

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 2498

SPONSOR: Governmental Oversight and Productivity Committee, Regulated Industries Committee and Senator Garcia

SUBJECT: Condominium Associations

DATE: April 19, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Imhof	RI	Fav/CS
2.	Rhea	Wilson	GO	Fav/CS
3.			JU	
4.			AGG	
5.			AP	
6.				

I. Summary:

The bill provides that unless expressly stated in an amendment to the declaration of condominium, any provision restricting unit owner’s rights relating to the rental of units or keeping of pets shall apply only to unit owners who purchase their unit after the effective date of that amendment. An amendment that expressly deprives current unit owners of any part of these rights must be approved by at least a majority of the voting interests. A declaration or an amendment to a declaration may require approval by a greater than super majority vote.

The bill creates an Office of the Condominium Ombudsman housed in the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) but independent of the division. The bill also creates a seven member Advisory Council whose duties are to receive input from the public regarding condominium issues, to review, evaluate and advise the division concerning revisions and adoption of rules, and to recommend improvements, if needed, to education programs offered by the division.

The bill provides that in addition to the prospectus or offering circular, the developer or current owner must also furnish the “Frequently Asked Questions and Answers” document to any prospective buyer. The bill amends the notice provision in the “Frequently Asked Questions and Answers” document concerning court cases in which the association may face liability of \$25,000 or more.

This bill substantially amends sections 718.110 and 718.504, Florida Statutes.

The bill creates the following sections of the Florida Statutes: 718.5011, 718.5012, 718.5013, 718.5014, and 718.5015.

II. Present Situation:

Executive Branch Structure - Chapter 20, F.S., establishes the structure of executive branch agencies. Section 20.03(7), F.S., defines the term “council” or “advisory council” to mean:

... an advisory body created by specific statutory enactment and appointed to function on a continuing basis for the study of the problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives.

Section 20.052, F.S., provides that advisory bodies, commission, boards of trustees and other collegial bodies created by statutory enactment must be established, evaluated, or maintained in accordance with specific standards:

- < It may be created only when it is found to be necessary and beneficial to the furtherance of a public purpose.
- < It must be terminated when it is no longer necessary and beneficial to the furtherance of a public purpose.
- < The Legislature and the public must be kept informed of the numbers, purposes, membership, activities, and expenses of these entities.
- < A collegial body may not be created or reestablished unless:
 - o It meets a statutorily defined purpose.
 - o Its powers and responsibilities conform to the definitions for governmental units in s. 20.03, F.S.
 - o Its members, unless expressly provided otherwise in the State Constitution, are appointed for 4-year staggered terms; and
 - o Its members, unless expressly provided otherwise by specific statutory enactment, serve without additional compensation or honorarium, and are authorized to receive only per diem and reimbursement for travel expenses as provided in s. 112.061, F.S.

Additionally, s. 20.052, F.S., requires the private citizen members of an advisory body that is adjunct to an executive agency to be appointed by the Governor, the head of the department, the executive director of the department, or a Cabinet officer.

All meetings and records of such an entity are public under the requirements of s. 286.011, F.S., and ch. 119, F.S.

Under the section, upon termination, all records of the collegial body are to be appropriately stored by the executive agency to which it was adjunct, and any property assigned to it must be reclaimed by that agency. The collegial body is not authorized to perform any activities after the effective date of its abolition.

Condominiums - A condominium is the form of ownership of real property created under 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.”¹ A condominium association may be a corporation for profit or a corporation not for profit.² The board of administration of a condominium is the board of directors or other representative body which is responsible for the administration of the association.³

Creation of condominiums; contents of declaration

Every condominium created in this state shall be created pursuant to ch. 718, F.S.⁴ A condominium is 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. Declarations must contain or provide for certain matters including a provision for unit owners’ membership and voting rights in the association.⁵

Amendment of declaration; correction of error or omission in declaration by circuit court

Section 718.104(5), F.S., provides that a declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units. Section 718.110, F.S., provides broad authority to amend a declaration. In *Woodside Village Condominium Assoc., Inc. v. Jahren*,⁶ the Florida Supreme Court held that a declaration of condominium may be amended to impose lease restrictions on condominium units. The court rejected the concept of “vested rights”, which rights are more commonly referred to as “grandfathered rights”. The court ruled that a properly enacted amendment to a declaration of condominium binds all condominium units, including units owned by an owner who purchased a unit prior to the amendment, even if the unit owner objected to the amendment.⁷ A concurring opinion in *Woodside*, however, urged the Legislature to consider including grandfathering rights in Florida law.⁸ Consistent with the *Woodside* decision, s. 718.104(5), F.S., was amended to recognize that an amendment to a declaration of condominium applies to all of the condominium units, including units whose owners did not consent to the amendment.⁹

Powers and duties of Division of Florida Land Sales, Condominiums, and Mobile Homes.

