

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL: SB 580

INTRODUCER: Senator Hays

SUBJECT: Homeowners' Associations

DATE: March 27, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	<b>Pre-meeting</b>
2.			CA	
3.			RC	
4.				
5.				
6.				

**I. Summary:**

SB 580 revises requirements for the governance of homeowners' associations. Regarding access to the official records of the association, the bill requires that associations permit their members to photograph records using a camera or other electronic device at no charge. It deletes the provision that permits associations to impose fees to cover the cost of providing copies of the official records and that permit the association to charge any reasonable costs involving personnel fees and charges at an hourly rate to cover administrative costs.

The bill requires that newly elected directors must certify in writing, within 90 days, that they have read the association's governing documents and policies, that they will work to uphold the documents and policies, and that they will faithfully discharge their fiduciary responsibility to the associations' members. These provisions are similar to the post-election certification requirement for members of a condominium association.

Regarding the officers and directors of homeowners' associations, the bill requires that contracts with interested directors must be disclosed and approved by two-thirds vote of the board. It also permits the contract to be cancelled by a vote of the members of the association.

The bill prohibits the officers, directors and managers of the association from soliciting or accepting things of value from anyone providing or offering to provide services to the association, and provides exceptions. Officers and directors may be removed from their office if they violate the prohibition. Officers or directors charged with theft or embezzlement of association funds must also be removed from the board. The bill requires associations to maintain insurance or fidelity bonding.

The bill provides an effective date of July 1, 2013.

This bill substantially amends section 720.303, Florida Statutes . This bill creates section 720.3033, Florida Statutes.

## II. Present Situation:

### Homeowners' Associations

Florida law provides statutory recognition to corporations that operate residential communities in this state and procedures for operating homeowners' associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.<sup>1</sup>

A "homeowners' association" is defined as a:

Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, 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.<sup>2</sup>

Homeowners' associations are also governed by ch. 607, F.S., relating to for-profit corporations, or by ch. 617, F.S., relating to not-for-profit corporations.<sup>3</sup>

Section 720.301(4), F.S., defines the terms "declaration of covenants," or "declaration," to mean:

a recorded written instrument in the nature of covenants running with the land which subjects the land comprising the community to the jurisdiction and control of an association or associations in which the owners of the parcels, or their association representatives, must be members.

Section 720.301(8), F.S., defines the term "member" to mean "a member of an association, and may include, but is not limited to, a parcel owner or an association representing parcel owners or a combination thereof."

Section 720.301(10), F.S., defines the term "parcel owner" to mean the record owner of legal title to a parcel.

Section 720.301(11), F.S., defines the term "voting interest" to mean "the voting rights distributed to the members of the homeowners' association, pursuant to the governing documents."

Homeowners' associations are administered by a board of directors whose members are elected.<sup>4</sup> The powers and duties of homeowners' associations include the powers and duties provided in

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<sup>1</sup> See s. 720.302(1), F.S.

<sup>2</sup> Section 720.301(9), F.S.

<sup>3</sup> Section 720.302(5), F.S.

ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents.<sup>5</sup> The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.<sup>6</sup>

### **State Regulation of Homeowners' Associations**

Unlike condominium and cooperative associations,<sup>7</sup> which are regulated by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation (department), homeowners' associations are not regulated by a state agency.

Section 720.302(2), F.S., expresses the legislative intent regarding the regulation of homeowners' associations:

The Legislature recognizes that it is not in the best interest of homeowners' associations or the individual association members thereof to create or impose a bureau or other agency of state government to regulate the affairs of homeowners' associations. However, in accordance with s. 720.311, the Legislature finds that homeowners' associations and their individual members will benefit from an expedited alternative process for resolution of election and recall disputes and presuit mediation of other disputes involving covenant enforcement and authorizes the department to hear, administer, and determine these disputes as more fully set forth in this chapter. Further, the Legislature recognizes that certain contract rights have been created for the benefit of homeowners' associations and members thereof before the effective date of this act and that ss. 720.301-720.407 are not intended to impair such contract rights, including, but not limited to, the rights of the developer to complete the community as initially contemplated.

