

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 653 Community Associations

SPONSOR(S): Commerce Committee; Civil Justice & Claims Subcommittee; Careers & Competition Subcommittee; Moraitis

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Careers & Competition Subcommittee	8 Y, 5 N, As CS	Brackett	Anstead
2) Civil Justice & Claims Subcommittee	10 Y, 4 N, As CS	Stranburg	Bond
3) Government Operations & Technology Appropriations Subcommittee	11 Y, 2 N	Helping	Topp
4) Commerce Committee	23 Y, 3 N, As CS	Brackett	Hamon

SUMMARY ANALYSIS

The Division of Florida Condominiums, Timeshares, and Mobile Homes (Division), located within the Department of Business and Professional Regulation, has regulatory authority over condominium and cooperative associations. The Division has limited authority regarding homeowner's associations (HOA). The bill:

- Removes the future repeal of condo bulk buyer provisions.
- Removes the option that condos, co-ops, and HOAs operating fewer than 50 units may prepare cash receipt reports in lieu of financial statements, and repeals the limitation that co-ops and condos may not waive financial reporting for more than three consecutive years, thereby allowing unlimited waiver.
- Increases the time in which a condo or co-op must respond to a unit owners' request to inspect records; requires electronic records related to voting be retained as official records, and allows notice of board meetings by website.
- Provides an exemption from retrofitting a fire sprinkler system or engineered lifesafety system; allows professional engineers to issue certificates of compliance; allows voting to forego installing engineered life-safety systems; delays the start date of applicability of retrofitting; requires signs for certain buildings that do not retrofit; increases the voting percentage necessary to forego retrofitting; extends permit application deadlines for retrofitting; authorizes electronic voting to forego retrofitting; removes the requirement that a vote to retrofit may only be called once every three years if there has been a vote to forego retrofitting; increases the voting percentage necessary to retrofit if there has been a vote to forego retrofitting.
- Requires that a vote authorizing an alteration or addition to a condo be held prior to beginning work.
- Amends co-op law to mirror condo law regarding removal of board members who are 90 days or more delinquent on payments and restricting co-owners from serving on the board of directors.
- Allows HOAs to provide electronic notice to any member who has provided a fax number or email; provides that write-in nominations are not permitted if elections are not required to fill board positions.
- Amends co-op common expenses to include communication and information services in bulk contracts.
- Removes the ability of a declaration of condo to provide for a termination vote of less than the statutory minimum; reduces the veto provision; extends the re-vote delay after a failed vote and the time before a condo conversion may vote for termination; expands the rights of homestead property owners; changes disclosure requirements of bulk owners before the approval of a termination plan.
- Clarifies that HOAs may apply payments for late assessments to interest, fines, and fees before applying the payments to assessments; adds certain provisions to HOA disclosure summaries.

The bill is not expected to have a fiscal impact on state or local government. The bill may have an indeterminate fiscal impact on the private sector.

The effective date of the bill is July 1, 2017.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0653g.COM

DATE: 4/25/2017

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Division of Condominiums, Timeshares and Mobile Homes (the Division), a division within the Department of Business and Professional Regulation (DBPR), provides consumer protection for Florida residents living in regulated communities through education, complaint resolution, mediation and arbitration, and developer disclosure. The Division has regulatory authority over the following business entities and individuals:

- Condominium Associations;
- Cooperative Associations;
- Florida Mobile Home Parks and related associations;
- Vacation Units and Timeshares;
- Yacht and Ship Brokers and related business entities; and
- Homeowners' Associations (limited to arbitration of election and recall disputes).

A condominium is a form of ownership of real property created pursuant to ch. 718, F.S., comprised of units which may be owned by one or more persons but have an undivided share of access to common facilities.¹ A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.² A declaration governs the relationships among condominium unit owners and the condominium association. 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. The condominium association is overseen by an elected board of directors, commonly referred to as a "board of administration." The association enacts condominium association bylaws, which govern the administration of the association, including quorum, voting rights, and election and removal of board members.

A cooperative is a form of property ownership created pursuant to ch. 719, F.S. The real property is owned by the cooperative association, and individual units are leased to the residents who own shares in the cooperative association.³ The lease payment amount is the pro-rata share of the operational expenses of the cooperative. Cooperatives operate similarly to condominiums and the laws regulating cooperatives are in many instances nearly identical.

A homeowners' association (HOA) is an association of residential property owners in which voting membership is made up of parcel owners, 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.⁴ Only HOAs whose covenants and restrictions include mandatory assessments are regulated by ch. 720, F.S. Like a condominium or cooperative, an HOA is administered by an elected board of directors. The powers and duties of an HOA includes the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include the recorded covenants and restrictions, together with the bylaws, articles of incorporation, and duly adopted amendments to those documents. No state agency has direct oversight of HOAs. Florida law provides procedures and minimum requirements for operating and provides for a mandatory binding arbitration program, administered by the Division, only for certain election disputes.

¹ s. 718.103(11), F.S.

² s. 718.104(2), F.S.

³ s. 719.103(2)(26), F.S.

⁴ s. 720.301(9), F.S.

