

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/SB 2984

SPONSOR: Regulated Industries Committee and Senator Atwater

SUBJECT: Homeowners' Associations

DATE: April 8, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>CP</u>	_____
3.	_____	_____	<u>CJ</u>	_____
4.	_____	_____	<u>JU</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill amends several substantive provisions of ch. 720, F.S., relating to homeowners' associations. The bill prohibits an officer, director, or manager of a homeowners' association (association) from soliciting, offering to accept, or accepting any thing or service of value for which consideration has not been provided for his or her own benefit, or that of his or her immediate family, from any person providing or proposing to provide goods or services to the association. A violation of this provision is a third degree felony and permanently disqualifies the violator from serving on the board of directors of the association or serving as an officer of the association.

The bill provides that parcel owners and members have the right to attend all meetings, and the right to speak for at least three minutes at meetings, provided that the parcel owner or member submits a request to speak prior to the commencement of the meeting. The bill requires notice to parcel owners and members of all board meetings, and requires an association's board to address an item of business if 20 percent of the total voting interests petition the board. The board would have to take up the petitioned item at its next meeting or special meeting.

The bill requires associations to maintain a copy of their governing documents and records, and to provide parcel owners with copies requested, if a copy machine is available, during an inspection if the entire request is limited to no more than 25 pages. The bill requires homeowners' associations to adopt reasonable rules that govern the frequency, time, location, notice, and manner of inspection of the associations' records.

The bill establishes financial reporting requirements for associations that are in accordance with generally accepted accounting principles (GAAP). The type of required financial statement is depended on the association's total annual revenue.

The bill establishes notice requirements for removal of director, the procedure for certification of the recall vote, the procedure for resolving a defective recall, and the procedure for replacement of a recalled director. The bill establishes dispute resolution procedures for recall and election disputes in homeowners' associations, including procedures for binding arbitration and mandatory mediation proceedings to be conducted by the division.

The bill expands flag display rights, including the right to display the official State of Florida and flags of the U.S. Armed Services. The bill prohibits "Strategic Lawsuits Against Public Participation" or "SLAPP" suits, and requires courts to award the prevailing party reasonable attorney's fees and costs. The bill also bars homeowners' associations from expending association funds in prosecuting a SLAPP suit against a parcel owner.

The bill provides that a fine against any member, tenant, guest, or invitee cannot become a lien against a parcel. The bill provides that in any action to recover a fine, with the prevailing party is entitled to collect reasonable attorney's fees and costs. The bill establishes requirements for associations' contracts for products and services.

The bill defines the term "division" to mean the Division of Florida Land Sales, Condominiums, and Mobile Homes (division) in the Department of Business and Professional Regulation (department), and defines the term "member" to include any person or entity obligated by the governing documents to pay an assessment or amenity fee to an association. The bill provides disclosure requirement for sellers of property in a community governed by a homeowners' association.

The bill provides a cause of action to rescind the contract for sale or for damages against developer for false or misleading material statements. The bill provides that a developer shall be deemed to have granted to the homeowners' associations an implied warranty of fitness and merchantability, and contractor.

The bill grants the county courts original jurisdiction over disputes occurring in homeowners' associations, and provides for concurrent jurisdiction in the circuit courts.

The bill would take effect on October 1, 2004.

This bill substantially amends the following sections of the Florida Statutes: 34.01, 316.00825, 558.002, 689.26, 720.301, 720.302, 720.303, 720.304, 720.305, 720.306, and 720.311.

This bill creates the following sections 720.3055, 720.402, and 720.501.

This bill transfers and renumbers section 689.26, Florida Statutes.

II. Present Situation:

Homeowners' Associations

Chapter 720, F.S., provides statutory recognition to corporations that operate residential communities in this state, provides procedures for operating homeowners' associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.¹

Section 720.301(7), F.S., defines a "homeowners' association" 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, 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. Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 617, F.S., relating to not for profit corporations.

Homeowners' associations are administered by a board of directors whose members are elected.² 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.³ The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.⁴

Section 720.301(3), F.S., defines the term "community" to mean:

the real property that is or will be subject to a *declaration of covenants* which is recorded in the county where the property is located. The term "community" includes all real property, including undeveloped phases, that is or was the subject of a development-of-regional-impact development order, together with any approved modification thereto.

Section 720.301(4), F.S., defines the terms "declaration of covenants," or "declaration," to mean:

a recorded written instrument in the nature of covenants running with the land which subjects the land comprising the community to the jurisdiction and control of an association or associations in which the owners of the parcels, or their association representatives, must be members.

Section 720.301(8), F.S., defines the term "member" to mean "a member of an association, and may include, but is not limited to, a parcel owner or an association representing parcel owners or a combination thereof." Section 720.301(10), F.S., defines the term "parcel owner" to mean the

¹ See s. 720.302, F.S.

² See ss. 720.303 and 720.307, F.S.

³ See ss. 720.301 and 720.303, F.S.

⁴ Section 720.303, F.S.

record owner of legal title to a parcel.” Section 720.301(11), F.S., defines the term "voting interest" to mean “the voting rights distributed to the members of the homeowners' association, pursuant to the governing documents.”

