

2008 Legislative Update

Note: The following summaries of the bills passed by the 2008 Legislature are not intended to constitute legal advice and you should not rely on them as legal advice. Whether particular legislative amendments apply to you in your particular set of circumstances, and how it may apply to you and your association, are questions that are beyond the intended scope of this update, and you should always consult with your attorney if questions arise. Moreover, this update contains mere summaries of the bills examined and is intended to explain amendments that are of common interest to practitioners, owners and associations, and not all parts of every bill are discussed.

Committee Substitute for House Bill 995.

This bill has been signed by the Governor and has been assigned the chapter law number of 2008-28, Laws of Florida. It will be effective on October 1, 2008.

CHANGES TO CHAPTER 468, F.S., COMMUNITY ASSOCIATION MANAGEMENT

- The bill contains a number of significant amendments to Chapter 468 governing community association managers. While under the old law, a manager's license was only required where the association being managed operated more than 50 units, under the amendments an individual managing an association containing more than 10 units must be licensed.
- The concept of a community association management "firm" has been introduced into the statute. The new law requires that management firms obtain a license from the Department of Business and Professional Regulation where the firm is responsible for the management of more than 10 units or a budget of \$100,000 or greater. A firm must employ at least one licensed CAM in order to be licensed. A firm shall only employ a licensed CAM in the direct provision of management services.
- Amendments to the part of the statute creating the Regulatory Council of Community Association Managers would allow members of the Council to serve on the Council even if the individual is or has been a resident or board member of a community association. Further, the Council is permitted to establish public education programs. The Council is charged with receiving public input, reviewing rules, and recommending any changes needed to the Division's education programs.
- Regarding the licensure of managers, an applicant for a license who is found to have provided management services without a license may be denied a license.
- When conducting investigations under the chapter, the Department is required to investigate complaints received from other divisions in the Department. In conducting its investigations, the Department is required to notify the complainant within 30 days whether the complaint falls within the jurisdiction of the Department and must complete its investigation within 90 days. Contracting, on behalf an association, with any entity in which a licensee has a financial interest is grounds for disciplinary proceedings.

Chapter 718 CHANGES

- 718.111(1)(b). A director who abstains from voting shall be presumed to have taken no action on the proposal. Previously, under section 617.0824, Florida Statutes, a board member was deemed to have voted in favor of the action taken where the board member abstained due to a conflict of interest.
- 718.111(1)(d). Creates a cause of action for damages where an officer, director or agent fails to perform his or her duties and where the breach of duties constitutes a violation of the criminal law, or where the officer or director derives an improper personal benefit or acts recklessly or in bad faith. *Note that it is possible that a CAM or licensed management company may face potential liability under this provision.*
- 718.111(11) Official Records. All official records shall be maintained for at least 7 years and must be made available upon request of an owner within 45 miles of the condominium or within the county in which the condominium is located. Anyone who knowingly defaces or destroys an accounting record or who knowingly fails to create or maintain accounting records may be fined individually by the Department. Contracts for work to be performed must be maintained among the official records for 7 years. An association upon receipt of a request to view the records has the option of making the records available electronically or on the internet. The list of records exempt from inspection by unit owners has been expanded to include social security numbers, driver's license numbers, credit card numbers and other personal identifying information. *Comment: The phrase "personal identifying information," is quite broad on its face and may even prohibit the release of names and unit addresses. It will be interesting to see how broadly this provision is interpreted by the courts.*
- 718.111(13) Financial Reporting. Where the members vote to downgrade the financial reporting requirement, for example from an audit to a review, the vote may be effective for the following fiscal year as well as the current year if the proposal being voted on provides for this. Also, any audit or review of the association's records while the association is under the control of the developer shall be paid for by the developer. Finally, an association may not waive (downgrade) the financial reporting requirements of the statute for more than 3 consecutive years.
- 718.112(2)(b)2. An association may no longer cast a vote for each unit owned by the association, and any unit owned by the association does not count towards a quorum.
- If at least 20% of the voting interests petition the board to address a particular item of business, the board must at its next regulated scheduled meeting place the item on the agenda, but in any event, the item must be scheduled to be heard not later than 60 days from the receipt of the request.
- Notice of board meetings at which regular or special assessments are to be considered now must specifically state that assessments will be considered and the nature, estimated cost and description of the purpose of the assessment.
- 718.112(2)(d) Unit owner Meetings and Elections. If the bylaws do not address the location of the annual meeting, the annual meeting of the unit owners must be held within 45 miles of the condominium. The terms of incumbent board members shall be automatically extended if no other unit owners run for the position. The terms of the board members expire at the election, and such board members may seek re-election unless otherwise permitted by the bylaws. Two year staggered board terms are allowed if

