HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1987 (PCB JU 04-13) Homeowners' Associations
SPONSOR(S): Committee on Judiciary and Rep. Kottkamp
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2984

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	17 Y, 1 N	Jaroslav	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill substantially rewrites Florida's Homeowners' Association ("HOA") Act. Some of the highlights include:

- granting concurrent jurisdiction to the county courts to hear HOA disputes;
- amending the legislative findings in the HOA statute to specify that the Legislature deems expedited dispute resolution and presuit mediation to benefit homeowners, and authorizes the Division of Florida Land Sales, Condominiums and Mobile Homes within the Department of Business and Professional Regulation ("DBPR") to conduct them;
- specifying that all parcel owners have the right to speak for at least three minutes on any item on the agenda of an HOA meeting;
- requiring 14 days' written notice of any meeting that will consider special assessments;
- requiring HOA boards to consider any item of business proposed by a petition of at least 20% of the voting interests at a regular or special meeting within 60 days;
- requiring a copy of the disclosure summary and all other records relating to operating the HOA be part of an HOA's official records;
- requiring copying of official records on request if the request is for 25 pages or less;
- forbidding HOA's from requiring parcel owners to state a purpose for inspecting official records, and from limiting their inspection to any less than one 8-hour business day each month;
- extending the deadline for year-end financial reports from 60 to 90 days, but specifying more extensive reviewing and/or auditing;
- allowing 20% of the parcel owners to petition the board for a higher level of financial reporting;
- forbidding use of HOA funds for defending suits or criminal prosecutions against the developer;
- providing a process for recalling board members similar to the condominium statute;
- authorizing respectful display of the state flag, and of military service flags on specified holidays;
- prohibiting SLAPP suits against parcel owners;
- providing a process to allow ramps for the disabled to be built within HOA communities;
- specifying that HOA fines against parcel owners do not become liens on parcels;
- creating a competitive bidding process for contracts for goods and services;
- requiring mandatory binding arbitration of election disputes by the Division;
- requiring presuit mediation of other covenant enforcement disputes by the Division;
- creating remedies for reasonable reliance on false or misleading HOA advertising; and
- stating implied warranties with respect to buildings and improvements.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[x]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[x]	N/A[]
4. Increase personal responsibility?	Yes[]	No[x]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

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

Because this bill requires an agency to resolve what were formerly purely private disputes, it could be described as increasing government.

Because this bill imposes implied warranties outside the scope of private contracts, it could be described as diminishing both individual freedom and personal responsibility.

B. EFFECT OF PROPOSED CHANGES:

General Background on the Homeowners' Association Task Force

A homeowners' association is "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."[1] A community is defined as all real property that is or will be subject to a recorded declaration of covenants;[2] a declaration of covenants is, in turn, a "written instrument … which subjects the land comprising the community to the jurisdiction and control of an association … in which the owners of the parcels, or their association representatives, must be members."[3] Corporations, whether for profit or not for profit, generally have authority to hold property and to sue and be sued in their own name, as well as other powers.[4]

Unlike condominiums, which are regulated by the Department of Business and Professional Regulation ("DBPR"), the Legislature has not placed homeowners' associations under the regulatory authority of any state or local agency; thus, enforcement of a homeowners' association's declaration of covenants, or of actions taken under it, is currently entirely a matter for private-party suits in the circuit courts.

This bill had its genesis in the gubernatorial veto of SB 1632 (2003), which would have granted counties authority to regulate homeowners' associations in unincorporated areas. In his veto letter, Governor Bush wrote:

> I recognize that homeowners' associations in Florida are facing a variety of difficult issues; however, I believe it is inappropriate and fundamentally unfair to use the government's taxation power to compensate for shortcomings in private contractual arrangements to the benefit of one party and to the detriment of another. Instead, I have asked Secretary Carr of the Department of Business and Professional Regulation to form a task force to examine the challenges that

[1] Section 720.301(7), F.S.
[2] *See* s. 720.301(3), F.S.
[3] Section 720.301(4), F.S.
[4] *See* ss. 607.0302 (for-profit corporations) and 617.0302 (non-profit corporations), F.S.

> associations face. It is my hope that practical solutions to these issues, like those in this bill, can be found.[5]

Secretary Carr created a 15-member task force with the following mission statement:

> The Homeowners' Association Task Force, a cross-section of representatives involved with homeowners' associations, was created at the Governor's request to harmonize and improve relations between homeowners, homeowners' associations and other related entities. The members will provide input and make recommendations for legislative change consistent with his vision for government and regulation.[6]

The Homeowners' Association Task Force ("the Task Force") held six meetings throughout the state over the course of late 2003 and early 2004.[7] DBPR prepared a list of six issues for the task force to discuss: flags, associations, removal of directors, alternative dispute resolution, disclosure, and purchaser protections. The Task Force added other issues as the meetings progressed, and voted out a report of their recommendations in February of 2004. This bill is based on those recommendations.