However, not all homeowners’ associations are regulated by ch. 720, F.S. “Non-mandatory homeowners’ associations” are voluntary associations established to provide defined benefits or services to homeowners’ who choose to participate. Usually these associations are incorporated for a specific purpose, such as road paving, neighborhood beautification, etc. Such associations do not have the power to enforce assessments unless its members are subject to a contractual obligation.

Community Disclosures

Section 689.26, F.S., requires that a prospective purchaser of property in a community be presented a disclosure summary prior to executing a contract for sale. The intent of the disclosure is to inform prospective buyers that they will be required to become a member of the homeowners’ association and will be obligated to pay assessments to the association. Chapter 689, F.S., does not define the term “community.” Because the provisions of ch. 689, F.S., apply to all land sale transactions, unless otherwise exempted,⁵ this provision is generally applicable to both mandatory and non-mandatory homeowners’ associations.

Section 689.26, F.S., specifies the form and contents of the disclosure summary, and provides that the disclosure be supplied by the developer, or by the parcel owner if the sale is by an owner other than the developer.

The disclosure notice in s. 689.26, F.S., requires sellers to specify whether or not property purchasers will be obligated to be a member of a homeowners’ association, to pay assessments to this association, and to pay assessments to the municipality. The notice must also state whether or not the restrictive covenants of the association can be amended with the approval of the membership or, if there is not a mandatory association, the parcel owners. The provision encourages prospective purchasers to refer to the actual governing documents and covenants prior to purchasing the property.

In addition, s. 689.26(1)(b), F.S., requires that the contract for the sale of real property governed by covenants subject to the disclosure summary under s. 689.26, F.S., must contain a voidability clause in the form provided in the statute. This clause gives notice that the contract is voidable at the option of the purchaser prior to closing if it does not have the disclosure summary or the disclosure summary is not provided to the purchaser. The clause also allows a buyer to void the contract by delivering written notice of his or her intent to cancel within three days of receiving the disclosure summary or prior to closing, whichever occurs first, to the seller or seller’s agent.

Section 689.26(1)(c), F.S., provides that the buyer’s right to void the agreement terminates at closing. However, the buyer’s right to cancel the contract within three days of receiving the disclosure summary or prior to closing, whichever occurs first, and the buyer’s obligation to

⁵ See exemptions in s. 689.025, F.S.

deliver the written notice of intent to cancel the contract to the seller or seller's agent, are only contractual because of the contract clause in s. 689.26(1)(b), F.S.

This disclosure requirement does not apply to any condominium,⁶ cooperative,⁷ vacation or timeshare plan,⁸ mobile home park association,⁹ or to a subdivision registered under ch. 498, F.S.

Access to Homeowners' Associations Records

Member assessments in the governing documents must describe the manner in which expenses are shared and specify the member's proportional share.¹⁰ The governing documents must be available for inspection, must be maintained within the state, and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within ten business days after receipt of a written request for access. An association is in compliance if it has a copy of the official records available for inspection or copying in the community. Failure to provide access to the records within ten business days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this provision. A member who is denied access to official records is entitled to the actual damages or minimum damages of \$50 per calendar day up to 10 days for the association's willful failure to comply.¹¹

Enforcement

Any legal action to redress the alleged failure or refusal to comply with the provisions of ch. 720, F.S., may be brought by the association or any member of the association against the association itself, a member, or a director or officer of an association who willfully and knowingly fails to comply with these provisions, or a tenant, guest, or invitee occupying a parcel or using the common areas. The prevailing party in the action is entitled to reasonable attorney's fees and costs.¹² Chapter 720, F.S., also provides an option to litigation. The Legislature recognized the role of alternative dispute resolution in reducing court dockets and trials and offering a more efficient, cost effective alternative to litigation. Accordingly, at any time after a complaint is filed relating to a dispute under ch. 720, F.S., the court may order mediation or arbitration.¹³

State Regulation

Homeowners' associations are not regulated by a state agency. Regarding state regulation of homeowners' associations, s. 720.302(2), F.S., provides:

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

⁶ Chapter 718, F.S.

⁷ Chapter 719, F.S.

⁸ Chapter 721, F.S.

⁹ Chapter 723, F.S.

¹⁰ Section 720.308, F.S.

¹¹ Section 720.303(5)(a) and (b), F.S.

¹² Section 720.305(1)(a)-(d), F.S.

¹³ Section 720.311, F.S.

bureau or other agency of state government to regulate the affairs of homeowners' associations. 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. 720.301-720.312 are not intended to impair such contract rights, including, but not limited to, the rights of the developer to complete the community as initially contemplated.

The number of homeowners' associations or persons living in homeowners' associations in Florida is unknown. Although homeowners' associations are required to file articles of incorporation with the Division of Corporations (DOC) in the Department of State, the DOC cannot identify corporations that are homeowners' associations under ch. 720, F.S.¹⁴

Homeowners' Association Task Force

The Homeowners' Association Task Force (task force) within the department was composed of a cross-section of representatives involved with homeowners' associations. It was created at the Governor's request to harmonize and improve relations between homeowners, homeowners' associations (HOA), and other related entities. The task force held monthly meetings throughout the state from September 2003 through its final meeting on January 28, 2004, and issued a report making specific recommendations.¹⁵

The task force made the following recommendations:

