

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 1682

INTRODUCER: Senators Garcia and Rodriguez

SUBJECT: Condominiums

DATE: April 3, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1682 makes three main categories of changes relating to the regulation and operation of condominium associations. The changes:

- Define and prohibit or restrict activities constituting a conflict of interest which may be detrimental to the unit owners of a condominium.
- Impose criminal penalties for misconduct in the operations of a condominium, such as withholding or altering the records or engaging in fraudulent activities in elections.
- Increase access to records by unit owners.

These changes are substantially based on a final report by a Miami-Dade County grand jury, titled, *Addressing Condo Owners' Pleas for Help: Recommendations for Legislative Action*. The grand jury found that the existing statutes do not sufficiently restrict self-dealing by members of the boards of condominiums or sufficiently deter other forms of misconduct such as election fraud. Additionally, the grand jury found that the existing statutory mechanisms are insufficient to force condominium associations to make their official records available to unit owners in a timely manner.

II. Present Situation:

A condominium is a form of ownership of real property which is comprised entirely of units which are accompanied by an undivided share in common elements, such as hallways, staircases, parking lots, and recreational facilities.¹ An association, which is a nonprofit corporation comprised of the unit owners of the condominium, is responsible for operating the

¹ Section 718.103(11), F.S.

condominium.² The board of the condominium is a representative body that is responsible for managing the association.³

Condominium associations are self-governing but are regulated to some degree by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation (DBPR). Larger condominium associations may operate with the assistance of a community association management firm or community association manager. Community association management firms and community association managers are also licensed and regulated by the department.⁴

Condominium Powers and Duties

The powers and duties of the association, operated by the board, include the power or duty to:

- Manage the condominium's property.
- Contract, sue, and be sued.
- Make and collect assessments and maintain the common elements of the association.
- Purchase adequate property insurance.
- Obtain liability insurance for its directors and officers.
- Maintain insurance or a fidelity bond for those persons who control or disburse the association's funds.
- Maintain the official records of the association, which include:
 - Minutes of the meetings of the board of administration.
 - The association's insurance policies.
 - Accounting records for the association.
 - Ballots, sign-in sheets, and other papers relating to voting by unit owners.
- Make the official records of the association available to a unit owner within five working days after the receipt of a written request.
- Preparing financial reports and providing them to unit owners.⁵

Restrictions on Conflicts of Interest

Chapter 718, F.S., imposes a number of general restrictions on conflicts of interest by members of the board of a condominium association. The members of the board of the association have a fiduciary relationship to the unit owners.⁶ Consistent with this responsibility, officers and directors may not solicit or accept anything of value from a person providing or proposing to provide goods or services to the association. An officer or director who violates the prohibition is subject to a civil penalty.⁷

Additionally, officers and directors are required to exercise their duties "in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances,

² Section 718.111(1)(a), F.S.

³ Section 718.103(4), F.S.

⁴ See part VIII of ch. 468, F.S.

⁵ Section 718.111, F.S.

⁶ Section 718.111(1)(a), F.S.

⁷ *Id.*

and in a manner he or she reasonably believes to be in the interests of the association.”⁸ An officer or director of an association is liable for monetary damages if he or she breaches or fails to perform his or her duties and the breach or failure related to certain violations of criminal law, an improper personal benefit, or certain reckless acts.⁹

The restrictions on conflicts of interest by board members do not prohibit a board member from having a financial interest in a party providing maintenance or management services to the association.¹⁰ In those cases, contracts between the party providing maintenance or services are permissible if the board member’s interest in the party is disclosed in the contract.

Officers and directors of a condominium association are required to comply with s. 617.0832, F.S., dealing with the general standards for directors in not-for-profit corporations. Officers and directors must disclose and seek approval of conflicts of interest related to contracts between the board of a not-for-profit corporation and a member or members of the board. Such a contract is not void or voidable, if:

- The relationship is disclosed to the board or committee that approves or ratifies the contract or transaction by a vote or consent that does not count the interested director or directors;
- The fact of such relationship or interest is disclosed or known to the members of the board or committee entitled to vote on such contract or transaction, if any, and they authorize, approve, or ratify it by vote or written consent; or
- The contract or transaction is fair and reasonable as to the corporation at the time it is authorized by the board, a committee, or the members.

