

9-1-1980

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university of miami law review

VOLUME 34

SEPTEMBER 1980

NUMBER 5

Florida's Regulatory Response to Condominium Conversions: The Roth Act

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The author examines the provisions and policies of the Roth Act, recently enacted by the Florida Legislature to regulate the practice of converting existing improvements, particularly rental apartments, to the condominium form of ownership. The Act protects tenants by requiring notice of intended conversion, extension of existing leases, disclosure of building condition, right of first refusal, converter reserve accounts and warranties, and nondiscriminatory treatment of tenants who do not purchase their apartments. Additionally, the legislation permits local government incentives to ease the increasing shortage of rental housing.

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This article examines legislation based upon the findings and recommendations of a report issued by the Division, "Condominium Conversion in Florida: A Report to Governor Bob Graham." Mr. Mursten assisted in the preparation of the report, drafted the legislation, and represented the Division before the legislature at committee hearings.

I. INTRODUCTION

In his State of the State Address on April 8, 1980, Governor Bob Graham exhorted a joint session of the Florida Legislature to adopt legislation addressing the conversion of rental apartments to condominiums: "We as leaders need to face head-on the terrible problems of our citizens being forced out of their homes by condominium conversions. I *strongly urge* that you adopt the legislation proposed by the Department of Business Regulation regarding that matter."¹ The legislature responded quickly; less than one month later, on May 1, 1980, Governor Graham signed into law legislation regulating conversions.² Florida's new law on condominium conversions is based substantially on a report³ prepared at Governor Graham's request by Mr. James S. Roth, who served as Director of the Division of Florida Land Sales and Condominiums (the Division) from September 1979 until his unexpected death in March 1980. In memory of Mr. Roth, the new conversion law is entitled the "Roth Act."⁴

Mr. Roth's report is important to any discussion or analysis of the Roth Act, since some provisions of the Roth Act are ambiguous and require statutory construction.⁵ The report sets forth the pol-

1. Address by Governor Graham, Joint Session of the 82d Session of the Florida Legislature (Apr. 8, 1980) (emphasis in original).

2. 1980 Fla. Laws ch. 80-3 (codified in scattered sections of FLA. STAT. chs. 718 & 719 (Supp. 1980)).

3. DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, CONDOMINIUM CONVERSIONS IN FLORIDA: A REPORT TO GOVERNOR BOB GRAHAM (1980) (on file *University of Miami Law Review*) [hereinafter cited as ROTH REPORT].

4. 1980 Fla. Laws ch. 80-3, § 1 (codified at FLA. STAT. § 718.604 (Supp. 1980)). The bill enacting the Roth Act also enacted the "Roth Cooperative Conversion Act." *Id.* § 7 (codified at FLA. STAT. §§ 719.604-.622 (Supp. 1980)). The provisions for cooperative conversion parallel those for condominiums, except that the sections are renumbered and the word "cooperative" replaces the word "condominium." Unfortunately, this substitution created the phrase "the recording of the declaration to cooperative" in the converter reserve account warranty section of the Roth Cooperative Conversion Act. FLA. STAT. § 719.618(7) (Supp. 1980). Because the recording of a declaration does not create a cooperative, one should consider this phrase a drafting error. For a comprehensive explanation of the cooperative form, see 2 P. ROHAN & M. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE (1980).

5. "In construing ambiguous statutes, courts have referred to messages of the executive to the legislature relative to the subject considered in the statute in litigation in order to ascertain the evils at which the statute was aimed." 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 48.05 (4th ed. 1973) (citing *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904) (judicial reference to annual presidential messages to Congress)). Governor Graham, in his annual address to the Florida Legislature, made explicit reference to the legislation developed by Mr. Roth. "Annual reports of other members of the executive branch of the government have occasionally been used as aids in determining the evil sought to be remedied by statute." *Id.* (footnote omitted). Of course, the legislature must have had knowledge of the report, a requirement satisfied by the delivery of a copy of the Roth Report to each

icy considerations underlying its recommendations. The report reflects not only the recommendations of the Division, but also the views of legislators and findings based on hearings of the Subcommittee on Consumer, Probate and Family Law, which sponsored the conversion legislation.

