

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

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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>6 Y, 0 N w/CS</u>	<u>Bond</u>	<u>Everhart</u>
3) <u>Commerce &amp; 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>

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### 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 with CS amends condominium law to: restrict the ability of a condominium association to amend its governing documents regarding certain issues, re-create the Office of the Condominium Ombudsman, re-create the Advisory Council on Condominiums, and reinstate the requirement that a condominium unit seller provide a Frequently Asked Questions and Answers form to a prospective purchaser.

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

This bill with CS 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 with CS 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:** h1223c.sa.doc  
**DATE:** April 1, 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 type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

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

This bill with CS increases government regulation of condominium association governance, creates the Office of the Condominium Ombudsman, and creates a seven member Advisory Council on Condominiums.

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

#### 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 with CS 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”, which rights are more commonly referred to as “grandfathered rights”. The court ruled that a properly enacted amendment to a declaration of 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. However, a concurring opinion to the *Woodside* decision urged the legislature to consider including grandfathering rights in Florida law. *Id.*,

at 465 (Quince, concurring).<sup>1</sup> 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 with CS 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) provides that the ability of a unit owner to rent the condominium unit, to keep a pet, or to utilize a specific parking space is a "right". An amendment to a declaration may not restrict such rights unless the amendment specifically provides that it is taking away such rights. Additionally, an amendment to a declaration that affects such rights must be approved by at least a majority of the voting interests of the association, unless a higher vote is required by the declaration.

#### 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.<sup>2</sup> The authority for the office was repealed before the office was ever opened.<sup>3</sup>

This bill with CS 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.<sup>4</sup> 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.<sup>5</sup> Chapter 2000-302, L.O.F., eliminated the council.

This bill with CS re-creates the Advisory Council on Condominiums.

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<sup>1</sup> The concurring opinion reads: I concur in the majority's decision which quashes the decision by the Second District Court of Appeal. I write simply to urge the Legislature to seriously consider placing some restrictions on present and/or future condominium owners' ability to alter the rights of existing condominium owners. At the time the units in question here were purchased, the owners had the right to lease their property with relatively few restrictions. One of the owners purchased his units in 1979 and had enjoyed this leasing right for eighteen years before the Declaration of Condominium was amended. The twelve-month lease which was permitted at the time these unit owners purchased their units is no longer valid. These owners can now only lease their property for nine months in any twelve month period. As the district court pointed out the amendment has deprived these owners of a valuable right that existed at the time of purchase. See *Woodside Village Condominium Assoc., Inc. v. Jahren*, 754 So.2d 831, 833 (Fla. 2d DCA 2000). This valuable right may well have been the determinative factor for their decisions to buy these properties. As the district court suggested, there should at least be some type of "escape" provision for those "unit owners whose substantial property rights are altered by amendments to declarations adopted after they acquire their property." 754 So.2d at 835.

<sup>2</sup> Section 17 of ch. 91-103, L.O.F.

<sup>3</sup> Section 16 of ch 92-49, L.O.F.

<sup>4</sup> Section 17 of ch. 91-103, L.O.F.

<sup>5</sup> From floor debate on HB 1465, April 11, 2000.

## Frequently Asked Questions and Answers Form

Current law requires a developer to provide extensive disclosure regarding a condominium to prospective purchasers,<sup>6</sup> and requires a lesser amount of information to be provided by a person reselling a condominium unit.<sup>7</sup> 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.<sup>8</sup> That requirement was eliminated in 2002<sup>9</sup> because many owners were unable to obtain a copy of the document to provide to a prospective purchaser; and because many sellers were unable to properly understand the management of the association in sufficient detail to accurately update the form.

This bill with CS 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 with CS 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.

### C. SECTION DIRECTORY:

Section 1 amends s. 718.110, F.S., relating to grandfathered rights and amendments to a declaration of condominium.

Sections 2, 3, 4 and 5, create ss. 718.5011, 718.5012, 718.5013, and 718.5014, F.S., re-creating the Office of the Condominium Ombudsman.

Section 6 creates s. 718.5015, F.S., re-creating the Advisory Council on Condominiums.

Section 7 amends s. 718.504, F.S., reinstating the requirement that a private seller of a condominium unit must provide a prospective purchaser with the "Frequently Asked Questions and Answers" document.

Section 8 provides that passage of this act will not affect any existing prosecution.

Section 9 provides an effective date of July 1, 2004.

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

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

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

#### 2. Expenditures:

The Department of Business and Professional Regulation provided estimates for HB 1223 as filed. This bill with CS should likewise have the same fiscal effects. This bill with CS appears to have a negative fiscal impact on expenditures from the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund<sup>10</sup> as follows:

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<sup>6</sup> See s. 718.503(1), F.S.

<sup>7</sup> See s. 718.503(2), F.S.

<sup>8</sup> Section 19 of ch. 91-103, L.O.F.

<sup>9</sup> Section 14 of 2002-27, L.O.F.

<sup>10</sup> 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).

	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:

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 with CS does not affect local governments.

##### 2. Expenditures:

None. This bill with CS does not affect local governments.

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

None.

#### D. FISCAL COMMENTS:

In 1991, the act that first created an ombudsman and an advisory council also increased the annual condominium fee from \$1 per unit per year to \$4 per unit per year. The increase was to, in part, fund the ombudsman and the advisory council. That \$4 fee remains today. That fee would have to be increased to \$5.45 today in order for it to be equivalent.<sup>11</sup>

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

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

Not applicable. This bill with CS 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 with CS provides that a legislative committee may allow the Office of the Condominium Ombudsman to spend state funds, without the requirement of an appropriation by law.

<sup>11</sup> <http://www.aier.org/colcalc.html>

Article I, s. 10, Fla.Const., prohibits the legislature from enacting any law impairing the obligation of contracts. This bill with CS may impair the current contractual rights of condominium unit owners to amend their covenants.

#### B. RULE-MAKING AUTHORITY:

Section 3 of this bill with CS 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 with CS 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 with CS does not make corresponding changes to ch. 719, F.S.

The concept of grandfathered rights may create significant practical enforcement difficulties for condominium associations. Many timeshare properties are also governed by condominium law. The concept of grandfathered rights in a timeshare could be very difficult in application (for instance, a weekly timeshare property with 200 physical units has 10,000 owners).

### 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.

On March 29, 2004, the Committee on State Administration adopted one amendment to the bill. The amendment removed the provisions that increased the vote necessary to waive minimum reserves, restricted who may be elected to a condominium board, increased lender responsibility for past due condominium assessments, restricted collection of assessment liens, changed how payments on past due assessments are applied, created a misdemeanor for board members who vote to foreclose a lien, altered how excess special assessments are treated, limited attorney's fees related to condominium matters, required additional disclosures regarding association contracts, required three bids for nearly all condominium association contracts, required all condominium board members to attend training, transferred regulation of Community Association Managers within DBPR, and required DBPR to create a Condominium Owner's Bill of Rights brochure. The amendment also changed the effective date to July 1, 2004. The bill was then reported favorably with a committee substitute.