The number of homeowners' associations or persons living in homeowners' associations in Florida is unknown. Although homeowners' associations are required to file articles of incorporation with the Division of Corporations (division) in the Department of State, the division cannot identify corporations that are homeowners' associations under ch. 720, F.S.<sup>8</sup>

### **Division of Florida Condominiums, Timeshares, and Mobile Homes**

The division is afforded complete jurisdiction to investigate complaints and enforce compliance with ch. 718, F.S., and ch. 719, F.S., with respect to condominium and cooperative associations that are still under developer control.<sup>9</sup> The division also has the authority to investigate complaints against developers involving improper turnover or failure to turnover, pursuant to s. 718.301, F.S. After control of the condominium is transferred from the developer to the unit

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<sup>4</sup> See ss. 720.303 and 720.307, F.S.

<sup>5</sup> See ss. 720.301 and 720.303, F.S.

<sup>6</sup> Section 720.303(1), F.S.

<sup>7</sup> See chs. 718 and 719, F.S., respectively.

<sup>8</sup> Homeowners' Association Task Force, *Final Report of the Homeowners' Association Task Force*, February 2004, page 5. A copy of the report is available on the internet at <http://www.ccfj.net/DBPRTFfinalreport.pdf> (Last visited March 28, 2013).

<sup>9</sup> Section 718.501(1), F.S., and s. 719.501(1), F.S., respectively.

owners, the division's jurisdiction is limited to investigating complaints related to financial issues, elections, and unit owner access to association records pursuant to s. 718.111(12), F.S.<sup>10</sup>

As part of the division's authority to investigate complaints, s. 718.501(1), F.S., for condominium and s. 719.501(1)(c), F.S., for cooperatives, authorize the division to subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties (fines) against developers and associations.

In regards to homeowners' associations, the division's authority is limited to arbitration of recall election disputes.<sup>11</sup>

### **Inspection and Copying of Homeowners' Association Records**

Section 720.303(4), F.S., requires homeowners' associations to maintain the official records of the association. Section 720.303(5), F.S., requires that a homeowners' association permit members to inspect and copy its official records within 10 days of a written request for access. The official records must be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access.

If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages. The association may impose fees to cover the cost of providing copies of the official records, including, without limitation, the cost of copying. The association may also charge any reasonable costs involving personnel fees and charges at an hourly rate to cover the association's or vendors administrative costs.

Any failure by the association to comply with a request in a timely fashion creates a rebuttable presumption that the association willfully failed to do so, and entitles the requesting party to actual damages, or a minimum fine of \$50 per calendar day, for up to 10 calendar days, commencing on the eleventh business day.

### **Post-Election Certification of Directors**

Chapter 720, F.S. does not provide for the post-election certification of directors of the homeowners' association as is required for members of a condominium association's board.

Section 718.112(2)(d)4.b., F.S., outlines a post-election certification requirement for newly elected condominium board members. Within 90 days after being elected or appointed, a new board member must certify that he or she:

- Has read the declaration of condominium for all condominiums operated by the association and the association's articles of incorporation, bylaws, and current written policies;
- Will work to uphold such documents and policies to the best of his or her ability; and

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<sup>10</sup> Section 718.501(1), F.S. See Peter M. Dunbar, *The Condominium Concept: A Practical Guide for Officers, Owners, Realtors, Attorneys, and Directors of Florida Condominiums*, 12 ed. (2010-2011) s. 14.2.

<sup>11</sup> See s. 720.303(10)(d), F.S.

- Will faithfully discharge his or her fiduciary responsibility to the association's members.

As an alternative to a written certification, the newly elected or appointed director may submit a certificate of satisfactory completion of the educational curriculum within one year before the election or 90 days after the election or appointment.<sup>12</sup> The curriculum must be administered by a condominium education provider approved by the division.<sup>13</sup> A certification is valid and does not have to be resubmitted as long as the director continuously serves on the board.

A board member is suspended from service on the board until he or she files the written certification or submits a certificate of completion of the educational curriculum.<sup>14</sup> If a suspension occurs, the board may temporarily fill the vacancy during the period of suspension. The secretary of the association must keep the written certification or educational certificate for inspection by the members for five years after a director's election or appointment.<sup>15</sup> The validity of any action by the condominium board is not affected by the association's failure to have the certification on file.<sup>16</sup>

### **Director Conflicts of Interest**

Section 617.0832, F.S., provides for the process for the disclosure and approval of conflicts of interest related to contracts between the board of a not-for-profit corporation and a member or members of the board. Section 617.0832(1), F.S., provides that such a contract is not void or voidable, if:

- The relationship is disclosed to the board or committee that approves, or ratifies the contract or transaction by a vote or consent that does not count the interested director or directors;
- The fact of such relationship or interest is disclosed or known to the members of the board or committee entitled to vote on such contract or transaction, if any, and they authorize, approve, or ratify it by vote or written consent; or
- The contract or transaction is fair and reasonable as to the corporation at the time it is authorized by the board, a committee, or the members.

