

**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 Rules

**BILL:** CS/CS/CS/SB 580

**INTRODUCER:** Rules Committee, Community Affairs Committee; Regulated Industries Committee; and Senator Hays

**SUBJECT:** Homeowners' Associations

**DATE:** April 17, 2013      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/CS
2.	Oxamendi	Yeatman	CA	Fav/CS
3.	Oxamendi	Phelps	RC	Fav/CS
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

CS/CS/CS/SB 580 revises requirements for the governance of homeowners' associations. The bill provides additional grounds for disciplining licensed community association managers for failing to comply with the governing statutes for condominium, cooperative, and homeowners' associations. Regarding the homeowner's access to official records of the association, the bill:

- Requires that the official records must be maintained for seven years and maintained within 45 miles of the community or within the same county;
- Permits associations to maintain the records electronically;
- Permits members to photograph records using a camera or other electronic device at no charge;
- Permits associations to charge copying costs and personnel costs required to retrieve and copy records that exceed one half hour, but the cost may not exceed \$20 per hour, except that personnel costs may not be charged for requests that result in 25 or fewer pages; and
- Decreases the cost of copies provided on the association's photocopier from 50 cents per page to 25 cents per page.

The bill requires homeowners' associations to report specified information to the Division of Florida Condominiums, Timeshares, and Mobile Homes within the Department of Business and Professional Regulation. It requires the department to establish an Internet-based registration system and to submit an annual report to the Governor and, the President of the Senate, and the Speaker of the House of Representatives. This reporting requirement would expire on July 1, 2016, unless reenacted by the Legislature.

The bill provides that associations do not have to allow nominations at the meeting where the election is to be held if it permits nominations in advance of the meeting. It also provides that an election is not required unless more candidates are nominated than board vacancies exist.

The bill limits the liability of associations for assessments that came due before the association acquired title through a foreclosure.

Regarding the officers and directors of homeowners' associations, the bill requires:

- Newly elected directors to certify that they have read, and will uphold, the governing documents;
- Contracts with interested directors to be disclosed and approved by a two-thirds vote of the board, and permits the contract to be cancelled by a vote of the members;
- The removal of officers and directors who solicit or accept things of value from anyone providing or offering to provide services to the association, with exceptions;
- The removal of officers or directors charged with theft or embezzlement of association funds; and
- Associations to maintain insurance or fidelity bonding.

Regarding developer control of homeowners' associations, the bill provides:

- Additional events that trigger control of the association by the non-developer members, including when the developer has failed to complete the amenities and infrastructure, has filed chapter 7 bankruptcy, has lost title through foreclosure, or when a receiver has been appointed;
- Entitles homeowners to elect at least one member to the board when 25 percent of the parcels are conveyed to non-developer members; and
- Prohibits certain clauses in the governing documents that permit the developer to make unilateral changes to the governing documents.

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

This bill substantially amends the following sections of the Florida Statutes: 468.436, 720.303, 720.3033, 720.306, 720.307, 720.3075, and 720.3085.

## **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 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>

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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.

<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.

### **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 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.

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<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.

<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.

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

### **Community Association Management**

Community association managers are regulated and licensed pursuant to part VIII of ch. 468, F.S. To be licensed, a community association manager must satisfactorily complete an examination for licensure.

Section 468.431(2), F.S., defines "community association management" to mean:

any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of \$100,000: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

A license is not required for persons who perform clerical or ministerial functions under the direct supervision and control of a licensed manager or who only perform the maintenance of a community association and do not assist in any of the management services.<sup>12</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.

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

<sup>12</sup> Section 468.431(2), F.S.

### **Reserves for Capital Expenditures and Deferred Maintenance**

Reserve accounts are separate portion of the association's budget in which funds are set aside for capital expenditures and deferred maintenance. Reserves are used to fund expenses that do not occur on a regular basis, such as repaving roads.<sup>13</sup> Associations are required to have reserve accounts if they were initially established by the developer or if the membership has affirmatively elected to provide for reserves by a majority of the total voting interests of the association at a duly called meeting of the membership or by the written consent.<sup>14</sup> Associations may terminate and remove from the budget reserve accounts upon the approval of a majority of the total voting interests of the association.<sup>15</sup> Current law does not specify that the budget must designate the components for which the reserve accounts may be used.