Before the Division published the report, Mr. Roth met with the legislative leadership of the Florida Senate and House of Representatives, as well as those legislators with a keen interest in condominium legislation. He also attended most of the pre-session committee hearings investigating the conversion issue.⁶ The Division distributed the Roth Report widely, delivering copies to each legislator and the appropriate legislative committees, officials of the executive branch, industry representatives, news reporters, and others. Participants in the legislative hearings on the proposed Roth Act frequently referred to the report. During one such hearing, the Division's representative testified that "the Division considers the provisions of this bill to be implementing the conversion report and we think that the conversion report sets the outside borders of what we would do in these areas. . . . [I]t would be a statement . . . looked to for legislative intent in determining what could be done under this subsection."⁷

A. *The Conversion Problem*

The demand for condominiums promotes condominium con-

legislator upon its release on February 11, 1980. Even the legislative recommendations of an executive report not addressed to the legislature may be consulted, when the language of the recommendations is similar to the language of the adopted legislation. *Id.* See generally Rhodes, White & Goldman, *The Search for Intent: Aids to Statutory Construction in Florida*, 6 FLA. ST. U.L. REV. 383 (1978).

The provisions of the Roth Act parallel the language of the recommendations of the Roth Report. Three substantive deviations exist: 1) the Act scales back the report's recommendation for a right of tenants to purchase their apartments; 2) the Act grants county governments a local option to increase tenants' rental agreement extension periods; and 3) the Act gives developers a choice of post-purchase protections that they must provide to unit owners (the report recommended converter reserve accounts only).

6. Between August 1979 and April 1980, there were five pre-session committee hearings on the conversion issue; Mr. Roth attended three of the five hearings. He also testified at two public hearings—one in Dade County and one in Broward County.

7. *Hearings on Proposed Committee Bill 42 Relating to the Conversion of Existing Improvements to Condominiums and Cooperatives, Before the Subcommittee on Consumer, Probate and Family Law of the Committee on the Judiciary, Florida House of Representatives*, April 18, 1980 (testimony of Mr. David B. Mursten, representing the Division of Florida Land Sales and Condominiums) (tape on file with the House Committee on the Judiciary) [hereinafter cited as *April House Hearings*]. Proposed Committee Bill 42 was subsequently introduced and renumbered as House Bill 1591.

TABLE I-A

A. Location	B. Number of licensed apartment units (1) Jan. 79	C. Percent of apartment units in the state Jan. 79	D. Number of licensed apartment units (1) Jan. 80	E. Net (decrease) increase number of licensed apartments Jan. 79- Jan. 80	F. Percent (decrease) increase Jan. 79- Jan. 80	G. Number of apartment units converted to condo- minium (3) Jan. 79- Jan. 80	H. Percent of total Jan. 79 apartments converted to condo- minium Jan. 79- Jan. 80	I. Vacancy rate rental apart- ments (2) Nov. 79 (percent)	J. Number of vacancies Nov. 79	K. Number of condo- miniums created (3) Jan. 79- Jan. 80	L. Conversions as a percent of created condominiums Jan. 79- Jan. 80
Broward	79,452	13.9	77,002	(2,444)	(3.08)	3,155	3.97	0.5	385	13,988	22.6
Dade	176,784	30.9	173,112	(3,672)	(2.08)	4,205	2.38	0.5	866	12,782	32.9
Hillsborough	37,160	6.5	38,657	1,497	4.03	1,645	4.43	2.6	1,005	3,675	44.8
Palm Beach	29,367	5.1	28,336	(1,031)	(3.51)	1,067	3.63	0.5	142	14,805	7.2
Pinellas	53,566	9.4	50,992	(2,574)	(4.81)	2,581	4.82	1.7	867	8,726	29.6
Five Counties	376,329	65.8	368,099	(8,224)	(2.19)	12,653	3.36	1.2	4,417	53,976	23.4
Statewide	572,340	---	567,347	(4,993)	(0.87)	16,145	2.82	---	---	81,960	19.7

NOTES:

