

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 Innovation, Industry, and Technology

BILL: CS/SB 1752

INTRODUCER: Innovation, Industry, and Technology Committee and Senator Pizzo

SUBJECT: Condominium Associations

DATE: February 17, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>IT</u>	<u>Fav/CS</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1752 revises current law to provide that when a condominium or cooperative association has filed a single joint petition to challenge a tax assessment issued by the county property appraiser, an association may continue to represent and defend the unit owners through any related subsequent proceeding in any tribunal on appeal. The association must provide unit owners with notice of its intent to respond to a complaint, and advise the unit owners that they may opt out. Current law permits the association to challenge the initial valuation on behalf of the unit owners. However, the association cannot appeal that decision on behalf of the unit owners. The bill provides that this is intended to clarify existing law and applies to cases pending on July 1, 2020.

The bill amends s. 718.111, F.S., relating to condominium associations, to prohibit certain activities related to an association's obligation to comply with the right of a unit owner or a tenant to inspect and copy official records of the association. The bill also prohibits officers, directors, and managers of an association from performing certain acts related to the association's management, financial obligations, or conduct of elections. The bill provides criminal penalties for certain violations, such as a:

- Third degree felony¹ for an officer, director, or manager of a condominium association to knowingly solicit, offer to accept, or accept anything or service of value or kickback;

¹ A third degree felony is punishable by up to five years in state prison and a fine of up to \$5,000. See ss. 775.082 and 775.083, F.S.

- Second degree misdemeanor² for any director or member of the board or association to knowingly, willfully, and “repeatedly” violate (two or more violations within a 12-month period) any specified requirements relating to inspection and copying of official records of an association;
- First degree misdemeanor³ to knowingly or intentionally deface or destroy required accounting records or knowingly and intentionally fail to create or maintain required accounting records, with the intent of causing harm to the association or one or more of its members; and
- Third degree felony to willfully and knowingly refuse to release or otherwise produce association records, with the intent to avoid or escape detection, arrest, trial, or punishment for the commission of a crime, or to assist another person with such avoidance or escape.

The bill also:

- Provides that a person commits theft by use of a debit card, if the person uses a debit card issued in the name of, or billed directly to, an association for any expense that is not a lawful obligation of the association.
- Creates s. 718.129, F.S., which specifies acts constituting fraudulent voting activities related to an association election and acts taken in furtherance of such fraudulent voting activities, and provides that commission of any of those acts is a third degree felony.
- Revises requirements related to a condominium association’s maintenance of official records and access to official records by unit owners.
- Expands the application of a requirement to provide digital copies of specified documents on an association’s website to condominium associations of 25 or more units (and no timeshare units) from associations of 150 or more units (and no timeshares). The bill also extends the date by which an association must comply with this requirement from January 1, 2019 to January 1, 2022.
- Authorizes the Florida Division of Condominiums, Timeshares, and Mobile Homes to investigate complaints related to financial issues.

Some of the changes made by the bill regarding condominium association records and elections are similar to changes recommended in a 2017 report by a Miami-Dade County grand jury.

The bill is effective October 1, 2020.

II. Present Situation:

The Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation (DBPR) administers the provisions of ch. 718, F.S., (the “Condominium Act”) for condominium associations. The division may investigate complaints and enforce compliance with ch. 718, F.S., with respect to associations that are still under developer control.⁴ The division also has the authority to investigate

² A second degree misdemeanor is punishable by up to 60 days in county jail and a fine of up to \$500. *See* ss. 775.082 and 775.083, F.S.

³ A first degree misdemeanor is punishable by up to one year in county jail and a fine of up to \$1,000. *See* ss. 775.082 and 775.083, F.S.

⁴ Sections 718.501(1), F.S.

complaints against developers involving improper turnover or failure to transfer control to the association.⁵ After control of the condominium 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.⁶

As part of the division's authority to investigate complaints, the division may subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties against developers and associations.⁷

If the division has a reasonable cause to believe that a violation of any provision of the Condominium Act, or related rule has occurred, the division may institute enforcement proceedings in its own name against any developer, bulk assignee, bulk buyer, association, officer, or member of the board of administration, or its assignees or agents. The division may conduct an investigation and issue an order to cease and desist from unlawful practices and to take affirmative action to carry out the purpose of the applicable chapter. In addition, the division is authorized to petition a court to appoint a receiver or conservator to implement a court order, or to enforce of an injunction or temporary restraining order. The division may also impose civil penalties.⁸

Condominium Associations

The Condominium Act "give[s] statutory recognition to the condominium form of ownership of real property and establish[es] procedures for the creation, sale and operation of condominiums."⁹ 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.¹⁰

A condominium association, which is a Florida corporation for profit or a Florida corporation not for profit,¹¹ "manages and operates the condominium community, maintains the common elements, and provides services in furtherance of its duties to the members. Each purchaser, by accepting title to his or her unit, automatically becomes an association member, and is bound by the association rules and regulations."¹²

⁵ *Id.*

⁶ Section 718.501(1), F.S.

