



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Maintain public security – This bill provides a mechanism to review what changes, if any, are needed to assist condominium associations during catastrophic events.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Advisory Council on Condominiums**

Section 718.50151, F.S., created the Advisory Council on Condominiums (Advisory Council or council). The council has seven appointed members, 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 that is appointed by the Governor must represent timeshare condominiums. Members are appointed to 2-year terms.

The Advisory Council is required to:

- Receive, from the public, input regarding issues of concern with respect to condominiums and recommendations for changes in the condominium law. The issues that the council shall consider include, but are not limited to, the rights and responsibilities of the unit owners in relation to the rights and responsibilities of the association.
- Review, evaluate, and advise the division concerning revisions and adoption of rules affecting condominiums.
- Recommend improvements, if needed, in the education programs offered by the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation.<sup>1</sup>

The council may 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 constitutes 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.<sup>2</sup>

The bill directs the Advisory Council to hold public hearings, study available options and proposals and prepare a report to the Legislature, including recommended legislation, dealing with the protection and preservation of condominium property at the time of anticipated catastrophic windstorm events and the recovery and rebuilding following such events. The bill also directs the Advisory Council to consider certain items for their recommendations such as the powers and responsibilities of unit owners and the board of directors before, during, and after such events.

##### **Condominium Associations**

*Emergency Powers:* The Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation (DBPR) oversees compliance by condominium associations with ch. 718, F.S., which governs condominium associations. According to DBPR, many condominium associations have had to address emergency operations issues this past year due to the

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<sup>1</sup> Section 718.50151(2), F.S.

<sup>2</sup> Section 718.50151(3), F.S.

high number of hurricanes that impacted the state.<sup>3</sup> In general, the law does not set forth condominium association emergency powers in a catastrophic event.

*Association Powers and Operation:* The powers of a condominium association include the power to enter into agreements, to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities.<sup>4</sup> The association has this power “whether or not the lands or facilities are contiguous to the lands of the condominium, if they are intended to provide enjoyment, recreation, or other use or benefit to the unit owners.”<sup>5</sup> Generally, the operation of an association is governed by the articles of incorporation and the bylaws of the association.<sup>6</sup>

*Contracts for Products and Services:* Section 718.3026, F.S., provides that most contracts entered into by an association, particularly any contracts for the provisions of services, must be in writing. This section also requires an association to obtain a competitive bid if a contract for the purchase, lease, or renting of materials or equipment, or for the provision of services, requires payment in the aggregate that exceeds 5 percent of the total annual budget of the association, including reserves. This section also provides that the association is not required to accept the lowest bid. However, contracts with employees of the association, and contracts for attorney, accountant, architect, community association manager, timeshare management firm, engineering, and landscape architect services are exempt from the bidding requirement. This section also states that “[n]othing contained herein is intended to limit the ability of an association to obtain needed products and services in an emergency.”<sup>7</sup>

*Assessments:* If an association imposes a special assessment, the specific purpose must be put in writing and be delivered to each unit owner.<sup>8</sup> Any funds collected from special assessments may only be used for the specific purpose set out in the notice.<sup>9</sup> Any excess funds remaining are considered common surplus, and may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.<sup>10</sup>

*Association Bylaws:* A condominium association’s bylaws usually spell out the specific responsibilities of an association. Section 718.112(2), F.S., provides items that must be included in an association’s bylaws, and provides that if the items are not included, the bylaws are deemed to include those items. Among some of those items are the following:

- Appointment – This section provides that the powers, duties and the appointment of a condominium board must be provided for in the bylaws. This section also states that “[u]nless prohibited in the bylaws, the board...may appoint other officers and grant them the duties it deems appropriate.”<sup>11</sup>
- Board Meeting – A board meeting notice must include an agenda and must be posted conspicuously on the condominium property at least 48 continuous hours before the meeting except in an emergency. The statute provides that: Any item not included on the notice may be taken up on an emergency basis by at least a majority plus one of the members of the board. Such emergency action shall be noticed and ratified at the next regular meeting of the board. However, written notice of any meeting at which nonemergency special assessments, or at which amendment to rules regarding unit use, will be considered shall be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property not less than

