

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 Judiciary

BILL: CS/SB 1520

INTRODUCER: Regulated Industries Committee and Senator Latvala

SUBJECT: Termination of a Condominium Association

DATE: April 20, 2017

REVISED: 04/20/17

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	<u>Favorable</u>
3.	<u></u>	<u></u>	<u>RC</u>	<u></u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1520 revises the requirements for the optional termination of a condominium. Most of the bill's changes pertain to the optional termination of a condominium in which a bulk owner owns at least 80 percent of the total voting interests. Regarding these terminations, the bill increases consumer protections by:

- Entitling all persons whose condominium unit is their homestead to be paid at least as much as they paid for their units;
- Increasing mandatory disclosure of the identities of significant stakeholders in a condominium before a termination plan may proceed; and
- Requiring approval of a termination plan by the Department of Business and Professional Regulation.

Regarding optional terminations in general, the bill requires 80 percent of a condominium's voting interests to vote for an optional termination, regardless of what a condominium's governing documents may provide. The bill also reduces from 10 percent to 5 percent the percentage of voting interests necessary to veto a termination plan. In relation to an optional termination of a condominium created by conversion (such as from an apartment complex), the bill prohibits termination until 10 years after conversion, which is 5 years more than current law requires.

Additionally, the bill expressly states that the amendments made by the bill to s. 718.117, F.S., are intended to clarify existing law, are remedial in nature, and are intended to address the rights

and liabilities of the affected parties, and apply to all condominiums created under the Condominium Act.

II. Present Situation:

Condominiums

A condominium is a “form of ownership of real property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, [as part of the ownership of] to each unit, an undivided share in common [portion of the condominium property].”¹ A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.² The declaration must include the condominium’s bylaws, and the declaration functions as the condominium’s “constitution,” subject to applicable laws.³ A condominium is administered by a board of directors referred to as a “board of administration.”⁴

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units and may be amended as provided in the declaration.⁵ If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of not less than two-thirds of the unit owners.⁶

Condominium “association property” is real and personal property owned or leased, or dedicated by a recorded plat to the association for the use and benefit of its members.⁷ However, “condominium property” is lands, leaseholds, and personal property subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.⁸ The common elements are the portions of the condominium property not included in the units.⁹

Voting interests are the voting rights distributed to the association members as set forth in the declaration.¹⁰ In a multicondominium association, the voting interests of the association are the voting rights distributed to the unit owners in all condominiums operated by the association. On matters related to a specific condominium in a multicondominium association, the voting interests of the condominium are the voting rights distributed to the unit owners in that condominium.¹¹

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

³ *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).

⁴ Section 718.103(4), F.S.

⁵ Sections 718.104(5) and 718.110(1)(a), F.S.

⁶ Section 718.110(1)(a), F.S. *But see*, s. 718.110(4) and (8), F.S., which provides exceptions to the subject matter and procedure for amendments to a declaration of condominium.

⁷ Section 718.103(3), F.S.

⁸ Section 718.103(13), F.S.

⁹ Section 718.103(8), F.S.

¹⁰ Section 718.103(30), F.S. Voting rights are distributed pursuant to s. 718.104(4)(j), F.S.

¹¹ Section 718.103(30), F.S.

Termination of a Condominium

The termination of a condominium is authorized under two circumstances.¹² One circumstance is when the continued operation of the condominium would constitute economic waste or the ability to continue the condominium is impossible because of laws or regulations. The second circumstance is when a sufficient percentage of the voting interests of the condominium approve a plan of termination. A termination that occurs under the second circumstance is referred to as an optional termination.

Termination Due to Economic Waste or Impossibility

When the continued operation of a condominium would constitute economic waste or when the ability to continue operating a condominium is made impossible by law or regulation, a plan of termination based on economic waste or impossibility may be approved by the lesser of the lowest percentage of voting interests necessary to amend the declaration or as otherwise provided in the declaration for approval of termination. Conditions constituting economic waste or impossibility exist if:

1. The total estimated cost of construction or repairs necessary to construct the intended improvements or restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of the units in the condominium after completion of the construction or repairs; or
2. It becomes impossible to operate or reconstruct a condominium to its prior physical configuration because of land use laws or regulations.¹³

