

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 319 Residential Properties

**SPONSOR(S):** Judiciary Committee; Business & Consumer Affairs Subcommittee; Civil Justice Subcommittee; Moraitis and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/SB 680

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 3 N, As CS	Cary	Bond
2) Business & Consumer Affairs Subcommittee	12 Y, 1 N, As CS	Collins	Creamer
3) Judiciary Committee	13 Y, 2 N, As CS	Cary	Havlicak

### SUMMARY ANALYSIS

This bill amends laws relating to condominiums, cooperatives, and homeowners' associations. Specifically, it:

- removes the requirement that certain elevators be retrofitted to meet certain codes by 2015;
- provides that the home address of a licensed Community Association Manager may not be published, except in response to a specific public records request;
- permits board members to serve two-year board terms, if provided for by the association's bylaws or articles of incorporation;
- allows timeshare condominium associations to use proxies during elections;
- requires board secretaries to maintain directors' educational certificates for at least five years;
- allows condominium boards to install code-compliant hurricane doors and other types of code-compliant hurricane protection, and includes these items as common expenses of the condominium;
- allows extra time for the completion of planned additional phases to a condominium;
- provides for the creation of a condominium within a condominium;
- allows the Condominium Ombudsman and his or her staff to engage in other professions;
- extends the time period for classification as a bulk assignee or buyer of condominiums to July 1, 2015;
- limits challenges to association member election or recall results to within 60 days after the results are released;
- allows a condominium or homeowners' association to collect unpaid late fees, interest, costs, and reasonable attorneys fees when collecting unpaid assessments;
- provides that a first mortgagee may be liable to the condominium or homeowners' association if title is foreclosed due to unpaid late fees, interest, costs, and reasonable attorneys fees, however the first mortgagee cannot be held liable for these fees and costs;
- provides that associations may not suspend delinquent members from using certain common elements;
- removes the requirement that a homeowners' association member or parcel owner submit a written request to speak at an association meeting, prior to the meeting.
- conforms certain provisions to make the laws of condominiums, cooperatives, and homeowners' associations consistent in certain areas; and
- otherwise contains numerous technical and clarifying changes throughout.

The bill does not appear to create a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2012.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### *Condominiums*

A condominium is a form of ownership of real property created pursuant to ch. 718, F.S., that is comprised of units which are individually owned, but have an undivided share of access to common facilities.<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 similar to a constitution in that it governs the relationships among condominium unit owners and the condominium association. Specifically, a declaration of condominium may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.<sup>3</sup> Further, it delineates condominium association bylaws, which governs the administration of the association, including, but not limited to, quorum, voting rights, and election and removal of board members.<sup>4</sup>

All unit owners are members of the condominium association, an entity responsible for the operation of the common elements owned by the unit owners which operates or maintains real property in which unit owners have use rights.<sup>5</sup> The condominium association is overseen by an elected board of directors, commonly referred to as a "board of administration."<sup>6</sup>

##### ***Cooperatives***

A "cooperative" is a form of ownership of real property created pursuant to ch. 719, F.S., wherein legal title is vested in a corporation or other business entity, and the property's residents own shares of the company, reflecting their equity in the real estate.<sup>7</sup>

Like condominiums, cooperatives are created by cooperative documents and include articles of incorporation of the association, bylaws, a ground lease or any other underlying lease, a document evidencing a unit owner's membership or share in the association, and the document recognizing a unit owner's title or right of possession to his or her unit.<sup>8</sup> Cooperatives are administered in accordance with these bylaws or other cooperative documents, and are run by a board of administration.

##### ***Homeowners' Associations***

A "homeowners' association" is defined 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, 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>9</sup> Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 617, F.S., relating to not-for-profit corporations.<sup>10</sup>

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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> Section 718.104(5), F.S.

<sup>4</sup> Section 718.112, F.S.

<sup>5</sup> Section 718.103(2), F.S.

<sup>6</sup> Section 718.103(4), F.S.

<sup>7</sup> Section 719.103(12), F.S.

<sup>8</sup> Section 719.103(13), F.S.

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

<sup>10</sup> Section 720.302(5), F.S.