- broaden the homeowner's right to fly flags;
- subject HOA board members to recall under a clearly defined process that would include recourse to fast-track arbitration;
- to avoid the unnecessary expense and delays of litigation, arbitration and mediation should be available for aggrieved homeowners under certain circumstances;
- to ensure that homeowners are fully informed before purchasing a home in a mandatory homeowners' association, sellers and developers should be required to make complete disclosures;
- provide notice to homeowners before a HOA board can act on special assessments and amendments that affect the use of lots;
- provide homeowners the right to be heard at HOA board meetings;
- require HOA boards to allow homeowners to add items to meeting agendas when petitioned by 20% of the voting interests;
- provide homeowners with additional remedies for false and misleading statements made to them when purchasing;
- provide statutory warranties for HOA common area improvements;
- provide homeowners protection from association liens resulting from unpaid fines, or from fees that are not assessments;
- enhance homeowners' right of access to HOA records;

¹⁴ Homeowners' Association Task Force, *Final Report of the Homeowners' Association Task Force*, February 2004, page 5. A copy of the report is available on the internet at http://www.myflorida.com/dbpr/os/hot_topics/hoa_taskforce (Website last visited on March 20, 2004.)

¹⁵ *Id.*

- subject HOA board members, officers, and managers to criminal penalties for self-dealing;
- require HOA boards to use competitive bidding to ensure fiscal accountability; and
- hold HOA boards to higher financial reporting standards to promote fiscal integrity.

The task force decided not to offer the following additional suggestions for legislative change:

- adding non-mandatory associations to the definition of HOA to ch. 720, F.S.;
- changing HOA board election procedures to parallel Condominium Act procedures in ch. 718, F.S.;
- providing by statute for a mandatory assessment by non-mandatory HOA on homeowners in order to fund their enforcement efforts against homeowners;
- requiring additional warranties on individual homes and lot improvements; and
- creating a new state regulatory agency to police homeowners' associations.

Display of Flag

Section 720.304(2), F.S., provides that homeowners “may display one portable, removable United States flag in a respectful manner, regardless of any declaration rules or requirements dealing with flags or decorations.” Section 720.304(3), F.S., provides homeowners a right to bring an action in the appropriate court to enjoin a homeowners’ association that attempts to deprive the owner of this right. Section 720.3075, F.S., also provides that homeowners’ associations documents, including declarations of covenants, articles of incorporation, or bylaws, cannot preclude the display of the flag by homeowners in a respectful manner.

By comparison, the condominium owner’s statutory flag display right includes the right to display flags representing branches of the U.S. Armed Forces.¹⁶ Section 718.113(4), F.S., relating to condominiums, provides:

Any unit owner may display one portable, removable United States flag in a respectful way and, on Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day, may display in a respectful way portable, removable official flags, not larger than 4½ feet by 6 feet, that represent the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, regardless of any declaration rules or requirements dealing with flags or decorations.

Statute of Limitations

Section 95.11(3)(c), F.S., provides a four year statute of limitations for:

[a]n action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of

¹⁶ Condominium owners whose right to display the flag is threatened by the condominium association may seek redress through the dispute resolution provisions of s. 718.1255, F.S., which provides for mandatory non-binding arbitration and voluntary mediation.

abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

Section 95.11(3)(e), F.S., also provides a four year statute of limitations for:

[a]n action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.

III. Effect of Proposed Changes:

Section 1. Definitions. The bill amends s. 720.301, F.S., to define the term “division” to mean the Division of Florida Land Sales, Condominiums, and Mobile Homes in the Department of Business and Professional Regulation. The bill amends the definition of the term “member” to include any person or entity obligated by the governing documents to pay an assessment or amenity fee to an association. The bill provides disclosure requirement for sellers of property in a community governed by a homeowners’ association.

Section 2. Purposes, scope, and application. The bill amends s. 720.302, F.S., to provide that the Legislature finds that homeowners’ associations and their members will benefit from an expedited alternative process for resolution of election and recall disputes and presuit mediation of other disputes. The bill authorizes the division to hear, administer, and determine these disputes as more fully set forth in ch. 720, F.S.

The bill also amends the reference to ss. 720.301-720.501 to conform to the sections that would constitute ch. 720, F.S., as amended by this bill.

Section 3. Association powers and duties. The bill amends s. 720.303(1), F.S., to prohibit an officer, director, or manager of an association from soliciting, offering to accept, or accepting any thing or service of value for which consideration has not been provided for his or her own benefit, or that of his or her immediate family, from any person providing or proposing to provide goods or services to the association. A person who violates this provision commits a third degree felony and is permanently disqualified from serving on the board of directors of the association or serving as an officer of the association.

However, an officer, director, or manager may accept customary amenities provided in business relationships, such as food and drinks at meetings or conferences, business lunches not

exceeding \$20 per person, or marketing trinkets, provided that the value of each item does not exceed \$20.

The bill also amends s. 720.303(1), F.S., to provide that an association of fifteen or fewer parcel owners may enforce upon an affected parcel owner or owners only the requirements of deed restrictions established before the purchase of each parcel.

The bill changes the reference to the term “unit owner” to the term “members.”

Section 720.303(2)(b), F.S., of the bill provides that parcel owners and members have the right to attend all meetings of the board. The bill also provides that association members have the right to speak at any board meeting with reference any matter placed on the agenda by petition of the voting interests. A parcel owner or member would have the right to speak for at least three minutes. The bill provides that the association may adopt written reasonable rules expanding the right of members to speak governing the frequency, duration, and other manner of member statements. These rules must be consistent with the requirements of this paragraph and may include a sign up sheet for members wishing to speak.

