

**The Florida Senate**  
**PROFESSIONAL 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: SB 314

INTRODUCER: Senator Geller

SUBJECT: Condominiums

DATE: February 21, 2007      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Imhof	RI	<b>Favorable</b>
2.			JU	
3.				
4.				
5.				
6.				

**I. Summary:**

This bill substantially revises the provisions of the statute governing the termination of the condominium form of ownership of a property. It provides legislative findings.

The bill provides for termination because of economic waste or impossibility when the cost of repairs exceeds fair market value or legal restrictions prevent reconstruction. It allows for termination in certain circumstances when 75 percent or more of the units are timeshares. It provides for optional termination if approved by 80 percent of the voting interests.

The bill provides that the approval of the plan does not terminate the association and provides directions for the board. It provides for directives for locating directors if they are deceased or unable or fail or refuse to act should a natural disaster occur.

The bill provides for quarterly reports prepared by the association, receiver, or termination trustee following the approval of the termination plan. It provides the contents of the report. Unit owners may recall or remove members of the board of administration and certain lienors of an association may petition the court for the appointment of a termination trustee.

A copy of the proposed plan of termination must be given to all of the unit owners at least 14 days prior to the meeting at which time the plan will be voted upon. Once a plan is approved, each unit owner and the lienholders on property 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. The distribution notice must be sent not less than 30 days prior to the first distribution.

The condominium association shall serve as the “termination trustee,” unless another person is appointed in the plan. Once the plan is effective, the trustee is vested with the title to the condominium property, and the unit owners become the beneficiaries of the proceeds from the plan. The trustee is obligated to protect and maintain the property, to sell the assets of the condominium, and disburse the proceeds to the unit owners and the mortgagees as provided for in the plan.

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. The mortgagees’ consent is not required for the adoption of a plan unless the proceeds under the plan are less than the full satisfaction of the lien encumbering the unit.

This bill substantially amends section 718.117, Florida Statutes.

## II. Present Situation:

Condominiums are established pursuant to the provisions of ch. 718, F.S.<sup>1</sup> The basic instrument that creates a condominium is the declaration of condominium<sup>2</sup> which must be recorded in the public records “of the county where the land is located, executed and acknowledged with the requirements for a deed.”<sup>3</sup> Condominiums are governed by boards of administration which adopt bylaws for administration of the association.<sup>4</sup>

### Voting rights

The declaration of condominium must contain or provide for the unit owners’ membership and voting rights in the association.<sup>5</sup> These voting rights are distributed to the association members and are defined in s. 718.103(3), F.S. as “voting interests.” In a multicondominium association, the voting interests of the association are the voting rights distributed to unit owners in all condominiums operated by the association. When issues pertain to a specific condominium in a multicondominium association, the voting interest are the voting rights distributed to the unit owners in the condominium. A “unit owner” or “owner of a unit” means a record owner of legal title to a condominium parcel.<sup>6</sup>

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<sup>1</sup> See s. 718.104, F.S.

<sup>2</sup> Section 718.103(15), F.S., defines declaration of condominium to mean “the instrument or instruments by which a condominium is created, as they are from time to time amended.”

<sup>3</sup> Section 718.104(2), F.S.

<sup>4</sup> See s. 718.103(4) and (6), F.S.

<sup>5</sup> Section 718.104(4)(j), F.S.

<sup>6</sup> Section 718.103(27), F.S.

## 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.

Section 718.117(2), F.S., provides the duties and powers of the board of directors or court-appointed persons after the commencement of the termination. They have the power to:

- Employ directors, agents, and attorneys to liquidate or wind up its affairs.
- Continue the conduct of the affairs of the association insofar as necessary for the disposal or winding up thereof.
- Carry out contracts and collect, pay, compromise, and settle debts and claims for and against the association.
- Defend suits brought against the association.
- Sue in the name of the association, for all sums due or owing to the association or to recover any of its property.
- Perform any act necessary to maintain, repair, or demolish unsafe and uninhabitable structures, or other condominium property in compliance with applicable codes.
- Sell at public or private sale, exchange, convey, or otherwise dispose of all or any part of the assets of the association for an amount deemed in the best interest of the association, and to execute bills of sale and deeds of conveyance in the name of the association.
- Collect and receive any and all rents, profits, accounts receivable, income, maintenance fees, special assessments, and insurance proceeds for the association.
- In general, to make contracts and to do any and all things in the name of the association which may be proper or convenient for the purposes of winding up, selling, and liquidating the affairs of the association.

