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2010 CONDOMINIUM & COMMUNITY ASSOCIATION LEGISLATION

I. Introduction

The meltdown in the Florida economy has affected all segments of Florida condominium developments. Numerous developers have either defaulted on their construction loans and are being foreclosed or have gone into bankruptcy because of the significant drop in project values and the viability of purchasers—some of this is a market effect, some the result of issues involving the project documents or development status or strategy that have resulted in numerous rescissions of purchase contracts, and some merely because the developer was overextended financially from an early point in time but the economic crash was the trigger that revealed the problems. Lenders have been damaged because of underperforming collateral, the precipitous drop in property values, the myriad of lawsuits seeking rescission that have left the borrower without any real ability to succeed, and the uncomfortable realization that the project will have to be taken over and completed at a significant financial loss. Unit owners have realized that their units are not worth what they were purchased for and there is little hope of seeking significant appreciation in the short term, as well as finding themselves unable to meet mortgage obligations which has led to numerous foreclosures. Condominium associations are unable to maintain the projects because of the inability to collect assessments from association members and developers who are not contributing financially to the association's financial situation. All in all, every segment has been touched in a significant and detrimental manner.

The Florida Legislature recognized these problems and took steps to help the Florida condominium industry to recover, and passed Senate Bill 1196 and House Bill 561. These bills were signed into law by Governor Crist on June 1, 2010, and are referred to as the "Legislation." The Legislation will take effect on July 1, 2010. The Legislation creates the Distressed Condominium Relief Act, and also provides associations with the ability to collect monies from tenants where the owner is not paying assessments. The Legislation also contains a variety of other changes to the condominium, cooperative and homeowners association statutes, changes which provide better protections and disclosures to owners. A summary of the Legislation is provided below.

II. Distressed Condominium Relief Act—Chapter 718, Including New Part VII

A. Legislative Findings and Intent—Section 718.702

The legislative findings of the Distressed Condominium Relief Act set out the justification for creating new Part VII of Chapter 718 (and the related changes to Sections 718.103(16) and 718.501). The Legislature acknowledged the "massive downturn in the condominium market" throughout the state and identified the inability to find purchasers for the inventory of unsold condominium units as a continued cause of devaluation. The findings note that potential purchasers of unsold units are reluctant to move forward because of liability inherited from the original developer and the "unknown and unquantifiable risks" associated with such purchases. To prevent the stagnation of the condominium projects that contain unsold units, the Legislature has concluded that successor purchasers of bulk units (including foreclosing mortgagees) should be granted relief from certain

provisions of the Florida Condominium Act. Such relief, the Legislature states, would create economic opportunities for successor purchasers that would benefit existing unit owners and condominium associations.

B. New Classifications: "Bulk Assignee" and "Bulk Buyer"

1. Not a "Developer"—Section 718.103(16)

A party that qualifies as a bulk assignee or bulk buyer is explicitly excluded from the definition of "developer" under the new exception added to the definition of "developer."[1]

2. "Bulk Assignee"—Sections 718.703(1), 718.704(5)

A "bulk assignee" is defined as a person who (a) acquires more than seven condominium parcels, and (b) receives an assignment of some or all of the rights of the developer by a written instrument recorded as an exhibit to the deed or as a separate instrument in the public records of the county in which the condominium is located. Such an assignment of rights may be made by (i) the developer; (ii) a previous bulk assignee; or (iii) a court acting on behalf of the developer or the previous bulk assignee.

3. "Bulk Buyer"—Section 718.703(2)

A "bulk buyer" is defined as a person who acquires more than seven condominium parcels but does *not* receive an assignment of developer rights other than:

- the right to conduct sales, leasing, and marketing activities within the condominium;
- the right to be exempt from the payment of working capital contributions to the condominium association arising out of, or in connection with, the bulk buyer's acquisition of a bulk number of units; and
- the right to be exempt from any rights of first refusal that may be held by the condominium association and would otherwise be applicable to subsequent transfers of title from the bulk buyer to a third party purchaser concerning one or more units.

4. Limit on Number of Bulk Assignees and Bulk Buyers for a Single Condominium Project—Section 718.704(5)

There may be multiple bulk buyers for a single condominium project at the same time, but there may be only one bulk assignee for a condominium at any particular time. If more than one acquiring party receives an assignment of developer rights from the same person, the bulk assignee is the acquiring party whose instrument of assignment is recorded first.

[1] Additional changes to the definition of "developer" are discussed below in Part VI(A) on page 12.

5. Exclusion for Bad Intent or Insider Status—Section 718.704(3)

A party that acquires condominium parcels will not be classified as a bulk assignee or a bulk buyer if (i) the transfer to the acquiring party was made with the intent to hinder, delay, or defraud any purchaser, unit owner, or the association, or (ii) if the acquiring party is a person who would be considered an insider under the fraudulent conveyance statute, Section 726.102(7).

6. Forfeiture for Failure to Substantially Comply—Section 718.705(5)

The "[f]ailure of a bulk assignee or bulk buyer to substantially comply with all the requirements in this *part* results in the loss of any and all protections or exemptions provided under this *part*" (emphasis added). While this language is contained within a statute that discusses transfer of control of the condominium association in a bulk purchase scenario, the language applies to all matters covered under Part VII.

7. Sunset of "Bulk Assignee," and "Bulk Buyer" Designations—Section 718.707

The final sentence of the legislative findings in Section 718.702 expresses the Legislature's concern that open-ended exemption for bulk assignees and bulk buyers could harm existing unit owners and condominium associations. Accordingly, Section 718.707 allows a party to qualify as a bulk assignee or bulk buyer only as to condominium parcels acquired before July 1, 2012. The date that a parcel is "acquired" is established by either (i) the recording of a deed (or other instrument of conveyance) in the public records of the county in which the condominium is located, or (ii) the issuance of a certificate of title in a foreclosure proceeding.