Similar to condominiums and cooperatives, homeowners' associations are administered by an elected board of directors.<sup>11</sup> 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 the recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to those documents.<sup>12</sup>

## **Elevator Safety**

### **Current Situation**

Section 399.02, F.S., provides that elevators in condominiums, cooperatives, and other multi-family residential buildings that were issued certificates of occupancy as of July 1, 2008, are exempt from retroactive application of future updates to the Elevator Safety Code (ASME A17.1 and A17.3) until either July 1, 2015, or until the elevator is replaced or requires major modification, whichever occurs first. These exempted elevators need not comply with future provisions of the Elevator Safety Code until July 1, 2015, so long as the elevator does not require major modification or replacement. The division is still in the rulemaking process to define "major modification."<sup>13</sup>

### **Effect of Proposed Changes**

The bill removes the July 1, 2015, end date for the elevator safety code enforcement exemption, essentially creating a permanent exemption to compliance with future updates to the Elevator Safety Code for specified elevators. However, an exempted elevator is required to comply with all updated provisions of the Elevator Safety Code after it is replaced or substantially modified.

## **Public Records**

### **Current Situation**

The Department of Business and Professional Regulation is responsible for certifying applicants to be licensed as Community Association Managers.<sup>14</sup> Currently, the Department is not prohibited from publishing a licensee's personal home address or other contact information.

### **Effect of Proposed Changes**

The bill amends s. 468.433, F.S., to prohibit the Department from publishing a licensee's personal home address, unless it is for the purpose of satisfying a public records request.

## **Condominiums**

These provisions of the bill apply only to condominium associations:

### ***Board Member Terms***

#### **Current Situation**

Section 718.112(2)(d)2., F.S., requires approval by the membership in order for board members to serve two-year staggered terms if the association's bylaws or articles of incorporation permit staggered terms of no more than two years. The provision requires the board to get approval to comply with its own governing documents.

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<sup>11</sup> See ss. 720.303 and 720.307, F.S.

<sup>12</sup> See ss. 720.301 and 720.303, F.S.

<sup>13</sup> Department of Business and Professional Regulation 2012 Legislative Analysis Form, October 25, 2011.

<sup>14</sup> Section 468.433(1), F.S.

## Effect of Proposed Changes

The bill eliminates this circular language, and allows for association board members to serve two-year board terms, if provided for by their bylaws or articles of incorporation. Because the approval provision only applies when the bylaws or articles of incorporation have explicitly stated that board members may serve two-year terms, it is eliminating the requirement that the membership conduct an annual vote to comply with their own governing documents.

### ***Proxy Voting Exemption***

#### Current Situation

Section 718.112(2)(d)4., F.S., provides that condominium board members shall be elected by written ballot or voting machine. Unless otherwise provided in ch. 718, F.S., proxies may not be used in board member elections.<sup>15</sup>

#### Effect of Proposed Changes

The bill amends s. 718.112(2)(d)4., F.S., to provide an exemption to the subparagraph for timeshare condominium boards. Specifically, it allows proxy voting for timeshare condominium board elections.

### ***Association Recordkeeping Requirements***

#### Current Situation

Within 90 days after a condominium board member is elected or appointed, he or she must certify in writing that they have read the association's governing documents and current written policies, they will work to uphold the documents and policies, and they will maintain fiduciary responsibility to the association's members.<sup>16</sup> In lieu of the written certification, they can obtain certification from a division-approved educational provider.<sup>17</sup> Currently, the certification must be maintained for five years after the director's election.<sup>18</sup>

#### Effect of Proposed Changes

The bill amends s. 718.112, F.S. to require that a director's certification be maintained for either five years after the director's election, or for the duration of the director's uninterrupted tenure, whichever is longer.

### ***Windstorm Protection***

#### Current Situation

Pursuant to s. 718.113(5), F.S., a condominium board must adopt hurricane shutter specifications for its buildings. The board may also approve the installation of hurricane shutters, impact glass, and code-compliant windows.<sup>19</sup> Unless otherwise provided in the declaration, the expense of installation, replacement, operation, repair, and maintenance of hurricane shutters or other hurricane protection by the board pursuant to s. 718.113(5), F.S., is a common expense.<sup>20</sup>

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<sup>15</sup> Section 718.112(2)(d)4., F.S.

<sup>16</sup> Section 718.112(2)(d)4.b., F.S.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Section 718.113(5)(a), F.S.