Sections 617.0832(2) and (3), F.S., require an affirmative vote of a majority of the directors on the board of directors, or on the committee, who have no relationship or interest in the transaction or contract. The contract or transaction may not be approved or ratified by a single director.

A quorum is present for the purpose of taking action if a majority of the directors who have no relationship or interest in the transaction vote to authorize, approve, or ratify the transaction.

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<sup>12</sup> *Id.* The department's Internet site provides a listing of approved educational providers. See Division of Florida Condominiums, Timeshares, and Mobile Homes, *Approved Education Providers*, available at <http://www.myfloridalicense.com/dbpr/lsc/condominiums/ApprovedEducationProviders.html> (Last visited March 28, 2013).

<sup>13</sup> Section 718.112(2)(d)3.b., F.S.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

The presence of, or a vote cast by, a director having a relationship or interest in the transaction does not invalidate the approval or ratification if the transaction is otherwise authorized, approved, or ratified as provided in s. 617.0832(1), F.S.

### III. Effect of Proposed Changes:

#### Official Records

The bill amends s. 720.303(5), F.S., to require homeowners' associations to permit members to photograph records using a camera or other electronic device at no charge.

The bill deletes the provision in s. 720.303(5)(c), F.S., that permits the association to impose fees to cover the cost of providing copies of the official records, including, without limitation, the cost of copying. It also deletes the provision that permits the association to charge any reasonable costs involving personnel fees and charges at an hourly rate to cover the association's or vendors administrative costs.

#### Post-Election Certification of Directors

The bill creates s. 720.3033(1), F.S., to require the post-election certification of homeowners' association directors. These provisions are similar to the post-election certification requirement for members of a condominium association board in s. 718.112(2)(d)4.b., F.S.

The bill requires that newly elected directors must certify in writing, within 90 days, that they have read the association's governing documents and policies, that they will work to uphold the documents and policies, and that they will faithfully discharge their fiduciary responsibility to the associations' members. Alternatively, the newly elected or appointed director may submit a certificate of satisfactory completion of the educational curriculum approved by the division within one year before or 90 days after the date of his or his election or appointment to the board. A director who fails to comply with the certification requirement is suspended from the board until he or she complies. The association must maintain a copy of the certification for 5 years after the director's election.

#### Contracts with Members of the Board

The bill creates s. 720.3033(2), F.S., to provide that contracts between homeowners' associations and directors, or entities in which a director has a financial interest, must:

- Comply with conflict of interest procedures outlined in s. 617.0832, F.S.;
- Comply with disclosure requirements outlined in s. 617.0832, F.S.;
- Be approved by a two-thirds vote of the directors present; and
- Be disclosed at the next regular or special meeting of the members.

If any member makes a motion at the next regular or special meeting of the members, the contract may be canceled by a majority vote of the members present.<sup>17</sup> If the contract is canceled,

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<sup>17</sup> Section 720.306(1)(a), F.S., provides that a quorum at a meeting of the members is 30 percent of the total voting interests, unless a lower number is provided in the bylaws. Decisions that require a vote of the members must be made by the concurrence of at least a majority of the voting interests present, in person or by proxy, at a meeting at which a quorum has been attained, unless otherwise provided in ch. 720, F.S., or in the articles of incorporation or bylaws.

the association is only liable for the reasonable value of goods and services previously provided and is not liable for any fee or damages connected to the cancellation.

#### **Prohibited Solicitations by Board Members**

The bill creates s. 720.3033(3), F.S., to provide that officers, directors and managers may not solicit or accept anything of value from any person providing or offering to provide goods or services to the association. It requires that an officer, director or manager who violates this prohibition must be removed from office. The bill does not specify how the board member must be removed from office. The requirement that the manager must be removed from office is also unclear because the manager does not hold an office in the association.

