STORAGE NAME: h4129.rpp
DATE: April 2, 1998

HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: HB 4129

RELATING TO: Homeowners' Associations

SPONSOR(S): Representative Tobin & Others

COMPANION BILL(S): SB 2068

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) REAL PROPERTY & PROBATE
(2) COMMUNITY AFFAIRS
(3)
(4)
(5)

I. SUMMARY:

HB 4129 amends the law relating to homeowners' associations. The bill:

- Provides a definition of Division;
- Requires board meetings occur in the county in which the community is located;
- Addresses commingling of funds;
- Provides for notice before imposition of additional fees or charges or suspension of voting privileges;
- Provides for earlier transition of the homeowners' association from the developer to the parcel owners;
- Provides a list of documents which must be provided by the developer upon transition;
- Specifies prohibited clauses in homeowners' association documents;
- Requires specified disclosures;
- Requires that all homeowners' associations must be incorporated under ch. 617, F.S.;
- Provides for reserve and operating accounts;
- Precludes developers from employing affiliated entities for upkeep and maintenance; and
- Provides for alternative dispute resolution.

This bill will have a fiscal impact.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Homeowners' associations have been a subject of debate in the Legislature for many years. Chapter 94-350, Laws of Florida, required the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation to conduct a study concerning "laws governing mandatory associations and residential subdivisions" and to report to the Legislature. The division was directed to evaluate any changes which would be "appropriate to protect the interests of consumers." The Legislature was particularly interested in the issues of control of association operations; agreements for recreational amenities, management, and maintenance; and disclosure of covenants concerning real property.

In December 1994, the division produced its *Report on Mandatory Homeowners' Associations* that became the basis for substantive legislation during the 1995 session. Chapter 95-274, Laws of Florida, substantially amended chapter 617, Florida Statutes. Sections 617.301 through 617.312, Florida Statutes, were enacted to govern disclosures to prospective purchasers, association powers and duties, obligations and remedies of members, voting and election procedures, transition of association control, and association contracts. The purposes of these sections are to give statutory recognition to corporations that operate residential communities in this state, to provide procedures for operating homeowners' associations, and to protect the rights of association members without unduly impairing the ability of such associations to perform their functions. These statutes do not apply to associations subject to chapters 718, 719, 721, or 723, Florida Statutes.

Subsection 617.301(7), Florida Statutes, defines a "homeowners' association" as a Florida corporation responsible for the operation of a community in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. The term does not include a community development district or other similar special taxing district created pursuant to statute.

Section 617.303, Florida Statutes, governs an association's powers and duties, including its budget and financial reporting obligations; however, this section does not specifically address the issue of commingling of the association's funds.

Section 617.305, Florida Statutes, specifies the obligations of members of the association, provides for legal remedies and fines and suspension of use rights. This section addresses vacancies on the board of directors. If the association fails to fill vacancies on the board of directors sufficient to constitute a quorum in accordance with the bylaws, any member may apply to the circuit court for the appointment of a receiver.

Section 617.307, Florida Statutes, provides for the transition of control from the developer to the homeowners' association. The statute authorizes members other than the developer to elect the majority of the board of directors of the association when the earlier of two events occurs:

(1) Three months after 90 percent of the parcels in all phases of the community that will ultimately be operated by the homeowners' association have been conveyed to members; or

(2) Such other percentage of the parcels has been conveyed to members, or such other date or event has occurred, as is set forth in the governing documents in order to comply with the requirements of any governmentally chartered entity with regard to the mortgage financing of parcels.

Section 617.309, Florida Statutes, requires that any grant or reservation made by any document with a term in excess of 10 years made by an association before control of the association is turned over to the members other than the developer, which provide for operation, maintenance, or management of the association or common areas must be fair and reasonable.

Section 617.311, Florida Statutes, provides that at any time after filing a complaint relating to a dispute under the homeowners' association provisions, the court may order the parties to enter mediation or arbitration procedures.

Section 689.26, Florida Statutes, requires that a prospective purchaser of property in a mandatory homeowners' association be presented a disclosure summary prior to executing a contract for sale. The statute specifies the form and contents of the disclosure summary, and provides that the disclosure be supplied by the developer, or by the parcel owner if the sale is by an owner other than the developer.

