

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7055 PCB CJC 17-02 Termination of a Condominium Association
SPONSOR(S): Commerce Committee; Civil Justice & Claims Subcommittee; White and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1520

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|---------------------|----------|--|
| Orig. Comm.: Civil Justice & Claims Subcommittee | 13 Y, 0 N | Bond | Bond |
| 1) Government Operations & Technology Appropriations Subcommittee | 11 Y, 0 N | Topp | Topp |
| 2) Commerce Committee | 25 Y, 0 N, As CS | Brackett | Hamon |
| 3) Judiciary Committee | 16 Y, 0 N | Bond | Camechis |

SUMMARY ANALYSIS

Under current law, a condominium may be terminated because of economic waste, impossibility of continuing as a condominium, or at the option of the owners. Optional termination must be approved by 80 percent of the condominium's voting interests, but may be vetoed by 10 percent or more of the voting interests. If an optional plan of termination is rejected, a subsequent termination may not be considered for 18 months. Terminations involving a bulk owner (where one person owns 80 percent or more of the voting interests) are subject to additional conditions and limitations to protect the other owners in the condominium, including disclosures regarding who owns or controls the units that constitute the bulk owner.

The bill:

- Provides additional legislative findings regarding the public policy supporting condominium termination laws regarding economic waste, impossibility, or optional termination;
- Removes the ability of a declaration of condominium to provide for a termination vote of less than the statutory minimum;
- Changes the vote that may reject an optional termination from 10 to 5 percent;
- Extends the re-vote delay after a failed vote from 18 to 24 months;
- Extends the time before a condominium conversion may vote for optional termination from 5 to 10 years;
- Provides that all homestead owners are entitled to a potentially higher payout during a termination by a bulk owner, not just original purchasers from the developer;
- Increases disclosure requirements related to bulk owners which must be given to all voting interests before the approval of a plan of termination; and
- Requires the Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) to review within 45 days of receipt of a plan of termination from a residential condominium and determine whether the plan meets the requirements of the law.

The bill appropriates \$85,006 in recurring funds and \$4,046 in nonrecurring funds (1 FTE) from the Division of Florida Condominiums, Timeshares and Mobile Homes Trust Fund in FY 2017-18. The bill does not appear to have a fiscal impact on local governments.

The bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Condominiums, In General

Condominiums in Florida are governed by ch. 718, F.S., the Condominium Act. The Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation (the "Division") has the power and duty to enforce and ensure compliance with the provisions of the Condominium Act, and to provide consumer protection for Florida residents living in condominiums.

A condominium is a form of ownership of real property created pursuant to the Condominium Act, which is comprised of units which are individually owned, but have an undivided share of common areas. A condominium developer must first file the proposed governing documents with the Division, who examines the documents to ensure statutory compliance. Upon approval by the Division, the condominium is formally created by recording a declaration of condominium in the public records of the county in which the condominium will be located. A declaration is similar to a constitution in that it governs the relationships among condominium unit owners and the condominium association. Specifically, a declaration of condominium may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.

All unit owners are members of the condominium association, an entity responsible for the operation of the common elements owned by the unit owners, which operates or maintains real property in which unit owners have use rights. The condominium association is overseen by an elected board of directors, commonly referred to as a "board of administration." The association enacts condominium association bylaws, which govern the administration of the association, including, but not limited to, quorum, voting rights, and election and removal of board members.

Termination of a Condominium

Section 718.117, F.S., governs the process for terminating a condominium association. The section begins with legislative findings regarding the purpose of termination of condominium. These findings provide that there should be a statutory method to terminate condominiums to preserve the value of the property and rights of alienation of the owners.¹ The findings also provide that it is against public policy in the state to require condominium operations to continue when to do so constitutes economic waste or is made impossible by law or regulation.² These findings apply to all condominiums in the state in existence on or after July 1, 2007.³

There are two primary grounds for termination, each governed by its own requirements. First, a condominium may be terminated where there is economic waste or impossibility.⁴ A condominium may be terminated for "economic waste" if the total cost of construction or repairs necessary to construct the 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. A condominium may be terminated for "impossibility" if "it becomes impossible to operate or reconstruct a condominium to its prior physical configuration because of land use laws or regulations.

