

**REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF THE FLORIDA BAR**

WHITE PAPER

**PROPOSAL TO CLARIFY AND EXPAND USAGE OF
HURRICANE PROTECTION IN CONDOMINIUMS –
REVISING § 718.104(4), 718.113(5) AND § 718.115(1)(E)**

I. SUMMARY

The proposal would clarify the law governing the installation and maintenance of hurricane protection and expand the law to encourage the usage of hurricane protection, such as hurricane shutters and impact glass, in condominiums. It would allow for associations to adopt specific requirements for the adoption and installation of hurricane protection. The proposal also clarifies the maintenance obligations for the installation of hurricane protection and allows associations to operate the installed type of hurricane protection to protect the condominium property and units from damage due to a hurricane. The proposal also provides financial incentives to unit owners to install their own hurricane protection. These changes are necessary due to the increasing insurance costs in condominium associations for property, casualty and windstorm coverage since insurance increases will be mitigated by the installation of hurricane protection and that the damage caused by hurricanes to condominiums is minimized by the installation and utilization of hurricane protection, substantially lessening the impact of a hurricane to a condominium and its unit owners. The legislation does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Hurricanes in Florida are an unfortunate fact of life. Beginning every June 1st, Floridians face the uncertain future of another Atlantic hurricane season. 40% of all hurricanes that make landfall on the eastern coast of the United States make landfall in Florida. Between 2000 and 2017, 79 subtropical and tropical systems have impacted Florida causing over 120 billion dollars in damage and killing almost 200 people. 11 tropical cyclones affected Florida in 2019. Currently, there have been 23 named tropical systems during the 2020 hurricane season. Of the 10 most costly hurricanes to impact the United States, 6 of those hurricanes have impacted Florida.

In response to the omnipresent threat of hurricanes, Florida has continually looked for ways to limit the impact of hurricanes on the State, both in terms of limiting property damage and protecting the lives of Floridians. A substantial concern of the Florida Legislature has been the impacts of hurricanes on the cost of insurance and the affordability of housing. To combat the increasing costs of insurance in condominiums, the Florida Legislature has adopted Section 718.113(5) and Section 718.115(1)(e) to provide condominium associations with the ability to require the installation of types of hurricane protection that are building code compliant in effort to provide condominium associations and unit owners with a means to protect the condominium property and their condominium units.

However, despite providing a framework for how the installation and operation of hurricane protection should function in condominium associations, the current statutory framework creates confusion as how when hurricane protection can be required by a condominium

association, who is responsible for the maintenance of hurricane protection when it is installed and how the costs of hurricane protection should be allocated. This confusion has led to a lower adoption of hurricane protection measures in Florida condominiums and as a result, the vast majority of condominiums in Florida remain vulnerable to damage from a hurricane that could be limited or mitigated by the available types of hurricane protection.

Further compounding the potential impact of the suboptimal adoption of hurricane protection is the unprecedented COVID-19 pandemic. The emergency services of Florida have been stretched thin responding to the COVID-19 pandemic, impacting the ability of all levels of emergency services in Florida to respond to the damage that would be caused by a hurricane making landfall. Without further clarification and expansion of how condominium associations and unit owners can utilize hurricane protection, the risk remains unnecessarily high that Florida's emergency services will be pushed to the limit upon a hurricane making landfall and causing substantial property damage and increased risk of loss of life.

III. EFFECT OF PROPOSED CHANGE

The proposed changes serve to address the shortfalls in Sections 718.113(5) and 718.115(1)(e) that have limited a more widespread adoption of hurricane protection by expanding the ability of condominium associations to require the installation of hurricane protection, clarifying the process that condominium associations must follow to require the installation of hurricane protection, clarifying the maintenance obligations for hurricane protection that has been installed and addressing how the costs of the installation of hurricane protection are to be allocated. It also amends Section 718.104(4) to require that any residential or mixed-use condominium that is created in Florida specify whether the association to unit owner is responsible for maintenance, repair and replacement of exterior doors, windows, glass apertures any code-compliant hurricane protection.