<sup>20</sup> Section 718.115(1)(e), F.S.

## Effect of Proposed Changes

This bill amends s. 718.113(5), F.S., to allow a condominium board to also approve the installation of code-compliant doors and other types of code-compliant hurricane protection. In addition, the bill amends s. 718.115(1)(e), F.S., to include impact glass, code-compliant windows and doors, and other types of code-compliant hurricane protection as common expenses of the condominium.

### **Phase Condominiums**

#### Current Situation

A developer may develop a condominium in phases if the original declaration of condominium, or an amendment to that declaration, provides for and describes in detail all anticipated phases and the impact that the completion of subsequent phases will have upon the initial phase.<sup>21</sup> In addition, the time period for completion of the proposed phases cannot exceed seven years from the date of the recording of the declaration.<sup>22</sup> If the phases are not added within seven years from the date of the recording of the declaration, the right to add additional phases expires.<sup>23</sup>

#### Effect of Proposed Changes

The bill amends s. 718.403(1), F.S., to provide that the unit owners may extend the seven-year period to allow for an additional three years for completion, beginning at the end of the original period. The vote to extend must occur within the last three years of the original seven-year period. The amendment to the declaration to extend the seven-year period is not an amendment, subject to s. 718.110(4), F.S., which requires approval of all unit owners in the condominium. Rather, it is a general amendment to the declaration, requiring approval by at least two-thirds of the unit owners, pursuant to s. 718.110(1)(a), F.S.

### **Secondary Condominiums**

#### Current Situation

The Florida Condominium Act does not currently address the concept of primary and secondary condominiums or condominiums within condominium parcels.

#### Effect of Proposed Changes

The bill creates s. 718.406, F.S., to allow for the development of a secondary condominium within one or more condominium units pursuant to a secondary condominium declaration. Unless the declaration of condominium of the primary condominium provides otherwise, no secondary condominium can be created, and no amendment to the primary condominium declaration may permit secondary condominiums to be created, unless approved by the primary condominium unit owners and lien-holders, pursuant to current law.<sup>24</sup> Once approved, the primary condominium association, the owner of the subdivided parcel, and the holders of liens upon the subdivided parcel shall have approval rights regarding the creation of the secondary condominium and its declaration.

The secondary condominium is governed by both the primary condominium declaration and the secondary condominium declaration. The primary condominium declaration controls the secondary, in the event of a conflict. Moreover, the secondary condominium association represents its unit owners in the primary condominium association, with the president of the secondary condominium association casting the secondary association's vote in the primary condominium association.

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<sup>21</sup> Section 718.403(1), F.S.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See* s. 718.110, F.S.

The primary condominium association may furnish insurance required by s. 718.111(11), F.S., for both the primary and secondary condominium if the primary condominium declaration allows it, and the board of the primary condominium association is permitted to adopt hurricane shutter and other hurricane protection specifications for both the primary and secondary condominium. Further, common expenses due the primary condominium association with respect to a subdivided unit are a common expense of the secondary condominium association, and are collected by the secondary condominium association from its members to be paid to the primary condominium association.

Finally, an owner or mortgagee of a unit in a secondary condominium must register with the primary condominium in order to receive notices of delinquencies of, or foreclosure against, the secondary condominium due to non-payment by the subdivided parcel owner, and of release of the unit in the secondary condominium from any such delinquency or foreclosure.

## ***Ombudsman***

### Current Situation

In 2004, the Legislature created the Office of the Condominium Ombudsman.<sup>25</sup> The Ombudsman is an attorney appointed by the Governor who is charged with certain duties, including but not limited to:

- preparing and issuing reports and recommendations to the Governor, the Department, the division, the Advisory Council on Condominiums, the President of the Senate, and the Speaker of the House of Representatives on any matter or subject within the jurisdiction of the division;
- acting as a liaison between the Division, unit owners, boards of directors, board members, community association managers, and other affected parties;
- monitoring and reviewing procedures and disputes concerning condominium elections or meetings, including enforcement when the Ombudsman believes election misconduct has occurred;
- making recommendations to the Division for changes in rules and procedures for the filing, investigation, and resolution of complaints filed by unit owners, associations, and managers;
- providing resources to assist members of boards of directors and officers of associations to carry out their powers and duties consistent with the statutes, division rules, and the condominium documents governing the association;
- encouraging and facilitating voluntary meetings with and between unit owners, boards of directors, board members, community association managers, and other affected parties when the meetings may assist in resolving a dispute within a community association before a person submits a dispute for a formal or administrative remedy; and
- assisting with the resolution of disputes between unit owners and the association or between unit owners when the dispute is not within the jurisdiction of the Division to resolve.<sup>26</sup>

