

**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.)

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Prepared By: The Professional Staff of the Committee on Community Affairs

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BILL: SB 556

INTRODUCER: Senator Hooper

SUBJECT: Hurricane Protection for Condominium Associations

DATE: March 27, 2023

REVISED: \_\_\_\_\_

|    | ANALYST         | STAFF DIRECTOR | REFERENCE | ACTION           |
|----|-----------------|----------------|-----------|------------------|
| 1. | <u>Oxamendi</u> | <u>Imhof</u>   | <u>RI</u> | <b>Favorable</b> |
| 2. | <u>Hunter</u>   | <u>Ryon</u>    | <u>CA</u> | <b>Favorable</b> |
| 3. | _____           | _____          | <u>RC</u> | _____            |

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**I. Summary:**

SB 556 revises the requirements governing the installation and maintenance of hurricane protection in condominium associations. Under the bill, the term “hurricane protection” means hurricane shutters, impact glass, code-compliant windows or doors, and other code-compliant hurricane protection products used to preserve and protect the condominium property or association property.

The bill requires declarations for residential condominiums and mixed-use condominiums, which contain residential and commercial units, to specify whether the unit owner or the association is responsible for the installation, maintenance, repair, or replacement of hurricane protection. Under the bill, residential and mixed-use condominiums created after July 1, 2023, must contain hurricane protection procedures for the condominium in the declaration of condominium documents creating the community. The bill applies to all residential and mixed-use condominiums in Florida, regardless of when the condominium was created. The bill provides that the installation, replacement, operation, repair, and maintenance of hurricane protection is not a substantial addition to the common elements or association property.

Under the bill, a certificate attesting to a vote of the unit owners approving the installation of hurricane protection must be filed in the public records of the county where the condominium is located. The validity or enforceability of the vote of the unit owners is not affected by a failure to record the certificate or to send a copy of the recorded certificate to the unit owners.

The bill authorizes a board of administration for a condominium to require unit owners to adhere to an existing unified building scheme regarding the external appearance of the condominium. Under the bill, unit owners may be responsible for the costs of removal and reinstallation of any hurricane protection if the association is required to remove the hurricane protection for maintenance, repair or replacement of condominium property the association is obligated to maintain. The board must determine whether the removal or reinstallation is to be performed by

the association or unit owner. If the removal or reinstallation of hurricane protection is completed by the associations, the removal and reinstallation of hurricane protection is chargeable to the owner and may be enforced as an assessment. If the cost of installation of hurricane protection is the responsibility of unit owners pursuant to the declaration or a vote of the owners, the cost of installation by the association is not a common expense and may be charged to the unit owners based on the cost of installation.

The bill also provides that, if an owner has already installed code-compliant hurricane protection, the owner may be excused from the assessment levied by the association to fund the installation of hurricane protection or may receive credit equal to the amount the owner would have been charged for the installation. The credit only applies if the installation is for all other units lacking code-compliant hurricane protection and the expense of the installation is funded by the budget, including reserve funds. However, under current law and the bill, a unit owner remains responsible for the pro rata share of expenses for hurricane protection installed on common elements and association property by the board and remains responsible for a pro rata share of the expense of the replacement, operation, repair, and maintenance of such.

Under the bill, expenses for the installation, replacement, operation, and repair, or maintenance of hurricane protection on common elements and association property are common expenses enforceable against the unit owner as an assessment.

The bill takes effect July 1, 2023.

## II. Present Situation:

### **Division of Florida Condominiums, Timeshares, and Mobile Homes**

The Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation (DBPR) administers the provisions of chs. 718 and 719, F.S., for condominium and cooperative associations, respectively. The division may investigate complaints and enforce compliance with chs. 718 and 719, F.S., for associations that are still under developer control.<sup>1</sup> The division also has the authority to investigate complaints against developers involving improper turnover or failure to transfer control to the association.<sup>2</sup> After control of the condominium is transferred from the developer to the unit owners, the division has jurisdiction to investigate complaints related to financial issues, elections, and maintenance of and unit owner access to association records.<sup>3</sup> For cooperatives, the division's jurisdiction extends to the development, construction, sale, lease, ownership, operation, and management of residential cooperative units.<sup>4</sup>

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, associations, and association board members.<sup>5</sup>

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<sup>1</sup> Sections 718.501(1) and 719.501(1), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 718.501(1), F.S.