C. Scope of Liability Following Bulk Acquisition of Units

Generally, liability following the bulk acquisition of units is as follows - the original developer's liability is essentially unchanged, a bulk assignee assumes all liability of an original developer, unless excluded by statute, and a bulk buyer's liability must be expressly assumed or provided by statute. A more detailed description follows.

1. Original Developer—Section 718.708

An assignment of developer rights to a bulk assignee or bulk buyer does not release the original developer from liability under the declaration of condominium or Chapter 718.

Furthermore, unless specifically excluded by Distressed Condominium Relief Act, the developer's liability for violations of Chapter 718 is not waived, released, compromised, or limited by the Distressed Condominium Relief Act. This includes liability for claims brought by unit owners, bulk assignees, and bulk buyers.

2. Bulk Assignee

A bulk assignee assumes and is liable for all duties and responsibilities of the developer under the declaration of condominium and Chapter 718, except those explicitly excluded by the Distressed Condominium Relief Act (outlined below), as follows:

(a) Warranties—Section 718.704(1)(a)

Unless expressly assumed, a bulk assignee is not liable for warranties of the developer under Sections 718.203(1) (standard condominium warranties) and 718.618 (converter warranties); however, a bulk assignee will have warranty liability under Section 718.203(1) for design, construction, development or repair work performed by or on behalf of such bulk assignee.

(b) Converter Reserves and Converter Warranties—Section 718.704(1)(b)

Unless expressly assumed, a bulk assignee is not liable for any obligation to (i) fund converter reserves under Section 718.618 for units not acquired by the bulk assignee, or (ii) provide converter warranties for certain portions of the condominium property.

(c) Audit of Association Finances—Sections 718.704(1)(c), 718.705(3)

Unless expressly assumed, a bulk assignee is not liable for the requirement to provide a cumulative audit of the association's finances at transfer of control of the condominium association. However, such an audit is still required for any period during which the bulk assignee controls the association (*see* 718.704(1)(c)), and such responsibility commences as of the date on which the bulk assignee elected a majority of the members of the board of administration (*see* Section 718.705(3)).

(d) Liability of Board of Administration Actions—Section 718.704(1)(d)

Unless expressly assumed, a bulk assignee does not have responsibility for any liability arising out of or in connection with actions taken by the board of administration or the developer-appointed directors before the bulk assignee assumed control of the board of administration.

(e) Failure to Fund Guaranteed Assessments—Sections 718.704(1)(e), 718.704(2)

Unless expressly assumed, a bulk assignee does not have responsibility for any liability arising out of the developer's failure to fund previous assessments or resolve budgetary deficits in relation to the developer's right to guarantee assessments. *See* Section 718.704(1)(e).

A bulk assignee who does not assume the rights of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to Section 718.116 also does not assume and is not liable for the obligations of the developer with respect to a guarantee. However, such a bulk assignee

is responsible for payment of assessments in the same manner as all other owners of condominium parcels. *See* 718.704(2).

A bulk assignee who assumes the rights of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to Section 718.116 also assumes and is liable for all obligations of the developer with respect to that guarantee—including any requirement to fund reserves—for as long as the guarantee remains in effect. *See* 718.704(2).

3. Bulk Buyer—Section 718.704(2)–(3)

A bulk buyer is liable only for the duties and responsibilities of the developer (i) as expressly assumed in writing by the bulk buyer, or (ii) as specifically provided in the Distressed Condominium Relief Act. *See* Section 718.704(3).

A bulk buyer (who, by definition does not assume the rights of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to Section 718.116) does not assume and is not liable for the obligations of the developer with respect to such a guarantee, but *is* responsible for payment of assessments in the same manner as all other owners of condominium parcels. *See* Section 718.704(2).

D. Association Matters

The Distressed Condominium Relief Act contains several provisions related to the operation and turnover of the association.

1. Waiver or Reduction of Reserves—Section 718.706(3)

A bulk assignee, while in control of the board of administration of the association, may not authorize either of the following actions, unless such action is approved by majority of the voting interests not controlled by the developer, bulk assignee, or bulk buyer:

- Waiver of reserves or reduction of funding for reserves, pursuant to Section 718.112(2)(f)(2).
- Use of reserves expenditures for other purposes, pursuant to Section 718.112(2)(f)(3).

2. Contracts of the Association—Section 718.706(4)

Unit owners continue to enjoy all of the protections offered by Section 718.302 as to agreements entered into by the association before unit owners other than the developer, bulk assignee, or bulk buyer elected a majority of the board of administration. Furthermore, a bulk assignee or a bulk buyer must comply with all the requirements of Section 718.302 regarding any contracts entered into by the association during the period the bulk assignee or bulk buyer maintains control of the board of administration.

3. Transfer of Control of the Association—Section 718.705

As a general matter, unless transfer of control has already taken place pursuant to Section 718.301(1), the bulk assignee must turn over control pursuant to Section 718.301, as if it were the developer. *See* Section 718.705(2). However, if there is a conflict between Sections 718.301 and Section 718.705, the latter controls. *See* Section 718.705(4).

(a) Timing—Section 718.705(1)

For purposes of determining the timing for transfer of control under Sections 718.301(1)(a)–(b), a condominium parcel acquired by a bulk assignee is not "conveyed to a purchaser" or "owned by an owner other than the developer" until that condominium parcel is conveyed to an owner that is not a bulk assignee.

