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SENATE BILL 1196 (2010 Community Association Legal Update)

In 2009, the Florida Legislature had proposed a similar reform bill known as Senate Bill 714 which was vetoed by the governor. However, the 2010 Florida Legislature again proposed numerous changes contained in Senate Bill 1196 which will form and will have significant impact on issues facing the Florida real estate market, generally in common interest ownership communities. Senate Bill 1196 (the "Legislation") was signed into law by Governor Crist on June 1, 2010, and took effect July 1, 2010.

A summary of the Legislation changes affecting condominiums, cooperatives, and homeowner associations are set out below.

Condominium and Cooperative Elevators:

* Amends Section 399.02(8), Florida Statutes to provide that updates to the building code requiring modifications for Phase II Firefighters' Service on existing elevators, as amended into the Safety Code for Existing Elevators and Escalators, ASME A17.1 and A17.3, may not be enforced on elevators in condominiums or cooperatives issued a certificate of occupancy by the local building authority as of July 1, 2008, for 5 years or until the elevator is replaced or requires major modification, whichever occurs first. This exception does not apply to a building for which a certificate of occupancy was issued after July 1, 2008. This exception would not prevent an elevator owner from requesting a variance for the applicable code before or after the expiration of the 5 year term, and also does not prohibit the Division from granting variances to the upgrade requirements.

Corporations Not-for-Profit:

* Amends 617.0721 to provide that subsections (1), (5), and (6), dealing with voting by members, do not apply to associations regulated by Chapters 718, 719, and 720.

* Amends 617.0808, dealing with removal of directors, to state that it does not apply to any associations regulated by Chapters 718, 719, and 720.

* Creates 617.1606 to provide that Sections 617.1601-617.1605, dealing with access to records, does not apply to associations regulated by Chapters 718, 719, and 720.

Condominium and Cooperative Fire Alarm Systems:

* Provides that 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

corridor is exempt from installing a manual fire alarm system as required in s. 9.6 of the most recent edition of the Life Safety Code adopted in the Florida Fire Prevention Code.

Condominium Fire Sprinklers:

* Amends F.S. 718.112(2)(1) to extend deadline for sprinkler retrofitting from 2014 to 2019. By December 31, 2016, an association that is not in compliance with the requirements for a fire sprinkler system or other form of engineered lifesafety system and has not voted to forego retrofitting, must initiate an application for a building permit for the required installation demonstrating that the association will become compliant by December 31, 2019.

* Further amends F.S. 718.112(2)(1) to allow high rise buildings to forego fire sprinkler retrofitting of units and common areas by vote of majority of all voting interests.

(Current law prohibits high rise buildings from opting out of fire sprinkles for common areas and requires opt-out vote to be approved by two-thirds of all voting interests).

* Removes ability of association to provide electronic notice of meeting held to opt-out of retrofitting requirements.

* If there has been a previous vote to forego retrofitting, a vote to require retrofitting may be called for by a petition signed by 10% of the voting interests. Such re-vote may take place once every 3 years.

Generators for Elevators:

* Creates 718.112(2)(1)4 to provide that notwithstanding Section 553.509, an association may not be obligated to, and may forego the retrofitting of, any improvements required by s. 553.509(2) upon an affirmative vote of a majority of the voting interests in the affected condominium.

Condominium Insurance:

* Creates 627.714 to require all HO-6 policies issued or renewed after July 1, 2010, to include at least \$2,000.00 property loss assessment coverage for all assessments made as a result of the same direct loss to the property, regardless of the number of assessments, owned by all members of the association collectively if such loss is the type of loss covered by the unit owner's residential property insurance policy, to which a deductible of no more than \$250 per direct property loss applies. 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 shall apply to the loss assessment coverage. The maximum amount of any unit owner's loss assessment coverage that can be assessed shall be an amount equal to that unit owner's loss assessment coverage limit in effect one day before the occurrence. Every HO-6 policy shall contain a provision stating that coverage is excess coverage over the amount recoverable under any other policy covering the same property.

* Amends all references to "hazard" insurance found in F.S. 718.111(11) to "property" insurance.