Section 1: County Court Jurisdiction

Under Florida's dual system of trial courts, the circuit courts are courts of general jurisdiction, while the county courts are courts of limited jurisdiction defined by the Legislature through general law.[8] This definition of county court jurisdiction is provided in s. 34.01(1), F.S., which currently states:

> (1) County courts shall have original jurisdiction:
> (a) In all misdemeanor cases not cognizable by the circuit courts;
> (b) Of all violations of municipal and county ordinances; and
> (c) Of all actions at law in which the matter in controversy does not exceed the sum of $15,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts. The party instituting any civil action, suit, or proceeding pursuant to this paragraph where the amount in controversy is in excess of $5,000 shall pay to the clerk of the county court the filing fees and service charges in the same amounts and in the same manner as provided in s. 28.241 [with respect to fees and charges in circuit court].

Proposed Changes

This bill amends s. 34.01(1), F.S., to grant the county courts jurisdiction over disputes relating to enforcement of the covenants of homeowner's associations, or other documents or actions made pursuant to those covenants, as modified to provide for alternative dispute resolution by DBPR under Section 9 of this bill (see below). This jurisdiction is concurrent with the jurisdiction of the circuit courts over the same kinds of disputes, i.e., by granting jurisdiction to the county courts, this bill does not divest the circuit courts of jurisdiction.

Section 2: Definitions

Section 720.301, F.S., defines terms used throughout ch. 720, F.S., the Homeowners' Association Act.

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[5] Department of Business and Professional Regulation, Final Report of the Homeowners' Association Task Force (Feb. 2004), 7.
[6] Id. at 7-8.
[7] The Task Force met in: Tallahassee, Sept. 24, 2003; Miami, Oct. 17, 2003; Orlando, Nov. 14, 2003; Tampa, Dec. 8, 2003; St. Augustine, Jan. 9, 2004; and again in Tallahassee, Jan. 28, 2004.
[8] *See* Art. V, ss. 5 and 6, Fla. Const.

Proposed Changes

This bill amends s. 720.301, F.S., to provide that "Division," when used in ch. 720, means DBPR's Division of Florida Land Sales, Condominiums and Mobile Homes, and that "member" means any person or entity obligated by the governing documents to pay an assessment or amenity fee.

Section 3: Legislative Intent and Findings

Section 720.302, F.S., describes the purposes behind enacting ch. 720, F.S., the Homeowners' Association Act. In s. 720.302(2), F.S., the Legislature provides its rationale for deciding not to place homeowners' association under the authority of a regulatory agency:

> The Legislature recognizes that it is not in the best interest of homeowners' associations or the individual association members thereof to create or impose a bureau or other agency of state government to regulate the affairs of homeowners' associations. Further, the Legislature recognizes that certain contract rights have been created for the benefit of homeowners' associations and members thereof before the effective date of this act and that ss. 720.301-720.312 are not intended to impair such contract rights, including, but not limited to, the rights of the developer to complete the community as initially contemplated.

Proposed Changes

This bill amends s. 720.302(2), F.S., to state a legislative finding that homeowners' associations and their individual members will benefit from expedited alternative dispute resolution of election and recall disputes and presuit mediation of other covenant enforcement disputes, and thus authorizes the Division to hear and determine those disputes as set forth in the rest of ch. 720, F.S. (as amended elsewhere by this bill).

Section 4: Gifts, Grandfathering, Meetings, Official Records, Financial Reporting, Commingling, and Board Recall

Gifts

Current law does not appear to prohibit directors, officers or managers of a homeowners' association from accepting, soliciting or offering to accept, goods or services from persons providing or proposing to provide goods or services to the association.

Grandfathering

Current law treats all amendments to association documents as binding on all association members, regardless of when they became members.

Board Meetings

Section 720.303(2), F.S., governs meetings of boards of homeowners' associations. This section does not directly address what rights other parcel owners have to attend and speak at board meetings, nor does it require any special notice with respect to meetings to consider special assessments, or allow parcel owners other than board members any means of official input with respect to what business to place on the agenda of a board meeting.

Official Records

Section 720.303(4), F.S., requires a homeowners' association to maintain on file a number of documents as its official records, but does not include among them the disclosure summary the association presents to prospective purchasers.

Section 720.303(5), F.S., requires that a homeowners' association allow its members to inspect and copy its official records within 10 days of a written request for access. A failure to comply with such a request in a timely fashion creates a rebuttable presumption that the association failed to do so,[9] and entitles the requesting party to actual damages, or to a minimum of $50 per calendar day, commencing on the eleventh business day.[10] A homeowners' association "may adopt reasonable written rules governing the frequency, time, location, notice, and manner of inspections, and may impose fees to cover the costs of providing copies of the official records, including without limitation, the costs of copying."[11]

Financial Reporting

Section 720.303(7), F.S., currently imposes the following financial reporting requirements on homeowners' associations:

> The association shall prepare an annual financial report within 60 days after the close of the fiscal years. The association shall within the time limits set forth in subsection (5), provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

Commingling of Funds

Section 720.303(8), F.S., currently restricts commingling between association and developer funds, and between operating and reserve accounts, in the following manner:

> (a) All association funds held by a developer shall be maintained separately in the association's name. Reserve and operating funds of the association shall not be commingled prior to turnover except the association may jointly invest reserve funds; however, such jointly invested funds must be accounted for separately.
> (b) No developer in control of a homeowners' association shall commingle any association funds with his or her funds or with the funds of any other homeowners' association or community association.

Recall of Board Members

Current law does not specifically provide a mechanism for the recall of board members. Thus, whether and how this may be done is a matter controlled by individual associations' declarations of covenants.