### **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
- 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>16</sup> The curriculum must be administered by a condominium education provider approved by the division.<sup>17</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>18</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>19</sup> The validity

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<sup>13</sup> See Peter M. Dunbar and Charles F.S. Dudley, *The Law of Florida Homeowners' Associations*, 9<sup>th</sup> ed. (2012-2013) s. 5.3.

<sup>14</sup> Section 720.303(6)(d), F.S.

<sup>15</sup> Section 720.303(6)(b), F.S.

<sup>16</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>17</sup> Section 718.112(2)(d)3.b., F.S.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

of any action by the condominium board is not affected by the association's failure to have the certification on file.<sup>20</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.

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.

### **Amendments to the Governing Documents**

The process for amending the governing documents of a homeowners' associations is determined by the association's articles of incorporation and its bylaws. Unless the governing documents provide otherwise, the governing documents may be amended by an affirmative vote of two-thirds of the voting interests.<sup>21</sup> An amendment may materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association if the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment or the governing documents as originally recorded, or chs. 617 or 720, F.S., permit such an amendment.<sup>22</sup>

A developer may reserve the power in the declaration of covenants to amend or modify the restrictions in the governing documents. However, the developer must exercise that power in a

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<sup>20</sup> *Id.*

<sup>21</sup> Section 720.306(1)(b), F.S.

<sup>22</sup> Section 720.306(1)(c), F.S.

reasonable manner so as not to destroy the general plan of development.<sup>23</sup> An amendment is unenforceable if it alters the “relationship of lot owners to each other and the right of individual control over one’s own property.”<sup>24</sup> The consent of the owners is required to amend the governing documents in a manner that would prejudice the rights of parcel owners to use and enjoy the benefits of the common property.<sup>25</sup> The ability of the developer and the association to change the community scheme is also limited by the association’s articles of incorporation and its bylaws.<sup>26</sup>

### **Elections**

Section 720.306(9), F.S., provides the process for elections to the board. Section 720.306(9)(a), F.S., requires that elections of directors must be conducted according to the procedures set forth in the governing documents of the association. It provides that all members are eligible to serve on the board. A member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held or, if the election process allows voting by absentee ballot, in advance of the balloting.

Representatives for homeowners’ associations have advised that many associations require, in their governing documents, that nominations for a seat on the board must be made before the meeting at which the election will be conducted. This gives the association the ability to produce ballots for the election. However, s. 720.306(9)(a), F.S., requires that that associations must still allow nominations from the floor, even if the election process allows nominations in advance of the balloting.

### **Transition of Association Control**

Section 720.307, F.S., provides the situations in which the parcel owners other than the developer are entitled to elect at least a majority of the members of the board of directors:

- Three months after 90 percent of the parcels that will be operated ultimately by the association have been conveyed to purchasers; or
- When such other percentage of the parcels has been conveyed to members, or such other date or event has occurred, as is set forth in the governing documents in order to comply with the requirements of any governmentally chartered entity with regard to the mortgage financing of parcels.

Builders, contractors, or others who purchase a parcel for the purpose of constructing improvements on the parcel for resale are not considered members other than the developer.<sup>27</sup>

In contrast, s. 718.301(1), F.S., provides the following circumstances that require transition of control of the condominium association from the developer to the non-developer unit owners:

- Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;

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<sup>23</sup> *Klinow v. Island Court at Boca West Property Owners’ Ass’n, Inc.*, 64 So. 3d 177 (Fla. 4<sup>th</sup> D.C.A. 2011).

<sup>24</sup> *Id.* at 180.

<sup>25</sup> *Blue Reef Holding Corp., Inc. v. Coyne*, 645 So. 2d 1053 (Fla. 4<sup>th</sup> D.C.A. 1994).

<sup>26</sup> *S&T Anchorage, Inc. v. Lewis*, 575 So. 2d 696 (Fla. 3<sup>rd</sup> D.C.A. 1991).

<sup>27</sup> Section 720.307(1), F.S.

- Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;
- When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business;
- When the developer files a petition seeking protection in bankruptcy;
- When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless the court determines within 30 days after appointment of the receiver that transfer of control would be detrimental to the association or its members; or
- Seven years after recordation of the declaration of condominium with some conditions.

### **Liability for Unpaid Assessments**

Section 720.3085(2)(b), F.S., provides that a parcel owner is jointly and severally liable with the previous parcel owner of all unpaid assessments that came due up to the time of transfer of title. The present parcel owner may recover any amounts paid by the present parcel owners from the previous owner. Section 718.116(1), F.S., provides a substantively similar liability for unpaid assessments for present and previous condominium unit owners. In *Aventura Management, L.L.C., v. Piaggia Ocean Condominium Association, Inc.*,<sup>28</sup> the Third District Court of Appeal held that a condominium association that had acquired title to a unit through foreclosure, was a previous owner for purposes of liability under s. 718.116(1), F.S. Consequently, the present owner of the unit, who had acquired the title from the association, was not liable for the unpaid assessments for time before the association acquired title.

### **Assessment Increases in a Developer-Controlled Association**

Section 720.315, F.S., provides that, before turnover, the board of directors controlled by the developer may not levy a special assessment unless a majority of the parcel owners other than the developer have approved the special assessment by a majority vote at a duly called special meeting of the membership at which a quorum is present. Chapter 720, F.S., does not provide a similar limitation for increases of regular assessments.

## **III. Effect of Proposed Changes:**

### **Community Association Managers**

The bill amends s. 468.436(2)(b), F.S., to authorize the division to discipline community association managers for violating any provision of chs. 718, 719, and 720, F.S., during the course of performing community association management under a contract with a community association as defined in s. 468.431(1), F.S.<sup>29</sup>

<sup>28</sup> *Aventura Management, L.L.C., v. Piaggia Ocean Condominium Association, Inc.*, 105 So. 3d 637 (Fla. 3<sup>rd</sup> D.C.A. 2013).

<sup>29</sup> Section 468.431(1), F.S., defines “community association” to mean:

a residential homeowners’ association in which membership is a condition of ownership of a unit in a planned unit development, or of a lot for a home or a mobile home, or of a townhouse, villa, condominium,

**Official Records**

The bill amends s. 720.303(5), F.S., to require homeowners' associations to maintain official records seven years. It requires that the records must be maintained within 45 miles of the community or within the same county. It also permits associations the option of making records available electronically via the Internet or by allowing the records to be viewed on a computer screen and printed upon request.

The bill amends s. 720.303(5), F.S., to require homeowners' associations to permit members or their authorized representatives to photograph records using portable devices, tablets, portable scanners, and other devices capable of taking photographs. The member cannot be charged for taking the photograph.

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 permits the association to charge copying costs and personnel costs required to retrieve and copy records that exceed one half hour may not exceed \$20 per hour.

The bill prohibits associations from charging personnel costs for records requests that result in 25 or fewer pages.

It also decreases the cost of copies provided on the association's photocopier from 50 cents per page to 25 cents per page.

The bill 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. The bill deletes the provision that permits the association to charge for the actual cost using community association management personnel to make copies of official records. Instead, it permits the association to use an outside duplicating service to make copies of official records, and to charge the actual cost of copying as supported by an invoice.

**Reserves for Capital Expenditures and Deferred Maintenance**

The bill amends s. 720.303(6)(d), F.S., to require that, if reserve accounts are established by the developer, a homeowners' association's budget must designate the components for which the reserve accounts may be used. This provision does not require that the association establish or maintain a reserve account.

**Reporting Requirement**

The bill creates s. 720.303(13), F.S., to require community association managers, or the association if there is no manager, to report the following information to the division:

- The legal name of the association.
- The Federal Employee Identification Number of the association.
- The mailing and physical addresses of the association.

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cooperative, or other residential unit which is part of a residential development scheme and which is authorized to impose a fee which may become a lien on the parcel.

- The number of parcels.
- The total amount of revenues and expenses from the annual budget of the association.

For associations in which the developer retains control, the following additional information is required:

- The legal name of the developer.
- The mailing address of the developer.
- The number of parcels the developer owns as of the date of reporting.