1. The number of apartments is understated by an approximate factor of ten-percent. Excluded are apartments not licensed by the state; buildings containing less than four rental apartments. Also excluded from the number of apartments are rooming houses, rental condominiums, retirement housing and nursing homes. Source: Florida Department of Business Regulation, Division of Hotels and Restaurants.
2. Vacancy Rate Source: Report by Reinhold Wolff Economic Research, Inc. Keith White, President, advises that the "Vacancy Rate" is an estimate compiled from a survey which is believed to be representative but lacks scientific precision.
3. Condominium Statistics Source: Florida Department of Business Regulation, Division of Florida Land Sales and Condominiums, Bureau of Condominiums.

versions and aggravates the shortage of rental housing.⁸ Statistics included in the Roth Report set forth growth trends showing that the shortage of rental housing has been increasing since 1975. The Roth Report indicates that during the five-year period ending on July 31, 1974, the number of licensed rental apartment units in Florida increased at an average annual rate of 10.64%.⁹ During the subsequent five-year period the average annual growth rate in the number of Florida licensed rental apartment units was a mere 1.9%—an 82% decline from the prior period.¹⁰ The Roth Report also points out that during the one-year period ending on January 1, 1980, the number of licensed rental apartment units in Florida decreased by 4,993, while during the same period 81,960 condominium units were created.¹¹

TABLE I-B

Year (July)	Number of Licensed Rental Apartments Statewide*	Net Change From Preceding Year	Percent Change From Preceding Year
1979	570,645	480	0.1
1978	570,165	4,680	0.8
1977	565,485	3,705	0.7
1976	561,780	18,618	3.4
1975	543,162	23,342	4.5
1974	519,820	59,138	12.8
1973	460,682	34,593	8.1
1972	426,089	34,592**	8.8
1971	391,497	37,951	10.7
1970	353,546	40,079	12.8
1969	313,467	----	----

* See Note 1 to Table I-A.

** Average—actual statistics not available.

8. ROTH REPORT, *supra* note 3, at 1-2. The shortage of rental housing is indicated by low vacancy statistics and may be attributed to several factors, including an increased demand for housing and a lack of incentives for the construction and retention of rental housing. *Id.* at 2, 15-18.

9. *Id.* at 6 (Table I-B).

10. *Id.* at 7 (Table I-C).

11. *Id.* at 5 (Table I-A). The report fails to point out that the growth in the number of condominium units outstripped the growth in the number of rental apartments during the period 1970-1979. In 1970, licensed apartment units numbered 353,546. *Id.* at 6. The number of condominiums or cooperatives in 1970 stood at 53,355. U.S. DEP'T OF COMMERCE, 1970 CENSUS OF HOUSING pt. 11, at 11-19 (1972). In 1980, licensed apartment units numbered 567,347, an increase of 60%; condominium units numbered an estimated 600,000, an increase of 1,054%. ROTH REPORT, *supra* note 3, at 4-5.

TABLE I-C

Six Month Period Ending	Number of Licensed Rental Apartments Statewide*	Net Change From Preceding Period	Percent Change From Preceding Period
Jan. 80	567,347	(3,298)	(0.6)
July 79	570,645	(1,695)	(0.3)
Jan. 79	572,340	2,175	0.4
July 78	570,165	3,029	0.5
Jan. 78	567,136	1,651	0.3
July 77	565,485	2,028	0.4
Jan. 77	563,457	1,677	0.3
July 76	561,780	8,142	1.5
Jan. 76	553,638	10,476	1.9
July 75	543,162	----	----

* See Note 1 to Table I-A.

Disincentives to retain apartment buildings for rental purposes have contributed to the shortage of rental apartments. The underlying factors include: 1) increased costs of ownership and operation of rental buildings, outpacing increases in rental rates; 2) fear of rent control; 3) increased interest rates; and 4) reductions in available federal income tax benefits.¹² For a landlord facing such disincentives, selling the apartment building to a developer for conversion to a condominium often represents the most profitable option. Although the owner can generally sell an apartment building for five to six times its gross annual rent, it is not unusual for converted condominium units to bring fifteen to twenty-five times the gross annual rent.¹³

The Roth Report identifies several reasons why developers purchase apartment buildings for conversion. First, there is an increased demand for Florida condominiums, attributable to several classes of prospective purchasers: 1) those who desire a condominium as a permanent residence; 2) those who plan to occupy a condominium in the future and rent it to a third party in the interim; 3) domestic investors who have inflationary expectations and know about the healthy performance of condominium units as an investment; 4) foreign investors who seek to shift assets from their home

