

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 327 Community Associations
SPONSOR(S): Criminal & Civil Justice Policy Council; Robaina
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 840

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	10 Y, 0 N	Bond	De La Paz
2)	Insurance, Business & Financial Affairs Policy Committee	11 Y, 1 N	Marra	Cooper
3)	Criminal & Civil Justice Policy Council	15 Y, 0 N, As CS	Bond	Havlicak
4)	_____	_____	_____	_____
5)	_____	_____	_____	_____

SUMMARY ANALYSIS

The Florida Condominium Act defines a developer as one “who creates a condominium or offers condominium [units] for sale or lease in the ordinary course of business” Persons who would seek to buy a number of condominium units in a distressed condominium are deterred from doing so because, by being defined as a developer, such persons must register as a developer and potentially may be liable for warranties and for prior financial mismanagement of the condominium association.

The bill amends the Condominium Act to create Part VII to Chapter 718, F.S., known as the “Distressed Condominium Relief Act.” The bill amends the definition of a developer, limits the liability and responsibilities of a person buying a number of condominium units, and provides protection for the interests of lenders, unit owners, and the condominium association. This bill also amends the disciplinary provisions related to condominium regulation to provide for regulation of bulk buyers and bulk assignees.

This bill does not appear to have a fiscal impact on state or local governments.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Section 718.103(16), F.S., defines a developer as one “who creates a condominium or offers condominium [units] for sale or lease in the ordinary course of business” In essence, the statute creates two classes of developers: those who create the condominium by executing and recording the condominium documents and those who offer condominium units for sale or lease in the ordinary course of business. There are advantages that may accrue with the status as successor developer, including acquisition of certain developer-retained rights under the condominium documents and the ability to control the condominium association by electing or designating a majority of the directors of the condominium association board of directors. On the other hand, there are certain disadvantages, including potential warranty liability, liability for prior financial mismanagement of the condominium association, and loss of the ability to control the condominium association.¹

This bill creates part VII of ch. 718, F.S., consisting of ss. 718.701, 718.702, 718.703, 718.704, 718.705, 718.706, 718.707, and 718.708, F.S. Section 718.701, F.S., provides that part VII of ch. 718, F.S., may be cited as the “Distressed Condominium Relief Act.”

The bill creates s. 718.702, F.S., to provide legislative findings and legislative intent. The findings include a finding that potential successor purchasers of condominium units are unwilling to accept the risk of purchase, because the potential liabilities inherited from the original developer are imputed to the successor purchaser, including a foreclosing mortgagee.² The bill provides a statement of legislative intent that it is public policy of this state to protect the interests of developers, lenders, unit owners, and condominium associations with regard to distressed condominiums.

¹ Schwartz, *The Successor Developer Conundrum in Distressed Condominium Projects*, The Florida Bar Journal, Vol. 83, No. 7, July/August 2009.

² For instance, in one case the construction lender foreclosed after the original developer defaulted on a loan. The lender took title to the condominium project, completed construction, and, while holding itself out as developer and owner of the project, advertised and sold units to purchasers. The court found that the lender became the developer of the project and therefore liable for performance of express representations made to buyers, for patent construction defects in the entire condominium project, and for breach of any applicable warranties due to defects in portions of the project completed by the lender. *Chotka v. Fidelco Growth Investors*, 383 So.2d 1169 (Fla. 2nd DCA 1980).

Definitions

The bill amends the definition of “developer,” s. 718.103(16), F.S., to exclude a bulk assignee or a bulk buyer. The bill creates s. 718.703, F.S., to define “bulk assignee” as a person who acquires more than seven condominium parcels as provided in s. 718.707, F.S., and receives an assignment of some or all of the rights of the developer under specified recorded documents. It also defines “bulk buyer” as a person who acquires more than seven condominium parcels but who does not receive an assignment of developer rights other than the limited transferrable rights provided by this bill.

Assignment and Assumption of Developer Rights

The bill creates s. 718.704, F.S., relating to the assignment and assumption of developer rights. In general, a bulk assignee assumes all liabilities of the developer. However, a bulk assignee is not liable for:

- Construction warranties, unless related to construction work performed by or on behalf of the bulk assignee.
- Funding converter reserves for a unit not acquired by the bulk assignee.
- Providing converter warranties on any portion of the condo property except as provided in a contract for sale between the assignee and a new purchaser.
- Providing a cumulative audit of income and expenses during the period prior to assignment.
- Any actions taken by the board prior to the bulk assignee appointing a majority of the board.
- The failure of a prior developer to fund previous assessments or resolve budgetary deficits.

A bulk assignee may elect to be responsible for some or all of these liabilities.

Under current law, a developer may elect to guarantee to pay all expenses of the association not covered by collections from purchased units. If the developer makes this guarantee, the developer is not required to pay regular assessments on units owned. A bulk assignee that elects to guarantee assessments must assume the prior developer's unpaid guarantees. A bulk assignee that does not assume the guarantee and the requirement to pay past guarantees must pay assessments as any other owner.