The bill creates a continuing obligation on each association to report until the required information is submitted. An association would be required to submit the required information only once.

The bill requires the department to establish and implement an Internet-based registration system by December 1, 2013 for associations to use for reporting the required information.

The bill requires the department to submit a report, on or before December 1, 2013, to the Governor, the President of the Senate, and the Speaker of the House of Representatives providing the homeowner association data reported as required by the bill.

The bill authorizes the division to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to implement this reporting requirement.

The reporting requirement in s. 720.303(13), F.S., would expire on July 1, 2016, unless reenacted by the Legislature.

#### **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. 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 homeowners' association contracts with an officer or director or a corporation, firm or association that is not an affiliated homeowners' association 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>30</sup> If the contract is canceled, the association is only liable for the reasonable value of goods and service 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. The bill requires that the board immediately remove from office any officer or director upon a finding by the board that the officer or director has violated this subsection.

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 the board immediately remove from office any officer or director who is charged with felony theft or embezzlement involving association funds. If the charges are resolved without a finding of guilt or without acceptance of a plea of guilt or nolo contendere, the director or officer shall be 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.

#### **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 check 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.

#### **Amendment of Homeowner Association Documents**

The bill creates s. 720.306(1)(d), F.S., to provide the legislative findings that the procurement of consent or joinder to amendments that do not materially affect the rights or interests of mortgagees is unreasonable and a substantial burden on homeowners' and associations. The bill provides that there is a compelling state interest in enabling homeowners' association members to approve amendments. This provision will facilitate attempts by homeowners to amend their documents without the approval of all mortgagees when a change to the association documents does not adversely affect the mortgagee's rights or interests.

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<sup>30</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 bill limits the enforceability of any mortgage or any provision or amendment to declarations, articles of incorporation, or bylaws of a homeowners' association recorded on or after July 1, 2013, or amendments thereto, that require the consent or joinder of some or all mortgagees of units or any other portion of the association property for those mortgages. Any such provisions or amendments recorded prior to July 2013, will remain enforceable. As to provisions or amendments created after July 1, 2013, the bill provides that provisions requiring consent or joinder are enforceable only if the provisions adversely affect the priority of the mortgagee's lien or the mortgagee's right to foreclose its lien or that otherwise materially affects 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. The association may rely upon the public records to identify the holders of outstanding mortgages. It may also rely on the address in the original recorded mortgage document unless there is a different address in a recorded assignment or modification of the mortgage.

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.

For any amendments that require mortgage consent after July 1, 2013, the consent must be evidenced by an affidavit of the association recorded in the public records of the county in which the declaration is recorded.

An amendment may be voidable by any mortgagee who was entitled to notice and an opportunity to consent. An action to void an amendment is subject to a 5 year statute of limitations from the date of discovery or the date of recordation. This provision applies to all mortgages, regardless of the date of recordation of the mortgage.

There are comparable provisions for the amendment of condominium documents in s. 718.110(11), F.S.

### **Elections**

The bill amends s. 720.306(9)(a), F.S., to provide that the association does not have to allow nomination at the meeting where the election is to be held if it permits members to nominate themselves in advance of the meeting.

The bill also provides that an election is not required unless more candidates are nominated than board vacancies exist.

### **Transition of Association Control**

The bill amends s. 720.307(1), F.S., to provide the following additional events which would entitle the non-developer parcel owners to elect the majority of the members of the board:

- When the developer has abandoned or deserted his or her responsibility to maintain and complete the amenities or infrastructure disclosed in the governing documents. There is a rebuttable presumption that the developer has abandoned and deserted the property if the

- developer has unpaid assessments or guaranteed amounts under s. 720.308, F.S., for a period of more than two years;
- When the developer files a petition seeking protection in bankruptcy under chapter 7 of the United States Bankruptcy Code;
  - When the developer loses title to the property either through a foreclosure action or the transfer of a deed in lieu of foreclosure, unless the successor owner has accepted an assignment of developer rights and responsibilities first arising after the date of such assignment; and
  - When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless the court determines within 30 days after appointment of the receiver that transfer of control would be detrimental to the association or its members.

