

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1257 Community Associations

SPONSOR(S): Tomkow

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	11 Y, 0 N	Wright	Anstead
2) Ways & Means Committee	10 Y, 5 N	Curry	Langston
3) Judiciary Committee			

SUMMARY ANALYSIS

A condominium is a form of ownership of real property comprised of units which may be owned by one or more persons along with an undivided right of access to common elements. A cooperative is real property owned by the cooperative association, and individual units are leased to the residents, who own shares in the cooperative association. The Division of Florida Condominiums, Timeshares, and Mobile Homes, within the Department of Business and Professional Regulation (DBPR), investigates complaints related to financial issues, elections, and unit owner access to official records for condominium and cooperative associations.

A homeowners' association (HOA) is an association of residential property owners in which voting membership is made up of parcel owners, membership is a mandatory condition of parcel ownership, and is authorized to impose assessments.

Related to condominium and cooperative association legal challenges to tax assessments before the value adjustment board, the bill amends current law to clarify that where an association has filed a single joint petition to challenge a tax assessment, an association may continue to represent and defend the unit owners through any related subsequent proceeding in any tribunal on appeal. The association must provide unit owners with notice of its intent to respond to a complaint, and advise the unit owners that they may opt out.

Related to condominium association records, the bill provides that:

- associations must maintain official records in a manner determined by DBPR, and
- when a unit owner or renter requests to inspect the official records, the association must provide the owner or renter with a checklist of all the records that are and are not being made available for inspection.

Related to DBPR regulations, the bill:

- defines "financial issues," and allows DBPR to further define the term; and
- allows DBPR to adopt rules to establish requirements for training programs provided by DBPR.

Related to HOA swimming pools, the bill provides that pools for HOAs that have 32 parcels or less and are not being operated as public lodging establishments are exempt from Department of Health requirements for public pools, except for maintaining water quality standards.

The Revenue Estimating Conference estimates that the bill will reduce local government revenues by \$5.5 million in FY 2020-21, but by -\$1.7 million on a recurring or annualized basis.

The bill has an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Community Associations

The Florida Division of Condominiums, Timeshares and Mobile Homes (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).

Condominiums

A condominium is a form of ownership of real property created pursuant to ch. 718, F.S., also referred to as the Condominium Act,¹ comprised of units which may be owned by one or more persons along with an undivided right of access to common elements.² A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.³ 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 and maintenance of the common elements owned by the unit owners. The condominium association is overseen by an elected board of directors, commonly referred to as a “board of administration.” The board enacts bylaws which govern the administration of the association.

Cooperatives

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.⁴ 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 to those regulating condominiums.

The building and land of a cooperative association are owned by a corporation, not the individual unit owners. A person who purchases a cooperative unit does not receive title to the unit or any portion of the cooperative’s building or land. Instead, the purchaser receives shares of the cooperative association and leases a unit from the association. An interest in a corporation or cooperative is represented by the ownership of stock in the corporation.

An ownership interest in a corporation or cooperative is an interest in personal property, not real property.⁵ Generally, personal property is any object or right that is not real property, such as automobiles, clothing, or stocks.⁶

¹ S. 718.101, F.S.

² “Common elements” means the portions of the condominium property not included in the units. S. 718.103(11), F.S.

³ S. 718.104(2), F.S.

⁴ S. 719.103(2)(26), F.S.

⁵ *Downey v. Surf Club Apartments, Inc.*, 667 So.2d 414 (Fla. 1st DCA 1996).

⁶ Am. Jur. 2d Property § 18.

Real property is anything that is permanent, fixed, and immovable, such as land or a building. At common law, a leasehold, even for as long as 99 years, was not considered an interest in real property. However, a long-term leasehold interest is taxed in the same manner as a fee interest, so courts generally regard long-term leaseholds to be an interest in real property for taxation purposes.⁷

In Florida, a cooperative is treated as real property for some homestead purposes. Even though the legal definition of homestead follows the common law and requires an interest in real property to qualify for the homestead exemption, the Florida Constitution specifically extends the exemption to a cooperative unit.⁸ Florida's homestead laws govern the cooperative for purposes of exemption from forced sale by creditors⁹ and for purposes of the exemption from ad valorem taxation. However, a cooperative is not subject to Florida's homestead protections and is not considered real property for purposes of devise and descent. Devise and descent is the transfer or conveyance of property by will or inheritance.¹⁰