Optional Termination

Unless the declaration of condominium provides a lower percentage, a condominium may be terminated at any time if, in a vote on a plan of termination, at least 80 percent of the condominium's total voting interests vote for termination and less than 10 percent of the total voting interests reject the termination.¹⁴ If 10 percent or more of the voting interests reject the plan of termination, another termination may not be considered for 18 months after the date of rejection.¹⁵

If a bulk owner owns 80 percent of the total voting interests of a condominium, the optional termination of the condominium is subject to additional limitations and requirements. These limitations and requirements are meant to protect the non-bulk owners.¹⁶ A bulk owner is defined as a single holder of an association's voting interests or an owner together with a related entity or entities that would be considered an insider¹⁷ holding these voting interests.¹⁸

¹² Section 718.117, F.S. This section's termination provisions apply to all condominiums in this state in existence on or after July 1, 2007.

¹³ Section 718.117(2)(a), F.S. However, if the condominium contains timeshare units, a different approval percentage may apply. *See* ss. 718.117(2)(b) and (c), F.S.

¹⁴ Section 718.117(3), F.S.

¹⁵ Section 718.117(3)(a)2., F.S.

¹⁶ Section 718.117(3)(c), F.S.

¹⁷ *See* s. 726.102(8), F.S. for the definition of "insider."

¹⁸ *Id.*

The plan of termination must make the following disclosures to unit owners in a sworn statement before a plan of termination may be presented for consideration:

- The identity of any person who owns or controls 50 percent or more of the condominium units or, if owned by an artificial entity, the person who owns or controls it and the person who owns or controls 20 percent of the entity that constitutes the bulk owner;
- The units acquired by the bulk owner, the date of acquisition and the price of each unit; and
- The relationship of any board member to the bulk owner.¹⁹

The unit owners, other than the bulk owner or owners, are entitled to elect at least one-third of the board before approval of any plan of termination.²⁰

If a plan goes forward, all unit owners, other than the bulk owner, must be compensated in an amount equal to at least 100 percent of the fair market value of their units, as determined by an independent appraiser selected by the termination trustee.²¹ An original purchaser from the developer who rejects the plan of termination and whose unit was granted a homestead exemption and who is current in payment of assessments, other monetary obligations to the association, and any mortgage encumbering the unit on the date of recording of the plan of termination must receive the original purchase price paid for the unit or current fair market value, whichever is greater.²² The plan of termination must provide for the payment of a first mortgage encumbering a unit to the extent necessary to satisfy the lien.²³ The payment may not exceed the unit’s share of the proceeds of termination under the plan.²⁴

Additionally former unit owners are allowed to lease their units if the former condominium units are offered for lease to the public,²⁵ and a relocation fee must be paid to former unit owners who had a homestead exemption on their units.²⁶

Number of Condominium Terminations

The Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation furnished the number of condominium terminations for the previous 5 calendar years, which are shown in the chart below:²⁷

Calendar Year	Total Terminations	Optional Terminations
2012	30	28
2013	37	35
2014	38	37
2015	33	33
2016	29	26

¹⁹ Section 718.117(3)(c)5., F.S.

²⁰ Section 718.117(3)(d), F.S.

²¹Section 718.117(3)(c)3., F.S.

²² *Id.*

²³ Section 718.117(3)(c)4., F.S.

²⁴ *Id.*

²⁵ Section 718.117(3)(c)1., F.S.

²⁶ Section 718.117(3)(c)2. F.S.

²⁷ Email from Colton Madill, DBPR, March 28, 2017, on file with the Senate Committee on Regulated Industries.

Division of Florida Condominiums, Timeshares, and Mobile Homes

The Division of Florida Condominiums, Timeshares, and Mobile Homes may enforce and ensure compliance with the provisions of the condominium chapter of the Florida Statutes, as well as with the rules relating to the development, construction, sale, lease, ownership, and operation, and management of residential condominium units.²⁸ The Division has complete jurisdiction to investigate complaints and enforce compliance with respect to associations that are still under developer control. The Division also has the authority to investigate complaints against developers involving improper turnover or failure to turnover control to the association. After control of the condominium or cooperative 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.²⁹

As part of the Division's authority to investigate complaints, the Division is authorized to subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties (fines) against developers and associations.³⁰

III. Effect of Proposed Changes:

The bill amends s. 718.117(3), F.S. to revise the requirements for the optional termination of a condominium.