- * Amends F.S. 718.111(11)(a) to provide that the "replacement cost" must be determined once every 36 months.
- * Amends F.S. 718.111(11)(c)3 to remove requirement that notice of board meeting where insurance deductible is set contain specific information (but still requires 14 days notice).
- * Amends F.S. 718.111(11)(f)3 to state that unit owner insurance is only for items listed (*i.e.*, wallpaper, carpet, cabinets, etc.) that are located within the boundaries of the unit and serve only such unit. Such property and any insurance thereupon is the responsibility of the unit owner.
- * Amends F.S. 718.111(11)(g) to state that a condominium unit owner's policy shall conform to s. 627.714.
- * Amends F.S. 718.111(11)(g)1 by removing language regarding insurance of "improvements."
- * Amends F.S. 718.111(11)(g)2 regarding mandatory HO-6 insurance by eliminating the requirement that the association require owners to provide proof of insurance to the association not more than once a year. Also eliminates language that association may "force place" insurance if the owner does not have it.
- * Amends F.S. 718.111(11)(g)4 to eliminate requirement that Association be loss payee and additional insured on HO-6 policy.

Timeshare Condominiums:

- * Amends F.S. 718.112(2)(d)1 to exempt timeshare condominiums from the requirement that the terms of all members of the board expire at the annual meeting unless otherwise permitted by the bylaws.
- * Amends F.S. 718.112(2)(d)1 to exempt timeshare condominiums from the prohibition against co-owners serving on the board at the same time.

Condominium Rental Amendments:

- * Amends 718.110(13) to provide that any amendment prohibiting unit owners from renting their units or altering the duration of the rental term or the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to amendment and unit owners who acquire title to their units after effective date of amendment.

Condominium Amendments:

- * Creates 718.110(14) to provide that except for those portions of the common elements designed and intended to be used by all unit owners, a portion of the common elements serving only one unit or a group of units may be reclassified as a limited common element upon the vote required to amend the declaration as provided therein or as required under Section 718.110(1)(a), and shall not be considered an amendment pursuant to 718.110(4).

Condominium Official Records:

- * Limits director liability for destruction of official records to cases where there is intent to harm.
- * Association is not liable for unit owner misuse of information obtained from official records.
- * Exempts personnel records (disciplinary, payroll, health and insurance records) from ambit of official records.
- * Exempts e-mail addresses, telephone numbers, emergency contact information, and other addresses of unit owners from ambit of official records.
- * To exempt association computer security data, including passwords, and software and operating systems, from ambit of official records.

Condominium Financial Reporting Requirements-Changes the Financial Reporting Requirements to:

- * Associations that operate fewer than 75 units, regardless of the association's annual revenues, shall prepare a report of cash receipts and expenditures. (Current law states that associations with fewer than 50 units, regardless of the association's annual revenues, shall prepare a report of cash receipts and expenditures.)
- * Amends the provisions dealing with DBPR's requirement to adopt rules involving financial reporting requirements. The rules shall include, but not be limited to, standards for presenting a summary of association reserves, including, but not limited to, a good faith estimate disclosing the annual amount of reserve funds that would be necessary for the association to fully fund reserves for each reserve item based on a straight-line accounting method. This disclosure is not applicable to reserves funded via the pooling method.

Condominium Board Elections/Qualifications:

- * Provides that board members are not automatically reappointed when no one runs for their seat; rather, they are eligible for re-appointment.
- * Precludes "co-owners" from simultaneous board service, unless they own more than one unit or unless there are not enough eligible candidates to fill the vacancies on board.
- * Adds special assessments and fines to financial delinquencies which disqualify a director.
- * Eliminates requirement that candidate certification form be sent out with second notice of meeting. Replaces candidate certification form requirement with a requirement that: newly elected or appointed directors either: (1) certify in writing, within 90 days after being elected or appointed, that he or she has read the association's declaration of condominium, articles of incorporation, bylaws, and written policies; that he or she will work to uphold such documents and policies; and that he or she will faithfully discharge

his or her fiduciary duty; or (2) Submit a certificate of completion of educational curriculum administered by a division approved education provider. Failure to comply will result in suspension from Board until requirement is completed. Board may temporarily appoint someone to fill seat held by suspended board member.