The Ombudsman, along with office staff, is restricted from certain acts such as actively engaging in any other business or profession, serving as the representative of any political party, executive committee, or other governing body of a political party, serving as an executive, officer or employee of a political party, receiving remuneration for activities on behalf of any candidate for public office, or campaigning for a candidate for political office.<sup>27</sup> Essentially, an officer or full-time employee of the Ombudsman's office may not actively engage in any other business or profession.

### Effect of Proposed Changes

The bill amends s. 718.5011(2), F.S., to provide that an officer or full-time employee of the Ombudsman's office may engage in another business or profession, so long as it does not directly or indirectly relate to or conflict with his or her work in the Ombudsman's office.

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<sup>25</sup> Chapter 2004-385, L.O.F.

<sup>26</sup> Section 718.5012, F.S.

<sup>27</sup> Section 718.5011(2), F.S.

## ***Bulk Assignees and Bulk Buyers***

### Current Situation

In 2010, the Legislature passed the Distressed Condominium Relief Act in order to relieve developers, lenders, unit owners, and condominium associations from certain provisions of the Florida Condominium Act.<sup>28</sup> The Act was intended to relieve specific parties from certain liabilities, so as to enable economic opportunities for successor purchasers of distressed condominiums.

Specifically, the Act created categories of "bulk buyers" and "bulk assignees." A bulk assignee is a person who acquires more than seven condominium parcels as provided in s. 718.703, F.S., and receives an assignment of some or all of the rights of the developer under specified recording documents.<sup>29</sup> Similarly, a bulk buyer is a person who acquires more than seven condominium parcels, but who does not receive an assignment of developer rights other than the right to:

- conduct sales, leasing, and marketing activities within the condominium;
- be exempt from payment of working capital contributions; and
- be exempt from rights of first refusal.<sup>30</sup>

Because the Act was created in reaction to the "massive downturn in the condominium market which has occurred throughout the state," it was not intended to be open-ended.<sup>31</sup> Rather, the intent of the Legislature was to enact the relief only for "a specific and defined period."<sup>32</sup> Currently, the time limitation for classification as a bulk assignee or bulk buyer is until July 1, 2012.<sup>33</sup>

### Effect of Proposed Changes

The bill amends s. 718.707, F.S., to extend the period to be classified as a bulk buyer or bulk assignee for the purposes of the Distressed Condominium Relief Act from July 1, 2012, to July 1, 2015.

## **Homeowners' Associations**

This provision of the bill applies only to homeowners' associations:

### ***Members' Right to Speak***

#### Current Situation

In order to speak at a homeowners' meeting, s. 720.306(6), F.S., requires that a member and/or parcel owner first provide written notice to the association. The notice must be received prior to the meeting; if this written request is not received, a member may not speak at the meeting.

#### Effect of Proposed Changes

The bill amends s. 720.306(6), F.S., to eliminate the requirement that homeowners' association members and/or parcel owners submit a written request to speak at the association meeting, prior to the meeting. Members and parcel owners may speak if present at the meeting.

## **Changes to Laws Related to Condominiums, Cooperatives, and Homeowners' Associations**

This bill makes uniform changes to certain aspects of the Condominium Act, the Cooperative Act, and the statute governing Homeowners' Associations.

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<sup>28</sup> See ch. 2010-174, L.O.F. and s. 718.702(3), F.S.

<sup>29</sup> Section 718.703(1), F.S.

<sup>30</sup> Section 718.703(2), F.S.

<sup>31</sup> Section 718.702, F.S.

<sup>32</sup> *Id.*

<sup>33</sup> Section 718.707, F.S.

