

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: CS/SB 278

INTRODUCER: Fiscal Policy Committee and Senator Martin

SUBJECT: Estoppel Certificates

DATE: January 19, 2024 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Bond</u>	<u>Yeatman</u>	<u>FP</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 278 restores the limits on fees for preparation of an estoppel certificate by a condominium, cooperative, or homeowners association to \$250, which was the maximum allowed in law before July 1, 2022, and repeals the future automatic increases mandated by current law. The bill provides that any fee in excess of that authorized by statute is void. The deadline for completion and delivery of an estoppel certificate is reduced from 10 business days to 5 business days, and the option to charge an extra fee for expedited 3-day service is repealed. An association board of directors must annually establish the authority to impose a fee and the amount of such fee. Payment of the estoppel certificate fee is changed from the time that the certificate is ordered to the time of the closing. The effect is that closing agents will no longer have to advance the fee but can pay it from the closing proceeds. If the closing does not occur, the property owner must pay the estoppel certificate fee to the association.

The bill prohibits a community association manager or firm from including in their management agreement a provision requiring the association to indemnify the manager for errors or omissions in an estoppel certificate. The bill also adds the following offenses that may lead to professional discipline against a community association manager or firm: charging or attempting to charge a fee related to an estoppel certificate in excess of statutory limits, failing to timely furnish an estoppel certificate, or failing to fully complete an estoppel certificate form.

The bill is effective July 1, 2024.

II. Present Situation:

Estoppel Certificates

In general, an estoppel certificate is a legal document that stops someone from later claiming different facts or terms regarding an agreement.¹ It is sometimes referred to as an estoppel letter.

In regards to real estate, estoppel certificates are typically used to confirm amounts of moneys owed that attach to a certain piece of property, such as mortgage debt, condominium association fees, homeowners' association fees, and outstanding claims or deposits due to tenants. Estoppel certificates are sought prior to closing on a real estate transaction as part of the closing agent's due diligence. Closing agents rely on estoppel certificates to determine proper amounts due as part of the settlement process, and real estate purchasers rely on such certificates to warrant that old charges or violations will not appear after closing.

Where the property being transferred is subject to a condominium association, cooperative association, or homeowners' association, a closing agent will solicit an estoppel certificate from the association to determine if any past due monies are due the association, determine the proper allocation of current assessments between the seller and buyer, and certify whether there are any unresolved violations of the covenants and restrictions.

The forms of these estoppel certificates are provided in the statutes. The forms that apply to condominiums, cooperatives and homeowners' associations are nearly the same. The estoppel certificate must contain all of the following information and must be substantially in the following form:

1. Date of issuance: _____
2. Name(s) of the unit owner(s) as reflected in the books and records of the association: _____
3. Unit designation and address: _____
4. Parking or garage space number, as reflected in the books and records of the association: _____
5. Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection. No fee may be charged for this information.
6. Fee for the preparation and delivery of the estoppel certificate: _____
7. Name of the requestor: _____
8. Assessment information and other information: _____

Assessment Information:

- a. The regular periodic assessment levied against the unit is \$ _____ per (insert frequency of payment).
- b. The regular periodic assessment is paid through (insert date paid through).
- c. The next installment of the regular periodic assessment is due (insert due date) in the amount of \$ _____

¹ *Estoppel Letter*, CREPedia, <https://www.crepedia.com/dictionary/definitions/estoppel-letter/> (last visited Jan. 18, 2024); and *What is an Estoppel Certificate*, Redfin <https://www.redfin.com/definition/estoppel-certificate> (last visited Jan. 18, 2024).

- d. An itemized list of all assessments, special assessments, and other moneys owed on the date of issuance to the association by the unit owner for a specific unit is provided.
- e. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate is provided. In calculating the amounts that are scheduled to become due, the association may assume that any delinquent amounts will remain delinquent during the effective period of the estoppel certificate.

Other Information:

- f. Is there a capital contribution fee, resale fee, transfer fee, or other fee due? ____ (Yes) ____ (No). If yes, specify the type and the amount of the fee.
- g. Is there any open violation of rule or regulation noticed to the unit owner in the association official records? ____ (Yes) ____ (No).
- h. Do the rules and regulations of the association applicable to the unit require approval by the board of directors of the association for the transfer of the unit? ____ (Yes) ____ (No). If yes, has the board approved the transfer of the unit? ____ (Yes) ____ (No).
- i. Is there a right of first refusal provided to the members or the association? ____ (Yes) ____ (No). If yes, have the members or the association exercised that right of first refusal? ____ (Yes) ____ (No).
- j. Provide a list of, and contact information for, all other associations of which the unit is a member.
- k. Provide contact information for all insurance maintained by the association.
- l. Provide the signature of an officer or authorized agent of the association.