In contrast, the Condominium Act specifically provides that “[a] condominium parcel created by the declaration is a separate parcel of real property, even though the condominium is created on a leasehold.” Thus, an ownership interest in a condominium is expressly converted by statute into an interest in real property. There is no corresponding statute in the Cooperative Act.¹¹ Florida courts have recognized that there is some confusion in this area and that there is a need for clarification on whether a cooperative ownership interest is an interest in real property or personal property.¹²

Homeowners' Associations

A homeowners' association (HOA) is an association of residential property owners in which voting membership is made up of parcel owners, membership is a mandatory condition of parcel ownership, and is authorized to impose assessments that, if unpaid, may become a lien on the parcel.¹³ 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.

Tax Assessments

Background

Condominium association unit owners and cooperative associations unit owners are assessed yearly ad valorem¹⁴ taxes by the county property appraiser.¹⁵ For condominium unit owners, ad valorem taxes for common elements are divided and levied proportionally among individual condominium parcel owners.¹⁶

⁷ *Williams v. Jones*, 326 So.2d 425, 433 (Fla. 1975); See generally, The Florida Bar, *Practice Under Florida Probate Code* Chapter 19 (9th ed. 2017).

⁸ Art. VII, s. 6(a), Fla. Const. (“The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner’s or member’s proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.”).

⁹ Ss. 222.01, and 222.05, F.S.

¹⁰ *Southern Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566, 572 (Fla. 2nd DCA 2002); *Phillips v. Hirshon*, 958 So. 2d 425, 430 (Fla. 3rd DCA 2007); *In re Estate of Wartels*, 357 So.2d 708 (Fla. 1978); Black’s Law Dictionary (11th ed. 2019).

¹¹ S. 718.106(1), F.S.; See generally Ch. 719, F.S.

¹² *Phillips*, 958 So.2d 425; *Levine v. Hirshon*, 980 So.2d 1053 (Fla. 2008).

¹³ S. 720.301(9), F.S.

¹⁴ “Ad valorem tax” means a tax based upon the assessed value of property.” Section 192.001(1), F.S.

¹⁵ S. 194.011, F.S.

¹⁶ S. 718.120(1), F.S.; Office of the Attorney General, Advisory Legal Opinion – AGO 99-12, Mar. 8, 1999.

Current law permits condominium and cooperative associations to file a single joint petition to the Value Adjustment Board ("VAB") contesting the tax assessment of all units within the condominium or cooperative.¹⁷ The association must provide each unit owner notice of the petition and their right to opt out of the appeal, if desired.¹⁸

A decision by the VAB may be appealed to the circuit court.¹⁹ While current law is clear that an association is authorized to act on behalf of all unit owners when filing a petition to the VAB and when initiating an appeal of the VAB's decision, it is unclear whether the association may defend, on behalf of unit owners, an appeal of the VAB's decision by the property appraiser.²⁰

The court in *Central Carillon Beach Condominium v. Garcia* took up this issue in a case of first impression.²¹ Petitioners were two condominium associations who had represented their unit owners in a tax assessment challenge before a VAB (Associations). Respondent was the property appraiser for Miami-Dade County (Appraiser).²²

When the Associations initially challenged their tax assessment, the VAB substantially lowered their assessed property values.²³ As a result, the Appraiser challenged the decision in an appeal to the Miami-Dade Circuit Court, and named the individual unit owners, instead of the Associations.²⁴ In response, the Associations submitted a motion to dismiss the appeal and a motion for certification of the unit owners as a defense class. Both motions were denied by the circuit court, and the Associations appealed the denial of the motion to the Third District Court of Appeal.²⁵

In response, the Appraiser argued that defense class certification should be denied, and the appeal should name individual unit owners, because statutes governing tax assessment challenge procedures require that individual unit owners be named on appeal.²⁶

Section 194.181(2), F.S., states that in any case brought by the **taxpayer or association** contesting the assessment of any property, the county property appraiser shall be party. In any case brought by the property appraiser alleging specific legal violations in the VAB's decision or claiming a certain monetary variance between the assessed value of the property by the property appraiser and the VAB in the decision,²⁷ **the taxpayer shall be party defendant**. "Taxpayer" is defined as the person or other legal entity in whose name property is assessed, including an agent of a timeshare period titleholder.²⁸ In *Central Carillon*, the individual unit owners were assessed the taxes, not the associations.²⁹

