

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1203 Homeowners' Associations

**SPONSOR(S):** Commerce Committee, Regulatory Reform & Economic Development Subcommittee, Esposito and others

**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE  | ACTION           | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|------------------|---------|---------------------------------------|
| 1) Regulatory Reform & Economic Development Subcommittee | 11 Y, 2 N, As CS | Larkin  | Anstead                               |
| 2) Civil Justice Subcommittee                            | 14 Y, 2 N        | Mawn    | Jones                                 |
| 3) Commerce Committee                                    | 17 Y, 0 N, As CS | Larkin  | Hamon                                 |

### SUMMARY ANALYSIS

A homeowners' association (HOA) is an association of residential property owners in which voting membership is made up of parcel owners, membership is a mandatory condition of parcel ownership, and the association is authorized to impose assessments that, if unpaid, may become a lien on the parcel. HOAs may levy fines against or suspend certain access rights of a parcel owner for failing to comply with the HOA's governing documents.

The bill:

- Provides educational requirements for community association managers (CAMs) and HOA directors.
- Provides that an HOA with **100 parcels or more** is required to post certain official records on the HOA's website or application, by January 1, 2025.
- Allows a parcel owner to make a written request for a detailed accounting of any amounts owed to the HOA, and the HOA must provide such information or else the board forfeits any outstanding fine.
- Requires that an HOA or its architectural, construction improvement, or other similar committee (ARC) to allow homeowners to appeal a decision of the HOA or ARC.
- Provides criminal penalties if an HOA officer, director, or manager accepts a kickback.
- Prohibits an HOA from levying fines or imposing suspensions if a violation has been timely cured.
- Prohibits certain fines from becoming a lien on a parcel such as: lawn, landscaping, grass maintenance, and traffic violations.
- Prohibits fines from being aggregated to create a lien against a parcel; and only allows an assessment or a fine of less than 1 percent of a parcel's just value to become a lien against the parcel in certain circumstances.
- Prohibits HOAs from issuing fines to parcel owners based on traffic infractions that were not committed by the parcel owner, based on leaving garbage receptacles on the street for a certain time period, and based on leaving holiday decorations or lights up under certain circumstances.
- Prohibits an HOA from preventing a homeowner from installing or displaying vegetable gardens and clotheslines in areas not visible from the frontage or adjacent parcels.
- Provides that without the approval of 60% of the voting members at a member meeting, the HOA may not impose a regular assessment that is more than 10 percent greater than the regular assessment for the HOA's preceding fiscal year unless it can be shown that a higher increase is necessary for property protection and public safety, or special assessments that in the aggregate exceed 5 percent of the budgeted gross expenses of the HOA for that fiscal year.

The bill may have an insignificant fiscal impact on state or local government.

The bill provides an effective date of July 1, 2024.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Community Association Managers- Current Situation**

Community association managers (CAMs) are licensed and regulated by the Department of Business and Professional Regulation (DBPR) pursuant to part VIII of ch. 468, F.S. Community association managers are regulated by the seven-member Regulatory Council of Community Association Managers at DBPR.<sup>1</sup>

Section 468.431(2), F.S., defines “community association management” to mean:

any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of \$100,000: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

A license is not required for a person who:

- Performs clerical or ministerial functions under the direct supervision and control of a licensed manager, or
- Performs only the maintenance of a community association and does not assist in any of the management services.<sup>2</sup>

To become licensed as a CAM, a license applicant must:

- Submit to a background check to determine good moral character,
- Attend a DBPR-approved in-person training prior to taking the examination, and
- Pass the licensure examination.<sup>3</sup>

CAMs must also complete not more than 10 hours of continuing education hours as approved by the council to renew and maintain their licenses.<sup>4</sup>

Section 468.4334, F.S., outlines the professional practice standards for CAMs and CAM firms, including the duty to “discharge the duties performed on behalf of the association as authorized by [ch. 468, F.S.], loyally, skillfully, and diligently; dealing honestly and fairly; in good faith; with care and full disclosure to the community association; accounting for all funds; and not charging unreasonable or excessive fees.”

The license of a CAM or CAM firm may be disciplined, including a suspension or revocation of their license, or denial of a license renewal, for the grounds specified in s. 468.436, F.S., including:

- Committing acts of gross misconduct or gross negligence in connection with the profession.
- Contracting, on behalf of an association, with any entity in which the CAM has a financial interest that is not disclosed.
- Violating any provision of chapter 718 (relating to condominiums), chapter 719 (relating to cooperatives), or chapter 720 (relating to homeowners’ associations) during the course of

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<sup>1</sup> S. 468.4315(1), F.S.

<sup>2</sup> S. 468.431(2), F.S.

<sup>3</sup> S. 468.433, F.S.

<sup>4</sup> S. 468.4336 and 468.4337, F.S.

performing community association management services pursuant to a contract with a community association.<sup>5</sup>

### **Community Association Managers- Effect of the Bill**

The bill requires CAMs and CAM firms authorized by a contract to provide community association management to an HOA to:

- Attend in person at least one member meeting or board meeting of the homeowners' association annually;
- Provide HOA members:
  - The name and contact information for each CAM or representative of the CAM firm assigned to the HOA.
  - The CAM's or representative's hours of availability.
  - A summary of the duties for which the CAM or representative is responsible.

The bill requires that the HOA post this information on the HOA website or application. The bill requires that a CAM or CAM firm must update the HOA and its members within 14 business days after any change to such information.

A CAM or CAM firm is required to provide the contract between the HOA and the CAM, and the HOA governing documents, upon an HOA member's request.

The bill clarifies that the council may not require more than 10 hours of continuing education annually for the renewal of a license.

The bill mandates that every two years, a CAM that provides services to an HOA must complete at least 5 hours of continuing education that pertains specifically to HOAs, 3 hours of which must relate to recordkeeping.

### **Homeowners' Association Background**

A homeowners' association (HOA) is an association of residential property owners in which voting membership is made up of parcel owners, membership is a mandatory condition of parcel ownership, the association is authorized to impose assessments that, if unpaid, may become a lien on the parcel.<sup>6</sup> In Florida, approximately 45 percent of homes are part of an HOA.<sup>7</sup>

Only HOAs whose covenants and restrictions include mandatory assessments are regulated by ch. 720, F.S., the Homeowners' Association Act (HOA Act). Like a condominium, an HOA is administered by an elected board of directors. The powers and duties of an HOA include the powers and duties provided in the HOA Act, and in the association's governing documents, which include the recorded covenants and restrictions, together with the bylaws, articles of incorporation, and duly adopted amendments to those documents.<sup>8</sup>

An HOA must be a Florida corporation and the initial governing documents must be recorded in the official records of the county in which the community is located.

After control of the HOA is obtained by members other than the developer, the HOA may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning matters of common interest to the members. The HOA may defend actions in eminent domain or bring inverse condemnation actions. Any individual member or class of members may bring any action without

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<sup>5</sup> S. 468.436(2)(b)5.-7., F.S.

<sup>6</sup> S. 720.301(9), F.S.

<sup>7</sup> Patrick Regan, "45% of Florida Homes Are Part of an HOA, the Highest Percentage in the Nation." *South Florida Agent Magazine*, Apr. 21, 2023, <https://southfloridaagentmagazine.com/2023/04/20/45-of-florida-homes-are-part-of-an-hoa-the-highest-percentage-in-the-nation/> (last visited Feb. 1, 2024).