Official Records – Current Situation

Condominium and cooperative associations are required to maintain official records for at least 7 years. The official records must include:

- A copy of the articles of incorporation, declaration, bylaws of and rules of the association;
- Meeting minutes;
- A roster of all unit owners or members, including the electronic mailing addresses and fax numbers of unit owners consenting to receive notice by electronic transmission;
- A copy of any contracts to which the association is a party or under which the association or the unit owners or members have an obligation;
- Accounting records for the association;
- All contracts for work to be performed including bids;
- All other written records which are related to the operation of the association; and
- All ballots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners.⁵

Unit owners are able to inspect the official records, and a condominium or cooperative must have the records available for inspection within 5 working days of receiving a request to inspect them.⁶

Official Records – Effect of the Bill

The bill:

- Extends the deadline condominiums and cooperatives have to make records available to unit owners from 5 working days to 10 working days.
- Includes electronic records relating to voting to the list of official records that must be kept by the cooperative or condominium association.

Financial Reporting – Current Situation

A condominium, cooperative, and HOA (collectively associations) must complete an annual financial report, and provide each member a copy of the financial report or notice that a copy of the financial report is available upon request.⁷ The type of financial report required by an association is determined by the total annual revenues of the association.

- An association with total annual revenues of less than \$150,000 must prepare a report of cash receipts and expenditures.
- An association with total annual revenues of at least \$150,000 but less than \$300,000 must prepare compiled financial statements.
- An association with total annual revenues of at least \$300,000 but less than \$500,000 must prepare reviewed financial statements.
- An association with total annual revenues of \$500,000 or more must prepare audited financial statements.⁸

Condominiums and cooperatives must, and HOAs may, prepare a report of cash receipts and expenditures in lieu of financial reports regardless of total annual revenues if the association operates fewer than 50 units or parcels.⁹

A condominium or cooperative may annually vote to waive the financial report and prepare a report of cash receipts and expenditures, but it may not waive the financial report requirement for more than

⁵ s. 718.111(12)(a), F.S. and s. 719.104(2), F.S.

⁶ *Id.*

⁷ ss. 718.111(13), 719.104(4), & 720.303(7), F.S.

⁸ *Id.*

⁹ *Id.*

three consecutive years.¹⁰ Industry experts have interpreted waiving a financial report to mean preparing a report of cash receipts and expenditures in lieu of the financial report.¹¹

Financial Reporting – Effect of the Bill

The bill removes the provisions that associations operating fewer than 50 units or parcels may or must prepare cash receipt reports in lieu of financial statements regardless of total annual revenues.

The bill removes the limitation on cooperatives and condominiums that prohibited waiving financial reporting for more than three consecutive years, thus allowing condominiums and cooperatives to waive financial reporting indefinitely (if approved annually by a vote of the membership).

Notice of Board Meetings – Current Situation

Associations are required to notice all board meetings by posting notice in a conspicuous place on the association's property for at least 48 hours. Notice must be posted 14 days before meetings where a nonemergency special assessment or an amendment to the rules regarding unit use is considered.¹²

Condominiums and cooperatives are required to notice all member meetings by mailing, hand delivering, or electronically transmitting notice at least 14 days before the meeting. They must also post notice in a conspicuous place at least 14 days before the meeting. If a condominium or cooperative opts to broadcast notice in lieu of posting notice it must broadcast notice at least four times every broadcast hour of each day for 14 days.¹³

If a parcel owner in a HOA provides written consent, the HOA may provide the parcel owner notice by electronic transmission for board meetings, committee meetings, annual meetings, and special meetings.¹⁴

Notice of Board Meetings – Effect of the Bill

The bill allows condominiums and cooperatives to adopt rules for noticing all board meetings on a website if the time requirements for physically posting the board meetings are met. Any rule adopted for website notice must include a requirement that the cooperative or condominium send an electronic notice providing a hyperlink to the website where the notice is posted, to all unit owners whose email addresses are part of the official records, and in the same manner as notice for a meeting of the members. Notice by website must be in addition to the other notice requirements.

The bill allows a HOA to give notice by electronic transmission to any parcel owner who provided written consent and a fax number or email address to the HOA.

Communication by Board Members for Cooperatives and HOAs – Current Situation and Effect of the Bill

It is not clear if board members for cooperatives and HOAs may use email as a form of communication. Board members for condominiums may use email as a form of communication.¹⁵

The bill allows members of the board of directors for cooperatives and HOAs to use email as a form of communication. However, a board member may not cast a vote via email.

¹⁰ ss. 718.111(13) & 719.104(4), F.S.

¹¹ See Peter M. Dunbar, *The Complete Condominium*, 169 (13th ed. 2012-13).

¹² ss. 718.112(2)(c), 720.303(2)(c), & 719.106(1)(c)(1), F.S.

¹³ ss. 718.112(2)(d) & 719.106(1)(d), F.S.

¹⁴ s. 720.303(2)(c), F.S.

¹⁵ s. 718.112(2)(c), F.S.