The Associations argued that this law conflicts with condominium association law which generally allows associations to represent unit owners through their rights of collective representation.³⁰ Section 718.111(3), F.S., in pertinent part, states that:

the association may institute... or appeal actions or hearings in its name on behalf of all unit owners **concerning matters of common interest to most or all unit owners, including, but not limited to**, the common elements; the roof and structural components of a building or other improvements; mechanical,

¹⁷ S. 194.011(3)(e), F.S.

¹⁸ S. 194.171, F.S.

¹⁹ S. 194.011(3)(e), F.S.

²⁰ *Id.*

²¹ *Central Carillon Beach Condominium Association, Inc., et al., v. Garcia, et al., et al.*, 245 So. 3d 869 (Fla. 3d DCA 2018).

²² *Id.* at 869.

²³ *Id.* at 870.

²⁴ *Id.* at 871.

²⁵ *Id.* at 869.

²⁶ *Id.* at 871.

²⁷ S. 194.036(1)(a), (b), F.S. In cases where the property appraiser is claiming a systematic violation of legal requirements, the VAB is the defendant.

²⁸ S. 192.001(13), F.S.

²⁹ *Central Carillon*, *supra* note 20, at 871.

³⁰ *Id.* at 871, 872.

electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and **protesting ad valorem taxes on commonly used facilities and on units; and may defend actions in eminent domain** or bring inverse condemnation actions. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action. (Emphasis added).

The court found that the Associations' argument was unsupported, stating that the provision only addresses ad valorem taxes in one phrase: "protesting ad valorem taxes on commonly used facilities and on units." The Associations protested the ad valorem taxes on behalf of all units, but the lawsuits brought by the Appraiser against the unit owners are not "protests." Rather, they are judicial review proceedings in which the unit owners are defendants. The specific cases in which an association may defend on behalf of all unit owners are "actions in eminent domain."³¹

The Associations argued that because they could bring a class action if they were appealing a decision of the VAB, they "**may** be joined in an action as a representative of that class with reference to litigation...." However, the court found that s. 718.111(3), F.S., was not as precisely applied to the Appraiser's lawsuits against the unit owners as the ad valorem litigation provision, s. 194.181(2), F.S., which states that when an appraiser is the plaintiff seeking circuit court review of the VAB decision, "**the taxpayer shall be the party defendant....**"³²

Based on this statutory interpretation, the court in *Central Carillon* found that current law does not allow such an association to act on behalf of unit owners on appeal where a VAB decision is appealed by the property appraiser.³³

Effect of the Bill

The bill amends current law to clarify that where an association has filed a single joint petition to challenge a tax assessment, a condominium or cooperative association may continue to represent, prosecute, and defend the unit owners through any related subsequent proceeding in any tribunal and any appeals. This provision would apply to cases pending on July 1, 2020.

The bill provides that in any case brought by the property appraiser concerning a value adjustment board decision on a single joint petition filed by a condominium or cooperative association, the association and all unit owners included in the single joint petition are the party defendants.

In order to represent unit owners in such a proceeding, the condominium or cooperative association must provide unit owners with notice of its intent to respond to or answer the property appraiser's complaint, and advise the unit owners that they may elect to:

- retain their own counsel to defend the appeal;
- choose not to defend the appeal; or
- be represented together with other unit owners in the response or answer filed by the association.

Such notice must be mailed, delivered, or electronically transmitted to unit owners and posted conspicuously on the condominium or cooperative property in the same manner for notice of board meetings. Any unit owner who does not respond to the association's notice will be represented in the response or answer filed by the association.

Specific to the Condominium Act, the bill provides that a condominium association, in its own name or on behalf of some or all unit owners, may institute, file, protest, maintain, or defend any administrative challenge, lawsuit, appeal, or other challenge to ad valorem taxes assessed on units for commonly

³¹ *Id.* at 872.

³² *Id.* at 872.

³³ *Id.* at 873.

used facilities or common elements. The affected association members are not necessary or indispensable parties to such actions. This provision is intended to clarify existing law and would apply to cases pending on July 1, 2020.