Section 720.303(2)(b), F.S., of the bill also provides that meetings between the board or a committee and the association's attorney, with respect to meetings held for the purpose of discussing personnel matters, are also not subject to the open meetings requirement.

Section 720.303(2)(c), F.S., of the bill requires that an association's bylaws must provide for giving notice to parcel owners and members of all board meetings. If not in the association's bylaws, the bill provides that the notice provisions of s. 720.303(2)(c), F.S., shall be deemed a part of the bylaws.

Section 720.303(2)(c)2., F.S., of the bill requires written notice of any meeting at which special assessments will be considered or at which amendments to rules regarding parcel use will be considered. The bill requires that the written notice must be mailed, delivered, or electronically transmitted to the members and parcel owners. The notice must also be posted conspicuously on the property or broadcast on closed-circuit cable television not less than 14 days before the meeting.

Section 720.303(2)(d), F.S., of the bill requires an association's board to address an item of business if 20 percent of the total voting interests petition the board. The board would have to take up the petitioned item at its next regular board meeting or special meeting of the board, but not later than 60 days after receipt of the petition. The board need not address any other item at the meeting. The bill requires that the meeting must be noticed in accordance with the 14-day notice requirement in s. 720.303(2), F.S.

The bill provides that each member has the right to speak for at least three minutes on each matter placed on the agenda by petition, provided that the member signs the sign up sheet, if one is provided, or submits a written request to speak before the meeting. The bill does not require that the association take any action requested by the petition.

The bill amends s. 720.303(4), F.S., to require associations to maintain a copy of the disclosure summary described in s. 720.401(2), F.S.¹⁷ The bill also requires that associations maintain all other records of the association that are related to the operation of the association, but that are not specifically listed in s. 720.303(4), F.S.

Section 720.303(5), F.S., requires that the association's official records must be maintained in the state, open for inspection, and available for copying by members or their agents within 10 business days of a written request. The bill requires homeowners' associations to provide parcel owners with copies requested during an inspection if the entire request is limited to no more than 25 pages. However, the association does not have to provide copies on request during inspection if it does not have a copy machine available where the records are maintained.

The bill amends the records inspection provisions of s. 720.303(5)(c), F.S., to provide that in addition to having the right in current law to adopt reasonable rules that govern the frequency, time, location, notice, and manner of inspection of the associations' records, homeowners' associations may adopt rules to govern the records to be inspected. The bill allows an association to charge up to 50 cents per page if it has a photocopier. If the association does not have a photocopier where the records are kept, or if the request exceeds 25 pages in length, the association may have copies made by an outside vendor, and the association may charge no more than actual cost of the copying. This provision conflicts with s. 720.401, F.S., of the bill that provides that the association may charge 50 cents per page for association records with the cost not to exceed \$50. Section 119.07, F.S., allows a charge up to 15 cents for one-sided and up to 20 cents for two-sided copies of public records.

The bill further amends the records inspection provisions of s. 720.303(5)(c), F.S., to provide that the following records shall not be accessible to members or parcel owners:

- any record protected by the attorney-client privilege, that is prepared at the direction association's attorney, or that is an attorney's work product;
- information in connection with the approval of a lease, sale, or other transfer of a parcel;
- disciplinary, health, insurance, and personnel records of the association's employees; and
- medical records of parcel owners or community residents.

The bill amends the financial reporting requirements of Section 720.303(7), F.S., to require financial statements in accordance with generally accepted accounting principles (GAAP). The type of required financial statement is dependant on the association's total annual revenue. The association must prepare:

- a compiled financial statement if it has total annual revenues of \$100,000 or more, but less than \$200,000;¹⁸
- a reviewed financial statement if it has total annual revenues of at least \$200,000, but less than \$400,000;¹⁹

¹⁷ See section 9 of the bill, which transfers and renumbers s. 689.26, F.S. as s. 720.401, F.S., and substantially amends that section.

¹⁸ 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*, 3rd ed. (Barron's 2000).

- an audited financial statement if it has total annual revenues of \$400,000;²⁰ or
- a report of cash receipts and expenditures if it has total annual revenue of less than \$100,000.

Regardless of the association's annual revenues, an association in a community of fewer than 50 parcels may prepare a report of cash receipts and expenditures in lieu of financial statements, unless the governing documents provide otherwise. The bill specifies the types of expenditure that must be included in a report of cash receipts and expenditures.

Section 720.303(7)(c), F.S., of the bill provides that if 20 percent of the parcel owners petition the board for a level of financial reporting higher than that required by this section, the association must notice and hold a meeting of members.

The meeting must be held within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that fiscal year. If a majority of the voting interests elect to raise the level of reporting, the association must prepare the financial report. The association must also amend its budget to adopt a special assessment to pay for the financial report. The association must also provide within 90 days of the meeting, or the end of the fiscal year, whichever occurs later, a compiled, reviewed, or audited financial report as determined by its total annual revenue.

Section 720.303(7)(d), F.S., of the bill provides that if the majority of the voting interests approve, and association may prepare, or cause to be prepared, a report of cash receipts and expenditures for a compiled, reviewed, or audited financial statement in lieu of a more detailed required financial statement or report. Section 720.303(8)(c), F.S., of the bill prohibits a developer from using association funds in a civil or criminal action, administrative proceeding, or arbitration proceeding to defend the developer or a director appointed by the director. This prohibition applies even when the action or proceeding concerns the operation of a developer-controlled association.

