

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 611 Residential Properties

**SPONSOR(S):** Civil Justice Subcommittee

**TIED BILLS:** None. **IDEN./SIM. BILLS:** SB 736

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Robinson	Bond

### SUMMARY ANALYSIS

When an ownership interest in a home, cooperative, or condominium is transferred, the new owner is jointly and severally liable with the previous owner for unpaid assessments owed to a homeowners, cooperative, or condominium association. Unpaid assessments may also become a lien on the parcel. To protect against undisclosed financial obligations and to transfer title that is free of any lien or encumbrance, buyers often request that the seller provide an estoppel certificate from any association of which the unit or parcel is a part. An estoppel certificate certifies the total debt owed to the association for unpaid financial obligations by a parcel owner, unit owner, or mortgagee as of a specified date.

This bill amends the law governing homeowners, cooperative and condominium associations (collectively "association") to:

- Provide for the standardization of information in an estoppel certificate issued by an association.
- Reduce the time that an association has to respond to a request for an estoppel certificate.
- Specify that an estoppel certificate may be delivered by mail, hand, or electronic means.
- Establish maximum fees an association may charge for the issuance of an estoppel certificate.
- Revise the time for payment of fees for the preparation an estoppel certificate.
- Provide that an association waives the right to collect moneys owed if such moneys are not stated in the estoppel certificate or if the association fails to issue the certificate.

The changes reflect recommendations made to the Legislature by the Community Association Living Study Council.

The bill does not appear to have a fiscal impact on state or local governments.

The bill takes effect July 1, 2015.

HB 611, as filed, was referred to the Civil Justice Subcommittee, the Business and Professions Subcommittee, and the Judiciary Committee.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

Condominium<sup>1</sup> and cooperative<sup>2</sup> associations are governed internally by an association whose members are the owners of units within the association. Many, but not all, residential communities are similarly governed by a homeowners association<sup>3</sup> made up of parcel owners. Associations are in effect a partnership between unit or parcel owners with a common interest in real property. To operate, an association must collect regular assessments from the unit owners and parcels owners in order to pay for common expenses, management, maintenance, insurance, and reserves for anticipated future major expenses. Sections 718.111(4), 719.104(5), and 720.308, F.S., provide for the assessment and collection of periodic and special assessments to fund an association. A unit or parcel owner is liable for all assessments that come due while he or she is the owner, and is jointly liable with past owners for any assessment owed by such previous owners.<sup>4</sup> Unpaid assessments may also become a lien on the parcel.<sup>5</sup>

To protect against undisclosed financial obligations and to ensure that title is transferred free of any lien or encumbrance, buyers in an ordinary sale of a unit or parcel insist that all assessments be brought current through the date of sale, and an owner's title insurance company (if purchased) insures the buyer should the closing agent not properly see to payment of assessments through closing.

Accordingly, buyers, sellers, lenders, and other entities involved in the sale or refinance of a unit or parcel rely on estoppel certificates issued by an association to ascertain the amount to be collected and applied at closing. An estoppel certificate issued by an association certifies the total debt owed to the association for unpaid financial obligations by a parcel owner, unit owner, or mortgagee as of a specified date. The association is legally bound<sup>6</sup> by the amount in the estoppel certificate and is barred from asserting a claim of moneys due that contradicts the information provided in the estoppel certificate against any third party who relies on such certificate.<sup>7</sup>

#### Fees for Preparation of Estoppel Certificate

A homeowners or condominium association may charge a fee for the preparation of an estoppel certificate as long as the fee is established by a written resolution adopted by the board, or provided by a written management, bookkeeping, or maintenance contract.<sup>8</sup> A cooperative association may also charge a fee, but there is currently no similar condition in ch. 719, F.S., on the establishment of such fee. Current law also provides no limitation on the amount of the fee that may be charged by an

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<sup>1</sup> A condominium association means, in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership. Section 718.103(2), F.S.

<sup>2</sup> A cooperative association means the corporation for profit or not for profit that owns the record interest in the cooperative property or a leasehold of the property of a cooperative and that is responsible for the operation of the cooperative. Section 719.103(2), F.S.

<sup>3</sup> A homeowners' association is a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. Section 720.301(9), F.S.

<sup>4</sup> Sections 718.116(1), 719.108(1), and 720.3085(2)(b), F.S.

<sup>5</sup> Sections 718.116(5), 719.108(4), and 720.3085, F.S.

<sup>6</sup> "Estoppel" means a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. *Black's Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS.

<sup>7</sup> Sections 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

<sup>8</sup> Sections 718.116(8)(d) and 720.30851(3), F.S.

association other than that such amount must be "reasonable."<sup>9</sup> Neither the Legislature nor the courts have provided guidance on what constitutes a reasonable fee for an estoppel certificate. This has caused variations in the amount of the fee charged by associations for the preparation of an estoppel certificate.