## *Election and Recall Challenge Procedures*

### Current Situation

Current law allows any member of a condominium, cooperative, or homeowners' board to be recalled and removed from office by a majority of all the voting interests.<sup>34</sup> If a recall is approved by a majority of all voting interests at a meeting or by an agreement in writing, the board must notice and hold a board meeting within five business days; at that meeting, the board must determine whether to certify the recall.<sup>35</sup>

If the board fails to notice and/or hold a board meeting within five business days, the recall will automatically be deemed effective.<sup>36</sup> Currently, there is no specified procedure regarding challenging the validity of the recall. Moreover, there are no time limitations regarding challenging an election process, generally.

### Effect of Proposed Changes

The bill creates ss. 718.112(2)(j)5., 719.106(1)(f)5., and 720.303(10)(g), F.S., which allows a unit owner representative to file a petition challenging the board's failure to act. The petition must be filed within 60 days after the expiration of the applicable five-business-day period. The review of the petition is limited to the sufficiency of service on the board, and the facial validity of the written agreement or ballots filed.

Similarly, the bill creates ss. 718.112(2)(j)7., 719.106(1)(f)7., and 720.303(10)(k), F.S., which allows a board member who has been recalled to file a petition challenging the validity of the recall. The petition must be filed within 60 days after the recall is deemed certified, and must name the condominium, cooperative, or homeowners' association and the unit owner representative as respondents. The bill prohibits the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation (Division) from accepting a recall petition, regardless of the reason for filing, when there is 60 or fewer days until the scheduled reelection of the board member sought to be recalled, or when 60 or fewer days have elapsed since the election of the board member that sought to be recalled.

The bill also creates s. 718.112(2)(d)4.c., F.S., and amends ss. 719.106(1)(d)1. and 720.306(9)(a), F.S., to require that any challenge to the election process must be commenced within 60 days after the election results are announced.

### ***Liability for Unpaid Assessments***

#### Current Situation

Owners of units in condominiums, cooperatives, and homeowners' associations are required to pay periodic assessments to fund the operations of the association.<sup>37</sup> The purchaser of a unit is jointly and severally liable with the previous owner for all assessments that were due at the time of the purchase, regardless of the method of purchase.<sup>38</sup>

Similarly, with regards to condominiums and homeowners associations', the first mortgagee, usually the previous owner's bank or lender, or its successors or assignees who acquire title to a unit by foreclosure/deed in lieu of foreclosure, may be liable to the association if the foreclosure is due to unpaid assessments.<sup>39</sup> However, the liability is limited to the lesser of:

- unpaid assessments that accrued within the previous twelve months; or

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<sup>34</sup> See ss. 718.112(2)(j), 719.106(1)(f) and 720.303(10)(b)1., F.S.

<sup>35</sup> See ss. 718.112(2)(j)1., 719.106(1)(f)1., and 720.303(10)(b)5.c.2., F.S.

<sup>36</sup> See ss. 718.112(2)(j)4., 719.106(1)(f)4., and 720.303(10)(c)2.f., F.S.

<sup>37</sup> See ss. 718.116, 719.104(5), and 720.308, F.S.

<sup>38</sup> See ss. 718.116(1)(a), 719.108(1), and 720.3085(2)(b), F.S.

<sup>39</sup> See ss. 718.116(1)(b) and 720.3085(2)(c), F.S.



- one percent of the original mortgage debt.<sup>40</sup>

This liability only attaches if the lender is joined with the association as a defendant in the foreclosure action.<sup>41</sup>

### Effect of Proposed Changes

The bill amends ss. 718.116(1)(a), 719.108(1), and 720.3085(2)(b), F.S., to provide that a purchaser is also jointly and severally liable with the previous owner for late fees, interest, costs, and reasonable attorney fees incurred by the association in an attempt to collect, in addition to the unpaid assessments.

Further, the bill amends ss. 718.116(1)(b)1., and 720.3085(2)(c), F.S., providing that the first mortgagee may also be liable to the association for unpaid assessments if the foreclosure is due to unpaid interest, administrative late fees, reasonable costs and attorney fees, and any other fee, cost or expense incurred in the collection process that is owed by the previous owner. However, the bill creates ss. 718.116(1)(b)3., and 720.3085(2)(c)3., F.S., to clarify that the first mortgagee is not liable for any interest, administrative late fee, reasonable cost or attorney fee, or any other fee, cost or expense that came due prior to its acquisition of title. The first mortgagee may still only be held liable for:

- unpaid assessments that accrued within the previous twelve months; or
- one percent of the original mortgage debt.

