

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1185
SPONSOR(S): Ambler
TIED BILLS: None.

Homeowners' Associations

IDEN./SIM. BILLS: SB 2330

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Courts		Webb	Bond
2) Safety & Security Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

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.

Current law provides that parties are subject to presuit mediation before they can file a dispute between a homeowners' association and a parcel owner in court. This bill provides that in addition to presuit mediation, parties are also subject to presuit arbitration before they are able to file the dispute in court, unless one of the parties fails to participate in presuit mediation or all of the parties agree to waive presuit arbitration anytime before the arbitrator's final written decision.

This bill appears to have a minimal fiscal impact on state government expenditures. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill provides that the division may adopt rules in order to administer this section.

B. EFFECT OF PROPOSED CHANGES:

Background

In General

Alternative Dispute Resolution (ADR) is a procedure for settling a dispute by means other than litigation, such as arbitration or mediation.¹ Mediation is a process where a neutral third person, a mediator,

Acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.²

Arbitration is a process where a "neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding."³ ADR has been utilized by the Florida Court System to resolve disputes for over 25 years, starting with the creation of the first citizen dispute settlement (CDS) center in Dade County in 1975.⁴

Homeowners' association means a Florida corporation responsible for the operation of a subdivision 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 that, if unpaid, may become a lien on the parcel.⁶ Homeowners' associations are regulated under chapter 720, F.S.

Dispute Resolution for Homeowners' Associations

Section 720.311, F.S., provides dispute resolution procedures for homeowners' associations and their members. Current law requires that disputes related to a recall election must be resolved by binding arbitration conducted by the Department of Business and Professional Regulation (DBPR). Any recall dispute filed with the 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 718.1255, 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., and provides that, if the condominium association fails to comply with the final order of arbitration, the DBPR may take action pursuant to s. 718.501, F.S. Section 718.501, F.S., establishes the powers and duties of the DBPR, which include the power to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf

¹ Garner, Bryan. Black's Law Dictionary, Second Pocket Edition, (St. Paul, Minn., 2001).

² Section 44.1011(2), F.S.

³ Section 44.1011(1), F.S.

⁴ See http://www.flcourts.org/gen_public/adr/index.shtml

of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties.

Section 720.311(1), F.S., provides that the DBPR must conduct mandatory binding arbitration of election disputes in accordance with s. 718.1255, F.S. Election and recall disputes are not eligible for mediation. Current law requires a \$200 filing fee and authorizes the DBPR to assess the parties an additional fee in an amount adequate to cover the DBPR's costs and expenses. The fee paid to the DBPR must be a recoverable cost in the arbitration proceeding, and the prevailing party must be paid its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. Section 720.311(1), F.S., provides that any petition for mediation or arbitration shall toll the applicable statute of limitations. The statute authorizes the DBPR to adopt rules to implement this section.

As to disputes that are not election-related, s. 720.311(2)(a), F.S., provides that the following disputes must be subject to a demand for presuit mediation 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.

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. 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. Furthermore, a motion for temporary injunctive relief may be filed with the court without first complying with the presuit mediation requirements of s. 720.311, F.S., where emergency relief is required. After issues regarding emergency or temporary relief are resolved, then the court may refer the parties to either a mediation program administered by the courts or require mediation. An arbitrator or judge cannot consider any information arising from presuit mediation, except to the extent that the arbitrator imposes sanctions for failure to attend a presuit mediation session or has to enforce a mediated settlement agreement.

Persons who are not parties to the dispute may not attend the presuit mediation without consent of all the parties, unless the person is counsel for the parties or a corporate representative for the association. If mediation is attended by a quorum of the board, it does not constitute a board meeting for purposes of notice. An aggrieved party must serve the responding party with a written demand to participate in presuit mediation. The demand must be in substantially the following form and provide that:

- The form is a demand to resolve a dispute through presuit mediation pursuant to s. 720.311, F.S.;
- Presuit mediation is conducted by a neutral third party in a supervised negotiation process;
- By agreeing to participate in presuit mediation, the responding party is not agreeing to be bound to change his or her position;
- The mediator has no authority to make decisions;
- If an agreement is reached, then it will be reduced to writing and become binding on all the parties;
- A failure to reach an agreement or the failure of a party to participate constitutes an impasse, and the aggrieved party may then proceed to court to settle unsettled disputes;
- List the names and addresses of 5 certified mediators believed to be neutral and their hourly rates;

- List that mediators who do not feel they are neutral are ethically required to decline the mediation;
- The responding party may call the Florida Supreme Court for a list of more mediator is desired;
- Parties must share the costs of presuit mediation equally, including the mediator charge;
- Use of an attorney is not required, but if it chosen, then each party will be responsible for their own attorney fees;
- Mediation must beheld within 90 days, unless extended by mutual written agreement;
- If the responding party does not respond within 20 days from the date of the letter or fails to agree to a mediator or to pay for one half of the costs, then the aggrieved party may proceeding with a lawsuit in court without further notice.

