

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 611 Residential Properties

SPONSOR(S): Judiciary Committee; Business & Professions Subcommittee; Civil Justice Subcommittee; Wood and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 736

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Robinson	Bond
2) Business & Professions Subcommittee	9 Y, 4 N, As CS	Anstead	Luczynski
3) Judiciary Committee	15 Y, 3 N, As CS	Robinson	Havlicak

SUMMARY ANALYSIS

When an ownership interest in a home, cooperative, or condominium is transferred, the new owner is jointly and severally liable with the previous owner for unpaid assessments owed to a homeowners', cooperative, or condominium association. Unpaid assessments may also become a lien on the parcel. An estoppel certificate certifies the total debt owed to the association for unpaid financial obligations by a parcel owner, unit owner, or mortgagee as of a specified date. To protect against undisclosed financial obligations and to transfer title that is free of any lien or encumbrance, buyers often request that the seller provide an estoppel certificate from any association of which the unit or parcel is a part.

The bill amends the law governing homeowners', cooperative and condominium associations (collectively referred to herein as "association") by:

- Authorizing electronic submission of estoppel certificate requests.
- Providing standards for the issuance, form, and delivery of an estoppel certificate.
- Reducing the time that an association has to respond to a request for an estoppel certificate from 15 days to 10 business days.
- Providing that an estoppel certificate is effective for 30 or 35 days depending upon the method of delivery.
- Providing that an association waives the right to collect moneys owed in excess of those stated in the estoppel certificate.
- Establishing the maximum fee that an association may charge for the issuance of an estoppel certificate and authorizing additional fees in limited circumstances.
- Revising the time for payment of the estoppel certificate fee charged by an association for the preparation an estoppel certificate.
- Providing that a person may use a statutory summary procedure to compel compliance with provisions governing the issuance of estoppel certificates from a cooperative association.

The changes reflect recommendations made to the Legislature by the Community Association Living Study Council.

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

The bill takes effect July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Condominium¹ and cooperative² associations are governed internally by an association whose members are the owners of units within the association. Many, but not all, residential communities are similarly governed by a homeowners' association³ made up of parcel owners. Associations are in effect a partnership between unit or parcel owners with a common interest in real property. To operate, an association must collect regular assessments from the unit owners and parcel owners in order to pay for common expenses, management, maintenance, insurance, and reserves for anticipated future major expenses. Sections 718.111(4), 719.104(5), and 720.308, F.S., provide for the assessment and collection of periodic and special assessments to fund an association. A unit or parcel owner is liable for all assessments that come due while he or she is the owner, and is jointly liable with past owners for any assessment owed by such previous owners.⁴ Unpaid assessments may also become a lien on the parcel.⁵

To protect against undisclosed financial obligations and to ensure that title is transferred free of any lien or encumbrance, buyers in an ordinary sale of a unit or parcel insist that all assessments be brought current through the date of sale, and an owner's title insurance company insures the buyer should the closing agent not properly see to payment of assessments through closing.

An estoppel certificate issued by an association certifies the total debt owed to the association for unpaid financial obligations by a parcel owner, unit owner, or mortgagee as of a specified date. Buyers, sellers, lenders, and other entities involved in the sale or refinance of a unit or parcel rely on estoppel certificates issued by an association to ascertain the amount to be collected and applied at closing. The association is legally bound⁶ by the amount in the estoppel certificate and is barred from asserting a claim of moneys due that contradicts the information provided in the estoppel certificate against any third party who relies on such certificate.⁷

Present Situation - Fees for Preparation of Estoppel Certificate

A homeowners' or condominium association may charge a fee for the preparation of an estoppel certificate as long as the fee is established by a written resolution adopted by the board, or provided by a written management, bookkeeping, or maintenance contract.⁸ A cooperative association may also charge a fee, but there is currently no similar condition in ch. 719, F.S., for cooperative associations to

¹ A condominium association means, in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership. s. 718.103(2), F.S.

² A cooperative association means the corporation for profit or not for profit that owns the record interest in the cooperative property or a leasehold of the property of a cooperative and that is responsible for the operation of the cooperative. s. 719.103(2), F.S.

³ A homeowners' association is 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, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. s. 720.301(9), F.S.