The bill also amends s. 720.307(2), F.S., to provide that non-developer parcel owners are entitled to elect at least one member of the board of directors once 25 percent of the parcels in all phases of the community have been conveyed to members.

### **Prohibited Clauses**

The bill amends s. 720.3075, F.S., to prohibit the developer from making the following unilateral changes to the governing documents before the association is controlled by nondeveloper members:

- Unreasonably modifying the original plan of development;
- Radically change the community scheme; or
- Prejudice the rights of the existing nondeveloper members to use and enjoy the benefits of the common property.

The bill provides that a developer's amendment to the governing documents shall not be deemed to unreasonably modify the original plan of development, radically change the community scheme, or prejudice the rights of the existing nondeveloper members to use and enjoy the benefits of the common property unless:

- The developer did not reserve in the original governing documents the authority to make such amendments, and
- The amendment is arbitrary, capricious or in bad faith, destroys the general plan of development, or materially shifts economic burdens from the developer to the existing nondeveloper members.

### **Assessments**

The bill amends s. 720.3085(2)(b), F.S., to provide that, for purposes of the liability of the previous parcel owner for unpaid assessments, the association is not considered a previous owner. An association that acquires title to a parcel through foreclosure, or by a deed in lieu of foreclosure, would not be liable for unpaid assessments that came due before the association acquired the title to the parcel. The bill would limit the liability of the present parcel owner to any assessments that came due before the association acquired title.

**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>31</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>32</sup> The severity of the impairment is a key issue when evaluating whether a state law impairs a contract.<sup>33</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>34</sup> This exception extends to laws that are reasonable and necessary to serve and important public purpose,<sup>35</sup> to include

<sup>31</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>32</sup> *Stone v. Mississippi*, 101 U.S. 814 (1880).

<sup>33</sup> *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

<sup>34</sup> *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So2d 681 (Fla. 1980).

<sup>35</sup> *Yellow Cab Co. v. Dade County*, 412 So2d 395 (Fla. 3rd DCA 1982), petition den. 424 So2d 764 (Fla. 1982).

protecting the public's health, safety or welfare.<sup>36</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>37</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>38</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The bill requires 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. According to information provided by representatives for homeowners' associations, the cost of the insurance coverage is dependent on the number of persons with access to the association's funds, the amount of the coverage, and the type of coverage desired. The annual insurance premium for an association with five or fewer persons handling funds and with \$10,000 coverage for employee theft and crime, \$10,000 for premises and in-transit coverage,<sup>39</sup> and \$10,000 coverage for forgery and computer and wire fraud would be approximately \$309. The same insurance coverage, but with limits of \$1,000,000, would require an annual insurance premium of approximately \$2,346.

The bill requires homeowners' associations to annually report to the division information about the association. Associations may incur costs related to gathering and reporting the information.

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<sup>36</sup> *Khoury v Carvel Homes South, Inc.*, 403 So2d 1043 (Fla. 1st DCA 1981), petition den. 412 So2d 467 (Fla. 1981).

<sup>37</sup> *Tri-Properties, Inc. v. Moonspinner Condominium Association, Inc.*, 447 So.2d 965 (Fla. 1<sup>st</sup> DCA 1984).

<sup>38</sup> *Pomponio v Claridge of Pompano Condominium, Inc.*, 378 So2d 774 (Fla. 1979).

<sup>39</sup> In-transit coverage includes coverage for the direct loss of money or securities directly caused by theft, disappearance, damage or destruction while in transit outside the insured's premises and in the care and custody of a messenger or armored vehicle company, e.g., this could cover theft of the association's funds from a delivery truck or messenger at a location other than the community's property. Premises coverage is coverage for the direct loss of money or securities located inside the premises directly caused by a theft, robbery, or burglary, e.g., this could cover the theft of funds from the association's office by a burglar. See <https://www.travelers.com/business-insurance/management-professional-liability/private-non-profit/crime/documents/59690.pdf> (Last visited April 5, 2013).