Section 720.303(10), F.S., of the bill provides the procedures for recall of directors. These procedures apply regardless of any provision to the contrary in the governing documents. When the governing documents provide that only a specific class of members is entitled to elect a board director, only that class of members may vote to recall the director. The vote may be conducted by an agreement in writing, by written ballot without a meeting, or by ballot at a meeting.

The bill also prescribes the proper notice, the procedure for certification of the recall vote, the procedure for resolving a defective recall, and the procedure for replacement of a recalled director. The bill provides that any board director may be recalled and removed from office with or without cause by a majority of the total voting interests. If the governing documents provide that only a class of members may elect a board director, only that class of members may vote to recall the board directors so elected. After receipt of the recall ballots or agreement in writing,

¹⁹ 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.*

²⁰ An audited financial statement by a CPA verifies the accuracy and completeness of the audited entities records in accordance with GAAP. *Id.*

the board must hold a meeting within five business days to certify the ballots or the agreement in writing. Upon certification, any director or directors would be recalled effective immediately and must turn over to the board within five full business days any and all records and property of the association in his or her possession.

The bill requires that if the association's board does not certify the recall vote, the board shall file a petition with the division for binding arbitration pursuant to the applicable procedures in ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors, and dispute resolution procedures for condominiums.²¹ The bill authorizes judicial enforcement of a recall when the removed director refuses to relinquish his or her office or records. When the removal of more than one director is sought, there must be a separate vote for each director sought to be removed.

Section 4. Display of flag; SLAPP suits prohibited. The bill amends s. 720.304, F.S., to provide that any homeowner may display the official flag of the State of Florida. The bill also provides that any homeowner may display in a respectful way on Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day, portable, removable official flags, not larger than 41/2 feet by 6 feet, that represent the United States Army, Navy, Air Force, Marine Corps, or Coast Guard.

Section 720.304(4), F.S., of the bill prohibits "Strategic Lawsuits Against Public Participation" or "SLAPP" lawsuits. The bill makes the legislative finding that such lawsuits are against the public interest. The bill describes a SLAPP lawsuit as one that occurs when members are sued by individuals, business entities, or governmental entities for matters arising out of a parcel owner's appearance and presentation before a governmental entity on matters related to the homeowners' association.

The bill provides that parcel owners have a right to expeditious resolution of such an action, including the right to petition for a motion to dismiss or for summary judgment. The bill further provides that the court may award the parcel owner actual damages for a violation of this prohibition, and may also award treble damages. However, the court must state a basis for an award of treble damages. The court would also be required to award the prevailing party reasonable attorney's fees and costs. The bill also bars homeowners' associations from expending association funds in prosecuting a SLAPP lawsuit against a parcel owner.

Section 5. Levy of fines. The bill amends s. 720.305(2), F.S., to provide that any fine against any member, tenant, guest, or invitee cannot become a lien against a parcel. The bill provides that in any action to recover a fine, the prevailing party is entitled to collect reasonable attorney's fees and costs.

Section 6. Contracts for products and services; in writing; exceptions. The bill creates s. 720.3055, F.S., to provide requirements for associations' contracts for products and services. The bill requires that the following contracts must be in writing:

- any contract that is not to be fully performed within one year for the purchase, lease, or renting of materials or equipment to be used by the association; and

²¹ See also s. 720.311, F.S., in section 8 of the bill, and discussion about that section *infra*.

- all contracts for the provision of services.

If a contract requires payment by the association that exceeds 10 percent of the total annual budget of the association, including reserves, the association must obtain competitive bids. The bill provides that this section shall not be construed to require the association to accept the lowest bid.

The bill exempts the following contracts from the competitive bidding requirements of s. 720.3055, F.S.:

- a contract executed before October 1, 2004, and any renewal of that contract;
- the renewal of any contract that was awarded under the competitive bid procedures if the contract contains a provision that allows the board to cancel the contract on 30 days notice;
- a contract for products or services provided to an association under a local government franchise agreement by a franchise holder; or
- a contract with a manager that was made by a competitive bid.

The bill provides that a contract with a manager, if made by competitive bid, may be for a period up to three years.

An association may operate under provisions in its declaration or bylaws for competitive bidding if those provisions are not less stringent than the requirements of this section. The bill provides that s. 720.3055, F.S., is not intended to bar an association's ability to obtain needed products and services in an emergency. The bill provides that the competitive bid requirement does not apply if the business entity with which the association desires to enter into contract is the only source of supply for the product or service. The bill also provides that a party contracting to provide maintenance or management services may not use this section to excuse compliance with s. 720.309, F.S.²²

Section 7. Meetings of members; voting and election procedures; amendments. The bill amends s. 720.306, F.S., to provide members and parcel owners a right to notice of, and right to speak at, homeowners' association meetings. Section 720.306(5), F.S., of the bill requires that an association's bylaws must provide for giving notice to members of all member meetings. The bill provides that if the association's bylaws do not provide for notice, the notice requirements of s. 720.306, F.S., are deemed to apply. The bill requires 14-day notice of all member meetings. The notice may be mailed, delivered, or transmitted by electronic means. The bill requires that the association evidence its compliance with the 14-day notice requirement by an affidavit executed by the person providing the notice. The affidavit must be filed upon execution among the official records of the association.