B. EFFECT OF PROPOSED CHANGES:

HB 4129 amends the law relating to homeowners' associations. The bill:

- Provides a definition of "division" to mean the Division of Land Sales, Condominiums & Mobile Homes within the Department of Business and Professional Regulation;
- Requires board meetings occur in the county in which the community is located;
- Prohibits the commingling of funds, but provides an exception for joint investments in investment grade securities;
- Provides for notice before imposition of additional fees or charges or suspension of voting privileges;
- Provides for earlier transition of the homeowners' association from the developer to the parcel owners when the earlier of three specified events occur;
- Provides a list of documents which must be provided by the developer upon transition;
- Specifies prohibited clauses in homeowners' association documents;
- Requires specified disclosures of homeowners' association governing documents to prospective purchasers of real property;

- Requires that all homeowners' associations must be incorporated under ch. 617, F.S.;
- Provides specific funding for and use of reserve and operating accounts;
- Precludes developers from employing affiliated entities for upkeep and maintenance; and
- Provides for alternative dispute resolution. This provision includes the ability to request arbitrator(s) be appointed by the division, or the parties may "apply" to the court for appointment of arbitrator(s). This provision allows filing fees, requires the clerk of court to maintain separate records for these arbitrations, provides for the tolling of the statute of limitations, provides for appeal to the courts, and for enforcement of the arbitration order.

The bill will take effect July 1, 1998.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes.

(3) any entitlement to a government service or benefit?

Yes.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

The bill permits filing fees for an application to the court for arbitration which will be in the same amount as civil action filing fees.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

   a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

      Yes.

   b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

      Yes.

5. Family Empowerment:

   a. If the bill purports to provide services to families or children:

      (1) Who evaluates the family's needs?

          N/A

      (2) Who makes the decisions?

          N/A

      (3) Are private alternatives permitted?

          N/A

      (4) Are families required to participate in a program?

          N/A

      (5) Are families penalized for not participating in a program?

          N/A

   b. Does the bill directly affect the legal rights and obligations between family members?

      N/A

   c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 617.301, 617.303, 617.305, 617.307, 617.309, 617.311, 689.26, Florida Statutes are amended. Sections 617.3075, 617.3076, 617.30765, 617.3077, Florida Statutes are created.

E. SECTION-BY-SECTION RESEARCH:

Section 1.

Section 617.301, Florida Statutes, relating to homeowners' associations, is amended to add a definition of the term "division." "Division" is defined to mean the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation.

Section 2.

Section 617.303(2), Florida Statutes, is amended to require that board meetings be held at a location within the county in which the community is located.

Section 617.303(8), Florida Statutes, is created to prohibit commingling of funds. This new section provides that all funds must be maintained separately in the association's name. Reserve and operating funds of the association may not be commingled, except that an association may jointly invest reserve funds in investment grade securities. This provision is vague in that it does not specify what kinds of funds may be jointly invested with reserve funds, i.e. this could be construed to mean that reserve funds of several associations could be jointly invested. This section further provides that any jointly invested funds must be accounted for separately.

Section 3.

Section 617.305(5), Florida Statutes, is created to provide that prior to any additional fees or charges, including the suspension of voting privileges, written notice of a member's delinquency must be mailed within 30 days after the delinquency or within the time prescribed in the governing documents if the governing documents are more restrictive. Notice is sufficient if mailed to the parcel owner at the address that the developer initially identifies for that purpose, or, if no address is given, to the address provided on the deed of record. The first sentence in this subsection seems to identify

"suspension of voting privileges" as included in the phrase "additional fees or charges." The provision provides for notice by mail, but does not specify "certified" mail. Therefore, the only proof of mailing will be the association's word or record.

In addition, this newly created subsection states that notice is sufficient if mailed to the parcel owner at the address that the "developer" initially identifies for that purpose, or to the address on the deed. This section deals with the association and its members. The association is required by s. 617.303(4)(g), F.S., to maintain a current roster of all members and their mailing addresses. Therefore, it is unclear why this section provides for notice at the address that the "developer" identifies.