12. ROTH REPORT, *supra* note 3, at 15-18.

13. *Hearings on the Conversion of Rental Apartments to Condominiums Before the Subcommittee on Consumer, Probate and Family Law of the House Committee on the Judiciary, Florida House of Representatives*, March 12, 1980 (testimony prepared by the Division of Florida Land Sales and Condominiums, delivered by Mr. David B. Mursten) (tape on file with the House Committee on the Judiciary) [hereinafter cited as *March House Hearings*].

country to a conservative investment located in a stable nation; and 5) those who desire vacation homes.¹⁴ A second reason why developers purchase existing buildings is that conversion is less risky than construction.

The time involved in the construction of a new high-rise condominium building is normally eighteen to twenty-four months. Absent restrictive legislation, an existing high-rise apartment building can generally be purchased, converted and marketed in six to nine months with substantially less risk: the market demand can be more accurately predicted; interest rates and financing costs are more certain; and other uncertainties or risks, such as construction delays, strikes, material shortages, inflationary pressures, and other variables are substantially reduced.¹⁵

Third, the conversion of an existing apartment building creates a demand that is absent when the developer constructs a new condominium: approximately 25% of the present tenants typically purchase the converted condominium units.¹⁶

The Roth Act aims primarily at alleviating the difficulties that existing tenants face. According to testimony presented before a legislative subcommittee, summarizing the findings of the Roth Report:

[T]he tenants faced with the prospect of conversion of their rental units to condominium have previously elected to rent rather than purchase their dwelling units. To many tenants, particularly those who have resided in the converted building for many years, the conversion process represents a severe and traumatic psychological experience. It is particularly true with elderly tenants in the high-rise apartments. Their buildings have become their social community, a place of familiar surroundings where long-term friendships have developed, familiar social services are conveniently located and patterns of daily life are well established. Many, if not most of the tenants move into rental apartments with the reasonable expectation that they could remain as tenants indefinitely, as long as they were willing to pay increased rents each time the lease term expired. While such tenants have no legal right to such expectation, until a few years ago when the conversion activity increased dramatically, the expectation of these tenants was reasonably justified. The trau-

14. *March House Hearings*, *supra* note 13; see *ROTH REPORT*, *supra* note 3, at 11-14.

15. *ROTH REPORT*, *supra* note 3, at 19.

16. *Id.* at 19-20.

matic impact on such tenants is greatly magnified by extremely low vacancy rates, making it difficult, if not impossible, for such tenants to find alternative housing of a similar nature, in close proximity to the apartment building in which they have resided.¹⁷

B. Condominium Fundamentals

The term "condominium" defines a form of ownership of real property: individually owned units subject to exclusive use and, appurtenant to each unit, an undivided interest in other property jointly owned by the unit owners and subject to the common use of all unit owners.¹⁸ The term also refers to the property that is owned in the condominium form of ownership. Condominiums are predominantly residential housing, although almost any property can be a condominium—including offices, shopping centers, warehouses, cemeteries, and boat moorings.¹⁹

A person who creates a condominium or offers condominium parcels is a "developer."²⁰ The developer creates a condominium by recording an instrument called a "declaration" or "declaration of condominium"²¹ in the public records of the county in which the condominium is located.²² The declaration must set forth the legal description of the property, including the legal description of each individual unit and each unit owner's undivided share in the condominium property. The declaration also provides for the operation of the condominium by an "association"²³ composed of the unit owners, for the allocation of common expenses, and for the establishment of restrictions on the use of the units and the jointly owned property.²⁴

17. *March House Hearings*, *supra* note 13 (testimony of Mr. David B. Mursten, representing the Division of Florida Land Sales and Condominiums).

18. FLA. STAT. § 718.103 (1979).

19. *See generally* D. CLURMAN, *THE BUSINESS CONDOMINIUM* (1973); *COMMERCIAL AND INDUSTRIAL CONDOMINIUMS* (H. Enberg II ed. 1974); *Miami Herald*, June 1, 1980, § H, at 21, col. 1.

20. FLA. STAT. § 718.103(13) (Supp. 1980).

21. *Id.* § 718.103(12).

22. *Id.* §§ 718.104(2), .105 (1979).