<sup>4</sup> Section 719.501(1), F.S.

<sup>5</sup> Sections 718.501(1) and 719.501(1), F.S.

If the division has reasonable cause to believe that a violation of any provision of ch. 718, F.S., ch. 719, F.S., or a related rule has occurred, the division may institute enforcement proceedings in its 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. Also, Florida law authorizes the division to petition a court to appoint a receiver or conservator to implement a court order or to enforce an injunction or temporary restraining order. The division may also impose civil penalties.<sup>6</sup> Unlike condominium and cooperative associations, homeowners' associations are not regulated by a state agency. For homeowners' associations, the division's authority is limited to the arbitration of recall election disputes.<sup>7</sup>

### **Condominiums**

A condominium is a "form of ownership of real property created under ch. 718, F.S.,"<sup>8</sup> the "Condominium Act." Condominium unit owners are in a unique legal position because they are exclusive owners of property within a community, joint owners of community common elements, and members of the condominium association.<sup>9</sup> For unit owners, membership in the association is an unalienable right and required condition of unit ownership.<sup>10</sup>

The "declaration" or "declaration of condominium" is the legal instrument by which a condominium is created. The declaration may be amended.<sup>11</sup>

A condominium association is administered by a board of directors referred to as a "board of administration."<sup>12</sup> The board of administration (board) is comprised of individual unit owners elected by the members of a community to manage community affairs and represent the interests of the association. Association board members must enforce a community's governing documents and are responsible for maintaining a condominium's common elements which are owned in undivided shares by unit owners.<sup>13</sup>

### **Material Alterations**

The common elements<sup>14</sup> and the real property of a condominium association may not be materially altered or substantial additions may not be made to the property, except in the manner authorized in the declaration of condominium. If the declaration does not specify a procedure for making material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions before the material alterations or substantial

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<sup>6</sup> *Id.*

<sup>7</sup> See ss. 720.303(10)(d) and 720.306(9)(c), F.S.

<sup>8</sup> Section 718.103(11), F.S.

<sup>9</sup> See s. 718.103, F.S., for the terms used in the Condominium Act.

<sup>10</sup> *Id.*

<sup>11</sup> See s. 718.13(15), F.S., defining the terms "declaration" or "declaration of condominium;" and s. 718.104, F.S., relating to the creation of condominiums.

<sup>12</sup> Section 718.103(4), F.S.

<sup>13</sup> Section 718.103(2), F.S.

<sup>14</sup> Section 718.103(8), F.S., defines the term "common elements" to mean "the portions of the condominium property not included in the units."

additions may commence.<sup>15</sup> A comparable requirement also applies to material alterations and substantial additions to the property of a multicondominium.<sup>16</sup>

### **Hurricane Protection**

The board of administration of a residential condominium is required to adopt hurricane shutter specifications for each building within each condominium. The specifications must include color, style, and other factors deemed relevant by the board. All specifications adopted by the board must comply with the applicable building code.<sup>17</sup>

A contract to install hurricane protection, subject to the contract and written bids requirements in s. 718.3026, F.S., must be approved by a majority of voting interests of a residential condominium. A vote of the owners is not required if the maintenance, repair, and replacement of hurricane protection is the responsibility of the association pursuant to the declaration of condominium. If hurricane protection or laminated glass or window film architecturally designed to function as hurricane protection that complies with or exceeds the current applicable building code has been previously installed, the board may not install hurricane protection without the approval of a majority vote of the voting interests.

The association is responsible for the maintenance, repair, and replacement of the hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection (hurricane protection or hurricane protection products) if the association is responsible for hurricane protection under its declaration. If the hurricane protection products are the responsibility of the unit owners pursuant to the declaration of condominium, the maintenance, repair, and replacement of such items are the responsibility of the unit owner.<sup>18</sup>

The board may operate hurricane protection installed without permission of the unit owners only if such operation is necessary to preserve and protect the condominium property or association property. The installation, replacement, operation, repair, and maintenance of hurricane protection is not a material alteration to the common elements or association property,<sup>19</sup> if done in accordance with the procedures in s. 718.113(5), F.S.<sup>20</sup> Current law is silent regarding whether the installation, replacement, operation, repair, and maintenance of hurricane protection is considered a substantial addition to the common elements or association property.

