

2023 Construction Law Legislative Update

Construction Law Committee

RPPTL Section

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Overview

- SB 360 – Causes of Action Based on Improvements to Real Property ([Ch. 2023-22, Laws of Florida](#))
- HB 331 – Liens and Bonds ([Ch. 2023-226, Laws of Florida](#))
- HB 89 – Building Construction ([Ch. 2023-229, Laws of Florida](#))
- SB 346 – Public Construction ([Ch. 2023-134, Laws of Florida](#))
- SB 1718 – Immigration ([Ch. 2023-40, Laws of Florida](#))

SB 360 – Causes of Action Based on Improvements to Real Property

Changes to Fla. Stat. § 95.11(3)(c) and Fla. Stat. § 553.84 effective upon signing → **Took effect on April 13, 2023**

95.11(3)(c)

- Statute of Repose – 10 years → 7 years
- Eliminates 2 prior “triggers” for SOL & SOR
 - Completion or termination of contract
 - Actual possession
- “Triggers” for SOL & SOR under new law (*earlier of*)
 - “the authority having jurisdiction issues a temporary certificate of occupancy, a certificate of occupancy, or a certificate of completion,” or
 - “the date of abandonment of construction if not completed”

SB 360 – CO v. TCO v. CC

Certificate of Occupancy	Temporary Certificate of Occupancy	Certificate of Completion
<u>[A] 111.1 Use and occupancy.</u> A building or structure shall not be used or occupied, and a change in the existing use or occupancy classification of a building or structure or portion thereof shall not be made, until the building official has issued a <i>certificate of occupancy</i> therefor as provided herein.	<u>[A] 111.3 Temporary occupancy.</u> The building official is authorized to issue <i>a temporary certificate of occupancy before the completion of the entire work covered by the permit, provided that such portion or portions shall be occupied safely.</i> The building official shall set a time period during which the temporary certificate of occupancy is valid.	<u>111.5 Certificate of completion.</u> A <i>certificate of completion</i> is proof that <i>a structure or system is complete</i> and for certain types of permits <i>is released for use</i> and may be connected to a utility system. This certificate does not grant authority to occupy a building, such as shell building, prior to the issuance of a certificate of occupancy.

SB 360 – “Trigger” Gaps?

- Not all “improvements to real property” are “building” improvements (i.e., horizontal / roadway) → no “CO,” “TCO,” or “CC”
- Issuance of a “Certificate of Completion” can be discretionary for certain improvements (i.e., remodel)
 - Should “CC” be a contract requirement?
 - What if never issued?
- FBC [A] 111.4 permits a Building Official to revoke CO, CO, or CC – what then?

SB 360 – CLC Legislative Subcommittee Comment (2/2023)

Legislature should create a new defined term of “final acceptance,” to include a list of the potential triggering events that would constitute final acceptance. Examples of such triggering events would include a certificate of occupancy, a certificate of completion, **approved final inspection by the governmental authority having jurisdiction over the project**, or **notice of final acceptance from the governmental authority having jurisdiction over the project**.

SB 360 – Multi-Building Projects

- For projects involving “multiple buildings,” “each building” is considered its own “improvement” for the purpose of calculating the SOL & SOR
- Old version of 95.11(3)(c) – SOR begins to run at CO, not sale to first purchaser
 - “When construction was completed and the county issued the certificate of occupancy for each and every townhome unit, Pulte was the owner in possession of the townhome. Thus, the latest date that the statute of repose would have begun to run [...] the date [of] certificate of occupancy [...]” Westpark Pres. Homeowners Ass'n, Inc. v. Pulte Home Corp., 2023 WL 3325821, at *3 (Fla. 2d DCA May 10, 2023)
- Exception under SB 360: SOL & SOR for “model” single-family homes does not begin to run until “deed transferring title to first purchaser”

SB 360 – Condo Association Turnover

- Developer may retain control of Association up to 7 years following recordation of the certificate of surveyor or mapper accompanying Declaration (Fla. Stat. § 718.301(1)(g))
- Association has right to sue for matters of common interest at turnover (Fla. Stat. § 718.111(3))
- Under Ch. 718, the SOL, but not SOR, is tolled until developer turnover (Fla. Stat. § 718.124; Sabal Chase Homeowners Ass'n, Inc. v. Walt Disney World Co., 726 So. 2d 796, 799 (Fla. 3d DCA 1999))