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<sup>3</sup> Hurricane Charley made landfall in Florida on August 13, 2004 as a category 4 hurricane with 145 mph winds. Hurricane Frances made landfall in Florida on September 5, 2004 as a category 2 hurricane with 105 mph winds. Hurricane Ivan made landfall in Florida on September 16, 2004 as a category 3 hurricane with 130 mph winds. Hurricane Jeanne made landfall in Florida on September 26, 2004 as a category 3 hurricane with 120 mph winds. (Information from National Weather Service Tropical Prediction Center National Hurricane Center -[http://www.nhc.noaa.gov/archive/2004/tws/MIATWSAT\\_nov\\_shtml?](http://www.nhc.noaa.gov/archive/2004/tws/MIATWSAT_nov_shtml?))

<sup>4</sup> Section 718.114, F.S.

<sup>5</sup> *Id.*

<sup>6</sup> Section 718.112(1)(a), F.S.

<sup>7</sup> Section 718.3026(2)(b), F.S.

<sup>8</sup> Section 718.116(10), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> Section 718.116, F.S.

<sup>11</sup> Section 718.112(2)(a)1., F.S.

14 days prior to the meeting...If there is no condominium property or association property upon which notices can be posted, notices of board meetings shall be mailed, delivered, or electronically transmitted at least 14 days before the meeting to the owner of each unit.<sup>12</sup>

- Unit Owners Meetings – A written notice for a unit owners meeting, including an annual meeting, must include an agenda, and must be mailed, hand delivered, or electronically transmitted to each unit owner at least 14 days prior to the annual meeting, and must be posted in a conspicuous place on the condominium property at least 14 continuous days before the annual meeting.<sup>13</sup>
- Assessments – The bylaws must also provide for the manner of collecting assessments from the unit owners, and such assessments must be made not less frequently than quarterly.<sup>14</sup>
- Optional Provisions – Under the statute, the bylaws may also include:
  - A method of adopting and amending administrative rules and regulations governing the details of the operation and use of the common elements.
  - Restrictions on and requirements for the use, maintenance, and appearance of the units and the use of the common elements.
  - Provisions for giving notice by electronic transmission in a manner authorized by law of meetings of the board of directors and committees and of annual and special meetings of the members.
  - Other provisions which are not inconsistent with this chapter or with the declaration, as may be desired.<sup>15</sup>

### Homeowners' Associations

*Liens:* Section 720.305, F.S., establishes, among other things, the power of a homeowner's association to levy fines against a member for failure to follow the homeowner's association's rules. The homeowner's association may suspend, for a reasonable period of time, the rights of a member or their guests, or both, to use common areas and facilities, and may levy reasonable fines not greater than \$100 per violation against any member or their guests.<sup>16</sup> This section provides that "a fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, except that no such fine shall exceed \$1,000 in the aggregate unless otherwise provided in the governing documents."<sup>17</sup> This section states that a fine may not become a lien against a parcel.<sup>18</sup> Additionally, this section provides for notice of at least 14 days to the person sought to be fined or suspended.<sup>19</sup> Such person is provided an opportunity for a hearing before a committee of at least three members appointed by the board who are not officers, directors, or employees of the association, or a relation of an officer, director, or employee.<sup>20</sup> A majority vote is necessary to impose a fine or suspension.<sup>21</sup>

The bill provides that a fine by a homeowner's association against a member may not become a lien on a homeowner's parcel unless it is imposed for violations of use restrictions on the land.

*Alternative Dispute Resolution:* Section 720.311(2)(a), F.S., requires that disputes between a homeowner's 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 homeowner's association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the

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<sup>12</sup> Section 718.112(2)(c), F.S.

<sup>13</sup> Section 718.112(2)(d)2., F.S.

<sup>14</sup> Section 718.112(2)(g), F.S.

<sup>15</sup> Section 718.112(3), F.S.