Part of the powers and duties of the Division of Land Sales includes the requirement to provide training programs for board members and unit owners.¹⁰

Prospectus or offering circular; “Frequently Asked Questions and Answers”

A question and answer sheet is required to be updated and maintained by the association, but it is only required to be given by the developer to first time purchasers from the developer. Resale

¹ Section 718.103(11), F.S.

² Sections 718.104(4)(i) and 718.111(1)(a), F.S.

³ Section 718.103(4), F.S.

⁴ Section 718.104, F.S.

⁵ Section 718.104(4)(j), F.S.

⁶ 754 So.2d 831, 833 (Fla. 2d DCA 2000).

⁷ *Id.*, at 461-62.

⁸ *Id.*, at 465

⁹ Chapter 2002-27, L.O.F.

¹⁰ Section 71.501, F.S.

purchasers are not entitled to receive the question and answer sheet. The question and answer sheet must disclose all litigation in which the association is subject to liability of \$100,000 or more.¹¹

III. Effect of Proposed Changes:

Section 1. Amendment of declaration; correction of error or omission in declaration by circuit court; grandfathering and modification of certain rights. The bill amends s. 718.110, F.S., to add provisions relating to grandfathering and modification of certain rights. The bill provides that amendments to the declaration relating to pets or the rental of units may only be applied to owners purchasing after the effective date of the amendment unless expressly stated in the amendment.

Unless otherwise provided by law, or by the declaration or bylaws, if an amendment deprives an owner of the right to have pets or offer their units for rent, the amendment must be approved by at least a majority of the voting interest. A declaration or an amendment to a declaration may require approval by a greater than super majority vote.

Section 2. Ombudsman; appointment; oath; restrictions on ombudsman and his or her employees. The bill creates an Office of the Condominium Ombudsman. The office is, for administrative purposes, within the division but shall remain independent of the division. The office shall be a separate budget entity, funded by the division and the ombudsman shall be the agency head. The department shall provide administrative support and service to ombudsman, but the ombudsman is not subject to the control, supervision, or direction of the department. The ombudsman shall develop a budget under ch. 216, F.S. which the department must submit, without change to the Governor along with the budget of the department.

The ombudsman is appointed by the governor and must be an attorney admitted to practice in Florida and must serve at the pleasure of the Governor. Vacancies are filled in the same manner as the original appointment. The ombudsman and attorneys serving as staff must take and subscribe to the oath of office required of state officers by the State Constitution.

An officer or full-time employee of the ombudsman's office may not:

- actively engage in any other business or profession;
- serve as the representative of any political party or on the executive committee or other governing body of any political party, committee, organization, or association;
- receive remuneration for activities on behalf of any candidate for public office; or
- engage in the solicitation of votes or other activities on behalf of any candidate for public office.

The ombudsman or any employee of his or her office may not become a candidate for election to public office unless he or she first resigns from his or her office or employment.

¹¹ Section 718.504, F.S.

Section 3. Ombudsman; powers and duties. The ombudsman has powers as are necessary to carry out the duties of his or her office including, but not limited to the following specific powers:

- have access to and use of all files and records of the division and of all condominium associations, by subpoena if necessary;
- employ professional and clerical staff as necessary for the efficient operation of the Office of the Condominium Ombudsman, including experts and other technical personnel for participation in contested proceedings before the division when the best interest of the public will be served, and with the approval of the Office of the Governor to adopt and administer a uniform personnel job classification and pay plan for such employees, and to enter into contracts;
- prepare and issue reports, recommendations, and proposed orders to the division, the Governor, the Advisory Council on Condominiums, the President of the Senate, the Speaker of the House of Representatives, and the minority leader of the Senate and the House of Representatives on any matter or subject within the jurisdiction of the division and to make recommendations as he or she deems appropriate for legislation relative to division procedures, rules, jurisdiction, personnel and functions;
- act as liaison between the division and unit owners, and to provide information and explain how to file a complaint to be investigated by the division;
- recommend that the division initiate enforcement proceedings;
- submit findings of a criminal nature to the state attorney and assist that office in bringing charges;
- monitor, investigate, and review condominium elections and meetings, which includes, but is not limited to:
 - Providing information and evidence to the division if a member of a condominium board attempts, engages in, conspires to engage in, or willfully and knowingly benefits from electoral fraud. If the information and evidence is clear and convincing, the division must order the member removed from the board. The order must also prohibit the person who is removed from running for election to any office of a condominium board in the state for four years. Any person who is removed twice is barred from serving on a condominium board in the state. Factual findings forming the basis for an order shall be subject to judicial review only for abuse of discretion;
 - Working with the division to adopt rules governing proceedings to remove a board member for electoral fraud. The rules must, at minimum, provide the accused board member with adequate notice, opportunity to be heard, the right to confront and cross-examine witnesses, the right to submit rebuttal evidence, and the right to counsel. Before the division develops a rule proposal on removal, the division and the office shall meet and confer regarding issues to be addressed in the rule. After the division develops a rule proposal on removal, and before the proposal is finalized for publication or other presentation to the public, the division shall provide

the office with a reasonable opportunity to review and provide written comments on the proposal and consider any comments the ombudsman provides.