Unless the declaration or bylaws provide otherwise, the vacancy on the board during the winding up proceeding shall be filled by the majority of the board under s. 718.117(3), F.S.

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.

Section 718.118, F.S., provides that in the event of substantial damage to or destruction of all or a substantial part of the condominium property, and if the property is not repaired, reconstructed, or rebuilt within a reasonable period of time, any unit owner may petition a court for equitable relief, which may include a termination of the condominium and a partition.

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.<sup>7</sup>

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

Assets that are held under a valid condition must be disposed of pursuant to that condition. The remaining assets are to be distributed through the provisions in the declaration or bylaws.<sup>8</sup> If the declaration or bylaws does not provide for distribution, then the property “is owned by the unit owners in the same shares as each owner previously owned in the common elements. All liens shall be transferred to the share in the condominium property attributable to the unit originally encumbered by the lien in its same priority.”<sup>9</sup>

Section 718.117(8), F.S., provides that the distribution “may be made either in money or in property or securities and either in installments from time to time or as a whole, if this can be done fairly and ratably and in conformity with the declaration and shall be made as soon as reasonably consistent with the beneficial liquidation of the assets.”

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 (RPPTL), obtaining 100 percent agreement of all unit owners has proven to be an 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 through inaction.

A subcommittee of the Condominium and Planned Development Committee began working on revising the provisions of s. 718.117, F.S., in February 2003. Its recommendations were reviewed by the Condominium and Planned Development Committee and then the full Executive Council of the RPPTL Section in November 2004. In November 2005 the initiative was approved by the section as a legislative position pursuant to the Rules Regulating the Florida

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<sup>7</sup> The Florida Bar, Florida Condominium Law and Practice §13.52 (3d ed. 2003).

<sup>8</sup> Section 718.117(6), F.S.

<sup>9</sup> Section 718.117(7), F.S.

Bar.<sup>10</sup> The Advisory Council on Condominiums gave their approval to the bill which was passed as SB 1556 in the 2006 session but was vetoed by the Governor.<sup>11</sup>

The Governor stated that SB 1556 may cause unintended consequences by possibly denying condominium unit owners of their rights to remain in their units without adequate procedural safeguards. While the Governor agreed that there is a need to modify the law on condominium terminations due to natural disasters, he stated that the bill may be too overreaching.

The Governor addressed that bill specifically by enumerating the following concerns:

- (1) The ability for optional termination on any basis, “if 80 percent of the total voting interests fail to approve the plan of termination but fewer than 20 percent of the total voting interests vote to disapprove,” may allow for optional termination by a small fraction of the total voting interests.
- (2) The language of the bill might have unintended consequences by allowing one owner (such as a developer) to purchase 80 percent of the units in a condominium and seek termination, with the ultimate goal of redevelopment, in the absence of economic waste or impossibility. The Governor suggested that a possible remedy would be to require one vote per person, regardless of the number of units owned.
- (3) There are minimal procedural safeguards for the objecting unit owners, limiting the right to contest apportionment of the proceeds and creating a presumption that the valuation and apportionment are fair and reasonable.
- (4) The provision that allows a termination plan to be modified by a judge after the fact could prejudice the majority owners by permitting the court to apportion a greater amount of the proceeds to the holdouts. The Governor stated that, moreover, there is no provision in the bill for the majority to retract its votes if the court-modified termination plan is unacceptable.
- (5) Service of process by publication limits the ability of absentee owners who live in other states or countries to receive notice. The Governor stated that the bill should provide for actual notice or, at a minimum, impose a requirement for due diligence in contacting title owners before noticing by publication.
- (6) The bill shifts the cost of contesting the apportionment to the objecting owner, who may have to hire appraisers and who will be required to pay the attorneys’ fees of the prevailing party if the contest is denied. The Governor stated that many residents of older condominiums that are likely to be terminated under the new law are persons on fixed incomes who can ill-afford the cost of challenging the termination or finding a new place to live.