Service of the statutory demand to participate in presuit mediation must be sent by certified mail, return receipt requested, with an additional copy sent first-class mail to the address of the responding party as it appears on the books and records of the association. If presuit mediation does not solve all issues between the parties, then the parties may either file the unresolved dispute in court or enter into binding or nonbinding arbitration, which will be conducted by a department arbitrator or a private arbitrated certified by the department. However, if all parties do not agree to arbitration, then any party may file the dispute in court. A final order from nonbinding arbitration is final and enforceable if a complaint is not filed within 30 days after entry of the order for a trial de novo.⁵

Effect of Bill

This bill repeals s. 720.311, F.S., and creates ss. 720.501, 720.502, 720.503, and 720.504, F.S., related to presuit dispute resolution in homeowners' associations.

Current law provides that a party is subject to presuit mediation by an aggrieved party but not presuit arbitration before a dispute between a homeowners' association and a parcel owner may be filed in court. This bill provides for mandatory presuit mediation and mandatory presuit arbitration. If presuit mediation does not resolve the dispute, then the parties are subject to presuit arbitration before they are able to litigate in court, unless a party does not participate in presuit mediation as provided in s. 720.504, F.S., or all of the parties agree to waive presuit arbitration anytime before the arbitrator's final written decision.

This bill further provides that mandatory mediation and arbitration is limited to disputes between homeowners' associations and parcel owners regarding:

- The use of or changes to the parcel or common areas;
- Other covenant disputes;
- Disputes regarding amendments to association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Membership meetings, except election meetings; and
- Access to the official records of the association.

This bill provides that disputes involving the collection of any assessment or fine, including attorney's fees, or any action to enforce a prior mediation agreement or arbitration order are not subject to presuit mediation or arbitration.

This bill provides that the department must charge the parties a fee to cover all costs and expenses incurred by the department in conducting arbitration for election disputes and recall disputes at the conclusion of the proceeding. Furthermore, this bill gives the division the power to adopt rules under ss. 120.536(1) and 120.54, F.S., in order to administer this section.

⁵ A trial de novo is a new trial on the entire case, conducted as if there had been no trial in the first instance. Garner, Bryan. Black's Law Dictionary, Second Pocket Edition, (St. Paul, Minn., 2001).

A mediator may only conduct mediation under this bill if he or she is certified as a circuit court civil mediator pursuant to the requirements of the Florida Supreme Court. This bill also provides that an arbitrator must meet the qualification and training requirements required by s. 44.106, F.S.⁶ Settlement agreements from mediator or arbitration proceedings do not have precedential value in other proceedings involving other parties not participating in the mediation or arbitration.

Presuit Mediation

This bill provides that presuit mediation may be used by nonmandatory homeowners' associations.⁷ This bill provides that presuit mediation and arbitration procedures provided in this section do not apply to a previously arbitrated dispute between the same parties. Parties may seek to recover any costs and attorney's fees incurred in mediation or arbitration as the prevailing party in any subsequent litigation. Any party may enforce an arbitration award by filing a petition in court in the jurisdiction of the homeowners' association to do so. This bill provides that the petition will not be granted unless the time to appeal by filing a motion for a trial de novo is expired. If the petition is granted, then the petitioner must be awarded reasonable attorney's fees and costs incurred.

A mediation settlement may be enforced through the county or circuit court and any costs awarded to the prevailing party. The division must maintain a list of certified mediators and county and circuit court arbitrators in each county who are willing to mediate or arbitrate a homeowners' association dispute.

Statutory Notice

This bill provides that a form for the written offer to participate in presuit mediation titled "Statutory Offer to Participate in Presuit Mediation" that must be substantially followed by the aggrieved party and which is served on the responding party. This bill also provides that service of the statutory offer is affected by sending the statutory form, or a letter that conforms substantially to the statutory form, by certified mail, with an additional copy being sent via regular first-class mail, to the address of the responding party as it appears on the books and records of the association. Furthermore, the responding party will have 20 days from the date the offer is mailed to serve a response in writing. This bill provides that the response is to be served by certified mail, with an additional copy being sent by regular first-class mail to the address shown on the offer.

This bill provides that the parties must share the costs of presuit mediation or arbitration equally, and the mediator or arbitrator may require advance payment of his or her fees and costs. The responding party must sign the notice and indicate which mediator in the list of five required on the notice is acceptable. The responding party must provide a listing of dates and times within 90 days after the date of the mailing. The mediator or arbitrator must schedule the mediation or arbitration at a mutually convenient time and place. However, if the responding party does not provide a list of available dates and times, then the mediator may schedule a mediation or arbitration without taking the responding party's schedule into account.