Section 4.

Section 617.307, Florida Statutes, relates to transition of homeowners' association control from the developer to the homeowners. This section is amended to accelerate the transition of the association from the developer to its members in phase communities. Transition is to occur upon the happening of the earlier of the following events:

(a) Three months after 90 percent of the parcels have been granted a certificate of occupancy, provided that the total number of parcels is calculated as only those parcels which were platted, site-planned, or otherwise approved by the appropriate governmental authority before the sale of the first unit.

This amendment addresses the issue of large developments which are platted and sold in phases over time, allowing for the transition of control upon the conveyance of 90 percent of a phase, rather than the entire development.

This provision could result in some difficulty for developers to market and show lots and homes. For example, if a homeowner's association in an early phase votes to preclude signs or model homes, this could impede the developer's ability to advertise other lots or homes.

(b) Such other percentage of the parcels has been granted a certificate of occupancy (current law triggers when the specified percentage of parcels are conveyed to members), or such other date or event has occurred, as set forth in the governing documents in order to comply with the requirements of any governmentally chartered entity with regard to the mortgage financing of parcels.

(c) Thirty-six consecutive months have elapsed since the developer last completed a home in the community. This paragraph is newly created.

A new subsection (4) is added to require the developer, at his or her cost, to deliver a complete list of association documents to the board at the time of transition.

Section 5.

Section 617.3075, Florida Statutes, is created to prohibit the inclusion or enforcement of the following clauses within an association's governing documents:

(a) authorizing the developer to unilaterally make changes to the homeowners' association documents after the transition of control from the developer to the nondeveloper members;

(b) prohibiting the homeowners' association from filing a lawsuit against the developer;

(c) authorizing the developer to cast votes in excess of one per lot after the transition of the association to nondeveloper control;

(d) authorizing the developer to veto any action taken by the association after the transition of control of the association from the developer to the nondeveloper members, unless action taken is detrimental to sales or construction activities. A developer must own land in the community in which the homeowners' association has authority.

Subsection (2) clarifies that the prohibition applies prospectively to clauses created on or after the effective date of this act. This should probably be on or after the effective date of this section.

Section 6.

Section 617.3076, Florida Statutes is created to provide for the obligation to make disclosures.

A developer, real estate agent or broker, or the parcel owner, if the sale is by an owner that is not the developer, must make available to all prospective purchasers copies of current governing documents, including copies of standards from sales contracts, articles of incorporation, by-laws, rules, restrictive covenants, and any other document then in effect which governs the rights or duties of the homeowners.

Developers are required to make the governing documents available for inspection during normal business hours. In addition, the developer, real estate agent or broker, or the parcel owner, must make copies of the governing documents available to the prospective purchasers upon request.

The prospective purchaser is obligated to pay the reasonable cost of copying. Copying costs cannot exceed the lesser of 15 cents per page or $75 for copies of all governing documents.

Section 617.3076(2), Florida Statutes, is created to provide that after the transition of the homeowners' association control from the developer to the homeowners, an association must compile at least once every 3 years, all governing documents. If the governing documents have not changed in the prior 3 years, the association must provide a statement on homeowner's association stationery that no changes have been made and attach the statement to the governing documents.

There is no requirement that this information be transmitted to the homeowners. In addition, some small homeowners' associations do not have specific "association stationery."

Section 617.3076(3), Florida Statutes, is created to specify a form for disclosures relating to the homeowners' association, which must be presented to and signed by the

purchaser before executing the contract for sale. The disclosure must be supplied by the developer, or if the sale is by an owner, by the parcel owner or real estate agent or broker. A separate copy of the disclosure statement must be signed at the time of closing and mailed by the seller to the homeowners' association address.

The developer or parcel owner must supply all governing documents to the buyer no later than the date of the contract. The buyer has 24 hours to review the governing documents after executing the contract before the contract becomes binding. This creates a voidability period of 24 hours. This section further provides that if a developer fails to provide a buyer to whom a parcel is conveyed with a copy of the governing documents, the buyer may rescind the contract without penalty at any time up to 15 days after receipt of the governing documents from the developer. This section is unclear as to when this voidability period occurs. the phrase "to whom a parcel is conveyed" may mean after closing. However, the following sentence seems to refer to the sales contract which is executed prior to closing.