Note that a drafting error in line 2012 of the second engrossed version of SB 1196 omits the word "not" from this provision. Omission of this critical term renders the text of the amendment almost nonsensical.

(b) Delivery of Items—Section 718.705(3)

If the bulk assignee turns over control of the association under Section 718.301, the bulk assignee must deliver all of those items required by Section 718.301(4). However, recognizing that it may be difficult—if not impossible—for a bulk assignee to secure possession of all of the required items, Section 718.705(3) provides some latitude.

First, the bulk assignee is not required to deliver any items or documents that it did not possess during the period in which it was entitled to control the association.

Second, a bulk assignee must undertake a "good faith effort" to acquire the items required to be delivered by Section 718.301(4). If the bulk assignee is unable to obtain all of those items, it must provide written certification to the association providing the name or description of each item that could not be obtained. Delivery of that certificate to the association relieves the bulk assignee of its responsibility to deliver the items listed on the certificate, as would otherwise be required by Sections 718.112 and 718.301 and by Part VII of Chapter 718.

(c) Audit of Association Finances—Sections 718.704(1)(c), 718.705(3)

The responsibility of the bulk assignee to prepare an audit of association finances required by Section 718.301(4)(c) commences as of the date on which the bulk assignee elected a majority of the members of the board of administration. *See* Section 718.705(3). Note, however, that a bulk assignee is not liable for the requirement to provide a *cumulative* audit of the association's finances as required by Section 718.301(4)(c) unless the bulk assignee expressly assumes that requirement.

E. Offering by Bulk Buyer—Section 718.706

1. Documents to be Filed with Division and Provided to Prospective Purchasers or Tenants—Section 718.706(1)

A bulk assignee or bulk buyer must file the following documents with the Division and provide them to a prospective purchaser or tenant:

- Either (i) an updated prospectus or offering circular or (ii) a supplement to the prospectus or offering circular filed by the original developer. The update or supplement must comply with Section 718.504.
- A form of contract for sale and for lease, which must comply with Section 718.503(2).
- An updated Frequently Asked Questions and Answers Sheet.
- An executed escrow agreement, if required under Section 718.202.
- The financial information required by Section 718.111(13)—unless (i) the appropriate financial information does not exist or cannot be prepared and (ii) a specific conspicuous type disclosure is added to the form of purchase contract. *See* Section 718.706(1)(d).

2. Disclosure Statement—Section 718.706(2)

A bulk assignee must file a disclosure statement with the Division and provide it to prospective purchasers before offering any unit for sale or for lease with a term exceeding five years. The disclosure statement must include, but is not limited to:

- A description of any rights of the developer that have been assigned to the bulk assignee or bulk buyer. [Note: there is an inconsistency in the statute, as Section 718.706(2) is stated to apply only to bulk assignees but this requirement is stated to apply to both bulk assignees and bulk buyers]
- A conspicuous type statement disclosing the limited liability for developer warranties.
- A conspicuous type statement disclosing the limited obligation to fund converter reserves or provide converter warranties, if the condominium is a conversion subject to Part VI of the Florida Condominium Act.

3. Declaration Requirements Concerning Transfer of Units—Section 718.706(5)

A bulk buyer is subject to all requirements contained in the declaration regarding the transfer of a unit—including sales, leases, and subleases. A bulk buyer is not entitled to any exemptions afforded a developer or successor developer under this Chapter 718 regarding the transfer of a unit, including sales, leases or subleases.

III. Amendments Related to the Distressed Condominium Act

The following amendments are not included in the new Distressed Condominium Relief Act, but they are directly related to it.

A. Division of Florida Condominiums, Timeshares, and Mobile Homes—Section 718.501

The majority of changes to Section 718.501 involve the expansion of existing provisions related to the Division's authority to regulate bulk assignees and bulk buyers.

1. Expansion of Existing Provisions to Apply to Bulk Assignees and Bulk Buyers

The following provisions are expanded to apply to bulk assignees and bulk buyers without making any other substantive change:

- Authority of the Division to act upon complaints with respect to associations under the control of a bulk assignee or bulk buyer. *See* Section 718.501(1).
- Authority of the Division to act upon complaints pursuant to Section 718.301 involving a bulk assignee or bulk buyer's improper turnover of or failure to turnover an association. *See* Section 718.501(1).
- Authority of the Division to conduct enforcement proceedings in the name of the Division under Section 718.501(1)(d).
- Authority of the Division to issue orders to cease and desist from unlawful practices. Also included are (a) bulk assignee-designated assignees or agents and (b) bulk buyer-designated assignees or agents. *See* Section 718.501(1)(d)(2).
- Authority of the Division to take legal or equitable action against a bulk buyer or assignee in the event of a failure to pay restitution determined by the Division to be owed by the bulk buyer or assignee. *See* Section 718.501(1)(d)(3).
- Authority of the Division to (a) levy civil penalties and (b) issue orders upon a bulk assignee or bulk buyer's failure to pay such a civil penalty. *See* Section 718.501(1)(d)(6).

2. Notice by Division—Sections 718.501(1)(g), (n)

The following notice-related provisions are both updated to include bulk assignees and bulk buyers:

- Procedures for providing notice if the Division is considering the issuance of a declaratory statement with respect to the declaration of condominium or any related document governing the condominium. *See* Section 718.501(1)(g).
- Standard for completion of notice to a bulk buyer or assignee. *See* Section 718.501(1)(q).