To ratify or approve a conflict of interest, an affirmative vote is required by a majority of the directors on the board who have no relationship or interest in the transaction or contract. The conflict of interest may not be approved or ratified by a single director.¹¹ However, the presence or vote of such a director, whose conflict of interest has been ratified or approved by the board, may be counted for purposes of determining whether the transaction is approved.¹²

Homeowners’ Association Comparison – Conflicts of Interest

In contrast, contracts between mandatory homeowners’ associations under ch. 720, F.S., and directors or entities in which a director has a financial interest, must comply with conflict of interest procedures outlined in s. 617.0832, F.S., comply with disclosure requirements outlined in s. 617.0832, F.S., be approved by a two-thirds vote of the directors present, and be disclosed at the next regular or special meeting of the members.¹³ If any member of a homeowners’ association makes a motion at the next regular or special meeting of the members, the contract may be canceled by a majority vote of the members present. If the contract is canceled, the association is only liable for the reasonable value of goods and service previously provided and is not liable for any fee or damages connected to the cancellation.¹⁴

⁸ Section 718.111(1)(d), F.S.

⁹ *Id.*; s. 617.0834, F.S.

¹⁰ Section 718.3025, F.S.

¹¹ Section 617.0832, F.S.

¹² *Id.*

¹³ Section 720.3033(2), F.S.

¹⁴ *Id.*

Officers, directors and managers in a homeowners' association may not solicit or accept anything of value from any person providing or offering to provide goods or services to the association. Upon a finding by the board that an officer or director has violated this prohibition, the board must immediately remove the officer or director from office. However, board members may accept food to be consumed at a business meeting with a value of less than \$25 per individual or services or items in connection to trade fairs or education programs.

Elections

Members of the board of an association are generally selected through elections.¹⁵ Candidates for election to the board, however, may not include a member who is delinquent in the payment of any monetary obligation due to the association. Similarly, the association may suspend the voting rights of members who are delinquent in paying any monetary obligation to the association by more than 90 days.¹⁶ Notices of elections must be delivered to each unit owner entitled to vote at least 60 days before the election.¹⁷ The elections must be conducted using secret ballots.¹⁸

Members of the board may be recalled by an agreement among a majority of the unit owners who are entitled to vote in condominium matters, or a by a vote of the unit owners at a special meeting.¹⁹ A recalled member must turn over association records and other property of the association within five days after he or she is recalled. If the board does not certify the recall of a board member, the board must file a petition for arbitration with the division.²⁰

Arbitration

The division is authorized to employ attorneys and certify attorneys who may act as arbitrators to resolve condominium disputes.²¹ An attorney who is certified by the division as an arbitrator must be in good standing with The Florida Bar. The disputes that are subject to arbitration may relate to the authority of the board to require or prohibit a unit owner from taking actions relating to his or her unit.²² Other disputes eligible for arbitration may relate to the failure of the board to properly conduct an election, give adequate notice of meetings and other actions, or allow inspection of the association's books and records. A dispute relating to election irregularities in an election for a member of the board must be handled on an expedited basis.²³

¹⁵ See s. 718.112(2), F.S.

¹⁶ Section 718.303(5), F.S.

¹⁷ Section 718.112(2)(d)4.a., F.S.

¹⁸ *Id.*

¹⁹ Section 718.112(2)(j), F.S.

²⁰ Section 718.112(2)(j)3., F.S.

²¹ Section 718.1255(4), F.S.

²² Section 718.1255(1), F.S.

²³ Section 718.1255(5), F.S.

Regulation by the Department of Business and Professional Regulation

The division has authority to ensure that condominium associations and boards comply with the statutes and rules governing condominiums. This includes the authority to investigate complaints relating to financial issues, elections, and access to records by unit owners.²⁴

If the division has reasonable cause to believe that a condominium association, its board, or officer of the board has violated the statutes or rules governing condominiums, the division may initiate enforcement proceedings.²⁵ These enforcement proceedings may result in letters of censure or warning, cease and desist orders, restitution, declaratory relief, injunctive relief, and civil penalties.

