

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.)

Prepared By: Regulated Industries Committee

BILL: CS/SB 1556

INTRODUCER: Regulated Industries Committee and Senator Geller

SUBJECT: Condominiums

DATE: March 8, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Imhof	RI	Fav/CS
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

Reports and Replacement of Receiver- The bill provides for quarterly reports prepared by either the association, receiver or termination trustee following the approval of the termination plan. The report shall provide the status and progress of the termination, costs and fees incurred, the expected completion date of termination and the current financial condition of the association, receivership or trusteeship. Unit owners may recall or remove members of the board of administration with or without cause and lienors of an association in termination representing at least fifty percent of the outstanding amounts of liens may petition the court for the appointment of a termination trustee upon a showing of good cause.

Plan of Termination - The bill requires a plan of termination to be prepared and presented to the unit owners in the condominium for approval before termination can occur. The plan must provide for the valuation of the individual units, the common elements and the other assets of the condominium based upon their respective fair market values. The plan must further set out the share that each unit owner will receive if the plan of termination is adopted, and if the property is to be sold, it must state the minimum sale terms.

Once adopted by not less that 80 percent of the voting interests in the condominium, the plan of termination becomes effective upon recording of the plan with the Clerk of the Circuit Court. Within 90 days of the recording, any owner who does not agree with the valuations in the plan may proceed to circuit court for an independent determination of the plan valuations.

Notices - Under the provisions of the bill, three different notices are required to implement the termination. A copy of the proposed plan of termination must be given to all of the unit owners (in the same manner as for notice of the annual meeting) at least 14 days prior to the meeting at

which the plan will be voted upon. Once a plan of termination is approved, each unit owner and the holders of liens on property in condominiums must be mailed notice of the plan's adoption and the right to contest the plan within 30 days of the recording with the Clerk. Within 90 days after the effective date of the plan, a certified copy of the recorded plan must be provided to the Division of Land Sales, Condominiums and Mobile Homes.

Termination Trustee and Title to the Property - Unless another person is appointed as trustee in the plan of termination, the condominium association shall serve as the "termination trustee." Once the plan is effective, the termination trustee (the association) is vested with the title to the condominium property, and the unit owners become the beneficiaries of the proceeds in plan of termination. The trustee is obligated to protect and maintain the property, to sell the assets of the condominium, and disperse the proceeds to the unit owners and the mortgagees as provided for in the plan.

Optional Termination - In addition to the 80 percent threshold, the bill provides two additional methods for obtaining approval for termination of the condominium. First, the plan of termination may be approved by a majority vote after catastrophic damage when the costs to repair and restoration of the property to its prior condition are more than the fair market value of the property after the repairs, or when it is impossible to reconstruct the physical configuration of the condominium because of the current land use laws.

The bill also provides that termination may be pursued in circuit court by one or more unit owners if the plan of termination did not receive approval by at least 80 percent the community, and fewer than 20 percent of the total voting interests voted against the plan.

Valuation of the Property - Under the bill, the value of each unit must be determined based upon the fair market value of the units immediately before the termination by one or more independent appraisers or based upon the values maintained by the county property appraiser. Unit owners are also entitled to the fair market value of their share of the common elements, association property, and the common surplus. Each unit's total share of the proceeds must be set out in the plan of termination. Any unit owner may contest the termination within 90 days of the plan's effective date by filing in circuit court. The court may order the plan to be modified, voided or implemented.

Mortgagee Approval -The consent of mortgagees is not required for the adoption of a plan of termination under the provisions of the bill unless the proceeds under the plan are less than the full satisfaction of the mortgage lien encumbering the unit.

This bill substantially amends section 718.117 of the Florida Statutes.

II. Present Situation:

Termination of a condominium property

Section 718.117(1), F.S., requires consent of the unit owners and all of the holders of all recorded liens to agree in order to terminate a condominium unless otherwise provided in the declaration. The board of directors must notify the Division of Land Sales, Condominiums and

Mobile Homes within the Department of Business and Professional Regulation (division), before taking any action to terminate or merge the condominium or the association.