Proposed Changes

Gifts

This bill amends s. 720.303(1), F.S., to provide that it is a first-degree misdemeanor for a director, officer or manager of a homeowners' association to solicit, accept or offering to accept anything of value for which consideration has not been provided for his or her own benefit, or that of his or her

[9] *See* s. 720.303(5)(a), F.S.
[10] *See* s. 720.303(5)(b), F.S.
[11] Section 720.303(5)(c), F.S.

immediate family, from any person providing or proposing to provide goods or services to the association.

Grandfathering

This bill amends s. 720.303(1), F.S., to provide that an association of 15 or fewer parcel owners may enforce only the requirements of those deed restrictions established prior to the purchase of each parcel upon an affected parcel owner or owners.

Board Meetings

This bill amends s. 720.303(2), F.S., to provide that association members have the right to attend all meetings and to speak with reference to any item on the agenda or opened for discussion. This bill provides that a member has the right to speak for at least three minutes on any item, provided that he or she submits a request to speak prior to the meeting. This bill's open-meetings requirement expressly does not apply to meetings between the board and the association's attorney for the purpose of seeking legal advice, or to meetings for the discussion of personnel matters.

This bill further amends s. 720.303(2), F.S., to require that, if the subject of reasonable notice to members of board meetings for the purpose of considering special assessments or amendments to the association documents is not addressed in the bylaws, written notice must be mailed, delivered or electronically transmitted to parcel owners and other members, and posted conspicuously or broadcasted on closed-circuit television, at 14 days prior to any board meeting for such purposes.

This bill also amends s. 720.303(2), F.S., to require boards take up on their agenda for the next general or special board meeting within 60 days, any item of business petitioned by at least 20 percent of the voting interests.

Official Records

This bill amends s. 720.303(4), F.S., to include among the documents an association is required to maintain: a copy of its disclosure summary; and "[a]ll other written records of the association not specifically included in the foregoing that are related to the operation of the association."

This bill also amends s. 720.303(5), F.S., to require associations to provide copies on request during an inspection of official records if the request is 25 pages or less, charging up to 50 cents per page if on the association's copier or actual costs if copied by an outside vendor. This bill specifies that associations may not impose a requirement that a parcel demonstrate a proper purpose or state a reason for an inspection, nor may they restrict a parcel owner's right of inspection to less than one 8-hour business day per month. However, this bill also expressly exempts the following from parcel owner inspection: any record protected by attorney-client or work-product privilege; information obtained in association with the lease, sale or transfer of a parcel that is otherwise privileged by state or federal law; disciplinary, health, insurance and personnel records of the association's employees; or medical records of parcel owners or other community residents.

Financial Reporting

With respect to financial reporting, this bill imposes a graduated scale of outside scrutiny: associations with total revenues between $100,000 and $200,000 are required to prepare compiled financial statements; those with revenues between $200,000 and $400,000, reviewed financial statements; and those with more than $400,000 in total revenue, audited financial statements. Those with less than $100,000 of annual revenue, or less than 50 parcels regardless of revenue, need only prepare a report of cash receipts and disbursements. If 20 percent of the parcel owners petition the board for a higher level of financial reporting than required, the association is to notice and hold a meeting within 30 days

for the purpose of raising the level of reporting for that fiscal year, and to amend the budget or provide special assessments to provide for the higher level of reporting.

Commingling of Funds

This bill further restricts commingling of funds by amending s. 720.303(8), F.S., to prohibit a developer from expending association funds to defend a civil, criminal, administrative or arbitration proceeding filed against it or against directors appointed by it to an association's board, even when the action or proceeding concerns the operation of an association still under the developer's control.

Recall of Board Members

This bill adopts mechanisms for recalling board members from the Condominium Act, ch. 718, F.S. The procedure provided is exclusive, i.e., it is mandatory and universal to all associations statewide notwithstanding any conflicting provisions in their association documents.

Section 5: SLAPP Suits, Display of Flags, Ramps for the Disabled, Security Signs

SLAPP Suits Generally

Under both the federal and state constitutions, citizens have the right to petition governments for redress of their grievances.[12] Lawsuits aimed at deterring this type of public participation in government are known as strategic lawsuits against public participation or SLAPPs. Although these suits are frequently dismissed, the costly and time-consuming consequences of litigation or merely the threat thereof may nonetheless have a chilling effect on individual citizens or citizen groups wanting or attempting to exercise their constitutional rights.

According to a 1993 study conducted by the Office of the Attorney General, the cost of defending against such lawsuits ranged from $500 to $106,000 based on 21 SLAPP lawsuits reported in Florida for the period 1985-1993.[13] Over 90% of the SLAPP suits were brought by private individuals or corporate entities; the remaining lawsuits were brought by government entities. Even in cases where the public won, the litigation effectively stopped any further activity. According to that survey, most of the suits were initiated in response to informal public activities such as speaking at public meetings and letter campaigns to local governmental entities or electorate. The remainder were filed in response to formal public activities, i.e., challenges to local, regional, state or federal agency decisions.

