

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 203 Residential Properties

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

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 722

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 2 N, As CS	Robinson	Bond
2) Business & Professions Subcommittee	13 Y, 0 N, As CS	Anderson	Anstead
3) Judiciary Committee	17 Y, 0 N, As CS	Robinson	Havlicak

### SUMMARY ANALYSIS

An estoppel certificate is a legal document issued by a homeowners', cooperative, or condominium association (collectively referred to herein as "association") which certifies the total debt owed to the association for unpaid financial obligations of a parcel owner or unit owner.

The bill:

- provides for the ability to request and deliver estoppel certificates through electronic means;
- reduces the period of time in which an association must respond to an estoppel certificate request;
- specifies the required content, effective periods, and approved delivery methods for estoppel certificates;
- requires the designation of a person or entity for receipt of estoppel certificate requests;
- establishes fee caps for the preparation and delivery of an estoppel certificate;
- waives the right of an association to collect moneys owed in excess of the amount stated in an estoppel certificate from any person who in good faith relies on such certificate; and
- provides that cooperative associations are subject to the same requirements regarding the issuance of estoppel certificates as homeowner and condominium associations.

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

The bill has an effective date of July 1, 2016.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

Condominium<sup>1</sup> and cooperative<sup>2</sup> associations are governed internally by an association whose members are the owners of units within the association. Many single-family residential communities are similarly governed by a homeowners' association<sup>3</sup> made up of parcel owners. An association is in effect a partnership between unit or parcel owners who share an undivided interest in the common elements of the community.

Sections 718.111(4), 719.104(5), and 720.308, F.S., provide for the collection of periodic and special assessments to fund the association. To operate, an association must collect periodic assessments from the unit or parcel owners in order to pay for common expenses, management, maintenance, insurance, and reserves for anticipated future major expenses. Additionally, special assessments may be levied for expenditures that were not included in the association's annual budget.<sup>4</sup> 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 previous unpaid assessments.<sup>5</sup> Unpaid assessments may also become a lien on the parcel.<sup>6</sup>

An estoppel certificate issued by an association certifies the total debt owed to the association for unpaid financial obligations by a parcel owner or unit owner as of a specified date.<sup>7</sup> The association is legally bound<sup>8</sup> by the amount stated in the estoppel certificate. It may not later assert a contradictory claim of moneys due against any third party who relies on the certificate.<sup>9</sup>

Buyers, lenders, title insurance companies, and other entities involved in the sale or refinance of real property are examples of third-parties who rely on estoppel certificates to ascertain the value of property and ensure that title to property is transferred without any lien or encumbrance.

##### **Present Situation – Form, Effective Period, and Delivery of Estoppel Certificate**

An association is required to provide an estoppel certificate within 15 days after receiving a request<sup>10</sup> from a unit or parcel owner, unit or parcel mortgagee, or the designee of the owner or mortgagee.<sup>11</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> ss. 718.103(24), 719.103(23), and 720.308(1)(a), F.S.

<sup>5</sup> ss. 718.116(1), 719.108(1), and 720.3085(2)(b), F.S.

<sup>6</sup> ss. 718.116(5), 719.108(4), and 720.3085, F.S.

<sup>7</sup> ss. 718.116(8), 719.108(6), and 720.30851, F.S.

<sup>8</sup> "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.

<sup>9</sup> ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

<sup>10</sup> A request to a condominium association must be in writing. s. 718.116(8), F.S.

<sup>11</sup> ss. 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.

Current law provides few criteria for the form of 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.<sup>12</sup> An estoppel certificate issued by a cooperative association must only set forth the amount of assessments or other moneys owed.<sup>13</sup>

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 some certificates reflects only the amount presently owed while others provide the amount owed through a given date a few weeks or months into the future which provides for a longer use of the certificate. Accordingly, the information provided in an estoppel certificate and the period of effectiveness varies among associations.