Notwithstanding any other provision in the residential condominium documents, even if the board's approval is required, a board may not refuse to approve the installation or replacement of hurricane protection by a unit owner conforming to the specifications adopted by the board.<sup>21</sup>

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<sup>15</sup> Section 718.113(2)(a), F.S.

<sup>16</sup> See ss. 718.113(2)(b) and (c), F.S. "Multicondominium" means real property containing two or more condominiums, all of which are operated by the same association. See s. 718.103(20), F.S.

<sup>17</sup> Section 718.113(5), F.S.

<sup>18</sup> Section 718.113(5)(b), F.S.

<sup>19</sup> See s. 718.113(2), F.S., relating to material alterations and substantial additions to condominium property.

<sup>20</sup> Section 718.113(5)(c), F.S.

<sup>21</sup> Section 718.113(5)(d), F.S.

The expense of installation, replacement, operation, repair, and maintenance of hurricane protection by a board is a common expense<sup>22</sup> and must be collected by the association if it is responsible for the maintenance, repair, and replacement of hurricane protection pursuant to the declaration of condominium. If the maintenance, repair, and replacement of the hurricane protection is the responsibility of the unit owners pursuant to the declaration of condominium, the cost of the installation of hurricane protection is not a common expense and must be charged individually to the unit owners.<sup>23</sup>

If a unit owner has previously installed building code-compliant hurricane shutters, the unit owner must receive a credit from the association when the shutters are installed by the association. If a unit owner has previously installed impact glass or code-compliant windows or doors that comply with the current applicable building code, the unit owner must receive a credit when the impact glass or code-compliant windows or doors are installed. Additionally, if a unit owner has installed other types of code-compliant hurricane protection that comply with the current applicable building code, the unit owner must receive a credit when the same type of other code-compliant hurricane protection is installed. The credit must be equal to the pro rata portion of the assessed installation cost assigned to each unit.<sup>24</sup>

However, a unit owner remains responsible for the pro rata share of expenses for hurricane protection installed on common elements and association property by the board. A unit owner is also responsible for a pro rata share of the expense of the replacement, operation, repair, and maintenance of hurricane protection.<sup>25</sup>

### III. Effect of Proposed Changes:

#### Definition

The bill creates s. 718.103(18), F.S., to define the term “hurricane protection” to mean hurricane shutters, impact glass, code-compliant windows or doors, and other code-compliant hurricane protection products used to preserve and protect the condominium property or association property.

#### Declaration of Condominium

The bill amends s. 718.104(4), F.S., to require declarations for residential condominiums and mixed-use condominiums<sup>26</sup> to specify whether the unit owner or the association is responsible for the installation, maintenance, repair, or replacement of hurricane protection that is for the preservation and protection of the condominium property and association property. Under the

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<sup>22</sup> Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property, costs of carrying out the powers and duties of the association, and any other expense, whether or not included in the foregoing, designated as common expense by ch. 718, F.S., the declaration, the documents creating the association, or the bylaws. *See* s. 718.115(1)(a), F.S.

<sup>23</sup> Section 718.115(1)(e), F.S.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Section 718.103(23), F.S., provides that a condominium which contains both commercial and residential units is a mixed-use condominium. *See also*, s. 718.404, F.S., relating to mixed-use condominiums.

bill, condominiums created after July 1, 2023, must contain hurricane protection procedures for the condominium in the declaration of condominium creating the community.

### **Application to Residential and Mixed-Use Condominiums**

Section 718.113(5), F.S., is amended by the bill to apply the installation of hurricane protection requirements to all residential and mixed-use condominiums in Florida, regardless of when the condominium is created pursuant to the declaration of condominium.

### **Material Alterations and Substantial Additions to Condominium Property**

The bill also amends s. 718.113(5), F.S., to provide that the installation, replacement, operation, repair, and maintenance of hurricane protection is not a substantial addition to the common elements or association property. It maintains the provision in current law that the installation, replacement, operation, repair, and maintenance of hurricane protection is not a material alteration to the common elements or association property.

