The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL:	CS/CS/SB 902
INTRODUCER:	Judiciary Committee, Regulated Industries Committee, and Senator Jones
SUBJECT:	Community Associations
DATE:	April 18, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.	Herrin	Yeatman	CA	**Favorable**
3.	Daniell	Maclure	JU	**Fav/CS**
4.				
5.				
6.				

I. Summary:

This bill amends the Condominium Act to provide the following provisions and requirements regarding the rights, powers, and duties of condominium associations and their members:

- Prohibits local ordinances or regulations that limit access to a public beach contiguous to a condominium for the condominium members and their guests, unless necessary to protect public health, safety, or natural resources;
- Limits the enforcement of provisions in the governing documents recorded on or after October 1, 2007, or amendments thereto, that require consent or joinder of some or all mortgagees of units or any other portion of the condominium property for those mortgages;
- Prohibits the acquiring or entering into agreements acquiring leaseholds, memberships, or other possessory or use interests within 12 months after a declaration; and
- Provides that provisions relating to mixed-use condominiums apply retroactively as a remedial measure.

This bill establishes conformity in the laws regulating homeowners' associations and condominium associations and provides the following provisions and requirements regarding the powers and duties of a homeowners' association:

- Procedures for the revival of the declaration of covenants for non-mandatory homeowners' associations in which the covenants have lapsed;
- Authorizes the creation of for-profit homeowners' associations;

- All meetings of a homeowners' association regarding the spending of association funds or to approve or disapprove architectural decisions must be open to all members;
- Authorizes a homeowners' association to charge a reasonable fee, plus photocopying and attorney's fees, for providing good faith responses to requests for information;
- Provides for the maintenance of reserve accounts in the annual budget, including how to calculate reserves and conditions for waiving the maintenance of reserve accounts;
- Increases the period after each fiscal year that an association must prepare and complete the annual financial report;
- An association may review and approve building plans only to the extent that it is specifically stated or reasonably inferred in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants;
- An association can only enforce setbacks specifically provided for in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants;
- Each parcel owner's rights and privileges as provided in the declaration of covenants cannot be unreasonably impaired concerning the use of the parcel, and the construction of permitted structures and improvements;
- An association cannot enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants;
- Any member who prevails in an action against an association and is awarded attorney's fees may be awarded an amount sufficient to cover the member's share of assessments levied to fund the association's litigation expenses;
- Permits the merger or consolidation of one or more associations;
- Specifies additional records and documents that the developer must provide to the association's board of directors upon creation of the association; and
- Provides for guarantees of assessments of parcel owners that are not included in the purchase contract or declaration.

This bill also eliminates the mediation of disputes between homeowners' associations and members from the jurisdiction of the Department of Business and Professional Regulation. Such disputes would be mediated by private mediators.

This bill substantially amends the following sections of the Florida Statutes: 718.106, 718.110, 718.114, 718.404, 719.103, 720.302, 720.303, 720.305, 720.306, 720.307, 720.308, and 720.311. This bill creates sections 712.11 and 720.3035, Florida Statutes.

II. Present Situation:

Background

A condominium is a "form of ownership of real property created pursuant to [ch. 718, F.S.,] which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements."[1] A condominium is

[1] Section 718.103(11), F.S.

created by recording a declaration of condominium in the public records of the county in which the condominium will be located.[2] A declaration is like a constitution in that it:

> [S]trictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[3]

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[4] A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of two-thirds of the units.[5]

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments for violations of the governing documents.[6] Homeowners' associations are regulated under ch. 720, F.S.

Reviving Association Covenants and Restrictions

Some Florida homeowners' associations have governing documents that provide for an expiration of the community covenants after a specified number of years. The Marketable Record Title Act[7] may cause covenants to lapse by operation of law if the covenants are silent as to expiration, or if a 30-year period in the Marketable Record Title Act is shorter than the stated expiration time. Residents in these communities have the option to revive the covenants after the expiration by following the covenant revitalization procedures in ss. 720.403-720.407, F.S. These procedures are not available to homeowners' associations not governed by ch. 720, F.S., e.g., those in which membership is not a mandatory condition of parcel ownerships.[8]

Section 712.02, F.S., provides the process for revival of covenants and restrictions for condominium associations with extinguished covenants and restrictions. Parcel owners in a community may revive a declaration of covenants with the approval of the Department of Community Affairs, if certain requirements are met.

Section 720.405(6), F.S., requires that a community must form an organizing committee to draft or obtain the correct documents to revive extinguished covenants. A majority of the affected parcel owners must agree in writing to the revived declaration of covenants and governing documents or approve the revived declaration and governing documents by a vote at a meeting of the affected parcel owners noticed and conducted in the manner prescribed by s. 720.306, F.S.

