

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty -- This bill decreases regulations on association swimming pools with 32 or less units.

B. EFFECT OF PROPOSED CHANGES:

Background

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.¹ Homeowners' associations are regulated under chapter 720, F.S.

Effect of Bill

Swimming Pools and Spas

Current Law

Public swimming pools must be supervised by the Department of Health.² Swimming pools serving 32 or less condominium or cooperative units, which are not operated as public lodging, are exempt from supervision by the Department of Health.³ However, pools owned by homeowners' associations are considered public and, therefore, must be supervised.⁴

According to the United States Consumer Product Safety Commission, there were 74 cases of body entrapment, including 13 confirmed deaths, between January 1990 and August 2004. The deaths were the result of drowning after the body, or a limb, was held against the drain by the suction of the circulation pump. The incidents occurred in both residential and public settings.⁵

The Virginia Graeme Baker Pool and Spa Safety Act of 2007 was signed into federal law by President Bush on December 17, 2007, which provides that all new and existing public pools and spas must be equipped with drain covers conforming to the American National Standard ASME A112.19.8-2007 Suction Fittings for Use in Swimming Pools, Wading Pools, Spas and Hot Tubs published by the American Society of Mechanical Engineers. It also requires one of five design features that minimize entrapment hazards. The Act provides, among other things, an incentive grant program for states to adopt comprehensive pool and spa safety laws requiring certain safety devices in swimming pools and spas to protect children. The Act also requires states who receive the grants to use the funds to hire and train personnel for the proper enforcement of state law and to educate pool owners and operators, pool construction and installation companies, pool service companies and the public about the state law. The Act does not require the design features on private pools which are owned by an individual homeowner.

¹ Section 720.301(9), F.S.

² Section 514.0115, F.S.

³ Section 514.0115, F.S.

⁴ *Supra at note 7.*

⁵ U.S. Consumer Product Safety Commission, Washington, D.C. 20207 (2005).

Proposed Changes

This bill adds homeowners' associations serving 32 units or less to the list of swimming pools exempt from supervision by the Department of Health, except for water quality. This bill adds the definition of homeowners' associations to s. 514.011, F.S., as provided in s. 720.301, F.S.⁶

This bill creates s. 515.295, F.S., which provides that all residential spas and swimming pools built after January 1, 2009, must have more than one drain, one or more unblockable drains, or no main drain. This bill defines an "unblockable drain" as any size or shape of drain which a human body cannot sufficiently block to create a suction-entrapment hazard. The bill defines a "main drain" as a submerged suction outlet located at the bottom of a pool or spa to conduct water to a recirculating pump.

This bill provides that all residential spas and swimming pools built on or after January 1, 2009, must also have one or more of the following devices and systems:

- a safety vacuum release system⁷, which ceases operation of the pump, reverses circulation flow, or otherwise provides a vacuum release at a suction outlet when a blockage is detected. This system must have been tested by an independent third party who finds that it conforms to ASME/ANSI standard A112.19.17 or ASTM standard F2387⁸;
- a suction vent system that has a tamper resistant atmospheric opening⁹;
- a gravity drainage system that uses a collector tank¹⁰;
- an automatic pump shut-off system¹¹;
- a device or system that disables the drain; or
- any other system that the department determines is equally effected, or better than, the systems described above at preventing or eliminating the risk of injury or death related to swimming pool and spa drainage system.

This bill further provides that any device or system above must meet the requirements of any ASME/ANSI or ASTM performance standard, if there is such a standard for the device or system, or any applicable consumer product safety standard.

This bill provides that the Department of Health must apply for a federal grant and implement, if awarded the grant, swimming pool and safety standards education and enforcement under the State Swimming Pool Safety Grant Program.¹² The Department of Health, in coordination with the Department of Community Affairs and the Florida Building Commission, is required under this bill to determine if actual changes are necessary and to ensure compliance with federal standards regarding swimming pool and spa safety. The Department of Health must provide the assessment to the Legislature by January 1, 2009.

⁶ Section 720.301, F.S., provides that a homeowners' association is a corporation responsible for the operation of a community or mobile home subdivision where voting members are made up of parcel owners or agents and membership is mandatory for parcel ownership. A homeowners' association is authorized to impose assessments and create a lien on the parcel if they are not paid.

⁷ This bill defines a "safety vacuum release system" as a vacuum release system capable of providing vacuum release at a suction outlet caused by a high vacuum occurrence due to a suction outlet flow blockage.

⁸ The ASME/ANSI safety standard is a standard which is accredited by the American National Standards Institute and published by the American Society of Mechanical Engineers.

⁹ A suction limiting vent is a pipe perpendicular to the suction side of the circulation system on one end and open to the atmosphere on the opposite end, which is normally full of water. When a blockage occurs at the main drain, air is introduced into the suction line and causes the pump to lose prime and relieve the suction forces at the main drain.

¹⁰ A gravity drainage system with a collector tank has a pool circulation pump that draws water from this tank, removing direct suction from the pool.

¹¹ An automatic pump shut-off system is a device that can sense a drain blockage and shut off the pump.