¹ s. 718.117(1), F.S.

² *Id.*

³ *Id.*

⁴ s. 718.117(2), F.S.

A condominium may also be terminated in the discretion of the owners.⁵ Referred to as "optional termination," current law provides that unless the condominium declaration provides for a lower percentage, the condominium may be terminated if the termination is approved by at least 80 percent of the total voting interests of the condominium and no more than 10 percent of the total voting interests of the condominium reject the termination.⁶ A voting interest of the condominium may not be suspended for any reason when voting on an optional termination.⁷ If 10 percent or more of the total voting interests reject a plan of termination, another plan of optional termination may not be considered for 18 months after the date of rejection.⁸

Optional terminations are subject to additional limitations and requirements if 80 percent of the total voting interests are owned by a bulk owner.⁹ A bulk owner is defined as a single holder of such voting interests or an owner together with a related entity or entities that would be considered an insider holding such voting interests.¹⁰ These limitations are meant to protect the other unit holders. The limitations include allowing former unit owners to lease their units if the former condominium units are offered for lease to the public¹¹ and paying a relocation fee to former unit owners who had a homestead exemption on their units.¹² All unit owners, other than the bulk owner, must be compensated at least 100 percent of the fair market value of their units, as determined by an independent appraiser selected by the termination trustee.¹³ An original purchaser from the developer who rejects the plan of termination and whose unit was granted homestead and 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.¹⁴ The plan of termination must provide for the payment of a first mortgage encumbering a unit to the extent necessary to satisfy the lien.¹⁵ The payment may not exceed the unit's share of the proceeds of termination under the plan.¹⁶

Before a plan of termination is presented to the unit owners for consideration, a bulk owner must prepare a sworn statement with disclosures to the other owners.¹⁷ The bulk owner must identify any person or entity that, directly or indirectly, owns or controls 50 percent or more of the units in the condominium.¹⁸ If these units are owned by an artificial entity or entities, the bulk owner must disclose any natural person who owns or controls, directly or indirectly, 20 percent or more of the artificial entity or entities that constitute the bulk owner.¹⁹ The bulk owner must identify the units it has acquired, the date each unit was acquired, and the total compensation paid to each prior owner by the bulk owner.²⁰ The relationship of any board member to the bulk owner or any person or entity affiliated with the bulk owner subject to disclosure must also be contained in the statement.²¹ The bulk owner must also share the factual circumstances that show that the plan complies with the requirements in the law for optional terminations by a bulk owner and that the plan supports the public policies of the condominium termination law.²²

⁵ s. 718.117(3), F.S.

⁶ *Id.*

⁷ s. 718.117(3)(a)(1), F.S.

⁸ s. 718.117(3)(b), F.S.

⁹ s. 718.117(3)(c), F.S.

¹⁰ *Id.*

¹¹ s. 718.117(3)(c)(1), F.S.

¹² s. 718.117(3)(c)(2), F.S.

¹³ s. 718.117(3)(c)(3), F.S.

¹⁴ *Id.*

¹⁵ s. 718.117(3)(c)(4), F.S.

¹⁶ *Id.*

¹⁷ s. 718.117(3)(c)(5), F.S.

¹⁸ s. 718.117(3)(c)(5)(a), F.S.

¹⁹ *Id.*

²⁰ s. 718.117(3)(c)(5)(b), F.S.

²¹ s. 718.117(3)(c)(5)(c), F.S.

²² s. 718.117(3)(c)(5)(d), F.S.

If the members of the board of administration are elected by the bulk owner, the unit owners may elect at least one-third of the members of the board before approval of any plan of termination.

Condominiums in which 75 percent or more of the units are timeshare units are not subject to the optional termination provisions of s. 718.117, F.S.

Condominium Conversion

Most condominiums are created as a part of new construction. However, a condominium conversion is allowed. A conversion is where an existing improvement, usually an apartment complex, is converted to the condominium form of ownership. Condominium conversions have special requirements pursuant to Part VI of ch. 718, F.S.