23. *Id.* §§ 718.103(2), .111 (Supp. 1980); *id.* §§ 718.113-.115 (1979). An association must be a corporation, either for profit or not for profit, unless it existed on January 1, 1977. *Id.* § 718.111(1) (Supp. 1980). Bylaws govern the administration of the association, and unless the bylaws contain certain basic provisions, the Condominium Act supplies them. *Id.* § 718.112. The rights and obligations of associations are set forth in *id.* § 718.301-.304 (1979). *See also* DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, DEPARTMENT OF BUSINESS REGULATION, *CONDOMINIUM LIVING IN FLORIDA 2* (1980).

24. FLA. STAT. § 718.104(4) (1979) sets forth the contents required of a declaration: 1) a

Before offering residential condominium units, a developer must file certain disclosure documents with the Division.²⁵ The developer may then enter into binding contracts for the sale of units.²⁶ A developer who is not prepared to file the disclosure documents, but who desires to begin marketing or "test the market," may file a reservation agreement with the Division.²⁷ This agreement permits the developer to accept deposits and enter into voidable agreements for the reservation of units. Each agreement remains voidable by either party until fifteen days after the developer has properly filed the disclosure documents with the Division and has provided a copy of the documents to the purchaser.

The real property that will become a condominium may be newly constructed or may have been subject to prior occupancy.²⁸ The creation of a condominium from existing, previously occupied buildings is referred to as a "conversion." When a developer creates a residential condominium by conversion, the Roth Act governs the process.

II. THE ROTH ACT

In addition to recording a declaration and filing disclosure documents, the developer who creates a residential condominium by conversion must comply with the provisions of the Roth Act. The Roth Act requires that: 1) tenants be notified of the conver-

statement submitting the property to condominium ownership; 2) a name for the condominium; 3) the legal description; 4) an identification of each unit; 5) a survey that meets certain requirements; 6) a complete allocation of the common expenses and the ownership of the common elements; 7) the name of the association; 8) the documents creating the association and establishing membership and voting requirements; 9) bylaws; 10) provisions for the creation of easements of ingress and egress; 11) if desired, a provision for the creation of "time-share estates," *see* note 28 *infra*; and 12) other provisions not inconsistent with the Condominium Act.

25. The disclosure documents must include, among other things, a copy of the declaration of condominium; articles of incorporation of the association; bylaws; an estimated budget for the condominium and a schedule of expenses; and a copy of any leases or contracts of the association. Developers of residential condominiums containing more than 20 units must meet more extensive disclosure requirements. *Id.* §§ 718.503-.504 (Supp. 1980).

26. *Id.* §§ 718.502-.503(1)(a) (1979). These sections require each agreement to contain certain cancellation terms and other disclosures.

27. *Id.* § 718.502(2).

28. Developers usually convert apartment buildings, although they sometimes convert hotels and motels to a type of condominium in which an owner does not reside regularly. These are units owned on a "time-share" basis. The "exclusive right of use, possession or occupancy of the unit, circulates among the various owners . . . in accordance with a fixed time schedule" *Id.* § 718.103(19). Time-share estates are attractive to persons who wish to own a vacation home, but only for two weeks a year, or to investors interested in owning a share of a hotel-like property.

sion and given time to decide whether to purchase or move;²⁹ 2) tenants be given information necessary to decide whether to purchase a unit or locate alternative rental housing;³⁰ 3) tenants be guaranteed the opportunity to purchase their apartments;³¹ 4) developers disclose the condition of the building;³² 5) developers either give warranties or fund "reserve accounts"³³ to cover future repair and replacement expenses; and 6) tenants be protected against discrimination vis-à-vis purchasers.³⁴

One of the potential problems confronting tenants re-entering the rental housing market is a shortage of alternative rental housing. In view of this situation, the legislature, as recommended by the Roth Report, has granted local governments the authority to create incentives for the construction of additional rental housing. Under the enacted legislation, local officials may create incentives for the construction of apartment units, as compared to condominium units.³⁵ Such measures will help in the search for long-term solutions to the rental shortage.