In cases of natural disaster, s. 718.117(4), F.S., provides that if the identity of the directors or their right to hold office is in doubt, or if they are dead or unable to act, or refuse or fail to act, or their whereabouts cannot be ascertained, any interested person may petition the circuit court to determine the identity of the directors, or appoint a receiver.

Problems have arisen from the destruction of condominium property caused by hurricanes. As noted in *Florida Condominium Law and Practice* published by the Florida Bar:

In South Dade County, some condominiums were automatically terminated after Hurricane Andrew. Most were not terminated because the unit owners made an informed choice to do so; they were terminated because their associations were unable to communicate with unit owners in sufficient numbers to obtain enough votes to forestall the termination, within the short time period (usually 60 days) allowed before automatic termination. It was virtually impossible 60 days after Hurricane Andrew to find competent contractors for reconstruction. Additionally, many insurance claims were not yet filed, let alone settled, and some associations did not even know where to find their owners.¹

Section 718.117(5), F.S., provides that the person or persons appointed by the court shall distribute all remaining assets held by the association after determining that all known debts and liabilities of an association in the process of winding up have been paid or adequately provided for.

Section 718.117(9), F.S., provides that an association that has been terminated nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, collecting and discharging its obligations, disposing and conveying its property, and collecting and dividing its assets.

According to the Condominium and Planned Development Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (RPPT), obtaining 100 percent agreement of all unit owners has proven to be impossibility in many cases. A representative of the section stated that as condominiums have aged, become obsolete or suffered serious hurricane or other casualty damage; it has become apparent that the current statute is an impediment to terminating a condominium. Missing or intransigent owners or unresponsive mortgagees can veto termination merely through inaction.

This Committee began working on revising the provisions of 718.117, F.S. in February 2003. Their recommendations were also reviewed by the RPPT Section of the Condominium and Cluster Housing Committee and then the full Executive Council in November 2004. In November 2005 the initiative was approved by the section as a legislative position pursuant to

¹ Florida Condominium Law and Practice, 3d ed., (The Florida Bar, 2003).

the Rules Regulating the Florida Bar.² This bill is the result of their work. The Advisory Council on Condominiums has also given their approval to the bill.³

III. Effect of Proposed Changes:

According to the Legislative Counsel for the RPPT, the purpose of the legislation is to revise the termination provisions in the Condominium Act. Counsel states that the bill has two primary purposes:

1. The first objective is to provide an equitable method of termination following a natural disaster or in other circumstances that fully values the interests of each unit, as well as the common elements. (Currently, the law does not contemplate valuation of the units, and places unit owners in a position of not being able to receive the market value of their investments.); and
2. The second objective is to eliminate the ability of an owner or a small minority of owners from extracting an excessive portion of the termination proceeds at the expense of the other unit owners in the community. (Currently, the law allows one or more owners to withhold approval to extort additional money and does not provide a remedy for other owners to challenge the conduct.)

Legislative Findings

Section 718.117(1), F.S., provides that the Legislature finds that it is contrary to the public policy of this state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation. The provisions of the section apply to all condominiums in Florida in existence on or after the effective date of the act.

Termination of condominium

Section 718.117(2)(a), F.S., is substantially rewritten to provide that notwithstanding any provision to the contrary in the declaration, the condominium form of ownership of a property may be terminated by a plan of termination approved by the lesser of a majority of the total voting interests or as otherwise provided in the declaration for approval of termination in the following circumstances:

- When the total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or
- When it becomes impossible to operate a condominium in its prior physical configuration because of land-use laws or regulations.

² R. Regulating Fla. Bar 2-7-5.

³ In 2004, the Advisory Council on Condominiums was created, in part, to receive public input regarding issues of concern with respect to condominiums and recommendations for changes in the condominium law.

