

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL: SB 748

INTRODUCER: Senator Ring

SUBJECT: Residential Properties

DATE: March 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 748 relates to the governance of condominium, cooperative, and homeowners' associations (residential properties or community associations). It permits corporations not for profit to use a copy, facsimile, or other reliable reproduction of the original proxy for any purpose for which the original proxy could be used if it is a complete reproduction of the entire proxy. In current law, community associations may be corporations for profit or corporations not for profit.

Regarding condominium associations, the bill permits the association to charge a fee against the unit owners for use of common elements or association property if the fee is authorized by a majority vote of the voting interests present, in person or by proxy, at a meeting of the association in which a quorum has been established. Current law authorizes such a vote but does not specify that it can be by proxy. Currently, the vote must be by vote of the association (majority of the membership).

Regarding condominium, cooperative, and homeowners' associations, the bill provides that association members may not post tape or video recordings of a meeting of the board or a meeting of the membership on any website or other media that can be readily viewed by persons who are not members of the association.

Regarding condominium associations, the bill permits condominium associations to posting meeting notices on association property in addition to condominium property.

Regarding condominium, cooperative, and homeowners' associations, the bill permits associations to recover from the unit owner any reasonable charges imposed upon the association under a written contract with its management, bookkeeping company, or collection agent, incurred in connection with collecting a delinquent assessment. The bill specifies the order in which payments from a homeowner must be applied to his or her unpaid debts. The bill also

permits the associations to file a lien on unpaid authorized administrative late fees, and reasonable costs for collection services contracted by the associations.

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

II. Present Situation:

Condominium

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

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

A declaration “may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.”⁴ A declaration of condominium may be amended as provided in the declaration.⁵ If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of not less than the owners of two-thirds of the units.⁶ Condominiums are administered by a board of directors referred to as a “board of administration.”⁷

Section 718.103(3), F.S., defines the term “association property” to mean:

that property, real and personal, which is owned or leased by, or is dedicated by a recorded plat to, the association for the use and benefit of its members.

Section 718.103(8), F.S., defines the term “common elements” to mean the portions of the condominium property not included in the units.

Section 718.103(13), F.S., defines the term “condominium property” to mean:

the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

³ *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).

⁴ Section 718.104(5), F.S.

⁵ See s. 718.110(1)(a), F.S.

⁶ Section 718.110(1)(a), F.S. *But see*, s. 718.110(4) and (8), F.S., which provides exceptions to the subject matter and procedure for amendments to a declaration of condominium.

⁷ Section 718.103(4), F.S.

Condominium – Assessments and Foreclosures

Section 718.111(4), F.S., permits condominium associations to make and collect assessments and to lease, maintain, repair, and replace the common elements or association property. The association may not charge a use fee against a unit owner for the use of common elements or association property. However, the association may charge a fee against the unit owners for use of common elements or association property if:

- The fee is provided for in the declaration of condominium;
- The fee is authorized by a majority vote of the association; and
- The charges relate to expenses incurred by an owner having exclusive use of the common elements or association property.

Section 718.103(1), F.S., defines the term “assessment” to mean “a share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner.”

“Special assessment” is defined to mean “any assessment levied against a unit owner other than the assessment required by a budget adopted annually.”⁸

A unit owner is jointly and severally liable with the previous owner for all unpaid assessments that come due up to the time of transfer of title.⁹ This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.¹⁰

If a first mortgagee, (e.g., the mortgage lending bank) or its successor or assignee, acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure, the first mortgagee’s liability for unpaid assessments is limited to the amount of assessments that came due during the 12 months immediately preceding the acquisition of title or one percent of the original mortgage debt, whichever is less.¹¹ However, this limitation applies only if the first mortgagee joined the association as a defendant in the foreclosure action.¹² This gives the association the right to defend its claims for unpaid assessments in the foreclosure proceeding. A first mortgagee who acquires title to a foreclosed condominium unit is exempt from liability for all unpaid assessments if the first mortgage was recorded prior to April 1, 1992.¹³ The successor or assignee, in respect to the first mortgagee, includes only a subsequent holder of the first mortgage.¹⁴

Section 718.116(3), F.S., provides for the accrual of interest on unpaid assessments. Unpaid assessments and installments on assessments accrue interest at the rate provided in the

⁸ Section 718.103(24), F.S.

⁹ Section 718.116(1)(a), F.S.