Section 7.

Section 617.30765, Florida Statutes, is created to require homeowners' associations to be incorporated under ch. 617, F.S., and to require the recording of the incorporation with the Department of State prior to the sale or occupancy of a home. Some homeowners' associations are not mandatory and are not incorporated currently. This would seem to preclude voluntary homeowners' associations in the future.

Section 8.

Section 617.3077, Florida Statutes, is created to provide for reserve and operating accounts. This section requires that reserve accounts for all expenditures of deferred maintenance, repairs, or replacement of common property be established at the time the association is created.

The reserve accounts must be funded in amounts calculated as follows:

(a) When the association is responsible for parking lots or roadways, the association must fund a paving reserve account annually in an amount not less than 5 percent of the current estimated cost to pave all roads for which the association is responsible. This is unclear as to whether the fund must include a reserve for parking lots.

(b) When the association is responsible "for the exterior of the common property including individual parcels," a common property account must be funded annually in an amount not less than 20 percent of the current estimated cost of all expenses for which the association is responsible. It is unclear what "the exterior of the common property" includes. Does this mean the outside of a club house? grounds only?

(c) When the association is responsible for a clubhouse; tennis, racquetball, basketball, or rollerblading court; or recreational facility, a reserve account for the expected amount of maintenance and repairs that would normally be required at intervals of less than once per year must be funded. This would appear to apply to fairly major repairs and maintenance. No mechanism for calculating the reserve is provided.

(d) When the association is responsible for the maintenance of a pool(s), a reserve for the resurfacing of the pool(s) annually in an amount not less than 20 percent of the estimated cost to resurface the pool(s) must be funded annually.

(e) The association is permitted to fund additional reserve accounts for the maintenance, repair, or replacement of other common property or common property components.

Section 617.3077(2), Florida Statutes, provides for the use of reserve account funds as follows:

(a) Reserve account funds can be expended only for substantial maintenance, repair, or replacement of common property or common property specific components for which the funds were originally deposited, unless, after transition from the developer to the homeowners, two-thirds of a quorum or two-thirds of the voting members of the association, whichever is greater, at a duly noticed meeting, vote to expend the funds for other purposes.

(b) The reserve accounts must be established in the association's name at a bank, savings and loan association, or trust company in the county in which the community is located, and the funds may not be commingled with other funds. This provision seems to be in conflict with s. 617.303(8), F.S., as created in this bill, which provides an exception to the preclusion to commingling of reserve funds.

Section 617.3077(3), Florida Statutes, is created to provide that the association must, at the time the association is created, establish a separate operating account, and the funds cannot be commingled with other funds.

Section 617.3077(4), Florida Statutes, provides that the reserve accounts specified in this section must be maintained by the association throughout its existence unless waived by a majority of the homeowners' association's members. This section does not require that operating accounts be maintained, although they are required to be created initially.

Section 9.

Section 617.309, Florida Statute, is amended to provide that a developer responsible for the upkeep, maintenance, and repair of any aspect of a community may not contract with affiliated businesses or subsidiaries to a business owned or managed by the developer to provide upkeep, maintenance, or repair services unless the charge for the services is at a rate that is competitive with rates charged by independent contractors in the community. This appears to refer to other contractors who are not affiliated with or subsidiaries to a business owned or managed by the developer as opposed to requiring "independent contractors."

Section 10.

Section 617.311, Florida Statutes, is amended to provide for alternative dispute resolution, voluntary mediation, voluntary binding arbitration, and legislative findings.

Section 617.311(1), Florida Statutes, provides legislative findings that support alternative dispute resolution, and recognize that parcel owners are frequently at a disadvantage when litigating against an association.

Section 617.311(2), Florida Statutes, provides definitions of the following terms:

(a) arbitration

(b) dispute (this definition provides what the term includes and what it excludes)

Section 617.311(3), Florida Statutes, encourages voluntary mediation through Citizen Dispute Settlement Centers as provided in s. 44.201, F.S. According to the Office of the State Court Administrator, there are 15 Citizen Dispute Settlement Centers in the state.