<sup>8</sup> See generally ch. 720, F.S.

participation by the HOA, but a member does not have authority to act for the HOA by virtue of being a member.<sup>9</sup>

No state agency has direct oversight over HOAs. However, Florida law provides for a limited mandatory binding arbitration program, administered by the Division of Condominiums, Timeshares and Mobile Homes, within the Department of Business and Professional Regulation, for certain election and recall disputes.<sup>10</sup>

## HOA Governing Documents

An HOA's governing documents include the:

- Recorded declaration of covenants for a community and all duly adopted amendments thereto;
- HOA's articles of incorporation and bylaws and any duly adopted amendments thereto; and
- Rules and regulations adopted under the authority of the recorded declaration, articles of incorporation, or bylaws and any duly adopted amendments thereto.<sup>11</sup>

The declaration of covenants, much like a constitution, establishes the community's basic covenants and restrictions.<sup>12</sup> The articles of incorporation establish the HOA's existence, basic structure, and governance.<sup>13</sup> The bylaws govern the HOA's operation and administration, while the rules and regulations typically supplement the other documents, addressing matters of everyday policy.<sup>14</sup>

Unless otherwise provided in the governing documents or required by law, an HOA's governing documents may be amended by the affirmative vote of two-thirds of the HOA's voting interests.<sup>15</sup> Within 30 days after recording a governing document amendment, the HOA must give its members copies thereof unless a copy was provided to the members before the vote on the amendment, in which case the HOA must only provide the members with notice of the amendment's adoption.<sup>16</sup>

## Official Records- Current Situation

An HOA must maintain each of the following items, when applicable, which constitute the official records of the HOA:<sup>17</sup>

- A copy of the HOA's governing documents:
  - declaration of covenants and each amendment,
  - bylaws and each amendment,
  - articles of incorporation and each amendment, and
  - current rules.
- Copies of any plans, specifications, permits, and warranties related to improvements constructed on the common areas or other property that the HOA is obligated to maintain, repair, or replace.
- The minutes of all meetings of the board of directors and of the members, which minutes must be retained for at least 7 years.
- A current roster of all members and their designated mailing addresses and parcel identifications. A member's designated mailing address is the member's property address, unless the member has sent written notice to the association requesting that a different mailing address be used for all required notices.
  - The association shall also maintain the e-mail addresses and the facsimile numbers designated by members for receiving notice sent by electronic transmission of those members consenting to receive notice by electronic transmission. A member's e-mail

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<sup>9</sup> S. 720.303(1), F.S.

<sup>10</sup> S. 720.311, F.S.

<sup>11</sup> S. 720.301(8), F.S.

<sup>12</sup> Joseph Adams, *HOA Governing Documents Explained* (July 1, 2018), <https://www.floridacondohoalawblog.com/2018/07/01/hoa-governing-documents-explained/> (last visited Feb. 1, 2024).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> S. 720.306(1), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> S. 720.303(4), F.S.

address is the e-mail address the member provided when consenting in writing to receiving notice by electronic transmission, unless the member has sent written notice to the association requesting that a different e-mail address be used for all required notices. The e-mail addresses and facsimile numbers provided by members to receive notice by electronic transmission must be removed from association records when the member revokes consent to receive notice by electronic transmission.

- All of the HOA's insurance policies, which must be retained for at least 7 years.
- A current copy of all contracts to which the HOA is a party, including, without limitation, any management agreement, lease, or other contract under which the HOA has any obligation or responsibility.
  - Bids received by the HOA for work to be performed must also be considered official records and must be kept for a period of 1 year.
- The financial and accounting records of the HOA, kept according to good accounting practices. All financial and accounting records must be maintained for a period of at least 7 years. The financial and accounting records must include:
  - Accurate, itemized, and detailed records of all receipts and expenditures.
  - A current account and a periodic statement of the account for each member, designating the name and current address of each member who is obligated to pay assessments, the due date and amount of each assessment or other charge against the member, the date and amount of each payment on the account, and the balance due.
  - All tax returns, financial statements, and financial reports of the HOA.
  - Any other records that identify, measure, record, or communicate financial information.
- A copy of the disclosure summary.
- Ballots, sign-in sheets, voting proxies, and all other papers and electronic records relating to voting by parcel owners, which must be maintained for at least 1 year after the date of the election, vote, or meeting.
- All affirmative acknowledgments made pursuant to s. 720.3085(3)(c)3, F.S.
- All other written records of the HOA which are related to the operation of the HOA.

The HOA bylaws must require the HOA to post all notices of board meetings in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency.<sup>18</sup>

#### *Access to Official Records*

The official records must be maintained within the state for at least 7 years and be made available to a parcel owner for inspection or photocopying within 45 miles of the community or within the county in which the HOA is located within 10 business days after receipt by the board or its designee of a written request.

An HOA may comply with these requirements by having a copy of the official records available for inspection or copying in the community or, at the option of the HOA, by making the records available to a parcel owner electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request.

If the HOA has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages. However, an HOA may impose fees to cover the costs of providing copies of the official records.<sup>19</sup> An association must allow a member or authorized representative to use a portable device, including a smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of providing the member or

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<sup>18</sup> S. 720.303(2)(c), F.S.

<sup>19</sup> The association may impose fees to cover the costs of providing copies of the official records, including the costs of copying and the costs required for personnel to retrieve and copy the records if the time spent retrieving and copying the records exceeds one-half hour and if the personnel costs do not exceed \$20 per hour. Personnel costs may not be charged for records requests that result in the copying of 25 or fewer pages. The association may charge up to 25 cents per page for copies made on the association's photocopier.

authorized representative with a copy of such records. The association may not charge a fee to a member or his or her authorized representative for the use of a portable device.<sup>20</sup>

The failure of an association to provide access to the records within 10 business days after receipt of a written request submitted by certified mail, return receipt requested, creates a rebuttable presumption that the association willfully failed to comply with this requirement.<sup>21</sup>

A member who is denied access to official records is entitled to the actual damages or minimum damages for the HOA's willful failure to comply with this requirement. The minimum damages are to be \$50 per calendar day up to 10 days, the calculation to begin on the 11th business day after receipt of the written request.<sup>22</sup>

The HOA may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not require a parcel owner to demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records to less than one 8-hour business day per month.<sup>23</sup>

The following records are not accessible to members or parcel owners:<sup>24</sup>

- Any record protected by the lawyer-client privilege as described in s. 90.502, F.S., and any record protected by the work-product privilege.
- Information obtained in connection with the approval of the lease, sale, or other transfer of a parcel.
- Information obtained in a gated community in connection with guests' visits to parcel owners or community residents.
- Personnel records of HOA or management company employees.
- Medical records of parcel owners or community residents.
- Personal identifying information of a parcel owner other than as provided for HOA notice requirements, excluding the person's name, parcel designation, mailing address, and property address.
- Any electronic security measure that is used to safeguard data, including passwords.
- The software and operating system which allows the manipulation of data; however, the data is part of the official records.
- All affirmative acknowledgments made pursuant to s. 720.3085(3)(c)3, F.S.

### **Official Records- Effect of the Bill**

The bill mandates that the HOA adopt written rules governing the method of retaining official records and length of such retention.

The bill also requires every HOA with 100 parcels or more, by January 1, 2025, to:

- post a current digital copy of specified official records on its website, or make such documents available through an application that can be downloaded on a mobile device.
- Such application or website must be accessible through the Internet and have a subpage or portal inaccessible to the general public, and that is accessible only to HOA parcel owners and employees.
- Upon the parcel owner's written request, an HOA must provide a parcel owner a username and password giving the parcel owner access to the restricted subpage or portal.

The bill provides that if an HOA receives a subpoena for records from a law enforcement agency, the HOA must provide a copy of such records or otherwise make the records available to a law

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<sup>20</sup> S. 720.303(5), F.S.

<sup>21</sup> S. 720.303(5)(a), F.S.

<sup>22</sup> S. 720.303(5)(b), F.S.

<sup>23</sup> S. 720.303(5)(c), F.S.

<sup>24</sup> S. 720.303(5)(c)1.-9., F.S.

enforcement agency within 5 business days after receipt of the subpoena. The bill requires that an HOA must assist a law enforcement agency in its investigation to the extent permissible by law.

The bill creates the following criminal offenses connected with the production, retention, inspection, or tampering of official records:

- Second-degree misdemeanor for a director, board member, the HOA, or a community association manager who knowingly, willfully, and repeatedly violates the inspection and copying of official records provisions, with the intent of causing harm to the association or one or more of its members.
- First-degree misdemeanor for any person who knowingly and intentionally defaces or destroys accounting records during the period in which such records are required to be retained, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or retained, with the intent of causing harm to the association or one or more of its members.
- Third-degree felony for any person who willfully and knowingly refuses 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.

