

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for CS/HB 791 Residential Properties

**SPONSOR(S):** Finance & Tax Committee

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Finance & Tax Committee	11 Y, 4 N	Pewitt	Langston

### SUMMARY ANALYSIS

The proposed committee substitute amends the statutes relating to various forms of residential properties, including condominiums, cooperatives, and homeowners' associations. Specifically, the proposed committee substitute:

- Amends the definition of "developer" to exclude certain owners who own small numbers of condominium units and certain timeshare trustees;
- Regulates the order of application of payments received by a condominium or cooperative association for past due assessments;
- Revises provisions related to fines and penalties assessed by associations;
- Provides that a homeowners' association may only levy fines up to \$100, unless otherwise provided in the association's governing documents;
- Provides that a homeowners' association member that fails to pay a fine may be suspended from the board of directors or barred from running for the board;
- Provides that a homeowners' association's failure to provide notice of the recording of an amendment does not affect the validity or enforceability of the amendment;
- Authorizes non-profit corporation proxy voting based on a reproduction of the original proxy;
- Updates the definition of "governing documents" for homeowners' associations to include the rules and regulations that have been adopted by the association; and
- Extends the time limitation for classification as bulk assignee or bulk buyer under the Distressed Condominium Relief Act until July 1, 2018 from July 1, 2016.

The proposed committee substitute does not appear to have a fiscal impact on state or local government.

The proposed committee substitute provides an effective date of July 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### ***Condominiums***

A condominium is a form of ownership of real property created pursuant to ch. 718, F.S., which is comprised of units which are individually owned, but have an undivided share of access to common facilities.<sup>1</sup> A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.<sup>2</sup> A declaration is similar to a constitution in that it governs the relationships among condominium unit owners and the condominium association. Specifically, a declaration of condominium may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.<sup>3</sup>

All unit owners are members of the condominium association, an entity responsible for the operation of the common elements owned by the unit owners, which operates or maintains real property in which unit owners have use rights.<sup>4</sup> The condominium association is overseen by an elected board of directors, commonly referred to as a "board of administration."<sup>5</sup> The association enacts condominium association bylaws, which govern the administration of the association, including, but not limited to, quorum, voting rights, and election and removal of board members.<sup>6</sup>

##### ***Cooperative Associations***

A cooperative is a form of real property ownership created pursuant to ch. 719, F.S. The real property is owned by the cooperative association,<sup>7</sup> and individual units are leased to the residents, who own shares in the cooperative association.<sup>8</sup> The lease payment amount is the pro-rata share of the operational expenses of the cooperative. Cooperatives are, in practice, operated in a fashion very similar to condominiums, and the laws regulating cooperatives are in many instances nearly identical.

##### ***Homeowners' Associations***

A homeowners' association is a corporation responsible for the operation of a community subdivision. Only homeowners' associations whose covenants and restrictions include mandatory assessments are regulated by the statute.<sup>9</sup>

##### ***Distressed Condominium Relief Act***

In 2010, the Legislature passed the Distressed Condominium Relief Act (Act) in order to relieve developers, lenders, unit owners, and condominium associations from certain provisions of the Florida Condominium Act. The Act was intended to relieve specific parties from certain liabilities so as to enable economic opportunities for successor purchasers of distressed condominiums.<sup>10</sup>

Specifically, the Act created categories of "bulk buyers" and "bulk assignees." A bulk assignee is a person who acquires more than seven condominium parcels as provided in s. 718.703, F.S., and

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<sup>1</sup> Section 718.103(11), F.S.

<sup>2</sup> Section 718.104(2), F.S.

<sup>3</sup> *Id.* at (5).

<sup>4</sup> Section 718.103(2), F.S.

<sup>5</sup> *Id.* at (4).

<sup>6</sup> Section 718.112, F.S.

<sup>7</sup> Section 719.103(2), F.S.

<sup>8</sup> *Id.* at (26).

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

<sup>10</sup> Chapter 2010-174, L.O.F.

receives an assignment of some or all of the rights of the developer under specified recording documents.<sup>11</sup> Similarly, a bulk buyer is a person who acquires more than seven condominium parcels, but who does not receive an assignment of developer rights other than the right to: conduct sales, leasing, and marketing activities within the condominium; be exempt from payment of working capital contributions; and be exempt from rights of first refusal.<sup>12</sup>

Because the Act was created in reaction to the "massive downturn in the condominium market which has occurred throughout the state," it was not intended to be open-ended. Rather, the intent of the Legislature was to enact the relief only for "a specific and defined period."<sup>13</sup> Accordingly, the time limitation for classification as a bulk assignee or bulk buyer is until July 1, 2016.

