

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 5D Condominium and Cooperative Associations

**SPONSOR(S):** Appropriations Committee, Perez

**TIED BILLS:**           **IDEN./SIM. BILLS:** SB 4-D

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**FINAL HOUSE FLOOR ACTION:** 110 Y's      0 N's            **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 5D passed the House on May 25, 2022, as SB 4-D.

A condominium is a form of real property ownership where persons own condominium units along with an undivided right of access to the condominium's common elements. A cooperative is a form of property ownership in which the real property is owned by the cooperative association and individual units are leased to the residents, who own shares in the association.

The Florida Building Codes Act provides a mechanism for the uniform adoption, updating, interpretation, and enforcement of a single, unified state building code known as the Florida Building Code (Code). The Code is applied, administered, and enforced uniformly by local governments through permits and inspections. The Florida Building Commission (Building Commission) implements the Code. However, the Code does not contain requirements for the maintenance and inspection of existing buildings.

The Code provides that when repairing, replacing, or recovering 25 percent or more of a roof, the entire roof must comply with the current edition of the Code (25 percent rule). As a result, if more than 25 percent of a roof is damaged, and the undamaged portion of the roof does not meet the requirements of the current Code, the entire roof would be required to be replaced to meet current Code requirements.

Related to roof repairs, the bill creates an exception to the 25 percent rule to allow the repair, replacement, or recovering of any portion of a roof without requiring the rest of the roof to be brought up to the current edition of the Code, if the remaining portion of the roof, at a minimum, meets the requirements of the 2007 Code. The Building Commission is required to adopt this exception by rule and incorporate it in the Code.

Related to condominiums and cooperatives, the bill:

- Creates a statewide building milestone inspection requirement for condominiums and cooperative buildings three stories or higher 30 years after initial occupancy, or 25 years if within three miles of the coast.
- Requires additional inspections every 10 years after a building's initial milestone inspection.
- Provides local building officials with ability to assess penalties for failing to comply with the inspection requirements.
- Requires condominiums and cooperatives to conduct structural integrity reserve studies every 10 years for buildings that are three stories or higher.
- Prohibits waiver of funding for certain structural reserves.
- Requires developers to complete structural integrity reserve studies for every building that is three stories or higher, and repeals the ability of developers to waive the collection of all types of reserve funds.
- Provides that structural integrity reserve studies, and inspection reports are a part of an association's official records and must be provided to a potential purchaser of a unit.

The bill may have an insignificant negative fiscal impact on local governments and a significant impact on the private sector. See Fiscal Analysis and Economic Impact Statement.

The bill was approved by the Governor on May 26, 2022, and became effective on that date.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Florida Building Code – Current Situation**

In 1974, Florida adopted legislation requiring all local governments to adopt and enforce a minimum building code that would ensure that Florida's minimum building standards were met. Local governments could choose from four separate model codes. The state's role was limited to adopting all or relevant parts of new editions of the four model codes. Local governments could amend and enforce their local codes as they desired.<sup>1</sup>

In 1992, Hurricane Andrew demonstrated that Florida's system of local codes did not work. Hurricane Andrew easily destroyed structures that were allegedly built according to the strongest code. The Governor eventually appointed a study commission to review the system of local codes and make recommendations for modernizing the system. In 1998, the Legislature adopted the study commission's recommendations for a single state building code and enhanced the oversight role of the state over local code enforcement. In 2000, the Legislature authorized the implementation of the Building Code (Code), and that first edition replaced all local codes on March 1, 2002, making it the first statewide building code in the United States.<sup>2</sup>

The "Florida Building Codes Act" was created to provide a mechanism for the uniform adoption, updating, interpretation, and enforcement of a single, unified state Code. The Code must be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction.<sup>3</sup>

The Florida Building Commission (Building Commission) was statutorily created to implement the Code. The Building Commission, which is housed within the Department of Business and Professional Regulation (DBPR), is a 19-member technical body made up of design professionals, contractors, and government experts in various disciplines covered by the Code. The Building Commission reviews several International Codes published by the International Code Council, the National Electric Code, and other nationally adopted model codes (model codes) to determine if the Code needs to be updated and adopts an updated Code every three years.<sup>4</sup>

In 2017, the Legislature updated the Code adoption process so that the Building Commission is no longer required to adopt the most recent version of the model codes as the foundation of the Code. Instead, the triennial process requires the Building Commission to review the model codes to determine which programs are essential for Florida's specific needs.<sup>5</sup> As a result, the past edition of the Code becomes the foundation or base Code and the Building Commission decides what updates to make.

In 2019, the Legislature allowed the Building Commission to approve provisions to the Building Code every three years without a specific individual finding that each of the provisions are needed to meet the specific needs of the state. The Building Commission can use discretion to require such finding if it so chooses. The Building Commission may continue to adopt technical amendments once a year for statewide or regional application if they find that the amendment is needed in order to accommodate the specific needs of the state.<sup>6</sup>

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<sup>1</sup> The Florida Building Commission Report to the 2006 Legislature, *Florida Department of Community Affairs*, p. 4, [http://www.floridabuilding.org/fbc/publications/2006\\_Legislature\\_Rpt\\_rev2.pdf](http://www.floridabuilding.org/fbc/publications/2006_Legislature_Rpt_rev2.pdf) (last visited May 31, 2022).

<sup>2</sup> *Id.*

<sup>3</sup> See s. 553.72(1), F.S.

<sup>4</sup> Ss. 553.73 and 553.74, F.S.

<sup>5</sup> Ch. 2017-181, Laws of Fla.

<sup>6</sup> Ch. 2019-75, Laws of Fla.

The current edition of the Code, the seventh edition, is generally referred to as the “2020 Florida Building Code.”<sup>7</sup>

### *Damaged Roof Coverings*

The Code addresses repairing, replacing and recovering damaged roof coverings (reroofing).<sup>8</sup> Chapter 6, Section 611.1.1 of the Code states:

Not more than 25 percent of the total roof area or roof section of any existing building or structure shall be repaired, replaced, or recovered in any 12 month period unless the entire roofing system or roof section conforms to the requirements of this code.<sup>9</sup>

The Code provides the following definitions related to recovering or replacing damaged roof coverings:<sup>10</sup>

- Roof Recover: The process of installing an additional roof covering over a prepared existing roof covering without removing the existing roof covering.
- Roof Repair: Reconstruction or renewal of any part of an existing roof for the purposes of its maintenance.
- Roof Replacement: The process of removing the existing roof covering, repairing any damaged substrate and installing a new roof covering.
- Roof Section: A separation or division of a roof area by existing expansion joints, parapet walls, flashing (excluding valley), difference of elevation (excluding hips and ridges), roof type or legal description; not including the roof area required for a proper tie-off with an existing system.
  - This definition applies to residential roof coverings.

### *Home Hardening, Windstorm Loss Mitigation Requirements and Roofs*

Between 1980 and 2021, hurricanes<sup>11</sup> in the United States (U.S.) caused approximately \$1.1 trillion in damage, including an average cost of \$20.5 billion per event and 6,697 deaths.<sup>12</sup> In Florida, Hurricanes Irma and Michael, in 2017 and 2018 respectively, caused approximately \$43 billion in insured losses.<sup>13</sup> The current forecast for hurricane activity in the Atlantic Basin for 2022 predicts above-normal activity, including 19 named storms, nine hurricanes and four major hurricanes.<sup>14</sup>

In 2007, the Legislature found that due to the effects and threats of hurricanes, the mitigation of property damage is a valid and recognized objective of the Code, and that cost-effective techniques for integrating Code requirements into buildings built prior to the Code’s implementation benefit all residents of the state.<sup>15</sup>

Consequently, the Building Commission was required to:<sup>16</sup>

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<sup>7</sup> Florida Building Commission Homepage, <https://floridabuilding.org/c/default.aspx> (last visited May 31, 2022).

<sup>8</sup> Ch. 15, *Building* and Ch. 9 *Residential*, F.B.C. (2020).

<sup>9</sup> Ch. 6, s. 611.1.1, F.B.C.

<sup>10</sup> Ch. 2, s. 202, *Building*, ch. 2, s. R202, *Residential*, F.B.C. (2020).

<sup>11</sup> The National Oceanic and Atmospheric Administration (NOAA), National Hurricane Center (NHC), <https://www.nhc.noaa.gov/aboutgloss.shtml> (last visited May 18, 2022), defines the term “hurricane” to mean a tropical cyclone in which the maximum sustained surface wind (using the U.S. 1-minute average) is 64 kt (74 mph or 119 km/hr) or more. The term hurricane is used for Northern Hemisphere tropical cyclones east of the International Dateline to the Greenwich Meridian. The term typhoon is used for Pacific tropical cyclones north of the Equator west of the International Dateline.