⁷ *Id.*

⁸ *Id.*

⁹ *Citizen Property Insurance Corp. v. River Manor Condominium Assoc., Inc.*, 125 So.3d 846, 850 (Fla. 4th DCA 2013) (citation omitted).

¹⁰ Section 718.103(11), F.S. "Common elements" are the portions of the condominium property not included in the units. Section 718.103(8), F.S. "The structure of the building including the roof, walls, conduit and hallways, and recreation facilities are examples of items that are usually part of the common elements. Common elements are legally attached to each unit and are transferred with the unit when it is sold." *Condominium Living in Florida* (Revised Jan. 2018), Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes, available at <http://www.myfloridalicense.com/dbpr/lsc/documents/CondominiumLiving.pdf> (last visited on March 18, 2019). This document is further cited in this analysis as "*Condominium Living in Florida*."

¹¹ Section 718.111(1)(a), F.S.

¹² *Condominium Living in Florida*, *supra*. note 10. Owners of units are shareholders or association members. Section 718.111(1)(a), F.S.

“The board of directors, initially appointed by the developer and subsequently elected by the unit owners, is responsible for managing the affairs of the association. The board may appoint committees to assist with the various duties of the association.”¹³ “It is the board’s duty and responsibility to determine the association’s needs, limited by the association’s fiscal resources. An association may be self-managed or hire professional management.”¹⁴

Tax Assessments – Condominium and Cooperative Associations

Condominium association unit owners and cooperative associations unit owners are assessed yearly ad valorem¹⁵ taxes by the county property appraiser.¹⁶ For condominium parcels, ad valorem taxes are assessed on the condominium parcels and not upon the condominium property as a whole, and the common elements are divided and levied proportionally among individual condominium parcel owners.¹⁷ For a parcel in a cooperative association, ad valorem property taxes are assessed against the cooperative parcels and not upon the cooperative property as a whole.¹⁸

Current law permits condominium and cooperative associations to file a single joint petition to the Value Adjustment Board ("VAB") contesting the tax assessment of all units within the condominium or cooperative.¹⁹ The association must provide each unit owner notice of the petition and their right to opt out of the appeal, if desired.²⁰

A decision by the VAB may be appealed to the circuit court.²¹ While current law is clear that an association is authorized to act on behalf of all unit owners when filing a petition to the VAB and when initiating an appeal of the VAB’s decision, it is unclear whether the association may defend, on behalf of unit owners, an appeal of the VAB’s decision by the property appraiser.²²

In *Central Carillon Beach Condominium v. Garcia*, the Florida Third District Court of Appeals (Third DCA) reviewed this issue in a case of first impression.²³ Petitioners were two condominium associations who had represented their unit owners in a tax assessment challenge before a VAB. Respondent was the property appraiser for Miami-Dade County (appraiser).²⁴

When the associations initially challenged their tax assessment, the VAB substantially lowered their assessed property values.²⁵ As a result, the appraiser challenged the decision in an appeal to the Miami-Dade Circuit Court, and named the individual unit owners, instead of the each

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Section 192.001(1), F.S., defines the term “ad valorem tax” to mean a tax based upon the assessed value of property.

¹⁶ Section 194.011, F.S.

¹⁷ Section 718.120(1), F.S.

¹⁸ Section 719.114, F.S.

¹⁹ Section 194.011(3)(e), F.S.

²⁰ Section 194.171, F.S.

²¹ Section 194.011(3)(e), F.S.

²² *Id.*

²³ *Central Carillon Beach Condominium Association, Inc., et al., v. Garcia, et al., et al.*, 245 So. 3d 869 (Fla. 3d DCA 2018).

²⁴ *Id.* at 869.

²⁵ *Id.* at 870.

association as defendants.²⁶ In response, the associations submitted a motion to dismiss the appeal and a motion for certification of the unit owners as a defense class. Both motions were denied by the circuit court, and the associations appealed the denial of the motion to the Third DCA.²⁷

In response, the appraiser argued that defense class certification should be denied, and the appeal should name individual unit owners, because statutes governing tax assessment challenge procedures require that individual unit owners be named on appeal.²⁸

Section 194.181(2), F.S., provides that in any case brought by the taxpayer or association contesting the assessment of any property, the county property appraiser shall be the party defendant. If the property appraiser appeals a decision of the VAB under s. 194.036(1)(a) or (b), F.S.,²⁹ the taxpayer shall be party defendant. The term “taxpayer” means the person or other legal entity in whose name property is assessed, including an agent of a timeshare period titleholder.³⁰ In *Central Carillon*, the individual unit owners were assessed the taxes, not the associations.³¹