Completing the form requires time and skill. The association risks a financial loss should it incorrectly calculate monies due and thereafter is unable to collect; and the association risks difficulties in enforcing its covenants and rules if a current violation is overlooked. The applicable statutes allow an association up to 10 business days to furnish the certificate, and waive the fees if the certificate is furnished after the deadline. An association may charge an additional fee if an estoppel certificate is requested on an expedited basis and the certificate is delivered within 3 business days.

The authority to charge a fee, and the amount of the fee, for preparation and delivery of an estoppel certificate must be established by a vote of the board of directors of the association. To account for the time and risk of production, current law allows the association to charge up to \$299 for a single unit or parcel, plus \$119 for expedited service (3 business days rather than 10) and an additional \$179 should the owner's account be delinquent at the time.² A sliding scale applies to a certificate covering multiple units.³ The fees were originally set in 2017 at \$250 base fee, \$100 additional for expedited service, plus \$150 if the owner is delinquent.⁴ The current fees were set in 2022 by administrative action by the Department of Business and Professional Regulation pursuant to a required inflationary adjustment, and are scheduled for inflationary adjustment again in 2027 and every 5 years thereafter.

² Department of Business and Professional Regulation, *Estoppel Certificate Fees Revised: Chapter 2017-93 Laws of Florida*, http://www.myfloridalicense.com/dbpr/lsc/documents/ESTOPPEL_CERTIFICATE_FEES.pdf

³ For 25 or fewer units, \$896; for 26 to 50 units, \$1,194; for 51 to 100 units, \$1,791; and for more than 100 units, \$2,985.

⁴ Chapter 2017-93, Laws of Fla.

Community Association Managers and Management Firms

Community association managers and community association management firms are licensed and regulated by the Department of Business and Professional Regulation.⁵ The term “community association management” means 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,
- Determining the number of days required for statutory notices, determining amounts due to the association,
- Collecting amounts due to the association before the filing of a civil action,
- Calculating the votes required for a quorum or to approve a proposition or amendment,
- Completing forms related to the management of a community association that have been created by statute or by a state agency,
- Drafting meeting notices and agendas,
- Calculating and preparing certificates of assessment and estoppel certificates, and responding to requests for certificates of assessment and estoppel certificates,
- Negotiating monetary or performance terms of a contract subject to approval by an association,
- Drafting prearbitration demands,
- Coordinating or performing maintenance for real or personal property and other related routine services involved in the operation of a community association, and
- Complying with the association’s governing documents and the requirements of law as necessary to perform such practices.⁶

Community association managers and community association management firms are, like all other professions regulated by the Department of Business and Professional Regulation, subject to professional disciplinary proceedings.⁷

Practical Considerations

While some smaller associations are self-managed, most associations employ a licensed community association management firm who employs one or more community association managers. Some associations keep estoppel certificate fees as additional income, but most give some or all of the estoppel certificate fee to the management firm as additional income to account for the added work and related assumption of liability. Statutory changes to the estoppel certificate fees which occur during the term of a management agreement may impact community association managers, associations, owners, and their respective reasonable contract expectations. Statutory changes to the fee may also impact association budgets and may require mid-year amendments to association budgets.

⁵ See generally, part VIII of ch. 468, F.S., and ch. 455, F.S.

⁶ Section 468.431(2), F.S.

⁷ Section 468.436, F.S.

It is reported that some associations are effectively charging fees in excess of those authorized by the statutes. They do so by adding additional fees that are designated by other titles, such as “convenience fee,” “archive fee,” “service fee,” “processing fee,” or “third party fee.”⁸ Current law implies that such add-on fees are not authorized, but does not specifically prohibit such add-on fees.

III. Effect of Proposed Changes:

The bill makes the following changes regarding the preparation and delivery of an estoppel certificate by a condominium, cooperative, or homeowners association:

- The deadline for completion and delivery of an estoppel certificate is reduced from 10 business days to 5 business days, and the option to charge an extra fee for expedited 3-day service is repealed.
- The inflationary adjustment provisions are repealed, thereby restoring the previous limits that were changed by administrative action effective July 1, 2022. Accordingly, the fee for an estoppel certificate regarding a single unit or parcel may not exceed \$250, plus, if applicable, an additional fee of up to \$150 if the owner is delinquent. The tiered fees related to a multiple unit or multiple parcel closing are also restored to those in effect June 30, 2022.⁹
- A condominium, cooperative, or homeowners’ association board of directors must annually establish the authority to impose a fee and the amount of such fee.
- The time for payment of the estoppel certificate fee is changed from the time that the certificate is ordered to the time of the closing. The effect is that closing agents will no longer have to advance the fee but can pay it from the closing proceeds. The ability of a closing agent to seek a refund if the closing does not occur is repealed as unnecessary, and replaced with a duty of the property owner to pay the fee to the association if the closing does not occur. If the owner does not timely pay the association, the amount due may be collected as an assessment against the property.
- Fees or charges in any form that are in excess of those authorized are considered void and may be ignored.