Section 718.117(2)(b), F.S. is created to provide that notwithstanding paragraph (a), a condominium in which 75 percent or more of the units are timeshare units may only be terminated pursuant to a plan of termination approved by 80 percent of the total voting interests of the association and the holders of 80 percent of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium, unless the declaration provides for a lower voting percentage.

Optional Termination

Section 718.117(3), F.S., is substantially rewritten to provide that, except as provided in subsection (2) and (4) or unless the declaration provides for a lower percentage, the condominium form of ownership of the property may be terminated pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium. However, the subsection does not apply to condominiums in which 75 percent or more of the units are timeshare units.

Jurisdiction

Section 718.117(4)(a), F.S., is substantially rewritten to provide that if 80 percent of the total voting interests fails to approve the plan of termination but fewer than 20 percent of the total voting interests disapprove of the plan, the circuit court shall have jurisdiction to entertain a petition by the association or by one or more unit owners and approve the plan of termination, and the action may be a class action.

Section 718.117(4)(b), F.S., is created to provide that all unit owners and the association must be joined as parties to the action. The action may be brought against the non-consenting unit owners as a class action. Service of process on unit owners may be by publication, but if the unit owner is not personally served, a copy of the petition and plan of termination and after entry of judgment, a copy of the final decree of the court, by mail at the owner's last known address.

Section 718.117(4)(c), F.S., is created to provide that after the consideration of whether the rights and interests of unit owners are equitably set forth in the plan of termination, the plan may be approved or rejected by the court. The court may modify the plan of termination to provide for an equitable distribution of the interest of unit owners prior to approving the plan of termination.

Section 718.117(4)(d), F.S., provides that the subsection is not applicable to condominiums in which 75 percent or more of the units are timeshare units.

Exemption

Section 718.117(5), F.S., provides that a plan of termination is not an amendment subject to s. 718.110(4), F.S., unless otherwise provided in the original declarations. Section 718.110(4), F.S., prohibits an amendment to a declaration that changes the configuration or size of any unit in material fashion, materially alters or modifies the appurtenances to the unit or changes the proportion or percentage of the common expenses and owns the common surplus of the condominium, unless the record owner of the unit and all record owners of liens in the unit join

in the execution of the amendment and unless all the record owners of all other units in the same condominium approve the amendment.

Mortgage Lienholders

Section 718.117(6), F.S., provides that notwithstanding any provision to the contrary in the declaration or this chapter, approval of a plan of termination by the holder of a recorded mortgage lien affecting a condominium parcel which fewer than 75 percent of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien affecting the parcel.

Powers in Connection with Termination

Section 718.117(7), F.S., provides that the association shall continue in existence following approval of the plan of termination, with all powers it had before approval of the plan. Notwithstanding any contrary provision in the declaration or bylaws, after approval of the plan, the board has the power and duty:

- To employ directors, agents, attorneys, and other professionals to liquidate or conclude its affairs;
- To conduct the affairs of the association as necessary for the liquidation or termination;
- To carry out contracts and collect, pay, and settle debts and claims for and against the association;
- To defend suits brought against the association;
- To sue in the name of the association for all sums due or owed to the association or to recover any of its property;
- To perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes;
- To sell at public or private sale or to exchange, convey, or otherwise dispose of assets of the association or to recover any of its property;
- To perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes;
- To sell at public or private sale or to exchange, convey, or otherwise dispose of assets of the association for an amount deemed to be in the best interest of the association, and to execute bills of sale and deeds of conveyance in the name of the association;
- To collect and receive rents, profits, accounts receivable, income, maintenance fees, special assessments, or insurance proceeds for the association;
- To contract and do anything in the name of the association which is proper or convenient to terminate the affairs of the association.

Natural Disasters

Section 718.117(8), F.S., provides that, if after a natural disaster, where the board of directors cannot be located, identified, or refuses to act, any interested person may petition the court to determine the identity of the directors or, if found to be in the best interests of the unit owners, to appoint a receiver to conclude the affairs of the association following notice to persons as

directed by the court. Lienholders shall be given notice of the petition and shall have the right to propose persons for the consideration by the court as receiver.