a majority of the unit owners approve this. A person who has been suspended or removed from the board by the Division, or who is delinquent in the payment of any fee or assessment, is not eligible for board membership. A candidate for the board must provide a signed certification to the association on a form provided by the Division attesting that he or she has read and understands the governing documents and the statute and administrative rules. *Note: It is uncertain whether the failure of a candidate to include this certification will render the candidate ineligible for candidacy, or if the individual is allowed on the board, whether his or her actions as a board member will be void or voidable. Note further that the interaction, if any, between this certification and the post-election certification required by HB 679 is uncertain. The prevailing theory is that since HB 679 will take effect after this bill, the provisions of that bill reflect the latest expression of the legislative will and should prevail over the pre-election certification requirements. The firm does not necessarily ascribe to this theory and it may be prudent to follow both laws absent judicial clarification or until the statutory revision committee addresses the issue.* Finally, while previously any association was able to opt out of the statutory election method, under the new law only those associations operating 10 units or fewer may vote to opt out of the statutory voting system requiring that elections be conducted by secret ballot.

- Proxies and Reserves. Limited proxies voted for the purpose of waiving or reducing reserves must contain a disclosure stating that waiving or reducing the funding of reserves may result in special assessments for these items.
- 718.112. Directors. A director or officer delinquent in the payment of regular assessments shall be deemed to have abandoned the office. A director or officer changed with a felony theft or embezzlement offense involving association funds or property shall be removed from the board and may not be appointed or elected to another officer or director position. If the charges are resolved without a conviction, the individual shall be reinstated for any remainder of the term.
- 718.113(2) Material Changes and the Display of Religious Ornaments. An association may not refuse to allow an owner to attach a religious object not to exceed a certain size to the mantle or the frame of the door.
- 718.121 Liens. An association is required to give a unit owner 30 days written notice prior to filing the claim of lien for unpaid assessments.
- 718.1224 SLAPP suits. The provision from chapter 720 prohibiting an association from initiating harassing lawsuits against individual owners has been adopted into chapter 718.
- 718.1265 Association Emergency Powers. This new section lists new powers given to associations during a declared state of emergency such as a hurricane. Such an association may conduct owner and board meetings with relaxed notice requirements, may enter into contracts with state and local government for debris removal, may implement a disaster plan including shutting down elevator service, electricity and water, determine which parts of the property are uninhabitable, may require the property to be evacuated, may mitigate further damage by entering into units to remove debris in order to prevent mold and mildew, may contract on behalf of an owner to enter the units and perform remedial services, may levy special assessments without advance notice, and may borrow money to fund emergency repairs.
- Turnover of Control. Where a developer in charge of the association files a petition in the bankruptcy court or when a receiver is appointed for the developer, turnover from

developer control is triggered. Also, the new law requires the preparation of a turnover inspection report under seal of an architect or engineer attesting to the maintenance, useful life, and replacement costs of the major systems of the condominium.

- 718.3025 Contracts. Contracts for maintenance or management services must disclose any financial or ownership interest a board member may have.
- 718.3026 Contracts for Services. Only associations with 10 or fewer units may opt out of this section of the statute which requires that an association obtain competitive bids for certain products and services. Special disclosures are required before an association may enter into such a contract where its directors are financially interested in the company that the association is contracting with, and the contract must be approved by 2/3 of the directors, and may be canceled by a majority of the owners present at a meeting.
- 718.501 Division powers. The ability of the Division to conduct investigations in post-turnover associations has been abolished except for financial issues, elections and access to official records. At the same time, the Division has been given the authority to enter orders against managers or management firms. The Division may also order the removal of an individual officer or board members for willfully and knowingly violating the statute, rules or orders of the Division. The Division is also directed to issue a subpoena to an association that has twice refused to produce official books and records for inspection by an owner who so requests by certified mail.
- 718.503 Nondeveloper purchaser disclosure. The statute is amended to address unit resales. Nondeveloper unit owners selling their units are required to provide a disclosure form drafted by the Division that explains the operation of the association to the new purchaser.

COMMITTEE SUBSTITUTE FOR HOUSE BILL 679.

This bill, that featured many proposed changes to chapter 720, F.S., was vetoed by the Governor.

HOUSE BILL 601;

Effective date July 1, 2008. Has been signed by the Governor and is now in effect.

CHANGES TO CHAPTER 718, FLORIDA STATUTES

NEW INSURANCE LAW.