- make recommendations to the division for changes in rules and procedures for the filing, investigation, and resolution of complaints filed by unit owners, associations and managers.

Section 4. Ombudsman; location. The ombudsman shall maintain his or her principal office in Leon County on the premises of the division or, if suitable space cannot be provided there, at such other place convenient to the office of the division as will enable the ombudsman to expeditiously carry out the duties and functions of his or her office. The ombudsman may establish branch offices upon the concurrence of the Joint Legislative Auditing Committee.

Section 5. Advisory council; membership functions. The bill creates a seven member Advisory Council on Condominiums. The council shall consist of:

- two members appointed by the President of the Senate;
- two members appointed by the Speaker of the House of Representatives; and
- three members appointed by the Governor.

At least one member appointed by the Governor shall represent timeshare condominiums. Members are appointed to 2-year terms. However, one of the persons initially appointed by the Governor, by the President of the Senate, and by the Speaker of the House of Representatives, shall be appointed to a 1-year term. The director of the division shall serve as an ex officio nonvoting member. It is the intention of the Legislature that the persons appointed represent a cross section of person interested in condominium issues. The council shall be located within the division for administrative purposes. Members of the council shall serve without compensation, but are entitled to receive per diem and travel expenses while on official business.

The functions of the advisory council shall be to:

- receive, from the public, input regarding issues of concern with respect condominiums and recommendations for changes in the condominium law. The issues that the council shall consider include, but are limited to, the rights and responsibilities of the unit owners in relation to rights and responsibilities of the association;
- review, evaluate, and advise the division concerning revisions and adoption of rules affecting condominiums;
- recommend improvements if need, in the education programs offered by the division.

The council may elect a chair and vice chair and such other officers as it may deem advisable. The council shall meet at the call of its chair, at the request of a majority of its membership, at the request of the division, or at such times as it may prescribe. A majority of the members of the

council shall constitute a quorum. Council action may be taken by vote of a majority of the voting members who are present at a meeting where there is a quorum.

Section 6. Prospectus or offering circular; “Frequently Asked Questions and Answers”.

The bill amends s. 718.504, F.S., to provide that in addition to the prospectus or offering circular, the developer or current owner must also furnish the “Frequently Asked Questions and Answers” document to any prospective buyer. The bill amends the notice provision in the “Frequently Asked Questions and Answers” document concerning court cases in which the association may face liability of \$25,000 or more.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The manner of appointment of statutory officers may not unconstitutionally infringe upon the authority of the Governor to appoint executive branch officers.¹² The bill creates a council, as provided in s. 20.03, F.S. (see, *infra*). While the definition of a “council” does not specifically require it to be created within or adjunct to an executive branch entity, a council is still within the executive branch. As such, the Governor is authorized to appoint all executive branch officers and the Legislature is authorized to provide for Senate confirmation under Article IV, s. 6 of the State Constitution.¹³ The bill provides for legislative officers, as well as the Governor, to appoint members to the advisory council.

Article I, s. 10, Fla.Const., prohibits the legislature from enacting any law impairing the obligation of contracts. As the bill modifies the ability of condominium owners to amend their covenants, it might be argued that the bill impairs current contractual rights.

¹² *Jones v. Chiles*, 638 So.2d 48 (Fla. 1994).

¹³ While the ultimate choice of an appointee to an executive branch office resides with the Governor, the Legislature has established processes which limit the choices that are available to the Governor for appointment to a statutory office. For example, the Governor is required to select the head of the Department of Transportation from a list of three nominees forwarded to him by the Florida Transportation Commission.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the department, the bill will have the following fiscal impacts:

- The Florida Division of Land Sales, Condominiums, and Mobile Homes' Trust Fund would be required to provide support for the Advisory Council on Condominiums and the Office of the Ombudsman. Both the Council and Ombudsman would require additional positions and expenditures.
- The Advisory Council on Condominiums will require additional expenditures for travel and per diem. Quarterly meetings of the Council and travel for seven Council members and the division director could cost approximately \$18,720. The division would also require an additional Administrative Assistant II, pay grade 18, to provide staffing for the Council.

VI. Technical Deficiencies:

None.

VII. Related Issues:

While the definition of a "council" does not specifically require it to be created within or adjunct to an executive branch entity, collegial bodies are typically created adjunct to a specific department. This ensures proper oversight and administrative support. Further, under s. 20.052, F.S., the entity that the council is created adjunct to receives all public records of the council upon its termination.

VIII. Amendments:

None.