

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 643 Termination of a Condominium Association

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

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1172

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Malcolm	Bond
2) Business & Professions Subcommittee	11 Y, 1 N, As CS	Butler	Luczynski
3) Judiciary Committee	17 Y, 0 N, As CS	Malcolm	Havlicak

SUMMARY ANALYSIS

A condominium may be terminated at any time if the termination is approved by 80 percent of the condominium's voting interests and no more than 10 percent of the voting interests reject the termination.

The bill provides that if at least 80 percent of the voting interests are owned by a bulk owner, the termination must include the following:

- Unit owners must be allowed to lease their units if the units will be offered for lease after termination;
- Any unit owner whose unit was granted homestead exemption must be paid a relocation payment;
- Unit owners must be paid at least 100 percent of the fair market value of their units;
- Dissenting or objecting owners must be paid at least the original purchase price paid for their units;
- The outstanding first mortgages of all unit owners must be satisfied in full;
- A notice identifying any person or entity that owns 50 percent or more of the units and the purchase and sale history of any bulk owners; and
- Approval by a board with at least one-third of the members elected by unit owners other than a bulk owner.

The bill also makes changes to condominium termination proceedings that are not specific to those owned by bulk owners, including:

- If 10 percent or more of the voting interests of a condominium reject a plan of termination a termination may not proceed and another termination may not be considered for 18 months;
- A condominium formed by a conversion cannot be terminated for five years, unless there are no objections to the termination;
- A plan of termination may be withdrawn under certain circumstances;
- A termination trustee may reduce termination proceeds to a unit for unpaid fines, costs, and expenses;
- Unit owners may only contest the fairness and reasonableness of the apportionment of the proceeds from the sale, that the first mortgages of unit owners will not be fully satisfied, or that the required vote was not obtained;
- An arbitrator may void a plan of termination if it determines that the plan did not apportion the sales proceeds fairly and reasonably, that the plan was not properly approved, or that the procedures to adopt the plan were not properly followed.

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

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Condominiums in Florida are governed by ch. 718, F.S., the Condominium Act. The Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation has the power and duty to enforce and ensure compliance with the provisions of the Condominium Act, and to provide consumer protection for Florida residents living in condominiums.

A condominium is a form of ownership of real property created pursuant to the Condominium Act, which is comprised of units which are individually owned, but have an undivided share of access to common facilities. A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located. 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.

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. The condominium association is overseen by an elected board of directors, commonly referred to as a "board of administration." The association enacts condominium association bylaws, which govern the administration of the association, including, but not limited to, quorum, voting rights, and election and removal of board members.

Termination of a Condominium

Section 718.117, F.S., governs the process for terminating a condominium in cases of economic waste or impossibility¹ and in cases where the association uses its discretion to terminate.² In cases of optional termination, current law provides that unless the condominium declaration provides for a lower percentage, the condominium may be terminated if the termination is approved by at least 80 percent of the total voting interests of the condominium and no more than 10 percent of the total voting interests of the condominium reject the termination.³ Condominiums in which 75 percent or more of the units are timeshare units are not subject to the optional termination provisions of s. 718.117, F.S.

Condominium Conversions

A condominium conversion generally involves converting existing improvements, such as an apartment complex, to condominiums. Condominium conversions are regulated pursuant to Part VI of ch. 718, F.S. Current condominium termination regulations in s. 718.117, F.S., do not make specific provision for recent condominium conversions pursuant to Part VI of ch. 718, F.S.

¹ Section 718.117(2), F.S., provides that a condominium may be terminated for "economic waste" if the total cost of construction or repairs necessary to construct the improvements or restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of the units in the condominium. A condominium may be terminated for "impossibility" if "it becomes impossible to operate or reconstruct a condominium to its prior physical configuration because of land use laws or regulations." *Id.* at (2)(a)2.

² *Id.* at (3).

³ *Id.* Optional terminations do not apply to condominiums in which 75 percent or more of the condominium units are timeshare units.

Effect of the Bill

The bill makes a number of changes to condominium terminations pursuant to s. 718.117, F.S.