* Provides that a director must be accused of embezzlement by information or indictment before they can be removed from office. Such removal shall last until the end of the period of the suspension or the end of the director's term of office, whichever occurs first.

Condominium Common Expenses:

* Common expenses may include communication services as defined in Chapter 202, information services, and Internet services. Association may enter into bulk contracts for such services.

Condominium Collections and Foreclosures:

* Changes the "statutory cap" that a foreclosing mortgagee must pay from "6 months past due assessments, or 1% of the original mortgage debt" to "12 months past due assessments, or 1% of the original mortgage debt."

* Provides that if a unit is occupied by a tenant and that unit owner is delinquent in the payment of any monetary obligation to the association, the association may demand that the tenant pay to the association the future monetary obligations related to the condominium unit. Requires the association to mail written notice to the unit owner of the association's demand that the tenant make payments to the association.

* Provides that the liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. Provides that the tenant's landlord shall provide the tenant against rents due to the unit owner in the amount of monies paid to the association. Provides that the association may sue for eviction as if the association were a landlord if the tenant fails to pay a required assessment to the association.

* Provides that the association may suspend the use rights for the common elements, common facilities or any other association property if a unit owner is delinquent for more than ninety days in the payment of a monetary obligation due to the association, except that association may not suspend the right to use limited common elements intended to be used only by that unit, common elements that must be used to access the unit, utility services provided to the unit, parking spaces, or elevators.

* Provides that an association may also suspend the voting rights of a member due to nonpayment of any monetary obligation due to the association which is delinquent in excess of ninety days.

Condominium Termination:

* Amends 718.117(2)(a)1 dealing with termination because of economic waste. Provides that condominium may be terminated because of economic waste when the total estimated cost of construction or repairs necessary to construct the intended improvements or restore the improvements to their former condition or bring them into

compliance with applicable laws or regulations exceeds the combined fair market value of the units in the condominium after completion of the construction or repairs.

* Amends 718.117(19) to provide that the termination of a condominium does not bar the filing of a declaration of condominium or an amended and restated declaration of condominium.

Condominium Sales or Reservation Deposits Prior to Closing

* Creates 718.202(11) to require escrow agents to maintain separate accounting records for each purchaser and for amounts separately covered by 718.202(1) and (2), and if applicable, released to developer pursuant to 718.202(3).

Turnover of Condominiums from Developer:

* Amends F.S. 718.301(1)(f) to provide that turnover shall occur when a receiver is appointed by the circuit court and is not discharged within 30 days of appointment, unless the court determines within 30 days after appointment that transfer of control would be detrimental to association or its members.

Condominium Bulk Buyers:

* Creates the new "Distressed Condominium Relief Act" (also known as bulk-buyer law). It is intended to stimulate the condominium market by encouraging purchasers to buy units in bulk.

Cooperative Associations-Filling Vacancies on Board:

* Provides for filling of vacancies for remainder of the term unless otherwise provided in Bylaws. In the alternative, the Board may hold an election to fill the vacancy.

Cooperative Associations—Fire Sprinklers

* Extends deadline for sprinkler retrofitting from 2014 to 2019. By December 31, 2016, an association that is not in compliance with the requirements for a fire sprinkler system or other form of engineered lifesafety system and has not voted to forego retrofitting, must initiate an application for a building permit for the required installation demonstrating that the association will become compliant by December 31, 2019.

* Amends 719.1055(5) to allow high rise buildings to forego fire sprinkler retrofitting of units and common areas by vote of majority of all voting interests. (Current law prohibits high rise buildings from opting out of fire sprinkles for common areas and requires opt-out vote to be approved by two-thirds of all voting interests).

* Removes ability of association to provide electronic notice of meeting held to opt-out of retrofitting requirements.

* If there has been a previous vote to forego retrofitting, a vote to require retrofitting may be called for by a petition signed by 10% of the voting interests. Such re-vote may take place once every 3 years.