3. Duty to Cooperate with the Division—Section 718.501(1)(n)

Bulk assignees and bulk buyers—like condominium association directors, officers, and employees; condominium developers; community association managers; and community association

management firms—have an ongoing duty to reasonably cooperate with the Division in any investigation.

B. Association Collection of Rent from Tenants.

1. Collection of Rent From Tenant of a Delinquent Condominium Unit Owner—Section 718.116(11)

A process is now established by which the association may seek payment from the tenant of a unit owner in the event that a unit owner is delinquent in paying any monetary obligation to the association. If the association follows the required procedures, the tenant must begin paying rent to the association in the amount up to the monetary obligations due from the unit owner.

(a) Tenant Protection—Sections 718.116(11)(a)–(b)

The following provisions are included for the protection of the tenant:

- The tenant's obligation to the association may not exceed the amount due from the tenant to the tenant's landlord.
- The tenant is not liable for any increase in monetary obligations of the unit unless the tenant received written notice of the increase at least ten days before the rent was due.
- In the event the tenant prepaid rent to the unit owner before the tenant received appropriate notice from the association, the tenant will receive credit from the association by providing certain documentation within a specified time frame.
- The tenant's landlord must provide the tenant a credit against the amount due to the landlord for any funds paid to the association under Section 718.116(11), and good faith compliance by a tenant creates immunity from any related claim against the tenant by the unit owner.

(b) Relation to Chapter 83—Section 718.116(11)(c)

The association does not become a landlord under Chapter 83 by collecting rent from the tenant, and specifically takes on no duties under Section 83.51. The association may, however, issue notices under Section 83.56 and sue for eviction under Sections 83.59–625 in the event the tenant fails to make required payments to the association.

(c) Tenant Does Not Gain Unit Owner Rights—Section 718.116(11)(d)

The tenant does not assume any rights of a unit owner by virtue of making payments to the association under this Section.

(d) Effect of Receiver—Section 718.116(11)(e)

Application of this Section 718.116(11) may be superseded by the appointment of a receiver by a court.

2. Collection of Rent From Tenant of Cooperative Unit Owner—Section 719.108(10)

Section 719.108(10) is added to allow an association to collect rent from a tenant under certain conditions when a unit owner is delinquent in paying monetary obligations to the association.

This provision is almost identical to the analogous condominium provision described in Part IV(A) above. The only difference is that Section 719.108(10)(b) exempts the cooperative tenant from responsibility for an increase in *regular* monetary obligations due unless written notice is provided within a certain time frame. The analogous condominium provision does not include the term "regular."

3. Collection of Rent From Tenant of Homeowner—Section 720.3085(8)

This provision is almost identical to the analogous condominium provision described in Part IV(A) above. However, there is a very significant difference between the two provisions. Under the Chapter 718 provision, the liability of the tenant is limited to the amount of rent owed by the tenant to the landlord. This Chapter 720 provision has no such restriction, suggesting that the tenant may be held liable for the full amount of any monetary obligation owed on the parcel. This is likely an unintended consequence.

IV. Elevator and Life Safety - Condominiums

A. Fire Safety for Condominium Elevators—Section 399.02(8)

Section 399.02(8) establishes a phase-in period for provisions of the elevator safety code requiring modifications for Phase II Firefighters' Service on existing elevators consistent with ASME A17.1 and A17.3. For elevators in condominiums, cooperatives, or multifamily residential buildings issued a certificate of occupancy on or before July 1, 2008, those elevator safety code provisions may not be enforced until the earliest of the following to occur: five years elapse; the elevator is replaced; or the elevator requires major modification. That exception does not apply to residential buildings issued a certificate of occupancy after July 1, 2008, and does not prohibit the request or grant of variances pursuant to Section 120.54. The Division is required to adopt rules to administer this new subsection.

B. Alternative Power for Elevators in a Condominium—Section 718.112(2)(l)(4)

A majority of voting interests of a condominium may vote to forgo the retrofitting of any improvements required by Section 553.509(2).

C. Manual Fire Alarm Systems—Section 633.0215

The requirement to install a manual fire alarm system under Section 9.6 of the Life Safety Code, adopted in the Florida Fire Prevention Code, is no longer applicable to a condominium, cooperative, or multifamily residential building that is less than four stories in height and has a corridor providing an exterior means of egress.

D. Fire Sprinkler Retrofitting in Condominiums—Sections 718.112(2)(l)(1)–(2)

The provision allowing unit owners to vote to forego retrofitting a condominium with a fire sprinkler system is revised to include association property. The number of voting interests required to forgo such retrofitting is reduced from two-thirds to a majority, and unit owners in a "high-rise building" are no longer precluded from taking such a vote. The provision is also amended to limit the required retrofitting to a fire sprinkler system (the previous version of the Section also included "other engineered life safety system").

If the unit owners have previously voted to forego retrofitting, a vote to *require* such retrofitting may take place at a special meeting of the unit owners called by a petition supported by at least 10% of the voting interests, but such a vote to require retrofitting may only take place every three years.

Electronic transmission is no longer allowed for notice of the meeting at which a vote to forgo retrofitting or require retrofitting is to take place.

The date before which a local government may not require fire sprinkler retrofitting is extended to the end of 2019. However, by December 31, 2016, certain condominiums must initiate an application for a building permit for the required retrofitting, demonstrating that compliance will occur before the end of 2019.

E. Fire Sprinkler Retrofitting in Cooperatives—Sections 719.1055(5)

The Legislation purports to add a significant amount of statutory text to the beginning of Section 719.1055, but a great deal of this "added" text actually remains unchanged. The substance of the amended text is described below.