The bill amends the statutes regulating community association managers and management firms (CAM) to add that:

- A contract between a CAM and an association may not require an association to indemnify a CAM for errors and omissions related to the preparation or provision of an estoppel certificate.
- A CAM may be disciplined by the Department of Business and Professional Regulation for charging or attempting to charge an estoppel certificate fee in excess of the fees authorized by statute.
- A CAM may be disciplined by the Department of Business and Professional Regulation for failing to timely prepare and deliver an estoppel certificate, or for delivering an incomplete estoppel certificate.

The bill takes effect July 1, 2024.

⁸ Examples are on file with the Senate Committee on Judiciary.

⁹ For 25 or fewer units, \$750; for 26 to 50 units, \$1,000; for 51 to 100 units, \$1,500; and for more than 100 units, \$2,500.

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:

Under Florida law, statutes are presumed to operate prospectively, not retroactively. In other words, statutes generally apply only to actions that occur on or after the effective date of the legislation, not before the legislation becomes effective. The Florida Supreme Court has noted that, under the rules of statutory construction, if statutes are to operate retroactively, the Legislature must clearly express that intent for the statute to be valid.¹⁰ When statutes that are expressly retroactive have been litigated and appealed, the courts have been asked to determine whether the statute applies to cases that were pending at the time the statute went into effect. The conclusion often depends on whether the statute is procedural or substantive.

In a recent Florida Supreme Court case, the Court acknowledged that “[t]he distinction between substantive and procedural law is neither simple nor certain.”¹¹ The Court further acknowledged that their previous pronouncements regarding the retroactivity of procedural laws have been less than precise and have been unclear.¹²

Courts, however, have invalidated the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties.¹³ Still, in other cases, the courts have permitted statutes to be applied retroactively if they do not create new, or take away, vested rights, but only operate to further a remedy or confirm rights that already exist.¹⁴

¹⁰ *Walker & LaBerge, Inc., v. Halligan*, 344 So. 2d 239 (Fla. 1977).

¹¹ *Love v. State*, 286 So. 3d 177, 183 (Fla. 2019) (quoting *Caple v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49, 53 (Fla. 2000)).

¹² *Love*, at 184.

¹³ *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1217 (Fla. 2004) (quoting *LaForet* 658 So. 2d 55, 61 (Fla. 1995)).

¹⁴ *Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 2d DCA 1990).

Florida’s contracts clause states that “no bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.”¹⁵ Regarding the impairment of an existing contract by the retroactive application of a statute, the Florida Supreme Court recently said:

“[V]irtually no degree of contract impairment is tolerable.” However, we also recognized that the holding that “virtually” no impairment is tolerable “necessarily implies that some impairment is tolerable.” The question thus becomes how much impairment is tolerable and how to determine that amount. To answer that question, in *Pomponio* we proposed a balancing test that “allow[ed] the court to consider the actual effect of the provision on the contract and to balance a party’s interest in not having the contract impaired against the State’s source of authority and the evil sought to be remedied.” “[T]his becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State’s objective, or whether it unreasonably intrudes into the parties’ bargain to a degree greater than is necessary to achieve that objective.”

An impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. However, where the impairment is severe, “[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.” There must be a “significant and legitimate public purpose behind the regulation.”¹⁶

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may reduce revenues to community associations and their management companies related to the preparation and delivery of an estoppel certificate. The lost revenues may create incentives for associations and management companies to raise other assessments or fees.

The bill may reduce expenditures for those seeking an estoppel certificate as part of a real estate transaction. The reduction of the estoppel certificate fee may facilitate real estate transactions by reducing transaction costs.

C. Government Sector Impact:

None.

¹⁵ FLA. CONST. art. I, s. 10.

¹⁶ *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1192 (Fla. 2017) (internal citations omitted for clarity).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 468.4334, 468.436, 718.116, 719.108, and 720.30851.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Fiscal Policy Committee on January 18, 2024:

The CS removed from the bill the provisions that would have prohibited charging any fee for the preparation and delivery of an estoppel certificate. The CS added the following to the bill:

- Estoppel certificate fee limits revert to those in effect June 30, 2022, and future automatic inflationary increases are repealed.
- Delivery is reduced to 5 business days, and the 3 day expedited delivery option with related additional fee is repealed.
- The time for payment is moved from pay on order to pay from closing.
- It is expressly prohibited to charge or collect any fee beyond the limit.
- A community association manager or firm may not be indemnified for errors or omissions related to an estoppel certificate, and can be disciplined for late or incomplete estoppel certificates.

B. Amendments:

None.