

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1223 w/CS Condominium Associations
SPONSOR(S): Robaina, and others
TIED BILLS: none **IDEN./SIM. BILLS:** SB 2498 (s)

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Business Regulation</u>	<u>33 Y, 6 N w/CS</u>	<u>Livingston</u>	<u>Liepshutz</u>
2) <u>State Administration</u>	<u></u>	<u>Bond</u>	<u>Everhart</u>
3) <u>Commerce & Local Affairs Approp. (Sub)</u>	<u></u>	<u></u>	<u></u>
4) <u>Appropriations</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

During the interim prior to the 2004 Legislative Session, the Speaker appointed the Select Committee on Condominium Association Governance. The charge of the committee was to take public testimony and review current laws regulating the governance of condominium associations to identify any improvements in those laws that might be recommended.

This bill recognizes grandfathered rights, increases the vote necessary to waive minimum reserves, restricts who may be elected to a condominium board, increases lender responsibility for past due condominium assessments, restricts collection of assessment liens, changes how payments on past due assessments are applied, creates a misdemeanor for board members who vote to foreclose a lien, alters how excess special assessments are treated, limits attorney's fees related to condominium matters, requires additional disclosures regarding association contracts, requires three bids for nearly all condominium association contracts, requires all condominium board members to attend training, re-creates the Office of the Condominium Ombudsman, re-creates the Advisory Council on Condominiums, reinstates the requirement that a condominium unit seller provide a Frequently Asked Questions and Answers form, transfers regulation of Community Association Managers with DBPR, and requires DBPR to create a Condominium Owner's Bill of Rights brochure.

There are constitutional concerns with this bill, see "Constitutional Issues". There are rulemaking concerns, see "Rule-Making Authority". There are other concerns with this bill, see "Drafting Issues and Other Comments".

This bill appears to have a negative impact on state expenditures from the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund of approximately \$300,000 annually (4 FTE's). This bill does not appear to have a fiscal impact on local governments.

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

STORAGE NAME: h1223b.sa.doc
DATE: March 26, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a “no” above, please explain:

This bill increases government regulation of condominiums, creates the Office of the Condominium Ombudsman, and creates a seven member Advisory Council on Condominiums.

This bill reduces individual freedom to amend condominium documents, and to manage condominium affairs.

This bill requires an individual to attend condominium training if the individual wishes to serve on a condominium board.

This bill restricts families from serving together on a condominium board.

B. EFFECT OF PROPOSED CHANGES:

Background

During the interim prior to the 2004 Legislative Session, the Speaker created the Select Committee on Condominium Association Governance. The charge of the committee was to take public testimony and review current laws regulating the governance of condominium associations to identify any improvements in those laws that might be recommended. The select committee was instructed to issue a report prior to the beginning of the 2004 session outlining any recommendations for legislation consistent with the committee’s conclusions. This bill represents some of the recommendations of the select committee.

The declaration of condominium is the legal document, recorded in the public records of the county where a condominium is located, that details the legal rights and legal obligations of condominium unit owners in a condominium associations. It has been referred to as a condominium’s constitution. See *Woodside Village Condominium Association, Inc. v. Jahren*, 806 So.2d 452, 456 (Fla. 2002). The declaration “strictly governs the relationships among the condominium unit owners and the condominium association.” *Id.*

Effect of Bill

Amendments to the Declaration

Section 718.104(5), F.S., provides that a declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units. Section 718.110, F.S., provides broad authority to amend a declaration. In *Woodside*, the Florida Supreme Court held that a declaration of condominium may be amended to impose lease restrictions on condominium units. The court rejected the concept of “vested rights”,¹ holding that a properly enacted amendment to a declaration of

¹ Also sometimes referred to a “grandfathered rights”.

condominium binds all condominium units, including units owned by an owner who purchased a unit prior to the amendment, even if the unit owner objected to the amendment. *Id.*, at 461-62. Consistent with the *Woodside* decision, ch. 2002-27, L.O.F., amended s. 718.104(5), F.S., to recognize that an amendment to a declaration of condominium applies to all of the condominium units, including units whose owners did not consent to the amendment.