A. Notice of Intended Conversion

The Roth Act requires a developer to give each tenant³⁶ a written notice of intended conversion before or simultaneously with the first offering of individual units to any person.³⁷ The Act specifies the content of the notice, including a detailed explanation

29. FLA. STAT. §§ 718.606, .608 (Supp. 1980); see notes 36-86 and accompanying text *infra*.

30. FLA. STAT. § 718.614 (Supp. 1980); see notes 94-97 and accompanying text *infra*.

31. FLA. STAT. § 718.612 (Supp. 1980); see notes 87-113 and accompanying text *infra*.

32. FLA. STAT. § 718.616 (Supp. 1980); see notes 114-25 and accompanying text *infra*.

33. FLA. STAT. § 718.618 (Supp. 1980); see notes 126-61 and accompanying text *infra*.

34. FLA. STAT. § 718.62 (Supp. 1980); see notes 162-64 and accompanying text *infra*.

35. 1980 Fla. Laws ch. 80-3, § 6 (amending FLA. STAT. § 718.507 (1979)); see notes 165-74 and accompanying text *infra*.

36. Neither the Roth Act nor the Condominium Act defines the term *tenant*, a definition necessary to determine who must receive the developer's notices of intended conversion. For example, a developer converting a hotel to condominium could arguably be required to send notices to the guests. The lack of a statutory definition requires correction, and the Division will likely adopt a rule defining the term. The Roth Report and the legislative intent evidenced in the language of the Roth Act and comparable statutes indicate that *tenant* means a party to a rental agreement in nontransient residential occupancy of a place rented as a home, residence, or sleeping place for the purpose of maintaining a household. See, e.g., FLA. STAT. § 83.43(4) (1979) (defining *tenant*); *id.* § 83.43(2) (defining *dwelling unit*); *id.* § 509.013(3) (defining *guest*); *id.* § 509.013(4) (defining *public lodging establishment*); *id.* § 509.013(8) (defining *transient occupancy*); *id.* § 509.012(9) (defining *transient*); *id.* § 509.242 (setting forth classifications of public lodging establishments).

37. *Id.* § 718.608(1) (Supp. 1980).

of the tenants' rights.³⁸ Prior law contained no requirement covering the content of notices of intended conversion. Tenants' rights regarding conversions were minimal and thus could be explained more briefly.³⁹ Some notices, nonetheless, lacked clarity or contained an abundance of advertising.⁴⁰

Tenants must now receive actual notice of the conversion by letter rather than, for example, by reading a newspaper advertisement offering their rental unit for sale. From the form of the required notice set forth in the statute, tenants will receive a full disclosure of their rights during the conversion. The tenants will know their standing and be better equipped to respond to the situation. Furthermore, the Act specifically provides that tenants may not waive notice of the intended conversion "unless the tenant's lease conspicuously states that the building is to be converted and the other tenants residing in the building have previously received a notice of intended conversion."⁴¹

A notice of intended conversion must be sent to each tenant by certified or registered mail and is deemed given when mailed to the tenant's last known address. The date of the notice is the date when it is mailed.⁴² This provision is significant because certain tenant rights begin to run from the date of the notice of conversion. To extend a rental agreement, for example, a tenant must notify the developer within forty-five days after the date when the developer gave notice of conversion to the tenant.⁴³

Each developer must file with the Division of Florida Land Sales and Condominiums a copy of the notice of intended conversion by the date it is mailed to the tenants. Notices are not subject to the approval of the Division, although a developer may request

38. *Id.* § 718.608(2).

39. Tenants' rights in this area under prior law were limited to notice and an opportunity to extend the rental agreement if it expired within 180 days, or to be evicted after certain minimum notice according to provisions contained in the rental agreement. *Id.* § 718.402 (1979) (amended 1980). The Roth Act deleted the conversion provisions of section 402, leaving only a cross-reference in subsection 1 to the new conversion law. 1980 Fla. Laws ch. 80-3, § 3 (amending FLA. STAT. § 718.402 (1979)).

40. In one instance, the Division determined that by means of a deceptive notice, a developer had effectively deprived the tenants of their statutory right to extend their tenancies. Using its power to institute enforcement proceedings against developers, the Division obtained a consent judgment providing that the developer would send new notices and refrain from evicting the tenants. *Division of Fla. Land Sales & Condominiums v. Cypress Village Dev. Co.*, No. 80-3721-07 (Fla. 11th Cir. Ct., Mar. 10, 1980).