<sup>12</sup> NOAA, *Fast Facts, Hurricane Costs*, <https://coast.noaa.gov/states/fast-facts/hurricane-costs.html> (last visited May 31, 2022).

<sup>13</sup> Insurance Information Institute, *Facts + Statistics: Hurricanes*, <https://www.iii.org/fact-statistic/facts-statistics-hurricanes> (last visited May 31, 2022).

<sup>14</sup> Colorado State University Tropical Weather & Climate Research, *Seasonal Hurricane Forecasting, Forecast for the 2022 Hurricane Activity*, <https://tropical.colostate.edu/forecasting.html> (last visited May 31, 2022).

<sup>15</sup> Ch. 2007-126, Laws of Fla., codified in s. 553.844(1), F.S.

<sup>16</sup> S. 553.844(2), F.S.

- Analyze the extent to which proposed Code provisions will mitigate property damage to buildings and their contents;
- Develop and adopt within the Code a means to incorporate recognized mitigation techniques for site-built, single-family residential structures constructed before the implementation of the Code, including, but not limited to:
  - Prescriptive techniques for the installation of gable-end bracing;
  - Secondary water barriers for roofs and standards relating to secondary water barriers;
  - Prescriptive techniques for improvement of roof-to-wall connections;
  - Strengthening or correcting roof-decking attachments and fasteners during reroofing; and
  - Adding or strengthening opening protections.

The Building Commission adopted many of these measures related to roofs and incorporated them into the 2007 Florida Building Code, including measures that require a roof replacement to include secondary water barriers for roofs and measures that strengthen or correct roof-decking attachments and fasteners during reroofing.

The 2007 Florida Building Code also required specific roof replacement techniques for certain site-built, single-family residential structures located in a wind-borne debris region as defined in s. 1609.2 of the International Building Code (2006)<sup>17</sup> and that meet certain insured or taxable value thresholds.<sup>18</sup>

### *Florida Residential Property Insurance Market*

From 2017 through the second quarter of 2021, Florida property insurers (insurers) experienced combined financial losses of \$1 billion.<sup>19</sup> As a result, it is reported that insurers sought rate increases, dropped customers, and stopped writing new policies. This also resulted in an influx of policies into Citizens Property Insurance Corporation,<sup>20</sup> which was created by the Legislature as a government entity to provide property insurance to eligible Florida property owners unable to find affordable coverage in the private market.<sup>21</sup>

The Florida Insurance Commissioner attributed the financial losses to several trends and behaviors present in Florida's property insurance market, including but not limited to, claims solicitations and litigation.<sup>22</sup> Claims solicitations allegations include solicitations related to roofs and the fraudulent use of the 25 percent rule. It is reported that in such cases, roofers and roofing contractors go door to door asking homeowners if they can inspect their roof for damage. The contractors then advise homeowners their property insurance may replace the entire roof if the homeowners file a claim.

In response to such challenges in Florida's property insurance market, the Legislature passed SB 76 in 2021.<sup>23</sup> The bill addressed various property insurance concerns including contractors soliciting homeowners to file insurance claims for roof damage, notices of intent to litigate property insurance claims, attorney fee awards in first-party property insurance litigation, and eligibility standards for, and

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<sup>17</sup> 2006 International Building Code, Section 1609, Wind Loads, <https://www.optasoft.com/applications/codes/2006IBC/HTMLHelp/1609.htm> (last visited May 31, 2022). S. 1609.2, IBC, defines the term "Wind-borne Debris Region" to mean "portions of hurricane-prone regions that are within 1 mile (1.61 km) of the coastal mean high water line where the basic wind speed is 110 mph (48 m/s) or greater; or portions of hurricane-prone regions where the basic wind speed is 120 mph (53 m/s) or greater; or Hawaii."

<sup>18</sup> S. 553.844(3), F.S.

<sup>19</sup> David Altmaier, Commissioner Florida Office of Insurance Regulation (OIR), Overview of the Florida Insurance Market, pg. 6 (Sept. 22, 2021). [https://www.flsenate.gov/Committees/Show/BI/MeetingPacket/5252/9419\\_MeetingPacket\\_5252\\_2.pdf](https://www.flsenate.gov/Committees/Show/BI/MeetingPacket/5252/9419_MeetingPacket_5252_2.pdf) (last visited May 31, 2022).

<sup>20</sup> S. 627.351(6), F.S.

<sup>21</sup> News4JAX, Property Insurers Seek Hefty Rate Hikes, <https://www.news4jax.com/news/florida/2022/05/18/property-insurers-seek-hefty-rate-hikes/> (last visited May 31, 2022).

<sup>22</sup> Altmaier, supra note 19.

<sup>23</sup> Ch. 2021-77, Laws of Fla.

ratemaking by Citizens Property Insurance Corporation. Specifically, the bill attempted to address increases in roof claims by prohibiting contractors, and persons acting on behalf of contractors, from:

- Soliciting residential property owners through prohibited advertisements, which are communications to a consumer that encourage, instruct, or induce a consumer to contact a contractor to file an insurance claim for roof damage;
- Offering the residential property owner consideration to perform a roof inspection or file an insurance claim;
- Offering or receiving consideration for referrals when property insurance proceeds are payable;
- Engaging in unlicensed public adjusting; and
- Providing an insured with an agreement authorizing repairs without providing a good faith estimate.

On July 11, 2021, a federal district court enjoined the enforcement of the provisions of SB 76 that ban contractors from making prohibited advertisements regarding property insurance roof claims. The judge issued the injunction on the basis that these provisions violate First Amendment commercial free speech rights of contractors under the U.S. Constitution.<sup>24</sup>

### **Florida Building Code – Effect of the Bill**

The bill amends s. 583.844, F.S., creating an exception to the 25 percent rule. The exception allows the repair, replacement, or recovering of any portion of a roof without requiring the remaining portion of the roof to be brought up to the current edition of the Code if the remaining portion of the roof at least meets the requirements of the 2007 Florida Building Code.

Specifically, the bill provides that if an existing roofing system or roof section was built, repaired, or replaced in compliance with the requirements of the 2007 Florida Building Code, or any subsequent editions of the Florida Building Code, and 25 percent or more of such roofing system or roof section is being repaired, replaced, or recovered, only the repaired, replaced, or recovered portion is required to be constructed in accordance with the Florida Building Code in effect, as applicable.

The bill requires the Building Commission to adopt this exception by rule and incorporate it in the Code.

### **Community Associations – Current Situation**

The Florida Division of Condominiums, Timeshares and Mobile Homes (“Division”), within the Department of Business and Professional Regulation (“DBPR”), provides consumer protection for Florida residents living in regulated communities through education, complaint resolution, alternative dispute resolution, and developer disclosure. The Division has regulatory authority over:

- Condominium associations.
- Cooperative associations.
- Florida mobile home parks and related associations.
- Vacation units and timeshares.
- Yacht and ship brokers and related business entities.
- Homeowners’ associations (limited to the arbitration of election and recall disputes).

#### *Condominiums*

A condominium is a form of real property ownership created under ch. 718, F.S., the “Condominium Act.” Persons own condominium units along with an undivided right of access to the condominium’s common elements.<sup>25</sup> A condominium is created by recording a declaration of condominium, which governs the relationship between condominium unit owners and the condominium association, in the

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<sup>24</sup> *Gale Force Roofing & Restoration, LLC. V. Brown*, 548 F.Supp.3d 1143, (N.D. Fla., 2021). (Order Granting Preliminary Injunction, July 11, 2021).

<sup>25</sup> S. 718.103(11), F.S.

public records of the county where the condominium is located.<sup>26</sup> All unit owners are members of the condominium association, and the association is responsible for common elements operation and maintenance.<sup>27</sup> The condominium association is overseen by an elected board of directors, commonly referred to as a “board of administration,” which is responsible for the association’s administration.<sup>28</sup>

### *Cooperatives*

A cooperative is a form of property ownership created under ch. 719, F.S., the “Cooperative Act,” in which the real property is owned by the cooperative association and individual units are leased to the residents, who own shares in the association.<sup>29</sup> The lease payment amount is the pro-rata share of the cooperative’s operational expenses. Cooperatives operate similarly to condominiums, and the laws regulating cooperatives are largely identical to those regulating condominiums.