Optional Termination of a Condominium

Changes Applying to All Optional Terminations of Condominiums

For an optional condominium termination to proceed, the bill requires that at least 80 percent of the total voting interests of a condominium vote for termination. However, the bill prohibits a termination plan from proceeding if it is rejected by 5 percent of the condominium's voting interests, which is a smaller percentage of the condominium's voting interests than specified in current law. Under current law, a termination plan may not proceed if it is rejected by at least 10 percent of the voting interests.

Moreover, under current law, the approval percentage is a default threshold that may be supplanted by the terms of a condominium's declaration to make it easier or more difficult to terminate a condominium. The threshold in the bill, however, will supplant any approval threshold in a condominium's declaration.

The bill also increases the minimum time periods between successive votes on a termination plan. If 5 percent or more of the voting interests of a condominium reject a plan of termination, a subsequent plan may not be considered for 24 months, instead of 18 months as under current law.

²⁸ Section 718.501(1), F.S.

²⁹ Sections 718.501(1) and 719.501(1), F.S.

³⁰ *Id.*

Condominium Conversions

Some condominiums are created by the conversion of non-condominium property, such as apartment buildings. The bill extends the time between the date that a condominium is created by conversion and the date that the condominium association may vote for optional termination from 10 years to 5 years.

Changes Applying to Condominiums that are At Least 80-percent-owned by Bulk Owners

Compared to other condominium terminations, current law places more restrictions on the termination of a condominium if a bulk owner owns at least 80 percent of the condominium's total voting interests.

As under current law, each unit owner other than the bulk owner must be compensated at least 100 percent of the fair market value of his or her unit. Additionally, current law requires that a unit owner receive at least the original purchase price paid for his or her unit if he or she:

- Was an original purchaser;
- Rejected the plan of termination; and
- Received a homestead exemption on the unit.

The bill, in contrast, requires only that a person's unit have been granted homestead-exemption status for the person to be guaranteed this amount of compensation.

The bill also broadens the requirement to disclose to the unit owners anyone who owns a significant portion of the condominium before a plan of termination is presented to the unit owners. Specifically, the plan must include written, sworn disclosures of the identity of any person or entity that owns or controls at least 25 percent (instead of 50 percent, as in current law) of the condominium units. Moreover, if it is an artificial entity that owns at least 25 percent of the units, then the following must also be disclosed in the same manner:

- The natural person or persons who directly or indirectly manage or control the artificial entity or entities; and
- The natural person or persons who directly or indirectly own or control 10 percent (instead of 20 percent as under current law) or more of the artificial entity or entities that constitute the bulk owner.

Lastly, the written and sworn disclosure must also include the factual circumstances that show that the plan complies with the requirements of s. 718.117, F.S., the statute amended by the bill, and shows that the plan supports the expressed public policies of the statute.

Division Approval

The bill requires a condominium association that approves a plan for optional termination to submit the plan to the Division for review. The Division may authorize the termination to proceed after it determines that the plan complies with the procedural requirements set forth in s. 718.117, F.S., the statute amended by the bill.

Retroactive Application

The bill expressly states that the amendments made by the bill to s. 718.117, F.S., are intended to clarify existing law, are remedial in nature, and are intended to address the rights and liabilities of the affected parties, and apply to all condominiums created under the Condominium Act.

Effective Date

The bill takes effect July 1, 2017.

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:

CS/SB 1520 provides that the amendments to s. 718.117, F.S., are intended to clarify existing law, are remedial in nature, are intended to address the rights and liabilities of the affected parties, and apply to all condominiums created under the Condominium Act. With respect to *existing* condominiums, the provisions of the bill may implicate constitutional concerns relating to impairment of contract.³¹

In *Pomponio v. Claridge of Pompano Condominium, Inc.*,³² the Florida Supreme court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. In the Court's opinion, it invalidated a statute, as an unconstitutional impairment of contract, which required the deposit of rent into a court registry during litigation involving obligations under a contract lease. The Court further set forth several factors to be considered in balancing whether a state law has in fact operated as a substantial impairment of a contractual relationship, stating "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear."³³

The court stated that if there is minimal alteration of contractual obligations, the inquiry may end at its first stage. Severe impairment pushes the inquiry into a careful

³¹ Article I, s. 10, U.S. Constitution and Art. I, s. 10, Fla. Const.