This bill creates grandfathering rights in new s. 718.110(13), F.S., that are inconsistent with the ruling in *Woodside* and inconsistent with s. 718.104(5), F.S., as changed by ch. 2002-27, L.O.F. The new subsection (13) declares that the ability of a unit owner to rent a unit, to keep a pet, or to utilize a parking space is a “right” that cannot be taken away from a current owner by amendment to the declaration unless approved by three-fourths of the voting interests of the association, and unless the notice of the amendment clearly states that the amendment takes away current rights.

Vote to Waive Minimum Reserve Funding

Section 718.112(2)(f)2., F.S., requires that the adopted annual budget of a condominium association must provide for assessments sufficiently high enough to create reserve accounts for capital expenditures and deferred maintenance. The purpose of reserve accounts is to provide a savings account that can pay the cost of expected future substantial maintenance and repair costs. By majority vote, the members of an association may waive some of all of the required reserves.

This bill requires a two-thirds vote (of members present) to waive reserves.

Board Members

The only restriction in current law as to who may serve on a condominium board of directors is that an individual convicted of a felony may not serve on a board.² Associations may impose additional requirements on who may serve on the board.

This bill imposes two restrictions upon who may serve on the board of directors of a condominium association:

- No more than one “immediate family member” may serve on a board, unless a majority of those voting approve having more than one immediate family member serve. Immediate family member is defined as a parent, child, spouse, sibling, grandparent, grandchild, uncle, aunt, niece, nephew, great-uncle, great-aunt, great-nephew, great-niece, first cousin, or second cousin by blood, marriage, or adoption and includes half and step relatives.
- Only an individual who has been a resident in the condominium at least 3 months in the previous year may serve on a board.

Past Due Assessments Paid by Purchaser at Foreclosure

Typically, a condominium unit owner who stops paying his or her mortgage will also stop paying the regular assessments due to the association. Section 718.116(1)(b), F.S., limits the liability of a first mortgagee who takes title by foreclosure to paying the lesser of 6 months past due assessments, or 1% of the mortgage debt. By limiting the exposure of mortgage companies, this provision encourages lenders to make mortgage loans on condominiums, lowers mortgage rates on condominium loans in general by lowering the risk to lenders, and encourages condominium associations to aggressively pursue collections before a unit owner falls too far behind.

² There is no statutory requirement that a member of the board even own a condominium unit in the association.

This bill increases the 1% to 5%, thereby making a first mortgage holder who takes a condominium unit by foreclosure liable for as much as the lesser of 6 months regular assessments or 5% of the original mortgage debt.

Assessment Liens

Current law does not limit how early an association may file a lien for unpaid assessments against a condominium unit, nor does current law require warning prior to the filing of a lien.

This bill requires a condominium association to give a condominium unit owner 30 days notice by certified mail of the association's intent to file a lien.

Application of Payment on Past Due Assessments

Current law provides that payment on a past due assessment is first applied to interest, then late fees, then collection costs, and then to the past due assessment.

This bill provides that payment on a past due assessment is first applied to the assessment, then collection costs, then interest, and finally towards late fees. This bill also provides that a lien may not be filed against a condominium unit solely for late fees or interest on unpaid assessments.

Lien Enforcement Misdemeanor

This bill provides that it is a misdemeanor for a board member or officer to willfully and maliciously act to impose, enforce, or increase the overall value of a lien for the payment of a condominium association assessment with the intent to purchase or assist in the purchase of the condominium unit at foreclosure.

Refund of Excess Special Assessments

Current law provides for special assessments to be collected for unusual expenses of a condominium association. If the board does not need all of the monies collected to pay for the unusual expense, the board by majority vote may either make a pro-rata refund to unit owners, or may apply the excess against future assessments.

This bill requires a pro-rata refund to the unit owners unless the board, by a two-thirds vote, votes to apply the excess to future assessments.

Attorney's Fees

Current statutory law has no restriction upon attorney's fees that an attorney charges a condominium association board. In some cases, the declaration of condominium provides that an attorney's fee for an attorney employed by the board to represent the association may be assessed against a unit owner who is not complying with the covenants.

This bill provides that an attorney may not charge in excess of \$75 per letter for correspondence, collection efforts, litigation, or other business arising under the condominium law (ch. 718, F.S.).

Disclosure Requirements in Contracts with Condominium Associations

A condominium developer typically remains in control of a condominium association through the initial sales period. Current law requires that, while a developer is in control of a condominium association, the developer must disclose any financial or ownership interest that the developer has in any entity contracting with the association.