## **Effect of the Bill**

### **Condominiums - Definition of Developer**

Section 718.103(16), F.S., defines a developer as one "who creates a condominium or offers condominium [units] for sale or lease in the ordinary course of business . . . ." In essence, the statute creates two classes of developers: those who create the condominium by executing and recording the condominium documents and those who offer condominium units for sale or lease in the ordinary course of business. There are advantages that may accrue with the status as successor developer, including acquisition of certain developer-retained rights under the condominium documents and the ability to control the condominium association by electing or designating a majority of the directors of the condominium association board of directors. On the other hand, there are certain disadvantages, including potential warranty liability, liability for prior financial mismanagement of the condominium association, and loss of the ability to control the condominium association.<sup>14</sup>

The proposed committee substitute amends the definition of "developer" in s. 718.103(16), F.S., to exclude:

- A person who owns 7 or fewer units operated by an association consisting of 40 or fewer units or who owns less than 20 percent of the units operated by an association consisting of more than 40 units; and
- The trustee and any related trust association of a timeshare trust.

### **Condominiums - Association Insurance and Repair of Uninsured Events**

Current law, s. 718.111(11), F.S., provides that condominium property that is damaged by an insurable event must be repaired or replaced by the association as a common expense. If the damage is not the result of an insurable event, the association or the unit owners are responsible for the repair or replacement, as determined by the declaration or bylaws. The proposed committee substitute specifies that in cases where the damage is not the result of an insurable event, the *maintenance* provisions of declaration or bylaws determine whether the association or the unit owners are responsible for the repair or replacement.

### **Condominiums and Cooperatives - Assessments**

Sections 718.116(3) and 719.108(3), F.S., provide that any payment received by a condominium or cooperative association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then

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<sup>11</sup> Section 718.703(1), F.S.

<sup>12</sup> *Id.* at (2).

<sup>13</sup> Section 718.702, F.S.

<sup>14</sup> Schwartz, *The Successor Developer Conundrum in Distressed Condominium Projects*, The Florida Bar Journal, Vol. 83, No. 7, July/August 2009.

to the delinquent assessment. This payment structure applies in spite of any restrictive endorsement, designation, or instruction placed on or accompanying a payment.

The proposed committee substitute amends ss. 718.116(3) and 719.108(3), F.S., to provide that the required distribution of delinquent assessment payments also applies in spite of any purported accord and satisfaction.<sup>15</sup> The proposed committee substitute states that the amended sentences are intended to clarify existing law.

### **Condominiums, Cooperatives, and Homeowners' Associations - Fines and Penalties**

Current law authorizes condominium, cooperative, and homeowners' associations to levy fines against owners or members who violate the association's rules or other governing documents.<sup>16</sup> A fine may only be levied after the association has provided the owner or member notice and a hearing. If an owner or member fails to pay an imposed monetary obligation, the association may suspend his or her right to use common elements, facilities, or areas and may suspend his or her voting rights. Additionally, failure by an owner or member of a condominium or cooperative association to pay a monetary obligation bars him or her from being nominated for the board,<sup>17</sup> and, if he or she is a condominium board member, failure to pay after 90 days results in abandonment in his or her seat on the board.<sup>18</sup>

The proposed committee substitute amends ss. 718.303, 719.303, and 720.305, F.S., to provide general uniformity among the three provisions. The proposed committee substitute specifies that it is the board of administration of the association that levies any fines and that the committee formed to hear potential fines is limited to that purpose and must be impartial.

With regard to condominium and homeowners' associations, the proposed committee substitute provides that when an owner or member's voting rights have been suspended, the total number of voting interests of the association must be reduced by the number of suspended voting interests when calculating the total percentage or number of all voting interests available to take or approve any action. Additionally, any suspensions imposed apply even if the suspension arose from less than all of the units or parcels owned by the member.

With regard to homeowners' associations only, the proposed committee substitute provides that a fine may not exceed \$100 per violation, unless a greater amount is provided in the association's governing documents. The proposed committee substitute also provides that an association member's failure to pay a monetary obligation bars him or her from being nominated for the board, and, if he or she is a board member, failure to pay after 90 days results in abandonment in his or her seat on the board.