The division is also required to maintain a toll-free number for condominium unit owners.²⁶ When the division receives a complaint, it generally must conduct its investigation and take action on the complaint within 90 days of receipt.²⁷ If the division believes that a person has altered, concealed, or destroyed a document that must be maintained by an association for the purpose of impairing its accuracy or availability in an investigation, the division must refer the matter to a local law enforcement agency.²⁸

The division also houses a condominium ombudsman whose duties include:

- Acting as a liaison between the division, unit owners, boards of directors, and board members.
- Developing policies and procedures to assist unit owners, boards of directors, board members and community association managers to understand their rights and responsibilities.
- Monitoring and reviewing procedures and disputes concerning condominium election and meetings.
- Appointing an election monitor to attend the annual meeting of unit owners and conduct the election of directors upon a petition by at least 15 percent of the voting interests in the association or six unit owners, whichever is greater.²⁹

Grand Jury Report—Addressing Condominium Owners’ Pleas for Help: Recommendations for Legislative Action

The increasing numbers of condominiums in this state, the increasing numbers of problems for people living in them, and the increasing numbers of complaints against the DBPR motivated a Miami-Dade County grand jury to conduct an investigation of complaints by condominium

²⁴ Section 718.501(1), F.S.

²⁵ Section 718.501(1)(d), F.S.

²⁶ Section 718.501(1)(k), F.S.

²⁷ Section 718.501(1)(m), F.S.

²⁸ Section 718.501(1)(n), F.S.

²⁹ Section 718.5012, F.S.

residents and the DBPR's responses to their complaints.^{30,31} The grand jury's report contains several findings and recommendations, including:

- The statutes governing unit owner access to records are ineffective because the financial penalties for the denial of access to records may be paid from assessments levied against the unit owners, not by the person who wrongfully withheld access to records.³²
- The statutes should not allow a member of a board of a condominium to vote for or against awarding a contract that involves the board member, a relative of the board member, or any person or entity who has a relationship with that board member or the board member's relative.³³
- Investigators with the department have little experience or training and seem more intent of closing complaints than resolving them.³⁴
- Some associations delay notifying unit owners of delinquent assessments that disqualify them from voting in elections in order to impede those unit owners from becoming current in their financial obligations before the election.³⁵
- There are many complaints about fraud in condominium elections, and the statutes should be revised to provide criminal punishments for those who engage in fraudulent activities in condominium elections.³⁶
- Election monitors should have the authority to collect evidence and void a condominium election when they reasonably believe that fraudulent election activities have occurred.³⁷
- The broad scope of the department's responsibilities may be the cause of its ineffective regulation of condominiums, and if placed elsewhere, the department's investigative arm should employ trained and experienced investigators who have the authority to conduct criminal investigations and to initiate investigations based on their own observations.³⁸

III. Effect of Proposed Changes:

This bill makes three main categories of changes relating to the regulation and operation of condominium associations. The changes:

- Define and prohibit or restrict activities constituting a conflict of interest.
- Impose criminal penalties for misconduct in the operations of a condominium.
- Increase access to records by unit owners.

The bill also addresses a number of other issues pertaining to condominiums.

³⁰ FINAL REPORT OF THE MIAMI-DADE COUNTY GRAND JURY, ADDRESSING CONDO OWNERS' PLEAS FOR HELP: RECOMMENDATIONS FOR LEGISLATIVE ACTION (Feb. 6, 2017), <http://www.miamisao.com/wp-content/uploads/2017/02/Grand-Jury-Report-Final.pdf>.

³¹ In addition to issuing criminal indictments, grand juries "consider the actions of public bodies and officials in the use of public funds and report or present findings and recommendations as to practices, incompetency, inefficiency, mistakes and misconduct involving public offices and public monies." *Miami Herald Pub. Co. v. Marko*, 352 So. 2d 518, 522 (Fla. 1977).

³² FINAL REPORT OF THE MIAMI-DADE COUNTY GRAND JURY, *supra* note 24 at 8-9.

³³ *Id.* at 9-10.

³⁴ *Id.* at 19.

³⁵ *Id.* at 21.

³⁶ *Id.* at 20-22.