This provision applies only to condominium associations, and does not apply to either cooperative or homeowners' associations.

The bill also amends s. 718.116(1)(c), F.S., and creates s. 720.3085(2)(d), F.S., to limit the liability of the person acquiring title to the amount specifically provided for in the statute. This provision does not apply to cooperatives.

### ***Limitation to Use of Common Elements***

#### Current Situation

Condominiums, cooperatives, and homeowners' associations own common elements and facilities. Under current law, these entities are able to take action against owners and/or residents that do not comply with the provisions of the declaration bylaws, or reasonable rules.<sup>42</sup> Sanctions may include suspending, for a reasonable time, the right of a unit owner, tenant, or guest to use the common elements, common facilities, or any other association property.<sup>43</sup>

#### Effect of Proposed Changes

The bill limits which common elements the association may restrict the unit owner, tenant, or guest from using. Specifically, the bill amends ss. 718.303(3)(a), 719.303(3)(a), and 720.305(2)(a), F.S., to prohibit an association from restricting the use of:

- limited common elements intended to be used only by that unit;
- common elements needed to access the unit;
- utility services provided to the unit;
- parking spaces; and
- elevators.

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See* ss. 718.303(3), 719.303(3), and 720.305(2).

<sup>43</sup> *Id.*

The bill does not include the 'elevators' provision in regards to homeowners' associations, but does include a provision prohibiting the homeowners' association from impairing the right of an owner or tenant of a parcel to have vehicular and pedestrian ingress to and from the parcel, including the right to park.

### **Conforming Laws Related to Condominiums, Cooperatives, and Homeowners' Associations**

This bill conforms certain aspects of the Condominium Act, the Cooperative Act, and/or the statute governing Homeowners' Associations.

#### ***Inaccessible Cooperative Records***

##### Current Situation

Pursuant to s. 719.104(2), F.S., the official records of a cooperative association must be open to inspection by any association member or authorized representative; however, certain records are not accessible to unit owners.<sup>44</sup> Exempted information includes:

- records that were prepared by an association attorney, records that reflect a mental impression, conclusion, litigation strategy or legal theory, or records that were prepared exclusively for imminent litigation or administrative proceedings;
- information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit; and
- medical records of unit owners.<sup>45</sup>

##### Effect of Proposed Changes

The bill amends s. 719.104(2)(c), F.S., to clarify that records protected by attorney-client privilege, as provided in s. 90.502, F.S., and work-product privilege are exempt from disclosure. Further, the bill includes several other records that shall not be accessible to unit owners, including:

- personnel records of association employees;
- identifying information of a unit owner, other than the address provided to fulfill the association's notice requirements;
- electronic security measures that are used by the association to safeguard data, such as passwords; and
- the software and operating system used by the association, as the data is part of the official records of the association.

The bill also amends s. 720.303(5)(c)3., F.S., to exempt personnel records of management company employees from disclosure by members.

These provisions substantially mirror the Condominium Act.

#### ***Amendment of Documents***

##### Current Situation

Current law allows condominiums, cooperatives, and homeowners' associations, through the declaration of condominium, cooperative documents, and bylaws, to establish procedures for amending said documents.<sup>46</sup> Specifically, the Condominium Act provides that for any mortgage entered into after October 1, 2007, provisions in the declaration, articles of incorporation, or bylaws that require mortgagee consent in matters that do not affect the rights or interests of the mortgagee are rendered unenforceable.<sup>47</sup> The Act

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<sup>44</sup> Section 719.104(2)(c), F.S.

<sup>45</sup> *Id.*

<sup>46</sup> See ss. 718.110, 719.1055, and 720.306, F.S.

<sup>47</sup> Section 718.110(11), F.S.

specifically delineates which matters mortgagee consent will still be required for, and provides procedures for obtaining mortgagee consent for those matters.<sup>48</sup>

### Effect of Proposed Changes

The bill creates ss. 719.1055(7), F.S., and 720.306(1)(d), F.S., to provide substantially the same provisions for both cooperatives and homeowners' associations.