### Financial Reporting - Current Situation

Florida law does not require a financial audit of all HOAs; instead, it requires certain HOAs to prepare and complete, or contract with a third party to prepare and complete, a financial report for the preceding fiscal year within 90 days after the fiscal year's end, or annually on the date provided in the governing documents.<sup>25</sup> Specifically, under Florida law, an HOA that meets the criteria specified below must prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles as adopted by the Board of Accountancy, which financial statements shall be based on the HOA's total annual revenues, as follows:<sup>26</sup>

- An HOA with total annual revenues of \$150,000 or more, but less than \$300,000, must prepare compiled financial statements.<sup>27</sup>
- An HOA with total annual revenues of at least \$300,000, but less than \$500,000, must prepare reviewed financial statements.<sup>28</sup>
- An HOA with total annual revenues of \$500,000 or more must prepare audited financial statements.<sup>29</sup>

Within 21 days after the final financial report is completed by the HOA or received from the third party, but no later than 120 days after the fiscal year's end or other date as provided in the governing documents, the HOA must, within specified time limits, provide each member with a copy of the annual financial report or a written notice that a copy thereof is available upon request at no charge to the member.<sup>30</sup>

If approved by a majority of the voting interests present at a properly called HOA meeting, an HOA may prepare or cause to be prepared:

- A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

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<sup>25</sup> S. 720.303(7), F.S.

<sup>26</sup> *Id.*

<sup>27</sup> "Compiled financial statements" involve the placement of an HOA's accounting data into a financial statement format but no comparison is made by a CPA firm between the financial statement's data and the HOA's financial records. Thus, there are no assurances as to the financial statement's accuracy. John H. Stroemer, *Understanding Annual Financial Reporting Requirements for Associations*, [https://www.stroemercpa.com/reporting\\_requirements.php](https://www.stroemercpa.com/reporting_requirements.php) (last visited Feb. 14, 2024).

<sup>28</sup> "Reviewed financial statements" involve an analytical review of the HOA's balance sheet, income statement, and board meeting minutes, and an interview of the HOA's management personnel, by a Certified Public Accountant (CPA). The CPA firm then provides "negative assurances"; in other words, the CPA firm states that nothing came to its attention that would indicate that the financial statements were not in accordance with generally accepted accounting principles. *Id.*

<sup>29</sup> "Audited financial statements" involve an in-depth audit of the HOA's financial records and come with the CPA firm's expression of an opinion on the financial statements taken as a whole. Such statements provide the highest level of accuracy. *Id.*

<sup>30</sup> S. 720.303(7), F.S.

- A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or
- A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.<sup>31</sup>

Florida law also provides that an HOA with total annual revenues of less than \$150,000 must prepare a report of cash receipts and expenditures, which report must disclose the amount of receipts by accounts and receipt classifications, and the amount of expenses by accounts and expense classifications, including, but not limited to the following:

- Costs for security, professional, and management fees and expenses;
- Taxes;
- Recreation facilities costs;
- Refuse collection and utility services expenses;
- Lawn care expenses;
- Building maintenance and repair costs;
- Insurance costs;
- Administration and salary expenses; and
- Reserves, if maintained by the HOA.

However, parcel owners may petition the board for a level of financial reporting higher than that required under law, and if 20 percent of the parcel owners bring such a petition, the board must notice and hold a member meeting within 30 days of the petition's receipt for the purpose of voting on raising the reporting level.<sup>32</sup> Upon approval by a majority of the total voting interests of the parcel owners, the HOA must provide within 90 days of the meeting or fiscal year's end, whichever occurs later:

- Compiled, reviewed, or audited financial statements, if the HOA is otherwise required to prepare a report of cash receipts and expenditures;
- Reviewed or audited financial statements, if the HOA is otherwise required to prepare compiled financial statements; or
- Audited financial statements if the HOA is otherwise required to prepare reviewed financial statements.<sup>33</sup>

### **Financial Reporting - Effect of the Bill**

The bill requires an HOA with 1,000 parcels or more to prepare audited financial statements, regardless of the HOA's total annual revenue.

The bill prohibits an association from waiving the annual financial reporting requirements and preparing a report of cash receipts and expenditures by approval of a majority of voting interests for consecutive fiscal years.

### **Debit Cards – Current Situation**

Nothing in the HOA Act expressly prohibits an HOA, or the officers, directors, or employees thereof, from using a debit card issued in the HOA's name, or billed directly to the HOA.<sup>34</sup>

### **Debit Cards – Effect of the Bill**

The bill prohibits an HOA and its officers, directors, employees, and agents from using a debit card issued in the HOA's name, or billed directly to the HOA, for the payment of any association expenses. Further, the bill specifies that any person who uses a debit card issued in the HOA's name, or billed

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Contrast this to s. 718.111(15), F.S., governing condominium associations, which prohibits a condominium association, and the officers, directors, employees, and agents thereof, from using a debit card issued in the association's name, or billed directly to the association, for the payment of any association expense, and provides that use of a debit card issued in the association's name, or billed directly to the association, for any expense that is not a lawful association obligation may be prosecuted as credit card fraud under s. 817.61, F.S.



directly to the HOA, for any expense that is not a lawful HOA obligation<sup>35</sup> commits theft as provided under s. 812.014, F.S.

## **Powers and Duties of Officers and Directors – Current Situation**

The officers and directors of an HOA have a fiduciary relationship to the members who are served by the HOA.<sup>36</sup>

### HOA Director Education Requirements

Within 90 days after being elected or appointed to the board, each director shall either:

- Certify in writing to the secretary of the HOA that:
  - he or she has read the HOA's declaration of covenants, articles of incorporation, bylaws, and current written rules and policies;
  - he or she will work to uphold such documents and policies to the best of his or her ability; and
  - he or she will faithfully discharge his or her fiduciary responsibility to the HOA members; or
- Submit a certification showing satisfactory completion of the educational curriculum administered by a division-approved education provider within 1 year before or 90 days after the date of election or appointment.

The written certification or educational certificate is valid for the uninterrupted tenure of the director on the board. A director who does not timely file the written certification or educational certificate shall be suspended from the board until he or she complies with the requirement, and the board may temporarily fill the vacancy during the period of suspension.

The HOA must retain each director's written certification or educational certificate for inspection by the members for 5 years after the director's election. However, the failure to have the written certification or educational certificate on file does not affect the validity of any board action.<sup>37</sup>

### Kickbacks

An HOA officer, a director, or a manager who knowingly solicits, offers to accept, or accepts any thing or service of value for which consideration has not been provided for his or her own benefit or that of his or her immediate family from any person providing or proposing to provide goods or services to the HOA is subject to monetary damages.<sup>38</sup> If the board finds that an officer or director has violated this condition, the board must immediately remove the officer or director from office. The vacancy must be filled according to law until the end of the director's term of office. However, an officer, director, or manager may accept food to be consumed at a business meeting with a value of less than \$25 per individual or a service or good received in connection with trade fairs or education programs.<sup>39</sup>

### Conflicts of Interest

If the HOA enters into a contract or other transaction with any of its directors or a corporation, firm, or association that is not an affiliated HOA, or other entity in which a director is also a director or officer or is financially interested, the board must:<sup>40</sup>

- Comply with the requirements for conflicts of interest in a corporation not for profit.<sup>41</sup>

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<sup>35</sup> The bill defines "lawful HOA obligation" to mean an obligation that has been properly preapproved by the board and is reflected in the meeting minutes or the written budget.

<sup>36</sup> S. 720.303(1), F.S.

<sup>37</sup> S. 720.3033(1)(a)-(c), F.S.

<sup>38</sup> Monetary damages are provided for in s. 617.0834, F.S.

<sup>39</sup> S. 720.3033(3), F.S.

<sup>40</sup> S. 720.3033(2), F.S.

<sup>41</sup> A contract or transaction with a conflict of interest is not voidable if the relationship or interest is disclosed or known to the board; the board authorized, approved, or ratified it by vote or written consent; or the contract or transaction is fair and reasonable at the time it is

- Enter certain disclosure requirements into the written minutes of the meeting.
- Approve the contract or other transaction by an affirmative vote of two-thirds of the directors present.
- At the next regular or special meeting of the members, disclose the existence of the contract or other transaction to the members. Upon motion of any member, the contract or transaction must be brought up for a vote and may be canceled by a majority vote of the members present. If the members cancel the contract, the HOA is only liable for the reasonable value of goods and services provided up to the time of cancellation and is not liable for any termination fee, liquidated damages, or other penalty for such cancellation.

The directors and officers of an HOA who are appointed by the developer must disclose to the HOA their relationship to the developer each calendar year in which they serve as a director or an officer. <sup>42</sup>A developer's appointment of an officer or director does not create a presumption that the officer or director has a conflict of interest with regard to the performance of his or her official duties.