Since the 1993 survey, there has been no ongoing systematic program or effort to track the number of SLAPP suits in Florida. The difficulty is due in part to the fact that SLAPP lawsuits are not easily identifiable. SLAPP suits are filed under a variety of legal theories, frequently including, but certainly not limited to, interference with a business relationship, slander, libel, conspiracy, abuse of process, trespass, nuisance, and harassment. Existing Florida law offers litigants the following options to address SLAPP suits:

SLAPP Suits by Governmental Entities: Citizen Participation in Government Act

In 2000, the Legislature enacted the "Citizen Participation in Government Act" ("CPGA").[14] Codified as s. 768.295, F.S., the CPGA provides, in pertinent part:

> No governmental entity in this state shall file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against a person or

[12] *See* Amend. I, U.S. Const.; Art. I, s. 5, Fla. Const.
[13] *See* Department of Legal Affairs, "Strategic Lawsuits Against Public Participation in Florida: Survey and Report," July 1993.
[14] *See* ch. 2000-174, L.O.F.

> entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.[15]

The CPGA further provides for a procedure to address an alleged violation of its provisions: the party asserting a violation may bring a motion to dismiss, for summary judgment or for final judgment, as appropriate on that basis, and must be heard on the motion as soon as practicable.[16] If the motion is granted, the prevailing party is entitled to actual damages, court costs and reasonable attorney's fees, although this award is subject to the limitation of the sovereign-immunity statute.[17]

The CPGA may be an effective deterrent to SLAPP suits, but applies only against SLAPP suits by governmental entities, not those initiated by private parties.

Action for Malicious Prosecution

If a defendant in a SLAPP lawsuit successfully has the action dismissed or prevails on the merits, a malicious prosecution action may be filed against the former plaintiff on the theory that the original action was brought maliciously. Under Florida case law, six separate elements must be proven in a malicious prosecution claim or the case must be dismissed:[18]

1. An original action was commenced;
2. The original action was filed by the defendant in the new malicious prosecution action;
3. The original action ended with a ruling in favor of the plaintiff who is bringing the malicious prosecution action;
4. The original action was instigated with malice;
5. The original action was instigated without probable cause; and
6. The original action resulted in damages to the person bringing the malicious prosecution action.

Actions for malicious prosecution may not serve to deter SLAPP suits because the malicious prosecution action cannot be brought until the resolution of the original SLAPP suit. Thus, the SLAPP suit may still serve the intended purpose of discouraging public participation, regardless of whether it has merit.

Motion to Strike Sham Pleadings

A party to a civil suit may move to strike a sham pleading.[19] The moving party must prove that the pleading in question is plainly fictitious,[20] with the court resolving any doubts in favor of the party opposing the motion.[21] Because this standard is difficult to meet, filing such a motion will not only require legal expenditures by the plaintiff, but may fail to slow down or eliminate the suit. If the court finds in favor of the moving party, the effect will only be to strike the pleading. Such an action may not serve as an effective deterrent to SLAPP suits.

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[15] Section 768.295(4), F.S.
[16] *See* s. 768.295(5), F.S.
[17] *See id.* The state's limited waiver of sovereign immunity is codified as s. 768.28, F.S.
[18] *Scozari v. Barone*, 546 So.2d 750, 741 (Fla. 3d DCA 1989).
[19] *See* FLA. R. CIV. P. 1.150.
[20] *See Rhea v. Hackney*, 157 So. 190 (Fla. 1934); 40 FLA. JUR. 2D PLEADINGS §§ 147-48 and authorities cited therein.
[21] *See Bay Colony Office Building Joint Venture v. Wachovia Mortgage Co.*, 342 So.2d 1005 (Fla. 4th DCA 1977).

Motion to Dismiss and Motion for Summary Judgment

A party to a civil suit may move to have all or part of an opposing party's case dismissed.[22] The burden rests on the moving party to show that even if the allegations in the complaint were true, the complaint fails to state a cause of action. Another option available to a party is filing a motion for summary judgment, seeking to show that there is a complete absence of any issue of material fact.[23] The standard needed to prevail under either of these rules may be so high that such procedures would not make effective deterrents for SLAPP suits.

Other Remedies

Other remedies may be available to a defendant in a SLAPP suit, such as an award of attorney's fees, but those remedies are available only after the litigation has progressed to judgment and the desired intent to discourage the defendant from public participation has already been achieved.

Other States

SLAPP suits are filed nationwide, and thus other states have either enacted or proposed anti-SLAPP legislation.[24] At least one state has addressed the issue of SLAPP suits judicially rather than legislatively. In *Protect Our Mountain Environment, Inc. v. District Court*,[25] the Colorado Supreme Court held that a claim which allegedly interferes with the constitutional right to petition must be dismissed unless the plaintiff shows that the defendant's petitioning activities should not be immunized because:

> (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.[26]

Display of Flags

Section 720.304(2), F.S., provides that, regardless of declaration rules or other requirements, a homeowner may display one portable, removable United States flag in a respectful manner.

Ramps for the Disabled

Current law does not appear to specifically address the subject of ramps for the disabled with respect to homeowners' associations.

Security Signs

Current law does not appear to specifically address the subject of signs for security services with respect to homeowners' associations.