### **Homeowners' Associations - Amendments to Governing Documents**

Section 720.306(1), F.S., provides that a homeowners' association may amend its governing documents. The process for amendment, and the vote required is generally found in the governing documents. Once adopted, an amendment to the governing documents must be recorded in the public records. Generally, a homeowners' association must furnish each member with a copy of an amendment within 30 days of recording; however, in lieu of providing a copy of the recorded amendment, the association may provide notice to members that the amendment was adopted and identify the book and page number or instrument number of the recorded amendment.

The proposed committee substitute amends 720.306(1), F.S., to provide that the association's failure to timely provide notice of the recording of the amendment does not affect the validity or enforceability of the amendment.

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<sup>15</sup> Generally, an accord and satisfaction occurs when a person against whom a claim is asserted proves that debt payment instrument or an accompanying written communication contained a conspicuous statement that the instrument was tendered as full satisfaction of the claim. The result is that the claimed debt is discharged. See s. 673.3111, F.S.

<sup>16</sup> Sections 718.303, 719.303, and 720.305, F.S.

<sup>17</sup> Sections 718.112(2)(d)(2) and 719.106(1)(a)2., F.S.

<sup>18</sup> Section 718.112(2)(n)

## Other Effects of the Bill

The proposed committee substitute amends s. 617.0721, F.S., related to proxy voting for members of a non-profit corporation, to provide that a copy, fax, or other reliable reproduction of an original proxy may be substituted for any purpose for which the original proxy could be used.

The proposed committee substitute amends s. 718.111, F.S., and s. 719.104, F.S., to specify that "all other *written* records" of the condominium association and cooperative association which are related to the association but not otherwise specifically required in current law, are considered official records that must be maintained by the association.

The proposed committee substitute amends s. 720.301, F.S., to update the definition of "governing documents" for homeowners' associations, to include the rules and regulations adopted under the authority of the association's declaration, articles of incorporation, or bylaws.

The proposed committee substitute creates s. 720.3015, F.S., to identify ch. 720, F.S., as the "Homeowners' Association Act."

The proposed committee substitute extends the time limitation for classification as a bulk assignee or bulk buyer under the Distressed Condominium Relief Act from July 1, 2016 until July 1, 2018.

The proposed committee substitute provides an effective date of July 1, 2015.

### B. SECTION DIRECTORY:

Section 1 amends s. 617.0721, F.S., related to voting by members.

Section 2 amends s. 718.103, F.S., related to definitions.

Section 3 amends s. 718.111, F.S., related to condominium associations.

Section 4 amends s. 718.112, F.S., related to condominium association bylaws.

Section 5 amends s. 718.116, F.S., related to assessments; lien and priority; interest; and collection.

Section 6 amends s. 718.303, F.S., related to the obligations of owners and occupants, and remedies.

Section 7 amends s. 718.707, F.S., related to the time limitation for classification as bulk assignee or bulk buyer under the Distressed Condominium Relief Act.

Section 8 amends 719.104, F.S., related to cooperatives; access to units; records; financial reports; assessments; and purchase of leases.

Section 9 amends s. 791.108, F.S., related to rents and assessments; liability; lien and priority; interest; collection; and cooperative ownership.

Section 10 amends s. 719.303, F.S., related to obligations of owners.

Section 11 amends s. 720.301, F.S., related to definitions.

Section 12 creates s. 720.3015, F.S., related to the short title.

Section 13 amends s. 720.305, F.S., related to the obligations of members; remedies at law or in equity; and levy of fines and suspension of use rights.

Section 14 amends 720.306, F.S., related to meetings of members; voting and election procedures; amendments.

Section 15 provides an effective date of July 1, 2015.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The proposed committee substitute does not appear to have an impact on state revenues.

#### **2. Expenditures:**

The proposed committee substitute does not appear to have any impact on state expenditures.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

The proposed committee substitute does not appear to have any impact on local government revenues.

#### **2. Expenditures:**

The proposed committee substitute does not appear to have any impact on local government expenditures.

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

The proposed committee substitute does not appear to have any direct economic impact on the private sector.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

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

The proposed committee substitute 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:**

None.

### **B. RULE-MAKING AUTHORITY:**

The proposed committee substitute does not appear to create a need for rulemaking or rulemaking authority.

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

None.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**