³⁷ *Id.* 24-26.

³⁸ *Id.* at 27.

Conflicts of Interest (Sections 1, 2, 5, & 6)

The bill prohibits conflicts of interest among those who are responsible for operating a condominium as follows:

- Attorneys are prohibited from representing both the board of a condominium association and the management company of the association.
- Members of the board or the management company for a condominium association are prohibited from purchasing a unit at a foreclosure sale resulting from the association's foreclosure of its lien for unpaid assessments or from taking title to the unit by deed in lieu of foreclosure.
- Condominium associations are prohibited from contracting with a service provider that is owned or operated by a board member or a person who has a financial relationship with a board member.
- A party that contracts to provide maintenance or management services or a board member of the party is prohibited from owning more than 50 percent of the units of the condominium or from purchasing a property that is subject to a lien by the association.

Additionally, officers and directors of a condominium board are required to disclose activities that may reasonably be construed to be a conflict of interest. The existence of the conflict of interest must be documented on contracts and meeting agendas. In some cases, the officer or director engaged in a conflict of interest must choose to no longer pursue the activity creating the conflict or withdraw from office. Otherwise, the board must remove the officer or director from office.

In other cases, where the potential for a conflict of interest exists, the person responsible for creating the potential conflict may not be present during the board's deliberations or vote on the matter. The board must disclose to the unit owners that there is a potential conflict of interest. Additionally, a contract between a director, officer, or relative of either and the association which is not properly noticed to the unit owners is void.

Criminal Penalties (Sections 1 & 4)

The bill authorizes criminal penalties for several types of misconduct relating to condominiums. A person is subject to criminal penalties as follows:

- A director or board member who knowingly, willfully, and repeatedly fails to provide access to the official records of the association commits a second degree misdemeanor.³⁹
- A person who knowingly and intentionally defaces or destroys association accounting records or fails to create or maintain required accounting records with the intent of harming the association commits a first degree misdemeanor.⁴⁰

³⁹ Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S. provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

⁴⁰ Section 775.082, F.S., provides that a misdemeanor of the first degree is punishable by a term of imprisonment not to exceed one year. Section 775.083, F.S. provides that a misdemeanor of the first degree is punishable by a fine not to exceed \$1,000.

- A person who willfully and knowingly refuses to produce association records with the intent of facilitating the commission of a crime or avoiding or escaping detection, arrest, trial, or punishments commits a third degree felony.⁴¹
- A person who willfully, knowingly, and falsely swears or affirms an oath or affirmation or procures another person to do the same in connection with voting in an association election commits a third degree felony.
- A person who willfully and knowingly perpetrates or attempts to perpetrate fraud in connection with voting in an association election commits a third degree felony.
- A person who willfully, knowingly, and fraudulently changes or attempts to change a vote or ballot cast or to be cast in an association election commits a felony of the third degree.
- A person shall also be punished as if he or she committed the violation if the person willfully and knowingly aides or advises another person to commit a violation, agrees or conspires to commit a violation, or advises another person how to escape detection, trial, or punishment.

Access to Association Records (Sections 1 & 9)

The bill requires condominium associations to keep additional records and generally to take actions to make those records available to unit owners as follows:

- A condominium association must maintain bids for materials, equipment, and services as part of its official records.
- A condominium association must make its records available to renters and authorized representatives of unit owners and renters.
- A condominium association must provide an annual report to the Department of Business and Professional Regulation listing the financial institutions at which it maintains accounts, and unit owners may obtain the report from the department.
- A unit owner may give notice to the Division of Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation that an association has failed to mail or hand deliver to the unit owner a copy of the most recent financial statement after a request. The division must then give the association notice that it must comply with the request. If the association fails to comply with that request within five business days, the association may not waive the financial reporting requirement.⁴²

Additionally, condominium associations having 500 or more units must post copies of certain types of its official records on its website. However, the records must be inaccessible to the general public. The records that must be posted on the website include:

- The declaration of condominium and related amendments.
- The bylaws.
- Articles of incorporation of the association and related amendments.
- The rules of the association.
- Management agreements, leases, and other contracts to which the association is a party.
- The annual budget for the association.