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[22] *See* FLA. R. CIV. P. 1.140.
[23] *See* FLA. R. CIV. P. 1.510.
[24] *See e.g.*, Cal. Civ. Proc. Code § 425.16; Del. Code Title 10 §§ 8136-38; Ga. Code § 9-11-11.1; Ind. Code § 34-7-7; La. Code Civ. Pro. art. 971; Me. Rev. Stat. Title 14 § 556; Mass. Gen. Laws ch. 231, § 59H; Minn. Stat. § 554.02; Neb. Rev. Stat. §§ 21-25-241 to -246; Nev. Rev. Stat. §§ 41.640-.670; N.M. Stat. §§ 38-2-9.1 and 9.2; N.Y. CIV. RIGHTS LAW § 76; Okla. Stat. Title 12 § 1443.1; 42 Pa. Cons. Stat. §§ 27-77-7707 and 27-83-8301 to -8305; R.I. Gen. Laws §§ 9-33-3-1 to 9-33-3-4; Tenn. Code §§ 4-21-1003 to -1004; Wash. Rev. Code §§ 4.24.500-4.24.520. For an overview of the history of anti-SLAPP legislation, *see generally* Erin Malia Lum, *Hawai'i's Response to Strategic Litigation Against Public Participation and the Protection of Citizen's Right to Petition the Government*, 24 U. HAW. L. REV. 411 (Winter 2001).
[25] 677 P.2d 1361 (Colo. 1984).
[26] *Id.* at 1369.

Proposed Changes

SLAPP Suits

This bill first states a legislative finding that SLAPP suits by governmental entities, business organizations or private individuals are inconsistent with parcel owners' exercise of their rights to participate in the state's institutions of government.

This bill then creates a new s. 720.304(4), F.S., to extend the expedited procedures and additional remedies of the CPGA, see above, to SLAPP suits brought by private parties against parcel owners solely because such parcel owners have exercised their constitutional right to instruct their representatives or petition their government for redress of grievances. A court may award actual damages or may treble the damage award, stating reasons for doing so. The prevailing party in such a suit is entitled to costs and reasonable attorneys' fees.

This bill further provides that an association shall not expend association funds in prosecuting a SLAPP suit against a parcel owner.

Display of Flags

This bill amends s. 720.304(2), F.S., authorizing the display of Florida's state flag on an equal footing with the U.S. flag, and authorizing the display of portable, removable official flags representing the United States Army, Navy, Air Force, Marine Corps or Coast Guard on Armed Forces Day, Memorial Day, Flag Day, Independence Day and Veterans Day.

Ramps for the Disabled

This bill creates a new s. 720.304(5), F.S., providing that a homeowner may construct a ramp when a resident or occupant has a medical necessity or disability requiring a ramp for ingress and egress. The homeowner must submit to the association an affidavit from a physician attesting to the medical necessity or disability of the resident or occupant of the home requiring the access ramp. The ramp must be as unobtrusive as possible, designed to blend in aesthetically as practicable, and be reasonable sized to fit the intended use. Plans for the ramp must be submitted in advance to the homeowner association, and the association may make reasonable requests to modify the design to achieve architectural consistency with surrounding structures and surfaces.

Security Signs

This bill creates a new s, 720.304(6), F.S., providing that any owner may display a sign of a reasonable size provided by a contractor for security services within 10 feet of any entrance to the home.

Section 6: Fines, Liens and Attorneys' Fees

Section 720.305(2), F.S., currently provides:

> (2) If the governing documents so provide, an association may suspend, for a reasonable period of time, the rights of a member or a member's tenants, guests, or invitees, or both, to use common areas and facilities and may levy reasonable fines, not to exceed $100 per violation, against any member or any tenant, guest, or invitee. A fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, except that no such fine shall exceed $1,000 in the aggregate unless otherwise provided in the governing documents.
> (a) A fine or suspension may not be imposed without notice of at least 14 days to the person sought to be fined or suspended and an opportunity for a hearing before a committee of at least

three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. If the committee, by majority vote, does not approve a proposed fine or suspension, it may not be imposed.
(b) The requirements of this subsection do not apply to the imposition of suspensions or fines upon any member because of the failure of the member to pay assessments or other charges when due if such action is authorized by the governing documents.
(c) Suspension of common-area-use rights shall not impair the right of an owner or tenant of a parcel to have vehicular and pedestrian ingress to and egress from the parcel, including, but not limited to, the right to park.

It is not clear whether fines imposed under this section currently operate as liens on an owner's parcel.

Proposed Changes

This bill amends s. 720.205(2), F.S., to specifically provide that the fines provided for in that section do not become liens against a parcel. This bill further provides that in any action to recover a fine, the prevailing party is entitled to reasonable attorneys' fees and costs.

Section 7: Competitive Bidding For Contracts

Homeowners' associations are not currently required to engage in competitive bidding for contracts.

Proposed Changes

This bill creates a new s. 720.3055, F.S., adopting verbatim the current competitive-bidding requirements imposed on condominium associations in s. 718.3026, F.S. Contracts with employees of the association and for attorney, accountant, architect, community association manager, engineer and landscape architect services are exempt from these requirements, as are contracts entered into before October 1, 2004.

Section 8: Notice of Meetings, Election Disputes

Notice of Meetings

Current law does not specifically require notice of association member meetings; thus, whether and how any such requirement operates is currently a matter to be addressed, if at all, in the documents of individual homeowners' associations. Nor does current law provide minimum rights to speak at such meetings.

Election Disputes

Section 720.306(7), F.S., currently provides:

> Elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association. All members of the association shall be eligible to serve on the board of directors, and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held. Except as otherwise provided in the governing documents, boards of directors must be elected by a plurality of the votes cast by eligible voters.