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<sup>10</sup> R. Regulating Fla. Bar 2-7.5.

<sup>11</sup> 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. See s. 718.50151, F.S., which provides for the composition and functions of the council.

- (7) The retroactive application of the bill to all existing condominiums will have a diminishing effect on the owners' existing rights. The Governor stated that retroactive application should only apply to condominium terminations that relate to hurricane damaged facilities.

The Governor directed the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes to conduct a series of town hall meetings in areas throughout the state that are heavily populated with condominium owners to discuss the bill, including the concerns expressed in the veto message. The department findings were to be provided to the State's Condominium Ombudsman for review and comment. The department was required to provide a report to the Governor, the President of the Senate, and the Speaker of the House, including the comments of the Ombudsman, no later than October 1, 2006.

The department conducted the public meetings and issued its report.<sup>12</sup> The report included the following recommendations: (1) The Legislature should not permit optional termination provisions to be applied retroactively; (2) The presumption of reasonableness should be removed from the proposed legislation, and the unit owners should be given the right to contest any aspect of a plan of termination; (3) Personal service or service via certified mail to the last known address or emergency contact address should be included in the proposed legislation; (4) The proposed legislation should be revised to require the judge to apportion costs and fees in an equitable manner, taking into account the merits of the case, the financial status of the parties, the outcome of the case, and other factors deemed relevant; (5) The Legislature should amend the Condominium Act to allow termination-for-cause based on changes in land use regulation or substantial destruction of the property as provided in the bill.

### **III. Effect of Proposed Changes:**

This bill substantially revises the provisions of the statute governing the termination of the condominium form of ownership of a property.

According to the Legislative Counsel for the Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL), 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.)
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 obtain additional money and does not provide a remedy for other owners to challenge the conduct.)

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<sup>12</sup> See <http://www.myflorida.com/dbpr/lsc/index.shtml>.

### **Legislative Findings**

This bill provides that it is the public policy of the state to provide a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination. It is also 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 bill also provides that s. 718.117, F.S., applies to all condominiums in this state in existence on or after July 1, 2007.

### **Termination Approval**

The bill creates s. 718.117(2)(a), F.S., to provide that regardless of any provision to the contrary in the condominium declaration, a condominium form of ownership may be terminated by a termination plan approved by the lesser of the lowest percentage of voting interests needed to amend the declaration<sup>13</sup> or as otherwise provided in the declaration for approval of termination when:

- The total estimated cost of necessary repairs 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
- It becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.

It creates s. 718.117(2)(b), F.S., that notwithstanding paragraph (a), a condominium in which at least 75 percent or more of the units are timeshare units may be terminated only 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.

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<sup>13</sup> Section 718.110(1)(a), F.S., provides that if the declaration fails to provide a method of amendment, an amendment must be approved by two-thirds of the owners of the units.

### **Optional Termination**

The bill creates s. 718.117(3), F.S., to provide for optional termination of the condominium form of ownership of the property if it is approved by at least 80 percent of the total condominium voting interests of the condominium unless as provided in s. 718.117(2) F.S., or unless the declaration provides for a lower percentage.

### **Exemption**

The bill provides that a plan of termination is not an amendment subject to s. 718.110(4), F.S., governing material alterations to the appurtenances to the unit. Appurtenances are identified in ss. 718.106 and 718.110(4), F.S. Under these provisions, rights such as ownership interest in the common elements and other appurtenant rights may not be changed except upon unanimous approval of the owners and lienholders, unless otherwise provided in the declaration as originally recorded.

### **Mortgage Lienholders**

The bill 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 in 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. If the approval is required and not given, a holder of a recorded mortgage lien who objects to the plan of termination may contest the plan. At the time of sale, the lien shall be transferred to the proportionate share of the proceeds assigned to the condominium parcel in the plan of termination or as subsequently modified by the court.