SB 360 – Condo Association Turnover



SB 360 – HOA Turnover

- Unlike Ch. 718, Ch. 720 does not include a tolling provision for the SOL for actions to be brought in Association name
- Association has to wait to bring suit concerning matters of common interest until turnover (Fla. Stat. § 720.303(1))
- Unlike Ch. 718, Ch. 720 does not impose a time limit on developer turnover to the unit-owner controlled Association (See Fla. Stat. § 720.307)

SB 360 –Savings Clause

- Savings clause: Any action that would be barred by amendment must be commenced on or before **July 1, 2024**
 - Example
 - TCO: 1/1/2016 /// Final Completion of Contract: 2/1/2016 /// Owner Possession: 2/15/2016
 - Latent Defect Discovered: 1/1/2021
 - SOL: 1/1/2025
 - SOR under old 95.11(3)(c): 2/15/2026 (10 years from Owner Possession – latest trigger)
 - SOR under new 95.11(3)(c) (absent savings clause, claim barred): 1/1/2023 (7 years from TCO – earliest trigger)
 - Savings clause: Owner has until 7/1/2024 to bring claim

SB 360 –Access to Courts

- Access to Courts Issue: Unlike [Chapter 2006-145, Laws of Florida](#) (amended SOR from 15 → 10 years), Ch. 2023-22 contains findings of “public necessity” (H/T: Bruce & Lee)

“[...] the Legislature is without power to abolish [the right of access to courts] without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, **unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.** Overland Const. Co. v. Sirmons, 369 So. 2d 572, 573 (Fla. 1979)

SB 360 – Fla. Stat. § 553.84

- Adds “materiality” requirement – FBC Violation must:
 - Exists within a completed building, structure, or facility; and
 - Has or may reasonably result in:
 - Physical harm to a person, or
 - Significant damage to the performance of a building or its systems

HB 331 – Liens and Bonds

- Takes effect on October 1, 2023
- Numerous changes – some stylistic, some significant
- Won't hit on all changes, but rather, the ones that impact our practices the most

HB 331 – Notices of Commencement

- Section 713.132 - Terminating Notice of Commencement
 - Under the old Section 713.132(3), F.S. – NOCs can be terminated after completion of construction or after construction ceases before completion and after all lienors are paid in full
 - The new Section 713.132(3), F.S. has eliminated the contingencies except the requirement that all lienors are paid in full:

(3) An owner may not record a notice of termination at any time after ~~except after completion of construction, or after construction ceases before completion~~ and all lienors have been paid in full or pro rata in accordance with s. 713.06(4).

HB 331 – Notices of Commencement

- Added new service and recording requirements of Notices of Termination of NOC
 - A notice of termination must be served before recording on each lienor who has a direct contract with the owner and on each lienor who has timely and properly served a notice to owner.
 - A notice of termination must be recorded in the official records of the county in which the improvement is located.
 - If properly served before recording in accordance with this subsection, the notice of termination terminates the period of effectiveness of the notice of commencement 30 days after the notice of termination is recorded in the official records.
 - However, if a lienor who began work under the notice of commencement before its termination lacks a direct contract with the owner and timely serves his or her notice to owner after the notice of termination has been recorded, the owner must serve a copy of the notice of termination upon such lienor, and the termination of the notice of commencement as to that lienor is effective 30 days after service of the notice of termination.

House Bill 331 – Notice of Commencement

- Section 713.135(1)(e), FS - Increased contract value from \$2,500 to \$5,000 that requires a NOC to be recorded.
 - Now, on all direct contracts with an Owner greater than \$5,000, the lienor must provide the AHJ with a recorded copy of the NOC before the first inspection.
- Section 713.135, FS - No NOC required for a direct contract for the repair or replacement of an HVAC system under \$15,000 in value.

HB 331 – Definition of Contractor

- 713.01(8), FS – Added the following to the definition of Contractor under the lien law:
 - Contractor also includes a licensed general contractor or building contractor, as those terms are defined in s. 489.105(3)(a) and (b), respectively:
 - **Who provides construction management services**, which include scheduling and coordinating preconstruction and construction phases for the construction project,
 - or **who provides program management services**, which include schedule control, cost control, and coordinating the provision or procurement of planning, design, and construction for the construction project.