This bill requires the same disclosure of officers of an association and members of the board. This bill also requires that a majority of unit owners must approve any contract between an association and any company in which a member of the board, an officer, or an immediate family of a board member or officer, owns more than 10% of such company.

Contracts and Purchasing by Condominium Associations

Current law requires that a contract valued in excess of 5% of the annual budget of an association must be in writing, and requires that the association solicit bids for such contracts. An association contract for attorney, accountant, architect, community association manager, timeshare management firm, engineering, and landscape architect services are exempt from the bidding requirement. An association of fewer than 100 units may waive these requirements.

This bill removes the ability of an association of fewer than 100 units to waive the requirements. This bill also lowers the threshold contract amount beyond which bids are required from 5% of the annual budget to 2.5% of the annual budget, and requires a minimum of three bids. This bill also removes the exceptions for attorney, accountant, architect, community association manager, timeshare management firm, engineering, and landscape architect services; thereby requiring all such services to be put out for bid.

Mandatory Training for Condominium Board Members

The Department of Business and Professional Regulation offers a number of training courses for officers and directors of condominium associations, but such training is not mandatory. This bill requires a newly elected board member of a condominium association to attend training.

Re-Creation of Condominium Ombudsman

A prior Condominium Study Commission recommended creation of an Office of the Condominium Ombudsman, which office was created in 1991.³ The authority for the office was repealed before the office was ever opened.⁴

This bill re-creates the Office of the Condominium Ombudsman. The ombudsman must be an attorney. The ombudsman is appointed by, and serves at the pleasure of, the Joint Legislative Auditing Committee. The ombudsman may use division records, make recommendations for legislation, act as liaison between parties to a dispute or complaint, recommend initiation of enforcement proceedings, and make recommendations to the division for addressing complaints. The expenses of the ombudsman are to be approved by the Joint Legislative Auditing Committee, and paid out the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund. The office of the ombudsman must be in Leon County.

There are constitutional and rule concerns regarding this office, see "Constitutional Issues" and "Rule-Making Authority".

Re-Creation of Advisory Council on Condominiums

A prior Condominium Study Commission recommended creation of an Advisory Council on Condominiums, which was created in 1991.⁵ In its 9 year life, the council rarely met, and had continued and constant vacancies. DBPR listed it as one of nine advisory committees or boards to eliminate in the 2000 session.⁶ Chapter 2000-302, L.O.F., eliminated the council.

³ Section 17 of ch. 91-103, L.O.F.

⁴ Section 16 of ch 92-49, L.O.F.

⁵ Section 17 of ch. 91-103, L.O.F.

⁶ From floor debate on HB 1465, April 11, 2000.

This bill re-creates the Advisory Council on Condominiums.

Frequently Asked Questions and Answers Form

Current law requires a developer to provide extensive disclosure regarding a condominium to prospective purchasers,⁷ and requires a lesser amount of information to be provided by a person re-selling a condominium unit.⁸ In 1992, the condominium law was amended to require current owners reselling their unit to provide a copy of the document known as “Frequently Asked Questions and Answers”, a document initially created by the developer.⁹ That requirement was eliminated in 2002 because many owners were unable to obtain a copy of the document to provide to a prospective purchaser; and because the document requires current information regarding the condominium association, yet many sellers are unable to properly understand the management of the association in sufficient detail to accurately update the form.¹⁰

This bill reinstates the requirement that a person selling a condominium unit must provide the Frequently Asked Questions and Answers document to a prospective purchaser. This bill also amends the content of the document to require disclosure of all potential lawsuits in which the association may be liable for more than \$25,000.

Transfer Regulation of Community Association Managers

This bill transfers the licensure program for community association managers within the Department of Business and Professional Regulation, from the Division of Professions to the Division of Florida Land Sales, Condominiums, and Mobile Homes. This bill further provides that existing active administrative licensure cases pending against a community association manager are not abated by the transfer.

Condominium Rights Brochure

The department has created a document entitled “CONDOMINIUM UNIT-OWNER RIGHTS AND RESPONSIBILITIES”.¹¹

This bill requires the division to create and distribute a similar brochure entitled “Condominium Owners’ Bill of Rights”.

C. SECTION DIRECTORY:

Section 1 amends s. 718.103, F.S., creating a definition of immediate family member.