### *Fiduciary Relationship*

Board members and officers of a condominium or cooperative association have a fiduciary relationship with the unit owners in their condominium or cooperative. This fiduciary relationship requires board members and officers to act in good faith and in the best interests of the unit owners. Under the “business judgment rule,” the board must act within the scope of its authority, in a reasonable manner, and must perform its duties with the care and responsibility that an ordinarily prudent person would exercise under similar circumstances.<sup>30</sup>

Board members and officers can be the subject of a cause of action for a breach of their fiduciary duty. However, a person bringing such action must prove that the board member or officer had a fiduciary duty that was breached that caused damages and rose to the level of criminal activity, fraud, self-dealing, unjust enrichment, or other improper personal benefit.<sup>31</sup>

To determine if a board member or officer breached his or her fiduciary duty, Florida courts look to see if the board member or officer violated the business judgment rule by determining if the association had the contractual or statutory authority to perform the relevant act and if the decision was reasonable. The business judgment rule generally will protect association board members and officers, as long as those board members or officers act within the scope of their authority and in a reasonable manner.<sup>32</sup>

### *Champlain Towers South*

On June 24, 2021, Champlain Towers South, a 12-story beachfront condominium building in the Town of Surfside, which was completed in 1981, partially collapsed resulting in the death of 98 people.

In response, the National Institute of Standards and Technology (NIST) within the United States Department of Commerce launched a full investigation into the cause of the building’s failure. According to NIST, it will provide regular updates on the progress of the investigation, but because of the amount of evidence and information that must be examined thoroughly, the investigation could take multiple years to complete.<sup>33</sup>

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<sup>26</sup> S. 718.104(2), F.S.

<sup>27</sup> S. 718.103(2), F.S.

<sup>28</sup> S. 718.103(4), F.S.

<sup>29</sup> S. 719.103(2) and (26), F.S.

<sup>30</sup> Ss. 718.111(1) and 719.104(8), F.S.

<sup>31</sup> Harris B. Katz, *Condo column: Can board members be sued and how can an association remove a director?*, TC Palm (Oct. 17, 2019) <https://www.tcpalm.com/story/news/local/florida/2019/10/17/can-condo-board-members-sued-and-how-can-association-remove-director/3907749002/> (last visited May 31, 2022).

<sup>32</sup> *Id.*; *Hollywood Towers Condominium Association v. Hampton*, 40 So. 3d 784, 787 (Fla. 4th DCA 2010).

<sup>33</sup> National Institute of Standards and Technology, *NIST Establishes Expert Team to Investigate the Champlain Towers South Collapse*, Aug. 25, 2021 <https://www.nist.gov/news-events/news/2021/08/nist-establishes-expert-team-investigate-champlain-towers-south-collapse> (last visited May 31, 2022).

The Town of Surfside has also hired a forensic investigator to investigate the cause of the collapse, which could take multiple months.<sup>34</sup>

Despite the fact that the investigations to determine the cause of the building's failure may take months if not years to complete, the condition of the building prior to collapse and released documentation about the building's history have revealed potential factors that may have caused or contributed to the building's collapse.<sup>35</sup>

According to a news report, in 2018, an engineering firm performed an inspection of the building and issued a report that noted that Champlain Towers South's pool deck was flat and not sloped. A sloped deck allows water to drain properly whereas a flat deck can create standing water, which can seep down and damage underlying concrete. The engineer's report also mentioned that the waterproofing below the pool deck was beyond its useful life.<sup>36</sup>

The report noted that the building had major structural damage to a concrete slab below the pool deck and corrosion (spalling and cracking) of the building's columns and beams in the underground garage.<sup>37</sup>

According to a news reports, the building may have also had design flaws. According to the report, the building plans specified structural columns that were too narrow to accommodate enough rebar, which means the contractors had to choose between cramming extra steel into a too-small column — which can create air pockets that accelerate corrosion — or inadequately attaching floor slabs to their supports. The report also indicated the columns were “barely designed with enough strength to support a pool party, much less the layers of pavers and standing water that loaded it down over the decades.”<sup>38</sup>

According to news reports, the association also delayed the repairs of the issues identified in the engineering reports because of infighting among members of the association.<sup>39</sup>

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<sup>34</sup> Phil Prazan, *Surfside Hired Him to Investigate Condo Collapse. Here's How He'll Do It.*, 6 South Florida (Jul. 2, 2021) <https://www.nbcmiami.com/news/local/surfside-hired-him-to-investigate-condo-collapse-heres-how-hell-do-it-0/2485052/> (last visited May 31, 2022).

<sup>35</sup> The Occupational Safety and Health Administration, the town of Surfside and Miami-Dade County's State Attorney's Office are also investigating the collapse. The Real Property, Probate and Trust Law Section of the Florida Bar created the Condominium Law and Policy on Life Safety Task Force, which provided recommendations to improve building safety on October 12, 2021. In addition, the Miami-Dade police are handling a homicide investigation, and the unit owners have filed a class-action lawsuit against the condo association.

<sup>36</sup> Gina Harkins, *What you need to know about the Florida condo collapse as the search for survivors continues and probe begins*, Washington Post (Jul. 10, 2021), <https://www.washingtonpost.com/nation/2021/06/25/florida-condo-collapse-what-you-should-know/> (last visited May 31, 2022); Visual Journalism Team, *Miami building collapse: What could have caused it?*, BBC (Jul. 1, 2021) <https://www.bbc.com/news/world-us-canada-57651025> (last visited May 31, 2022).

<sup>37</sup> *Id.*

<sup>38</sup> Alissa Walker, *Collapsed Surfside Towers Actually Broke Building Code From the Very Beginning*, Curbed (Aug. 9, 2021) <https://www.curbed.com/2021/08/miami-condo-collapse-structural-flaws.html> (last visited May 31, 2022); James Glanz, Mike Baker, and Anjali Singhvi, *Condo Wreckage Hints at First Signs of Possible Construction Flaw*, The New York Times (Jul. 3, 2021) <https://www.nytimes.com/2021/07/03/us/florida-condo-collapse-steel-rebar.html> (last visited May 31, 2022).

<sup>39</sup> Russell Lewis, *Months Before Florida Condo Collapsed, Residents And The Board Sparred Over Repairs*, NPR (Jul. 2, 2021) <https://www.npr.org/sections/live-updates-miami-area-condo-collapse/2021/07/02/1012373938/months-before-florida-condo-collapse-residents-and-board-sparred-over-repairs> (last visited May 31, 2022); Beth Reinhard, Tik Root, Brady Dennis, and Jon Swaine, *Majority of Florida condo board quit in 2019 as squabbling residents dragged out plans for repairs*, Washington Post (Jun. 30, 2021) [https://www.washingtonpost.com/investigations/majority-of-florida-condo-board-quit-in-2019-as-squabbling-residents-dragged-out-plans-for-repairs/2021/06/30/43592282-d98e-11eb-ae62-2d07d7df83bd\\_story.html](https://www.washingtonpost.com/investigations/majority-of-florida-condo-board-quit-in-2019-as-squabbling-residents-dragged-out-plans-for-repairs/2021/06/30/43592282-d98e-11eb-ae62-2d07d7df83bd_story.html) (last visited May 31, 2022).

## Enforcement of the Florida Building Code

It is the intent of the Legislature that local governments have the power to inspect all buildings, structures, and facilities within their jurisdiction in protection of the public's health, safety, and welfare.<sup>40</sup> Every local government must enforce the Building Code and issue building permits.<sup>41</sup>

It is unlawful for a person, firm, or corporation to construct, erect, alter, repair, secure, or demolish any building without first obtaining a building permit from the local government or from such persons as may, by resolution or regulation, be directed to issue such permit, upon the payment of reasonable fees as set forth in a schedule of fees adopted by the enforcing agency.<sup>42</sup>

To obtain a building permit an applicant must complete an application for the proposed work on the form furnished by the government entity.<sup>43</sup> A local government that issues building permits must post each type of building permit application on its website.<sup>44</sup>

A building permit is an official document or certificate issued by the local building official that authorizes performance of a specific activity.<sup>45</sup> A building official is a local government employee or a person contracted by a government entity who supervises building code activities, including plans review, enforcement, and inspection.<sup>46</sup>

Any construction work that requires a building permit also requires building plans and inspections by the building official to ensure the work complies with the Building Code.<sup>47</sup> Generally speaking, a permitted project that passes the required inspections is considered completed or closed.<sup>48</sup>

The Building Code only applies to new construction, and does not apply to existing buildings unless there is new design, construction, erection, alteration, modification, repair, addition, change of occupancy, or demolition of such buildings.<sup>49</sup>

Florida law formally required regular inspections of certain condominium buildings, but the law was repealed shortly after enactment. In 2008, the Legislature mandated that every condominium greater than three stories in height be inspected for maintenance, useful life, and replacement costs of useful elements every five years by a licensed engineer or architect. A condominium association could waive the requirement to perform an inspection for five years with a majority vote of interests present at a properly called meeting of the association.<sup>50</sup>

The Legislature repealed the requirement in 2010. According to news reports, the Legislature repealed the inspection requirement because the inspections were too expensive.<sup>51</sup>

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<sup>40</sup> S. 553.72, F.S.