⁴ ss. 718.116(1), 719.108(1), and 720.3085(2)(b), F.S.

⁵ ss. 718.116(5), 719.108(4), and 720.3085, F.S.

⁶ "Estoppel" means a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. *Black's Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS.

⁷ ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

⁸ ss. 718.116(8)(d) and 720.30851(3), F.S.

establish such fee by written resolution. Current law also provides no limitation on the amount of the fee that may be charged by an association other than that such amount must be "reasonable."⁹ Neither the Legislature nor the courts have provided guidance on what constitutes a reasonable fee for an estoppel certificate. This has caused variations in the amount of the fee charged by associations for the preparation of an estoppel certificate.

Additionally, any fee charged by a homeowners' or condominium association for an estoppel certificate is payable upon preparation of the certificate.¹⁰ As estoppel certificates are generally required to close the sale or refinancing of a home and must be requested earlier than the time of closing, the funds must be paid solely by one party to the transaction, usually the seller, rather than from the closing settlement proceeds. However, current law does provide that if the certificate was requested in conjunction with the sale or mortgage of a unit or parcel but the sale does not occur, a homeowners' or condominium association must refund the fee, but only to a non-owner payor.¹¹ The refund becomes the obligation of the unit or parcel owner and the homeowners' or condominium association may collect it from the owner in the same manner as an assessment.¹² Accordingly, owners may be required to pay an estoppel fee even where closing does not occur due to the early payment requirement or the obligation to reimburse a homeowners' or condominium association for a fee refund given to a non-owner payor.

After a series of public meetings in 2014, the Community Association Living Study Council,¹³ by unanimous vote, recommended to the Legislature that a reasonable cap be established for estoppel certificate fees and that such fees be tiered.¹⁴ The Council proposed several additional factors that should be considered when determining the amount of the fee including whether or not the owner is current in fees, delinquent in fees, or estoppel certificates were requested in conjunction with a bulk purchase.¹⁵

Effect of Proposed Changes - Fees for Preparation of Estoppel Certificate

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., to authorize an association to charge a fee for the delivery as well as the preparation of an estoppel certificate. Cooperative associations must establish the authority to charge such a fee in the same manner as a condominium or homeowner association - by written resolution of the board or a management, bookkeeping, or maintenance contract.

The fee may not exceed \$250 if there is no delinquency on the account of the unit or parcel for which the certificate is issued. However, an association may charge an additional supplemental fee of up to \$100 if:

- The owner is delinquent with respect to moneys owed to the association; or
- The certificate is prepared and delivered within three days pursuant to an expedited request.

⁹ ss. 718.116(8)(c) and 719.108(6), F.S. There is no corresponding requirement in ch. 720, F.S., that the fee charged by a homeowners' association be reasonable.

¹⁰ ss. 718.116(8)(d) and 720.30851(3), F.S.; The time for payment of the fee to a cooperative association is not provided under current law.

¹¹ *Id.*

¹² *Id.*

¹³ The Community Association Living Study Council was created by the Legislature in 2008 to receive input from the public regarding issues of concern with respect to community association living and to advise the Legislature concerning revisions and improvements to the laws relating to community associations. The council consisted of seven members appointed by the President of the Senate, the Speaker of the House Representatives, and the Governor. An ex officio nonvoting member was appointed by the Director of the Division of Florida Condominiums, Timeshares, and Mobile Homes. The Council was abolished by the Legislature in 2014. See s. 718.50151, F.S. (2013); Ch. 2014-133, L.O.F.

¹⁴ Community Association Living Study Council, *Final Report*, March 31, 2014, available at <http://www.myfloridalicense.com/Dbpr/lsc/documents/2014CALSCReport.pdf> (last visited Feb. 26, 2015).

¹⁵ *Id.*

The bill prohibits an association from charging a fee for an estoppel certificate that is issued more than 10 business days after receipt of a request for such certificate.

The bill also repeals the requirement that the fee for an estoppel certificate be paid upon preparation by an association. Where an estoppel certificate is requested in conjunction with the sale or refinancing of a unit or parcel, the fee and any supplemental fees are paid from the closing or settlement proceeds. Since the fees must be paid from the closing or settlement proceeds, the bill repeals the provision authorizing a refund of fees by a homeowners' or condominium association to a non-owner payor as no fee will have previously been paid. However, if the closing does not occur within 60 days after the issuance of the estoppel certificate, the fee is the obligation of the unit or parcel owner and may be collected by an association in the same manner as an assessment.