Section 2 amends s. 718.110, F.S., relating to grandfathered rights and amendments to a declaration of condominium.

Section 3 amends s. 718.112, F.S., to require a 2/3 vote to waive reserves.

Section 4 creates s. 718.1125, F.S., to restrict condominium board membership.

Section 5 amends s. 718.116, F.S., to increase the amount payable by a purchaser at foreclosure, change the manner in which payments on delinquent assessments are credited, require notice before filing of a lien, create a misdemeanor, and change how excess special assessments are handled.

⁷ See s. 718.503(1), F.S.

⁸ See s. 718.503(2), F.S.

⁹ Section 19 of ch. 91-103, L.O.F.

¹⁰ Section 14 of 2002-27, L.O.F.

¹¹ <http://www.myflorida.com/dbpr/lsc/condominiums/publications/uorr.pdf>

Section 6 creates s. 718.130, F.S., limiting attorney's fees in condominium actions.

Section 7 amends s. 718.3025, F.S., limiting contracts between condominium associations and related persons.

Section 8 amends s. 718.3026, F.S., removing the ability of associations of under 100 units to waive certain contracting requirements.

Section 9 amends s. 718.501, F.S., to require all condominium board members to attend a training session.

Sections 10, 11, 12, and 13, create ss. 718.5011, 718.5012, 718.5013, and 718.5014, F.S., creating the Office of the Condominium Ombudsman.

Section 14 creates s. 718.5015, F.S., creating an Advisory Council on Condominiums.

Section 15 amends s. 718.504, F.S., requiring a private seller of a condominium unit to provide a prospective purchaser with the "Frequently Asked Questions and Answers" document.

Sections 16 and 17 transfer licensure of community association managers.

Section 18 creates s. 718.510, F.S., requiring DBPR to create a condominium owner bill of rights brochure.

Section 19 provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. This bill does not provide for increased revenues to the state.

2. Expenditures:

The Department of Business and Professional Regulation estimates that this bill will have a negative fiscal impact on expenditures from the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund¹² as follows:

	FY 2004-2005	2005-2006	2006-2007
Nonrecurring	\$22,889		
Recurring	\$287,745 (4.0 FTE's)	\$293,686 (4.0 FTE's)	\$299,775 (4.0 FTE's)
Total	\$310,634	\$293,686	\$299,775

Broken down by issue, the first year recurring costs are:

¹² Section 498.019, F.S., creates the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund, to be used for the administration and operation of chapters 498 (land sales), 718 (condominiums), 719 (cooperatives), 721 (timeshares), and 723 (mobile home parks).

Ombudsman	3.0 FTE's	\$184,479
Advisory Council	1.0 FTE's	\$ 66,109
Additional inquiries	1.0 FTE's	\$ 51,746

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None. This bill does not affect local governments.

2. Expenditures:

None. This bill does not affect local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The transfer of regulation of community association managers from the Division of Professions to the Division of Florida Land Sales, Condominiums, and Mobile Homes will negatively impact the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund. There are 8,949 licensed community association managers. The Community Association Managers operating account showed deficit balances of \$489,684 and \$664,389 for the years ending June 30, 2001, and June 30, 2002, respectively. During the year ending June 30, 2003, the program received a one-time assessment of \$1,401,695. The fund showed a surplus of \$1,184,168 for the year ending June 30, 2003. The program would have incurred a deficit of \$217,527 without the infusion of the one time assessment. Further, the CAM license has a two-year renewal period with significant revenues every other year. Licensing revenues for 2003 increased \$823,720 over those of 2002, but expenses increased by only \$209,338. This means that without an increase in the license fees, the program is likely to incur deficits each year and significant deficits every other year.

The fiscal estimate provided by the department did not include an estimate of the cost to produce or distribute the Condominium Owner's Bill of Rights.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not affect local governments.

2. Other:

Article II, s. 3, Fla.Const., requires the government to be separated into three branches, and prohibits one branch from exercising the powers of another. The proposed Office of the Condominium Ombudsman is to be physically housed in an executive branch agency and is to perform executive functions, but is to be appointed, managed, funded, and supervised by a legislative committee.