<sup>41</sup> Ss. 125.01(1)(bb), 125.56(1), and 553.80(1), F.S.

<sup>42</sup> See ss. 125.56(4)(a) and 553.79(1), F.S.

<sup>43</sup> S. 713.135(5) and (6), F.S.

<sup>44</sup> Ss. 125.56(4)(b) and 553.79(1), F.S.

<sup>45</sup> S. 468.603(2), F.S.; Section 202 of the Seventh edition of the Florida Building Code (Building).

<sup>46</sup> S. 468.603(2), F.S.; Section 202 of the Seventh edition of the Florida Building Code (Building).

<sup>47</sup> Sections 107, 110.1, and 110.3 of the Seventh edition of the Florida Building Code (Building).

<sup>48</sup> Doug Wise, *Closing Inactive & Excluded Building Permits*, Palm Beach County Planning, Zoning & Building Department, Building Division, <http://discover.pbcgov.org/pzb/building/BuildingCodes/PBO-126%20E2%80%9320Closing%20Inactive%20and%20Excluded%20Building%20Permits.pdf> (last visited May 31, 2022).

<sup>49</sup> S. 553.73(1)(a), F.S.; Section 101 of the Seventh edition of the Florida Building Code (Existing Building).

<sup>50</sup> Ch. 08-28, Laws of Fla.

<sup>51</sup> Ch. 10-176, Laws of Fla.; Jeffrey Schweers, *'It takes a tragedy': Florida's hands-off approach to condo regulations tested after Surfside*, Tallahassee Democrat (Jul. 2, 2021) <https://www.tallahassee.com/story/news/local/state/2021/07/02/surfside-miami-condo-collapse-florida-aging-condos-not-require-inspections/7811000002/> (last visited May 31, 2022).

## Age of Condominium Buildings

There are 1,529,764 condominium units in Florida operated by 27,588 associations. Of those units:<sup>52</sup>

- 105,404 units are 50 years or older.
- 479,435 units are 40-50 years old.
- 327,537 units are 30-40 years old.
- 141,773 units are 20-30 years old.
- 428,657 units are 10-20 years old.
- 46,958 units are 0-10 years old.

Additionally, over 2,000,000 residents are estimated to be occupying condominiums 30 years or older in Florida, based upon census data of approximately 2.2 persons living in an average condominium unit.<sup>53</sup>

## Local Building Recertification Programs

The Building Code does not contain requirements for the maintenance and inspection of existing buildings.<sup>54</sup> However, local governments may enact such requirements at their discretion to apply throughout a local jurisdiction. According to DBPR, some local jurisdictions in the state have used the following model standards to aid in their adoption of local requirements for the maintenance and inspections of existing buildings: the International Property Maintenance Code, the Standard Housing Code, and the Standard Unsafe Building Abatement Code, or some combination thereof.<sup>55</sup>

Since the 1970s, Miami-Dade County has required certain existing buildings to be recertified.<sup>56</sup> Currently, Miami-Dade County requires certain buildings to be recertified that are at least 40 years of age in order to determine the general structural condition of the building and the general condition of its electrical systems. Buildings must be recertified every 10 years after the initial recertification.<sup>57</sup>

Miami-Dade County requires all buildings, except single-family residences, duplexes, and minor structures<sup>58</sup> to be recertified when they have been in existence for 40 years or longer, as determined by the building official. When a building official determines a building must be recertified, the building official must provide notice of recertification to the building owner.<sup>59</sup>

Within 90 days of receiving the notice, an owner must provide a written report to the building official certifying that such building or structure is structurally and electrically safe, or has been made structurally and electrically safe, for the specified use for continued occupancy. The written report must be prepared by a licensed engineer or architect. An engineer or architect may only undertake assignments if he or she is qualified by training and experience in the specific technical field involved in the inspection and report.<sup>60</sup>

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<sup>52</sup> Report of the Florida Bar RPPTL Condominium Law and Policy Life Safety Advisory Task Force, p. 4, available at: <https://www-media.floridabar.org/uploads/2021/10/Condominium-Law-and-Policy-Life-Safety-Advisory-Task-Force-Report.pdf> (last visited May 31, 2022).

<sup>53</sup> *Id.*

<sup>54</sup> Department of Business and Professional Regulation, Agency Analysis of 2022 Senate Bill 1702, p. 2 (Jan. 7, 2022).

<sup>55</sup> *Id.*

<sup>56</sup> Broward.org, *Building Safety Program*, <https://www.broward.org/Building/Pages/40-Year-Building-Safety-Inspection-Program.aspx> (last visited May 31, 2022).

<sup>57</sup> Section 8-11(f), Miami-Dade County Code. Miami-Dade County Department of Regulatory and Economic Resources, *Notice of Required Recertification of 40 Year Old Building(s)*, <https://www.miamidade.gov/permits/library/recertification-building.pdf> (last visited May 31, 2022).

<sup>58</sup> Minor structures are buildings that have occupancy loads of 10 or less people and have a gross area of 2,000 square feet or less.

<sup>59</sup> Section. 8-11(f), Miami-Dade County Code.

<sup>60</sup> *Id.*

The written report must bear the impressed seal and signature of the engineer or architect who performed the inspection, indicate the manner and type of inspection forming the basis for the report, and describe any matters identified as requiring remedial action.<sup>61</sup>

If the recertification inspection finds that repairs or modifications are necessary, the owner must complete the repairs or modifications within 150 days from the date of receiving the notice of recertification from the building official.<sup>62</sup>

Written recertification reports must be in conformity with the minimum inspection procedural guidelines issued by the Board of Rules and Appeals.<sup>63</sup>

Miami-Dade County provides that any building or structure that is subject to recertification, which the owner has not timely responded to the building official's notice of required inspection or has failed to make all of the necessary repairs or modifications resulting from the recertification inspection, will be demolished.<sup>64</sup>

Broward County created a recertification program in 2005, and it has been in effect since January 2006. Broward County's recertification is modeled after Miami-Dade County's. However, Broward County exempts all buildings that have a gross area of 3,500 square feet or less. Broward County also gives an owner of a building 180 days to complete repairs identified in a written recertification report, instead of 150 days.<sup>65</sup>

Currently, other local governments in Florida have adopted or are considering adopting building recertification programs similar to Miami-Dade County's and Broward County's recertification program, including Palm Beach County<sup>66</sup>, the city of Boca Raton<sup>67</sup>, and Hillsborough County.<sup>68</sup>

### *Professional Engineers*

The practice of engineering is regulated by ch. 471, F.S., and by the Florida Board of Professional Engineers (FBPE). DBPR contracts with the Florida Engineers Management Corporation to provide the administrative, investigative, and prosecutorial services for FBPE.<sup>69</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Section 8-5(6), Miami-Dade County Code.

<sup>65</sup> Broward County Board of Rules & Appeals, *40 Year Building Safety Inspection Program*, (Jun. 2015) <https://www.broward.org/CodeAppeals/Documents/40YBSI-INFO-Rev.6-15.pdf> (last visited May 31, 2022).

<sup>66</sup> Wayne Washington, *Panelists: HOAs and timely building inspections at the heart of better safety protocols*, The Palm Beach Post (Aug. 18, 2021) <https://www.palmbeachpost.com/story/news/local/westpb/2021/08/18/surfside-condo-collapse-panelists-discuss-ways-make-buildings-safer/8164366002/> (last visited May 31, 2022).

<sup>67</sup> City of Boca Raton, *Building Recertification Program Ordinance*, <https://www.myboca.us/2058/Building-Recertification-Program-Ordinan> (last visited May 31, 2022).

<sup>68</sup> C.T. Bowen, *Hillsborough commissioner seeks expedited building inspection rules*, Tampa Bay Times (Oct. 20, 2021) <https://www.tampabay.com/news/hillsborough/2021/10/20/hillsborough-commissioner-seeks-expedited-building-inspection-rules/> (last visited May 31, 2022).

<sup>69</sup> S. 471.038(3), F.S.