The associations argued that this law conflicts with condominium association law which generally allows associations to represent unit owners through their rights of collective representation.³²

Section 718.111(3), F.S., permits a condominium association to appeal actions or hearings in its name on behalf of all unit owners “concerning matters of common interest to most or all unit owners,” including “protesting ad valorem taxes on commonly used facilities and on units.”³³ The association may also defend actions in eminent domain.³⁴

The Third DCA found that the associations’ argument was unsupported, stating that the s. 718.111(3), F.S., only addresses ad valorem taxes in one phrase: “protesting ad valorem taxes on commonly used facilities and on units.” The associations protested the ad valorem taxes on behalf of all units, but the lawsuits brought by the appraiser against the unit owners are not “protests.” Rather, they are judicial review proceedings in which the unit owners are defendants. The specific cases in which an association may defend on behalf of all unit owners are “actions in eminent domain.”³⁵

The associations argued that because they could bring a class action, if they appealed a decision of the VAB, they “may be joined in an action as a representative of that class with reference to

²⁶ *Id.* at 871.

²⁷ *Id.* at 869.

²⁸ *Id.* at 871.

²⁹ This section providing grounds for an appeal of a VAB decision by the property appraiser.

³⁰ Section 192.001(13), F.S.

³¹ *Central Carillon*, *supra* note 22, at 871.

³² *Id.* at 871, 872.

³³ Chapter 719, F.S., relating to cooperative associations, does not provide a comparable provision.

³⁴ Section 718.111(3), F.S.

³⁵ *Central Carillon*, *supra* note 22, at 872.

litigation....” However, the court rejected the argument, because under s. 718.111(3), F.S., if an appraiser’s appeal of a VAB’s decision, “the taxpayer shall be the party defendant.”³⁶

Miami-Dade County Grand Jury Report “Addressing Condo Owners’ Pleas for Help: Recommendations for Legislative Action”

The increasing numbers of condominiums in Florida, 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 residents and the DBPR’s responses to their complaints.³⁷ The grand jury’s report contains numerous findings and recommendations, but those relevant to the provisions of the bill are discussed below.

Breaches of a Fiduciary Duty and Prohibited Acts

Officers and directors of a condominium association have a fiduciary relationship to the unit owners, and may be sanctioned for breach of their fiduciary duty.³⁸ An officer, director, or manager may not solicit, offer to accept, or accept anything or service of value or kickback for which consideration has not been provided for the benefit of such person (or immediate family members) from any person providing or proposing to provide goods or services to the association.³⁹

Any such officer, director, or manager who knowingly solicits, offers to accept, or accepts anything or service of value or kickback is subject to a civil penalty pursuant to s. 718.501(1)(d), F.S., and, if applicable, a criminal penalty as provided in s. 718.111(1)(d), F.S.

Section 718.111(1)(d), F.S., requires an officer, director, or agent to discharge his or her duties in good faith, with the care an ordinarily prudent person in a similar position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the interests of the association. An officer, director, or agent is liable for monetary damages as provided in s. 617.0834, F.S., if such officer, director, or agent breaches or fails to perform his or her duties and the breach of, or failure to perform, such duties constitutes:

- A violation of criminal law as provided in s. 617.0834, F.S.;
- A transaction from which the officer or director derived an improper personal benefit, either directly or indirectly; or
- Recklessness or an act or omission that was in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Section 718.111(1)(d), F.S., also criminalizes the following acts:

³⁶ *Id.* at 872.

³⁷ *Final Report of the Miami-Dade County Grand Jury (Addressing Condo Owner’s Pleas for Help: Recommendations for Legislative Action)* (Filed Feb. 6, 2017), Eleventh Judicial Circuit, available at <http://www.miamisao.com/wp-content/uploads/2017/02/Grand-Jury-Report-Final.pdf> (last visited on Jan. 29, 2020). This document is further cited in this analysis as “*Final Report of the Miami-Dade County Grand Jury.*”

³⁸ Section 718.111(1)(a), F.S.

³⁹ Section 718.111(1)(a), F.S., does not prohibit an officer, director, or manager from accepting services or items received in connection with trade fairs or education programs.

- Forgery of a ballot envelope or voting certificate used in a condominium association election is punishable as provided in s. 831.01, F.S.;
- Theft or embezzlement of funds of a condominium association is punishable as provided in s. 812.014, F.S.; and
- Destruction of or refusal to allow inspection or copying of an official record of a condominium association that is accessible to unit owners within the time periods required by general law in furtherance of any crime is punishable as tampering with physical evidence as provided in s. 918.13, F.S., or as obstruction of justice as provided in ch. 843, F.S.