The number of voting interests required to forgo certain types of fire sprinkler retrofitting is reduced from two-thirds to a majority, and unit owners in a "high-rise building" are no longer precluded from taking such a vote.

The date before which a local government may not require fire sprinkler retrofitting is extended from the end of 2014 to the end of 2019. However, by December 31, 2016, a non-compliant cooperative must initiate an application for a building permit for the required retrofitting, demonstrating that compliance will occur before the end of 2019.

New Section 719.1055(5)(b) sets forth requirements for a vote to *require* retrofitting after a vote to forgo such retrofitting has already taken place.

Electronic transmission is no longer allowed for notice of the meeting at which a vote to forgo retrofitting or require retrofitting is to take place.

F. Required Provision in Cooperative Bylaws—Section 719.1055(5)

The bylaws for a cooperative must now include a provision regarding the acceptance of a certificate of compliance from a licensed electrical contractor or electrician as evidence of compliance with the applicable fire and life safety code.

V. Termination of Condominium—Section 718.117

A. Economic Waste and Never-To-Be Constructed Units—Section 718.117(2)(a)(1)

The standard by which a condominium may be terminated for economic waste now includes the cost of construction necessary to construct intended improvements. This revision permits the termination of condominium units that were planned for construction but no longer have any realistic chance of completion (as compared to the statutory language only formerly pertaining to reconstruction following an event of casualty). This change will create a potential means for resolving the "phantom unit" problem (where units legally exist because they were declared to condominium ownership but have never been constructed).

B. Creation of Another Condominium—Section 718.117(19)

The provision regarding the creation of another condominium has been revised to allow the filing of either (i) a new declaration of condominium, or (ii) an amended and restated declaration of condominium for any portion of the same property. In the event that a condominium is terminated to eliminate unconstructed units that are no longer economically feasible (as discussed immediately above), this revision allows the remainder of the condominium to continue under the same terms, with the now-terminated portions removed from the declaration. Returning to the issue of phantom units, this will allow existing units (along with their mortgages) to be preserved and to continue to exist if and when phantom units are removed from a condominium.

VI. Other Condominium-Related Amendments—Chapter 718

A. Definition of "Developer"—Section 718.103

The definition of "developer" is revised[2] to clarify that the existing exception for a state, county, or municipal entity acting as a lessor is not applicable when the state, county, or municipal entity is

[2] Additional changes to the definition of "developer" are discussed above in Part II(A) on page 1.

named as a developer under the declaration of condominium. The previous wording excluded a state, county, or municipal entity "named as a developer in the association."

B. Amendment of Declaration—Section 718.110

1. Rental of Units—Section 718.110(13)

The prior limitation on amendments to the declaration of condominium that "restrict[] unit owners' rights relating to the rental of units" is narrowed to apply only to amendments that (i) prohibit the rental of units; (ii) alter the duration of a rental term; or (iii) specify or limit the number of times a unit may be rented during a specified period. The scope of the limitation is also expanded, however, to apply to unit owners who "acquire title" to a unit, ensuring that it can be used by parties that classify as a bulk assignee or bulk buyer.

2. Limited Common Elements—Section 718.110(14)

A portion of the common elements serving only one unit or a group of units may be reclassified as a limited common element by an amendment to the declaration of condominium under amendment provisions of the declaration or as required by Section 718.110(1)(a). Such an amendment is not an amendment pursuant to Section 718.110(4). The Legislation specifically indicates that this represents a clarification of existing law.

C. Insurance—Section 718.111(11)

1. "Property Insurance"

The term "hazard insurance" has been replaced throughout Section 718.111(11) with "property insurance."

2. Adequacy of Coverage—Section 718.111(11)(a)

The requirement to reevaluate the adequacy of coverage every thirty-six months now applies to replacement cost—not full insurable value.

3. Meeting of Board to Establish Insurance Deductibles—Section 718.111(11)(c)(3)

The meeting of the board of administration of the association to establish the amount of insurance deductibles is no longer required to be open to unit owners.

4. Scope of Condominium Insurance Coverage—Section 718.111(11)(f)(3)

Property that must be excluded by an insurance policy for the condominium is now limited to property "located within the boundaries of the unit and serv[ing] only such unit." Insurance on the property listed in this subsection is now explicitly the responsibility of the unit owner.

5. Scope of Unit Owner Insurance Coverage—Sections 627.714, 718.111(11)(g)

The first three paragraphs of Section 718.111(11)(g) are removed entirely and replaced with a requirement that each condominium unit owner's policy must conform to the requirements of new Section 627.714, outlined below.

(a) Loss Assessment Insurance Coverage, Generally

When a condominium's property or liability insurance coverage is insufficient to pay for a claim, the shortfall will be assessed to unit owners as a "loss assessment." Loss assessment coverage is a feature of a unit owner's individual insurance coverage that pays for the unit owner's share of such a loss assessment. The Legislation creates new Section 627.714 to require and limit the terms of such coverage.

(b) Minimum Loss Assessment Coverage—Section 627.714(1)

Insurance coverage issued or renewed on or after July 1, 2010, for a condominium unit owner's residential property must include at least $2,000 in property loss assessment coverage for all assessments made as a result of the same direct loss to the property owned by all members of the condominium association, collectively, if such loss is the type of loss covered by the unit owner's residential property insurance policy. That requirement is effective regardless of the number of assessments and imposes a deductible limit of $250 or less per direct property loss. Also, if a deductible was or will be applied to *other* property loss sustained by the unit owner resulting from the same direct loss to the property, no deductible will apply to the loss assessment coverage.