Additionally, any fee charged by a homeowners' or condominium association for an estoppel certificate is payable upon preparation of the certificate.<sup>10</sup> As estoppel certificates are generally required to close the sale or refinancing of a home and must be requested earlier than the time of closing, the funds must be paid solely by one party to the transaction, usually the seller, rather than from the closing settlement proceeds. However, current law does provide that if the certificate was requested in conjunction with the sale or mortgage of a unit or parcel but the sale does not occur, a homeowners or condominium association must refund the fee, but only to a non-owner payor.<sup>11</sup> The refund becomes the obligation of the unit or parcel owner and the homeowners or condominium association may collect it from the owner in the same manner as an assessment.<sup>12</sup> Accordingly, owners may be required to pay an estoppel fee even where closing does not occur due to the early payment requirement or the obligation to reimburse a homeowners or condominium association for a fee refund given to a non-owner payor.

After a series of public meetings in 2014, the Community Association Living Study Council,<sup>13</sup> by unanimous vote, recommended to the Legislature that a reasonable cap be established for estoppel certificate fees and that such fees be tiered.<sup>14</sup> The Council proposed several additional factors that should be considered when determining the amount of the fee including whether or not the owner is current in fees, delinquent in fees, or estoppel certificates were requested in conjunction with a bulk purchase.<sup>15</sup>

### **Effect of Proposed Changes - Fees for Preparation of Estoppel Certificate**

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., to authorize an association to charge a fee for the delivery as well as the preparation of an estoppel certificate. The bill establishes a maximum fee of \$100 for the preparation and delivery of an estoppel certificate. An association may charge an additional supplemental fee of up to \$50 under each of the following circumstances:

- The owner is delinquent with respect to moneys owed to the association and his or her account has been referred for collection;
- Expedited delivery of an estoppel certificate is requested and made; or
- An additional estoppel certificate is requested within 30 days after the most recently delivered estoppel certificate.

However, notwithstanding the authority to charge up to \$100 for an estoppel certificate, if a unit or parcel owner meets certain requirements and makes a simultaneous request for the estoppel certificate of multiple units owned by the unit or parcel owner, the association may deliver the statement of moneys due in one or more estoppel certificates and the total fee that may be charged may not exceed:

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<sup>9</sup> Sections 718.116(8)(c) and 719.108(6), F.S.; There is no corresponding requirement in ch. 720, F.S., that the fee charged by a homeowners' association be reasonable.

<sup>10</sup> Sections 718.116(8)(d) and 720.30851(3), F.S.; The time for payment of the fee to a cooperative association is not provided under current law.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> The Community Association Living Study Council was created by the Legislature in 2008 to receive input from the public regarding issues of concern with respect to community association living and to advise the Legislature concerning revisions and improvements to the laws relating to community associations. The council consisted of seven members appointed by the President of the Senate, the Speaker of the House Representatives, and the Governor. An ex officio nonvoting member was appointed by the Director of the Division of Florida Condominiums, Timeshares, and Mobile Homes. The Council was abolished by the Legislature in 2014. See s. 718.50151, F.S. (2013); Ch. 2014-133, L.O.F.

<sup>14</sup> Community Association Living Study Council, *Final Report*, March 31, 2014, available at <http://www.myfloridalicense.com/Dbpr/lsc/documents/2014CALSCReport.pdf> (last visited Feb. 26, 2015).

<sup>15</sup> *Id.*

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

The bill also repeals the requirement that the fee for an estoppel certificate be paid upon preparation by an association. Where an estoppel certificate is requested in conjunction with the sale or refinancing of a unit or parcel, the fee and any supplemental fees are due and payable to an association no earlier than the closing and must be paid from the closing settlement proceeds. Since the fees must be paid from the closing settlement proceeds, the bill repeals the provision authorizing a refund of fees by a homeowners or condominium association to a non-owner payor as no fee will have previously been paid. However, if the sale does not occur within 60 days after the estoppel certificate is delivered, the fee is the obligation of the owner and may be collected by an association in the same manner as an assessment.

The preparation and delivery of an estoppel certificate may not be conditioned upon the payment of any other fees not authorized by the bill.

### **Form and Delivery of Estoppel Certificate**

An association is required to provide an estoppel certificate within 15 days after receiving a request<sup>16</sup> from a unit or parcel owner, unit or parcel mortgagee, or the designee of the owner or mortgagee.<sup>17</sup> Although the certificate acts as a bar and prevents the association from later asserting a claim or right that contradicts the information in the certificate, current law is largely silent on the specific contents and form the certificate. An estoppel certificate issued by a homeowners or condominium association must only set forth all assessments and other moneys owed to the association with respect to the unit or parcel, disclose any fee charged by the association for the preparation of such certificate, and be signed by an officer or authorized agent of the association.<sup>18</sup> An estoppel certificate issued by a cooperative association must only set forth the amount of assessments or other moneys owed.<sup>19</sup> Some associations provide the amount of assessments and other moneys owed to the association in one lump sum while others provide an itemized breakdown of assessments, late fees, interest, etc. The amount in the certificate may reflect the amount presently owed or the amount owed through a given date a few weeks or months into the future. Accordingly, the information provided in estoppel certificates varies among associations.