Directors and officers of an HOA are required to disclose to the HOA any activity that may reasonably be construed to be a conflict of interest at least 14 days prior to voting on the subject of such conflict or entering into such contract. A rebuttable presumption of a conflict of interest exists if any of the following occurs without prior disclosure to the HOA:<sup>43</sup>

- A director or an officer, or a relative of a director or an officer, enters into a contract for goods or services with the HOA.
- A director or an officer, or a relative of a director or an officer, holds an interest in a corporation, limited liability company, partnership, limited liability partnership, or other business entity that conducts business with the HOA or proposes to enter into a contract or other transaction with the HOA.

#### Removal from Office for Charges or Indictments

Florida law provides that any director or officer charged by information or indictment with any of the following crimes must be removed from office:<sup>44</sup>

- Forgery of a ballot envelope or voting certificate used in an HOA election as provided in s. 831.01, F.S.
- Theft or embezzlement involving the HOA's funds or property as provided in s. 812.014, F.S.
- Destruction of or the refusal to allow inspection or copying of an official record of the HOA which is accessible to parcel owners within the time periods required by general law, in furtherance of any crime, which act constitutes tampering with physical evidence as provided in s. 918.13, F.S.
- Obstruction of justice as provided in chapter 843, F.S.

### **Powers and Duties of Officers and Directors – Effect of the Bill**

#### Standards for Directors and Officers

The bill clarifies that the officers and directors of an HOA are subject to the general standards for directors outlined in s. 617.0830, F.S., of the Florida Not for Profit Corporation Act. HOA directors were likely obligated to comply with these standards under current law as long as they were not inconsistent with the provisions of the HOA governing documents, but the bill would expand the standards to HOA officers and require HOA governing provisions to be consistent with these standards. Under the bill, officers and directors would be required to discharge their duties:

- In good faith<sup>45</sup>;

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authorized. Such contract or transaction must be authorized, approved, or ratified by a majority of the directors on the board who have no relationship or interest in such transaction. S. 617.0832, F.S.

<sup>42</sup> S. 720.3033(6)(a), F.S.

<sup>43</sup> S. 720.3033(6)(b), F.S.

<sup>44</sup> S. 720.3033(4), F.S.

<sup>45</sup> S. 617.0830(3), F.S. provides an example of when a director or officer is not acting in good faith. A director or officer is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by s. 617.0830 (2), F.S. unwarranted.

- With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- In a manner he or she reasonably believes to be in the best interests of the corporation.

The bill also provides that in discharging his or her duties, officers and directors would be permitted to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- One or more officers or employees of the corporation whom the officer or director reasonably believes to be reliable and competent in the matters presented;
- Legal counsel, public accountants, or other persons as to matters the officer or director reasonably believes are within the persons' professional or expert competence; or
- A committee of the board of directors of which he or she is not a member if the officer or director reasonably believes the committee merits confidence.

The bill also provides that officers and directors are not liable for any action taken as an officer or director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with standards outlined in s. 617.0830, F.S., of the Florida Not for Profit Corporation Act.

### Director Education Requirements

The bill:

- Requires a new elected or appointed director, within 90 days after being elected or appointed, to the board, to complete and submit a certificate of having satisfactorily completed the educational curriculum administered by a DBPR-approved education provider.
- Provides that such educational curriculum, specific to newly elected or appointed directors, must include training relating to financial literacy and transparency, recordkeeping, levying of fines, and notice and meeting requirements.
- Provides that the certification of completion for education specific to newly elected or appointed directors is valid up to four years.
- Requires a director to retake the DBPR-approved initial education every 4 years.

In addition to the educational curriculum specific to newly elected or appointed directors, the bill requires a director of an association that:

- Has **fewer than 2,500** parcels to complete at least **4 hours** of continuing education annually.
- Has **2,500 parcels or more** must complete at least **8 hours** of continuing education annually.

### Prohibition of Kickbacks

The bill provides that an HOA officer, director, or manager who knowingly solicits, offers to accept, or accepts any kickback<sup>46</sup> commits a third-degree felony and is subject to monetary damages.

### Removal from Office for Charges or Indictments

The bill provides that where a director or officer is charged by information or indictment with a specified criminal offense and must be removed from office as provided in current law, a vacancy must also be declared, and adds any criminal violation under the HOA Act as a criminal offense for which such removal and declaration is required.

### **Accounting of Balance Due- Current Situation**

The HOA's financial and accounting records are considered official records and must be maintained by the HOA as discussed above.<sup>47</sup> More specifically, the HOA is required to maintain the current account

<sup>46</sup> The bill defines "kickback" to mean any thing or service of value for which consideration has not been provided for an officer's, a director's, or a member's benefit or for the benefit of a member of his or her immediate family from any person providing or proposing to provide goods or services to the HOA.

<sup>47</sup> S. 720.303(4), F.S.

and a periodic statement of the account for each member, designating the name and current address of each member who is obligated to pay assessments, the due date and amount of each assessment or other charge against the member, the date and amount of each payment on the account, and the balance due. These records are available upon written request for the requester to inspect and copy. Currently, Florida Law does not require an HOA to give a detailed accounting to an individual of any amounts he or she owes to the HOA.

### **Accounting of Balance Due- Effect of the Bill**

The bill provides that a parcel owner may make a written request to the board for a detailed accounting of any amounts owed to the HOA related to the parcel and the board shall provide such information within 10 business days after receipt of the written request. The bill specifies that a parcel owner can only request a detailed accounting of the amounts owed to the association related to the property. The bill allows an occupant, licensee, or invitee to request a detailed accounting if the parcel owner provides the board with written authorization for such occupant, licensee, or invitee to make a request to the board.

After a parcel owner, occupant, licensee, or invitee makes a written request for a detailed accounting, he or she may not ask for another detailed accounting for 90 calendar days.

Failure by the board to timely respond to a written request for a detailed accounting constitutes a complete waiver of any outstanding fines of the person who requested such accounting.

### **HOA Architectural and Construction Improvement Covenants and Rules - Current Situation**

If the governing documents allow, an HOA or its architectural review, construction improvement, or other similar committee (ARC) may:<sup>48</sup>

- Require a review and approval of plans and specifications for the location, size, type, or appearance of any structure or other improvement on a parcel before a parcel owner makes such improvement.
- Enforce standards for the external appearance of any structure or improvement located on a parcel.

The HOA or ARC may not restrict the right of a parcel owner to select from any options given in the governing documents for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel.<sup>49</sup>

Each parcel owner is entitled to the rights and privileges set forth in the governing documents concerning the architectural use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges may not be unreasonably infringed upon or impaired by the HOA or ARC. If the an HOA or ARC unreasonably, knowingly, and willfully infringes upon or impairs such rights and privileges, the adversely affected parcel owner may recover damages, including any costs and reasonable attorney's fees.<sup>50</sup>

An HOA or ARC may not enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner set forth in the governing documents, whether uniformly applied or not.<sup>51</sup>

### *Hurricane Hardening*

Generally, hurricane hardening involves improvements to a building structure and its openings to make it less susceptible to damage from extreme wind, flooding, or flying debris. Hardening improves the

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<sup>48</sup> S. 720.3035(1), F.S.

<sup>49</sup> S. 720.3035(2), F.S.

<sup>50</sup> S. 720.3035(4), F.S.

<sup>51</sup> S. 720.3035(5), F.S.

durability and stability of a structure, making it better able to withstand the impacts of hurricanes and weather events without sustaining major damage.<sup>52</sup>

Hurricane hardening includes installing hurricane impact-rated doors, windows with impact-resistant glass, reinforced roof and wall structures that meet or exceed high-velocity impact codes, independent emergency power systems, potable water storage, fuel stores, and other supplies and systems that will sustain those within the building for a certain time period after a storm.<sup>53</sup>

Most hurricane hardening must be installed in compliance with applicable codes, including the Florida Building Code, and by a licensed construction contractor.<sup>54</sup>

### *Condominium Hurricane Protection Specifications*

Each residential condominium must adopt hurricane shutter specifications for each building of the condominium, which must include color, style, and other factors deemed relevant by the condominium. All such specifications must comply with the applicable building code.<sup>55</sup> A condominium is not required to adopt other hurricane protection specifications.

A condominium may not refuse to approve the installation or replacement of hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection by a condominium unit owner conforming to the condominium's specifications.<sup>56</sup>

## **HOA Architectural and Construction Improvement Covenants and Rules – Effect of the Bill**

The bill requires an HOA or ARC to uniformly apply and enforce the architectural and construction improvement standards against all parcel owners authorized by the HOA governing documents.