<sup>16</sup> Section 720.305(2), F.S.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

association” must be filed with the DBPR for mandatory mediation before the dispute is filed in court.<sup>22</sup> This section also provides that if mediation is not successful in resolving all issues between the parties, the parties may proceed to court or elect to enter into binding or nonbinding arbitration. If all parties do not agree to arbitration proceedings following an unsuccessful mediation, any party may file the dispute in court. A final order resulting from nonbinding arbitration is final and enforceable if a complaint for a trial is not filed in court within 30 days after entry of the order.<sup>23</sup>

DBPR is responsible for developing a certification and training program for private mediators and private arbitrators.<sup>24</sup> A mediator or arbitrator may be certified by DBPR if he or she has:

- attended at least 20 hours of training in mediation or arbitration, as appropriate;
- has mediated or arbitrated at least 10 disputes involving community associations within 5 years prior to the date of the application, or has mediated or arbitrated 10 disputes in any area within 5 years prior to the date of application; and
- has completed 20 hours of training in community association disputes.<sup>25</sup>

Any mediator must also be certified by the Florida Supreme Court.<sup>26</sup> The expenses of operating the training and certification and training program shall be paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes and by the training fees.<sup>27</sup>

The bill provides that if, during a mediation proceeding between a homeowner and the homeowner’s association, a party fails to make payment of fees and costs within the time established by department rule, or fails to appear for a scheduled mediation session or arbitration, such failure acts as an impasse in the proceeding which entitles the other party to proceed to court and to receive and enforce an award of costs and fees associated with the mediation or arbitration. This section also removes the listed hours of training and qualifications for a mediator or arbitrator under this section and establishes that the requirements for both are the requirements established by the Florida Supreme Court for a circuit court mediator. Additionally, this section deletes a provision that funded education programs to assist homeowners, associations, board members, and managers in understanding homeowners’ associations and the use of alternative dispute resolution.

## Reviving Covenants and Restrictions

Section 712.02, F.S., provides that:

Any person having the legal capacity to own land in this state, who, alone or together with her or his predecessors in title, has been vested with any estate in land of record for 30 years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in s. 712.03.

This law had the effect of extinguishing covenants and restrictions of some condominium associations who had filed covenants and restrictions over 30 years ago. According to proponents of the bill, once this problem was exposed, steps were taken through legislative initiatives in 2002 and 2003 to provide mechanisms to allow planned communities whose covenants were nearing extinguishment age, but not yet extinguished, to extend the term of those covenants and restrictions.<sup>28</sup> Additional legislative fixes included mandatory homeowners’ associations whose covenants and restrictions had been

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<sup>22</sup> Section 720.311(2)(a), F.S.

<sup>23</sup> Section 720.311(2)(b), F.S.

<sup>24</sup> Section 720.311(2)(c), F.S.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Explanation paper for HB 1593 (on file with the Civil Justice Committee).

extinguished, but apparently did not include voluntary homeowners' associations whose covenants and restrictions were extinguished by ch. 712, F.S.

To revive a declaration of covenants, parcel owners in a community may seek approval from the Department of Community Affairs (DCA) once all of the following requirements are met:

- (1) All parcels to be governed by the revived declaration must have been once governed by a previous declaration that has ceased to govern some or all of the parcels in the community;
- (2) The revived declaration must be approved in the manner provided in s. 720.405(6); and
- (3) The revived declaration may not contain covenants that are more restrictive on the parcel owners than the covenants contained in the previous declaration, except that the declaration may:
  - (a) Have an effective term of longer duration than the term of the previous declaration;
  - (b) Omit restrictions contained in the previous declaration;
  - (c) Govern fewer than all of the parcels governed by the previous declaration;
  - (d) Provide for amendments to the declaration and other governing documents; and
  - (e) Contain provisions required by this chapter for new declarations that were not contained in the previous declaration.<sup>29</sup>

After a community has formed an organizing committee to draft or obtain the correct documents to revive extinguished covenants, "a majority of the affected parcel owners must agree in writing to the revived declaration of covenants and governing documents of the homeowners' association or approve the revived declaration and governing documents by a vote at a meeting of the affected parcel owners noticed and conducted in the manner prescribed by s. 720.306."<sup>30</sup>

Within 60 days of the parcel owners' approval, the organizing committee must submit the documents to the DCA. DCA must make a determination within 60 days of submittal that either the documents comply or do not comply with the requirements of the statute, and then so inform the community.<sup>31</sup>