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[2] Section 718.104(2), F.S.
[3] *Neuman v. Grand View at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003).
[4] Section 718.104(5), F.S.
[5] Section 718.110(1)(a), F.S.
[6] Section 720.301(9), F.S.
[7] *See* s. 712.05, F.S.
[8] Section 720.301(9), F.S.

The organizing committee must submit the documents to the Department of Community Affairs within 60 days of the parcel owners' approval. The department must determine within 60 days of submittal whether the documents comply or do not comply with the requirements of the statute, and inform the organizing committing in writing of its decision.

No later than 30 days after receiving approval from the department, the organizing committee must file the articles of incorporation of the association with the Division of Corporations of the Department of State if the articles have not been previously filed with the division. No later than 30 days after receiving approval from the division, the president and secretary of the association must execute the revived declaration and other governing documents approved by the department in the name of the association and have the documents recorded with the clerk of the circuit court in the county where the affected parcels are located.[9]

Mortgagee Consent or Joinder of Amendments to the Declaration of Condominium

Section 718.110(11), F.S., provides that any declaration of condominium recorded after April 1, 1992, may not require the consent or joinder of mortgagees in order for an association to pass an amendment to the declaration. This is limited to amendments which do not materially affect the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. Current law provides that such consent may not be unreasonably withheld. In the event mortgagee consent is provided, other than by properly recorded joinder, such consent must be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded.[10]

Condominium Association's Powers

Section 718.114, F.S., provides that a condominium association has the authority to enter into agreements and acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. All leaseholds, memberships, and other possessory or use interests existing or created at the time the declaration was recorded must be stated and fully described in the declaration. After the recording of the declaration, an association may not acquire or enter into agreements for these possessory or use interests, except as authorized by the declaration. If the declaration does not provide this authority, it can be amended by approval of not less than two-thirds of the unit owners.[11]

Mixed-Use Condominiums

Section 718.404, F.S., pertains to mixed-use condominiums, which are condominiums where there are both residential and commercial units. In a mixed-use condominium complex, the owner of a commercial unit does not have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association.[12] Section 718.404(2),

[9] Section 720.407(1) and (2), F.S.
[10] Section 718.110(11), F.S.
[11] Section 718.110(1)(a), F.S.
[12] Section 718.404(1), F.S.

F.S., provides that when the number of residential units is equal to or greater than 50 percent of the total number of units operated by the association, owners of the residential units are entitled to vote for a majority of the seats on the board of administration.

Equity Ownership

Facilities such as golf and tennis clubs often sell membership interests as "equity ownership." Such memberships offer the use of the facilities and can include other amenities. For example, some forms of equity membership provide access to the facility and the assets would be distributed to the equity members. If the member later resigns, his or her membership is bought by the club and resold. Members can then receive refunds from their membership contributions.[13]

Scope of Homeowners' Associations, Ch. 720, F.S.

Chapter 720, F.S., provides statutory recognition to corporations that operate residential communities in this state, provides procedures for operating homeowners' associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.[14] Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 617, F.S., relating to not-for-profit corporations.[15]

Homeowners' associations are administered by a board of directors, the members of which are elected.[16] The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporations, and duly adopted amendments to these documents.[17] The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.[18]

Homeowners' Association Board Meetings

Section 720.303(2), F.S., provides procedures for association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for those meetings between the board and its attorney relating to proposed or pending litigation.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to the meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice must be mailed or delivered to each association member at least seven days prior to the meeting, except in an emergency. For associations that have more than 100 members, the bylaws may provide for a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision of a schedule of board

[13] *See* Crystal Thornton, *Akron Management Corp. v. Zaino*, 29 OHIO N.U. L. REV. 735, 736 (2003).
[14] Section 720.302(1), F.S.
[15] Section 720.302(5), F.S.
[16] *See* ss. 720.303 and 720.307, F.S.
[17] *See* ss. 720.301 and 720.303, F.S.
[18] Section 720.303, F.S.

meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[19]

A board may not levy assessments at a meeting unless the notice of the meeting includes the nature of those assessments and a statement that the assessments will be considered at the meeting.[20]

Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. This also applies to meetings of any committee or similar body when a final decision will be made regarding the spending of association funds. Proxy voting or secret ballots are also not allowed when a final decision will be made on approving or disapproving architectural decisions with respect to a specific parcel of residential property owned by a member of the community.[21]

Inspection and Copying of Homeowners' Association Records

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, and entitles the requesting party to actual damages, or to a minimum of $150 per calendar day, commencing on the eleventh business day. A homeowners' association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspection, but may not impose a requirement that a parcel owner demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records less than one 8-hour business day per month. The association may impose fees to cover the cost of providing copies of the official records, including without limitation, the costs of copying.