Cooperative Common Expenses and Bulk Contracts – Current Situation and Effect of the Bill

Common expenses are normal costs incurred by a cooperative and include:

- Costs for the operation, maintenance, repair, or replacement of cooperative property;
- Costs of carrying out the powers and duties of the cooperative; or
- Costs designated by the cooperative as a common expense.¹⁶

Common expenses are paid by the unit owners of a cooperative and are included in a cooperative's annual budget to its members.¹⁷

Cooperatives may provide in their bylaws that bulk contracts for the cost of a master antenna television system or franchised cable television service are common expenses. Unlike condominiums, cooperatives may not provide bulk contracts for the cost of communication services defined in ch. 202, F.S., information services, or internet services as common expenses.¹⁸

Ch. 202, F.S., defines communication services to mean the transmission, conveyance, or routing of:

- voice, data, audio, video; or
- any other information or signals, including:
 - video services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave; or
 - other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance.
- The term also includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added.

Examples of communication services include:

- Cable and satellite television
- Video and music streaming
- Telephones
- Mobile communications, and similar services¹⁹

Information service is defined as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, using or making available information via communications services.²⁰ The term also includes data processing and other services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information. The term does not include video service.

The bill amends cooperative law to mirror condominium law by providing that bulk contracts for communication services defined in ch. 202, F.S., internet services, and information services may be considered a common expense.

¹⁶ ss. 719.103(9), & 719.107, F.S.

¹⁷ s. 719.103(1), & 719.106(1)(j), F.S.

¹⁸ ss. 719.107, & 718.115(1)(d), F.S.

¹⁹ Florida Department of Revenue, *Florida Communications Services Tax*, <http://floridarevenue.com/taxes/taxesfees/Pages/cst.aspx> (last visited on March 30, 2017).

²⁰ s. 202.11(5), F.S.

Cooperatives' Board of Directors and Board Members – Current Situation and Effect of the Bill

Cooperatives are administered by a board of directors whose members are elected. The board consists of unit owners who have been elected to serve on the board. Directors of the board nominate officers, including president, secretary, and treasurer. The officers are responsible for the duties that are customarily performed by their counterparts in corporations.²¹

Unlike condominiums, cooperatives are not required to have a provision that a director or officer is deemed to have abandoned their post if the officer or director is more than 90 days delinquent in the payment of any monetary obligation to the association.²²

Additionally, cooperatives do not have a provision that prevents co-owners of a unit in residential condominiums that are more than 10 units from serving on the board at the same time unless the co-owners own more than one unit or there are not enough eligible candidates to fill vacancies on the board.²³

The bill amends cooperative law to mirror condominium law by providing that:

- A director or officer is deemed to have abandoned their office if the officer or director is more than 90 days delinquent in the payment of any monetary obligation to the association; and
- In residential cooperatives that are more than 10 units, co-owners of a unit may not serve as members on the board at the same time unless the co-owners own more than one unit or there are not enough eligible candidates to fill vacancies on the board.

Engineered Life Safety System and Fire Sprinkler Retrofitting – Current Situation

Florida's fire prevention and control law, ch. 633, F.S., designates the state's Chief Financial Officer (CFO) as the State Fire Marshal. The State Fire Marshal, through the Division of State Fire Marshal within the Department of Financial Services (DFS), is charged with enforcing the provisions of ch. 633, F.S., and all other applicable laws relating to fire safety and has the responsibility to minimize the loss of life and property in this state due to fire. Pursuant to this authority, the State Fire Marshal regulates, trains, and certifies fire service personnel and fire safety inspectors; investigates the causes of fires; enforces arson laws; regulates the installation of fire equipment; conducts fire safety inspections of state property; and operates the Florida State Fire College.²⁴

In addition to these duties, the State Fire Marshal adopts by rule the Florida Fire Prevention Code (FFPC), which contains all fire safety rules that pertain to the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities and the enforcement of such fire safety laws and rules, at ch. 69A-60, F.A.C. The State Fire Marshal adopts a new edition of the FFPC every three years. The FFPC includes national fire safety and life safety standards set forth by the National Fire Protection Association (NFPA), including the NFPA's Fire Code (1), Life Safety Code (101) and Guide on Alternative Approaches to Life Safety (101A).²⁵

The state fire prevention codes and standards required existing multi-family buildings 75 feet or taller, including condominiums and cooperatives, to be retrofitted with fire sprinkler systems. All condominiums and cooperatives built since 1994 that are 3 stories or more have sprinkler systems and thus are in compliance. The deadline for retrofitting of condominiums and cooperatives has been extended by previous acts.

²¹ s. 719.106(1), F.S.

²² s. 718.112(2), F.S.

²³ *Id.*

²⁴ s. 633.104, F.S.

²⁵ s. 633.202(2), F.S. The National Fire Protection Association was founded in 1896 and delivers information and knowledge through more than 300 consensus codes and standards, research, training, education, outreach and advocacy; and by partnering with others who share an interest in furthering the mission.