Dispute resolution is not provided for; thus, under current law, any election dispute may only be adjudicated in circuit court.

Proposed Changes

Notice of Meetings

This bill amends s. 720.306, F.S., to require that the bylaws provide giving notice of association meetings to members, and if they do not, default provisions apply, requiring actual notice to all association members at least 14 days before an association member meeting, to be delivered, mailed or electronically transmitted. Evidence of this notice must be by affidavit executed by the person providing the notice and filed upon execution in the association's official records. In addition to such notice, the association may, by reasonable rule, provide for conspicuously posting the notice or broadcasting it on closed circuit television serving the association. Such broadcast notice must be in a manner and for sufficient continuous length of time for an average reader to observe the notice and comprehend it.

This bill further amends s. 720.306, F.S., to specify that an association member has the right to speak for at least three minutes on any item at an association meeting, provided that he or she submits a request to speak at least ten minutes prior to commencement of the meeting.

Election Disputes

This bill provides that any election dispute must be submitted to mandatory binding arbitration by the Division, conducted in the manner specified for such proceedings with respect to condominium elections under s. 718.1255, F.S., and procedural rules adopted by the Division.

Section 9: Alternative Dispute Resolution

Under s. 720.311, F.S., once a complaint has been filed alleging a dispute under the Homeowners' Association Act, the circuit court may order that the parties enter mediation or arbitration proceedings (collectively, "alternative dispute resolution" or "ADR").

Proposed Changes

This bill amends s. 720.311, F.S., to provide that election and recall disputes are subject to mandatory binding arbitration by the Division, which is to adopt rules governing such proceedings. The complaining party shall file an initial fee of $200; at the conclusion of such a proceeding, the Division shall impose an additional fee in an amount adequate to cover all its costs and expenses. Both fees shall be a recoverable cost which, together with other costs and reasonable attorneys' fees, shall be paid to the prevailing party by the nonprevailing party.

Under this bill, other homeowners' association disputes not involving elections or recalls are to be referred for mandatory mediation by the Division. The complaining party shall file an initial fee of $200; at the conclusion of such a proceeding, the Division shall impose an additional fee in an amount adequate to cover all its costs and expenses. Both fees shall be a recoverable cost which, together with other costs and reasonable attorneys' fees, shall be paid to the prevailing party by the nonprevailing party. If mediation is unsuccessful, the parties may either proceed to court, or elect to enter binding or nonbinding arbitration.

This bill requires the Division to develop a certification and training program for mediators and arbitrators emphasizing experience in the operation of community associations. Costs of this program are to be paid by the filing fees collected in the Division's arbitration and mediation proceedings; initial funding is to be provided by DBPR.

This bill also provides that its mediation procedures may be used by a corporation in this state responsible for the operation of a community in which voting members are parcel owners, but in which

membership is not a mandatory condition of parcel ownership, or which is not authorized to impose an assessment which may become a lien on the parcel.

Finally, this bill also provides that filing a petition for alternative dispute resolution with the Division tolls any applicable statute of limitations.

Section 10: Disclosures to Prospective Purchasers

Disclosures to be made to a prospective purchaser of a parcel subject to association membership are currently provided in s. 689.26, F.S., i.e., in the chapter on conveyances of land and declarations of trust, not in the Homeowners' Association Act. An association is required to disclose: whether membership is required; whether individual members must pay assessments to any local taxing districts; that failure to pay assessment levied by the association could result in a lien on the property; whether there is an obligation to pay rent or land use fees for common facilities; and whether the covenants can or cannot be amended without the approval of the association members.

Proposed Changes

This bill transfers and renumbers s. 689.26, F.S., as s. 720.401, F.S. This bill makes clarifying changes to the disclosure summary, and provides that if the disclosure summary is not provided to a prospective purchaser before the purchaser executes a contract for the sale, the purchaser may void the contract by delivering to the seller or the seller's agent or representative written notice canceling the contract within 3 days after receipt of the disclosure summary or prior to closing, whichever occurs first. This right may not be waived by the purchaser but terminates at closing.

Section 11: Additional Financial Reports

Section 689.265, F.S., governs financial reporting with respect to fees collected and expenditures made on common areas, whether by the association, the developer, or other third parties.

Proposed Changes

This bill transfers and renumbers s. 689.265, F.S., as s. 720.3086, F.S.

Section 12: False or Misleading Information in Promotional Materials, Etc.

Under the Condominium Act, specifically s. 718.506(1), F.S., a person who pays anything of value toward the purchase of a condominium unit in reasonable reliance upon a material statement or information that is false or misleading published by or under the authority of the developer has a cause of action for damages, as well as a cause of action to rescind the contract if suit is brought prior to closing on the sale. Such statements or information may include, but are expressly not limited to, a prospectus, the items required as exhibits to a prospectus, brochures, and newspaper advertising. In a suit pursuant to such a cause of action, the prevailing party is entitled to costs and reasonable attorneys' fees.[27]

The Homeowners' Association Act does not have an analogous provision.

Proposed Changes

This bill creates s. 720.402, F.S., adopting the Condominium Act's provisions on false or misleading promotional materials verbatim.

[27] *See* s. 718.506(2), F.S.

Section 13: Warranties

Warranties in addition to those expressly granted by developers in contracts for, and deeds conveying, parcels subject to homeowners association membership are not currently implied have been granted by the developer. Indeed, form purchase contracts and deeds often, if not typically, disclaim any implied warranties. The same is generally true with respect to work by contractors and subcontractors.