²² Section 720.309, F.S., provides that:

Any grant or reservation made by any document, and any contract with a term in excess of 10 years made by an association before control of the association is turned over to the members other than the developer, which provide for operation, maintenance, or management of the association or common areas must be fair and reasonable.

Section 720.306(6), F.S., of the bill provides that members and parcel owners have the right to attend all membership meetings and to speak at any meeting with reference to all items opened for discussion or included on the agenda. A parcel owner or member has the right to speak for at least three minutes, provided that the parcel owner or member submits a written request to speak prior to the commencement of the meeting. The bill provides that the association may adopt written reasonable rules to govern the frequency, duration, and other manner of parcel owner or member statements. These rules must be consistent with the requirements of this section. The provisions of s. 720.306(6), F.S., are identical to the member right to speak provisions detailed in section 3 of the bill, which amends s. 720.303(2), F.S.

Section 720.306(9), F.S., of the bill provides that any election dispute between a member and an association must be submitted to mandatory binding arbitration with the division to be conducted in accordance with s. 718.1255, F.S., and division rules.

Section 8. Dispute resolution. The bill amends s. 720.311, F.S., to establish dispute resolution procedures for homeowners' associations and their members. The bill requires that recall disputes must be resolved by binding arbitration conducted by the division. The bill requires that any recall disputes filed with the division shall be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors, and dispute resolution procedures for condominiums. Section 720.303(10), F.S., in section 3 of the bill, also establishes recall procedures for directors of homeowners' associations and requires that the arbitration procedures in accordance with ss. 718.1255 and 718.112(2)(j), F.S.

Section 718.1255, F.S., requires that arbitration proceedings relating to the recall of a condominium director must be conducted pursuant to the arbitration procedures in s. 718.1255, F.S., and also provides that, if the condominium association fails to comply with the final order of arbitration, the division may take action pursuant to s. 718.501, F.S. Section 718.501, F.S., establishes the powers and duties of the division, which include the power to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties. It is not clear to what extent the division's involvement in a recall dispute through its role as an arbitrator with final order authority and the exercise of its powers in s. 718.501, F.S., would be inconsistent with the legislative finding in s. 720.302, F.S., that state agency regulation is not in the best interest of homeowners' associations or their individual members.

Section 720.311(1), F.S., provides that the division must conduct mandatory binding arbitration of election disputes in accordance with s. 718.1255, F.S. The bill provides that election and recall disputes are not eligible for mediation. The bill requires a \$200 filing fee, and authorizes the division to assess the parties an additional fee in an amount adequate to cover the division's costs and expenses. The bill provides that the fee paid to the division must be a recoverable cost in the arbitration proceeding and that the prevailing party must be paid its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. Section 720.311(1), F.S., provides that any petition for mediation or arbitration shall toll the applicable statute of limitations. The bill authorizes the division to adopt rules to effectuate this section.

Section 720.311(2)(a), F.S., of the bill provides that the following disputes must be filed with the division for mandatory mediation by the division before the dispute is filed in court:

- disputes between an association and a parcel owner regarding use of, or changes to, the parcel or the common areas and other covenant enforcement disputes;
- disputes regarding amendments to the association documents;
- disputes regarding meetings of the board and committees appointed by the board;
- disputes regarding membership meetings not including election meetings; and
- disputes regarding access to the official records of the association.

The mediation would be conducted under the applicable Florida Rules of Civil Procedure, and the proceeding would be privileged and confidential to the same extent as court-ordered mediation. The bill provides that persons not a party to the suit may not attend the mediation conference without the consent of all the parties. The bill requires a \$200 fee to defray the costs of the mandatory mediation, authorizes the division to charge additional fees to cover the costs of the mandatory mediation, and requires that the parties share the costs of mediation equally, unless the parties agree otherwise. If the mandatory mediation is not successful, the bill provides that the division may file the dispute in a court or enter the dispute into binding or non-binding arbitration to be conducted by the division or a private arbitrator. Section 720.311(2)(d), F.S., of the bill provides that the mediation procedure may be used by non-mandatory homeowners' associations.

Section 720.311(2)(c), F.S., of the bill provides standards to division certification and training of mediators and arbitrators. Division certified mediators must also be certified by the Florida Supreme Court. Section 720.311(3), F.S., of the bill requires that the division develop an education program to assist homeowners' associations and their members and officers regarding the operation of homeowners' associations under ch. 720, F.S.

The bill provides that the certification program for arbitrators and mediators, and the education program for homeowners' associations and their members would be funded by moneys and filing fees generated by the arbitration and mediation proceedings.

Section 9. Disclosure required. The bill transfers and renumbers s. 689.26, F.S., as s. 720.401, F.S., and substantially amends the provision's disclosure requirements. The effect of the transfer is to place the disclosure requirement in the chapter dealing with homeowners' associations. It appears that the effect of this transfer would be to limit the application of the disclosure requirement to parcel owners in communities that are within a homeowners' association. The term "community" in ch. 720, F.S., and the terms "declaration of covenants," or "declaration," relate to mandatory homeowners' associations.