No later than 30 days after receiving approval from the department, the organizing committee must file the articles of incorporation of the association with the Division of Corporations of the Department of State if the articles have not been previously filed with the division. No later than 30 days after receiving approval from the division, the president and secretary of the association must execute the revived declaration and other governing documents approved by the department in the name of the association and have the documents recorded with the clerk of the circuit court in the county where the affected parcels are located.<sup>32</sup>

The bill creates section 712.11, F.S., to provide that homeowners' associations that are not otherwise subject to ch. 720, F.S., may use the procedures provided in sections 720.401 through 720.407, F.S., to revive a declaration of covenants and restrictions which were extinguished pursuant to ch. 712, F.S.

### C. SECTION DIRECTORY:

**Section 1.** The bill directs the Advisory Council on Condominiums to hold public hearings, study available options and proposals and prepare a report to the Legislature, including recommended legislation, dealing with the protection and preservation of condominium property at the time of anticipated catastrophic windstorm events and the recovery and rebuilding following such events. The bill also directs the Advisory Council to consider certain items for their recommendations such as the powers and responsibilities of unit owners and the board of directors before, during, and after such events.

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<sup>29</sup> Section 720.404, F.S.

<sup>30</sup> Section 720.405(6), F.S.

<sup>31</sup> Section 720.406(1) and (2), F.S.

<sup>32</sup> Section 720.407(1) and (2), F.S.

**Section 2.** Amends s. 720.305, F.S., to provide that a fine by a homeowner's association against a member may not become a lien on a homeowner's parcel unless it is imposed for violations of use restrictions on the land.

**Section 3.** Amends s. 720.311, F.S., to provide that if, during a mediation proceeding between a homeowner and the homeowner's association, a party fails to make payment of fees and costs within the time established by department rule, or fails to appear for a scheduled mediation session or arbitration, such failure acts as an impasse in the proceeding which entitles the other party to proceed to court and to receive and enforce an award of costs and fees associated with the mediation or arbitration. This section also removes the listed hours of training and qualifications for a mediator or arbitrator under this section and establishes that the requirements for both are the requirements established by the Florida Supreme Court for a circuit court mediator. Additionally, this section deletes a provision that funded education programs to assist homeowners, associations, board members, and managers in understanding homeowners' associations and the use of alternative dispute resolution.

**Section 4.** Creates s. 712.11, F.S., to provide that homeowners' associations that are not otherwise subject to ch. 720, F.S., may use the procedures provided in sections 720.401 through 720.407, F.S., to revive a declaration of covenants and restrictions which were extinguished pursuant to ch. 712, F.S.

**Section 5.** Provides that the bill takes effect upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The Department of Business and Professional Regulation (DBPR), the Department of Financial Services (DFS), and the Office of Insurance Regulation (OIR) report the bill will have no revenue impact on state government.

#### 2. Expenditures:

DBPR, DFS, and OIR report the bill will not require any expenditure by state government.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

DBPR and DFS report that the bill will have no revenue impact on local governments.

#### 2. Expenditures:

DBPR and DFS report that the bill will not require any expenditure by local governments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

DBPR reports that this bill will not require the promulgation of new rules to implement the provisions of the bill.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2005, the Civil Justice Committee considered the bill and adopted one amendment and one amendment to that amendment. The amendment to the amendment added that the qualifications for a mediator and arbitrator will be the qualifications set by the Florida Supreme Court for a circuit court mediator. The amendment, as amended, removed the provisions establishing emergency powers for condominium associations and replaced those provisions with a study and report to the Legislature of such issues to be conducted by the Advisory Council on Condominiums. The amendment also provided that a homeowner's association may place a lien on a parcel only if the homeowner's violation is against the use restrictions for the community. The amendment also removed a provision that funded education programs to assist homeowners, associations, board members, and managers in understanding homeowners' associations and the use of alternative dispute resolution. The bill, as amended, was reported favorably as a committee substitute.

On April 14, 2005, the Insurance Committee adopted one amendment and reported the bill favorably with a committee substitute. The amendment removed the section of the bill pertaining to the deadline date for retrofitting of sprinkler systems for common areas of condominiums to maintain current law. The staff analysis was updated to reflect the amendment adopted.