The bill **prohibits** an HOA or ARC from enforcing or adopting a covenant, rule, or guideline that:

- Limits or places requirements on the interior of a structure that is not visible from the parcel's frontage or an adjacent parcel.
- Requires the review and approval of plans and specifications for a central air-conditioning, refrigeration, heating, or ventilating system by the HOA or any architectural, construction improvement, or other such similar committee of an HOA, if such system is not visible from the parcel's frontage and is substantially similar to a system that is approved or recommended by the HOA or a committee thereof.

The bill provides that the HOA or ARC denies a parcel owner's request or application for the construction of a structure or other improvement on a parcel, the HOA or ARC must provide written notice to the parcel owner stating with specificity the rule or covenant on which the HOA or ARC relied when denying the request or application.

The bill provides that if a parcel owner's rights and privileges have been unreasonably infringed upon or impaired by a decision concerning the architectural use of his or her parcel or the construction of permitted structures and improvements on such parcel by the HOA or ARC, the HOA must provide the parcel owner with the ability to appeal such decision to an appeals committee that consists of at least three members appointed by the board. The members of the appeals committee cannot be:

- An officer,
- Director, or
- An employee of the HOA, or

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<sup>52</sup> *Hurricane Hardening*, WGI, (June 14, 2018), <https://wginc.com/hurricane-hardening/> (last visited Dec. 8, 2023); *Hardening and Resiliency U.S. Energy Industry Response to Recent Hurricane Seasons*, U.S. Department of Energy, Aug. 2010, p.8, <https://www.oe.netl.doe.gov/docs/HR-Report-final-081710.pdf> (last visited Dec. 8, 2023).

<sup>53</sup> *Id.*

<sup>54</sup> See s. 553.72(1), F.S.; s. 489.105, F.S.

<sup>55</sup> S. 718.113(5), F.S.

<sup>56</sup> S. 718.113(5)(d), F.S.

- Members of the ARC.

Furthermore, the bill provides that the appeals committee has the right to reverse, modify, or affirm the decision being appealed. A parcel owner may appeal a decision of the HOA or ARC within 90 days after the owner receives written notification of the initial decision. The bill requires that the appeals committee must decide on the issue under appeal within 60 days after receiving a parcel owner's request for appeal.

#### *HOA or ARC Hurricane Protection Specifications*

The bill requires an HOA or any ARC to adopt **hurricane protection** specifications for each structure or other improvement on a parcel governed by the HOA. The specifications may include the color and style of hurricane protection products and any other factor deemed relevant by the board. All specifications adopted by the HOA must comply with the applicable building code.

The bill allows the HOA or ARC to require a parcel owner to adhere to an existing unified building scheme regarding the external appearance of the structure or other improvement on the parcel.

The bill provides that, regardless of any other provision in the HOA's governing documents, the HOA or ARC may not deny an application for the installation, enhancement, or replacement of hurricane protection by a parcel owner which conforms to the specifications adopted by the HOA or ARC.

The bill provides that "hurricane protection" includes, but is not limited to:

- Roof systems recognized by the Florida Building Code that meet ASCE 7-22 standards,
- Permanent fixed storm shutters,
- Roll-down track storm shutters,
- Impact-resistant windows and doors,
- Polycarbonate panels,
- Reinforced garage doors,
- Erosion controls,
- Exterior fixed generators,
- Fuel storage tanks, and
- Other hurricane protection products used to preserve and protect the structures or improvements on a parcel governed by the HOA.

The bill provides that in order to protect the health, safety, and welfare of the people of the state and to ensure uniformity and consistency in the hurricane protection installed by parcel owners, the bill applies to all HOAs in the state, regardless of when the community was created.

#### **Prohibited Clauses in Governing Documents- Current Situation**

Under current Florida law, HOAs may not restrict the installation, display and storage of any items on a parcel that are not visible from the parcel's frontage or an adjacent parcel, unless the item is prohibited by general law or local ordinance. Such items include, but are not limited to:<sup>57</sup>

- Artificial turf;
- Boats;
- Flags; and
- Recreational vehicles.

HOA governing documents may not prohibit:

- A homeowner from displaying up to two portable, removable flags in a respectful manner. However, all flags must be displayed in a respectful manner consistent with the requirements for the United States flag.<sup>58</sup>

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<sup>57</sup> S. 720.3045, F.S.

<sup>58</sup> S. 720.3075(3), F.S.

- Any property owner from implementing Florida-friendly landscaping<sup>59</sup> on his or her land or create any requirement or limitation in conflict with any provision of part II of chapter 373, F.S., regarding the permitting of consumptive uses of water or a water shortage order, other order, consumptive use permit, or rule adopted or issued pursuant to part II of chapter 373, F.S.

Furthermore, HOAs are prohibited from preventing a law enforcement officer<sup>60</sup> who is a parcel owner, or who is a tenant, guest, or invitee of a parcel owner, from parking his or her assigned law enforcement vehicle where the parcel owner, or the tenant, guest, or invitee of the parcel owner, has a right to park.

### **Prohibited Clauses in Governing Documents - Effect of the Bill**

The bill expands the list of items that an HOA is prohibited from preventing a homeowner from installing, displaying, or storing on their property to include vegetable gardens and clotheslines in areas not visible from the frontage or adjacent parcels.

The bill provides that HOA governing documents cannot prohibit:

- A property owner, or a guest, tenant, or invitee, from parking his or her personal vehicle, including a pickup truck:
  - in the property owner's driveway,
  - in common parking lots,
  - on public roads and rights-of-way, or
  - in any other area at which the property owner or the property owner's tenant, guest, or invitee has a right to park which is governed by state, county, and municipal regulations.
- Regardless of any official insignia or visible designation, property owner, or a guest, tenant, or invitee, from parking his or her work vehicle, which is not a commercial motor vehicle<sup>61</sup>, in the property owner's driveway.
- A property owner from inviting, hiring, or allowing entry to a contractor or worker on the owner's parcel solely because the contractor or worker is not on a preferred vendor list of the HOA.
- Operating a vehicle that is not a commercial motor vehicle in conformance with state traffic laws on public roads or rights-of-way or the property owner's parcel.
- A property owner from inviting, hiring, or allowing entry to a contractor or worker on his or her parcel solely because the contractor or worker does not have a professional or an occupational license. The HOA may not require a contractor or worker to present or prove possession of a professional or an occupational license to be allowed entry onto a property owner's parcel.
- A property owner from installing code-compliant hurricane protection or home hardening, such as hurricane shutters, impact glass, code-compliant windows or doors, or other similar protection that complies with or exceeds the applicable building code.
- A property owner from installing a roof system recognized by the Florida Building Code that meet ASCE 7-22 standards, artificial turf, vegetable garden, or clotheslines or other energy-efficient device.<sup>62</sup>

The bill provides that HOA documents may not limit landscaping to grass-only or grass-majority lawns, or require mandatory watering for property owners. However, the association documents may provide designated timeframes for the parcel owners to follow related to the use of water for purposes of watering landscaping if the parcel owners choose to water.

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<sup>59</sup> Defined in s. 373.185, F.S.

<sup>60</sup> A law enforcement officer is defined in s. 943.10(1), F.S.

<sup>61</sup> "Commercial motor vehicle" means any vehicle which is not owned or operated by a governmental entity, which uses special fuel or motor fuel on the public highways, and which has a gross vehicle weight of 26,001 pounds or more, or has three or more axles regardless of weight, or is used in combination when the weight of such combination exceeds 26,001 pounds gross vehicle weight. S. 320.0, F.S.

<sup>62</sup> Similar to s. 163.04(2), F.S. regarding local governments.

The bill provides that a first responder<sup>63</sup>, instead of a law enforcement officer, that is a homeowner, or the tenant, guest, or invitee thereof, may park his or her assigned first responder vehicle on public roads or rights-of-way within the HOA if this is an area where the homeowner, or the tenant, guest, or invitee thereof, otherwise has a right to park. A first responder includes:

- A law enforcement officer;
- A firefighter;
- An emergency medical technician or paramedic; or
- Volunteer law enforcement officer, firefighter, or emergency medical technician or paramedic.

The bill also states that an HOA is prohibited from enforcing a new rule or covenant against a parcel owner for an action that took place before the new rule or covenant was enacted.