(c) Limitations on Loss Assessment Coverage—Sections 627.714(2)–(3)

The maximum amount of a unit owner's loss assessment coverage that can be assessed for a loss is an amount equal to the unit owner's loss assessment coverage limit in effect one day before the date of the occurrence. Any change in coverage that takes places on or after the day before the date of the occurrence is not applicable to the loss. An insurer providing loss assessment coverage to a unit owner is not required to pay, as a result of the same direct loss to property, more than an amount equal to the unit owner's loss assessment coverage limit—regardless of the number of loss assessments arising from that same direct loss.

(d) Loss Assessment Coverage is Excess Over Other Policies—Section 627.714(4)

Insurance coverage for a condominium unit owner's residential property must include a provision stating that the coverage afforded by such policy is excess coverage over the amount recoverable under any other policy covering the same property. It is unclear whether this new

requirement applies to all insurance policies (regardless of when they were issued) or only to policies issued on or after the effective date (as explicitly stated in Section 627.714(1)).

(e) Association as Named Insured and Loss Payee—Section 718.111(g)(2)

A condominium unit owner's policy is no longer required to name the association as an additional named insured and loss payee.

D. Official Records—Section 718.111(12)

1. Personal Civil Liability for Improper Maintenance of Records—Sections 718.111(12)(a)(11), (c)

The scope of behavior that will subject a person to personal civil liability pursuant to Section 718.501(1)(d) is restricted by the Legislation, as follows:

- Applicable records are now limited to those required to be "created and maintained" by Chapter 718. The previous version included only records that were required to be maintained.
- Defacement or destruction of records now must take place during the period in which the records were required to be maintained.
- Defacement or destruction now must be committed with intent to cause harm to the association or one or more of its members.

These changes are made to both Section 718.111(12)(a)(11) and Section 718.111(12)(c).

2. Association's Responsibility for Use of Association Records—Section 718.111(12)(b)

In complying with its requirement to make official records of the association available to an association member, the association is now shielded from liability from the association member's use or misuse of the information, unless the association has an affirmative duty not to disclose such information pursuant to Chapter 718.

3. Records Exempt From Unit Owner's Right of Inspection—Section 718.111(12)(c)

The following items are added to this list of records that are exempt from the association member's right to access association records:

- Personnel records of association employees, including, but not limited to, disciplinary, payroll, health, and insurance records.
- Personal identifying information such as e-mail addresses, telephone numbers, emergency contact information, any addresses of a unit owner (other than as provided to fulfill the association's notice requirements), but not the person's name, unit designation, mailing address, and property address.

- Any electronic security measure that is used by the association to safeguard data.
- The software and operating system used by the association that allows manipulation of data, even if the owner owns a copy of the same software used by the association.

The provision also specifies that electronic data is considered part of the association's official records.

E. Financial Reporting—Section 718.111(13)

1. Rules Adopted by Division Regarding the Disclosure of Reserves—Section 718.111(13)

The description of administrative rules required to regulate the disclosure of reserves not funded by the pooling method has been generalized to include standards for presenting a summary of association reserves.

Note, however, that protection is no longer granted to a person preparing financial reports required by Chapter 718. Prior to the Legislation, such person was entitled to rely on an inspection report prepared for the association.

2. Threshold for Creating Financial Report or Financial Statement—Section 718.111(13)(a)(2)

Condominiums with less than seventy-five units may now, regardless of annual revenue, prepare a financial report rather than a financial statement. The previous threshold was fifty units.

F. Condominium Association Bylaws—Section 718.112

1. Expiration of Board Member Terms—Section 718.112(d)(1)

Timeshare condominiums are no longer subject to the requirement that the term of each board member expires at the annual meeting.

The provision requiring automatic reappointment of a board member in the event that no other person has demonstrated an interest in running for that position has been revised so that such a board member is now "eligible for reappointment." The threshold condition is also revised to be more flexible, allowing reappointment when the number of board members whose terms have expired exceed the number of interested and eligible members.

2. Co-Owners Simultaneously Serving as Board Members—Section 718.112(2)(d)(1)

The general rule that co-owners of a single unit may not serve as members of the board of directors at the same time is now applicable to any condominium association that does not include timeshare units or timeshare interests, regardless of the number of units. However, two exceptions have also been added to the rule, allowing co-owners to serve simultaneously as directors when (i) they own

more than one unit, or (ii) there are not enough eligible candidates to fill a vacancy on the board of directors.

3. Ineligibility for Board of Directors—Section 718.112(2)(d)(1)

The list of conditions that will disqualify a person from election to the board of directors is expanded to include delinquency in the payment of any fine, regular assessment or special assessment.

4. Candidate Certification—Section 718.112(2)(d)(3)

The association is no longer required to distribute, along with the first notice of the date of election, a certification form for a candidate to attest to his or her reading and understanding of the condominium's governing documents, Chapter 718, Florida Statutes, and any applicable administrative rules. Instead, each newly elected or appointed director must provide, within ninety days of election or appointment, written certification to the secretary of the association that the new director has read and understands certain documents and will fulfill his or her duties according to certain standards. A certificate of satisfactory completion of a Division-approved condominium education program may be submitted instead.

A new director must be suspended from service on the board if this requirement is not complied with, but the board may temporarily fill the position during that time.

The required documentation must be retained by the association secretary for five years following the election or appointment of the director, but an association's failure to have the appropriate documentation on file does not affect the validity of any action taken by the association.