Condominium Association Financial Issues

Background

The Division is the agency charged with ensuring that condominium associations comply with the requirements of the Condominium Act (Act). The Division also handles complaints alleging violations of the Act and has complete jurisdiction to investigate complaints and enforce compliance with the Condominium Act for associations that are controlled by a developer, a bulk buyer, or a bulk assignee.³⁴ However, once a developer turns control of the condominium over to the association, the Division only has jurisdiction to investigate complaints related to financial issues, elections, and unit owner access to official records.³⁵

The term “financial issues” is not defined in the Condominium Act. According to DBPR, this can result in confusion for unit owners and associations for purposes of determining what types of complaints the Division can investigate. Defining “financial issues” will give unit owners and associations a better understanding of the types of financial issues that the Division may investigate.³⁶

Effect of the Bill

The bill defines “financial issues” to mean an issue related to:

- operating budgets;
- reserve schedules;
- accounting records;
- notices of meetings;
- minutes of meetings discussing budget or financial issues;
- assessments for common expenses, fees, or fines;
- the commingling of funds; and
- any other record necessary to determine the revenues and expenses of the association.

The bill also provides that the Division may adopt rules to further define “financial issues.”

³⁴ A bulk assignee is a person who buys more than seven units in a single condominium and receives assignment of any of the developer’s rights. A bulk buyer is a person who buys more than seven units in a single condominium but does not receive any of the developer’s rights. S. 718.703, F.S.

³⁵ Ss. 718.117, & 718.501, F.S.

³⁶ Email from Colton Madill, Deputy Legislative Affairs Director, Department of Business and Professional Regulation, RE: HB 1257 Community Associations (Jan. 22, 2020).

Condominium Association Records

Background

Condominium associations are required to maintain official records for at least 7 years. The official records must include:³⁷

- a copy of the articles of incorporation, declaration, bylaws, and rules of the association;
- meeting minutes;
- a roster of all 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 for work, materials, and equipment;
 - cooperatives and HOAs are only required to maintain bids for one year;
- all ballots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners;
- a copy of the plans, permits, warranties, and other items provided by the developer; and
- all other written records which are related to the operation of the association.

An association must maintain the official records within the state of Florida and make them available for inspection within 45 miles of the association or within the county where the association is located.³⁸

Associations must maintain accounting records in sufficient detail to permit determination of the revenues and expenses or receipts and disbursements attributable to separate units and operating and reserve funds.³⁹

Unit owners and renters may request to inspect and make copies of an association's official records, and the association must make the records available for inspection within 10 business days of receiving a written inspection request.⁴⁰ Failure to provide an owner or renter the requested official records within 10 business days of receiving a written request creates a rebuttable presumption that the association willfully failed to provide the requested records. A unit owner who is denied access to the official records is entitled to damages and costs.⁴¹

An association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections. An association also has the option to make the official records available electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen. Additionally, associations with 150 or more units must maintain a website with digital copies of certain official records such as meeting notices, a copy of the articles of incorporation, declaration, bylaws, and rules of the association.⁴²

Current law provides what records a condominium association must maintain, and where the condominium must maintain the records, but current law does not require associations to maintain the official records in a specific manner or format.⁴³

According to DBPR, not having requirements for how associations must maintain official records can be frustrating and time consuming for unit owners. According to DBPR, this is because a unit owner may request to inspect the official records and an association may give them access to a room full of boxes

³⁷ S. 718.111(12)(a), F.S.

³⁸ S. 718.111(12)(b), F.S.

³⁹ Rule 61B-22.002, F.A.C.

⁴⁰ S. 718.111(12)(c), F.S.

⁴¹ *Id.*

⁴² S. 718.111(12)(b),(g), F.S.

⁴³ See Ch. 718, F.S.

or filing cabinets, and the unit owner may not understand the association's organization of the records.⁴⁴

Effect of the Bill

The bill provides that condominium associations must maintain the official records in a manner and format determined by the Division so that the records are easily accessible for inspection. The bill allows the Division to investigate complaints against condominiums that are related to the maintenance of the official records.