Section 617.311(4), Florida Statutes, provides for voluntary binding arbitration.

(a) Two or more parties involved in a dispute may agree in writing to resolve their dispute in voluntary binding arbitration either prior to or after a lawsuit has been filed, provided no constitutional issue is involved.

(b) This section provides that if the parties have agreed to a method for the appointment of one or more arbitrators, the division must proceed with the appointment as prescribed. However, at least the chief arbitrator must meet the qualifications and training requirements under s. 44.106, F.S. If there is no agreement or if the agreement method fails or for any reason cannot be followed, the division, on application of a party, shall appoint one or more qualified arbitrators. This section is unclear as to how the parties contact or make application to the division with their request for an arbitrator(s).

(c) The arbitrators are to be compensated by the parties according to their agreement, but not less than $75 per day. There is no guidance on what constitutes a “day.” According to the Department of Business & Professional Regulation, customary rates for such services range from $150.00 to $200.00 per hour in the private sector.

(d) Within 10 days of the submission of the request for binding arbitration, the division is required to provide for the appointment of the arbitrator(s). The arbitrator(s) must notify the parties of the time and place for the hearing. The hearing must occur in the county in which the homeowner resides. This may be problematic if the homeowner does not reside within the community operated by the association. For example, the property may be a rental unit and the homeowner could reside at a remote location. The statute may require that the hearing be held in a place not convenient to the majority of the witnesses and parties.

(e) Application for voluntary binding arbitration made to the court must be filed and fees paid to the clerk of court as if for complaints initiating civil actions. The clerk of the court must handle and account for these matters as if they were civil actions, “except that the clerk of court shall keep separate the records of the applications for voluntary binding arbitration from all other civil actions.” It is unclear why the parties would apply to the court for arbitration and pay a filing fee if they can accomplish this purpose without paying a fee by applying to the division. If the parties are in litigation and agree to arbitration, this could currently be ordered by the court without the necessity of filing a separate “action” and paying a separate fee as anticipated by this provision.

(f) The statute of limitations is tolled upon filing of the application for binding arbitration. The process for filing for binding arbitration made to the court references "application," however, the process for seeking appointment of arbitrators by the division does not specifically mention an "application." Therefore, it is not clear whether requesting the appointment of arbitrators from the division would operate to toll the statute of limitations.

(g) The chief arbitrator can administer oaths or affirmation and can conduct the proceedings pursuant to the rules of court. The chief arbitrator can issue subpoenas for witnesses and for production of books, records, documents, and other evidence, and may apply to the court for orders compelling attendance and production. It is unclear how "application" to court would occur if there is no pending litigation.

(h) The hearing must be conducted by all of the arbitrators. The final decision is by majority.

(i) The Florida Evidence Code applies to all arbitration proceedings.

(j) An appeal can be made to the circuit court, but is limited to review on the record and not de novo, of:

1. Any alleged failure of the arbitrators to comply with the applicable rules of procedure or evidence.

2. Any alleged partiality or misconduct by an arbitrator prejudicing the rights of any party.

3. Whether the decision reaches a result contrary to the United States or Florida Constitutions.

The harmless error doctrine applies to all appeals.

(k) If no appeal is taken within the time permitted by the rules of court, the decision shall be referred to the presiding judge in the case, or if one has not been assigned, then to the chief judge of the circuit for assignment to a circuit judge. The assigned judge shall enter orders and judgments necessary to carry out the terms of the decision. These orders are enforceable by the contempt powers of the court "and for which judgments execution shall issue on request of a party."

A good portion of the voluntary binding arbitration section appears to mirror s. 44.104, F.S. According to the Office of the State Court Administrator, the voluntary binding arbitration process in s. 44.104, F.S., has been in effect since 1988 but has rarely been used.

Section 617.3077(5), Florida Statutes, relates to court-ordered mediation or arbitration. This is existing law providing that the court may order mediation or arbitration.

Section 11.

