

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 278

INTRODUCER: Senator Martin

SUBJECT: Estoppel Certificates

DATE: December 12, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 278 repeals the statutory authority of a condominium, cooperative, or homeowners association to charge a fee for preparation and delivery of an estoppel certificate. Instead, the bill requires an association to furnish an estoppel certificate within 10 business days after a request and without charge. Estoppel certificates protect the buyer and the closing agent from otherwise undisclosed financial obligations or unresolved violations of the covenants and rules of the association.

The bill is effective July 1, 2024.

II. Present Situation:

Estoppel Certificates

In general, an estoppel certificate is a legal document that stops someone from later claiming different facts or terms regarding an agreement.¹ It is sometimes referred to as an estoppel letter.

In regards to real estate, estoppel certificates are typically used to confirm amounts of moneys owed that attach to a certain piece of property, such as mortgage debt, condominium association fees, homeowners' association fees, and outstanding claims or deposits due to tenants. Estoppel certificates are sought prior to closing on a real estate transaction as part of the closing agent's due diligence. Closing agents rely on estoppel certificates to determine proper amounts due as part of the settlement process, and real estate purchasers rely on such certificates to warrant that old charges or violations will not appear after closing.

¹ *Estoppel Letter*, CREPedia, <https://www.crepedia.com/dictionary/definitions/estoppel-letter/> (last visited Nov. 30, 2023); and *What is an Estoppel Certificate*, Redfin <https://www.redfin.com/definition/estoppel-certificate> (last visited Nov. 30, 2023).

Where the property being transferred is subject to a condominium association, cooperative association, or homeowners' association, a closing agent will solicit an estoppel certificate from the association to determine if any past due monies are due the association, determine the proper allocation of current assessments between the seller and buyer, and certify whether there are any unresolved violations of the covenants and restrictions.

The forms of these estoppel certificates are provided in the statutes. The forms that apply to condominiums, cooperatives and homeowners' associations are nearly the same. The estoppel certificate must contain all of the following information and must be substantially in the following form:

1. Date of issuance: _____
2. Name(s) of the unit owner(s) as reflected in the books and records of the association: _____
3. Unit designation and address: _____
4. Parking or garage space number, as reflected in the books and records of the association: _____
5. Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection. No fee may be charged for this information.
6. Fee for the preparation and delivery of the estoppel certificate: _____
7. Name of the requestor: _____
8. Assessment information and other information: _____

Assessment Information:

- a. The regular periodic assessment levied against the unit is \$ _____ per (insert frequency of payment).
- b. The regular periodic assessment is paid through (insert date paid through).
- c. The next installment of the regular periodic assessment is due (insert due date) in the amount of \$ _____
- d. An itemized list of all assessments, special assessments, and other moneys owed on the date of issuance to the association by the unit owner for a specific unit is provided.
- e. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate is provided. In calculating the amounts that are scheduled to become due, the association may assume that any delinquent amounts will remain delinquent during the effective period of the estoppel certificate.

Other Information:

- f. Is there a capital contribution fee, resale fee, transfer fee, or other fee due? _____ (Yes) _____ (No). If yes, specify the type and the amount of the fee.
- g. Is there any open violation of rule or regulation noticed to the unit owner in the association official records? _____ (Yes) _____ (No).
- h. Do the rules and regulations of the association applicable to the unit require approval by the board of directors of the association for the transfer of the unit? _____ (Yes) _____ (No). If yes, has the board approved the transfer of the unit? _____ (Yes) _____ (No).

- i. Is there a right of first refusal provided to the members or the association? _____ (Yes) _____ (No). If yes, have the members or the association exercised that right of first refusal? _____ (Yes) _____ (No).
- j. Provide a list of, and contact information for, all other associations of which the unit is a member.
- k. Provide contact information for all insurance maintained by the association.
- l. Provide the signature of an officer or authorized agent of the association.

Completing the form requires time and skill. The association risks a financial loss should it incorrectly calculate monies due and thereafter is unable to collect; and the association risks an inability to enforce its covenants and rules if a current violation is overlooked. The applicable statutes allow an association up to 10 business days to furnish the certificate, and waive the fees if the certificate is furnished after the deadline.

To account for the time and risk of production, current law allows the association to charge up to \$299 for a single unit or parcel, plus \$119 for expedited service (3 business days rather than 10) and plus \$179 should the owner's account be delinquent at the time.² A sliding scale applies to a certificate covering multiple units.³ The fees were originally set in 2017,⁴ the current fees were set in 2022 pursuant to an inflationary adjustment, and are scheduled for inflationary adjustment again in 2027 and every 5 years thereafter.