Cooperative Associations—Collections/Foreclosures:

- * The claim of lien may include late fees and reasonable costs for services for which the association has contracted.
- * Revises requirements for 30-day intent to lien letter.
- * Provides that if a unit is occupied by a tenant and that unit owner is delinquent in the payment of any monetary obligation to the association, the association may demand that the tenant pay to the association the future monetary obligations related to the condominium unit. Requires the association to mail written notice to the unit owner of the association's demand that the tenant make payments to the association. Provides that the liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. Provides that the tenant's landlord shall provide the tenant a credit against rents due to the unit owner in the amount of monies paid to the association. Provides that the association may sue for eviction as if the association were a landlord if the tenant fails to pay a required assessment to the association.

Homeowners' Associations-Board of Directors:

- * Provides for filling of vacancies for remainder of the term unless otherwise provided in Bylaws. In the alternative, the Board may hold an election to fill the vacancy.
- * Meetings between the board or committee to discuss proposed or pending litigation are not required to be open to members.
- * Prohibits directors from receiving compensation from the association except in certain circumstances (for example, out-of-pocket expenses, compensation authorized by governing documents, etc.).

Homeowner' Associations-Official Records:

- * Rebuttable presumption that association willfully failed to provide access to records applies only if the request for records is submitted by certified mail, return receipt requested.
- * Association may charge owners for personnel fees at an hourly rate for employee time to cover administrative costs related to providing copies of association records.
- * Exempts personnel records (disciplinary, payroll, health and insurance records) from ambit of official records.
- * Exempts e-mail addresses, telephone numbers, emergency contact information, and other addresses of unit owners from ambit of official records.
- * Exempts association computer security data, including passwords, and software and operating systems, from ambit of official records.

Homeowners' Associations-Reserves:

* Clarification of reserve requirements to distinguish between "statutory" and "non-statutory/voluntary" reserves.

Homeowners' Associations—Flagpoles:

* Flagpoles and display are subject to all building codes, zoning setbacks, and other governmental regulations, including noise and lighting ordinances and setback and locational criteria contained in the governing documents.

Homeowners' Associations-Collections/Foreclosures (Section 718.116, Florida Statutes):

* If member is delinquent for more than 90 days in the payment of a monetary obligation, the association may suspend the right to use the common areas, except for common areas that must be used to provide access to the parcel or utility services provided to the parcel.

* Fines of less than \$1,000 may not become a lien against the parcel.

* If association imposes a fine or suspension, the association must provide written notice of such fine or suspension by mail or hand delivery to the parcel owner, and if applicable, to the tenant, licensee, or invitee.

* Provides that if a unit is occupied by a tenant and that unit owner is delinquent in the payment of any monetary obligation to the association, the association may demand that the tenant pay to the association the future monetary obligations related to the condominium unit. Requires the association to mail written notice to the unit owner of the association's demand that the tenant make payments to the association.

* Provides that the liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. Provides that the tenant's landlord shall provide the tenant a credit against rents due to the unit owner in the amount of monies paid to the association.

* Provides that the association may sue for eviction as if the association were a landlord if the tenant fails to pay a required assessment to the association.

Homeowners' Associations-Authority to Enter into Agreements:

* Association may enter into agreements to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities including, but not limited to, country clubs, golf courses, marinas, submerged land, parking areas, conservation areas, and other recreational facilities. Vote of the owners required, the same as required by the declaration for material alterations to the common areas or association property. If declaration is silent, it will require the approval of 75% of the total voting interests.

Homeowners' Associations-Elections:

- * If governing documents permit voting by secret ballot by members not in attendance at a meeting, it will require two envelopes (similar to two-envelope system required for condominiums).
- * A member may nominate himself or herself as a candidate for the board at a meeting where the election is held, or, if the election process allows voting by absentee ballot, in advance of the balloting.

Homeowners' Associations-Developer Control and Assessments:

- * Prior to turnover, the board controlled by the developer may not levy a special assessment unless a majority of the parcel owners other than the developer have approved the special assessment by a majority vote at a duly called special meeting of the membership at which a quorum is present.

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The comments expressed herein are for informational purposes only and should not be relied upon as legal counsel. Please consult with legal counsel to obtain specific advice.