### **Powers in Connection with Termination**

The bill 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 certain powers in connection with termination, which powers are necessary to continue with the business and operation of the association.<sup>14</sup> These powers include the power to conduct the affairs of the association as necessary for termination or liquidation.

### **Natural Disasters**

The bill 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.

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<sup>14</sup> These powers are similar to the consent powers granted in s. 718.117(2), F.S. (2006).

The receiver shall have all the powers given to the board by the condominium documents, by the provisions of the bill concerning the powers in connection with termination, and by any other powers that are necessary to conclude the affairs of the association and are set forth in the order of appointment.<sup>15</sup>

### **Reports and Replacement of Receiver**

The bill 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 lienors at the mailing address provided to the association by the unit owners and the lienors.

The bill provides that 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)(j), F.S. The lienors of an association in termination representing at least 50 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. 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. 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.

A plan must specify:

- 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;
- The interests of the respective unit owners in the association property, common surplus, and other assets of the association;
- 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 the Allocation of Proceeds section as described below. If the condominium property or real property owned by the association is to be

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<sup>15</sup> Similar to powers granted in s. 718.117(4), F.S. (2006).

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 the Allocation of Proceeds section as described below.

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.

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.

### **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. The market values are to be determined by one or more independent appraisers selected by the association or termination trustee.

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; 2) the respective values of the units based on the most recent market value of the units before the termination; or 3) the respective interests of the units in the common elements specified in the declaration immediately before the termination.

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.

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.

### **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. Generally, the termination trustee will be vested with the powers given to the board.

If the association does not serve as the termination trustee, the trustee's powers are usually coextensive with those of the association. If the association is dissolved, the trustee will also have the powers necessary to conclude the affairs of the association.

### **Title Vested in Termination Trustee**

The bill provides that, if the termination plan is pursuant to a plan approved under the provisions for (1a) "Termination Because of Economic Waste or Impossibility," (1b) timeshare units, (2) "Optional Termination," or (3) court approval (subsection heading: "Jurisdiction For Plan of Termination Review") then the unit owners' rights and title 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 may contract for the sale of real property.

### **Notice**

Within 30 days after a plan has been recorded, the termination trustee must provide notice by certified mail, return receipt requested to all unit owners, lienors of the condominium property, and lienors of all units. The notice must include the book and page number of the public records of the plan, that the plan will be furnished upon written request, and that the unit owner or lienor has the right to contest the fairness of the plan.

Within 90 days after the effective date of the plan, the trustee must provide to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation (division) a certified copy of the recorded plan as well as certain recording information.

### **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.<sup>16</sup>

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. The apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in the bill.

The court must adjudge the rights and interests of the parties and order the plan to be implemented if it is fair and reasonable. If the court determines that the plan of termination is not fair and reasonable, the court may (i) void the plan or (ii) modify and approve the plan based on

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<sup>16</sup> This section provides for expedited trial procedures.

findings during the court proceedings. In such an action, the prevailing party may recover reasonable attorney's fees and costs.

### **Distribution**

Following termination, the condominium property, association property, common surplus, and other assets of the association are held by the termination trustee.

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, lienors of the condominium property, and lienors of each unit 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.

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. In the alternative, the bill provides for an interpleader action.<sup>17</sup>

The bill provides the order of priority for distributing the proceeds of any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets.

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.

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.

### **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.

### **Exclusion**

The provisions of this bill do not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums.

### **Effective date**

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<sup>17</sup> An interpleader action is a "suit to determine a right to property held by a usu. disinterested third party (called a *stakeholder*) who is in doubt about ownership and who therefore deposits the property with the court to permit interested parties to litigate ownership. • Typically, a stakeholder initiates an interpleader both to determine who should receive the property and to avoid multiple liability." *Black's Law Dictionary* (8<sup>th</sup> Ed. 2004).

The act would take effect July 1, 2007.