HB 331 – Finance Charge Definition

- 713.01(13), FS – Includes a new definition for Finance Charge:
 - a contractually specified additional amount to be paid by the obligor on any balance that remains unpaid by the due date set forth in the credit agreement or other contract.
 - *Fernandez v. Manning Building Supplies, Inc.*, 279 So. 3d 349 (Fla. 1st DCA 2019)
 - The issue in *Fernandez* was whether a 1.5% per month “delinquency charge” or late fee on unpaid amounts, as set forth in the contract, should be factored into the lien amount.
 - The First District Court of Appeal held no because a finance charge is not interest or a late fee. Instead, a finance charge applies to credit agreements and the cost of credit.
 - The new definition for finance charge seeks to fix the outcome in *Fernandez* and arguably allows for interest and late fees to be included within a claim of lien amount
 - Because Section 713.06(1) provides that a lienor has a lien:
 - “...for any money that is owed to him or her for labor, services, or materials furnished in accordance with his or her contract and with the direct contract **and for any unpaid finance charges** due under the lienor’s contract.”

HB 331 – Attorney Fees

- Section 713.29, FS
 - Provides clarity that a prevailing party is entitled to recover attorney fees if they prevail on a lien transfer bond/security claim under 713.24, FS.

HB 331 – Lien Transfer Bonds – 713.24

- Increased attorney fees to be included in bond amount from \$1,000 or 25% of lien **to \$5,000** or 25% of lien.
- Clerk is required to record a certificate of the transfer with a copy of the bond or security and then send a copy with the bond or security to the lienor.

HB 331 – Computation of Time

- Section 713.011, FS – New section of the statute providing how to calculate the time limitations on recording claims of lien
 - (1) In computing any time period under this part, if the last day of the time period is a Saturday, Sunday, or holiday specified in s. 110.117(1), or any day observed as a holiday by the clerk's office or designated as a holiday by the chief judge of the circuit, the time period is extended to the end of the next business day.
 - (2) If the clerk's office is closed in response to an emergency for 1 or more days so that a person may not present a document for recording or an action for filing in person to the clerk's staff, the time period for recording a document or filing an action with the clerk's office under this part is tolled. When the clerk's office reopens, the time period is extended by the number of days the clerk's office was closed.

HB 331 – Service of Documents

- Section 713.18, FS
 - Applies the service requirements in 713.18 to all documents under Ch. 713, s. 255.05, and s. 337.18

HB 89 – Building Construction

- Trend toward streamlining the building permit & approval process (See Building Regulation, Ch. 2022-136 – [Summary](#))
 - Expanded eligibility criteria for private provider interns
 - Expanded scope of services for provisionally certified private providers
 - Defines “reasonable administrative fee” that can be imposed for private providers
 - Allows private providers “equal access” to records
 - Deems CO as issued within 10 business days if Building Official fails to respond
 - Building department limited to 3 requests for additional information in response to Permit Application, and must take action within 10 days upon timely or face reduction in permit fee

HB 89 – Building Construction

- Took effect on July 1, 2023
- Prohibits “local enforcing agency” or municipality from requiring plan changes after issuance of a permit, except to comply with the FBC, FFPC, LSC, or local code amendments (Fla. Stat. § 553.79(2)(b); Fla. Stat. § 633.208(c))
- If plan changes are required (either before or after permit), must ID specific plan features and applicable code sections to the permit holder in writing (Id., Fla. Stat. § 633.208(b))
- Plans examiner, local building official, and local fire official are subject to administrative discipline for failure to comply (Fla. Stat. § 553.79(2)(c); Fla. Stat. § 633.208(d))

SB 346 – Public Construction

- Took effect on July 1, 2023
- Requires not only the creation of a punch list at substantial completion, but an agreement on the estimate cost of repair each item on the list
- Requires public entities to pay the remaining contract balance at substantial completion, subject to withholding equal to 150% of the estimated value of the punch list items
- Shortens time frame for payment disputes between vendors and local government
- Provides a time limitation on the State's obligation to pay undisputed amounts