The receiver shall have all the powers given to the board by the condominium documents and by s. 718.117(7), F.S. and any other powers that are necessary to conclude the affairs of the association and are set forth in the order of appointment.

Reports and Replacement of Receiver

Section 718.117(9), F.S., provides that the association, receiver or termination trustee prepares quarterly reports following the approval of the plan of termination. It shall provide the status and progress of the termination, costs and fees incurred, the date the termination is expected to be completed and the current financial condition of the association, receivership or trusteeship. Copies are provided by regular mail to the unit owners and liners at the mailing address provided to the association by the unit owners and the liners.

The unit owners may recall or remove members of the board of administration with or without cause at any time as provided in s. 718.112(2)(f). The liners or an association in termination representing at least fifty percent of the outstanding amount of liens may petition the court for the appointment of a termination trustee which shall be granted upon good cause shown.

Plan of Termination

The plan must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee.⁴ A copy of the proposed plan must be given to all unit owners in the same manner as for notice of an annual meeting. Notice must be provided at least 14 days prior to the meeting during which the plan is to be voted upon or it must be provided prior to or simultaneously with the distribution of the solicitation seeking execution of the plan or written consent to or joinder in the plan.⁵ A unit owner may agree to the plan by executing the plan or by consent to or joinder in the plan in the manner of a deed. A plan of termination and the consents or joinders of unit owners and, if required, consents or joinders of mortgagees must be recorded in the public records of each county in which any portion of the condominium is located. The plan is effective only upon recordation or at a later date specified in the plan.⁶

A plan must specify:⁷

- The name, address, and powers of the termination trustee;
- A date after which the plan of termination is void if it has not been recorded;

⁴ Section 718.117(9), F.S.

⁵ *Id.*

⁶ *Id.*

⁷ Section 718.117(10), F.S.

- The interests of the respective unit owners in the association property, common surplus, and other assets of the association, which will be the same as the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided;
- The interests of the respective unit owners in any proceeds from any sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(13), F.S., (see the discussion below regarding the allocation of property). If the condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms; and
- Any interests of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction. Unless the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property).⁸

The plan may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.⁹

In the case of a conditional termination, the plan must specify the conditions for termination. A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed have been recorded that confirm the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests.¹⁰

Allocation of Proceeds of Sale of Condominium Property

Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination.¹¹ The market values are to be determined by one or more independent appraisers selected by the association or termination trustee.¹²

The portion of proceeds allocated to the units will be further apportioned among the individual units. The apportionment is deemed fair and reasonable if it is determined by any of the following methods: 1) the respective values of the units based on the fair-market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee; 2) the respective values of the units based on the most recent market value of the units before the termination, as provided in the county

⁸ *Id.*

⁹ Section 718.117(11)(a), F.S.

¹⁰ Section 718.117(11)(b), F.S.

¹¹ Section 718.117(12)(a), F.S.

¹² *Id.*

property appraiser's records; or 3) the respective interests of the units in the common elements specified in the declaration immediately before the termination.¹³

The three methods of apportionment listed above do not prohibit any other method of apportioning the proceeds of sale allocated to the units agreed upon in the plan of termination. However, the portion of the proceeds from the common elements will be divided among the units based upon their respective interests in the common elements as provided in the declaration.¹⁴

Liens that encumber a unit are transferred to the proceeds of the sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property.¹⁵

Termination Trustee

The association will serve as termination trustee unless another person is appointed in the plan of termination. If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. Upon recording or at a later date specified in the plan, title to the condominium property vests in the trustee. Unless prohibited by the plan, the termination trustee will be vested with the powers given to the board.¹⁶

If the association does not serve as the termination trustee, the trustee's powers are coextensive with those of the association to the extent not prohibited in the plan or the order of appointment. If the association is not the termination trustee, the association will transfer any association property to the trustee. If the association is dissolved, the trustee will also have the powers necessary to conclude the affairs of the association.¹⁷

Title Vested in Termination Trustee

If termination is pursuant to a plan, the unit owners' rights and title as tenants in common in undivided interests in the condominium property vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property, but the contract is not binding on the unit owners until the plan is approved.¹⁸

Notice

¹³ Section 718.117(12)(b), F.S.