### ***Board Meetings for the Purpose of Discussing Personnel Matters***

#### Current Situation

Generally, association meetings are open to unit owners.<sup>49</sup> Pursuant to the Condominium Act, a condominium board may close meetings from the public when the board meets with the association's attorney to seek legal advice, or when the board meeting is held for the purpose of discussing personnel matters.<sup>50</sup> Conversely, cooperatives are only able to close meetings from the public when it is meeting with the board's attorney.<sup>51</sup>

### Effect of Proposed Changes

The bill amends s. 719.106(1)(c), F.S., to make cooperatives consistent with condominiums, with respect to this issue.

### ***First Mortgagee Liability for Assessments***

#### Current Situation

Under the Condominium Act, the first mortgagee, usually the previous owner's bank or lender, or its successors or assignees who acquire title to a unit by foreclosure/deed in lieu of foreclosure, may be liable to the association if the foreclosure is due to unpaid assessments.<sup>52</sup> However, the liability is limited to the lesser of:

- unpaid assessments that accrued within the previous twelve months; or
- one percent of the original mortgage debt.<sup>53</sup>

This liability only attaches if the lender is joined with the association as a defendant in the foreclosure action.<sup>54</sup>

### Effect of Proposed Changes

The bill creates ss. 719.108(3) and (4), F.S., to make cooperatives consistent with condominiums, with respect to this issue.

### ***Transition of Control From Developers to Owners***

Current law provides several triggers that require the developer to turn over control of the association or board to the owners of the units. Unit owners other than the developer are entitled to elect at least a majority of the members of the board of administration of the association:

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<sup>48</sup> *Id.*

<sup>49</sup> *See* ss. 718.112(2)(c), 719.106(1)(c), and 720.306(6), F.S.

<sup>50</sup> Section 718.112(1)(c)3., F.S.

<sup>51</sup> Section 719.106(1)(c), F.S.

<sup>52</sup> *See* s. 718.116(1)(b), F.S.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

- Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;
- When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business;
- When the developer files a petition seeking protection in bankruptcy;
- When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless the court determines within 30 days after appointment of the receiver that transfer of control would be detrimental to the association or its members; or
- Seven years after recordation of the declaration of condominium with some conditions.

Current law provides only two triggers to require transition of control from a developer to a homeowners' association:

- Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers; or
- When such other percentage of the parcels has been conveyed to members, or such other date or event has occurred, as is set forth in the governing documents in order to comply with the requirements of any governmentally chartered entity with regard to the mortgage financing of parcels.

This bill amends s. 720.307(1), F.S., to create additional triggers that allow at least a majority of the members of the board of directors of the homeowners' association to be elected by members other than the developer:

- When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;
- When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business;
- When the developer files a petition seeking protection in bankruptcy; or
- When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless the court determines within 30 days after appointment of the receiver that transfer of control would be detrimental to the association

### **Other**

This bill contains numerous technical and clarifying changes throughout.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 399.02, F.S., relating to the Elevator Safety Code.

Section 2 amends s. 468.433, F.S., relating to licensure by examination.

Section 3 amends s. 718.112, F.S., relating to bylaws.

Section 4 amends s. 718.113, F.S., relating to maintenance; limitation upon improvement; display of flag; hurricane shutters; display of religious decorations.

Section 5 amends s. 718.115, F.S., relating to common expenses and common surplus.

Section 6 amends s. 718.116, F.S., relating to assessments; liability; lien and priority; interest; collection.

Section 7 amends s. 718.303, F.S., relating to obligations of owners and occupants; remedies.

Section 8 amends s. 718.403, F.S., relating to phase condominiums.

Section 9 creates s. 718.406, F.S., relating to condominiums created within condominium parcels.

Section 10 amends s. 718.5011, F.S., relating to ombudsman; appointment; administration.

Section 11 amends s. 718.707, F.S., relating to time limitation for classification as bulk assignee or bulk buyer.

Section 12 amends s. 719.104, F.S., relating to cooperatives; access to units; records; financial reports; assessments; purchase of leases.

Section 13 amends s. 719.1055, F.S., relating to amendment of cooperative documents; alteration and acquisition of property.

Section 14 amends s. 719.106, F.S., relating to bylaws; cooperative ownership.

Section 15 amends s. 719.108, F.S., relating to rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.

Section 16 amends s. 719.303, F.S., relating to obligations of owners.