**C. Government Sector Impact:**

The bill requires the department to establish and implement an Internet-based registration system by December 1, 2013 for associations to use for reporting the information that the bill requires that they annually report to the division. It also requires the department to submit a report, on or before December 1, 2013 and then annually thereafter, to the Governor, the President of the Senate, and the Speaker of the House of Representatives providing the homeowner association data reported as required by the bill. The reporting requirement is repealed on July 1, 2016, unless reenacted by the Legislature. The division may incur indeterminate expenses to comply with these requirements; however the department can absorb these costs within existing resources.

**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.)

**CS/CS/CS by Rules Committee on April 17, 2013:**

The committee substitute (CS) differs from CS/CS/SB 580 as follows:

- The CS does not amend s. 468.436(2)(b), F.S., to authorize the division to discipline community association managers for failure to report to the division as required in s. 720.303(13), F.S., as provided in the bill. It amends s. 468.436(2)(b)7., F.S., to cross-reference the definition of “community association” in s. 468.431(1), F.S.
- The CS deletes the requirement in s. 720.303(13), F.S., that the report to the division must be submitted annually. It provides that the reporting requirement in this subsection creates a continuing obligation on each association to report until the required information is submitted. It also authorizes the division instead of the department to adopt rules.
- The CS amends s. 720.3033(2), F.S., to clarify that an association in which the officer or director has a financial interest is an association that is not an affiliated homeowners’ association.
- The CS does not create s. 720.306(1)(d), F.S., to provide for the amending of the governing documents of the association without the procurement of mortgagee consent.
- The CS amends s. 720.306(9)(a), F.S., to reference nominations in advance of the meeting instead of in advance of the balloting.
- The CS deletes the provision in s. 720.307(1)(c), F.S., that non-developer parcel owners are entitled to elect the majority of the members of the board two years after the developer has ceased construction or ceased to offer parcels for sale in

the ordinary course of business. It provides that the amenities and infrastructure are as “described in the governing documents” instead of the “advertised” amenities and infrastructure. It deletes the presumption that the developer has abandoned or deserted the property if the developer has not engaged in the construction or sale of properties.

- The CS amends s. 720.307(1)(c), F.S., to provide that the successor developer has accepted an assignment of developer rights and responsibilities first arising after the date of the assignment from a developer who lost title through foreclosure.
- The CS amends s. 720.307(2), F.S., to increase from 15 percent to 25 percent the percentage of parcels in all phases of the community that must have been conveyed to non-developer parcel owners in order to allow the non-developer members to elect at least one member of the board of directors.
- The CS deletes s. 720.307(3), which provides that non-developer parcel owners are entitled to elect at least two members of the board of directors once 50 percent of the parcels in all phases of the community have been conveyed to members.
- The CS amends s. 720.3075(5), F.S., to provide that that a developer’s amendment to the governing documents shall not be deemed to unreasonably modify the original plan of development, radically change the community scheme, or prejudice the rights of the existing nondeveloper members to use and enjoy the benefits of the common property unless the developer did not reserve the authority in the original governing documents to make such amendments, and the amendment is arbitrary, capricious or in bad faith, destroys the general plan of development, or materially shifts economic burdens from the developer to the existing nondeveloper members.
- The CS does not amend s. 720.315, F.S., to limit the ability of developer-controlled associations to increase assessments and require that any assessment that is 5 percent greater than the assessments for the preceding fiscal year must be approved by a majority of the non-developer members.

**CS/CS by Community Affairs Committee on April 9, 2013:**

The committee substitute differs from CS/SB 580 as follows:

- Amends s. 468.436(2)(b), F.S., to authorize the division to discipline community association managers for violating chs. 718 and 719, F.S.
- Amends s. 720.303(5)(c), F.S., to prohibit associations from charging personnel costs for records requests that result in 25 or fewer pages.
- Does not amend s. 720.303(6)(b), F.S., to require that an association’s budget must designate the components for which the reserve accounts may be used. Instead, it amends s. 720.303(6)(d), F.S., to provide that, if reserve accounts are established by the developer, the budget must designate the components for which the reserve accounts may be used.
- Creates s. 720.306(1)(d), F.S., to provide for the amending of the governing documents of the association without the procurement of mortgagee consent.
- Amends s. 720.307(1)(f), F.S., to provide that the non-developer parcel owners would not have the right to control of the association when the developer has lost

title to the property if a successor owner has accepted an assignment of developer rights and responsibilities.