Section 471.013, F.S., provides the license qualifications for a professional engineer. In order to be licensed as a professional engineer, a person must successfully pass two examinations: the fundamentals examination and the principles and practices examination. Prior to being permitted to sit for the fundamentals examination, an applicant must have graduated from:<sup>70</sup>

- An approved engineering science curriculum of four years or more in a board-approved school, college, or university; or
- An approved engineering technology curriculum of four years or more in a board-approved school, college, or university.

The FBPE must certify for licensure any applicant who has submitted proof of being at least 18 years old and has the required engineering experience. For graduates of an approved engineering science curriculum, the applicant must have a record of at least four years of active engineering experience sufficient to indicate competence to be in responsible charge of engineering. Graduates of an approved engineering technology curriculum must have a record of at least six years of such qualified experience.<sup>71</sup>

A person who is licensed in another state is eligible for a professional engineering license by endorsement in Florida if the person:<sup>72</sup>

- Graduated from an FBPE-approved engineering program, passed a licensing examination that is substantially equivalent to the fundamentals examination and principles and practice examination, and satisfied the experience requirements; or
- Holds a valid license to practice engineering issued by another state or territory of the United States, if the criteria for issuance of the license were substantially the same as the licensure criteria that existed in this state at the time the license was issued.

FBPE deems that an applicant who seeks licensure by endorsement has passed an examination substantially equivalent to the fundamentals examination when such applicant has held a valid professional engineer's license in another state for 10 years.<sup>73</sup>

FBPE also deems that an applicant who seeks licensure by endorsement has passed an examination substantially equivalent to the fundamentals examination and the principles and practices examination when such applicant has held a valid professional engineer's license in another state for 15 years.<sup>74</sup>

Currently, there are 40,789 licensed engineers who are able to practice in the state.<sup>75</sup>

### *Architects*

Chapter 481, Part I, F.S., governs the licensing and regulation of architects and related business organizations. The Board of Architecture and Interior Design (Architecture Board) is housed within DBPR. The Architecture Board processes licenses and responds to consumer complaints and inquiries by monitoring activities and compliance within the architecture and interior design industries.

To practice architecture, an applicant must:<sup>76</sup>

- Complete a bachelor's or master's degree from an accredited architecture program.
- Complete the national architectural experience program, which takes approximately two years.
- Pass the national licensure examination given by the National Council of Architectural Registration Boards.

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<sup>70</sup> S. 471.013(1), F.S.

<sup>71</sup> See ss. 471.015(2)(a)1. and 2., F.S.

<sup>72</sup> S. 471.015(3), F.S.

<sup>73</sup> S. 471.015(5), F.S.

<sup>74</sup> *Id.*

<sup>75</sup> Email from Conner Mann, Legislative Affairs Coordinate, DBPR, Licensed Architects and Engineers (Feb. 8, 2022).

<sup>76</sup> Ss. 481.209, 481.211, and 481.213, F.S.

An architect who is licensed in another state and who seeks qualification for license by endorsement must complete a two-hour class approved by the Architecture Board on wind mitigation techniques.<sup>77</sup>

Currently, there are 11,308 licensed architects who are able to practice in the state.<sup>78</sup>

### **Community Associations – Effect of the Bill**

The bill creates a mandatory statewide structural inspection program for certain condominium and cooperative buildings.

A "milestone inspection" means a structural inspection of a building, including an inspection of load-bearing walls, primary structural members, and primary structural systems<sup>79</sup> by a licensed architect or engineer for the purposes of attesting to the life safety and adequacy of the structural components of the building and, to the extent reasonably possible, determining the general structural condition of the building as it affects the safety of such building, including a determination of any necessary maintenance, repair, or replacement of any structural component of the building. The purpose of such inspection is not to determine if the condition of an existing building is in compliance with the Florida Building Code or the fire safety code.

The bill requires that a condominium or cooperative must have a milestone inspection performed for each building that is three stories or more in height by December 31 of the year in which the building reaches 30 years of age, based on the date the certificate of occupancy for the building was issued, and every 10 years thereafter. If the building is located within 3 miles of a coastline<sup>80</sup>, the condominium or cooperative must have a milestone inspection performed by December 31 of the year in which the building reaches 25 years of age, based on the date the certificate of occupancy for the building was issued, and every 10 years thereafter.

Such condominium or cooperative must arrange for the milestone inspection to be performed and is responsible for ensuring compliance. The condominium or cooperative is responsible for all costs associated with the inspection. This requirement does not apply to a single-family, two-family, or three-family dwelling with three or fewer habitable stories above ground.

If a milestone inspection is required and the building's certificate of occupancy was issued on or before July 1, 1992, the building's initial milestone inspection must be performed before December 31, 2024. If the date of issuance for the certificate of occupancy is not available, the date of issuance of the building's certificate of occupancy is to be the date of occupancy evidenced in any record of the local building official.

Upon determining that a building must have a milestone inspection, the local enforcement agency must provide written notice of such required inspection to the condominium or cooperative by certified mail, return receipt requested. Within 180 days after receiving such written notice, the condominium or cooperative must complete phase one of the milestone inspection. Completion of phase one of the milestone inspection means the licensed engineer or architect who performed the phase one inspection submitted the inspection report by e-mail, United States Postal Service, or commercial delivery service to the local enforcement agency.

The bill provides that a milestone inspection consists of two phases.

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<sup>77</sup> S. 481.213, F.S.

<sup>78</sup> Email from Conner Mann, *supra* note 57.

<sup>79</sup> As they are defined in s. 627.706, F.S.

<sup>80</sup> "Coastline" has the same meaning as in the Submerged Lands Act, 43 U.S.C. ss. 1301 et seq.

For phase one of the milestone inspection, a licensed architect or engineer must perform a visual examination of habitable and nonhabitable areas of a building, including the major structural components of a building, and provide a qualitative assessment of the structural conditions of the building. If the architect or engineer finds no signs of substantial structural deterioration<sup>81</sup> to any building components under visual examination, phase two of the inspection is not required.

A phase two of the milestone inspection must be performed if any substantial structural deterioration is identified during phase one. A phase two inspection may involve destructive or nondestructive testing at the inspector's direction. The inspection may be as extensive or as limited as necessary to fully assess areas of structural distress in order to confirm that the building is structurally sound and safe for its intended use and to recommend a program for fully assessing and repairing distressed and damaged portions of the building. When determining testing locations, the inspector must give preference to locations that are the least disruptive and most easily repairable while still being representative of the structure.

The bill requires that upon completion of a phase one or phase two milestone inspection, the architect or engineer who performed the inspection must submit a sealed copy of the inspection report with a separate summary of, at minimum, the material findings and recommendations in the inspection report to the condominium or cooperative, and to the building official of the local government which has jurisdiction. The inspection report must, at a minimum, meet all of the following criteria:

- Bear the seal and signature, or the electronic signature, of the licensed engineer or architect who performed the inspection.
- Indicate the manner and type of inspection forming the basis for the inspection report.
- Identify any substantial structural deterioration, within a reasonable professional probability based on the scope of the inspection, describe the extent of such deterioration, and identify any recommended repairs for such deterioration.
- State whether unsafe or dangerous conditions, as those terms are defined in the Florida Building Code, were observed.
- Recommend any remedial or preventive repair for any items that are damaged but are not substantial structural deterioration.
- Identify and describe any items requiring further inspection.

The condominium or cooperative must:

- distribute a copy of the inspector-prepared summary of the inspection report to each condominium unit owner or cooperative unit owner, regardless of the findings or recommendations in the report, by United States mail or personal delivery and by electronic transmission to unit owners who previously consented to received notice by electronic transmission;
- post a copy of the inspector-prepared summary in a conspicuous place on the condominium or cooperative property; and
- publish the full report and inspector-prepared summary on the association's website, if the association is required to have a website.

The bill provides that a local enforcement agency may prescribe timelines and penalties with respect to compliance with this section.

The bill provides that a board of county commissioners may adopt an ordinance requiring that a condominium or cooperative schedule or commence repairs for substantial structural deterioration within a specified timeframe after the local enforcement agency receives a phase two inspection report; however, such repairs must be commenced within 365 days after receiving such report. If a

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<sup>81</sup> "Substantial structural deterioration" means substantial structural distress that negatively affects a building's general structural condition and integrity. The term does not include surface imperfections such as cracks, distortion, sagging, deflections, misalignment, signs of leakage, or peeling of finishes unless the licensed engineer or architect performing the phase one or phase two inspection determines that such surface imperfections are a sign of substantial structural deterioration.

condominium or cooperative fails to submit proof to the local enforcement agency that repairs have been scheduled or have commenced for substantial structural deterioration identified in a phase two inspection report within the required timeframe, the local enforcement agency must review and determine if the building is unsafe for human occupancy.