Section 17 amends s. 720.303, F.S., relating to association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.

Section 18 amends s. 720.305, F.S., relating to obligations of members; remedies at law or in equity; levy of fines and suspension of use rights.

Section 19 amends s. 720.306, F.S., relating to meetings of members; voting and election procedures; amendments.

Section 20 amends s. 720.307, F.S., relating to transition of association control in a community.

Section 21 amends s. 720.3085, F.S., relating to payment for assessments; lien claims.

Section 22 amends s. 721.16, F.S., relating to liens for overdue assessments; liens for labor performed on, or materials furnished to, a timeshare unit.

Section 23 provides an effective date of July 1, 2012.

## **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:**

Section 1 of this bill, regarding elevator codes, will have a positive fiscal impact on associations and the owners of multi-family structures, and a corresponding negative fiscal impact on companies that provide such services.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The 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:

The bill contains a provision that includes several triggers requiring transition of control of a homeowners' association from a developer to owners other than the developer. One such trigger, which is contained in current law in the condominium context, uses the filing of a bankruptcy petition by the developer.

This provision may violate federal bankruptcy law. The Bankruptcy Code contains a provision that an interest becomes property of the estate, notwithstanding any "applicable nonbankruptcy law" that is "conditioned on the insolvency or financial condition of the debtor."<sup>55</sup> If a court finds that such a voting interest provides the developer a vested right and/or property interest, it is possible that this provision violates federal law and as such would be contrary to the supremacy clause of the federal constitution.<sup>56</sup> However, there have not been any reported cases interpreting the same clause in the condominium section of the statutes.

**B. RULE-MAKING AUTHORITY:**

The 2010 law that exempted elevators in condominiums, cooperatives, and other multi-family residential buildings required the Department of Business and Professional Regulation to adopt rules to administer the exemption. The department is still in the rulemaking process, which may have to be started again if this bill is passed into law.<sup>57</sup>

Otherwise, the bill does not appear to create a need for rulemaking or rulemaking authority.

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<sup>55</sup> 11 U.S.C. s. 541(c)(1)(B).

<sup>56</sup> ARTICLE VI, CLAUSE 2, U.S. CONST.

<sup>57</sup> Conversation with DBPR staff on January 25, 2012.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill limits the liability for unpaid assessments of the person acquiring title to a condominium or home falling under a homeowners' association, but the amended language does not provide the same limitation of liability for units of a cooperative.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 7, 2011, the Civil Justice Subcommittee adopted five amendments. The amendments:

- Provide an exemption allowing proxy voting for timeshare condominium board members;
- Limit the liability for unpaid assessments of the person acquiring title to a condominium parcel to the amount specifically provided for in the statute;
- Limit the liability for unpaid assessments of the person acquiring title to a parcel within a homeowners' association to the amount specifically provided for in the statute;
- Provide additional requirements for the creation of a condominium within a condominium;
- Conform portions of cooperative law to be similar to condominium law; and
- Make numerous grammatical and stylistic changes to the bill.

On January 31, 2012, the Business & Consumer Affairs Subcommittee adopted five amendments. The amendments:

- Eliminate circular language and allows for association board members to serve two-year board terms, if provided for by their bylaws or articles of incorporation;
- Eliminate the requirement that the number of votes needed to constitute a quorum, conduct an election, or approve an action be reduced by the number of suspended voting interests;
- Clarify that a secondary condominium association is a member of the primary condominium association;
- Provide that an amendment to the primary condominium declaration to initiate the development of a secondary condominium be conducted pursuant to current law;
- Provide that approval to develop a secondary condominium be conducted pursuant to current law;
- Eliminate board directors of cooperative and homeowners' associations from being mandated to complete educational and certification requirements; and
- Eliminate the requirement that a homeowners' association member submit a written request to speak at an association meeting, prior to the meeting.

On February 22, 2012, the Judiciary Committee adopted two amendments and reported the bill favorably as a committee substitute. The first amendment conforms the condominium within condominiums section of the bill to the Senate version and changes the requirement for creation of a secondary condominium from two-thirds to a simple majority of condominium parcels to join in the execution of the amendment. The second amendment adds language from current condominium law to the homeowners' association chapter of the statutes that provides additional triggers for transferring control of a homeowners' association from the developer to the homeowners.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.