### **Fines and Suspension- Current Situation**

Owners, tenants, and guests must comply with an HOA's declaration, bylaws, and rules. HOAs may levy fines against or suspend the right of a parcel owner, or an occupant or guest of an owner or occupant, to use the common areas<sup>64</sup> or any other association property for failing to comply with any provision in the HOA's governing documents. A suspension for failing to comply with an HOA's declaration, bylaws, or rules may not be for an unreasonable amount of time.<sup>65</sup>

An HOA may levy reasonable fines for violations of the declaration, bylaws, or reasonable rules of the HOA. No fine may exceed \$100 per violation, although a fine may be levied on the basis of each day of a continuing violation provided that fine does not exceed \$1,000 in the aggregate. However, a fine may exceed \$1,000 if the HOA's governing documents authorize it. Fines may not become a lien on the property unless the fines exceed \$1,000.<sup>66</sup>

Before an HOA levies a fine or a suspension, it must give the person receiving the fine or suspension at least 14 days' notice of an opportunity for a hearing. Notice must be provided at the designated mailing or e-mail address in the HOA's official records. A hearing before a committee of at least three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee, must be provided. The notice must include a description of the alleged violation, the specific action required to cure such violation, and the date and location of the hearing. A parcel owner has the right to attend a hearing by telephone or other electronic means.

A fine and suspension committee of at least three members selected by the board must hold a hearing to reject or approve the fine or suspension. Board directors, officers, and employees of the HOA and family of such people may not serve on the committee. The committee must approve the fine or suspension by majority vote; otherwise, the proposed fine or suspension may not be imposed.<sup>67</sup> After the hearing, the committee shall provide written notice to the parcel owner at his or her designated mailing or e-mail address in the HOA's official records of the parcel owner, of the committee's findings related to the violation, including any applicable fines or suspensions that the committee approved or rejected, and how the parcel owner or any occupant, licensee, or invitee of the parcel owner may cure the violation, if applicable.<sup>68</sup>

If the proposed fine or suspension levied by the board is approved by the committee by a majority vote, the fine payment is due 5 days after notice of the approved fine is provided to the parcel owner and, if

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<sup>63</sup> A first responder is defined in s. 112.1815 (1), F.S.

<sup>64</sup> This does not apply to that portion of common areas used to provide access or utility services to the parcel. A suspension may not prohibit an owner or tenant of a parcel from having vehicular and pedestrian ingress to and egress from the parcel, including, but not limited to, the right to park. S. 720.305(2)(a), F.S.

<sup>65</sup> S. 720.305(2), F.S.

<sup>66</sup> S. 720.305(2), F.S.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*



applicable, to any occupant, licensee, or invitee of the parcel owner. Written notice of the fine or suspension must be provided to the person by mail or hand delivery.<sup>69</sup>

If a member is more than 90 days delinquent in paying any fee, fine, or other monetary obligation due to the HOA, the HOA may suspend the rights of the member, or the member's tenant, guest, or invitee, to use common areas and facilities<sup>70</sup> until it is paid in full.

An HOA may suspend the voting rights of a parcel or member for the nonpayment of any fee, fine, or other monetary obligation due to the HOA that is more than 90 days delinquent. The suspension ends upon full payment of all obligations currently due or overdue to the HOA.<sup>71</sup>

The notice and hearing requirements for levying fines do not apply to a suspension imposed for delinquent payment.<sup>72</sup>

All suspensions imposed for delinquent payment of any fee, fine, or other monetary obligation due to the HOA must be approved at a properly noticed board meeting. Upon approval, the HOA must send written notice to the parcel owner and, if applicable, the parcel's occupant, licensee, or invitee by mail or hand delivery to the parcel owner's designated mailing or e-mail address in the HOA's official records.<sup>73</sup>

## **Fines and Suspension- Effect of the Bill**

### *Levying Fines*

The bill requires that a fine or suspension levied by the board of administration may not be imposed unless the board first provides at least 14 days' **written notice of the parcel owner's right to a hearing**. Furthermore, the bill requires that the hearing must be held within 30 days after issuance of the notice. The bill provides that the committee is authorized to hold the hearing by telephone or other electronic means. If the hearing is held by telephone or other electronic means, the notice must include the access information required to attend the telephonic conference or appear through the electronic medium.

The bill provides that the committee must provide a written notice of the committee's findings related to the violation to the applicable person described in the statute within **7 days** after the hearing. If applicable, the written notice of the committee's findings is required to provide instructions on how the parcel owner or any occupant, licensee, or invitee of the parcel owner needs to **fulfill a suspension, or the date by which a fine must be paid**.

The bill provides new procedures for imposing a fine:

- If a violation is found by the committee, but has been cured before the hearing or as specified in the applicable written notice, a fine or suspension may not be imposed. Attorney fees and costs may not be awarded against the parcel owner.
- The HOA must indicate on the notice of fine the date it is due, which date must be at least 30 days after the notice is delivered. Attorney fees and costs may not be awarded against the parcel owner.
- If a violation is found by the committee, and the proposed fine or suspension levied by the board is approved by the committee and the violation is not cured or the fine is not paid, reasonable attorney fees and costs may be awarded to the HOA. However, attorney fees and costs may not begin to accrue until after the due date for the fine and time for an appeal has expired.

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<sup>69</sup> *Id.*

<sup>70</sup> A suspension may not prohibit an owner or tenant of a parcel from having access a portion of common areas used to provide access or utility services to the parcel, or from having vehicular and pedestrian ingress to and egress from the parcel. S. 720.305(4), F.S.

<sup>71</sup> S. 720.305(4), F.S.

<sup>72</sup> S. 720.305(3), (4), F.S.

<sup>73</sup> S. 720.305(5), F.S.

- Upon receipt of a payment for any outstanding fines, the HOA must apply the payment first to the fine before satisfying any other amounts due to the HOA. Attorney fees and costs may not continue to accrue after the fine is paid.
- A parcel owner or any occupant, licensee, or invitee may request a hearing before the board to dispute the reasonableness of the attorney fees and costs awarded to the HOA.

The bill provides that if the HOA fails to comply with the requirements for levying fines and suspensions, the HOA waives all fines or suspensions imposed or proposed for such violation.

### *Limitations on Fines*

The bill limits when an HOA may impose a fine or suspension. The bill provides that:

- A fine may not be imposed against a parcel owner for a speeding violation committed by his or her occupant, licensee, guest, or invitee.
- If an HOA allows a fine to be levied or a suspension to be imposed against a parcel owner or an occupant, licensee, guest, or invitee for a traffic infraction<sup>74</sup>, such infraction must be determined and issued by a board-approved nonaffiliated third party specializing in traffic infractions.
- HOAs may not issue a fine or suspension for:
  - Leaving garbage receptacles at the curb or end of the driveway less than 24 hours before or after the designated garbage collection day or time.
  - Leaving holiday decorations or lights up longer than indicated in the governing documents, unless such decorations or lights are left up for longer than 1 week after the association provides written notice of the violation to the parcel owner.

The bill restricts when an HOA fine can become a lien:

- A fine that amounts to less than 1 percent of the parcel's just value<sup>75</sup> as determined by the Property Appraiser at the time the fine was levied may only become a lien against the parcel with the approval by 75 percent of the total membership of parcel owners, and fines may not be aggregated to create a lien against a parcel.
- If an HOA allows a fine to be levied for an infraction relating to lawn, landscaping, or grass maintenance, such fine may not become a lien on a parcel.

## **Assessments and Charges- Current Situation**

### *Overview*

Current law gives HOAs the ability to levy and collect assessments<sup>76</sup> from unit or parcel owners. This allows the HOA to carry out its responsibility for the HOA's management, operation, and

<sup>74</sup> The term "traffic infraction" means a noncriminal violation of parking and traffic rules adopted by the state, county, municipality, or association.

<sup>75</sup> The Florida Supreme Court has held that "...the just valuation at which property must be assessed under the [Florida] [C]onstitution and section 193.011 is synonymous with fair market value, i.e., the amount a purchaser, willing but not obliged to buy, would pay a seller who is willing but not obliged to sell." *Valencia Ctr., Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989). Under s. 193.011, F.S., the Property Appraiser considers eight factors in arriving at a just valuation of a property:

1. The present cash value of the property,
2. The highest and best use of the property,
3. The location of said property,
4. The quantity or size of said property,
5. The cost of said property and the present replacement value of any improvements;
6. The condition of said property;
7. The income from said property; and
8. The net proceeds of the sale of the property.

