

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Community Affairs Committee

BILL: CS/SB 998

INTRODUCER: Regulated Industries Committee and Senator Ring

SUBJECT: Condominium and Homeowners' Associations

DATE: April 6, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Rhea</u>	<u>RI</u>	Fav/CS
2.	<u>Molloy</u>	<u>Yeatman</u>	<u>CA</u>	Favorable
3.	_____	_____	<u>BI</u>	_____
4.	_____	_____	<u>JU</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The CS/SB 998 (the bill) provides an exemption from the requirement to retrofit a condominium with fire alarm systems or smoke-detection systems under certain conditions, and provides requirements for the payment of the lesser of a portion of the condominium or homeowners' association unpaid assessments or a percentage of a mortgage debt when a mortgagee or its successor or assignee has not acquired title to an owner-occupied unit within 1 year after filing of a foreclosure action. The liability for unpaid assessments after title is acquired by foreclosure or by recorded deed in lieu of foreclosure is limited to the amount paid by the mortgagee or its successor or assignee before the title is acquired.

The bill repeals requirements that condominiums at least 75 feet in height and which have a public elevator be capable of operating at least one elevator on an alternate power source.

The bill provides an effective date of October 1, 2009.

This bill substantially amends ss. 718.112, 718.116, and 720.3085, F.s., and repeals subsection (2) of s. 553.509, F.S.

II. Present Situation:

Condominiums

A condominium is a “form of ownership of real property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.”¹ A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.² A declaration is like a constitution in that it:

[S]trictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.³

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.⁴ A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it generally may be amended as to any matter by a vote of two-thirds of the units.⁵ Condominiums are administered by a board of directors referred to as a board of administration.⁶

Condominiums are regulated by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation (department), in accordance with ch. 718, F.S.

Condominium – Retrofitting Common Elements

Pursuant to s. 718.112(2)(1), F.S., a condominium association may not vote to forego the retrofitting with a fire sprinkler system of common areas in a high-rise building. A “high-rise building” is defined as a building that is greater than 75 feet in height where the building height is measured from the lowest level of fire department access to the floor of the highest occupiable story. The local authority with jurisdiction over firesafety cannot require completion of retrofitting of common areas with a sprinkler system before the end of 2014.

Condominium – Assessments and Foreclosures

Section 718.103(1), F.S., defines an “assessment” as the “share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner.” Section 718.103(24), F.S., defines a “special assessment” to mean “any assessment levied against a unit owner other than the assessment required by a budget adopted annually.”

A unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.⁷

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

³ *Neuman v. Grand View at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003).

⁴ Section 718.104(5), F.S.

⁵ Section 718.110(1)(a), F.S.

⁶ Section 718.103(4), F.S.

⁷ Section 718.116(1), F.S.

Section 718.116(1)(b), F.S., provides that if a first mortgagee, e.g., the mortgage lending bank, or its successor or assignee, acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure, the first mortgagee's liability for unpaid assessments is limited to the amount of assessments that came due during the 6 months immediately preceding the acquisition of title or 1 percent of the original mortgage debt, whichever is less. However, this limitation applies only if the first mortgagee is joined by the association as a defendant in the foreclosure action. This gives the association the right to defend its claims for unpaid assessments in the foreclosure proceeding. A first mortgagee who acquires title to a foreclosed condominium unit is exempt from liability for all unpaid assessments if the first mortgage was recorded prior to April 1, 1992.

The successor or assignee, in respect to the first mortgagee, includes only a subsequent holder of the first mortgage.

Homeowners' Associations Background

Chapter 720, F.S., provides statutory recognition to corporations that operate residential communities in this state, provides procedures for operating homeowners' associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.⁸

Section 720.301(9), F.S., defines a "homeowners' association" as a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 617, F.S., relating to not for profit corporations.⁹

Homeowners' associations are administered by a board of directors whose members are elected.¹⁰ The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents.¹¹ The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.¹²

Homeowners' Associations – Assessments and Foreclosures

Section 720.301(1), F.S., defines an "assessment" or "amenity fee" to mean:

a sum or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing

⁸ See s. 720.302, F.S.

⁹ Section 720.302(5), F.S.

¹⁰ See ss. 720.303 and 720.307, F.S.

¹¹ See ss. 720.301 and 720.303, F.S.

¹² Section 720.303, F.S.

documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.