The amendment to Section 718.104(4)(p) addresses a consistent shortfall in the declarations for residential and mixed-use condominiums, the party that is obligated to maintain exterior doors, windows, glass apertures and hurricane protection. Currently, many declarations do not adequately address whether the association or unit owner is obligated to maintain, repair and replace these items. This change ensures that as condominiums are created in Florida, the obligation for the maintenance, repair and replacement of exterior doors, windows, glass apertures and hurricane protection is clearly delineated.

Section 718.113(5) is amended to provide a definition for the term "hurricane protection", which includes shutters, impact glass, code compliant windows and doors and any other code compliant form of hurricane protection. The proposal also establishes that Section 718.115 applies to every residential and mixed-use condominium in Florida to ensure uniformity and consistency in the installation of hurricane protection and to protect the health, safety and welfare of the people of Florida. The installation, maintenance, repair, replacement and operation of hurricane protection is not a material alteration of the common elements or association property.

Section 718.113(5)(a) is amended to provide that a majority votes of the owner of a residential or mixed-use condominium is required for an association to install hurricane protection or require the unit owners to install hurricane protection. Many older condominiums struggle to obtain the vote

needed to install hurricane protection due to the threshold vote required under their declaration. The amendment lowers the voting threshold to allow all condominiums in Florida to have to install hurricane protection that will save lives and reduce the fiscal impact of damage caused by tropical systems.

The amendment to Section 718.113(5)(a) also provides for the recording of a notice in the public records to place parties on notice of the decision of an association to require hurricane protection. This ensures notice to parties such as prospective purchasers of units of the vote to install hurricane protection so the purchasers are on notice prior to closing. The amendment specifies what must be contained in the notice and that the failure to record the notice does not affect the validity of the vote to install hurricane protection. The amendment also clarifies that a vote of the owners is not required if hurricane protection or any exterior window, door or other glass aperture to be protected by the hurricane protection is the obligation of the association or unit owners are required to install hurricane protection pursuant to the declaration. The amendment further provides that if hurricane protection that meets the building code has been installed, the association cannot require the owner to install the same hurricane protection unless it has reached the end of its useful life or is necessary to prevent damage to the common elements or a unit.

Section 718.113(5)(b) was deleted as this Section was duplicative of other sections of Section 718.113(5). Section 718.113(5)(c) is renumbered to Section 718.113(5)(b) and is amended to clarify that associations have the right, but not the obligation, to operate hurricane protection without the permission of the unit owner when it is necessary to preserve and protect the condominium property or association property. The amendment ensures that if an association elects to operate any type of hurricane protection that has been installed on a unit or by a unit owner, that the association does not need the owner's consent since the operation is necessary to preserve and protect the condominium property and association property.

Section 718.113(5)(d) is renumbered to Section 718.113(5)(c) and is amended to clarify that associations may not prohibit an owner from installing code complaint hurricane protection, but may require the owner to follow an existing unified building scheme regarding external appearance. This allows for associations to adopt specifications regarding the installation of hurricane protection to ensure the uniform appearance of the exterior of the condominium building.

The proposal amends Section 718.113(5) to add Section 718.113(5)(d) to provide that unit owners may be responsible for the costs of removal and reinstallation of any hurricane protection where the association is required to remove the hurricane protection for maintenance, repair or replacement of condominium property for which the association is obligated to maintain. The board shall determine whether the removal or reinstallation shall be performed by the association or unit owner. The cost of removal and reinstallation is chargeable to the owner and may be enforced as an assessment. This change avoids associations from being delayed in the performance of necessary maintenance of the condominium property while waiting for the unit owner to remove their hurricane protection and ensures the prompt reinstallation of hurricane protection to ensure the amount of time a condominium unit is without hurricane protection is minimized.

Section 718.115(1)(e) is amended to provide that if hurricane protection is the obligation of the unit owners pursuant to the declaration or pursuant to a vote of the owners, then the cost of

installation by the association is not a common expense, but shall be charged to the owners based on the cost of installation. The cost of installation shall be enforceable against the unit owner as an assessment.

Section 718.115(1)(e) is further amended by the addition of subparagraph 1 to address expenses that are not common expenses. If an owner has already installed code compliant hurricane protection, then the owner shall either be excused from the assessment levied by the association to fund the installation of hurricane protection or shall receive credit equal to the amount the owner would have been charged for the installation. The credit shall only be applicable if the installation of hurricane protection is for all other units lacking code-compliant hurricane protection and the expense of the installation is funded by the budget, including the usage of reserve funds.