Proposed Changes

This bill creates s. 720.501, F.S., providing that developers and contractors are deemed to have granted implied warranties of fitness and merchantability as follows:

- from the developer, a warranty for 3 years after commencing completion of a building or improvement, or 1 year after transfer of control, in no event more than 5 years after completion;
- from the developer, a warranty for personal property transferred with or appurtenant to the common areas for the same period as provided by the manufacturer;
- from contractors and subcontractors, etc., as to roofing and structural components of a building or improvement, and mechanical and plumbing elements serving a building or improvement, a warranty for 3 years after completion; and
- from contractors and subcontractors, etc., as to any other services or materials provided, a warranty for 1 year after completion.

These warranties are conditioned upon routine maintenance being performed, unless such maintenance is an obligation of the developer or a developer-controlled association. The warranties inure to the benefit of each owner and their successor owners, and the statutes of limitations for actually commencing suit based upon an alleged breach of these warranties does not commence until after the parcel owners assume control of the association from the developer.

Section 14: Closing and Abandonment of Roads

Section 316.00825, F.S., addresses optional conveyance of county-maintained roads to homeowners' associations.

Proposed Changes

This bill amends s. 316.00825(1)(a)3., F.S., to conform a cross-reference to this bill's numbering changes.

Section 15: Exemptions from the Land Sale Practices Act

Chapter 498 of the Florida Statutes is the state's adoption of the Uniform Land Sale Practices Act ("ULSPA"). Under s. 498.022, F.S., the provisions of ULSPA do not apply if all of a list of certain specified conditions are met, one of which is that a subdivider presents a purchaser with the homeowners' association disclosure summary for a parcel before the execution of a contract or lease.

Proposed Changes

This bill amends s. 498.025., F.S., to conform cross-references to this bill's numbering changes.

Section 16: Additional Definitions

Chapter 558 of the Florida Statutes governs construction defects. Section 558.002, F.S., provides definitions for that chapter, including a definition of "association."

Proposed Changes

This bill amends s. 558.002(2), F.S., to conform a cross-reference to this bill's numbering changes.

Section 17: Parts of the Homeowners' Association Act

Chapter 720, F.S., the Homeowners' Association Act, is not currently divided into parts.

Proposed Changes

This bill divides ch. 32, F.S., into parts. Sections 720.301-720.312, F.S., are designated as part I; ss. 720.401 and 720.402, F.S., are designated as part II, entitled "DISCLOSURE PRIOR TO SALE OF RESIDENTIAL PARCELS"; and s. 720.501, F.S., is designated as part III and entitled "RIGHTS AND OBLIGATIONS OF DEVELOPERS."

Section 18: Effective Date

This bill becomes effective October 1, 2004.

C. SECTION DIRECTORY:

Section 1. amends s. 34.01(1), F.S., relating to county court jurisdiction.

Section 2. amends s. 720.301, F.S., to provide additional definitions.

Section 3. amends s. 720.302(2), F.S., to provide for legislative findings and intent.

Section 4. amends s. 720.303, F.S., relating to meetings, official records, financial reporting, commingling, and board recall.

Section 5. amends s. 720.304, F.S., relating to SLAPP suits and the display of flags.

Section 6. amends s. 720.305(2), F.S., relating to fines, liens and attorneys' fees for collection.

Section 7. creates s. 720.3055, F.S., relating to competitive bidding for contracts.

Section 8. amends s. 720.306, F.S., relating to meeting notice and election disputes.

Section 9. amends s. 720.311, F.S., granting alternative dispute resolution authority to the Division.

Section 10. transfers, renumbers and amends s. 689.26, F.S., as s. 720.401, F.S., relating to mandatory disclosures prior to purchase.

Section 11. transfers and renumbers s. 689.265, F.S., as s. 720.3086, F.S., relating to additional financial reporting.

Section 12. creates s. 720.402, F.S., relating to false or misleading promotional information.

Section 13. creates s. 720.501, F.S., providing implied warranties.

Section 14. amends s. 316.00825(1)(a)3., F.S., to conform a cross-reference.

Section 15. amends s. 498.025, F.S., to conform cross-references.

Section 16. amends s. 558.002(2), F.S., to conform a cross-reference.

Section 17. divides ch. 720, F.S., into parts.

Section 18. provides an effective date of October 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill authorizes the Division to collect fees to cover its new ADR activities with respect to homeowners' associations. The positive fiscal impact is uncertain.

2. Expenditures:

   While this bill's fees are meant to cover all of the Division's new activities, it can be expected that, in rare cases, the Division may not be able to collect the fees, or for some other reason face a shortfall between its actual costs and the fees imposed. The fiscal impact, if any, is uncertain.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill's implied warranties could expose developers and contractors to greater liability, thus possibly increasing their insurance rates. The overall impact, if any, is uncertain.

D. FISCAL COMMENTS:

It is possible that this bill's imposition of mandatory ADR in numerous cases could decrease litigation costs to all parties connected to homeowners' associations.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Impairment of Contracts

Both Article I, section 10 of the United States Constitution and Article I, section 10 of the Florida Constitution forbid state impairment "of the obligation of contracts."[28] Florida courts have generally treated the requirements of the state and federal Contract Clauses as identical, although they have suggested that the provision in the state constitution is probably stronger.[29] This bill's imposition of a standard recall procedure notwithstanding any association documents may raise concerns under these provisions.