Section 720.3085(2), F.S., provides a limitation on the liability of a first mortgagee, e.g., the mortgage lending bank, for unpaid assessments by a parcel owner that is similar to that provided in s. 718.116, F.S., for condominiums. If a first mortgagee acquires title to a parcel by foreclosure or by deed in lieu of foreclosure, the first mortgagee's liability for unpaid assessments is limited to the lesser of the amount of assessments that came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received or 1 percent of the original mortgage debt. However, this limitation applies only if the first mortgagee is joined by the association as a defendant in the foreclosure action. This gives the association the right to defend its claims for unpaid assessments in the foreclosure proceeding.

Section 720.3085(1), F.S., limits the priority of any lien, mortgage, or certified judgment of record on July 1, 2008, to the priority it had before July 1, 2008.

Vertical Accessibility (s. 553.509, F.S)

Chapter 2006-71, Laws of Florida, was enacted by the Legislature in response to the 2004 and 2005 hurricane seasons. Subsection (2) of s. 553.509, F.S., provides that any person, firm, or corporation that operates a residential multifamily dwelling, including a condominium, that is at least 75 feet high and that contains a public elevator must have at least one public elevator that is capable of operating on an alternate power source for emergency purposes. The alternate power source that controls elevator operations must also be capable of powering any connected fire alarm system in the building, and must be capable of providing emergency lighting to the interior lobbies, hallways, and other portions of the building used by the public. The provisions also apply to each newly constructed residential multifamily dwelling, including a condominium, that is at least 75 feet high and contains a public elevator.

As part of the annual elevator inspection required under s. 339.061, F.S., certified elevator inspectors must confirm that all installed generators are in working order, have current inspection records posted in the elevator machine room or other place conspicuous to the elevator inspector, and that the required generator key is present in the lockbox posted at or near the installed elevator.

Interim Report 2009-125 – Review of Elevator Safety and Regulation

Interim Report 2009-125, prepared by the Regulated Industries Committee, studied the extent of compliance with s. 553.509(2), F.S., and reviewed the problems that citizens and governmental agencies have had in implementing these requirements. Senate professional staff recommended that the Legislature consider the repeal of s. 553.509(2), F.S. The repeal recommendation was based upon the following findings and conclusions:

- The requirement may pose a threat to public safety, i.e., the availability of emergency power for elevators during the five days after a declared state of emergency may encourage persons to stay in high-rise buildings and areas that are not safe and do not have the necessary infrastructure for safe habitation;

- The requirement does not have a clearly defined state or local agency that is responsible for its on-going enforcement;
- Enforcement of the requirement by a state agency would carry a fiscal burden without a clearly defined benefit that may out-weigh the public safety concerns;
- The requirement does not appear to have any clearly defined impact on elevator safety;
- It is not clear what penalty, if any, should be imposed on building owners who cannot comply with the requirement because they cannot afford the expense; and
- To the extent that an alternate emergency power for elevators provides a public benefit, the Florida Building Code currently requires emergency power for elevators in new high-rise residential construction.

Alternatively, the professional staff recommended that the Legislature could continue to require emergency generated power pursuant to s. 553.509(2), F.S., but, to ensure uniform compliance, provide funding for the Bureau of Elevator Safety within the Division of Hotels and Restaurants, Department of Business and Professional Regulation, for the enforcement of this provision.

III. Effect of Proposed Changes:

Condominium – Retrofitting Common Elements

The bill amends s. 718.112(2), F.S., to provide an exemption from the requirement to retrofit a condominium with fire alarm systems or smoke-detection systems. The exemption applies to condominiums that have one and one-half hour or higher fire-rated walls and are not a high-rise building.

Condominium Associations – Assessments and Foreclosures

The bill amends s. 718.116(1)(b), to provide that if a first mortgagee or its successor or assignee has not acquired title to an owner-occupied unit within 1 year of the filing of a foreclosure action, the first mortgagee or its successor or assignee must pay to the condominium association or the homeowners association the lesser of the unit's unpaid common expenses and regular periodic assessments which accrued or came due during the immediately preceding 6 months or 1 percent of the original mortgage debt. The liability for unpaid assessments after title is acquired by foreclosure or by recorded deed in lieu of foreclosure is limited to the amount paid by the mortgagee or its successor or assignee before the title is acquired.