Finally, s. 718.111(1)(d), F.S., provides that an officer or director charged by information or indictment with any crime referenced in this paragraph⁴⁰ must be removed from office, and the vacancy must be filled as provided in s. 718.112(2)(d)2., F.S., until the end of the officer's or director's period of suspension or the end of his or her term of office, whichever occurs first. If a criminal charge is pending against the officer or director, he or she may not be appointed or elected to a position as an officer or a director of any association and may not have access to the official records of any association, except pursuant to a court order. However, if the charges are resolved without a finding of guilt, the officer or director must be reinstated for the remainder of his or her term of office, if any.

The Miami-Dade County grand jury found:

Although the directors have a legally mandated fiduciary obligation toward their unit owners, it appears that some of them are more involved in self-dealing and looking out for their own financial interests. The position of board director is not generally a paid position. Yet, some directors appear to view the ability to get into office as an opportunity to cash in. This should not be countenanced.⁴¹

The grand jury did not make any specific recommendation to criminalize the prohibition against receiving kickbacks in s. 718.111(1)(a), F.S.

Access to Records of a Condominium Association

Section 718.111(12)(a), F.S., requires a condominium association to maintain various records, including but not limited to, the association's recorded bylaws and amendments to those bylaws, articles of incorporation and amendments to those articles, bills of sale or transfer for association-owned property, accounting records, voting ballots, contracts for work to be performed, and bids.

⁴⁰ The only crimes specifically referenced in s. 718.111(1)(d), F.S., are the previously-described offenses relating to forgery of a ballot envelope or voting certificate, theft or embezzlement of association funds, and destruction of or refusal to allow inspection or copying of association records. Additionally, s. 718.111(1)(d), F.S., states that an officer, director, or agent shall be liable for monetary damages as provided in s. 617.0834, F.S., if such officer, director, or agent breached or failed to perform his or her duties and the breach of, or failure to perform, his or her duties constitutes a violation of criminal law as provided in s. 617.0834, F.S. The reference to criminal violations in s. 718.111(1)(d), F.S., is slightly different than the reference to criminal violations in s. 718.112(2)(o), F.S., which provides that a director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds or property must be removed from office. The latter provision appears to be more limited than the former provision.

⁴¹ *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at page 10 (citation omitted).

Section 718.111(12)(b), F.S., requires that some of these records (e.g., bylaws and articles of incorporation) be permanently maintained from the inception of the association. All other official records must be maintained within the state for at least seven years, unless otherwise provided by general law.⁴² The records must be made available to a unit owner within 45 miles of the condominium property or within the county in which the condominium property is located within 10 working days after receipt of a written request by the board or its designee. An association must make a copy of the records available for inspection or copying by a unit owner on the condominium property or association property or offer the option of making the records available electronically via the Internet or allow the records to be viewed in electronic format on a computer screen and printed upon request.

Section 718.111(12)(c)1., F.S., provides that official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times.⁴³ A renter of a unit has a right to inspect and copy the association's bylaws and rules. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with these requirements. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply. The failure to permit inspection entitles any person prevailing in an enforcement action to recover reasonable attorney fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records.

Section 718.111(12)(c)2., F.S., provides that any person who knowingly or intentionally defaces or destroys accounting records that are required by the Condominium Act, to be maintained during the period for which such records are required to be maintained, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty pursuant to s. 718.501(1)(d), F.S.

Section 718.111(12)(g), F.S., provides that by January 1, 2019, an association managing a condominium with 150 or more units which does not contain timeshare units must post digital copies of specified records on its website. These documents include, but are not limited to: the recorded declaration of condominium of each condominium operated by the association and each amendment to each declaration, the recorded association bylaws and amendments to those bylaws, articles of incorporation of the association and amendments to those articles, the annual and proposed budget, and various contracts, including any contract or document regarding a conflict of interest or possible conflict of interest. The failure of the association to post required information is not in and of itself sufficient to invalidate any action or decision of the association's board or its committees.

The Miami-Dade County grand jury found that provisions of s. 718,111, F.S., "are not effectively protecting unit owners' right to access records."⁴⁴ "Under the law, if the association

⁴² Section 718.111(12)(b), F.S.

⁴³ The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the member or authorized representative of such member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying.