Optional Terminations

The bill amends s. 718.117(3), F.S., to provide that if 10 percent or more of the total voting interests of the condominium reject a plan of termination, a termination may not proceed and another optional plan of termination may not be considered for 18 months. The bill specifies that the total voting interests of the condominium include all voting interests for the purpose of considering a plan of termination, and a voting interest of the condominium may not be suspended during the consideration of a plan of termination. The bill also repeals the exemption from s. 718.117(3), F.S., for condominiums in which 75 percent or more of the units are timeshare units.

Terminations Following a Condominium Conversion

The bill prohibits a condominium that has been created pursuant to conversion procedures in Part VI of ch. 718, F.S., from undertaking an optional plan of termination until five years after the conversion unless there are no objections to the plan of termination.

Optional Terminations Involving Bulk Owners

The bill provides that for condominiums in which at least 80 percent of the total voting interests are owned by a bulk owner,⁴ the plan of termination is subject to the following conditions and limitations:

Right to Lease Former Unit

If the units are offered for lease after termination, a unit owner may lease his or her former unit and remain in possession of the unit for 12 months after the termination. The unit owner must make a written request to the termination trustee to rent the former unit. Any unit owner who fails to make a written request and sign a lease within the required timeframe waives his or her right to retain possession of the unit, unless otherwise provided in the plan of termination.

Relocation Payments for Homestead Property

Any former unit owner whose unit was granted homestead exemption must be paid a relocation payment equal to 1 percent of the termination proceeds allocated to the owner's former unit. The relocation payment must be paid by the entity owning at least 80 percent of the voting interests. The relocation payment is in addition to any termination proceeds and must be paid within 10 days after the former unit owner vacates the unit.

Unit Owner Compensation and Satisfaction of First Mortgages

All unit owners must be compensated at least 100 percent of the fair market value of their units. For original purchasers from the developer who have dissented or object to the plan of termination, the fair market value is at least the purchase price paid for the unit. Additionally, the plan of termination must include a plan for the full satisfaction of the first mortgage on each unit at the time the plan of termination is implemented.

Written Disclosures

Before presenting a plan of termination to the unit owners, the plan must include the following written disclosures:

- The identity of any person that owns or controls 50 percent or more of the units in the condominium and, if the units are owned by an artificial entity, a disclosure of the people who manage or control the entity and the people who own or control 20 percent or more of the entity or entities that constitute the bulk owner.

⁴ A "bulk owner" is defined in the bill as "the single holder of such voting interests or an owner together with a related entity or entities that would be considered an insider . . . holding such voting interests."

- The units acquired by any bulk owner, the date each unit was acquired, and the total amount of compensation paid to each prior unit owner by the bulk owner.
- The relationship of any board member to the bulk owner or any person or entity affiliated with the bulk owner subject to disclosure pursuant to this provision.

Board Composition

If the members of the board are elected by the bulk owner, unit owners other than the bulk owner may elect at least one-third of the members of the board of administration before the approval of any plan of termination.

Exemption from Amendment Requirements

Currently, a plan of termination pursuant to s. 718.117, F.S., is not considered an amendment to the condominium declaration and thus is not subject to the procedural and voting requirements of s. 718.110(4), F.S. The bill provides that an amendment to a declaration to conform the declaration to s. 718.117, F.S., is likewise not an amendment subject to s. 718.110(4), F.S., and may be approved by the lesser of 80 percent of the voting interests or the percentage of the voting interests required to amend the declaration.

Objecting to a Plan of Termination

The bill amends s. 718,117(9), F.S., to provide that any unit owner desiring to reject a plan of termination must vote to reject the plan or deliver a written rejection to the association if the plan is voted on at a unit owners' meeting. If the plan of termination is approved without a meeting, any unit owner desiring to object to the plan must deliver a written objection to the association.

Right to Possess Units After Termination

Section 718.117(11), F.S., currently provides that a plan of termination may provide that a unit owner retain the exclusive right of possession to the former unit. The bill amends s. 718.117(11), F.S., to provide that unless otherwise provided in the plan of termination all agreements for the use or occupancy of any unit or common elements of the condominium automatically terminate on the effective date of termination. If the plan expressly authorizes a unit owner to retain exclusive right of possession for the former unit or to use the common elements after termination, the plan must specify the terms and conditions of possession.