Current law expressly exempts the following from inspection by a member or parcel owner:

- 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.[22]

Homeowners' Association Budget

Section 720.303(6), F.S., requires that an association prepare an annual budget that reflects the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end

[19] Section 720.303(2)(c)1., F.S.
[20] Section 720.303(2)(c)2., F.S.
[21] Section 720.303(2)(c)3., F.S.
[22] Section 720.303(5)(c)1., 2., 3., and 4., F.S.

of the current year. Fees or charges for recreational amenities must be set out separately in the budget. Each member of the association must be provided with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. Current law is silent concerning the establishment of reserve accounts.

Homeowners' Association Financial Reporting

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must 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.

Enforcement and Attorney's Fees Between an Association and a Member

Any legal action to redress the alleged failure or refusal to comply with the provisions of ch. 720, F.S., may be brought by the association or any member of the association against the association itself, a member, or a director or officer of an association who willfully and knowingly fails to comply with these provisions, or a tenant, guest, or invitee occupying a parcel or using the common areas.[23] The prevailing party in the action is entitled to reasonable attorney's fees and costs.[24] However, because the association collects fees from the parcel owners in order to pay for litigation expenses (such as legal representation), a member that has successfully sued his or her association ends up returning a portion of any award back to the association in the form of these fees. Thus, under current law a member cannot be fully compensated for his or her attorney's fees.

Meetings of Association Members; Amendments

Section 720.306(1)(c), F.S., provides that an amendment may not materially and adversely alter the proportionate voting interest attached to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association, unless all owners and lienholders join in the execution of the amendment. A change in quorum requirements is not an alteration of voting interests.

Transition of Homeowners' Association Control

Section 720.307, F.S., provides procedures for turning over control of an association from the developer to parcel owners. The transition of association control begins with the election of the board of directors of the homeowners' association by the members. At the time the members elect the board of directors, the developer must deliver various documents to the board.

Guarantees of Common Expenses

The Condominium Act allows a developer to be excused from payment of common expenses if the common expenses of all unit owners are guaranteed not to increase and the developer agrees

[23] Section 720.305, F.S.
[24] *Id*.

to pay all common expenses incurred but not covered by unit owner payments during the period of the guarantee.[25] Chapter 720, F.S., does not currently have a similar provision.

Homeowners' Association Dispute Resolution Procedures

Section 720.311, F.S., establishes dispute resolution procedures for homeowners' associations and their members. Current law requires that recall disputes must be resolved by binding arbitration conducted by the Department of Business and Professional Regulation (DBPR or the department). Any recall dispute filed with DBPR must be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors and dispute resolution procedures for condominiums. Section 718.112(2)(j), F.S., requires that arbitration proceedings relating to the recall of a condominium director must be conducted pursuant to the arbitration procedures in s. 718.1255, F.S.,[26] and provides that, if the condominium association fails to comply with the final order of arbitration, DBPR may take action pursuant to s. 718.501, F.S.[27]

Section 720.311(1), F.S., requires the department to conduct mandatory binding arbitration for election disputes in accordance with s. 718.1255, F.S.[28] A $200 filing fee is required and the department may assess the parties an additional fee in an amount adequate to cover the department's costs and expenses. The prevailing party must be paid its costs and attorney's fees in an amount found reasonable by the arbitrator. Section 720.311(1), F.S., also provides that any petition for mediation or arbitration shall toll the applicable statute of limitations.

Section 720.311(2), F.S., provides that the following disputes must be filed with DBPR for mandatory mediation by the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation (division), before the dispute is filed in court:

- Disputes between an association and a parcel owner regarding use of, or changes to, the parcel or the common areas and other covenant enforcement disputes;
- Disputes regarding amendments to the association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings, not including election meetings; and
- Disputes regarding access to the official records of the association.

The mediation is conducted under the applicable Florida Rules of Civil Procedure, and the proceeding is privileged and confidential to the same extent as court-ordered mediation. Current law provides that persons not a party to the suit may not attend the mediation conference without the consent of all parties.

[25] Section 718.116, F.S.
[26] Section 718.1255, F.S., provides for alternative dispute resolution, voluntary mediation, and mandatory nonbinding arbitration and mediation of disputes.
[27] Section 718.501, F.S., establishes the powers and duties of DBPR, which include the power to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties.
[28] Section 720.311(1), F.S., provides that election and recall disputes are not eligible for mediation.

If the mandatory mediation is not successful, the parties may file the dispute in a court or enter the dispute into binding or non-binding arbitration to be conducted by the department or private arbitrator. Section 720.311(2)(d), F.S., provides that the mediation procedure may be used by non-mandatory homeowners' associations.