This bill provides that the mediator or arbitrator must notify the parties in writing within 21 days after being chosen the date, time and place of the mediation or arbitration. The mediation or arbitration must be held within 60 days after the scheduled date, unless extended by mutual written agreement. Furthermore, this bill provides that if the responding party does not reply within the 20 days following the date of the statutory notice of presuit mediation or arbitration, fails to agree to at least one mediator or arbitrator that was suggested, fails to suggest alternative mediators or arbitrators or fails to appear

⁶ Section 44.106, F.S., provides that Supreme Court must establish minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training for mediators and arbitrators who are appointed pursuant to this chapter.

⁷ For purposes of this bill, a "nonmandatory homeowners' association" is an association of homeowners where membership in the association or corporation is not a mandatory condition of parcel ownership, or the corporation or association is not authorized to impose an assessment that may become a lien on a parcel.

and participate at the scheduled mediation or arbitration, then the aggrieved party may proceed with the filing of the lawsuit without further notice. The aggrieved party may also seek attorney's fees or costs in attempting to obtain mediation or arbitration.

This bill provides that if any party fails to respond to the statutory notice of presuit mediation or presuit arbitration within 30 days, to agree upon a mediator or arbitrator, to provide a listing of dates and times within 90 days after the mailing of the notice the times available to participate in mediation or arbitration, to make payment of fees and costs, or to appear for a scheduled mediation or arbitration, constitutes failure or refusal to participate in the mediation or arbitration process and is an impasse. This bill provides that the impasse entitles the other party to proceed to arbitration, if it was mediation, or to file the dispute in court if it was a mediation or an arbitration, and to seek an award of the costs and fees associated with the mediation or arbitration. Furthermore, this bill provides that persons who do not participate in the mediation or arbitration may not recover attorney's fees in any subsequent arbitration or litigation relating to the dispute. This bill provides that if a mediation or arbitration cannot be scheduled and conducted within 90 days after the offer to participate was filed, then it will be deemed an impasse, unless both parties agreed to extend the deadline.

Presuit Arbitration

This bill provides that if the dispute is not resolved through presuit mediation, then the parties are subject to presuit arbitration before the dispute may be filed in court. This bill provides that in an arbitration proceeding, the arbitrator may not consider any unsuccessful mediation of the dispute, except to impose sanction for failure to appear at a mediation conference. If the parties do not agree to continue arbitration, then the arbitrator must enter a dismissal order and either party may institute a suit in court. This bill provides that at the request of either party, the arbitrator must issue subpoenas for the attendance of witnesses, and the production of books, records, documents, and other evidence. Furthermore, this bill provides that any party on whose behalf a subpoena is issued may apply to the court for orders to compel attendance and production. Furthermore, this bill provides that discovery may be permitted at the discretion of the arbitrator.

This bill provides that the arbitrator's decision must be presented to the parties in writing and is final in disputes where the parties have agreed to be bound by the arbitration. The arbitration decision is final unless a motion for a trial de novo is filed in a court of competent jurisdiction within 30 days after the date the arbitrator's decision is rendered. This bill provides that the prevailing party in arbitration must be awarded the costs of the arbitration and reasonable attorney's fees as determined by the arbitrator. The award must include the costs and reasonable attorney's fees incurred over the course of the arbitration proceeding as well as costs incurred in preparing for and attending any scheduled mediation.

This bill provides that the party filing a motion for a trial de novo must assess the other party's arbitration costs, court costs, and other reasonable costs, including attorney's fees, investigation expenses, and expenses for expert or other testimony or evidence incurred after the arbitration hearing if the trial de novo is not more favorable than the arbitration decision. If the judgment is more favorable, though, then the party filing the complaint must be awarded reasonable court costs and attorney's fees.

C. SECTION DIRECTORY:

Section 1 amends s. 34.01, F.S., relating to the jurisdiction of county court.

Section 2 amends s. 720.302, F.S., relating to purpose, scope and application.

Section 3 repeals s. 720.311, F.S., relating to dispute resolution.

Section 4 creates s. 720.501, F.S., s. 720.502, F.S., s. 720.503, F.S., and 720.504, F.S., relating to Legislative findings, applicability, mandatory presuit mediation, and mandatory presuit arbitration.

Section 5 provides and effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill requires the division to adopt rules in order to administer this section, and it is expected to have a minimal impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill gives the division the power to adopt rules under ss.120.536(1) and 120.54, F.S., in order to administer this section.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No Statement Submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A