A bulk assignee is liable for delivering documents at turnover (see discussion below about the limits on this obligation).

An acquirer of condominium parcels is not considered a bulk assignee or a bulk buyer, if the transfer of parcels was done to hinder, delay, or defraud any purchaser, unit owner, or the association, or if the acquiring person or entity is considered an insider.³

Development rights may be assigned to a bulk assignee by the developer, by a previous bulk assignee, or by a court of competent jurisdiction acting on behalf of the developer or previous bulk assignee.

- There may be more than one bulk buyer but not more than one bulk assignee within a condominium at any particular time.
- If more than one acquirer receives an assignment of development rights from the same person, the bulk assignee is the acquirer who first records the assignment in the applicable public records.

³ The bill references the definition of "insider" at s. 726.102(7), F.S. Chapter 726, F.S., prohibits fraudulent transfers.

Transfer to Unit Owner-Controlled Board

The bill creates s. 718.705, F.S., relating to the transfer of control of the condominium board of administration. The bill provides that transfer of condominium units to a bulk assignee is not a transfer that would require turnover. However, units transferred from the bulk assignee count for purposes of determining when turnover is required.

In an ordinary turnover, the developer is required to deliver certain items and documents to the new board of administration that is controlled by unit owners. A bulk assignee is only required, however, to turn over items and documents that the bulk assignee actually has. A bulk assignee has the duty to attempt to obtain turnover materials from the original developer and must list materials that the bulk assignee was unable to obtain. If a bulk buyer of bulk assignee fails to comply with the turnover requirements created by this bill, the bulk buyer or bulk assignee may lose the liability protections created by this bill.

Sale or Lease of Units by a Bulk Assignee or a Bulk Buyer

Under current law, a successor developer may be liable for filing anew all of the condominium documents for regulatory review. The bill creates s. 718.706, F.S., relating to the sale or lease of units by a bulk assignee or a bulk buyer. Prior to the sale or lease of units for a term of more than 5 years, a bulk assignee or a bulk buyer must file the following documents with the Division of Florida Condominiums, Timeshares and Mobile Homes within the Department of Business and Professional Regulation (DBPR):

- Updated prospectus of offering circular, or a supplement, which must include the form of contract for purchase and sale;
- Updated Frequently Asked Questions and Answers sheet;
- Executed escrow agreement if required under s. 718.202, F.S., relating to sales or reservation deposits prior to closing; and
- Financial information required under s. 718.111(13), F.S. (association financial report for preceding fiscal year), unless the report does not exist for the previous fiscal year prior to acquisition by bulk assignee or accounting records cannot be obtained in good faith, in which case notice requirements must be met.

In addition, a bulk assignee (but not a bulk buyer) must file with the division and provide each purchaser with a disclosure statement that includes, but is not limited to, the following:

- A description of any rights of the developer assigned to the bulk assignee;
- A statement relating to the seller's limited liability for warranties of the developer; and
- If the condominium is a conversion, a statement relating to the seller's limited obligation to fund converter reserves or to provide converter warranties under s. 718.618, F.S., relating to converter reserve accounts.

Similar to the restrictions on developers while they are in control of the association, a bulk assignee may not waive reserves, reduce reserves, or use a reserve for a purpose other than set aside for, unless such waiver, reduction or use is approved by a majority of the voting interests not under the control of the developer, bulk assignee, or a bulk buyer.

While in control of the association, a bulk assignee or a bulk buyer must comply with the requirements of s. 718.302, F.S., which section regulates contracts entered into by the association.

A bulk buyer must comply with the requirements of the declaration regarding the transfer of any unit by sale, lease or sublease. No exemptions afforded to a developer regarding the sale, lease, sublease, or transfer of a unit are afforded to a bulk buyer.

Effective Dates of This Bill

A person may only be a bulk buyer or bulk assignee if the person obtains that status after the effective date of this bill and before July 1, 2012.

Liability of Persons Other than Bulk Buyers and Bulk Assignees

This bill specifically does not alter the liability under current law, if any, owed by the original developer and others entities and professionals related to the design and construction of the condominium.

Regulation of Bulk Assignees and Bulk Buyers

This bill amends the regulatory authority of the DBPR at s. 718.501, F.S., to provide that the department has jurisdiction over, and regulatory authority over, bulk assignees and bulk buyers.

B. SECTION DIRECTORY:

Section 1 amends s. 718.103, F.S., amending the definition of "developer."

Section 2 amends s. 718.501, F.S., giving DBPR regulatory jurisdiction over bulk assignees and bulk buyers.

Section 3 creates Part VII of ch. 718, F.S., relating to distressed condominium relief.

Section 4 provides an effective date of upon becoming law.

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:

None.

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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 16, 2010, the Criminal & Civil Justice Policy Council adopted one amendment to the bill. The amendment made technical, grammatical and style changes to the bill and added the section giving DBPR jurisdiction over bulk buyers and bulk assignees. The bill was then reported favorably as a council substitute.