The department must develop a certification and training program for private mediators and arbitrators, which emphasizes experience and expertise in the area of the operation of community associations.[29] In order to be certified by the department, any mediator must also be certified by the Florida Supreme Court.

Section 720.311(3), F.S., requires that the department develop an education program to assist homeowners, associations, board members, and managers in understanding the use of alternative dispute resolution techniques in resolving disputes.

III. Effect of Proposed Changes:

Reviving Association Covenants and Restrictions

This bill creates s. 712.11, F.S., to provide that homeowners' associations that are not otherwise subject to ch. 720, F.S., may use the procedures provided in ss. 720.401 through 720.407, F.S., to revive a declaration of covenants and restrictions which were extinguished pursuant to ch. 712, F.S. This provision would subject homeowners, who purchase property in the community after the covenants have lapsed, to covenants that a majority of the affected parcel owners have agreed in writing to revive pursuant to s. 720.405(6), F.S.

Allowing Public Access to Beaches Adjacent to Condominiums

This bill amends s. 718.106, F.S., to provide that local governments may not prohibit condominium unit owners or their guests, licensees, or invitees access to a public beach contiguous to a condominium property, unless a prohibition is necessary to protect public health, safety, or natural resources.

The bill expressly provides that this subsection does not prohibit a governmental entity from enacting regulations governing activities taking place on the beach.

Mortgagee Consent or Joinder of Amendments to the Declaration of Condominium

This bill provides findings by the Legislature that consent or joinder by a mortgagee to amendments that do not materially affect the rights or interests of the mortgagee is unreasonable and is a substantial burden on the condominium owners and association. The bill provides that there is a compelling state interest in enabling condominium association members to approve amendments.

[29] Section 720.311(2)(c), F.S. This section provides standards that the department must follow in developing a certification and training program.

Section 718.110, F.S., is amended to limit the enforceability of any mortgage or any provision in the declaration, articles of incorporation, or bylaws of a condominium association recorded on or after October 1, 2007, or amendments thereto, that require the consent or joinder of some or all mortgagees of units or any other portion of the condominium property for those mortgages. Any such provisions or amendments recorded prior to October 1, 2007, would remain enforceable. Provisions requiring consent or joinder are enforceable only as to the following:

- Matters described in s. 718.110(4) [30] and (8),[31] F.S.; and
- Amendments to the declaration, articles of incorporation, or bylaws that adversely affect the priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien or otherwise materially affect the rights and interests of the mortgagees.

The bill provides a process for obtaining addresses of mortgagees and contacting them to obtain their consent or joinder. Failure of any mortgagee to respond to a request for the consent or joinder to a proposed amendment within 60 days after the date that a request is sent to the mortgagee is deemed to have consented to the amendment.

The bill also limits the ability of certain mortgagees to void amendments. An amendment may be voidable only by a mortgagee who was entitled to notice and an opportunity to consent. An action to void an amendment is subject to a five-year statute of limitations from the date of discovery or the date or recordation. This provision applies to all mortgages, regardless of the date of recordation of the mortgage.

Also, an amendment to conform a declaration of condominium to the insurance coverage provisions of s. 718.111(11), F.S.,[32] may be made as provided in that section.

Condominium Association's Powers

The bill amends s. 718.114, F.S., to provide that a leasehold, membership, or other possessory or use interest not entered into within 12 months after a declaration is recorded constitutes a material alteration or substantial addition to association property. A material alteration or substantial addition to the association's real property requires approval by 75 percent of the voting interest.[33] Therefore, this bill increases the percentage for approval from two-thirds of the voting interest[34] to three-fourths of the voting interest.

[30] Section 718.110(4), F.S., pertains to declaration amendments related to the alteration or modification of a unit or its appurtenances, or changes to the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium.
[31] Section 718.110(8), F.S., prohibits amendments to the declaration that permits timeshare estates to be created in any unit of the condominium, unless the record owner of each unit of the condominium and the record owners of liens on each unit join in the execution of the amendment.
[32] Section 718.111(11), F.S., requires the maintenance of adequate insurance by condominium associations.
[33] Section 718.113, F.S.
[34] Section 718.110(1)(a), F.S., provides that if the declaration does not provide authority regarding amendments, then the declaration cannot be amended without approval of two-thirds of the units. See "Present Situation" section of this analysis.

Mixed-Use Condominiums

Section 718.404(1), F.S., provides that in mixed-use condominiums, the condominium documents cannot provide that the owner of a commercial unit has the authority to veto the amendments to the declaration, articles of incorporation, bylaws, or rules/regulations of the association. Subsection (2) of s. 718.404, F.S., provides that if at least 50 percent of the total units operated by the association are residential units, the owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration. This bill amends subsections (1) and (2) of s. 718.404, F.S., to provide that these subsections are intended to be applied retroactively as a remedial measure.