- Creates s. 720.3075, F.S., to prohibit the inclusion or enforcement of specified clauses in the governing documents that permit the developer to make changes to the governing documents.
- Does not amend s. 720.308, F.S., to provide that assessments levied pursuant to the annual budget may not be increased, or special assessments levied, without the approval of the majority of non-developer voting interests unless the budget specifically describes and justifies the reason or reasons for the increase or special assessment.
- Amends s. 720.3085(2)(b), F.S., to provide that, for purposes of the liability of the previous parcel owner for unpaid assessments, the association is not considered a previous owner, and to limit the liability of the present parcel owner to any assessments that came due before the association acquired title.
- Amends s. 720.315, F.S., to limit the ability of developer-controlled associations to increase assessments.

**CS by Regulated Industries Committee on April 2, 2013:**

The committee substitute (CS) differs from SB 580 as follows:

- The CS amends s. 468.436(2)(b), F.S., to provide two additional grounds for the discipline of community association managers.
- The CS amends s. 720.303(5), F.S., to require homeowners' associations to maintain official records for seven years, and within 45 miles of the community or within the same county. It also permits associations the option of making records available electronically via the Internet or by allowing the records to be viewed on a computer screen and printed upon request. The CS amends 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 the cost of copying. It permits the association to charge copying costs and personnel costs required to retrieve and copy records that exceed one half hour, but the cost may not exceed \$20 per hour. It decreases the cost of copies provided on the association's photocopier from 50 cents per page to 25 cents per page. It permits the association to use an outside duplicating service to make copies of official records, and permits the association to charge the actual cost of copying as supported by an invoice.
- The CS amends s. 720.303(5), F.S., to include portable devices, tablets, portable scanners, and other devices capable of taking photographs among the type of devices that homeowners' associations must permit their member to use to make copies of official records. It permits authorized representatives of the member to make the photographic copies.
- The CS amends s. 720.303(6), F.S., to require that a homeowners' association's budget must designate the components for which the reserve accounts may be used.
- The CS creates s. 720.303(13), F.S., to provide an annual reporting requirement for community association managers, associations, and developers in developer-controlled associations. It also requires the department to establish and implement an Internet-based registration system and requires the department to submit an

annual report to the Governor and, the President of the Senate, and the Speaker of the House of Representatives. It authorizes the department to adopt rules to implement this reporting requirement. It also provides that reporting requirement in s. 720.303(13), F.S., would expire on July 1, 2016, unless reenacted by the Legislature.

- The CS does not provide in s. 720.3033(1), F.S., that the post-election certification requirement may be satisfied by submission of a certificate of satisfactory completion of the educational curriculum approved by the Division of Florida Condominiums, Timeshares, and Mobile Homes. It also does not provide that failure to have the written certification or education certificate on file does not affect the validity of any board action.
- In s. 720.3033(3), F.S., the CS does not provide that managers must be removed from office if they violate the prohibition in this subsection. Regarding the officer or director's removal from office, the CS specifies that the board must immediately remove them from office upon a finding by the board that any officer or director has violated the prohibition in this subsection.
- The CS amends s. 720.306(9), F.S., to revise requirements for elections in homeowners' associations by providing that the association does not have to allow nominations at the meeting where the election is to be held if it permits members to nominate themselves in advance of the balloting. It also provides that an election is not required unless more candidates are nominated than board vacancies exist.
- The CS amends s. 720.307(1), F.S., to provide additional events which would entitle the non-developer parcel owners to elect the majority of the members of the board.
- The CS amends s. 720.307(2), F.S., to provide that non-developer parcel owners are entitled to elect at least one member of the board of directors once 15 percent of the parcels in all phases of the community have been conveyed to members.
- The CS amends s. 720.307(3), F.S., to provide that non-developer parcel owners are entitled to elect at least two member of the board of directors once 50 percent of the parcels in all phases of the community have been conveyed to members.
- The CS amend s. 720.308, F.S., to limit increases in assessments and the levying of special assessments in developer-controlled associations.

**B. Amendments:**

None.