The Florida Fire Prevention Code allows an engineered lifesafety system (ELSS) as an alternative to a sprinkler system, and defines an ELSS as a system that consists of a combination of:

- partial automatic sprinkler protection;
- smoke detection alarms;
- smoke control; and
- compartmentation or other approved systems.²⁶

DBPR has estimated that retrofitting a condominium with sprinklers would cost from \$595 to \$8,633 per unit. The costs vary depending on a number of factors such as the extent of sprinkler coverage in the building, the age of the building, the size and number of the units, and type of construction.²⁷

In 2003, the Legislature amended the requirement to retrofit a residential condominium or cooperative building by providing that:

- Unit owners in residential condominiums and cooperatives may vote to forego retrofitting a building with a fire sprinkler system or engineered life safety system (ELSS). A vote to forego retrofitting required a two-thirds vote of all voting interests in the affected condominium or cooperative.
- Local governments may not require retrofitting with a fire sprinkler system before the end of 2014.
- However, residential condominiums and cooperatives could not vote to forego retrofitting a sprinkler system in any “common area” of a “high rise” building.
 - The common area of a high rise building includes any enclosed hallway, corridor, lobby, stairwell, or entryway
 - A high-rise building is defined as a building greater than 75 feet in height. The building height is measured from the lowest level of fire department access to the floor of the highest occupiable story.²⁸

Residential condominiums consist of two or more units, any of which are intended for use as a private temporary or permanent residence. A condominium that contains commercial and residential units is a mixed-use condominium.²⁹ Residential cooperatives consist of units which are intended for use as a private residence. If a cooperative has commercial and residential units then the cooperative is a residential cooperative with respect to those units intended for use as a private residence.³⁰

In 2010, the Legislature again amended the law regarding retrofitting by:

- Providing that unit owners may vote to forego retrofitting a sprinkler system in common areas of a high rise building.
- Reducing the voting requirement to forego retrofitting a sprinkler system from a two-thirds vote to a majority vote.
- Prohibiting local government from requiring retrofitting before the end of 2019.³¹

However, the Legislature also removed the ability of a residential condominium or cooperative to vote to forego retrofitting a building with an ELSS.³²

Currently the law provides that:

- An association, condominium, or unit owner is not required to retrofit common elements, association property, or units of a residential condominium to meet current codes in a building

²⁶ 101:A.31.3.5.11.3 and 101: 31.3.5.11.3 Florida Fire Prevention Code 5th edition 2012.

²⁷ Condominium Sprinkler Retrofit Report, October 2009.

²⁸ ss. 718.112(2)(l) & 719.1055(5) (2003), F.S.

²⁹ s. 718.103(23), F.S.

³⁰ s. 719.103(22), F.S.

³¹ ss. 718.112(2)(l), 719.1055(5), F.S.

³² *Id.*

that has been certified for occupancy by the applicable government entity if the unit owners vote to forego retrofitting by majority vote.

- Local governments may not require retrofitting with a fire sprinkler system before the end of 2019.
- Current law only applies to fire sprinkler systems. There is currently no statutory authority for condominiums or cooperatives to forego retrofitting a building with an ELSS.
- Current law only applies to residential condominiums. Nonresidential condominiums may not forego a requirement to install sprinklers.

For condominiums and cooperatives that complete retrofitting a certificate of compliance from a licensed electrical contractor or electrician may be accepted as evidence of compliance of the units with the applicable fire and life safety code.³³ Certified electrical contractors must be certified by the Board of Electrical Contracting. Registered electrical contractors are licensed by a local jurisdiction, and may practice within that locality.³⁴

Engineered Life Safety System and Fire Sprinkler Retrofitting – Effect of the Bill

The bill:

- Allows a professional engineer, in addition to an electrical contractor or electrician, to provide a certificate of compliance. Professional engineers must be certified by the Board of Professional Engineers.³⁵
- Provides that a condominium or cooperative may also vote to forego retrofitting of an ELSS as well as a fire sprinkler system.
- Provides that a vote to forego retrofitting requires a two-thirds vote of all voting interests.
- Allows all condominium or cooperative buildings that are greater than 75 feet in height to vote to waive retrofitting requirements.
- Prohibits a local authority from requiring retrofitting of a fire sprinkler system or ELSS until on or after January 1, 2022.
- Extends the time an association has to apply for a building permit, if it has not completed retrofitting or voted to forego retrofitting, from December 31, 2019, to December 31, 2021.

Vote to Forego Retrofitting – Current Situation

A vote to forego retrofitting may be obtained by limited proxy, a personally cast ballot at a membership meeting, or by execution of a written consent by the member. The association's vote to forego retrofitting is effective upon recording a certificate attesting to such vote in the public records for the county of the condominium or cooperative.³⁶

The cooperative or condominium must mail or hand deliver each unit owner written notice of the vote. After the vote to forego, notice of the results must be mailed or hand delivered to all unit owners. After notice is provided to each owner, a copy must be provided by the current owner to a new owner before closing, and by a unit owner to a renter before signing a lease.³⁷

If there has been a previous vote to forego retrofitting then a vote to require retrofitting may be obtained at a special meeting of the unit owners called by a petition of least 10 percent of the voting interests. Such vote may be called once every 3 years. Electronic transmission may not be used to provide notice of the special meeting.³⁸

³³ ss. 718.112(2)(l), & 719.1055(5), F.S.

³⁴ s. 489.505(4)(8)(16), F.S.

³⁵ s. 471.005(5), F.S.

³⁶ ss. 718.112(2)(l), & 719.1055(5), F.S.

³⁷ *Id.*

³⁸ *Id.*

DBPR must require condominiums and cooperatives to report the membership vote and recording of a certificate and, if retrofitting has been undertaken, the per-unit cost of such work. DBPR must annually report to the Division of State Fire Marshal of the Department of Financial Services the number of associations that have elected to forego retrofitting.