According to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation (division), in December 2005, the division issued a declaratory statement in re: Petition for Declaratory Statement, Cofield and Venetia Condominium Association, Docket No. 2005-04-8159 (December 2, 2005), currently on appeal in the Third District Court of Appeal, holding that the 1995 amendment creating s. 718.404, F.S., and allowing residential owners to vote for a majority of the board where they constitute at least a majority of the members, was not remedial or procedural in nature and could not apply retroactively. In the declaratory statement, the division mentioned that the Legislature did not expressly provide that s. 718.404, F.S., applies retroactively and, in the absence of such stated legislative intent, statutes are presumed prospective in application. Additionally, the division rejected the petitioner's argument that s. 718.404, F.S., is procedural or remedial in nature because the right to control an association is a substantive vested property right.

Equity Ownership

This bill creates a definition for "equity facilities club"[35] applicable to ch. 719, F.S., to mean:

> a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or other accommodation designed for overnight occupancy for one or more individuals.

The bill also amends s. 719.507, F.S., to extend current limitations related to zoning and building laws, ordinances, and regulations to include equity facilities club form of ownership.

[35] *See* Joseph E. Adams, *Community Associations: Statutory Changes and Appellate Law*, 26 NOVA L. REV. 1 n.104 (2001), which stated that the term "equity club" currently had no statutory definition and generally involved property interests and use rights with respect to recreational amenities (golf courses, country clubs, etc.) that are not tied to the ownership of real estate, and which do not involve mandatory membership in a community association.

Scope of Homeowners' Associations, Ch. 720, F.S.

This bill amends s. 720.302(4), F.S., to provide that ch. 720, F.S., does not apply to any association regulated under chs. 718 (condominiums), 719 (cooperatives), 721 (timeshares), or 723 (mobile home parks), F.S., except to the extent that a provision of chs. 718, 719, 721, or 723, F.S., is expressly incorporated in ch. 720, F.S., for the purpose of regulating homeowners' associations.

Section 720.302(5), F.S., is also amended to provide that corporations operating residential homeowners' associations in Florida are to be governed by and subject to either ch. 607, F.S. (corporations), or ch. 617, F.S. (not-for-profit corporations), depending on the basis for incorporation. Additionally, the bill removes the term "not for profit," in the context of corporations that operate residential homeowners' associations, to conform to the other changes in this subsection.

Homeowners' Association Board Meetings

This bill amends s. 720.303(2)(a), F.S., to provide that provisions of this subsection which require open meetings also apply to the meetings of any committee or other similar body when a final decision is made regarding the spending of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

This bill also repeals s. 720.303(2), F.S., as amended by s. 2 of ch. 2004-345 and s. 15 of ch. 2004-353, L.O.F., to remove conflicting versions of this subsection.

Inspection and Copying of Homeowners' Association Records

This bill amends s. 720.303(5), F.S., to provide that an association, or its agent, is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association unless ch. 720, F.S., requires that the information be made available or disclosed. However, an association, or its agent, may charge a reasonable fee to a prospective purchaser or lienholder, or the current parcel owner or member, for providing good faith responses to requests for information, except for information required by law. The fee cannot exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

Homeowners' Association Budget

This bill amends s. 720.303(6), F.S., to require that:

- The annual budget provide for the annual operating expenses, and the budget must be paid for by the association;
- The annual budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible, to the extent that the association's governing documents do not limit increases in assessments;

- If the budget of the association does not provide for reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in special assessments if reserves are not provided, each financial report for the preceding fiscal year must contain a statement in conspicuous type as provided by the bill;
- An association is deemed to have provided reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so by an affirmative vote of a majority of the total voting interests. Once established, the reserve accounts must be funded, maintained, or have their funding waived;
- The amount to be reserved must be computed by using a formula that is based upon the estimated remaining life and estimated replacement cost or deferred maintenance expense of each reserve item. The funding formulas may either be based on a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets. The bill provides the proper funding formula depending on which option (separate or pooled) the association chooses;
- Once reserve accounts are established, the membership of the association may provide for no reserves or less reserves. After turnover, a developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken to waive or reduce reserves shall be applicable for only one budget year;
- Reserve funds and any interest shall remain in the reserve account and may be used only for authorized reserve expenditures; and
- Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association may not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all non-developer voting interest.

Homeowners' Association Financial Reporting

This bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year, the association must provide each member with a copy of the annual financial report.

Section 720.303(7)(a), F.S., is amended to provide that financial statements are to be completed in accordance with the accounting principles adopted by the Florida Board of Accountancy.