Homeowners' Associations – Assessments and Foreclosures

The bill amends s. 720.3085(2)(c), F.S., to provide that if a first mortgagee or its successor or assignee has not acquired title to an owner-occupied unit within 1 year of the filing of a foreclosure action, the first mortgagee or its successor or assignee must pay to the condominium association or the homeowners association the lesser of the unit's unpaid common expenses and regular periodic assessments which accrued or came due during the immediately preceding 12 months or 1 percent of the original mortgage debt. The liability for unpaid assessments after title is acquired by foreclosure or by recorded deed in lieu of foreclosure is limited to the amount paid by the mortgagee or its successor or assignee before the title is acquired.

Vertical accessibility

The bill repeals subsection (2) of s. 553.509, F.S., relating to alternate power sources for public elevators in multifamily residential buildings of at least 75 feet, including condominiums.

Effective Date

The bill provides an effective date of October 1, 2009.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill amends ss. 718.116, and 720.3085, F.S., to require the payment of unpaid assessment liability before the first mortgagee or its successor or assignee acquires title to the condominium unit parcel in a homeowners' associations, respectively.

Unless the mortgage instrument provides for the application of laws that are enacted after the date the mortgage is entered into, the retroactive application of the provision in s. 720.3085, F.S., to the foreclosure of a parcel in a homeowners' association may violate the Contract Clause,¹³ the prohibition against ex post facto laws,¹⁴ and the Due Process clauses¹⁵ of the U.S. Constitution. The common law also provides that the government, through rule or legislation, cannot adversely affect substantive rights once such rights have vested.¹⁶

The Contract Clause prohibits states from passing laws which impair contract rights. It only prevents substantial impairments of contracts.¹⁷ The courts use a balancing test to determine whether a particular regulation violates the contract clause. The courts measure the severity of contractual impairment against the importance of the interest advanced by the regulation. Also, courts look at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest.¹⁸ Generally, courts accord considerable deference to legislative determinations relating to the need for laws which impair private obligations.¹⁹ However, courts scrutinize the impairment of public contracts in a stricter

¹³ Article I, s. 10, U.S. Constitution.

¹⁴ Article I, s. 9, U.S. Constitution.

¹⁵ Fifth and Fourteenth Amendments, U.S. Constitution.

¹⁶ *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).

¹⁷ *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1923).

¹⁸ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

¹⁹ *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945).

fashion. They exhibit less deference to findings of the Legislature because the Legislature may stand to gain from the outcome.²⁰

In regards to foreclosure of a condominium unit, the application of the provision for early payment in s. 718.116, F.S., may not unconstitutionally impair contract rights if the declaration of condominium or articles of incorporation expressly provide that the condominium is bound by future changes to the laws governing condominiums.²¹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

First mortgagees or their successors or assignees of property in a condominium or homeowners' associations would be required to pay unpaid assessments before they acquire title to the property in a foreclosure on a recorded deed in lieu of foreclosure. The unpaid assessment must be paid one year after a foreclosure action is filed. The amount of the unpaid assessment liability is the lesser of the amount accrued during the immediately preceding 6 months for a condominium unit or 12 months for a parcel in a homeowners' association. Alternatively, the liability may be 1 percent of the original mortgage debt. This liability after the foreclosure or recorded deed in lieu of foreclosure is limited to the amount paid before the title is acquired. The amount of liability is the same that is required under current law.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

²⁰ *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). See generally, Leo Clark, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183 (1985).

²¹ *Century Village, Inc. v. Wellington*, 361 So.2d 128 (Fla. 1978).

CS by Regulated Industries on April 1, 2009:

The committee substitute (CS) deletes sections 1, 2, 4, 6, 7, 9, and 10 of the original bill, relating to ss. 718.110, 718.111, 718.113, 718.303, 720.303, 720.3076, and 720.30851, F.S.

The CS amends ss. 718.112(2)(l), F.S., to provide an exemption for the retrofitting of fire alarm systems or smoke-detection systems.

The CS amends ss. 718.116(1)(b) and 720.3085, F.S., to provide requirements for the payment of the lesser of a portion of the association unpaid assessments or a percentage of a mortgage debt when a mortgagee or its successor or assignee has not acquired title to an owner-occupied unit within 1 year after filing of a foreclosure action. The liability for unpaid assessments after title is acquired by foreclosure or by recorded deed in lieu of foreclosure is limited to the amount paid by the mortgagee or its successor or assignee before the title is acquired. The amount of liability is the same that is required under current law.

B. Amendments:

None.