5. Abandonment of Director Position Due to Monetary Obligations—Section 718.112(2)(n)

A director is now deemed to have abandoned his or her position by being more than ninety days delinquent in the payment of *any* monetary obligation to the association. Previously, this was limited to delinquency in the payment of regular assessments.

6. Removal of Director for Charge of Felony Theft or Embezzlement—Section 718.112(2)(o)

Mandatory removal of a director due to a charge of felony theft or embezzlement of the association's funds occurs after such a charge—whether it is by information or indictment. The vacancy created continues until the end of the director's suspension or the end of the director's term of office—whichever occurs first.

G. Contracts for Communications, Information, and Internet Services—Section 718.115(1)(d)

The previous version of Section 718.115(1)(d) established that a bulk contract for a master antenna television system or duly franchised cable television service constituted a common expense of the condominium. The revised version, broadens and replaces that language to include as common expenses the cost of a bulk contract for communications services as defined in Chapter 202, information services, or internet services.

The previous version of Section 718.115(1)(d) required that if the declaration did not provide for the cost of such a bulk contract, such a bulk contract could be entered into, but the cost must be shared on an equal per-unit basis, even if the declaration provided for an *unequal* sharing of common expenses. The revised version of Section 718.115(1)(d) makes equal per-unit sharing in such a situation permissive, rather than mandatory.

The language of Section 718.115(1)(d)(2) has also been broadened so that "television" services are now "video" services.

H. Assessments—Section 718.116

1. Liability of First Mortgagees— Section 718.116(1)(b)

The amount of liability for certain first mortgagees or their successors or assigns may be determined by the amount of unpaid assessments during a particular period. The length of that period has been extended from six months to twelve months.

2. Claim of Lien—Section 718.116(5)(b)

The period during which a claim of lien secures unpaid assessments now runs through the entry of a final judgment, rather than a certificate of title.

I. Deposits Prior to Completion of Construction —Section 718.202(11)

New Section 718.202(11) clarifies that deposits made pursuant to Sections 718.201(1) or (2) may be held in one or more escrow accounts. If a single escrow account is used, the escrow agent must use certain accounting procedures, but compliance with those procedures constitutes compliance with Section 718.202(11), even though only one escrow account is used. This intent of this change is to clarify existing law, effectively reversing the court's decision in *Double AA v. Swire*, 2009 WL 4825097.

J. Transfer of Association Control—Section 718.301(1)(f)

A new exception is added to the provision requiring turnover of the association to unit owners other than the developer in the event a receiver for the developer is appointed by a circuit court and not discharged within thirty days. Under the new exception, such turnover is not required if a court

determines within that thirty-day period that turnover would be detrimental to the association or its members.

K. Sanctions Against Unit Owner More Than Ninety Days Delinquent in Monetary Obligation to Association—Section 718.303(3)–(5)

In the event that a unit owner is more than ninety days delinquent in paying a monetary obligation to the condominium association, the association may now take either or both of the following actions:

- Suspend the unit owner's right to use certain common property of the condominium—but not limited common elements appurtenant to the unit, common elements used for access to the unit, utility services, parking spaces, or elevators. *See* Section 718.303(3).
- Suspend the unit owner's voting rights in the association. *See* Section 718.303(5).

Both of these suspensions end upon full payment of the monetary obligation by the unit owner.

The existing procedural requirements of Section 718.303(3), including notice and hearing, are amended to apply suspensions by the association. However, Section 718.303(4) then states that the notice and hearing requirements of Section 718.303(3) are *not* applicable to a suspension or fine imposed due to failure to pay a monetary obligation to the association. Instead, separate requirements are set forth in Section 718.303(5).

It is important to note that the language of the statute is ambiguous as to whether the new procedural requirements of Subsection (4) apply to both types of suspension that are now authorized, or only the suspension of the right to access common elements. The term "suspension" is used to describe actions by the association under subsections (3) and (5). However, the new procedural subsection, (4), is added in between the two subsections and refers explicitly to subsection (3) only.

L. Statutes and Rules Provided by the Division to an Association—Section 718.501(1)(h):

The Division is now required to provide an association with updated copies of Chapter 718 and related administrative rules on an annual basis. The requirement for the Division to provide an amended version of Chapter 718 on a biennial basis has been removed.

VII. Cooperative Amendments—Chapter 719

In addition to the life safety-related amendments discussed elsewhere in this document, the following changed related to cooperatives are contained in the Legislation.

A. Vacancy on Board of Directors—Section 719.106(1)(d)(6)

New Section 719.106(1)(d)(6) establishes a default process to fill a vacancy on the board of directors that occurs prior to the expiration of that director's term, unless the bylaws provide otherwise.

B. Lien Rights of Cooperative Association—Section 719.108(4).

The scope of an association's lien against each cooperative parcel is expanded to include authorized administrative late fees and reasonable costs for collection services. However, new procedural requirements are added which (i) prohibit an association from filing a lien until thirty days after notice of intent has been delivered to an owner, and (ii) specify the requirements for such notice.

VIII. Community Associations—Chapter 720

A. Powers of Community Association—Section 720.303

1. Certain Board Meetings Not Open to Public—Section 720.303(2)(b)

The exception under which certain board meetings may be closed to members other than directors is amended to explicitly include meetings with the association's attorney to discuss proposed and pending litigation.

2. Access to Records—Section 720.303(5)(a)

Section 718.303(5)(a) creates a rebuttable presumption that the association willfully failed to comply with the requirements of the subsection if it fails to take access to records within a certain time period after receiving written request for access. Such request must now be submitted by certified mail with return receipt requested for the presumption to attach.