Vote to Forego Retrofitting – Effect of the Bill

The bill:

- Provides that a vote to retrofit after an affirmative vote to forego retrofitting requires a two-thirds vote of all voting interests.
- Adds electronic voting as a means to vote to forego retrofitting.
- Removes the requirement that notice of a vote to forego and such results be hand delivered or mailed and instead requires that a notice of a vote to forego shall be delivered or mailed to each unit owner.
- Clarifies that failure to timely notice unit owners of the results of a vote to forego does not invalidate the results of the vote as long as notice of the results is provided to the unit owners.
- Provides that a majority of the board of directors may hold a special owners meeting to vote to retrofit if there has already been a vote to forego retrofitting.
- Removes the provision that electronic transmission notice may not be used to notice the special meeting.
- Repeals the requirement that a vote to require retrofitting may only be called once every three years if there has already been a previous vote to forego retrofitting.
- Provides that failure to notify DBPR of a vote to forego and record the certificate will not affect the validity of the vote to forego.
- Provides that timeshare condominiums are subject to the firesafety standards found in s. 721.24, F.S., not the provisions of ch. 718, F.S.

Firesafety Signs on Buildings – Current Situation

In 2008, the Legislature passed the Aldridge/Benge Firefighter Safety Act. The Firefighter Safety Act required any building constructed of light-frame truss-type material to be marked by a sign on the outside of the building.³⁹ These signs served to warn emergency personnel of the construction material of the building when entering, as truss-type construction tends to suffer structural collapses during fires. The Firefighter Safety Act requires the State Fire Marshal to create rules regarding the color, size, and placement of these signs on all buildings with light-frame truss-type construction.⁴⁰ The State Fire Marshal and local fire officials are responsible for the enforcement of these rules.⁴¹ Owners who do not follow these rules are subject to penalties pursuant to the state fire safety and prevention code.⁴²

Firesafety Signs on Buildings – Effect of the Bill

The bill requires the board of a condominium or cooperative that operates a building that has not installed a sprinkler system in the common areas to post a sign on the outside of the building to warn persons conducting fire control and other emergency operations that there is not a sprinkler system in the building. The bill requires the State Fire Marshal to promulgate rules regarding the size and color of the sign, the time period within which a sign must be posted, and the location of the sign. However, the rules may not require a condominium or cooperative to post a sign that diminishes the aesthetic value of a building. The State Fire Marshal and local fire officials are in charge of enforcement of the law and rules. Condominiums and cooperatives who fail to comply with the requirements are subject to penalties pursuant to the state fire safety and prevention code.

³⁹ s. 633.222(1), F.S.

⁴⁰ s. 633.222(2), F.S.

⁴¹ s. 633.222(3), F.S.

⁴² *Id.*, citing to s. 633.228, F.S.

Bulk Assignees and Bulk Buyer – Current Situation

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.

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 receives an assignment of some or all of the rights of the developer under specified recording documents. 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.⁴³

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:⁴⁴

“The Legislature further finds and declares that this situation cannot be open-ended without potentially prejudicing the rights of unit owners and condominium associations, and thereby declares that the provisions of this part may be used by purchasers of condominium inventory for only a specific and defined period.”

Originally, the time limitation for classification as a bulk assignee or bulk buyer was until July 1, 2012.⁴⁵ In 2012, the Legislature extended the time limitation to July 1, 2015.⁴⁶ In 2014, the legislature again amended s. 718.707, F.S., to extend to July 1, 2016.

Finally, in 2015, the legislature again amended s. 718.707, F.S., to provide that a person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the parcels were acquired between July 1, 2010, and July 1, 2018.

Bulk Assignees and Bulk Buyer – Effect of the Bill

The bill removes the time limit on acquisition for classification as a bulk buyer, extending the applicability of the bulk buyer provisions indefinitely.

Termination of a Condominium – Current Situation

Section 718.117, F.S., governs the process for terminating a condominium association. The section begins with legislative findings regarding the purpose of termination of condominium. These findings provide that there should be a statutory method to terminate condominiums to preserve the value of the property and rights of alienation of the owners. The findings also provide that it is against public policy in the state to require condominium operations to continue when to do so constitutes economic waste or is made impossible by law or regulation. These findings apply to all condominiums in the state in existence on or after July 1, 2007.⁴⁷

There are two primary grounds for termination, each governed by its own requirements. First, a condominium may be terminated where there is economic waste or impossibility.⁴⁸ A condominium may

⁴³ s. 718.703, F.S.

⁴⁴ s. 718.702, F.S.

⁴⁵ Chapter 2010-174, L.O.F.

⁴⁶ Chapter 2012-61, L.O.F.

⁴⁷ s. 718.117(1), F.S.

⁴⁸ s. 718.117(2), F.S.

be terminated for "economic waste" if the total cost of construction or repairs necessary to construct the improvements or restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of the units in the condominium. A condominium may be terminated for "impossibility" if "it becomes impossible to operate or reconstruct a condominium to its prior physical configuration because of land use laws or regulations."