Number of Condominium Terminations

The Division furnished the number of condominium terminations for the previous 5 calendar years:

| Calendar Year | Number of Terminations |
|---------------|------------------------|
| 2012 | 30 |
| 2013 | 37 |
| 2014 | 38 |
| 2015 | 33 |
| 2016 | 29 |

Effect of the Bill

The bill makes a number of changes to condominium terminations pursuant to s. 718.117, F.S.:

Legislative Findings

Current law at s. 718.117(1), F.S., includes legislative findings supporting laws on termination of a condominium association. The bill adds legislative findings.

Vote Required for Optional Termination

The bill:

- Removes the ability of a declaration of condominium to provide for a termination vote of less than the statutory minimum, thus having the effect of requiring at least an 80% vote for termination.
- Changes the veto provision from 10% to 5%.
- Extends the re-vote delay after a failed vote for termination from 18 to 24 months.

Restriction Related to Conversions

The bill extends the time from creation of a condominium by conversion to the time that the condominium association may vote for optional termination from 5 years to 10 years.

Homestead Protection

Where there is a bulk owner involved in the condominium termination, homestead property owners who object to the plan of termination have special protections. An objecting homestead owner is entitled to:

- Demand to lease their unit for 12 months after the termination on the same terms as similar unit types are being offered to the public;
- Payment of a relocation fee; and
- Payment of the higher of the current fair market value of the unit or the amount paid to purchase the unit, provided that the objecting owner was an original purchaser from the developer and provided that the owner is current on his or her mortgage payments.

The bill expands the rights of a homestead property owner related to a termination involving a bulk owner. It gives the owner the special protections afforded the original purchaser regardless of whether they:

- Are the original purchaser from the developer;
- Are current on his or her mortgage; or
- Objected to the plan of termination.

Disclosure Requirements

A bulk owner seeking optional termination must make certain disclosures to the other owners.

The bill increases disclosure requirements to:

- Change from 50 percent or greater bulk owner must disclose the owner or entity that owns interest before plan is presented to unit owners to 25 percent or greater bulk owner;
- Change from reporting natural persons who own or control 20 percent or more of the artificial entity that is a bulk owner to natural persons who own or control 10 percent or more; and
- Require listing of the factual circumstances that show how the plan supports the public policy of s. 718.117(1), F.S.

Review by the State

Condominium associations are regulated by the Division. Current law has no requirement for filing or review of a plan of termination.

The bill requires that a proposed plan for termination by a residential association must be filed with the Division, who must determine whether the requirements of s. 718.117, F.S., have been met and whether the plan complies with the requirements of s. 718.117, F.S. If so, the Division must grant authority for the termination and the termination may proceed. If the Division determines the plan has deficiencies then the Division must notify the association of the deficiencies by mail.

The bill provides that the Division has 45 days upon receipt of a plan for termination to notify an association of any deficiencies in the plan, or that the Division accepted the plan and the association may proceed with the termination. Failure to notify an association within 45 days creates a presumption that the Division accepted the plan.

Application

The bill is remedial as it addresses the rights and liabilities of the affected parties and therefore applies to all condominiums that have been created under the Condominium Act.

Funding

Section 3 of the bill appropriates funding and authorizes 1 full time equivalent position (FTE) for these reviews.

B. SECTION DIRECTORY:

Section 1 amends s. 718.117, F.S., regarding condominium termination.

Section 2 provides for application to existing condominiums.

Section 3 provides an appropriation.

Section 4 provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill appropriates the sums of \$85,006 in recurring funds and \$4,046 in nonrecurring funds from the Division of Florida Condominiums, Timeshares and Mobile Homes Trust Fund to the Department of Business and Professional Regulation in FY 2017-18. The appropriation authorizes 1.00 FTE with an associated salary rate of \$56,791. The funding and position are necessary to accommodate increased workload on the Division.