3. Inspection and Copying of Records—Section 720.303(5)(c)

Provisions related to the process by which the association may copy records in response to a request for access have been amended. The scope of records that are not accessible to unit owners has also been revised in a manner similar to the analogous condominium association provision described on page 15 of this document, in Part VI(D)(3).

4. Reserve Accounts—Section 720.303(6)

Under Section 720.303(6)(b), limitations on funding reserve accounts contained in the governing documents now apply when reserve accounts are not established pursuant to Section 720.303(6)(d). Otherwise, if reserves are established pursuant to subsection (d), the provisions of Section 720.303(6) will apply. Neither provision precludes the termination of a reserve account pursuant to Section 720.303(6)(b).

The existing conspicuous type disclosure in Section 720.303(6)(c), required for financial reports of the association, is revised. A new conspicuous type disclosure is required in the event reserve funding exists in the budget but reserve accounts are not established pursuant to Section 720.303(6)(d).

The formula in Section 720.303(6)(g)(2) by which reserve funding must be calculated for pooled accounts is changed to incorporate doubtful accounts.

5. Compensation—Section 720.303(12)

New Section 720.303(12) is added to prohibit compensation of a director, officer, or committee member of the association for performance of association duties. The Section also lists activities that are not prohibited under certain conditions—generally:

- Participation in a financial benefit accruing to all or a significant number of members.
- Reimbursement for out-of-pocket expenses.
- Recovery of insurance proceeds
- Receipt of fees or compensation authorized by governing documents.
- Receipt of fees or compensation authorized by members in advance.
- Financial benefit derived from service by the developer as a director, officer, or committee member of the association.

B. Display of Flag—Section 720.304(2)(b)

The provision granting a homeowner the right to erect a flagpole and display a flag if certain requirements are met is amended to provide that any such flagpole and display is still subject to (i) all building codes, zoning setbacks, and other governmental regulations, and (ii) all "locational criteria" in the governing documents.

C. Suspension of Rights for Failure to Pay — Section 720.305

Section 720.305 authorizes the association to impose fines or suspend the right to use common areas and facilities in certain cases. The previous version authorized such action "for a reasonable period" if "the governing documents so provide." Both of these conditions are eliminated, under the revised version, and the association is now authorized to take such action if a member is delinquent in paying any monetary obligation to the association for a period of more than ninety days. Such fines or suspension may continue until the monetary obligation is paid.

Related changes include:

- Fines of $1,000 or more may now become a lien against a parcel. Previously, a fine of any amount could not become a lien against a parcel under this Section.
- The suspension of use rights may not apply to any portion of the common areas necessary for access to a parcel or the provision of utility services to the parcel.
- Additional notice requirements have been added that are applicable to both the imposition fines and the suspension of use rights.

D. Community Association Elections—Section 720.306

1. Secret Ballots—Section 720.306(8)(b)

New procedural requirements have been created to control the use of secret ballots for the election of directors if the governing documents permit the use of such secret ballots.

2. Advance Self-Nomination—Section 720.306(9)

A member may now nominate himself or herself to serve on the board of directors in advance of the meeting at which the election will be held if the election process allows voting by absentee ballot.

3. Vacancy on Board—Section 720.306(9)

In the event of a vacancy prior to the end of a director's term, the board of directors may now fill that vacancy by appointing a person or holding an election, pursuant to the requirements of Section 720.306(9). Under either option, the new director's term is limited to the unexpired term of the director being replaced. However, neither option may be used if it is contrary to the bylaws of the association.

Vacancies created by recall, however, are governed by the provisions of Section 720.303(10) and administrative rules established by the Division.

E. Recreational Leaseholds—Section 720.31(6)

Section 720.31(6) is created as a clarification of existing law. It has several functions, which can be generally described as follows:

- Explicitly state the authority of an association to enter into agreements to acquire certain possessory or use interests in lands or facilities (including examples).
- Require inclusion and description in the declaration, if in existence at the time the declaration is recorded.
- Specify standards for approval, if entered into after the recording of the declaration.
- Authorize funding for such possessory or use interests as a common expense.
- Authorize the imposition of covenants and restrictions concerning the use of such possessory or use interests.
- Authorize declaration provisions that are not inconsistent with Section 720.31(6).
- Allow an association to join with certain other associations in carrying out the intent of Section 720.31(6).

F. Special Assessments Prior to Turnover—Section 720.315

Prior to turnover, a developer-controlled board of directors may not levy a special assessment unless certain procedural requirements have been met.

IX. Non-Profit Corporations—Chapter 617

The three amendments to Chapter 617 create certain exceptions for condominium associations (regulated by Chapter 718), cooperative associations (regulated by Chapter 719), and community associations (defined by Chapter 720).

A. Voting—Section 617.0721(7)

Section 617.0721(7) allows certain types of not-for–profit corporations to be exempt from certain limitations on member voting rights. Prior to the Legislation, only community associations could take advantage of this exemption. The Legislation now expands the exemption to include condominium associations and cooperative. The Legislation also reduces the scope of the exemption, however, by removing subsection (2) from the list of limitations from which those types of corporations are exempt. The net effect is that community associations, condominium associations, and cooperative associations are now exempt from limitations on member voting found in subsections (1), (5), and (6) of Section 617.021.

B. Removal of Directors—Section 617.0808(3)

Community associations, condominium associations, and cooperative associations are now exempt from Section 617.0808, which sets forth the procedures for removal of a director of a not-for-profit corporation.

C. Access to Records—Section 617.1606

Community associations, condominium associations, and cooperative associations are now exempt from Sections 617.1601–1605, which set forth rights and duties related to the inspection of corporate records and financial reports.

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