⁴⁴ *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at page 5.

fails to comply with a valid request, monetary damages can be awarded to the unit owner. The problem is that the source of those funds will come from assessments levied against all owners.”⁴⁵ The grand jury also found:

It does not seem right to us that a recalcitrant board, acting against the interests of the association, can take willful action and not personally suffer serious consequences. To the extent that the association can engage in these tactics when a unit owner is making record requests for budget, accounting, audit or financial records, is most troubling. The willful failure to provide such documents may be part of a broader scheme to cover up embezzlement or other financial wrongdoing committed by the board or association. In furtherance of possible cover-ups, directors may also chose to intentionally deface or destroy accounting records or knowingly or intentionally create or maintain false accounting records that are required to be maintained by statute. Even such willful action, which again, may be done to cover-up theft of funds from the association, is only punishable by a civil penalty.⁴⁶

The grand jury made three recommendations regarding violations relating to access or destruction of association records that are relevant to directors:

- Section 718.111, F.S., should be amended to provide that directors and members of the board “who willfully and repeatedly fail to comply with their statutory obligation to appropriately and timely respond to written requests for official records of the association (more than two (2) violations within a rolling twelve (12) month period) shall be personally liable for payment of damages to the requesting unit owner(s)[.]”
- “... [D]irectors and members of the board or association who knowingly or intentionally deface or destroy accounting records or fail to create or maintain such records that are required by law shall be criminally liable for such conduct. We recommend that each such act will constitute a 2nd degree misdemeanor for a first offense, and that any subsequent offenses or violations will constitute a first degree misdemeanor[.]”
- “... [A]ny association, board director, management company or management company employee who willfully, knowingly, or intentionally refuses to release or otherwise produce official association records, and such refusal is done to facilitate or cover-up the commission of a crime, shall be criminally liable for such conduct. The violation shall be classified as a 3rd degree felony[.]”⁴⁷

Sanctions Relating to Unauthorized Use of Association-Related Debit Cards

Section 718.111(15)(b), F.S., prohibits the use of a debit card issued in the name of, or billed directly to, the association for any expense that is not a lawful obligation of the association. A violation of this prohibition may be prosecuted as credit card fraud pursuant to s. 817.61, F.S.⁴⁸

⁴⁵ *Id.*

⁴⁶ *Final Report of the Miami-Dade County Grand Jury, supra* note 15, at page 6 (citation omitted).

⁴⁷ *Final Report of the Miami-Dade County Grand Jury, supra* note 15, at pages 8-9.

⁴⁸ The applicable penalties for a violation range from a misdemeanor of the first degree to a felony of the third degree depending on the number of violations during a six-month period and the value of the property that was subject to the fraud. *See* s. 817.61, F.S.

Civil Immunity

As previously noted, s. 718.111(1)(d), F.S., provides that an association officer, director, or agent is liable for monetary damages as provided in s. 617.0834, F.S., if such officer, director, or agent breaches or fails to perform his or her duties as provided in that paragraph. Section 617.0834(1), F.S., in part, provides that an officer or director of a nonprofit organization recognized under s. 501(c)(3) or s. 501(c)(4) or s. 501(c)(6) of the Internal Revenue Code of 1986, as amended, is not personally liable for monetary damages to any person for any statement, vote, decision, or failure to take an action, regarding organizational management or policy by an officer or director, unless:

- The officer⁴⁹ or director⁵⁰ breached or failed to perform his or her duties as an officer or director; and
- The officer's or director's breach of, or failure to perform, his or her duties constitutes:
 - A violation of the criminal law, unless the officer or director had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful. A judgment or other final adjudication against an officer or director in any criminal proceeding for violation of the criminal law estops that officer or director from contesting the fact that his or her breach, or failure to perform, constitutes a violation of the criminal law, but does not estop the officer or director from establishing that he or she had reasonable cause to believe that his or her conduct was lawful or had no reasonable cause to believe that his or her conduct was unlawful;
 - A transaction from which the officer or director derived an improper personal benefit, directly or indirectly; or
 - Recklessness⁵¹ or an act or omission that was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Section 617.0830, F.S., provides general standards for directors of a non-profit corporation, and also specifies when a director is not personally liable for actions he or she takes or fails to take as a director. A director must discharge his or her duties as a director, including his or her duties as a member of a committee, in good faith, with the care an ordinarily prudent person in a similar position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the corporation.⁵² A director is not liable for any action taken as a director, or any failure to take any action, if the duties of office are performed in compliance with s. 617.0830, F.S.⁵³

⁴⁹ "Officer" means a person who serves as an officer without compensation except reimbursement for actual expenses incurred or to be incurred. Section 617.0834(2)(c), F.S.

⁵⁰ "Director" means a person who serves as a director, trustee, or member of the governing board of an organization. Section 617.0834(2)(b), F.S.

⁵¹ "Recklessness" means the acting, or omission to act, in conscious disregard of a risk: known, or so obvious that it should have been known, to the officer or director; and known to the officer or director, or so obvious that it should have been known, to be so great as to make it highly probable that harm would follow from such action or omission. Section 617.0834(2)(a), F.S.

⁵² Section 617.0830(1), F.S.

⁵³ Section 617.0830(4), F.S.