¹⁴ Section 718.117(12)(c), F.S.

¹⁵ Section 718.117(12)(d), F.S.

¹⁶ Section 718.117(13), F.S.

¹⁷ *Id.*

¹⁸ Section 718.117(14), F.S.

Within 30 days after a plan has been recorded, the termination trustee must deliver by certified mail, return receipt requested, a notice that a plan has been recorded to all unit owners, lienors of the condominium property, and lienors of all units at their last known addresses. The notice must include the book and page number of the public records in which the plan was recorded, that a copy of the plan must be furnished upon written request, and that the unit owner or lienor has the right to contest the fairness of the plan.¹⁹

Within 90 days after the effective date of the plan, the trustee must provide to the division²⁰ a certified copy of the recorded plan, the date the plan was recorded, and the county, book, and page number of the public records in which the plan was recorded.²¹

Right to Contest

A unit owner or lienor may contest a plan by initiating a summary procedure, pursuant to s. 51.011, F.S., within 90 days after the date the plan is recorded. A unit owner or lienor who fails to contest the plan within that period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property.²²

In an action contesting a plan, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. However, the apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in s. 718.117(12), F.S. (see the discussion above regarding the allocation of property).²³

The court must adjudge the rights and interests of the parties and order the plan to be implemented if it is fair and reasonable or the court may modify and approve the plan of termination based on findings during the court proceedings, but the court must void a plan that is determined not to be fair and reasonable. In such an action, the prevailing party may recover reasonable attorney's fees and costs.²⁴

Distribution

Following termination, the condominium property, association property, common surplus, and other assets of the association are held by the termination trustee, as trustee for unit owners and holders of liens on the units, in their order of priority.²⁵

Not less than 30 days prior to the first distribution, the termination trustee must deliver by certified mail, return receipt requested, a notice of the estimated distribution to all unit owners,

¹⁹ Section 718.117(15)(a), F.S.

²⁰ Division refers to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation. *See* s. 718.103(17), F.S.

²¹ Section 718.117(15)(b), F.S.

²² Section 718.117(16), F.S.

²³ *Id.*

²⁴ *Id.*

²⁵ Section 718.117(17)(a), F.S.

lienors of the condominium property, and lienors of each unit at their last known addresses stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount.²⁶ The deadline must be at least 15 days after the date the notice was mailed.²⁷

If a unit owner or lienor files a timely objection with the termination trustee, the trustee does not have to distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim.²⁸ In the alternative, the trustee may interplead the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs and court costs.²⁹

The proceeds of any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets must be distributed in the following priority:³⁰

1. To pay the reasonable termination trustee's fees and costs, accounting fees and costs;
2. To lien holders of liens recorded prior to the recording of the declaration;
3. To purchase money lien holders on units to the extent necessary to satisfy their liens;
4. To lienholders of liens of the association which have been consented to under s. 718.121, F.S.;³¹
5. To creditors of the association, as their interests appear;
6. To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor;
7. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor;
8. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to

²⁶ Section 718.117(17)(b), F.S.

²⁷ Section 718.117(17)(b), F.S.; the notice may be sent with or after the notice required by s. 718.117(15).

²⁸ Section 718.117(17)(b), F.S.

²⁹ *Id.*

³⁰ Section 718.117(17)(c), F.S.

³¹ Section 718.121(1), F.S., requires the unanimous consent of the unit owners before a lien is valid against the condominium as a whole.

satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor.