A condominium may also be terminated in the discretion of the owners. Commonly referred to as "optional termination," current law provides that unless the condominium declaration provides for a lower percentage, the condominium may be terminated if the termination is approved by at least 80 percent of the total voting interests of the condominium and no more than 10 percent of the total voting interests of the condominium reject the termination. A voting interest of the condominium may not be suspended for any reason when voting on an optional termination. If 10 percent or more of the total voting interests reject a plan of termination, another plan of optional termination may not be considered for 18 months after the date of rejection.⁴⁹

Optional terminations are subject to additional limitations and requirements if 80 percent of the total voting interests are owned by a bulk owner. A bulk owner is defined as a single holder of such voting interests or an owner together with a related entity or entities that would be considered an insider holding such voting interests. These limitations are meant to protect the other unit holders. The limitations include:

- Allowing former unit owners to lease their units if the former condominium units are offered for lease to the public;
- Paying a relocation fee to former unit owners who had a homestead exemption on their units;
- Compensating all unit owners, other than the bulk owner, at least 100 percent of the fair market value of their units, as determined by an independent appraiser selected by the termination trustee;
- An original purchaser from the developer who rejects the plan of termination, whose unit was granted homestead and is current in payment of assessments, other monetary obligations to the association, and any mortgage encumbering the unit on the date of recording of the plan of termination, must receive the original purchase price paid for the unit or current fair market value, whichever is greater; and
- Requiring the plan of termination to provide for the payment of a first mortgage encumbering a unit to the extent necessary to satisfy the lien. The payment may not exceed the unit's share of the proceeds of termination under the plan.⁵⁰

Before a plan of termination is presented to the unit owners for consideration, a bulk owner must prepare a sworn statement with disclosures to the other owners. The bulk owner must identify any person or entity that, directly or indirectly, owns or controls 50 percent or more of the units in the condominium.⁵¹ If these units are owned by an artificial entity or entities, the bulk owner must disclose any natural person who owns or controls, directly or indirectly, 20 percent or more of the artificial entity or entities that constitute the bulk owner. The bulk owner must identify the units it has acquired, the date each unit was acquired, and the total compensation paid to each prior owner by the bulk owner. The relationship of any board member to the bulk owner or any person or entity affiliated with the bulk owner subject to disclosure must also be contained in the statement. The bulk owner must also share the factual circumstances that show that the plan complies with the requirements in the law for optional terminations by a bulk owner and that the plan supports the public policies of the condominium termination law.⁵²

If the members of the board of administration are elected by the bulk owner, the unit owners may elect at least one-third of the members of the board before approval of any plan of termination.

⁴⁹ s. 718.117(3), F.S.

⁵⁰ s. 718.117(3)(c), F.S.

⁵¹ s. 718.117(3)(c)(5)(a), F.S.

⁵² s. 718.117(3)(c)(5), F.S.

Condominiums in which 75 percent or more of the units are timeshare units are not subject to the optional termination provisions of s. 718.117, F.S.

Most condominiums are created as a part of new construction. However, a condominium conversion is allowed. A conversion is where an existing improvement, usually an apartment complex, is converted to the condominium form of ownership. Condominium conversions have special requirements pursuant to Part VI of ch. 718, F.S.

Termination of a Condominium – Effect of the Bill

The bill:

- Adds legislative findings supporting laws on termination of a condominium association.
- Removes the ability of a declaration of condominium to provide for a termination vote of less than the statutory minimum, thus having the effect of requiring at least an 80 percent vote for termination.
- Changes the veto provision from 10 percent to 5 percent.
- Extends the re-vote delay after a failed vote for termination from 18 to 24 months.

The bill extends the time from creation of a condominium by conversion to the time that the condominium association may vote for optional termination from 5 years to 10 years.

Where there is a bulk owner involved in the condominium termination, homestead property owners who object to the plan of termination have special protections. An objecting homestead owner is entitled to:

- Demand to lease their unit for 12 months after the termination on the same terms as similar unit types are being offered to the public;
- Payment of a relocation fee;
- Payment of the higher of the current fair market value of the unit or the amount paid to purchase the unit, provided that the objecting owner was an original purchaser from the developer and provided that the owner is current on his or her mortgage payments.

The bill removes the restriction regarding original purchasers from the developer and removes the restriction requiring that the homestead owner be current on his or her mortgage.

A bulk owner seeking optional termination must make certain disclosures to the other owners. The bill increases disclosure requirements to:

- Change from 50 percent or greater bulk owner must disclose the owner or entity that owns interest before plan is presented to unit owners to 25 percent or greater bulk owner;
- Change from reporting natural persons who own or control 20 percent or more of the artificial entity that is a bulk owner to natural persons who own or control 10 percent or more; and
- Require listing of the factual circumstances that show how the plan supports the public policy of s. 718.117(1), F.S.

The bill is remedial as it addresses the rights and liabilities of the affected parties and therefore applies to all condominiums that have been created under the Condominium Act.

Alterations or Additions to Condominium Property-Current Situation and Effect of the Bill

Condominiums are required to maintain the property of the condominium. In order to maintain condominium property, condominiums may provide a specific procedure to approve material alterations or additions to condominium property in the condominium's declaration, which is the document creating

the condominium. If a condominium's declaration does not provide a procedure to approve material alterations or additions then approval by 75 percent of the voting interests is required to approve any material alterations or additions. It is not clear in current statute if the approval must occur before work begins on the additions or alterations.