Withdrawal of a Plan of Termination and Correction of Errors

The bill amends s. 718.117(11), F.S., to provide that unless the plan of termination provides otherwise, at any time before the sale of the condominium property, a plan of termination may be withdrawn or modified by the affirmative vote or written agreement of at least the same percentage of voting interests in the condominium as that which was required for the initial approval of the plan.

The bill also provides upon the discovery of a scrivener's error in a plan of termination, the termination trustee may record an amended plan or an amendment to the plan to correct the error, and the amended plan or amendment to the plan must be executed by the termination trustee in the same manner as required for the execution of a deed.

Allocation of Proceeds from the Sale of Condominium Property

Section 718.117(12), F.S., directs the apportionment of proceeds from the sale of condominium property. The bill provides that unless the declaration expressly provides for the allocation of the proceeds, the plan of termination may require separate valuations for the common elements. In the absence of such provision, it is presumed that the common elements have no independent value but rather that their value is incorporated into the valuation of the units. Additionally, a plan of termination may govern how liens that encumber units are handled following termination. The holder of a lien that encumbers a unit at the time of recording a plan must deliver to the termination trustee a statement,

within 30 days after the written request from the termination trustee, confirming the outstanding amount of any obligations of the unit owner secured by the lien.

The bill also provides that the termination trustee may reduce the termination proceeds allocated to a unit by the following amounts:

- All unpaid assessments, taxes, late fees, interest, fines, charges, and other amounts due to the association associated with the unit and its owner;
- All costs of clearing title to the owner's unit;
- All costs of removing the owner or the owner's family members, guests, tenants, or other people from the unit and for removal and storage of personal property;
- All costs from any breach of the plan by the owner or the owner's family members, guests, tenants, or other people;
- All costs arising out of the appointment and activities of a receiver or attorney ad litem acting for the owner in the event that the owner is unable to be located.

Right to Contest a Plan of Termination

Currently, a unit owner or lienor may contest a plan of termination by initiating a summary procedure⁵ within 90 days after the date the plan is recorded. The person contesting the plan has the burden of proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. If the court determines that the plan of termination is not fair and reasonable, it may void or modify the plan to apportion the proceeds in a fair and reasonable manner.⁶

The bill amends the right to contest provisions in s. 718.117(16), F.S., to provide that a unit owner or lienor may contest a plan of termination by initiating a petition for mandatory nonbinding arbitration. The petition is limited to contesting only the fairness and reasonableness of the apportionment of the proceeds from the sale, that the first mortgages of all unit owners other than the bulk owner have not or will not be fully satisfied at the time of termination, or that the required vote to approve the plan was not obtained.

The unit owner or lienor must contest the plan within 90 days after the plan is recorded. The arbitrator shall determine the rights and interests of the parties in the apportionment of the sale proceeds. If the arbitrator determines the apportionment of sales proceeds is not fair and reasonable, the arbitrator may void the plan or may modify the plan to apportion the proceeds in a fair and reasonable manner.

If the arbitrator determines that the plan was not properly approved, or the procedures to adopt the plan were not properly followed the arbitrator may void the plan or grant other relief it deems appropriate. The arbitrator shall automatically void the plan upon a finding that any of the disclosures required by s. 718.117(3)(d)5., F.S., are omitted, misleading, incomplete, or inaccurate. Any challenge to a plan, other than a challenge that the required vote was not obtained, does not affect title to the property.

The bill amends s. 718.1255, F.S., to include a plan for termination among the list of disputes that may be handled through alternative dispute resolution.

The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1 amends s. 718.117, F.S., related to the termination of condominiums.

Section 2 amends s. 718.1255, F.S., related to alternative dispute resolution; voluntary mediation; mandatory nonbinding arbitration.

Section 3 provides an effective date of July 1, 2015.

⁵ s. 51.011, F.S.