¹² The State Swimming Pool Safety Grant program is established in s. 1405 of Title XIV of the federal Energy Independence and Security Act of 2007.

Homeowners' Association -- Board Meetings

Current Law

Section 720.303(2), F.S., provides procedures for homeowners' 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 meetings between the board and its attorney relating to proposed or pending litigation. Members also have the right to attend all board meetings and speak for at least 3 minutes on any matter placed on the agenda by petition of the voting interests. However, a meeting between the board or a committee and the association's attorney held to discuss personnel matters is not open to the members.

Proposed Changes

This bill provides that board meetings are not open to board members when the meeting is between the board or a committee "to discuss proposed or pending litigation" with the association's attorney in addition to a discussion regarding personnel matters.

Homeowners' Association -- Records

Current Law

Homeowners' associations must provide access to their records at all reasonable times within 10 business days of a written request for inspection or copying of the records. The failure of an association to provide access to records within 10 business days after receipt of a written request to do so creates a rebuttable presumption that the association willfully failed to comply.

Proposed Changes

This bill adds that the written request to see records must have been submitted by certified mail, return receipt requested. Therefore, unless the association receives a written request by certified mail, return receipt requested to inspect the official records, they will not be held to have willfully not complied. This bill further provides that if the copies exceed 25 pages then in addition to allowing an outside vendor to copy the records, association management company personnel can also copy the records. This bill provides that in addition to the actual costs of copying that the member may be charged, all reasonable costs, including personnel fees, may also be charged.

Homeowners' Association -- Budgets and Reserve Accounts

Current Law

Section 720.03, F.S., provides that, in addition to annual operating expenses, the association 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. 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.¹³ 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

¹³ Section 720.03(6)(d), F.S.

provided, then each financial report for the preceding fiscal year must contain a statement in conspicuous type.

Funding formulas for reserves can be based on either a separate analysis for each of the required assets or a pooled analysis of two or more of the required assets. If the association maintains a pooled account, then the amount of the contribution to the pooled reserve account must not be less than required to ensure the balance on hand at the beginning of the period for which the budget will go into effect, plus the projected annual cash inflows over the remaining estimated useful life of the assets. The projected annual cash inflows may include earning statements from investment principle.

Proposed Changes

This bill provides that if reserve accounts are not initially provided by the developer or elected by the membership, then reserve accounts are limited to the extent that the governing documents limit increases in assessments, including reserves. This bill further provides that if the reserve accounts are created initially by a developer or elected by the membership majority, then the reserves will be determined, maintained, and waived according to s. 720.01, F.S.

This bill declares that it does not preclude termination of a reserve account upon approval of a majority of the association voting interests. Upon such approval, this bill provides that the reserve account must be removed from the budget.

This bill also provides that if the budget of the association does not provide for reserve accounts created or established initially by the developer or elected by the majority of the voting interests, then there must be a statement in bold print on each financial report for the preceding fiscal year which states in part that the association does not provide reserve accounts for capital expenditures and owners may select to provide for reserve accounts themselves by a majority vote at a meeting or by a majority of the voting interests who provide written consent.

The bill provides that if the budget provides for funding of accounts for deferred expenditures, then each financial report for the preceding fiscal year must contain a statement in conspicuous type that states in part that the budget does provide for limited, voluntary deferred expenditure accounts and that those funds are not subject to the restrictions on use of funds set forth in that statute.

In addition to the projected annual cash inflows which may include earning statements from investment principle, this bill provides that accounts receivable, minus the allowance for doubtful accounts, may be included in the projected annual cash inflow.

This bill provides that a director, officer or committee member may not receive any salary or compensation from the association for the performance of his or her duties and may not benefit in any other way financially from service to the association. This bill provides that this does not prohibit:

- Participation in a financial benefit accruing to all or a significant number of members as a result of lawful actions taken by the board including in part maintenance or repair of community assets;
- Reimbursement for out-of-pocket expenses subject to approve in accordance with procedures established by the governing documents;
- Recovery of insurance proceeds which are derived from a policy of insurance maintained by the association for the benefit of its members;
- Any fee or compensation authorized in the governing documents; or
- Any fee or compensation authorized in advance by a vote of a majority of the voting interests voting in person or by a proxy at the meeting of the members.

Homeowners' Association -- Remedies at Law

Current Law

Section 720.305, F.S., provides members and their tenants, guests and invitees must adhere to association rules and that the association may take action at law for failure or refusal to comply. The prevailing party in such litigation is entitled to attorney's fees and costs.

The association may levy a fine for each day a violation is continued and must provide only a single notice and opportunity to be heard. The fine cannot exceed \$1,000, unless otherwise provided by the governing documents. A fine cannot become a lien against a parcel.

Proposed Changes

This bill provides that liens less than \$1,000 cannot become a lien on the parcel. Therefore, a lien by the association which exceeds \$1,000 may become a lien against a parcel.

Homeowners' Association -- Meetings and Elections

Current Law

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.

Directors may not vote by proxy or 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 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.¹⁴

Elections of the board of directors must be conducted as provided in an association's governing documents. All members of the association are eligible to serve on the board of directors, and a member may nominate himself or herself. The board of directors must be elected by plurality of votes. Any election dispute must be submitted to mandatory arbitration if it is between the association and a member.