SB 346 – Public Construction

- Section 218.735, FS – Local Government Prompt Pay Act
 - 218.735(7)(a) – requires the punch list to include the price to repair each item on the punch list
 - 218.735(7)(e) – after 20 days of creating the punch list, the local gov't must pay contractor the remaining contract balance, including all retainage, less 150 percent of the cost to complete the punch list work
 - 218.735(7)(j) – if the local gov't does not comply with obligations, contractor may submit a request for the full remaining contract balance, including all retainage
 - 218.735(7)(j) – if the contractor does not comply with obligations to prepare the list, etc., local gov't must pay the contractor the remaining contract balance, less 150 percent of the estimated cost to complete the items that the local gov't would have included on the list

SB 346 – Public Construction

- Section 218.76, FS – Local Government Prompt Pay Act - Disputes
 - Any dispute resolution procedure established by a local gov't must provide that the proceeding commence within 30 days (instead of 45 days) from the request for payment and conclude within 45 days (instead of 60 days).

SB 346 – Public Construction

- 255.073, FS – Timely Payment for Construction Services
 - If a public entity disputes a portion of a payment request, the undisputed portion must be paid by the date required under the contract or by 20 business days after receipt of the request, whichever is earlier.
 - The section used to read “the undisputed portion must be timely paid.” -- leading to arguments about what “timely” means.

SB 346 – Public Construction

- Section 255.073, FS
 - State must submit pay request to CFO within 14 days (instead of 20 days) from receipt
- Section 255.077(4), FS
 - Same as 218.735(7)(a) re: creation of punch list and estimated cost to complete punch list items
- Section 255.077(9), FS
 - Similar to 218.735(7)(j) – If State does not comply with obligations, then State must pay contractor the full remaining contract balance
 - HOWEVER, if the contractor does not comply with its obligations, then State does not have to pay any portion of the remaining contract balance

SB 346 – Public Construction

- Section 255.078(3) – Public Construction Retainage
 - Does not require the State to release any amounts that are subject to dispute.
 - Previously, the State had three scenarios under which it could withhold funds
 - 1. Good faith dispute
 - 2. Subject to a 255.05 bond claim
 - 3. Subject to a claim or demand by the State or contractor
 - Now, the State only has two scenarios
 - 1. Good faith dispute made in writing pursuant to the contract or
 - 2. Subject to a 255.05 bond claim

SB 1718 – Immigration

- Signed into law on May 11, 2023
- Effective July 1, 2023, **all private employers with 25 or more employees** will be required to use the E-Verify system to verify the employment eligibility of new employees **within three business days** after the new employee begins working for pay
 - only applies to new employees hired on or after July 1, 2023
 - does not apply to past hires or existing employees
 - does not require employers to re-verify past hires or existing employees

SB 1718 – Immigration

- Employee : an individual filling a permanent position who performs labor or services under the control or direction of an employer that has the power or right to control and direct the employee in the material details of how the work is to be performed in exchange for salary, wages, or other remuneration
- Does not include
 - an individual hired for casual labor in a completed residence
 - an independent contractor, as defined in federal laws or regulations, hired to perform a specified portion of labor or services.

SB 1718 – Immigration

- E-Verify Records Retention
 - What is it? E-Verify is a free Internet-based system operated by the U.S. Department of Homeland Security (DHS) that allows employers to electronically verify the employment eligibility of new employees by comparing the information entered by an employer from an employee's Form I-9 to the records available to DHS and the Social Security Administration
 - What Records must be retained?
 - a copy of the documentation provided and any official verification generated, if applicable, for at least three years
 - document the unavailability of E-Verify by retaining a screenshot from each day, which shows the employer's lack of access to the system, a public announcement that E-Verify is not available, or any other communication or notice recorded by the employer regarding its unavailability

SB 1718 – Immigration

- Enforcement
 - Beginning July 1, 2024, Florida Department of Economic Opportunity (DEO) will monitor compliance and give employer 30 days' notice to cure in the event of a violation
- Penalties
 - 3 or more failures to use E-Verify within 24-month period, \$1000/day fine, from the date employer failed to E-Verify
 - **Suspension of all licenses**, until employer provides proof of compliance
 - Knowing employment of an unauthorized alien
 - Repayment of economic development incentives
 - 1 year probation with quarterly reporting requirements
 - Repeated violation (i.e., within 24 months of a previous violation), **revocation or suspension of state licenses**

The End

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