Section 689.26, Florida Statutes, prescribes a disclosure summary form for purchasers of property subject to association membership. The bill adds a provision in the form that

the purchaser has received the documents cited in the discloser and agree to the conditions contained therein. The bill also adds a requirement that a separate copy of the disclosure statement must be signed at the time of closing and mailed by the seller to the homeowners' association if the association was established under chapter 617, Florida Statutes.

Section 12.

The act will take effect July 1, 1998.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Unknown.

2. Recurring Effects:

This bill will have an indeterminant fiscal impact on the Department of Business and Professional Regulation, the clerks of court, and the court system.

3. Long Run Effects Other Than Normal Growth:

Unknown.

4. Total Revenues and Expenditures:

Unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Unknown.

2. Recurring Effects:

This bill will have an indeterminant fiscal impact on the clerks of court, and the court system. According to the Association of Court Clerks, several provisions of the bill are unclear as it relates to their duties and fees. The Clerks indicated that the bill may result in increased labor and costs. Chapter 44, Florida Statutes, already provides for voluntary binding arbitration with the same procedural and fee provisions as are provided in this bill.

3. Long Run Effects Other Than Normal Growth:

   Unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   Unknown.

2. Direct Private Sector Benefits:

   Homeowners' will be required to receive information on mandatory homeowners' associations. In addition, the bill provides for alternative dispute resolution which could result in faster and less expensive resolution of disputes between property owners and homeowners' associations.

3. Effects on Competition, Private Enterprise and Employment Markets:

   Unknown.

D. FISCAL COMMENTS:

   N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

   This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

   This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

   This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

On page 3 lines 26-27, the bill provides that "the association may jointly invest reserve funds". This could be more clearly written to specify that the association may jointly invest reserve "and operating" funds, if this is the intent.

On page 7 lines 1 through 3, the bill requires the developer to provide: "A list of the names, addresses, and telephone numbers of all contractors, subcontractors, or others in the employ of the association." Similarly on page 7 line 13, the bill requires the developer to provide: "Employment and service contracts in effect." This appears to be duplicative.

On page 6 lines 28 through 29, the bill requires the developer to provide: "A copy of all contracts which may be in force with the association as one of the parties." Similarly on page 7 lines 14 through 15, the bill requires the developer to provide: "All other contracts to which the association is a party." This also appears to be duplicative.

Section 617.3075(2), Florida Statutes is created in this bill to provide that the prohibition on specified clauses in homeowners' association documents applies prospectively to clauses created on or after the effective date of this act. This should probably be on or after the effective date of this section in order to avoid a possible retroactive effect.

Section 617.3076(2), Florida Statutes, is created to provide that after the transition of the homeowners' association control from the developer to the homeowners, an association must compile at least once every 3 years, all governing documents. If the governing documents have not changed in the prior 3 years, the association must provide a statement on homeowner's association stationery that no changes have been made and attach the statement to the governing documents. There is no requirement that this information be transmitted to the homeowners. In addition, some small homeowners' associations do not have specific "association stationary."

On page 10, line 3, the word "stationary" should be "stationery."

The developer or parcel owner must supply all governing documents to the buyer no later than the date of the contract. The buyer has 24 hours to review the governing documents after executing the contract before the contract becomes binding. This creates a voidability period of 24 hours. This section further provides that if a developer fails to provide a buyer to whom a parcel is conveyed with a copy of the governing documents, the buyer may rescind the contract without penalty at any time up to 15 days after receipt of the governing documents from the developer. This section is unclear as to when this voidability period occurs. The phrase "to whom a parcel is conveyed" may mean after closing. However, the next sentence seems to refer to the sales contract which is executed prior to closing.

Section 617.30765, Florida Statutes, is created to require homeowners' associations to be incorporated under chapter 617, and to require the recording of the incorporation with the Department of State prior to the sale or occupancy of a home. Some homeowners' associations are not mandatory, and are not incorporated currently. This would seem to preclude voluntary homeowners' associations in the future.

Section 617.3077, Florida Statutes, is created to provide for reserve and operating accounts. This section requires that reserve accounts for all expenditures of deferred maintenance,

repairs, or replacement of common property be established at the time the association is created.

Paragraph (a) is unclear as to whether the reserve fund must include funding for parking lots. The bill specifically provides for funding for roads.