Civil Penalties by the Division

As previously noted, s. 718.111(1)(d), F.S., provides that a condominium association officer, director, or manager who knowingly solicits, offers to accept, or accepts any thing or service of value or kickback is subject to a civil penalty pursuant to s. 718.501(1)(d), F.S.

Section 718.111(12)(c)2., F.S., provides that any person who knowingly or intentionally defaces or destroys accounting records of the association or knowingly or intentionally fails to create or maintain the required accounting records is personally subject to a civil penalty pursuant to s. 718.501(1)(d), F.S.

Section 718.501(1), F.S., authorizes the division to enforce and ensure compliance with the provisions of the Condominium Act, and rules relating to the development, construction, sale, lease, ownership, operation, and management of residential condominium units. The division may impose a civil penalty individually against an officer or board member who willfully and knowingly⁵⁴ violates a provision of the Condominium Act, adopted rule, or a final order of the division.⁵⁵

Condominium Association Elections

Section 718.112, F.S., relating to condominium association bylaws, addresses condominium association elections. Association board members are generally selected through elections.⁵⁶ However, candidates for election to the board may not include a person who is delinquent in the payment of any monetary obligation due to the association.⁵⁷ 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.⁵⁸

Section 718.112, F.S., requires the association to provide notice of the election date and a ballot to unit owners entitled to vote, and for an eligible person to provide notice to the association of his or her intent to be a candidate.⁵⁹

Elections are decided by a plurality of ballots cast.⁶⁰ There is no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election.⁶¹ A unit owner may not authorize any other person to vote his or her ballot, and any ballots improperly cast are invalid.⁶² The election must be by secret ballot.⁶³

⁵⁴ The term “willfully and knowingly” means that the division informed the officer or board member that his or her action or intended action violates ch. 718, F.S., a rule adopted under ch. 718, F.S., or a final order of the division and that the officer or board member refused to comply with the requirements of ch. 718, F.S., a rule adopted under ch. 718, F.S., or a final order of the division. Section 718.501(1)(d)6., F.S.

⁵⁵ Section 718.501(1)(d)6., F.S.

⁵⁶ See s. 718.112(2)(d)4., F.S.

⁵⁷ Section 718.112(2)(d)2., F.S.

⁵⁸ Section 718.303(5), F.S.

⁵⁹ Section 718.112(2)(d)4.a., F.S.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Section 718.112(2)(d)1., F.S.

The Miami-Dade County grand jury found that “[f]raud in the election process was a major factor impacting unit owners.”⁶⁴ Some of the fraudulent activity noted by the jury regarding one condominium association election included:

- The Election Monitor discovered what appeared to be double voting by many unit owners.
- “The candidate realized that some of the double votes were of owners from whom she had collected their ballot personally.”
- “Those owners identified their signatures on the true ballots and saw their names on other ballots, purportedly signed by those owners. The signatures on the other ballots were forged, notarized, and dated[.]”
- “Other owners identified their true ballots and identified forged signatures on ballots containing their names. Those ballots were also notarized and dated[.]”
- “All ballots with forged signatures were notarized by the same notary on the same day[.]”
- “Some unit owners whose names were on forged ballots were not in the country on the date the notary verified their signature and identity[.]”
- “None of the unit owners whose signatures were forged and notarized had ever met the notary[.]”
- The notary “later admitted the ballots were not signed in her presence[.]”⁶⁵

Two recommendations of the grand jury pertained to criminal penalties:

- “... [W]e recommend that any person or entity that engages in any fraudulent activity conducted in connection with the election of board members for the association shall be subject to criminal liability.”
- “We further recommend that any director, LCAM,⁶⁶ management company, notary, attorney, or any other person who engages in, or conspires with another person to engage in fraudulent election activity shall be subject to criminal charges classified as a 3rd degree felony.”⁶⁷

III. Effect of Proposed Changes:

Tax Assessments – Condominium and Cooperative Associations

The bill amends s. 194.011(3)(e), to provide that, if an association has filed a single joint petition to challenge a tax assessment, a condominium or cooperative association may continue to represent, prosecute, and defend the unit owners through any related subsequent proceeding in any tribunal and any appeals. The bill provides that this provision is intended to clarify existing law and applies to cases pending on July 1, 2020.

The bill amends s. 194.181(2), F.S., to provide that, in any case brought by the property appraiser concerning a value adjustment board decision on a single joint petition filed by a condominium or cooperative association, the association and all unit owners be included in the single joint petition are the party defendants.

⁶⁴ *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at page 21.

⁶⁵ *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at page 22.

⁶⁶ “LCAM” refers to a licensed condominium association manager.

⁶⁷ *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at page 24.

