

1 HB189  
2 173786-1  
3 By Representatives Davis, Faust, Baker, Shiver and McMillan  
4 RFD: Commerce and Small Business  
5 First Read: 11-FEB-16

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8 SYNOPSIS: Under existing law, after the time has  
9 passed for a purchaser to cancel a condominium  
10 contract, certain deposits may be withdrawn for  
11 construction purposes.

12 This bill would define certain terms  
13 involved in a condominium contract.

14 This bill would require that the escrow  
15 agent be located in state and that a declarant may  
16 accept a letter of credit in lieu of a portion or  
17 all of the deposit.

18 This bill would allow a declarant to  
19 withdraw certain deposits to pay hard costs  
20 associated with construction under certain  
21 circumstances and would limit the withdrawal.

22 This bill would require that the contract  
23 provide clear written notice that certain deposits  
24 may be used for certain hard costs.

25  
26 A BILL  
27 TO BE ENTITLED

1 AN ACT

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3 To amend Section 35-8A-410, Code of Alabama 1975,  
4 relating to the Alabama Uniform Condominium Act; to define  
5 certain terms relating to escrow and building costs; to  
6 specify conditions of escrow deposit and use; and to require  
7 written notice in the contract that deposits may be used under  
8 certain conditions.

9 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

10 Section 1. Section 35-8A-410, Code of Alabama 1975,  
11 is amended to read as follows:

12 "§35-8A-410.

13 "~~(a) Except as provided in subsection (b), any~~  
14 ~~deposit made in connection with the purchase or reservation of~~  
15 ~~a unit from a person required to deliver an offering statement~~  
16 ~~pursuant to Section 35-8A-402(c) shall be placed in escrow and~~  
17 ~~held either in this state or in the state where the unit is~~  
18 ~~located in an account designated solely for that purpose by a~~  
19 ~~licensed title insurance company, an attorney, a licensed real~~  
20 ~~estate broker, or an institution whose accounts are insured by~~  
21 ~~a governmental agency or instrumentality until (i) delivered~~  
22 ~~to the declarant at closing; (ii) delivered to the declarant~~  
23 ~~because of purchaser's default under a contract to purchase~~  
24 ~~the unit; or (iii) refunded to the purchaser. Except as~~  
25 ~~provided in subsection (b) and as otherwise provided herein,~~  
26 ~~the funds representing the deposit shall be held in an~~  
27 ~~interest bearing account and the interest shall belong to the~~

1 ~~party entitled to the principal deposit. Notwithstanding~~  
2 ~~anything in this subsection to the contrary, funds deposited~~  
3 ~~pursuant to a reservation agreement that provides the~~  
4 ~~prospective buyer is not bound to purchase a unit and that the~~  
5 ~~prospective buyer may choose to have the deposit returned to~~  
6 ~~him or her, need not bear interest unless the reservation~~  
7 ~~agreement specifically states that the deposit will bear~~  
8 ~~interest.~~

9 "As used in this section, except as otherwise  
10 provided, the following terms shall have the following  
11 meanings:

12 "(1) HARD COSTS. Any and all costs associated with  
13 the actual building and construction of the condominium  
14 project, including, but not limited to, site preparation,  
15 building materials, shell features, interior enclosures,  
16 fit-out costs, mechanical and electrical systems, and  
17 fixtures. The term hard costs does not include financing  
18 costs, compensation paid to architects, engineers,  
19 consultants, sales persons, or attorneys, advertising or other  
20 marketing costs.

21 "(2) QUALIFIED PURCHASER. (i) An individual, a group  
22 of individuals, or an entity owned directly or indirectly  
23 solely by individuals where each individual shall have an  
24 income of more than two hundred thousand dollars (\$200,000)  
25 for the calendar year immediately preceding the date of the  
26 purchaser's signing of the purchase contract, or a joint  
27 income with his or her spouse of three hundred thousand

1 dollars (\$300,000) for the calendar year immediately preceding  
2 the date of the purchaser's signing of the purchase contract,  
3 with a good faith reasonable expectation to maintain the same  
4 level of income for the current calendar year; or (ii) an  
5 individual, a group of individuals, or an entity owned  
6 directly or indirectly solely by individuals where each  
7 individual shall have a net worth, either individually or  
8 jointly with his or her spouse, exceeding one million dollars  
9 (\$1,000,000) on the date of the purchaser's signing of the  
10 purchase contract; or (iii) an individual, a group of  
11 individuals, or an entity owned directly or indirectly solely  
12 by individuals where each individual shall have an income for  
13 the calendar year immediately preceding the date of the  
14 purchaser's signing of the purchase contract of more than 30  
15 percent of the condominium's purchase price, or a joint income  
16 with his or her spouse of more than 50 percent of the  
17 condominium's purchase price for such calendar year, with a  
18 good faith reasonable expectation to maintain the same level  
19 of income for the current calendar year. Any purchaser  
20 providing a written statement to declarant attesting that  
21 purchaser satisfies the qualifications of this subsection  
22 shall be conclusively presumed to be a qualified purchaser  
23 within the meaning of this section and any such statement may  
24 be relied upon by declarant for purposes of this section.