Architectural Control Covenants

This bill creates s. 720.3035, F.S., to provide that an association may review and approve plans and specifications for the location, size, type or appearance of any structure, or enforce such standards, only to the extent that it is specifically stated or reasonably inferred in the declaration of covenants. It provides that if the declaration, or other published guidelines and standards authorized by the declaration of covenants, provides options for the use of material, the size or

design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association or any committee shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants, or other published guidelines or standards.

It limits an association's ability to enforce setbacks to only those specifically provided for in the declaration of covenants. It provides that, unless specifically stated in declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel shall be deemed to have one front for the purpose of determining the required front setback even if the parcel is bounded by a roadway or easement on more that one side. It also prohibits the association from enforcing setback requirements that are inconsistent with applicable county or municipal setback standards unless those setback limitations are included in the declaration of covenants.

The bill provides that each parcel owner is entitled to the rights and privileges provided in the declaration of covenants, or other published guidelines and standards authorized by the declaration of covenants, concerning the architectural use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges cannot be unreasonably impaired by the association. If the association knowingly or willingly infringes on the rights and privileges set forth in the declaration of covenants, or other published guidelines or standards, the affected parcel owner shall be entitled to recover damages, including attorney's fees and costs.

The bill also prohibits associations from enforcing or relying upon any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants, or other published guidelines and standards authorized by the declaration of covenants, whether the policy is uniformly applied or not.

Enforcement and Attorney's Fees Between an Association and a Member

This bill amends s.720.305, F.S., to provide that any member who prevails against an association and is awarded attorney's fees may also be awarded an amount sufficient to cover the member's pro-rata portion of those fees.

Meetings of Association Members; Amendments

Section 720.306(1)(c), F.S., is amended to add a provision that the merger or consolidation of associations under ch. 607, F.S. (regulating corporations), or ch. 617, F.S. (regulating not-for-profit corporations), is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Transition of Homeowners' Association Control

This bill amends s. 720.307, F.S., to provide additional documents that the developer must provide to the board of directors. Along with the documents that must be provided by the developer under current law, the bill requires that the developer also provide the board of directors the financial records, including the statements of the association and source documents,

from the incorporation of the association through the date of turnover. This bill also provides that an independent certified public accountant must audit the records and determine that the developer was charged with, and paid, the proper amounts of assessments.

The language of this section of the bill is taken from language found in s. 718.301(4)(c), F.S., of the Condominium Act. The current law for homeowners' associations pertaining to transition of association control is very similar to the current Condominium Act, and this bill provides conformity between homeowners' associations and condominium associations.

Guarantees of Common Expenses

Section 720.308, F.S., is amended to incorporate the guarantees of common expenses provision found in ch. 718, F.S., into ch. 720, F.S. Currently, s. 720.308, F.S., provides for guarantees of common expenses if it is provided for in the declaration. This bill provides guarantees of common expenses even if a guarantee is not included in the purchase contract or declaration. It provides that a guarantee is effective only upon approval of a majority of the voting interests of the members other than the developer.

The bill also provides that:

- The time period of a guarantee must have a specific beginning and ending date or event;
- The ending date must be the same for all members of the association;
- The guarantee may provide for different intervals during the guarantee period and dollar amounts during the intervals;
- After the initial period, the guarantee may provide that the developer may extend the guarantee for a stated period;
- The dollar amount of the guarantee must be an exact dollar amount for each parcel identified in the declaration;
- The developer must make cash payments to the association when the revenue collected by the association is not sufficient to provide payment for all common expenses during the guarantee period;
- The expenses incurred in the production of non-assessment revenues that do not exceed non-assessment revenues must not be included in the common expenses. The developer must only fund the excess expenses if the expenses attributable to non-assessment revenues exceed non-assessment revenues.
- Interest earned on the investment of the association may be used to pay income tax expenses, but such expenses may not be charged to the guarantor, and the net investment income must be retained by the association;
- Any portion of the parcel assessment that is budgeted for designated capital contributions cannot be used to pay operating expenses; and
- The guarantor's total financial obligation to the association at the end of the guarantee period is determined on an accrual basis using the following formula: any deficits paid by the guarantor that exceed the guaranteed amount less the total regular periodic assessments earned by the association from other members.

Homeowners' Association Dispute Resolution Procedures

This bill amends the homeowners' association dispute resolution procedures in s. 720.311, F.S., to change all references to mediation to "presuit" mediation. The bill deletes the Department of Business and Professional Regulation's (DBPR or the department) authority to resolve disputes between associations and a parcel owner. It also deletes the $200 filing fee requirements and the department's duty to provide certification programs for mediators and educational programs for homeowners' associations.