Additionally, although current law does not restrict the method in which an association may provide an estoppel certificate to an owner or mortgagee, the Community Association Living Study Council, by unanimous vote, recommended to the Legislature that the law governing community associations authorize the use of digital communications.<sup>20</sup>

### **Effect of Proposed Changes - Form and Delivery of Estoppel Certificate**

The bill amends ss. 720.30851 and 718.116(8), F.S., relating to homeowners and condominium associations, to provide additional specific requirements for the form and content of an estoppel certificate. An estoppel certificate must be dated as of the date it is delivered and set forth all assessments and other moneys owed to the association, including costs and reasonable attorney's fees incurred in collection of the unpaid assessments, as reflected in the official records of the association, through at least 30 days after the date of the estoppel certificate.

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<sup>16</sup> A request to a condominium association must be in writing. Section 718.116(8), F.S.

<sup>17</sup> Sections 718.116(8), 719.108(6), and 720.30851, F.S. The cooperative act does not currently require that a cooperative association provide an estoppel certificate to the designee of the owner or mortgagee.

<sup>18</sup> *Id.*

<sup>19</sup> Section 719.108(6), F.S.

<sup>20</sup> *Supra* at note 14.

Section 719.108(6), F.S. is also amended to provide that an estoppel certificate issued by a cooperative association be in the same form provided in current law for an estoppel certificate issued by homeowners and condominium associations with such additional information required for homeowners and condominium estoppel certificates as provided by this bill.

The bill reduces the period of time in which an association must respond to a request for an estoppel certificate from 15 days to 10 days and specifies that the certificate may be delivered by mail, hand, or electronic means. All requests for an estoppel certificate from an association must be written and may also be made the designee of an owner or mortgagee.

### **Compliance by Association**

Under current law, a unit or parcel owner may compel compliance with the provisions governing the issuance of an estoppel certificate from a homeowners' or condominium association by bringing a summary procedure pursuant to s. 51.011, F.S.<sup>21</sup> The prevailing party is entitled to recover reasonable attorney's fees and costs.<sup>22</sup>

The bill repeals the authority to compel compliance from a homeowners or condominium association by resort to the summary procedure specified in s. 51.011, F.S. If an association fails to respond to a request for an estoppel certificate, the bill provides that the association waives any claim, including a claim of lien against the unit or parcel, for moneys owed to the association that should have been shown on the estoppel certificate against any person who in good faith would have relied on such certificate, as well as that person's successors and assigns.

### **Other Changes**

Any person, other than the owner of a unit or parcel, who relies upon an estoppel certificate issued by an association, is protected by the estoppel effect of the certificate.<sup>23</sup> Accordingly, an association would be unable to assert a claim for an amount of unpaid assessments against a purchaser of a unit or parcel if that amount contradicted the amount of unpaid assessments provided by the association in an estoppel certificate during the closing of the sale. However, the protections of the estoppel effect extend only to such third parties and although an owner may pay a fee to obtain the certified amount of unpaid assessments and moneys owed to the association, the association is not estopped from asserting a contradictory claim in the future against the owner. The bill amends current law to expressly provide that the association waives the right to collect any money owed in excess of the amount set forth in the estoppel certificate. Such waiver extends to any person, which would include any owner, who in good faith relied upon the certificate as well as the person's successors and assigns.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 718.116, F.S., relating to assessments; liability; lien and priority; interest; collection.

Section 2 amends s. 719.108, F.S., relating to rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.

Section 3 amends s. 720.30851, F.S., relating to estoppel certificates.

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<sup>21</sup> Sections 718.116(8)(b) and 720.30851(2), F.S.; Section 51.011, F.S., specifies a summary procedure for actions that specifically provide for this procedure by statute or rule. Under the summary procedure, all defenses of law or fact are required to be contained in the defendant's answer which must be filed within five days after service of process of the plaintiff's complaint. If the answer incorporates a counterclaim, the plaintiff must include all defenses of law or fact in his or her answer to the counterclaim and serve it within five days after service of the counterclaim. (Fla. R. Civ. Pro. 1.140, requires an answer, including any counterclaims, within 20 days after service of the complaint.) No other pleadings are permitted, and all defensive motions, including motions to quash, are heard by the court prior to trial. Postponements are not permitted for discovery, and the procedure also provides for an immediate trial, if requested.

<sup>22</sup> *Id.*

<sup>23</sup> Sections 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

Section 4 provides an effective date of July 1, 2015.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

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

To the extent that an association charges more than \$100 for the issuance of an estoppel certificate, the bill may have a positive economic impact on unit and parcel owners of such association by reducing the amount of fees required to obtain an estoppel certificate. In such instance there would be a corresponding negative reduction in such fees collected by associations.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the state constitution both prohibit the legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted.

The United States Supreme Court has set forth the following principles in examining a law under an impairment analysis, ruling:

[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). Referring to the *Allied* opinion, the Florida Supreme Court added the following clarification to the analysis:

(a) Was the law enacted to deal with a broad, generalized economic or social problem?

(b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?

(c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

*Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779 (Fla. 1979).

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

n/a