The bill provides that approval by 75 percent of voting interests must be obtained prior to work beginning on the material alterations or additions of condominium property.

HOA Elections – Current Situation and Effect of the Bill

HOA are administered by a board of directors whose members are elected.⁵³ A HOA association is required to hold board of director elections at its annual meeting or as provided in its governing documents.⁵⁴ Elections are conducted in accordance with the procedures set forth in the governing documents of the association. An election is not required unless more candidates are nominated than vacancies exist.⁵⁵

The bill provides that if an election is not required because there are fewer or equal candidates than vacancies, and nominations from the floor are not required, then write-in nominations are not permitted. The candidates will commence service on the board of directors regardless of whether a quorum was attained at the annual meeting.

Payment of HOA Assessments – Current Situation and Effect of the Bill

HOAs are authorized to impose assessments on owners. Assessments are sums of money owed by parcel owners to an HOA to fund the HOA.⁵⁶ If assessments or installments of assessments are not paid timely, then they will accrue interest. Any payment received by a HOA for payment of an assessment or installment that accrued interest will first be applied to the interest accrued, then to any administrative late fee, then to any costs and reasonable attorney fees, and then to the delinquent assessment.⁵⁷ The order of payments is the same as condominium law.

The Florida Uniform Commercial Code (UCC) allows a debtor to make a restrictive notation on a payment instrument. Accepting the payment instrument with the notation may then be considered an accord and satisfaction of the outstanding debt.⁵⁸

The bill provides that this application of the payment in HOA law applies notwithstanding the UCC. The bill further provides that this is intended to clarify existing law.

B. SECTION DIRECTORY:

Section 1 creates s. 633.2225, F.S., regarding signs for condominium and cooperative buildings without sprinkler systems.

Section 2 amends s. 718.111, F.S., regarding official records and financial reporting for condominiums.

Section 3 amends s. 718.112, F.S., regarding retrofitting fire sprinkler systems and ELSS for condominiums.

⁵³ ss. 720.303 & 720.307, F.S.

⁵⁴ s. 720.306(2), F.S.

⁵⁵ *Id.*

⁵⁶ Charles F. Dudley & Peter Dunbar, *The Law of Florida Homeowners Associations*, 5 (9th ed. 2012-13).

⁵⁷ s. 720.3085(3), F.S.

⁵⁸ s. 673.3111, F.S. The UCC is a set of regulations adopted by all 50 states with the goal of harmonizing the laws of commercial transactions throughout the United States. Duke Law, *Uniform Commercial Code*, <https://law.duke.edu/lib/researchguides/ucc/> (last visited on March 30, 2017).

Section 4 amends s. 718.113, F.S., regarding alterations or additions to condominium property.

Section 5 amends s. 718.117, F.S., regarding termination of condominium.

Section 6 provides for application to existing condominiums.

Section 7 amends s. 718.707, F.S., regarding classifications of bulk buyer and assignee for condominiums.

Section 8 amends s. 719.104, F.S., regarding official records for cooperatives.

Section 9 amends s. 719.1055, F.S., regarding retrofitting fire sprinkler systems and ELSS for cooperatives.

Section 10 amends s. 719.106, F.S., regarding board members and meetings for cooperatives.

Section 11 amends s. 719.107, F.S., regarding common expenses for cooperatives.

Section 12 amends s. 720.303, F.S., regarding board members and financial reporting for HOA associations.

Section 13 amends s. 720.306, F.S., regarding board elections for HOA associations.

Section 14 amends s. 720.3085, F.S., regarding assessments for HOA associations.

Section 15 provides an effective date.

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:

The provisions of this bill regarding sprinklers and engineered life safety systems appear to have a positive economic impact on condominium and cooperative owners and a corresponding negative economic impact on contractors. Property insurance costs and rates may factor into the economic cost. The impact is unknown because it is dependent upon how many associations opt out.

It appears that this bill may lessen the number of optional terminations and, where they occur, may increase the number of homestead condominium owners entitled to the homestead-level increased payment from a bulk buyer upon termination.

The remainder of the bill does not appear to create any significant private sector economic impact.

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:

A declaration of condominium is a form of contract between the members of the association. Where a recorded declaration may have termination provisions or may implement the protections provided by s. 718.110(4), F.S., the bill may implicate art. I, s. 10 of the Florida Constitution and art. I, s. 10 of the United States Constitution, both of which prohibit the Legislature from passing any law that impairs "the obligation of contracts."

As a threshold matter, a law must "substantially impair" a contractual right for it be constitutionally problematic.⁵⁹ The Florida Supreme Court has also held that "[a]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."⁶⁰

The courts have adopted a balancing test 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."⁶¹ Factors considered in the balancing test include:

- (a) Was the law enacted to deal with a broad, generalized economic or social problem?⁶²
- (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?⁶³

Additionally, the United States Supreme Court has found that parties cannot avoid state regulations and restrictions in an enterprise that is already subject to state regulation by simply entering into a

⁵⁹ *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 779 (Fla.1979) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)).