Specifically, the workload requirements are due to the bill requiring that a proposed plan for termination must be filed with the Division, who must determine whether the requirements of s. 718.117, F.S., have been met and whether the plan for termination complies with the requirements set forth in this bill. If so, the Division must grant authority for the termination and the termination may proceed.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The fiscal impact of this bill on the private sector is speculative and difficult to quantify. In general, it appears that this bill may lessen the number of optional terminations and, where they occur, may increase the number of homestead condominium owners entitled to the homestead-level increased payment from a bulk buyer upon termination.

D. FISCAL COMMENTS:

None.

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

A declaration of condominium is a form of contract between the members of the association. Where a recorded declaration may have termination provisions or may implement the protections provided by s. 718.110(4), F.S., the bill may be implicate art. I, s. 10 of the Florida Constitution and art. I, s. 10 of the United States Constitution, both of which prohibit the Legislature from passing any law that impairs “the obligation of contracts.”

As a threshold matter, a law must “substantially impair” a contractual right for it be constitutionally problematic.²³ The Florida Supreme Court has also held that “[a]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.”²⁴

The courts have adopted a balancing test to “determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.”²⁵ Factors considered in the balancing test include:

- (a) Was the law enacted to deal with a broad, generalized economic or social problem?²⁶
- (b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- (c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?²⁷

Additionally, the United States Supreme Court has found that parties cannot avoid state regulations and restrictions in an enterprise that is already subject to state regulation by simply entering into a contract.²⁸ This finding may be particularly relevant given the Florida Supreme Court's statement that, “In Florida, condominiums are creatures of statute and as such are subject to the control and regulation of the Legislature. That body has broad discretion to fashion such remedies as it deems necessary to protect the interests of the parties involved.”²⁹

The Third District Court of Appeal has found that portions of s. 718.117, F.S., may violate the impairment of contracts provision. In the case, the declaration of a condominium association required a 100 percent vote for optional termination and a 100 percent vote to amend the declaration regarding termination. The association attempted a termination in which it was able to achieve the statutory 80 percent vote. The association argued that the statute controlled over the declaration. The district court of appeal disagreed, relying on the third prong of the *Pomponio* test (above) to find that the statute impaired vested contractual rights and thus could not override the 100% vote requirement of the declaration.³⁰

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking. If it does, DBPR has sufficient rulemaking authority granted it at s. 718.501(1)(f), F.S.

²³ *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 779 (Fla. 1979) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)).

²⁴ *Id.* at 778–79 (citing *United States Trust Co.*, 431 U.S. at 25 (1977)).

²⁵ *Id.* at 780.

²⁶ In determining the purpose of a statute, courts frequently look to the legislature's express statements of intent in the statute. See *Pomponio*, 378 So. 2d at 781 (noting in its analysis of the public purpose of the statute that the specific objectives for the statute are “neither expressly articulated nor plainly evident” in the statute).

²⁷ *Id.* at 779.

²⁸ *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983).

²⁹ *Century Vill., Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condo. Ass'n*, 361 So. 2d 128, 133 (Fla. 1978).

³⁰ *Tropicana Condo. Ass'n v. Tropical Condo., LLC*, 2016 Fla. App. LEXIS 17090 (3D15-2583, November 16, 2016).

C. DRAFTING ISSUES OR OTHER COMMENTS:

DBPR believes that the bill does not provide specific authority to adopt rules for the review process by the division or contemplate a filing fee. In addition, the bill does not address consequences to an association if the association records a plan of termination prior to approval by the Division or in contradiction of disapproval by the Division.”³¹

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 6, 2017, the Commerce Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Modifies the legislative findings.
- Provides that a residential condominium association must submit a termination plan to DBPR before enacting an optional termination of the association.
- Modifies the requirements for unit owners to obtain certain protections in an optional termination by providing that any person whose unit is granted homestead exemption is afforded the protections.
- Provides that DBPR has 45 days upon receiving a plan of termination to notify the association of any deficiencies with the plan.

The analysis is drafted to the committee substitute adopted by the Commerce Committee.

³¹ Florida Department of Business and Professional Regulation, Agency Analysis of 2017 House Bill 7055, p. 6 (Mar. 31, 2017).