### **Effect of Proposed Changes – Form, Effective Period, and Delivery of Estoppel Certificate**

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

The bill provides that an estoppel certificate must specify the following information as well as such additional information that may be determined by the association:

- The date of issuance and effective period.
- The legal name, address, and Department of Business and Professional Regulation (DBPR) license or registration number of the association.
- The fee for preparation and delivery of the estoppel certificate.
- The identity of the entity that prepared the estoppel certificate.
- The identity of the person requesting the estoppel certificate.
- The name of the unit/parcel owner and the unit/parcel designation and address as set forth in the official records of the association.
- Assessment information, including the regular periodic assessment amount levied against the unit, assessment payment history, and the due date and amount of the next assessment as set forth in the official records of the association.
- An itemized list of all assessments, special assessments, other moneys owed to the association, capital contribution/resale/transfer fees owed, and credit balances to the association by the unit owner for a specific unit as of the date of issuance as set forth in the official records of the association. Delinquent amounts must be specifically denoted.
- An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due during the effective period of the estoppel certificate. In calculating such amounts, the association may assume that any delinquent amounts will remain delinquent.
- All documented violations, if any, of the rules or regulations applicable to the unit as set forth in the official records of the association.
- The signature and printed name of an officer or agent of the association.

The bill provides that an estoppel certificate delivered on the date of issuance has a 30-day effective period, except that an estoppel certificate which is mailed has a 35-day effective period.

Additionally, the bill reduces the period of time in which an association must issue an estoppel certificate from 15 days to 10 business days. The certificate must be delivered on the day of issuance by mail, hand, or electronic transmission. The bill requires associations to designate a person or entity for receipt of estoppel certificate requests- such requests may be submitted electronically-and make the designation information available upon request.

### **Present Situation - Fees for Preparation of Estoppel Certificate**

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<sup>12</sup> *Id.*

<sup>13</sup> s. 719.108(6), F.S.

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.<sup>14</sup> A cooperative association may also charge a fee to prepare an estoppel certificate.<sup>15</sup>

Current law provides only that a preparation fee be "reasonable."<sup>16</sup> 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.

After a series of public meetings in 2014, the Community Association Living Study Council,<sup>17</sup> by unanimous vote, recommended to the Legislature that a reasonable cap be established for estoppel certificate fees and that such fees be tiered.<sup>18</sup> The Council proposed several additional factors that should be considered when determining the amount of the fee including whether the owner is current in fees, delinquent in fees, or if the estoppel certificate was requested in conjunction with a bulk purchase.<sup>19</sup>

### 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 establish the maximum fees that may be charged by an association for the preparation and delivery of an estoppel certificate as illustrated by **Figure 1**. Fee caps will be automatically adjusted for inflation every three years. The adjusted rates must be periodically calculated by DBPR and published on the DBPR website.

The bill establishes the following maximum fees related to the preparation and delivery of an estoppel certificate:

- For non-delinquent accounts, the association may charge a maximum fee of \$250.
- For delinquent accounts, the association may charge up to an additional fee of \$200 (for a maximum total fee of \$450).
- If the estoppel certificate is requested on an expedited basis and is delivered within 3 days of the request, the association may charge an additional fee of \$100.

The bill provides that the preparation and delivery of an estoppel certificate may not be conditioned upon the payment of any other fees not authorized by the bill. If the association issues the estoppel certificate more than 10 business days after receipt of the request, the association may not collect any fee.

**Figure 1: Maximum Allowable Estoppel Certificate Fees**

Authorized Fees	Cap*
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<sup>14</sup> ss. 718.116(8)(d) and 720.30851(3), F.S.

<sup>15</sup> s. 719.108(6), F.S.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> Community Association Living Study Council, *Final Report*, March 31, 2014, available at <http://www.myfloridalicense.com/Dbpr/lsc/documents/2014CALSCReport.pdf> (last visited Jan. 27, 2016).

<sup>19</sup> *Id.*

<b><u>Base Fee</u></b>	
Preparation and Delivery of Estoppel Certificate:	
- Non-Delinquent Account	Reasonable cost, not to exceed \$250
- Delinquent Account	or Reasonable cost, not to exceed \$450
<b><u>Additional Fee (as applicable)</u></b>	+
Expedited Delivery within 3 days	\$100
<b>TOTAL</b>	<b>Base Fees + Additional Fee (if applicable)</b>

\*Fee caps will be adjusted for inflation every three years based on the change in the Consumer Price Index for All Urban Consumers, U.S. City Average, all items.<sup>20</sup> The Department of Business and Professional Regulation must calculate and publish the adjusted rates on its website. The first adjustment should take effect July 1, 2019.