³² *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979).

³³ *Pomponio*, 378 So. 2d at 779.

examination of the nature and purpose of the state legislation. The factors to be considered are whether:

- The law was enacted to deal with a broad, generalized economic or social problem;
- The law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- The effect on the contractual relationships is temporary, or whether it is severe, permanent, immediate, and retroactive.³⁴

In *Tropicana Condominium Association, Inc. v. Tropical Condominium, L.L.C. (Tropicana Condominium)*,³⁵ the Third District Court of Appeal held that the 2007 amendments to s. 718.117, F.S., dealing with termination of a condominium, could not be applied retroactively to a condominium in which the declaration of condominium did not contain language that the condominium was governed by Florida's Condominium Act "as amended from time to time." The 2007 amendment to s. 718.117, F.S., reduced from 100 percent to 80 percent the vote required to consent to termination of a condominium.³⁶

Absent language that a condominium's declaration was governed by Florida's Condominium Act "as amended from time to time," the Condominium Act could not be applied retroactively to a declaration if it impairs contractual obligations. Applying the test in *Pomponio*, the court held that applying the reduced percentage required for termination in s. 718.117, F.S., would "work a severe, permanent, and immediate change" in the unit owners' safeguards against termination built into their condominium's declaration.³⁷

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may require investors seeking to convert a condominium unit to apartments or to some other use to provide unit owners greater compensation. The bill also ensures that all persons whose condominium is their homestead will receive at least the price they paid for the condominium units upon the condominiums' termination.

C. Government Sector Impact:

For Fiscal Year 2017-2018, the bill appropriates \$85,006 in recurring funds and \$4,046 in nonrecurring funds from the trust fund to the Department of Business and Professional Regulation. The bill also authorizes one full-time equivalent position with an associated salary rate of \$56,791/year to implement the bill.

³⁴ *Id.*

³⁵ *Tropicana Condominium Association, Inc. v. Tropical Condominium, L.L.C.*, 208 So. 3d 755 (Fla. 3rd DCA 2016).

³⁶ *Compare*, s. 718.117(1), F.S. (2006) and s. 1, ch. 2007-226, Laws of Fla., (the amendment to s. 718.117(3), F.S.).

Additionally, the *Tropicana Condominium's* declaration required approval of 100 percent of the unit owners to terminate the condominium. *See, Tropicana, Id.*

³⁷ *Id.*, quoting *Pomponio*.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 718.117 of the Florida Statutes.

This bill creates an undesignated section of Florida law.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Regulated Industries on April 4, 2017:**

The committee substitute:

- Revises the legislative findings in s. 718.117(1), F.S.
- Retains the requirement in current law that at least 80 percent of the total voting interests must approve the plan of termination.
- Repeals the requirement that a unit owner must have rejected the plan of termination to be compensated for the fair market value of the unit.
- Requires that the plan of termination must include factual circumstances that show that the plan complies with the requirements of s. 718.117, F.S., and that the plan supports the public policies expressed in s. 718.117, F.S.
- Requires that the plan of termination must be submitted to the division for review after the unit owners approve the plan of termination.
- Provides that plan of termination may proceed after the division determines that the plan complies with s. 718.117, F.S.
- Provides that the process in s. 718.117(2), F.S., dealing with termination of a condominium because of economic waste or impossibility, does not apply to the optional termination authorized in subsection (3) of that section.
- Transfers the language in s. 718.117(1), F.S., which provides for its application to all condominiums in Florida in existence on or after July 1, 2007, to a new subsection (21) in s. 718.117, F.S.
- Creates an undesignated section of law to provide that the amendments in the bill to s. 718.117, F.S., are intended to clarify existing law, are remedial in nature, and are intended to address the rights and liabilities of the affected parties, and apply to all condominiums created under the Condominium Act.
- Appropriates, for Fiscal Year 2017-2018, \$85,006 in recurring funds and \$4,046 in nonrecurring funds from the trust fund to the DBPR.
- Authorizes one full-time equivalent position at the DBPR with an associated salary rate of 56,791 to implement the provisions in the bill.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