The bill amends the required disclosure to specify that property purchasers will be obligated to be a member of a homeowners' association, to pay assessments to this association, and to pay assessments to the municipality. The disclosure is amended to specify the current amount for each assessment, if applicable. The disclosure is amended to provide that the developer may have the right to amend the restrictive covenants without the approval of the association membership or the approval of the parcel owners. The disclosure is further amended to provide that if the documents are not recorded, they can be obtained from the developer.

The bill amends the required disclosure clause in s. 720.3085(1)(b), F.S., to include the seller's representative as one of the persons, including the seller or seller's agent, that can be provided the buyer's written notice of intent to void the contract.

The bill also provides a statutory right, in addition to the contractual right contained in the disclosure clause. The bill gives the prospective purchaser the right to void the contract within three days of receiving the disclosure summary or prior to closing, whichever occurs first, by delivering written notice to the seller, seller's agent, or seller's representative. The bill provides that this right may not be waived by the purchaser, but that it terminates at closing.

Section 10. Financial Report. The bill transfers and renumbers s. 689.265, F.S., as s. 720.3086, F.S. This transfers the financial reporting requirement of the owners or developers of common areas, recreational facilities, and other parcels serving the lots and parcels in subdivisions to the chapter dealing with homeowners' association. It is unclear whether this transfer will limit the financial reporting requirement only to developers or common area owners in subdivisions governed by a homeowners' association. The statute refers to a reporting requirement of developers or common area owners in subdivisions and does not limit its application to developers or common area owners in subdivisions that are in communities within a homeowners' association.

Section 11. Exemptions. The bill amends s. 498.025, F.S., to conform the reference to s. 689.26, F.S., to s. 720.3085, F.S., in s. 498.025(2)(g)7 and (h)8, F.S.

Section 12. Publication of false and misleading information. The bill creates s. 720.402, F.S., to provide a cause of action to rescind the contract for sale or for damages against developer for false or misleading material statements. After closing, the purchaser has a cause of action against the developer for one year after the date upon which the last of the following events takes place:

- the closing of the transaction;
- the issuance of a certificate of occupancy or other evidence to allow lawful occupancy of the residence;
- the date of lawful occupancy in counties or municipalities in which certificates of occupancy or other evidence of lawful occupancy are not customarily issued;
- the completion by the developer of the common areas and recreational facilities, whether or not they are common areas, which the developer is obligated to complete or provide under the terms of the written contract;
- the completion by the developer of the common areas and such recreational facilities, whether or not they are common areas, that the developer is obligated to complete under any rule of law if there is no written contract.

The bill limits any cause of action brought under this provision to five years after the closing of the transaction. The bill provides that the prevailing party may recover reasonable attorney's fees, and prohibits the developer from using association funds to defend a suit brought under this section.

Section 13. Warranties. The bill creates s. 720.501, F.S., to provide that a developer shall be deemed to have granted to the homeowners' associations an implied warranty of fitness and

merchantability.²³ Section 720.501(1), F.S., provides that this warranty is for three years commencing with the completion of construction, or for one year after transfer of control of the association from the developer to the members. The bill provides this implied warranty for no more than 5 years after completion of the building or improvement. The bill provides that any warranty for personal property transferred with, or appurtenant to, the common areas shall be the same as that provided by the manufacturer.

Section 720.501(1)(b), F.S., provides that the statute of limitations for any actions in law or equity which an association may have shall not begin to run until the members have elected a majority of the members of the board.

The bill defines the term “completion of building or improvement” to mean issuance of a certificate of occupancy, an equivalent governmental authorization, or substantial completion of construction, finishing, or equipping. The bill provides that these warranties are conditioned upon routine maintenance, unless the maintenance is the obligation of the developer in a developer controlled association. The bill provides that these warranties shall inure to the benefit of each owner, owner successor, and the developer.

Section 720.501(5), F.S., provides that this section does not affect a homeowners' association as to which rights are established by transfer of control and ownership rights of the common areas from the developer to the homeowners' association prior to October 1, 2004. It is not clear whether the effect of this provision is to void any implied warranties, including any implied warranties under the Uniform Commercial Code, that would benefit homeowners' associations that are member-controlled before October 1, 2004, or whether the effect is to make inapplicable the time limitations in this section to such warranties.

Current law does not place a definitive time limit on any implied warranties. The warranty time limitations in s. 720.501, F.S., may have the effect of further narrowing the applicable four-year statute of limitations in s. 95.11(3), F.S.

Section 720.501(6), F.S., provides that the warranties provided by this section may be covered by an insured warranty program underwritten by a licensed insurance company registered in this state, provided that the minimum requirements of this chapter are met.

Section 14. Jurisdiction of county court. The bill amends s. 34.01, F.S., to grant the county courts original jurisdiction over disputes occurring in homeowners' associations. The county courts jurisdiction would be concurrent with the jurisdiction of the circuit courts.

Section 15. The bill amends s. 316.00825, F.S., to conform the reference to s. 720.301(7), F.S., to s. 720.301(8), F.S.

Section 16. The bill amends the definition “association” in s. 558.002, F.S., to conform the reference to s. 720.301(7), F.S., to s. 720.301(8), F.S.

²³ The Uniform Commercial Code (UCC) in s. 672.314, F.S., provides an implied warranty of merchantability for goods. Under current law, implied warranties for goods, as distinguished from workmanship, in the UCC do not pass from the contractor to the owner because the contractor is viewed as provider of services, not as a merchant. *See Lonnie D. Adams Building Contractor, Inc. v. O'Connor*, 714 So. 2d 1178 (Fla. 2nd DCA 1998).