¹⁰ *Id.* The term “without prejudice” means “without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party.” Black’s Law Dictionary 770 (2d pocket ed. 2001).

¹¹ Section 718.116(1)(b), F.S.

¹² *Id.*

¹³ Section 718.116(1)(e), F.S.

¹⁴ Section 718.116(1)(g), F.S.

declaration from the due date until paid. The rate may not exceed the rate allowed by law.¹⁵ If no rate is specified in the declaration, the interest accrues at the rate of 18 percent per year. The association may also charge an administrative late fee of up to the greater of \$25 or 5 percent of each installment of the assessment for each delinquent installment for which the payment is late. Payments are applied first to the interest accrued, then the administrative late fee, then to any reasonable attorney's fees incurred in collection, and then to the delinquent assessment.

Cooperative Associations

Section 719.103(12), F.S., defines a "cooperative" to mean:

that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

A cooperative differs from a condominium because, in a cooperative, no unit is individually owned. Instead, a cooperative unit's occupants receive an exclusive right to occupy the unit. The cooperative holds the legal title to the unit and all common elements. The cooperative association may assess costs for the maintenance of common expenses.¹⁶

Homeowners' Associations

Florida law provides statutory recognition to corporations that operate residential communities in this state and procedures for operating homeowners' associations. These laws protect the rights of association members without unduly impairing the ability of such associations to perform their functions.¹⁷

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, 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."¹⁸ Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 607, F.S., relating to for-profit corporations or by ch. 617, F.S., relating to not-for-profit corporations.¹⁹

Homeowners' associations are administered by a board of directors whose members are elected.²⁰ The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted

¹⁵ Section 687.02(2), F.S., prohibits as usurious interest rates that are higher than the equivalent of 18 percent per annum simple interest.

¹⁶ See ss. 719.106(1)(g) and 719.107, F.S.

¹⁷ See s. 720.302(1), F.S.

¹⁸ Section 720.301(9), F.S.

¹⁹ Section 720.302(5), F.S.

²⁰ See ss. 720.303 and 720.307, F.S.

amendments to these documents.²¹ The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.²²

Division of Florida Condominiums, Timeshares, and Mobile Homes

Condominiums and cooperatives are regulated by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) in accordance with ch. 718, F.S., and ch. 719, F.S. The division is afforded complete jurisdiction to investigate complaints and enforce compliance with ch. 718, F.S., and ch. 719, F.S., with respect to associations that are still under developer control.²³ The division also has the authority to investigate complaints against developers involving improper turnover or failure to turnover control to the association, pursuant to s. 718.301, F.S., and 719.301, respectively.²⁴ After control of the condominium or cooperative is transferred from the developer to the unit owners, the division's jurisdiction is limited to investigating complaints related to financial issues, elections, and unit owner access to association records.²⁵

As part of the division's authority to investigate complaints, s. 718.501(1), F.S., and s. 719.501(1), F.S., authorize the division to subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties (fines) against developers and associations.

Chapters 718, 719, and 720, F.S.

Although condominiums and cooperatives are regulated by the division, homeowners' associations are not regulated. Chapter 718, F.S., relating to condominiums, ch. 719, F.S., relating to cooperatives, and ch. 720, F.S., relating to homeowners' associations, provide many comparable requirements for the governance of these associations. For example, they delineate requirements for notices of meetings,²⁶ official records, including which records are accessible to the members of the association,²⁷ and financial reporting.²⁸ Timeshare condominiums are generally governed by ch. 721, F.S., the "Florida Vacation Plan and Timesharing Act."

Condominium, cooperative, and homeowners associations (community associations) may be a Florida corporation for profit or a Florida corporation not for profit. If the association is a corporation for profit, the provision of chs. 607, the Florida Business Corporation Act, would

²¹ See ss. 720.301 and 720.303, F.S.

²² Section 720.303(1), F.S.

²³ Section 718.501(1), F.S., s. 719.501(1), F.S.

²⁴ *Id.*

²⁵ *Id.*, See Peter M. Dunbar, *The Condominium Concept: A Practical Guide for Officers, Owners, Realtors, Attorneys, and Directors of Florida Condominiums*, 12 ed. (2010-2011) s. 14.2.

²⁶ See s. 718.112(2), F.S., for condominiums, s. 719.106(2)(c), F.S., for cooperatives, and s. 720.303(2), F.S., for homeowners' associations.

²⁷ See s. 718.111(12), F.S., for condominiums, s. 719.104(2), F.S., for cooperatives, and s. 720.303(4), F.S., for homeowners' associations.