In order to represent unit owners in such a proceeding, the condominium or cooperative association must provide unit owners with notice of its intent to respond to or answer the property appraiser's complaint, and advise the unit owners that they may elect to:

- Retain their own counsel to defend the appeal;
- Choose not to defend the appeal; or
- Be represented together with other unit owners in the response or answer filed by the association.

Such notice must be mailed, delivered, or electronically transmitted to unit owners and posted conspicuously on the condominium or cooperative property in the same manner for notice of board meetings. Under the bill, any unit owner who does not respond to the association's notice will be represented in the response or answer filed by the association.

For condominium associations, the bill provides that an association, in its own name or on behalf of some or all unit owners, may institute, file, protest, maintain, or defend any administrative challenge, lawsuit, appeal, or other challenge to ad valorem taxes assessed on units for commonly used facilities or common elements. The affected association members are not necessary or indispensable parties to such actions. The bill provides that this provision is intended to clarify existing law and would apply to cases pending on July 1, 2020.

Condominiums – Access to Records, Ethics, and Elections

The bill amends s. 718.111(1), F.S., to revise requirements related to the maintenance of condominium association's official records and a unit owner or tenant's right to access such records. The bill:

- Requires additional financial records (e.g., bank statements and invoices) to be maintained by a condominium association and made available for inspection by association members;
- Provides that the association's duty to maintain association records in a manner and format prescribed by division rule so that the records are easily accessible for inspection;
- Requires that a written request for inspection of the association's records must comply with the association's document inspection rule;
- Provides that the assessment of minimum damages for an association's willful failure to copy inspection records begins on the eleventh working day after receipt of the written request that complies with the association's document inspection rule;
- Permits an association to comply with its obligations related to a member's right of access to certain official records and right to copies of such records by posting the records on the association's website and directing an authorized requester to such website;
- Requires an association to respond to a statutorily compliant written request to inspect records with a checklist of all records made available, and not made available, for inspection and copying and a sworn affidavit in which the person facilitating or handling the association's compliance with the request attests to the veracity of the checklist provided to the requestor; and
- Requires an association to maintain the checklist provided in response to a statutorily compliant written request for seven years.

The bill amends s. 718.111(1)(g)1., F.S., to expand the application of a requirement to provide digital copies of specified documents on an association’s website to condominium associations of 25 or more units (and no timeshare units) from associations of 150 or more units (and no timeshares). The bill also extends the date by which an association must comply with this requirement from January 1, 2019 to January 1, 2022.

The bill creates s. 718.112(12)(g)5., F.S., to require a condominium association managing 25 or more units, not including timeshare units, to post on its website all official records subject to inspection or copying by tenants or unit owners or their authorized representatives.

Some of the changes made by the bill regarding condominium association records and elections are similar to changes recommended in a 2017 report by a Miami-Dade County grand jury.⁶⁸

The bill amends s. 718.111, F.S., to provide additional criminal prohibitions relating to the management of a condominium association, and provides penalties for violations, such as:

- Third degree felony for an officer, director, or manager of a condominium association to knowingly solicit, offer to accept, or accept anything or service of value or kickback;
- Second degree misdemeanor for any director or member of the board or association to knowingly, willfully, and “repeatedly” violate (two or more violations within a 12-month period) any specified requirements relating to inspection and copying of official records of an association;
- First degree misdemeanor to knowingly or intentionally deface or destroy required accounting records or knowingly and intentionally fail to create or maintain required accounting records, with the intent of causing harm to the association or one or more of its members (and deletes the provision that such an offense is punishable by a civil penalty);⁶⁹
- Third degree felony to willfully and knowingly refuse to release or otherwise produce association records, with the intent to avoid or escape detection, arrest, trial, or punishment for the commission of a crime, or to assist another person with such avoidance or escape;⁷⁰

The bill amends s. 718.111(15), to revise the prohibitions related to use of an association’s credit card. Under the bill, a person commits theft⁷¹ by use of a debit card, if the person uses a debit card issued in the name of, or billed directly to, an association for any expense that is not a lawful obligation of the association. The bill defines a “lawful obligation of the association” as an obligation that has been properly preapproved by the board and is reflected in the meeting

⁶⁸ See s. 718.112(2)(d)4.a., F.S.; and *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at pages 22 and 24.

⁶⁹ This provision is similar to the Miami-Dade County grand jury’s recommendation to criminally punish directors and members of the board or association who knowingly or intentionally deface or destroy accounting records or fail to create or maintain such records. The grand jury recommended a second degree misdemeanor for a first offense, and a first degree misdemeanor for any subsequent offenses. *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at pages 8-9.

⁷⁰ This provision is similar to the Miami-Dade County grand jury’s recommendation to make it a third degree felony for any association, board director, management company, or management company employee to willfully, knowingly, or intentionally refuse to release or otherwise produce official association records, if such refusal is done to facilitate or cover-up the commission of a crime. *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at pages 8-9.