After determining that all known debts and liabilities of an association in the process of termination have been paid or adequately provided for, the termination trustee will distribute the remaining assets pursuant to the plan.³² If the termination is by court proceeding, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed.³³

Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, will be returned, transferred, or conveyed in accordance with the condition. The remaining association assets shall be distributed pursuant to the priority order above.³⁴

Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets.³⁵

Association Status and Creation of Another Condominium

The termination of a condominium does not change the corporate status of the association that operated the condominium property, nor does it bar the creation of another condominium.³⁶

Exclusion

The section does not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums.³⁷

Effective date

The act would take effect July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

³² Section 718.117(17)(d), F.S.

³³ *Id.*

³⁴ Section 718.117(17)(e), F.S.

³⁵ Section 718.117(17)(f), F.S.

³⁶ Section 718.117(18) and (19), F.S.

³⁷ Section 718.117(20), F.S.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Condominium declarations are contracts. This bill has the effect of re-writing previously recorded declarations that have termination provisions or that implement the protections provided by s. 718.110(4), F.S. and therefore might be an unconstitutional impairment of obligation of contract, under Art. I, s. 10 of the Florida Constitution, which provides in relevant part, “No... law impairing the obligation of contracts shall be passed.” This provision empowers the courts to strike laws which retroactively burden or alter contractual relations. Article I, s. 10 of the United States Constitution provides in relevant part that “No state shall . . . pass any . . . Law impairing the Obligation of Contracts.”

In *Pompano v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, (Fla. 1979), the court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The court set forth several factors in balancing whether the state law has in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court stated that if there is minimal alteration of contractual obligations the inquiry can end at its first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the state legislation. The factors to be considered are:

- Whether the law was enacted to deal with broad economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- Whether the effect on the contractual relationship is temporary or whether it is severe, permanent, immediate, and retroactive.

The court in *United States Fidelity and Guaranty Co., v. Department of Insurance*, 453 So. 2d 1355, (Fla. 1984) also adopted the method used in *Pomponio*. The court stated that the method required a balancing of a person’s interest not to have his contracts impaired with the state’s interest in exercising its legitimate police power.

Adopting the method of analysis used by the U.S. Supreme Court, the court outlined the main factors to be considered in applying this balancing test.

- The threshold inquiry is “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment increases the level of scrutiny.
- In determining the extent of the impairment, the court considered whether the industry the complaining party has entered has been regulated in the past. This is a consideration since if the party was already subject to regulation at the time the

contract was entered, then it is understood that it would be subject to further legislation upon the same topic.

- If the state regulation constitutes a substantial impairment, the state needs a significant and legitimate public purpose behind the regulation.
- Once the legitimate public purpose is identified the next inquiry is whether the adjustment of the rights and responsibilities of the contracting parties are appropriate to the public purpose justifying the legislation.

The legislative purpose of the statute addresses whether the law was enacted to deal with broad economic problems by stating that the Legislature finds that it is contrary to the public policy of the state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation.

Condominiums were created by statute and therefore the law operates in an area that is already subject to regulation.

The bill addresses termination of a condominium and is therefore permanent and retroactive in nature since it could change the plan of termination originally entered into in the declaration. However, the bill does so by providing an equitable method of termination following a natural disaster or in other circumstances that fully values the interests of each unit, as well as the common elements. (Currently, the law does not contemplate valuation of the units, and places unit owners in a position of not being able to receive the market value of their investments.); and it eliminates the ability of an owner or a small minority of owners from extracting an excessive portion of the termination proceeds at the expense of the other unit owners in the community. (Currently, the law allows one or more owners to withhold approval and does not provide a remedy for other owners to challenge the conduct.)

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will affect the condominium owners by changing the options to terminate the condominium they had originally contracted for in the declarations of condominium.

C. Government Sector Impact:

According to the Department of Business and Professional Regulation, since the bill does not exclude the termination procedures from the jurisdiction of the Division of Land Sales, Condominiums, and Mobile Homes (division) either in compliance or in arbitration, if the division receives complaints regarding the new termination procedures, the division may be required to expend investigative resources for these purposes. The

department states that any fiscal impact should be accommodated within current resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