Practical Considerations

Often, associations do not prepare estoppel certificates. Their management firms prepare them. Some associations keep estoppel certificate fees as additional income, but others give some or all of the fee to the management firm as additional income to account for the added work and related assumption of liability. Statutory changes to the estoppel certificate fees which occur during the term of a management agreement may impact community association managers, associations, owners, and their respective reasonable contract expectations. Statutory changes to the fee may also impact association budgets and may require mid-year amendments to association budgets.

It is reported that some associations are effectively charging fees in excess of those authorized by the statutes. They do so by adding additional fees that are designated by other titles, such as "convenience fee," "archive fee," "service fee," "processing fee," or "third party fee."⁵ Current law implies that such add-on fees are not authorized, but does not specifically prohibit such add-on fees.

² Department of Business and Professional Regulation, Estoppel Certificate Fees Revised: Chapter 2017-93 Laws of Florida, http://www.myfloridalicense.com/dbpr/lsc/documents/ESTOPPEL_CERTIFICATE_FEES.pdf

³ For 25 or fewer units, \$896; for 26 to 50 units, \$1,194; for 51 to 100 units, \$1,791; and for more than 100 units, \$2,985.

⁴ Chapter 2017-93, Laws of Fla.

⁵ Examples are on file with the Senate Committee on Judiciary.

III. Effect of Proposed Changes:

The bill repeals the statutory authority of a condominium, cooperative, or homeowners association to charge a fee for the preparation and delivery of an estoppel certificate, and requires an association to furnish an estoppel certificate free of charge within 10 business days.

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:

Under Florida law, statutes are presumed to operate prospectively, not retroactively. In other words, statutes generally apply only to actions that occur on or after the effective date of the legislation, not before the legislation becomes effective. The Florida Supreme Court has noted that, under the rules of statutory construction, if statutes are to operate retroactively, the Legislature must clearly express that intent for the statute to be valid.⁶ When statutes that are expressly retroactive have been litigated and appealed, the courts have been asked to determine whether the statute applies to cases that were pending at the time the statute went into effect. The conclusion often depends on whether the statute is procedural or substantive.

In a recent Florida Supreme Court case, the Court acknowledged that “[t]he distinction between substantive and procedural law is neither simple nor certain.”⁷ The Court further acknowledged that their previous pronouncements regarding the retroactivity of procedural laws have been less than precise and have been unclear.⁸

⁶ *Walker & LaBerge, Inc., v. Halligan*, 344 So. 2d 239 (Fla. 1977).

⁷ *Love v. State*, 286 So. 3d 177, 183 (Fla. 2019) (quoting *Caple v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49, 53 (Fla. 2000)).

⁸ *Love*, at 184.

Courts, however, have invalidated the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties.⁹ Still, in other cases, the courts have permitted statutes to be applied retroactively if they do not create new, or take away, vested rights, but only operate to further a remedy or confirm rights that already exist.¹⁰

Florida's contracts clause states that "no bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."¹¹ Regarding the impairment of an existing contract by the retroactive application of a statute, the Florida Supreme Court recently said:

"[V]irtually no degree of contract impairment is tolerable." However, we also recognized that the holding that "virtually" no impairment is tolerable "necessarily implies that some impairment is tolerable." The question thus becomes how much impairment is tolerable and how to determine that amount. To answer that question, in *Pomponio* we proposed a balancing test that "allow[ed] the court to consider the actual effect of the provision on the contract and to balance a party's interest in not having the contract impaired against the State's source of authority and the evil sought to be remedied." "[T]his becomes a balancing process 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."

An impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. However, where the impairment is severe, "[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." There must be a "significant and legitimate public purpose behind the regulation."¹²

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may reduce revenues to community associations and their management companies related to the preparation and delivery of an estoppel certificate. The lost revenues may create incentives for associations and management companies to raise other assessments or fees.

⁹ *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1217 (Fla. 2004) (quoting *LaForet* 658 So. 2d 55, 61 (Fla. 1995)).

¹⁰ *Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 2d DCA 1990).

¹¹ FLA. CONST. art. I, s. 10.

¹² *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1192 (Fla. 2017) (internal citations omitted for clarity).

The bill may reduce expenditures for those seeking an estoppel certificate as part of a real estate transaction. The elimination of the estoppel certificates fees may facilitate real estate transactions by reducing transaction costs.

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: 718.116, 719.108, and 720.30851.

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.