<sup>76</sup> S. 720.301(1), F.S. provides that an "assessment" or "amenity fee" means a sum or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.

maintenance.<sup>77</sup> In addition to levying assessments, HOAs also have the power to establish the time when each assessment is due, including when an assessment becomes delinquent.<sup>78</sup>

The most common assessments are those required to fund an HOA's common expenses identified in an HOA's annual budget. The amount to fund the common expenses and the assessments required to meet that amount are determined when an HOA's budget is adopted.<sup>79</sup> In contrast, a special assessment is an assessment levied against unit or parcel owners for unexpected expenses that are over and above those anticipated by the annual budget.<sup>80</sup>

When the amount of an assessment has been determined, the HOA must establish a payment schedule for the owners in accordance with the HOA's bylaws. The payments must be sufficient to provide the funds necessary to pay all the anticipated operating expenses and all unpaid expenses previously incurred.<sup>81</sup>

A parcel owner may not avoid paying assessments by waiving the use of common elements or services in the HOA. No parcel owner may be relieved from liability for all or part of an assessment.<sup>82</sup> Boards must keep account of the assessments levied against every parcel owner and the assessments paid by every owner. These records are part of the HOA's official records.<sup>83</sup>

### *Claim of Lien*

An HOA may claim a lien for all unpaid assessments, but not for all unpaid fines.<sup>84</sup> An HOA may file a claim of lien for a delinquent assessment with the Clerk of Court in the county where the HOA is located. The claim of lien must state the legal description of the parcel, the owner of the parcel, the HOA's name and address, and the assessment amount owed and the due date. An officer or agent of the HOA must sign the claim of lien.<sup>85</sup> A filed claim of lien is valid for one year.<sup>86</sup>

Prior to filing a claim of lien, an HOA must give a parcel owner the opportunity to pay a delinquent assessment. At least 45 days before filing a claim of lien, an HOA must provide written notice of the HOA's intent to file a lien to the unit owner. The notice of intent to record a claim of lien must include the following information:<sup>87</sup>

- The amount owed on the owner's account;
- The interest rate for the amounts owed;
- A statement that the owner has 45 days after receipt of this notice to pay the amount owed or the HOA will file a claim of lien against the unit or parcel; and
- A breakdown of the amount owed including:
  - Maintenance costs due;
  - Late fee, if applicable;
  - Interest;
  - Certified mail charges;
  - Other costs; and
  - Total amount owed.

The notice must be sent by certified or registered mail, return receipt requested, and by first-class mail to the owner's address listed in the official records.<sup>88</sup> If the address is different than the parcel address, the notice must also be sent to the parcel. If the address is different than the parcel address and the

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<sup>77</sup> S. 720.301(1), and 720.308(1), F.S.

<sup>78</sup> See generally, ch. 720, F.S.

<sup>79</sup> S. 720.303(6)(a), F.S.

<sup>80</sup> S. 720.303(6), F.S.

<sup>81</sup> S.720.30851(1), F.S.

<sup>82</sup> S. 720.3085(2)(a), F.S.

<sup>83</sup> S. 720.303(4)-(5), F.S.

<sup>84</sup> An HOA has a lien on a parcel for a fine that is \$1,000 or more. S. 720.305(2), F.S.

<sup>85</sup> Ss. 720.301(1), and (11), 720.305(2), and 720.3085(1), F.S.

<sup>86</sup> S. 713.22(1), F.S.

<sup>87</sup> S. 720.3085(4), F.S.

<sup>88</sup> S. 720.3085(4)(b), F.S.

address is outside the United States, the HOA may send the notice by first class mail, instead of first class and certified/registered mail.

A parcel owner may challenge a claim of lien by filing a notice of contest of lien with the Clerk of Court. After a parcel owner files a notice of contest, an HOA has 90 days to commence enforcement of the lien.<sup>89</sup>

An HOA may bring an action to foreclose on a parcel for unpaid assessments in circuit court in the same way that a mortgage on real estate is foreclosed. The homestead protections provided by Florida's Constitution do not prevent the foreclosure and sale of a parcel.<sup>90</sup> In addition to an action of foreclosure, an HOA may also bring a civil action to recover a money judgment for the unpaid assessments without waiving any claim of lien.<sup>91</sup>

Prior to foreclosing on a lien, an HOA must provide written notice to the owner of its intent to foreclose on the lien. An HOA must give a parcel owner the written notice at least **45 days** before foreclosing on the lien. The notice must include the following information:<sup>92</sup>

- A claim of lien has been filed against the owner's property for failing to pay an assessment(s);
- The HOA intends to foreclose on the lien in 45 days;
- The total amount owed;
- The interest rate and the interest owed; and
- The contact information for the HOA's attorney or representative.

### *Maximum Level of Assessments*

Assessments charged to a member must not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate share of the expenses as described in the governing documents.<sup>93</sup> Currently in Florida, there is not a cap on how much an HOA can raise assessments. However, the HOA's governing documents may have specific provisions about raising regular assessments or imposing special assessments.<sup>94</sup> California has placed a cap on how much an HOA can increase assessments.<sup>95</sup>

### *Interest on Unpaid Assessments*

If an assessment or installment on an assessment is unpaid when the payment is due, such assessment bears interest at a rate<sup>96</sup> provided in the governing documents from the due date until paid. If an HOA does not prescribe an interest rate in its governing documents, the unpaid assessment bears interest at a rate of 18 percent per year.<sup>97</sup>

Florida law does not specify whether such interest on such unpaid assessments bears a simple interest or a compound interest. As currently written, it appears that the governing documents dictate the type of interest that accrues unless such rate exceeds the rate allowed by law.

Interest is charged on top of the owed assessment balance. There are two ways that interest can be calculated: simple interest and compound interest. A simple interest is calculated only on the original amount of the unpaid assessment. A compound interest is calculated on the original amount of the

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<sup>89</sup> S. 720.3085(1), F.S.

<sup>90</sup> *Bessemer v. Gersten*, 381 So. 2d 1344, 1347 (Fla. 1980).

<sup>91</sup> S. 720.3085(1) F.S.

<sup>92</sup> Ss. 718.116(6)(a) and 720.3085(5), F.S.

<sup>93</sup> S. 720.308(3).

<sup>94</sup> Dania S. Fernandez, "How Much Can an HOA Raise Dues Each Year in Florida?", Dania Fernandez and Associates, P.A., Feb. 26, 2021, [www.daniafernandez.com/2021/03/30/how-much-can-an-hoa-raise-dues-each-year-in-florida/](http://www.daniafernandez.com/2021/03/30/how-much-can-an-hoa-raise-dues-each-year-in-florida/) (last visited Feb. 1, 2024).

<sup>95</sup> California Civil Code § 5605.

<sup>96</sup> Such rate cannot exceed the rate allowed by law.

<sup>97</sup> S. 720.3085(3), F.S.

unpaid assessment and the accumulated interest of previous period. In sum, a compound interest is considered “interest on interest.”<sup>98</sup>

## Assessments and Charges- Effect of Bill

### *Maximum Level of Assessments*

The bill **prohibits** the board from imposing a regular assessment, excluding an assessment for the association’s insurance policy premium, that is 10 percent greater than the regular assessment of the HOA’s previous fiscal year or imposing special assessments that as a whole are valued more than 5 percent of the current fiscal year’s gross expense budget without the approval of 60 percent of voting members at a member meeting.

The bill also provides a few exceptions to the cap on regular assessments and special assessments described above. The exceptions are:

1. The board has the right to increase regular assessments or special assessments by more than the caps if such increase is necessary for the immediate physical protection of property or public safety.
2. While the developer is control, the developer may increase regular assessments or special assessments beyond the limits of such caps.
3. If an HOA’s insurance policy premium increases by more than 25 percent over the preceding fiscal year’s premium, the HOA must solicit at least two additional insurance quotes from an insurer providing the initial quote.
  - The board must present such quotes to the members of the HOA at a member meeting for the consideration by the members.
  - The determination on whether to accept the initial quote, which was for more than 25 percent of the preceding fiscal year’s premium, or accept another quote from another insurer must be voted on by the members and determined by majority vote.

The bill prohibits assessments below 1 percent of the just value <sup>99</sup>as determined by the Property Appraiser at the time of the assessment from becoming a lien on a property without the approval of a majority of voting members at a member meeting.

### *Interest on Unpaid Assessments*

The bill clarifies that unpaid assessments and installments for assessments are only permitted to bear simple interest.

The bill prohibits unpaid assessments and installments for assessments from bearing compound interest regardless of whether the governing documents prescribe a compound interest instead of a simple interest.