Documents creating some private legal entities have been treated as contracts under the Contracts Clause since at least 1819. That year, in *Trustees of Dartmouth College v. Woodward*,[30] the Supreme Court of the United States ruled that, by attempting to transform Dartmouth College into a public university, New Hampshire had unconstitutionally impaired the obligations of contract—obligations the state had inherited as successor-in-interest to the British Crown, which granted Dartmouth's corporate charter in 1769.

Under longstanding case law in this state, a corporate charter or articles of incorporation becomes a contract between the shareholders of the corporation and the state upon being granted—a contract governed by the law in force at the time it was made.[31] However, courts have also ruled that the Legislature's express reservation, in s. 607.0102, F.S., of its power to amend or repeal the Florida Business Corporations Act, prevents a corporation from asserting unalterable contractual rights in its charter or articles of incorporation.[32] Because ch. 720, F.S., does not contain such a reservation, it is possible that amending this chapter with respect to vested rights may only be prospective in nature, i.e., such amendments might only apply against homeowners' associations or their members that acquired such rights after the amendments became effective.

Applying the effects of this bill to covenants entered into, and articles of incorporation recorded, before its effective date may raise concerns about legislative impairment of these contracts, which might be held subject to prior law.[33] Courts use a balancing test to determine whether particular legislation violates the Contract Clause, measuring the severity of contractual impairment against the importance of the interest advanced by the regulation, and also looking at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest.[34]

County Court Jurisdiction

Article V, section 5(b) of the Florida Constitution provides that "[t]he circuit courts shall have original jurisdiction not vested in the county courts[.]" Therefore, it may not be possible for the Legislature to

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[28] *See generally* 16 AM. JUR. 2D CONSTITUTIONAL LAW §§ 708-744; 10 FLA. JUR. 2D CONSTITUTIONAL LAW §§ 348-373.
[29] *See, e.g.*, *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980) (accepting as persuasive an interpretation of the federal Contract Clause by the Supreme Court of the United States in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978)).
[30] 17 U.S. (4 Wheat.) 518 (1819).
[31] *See Marion Mortgage Co. v. State ex rel. Davis*, 145 So. 222 (Fla. 1932); *Ex parte Amos*, 114 So. 760 (Fla. 1927); *Columbia County Comm'rs v. King*, 13 Fla. 451 (1869).
[32] *See Aztec Motel, Inc. v. State*, 251 So.2d 849 (Fla. 1971); *Hopkins v. The Vizcayans*, 582 So.2d 689 (Fla. 3d DCA 1991).
[33] *See, e.g., Marion Mortgage Co. v. State ex rel. Davis*, 145 So. 222 (Fla. 1932); *Ex parte Amos*, 114 So. 760 (Fla. 1927); *Columbia County Comm'rs v. King*, 13 Fla. 451 (1869) (all holding that, under Contracts Clause, articles of incorporation were subject to law in effect when they were first promulgated).
[34] *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Ruhl v. Perry*, 390 So.2d 353 (Fla. 1980); *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980); *Yellow Cab Co. v. Dade County*, 412 So.2d 395 (Fla. 3d DCA 1982).

grant jurisdiction over specified homeowners' association disputes to the county courts while leaving the circuit courts with concurrent jurisdiction over the same subject matter, as this bill does.

B. RULE-MAKING AUTHORITY:

This bill authorizes the Division of Florida Land Sales, Condominiums and Mobile Homes to adopt rules with respect to mediation and arbitration of homeowners' association disputes.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Even if not constitutionally prohibited (see above), granting concurrent rather than exclusive jurisdiction to the county courts may make for confusion over where to file suit to enforce homeowners' association disputes, and possibly even for competing lawsuits in circuit and county court, with each racing for a judgment in order to moot the other through *res judicata*.

Even if an attempt to retroactively apply effects of this bill were held not to unconstitutionally impair the obligations of contract, Florida common law does not allow government to adversely affect substantive rights once those rights have vested;[35] moreover, unless the Legislature states otherwise, a statute is presumed only to operate prospectively, especially when such operation would impair vested rights.[36]

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On April 13, 2004, the House Committee on Judiciary adopted one strike-all amendment to this bill. Some highlights of the amendment included:

- expanding the definition of "member" to include any person or entity obligated by the governing documents to pay an assessment or amenity fee;
- making it a first-degree misdemeanor to solicit, accept or offering to accept any thing or service of value for which consideration has not been provided for his or her own benefit, or that of his or her immediate family, from any person providing or proposing to provide goods or services to the association;
- providing that an association of 15 or fewer parcel owners may enforce only the requirements of those deed restrictions established prior to the purchase of each parcel upon an affected parcel owner or owners;
- clarifying an inconsistency in the original bill to make clear that DBPR is to conduct mandatory binding arbitration of HOA election disputes;
- narrowing required contents of the disclosure summary; and
- eliminating a requirement that a prospective purchaser receive additional documents at the signing of a contract for sale, i.e., the latest governing documents, budget, and annual financial statement.

The Committee then reported this bill favorably as amended.

This analysis is drafted to the bill as amended.

[35] *See Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).
[36] *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994).