Paragraph (b) provides for a reserve fund when the association is responsible "for the exterior of the common property including individual parcels." It is unclear what "the exterior of the common property" includes. Does this mean the outside of a club house? grounds only?

Paragraph (c) provides that when the association is responsible for a clubhouse; tennis, racquetball, basketball, or rollerblading court; or recreational facility, a reserve account for the expected amount of maintenance and repairs that would normally be required at intervals of less than once per year must be funded. This would appear to apply to fairly major repairs and maintenance. No mechanism for calculating the reserve is provided.

Section 617.3077(2), Florida Statutes, is created to provide for the use of reserve account funds. Paragraph (b) provides that the reserve accounts must be established in the association's name at a bank, savings and loan association, or trust company in the county in which the community is located, and the funds may not be commingled with other funds. This provision seems to be in conflict with s. 617.303(8), F.S., as created in this bill, which provides an exception to the preclusion from commingling of reserve funds.

Section 617.3077(4), Florida Statutes, provides that the reserve accounts specified in this section must be maintained by the association throughout its existence unless waived by a majority of the homeowners' association's members. This section does not require that operating accounts be maintained, although they are required to be created initially.

Section 617.309, Florida Statute, is amended to provide that a developer that is responsible for the upkeep, maintenance, and repair of any aspect of a community may not contract with affiliated businesses or subsidiaries to a business owned or managed by the developer to provide upkeep, maintenance, or repair services unless the charge for the services is at a rate that is competitive with rates charged by independent contractors in the community. This appears to refer to other contractors who are not affiliated with or subsidiaries to a business owned or managed by the developer as opposed to requiring "independent contractors."

This section provides that if the parties have agreed to a method for the appointment of one or more arbitrators, the division must proceed with the appointment as prescribed. However, at least the chief arbitrator must meet the qualifications and training requirements under s. 44.106, F.S. If there is no agreement or if the agreement method fails or for any reason cannot be followed, the division, on application of a party, shall appoint one or more qualified arbitrators. This section is unclear as to how the parties contact or make application to the division with their request for an arbitrator(s). This provision may require rulemaking authority.

Section 617.311(4)(c), Florida Statutes, provides that the arbitrators are to be compensated by the parties according to their agreement, but not less than $75 per day. There is no guidance on what constitutes a "day." In addition, according to the Department of Business

& Professional Regulation, customary rates for such services range from $150.00 to $200.00 per hour in the private sector.

Section 617.311(4)(d), Florida Statutes, provides that the arbitration hearing must occur in the county in which the homeowner resides. This may be problematic if the homeowner does not reside within the community operated by the association. For example, the property may be a rental unit and the homeowner could reside at a remote location, or even out of the state. The statute may require that the hearing be held in a place not convenient to the majority of the witnesses and parties.

Section 617.311(4)(e), Florida Statutes, provides for voluntary binding arbitration. Application for voluntary binding arbitration made to the court must be filed and fees paid to the clerk of court as if for complaints initiating civil actions. The clerk of the court must handle and account for these matters as if they were civil actions, "except that the clerk of court shall keep separate the records of the applications for voluntary binding arbitration from all other civil actions." It is unclear why the parties would apply to the court for arbitration and pay a filing fee if they can accomplish this purpose without paying a fee by applying to the division. If the parties are in litigation and agree to arbitration, this could currently be ordered by the court without the necessity of filing a separate "action" and paying a separate fee as anticipated by this provision.

Section 617.311(4)(f), Florida Statutes, provides that the statute of limitations is tolled upon filing of the application for binding arbitration. The process for filing for binding arbitration made to the court references "application," however, the process for seeking appointment of arbitrators by the division does not specifically mention an "application." Therefore, it is not clear whether requesting the appointment of arbitrators from the division would operate to toll the statute of limitations.

A good portion of the voluntary binding arbitration section appears to mirror s. 44.104, F.S. According to the Office of the State Court Administrator, the voluntary binding arbitration process in s. 44.104, F.S., has been in effect since 1988 but has rarely been used.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:	Legislative Research Director:
P.K. Jameson	P.K. Jameson