The preparation and delivery of an estoppel certificate may not be conditioned upon the payment of any other fees not authorized by the bill.

Present Situation - Form and Delivery of Estoppel Certificate

An association is required to provide an estoppel certificate within 15 days after receiving a request¹⁶ from a unit or parcel owner, unit or parcel mortgagee, or the designee of the owner or mortgagee.¹⁷ Although the certificate acts as a bar and prevents the association from later asserting a claim or right that contradicts the information in the certificate, current law is largely silent on the specific contents and form the certificate. An estoppel certificate issued by a homeowners' or condominium association must only set forth all assessments and other moneys owed to the association with respect to the unit or parcel, disclose any fee charged by the association for the preparation of such certificate, and be signed by an officer or authorized agent of the association.¹⁸ An estoppel certificate issued by a cooperative association must only set forth the amount of assessments or other moneys owed.¹⁹ Some associations provide the amount of assessments and other moneys owed to the association in one lump sum while others provide an itemized breakdown of assessments, late fees, interest, etc. The amount in the certificate may reflect the amount presently owed or the amount owed through a given date a few weeks or months into the future. Accordingly, the information provided in estoppel certificates varies among associations.

Additionally, although current law does not restrict the method in which an association may provide an estoppel certificate to an owner or mortgagee, the Community Association Living Study Council, by unanimous vote, recommended to the Legislature that the law governing community associations authorize the use of digital communications.²⁰

Effect of Proposed Changes - Form and Delivery of Estoppel Certificate

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., to provide additional specific requirements for the form and delivery of an estoppel certificate.

The bill reduces the period of time in which an association must respond to a request for an estoppel certificate from 15 days to 10 business days upon receiving a request which may be written or electronic. Designees of a unit owner or unit mortgagee may submit such requests to a cooperative association.

The certificate must be delivered on the day of issuance by mail, hand, or electronic means, and contain the following information:

- The date of issuance.

¹⁶ A request to a condominium association must be in writing. Section 718.116(8), F.S.

¹⁷ Sections 718.116(8), 719.108(6), and 720.30851, F.S. The cooperative act does not currently require that a cooperative association provide an estoppel certificate to the designee of the owner or mortgagee.

¹⁸ *Id.*

¹⁹ Section 719.108(6), F.S.

²⁰ *Supra* at note 14.

- The amount of all assessments and other moneys owed to the association, limited to such amounts authorized to be recorded in the official records of the association.
- The amount of any additional assessments and other moneys scheduled to become due for each day during the effective period of the estoppel certificate, limited to such amounts authorized to be recorded in the official records of the association. In calculating the amounts, the association may assume that any delinquent amounts will remain delinquent.
- The amount of the estoppel certificate fee.
- The signature of an officer or agent of the association.

An estoppel certificate that is delivered on the date of issuance has a 30 day effective period and a 35-day effective period if mailed to the requester.

Present Situation - Estoppel Effect of Certificate

Any person, other than the owner of a unit or parcel, who relies upon an estoppel certificate issued by an association, is protected by the estoppel effect of the certificate.²¹ Accordingly, an association would be unable to assert a claim for an amount of unpaid assessments against a purchaser of a unit or parcel if that amount contradicted the amount of unpaid assessments provided by the association in an estoppel certificate during the closing of the sale. However, the protections of the estoppel effect extend only to such third parties and although an owner may pay a fee to obtain the certified amount of unpaid assessments and moneys owed to the association, the association is not estopped from asserting a contradictory claim in the future against the owner.

Effect of Proposed Changes - Estoppel Effect of Certificate

The bill amends current law to expressly provide that an association waives the right to collect any money owed in excess of the amount set forth in a estoppel certificate. Such waiver extends to any person, which would include any owner, who in good faith relied upon the certificate as well as the person's successors and assigns.