Article VII, s. 1(c), Fla.Const., provides that no payment may be made from the state treasury except upon appropriation made by law. This bill provides that a legislative committee may make allow the Office of the Condominium Ombudsman to spend state funds, without the requirement of an appropriation by law.

Article I, s. 10, Fla.Const., prohibits the legislature from enacting any law impairing the obligation of contracts. The following sections of this bill may impair the current contractual rights of condominium unit owners to:

- Amend covenants by a vote of less than three-fourths of the voting interests of the association. (Section 2)
- Elect an individual to the board. (Section 4)
- Have their association post payments on past due assessments to particular monies owed. (Section 5)

Article I, s. 10, Fla.Const., prohibits the legislature from enacting any law impairing the obligation of contracts. This bill may impair the current contractual rights of mortgage lenders to a certain limit on the amount of unpaid assessments that the lender may be liable for after foreclosure of a unit. (Section 5)

B. RULE-MAKING AUTHORITY:

Section 11 of this bill provides that the ombudsman is to jointly promulgate rules with the Division of Florida Land Sales, Condominiums, and Mobile Homes. It is unclear how an office associated with the Legislature can or would promulgate administrative rules. It is unclear how an independent officer (the ombudsman), whose duties may include confrontation of the division, can or will be able to jointly promulgate rules with DBPR. This section is in conflict with the Administrative Procedures Act, ch. 120, F.S., and with the constitutional separation of powers required by art. II, s. 3, Fla.Const.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill makes a number of changes to ch. 718, F.S., related to condominiums. Chapter 719, F.S., relating to cooperatives, is very similar to ch. 718, F.S., and many provisions regarding governance are identical. This bill does not make corresponding changes to ch. 719, F.S.

The concept of grandfathered rights may create significant enforcement difficulties for condominium associations.

There are a significant number of condominium associations that have 4 or fewer units. Several sections of this bill may, in practice, be very cumbersome to such associations. Those sections include the restrictions on who may be elected to a board, the requirement for obtaining bids for services, and the requirement for board member training.

The provision restricting immediate family members from serving on the same board is unclear. The provision allows waiver by a majority vote, but does not require notice or a separate majority vote, and thus it is arguable that the one vote that elects a member is also the same vote that waives the restriction, making the restriction a nullity.

The requirement of three bids for contractual services does not contain an exception to account for situations where three bids are not available.

Section 5 provides, in part, that collections on past due assessments must first be applied to the assessment, then to collection costs, then interest, and then late fees. The section then provides that late fees and interest alone may not be the sole basis of the lien. The practical effect of such a distinction may be that late fees and interest will become extremely difficult to collect, condominium unit owners will have significantly less incentive to pay their regular assessments, and condominium associations may suffer financial hardship due to slacking collections.

As written, the provision creating a misdemeanor for a board member or officer to willfully and maliciously act to impose, enforce, or increase the overall value of a lien for the payment of a condominium association assessment with the intent to purchase or assist in the purchase of the condominium unit at foreclosure is so broadly written that it may make any initiation of a foreclosure action by a condominium board a misdemeanor. The general purpose of a foreclosure sale is to "assist" someone in buying the parcel of property at issue.

As written, the provision requiring a newly elected board member of a condominium association to attend training does not specify the type and scope of the training, nor is a penalty for noncompliance specified.

Many timeshare properties are also governed by condominium law. Several provisions of this bill may prove troublesome for timeshare condominiums. For instance, in the typical timeshare property there is no person who can meet the 3 month residency requirement. The concept of grandfathered rights in a timeshare could be very difficult in application (a weekly timeshare property with 200 physical units has 10,000 owners).

The proposed limit on attorney's fees may serve to limit an association's choice of counsel.

The effective date of upon becoming law may give insufficient notice of the changes of this bill to the public, and may have a budgetary effect on affected state agencies. The effective date should perhaps be delayed until the new budgetary year commencing July 1, 2004.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Information supplied by the Committee on Business Regulation: The CS differs from the original bill as follows:

- Removes the provision specifying that a declaration or bylaw allowing a multiple unit owner in the same condominium to exercise multiple votes shall be void.
- Removes language in the bill that creates a two year term limit for board members.
- Removes language in the bill relating to mandatory criminal background checks by the board for all new potential unit owners and tenants.
- Prohibits an attorney from charging in excess of \$75 per letter for correspondence, collection efforts, litigation, or other business arising under this chapter.