⁶ s. 718.117(16), F.S.

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:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

A condominium declaration is a form of contract between the members of the association. Where a recorded declaration may have termination provisions or may implement the protections provided by s. 718.110(4), F.S., the bill may be implicate article I, section 10 of the Florida Constitution and article I, section 10 of the United States Constitution, which prohibit the legislature from passing any law that impairs "the obligation of contracts."

As a threshold matter, a law must "substantially impair" a contractual right for it be constitutionally problematic.⁷ The Florida Supreme Court has held that "[a]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."⁸

The courts have adopted a balancing test to "determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective."⁹ Factors considered in the balancing test include:

⁷ *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 779 (Fla.1979) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)).

⁸ *Id.* at 778-79 (citing *United States Trust Co.*, 431 U.S. at 25 (1977)).

⁹ *Id.* at 780.

- (a) Was the law enacted to deal with a broad, generalized economic or social problem?¹⁰
- (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?¹¹

Additionally, the United States Supreme Court has found that parties cannot avoid state regulations and restrictions in an enterprise that is already subject to state regulation by simply entering into a contract.¹² This finding may be particularly relevant given the Florida Supreme Court's statement that, "In Florida, condominiums are creatures of statute and as such are subject to the control and regulation of the Legislature. That body has broad discretion to fashion such remedies as it deems necessary to protect the interests of the parties involved."¹³

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 11, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Reduces from 36 months to 18 months the timeframe that an association may consider another plan of termination if more than 10 percent of the voting interests reject the initial termination;
- Creates and defines the term "bulk owner" and removes reference to bulk buyers and assignees;
- Provides that only termination plans involving bulk owners require dissenting unit owners to either vote or provide a written rejection or dissent;
- Requires certain disclosures regarding a bulk owner prior to submitting a plan of termination;
- Requires a minimum percentage of board members not elected by a bulk buyer to be on the board before a plan of termination may be adopted;
- Provides that a plan of termination may provide that a unit owner retain the exclusive right of possession in certain circumstances;
- Allows for the withdrawal of a plan of termination and correction of any changes;
- Allows a termination trustee to reduce the termination proceeds allocated to a unit for certain unpaid fines, costs, and expenses; and
- Makes technical and drafting corrections.

On March 24, 2015, the Business & Professions Subcommittee considered and adopted five amendments. These amendments:

- Clarify the procedures required to terminate a condominium association including removing an exception related to terminations when the terminated condominium is sold as a whole to an unrelated third party;
- Move the process for a unit owner to reject or object to a plan of termination to a more appropriate subsection;
- Restore language related to the surviving units and common elements in the partial termination of a condominium association;

¹⁰ In determining the purpose of a statute, courts frequently look to the legislature's express statements of intent in the statute. See *Pomponio*, 378 So. 2d at 781 (noting in its analysis of the public purpose of the statute that the specific objectives for the statute are "neither expressly articulated nor plainly evident" in the statute).

¹¹ *Id.* at 779.

¹² *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983).

¹³ *Century Vill., Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condo. Ass'n*, 361 So. 2d 128, 133 (Fla. 1978).

- Substitute the civil suit requirements with a requirement that the parties in a dispute over a plan for termination submit to mandatory nonbinding arbitration and provides clarifications and requirements for mandatory nonbinding arbitration;
- Provide that a dispute over a termination plan for a condominium association is among the types of disputes that may be handled through alternative dispute resolution.

On April 8, 2015, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Changes the objection threshold required to prevent a plan of termination and to prevent another plan of termination being considered for 18 months from "more than 10 percent" to "10 percent or more" of the total voting interests;
- Repeals the exemption from the act for condominiums in which 75 percent or more of the units are timeshare units;
- Provides that a condominium that has been created pursuant to a conversion must wait five years before undertaking a plan of termination, unless there is no objection to the termination;
- Provides that the "fair market value" that dissenting unit owners receive upon termination may not be less than the original purchase price of the unit;
- Requires mortgage satisfactions be negotiated as part of the plan of termination; and
- Makes technical corrections.

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