The bill provides a form for the written demand for presuit mediation. The form is entitled "Statutory Offer to Participate in Presuit Mediation"[36] and must be substantially followed by the aggrieved party and served on the responding party. The form gives notice that if the party receiving the notice fails to agree to presuit mediation, a law suit may be brought without further warning. The notice also provides notice of procedure for mediation of disputes, and rights and obligations of the parties. The notice must include a listing of five mediators. The party receiving the demand may select a mediator from that list. The notice also advises that the Florida Supreme Court can provide a list of certified mediators.[37]

The bill also provides that:

- Disputes subject to presuit mediation do not include:
  - The collection of any assessments, fines, or other financial obligations, including attorney's fees and costs, or any action to enforce a prior mediation settlement; and
  - Any dispute where emergency relief is required.
- Persons who fail or refuse to participate in the entire presuit mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute;
- Service of the statutory demand notice is made by sending the form, or a letter that conforms substantially to the statutory form, by certified mail. An additional copy must be sent by regular first-class mail to the address of the responding party as it appears on the books and records of the association;
- A responding party must serve a written response within 20 days from the date the demand is mailed. The response must be served by certified mail, and an additional copy must be sent by regular first-class mail to the address shown on the demand;
- The mediator may require advance payment of fees and costs;
- Failure of either party to appear for mediation, respond to the offer, agree on a mediator, or pay the fees and costs will entitle the other party to seek an award of the costs and fees associated with mediation;
- If presuit mediation cannot be conducted within 90 days after the offer to participate, impasse will be deemed, unless both parties agree to extend the deadline; and

[36] The title of the notice uses the term "offer" to characterize the notice. However, the language of the notice repeatedly refers to the "demand" to participate in presuit mediation.

[37] The Supreme Court provides lists of certified mediators through the Florida Dispute Resolution Center. These lists may be accessed via the Internet at http://www.flcourts.org/gen_public/adr/brochure.shtml (last visited April 12, 2007).

- Regarding any issue or dispute that is not resolved at presuit mediation, the prevailing party is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process in any subsequent arbitration or litigation proceeding.

The bill may require the repeal of ch. 61B-82, F.A.C., containing the Rules of Mediation Procedure in Homeowners' Associations.

Under the bill, in order to conduct mediation or arbitration proceedings the mediators or arbitrators must be certified by the Florida Supreme Court. Presently there is no statewide arbitrator certification process.[38] Rather, arbitrators are made eligible by placement on a list by the chief judge of the circuit in which the arbitrator will practice.[39] The department expressed concern that the effect of this provision of the bill may be to prohibit the use of department arbitrators for homeowners' association election and recall disputes required to be arbitrated by the department under s. 720.311, F.S., because they are not certified.

Effective Date

Except as otherwise expressly provided, this act shall take effect July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Condominium declarations are contracts. The Florida Constitution provides in relevant part, "No… law impairing the obligation of contracts shall be passed."[40] Article I, s. 10 of the United States Constitution provides in relevant part, "No state shall . . . pass any . . . law impairing the obligation of contracts." These provisions empower the courts to strike laws that retroactively burden or alter contractual relations. "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of

[38] *See* Florida Rules for Court-Appointed Arbitrators, http://www.flcourts.org/gen_public/adr/index.shtml (last visited April 14, 2007).
[39] *Id*.; *see also* FLA. R. CIV. P. 1.810(a).
[40] Art. I, s. 10, Fla. Const.

rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[41]

In *Pomponio v. Claridge of Pompano Condominium, Inc*., 378 So. 2d 774, 776 (Fla. 1979), the court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to improve the harshness of the original rigid application used by the United States Supreme Court. The court set forth several factors[42] in balancing whether a state law has in fact operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear.[43]

This bill amends subsections (1) and (2) of s. 718.404, F.S., to make these subsections apply retroactively, which could have the effect of re-writing previously recorded declarations, and therefore may be an unconstitutional impairment of obligation of contract.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Homeowners' associations may incur additional costs to comply with the accounting requirements in the bill relating to the preparation of the annual budget, accounting of reserves, and the accounting of assessments.

Additionally, the bill requires developers to engage and pay for a certified public accountant to audit the records of the homeowners' association from inception to the date of the transfer of association control.

C. Government Sector Impact:

This bill will eliminate the Department of Business and Professional Regulation's (DBPR or the department) Homeowners' Association (HOA) mediation program contained in ch. 720, F.S., and the corresponding HOA mediation filing fees collected by the department. According to the department, from the HOA mediation program's effective date on October 1, 2004, through December 31, 2006, the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) received 2,559 petitions for mediation and $511,800 in filing fees related to the mediation program. The division assigned 412

[41] 10A Fla. Jur. 2d *Constitutional Law* s. 414 (2007). The term "impair" is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." *Id*

[42] The factors enumerated by the Court are: (a) Whether the law was enacted to deal with a broad, generalized economic or social problem; (b) Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and (c) Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive. *Pomponio*, 378 So. 2d at 779.