Section 17. The bill requests that the Division of Statutory Revision designate ss. 720.301-720.312, F.S., as part I of ch. 720, F.S., and designate ss. 720.401 and 720.402, F.S., as part II of ch. 720, F.S. The bill provides that part II of ch. 720, F.S., shall be entitled "Disclosure Prior to Sale of Residential Parcels." The bill also requests that s. 720.501, F.S., be designated as part III of ch. 720, F.S., and that that this part be entitled "Rights and Obligations of Developers."

Section 18. The bill would take effect on October 1, 2004.

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:

This bill may affect existing covenants in homeowners' associations governing documents, including flag display rights. Because it applies retroactively, it may be challenged as an unconstitutional impairment of contract.

Article I, Section 10 of the United States Constitution prohibits state legislatures from enacting laws impairing the obligation of contracts. As early as 1880, the federal courts recognized that the contract clause does not override the police power of the states to establish regulations to promote the health, safety, and morals of the community.²⁴ The severity of the impairment is a key issue when evaluating whether a state law impairs a contract.²⁵ In *Exxon Corp. v Eagerton*, 462 U.S. 176 (1983), the Supreme Court suggested it would uphold legislation that imposes a generally applicable rule of conduct designed to advance a broad societal interest that only incidentally disrupts existing contractual relationships.

In 1989, the Federal District Court in Tampa held that the state statute permitting condominium unit owners to display the American Flag²⁶ did not impair existing contract rights of the condominium association to restrict such display. The court suggested in dicta that personal display of the flag is constitutionally protected speech, and because

²⁴ *Stone v. Mississippi*, 101 U.S. 814 (1880).

²⁵ *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

²⁶ Section s. 718.113(4), F.S.

“the statute did not create rights, but merely recognized them, it does not impair existing contract rights.”²⁷

Article I, s. 10 of the Florida Constitution also prohibits the state from enacting laws impairing the obligation of contracts. While Florida courts have historically strictly applied this restriction, they have exempted laws when they find there is an overriding public necessity for the state to exercise its police powers.²⁸ This exception extends to laws that are reasonable and necessary to serve an important public purpose,²⁹ to include protecting the public’s health, safety or welfare.³⁰ For a statute to offend the constitutional prohibition against impairment of contract, the statute must have the effect of changing substantive rights of the parties to an existing contract. Any retroactive application of a statute affecting substantive contractual rights would be constitutionally suspect.³¹

Historically, both the state and federal courts have attempted to find a rational and defensible compromise between individual rights and public welfare when laws are enacted that may impair existing contracts.³²

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

Persons and homeowners’ associations that are subject to the binding arbitration and mandatory mediation requirements in s. 720.311, F.S., would be assessed a \$200 fee and any additional fees charged by the division to cover the costs of these proceedings.

Under s. 720.303(5)(c), F.S., homeowners’ associations members may be charged for copies of official documents for up to 50 cents per page, if the association has a photocopier, or the actual cost of the copies. Under s. 720.401, F.S., members may be charged 50 cents per page for association records with the cost not to exceed \$50.

B. Private Sector Impact:

Homeowners’ associations may have to extend funds for accounting service in order to comply with the financial reporting requirements of this bill.

C. Government Sector Impact:

According to the department, there is no data on the number of homeowners’ associations and no estimates on the number of disputes that would need to be addressed. However, the division estimates a minimum of two attorneys, one senior attorney and one administrative staff person will be needed to provide the mediation and arbitration

²⁷ *Gerber v. Longboat Harbour North Condominium, Inc.*, 724 F.Supp. 884 (M.D. Fla. 1989).

²⁸ *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So2d 681 (Fla. 1980).

²⁹ *Yellow Cab Co. v. Dade County*, 412 So2d 395 (Fla. 3rd DCA 1982), petition den. 424 So2d 764 (Fla. 1982).

³⁰ *Khoury v. Carvel Homes South, Inc.*, 403 So2d 1043 (Fla. 1st DCA 1981), petition den. 412 So2d 467 (Fla. 1981).

³¹ *Tri-Properties, Inc. v. Moonspinner Condominium Association, Inc.*, 447 So.2d 965 (Fla. 1st DCA 1984).

³² *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So2d 774 (Fla. 1979).

services. The department estimates that for the first two fiscal years, a Regulatory Specialist position will be needed to assist the program. The department estimates that \$19,000 would be needed to provide 25 classes throughout the state for the educational program for homeowners' associations. The division could maintain on its website educational materials relating to alternative dispute resolution techniques and information on relevant statutes and department rules with minimal costs, or develop for \$10,000 annually an on-line course similar to the program designed for condominiums. In addition, the department estimates it could offer information brochures upon request for approximately one dollar per brochure and associated postage expenses. The department further estimates that it will have a one-time setup cost of \$25,000 for the Division of Technology to program homeowners' associations into its license management system called LicenseEase.

VI. Technical Deficiencies:

None.

VII. Related Issues:

CS/SB 1402 also transfers and renumbers s. 689.26, F.S., as s. 720.3085, F.S, and substantially amends that section, including the required disclosures.

VIII. Amendments:

None.