-election certification in different subparagraphs, the provisions in the bills do not conform. For example, CS/SB 880 requires the certification within 90 days of the election and this bill requires the certification within 30 days of the election. CS/SB 880 also provides an alternative to certification in the form of completion of the educational curriculum administered by a division-approved condominium education.

Section 720.509, F.S., provides the qualifications for mediators and arbitrators who are authorized to conduct proceedings under part IV of ch. 720, F.S. Although the bill provides specific qualification for a mediator providing mediation services under part IV of ch. 720, F.S., the bill does not specify the qualifications of an arbitrator.

The provisions of this bill were contained in CS/CS/HB 679 by the Policy & Budget Council; Safety & Security Council and Representative Gardiner, which passed both houses during the 2008 Regular Session, but was vetoed by the Governor. The Governor's veto of CS/CS/HB 679 was based on the bill's amendment of s. 514.0115(2), F.S., to exempt swimming pools in

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[44] *See, Alternative Dispute Resolution for Homeowners' Associations*, Interim Report No. 2008-148, Senate Committee on Regulated Industries, October 2007.

homeowners' associations that serve no more than 32 parcels from supervision by the Department of Health (DOH). This bill does not provide such an exemption.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on April 14, 2009:
The committee substitute (CS) deletes the delayed effective date of July 1, 2010 for the creation of part IV of ch. 720, F.S., and the repeal of s. 720.311, F.S.

The CS amends ss. 720.303(10)(b) and 720.306(9), F.S., to delete references to the arbitration of election and recall disputes by the division.

The CS creates s. 720.315, F.S., relating to special assessments by a developer-controlled board in a homeowners' association.

The CS does not create an unregulated insurance product that permits three or more condominium associations to form a self-insurance fund to pool and spread the liabilities for deductibles for commercial lines residential property insurance policies.

B. Amendments:

None.

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