[43] *Id.*

mediations to in-house mediators and the remaining petitions were referred to private mediators. The division assessed $71,915 to parties for reimbursement of costs associated with mediations handled by the division. The department projects HOA mediation filing fees in FY 2007-08 of $270,000.

According to the department, there were no positions or funding provided to administer the HOA program when it began in FY 2004-05. Currently, one mediator in the Condominium Arbitration Program is available to handle HOA mediations in addition to condominium mediations. In addition, one FTE and two full-time OPS positions handle the staff support functions for the HOA arbitration/mediation program.

There will be a reduction in workload associated with HOA petitions for mediation. The department should be able to eliminate current OPS funding associated with this program (approximately $60,000 for FY 2006-07). The mediator's position that is currently available for HOA mediation disputes will assume additional workload associated with condominium disputes. Current FTE staff support will be needed for continuance of the HOA arbitration program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The provisions of this bill were contained in HB 391 (CS/SB 2358 by Regulated Industries Committee and Senator Bennett), which passed both houses unanimously during the 2006 Regular Session, but was vetoed by the Governor. The Governor's veto of HB 391[44] was based on his objections to:

- The extension of the date after which local authorities may require the retrofit of applicable residential condominium common areas with a fire sprinkler system from 2014 until 2025 in s. 718.112, F.S.; and
- The repeal of the provisions of s. 720.311, F.S., relating to mandatory mediation of disputes between associations and a parcel owner, and the repeal of the mediation of such disputes by the Department of Business and Professional Regulation.

The Governor's veto message also stated that he was directing to the department to initiate a project to study and make recommendations on:

- Ways to improve and/or expand existing alternative dispute mediation and education programs to accommodate stricter association requirements;
- The extent to which the protections afforded to members of mandatory homeowners' associations can approach parity with the protection afforded condominium owners

[44] *See* http://www.myflorida.com/dbpr/lsc/condominiums/index.shtml (follow "Attachments" hyperlink) (last visited April 12, 2007).

while maintaining the legislative intent that homeowners' associations not be regulated; and

- Whether the state should move toward establishing a comprehensive common interest realty law by using the Uniform Common Interest Ownership Act[45] as a starting point and analyzing the laws of other states.

The department's study resulted in the following recommendations:[46]

1. The division's existing alternative dispute resolution program can be expanded. Greater utilization of private mediators can be required, the list of items eligible for such resolution should be expanded, and more in-house mediators could be employed by the division. The division's website and education program should be expanded to assist board members in homeowner and condominium associations in better understanding their responsibilities with the goal of minimizing complaints.

2. The protections afforded to members of mandatory homeowners' associations can approach parity with those afforded to members of condominium associations in some ways. This should be done by enacting laws that:

    a. Define the use of reserve funds.
    b. Define the use of developer guarantees.
    c. Establish purchaser warrantees.
    d. Enhance the voting rights of members.
    e. Adopt a similar election method to that provided for condominiums.
    f. Restrict the use of general proxies.
    g. Clarify the financial reporting requirements and due dates to those found in the condominium laws.
    h. Restrict the use of association funds to legitimate association expenses.
    i. Require that expenses be apportioned in a manner that limits the circumstances in which a parcel may pay a different proportionate share of expenses to those based on states of development.
    j. Remove the current restrictions on the right of an association to bring legal action.

3. Florida should not adopt the [Uniform Common Interest Ownership Act] because the existing common interest realty laws in Florida are more comprehensive than those of other states and have a greater emphasis on consumer protection than UCIOA.

[45] This model act was originally promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws. The Uniform Common Interest Ownership Act (UCIOA) is a comprehensive model act that governs the formation, management, and termination of a common interest community, including condominiums, planned communities, and real estate cooperatives. This model act is intended to supersede the earlier Uniform Condominium Act (1977)(1980), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981).

[46] Department of Business and Professional Regulation, *Report and Recommendations, House Bill 391*, 2-3 (October 2006), *available at* http://www.myflorida.com/dbpr/condominiums/index.shtml (follow "Report" hyperlink) (last visited April 13, 2007).

Unlike the 2006 legislation, which raised objections from the Governor, this bill does not amend the sprinkler provision in s. 718.112, F.S., nor does it eliminate mandatory mediation and replace it with a voluntary program. Rather, under the bill, the mediation program operated by the department will be replaced by a private sector mediation program in which it will be mandatory for a party in a dispute to offer the other party presuit mediation before proceeding to court.

VIII. Summary of Amendments:

None.