#### 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:

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 may be an unconstitutional impairment of obligation of contract, under s. 10, Art. I, Fla. Const., which provides in relevant part, “No... law impairing the obligation of contracts shall be passed.” This provision empowers the courts to strike laws that 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 *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (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:

- i. Whether the law was enacted to deal with a broad, generalized economic or social problem;
- ii. Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- iii. Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive.<sup>18</sup>

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<sup>18</sup> *Pomponio*, 378 So. 2d at 779.

The court in *United States Fidelity & 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.”<sup>19</sup> 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 entered has been regulated in the past. This is a consideration because 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.<sup>20</sup>
- If the state regulation constitutes a substantial impairment, the state needs a significant and legitimate public purpose behind the regulation.<sup>21</sup>
- 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.<sup>22</sup>

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. Thus, as to the threshold inquiry, at least on an as-applied-basis, the bill seems to operate as a substantial impairment of a contractual relationship. 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. The bill also 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.

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

The legislative purpose of the statute seems to indicate that 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.

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<sup>19</sup> *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spannaus*, 438 U.S. 234, 244 (1978)).

<sup>20</sup> *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

The last inquiry, whether the adjustment of the rights and responsibilities of the contracting parties are appropriate to the public purpose justifying the legislation, could be true for the “economic waste or impossibility” method of approving a plan of termination. Where there are situations involving economic waste or impossibility, the adjustments of the rights of condominium owners concerning approval of termination of the condominium form of ownership may seem as reasonable and of a character appropriate to the Legislature’s findings for this legislation. The other methods for approving a plan of termination may be considered unreasonable because in some circumstances they could be used for any reason to override the provisions of the declaration. Nevertheless, the adjustment of the rights and responsibilities of the contracting parties may be reasonable and appropriate because these other methods address deficiencies in the current law. As previously discussed, the current law, s. 718.117(7), F.S., places unit holders in the position of not being able to receive the market value of their investments and allowing one or more owners to withhold approval for the sale of the property<sup>23</sup> (after termination of the condominium) to obtain a disproportionate share of the proceeds.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

According to the department, the bill allows for termination of a condominium with less than 100 percent of the voting interests approval, which is currently provided in most of the existing condominiums. This would be most helpful in those situations where the condominium is uninhabitable, or laws and regulations prohibit the reconstruction, and not all of the unit owners will agree to the termination.

### **C. Government Sector Impact:**

The bill appears to leave the termination procedures within the jurisdiction of the Division of Land Sales, Condominiums, and Mobile Homes (division) in compliance and arbitration cases. If the division receives complaints regarding the new termination procedures, it may be required to expend investigative resources for these purposes; however, the Department of Business and Professional Regulation has indicated that any fiscal impact should be accommodated within current resources.

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<sup>23</sup> After termination of the condominium form of ownership, the current law, s. 718.117(7), F.S., provides that the property is owned by the unit owners in the same shares as each owner previously owned in the common elements, which is typically based on the square footage of the unit, not the market value. Because all of the property is owned as tenants in common after the termination of the condominium form of ownership, one or more owners could withhold approval for the sale of the property to extract a disproportionate share of the proceeds.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

According to the department, the lack of a definition of “natural disaster” and “interested person” in s. 718.117(7), F.S., may cause some uncertainty in the operation of the provision. The department states that if an association refuses to pay a contested bill after an unrelated hurricane affected the county, it is possible that the creditor will have standing to petition for termination. The department suggested that it may be that interested persons should be more closely tied to owners and mortgagees.

The department also provides that s. 718.117(10)(e), F.S., of the bill, which addresses distribution of insurance proceeds, does not address the allocation of the insurance deductible. The department states that this will result in uncertainty in how associations should allocate the insurance proceeds where, for example, termination occurs after a natural disaster has caused damage exceeding the deductible. The bill requires that the insurance proceeds for the common elements be paid to the unit owners in the percentage of ownership in the common elements. However, the insurance proceeds for the units may be distributed based on the fair market value of the units. Therefore, the distribution to each unit owner would be different depending on how the deductible is allocated to the proceeds. The department states that this problem could be fixed by requiring that the deductible be allocated in some designated manner.

## **VIII. Summary of Amendments:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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