25 "(3) SUBSTANTIALLY COMPLETED. The issuance of a  
26 certificate of occupancy for the improvements, or the  
27 equivalent authorization issued by the governmental body

1 having jurisdiction, and, in a jurisdiction where no  
2 certificate of occupancy or equivalent authorization is  
3 issued, shall mean substantial completion of construction of  
4 the improvements in accordance with the applicable plans and  
5 specifications.

6 " (b) ~~Notwithstanding subsection (a), if the time~~  
7 ~~period during which a purchaser may cancel an agreement to~~  
8 ~~purchase a unit pursuant to Section 35-8A-408 has expired~~  
9 ~~without the purchaser's having exercised the right to cancel~~  
10 ~~and construction of the project in which the unit is located~~  
11 ~~is not substantially completed, if the purchase contract~~  
12 ~~between the declarant and the purchaser so provides, and if~~  
13 ~~the declarant has acquired the land on which the condominium~~  
14 ~~will be built, the declarant may do either of the following:~~  
15 ~~(1) Withdraw deposited funds in excess of 10 percent of the~~  
16 ~~purchase price from the escrow account for use in the actual~~  
17 ~~construction and development of the condominium project~~  
18 ~~provided at least 10 percent of the purchase price remains on~~  
19 ~~deposit after any withdrawals, or (2) after the declarant has~~  
20 ~~caused a bond to be issued by a surety insurer licensed in~~  
21 ~~this state in favor of the purchaser, withdraw deposited funds~~  
22 ~~from the escrow account for use in the actual construction and~~  
23 ~~development of the condominium. The declarant may not withdraw~~  
24 ~~more than the face amount of the bond. The bond shall name the~~  
25 ~~purchaser as the beneficiary thereof and shall be payable to~~  
26 ~~the purchaser if the purchaser obtains a final judgment~~  
27 ~~against declarant requiring the declarant to return the~~

1 ~~deposit to the purchaser pursuant to the purchase contract.~~  
2 ~~The declarant may satisfy this bond requirement by causing one~~  
3 ~~or more blanket bonds to be issued in favor of all purchasers~~  
4 ~~whose deposited funds may be used pursuant to this subsection.~~  
5 ~~In the event of a withdrawal pursuant to this subsection, the~~  
6 ~~withdrawn funds need not bear interest and the declarant shall~~  
7 ~~not owe the purchaser interest on any withdrawn funds if the~~  
8 ~~purchase contract provides that interest on withdrawn funds~~  
9 ~~will not accrue or be owed. However, no part of these funds~~  
10 ~~may be used for salaries, commissions, or expenses of~~  
11 ~~salespersons or for advertising purposes. A purchase contract~~  
12 ~~that permits use of deposits for these purposes shall include~~  
13 ~~the following legend conspicuously printed or stamped in~~  
14 ~~boldfaced type on the first page of the contract and~~  
15 ~~immediately above the place for the signature of the~~  
16 ~~purchaser: ANY DEPOSIT MAY BE USED FOR CONSTRUCTION PURPOSES~~  
17 ~~BY DECLARANT. Additionally, an offering statement given to a~~  
18 ~~prospective purchaser whose deposit may be used as provided in~~  
19 ~~this subsection shall contain the same legend, which may be~~  
20 ~~contained within the body of the offering statement. In~~  
21 ~~determining whether more than 10 percent of the purchase price~~  
22 ~~has been deposited, the face amount of any letter of credit~~  
23 ~~accepted by declarant as part of the deposit shall be~~  
24 ~~considered.~~

25 "Except as provided in subsection (c), any deposit  
26 made in connection with the purchase or reservation of a unit  
27 from a person required to deliver an offering statement

1 pursuant to Section 35-8A-402(c) shall be placed in escrow and  
2 held in this state by a licensed title insurance company, a  
3 licensed title agent, an attorney, a licensed real estate  
4 broker, or an institution whose accounts are insured by a  
5 governmental agency or instrumentality until (i) delivered to  
6 the declarant at closing; (ii) delivered to the declarant  
7 because of purchaser's default under a contract to purchase  
8 the unit; or (iii) refunded to the purchaser. Declarant shall  
9 be permitted to accept a letter of credit in lieu of a portion  
10 or all of the deposit. Notwithstanding the foregoing, the  
11 escrow agent shall not be located outside of the state. Except  
12 as provided in subsection (c) and as otherwise provided  
13 herein, the funds representing the deposit shall be held in an  
14 interest bearing account and the interest shall belong to the  
15 party entitled to the principal deposit. Notwithstanding  
16 anything in this subsection to the contrary, funds deposited  
17 pursuant to a reservation agreement that provides the  
18 prospective purchaser is not bound to purchase a unit and that  
19 the prospective purchaser may choose to have the deposit  
20 returned to him or her, need not bear interest unless the  
21 reservation agreement specifically states that the deposit  
22 will bear interest.