The bill provides an exception from the prohibition for accepting food to be consumed at a business meeting with a value of less than \$25 per individual or services or items in connection to trade fairs or education programs.

#### **Removal of Board Members for Crimes**

The bill creates s. 720.3033(4), F.S., to provide that officers or directors charged with a felony theft or embezzlement involving association funds must be removed from office. The bill does not specify how the board member must be removed from office. If the charges are resolved without a finding of guilt, the director or officer is reinstated for any remainder of his or her term of office. It is not clear whether a director must be removed from office if the criminal case is resolved without an adjudication of guilt after a plea of nolo contendere.

#### **Insurance or Fiduciary Bond Requirement**

The bill creates s. 720.3033(5), F.S., to require homeowners' associations to maintain insurance or fidelity bonding for anyone who controls or disburses association funds, which includes persons authorized to sign checks on behalf of the association, and the president, secretary, and treasurer of the association. The association would bear the cost of the bond or insurance.

#### **Effective Date**

The bill would take effect on July 1, 2013.

### **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:

The bill would impose several requirements on the governance and administration of homeowners' associations. The bill may affect existing homeowners' associations governing documents. The governing documents of homeowners' associations are generally considered to be contracts.<sup>18</sup> To the extent that the provisions of this bill may be applied retroactively, provisions of the bill may prompt concerns regarding the unconstitutional impairment of contract.

Article I, Section 10 of the United States Constitution prohibits state legislatures from enacting laws impairing the obligation of contracts. As early as 1880, the federal courts recognized that the contract clause does not override the police power of the states to establish regulations to promote the health, safety, and morals of the community.<sup>19</sup> The severity of the impairment is a key issue when evaluating whether a state law impairs a contract.<sup>20</sup> In *Exxon Corp. v Eagerton*, 462 U.S. 176 (1983), the Supreme Court suggested it would uphold legislation that imposes a generally applicable rule of conduct designed to advance a broad societal interest that only incidentally disrupts existing contractual relationships.

Article I, s. 10 of the Florida Constitution also prohibits the state from enacting laws impairing the obligation of contracts. While Florida courts have historically strictly applied this restriction, they have exempted laws when they find there is an overriding public necessity for the state to exercise its police powers.<sup>21</sup> This exception extends to laws that are reasonable and necessary to serve an important public purpose,<sup>22</sup> to include protecting the public's health, safety or welfare.<sup>23</sup> For a statute to offend the constitutional prohibition against impairment of contract, the statute must have the effect of changing substantive rights of the parties to an existing contract. Any retroactive application of a statute affecting substantive contractual rights would be constitutionally suspect.<sup>24</sup>

Historically, both the state and federal courts have attempted to find a rational and defensible compromise between individual rights and public welfare when laws are enacted that may impair existing contracts.<sup>25</sup>

#### V. Fiscal Impact Statement:

##### A. Tax/Fee Issues:

None.

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<sup>18</sup> See *Venetian Isles Homeowners' Assoc., Inc., v. Albrecht*, 823 So.2d 813 (Fla. 2<sup>nd</sup> D.C.A. 2002) and *Cudjoe Gardens Property Owners Assoc., Inc. v. Patne*, 779 So.2d 598 (Fla. 3<sup>rd</sup> D.C.A. 2001).

<sup>19</sup> *Stone v. Mississippi*, 101 U.S. 814 (1880).

<sup>20</sup> *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

<sup>21</sup> *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So2d 681 (Fla. 1980).

<sup>22</sup> *Yellow Cab Co. v. Dade County*, 412 So2d 395 (Fla. 3rd DCA 1982), petition den. 424 So2d 764 (Fla. 1982).

<sup>23</sup> *Khoury v. Carvel Homes South, Inc.*, 403 So2d 1043 (Fla. 1st DCA 1981), petition den. 412 So2d 467 (Fla. 1981).

<sup>24</sup> *Tri-Properties, Inc. v. Moonspinner Condominium Association, Inc.*, 447 So.2d 965 (Fla. 1<sup>st</sup> DCA 1984).

<sup>25</sup> *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So2d 774 (Fla. 1979).



**B. Private Sector Impact:**

The bill would require homeowners' associations to maintain insurance or fidelity bonding for anyone who controls or disburses association funds, which includes persons authorized to sign checks on behalf of the association, and the president, secretary, and treasurer of the association. The association would bear the cost for the bond or insurance.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.