⁴¹ Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed \$5,000.

⁴² Section 718.111(13), F.S., requires the association to prepare an annual financial statement. The required type of financial statement is based upon the association's total annual revenue. An association may waive the requirement and prepare a less extensive statement, but may not waive the required statement for more than three consecutive years.

- The annual financial report for the association.
- Certifications by directors relating to conflicts of interest.
- Contracts and transactions between the association and other entities in which a director has a financial interest.
- Notices of board meetings and agendas for those meetings.

Miscellaneous Changes (Sections 1, 2, 3, & 7)

Finally, the bill includes a number of changes to the laws governing condominiums that:

- Require an association to timely provide copies of financial reports to unit owners or lose the authority to waive heightened financial reporting requirements.
- Prohibit member of a condominium board from serving more than four consecutive 2-year terms unless approved by a two-thirds vote of the total voting interests of the association.
- Eliminate the authority of a condominium board to certify the recall of a board member.
- Extend the time period for a recalled board member to turn over records and other association property to 10 days from 5 days after the recall.
- Specify minimum qualifications for arbitrators who are certified by the Division of Florida Condominiums, Timeshares and Mobile Homes to arbitrate a condominium dispute.
- Require arbitrators to conduct a hearing within 30 days after being assigned or entering a contract for the arbitration unless the arbitration petition is withdrawn or a continuance is granted for good cause.
- Require arbitrators who arbitrate condominium disputes to render decisions within 30 days after a hearing.
- Provide that failing to render a written decision within 30 days after a hearing may result in the cancellation of the arbitrator's certification.⁴³
- Prohibit a condominium from suspending the voting rights of a unit owner unless the unit owner owes more than \$1,000 to the association.
- Require that proof of nonpayment of a monetary obligation must be provided to the unit owner 30 days before the unit's owners membership rights are suspended because of the nonpayment.⁴⁴
- Prohibit a receiver from exercising the voting rights of a unit that is in receivership for the benefit of the association.
- Authorize the ombudsman to review secret ballots cast in the vote of an association where there is reasonable cause to believe that election misconduct has occurred.

Effective Date

The bill takes effect July 1, 2017.

⁴³ Section 44.106, F.S., provides that the Florida Supreme Court establishes the minimum standards and procedures for qualifications, certification, professional conduct, and discipline of arbitrators.

⁴⁴ Section 718.303(6), F.S., requires that the unit owner's suspension must be approved at a properly noticed meeting of the board. A nonemergency meeting of the board requires a 14-day notice pursuant to s. 718.112(2)(c), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The provisions of the bill that define and restrict conflicts of interests may result in lower costs for contracted services to condominiums.

Condominiums may incur increased costs to maintain and make their records available to unit owners.

C. Government Sector Impact:

The state will incur costs to investigate, prosecute, and punish persons who violate the new criminal standards in the bill.

The minimum qualifications for arbitrators who may arbitrate condominium disputes as set forth in the bill may reduce the pool of qualified arbitrators. This may result in greater costs to the Department of Business and Professional Regulation to employ these arbitrators.

VI. Technical Deficiencies:

None.

VII. Related Issues:

SB 1682 creates s. 718.111(13)(e), F.S., to provide that a unit owner may give notice to the Division of Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation that an association has failed to mail or hand deliver to the unit owner a copy of the most recent financial statement after a request. The division must then give the association notice that it must comply with the request. If the association fails to comply

with that request within five business days, the association may not waive the financial reporting requirement.

SB 294 by Senator Bracy amends s. 718.111(13), F.S., to provide that an association that fails to give the unit owner with a copy of the prior year's financial statement, after receipt of a written request, must provide the division with a copy of the required financial statement for the next three consecutive years, and is also prohibited from waiving the reporting requirement during those years.

The provision in SB 294 differs from the provision in this bill. SB 294 does not require the division to give notice to the association that it must comply with the unit owner's request and does not require that the association comply with the request within five days before the association is prohibited from waiving the required financial statement for failing to comply with the request.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 718.111, 718.112, 718.1255, 718.3025, 718.303, 718.5012, and 718.71.

This bill creates the following sections of the Florida Statutes: 718.129 and 718.3027.

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.