Present Situation - Compliance by Association

Under current law, a unit or parcel owner may compel compliance with the provisions governing the issuance of an estoppel certificate from a homeowners' or condominium association by bringing a summary procedure pursuant to s. 51.011, F.S.²² The prevailing party is entitled to recover reasonable attorney's fees and costs.²³

Effect of Proposed Changes - Compliance by Association

The bill extends applicability of the current procedure to compel compliance to cooperative associations.

B. SECTION DIRECTORY:

Section 1 amends s. 718.116, F.S., relating to assessments; liability; lien and priority; interest; collection.

²¹ ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

²² ss. 718.116(8)(b) and 720.30851(2), F.S.; s. 51.011, F.S., specifies a summary procedure for actions that specifically provide for this procedure by statute or rule. Under the summary procedure, all defenses of law or fact are required to be contained in the defendant's answer which must be filed within five days after service of process of the plaintiff's complaint. If the answer incorporates a counterclaim, the plaintiff must include all defenses of law or fact in his or her answer to the counterclaim and serve it within five days after service of the counterclaim. (Fla. R. Civ. Pro. 1.140, requires an answer, including any counterclaims, within 20 days after service of the complaint.) No other pleadings are permitted, and all defensive motions, including motions to quash, are heard by the court prior to trial. Postponements are not permitted for discovery, and the procedure also provides for an immediate trial, if requested.

²³ *Id.*

Section 2 amends s. 719.108, F.S., relating to rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.

Section 3 amends s. 720.30851, F.S., relating to estoppel certificates.

Section 4 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that an association charges more for an estoppel certificate than the fees authorized by the bill, the bill may have a positive economic impact on unit and parcel owners of such association by reducing the amount of fees required to obtain an estoppel certificate. In such instance there would be a corresponding negative reduction in such fees collected by associations.

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:

Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the state constitution both prohibit the legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted.

In *Allied Structural Steel Co. v. Spannaus*,²⁴ the United States Supreme Court set forth the following principles in examining a law under an impairment analysis, ruling:

²⁴ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Referring to the *Allied* opinion, the Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*²⁵ added the following clarification to the analysis:

(a) Was the law enacted to deal with a broad, generalized economic or social problem?

(b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?

(c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2015, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- Permanently waiving an association's claim for amounts due if the association fails to provide an estoppel certificate, and extending such waiver to the successor and assigns of any person who in good faith relied or would have relied on such estoppel certificate.
- Specifying additional information that must be contained within an estoppel certificate.
- Reducing the time for payment of an estoppel certificate fee from 120 to 60 days after delivery.
- Removing a restriction on the imposition of supplemental fees for issuing an estoppel certificate to correct an error in a previously issued estoppel certificate.
- Repealing the authority to compel compliance from an association by use of a summary procedure.
- Requiring a written request to compel the issuance of an estoppel certificate.
- Removing a provision authorizing an association to collect reasonable attorney fees and costs in connection with the collection of past due moneys.
- Amending the Cooperative Act to require that cooperative associations adhere to the same standards and requirements as a homeowners or condominium association when issuing estoppel certificates.

On March 24, 2015, the Business & Professions Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute:

²⁵ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779 (Fla. 1979).

- Establishes a reasonable fee, not to exceed \$300, for the issuance of estoppel certificates by cooperative, condominium, and homeowners' associations.
- Provides that a condominium association may only suspend the voting rights of a unit owner due to nonpayment of a monetary obligation over \$500 that is more than 90 days delinquent; and provides that a receiver shall not exercise voting rights of any unit if it was placed in receivership for the benefit of the association.

On April 14, 2015, the Judiciary Committee adopted a strike all amendment and reported the bill favorably as a committee substitute. The strike all amendment:

- Revises authorized fees for the preparation and delivery of an estoppel certificate.
- Removes provisions capping fees for the preparation and delivery of estoppel certificates in bulk.
- Clarifies that an association must issue an estoppel certificate within 10 business days after receiving a request instead of 10 calendar days.
- Authorizes electronic submission of estoppel certificate requests.
- Removes a provision waiving claims of an association for moneys owed if the association fails to respond to a request for an estoppel certificate.
- Restores current law regarding the method to compel compliance with provisions governing the issuance of estoppel certificates and specifies that such method is applicable to cooperative associations.
- Removes provisions regarding voting rights of condominium unit owners.

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