⁷¹ Theft is generally punishable based upon the value of the property stolen. Petit theft is generally a second degree misdemeanor or first degree misdemeanor. Section 812.014(3)(a) and (b), F.S. Grand theft is generally a third degree felony, second degree felony, or first degree felony. Section 812.014(1)(a)-(c), F.S. A second degree felony is punishable by up to 15 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S. A first degree felony is generally punishable by up to 30 years in state prison and a fine of up to \$10,000. *Id.*

minutes or the written budget. The bill deletes the current provision that the unlawful use of an association's credit card constitutes credit card fraud pursuant to s. 817.61, F.S.

The bill creates a new section relating to penalties for fraudulent voting activities. Section 718.129(1), F.S., provides that the commission of any of the following acts is a third degree felony:⁷²

- Willfully and falsely swearing or affirming any oath or affirmation, or willfully procuring another person to swear or affirm falsely to an oath of affirmation, in connection with or arising out of voting or elections;
- Perpetrating or attempting to perpetrate, or aiding in the perpetration of, any fraud in connection with any vote cast, to be cast, or attempted to be cast;⁷³
- Preventing an elector from voting, or preventing an elector from voting as the elector intended, by fraudulently changing or attempting to change a ballot, ballot envelope, vote, or voting certificate of the elector;
- Using bribery, menace, threat, or any other corruption to attempt, directly or indirectly, to influence, deceive, or deter any elector in voting;
- Directly or indirectly giving or promising anything of value to another person with the intent to buy the vote of that person or another person or to corruptly influence that person or another person in casting his or her vote;⁷⁴ or
- Directly or indirectly using or threatening to use force, violence, or intimidation or any tactic of coercion or intimidation to induce or compel an individual to vote or refrain from voting in an election or on any particular ballot measure.

Section 718.129(2), F.S., specifies that the commission of any of the following acts in furtherance of the previously-described fraudulent voting activity is a third degree felony:⁷⁵

- Knowingly aiding, abetting, or advising a person in the commission of a fraudulent voting activity related to association elections;
- Agreeing, conspiring, combining, or confederating with at least one other person to commit a fraudulent voting activity related to association elections; or
- Having knowledge of a fraudulent voting activity related to association elections and giving any aid to the offender with intent that the offender avoid or escape detection, arrest, trial, or punishment.⁷⁶

The bill transfers the current prohibitions in s. 718.111(1)(d), F.S., relating to forgery of a ballot, and destruction of or refusal to allow inspection of, or access to, official records to the new s. 718.129, F.S.

⁷² This provision is similar to the Miami-Dade County grand jury's recommendation to provide that it is a third degree felony for any director, LCAM, management company, notary, attorney, or any other person to engage in fraudulent election activity. *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at page 24.

⁷³ The bill deletes the current prohibition in s. 718.111(1)(d), F.S., against forgery of a ballot.

⁷⁴ The bill provides that this offense does not apply to the serving of food to be consumed at an election rally or meeting or to any item of nominal value which is used as an election advertisement, including a campaign message designed to be worn by a person.

⁷⁵ This provision is similar to the Miami-Dade County grand jury's recommendation to provide that it is a third degree felony for any director, LCAM, management company, notary, attorney, or any other person to conspire with another person to engage in fraudulent election activity. *Final Report of the Miami-Dade County Grand Jury*, *supra* note 15, at page 24.

⁷⁶ The bill provides that this offense does not apply to a licensed attorney giving legal advice to a client.

The bill amends s. 718.501(1), F.S., to expand the jurisdiction of the division, after control of the condominium is transferred from the developer to the unit owners, to include investigating complaints related to maintenance of official records. This provision currently grants the division jurisdiction to investigate complaints related to financial issues, elections, and unit owner access to association records.

The bill defines the term “financial issue” to mean an issue related to:

- Operating budgets;
- Reserve schedules;
- Financial records under s. 718.111(12)(a)11., F.S.;
- Notices of meetings and meeting minutes for budget or financial statement related meetings;
- Any assessment for common expenses, fees, or fines;
- Commingling of funds; and
- Any other record necessary to determine the revenues and expenses of the association.

The bill authorizes the division to adopt rules to further define the term “financial issue.”

The bill is effective October 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The title of the bill is an act related to condominium associations. However, the bill includes provisions related to tax assessment disputes by condominium and cooperative associations.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 194.011, 194.181, 718.111, 718.129, and 718.501.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Innovation, Industry, and Technology on February 17, 2020:

The CS amends ss. 194.011, 194.181, and 718.111(3), F.S., to revise the provisions relating the right of a condominium or cooperative association to represent, prosecute, and defend the parcel owners in actions related to ad valorem tax assessments.

B. Amendments:

None.