## Other Changes

- The bill amends current law to estop an association from collecting any moneys owed in excess of the amount stated in the certificate from any person, which would include owners, who in good faith relied upon the certificate as well as such person's successors and assigns. Current law provides that an association is only estopped from asserting a contradictory claim for amounts due against third parties who rely on an estoppel certificate, and expressly excludes owners from such protection.<sup>21</sup>
- The bill amends ch. 719, F.S., governing cooperative associations, to provide that a cooperative association issue estoppel certificates consistent with standards, procedures and requirements governing condominium and homeowners' associations. This includes establishing the authority to charge estoppel fees by resolution or contract, requiring payment of the fee upon preparation of the certificate, providing for the refund of the fee under certain circumstances,<sup>22</sup> and authorizing a cooperative unit owner to bring an action against the association pursuant to the summary procedure under s. 51.011, F.S., to compel compliance with the estoppel certificate requirements.<sup>23</sup>

## B. SECTION DIRECTORY:

Section 1 amends s. 718.116, F.S., revising requirements related to the issuance of an estoppel certificate for condominiums.

Section 2 amends s. 719.108, F.S., revising requirements related to the issuance of an estoppel certificate for cooperatives.

<sup>20</sup> A measure produced by the Bureau of Labor Statistics in the United States Department of Labor of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services.

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

<sup>22</sup> Any fee charged by a homeowners' or condominium association for an estoppel certificate is payable upon preparation of the certificate. 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 upon written request, but only to a non-owner payor. 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. ss. 718.116(8)(d), and 720.30851(3), F.S.

<sup>23</sup> 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.

Section 3 amends s. 720.30851, F.S., revising requirements related to the issuance of an estoppel certificate for homeowners' associations.

Section 4 provides an effective date of July 1, 2016.

## 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 currently imposes a greater fee 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 fee required to obtain an estoppel certificate. In such instance there would be a corresponding negative reduction in the fee collected by the association. Some opponents state that the fee cap may result in increased association fees.

### D. FISCAL COMMENTS:

The Department of Business and Professional Regulation has stated that the prohibition against an association or its agent charging a fee if an estoppel certificate is issued more than 10 business days after it receives the request for a certificate may create a burden on associations for the cost of preparation of the certificate.<sup>24</sup>

## 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:

Estoppel certificates are often prepared on behalf of an association by association counsel or community association management companies pursuant to a contract for services. The fee caps established by the bill may be greater or less than the current rates negotiated between the association and such contractors for the preparation of estoppel certificates.

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<sup>24</sup> Florida Department of Business and Professional Regulation, Agency Analysis of 2016 Senate Bill 722, p. 2 (Nov. 23, 2016).

Article I, section 10 of the United States Constitution and article I, section 10 of the Florida Constitution prohibit the legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, courts have long interpreted the provisions to only prohibit enactment of any law that is an *unreasonable* impairment of existing contractual rights.

In *Allied Structural Steel Co. v. Spannaus*,<sup>25</sup> the United States Supreme Court set forth the following principles in examining a law under an impairment analysis, ruling:

[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.

Referring to the *Allied* opinion, the Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*<sup>26</sup> stated that courts must consider:

- (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:**

It is unclear whether the bill authorizes an association to provide information regarding multiple units or parcels within a single estoppel certificate. If information regarding multiple units or parcels may be provided within a single estoppel certificate, language regarding the computation of fees may require clarification.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On November 3, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment requires the Department of Business and Professional Regulation to calculate the adjusted fee caps every three years and post the amounts on its website.

On February 2, 2016, the Business & Professions Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment makes the following changes in regards to homeowners', cooperative, and condominium associations:

- Requires an association to designate a person or entity for receipt of a request for an estoppel certificate and provide the designation information upon request;
- Provides a form and requires specified information to be included in an estoppel certificate and authorizes an association to require additional language;

<sup>25</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

<sup>26</sup> *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779 (Fla. 1979).

- Revises the maximum allowable fee for an estoppel certificate from \$200 to \$250; and
- Deletes a provision requiring payment of the fee for an estoppel certificate at closing and reverts to existing statutory language that provides that the fee is payable upon the preparation of the certificate.

On February 18, 2016, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Provides additional information that must be included in an estoppel certificate, specifically, the effective period of the certificate, the legal name of the association, the address of the association, the DBPR license or registration number of the association, and the identity of the entity that prepared the certificate.
- Requires that delinquent amounts owed to an association are specifically denoted on the estoppel certificate.
- Restores provisions of current law providing for payment of the estoppel certificate fee upon preparation and the refund of an estoppel certificate fee to a non-owner payor under certain circumstances.
- Makes other technical, stylistic, and grammatical changes.

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