²⁸ See s. 718.111(13), F.S., for condominiums, s. 719.104(4), F.S., for cooperatives, and s. 720.303(7), F.S., for homeowners' associations.

apply. If the association is a corporation for profit, the provisions of ch. 617, F.S., the Florida Not for Profit Corporation Act, would apply.²⁹

Community Association Meetings

Condominium, cooperative, and homeowners' association members have the right to attend meetings of the board and its committees and the right to speak at such meetings. Any member may tape record or videotape meetings of the board.³⁰

III. Effect of Proposed Changes:

Proxy Voting

The bill amends s. 617.0721(2), F.S., to permit, notwithstanding any provision to the contrary in the articles of incorporation or bylaws, corporations not for profit to use a copy, facsimile, or other reliable reproduction of the original proxy for any purpose for which the original proxy could be used if it is a complete reproduction of the entire proxy.

Condominiums – Assessments for Use of Common Elements.

The bill amends s. 718.111(4), F.S., to provide that the association may charge a fee against the unit owners for use of common elements or association property if the fee is authorized by a majority vote of the voting interests present, in person or by proxy, at a meeting of the association in which a quorum has been established.

Community Associations – Recording Meetings

The bill amends ss. 718.112(2)(c) and 718.112(2)(d), F.S., to provide that association members may not post tape or video recordings of meeting of the board or of the membership on any website or other media that can be readily viewed by persons who are not members of the association.

The bill also amends ss. 719.106(1)(c) and (d), F.S., for cooperatives, and ss. 720.306(10), F.S., to provide a comparable provision for recording of cooperative and homeowners' association board and member meetings.

Condominium – Meeting Notices

The bill amends s. 718.112(2), F.S., to permit condominium associations to posting meeting notices on association property in addition to condominium property.

Community Associations – Assessments and Foreclosure

The bill amends s. 718.116(3), F.S., to permit condominium associations to recover from the unit owner any reasonable charges imposed upon the association under a written contract with its

²⁹ See ss. 718.111(1)(a), 719.1035, and 720.303(1), F.S.

³⁰ Sections 718.112(2)(c), 719.106(1)(c), 723.078(c)4., F.S.

management or bookkeeping company, or collection agent, incurred in connection with collecting a delinquent assessment.

The provision applies to the collection charges that are in a liquidated amount and must be based on the actual time expended performing necessary, non-duplicative services. The association may not recover fees for collection services after the matter has been referred to the association's legal counsel. Any payment received from the unit owner must be applied in the following order: first to the interest accrued, then the administrative late fee, then reasonable attorney fees incurred in collection, then the bill adds the payment for any reasonable costs for collection services contracted by the association, and then to the delinquent assessment.

The bill amends s. 718.116(5)(b), F.S., to permit the condominium association to file a lien on unpaid authorized administrative late fees, and reasonable costs for collection services contracted by the associations. This provision appears to be inconsistent with s. 718.116(4), F.S., which provides that fees for collection services are not recoverable after the matter is referred to the association's legal counsel.

The bill also amends ss. 719.108(3) and (4), F.S., for cooperatives, and ss. 720.306(3), F.S., for homeowners' associations to permit these community associations to collect fees for collection services and to file a lien. As with the inconsistency between ss. 718.116(3) and (5)(b), F.S., these provisions are also inconsistent because they permit the association to file a lien for cost incurred under a contract for collection services but also provides that fees for collection services are not recoverable after the matter is referred to the association's legal counsel.

Effective Date

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill prohibits members of a community association from posting tape or video recordings of meetings of the board or of the membership on any website or other media that can be readily viewed by persons who are not members of the association. This provision may raise free speech issues under the First Amendment of the U.S.

Constitution and Article I, Section 4 of the Florida Constitution, which guarantee freedom of speech and promote the free exchange of ideas and information by prohibiting the government from restricting speech because of its content. Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights. As such, prior restraints are presumed unconstitutional. Therefore, only in “exceptional cases,” will the courts consider censorship of publication acceptable.³¹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill permits community associations to recover from their members fees for collection services and to file a lien on unpaid authorized administrative late fees, and reasonable costs for collection services contracted by the associations.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 617.0721, 718.111, 718.112, 718.116, 719.104, 719.106, 719.108, 720.3015, 720.306, and 720.3085.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

³¹ See *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So.2d 608, 610 (Fla. 5th DCA 2007).