This legislation adopts the insurance proposal of the Condominium Advisory Council and will apply to every condominium existing in the State whenever created.

- Under the new law, adequate hazard insurance shall be based on full replacement cost and is to be determined by an independent insurance appraisal conducted at least once every 36 months.
- Additional steps to permit self-insurance have been included in the new law.
- The level of deductibles shall be established by the board at a meeting open to all owners, with special notice required.

- The changes to the law require every hazard insurance policy issued or renewed on or after January 1, 2009 to provide coverage for all portions of the condominium property as originally installed or replacement of like kind and quality in accordance with the original building specification, for all alterations or additions to the condominium property or association property made pursuant to s. 718.113(2), Florida Statutes, with such coverage to exclude all personal property within the unit or limited common elements, floor, wall and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments.
- Individual owners are required to purchase hazard and liability insurance and must provide the association with proof of such insurance. Insurance policies purchased by individual owners must provide that coverage is excess coverage over the amount recoverable from any other policy, and such policies must contain special assessment coverage of not less than \$2,000 per occurrence.
- All improvements or additions to the condominium property that benefit fewer than all owners shall be insured by the owner or owners entitled to the use of the improvement, or may be insured by the association at the cost of those owners using the improvements.
- All reconstruction work after a casualty loss shall be undertaken by the association except that an owner may undertake reconstruction if allowed by the board.
- Owners are responsible for the cost of reconstructing any property they are required to carry insurance on.
- Any portion of the condominium property required to be insured by the association shall be reconstructed and repaired as a common expense, and all deductibles and uninsured losses are common expenses, with certain exceptions. An association may choose to opt out of these provisions regarding the allocation of repair or construction expenses and may allocate such expenses either as provided in the declaration as originally recorded or as amended. There are procedural requirements for the opt out procedure contained in the new law.
- An association is not required to pay for repairing or reconstructing expenses to any improvement installed by a current or former unit owner or if the by the developer if the improvement only benefits one unit and is not part of the standard improvements installed as part of the original construction.

OTHER AMENDMENTS TO CHAPTER 718:

- Common expenses include any expenses or items required to be incurred or installed by federal, state or local government, such as mandated fire safety equipment or the maintenance of a master water meter system.
- The authority of an association to charge for a certificate showing how much an owner owes in assessments was clarified.
- Throughout this bill, the name of the former Division of Florida Land Sales, Condominiums, and Mobile Homes has been changed to the Division of Condominiums, Timeshares, and Mobile Homes to reflect that the Division no longer regulates land sales pursuant to former Chapter 498, Florida Statutes, which has been repealed. Many of the amendments contained in the bill bring into Chapter 718 the former powers and duties of the Division under the former Chapter 498.

SENATE BILL 1378 (Effective date July 1, 2008).

As relevant here, the bill amends Chapter 720, Florida Statutes, which regulates homeowners associations. The new law expands the rights of homeowners association members to fly a flag. In addition to permitting a homeowner to display one portable United States or State of Florida flag, any homeowner may erect a freestanding flagpole not higher than 20 feet on any portion of the homeowner's property regardless of any restrictions in the documents, so long as the flagpole is not located within an easement or interfere with sightlines at intersections. The homeowner may further display a United States flag or a United States armed forces flag.

SENATE BILL 1986 (Effective July 1, 2008; signed by Governor on 6/17/08).

- The bill changes HOA lien procedures in several significant ways. As a general matter, the procedure for filing and perfecting a lien under the new law is made more consistent with the procedures applicable to condominium associations. Under the new law, an association lien relates back to the date of the filing of the original declaration in the public records, except when the association lien is competing with a first mortgage of record, in which case the association lien is effective from the time the claim of lien is actually recorded in the public records. Thus, first mortgages of record may well have a higher priority than association liens as a general proposition.
- The claim of lien must contain certain basic information enumerated in the new law.
- A form notice of contest of lien is provided in the new law whereby the homeowner may contest the lien.
- The association can bring an action to foreclose its lien and may also bring an action to recover a money judgment. The association is entitled to recover its reasonable attorney's fees in the foreclosure action.
- Under prior law, a new homeowner was equally liable the former homeowner for assessments unpaid by the former owner. Under the 2008 changes to the law, the liability of a first mortgagee of record is limited to the lesser of the unpaid assessments accruing during the 12 months before the acquisition of title or one percent of the mortgage debt. These limitations only apply if the first mortgagee filed suit against the parcel owner and named the association in the lawsuit.
- Additional procedures relating to the foreclosure action are specified.