⁶⁰ *Id.* at 778-79 (citing *United States Trust Co.*, 431 U.S. at 25 (1977)).

⁶¹ *Id.* at 780.

⁶² In determining the purpose of a statute, courts frequently look to the legislature's express statements of intent in the statute. See *Pomponio*, 378 So. 2d at 781 (noting in its analysis of the public purpose of the statute that the specific objectives for the statute are "neither expressly articulated nor plainly evident" in the statute).

⁶³ *Id.* at 779.

contract.⁶⁴ This finding may be particularly relevant given the Florida Supreme Court's statement that, "In Florida, condominiums are creatures of statute and as such are subject to the control and regulation of the Legislature. That body has broad discretion to fashion such remedies as it deems necessary to protect the interests of the parties involved."⁶⁵

The Third District Court of Appeal has found that portions of s. 718.117, F.S., may violate the impairment of contracts provision. In the case, the declaration of a condominium association required a 100 percent vote for optional termination and a 100 percent vote to amend the declaration regarding termination. The association attempted a termination in which it was able to achieve the statutory 80 percent vote. The association argued that the statute controlled over the declaration. The district court of appeal disagreed, relying on the third prong of the *Pompino* test (above) to find that the statute impaired vested contractual rights and thus could not override the 100 percent vote requirement of the declaration.⁶⁶

B. RULE-MAKING AUTHORITY:

The bill authorizes rulemaking by the State Fire Marshal relating to signage for condominium and cooperative buildings without a sprinkler system in the common areas.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 21, 2017, the Careers and Competition Subcommittee adopted a strike-all amendment and reported the bill favorably as a subcommittee substitute. The amendment:

- Required votes related to alteration or additions to condominiums to be held prior to beginning work.
- Removed the provision that prohibited a cooperative from waiving financial reporting requirements for more than 3 consecutive years.
- Removed the provision that allowed cooperatives and homeowners' associations operating fewer than 50 units to prepare a report of cash receipts and expenditures in lieu of a financial report.
- Amended cooperative director and officer requirements by providing that a director or officer is deemed to have abandoned the office if the director or officer is more than 90 days delinquent in the payment of any monetary obligation due the association.
- Amended cooperative board member eligibility by providing that in residential cooperatives that are more than 10 units, co-owners of a unit may not serve as members of the board of directors at the same time unless there are not enough candidates to fill the positions at the time of the vacancy or the co-owners own more than one unit.
- Amended cooperative bulk contracts to include communication services defined in ch. 202, F.S.
- Allowed homeowners' association's to provide electronic notice to any member who has provided a fax number or email address to the association for purposes of receiving notice.

On March 28, 2017, the Civil Justice & Claims Subcommittee adopted a strike-all amendment and reported the bill favorable as a committee substitute. The amendment:

- Required condominium and cooperative buildings that have opted out of installing sprinkler systems or ELSS in common areas to post a sign on their buildings.

⁶⁴ *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983).

⁶⁵ *Century Vill., Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condo. Ass'n*, 361 So. 2d 128, 133 (Fla. 1978).

⁶⁶ *Tropicana Condo. Ass'n v. Tropical Condo., LLC*, 2016 Fla. App. LEXIS 17090 (3D15-2583, November 16, 2016).

- Reinserted the requirement that a unit owner must notify a new owner before closing, or a new renter before signing the lease, that the condominium or cooperative building has opted out of installing a sprinkler system or ELSS.
- Provided that timeshare condominiums are subject to the firesafety provisions in s. 721.24, F.S., not the provisions in ch. 718, F.S.
- Added provisions amending the law relating to condominium termination.
- Added an appropriation to fund DBPR's additional duties relating to condominium terminations.
- Provided that a homeowners' association must have budget reserve for any item with a deferred maintenance cost in excess of \$100,000. How reserves are funded was also funded.
- Added a section to the disclosure summary for a prospective parcel owner in a homeowners' association that the budget of the association may not include reserve funds for deferred maintenance.

On April 24, 2017, the Commerce Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Required that the signs cooperatives and condominiums must post when retrofitting does not occur must not diminish the aesthetic value of the buildings.
- Specified requirements when condominiums and cooperatives provide notice of board meetings by website.
- Provided that professional engineers may provide retrofitting certificates of compliance in addition to electrical contractors and electricians.
- Removed the cross-references to retrofitting requirements for public lodging establishments and transient public lodging establishments regarding retrofitting, thereby maintaining current law.
- Provided that a vote to forego retrofitting and a vote to retrofit after an affirmative vote to forego retrofitting require a 2/3rds vote of all voting interests in the condominium or cooperative instead of a majority vote.
- Removed the requirement that DBPR review optional terminations by residential condominiums.
- Removed the appropriation for DBPR to review optional terminations by residential condominiums.
- Removed the provision that HOAs must fund reserve accounts and certain requirements related to budget meetings for excessive assessments, thereby maintaining current law.
- Removed the provision that HOAs must notify potential owners that the budget of an association may not include sufficient funds for reserve funds, thereby maintaining current law.
- Removed the provision which decreases the amount of time a condominium must maintain bids for contracts for work to be performed from a period of seven years to a period of one year, thereby maintaining the current law of seven years.

This analysis is drafted to the committee substitute as adopted by the Commerce Committee.