IV. ANALYSIS

The following describes the changes being proposed:

1. Section 718.104(4)(p) is created to require that any residential or mixed-use condominium created in Florida must specify in the declaration whether the association or the unit owner is responsible for the maintenance, repair and replacement of exterior doors, windows, glass apertures and code compliant hurricane protection.

2. Section 718.113(5) to provide for uniformity and consistency in the adoption of hurricane protection in residential and mixed-use condominiums in Florida. The Section defines the term “hurricane protection”. The amendment further provides the installation, maintenance, repair, replacement and operation of hurricane protection is not a material alteration of the common elements or association property.

3. Section 718.113(5)(a) is amended to provide that a majority votes of the owner of a residential or mixed-use condominium is required for an association to install hurricane protection or require the unit owners to install hurricane protection. The amendment also provides for the recording of a notice in the public records to place parties on notice of the decision of an association to require hurricane protection. The amendment clarifies that a vote of the owners is not required if hurricane protection or any exterior window, door or other glass aperture to be protected by the hurricane protection is the obligation of the association or unit owners are required to install hurricane protection pursuant to the declaration. The amendment further provides that if hurricane protection that meets the building code has been installed, the association cannot require the owner to install the same hurricane protection unless it has reached the end of its useful life or is necessary to prevent damage.

4. Section 718.113(5)(b) is deleted as being duplicative of other sections in 718.113(5).

5. Section 718.113(5)(c) is renumbered to Section 718.113(5)(b) and is amended to clarify that associations have the right, but not the obligation, to operate hurricane protection without the permission of the unit owner when it is necessary to preserve and protect the condominium property or association property.

6. Section 718.113(5)(d) is renumbered to Section 718.113(5)(c) and is amended to clarify that associations may not prohibit an owner from installing code complaint hurricane protection, but may require the owner to follow an existing unified building scheme regarding external appearance.

7. Section 718.113(5)(d) is added to provide that unit owners may be responsible for the costs of removal and reinstallation of any hurricane protection where the association is required to remove the hurricane protection for maintenance, repair or replacement of condominium property for which the association is obligated to maintain. The board shall determine whether the removal or reinstallation shall be done by the association or unit owner. The cost of removal and reinstallation is chargeable to the owner and may be enforced as an assessment.

8. Section 718.115(1)(e) is amended to provide that if hurricane protection is the obligation of the unit owners pursuant to the declaration or pursuant to a vote of the owners, then the cost of installation by the association is not a common expense, but shall be charged to the owners based on the cost of installation. The cost shall be enforceable against the unit owner as an assessment.

9. Section 718.115(1)(e) is amended to create subparagraph 1 to address expenses that are not common expenses of an association. If an owner has already installed code compliant hurricane protection, then the owner shall receive credit equal to the amount the owner would have been charged for the installation. The credit shall only be applicable if the installation of hurricane protection is for all other units lacking hurricane protection and the expense of the installation is funded by the budget, including the usage of reserve funds.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a direct fiscal impact on local governments. The proposal may have an indirect impact on state and local governments by limiting the resources state and local governments have to utilize to address property damage to condominiums as the result of a tropical or subtropical cyclone impacting the State.

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal may reduce the costs of property, casualty and windstorm insurance for condominium associations and unit owners due to requirements for the utilization of certain types of hurricane protection. There are no other fiscal impacts on the private sector.

VII. CONSTITUTIONAL ISSUES

Impairment of contract- To the extent that a court may find that a covenant or restriction may be considered a contract between the parties, the changes made by this bill may affect such current contract rights and obligations. Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the Florida Constitution both prohibit the Legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the constitutional provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted. The Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.* set forth the following test:

- Was the law enacted to deal with a broad, generalized economic or social problem?
- Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

VIII. OTHER INTERESTED PARTIES

Florida Department of Business and Professional Regulation, The Business Law Section of The Florida Bar, the Public Interest Law Section of The Florida Bar, Cyber Citizens for Justice, the Community Associations Institute, Florida Insurance Council, American Property Casualty Insurance Association and the Florida Property & Casualty Association.