## Priority of Association Lien- Current Situation

The priority of the lien of an HOA is contingent upon the language of the covenants that create the assessment obligation and the right to lien. Where the covenants are silent as to the priority, then the HOA’s lien will be effective for the purposes of determining priority as of the date of the filing of a claim of lien. Only where the HOA documents specifically provide that a claim of lien shall be considered a lien effective as of the date of the recorded declaration will a claim of lien take priority over mortgages and other liens filed. <sup>100</sup> **However, the lien of the HOA is subordinate to that of a first mortgage that was recorded prior to the filing of a notice of lien.**

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<sup>98</sup> Elvis Picardo, *Simple vs. Compounding Interest: Definitions and Formulas*. Investopedia, Investopedia, Aug. 22, 203, [www.investopedia.com/articles/investing/020614/learn-simple-and-compound-interest.asp](http://www.investopedia.com/articles/investing/020614/learn-simple-and-compound-interest.asp) (last visited Feb. 15, 2024).

<sup>99</sup> See *supra* note 65.

<sup>100</sup> *Holly Lake Association v. Federal National Mortgage Association*, 660 So. 2d 266 (Fla. 1995) (finding no relation back); *Association of Poinciana Villages v. Avatar Properties, Inc.*, 724 So. 2d 585 (Fla. 5th DCA 1998) (finding relation back).

## Priority of Association Lien- Effect of Bill

The bill provides that the lien of the association is subordinate to that of any mortgage, rather than only a first mortgage, that was recorded prior to the filing of a notice of association lien. Thus, when there is a mortgage of record, whichever lien was recorded first in the land records has a higher priority than later recorded liens.

### B. SECTION DIRECTORY:

Section 1: Amends s. 468.4334, F.S. relating to community association manager requirements.

Section 2: Amends. 468.4337, F.S., relating to continuing education.

Section 3: Amends s. 720.303, F.S., relating to requirements for HOA officers and directors, an accounting, official records, and budgets.

Section 4: Amends s. 720.3033, F.S., relating to education of directors.

Section 5: Amends s. 720.3035, F.S., relating to architectural control covenants.

Section 6: Amends s. 720.3045, F.S., relating to installation, display, and storage of items.

Section 7: Amends s. 720.305, F.S., relating to HOA fines and appeals.

Section 8: Amends s. 720.3075, F.S., relating to prohibited clauses in association documents.

Section 9: Amends s. 720.308, F.S., relating to assessments and charges.

Section 10: Amends s. 720.3085, F.S., relating to lien claims.

Section 11: Amends s. 720.317, F.S., relating to electronic voting.

Section 12: Amends s. 720.318, F.S., relating to first responder vehicles.

Section 13: Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The bill may have an indeterminate fiscal impact on state government to the extent that it increases criminal prosecutions in the state court system and thereby reduces the amount of available prison beds.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

The bill may have an indeterminate fiscal impact on local governments to the extent that it leads to increased criminal prosecutions and thereby reduces the amount of available jail beds.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Provisions preventing HOA board members from soliciting, offering to accept, or accepting kickbacks, requiring certain HOAs to prepare or cause to be prepared audited financial statements, prohibiting debit card use in specified circumstances, and creating certain criminal penalties may prevent unlawful behavior from occurring, and, thus, save HOAs money. However, some HOAs may have to spend money to develop a website and certain HOAs may see an increase in expenditures related to the

audited financial statement requirement. The bill may also have a negative financial impact on HOA board members charged with crimes created by the bill.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Impairment of Contracts and Due Process

Both the Florida and the United States Constitutions prohibit the state from passing a law impairing contractual obligations.<sup>101</sup> However, the Legislature may provide that a non-criminal law, including one that affects existing contractual obligations, applies retroactively in certain situations.<sup>102</sup> In determining whether a law may be applied retroactively, courts first determine whether the law is procedural, remedial, or substantive in nature.<sup>103</sup> A purely procedural or remedial law may apply retroactively without offending the Constitution, but a substantive law generally may not apply retroactively absent clear legislative intent to the contrary.<sup>104</sup> However, even where the Legislature has expressly stated that a law will have retroactive application, a court may reject that application if the law impairs a vested right, creates a new obligation, or imposes a new penalty.<sup>105</sup> Further, where a law is designed to serve a remedial purpose, a court may decide not to apply the law retroactively where doing so “would attach new legal consequences to events completed before its enactment.”<sup>106</sup>

Both the Florida and United States Constitutions prohibit the taking of life, liberty, or property without due process of law.<sup>107</sup> The right to contract, as long as no fraud or deception is involved and the contract is otherwise legal, is both a liberty and a property right subject to due process protections, and the impairment of contracts may, in certain instances, be viewed as the taking of property without due process.<sup>108</sup>

Whether some of bill’s language is procedural, remedial, or substantive, and whether such modification implicates the constitutional right to contract or the constitutional right to due process, is for the courts to decide.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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<sup>101</sup> U.S. Const. art. I, s. 10; Art. I, s. 10, Fla. Const.

<sup>102</sup> U.S. Const. art. I, ss. 9 and 10; Art. 1, s. 10, Fla. Const.

<sup>103</sup> A procedural law merely establishes the means and methods for applying or enforcing existing duties or rights. A remedial law confers or changes a remedy, i.e., the means employed in enforcing an existing right or in redressing an injury. A substantive law creates, alters, or impairs existing substantive rights. *Windom v. State*, 656 So. 2d 432 (Fla. 1995); *St. John’s Village I, Ltd. v. Dept. of State*, 497 So. 2d 990 (Fla. 5th DCA 1986); *McMillen v. State Dept. of Revenue*, 74 So. 2d 1234 (Fla. 1st DCA 1999).

<sup>104</sup> *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

<sup>105</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

<sup>106</sup> *L. Ross, Inc. v. R.W. Roberts Const. Co.*, 481 So. 2d 484 (Fla. 1986).

<sup>107</sup> U.S. Const. amends. V and XIV; Art. I, s. 21, Fla. Const.

<sup>108</sup> *Miles v. City of Edgewater Police Dept.*, 190 So. 3d 171 (Fla. 1st DCA 2016); see, e.g., *Griffin v. Sharpe*, 65 So. 2d 751 (Fla. 1953) (finding that a statute removing a specific deed restriction’s expiration date both impaired contracts and constituted a taking of private property without due process).

None.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 15, 2024, the Commerce Committee adopted a Proposed Committee Substitute (PCS) and reported the bill favorably with eight amendments as a committee substitute. The PCS:

- Amends and clarifies a community association manager (CAM) requirements.
- Amends and clarifies requirements for associations related to official records and record requests.
- Clarifies that the association may provide designated watering timeframes for parcel owners for the purpose of watering the landscape if the parcel owners choose to water as long as watering is not mandatory.
- Creates criminal offenses connected with the production, retention, inspection, or tampering of official records.
- Amends and clarifies financial reporting requirements for associations.
- Provides that a person using a debit card that is issued to the association or billed to the association for any expense that is not a lawful obligation of the association commits theft.
- Provides that guidelines if an HOA receives a subpoena for records from a law enforcement agency.
- Amends HOA director education requirements.
- Removes the requirement that an association with 2,500 members or more:
  - Use an independent certified public accountant to prepare the association's annual budget.
  - Retain an attorney to:
    - Advise the association and its members on procedural matters relating to the annual budget; and
    - Foster communications between the board and the members of the association.
- Makes it an automatic third-degree felony, instead of tying the degree of the criminal offense to the monetary value of the offense, when officers, directors, or managers accept kickbacks.
- Specifies that where a director or officer is charged by information or indictment with a specified criminal offense and must be removed from office as provided in current law, a vacancy must also be declared, and adds any criminal violation under the HOA Act as a criminal offense for which such removal and declaration is required.
- Provides requirements for architectural, construction improvement, or similar committees (ARCS).
- Provides that If the HOA fails to comply with the requirements for levying fines and suspensions, the HOA waives all fines or suspensions for the violation.
- Defines "property value" as "just value" which is determined by the property appraiser.
- Restricts HOAs from enacting parking curfew limitations on public streets and rights of way by requiring such parking rules to be governed by state, county, and municipal regulations.
- Provides certain limitations on assessments and special assessments in certain situations.
- Provides homeowners in an association with the ability to adopt hurricane protections and limits regulation by HOA.
- Allows HOA members to consent electronically to online voting, instead of only having the option to consent in writing.
- Amends and clarifies who can request a detailed accounting of the amounts owed to the association related to the property.