

**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.)

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

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BILL: SB 1274

INTRODUCER: Senators Passidomo and Mayfield

SUBJECT: Community Associations

DATE: January 29, 2018

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

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

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**I. Summary:**

SB 1274 revises requirements related to the governance and operation of condominium, cooperative, and homeowners' associations.

Regarding condominium, cooperative, and homeowners' associations, the bill revises the:

- Notice requirements for board and owner meetings at which an assessment will be considered to require specific information be provided in notices.
- Process for and membership of committees reviewing a recommended fine or suspension related to use of association property, the notice requirements associated with such fines and suspensions, and the time for payment of any fines.

Regarding condominium and cooperative associations, the bill:

- Requires the minutes of meetings and accounting records be maintained for seven years instead of one year.
- Makes condominium unit owners and cooperative shareholders responsible for removing or bypassing filters blocking receipt of mass e-mails sent by an association the owners and shareholders have consented to receive.

Regarding condominium associations, the bill:

- Repeals the prohibition against an association hiring an attorney who represents the management company of the association.
- Prohibits an association from waiving financial reporting requirements for two fiscal years after not complying with the division's request to provide an owner with a copy of the most recent financial report.
- Provides when the recall of a board member is effective.
- Provides attorney's fees and costs for a recalled board member who or for an association that prevails in an arbitration proceeding concerning a recall, in certain circumstances.

- Requires a vote on a substantial addition or alteration to a condominium's common elements before the addition or alteration is commenced.
- Repeals the July 1, 2018, deadline for classification as a bulk buyer, extending indefinitely the applicability of bulk buyer provisions.

Regarding cooperative associations, the bill:

- Prohibits co-owners of a unit in a residential cooperative association of more than 10 units from serving simultaneously on the board, unless the co-owners own more than one unit or there are not enough eligible candidates.
- Provides for the removal from office of an officer or director who is more than 90 days delinquent in any monetary obligation owed to the association.
- Allows the cost of communication services, information services, or Internet services obtained under a bulk contract to be a common expense of the association.

Regarding homeowners' associations, the bill:

- Permits an association to provide notices of a meeting by electronic transmission to any member who has provided a facsimile number or e-mail address for such purposes, and consented to receipt of electronic notices.
- Revises the requirements for the maintenance of reserve accounts to:
  - Apply the requirements to associations incorporated on or after July 1, 2018, and to any association incorporated before July 1, 2018, which elects by a majority vote to maintain reserves.
  - Require reserve accounts for deferred maintenance costs over \$100,000 and restrict the use of reserve funds to only authorized reserved expenditures.
  - Allow an association to elect not to maintain reserves or to maintain reserves for less than the required amount.
  - Provide the method for calculating reserves and the amount due for each parcel and prohibiting assessments for reserves on undeveloped parcels.
  - Exclude parcel owners not subject to assessment from voting on waiving or reducing the funding of reserves.
  - Limit a developer's voting interests to the parcels with completed improvements evidenced by a certificate of occupancy.
- Revises the requirements for increasing assessments in an association's budget to:
  - Require a special meeting of the owners if the board adopts an annual budget with assessments exceeding 115 percent of the preceding fiscal year's assessments; and
  - Permit a majority of the members to adopt a substitute budget at a special meeting.

The bill has no fiscal impact on state government.

The effective date of the bill is July 1, 2018.

## II. Present Situation:

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

Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business the Professional Regulation (DBPR) administers the provisions of

chs. 718 and 719, F.S., for condominium and cooperative associations, respectively. The division may investigate complaints and enforce compliance with chs. 718 and 719, F.S., with respect to associations that are still under developer control.<sup>1</sup> The division also has the authority to investigate complaints against developers involving improper turnover or failure to transfer control to the association.<sup>2</sup> 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.<sup>3</sup> For cooperatives, the division's jurisdiction extends to the development, construction, sale, lease, ownership, operation, and management of residential cooperative units.<sup>4</sup>

As part of the division's authority to investigate complaints, the division may subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties against developers and associations.<sup>5</sup>

If the division has a reasonable cause to believe that a violation of any provision of ch. 718, F.S., ch. 719, F.S., or related rule has occurred, the division may institute enforcement proceedings in its own name against any developer, bulk assignee, bulk buyer, association, officer, or member of the board of administration, or its assignees or agents. The division may conduct an investigation and issue an order to cease and desist from unlawful practices and to take affirmative action to carry out the purpose of the applicable chapter. In addition, the division is authorized to petition a court to appoint a receiver or conservator to implement a court order, or to enforce of an injunction or temporary restraining order. The division may also impose civil penalties.<sup>6</sup>

Unlike condominium and cooperative associations, 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,

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<sup>1</sup> Sections 718.501(1) and 719.501(1), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 718.501(1), F.S.

<sup>4</sup> Section 719.501(1), F.S.

<sup>5</sup> Sections 718.501(1) and 719.501(1), F.S.

<sup>6</sup> *Id.*

including, but not limited to, the rights of the developer to complete the community as initially contemplated.

In regards to homeowners' associations, the division's authority is limited to arbitration of recall election disputes.<sup>7</sup>

### **Condominium**

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, appurtenant to each unit, an undivided share in common elements.”<sup>8</sup> A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.<sup>9</sup> A declaration is similar to a constitution in that it:

[S]trictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.<sup>10</sup>

A condominium is administered by a board of directors referred to as a “board of administration.”<sup>11</sup>

### **Cooperative Associations**

Section 719.103(12), F.S., defines a “cooperative” to mean:

[T]hat form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

A cooperative differs from a condominium because, in a cooperative, no unit is individually owned. Instead, a cooperative unit's occupants receive an exclusive right to occupy the unit. The cooperative holds the legal title to the unit and all common elements. The cooperative association may assess costs for the maintenance of common expenses.<sup>12</sup>

### **Homeowners' Associations**

Florida law provides statutory recognition to corporations that operate residential communities in this state and procedures for operating homeowners' associations. These laws protect the rights

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<sup>7</sup> See s. 720.306(9)(c), F.S.

<sup>8</sup> Section 718.103(11), F.S.

<sup>9</sup> Section 718.104(2), F.S.

<sup>10</sup> *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).

<sup>11</sup> Section 718.103(4), F.S.

<sup>12</sup> See ss. 719.106(1)(g) and 719.107, F.S.

of association members without unduly impairing the ability of such associations to perform their functions.<sup>13</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, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.”<sup>14</sup> Unless specifically stated to the contrary, 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>15</sup>

Homeowners’ associations are administered by a board of directors whose members are elected.<sup>16</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>17</sup> The officers and members of a homeowners’ association have a fiduciary relationship to the members who are served by the association.<sup>18</sup>

### **Chapters 718, 719, and 720, F.S.**

Chapter 718, F.S., relating to condominiums, ch. 719, F.S., relating to cooperatives, and ch. 720, F.S., relating to homeowners’ associations, provide for the governance of these community associations. For example, the chapters delineate requirements for notices of meetings,<sup>19</sup> recordkeeping requirements, including which records are accessible to the members of the association,<sup>20</sup> and financial reporting.<sup>21</sup> Timeshare condominiums are generally governed by ch. 721, F.S., the “Florida Vacation Plan and Timesharing Act.”

For ease of reference to each of the topics addressed in SB 1274, the Present Situation for each topic will be described in Section III of this analysis, followed immediately by an associated section detailing the Effect of Proposed Changes.

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

SB 1274 revises the regulation and governance of condominium, cooperative, and homeowners’ associations under chs. 718, 719, and 720, F.S., respectively.

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<sup>13</sup> See s. 720.302(1), F.S.

<sup>14</sup> Section 720.301(9), F.S.

<sup>15</sup> Section 720.302(5), F.S.

<sup>16</sup> See ss. 720.303 and 720.307, F.S.

<sup>17</sup> See ss. 720.301 and 720.303, F.S.

<sup>18</sup> Section 720.303(1), F.S.

<sup>19</sup> See s. 718.112(2), F.S., for condominiums, s. 719.106(2)(c), F.S., for cooperatives, and s. 720.303(2), F.S., for homeowners’ associations.

<sup>20</sup> See s. 718.111(12), F.S., for condominiums, s. 719.104(2), F.S., for cooperatives, and s. 720.303(4), F.S., for homeowners’ associations.

<sup>21</sup> See s. 718.111(13), F.S., for condominiums, s. 719.104(4), F.S., for cooperatives, and s. 720.303(7), F.S., for homeowners’ associations.

## **Attorney Representation – Condominium Associations**

### ***Present Situation:***

Section 718.111(3)(b), F.S., prohibits a condominium association from hiring an attorney who represents the management company of the association.

An attorney representing a community association must also comply with the ethical rules of professional conduct relating to conflicts of interest imposed on attorneys by the Florida Supreme Court. The rules prohibit a Florida-licensed attorney from representing a client if:

- (1) The representation of one client would be directly adverse to another client; or
- (2) There is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>22</sup>

However, notwithstanding the existence of a conflict of interest, an attorney may represent a client if:

- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) The representation is not prohibited by law;
- (3) The representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
- (4) Each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.<sup>23</sup>

### ***Effect of Proposed Changes:***

The bill amends s. 718.111(3)(b), F.S., to remove the prohibition against a condominium association hiring an attorney who represents the management company of the association. As a result, the rules on attorney professional conduct established by the Supreme Court would govern an attorney representing a condominium association and the association's management company.

## **Official Records – Condominium and Cooperative Associations**

### ***Present Situation:***

Florida law specifies the official records condominium, cooperative, and homeowners' associations must maintain.<sup>24</sup> Generally, the official records must be maintained in this state for

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<sup>22</sup> Rule 4-1.7, Florida Rules of Professional Conduct, November 20, 2017.

<sup>23</sup> *Id.*

<sup>24</sup> See s. 718.111(12), F.S., relating to condominium associations, s. 719.104(2), F.S., relating to cooperative associations, and s. 720.303(5), F.S., relating to homeowners' associations.

at least seven years.<sup>25</sup> Certain of these records must be accessible to the members of an association.

Any management agreement, lease, or other contract to which the association is a party must be kept for one year. A condominium association must also maintain for one year summaries of bids for materials, equipment, or services.<sup>26</sup>

Condominium and cooperative associations, but not homeowners' associations, must maintain as an official record the ballots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners. And these records must be maintained for one year from the date of the election, vote, or meeting to which the document relates.<sup>27</sup>

***Effect of Proposed Changes:***

The bill amends ss. 718.111(12) and 719.104(2), F.S., which list the official records of condominium and cooperative associations, respectively, to remove language specifying that the minutes of all meetings of the association and all accounting records must be maintained for one year. Consequently, meeting minutes and accounting records must be maintained as official records for seven years.

The bill amends ss. 718.111(12)(a)11.d. and 719.104(2)(a)10., F.S., to add electronic records relating to voting to the official records a condominium or cooperative association must maintain for seven years.

**Financial Reporting – Condominium Associations**

***Present Situation:***

Sections 718.11(13), F.S., provides the financial reporting requirements for condominium associations.<sup>28</sup>

Within 90 days following the end of the fiscal or calendar year, or annually on a date stated in the association's bylaws, the board must complete, or contract with a third party to complete, the financial statements. Within 21 days after the financial report is completed by the association or received from the third party, but no later than 120 days after the end of the fiscal year, the board must provide each member of the association a copy of the financial report or a notice that it is available at no charge upon a written request.

The type of financial reporting that an association must perform is based on the association's total annual revenue. An association with total annual revenue of:

- Less than \$150,000 must prepare a report of cash receipts and expenditures.

<sup>25</sup> See s. 718.111(12)(b), F.S., for condominiums, s. 719.104(2)(b), F.S., for cooperatives, and s. 720.303(5), F.S., for homeowners' associations.

<sup>26</sup> Sections 719.104(2)(a)9.d. and 720.303(4)(i), F.S., require cooperative and homeowners' associations, respectively, to main a copy of such bids for one year but do not require the associations to maintain a summary of such bids.

<sup>27</sup> Sections 718.111(12)(a)12., and 719.104(2)(a)10., F.S.

<sup>28</sup> Sections 719.104(4), and 720.303(7), F.S., provide comparable financial reporting requirements for cooperative and homeowners' associations, respectively.

- Between \$150,000 and less than \$300,000 must prepare compiled financial statements.<sup>29</sup>
- At least \$300,000 but less than \$500,000 must prepare reviewed financial statements.<sup>30</sup>
- \$500,000 or more must prepare audited financial statements.<sup>31</sup>

If approved by a majority of voting interests present at a duly called meeting, an association may prepare or cause to be prepared:

- A report of cash receipts and expenditures in lieu of a compiled, reviewed or audited financial statement;
- A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or
- A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

A unit owner may notify the division that an association has failed to provide him or her with a copy of the most recent financial report within five business days after a written request. The division must provide written notice to the association that the association must mail or hand deliver a copy of the most recent financial report to the unit owner and the division within five business days. If an association fails to comply with the division's request, the association may not waive the financial reporting requirement.<sup>32</sup> Current law does not specify the fiscal year or years for which the financial reporting requirement may not be waived.

***Effect of Proposed Changes:***

The bill amends s. 718.111(13)(e), F.S., to prohibit a condominium association from waiving the financial reporting requirement for two consecutive years beginning with the fiscal year in which the association has failed to comply with the division's request to provide a unit owner a copy of the most recent financial report.

**Notice of Board Meetings – Condominium, Cooperative, and Homeowners' Associations**

***Present Situation:***

Condominium and cooperative associations are required to notice all board meetings by posting a notice in a conspicuous place on the cooperative's or condominium's property for at least 48 hours. The notice must be posted 14 days before meetings when a nonemergency special assessment or an amendment to the rules regarding unit use is to be considered.<sup>33</sup>

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<sup>29</sup> A compiled financial statement is an accounting service based on information provided by the entity that is the subject of the financial statement. A compiled financial statement is made without a Certified Public Accountant's (CPA) assurance as to conformity with GAAP. Compiled financial statements must conform to the American Institute of Certified Public Accountants (AICPA) Statements on Standards for Accounting and Review Services. J.G. Siegel and J.K. Shim, *Barron's Business Guides, Dictionary of Accounting Terms*, 3<sup>rd</sup> ed. (Barron's 2000).

<sup>30</sup> A reviewed financial statement is an accounting service that provides a board of directors and interested parties some assurance as to the reliability of financial data without the CPA conducting an examination in accordance with GAAP. Reviewed financial statements must comply with AICPA auditing and review standards for public companies or the AICPA review standards for non-public businesses. *Id.*

<sup>31</sup> An audited financial statement by a CPA verifies the accuracy and completeness of the audited entities records in accordance with GAAP. *Id.*

<sup>32</sup> Section 718.111(13)(e), F.S.

<sup>33</sup> Sections 718.112(2)(c) and 719.106(1)(c)(1), F.S.



If the governing documents of the association allow, unit owners in a condominium association and shareholders in a cooperative association may waive notice of specific meetings, but may not allow unit owners or shareholders to waive notice of meetings to recall board members. Unit owners and shareholders may also give consent to receive notice of committee meetings by electronic transmission.<sup>34</sup>

If a member of a homeowners' association consents in writing to receive notice by electronic transmission, the association may provide notice by electronic transmission in the manner authorized by law for meetings of the board of directors, committees meetings, and annual and special meetings.<sup>35</sup>

***Effect of Proposed Changes:***

The bill amends ss. 718.112(2)(c) and 719.106(1)(c), F.S., relating to board meetings and unit owner or shareholder meetings of a condominium or cooperative association, respectively, to:

- Require the notice of any meeting at which a regular or special assessment is to be considered to specifically state that an assessment will be considered and provide the estimated amount of the assessment and a description of the purposes for such assessment;
- Authorize the board to adopt, by rule, a procedure for conspicuously posting a meeting notice and agenda on a website serving the association;
- If the association adopts a rule for posting an electronic meeting notice and agenda, the rule must require the association to send an electronic notice to members with a hypertext link to the website where the notice is posted; and
- Require the notice on the association's website be posted for at least as long as the physical posting of a meeting notice is required.<sup>36</sup>

The bill also amends ss. 718.112(2)(d)6. and 719.106(1)(d)3., F.S., to make condominium unit owners and cooperative shareholders who consent to receive notices by electronic transmission solely responsible for removing or bypassing filters that block receipt of mass e-mails sent by the condominium or cooperative association in the course of giving electronic notices.

Regarding homeowners' associations, the bill amends s. 720.303(2)(c)1., F.S., to permit an association to provide meeting notices by electronic transmission to any member who has provided a facsimile number or e-mail address to the association to be used for such purposes. The bill maintains the requirement in current law requiring the homeowners' association to first obtain a member's consent to receive meeting notices by electronic transmission.

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<sup>34</sup> Sections 718.112(2)(d)6. and 719.106(1)(d)3., F.S., dealing with meeting notices for condominium and cooperative associations, respectively.

<sup>35</sup> Section 720.303(2)(c)1., F.S.

<sup>36</sup> See ss. 718.112(2)(c) and 719.106(1)(c), F.S., providing the notice requirements for meetings in condominium and cooperative associations, respectively.

## **Board Members – Cooperative Associations**

### ***Present Situation:***

Unless the governing documents of a cooperative association provide otherwise, the board of the association must be composed of five members. If the cooperative is a not-for-profit association with five or fewer units, the board must consist of not fewer than three members.<sup>37</sup>

### ***Effect of Proposed Changes:***

The bill amends s. 719.106(1)(a)1., F.S., to prohibit co-owners of a unit in a residential cooperative association of more than 10 units from serving on the board at the same time, unless the co-owners own more than one unit or there are not enough eligible candidates.<sup>38</sup>

## **Recall of Directors – Condominiums**

### ***Present Situation:***

In a condominium association in which the non-developer members are entitled to elect the majority of the board, any board director may be recalled and removed from office with or without cause by a majority of the voting interests. A board director may be recalled by an agreement in writing or by written ballot without a membership meeting.<sup>39</sup>

If the proposed recall is by written agreement, the written agreement must be served on the association by certified mail or personal service. Within five full business days after receipt of the written agreement, the board must hold a meeting. If the recall is approved by a majority of all voting members or the recall is by an agreement in writing by all voting members, the recall is effective immediately.<sup>40</sup>

If the board fails to hold a meeting within five business days or fails to file the required petition, the unit owner representative may file a petition with the division to challenge the board's failure to meet. Current law does not authorize the board to file any petition after the recall election or receipt of the written agreement. The division's review is limited to the sufficiency of service and the facial validity of the written agreement or ballots filed.<sup>41</sup>

Within 60 days after the recall, a recalled board member may file a petition with the division to challenge the validity of the recall.<sup>42</sup> In such a challenge, the association and the unit owner representative must be named as respondents. However, current law does not specify the matters to be reviewed by the division's arbitrator, the post-review process for removal or reinstatement of a recalled board member, or the award of attorney fees and costs to the prevailing party.

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<sup>37</sup> Section 718.112(2)(a), F.S., provides an identical requirement for condominium associations.

<sup>38</sup> *Id.*

<sup>39</sup> Section 718.112(2)(j)1., F.S.

<sup>40</sup> Sections 718.112(2)(j)2., F.S.

<sup>41</sup> Section 718.112(2)(j)4., F.S.

<sup>42</sup> Section 718.112(2)(j)6., F.S.

***Effect of Proposed Changes:***

The bill amends s. 718.112(2)(j), F.S., to provide that the recall of a director is effective immediately upon the conclusion of the board meeting called after the board's receipt of the written agreement for recall or the recall is approved in an election.

Also deleted by the bill is the provision in s. 718.112(2)(j)4., F.S., authorizing the unit owner representative to file a petition with the division challenging the board's failure to file a required petition. Current law does not authorize the board to file any petition after the recall election or receipt of the written agreement.<sup>43</sup> The bill maintains the authority in current law of the unit owner representative to file a petition with the division challenging the board's failure to hold the meeting required after a recall election or its receipt of the written agreement.<sup>44</sup>

Under the bill, the recalled board member may challenge the facial validity of the written agreement or ballots filed or compliance with the procedural requirements of the recall. If the recall is determined invalid by the division's arbitrator, the petitioning board member must be reinstated and the recall is null and void. A board member who is successful in challenging a recall is entitled to recover reasonable attorney fees and costs from the respondent association and unit owner representative. The arbitrator may award attorney fees and costs to a prevailing respondent, or upon a finding by the arbitrator that the petitioner's claim is frivolous.

**Alterations and Additions to Condominium Property*****Present Situation:***

Section 718.113(2), F.S., requires 75 percent of the total voting interests of the association to approve a material alteration or substantial addition to common elements or association property, including in a multicondominium association, but does not specify when the approval must be obtained.

The requirements in s. 718.113(2), F.S., for material alterations or substantial addition to common elements or association property apply to associations existing on October 1, 2008.

***Effect of Proposed Changes:***

The bill amends s. 718.113(2), F.S., to require the approval by the voting interests of the association before a material alteration or substantial addition to the common elements or association property is commenced. The bill also expands the number of associations subject to the revised requirements in s. 718.113(2), F.S., for making a material alteration or substantial addition to the common elements or association property to all condominium associations existing on July 1, 2018, instead of on October 1, 2008.

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<sup>43</sup> See s. 718.112(2)(j), F.S., relating to the process for the recall of board members.

<sup>44</sup> See s. 718.112(2)(j)4., F.S.

## Conflicts of Interest – Condominiums

### *Present Situation:*

Chapter 718, F.S., imposes a number of restrictions on conflicts of interest by members of the board of a condominium association. The members of the board of the association have a fiduciary relationship to the unit owners.<sup>45</sup> Consistent with this responsibility, officers and directors may not solicit or accept any good or service from a person providing or proposing to provide goods or services to the association.<sup>46</sup> An officer or director who violates the prohibition is subject to a possible civil penalty and criminal penalties.<sup>47</sup>

Additionally, officers and directors are required to exercise their duties in good faith, with the care of an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the interests of the association.<sup>48</sup> An officer or director is liable for monetary damages if he or she breaches or fails to perform his or her duties and the breach or failure is related to certain violations of criminal law, an improper personal benefit, or certain reckless acts or omissions.<sup>49</sup>

Section 718.3026(3), F.S., dealing with contracts for products or services in a condominium association, requires contracts between a condominium association, and a director, or an entity in which a director has a financial interest, to comply with the conflict of interest procedures outlined in s. 617.0832, F.S. A contract is void or voidable if the association does not comply with s. 617.0832, F.S.<sup>50</sup> To comply with the disclosure requirements in s. 617.0832, F.S., the fact of a potentially conflicting relationship or interest must be disclosed or known to the board of directors or committee which authorizes, approves, or ratifies the contract or transaction, must be disclosed or made known to the members entitled to vote on such contract or transaction, or the contract or transaction must be fair and reasonable as to the corporation at the time it is authorized by the board, a committee, or the members.<sup>51</sup>

Under s. 617.0832(2), F.S., a conflict-of-interest transaction must be authorized, approved, or ratified by a majority vote of the directors who have no relationship or interest in the transaction. However, s. 718.3026(3)(c), F.S., requires an affirmative vote of two-thirds of the directors present for any contract or other transaction between the association and a director or entity in which a director has a financial interest. The meeting minutes must contain the disclosures required under s. 617.0832, F.S.<sup>52</sup>

The existence of the contract or other transaction must be disclosed to the members at the next regular or special meeting of the members, and any member may make a motion for the contract

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<sup>45</sup> Section 718.111(1)(a), F.S.

<sup>46</sup> *Id.*

<sup>47</sup> See ss. 718.111(1)(a), (d), and 617.0834, F.S. Sections 718.111(1)(d) and 617.0834, F.S., specify that an officer's or director's breach of, or failure to perform, his or her duties constitutes a violation of the criminal law, but do not specify the criminal law violated.

<sup>48</sup> Section 617.0830(1), F.S.

<sup>49</sup> Sections 617.0830 and 617.0834, F.S.

<sup>50</sup> Section 617.0832(1), F.S.

<sup>51</sup> *Id.*

<sup>52</sup> Section 718.3026(3)(b), F.S.

or transaction to be brought up for a vote. The contract or transaction may be canceled by a majority vote of the members present at the meeting. If the members cancel the contract, the association is only liable for the reasonable value of goods and services provided up to the time of cancellation and is not liable for any termination fee, liquidated damages, or other form of penalty for the cancellation.<sup>53</sup>

Additionally, s. 718.3027, F.S., also provides a process for the resolution of conflicts of interests of directors and officers of the board, and the relatives of such directors and officers, in an association that is not a timeshare condominium. These persons must disclose to the board any activity that may reasonably be construed to be a conflict of interest. A rebuttable presumption of a conflict of interest exists if such person enters into a contract for goods or services with the association, or has an interest in the business entity conducting business with the association or which proposes to enter into a contract or other transaction with the association.

Under s. 718.3027, F.S., the existence of the conflict of interest must be documented on contracts and meeting agendas. The officer or director engaged in a conflict of interest must choose to not pursue the activity creating the conflict or must withdraw from office. Otherwise, the board must remove the officer or director from office.

***Effect of Proposed Changes:***

The bill transfers the provisions relating to the process for resolving conflicts of interest in s. 718.3026, F.S., dealing with contracts for products and services, to s. 718.3027(2), F.S., dealing with conflicts of interest.

**Fines and Suspensions – Condominiums, Cooperatives, and Homeowners’ Associations**

***Present Situation:***

A condominium, cooperative, or homeowners’ association may not issue a fine of more than \$100 per violation, or \$1,000 in the aggregate.<sup>54</sup> An association may suspend, for a reasonable period of time, the right of a unit owner, or a unit owner’s tenant, guest, or invitee, to use the common elements, common facilities, or any other association property for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.<sup>55</sup>

The association must provide at least 14 days’ written notice and an opportunity for a hearing to the unit owner and, if applicable, its occupant, licensee, or invitee before it may assess a fine or suspension. The hearing must be held before a committee of other unit owners who are not board members or persons residing in a board member’s household. The committee is limited to determining whether to confirm or reject the fine or suspension levied by the board. If the committee does not agree, the fine or suspension may not be imposed.<sup>56</sup>

<sup>53</sup> Section 718.3026(3)(d), F.S.

<sup>54</sup> Sections 718.303(3), 719.303(3), and 720.305(2) F.S., relating to condominiums, cooperatives, and homeowners’ associations, respectively.

<sup>55</sup> Sections 718.303(3)(b), 719.303(3)(b), 720.305(2)(2), F.S., relating to condominiums, cooperatives, and homeowners’ associations, respectively.

<sup>56</sup> *Id.*

***Effect of Proposed Changes:***

The bill amends ss. 718.303(3)(b), 719.303(3)(b), and 720.305(2)(b), F.S., relating to the obligations of owners in condominium, cooperative, and homeowners' associations, respectively, to require a committee reviewing a recommendation of the association to fine, or suspend the use rights of, a unit owner or occupant, licensee or invitee of the unit owner, contain at least three members appointed by the board who are not officers, directors or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee.

Under the bill, a majority vote of the committee must approve the proposed fine or suspension. If a fine is approved, the fine must be paid within five days after the date the committee approves the fine. The association must provide written notice of the fine or suspension by mail or hand delivery to the owner and, if applicable, the occupant, licensee, or invitee of the owner.

**Distressed Condominium Relief Act*****Present Situation:***

In 2010, the Legislature enacted the "Distressed Condominium Relief Act" (Act) as part VII of ch. 718, F.S., which defines the extent to which successors to the developer, including a construction lender after a foreclosure and other bulk buyers and bulk assignees of condominium units, may be responsible for implied warranties and other responsibilities of the developer.<sup>57</sup>

The Act creates the categories of "bulk buyers" and "bulk assignees."

A "bulk assignee" is a person who acquires more than seven condominium parcels in a single condominium as provided in s. 718.707, F.S., and receives an assignment of some or substantially all of the rights of the developer as an exhibit in the deed or as a separate instrument recorded in the public records in the county where the condominium is located.<sup>58</sup>

A "bulk buyer" is a person who acquires more than seven condominium parcels in a single condominium but who does not receive an assignment of developer rights other than the rights specified in the act to conduct sales, leasing, and marketing activities within the condominium. A bulk buyer is exempt from payment of working capital contributions and from rights of first refusal.<sup>59</sup>

Section 718.704(1), F.S., provides that a bulk assignee assumes all the duties and responsibilities of the developer, and specifies obligations for which the bulk assignee is not liable.

Section 718.707, F.S., specifies a time limit for classification as a bulk assignee or bulk buyer. A person acquiring condominium parcels may not be classified as a bulk assignee or a bulk buyer unless the condominium parcels were acquired prior to July 1, 2018. The date of acquisition is based on the date that the deed or other instrument of conveyance is recorded.

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<sup>57</sup> Ch. 2010-174, s. 18, Laws of Fla., codified as part VII, ch. 718, F.S.

<sup>58</sup> Section 718.703(1), F.S.

<sup>59</sup> Section 718.703(2), F.S.

The Act was created in reaction to the “massive downturn in the condo market which has occurred throughout the state”<sup>60</sup> and was not intended to be open-ended. Rather, the intent of the Legislature was to enact the relief only for a specific and defined period:

The Legislature further finds and declares that this situation cannot be open-ended without potentially prejudicing the rights of unit owners and condo associations, and thereby declares that the provisions of this part may be used by purchasers of condo inventory for only a specific and defined period.<sup>61</sup>

Originally, the time limitation for classification as a bulk assignee or bulk buyer ended July 1, 2012.<sup>62</sup> In 2012, the Legislature extended the time limitation to July 1, 2015.<sup>63</sup> In 2014, the legislature amended s. 718.707, F.S., to extend the time limitation to July 1, 2016.<sup>64</sup>

In 2015, the Legislature further amended s. 718.707, F.S., to provide that a person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the parcels were acquired between July 1, 2010, and July 1, 2018.

***Effect of Proposed Changes:***

The bill amends s. 718.707, F.S., to remove the deadline of July 1, 2018, for classification as a condominium bulk buyer or bulk assignee.

**Directors and Officers - Cooperative Associations**

***Present Situation***

If a director or officer of a condominium is more than 90 days delinquent in the payment of any monetary obligation due to the association, the director or officer is deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.<sup>65</sup> Chapter 719, F.S., does not provide a comparable sanction for directors or officers of a cooperative association.

***Effect of Proposed Changes***

The bill creates s. 719.106(1)(m), F.S., to provide that a cooperative association director or officer who is more than 90 days delinquent in the payment of any monetary obligation due to the association is deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.<sup>66</sup>

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<sup>60</sup> Section 718.702(1), F.S.

<sup>61</sup> Section 718.702(3), F.S.

<sup>62</sup> Ch. 2010-174, s. 18, Laws of Fla.

<sup>63</sup> Ch. 2012-61, s. 36, Laws of Fla.

<sup>64</sup> Ch. 2014-74, s. 5, Laws of Fla.

<sup>65</sup> See 718.112(2)(n), F.S.

<sup>66</sup> Section 718.112(2)(n), F.S., provides an identical provision for condominium associations.

## **Common Expenses – Cooperative Associations**

### ***Present Situation***

Section 719.107(1), F.S., specifies the costs a cooperative association may include as a common expense of the association. Common expenses include the expenses of the operation, maintenance, repair, or replacement of the cooperative property; costs of carrying out the powers and duties of the association; and any other expense designated as common expense by ch. 719, F.S., or the governing documents of the cooperative association.<sup>67</sup> The cost of a master antenna television system or duly franchised cable television service obtained under a bulk service contract is also a common expense of a cooperative association.<sup>68</sup>

Any contract made by the board of a cooperative association after April 2, 1992, for a community antenna system or duly franchised cable television service may be canceled by a majority of the voting interests present at the next regular or special meeting of the association.<sup>69</sup>

### ***Effect of Proposed Changes***

The bill amends s. 719.107(1)(b), F.S., to include the cost of communication services as defined in ch. 202, F.S., information services, or Internet service, obtained under a bulk contract, as cost deemed a common expense of the association. The bill removes the cost of a master antenna television system or duly franchised cable television service obtained under a bulk service contract as common expense of a cooperative association.

Additionally, the bill amends s. 719.107(1)(b)1., F.S., to permit contracts made by the board of a cooperative association after April 2, 1992, for communication services as defined in ch. 202, F.S., information services, or Internet service to be cancelled by a majority of the voting interests present at the next regular or special meeting of the association. The bill maintains the provision in current law for the cancellation of contracts for a community antenna system or duly franchised cable television service.

## **Budgets and Reserve Accounts - Homeowners' Associations**

### ***Present Situation***

#### **Budgets and Reserve Accounts**

Homeowners' associations must prepare an annual budget for the coming year that includes:

- The estimated revenues and operating expenses for that year;
- The estimated surplus or deficit as of the end of the current year; and
- All fees or charges paid for by the association for recreational amenities.<sup>70</sup>

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<sup>67</sup> Section 719.107(1), F.S.

<sup>68</sup> Section 719.107(1)(b), F.S.

<sup>69</sup> Section 719.107(1)(b)1., F.S.

<sup>70</sup> *Id.*



The association is required to provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member.<sup>71</sup>

The budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible. A reserve account is an account into which an association collects periodic advance payments to cover future anticipated and specific capital expenditures and deferred maintenance items.

If a reserve account is not established by developer or by a vote of the members, the account must be funded pursuant to the requirements of the governing documents. If the reserve account is established by the developer or by a vote of the members, the reserves shall be determined, maintained, and waived in the manner provided in s. 720.303(6), F.S. A majority of the total voting interests of the association may vote to terminate a reserve account.<sup>72</sup> The budget of the association must include a notice, as specified in current law, regarding whether the budget includes or does not include reserve accounts.<sup>73</sup>

The members may elect to establish a reserve account by an affirmative vote of a majority of the total voting interests of the association at a duly called meeting of the membership or by the written consent of a majority of the total voting interests. The approval to establish reserve accounts must designate the components for which the reserve accounts are established.<sup>74</sup>

The homeowners' association must compute the amount in the reserve account with a formula based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association must also annually adjust the replacement reserve assessments to take into account any changes in estimates of cost or useful life of a reserve item.<sup>75</sup>

A homeowners' association may vote to waive funding, reduce funding, or terminate a reserve account by a majority vote of the voting interests. A vote to waive or reduce reserves is applicable only as to one fiscal year.<sup>76</sup>

There are two types of reserve accounts:

- Separate reserve accounts for each asset; and
- Pooled reserve accounts for two or more assets.<sup>77</sup>

Current law provides funding formulas for separate and pooled reserve accounts.<sup>78</sup> Reserve funds and any interest accruing on the funds must remain in the reserve account or accounts and must

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<sup>71</sup> *Id.*

<sup>72</sup> Section 720.303(6)(b), F.S.

<sup>73</sup> Section 720.303(6)(c), F.S.

<sup>74</sup> Section 720.303(6)(d), F.S.

<sup>75</sup> Section 720.303(6)(e), F.S.

<sup>76</sup> Section 720.303(6)(f), F.S.

<sup>77</sup> *See* s. 720.303(6)(g), F.S.

<sup>78</sup> Section 720.303(6)(g), F.S. *See also* Division of Florida Condominiums, Timeshares, and Mobile Homes, Budgets & Reserves Schedules: A Self-Study Training Manual, available at:

<http://www.myfloridalicense.com/dbpr/lsc/documents/BudgetsandReserveSchedules.pdf> (last visited January 25, 2018).

be used only for authorized reserve expenditures, unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present. Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association cannot vote to use reserves for purposes other than those for which they were intended without the approval of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association.<sup>79</sup>

### Budgets and Assessments

Current law does not provide a process for members of a homeowners' association to reconsider the board's adoption of a budget that increases assessments. In a condominium association, the board is required to call a special meeting, if the board adopts an annual budget that requires an assessment that exceeds 115 percent of assessments for the preceding fiscal year. The condominium board must conduct a special meeting of the unit owners to consider a substitute budget if the board receives, within 21 days after adoption of the annual budget, a written request for a special meeting from at least 10 percent of all voting interests. The meeting must take place within 60 days of the adoption of the annual budget, and the notice must be delivered by mail or hand delivery at least 14 days before the meeting.<sup>80</sup>

### ***Effect of Proposed Changes:***

#### Budgets and Reserve Accounts

The bill amends s. 720.303(6), F.S., to revise the requirements for the maintenance of reserve accounts by homeowners' associations. The bill provides:

- All homeowners' associations incorporated on or after July 1, 2018, and any homeowners' association incorporated before July 1, 2018, which has voted by a majority to conform to the reserve account provisions as revised by this bill, must include reserve accounts in the annual budget for items with deferred maintenance costs exceeding \$100,000, instead of having the option to include reserve accounts in the annual budget.
- Boards may elect to reserve money for any item with deferred maintenance expense exceeding \$25,000, and also may elect to reserve money for any item with a deferred maintenance item that is less than \$25,000, if approved by a majority vote.
- A homeowners' association, by a majority vote of the members present at a meeting, may elect not to maintain reserves or to maintain reserves for less than the required amount.
- In calculating the reserves, each parcel owner is obligated to pay annual reserves for only the amount determined by dividing the total annual reserve amount disclosed in the budget by the total number of parcels that ultimately will be included in the association.
- Assessments may not be assessed on undeveloped parcels, and voting interests for parcels that are not subject to assessment are not eligible to vote on questions involving waiving or reducing the funding of reserves.
- The developer's voting interest is limited to the parcels owned by the developer with completed improvements evidenced by a certificate of occupancy.

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<sup>79</sup> Section 720.303(6)(h), F.S.

<sup>80</sup> Section 718.112(2)(e)2.a., F.S.

- Homeowners' associations must use the pool reserve account funding formula to determine the funding for two or more assets for which the reserve account is maintained; however, associations may, by majority vote, elect to use the alternative straight-line accounting method for separate accounts.
- Proxy voting is permitted to waive, reduce, or terminate funding of reserve accounts, but the proxy ballot must contain a statement in conspicuous type that waiving funding for reserve accounts may result in unanticipated special assessments.
- Reserve funds must be held in a separate bank account established for such funds and may not be used for any purpose other than reserved expenditure.
- Reserve funds do not apply to mandatory reserve accounts required by any local authority, water or drainage district, community development district, or political subdivision that has authority to approve and control subdivision infrastructure.

### Budgets and Assessments

The bill amends s. 720.303(6), F.S., to revise the requirements for assessment increases in the budget of a homeowners' association. Under the bill, which is comparable to the process under s. 718.112(2)(e)2.a., F.S., for condominium associations, if assessments for an annual budget exceed 115 percent of assessments for the preceding year and 10 percent of the voting interests request a special meeting within 21 days of the adoption of the budget, the board must:

- Conduct a special meeting of the unit owners to consider a substitute budget within 60 days of adopting the annual budget.
- Hand deliver or mail notice of the meeting to each parcel owner at least 14 days prior to such special meeting.

An officer or manager of the association, or other person providing notice of such meeting must execute an affidavit evidencing compliance with this notice requirement, and file the affidavit in the official records of the association.

Parcel owners may consider and adopt a substitute budget at the special meeting. A substitute budget is adopted if approved by a majority of all voting interests, unless the bylaws require adoption by a greater percentage of voting interests. If there is not a quorum at the special meeting or a substitute budget is not adopted, the annual budget approved by the board will take effect.

The determination of whether assessments exceed 115 percent of assessments for the prior fiscal year must exclude any authorized provision for reasonable reserves for repair, replacement of property, anticipated expenses which the board does not expect to be incurred on a regular basis, or assessments to improve the property.

### **Other Provisions – Cooperatives and Homeowners' Associations**

The bill amends ss. 719.106(1)(c) and 720.303(2)(a), F.S., to permit members of the board of a cooperative or homeowners' association to use e-mail as a means of communication, but not cast a vote by e-mail.<sup>81</sup>

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<sup>81</sup> Section 718.112(1)(c), F.S., provides an identical provision for condominium associations.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 718.111, 718.112, 718.113, 718.3026, 718.3027, 718.303, 718.707, 719.104, 719.106, 719.107, 719.303, 720.303, 720.305, 720.306, 720.3085, and 720.401.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

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