Proposed Changes

The bill provides that if secret ballots are permitted under the governing documents, then an absentee ballot must be inside a blank inner envelope and mailed or delivered to the association inside another envelope with the required information on the outer envelope, which includes the name of the owner, the lot or parcel for which the vote is being cast, and the signature of the lot or parcel owner casting the ballot. Once the eligibility to vote is verified and it is confirmed that there are no other ballots submitted for that lot or parcel, the inner envelope must be removed and added to the ballots of members who voted personally and must be opened when the ballots are counted. If there is more than one ballot submitted for a lot or parcel, the ballots for that lot or parcel are disqualified. This bill provides that no ballots received after the close of balloting by a vote of the membership will be considered.

¹⁴ Section 720.303(2)(c)3, F.S.

This bill also provides that within 30 days of being elected to the board of directors, the director must certify in writing to the association secretary that he or she has read the governing documents¹⁵ and that he or she will uphold and discharge the fiduciary responsibility of the members to the best of his or her ability. The bill provides that if the statement is not filed timely, then it will automatically disqualify the member from serving on the board of directors. The bill provides that the association secretary must keep the certification for 5 years after he or she is elected. However, the bill provides that failure to keep it on file does not affect the validity of any appropriate action.

Homeowners' Association -- Prospective Purchaser Disclosure

Current Law

Prospective parcel owners must be given a disclosure summary before the contract for sale is executed. It must be substantially similar in form to the one provided in s. 720.401, F.S. Statements on the form must declare in part that:

- A purchaser will be required to be a member of the homeowners' association;
- There are restrictive covenants;
- The purchaser will have to pay assessments;
- The purchaser may have to pay special assessments;
- Failure to pay assessments could result in a lien; and
- The developer may have the right to amend restrictive covenants without association approval.

Proposed Changes

This bill adds language that must be on the disclosure form. This bill adds that *if the association is still under developer control*, then the developer may have the right to amend restrictive covenants without association approval. The bill further provides that the disclosure form must state that there may be an obligation to pay assessments to a community development district for the purpose of retiring bond obligations used to construct the infrastructure or other improvements. This bill also provides that the declaration must state that the purchaser is jointly and severally liable with the previous owner for all unpaid assessments up to the time of the title transfer.

C. SECTION DIRECTORY:

Section 1 amends s. 514.011, F.S., relating to public swimming and bathing facilities.

Section 2 amends s. 514.0115, F.S., relating to exemptions from supervision or regulation.

Section 3 amends s. 515.25, F.S., relating to the residential swimming pool safety act.

Section 4 creates s. 515.295, F.S., relating to residential swimming pool and spa drain-cover safety.

Section 5 amends s. 720.303, F.S., relating to association powers and duties.

Section 6 amends s. 720.305, F.S., relating to obligations of members, remedies at law or in equity, levy of fines and suspension of use rights.

Section 7 amends s. 720.306, F.S., relating to meetings of members.

Section 8 amends s. 720.401, F.S., relating to prospective purchasers subject to association membership requirement.

¹⁵ The documents that must be certified in writing to have read are as follows: association's declarations of covenants and restrictions, articles of incorporation, bylaws, and current written policies.

Section 9 provides that the Department of Health must apply for a federal grant and implement if awarded the grant swimming pool and safety standards education and enforcement under the State Swimming Pool Safety Grant Program.¹⁶

Section 10 provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See fiscal comments.

D. FISCAL COMMENTS:

This bill will require private individuals whose residential swimming pools or spas are built on or after January 1, 2009, to purchase either a safety vacuum release system, which costs approximately \$600 for the parts¹⁷; a suction-limiting vent system, which is a design feature whose cost is unknown; a gravity drainage system, whose cost is unknown because it is a design feature; an automatic pump shut-off system, whose parts cost approximately \$600¹⁸; or a drain disablement system whose cost is unknown because it is a design feature.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

¹⁶ The State Swimming Pool Safety Grant program is established in s. 1405 of Title XIV of the federal Energy Independence and security Act of 2007.

¹⁷ See www.completepoolsafety.com (Last accessed April 7, 2008).

¹⁸ *Id.*

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

D. STATEMENT OF THE SPONSOR

No Statement Submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On April 9, 2008, the Safety & Security Council adopted one strike-all amendment to the bill. The amendment made the following changes:

- Removes the provisions amending insurance rights and obligations of the condominium association and the unit owners to obtain and maintain certain insurance policies;
- Removes the provisions revising the financial reporting requirements for condominium associations and homeowners' associations;
- Removes the provisions revising what must be included in an association's budget;
- Removes the provisions creating emergency powers for condominiums;
- Removes the provisions revising the contract requirements for maintenance or management services for associations;
- Removes the provisions revising the procedures for committees relating to unpaid fines;
- Removes the revisions regarding the Ombudsman;
- Provides safe requirements for residential pools and spas; and
- Requires the Department of Health to apply for a federal grant under the State Swimming Pool Safety Grant Program.

The bill was then reported favorably as a council substitute.