23 "(c) Notwithstanding subsection (b), provided that  
24 (1) the time period during which a purchaser may cancel an  
25 agreement to purchase a unit pursuant to Section 35-8A-408 has  
26 expired without the purchaser having properly and timely  
27 exercised the right to cancel and construction of the project



1 in which the unit is located is not substantially completed;  
2 (2) the purchase contract between the declarant and the  
3 purchaser authorizes the declarant to withdraw deposited funds  
4 pursuant to this subsection; and (3) the declarant has  
5 acquired an interest in the land on which the condominium  
6 project will be built, the existence of a mortgage on the  
7 declarant's interest in the land shall not preclude the  
8 declarant's satisfaction of this condition, then the declarant  
9 shall be permitted to: (i) withdraw deposited funds in excess  
10 of 10 percent of the purchase price from the escrow account  
11 for use in paying the hard costs incurred in the actual  
12 building and construction of the condominium project provided  
13 that at least 10 percent of the purchase price remains on  
14 deposit after any such withdrawals and provided that the  
15 purchaser whose funds are being withdrawn is a qualified  
16 purchaser; or (ii) after the declarant has caused a bond to be  
17 issued by a surety insurer licensed in this state in favor of  
18 a qualified purchaser for the full amount of the escrow  
19 deposit to be withdrawn, withdraw deposited funds from the  
20 escrow account up to the amount in the escrow account for use  
21 in paying the hard costs incurred in the actual building and  
22 construction of the condominium project.

23 "(d) If declarant elects to post the aforesaid bond  
24 pursuant to item (c)(ii), the declarant may not withdraw more  
25 than the face amount of the bond, the bond shall name the  
26 purchaser as the beneficiary thereof and shall be payable to  
27 the purchaser if the purchaser obtains a final judgment

1 against declarant requiring the declarant to return the  
2 deposit to the purchaser pursuant to the purchase contract,  
3 and the declarant may satisfy this bond requirement by causing  
4 one or more blanket bonds to be issued in favor of all  
5 purchasers whose deposited funds may be used pursuant to this  
6 subsection.

7 "(e) In the event of a withdrawal pursuant to this  
8 subsection, the withdrawn funds need not bear interest and the  
9 declarant shall not owe the purchaser interest on any  
10 withdrawn funds if the purchase contract provides that  
11 interest on withdrawn funds will not accrue or be owed to the  
12 purchaser.

13 "(f) A purchase contract that permits use of  
14 deposits in accordance with items (c)(i) and (c)(ii) shall  
15 include the following legend conspicuously printed or stamped  
16 in boldfaced type on the first page of the contract and  
17 immediately above the place for the signature of the  
18 purchaser: DEPOSITS MAY BE USED BY DECLARANT FOR HARD COSTS  
19 INCURRED IN THE ACTUAL BUILDING AND CONSTRUCTION OF THE  
20 CONDOMINIUM PROJECT PURSUANT TO SECTION 35-8A-410, CODE OF  
21 ALABAMA 1975. Additionally, an offering statement given to a  
22 prospective purchaser whose deposit may be used as provided in  
23 this subsection shall contain the same legend, which may be  
24 contained within the body of the offering statement. The funds  
25 deposited into escrow pursuant to subsection (b) and  
26 subsection (c) may be held in one or more escrow accounts by  
27 the escrow agent. If only one escrow account is used, then the

1 escrow agent must maintain separate accounting records for  
2 each purchaser and the amounts separately covered under  
3 subsections (b) and (c). For the purposes of item (c)(i), in  
4 determining whether more than 10 percent of the purchase price  
5 has been deposited, the face amount of any letter of credit  
6 accepted by declarant as part of the deposit shall be  
7 considered.

8 "(g) Any escrow agent holding deposited funds  
9 pursuant to this section is protected from liability arising  
10 from disbursing funds pursuant to subsections (c) or (d), or  
11 both, if such disbursement is pursuant to a draw requested by  
12 the declarant and the declarant certifies in such writing to  
13 the escrow agent that the declarant is entitled to such  
14 disbursement pursuant to subsection (c) or, as the case may  
15 be, pursuant to subsection (d)."

16 Section 2. This act shall become effective on the  
17 first day of the third month following its passage and  
18 approval by the Governor, or its otherwise becoming law.