### **Approval Process**

The bill amends s. 718.113(5)(a), F.S., to provide that a vote of the unit owners to approve the installation of hurricane protection must be set forth in a certificate attesting to the vote and include the date that the hurricane protection must be installed. The board must record the certificate in the public records of the county where the condominium is located. The certificate must include the recording data identifying the declaration of the condominium and must be executed in the form required for the execution of a deed. Once the certificate is recorded, the board must mail or hand-deliver a copy of the recorded certificate to the unit owners at the owners' address as reflected in the records of the association. The board may provide a copy of the recorded certificate by electronic transmission to unit owners who previously consented to receive notice by electronic transmission. The validity or enforceability of the vote of the unit owners is not affected by a failure to record the certificate or to send a copy of the recorded certificate to the unit owners.

Section 718.113(5)(a), F.S., is also amended by the bill to provide that an association's process for installing, maintaining, repairing, and replacing hurricane protection, or windows and doors protected by the hurricane protection, may be established in the originally recorded declaration or an amended declaration. Current law only references the declaration, not the original recorded declaration and an amended declaration.

Section 718.113(5)(c), F.S., as amended by the bill, authorizes boards to require unit owners to adhere to an existing unified building scheme regarding the external appearance of the condominium.

### **Assigning Costs**

The bill amends s. 718.113(5)(d), F.S., to provide that unit owners may be responsible for the costs of removal and reinstallation of any hurricane protection if the association is required to remove the hurricane protection for maintenance, repair or replacement of condominium

property for which the association is obligated to maintain. The board must determine whether the removal or reinstallation is to be performed by the association or unit owner. If the removal or reinstallation of hurricane protection is completed by the associations, the removal and reinstallation of hurricane protection is chargeable to the owner and may be enforced as an assessment.

Section 718.115(1)(e), F.S., is amended by the bill to provide that, if the cost of installation of hurricane protection is the responsibility of unit owners pursuant to the declaration or a vote of the owners, the cost of installation by the association is not a common expense and may be charged to the unit owners based on the cost of installation. The cost of installation is enforceable against the unit owner as an assessment.

The bill amends s. 718.115(1)(e), F.S., to provide that, if an owner has already installed code-compliant hurricane protection, the owner may be excused from the assessment levied by the association to fund the installation of hurricane protection or may receive a credit equal to the amount the owner would have been charged for the installation. The credit only applies if the hurricane protection installed by the unit owner complies with the current building code and is the same type installed by the association. Additionally, the credit applies only if the installation is for all other units lacking code-compliant hurricane protection and the expense of the installation is funded by the budget, including reserve funds. The credit must be equal to the amount that the unit owner would have been assessed to install the hurricane protection. However, under current law and the bill, a unit owner remains responsible for the pro rata share of expenses for hurricane protection installed on common elements and association property by the board and remains responsible for a pro rata share of the expense of the replacement, operation, repair, and maintenance of such.

The bill also provides that expenses for the installation, replacement, operation, and repair, or maintenance of hurricane protection on common elements and association property are common expenses. Current law provides that these expenses are common expenses if the association is responsible for these hurricane protection expenses under the declaration.

#### **Effective Date**

The bill takes effect July 1, 2023.

#### **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:**

A declaration of condominium is a contract. To the extent this bill affects previously recorded declarations, the bill may unconstitutionally impair contract, under s. 10, Art. I, Fla. Const., which provides in relevant part, “No... law impairing the obligation of contracts shall be passed.” This provision empowers the courts to strike laws that retroactively burden or alter contractual relations. Article I, s. 10 of the United States Constitution provides in relevant part that “No state shall . . . pass any . . . law impairing the obligation of contracts.”

In *Pomponio v. Claridge of Pompano Condominium, Inc.*,<sup>27</sup> the Florida Supreme Court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The court set forth several factors in balancing whether a state law operates as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court stated that if there is minimal alteration of contractual obligations the inquiry can end at its first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the state legislation. The factors to be considered are:

- Was the law enacted to deal with a broad, generalized economic or social problem;
- Does the law operate in an area that was already subject to state regulation at the time the contract was entered into; and
- Is the law’s effect on the contractual relationships temporary or whether is it severe, permanent, immediate, and retroactive.<sup>28</sup>

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

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<sup>27</sup> *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979).

<sup>28</sup> *Id.* at 779.

**B. Private Sector Impact:**

The installation and maintenance of hurricane protection may reduce the costs of property, casualty, and windstorm insurance for condominium associations and unit owners.

Installation of hurricane protection may increase costs to condominium unit owners and associations.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 718.103, 718.104, 718.113, 718.115

**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.