The bill also provides that when a unit owner or renter requests to inspect the official records, the association must provide the owner or renter with a checklist of all the records that are being made available for inspection. The checklist must also include a list of the requested official records that are not being made available for inspection. The association must provide a sworn affidavit by the person responding to the unit owner or renter's request attesting to the accuracy of the checklist along with the checklist. The association must keep a copy of the checklist and the affidavit for at least seven years.

The bill provides that delivery of the checklist and the sworn affidavit creates a rebuttable presumption that the association complied with the unit owner or renter's request to inspect the official records.

According to DBPR, requiring a checklist ensures that unit owners and renters will receive better access to a condominium association's official records, and it will also provide insurance for associations to show they complied with a unit owner or renter's request to inspect the official records.⁴⁵

Condominium Educational Material Published by DBPR

Background

The Division provides training and educational programs for condominium association board directors and unit owners such as publishing educational brochures and holding seminars for board directors and unit owners, and maintains a toll-free hotline to assist unit owners. The Division may also approve board director and unit owner education and training programs offered by third party providers. The Division must maintain a current list of all approved programs and third party providers, and make the list available to board directors and unit owners.⁴⁶

Effect of the Bill

The bill provides that the Division may adopt rules to establish requirements for the training and educational programs provided by the Division.

Homeowners' Association Swimming Pools

Background

The Department of Health (DOH) is responsible for the oversight and regulation of water quality and safety of public swimming pools in Florida under ch. 514, F.S. In order to operate or continue to operate a public swimming pool, a valid operating permit from DOH must be obtained. If DOH determines that the public swimming pool is, or may reasonably be expected to be, operated in compliance with state laws and rules, DOH will issue a permit. However, if it is determined that the pool is not in compliance with state laws and rules, the application for a permit will be denied. DOH is authorized to establish a

⁴⁴ DBPR, supra note 33.

⁴⁵ *Id.*

⁴⁶ S. 718.501(1)(j), F.S.

schedule of fees for plan approval and permitting.⁴⁷ Operating permits must be renewed annually and may be transferred from one name or owner to another.⁴⁸

DOH may, at any reasonable time, enter any and all parts of a public swimming pool to examine and investigate the pool's sanitary and safety conditions.⁴⁹ County health departments are responsible for the routine surveillance of water quality in all public swimming pools.⁵⁰

Pools that are used by condominiums or cooperatives with 32 units or less and which are not being operated as public lodging establishments are exempt from DOH's requirements for public pools. HOA pools are not exempt from DOH regulation, even where the HOA has 32 homes or less.⁵¹

Effect of the Bill

The bill provides that pools for HOAs, like current law for condominium and cooperative associations, that have 32 parcels or less and are not being operated as public lodging establishments are exempt from DOH's requirements for public pools, except for maintaining water quality standards.

B. SECTION DIRECTORY:

- Section 1 Amends s. 194.011, F.S., allowing condominium and cooperative associations to represent unit owners in certain proceedings.
- Section 2 Amends s. 194.181, F.S., allowing condominium and cooperative associations to represent unit owners in certain proceedings.
- Section 3 Amends s. 514.0115, F.S., relating to Department of Health regulations of homeowners' association swimming pools.
- Section 4 Amends s. 718.111, F.S., allowing condominium associations to represent unit owners in certain proceedings; relating to official records maintained by the condominium association.
- Section 5 Amends s. 718.501, F.S., defining "financial issues" related to condominium associations; allowing DBPR to establish requirements for certain educational material.
- Section 6 Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. DBPR may see a minor increase in expenditures due to adopting new rules to implement the bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

⁴⁷ S. 514.033, F.S.

⁴⁸ Ss. 514.031(2) and (3), F.S.

⁴⁹ S. 514.04, F.S.

⁵⁰ S. 514.025, F.S.

⁵¹ S. 514.0115(2), F.S.

The Revenue Estimating Conference on January 31, 2020 estimated that the bill will reduce local government revenues by \$5.5 million in FY 2020-21, but by -\$1.7 million on a recurring or annualized basis.

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Homeowners' associations may have less costs associated with maintaining swimming pools. Condominium unit owners may save money by being able to be represented through all phases of a tax assessment appeal.

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

DBPR will need to adopt rules related to establishing requirements for education programs, setting standards and definitions for financial issues, and establishing procedures for the maintenance and sharing of condominium association records. The rulemaking authority provided in the bill is sufficient.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES