

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL: CS/SB 1706

INTRODUCER: Regulated Industries Committee and Senator Yarborough

SUBJECT: Condominiums Within a Portion of a Building or Within a Multiple Parcel Building

DATE: February 5, 2024

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|-----------|---------------|
| 1. | <u>Oxamendi</u> | <u>Imhof</u> | <u>RI</u> | <u>Fav/CS</u> |
| 2. | _____ | _____ | <u>RC</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1706 creates s. 718.407, F.S., to provide conditions, including disclosure requirements in sales contracts, for the creation of condominiums within a portion of a building or within a multiple parcel building. Under the bill, when a condominium is created within a portion of a building or within a multiple parcel building, the document that creates the condominium must include the information specified by the bill, including:

- The portions of the building which are included in the condominium and the portions of the building that are excluded;
- The party responsible for maintaining and operating those portions of the building which are shared facilities, including, but not limited to, the roof, the exterior of the building, windows, balconies, elevators, the building lobby, corridors, recreational amenities, and utilities;
- How the expenses for the maintenance and operation of the shared facilities will be apportioned;
- The party responsible for collecting shared expenses from all owners; and
- The rights and remedies that are available to enforce payment from the other owners.

The bill provides that the association of a condominium subject to s. 718.407, F.S., has the right to inspect and copy the books and records upon which the costs for maintaining and operating the shared facilities are based and to receive an annual budget with respect to such costs.

The bill provides a disclosure clause that must be included, in conspicuous type, in every contract for the sale of any condominium created under s. 418.407, F.S. The disclosure clause

informs the prospective purchaser of a condominium unit of specified information, including that the condominium is created within a portion of a building, and that portions of the building that are not included in the condominium are governed by a separate recorded instrument that contains important provisions and rights.

The seller of a unit in a condominium created under s. 718.407, F.S., must also include an additional disclosure summary, in conspicuous type, in every contract for the sale of the unit, which must be signed by the purchaser. The disclosure summary informs the prospective purchaser of a condominium unit of specified information, including that the condominium is created within a portion of a building or within a multiple parcel building, and that the association and unit owners may have limited or no control over the maintenance, operation, and costs of the portions of the building that are not submitted to the condominium form of ownership, and that a copy of instrument creating the condominium is or will be recorded in the public record.

The bill revises the definition for the term “condominium property” in s. 718.103(14), F.S., to mean “the lands, leaseholds, improvements, any personal property, and all easements and rights appurtenant thereto, regardless of whether contiguous, which are subjected to condominium ownership.”

The bill also provides that the amendments made to s. 718.103, F.S., which revise the definition for the term “condominium property,” and s. 718.202(3), F.S., relating to the use of escrow funds by the developer, and the creation of ss. 718.407(1), (2), and (7), F.S., relating to the creation of a condominium within a portion of a building or within a multiple parcel building, are intended to clarify existing law and to apply retroactively. The bill also provides the provisions in the bill do not revive or reinstate any right or interest that has been fully and finally adjudicated as invalid before July 1, 2024.

The bill also:

- Revises the escrow requirements for nonresidential condominiums to allow the developer the option of delivering to the escrow agent a surety bond or an irrevocable letter of credit with specified conditions.
- Revises the required nondeveloper pre-sale disclosures to include the annual financial statement and annual budget of the condominium association (instead of the financial information required by s. 718.111, F.S.) among the list of documents that must be provided to the prospective purchaser of a unit.
- Requires the prospectus or offering circular for a condominium to state whether the condominium is created within a portion of a building or a multiple parcel building.

The bill takes effect July 1, 2024.

II. Present Situation:

Division of Florida Condominiums, Timeshares, and Mobile Homes

The Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation administers the provisions of chs. 718, F.S., for condominium associations.

Section 718.501, F.S., provides the investigative and enforcement authority of the division. The division may enforce and ensure compliance with ch. 718, F.S., and rules relating to the development, construction, sale, lease, ownership, operation, and management of residential condominium units and complaints related to the procedural completion of milestone inspections under s. 553.899, F.S. The division may investigate complaints and enforce compliance with ch. 718, F.S., for associations that are still under developer control, including investigating complaints against developers involving improper turnover or failure to transfer control to the association.¹ After control of the condominium is transferred from the developer to the unit owners, the division only has jurisdiction to investigate complaints related to financial issues, elections, and maintenance of and unit owner access to association records.²

Condominiums

A condominium is a “form of ownership of real property created under ch. 718, F.S.”³ the “Condominium Act.” Condominium unit owners are in a unique legal position because they are exclusive owners of property within a community, joint owners of community common elements, and members of the condominium association.⁴ For unit owners, membership in the association is an unalienable right and required condition of unit ownership.⁵ Condominiums are created by recording a declaration in the public records of the county where the land is located, executed and acknowledged with the requirements for a deed.⁶

The term “condominium” is defined in the Condominium Act to mean:⁷

...that form of ownership of real property created pursuant to this chapter, 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.

The term “condominium property” is defined in the Condominium Act to mean:⁸

...the lands, leaseholds, and personal property that are 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.

¹ *Id.*

² Section 718.501(1), F.S.

³ Section 718.103(11), F.S.

⁴ *See* s. 718.103, F.S., for the terms used in the Condominium Act.

⁵ *Id.*

⁶ Section 718.104(2), F.S.

⁷ Section 718.103(12), F.S.

⁸ Section 718.103(14), F.S.

The “common elements” of a condominium include:⁹

- The condominium property which is not included within the units.
- Easements through units for conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services to units and the common elements.
- An easement of support in every portion of a unit which contributes to the support of a building.
- The property and installations required for the furnishing of utilities and other services to more than one unit or to the common elements.

Other parts of the condominium may be declared common elements in the declaration of condominium.¹⁰

A condominium association is administered by a board of directors referred to as a “board of administration.”¹¹ The board of administration is comprised of individual unit owners elected by the members of a community to manage community affairs and represent the interests of the association. Association board members must enforce a community's governing documents and are responsible for maintaining a condominium's common elements which are owned in undivided shares by unit owners.¹²

There are several types of condominiums:

- Phase condominiums in which the developer may develop the condominium in phases with all phases completed within a seven-year period.¹³
- Mixed-use condominiums in which the condominium contains both commercial and residential units.¹⁴
- Multi-condominiums in which the real property contains two or more condominiums, all of which are operated by the same association.¹⁵
- Condominiums created with a condominium parcels, i.e., a condominium is created with a condominium unit with an undivided share in the appurtenant common elements.¹⁶

Recent Case Law - Mixed-Use Condominiums

In a recent decision by the Florida Third District Court of Appeals (3rd DCA), the court held in that the declaration of condominium had impermissibly divested a unit of its undivided share of the common elements by designating certain portions of the condominium property as “shared facilities.”¹⁷

⁹ Section 718.108(1), F.S.

¹⁰ Section 718.108(2), F.S. Section 718.103(16), F.S., defines the terms “declaration” or “declaration of condominium” to mean the instrument or instruments by which a condominium is created, as they are from time to time amended.

¹¹ Section 718.103(4), F.S.

¹² Section 718.103(2), F.S.

¹³ Section 718.403, F.S.

¹⁴ See ss. 718.103(24) and 718.404, F.S.

¹⁵ See ss. 718.103(21) and 718.405, F.S.

¹⁶ Section 718.103(13), F.S., defines a “condominium parcel” to mean a unit, together with the undivided share in the common elements appurtenant to the unit.

¹⁷ *IconBrickell Condominium No. three Association, Inc. v. New Media Consulting, L.L.C.*, 310 So.3rd 477 (Fla. 3rd DCA 2020).

In *IconBrickell*, the condominium is a mixed-use condominium consisting of residential condominium units and a luxury hotel. The declaration of condominium designated a wide variety of specific portions of the common elements as “shared facilities” under the exclusive ownership and control of the hotel unit owner. The “shared facilities” include the balconies, lobby, elevators, and the infrastructure for utilities, such as wires and pipes. The term “shared facilities” is not defined in ch. 718, F.S.

Even though the residential unit owners did not have a common ownership interest in the “shared facilities,” the declaration burdened the residential unit owners, and not the owner of the hotel, with expenses incurred by the owner of the hotel for the maintenance, repair, replacement, improvement, management, and operation of the shared facilities.

The court held that the “recharacterization, and the resultant expropriation of undivided common ownership, indubitably contravenes the edict of the [Condominium] Act.”¹⁸

III. Effect of Proposed Changes:

Section 1 of the bill revises the definition for the term “condominium property” in s. 718.103(14), F.S., to mean:

the lands, leaseholds, improvements, any personal property, and all easements and rights appurtenant thereto, regardless of whether contiguous, which are subjected to condominium ownership.

Section 2 of the bill revises s. 718.202(1), F.S., relating to the escrow requirements in contracts for the sale of a condominium parcel and the construction, furnishing and landscaping of the property, to allow developers of nonresidential condominiums the option of delivering to the escrow agent a surety bond or an irrevocable letter of credit with specified conditions. The surety bond or irrevocable letter of credit must be in an amount equivalent to the aggregate of some or all of all payments up to 10 percent of the sale price received by the developer from all buyers towards the sale price, in all cases the aggregate of initial 10 percent deposits monies being released secured by a surety bond or irrevocable letter of credit in an equivalent amount.

The bill also revises s. 718.202(3), F.S., which allows a developer to use escrow funds in excess of 10 percent of the purchase price to pay for actual costs incurred by the developer in the construction and development of the condominium property, to allow the developer to use such escrow funds for the construction and development of easements and the rights appurtenant thereto.

Section 3 of the bill creates s. 718.407, F.S., to provide conditions, including disclosure requirements in sales contracts, for the creation of condominiums within a portion of a building or within a multiple parcel building.

¹⁸ *IconBrickell* at 481.

Section 718.407(1), F.S., provides that a condominium may be created within a portion of a building or within a multiple parcel building, as defined in s. 193.0237(1), F.S.¹⁹

The bill provides that a condominium may be created within a portion of a building or within a multiple parcel building notwithstanding the definition for “condominium” in s. 718.103(12), F.S., or the provision of s. 718.108(1), F.S., relating to common elements.

Section 718.407(2), F.S., provides that the common elements of a condominium created within a portion of a building or a multiple parcel building are only the portions of the building submitted to the condominium form of ownership, excluding the units of such condominium.

Section 718.407(3), F.S., provides that the declaration of condominium that creates a condominium within a portion of a building or within a multiple parcel building, the recorded instrument that creates the multiple parcel building, or any other recorded instrument applicable (creating document) under s. 718.407, F.S., must specify all of the following:

- The portions of the building which are included in the condominium and the portions of the building that are excluded.
- The party responsible for maintaining and operating those portions of the building which are shared facilities, and which may include, among other things, the roof, the exterior of the building, windows, balconies, elevators, the building lobby, corridors, recreational amenities, and utilities.
- The manner in which the expenses for the maintenance and operation of the shared facilities will be apportioned.
 - An owner of a portion of the building, which is not submitted to condominium form of ownership, or the condominium association, as applicable, submitted to condominium form of ownership, must approve any increase in the apportionment of expenses to such portion of the building.
 - The apportionment of expenses for the maintenance and operation of the shared facilities may be based on any of the specified criteria or any combination thereof.
 - An alternative method of apportionment of expenses may be provided that the apportionment is stated in the creating document.
- The party responsible for collecting shared expenses.
- The rights and remedies that are available to enforce payment of shared expenses.

The specified criteria for the apportionment of expenses for the maintenance and operation of the shared facilities include:

- The area or volume of each portion of the building in relation to the total area or volume to the entire building without the shared facilities.
- The initial estimated market values of each portion compared to the initial estimated market value of the entire building.
- The extent the owners are allowed to use the shared facilities.

It is unclear how these criteria are to be applied to determine if the expenses are appropriate.

¹⁹ Section 193.0237(1), F.S., defines a “multiple parcel building” to mean “a building, other than a building consisting entirely of a single condominium, timeshare, or cooperative, which contains separate parcels that are vertically located, in whole or in part, on or over the same land.”

Section 718.407(4), F.S., provides that the association of a condominium subject to s. 718.407, F.S., has the right to inspect and copy the books and records upon which the costs for maintaining and operating the shared facilities are based and to receive an annual budget with respect to such costs.

Section 718.407(5), F.S., provides a disclosure clause that must be included, in conspicuous type,²⁰ in every contract for the sale of any condominium created under s. 418.407, F.S. The disclosure clause informs the prospective purchaser of a condominium unit that:

- The condominium is created within a portion of a building.
- The common elements of the condominium consist only of the portions of the building submitted to the condominium form of ownership, excluding the units.
- The condominium may have minimal or no common elements.
- Portions of the building that are not included in the condominium are governed by a separate recorded instrument that contains important provisions and rights.

The bill provides that a contract that does not conform to the requirements of s. 718.407, F.S., is voidable at the option of the purchaser before closing. The disclosure clause does not inform the prospective purchaser of a condominium unit that a contract that does not conform to the requirements of s. 718.407, F.S., is voidable at the option of the purchaser before closing.

Section 718.407(6), F.S., provides a disclosure summary that the seller must be included, in conspicuous type,²¹ in every contract for the sale of any condominium created under s. 418.407, F.S., and which must be signed by the purchaser. The disclosure summary informs the prospective purchaser of a condominium unit that:

- The condominium is created within a portion of a building or within a multiple parcel building.
- Portions of the building that are not included in the condominium are (or will be) governed by a separate recorded instrument that contains important provisions and rights.
- The association and unit owners may have limited or no control over the maintenance, operation, and costs of the portions of the building that are not submitted to the condominium form of ownership, but are responsible for their share of expenses, and that a copy of such instrument is or will be recorded in the public records.
- The allocation between the owners of the costs to maintain and operate the building are set forth in the declaration of condominium or other recorded instrument.
- The owner of another portion of the building controls the maintenance and operation of the portions of the building that are not submitted to the condominium form of ownership and determines the budget for such operation and maintenance.

Section 718.407(7), F.S., provides that the creation of a multiple parcel building is not a subdivision of the land upon which such building is situated, provided the land itself is not subdivided.

²⁰ Section 718.103(15), F.S., defines the term “conspicuous type” to mean “bold type in capital letters no smaller than the largest type, exclusive of headings, on the page on which it appears and, in all cases, at least 10-point type. Where conspicuous type is required, it must be separated on all sides from other type and print.”

²¹ *Id.*

Section 4 of the bill revises s. 718.503(2)(a), F.S., which lists the documents a nondeveloper seller of a unit must give to a prospective purchaser of a unit, to include the annual financial statement and annual budget of the condominium association (instead of the “financial information required by s. 718.111, F.S.”)

The bill also revises s. 718.503(3), F.S., relating to disclosures the seller of a condominium unit must give in sales contracts before the sale of a unit, to provide that, if a unit is located within a condominium that is created within a portion of a building or within a multiple parcel building, the developer or nondeveloper unit owner must provide the disclosures required by ss. 718.407(5) and (6), F.S.

Section 5 revises s. 718.504, F.S., to require the prospectus or offering circular for a condominium to state whether the condominium is created within a portion of a building or a multiple parcel building. The developer of a condominium with more than 20 residential units must prepare a prospectus or offering circular, which must be filed with the division and given to each prospective purchaser of a unit.

Section 6 of the bill creates an undesignated section of Florida law to provide that the amendments made to s. 718.103, F.S., which revise the definition for the term “condominium property,” and s. 718.202(3), F.S., relating to the use of escrow funds by the developer, and the creation of ss. 718.407(1), (2), and (7), F.S., by the bill are intended to clarify existing law and to apply retroactively. The bill also provides the provisions in the bill do not revive or reinstate any right or interest that has been fully and finally adjudicated as invalid before July 1, 2024.

Section 7 of the bill provides that the bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill creates an undesignated section of Florida law to provide that the amendments made to s. 718.103, F.S., which revise the definition for the term “condominium

property,” and s. 718.202(3), F.S., relating to the use of escrow funds by the developer, and the creation of ss. 718.407(1), (2), and (7), F.S., by the bill are intended to clarify existing law and to apply retroactively.

The governing documents of a condominium association are a contract. To the extent this bill affects previously recorded condominium declarations, the bill may unconstitutionally impair a contract, under s. 10, Art. I, Fla. Const., which provides in relevant part, “No... law impairing the obligation of contracts shall be passed.” This provision empowers the courts to strike laws that retroactively burden or alter contractual relations. Article I, s. 10 of the United States Constitution provides in relevant part that “No state shall . . . pass any . . . law impairing the obligation of contracts.”

In *Pomponio v. Claridge of Pompano Condominium, Inc.*,²² 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. The court set forth several factors in balancing whether a state law operates as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court stated that if there is minimal alteration of contractual obligations the inquiry can end at its first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the state legislation. The factors to be considered are:

- Was the law enacted to deal with a broad, generalized economic or social problem;
- Does the law operate in an area that was already subject to state regulation at the time the contract was entered into; and
- Is the law’s effect on the contractual relationships temporary or is it severe, permanent, immediate, and retroactive.²³

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

²² *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979).

²³ *Id.* at 779.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 718.103, 718.202, 718.503, and 718.504.

This bill creates section 718.407 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 February 5, 2024:

The committee substitute:

- Revises the definition for the term “condominium property” to mean the lands, leaseholds, improvements, any personal property, and all easements and rights appurtenant thereto, regardless of whether contiguous, which are subjected to condominium ownership.
- Revises the escrow requirements for nonresidential condominiums to allow the developer the option of delivering to the escrow agent a surety bond or an irrevocable letter of credit with specified conditions.
- Revises the criteria for the apportionment of the expenses for the maintenance and operation of “shared facilities” to include the initial estimated market value (instead of market value) of each portion of the building in comparison to the total initial estimated market value (instead of market value) of the entire building.
- Deletes the presumption that the apportionment of the expenses for the maintenance and operation of the shared facilities is appropriate if based on the criteria in the bill.
- Revises the Disclosure Summary form to include a statement that the purchaser may be responsible for payment of a share of the expenses, and to provide that the separate instrument that contains important provisions and rights is or will be recorded in the public record (instead of is attached to the contract).
- Revises the nondeveloper disclosures to include the annual financial statement and annual budget of the condominium association (instead of the “financial information required by s. 718.111,” among the list of documents that must be provided to the prospective purchaser of a unit.
- Removes from the bill the clause in the disclosure form that informs the prospective purchaser of a condominium unit that a contract that does not conform to the requirements of s. 718.407, F.S., is voidable at the option of the purchaser before closing.
- Requires the prospectus or offering circular for a condominium to state whether the condominium is created within a portion of a building or a multiple parcel building.

- Includes the amendments made to s. 718.103(14), F.S., defining “condominium property,” and s. 718.202(3), F.S., relating to the use of escrow by the developer, are meant to clarify existing law and apply retroactively.

B. Amendments:

None.

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