The bill requires the Commission to review the milestone inspection requirements under this section and make recommendations, if any, to the Legislature to ensure inspections are sufficient to determine the structural integrity of a building. The commission must provide a written report of any recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2022.

The bill also requires the Commission to consult with the State Fire Marshal to provide recommendations to the Legislature for the adoption of comprehensive structural and life safety standards for maintaining and inspecting all types of buildings and structures in this state that are three stories or more in height. The commission shall provide a written report of its recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2023.

The bill provides that it is a breach of a board member or officer's fiduciary duty if an association fails to complete a milestone inspection or structural integrity reserve study.

### **Community Association Managers – Current Situation**

Current law establishes licensure requirements for community association managers.<sup>82</sup> A community association manager or firm must be licensed if he or she serves as management for an association of more than 10 units or an association with a budget of \$100,000 or greater.<sup>83</sup> Community association managers are licensed by DBPR. The profession is overseen by the Regulatory Council of Community Association Managers (Council).<sup>84</sup>

Current law provides that a community association manager or a community association management firm must discharge their duties performed on behalf of the association:<sup>85</sup>

- loyally, skillfully, and diligently;
- dealing honestly and fairly;
- in good faith;
- with care and full disclosure to the community association;
- accounting for all funds; and
- not charging unreasonable or excessive fees.

DBPR investigates complaints filed against community association managers or firms<sup>86</sup> and may impose the following administrative penalties against licensed community association managers:<sup>87</sup>

- Denial of an application for licensure.
- Revocation or suspension of a license.
- Imposition of an administrative fine not to exceed \$5,000 for each count or separate offense.
- Issuance of a reprimand.
- Placement of the community association manager on probation for a period of time and subject to such conditions as the department specifies.
- Restriction of the authorized scope of practice by the community association manager.

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<sup>82</sup> Ch. 468, Part VIII, F.S.

<sup>83</sup> S. 468.432(2), F.S.

<sup>84</sup> S. 468.4315, F.S.

<sup>85</sup> S. 468.4334(1), F.S.

<sup>86</sup> S. 468.436, F.S.

<sup>87</sup> S. 468.436(4), F.S.

The grounds for disciplinary action include the following:<sup>88</sup>

- Violating any provision of community association management practice act or lawful order of DBPR or the Council.
- Violating the Condominium Act, the Cooperative Act, or the Homeowners' Association Act when such violation is committed during the course of performing community management services pursuant to a contract with an association.
- Violating any provision relating to regulation of professions by DBPR.
- Committing acts of gross misconduct or gross negligence in connection with community association management.
- Making misleading, deceptive, or fraudulent representations related to community association management.
- Being convicted of or pleading nolo contendere to a felony in any court in the United States.
- Obtaining a license or certification or any other order, ruling, or authorization by means of fraud, misrepresentation, or concealment of material facts.
- Contracting, on behalf of an association, with any entity in which the manager has a financial interest that is not disclosed.

### **Community Association Managers – Effect of the Bill**

The bill provides that if a community association manager or firm has a contract with a condominium or cooperative association with a building that is subject to a milestone inspection, the community association manager or firm has a duty to comply with the requirements for inspection as directed by the board.

### **Structural Integrity Reserve Study – Current Situation**

A reserve study is a budget-planning tool for community associations. Generally, a reserve study consists of the following two parts:<sup>89</sup> physical analysis and financial analysis.

The physical analysis of a reserve study lists components in a community association that the association is responsible to maintain or replace, which is usually a visual inspection of the community association. The physical analysis includes an assessment of the physical condition of the association property, a determination of the estimated remaining life for each component in the association, and the estimated cost to maintain or replace such components.<sup>90</sup>

The financial analysis of a reserve study is performed after the physical analysis is completed, and the association's annual budget and reserve funds have been reviewed. The financial analysis is a recommended funding plan that provides an appropriate reserve contribution rate for the components identified in the physical analysis to ensure the association will have the necessary reserves to maintain or replace each component.<sup>91</sup>

Currently, the following nine states require community associations to have regular reserve studies or encourage community associations to have regular reserve studies:<sup>92</sup> California, Colorado, Delaware, Hawaii, Nevada, Oregon, Utah, Virginia, and Washington. However, of the nine states that require or

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<sup>88</sup> S. 468.436(2), F.S.

<sup>89</sup> Cedar Management Group, *HOA Reserve Study: Why Does Your Community Need It?*, <https://cedarmanagementgroup.com/hoa-reserve-study-community/#what> (last visited May 31, 2022); Kevin Leonard and Robert Nordlund, *Understanding Reserves: A guide to your association's reserve fund & reserve study*, 26-29 (1st ed. 2021); Community Associations Institute, *National Reserve Study Standards*, <https://www.reservestudy.com/wp-content/uploads/2019/01/NRSS-998-CAI-version-updated-2016.pdf> (last visited May 31, 2022).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Community Associations Institute, *Reserve Requirements and Funding*, <https://www.caionline.org/Advocacy/Priorities/ReserveStudy/Pages/default.aspx#UT> (last visited May 31, 2022).

encourage community associations to have regular reserve studies, only Delaware requires community associations to fund reserve accounts.<sup>93</sup>

### **Structural Integrity Reserve Study – Effect of the Bill**

The bill provides that "structural integrity reserve study" means a study of the reserve funds required for future major repairs and replacement of the common areas based on a visual inspection of the common areas. A structural integrity reserve study may be performed by any person qualified to perform such study. However, the visual inspection portion of the structural integrity reserve study must be performed by an engineer or an architect.

At a minimum, a structural integrity reserve study must:

- Identify the common areas being visually inspected,
- State the estimated remaining useful life and the estimated replacement cost or deferred maintenance expense of the common areas being visually inspected, and
- Provide a recommended annual reserve amount that achieves the estimated replacement cost or deferred maintenance expense of each common area being visually inspected by the end of the estimated remaining useful life of each common area.

The bill requires a condominium or cooperative to have a structural integrity reserve study completed at least every 10 years after the condominium's creation for each building on the condominium property that is three stories or higher in height which includes, at a minimum, a study of the following items as related to the structural integrity and safety of the building:

- Roof.
- Load-bearing walls or other primary structural members.
- Floor.
- Foundation.
- Fireproofing and fire protection systems.
- Plumbing.
- Electrical systems.
- Waterproofing and exterior painting.
- Windows.
- Any other item that has a deferred maintenance expense or replacement cost that exceeds \$10,000 and the failure to replace or maintain such item negatively affects the items listed above as determined by the licensed engineer or architect performing the visual inspection portion of the structural integrity reserve study.

Before a developer turns over control of an association to unit owners other than the developer, the developer must have a structural integrity reserve study completed for each building on the condominium property that is three stories or higher in height.

The bill provides that associations existing on or before July 1, 2022, which are controlled by unit owners other than the developer, must have a structural integrity reserve study completed by December 31, 2024, for each building on the condominium property that is three stories or higher in height.

The bill provides that if an association fails to complete a structural integrity reserve study pursuant to this paragraph, such failure is a breach of an officer's and director's fiduciary relationship to the unit owners.

The bill requires that if a condominium or cooperative is required to have a milestone inspection, the association must arrange for the milestone inspection to be performed and is responsible for ensuring

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<sup>93</sup> *Id.*

compliance. The association is responsible for all costs associated with the inspection. If the officers or directors of an association willfully and knowingly fail to have a milestone inspection, such failure is a breach of the officers' and directors' fiduciary relationship to the unit owners. Upon completion of a phase one or phase two milestone inspection and receipt of the inspector-prepared summary of the inspection report from the architect or engineer who performed the inspection, the association must distribute a copy of the inspector-prepared summary of the inspection report to each unit owner, regardless of the findings or recommendations in the report, by United States mail or personal delivery and by electronic transmission to unit owners who previously consented to receive notice by electronic transmission; must post a copy of the inspector-prepared summary in a conspicuous place on the condominium property; and must publish the full report and inspector-prepared summary on the association's website, if the association is required to have a website.

### **Reserves – Current Situation**

Every condominium and cooperative association must have a budget that sets forth the proposed expenditure of funds for the maintenance, management, and operation of the association. The budget is adopted for a 12-month period reflecting an association's fiscal year, and it must provide a detailed listing of the estimated revenues and expenses that the association reasonably projects for the coming fiscal year. The annual budget is made up of two parts, the part covering the regular operations of the association and the part covering the cost for capital expenses and deferred maintenance (reserves).<sup>94</sup>

Reserves are funds that are set aside for capital expenses and deferred maintenance. Reserves provide funds for major capital repairs or replacements that are needed intermittently such as replacing a roof. The reserves are designed to ensure that an association will have the funds when the repairs are needed and will not have to do a large special assessment.<sup>95</sup>

Current law requires associations to have and fund reserve accounts for roof replacement, building painting, pavement resurfacing, and any item for which the deferred maintenance expense or replacement cost is greater than \$10,000.<sup>96</sup>

There are two methods of calculating the reserves. The first is the traditional formula, and the second is the alternative formula. The traditional formula takes into account the estimated deferred maintenance or capital expenditure amount, estimated fund balance, and number of years remaining until deferred maintenance or a capital expenditure is needed.<sup>97</sup>

For example, if the remaining useful life of the roof is four years, and the estimated cost to replace the roof is \$86,000, and \$50,000 is in the roof reserve account when the budget becomes effective, in order to determine the amount that must be deposited in reserves during the proposed budget year, subtract \$50,000 from \$86,000. Then, divide \$36,000 by the remaining useful life of four years, resulting in \$9,000 as the current year funding requirement.  $(\$86,000 - \$50,000) / 4 = \$9,000$ .<sup>98</sup>

The alternative formula allows associations to maintain a pooled account for multiple reserve assets that are similar or related. For example, an association responsible for managing two swimming pools may create a pool reserve account for both pools instead of a reserve account for each pool. The formula for a pooled account must provide for an annual contribution that will ensure the balance on hand in the account is equal to or greater than the annual projected outflows from the account.<sup>99</sup>

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<sup>94</sup> Ss. 718.112(2)(f) and 719.106(1)(j), F.S.

<sup>95</sup> Ss. 718.112(2)(f) and 719.106(1)(j), F.S.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; Rules 61B-22.005(3), and Rule 61B-76.005(1), F.A.C.

<sup>98</sup> DBPR, *BUDGETS & RESERVE SCHEDULES: A Self-Study Training Manual*, 41-42

<http://www.myfloridalicense.com/dbpr/lsc/documents/BudgetsandReserveSchedules.pdf> (last visited May 31, 2022).

<sup>99</sup> Rules 61B-22.005(1) and (3), and Rule 61B-76.005(1) and (3), F.A.C.

## *Waiver of Reserves*

Associations can waive funding reserves for capital expenditures and deferred maintenance or provide funds that are less than the required amount by a majority of the voting interests present at a properly called meeting. The waiver of reserves by the membership is only for the current year, and a separate vote must be taken each year to waive the reserves or fund less than the required amount.<sup>100</sup>

Associations may also vote to use reserve funds for purposes other than their intended purpose, such as using funds from the roof reserve account for painting buildings, by a majority of the voting interests present at a properly called meeting.<sup>101</sup>

Prior to a developer turning over an association to unit owners, the developer may use the voting interests allocated to his or her units to waive the reserves or reduce the funding of reserves for the first two years of the association. After the first two years, the collection of reserve funds may only be waived or reduced by a vote of a majority of all nondeveloper voting interests at a duly called meeting of the association. After the turnover of an association, a developer may still vote its voting interest to waive or reduce the funding of reserves.<sup>102</sup>

### **Reserves – Effect of the Bill**

The bill provides that the amount of funds placed in reserve is determined by the condominium or cooperative association's most recent structural integrity reserve study. If the amount to be reserved for an item is not in the association's most recent structural integrity reserve study or the association has not completed a structural integrity reserve study, then the association may use the traditional formula or alternative formula to determine the amount of funds to reserve.

The bill provides that effective December 1, 2024, a unit-owner controlled association may not waive collecting reserves or collect less reserve funds than required for items that are required to be inspected in a structural integrity reserve study for an association building that is three stories or higher in height. In addition, unit-owner controlled associations may not use such reserve funds for purposes other than their intended purpose.

The bill repeals the ability of a developer-controlled association to waive collecting reserves or reduce the funding of reserves. The bill also repeals the ability of a developer-controlled association to use reserves funds for purposes other than their intended purposes.

### **Official Records – Current Situation**

Condominiums and cooperatives must maintain certain records known as official records for at least seven years, including:<sup>103</sup>

- A copy of the articles of incorporation, declaration, bylaws, and rules of the association (governing documents).<sup>104</sup>
- Meeting minutes.
- A roster of all unit owners or members, including the electronic mailing addresses and fax numbers of unit owners or members consenting to receive notice by electronic transmission.
- A copy of any contracts to which the association is a party or under which the association or the unit owners or members have an obligation.
- The association's accounting records.

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<sup>100</sup> Ss. 718.112(2)(f) and 719.106(1)(j), F.S.; Rules 61B-22.005(8), and Rule 61B-76.005(8), F.A.C.

<sup>101</sup> Ss. 718.112(2)(f) and 719.106(1)(j), F.S.

<sup>102</sup> *Id.*

<sup>103</sup> Ss. 718.111(12)(a) and (b) and 719.104(2), F.S.

<sup>104</sup> Condominiums must permanently maintain their governing documents.

- All contracts for work to be performed, including bids for work, materials, and equipment, except that associations are only required to maintain bids for one year.
- A copy of the plans, permits, warranties, and other items provided by the developer.
- All other written records related to the association's operation.

Owners may inspect and copy an association's official records, and the association must make records available for inspection within 10 business days of receiving an inspection request.<sup>105</sup> An association must maintain its official records within the State of Florida and make them available for inspection within 45 miles of the association or within the county where the condominium or cooperative is located.<sup>106</sup>

An association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections, but may not require an owner to state a reason for inspecting the records. A condominium unit renter may inspect and copy the association's governing documents.<sup>107</sup>

An association also has the option to make the official records available electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen.<sup>108</sup>

### *Website*

Condominiums with 150 or more units that do not manage timeshare units must post certain documents to a website or an app that is accessible only to unit owners and condominium employees. The website or app must include:<sup>109</sup>

- The condominium's governing documents.
- Any management agreement, lease, or other contract to which the condominium association is a party or under which the condominium association or the unit owners have an obligation or responsibility.
- Summaries or complete copies of bids for materials, equipment, or services, which must be maintained on the website or app for one year.
- The annual budget to be considered at the annual meeting.
- The financial report to be considered at a meeting.
- Each director's certification.
- All contracts or transactions between the condominium association and any director, corporation, firm, or association that is not an affiliated condominium association or any other entity in which a condominium director is also a director or officer and financially interested.
- Any contract or document regarding the conflict of interest or possible conflict of interest of a manager or a board member.
- The notice of any unit owner meeting and the meeting's agenda, posted at least 14 days before the meeting in plain view on the front page or on a separate subpage.
- Any documents to be considered during a meeting or listed on the meeting's agenda, which must be posted at least seven days before the meeting where the document will be considered.

### **Official Records – Effect of the Bill**

The bill provides that structural integrity reserve studies and milestone inspection reports are part of a condominium or cooperative association's official records. A condominium and cooperative association must permanently maintain written inspection reports, and an association must maintain structural integrity reserve studies for at least 15 years and on association's website.

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Ss. 718.111(12)(b) and (c)1. and 719.104(2)(b), F.S.

<sup>108</sup> *Id.*

<sup>109</sup> S. 718.111(12)(g), F.S.

## **Developer Transition to Unit Owners – Current Situation**

The developer creates the association and appoints the first board of administration at the time the condominium or cooperative is created. After control of the board is transferred to the unit owners the developer must deliver all of the property of the association, which is held or controlled by the developer or the developer-controlled board, to the association. The developer is responsible for any expenses for providing the property.<sup>110</sup>

The property the developer must turn over includes, but is not limited to:<sup>111</sup>

- All tangible personal property that is property of the association.
- Insurance policies for the association.
- Funds of the association.
- Copies of the association's governing documents.
- Copies of certificates of occupancy.
- Written warranties from contractors or suppliers that are still effective.
- Governmental permits for the association property.
- Copies of all agreements and contracts to which the association is a party.
- List of all contractors, subcontractors, and suppliers who worked on the property or provided supplies.
- A roster of the unit owners and their addresses and telephone numbers, if known.
- The resignation of the board members and officers of the developer-controlled board.
- A copy of the plans and specifications utilized in the construction or remodeling of the condominium.
- Financial records of the association.

The developer of the condominium must also provide a report attesting to the maintenance requirements, useful life, and estimated replacement costs for improvements of the condominium property under seal of a licensed architect or engineer.<sup>112</sup>

## **Developer Transition to Unit Owners – Effect of the Bill**

The bill provides that during a transfer, a developer must also turn over the milestone inspection report to the association.

## **Sale of a Unit – Current Situation**

Developers and nondeveloper owners of condominium or cooperative units must give certain documents to a prospective buyer or lessee before the execution of a contract for the sale of a residential unit.<sup>113</sup>

Prior to the sale of a unit by a non-developer, prospective buyers are entitled to a copy of the following association documents, at the seller's expense:<sup>114</sup>

- The association's most recent financial information.
- The association's governance document, which explains the association's operations.
- The frequently asked questions and answers sheet.
- The association's governing documents.

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<sup>110</sup> Ss. 718.301(4) and 719.301(4), F.S.

<sup>111</sup> *Id.*

<sup>112</sup> S. 718.301(4), F.S.

<sup>113</sup> Ss. 718.503 and 719.503, F.S.

<sup>114</sup> Ss. 718.503(2) and 719.503(2), F.S.

These documents must be provided more than three days, excluding Saturdays, Sundays, and legal holidays, before the execution of the contract, or the sales contract is voidable by the prospective purchaser. These disclosures do not apply to the leasing of a residential unit by a nondeveloper owner.<sup>115</sup>

The contract for the sale of a unit must contain a clause where the buyer acknowledges receiving such documents and an opportunity of at least three business days to review them.<sup>116</sup>

A developer must provide prospective buyers or renters who are signing a lease of more than five years, with:<sup>117</sup>

- The association's most recent financial information.
- The association's governance document, which explains the association's operations.
- The frequently asked questions and answers sheet.
- The prospectus or offering circular.

The contract for the sale or lease of a unit must contain a clause stating the buyer or renter has 15 days after signing the contract and receiving such documents to void the contract.<sup>118</sup>

The developer may not close for 15 days following the execution of a purchase contract, or execution of the lease, and the delivery of the required documents to the buyer. A prospective purchaser may void the contract within 15 days of his or her receipt of all the required documents.<sup>119</sup>

### *Prospectus or Offering Circular*

Every developer of a residential condominium or cooperative which contains more than 20 residential units, or which is part of a group of residential condominiums or cooperatives that will be served by property to be used in common by unit owners of more than 20 residential units, must prepare a prospectus or offering circular and file it with the Division prior to entering into an enforceable contract of purchase and sale of any unit or lease of a unit for more than five years. A copy of the prospectus or offering circular must be provided to each buyer.<sup>120</sup>

The prospectus or offering circular is an introductory synopsis to the association's governing documents. It sets forth a summary of all the restrictions, financial obligations, and liabilities of the owner. It also sets forth the commitments and responsibilities of the association. The prospectus or offering circular must contain certain information about the condominium or cooperative, including an estimated operating budget for the association, and a schedule of the unit owner's expenses.<sup>121</sup>

### **Sale of a Unit – Effect of the Bill**

The bill provides that prior to the sale of a unit, or the lease of a unit by a developer that is for more than five years, a prospective buyer or renter is entitled to the association's most recent structural integrity reserve study or a statement that the association has not completed a structural integrity reserve study.

If the unit is in a building which has been required to have a milestone inspection or have a phase 2 inspection, the prospective buyer or renter is entitled to a copy of the association's most recent written

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Ss. 718.503, 718.504, 719.503, and 719.504, F.S.

<sup>118</sup> *Id.*

<sup>119</sup> Ss. 718.503(1) and 719.503(1), F.S.

<sup>120</sup> Ss. 718.504 and 719.504, F.S.

<sup>121</sup> *Id.*

inspection report or phase 2 inspection report or a statement that the association has not completed the required milestone inspection or phase 2 inspection.

The bill also requires the prospectus or offering circular to include the association's most recent structural integrity reserve study, or a statement that the association has not completed a structural integrity reserve study. If the unit is in a building that is required to have a milestone inspection, the prospectus must include a copy of the association's most recent written milestone inspection report or a statement that the association has not completed the required milestone inspection.

### **Enforcement– Current Situation**

For condominium associations, the Division has jurisdiction to investigate complaints and enforce compliance with the Condominium Act for associations that are controlled by a developer, a bulk buyer, or a bulk assignee. Once a developer has turned over control of the condominium to the association the Division only has jurisdiction to investigate complaints related to financial issues, elections, and unit owner access to official records.<sup>122</sup>

For cooperative associations, the Division has jurisdiction to investigate complaints and enforce compliance with the Cooperative Act.<sup>123</sup>

If a person believes there is a violation of the Condominium Act or Cooperative Act, he or she may file a complaint with the Division. If the complaint is within the Division's jurisdiction, the Division assigns an investigator to the complaint. After investigating the complaint, if the Division has reasonable cause to believe that a violation occurred, it may initiate an enforcement proceeding in its own name as follows:<sup>124</sup>

- Enter in a voluntary consent proceeding with the person who violated the Condominium Act or Cooperative Act where he or she consents to stopping the violation.
- Issue a cease and desist.
- File an administrative complaint against the person.
- File an enforcement action in circuit court to seek declaratory or injunctive relief on behalf of the unit owners.
- Remove an individual from his or her position as an officer or board member of a condominium or cooperative.
- Impose civil penalties in the amount of up to \$5,000 per violation.

In order to enforce the Condominium Act and Cooperative Act, the Division may conduct investigations, take sworn statements, receive evidence, and subpoena individuals and documentation. If the Division believes a person has destroyed or altered association documents or impaired the availability of association documents during an investigation, the Division must refer it to local law enforcement.<sup>125</sup>

### **Enforcement – Effect of the Bill**

The bill provides that the Division has authority to investigate condominium and cooperative complaints related to the procedural completion of milestone structural inspections and structural integrity reserve studies.

The bill provides that associations existing on or before January 1, 2023, on a form prescribed by the Division, must provide the Division with:

- The number of buildings in the association that are three stories or higher in height,
- The number of units in such buildings,

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<sup>122</sup> S. 718.501(1), F.S.

<sup>123</sup> S. 719.504(1), F.S.

<sup>124</sup> Ss. 718.501(1)(d) and (m) and 719.501(1)(d) and (m), F.S.

<sup>125</sup> Ss. 718.501(1)(c) and 719.501(1)(c), F.S.

- The address of such buildings, and
- The counties in which all buildings are located.

The associations must send the information by e-mail, mail, or hand delivery to an e-mail address or physical address provided by the Division and on a form that is posted to the Division's website. Every condominium and cooperative association must provide an update to the Division if there is any change within six months of the change.

The Division must compile a list of the number of buildings on condominium property that are three stories or higher in height and must post the list on the Division's website. The list must be searchable by county. The list must include:

- The name of each association with buildings on the condominium property that are three stories or higher in height.
- The number of such buildings in each association.
- The addresses of all such buildings.
- The county in which such buildings are located.

The bill also makes cross-reference and conforming changes.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

The bill may require DBPR to expend additional resources to implement the bill.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

The bill may have an indeterminate, but likely insignificant, negative fiscal impact to local governments. Local building departments may have to expend funds to enforce the building milestone inspection program. It is unclear what the cost will be, if any, for local building departments to enforce such program.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may have an indeterminate positive fiscal impact on the private sector because the Code will not require the entire roof to be updated to the most current version of the Code when 25 percent or more of the roof needs to be repaired or replaced, if the remaining portion of the roof, at a minimum, meets the requirements of the 2007 Code. In addition, to the extent the bill reduces fraud, property insurance rates, and claims litigation, the bill may have an indeterminate positive fiscal impact on the private sector.

Condominium and cooperative associations and unit owners may incur additional expenses related to milestone inspections and reserve studies. However, the bill may have a positive economic impact on

condominium and cooperative associations by alerting them to necessary building repairs before the costs for such repairs increases and may positively impact the ability of the association to obtain property insurance coverage.

D. FISCAL COMMENTS:

The bill may reduce expenditures of county courts and the state circuit court system related to litigation regarding roof related property insurance claims and fraud.

According to DBPR, Miami-Dade County's and Broward County's recertification inspections can cost as much as \$20,000-\$40,000 for the inspection of a 15-20 story condominium and between \$2,000 and \$4,000 for the inspection of a small commercial building.<sup>126</sup>

The bill's milestone inspection program may have similar costs on condominium and cooperative buildings.

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<sup>126</sup> Florida Department of Business and Professional Regulation, Agency Analysis of 2022 Senate Bill 1702, p. 8 (Jan. 7, 2022).