41. FLA. STAT. § 718.608(3) (Supp. 1980).

42. *Id.* § 718.61(2). The detail required by this provision implies that alternative methods of giving notice, such as by telegram or private delivery service, are unacceptable.

43. *Id.* § 718.606(2)(a).

the Division to verify that a notice complies with the Roth Act.⁴⁴

The Roth Act requires that each developer give all notices of intended conversion within seventy-two hours after the first notice.⁴⁵ This requirement eliminates the possibility of evicting individual tenants through conversion on an arbitrary or discriminatory basis. Because the seventy-two-hour provision applies "to all tenants of the existing improvements being converted to residential condominium,"⁴⁶ it also effectively bars a "phased conversion" within a building.⁴⁷ When an apartment complex consists of separate, distinguishable buildings, however, the conversion may proceed on a building-by-building basis. Although the Roth Act does not explicitly provide for multi-building phasing, it follows from the language of the Act that if certain existing improvements in the complex are not "being converted to condominium," then the developer need not give notice of intended conversion to the tenants in those improvements—at least not until the developer converts those buildings in the later phase.⁴⁸

44. *Id.* § 718.608(4). The legislature provided the verification procedure to assist developers who are uncertain whether a notice complies with the Roth Act. Its implementation is subject to the Division's adoption of a rule providing for the payment of a verification fee "not to exceed \$50." As originally proposed, the Roth Act provided for the charging of a fee not to exceed \$100. FLA. P.C.B. 42, § 1 (1980) (House Judiciary Comm.); FLA. S.B. 825, § 1 (1980).

45. As originally proposed, the Roth Act required that all notices be given on the same date. ROTH REPORT, *supra* note 3, at 60. The Division recommended that this requirement be amended to provide that "each developer shall make [a] good faith effort to give all notices on the same date," to eliminate the possibility that a developer might inadvertently fail to send a tenant a notice. The Florida Home Builders Association, representing developers, suggested that the provision require the developer to give all conversion notices within a 72-hour period. The legislature adopted the Home Builders' suggestion, although it failed to correct the original problem. See *April House Hearings*, *supra* note 7.

46. FLA. STAT. § 718.608(1) (Supp. 1980).

47. In an intra-building phased conversion, the developer might proceed on a floor-by-floor basis, evicting all tenants on the top floor and remodeling that floor before continuing downstairs. Alternatively, the developer might evict tenants in response to market demand, giving them notice as purchasers select particular apartments.

48. Both tenants and developers realize advantages from multi-building phasing. Phasing extends the time available for the relocation of tenants, promoting a more orderly absorption of the tenants into the housing market. Phasing also gives the tenants in later phases longer *de facto* notice of impending conversion. As for developers, phasing helps them market the units by advertising that later phases will sell at higher prices—a "buy now before you miss out" sales pitch is available as each phase approaches the sellout point. Phasing avoids saturation of the market with competing units. Developers can focus their sales and remodeling personnel on each phase, rather than the entire complex, and need fewer employees. Developers send conversion notices and disclosure materials to a smaller group of tenants and can more easily manage and record their responses. If the sales program fails, the departure of tenants affects only the particular phase, reducing the developer's risk. Developer-arranged mortgage financing usually requires that a certain percent-

The Roth Act does not provide for withdrawal of conversion notices, reflecting a position taken by the Division for reasons of public policy. Because notice of conversion alters the rental agreement and creates certain rights and obligations of both tenant and developer, the developer may not unilaterally restore the former relationship. Although requiring a developer to continue a conversion after giving notice may appear inconsistent with the long-range objective of encouraging landlords to retain rental housing, this policy protects tenants from the trauma of receiving multiple conversion notices. Thus, the no-withdrawal policy furthers the Roth Act's broader purpose of reducing the psychological trauma experienced by conversion-evicted tenants.⁴⁹

B. *Rental Agreements*

The Roth Act provides for the extension and termination of rental agreements after notice of intended conversion. Rather than use the "lease or tenancy" language of the former conversion law,⁵⁰ the Condominium Act now employs the term "rental agreement,"⁵¹ as does the Florida Residential Landlord and Tenant Act.⁵² This usage promotes consistency of interpretation among the chapters of the Florida Statutes.

1. EXTENSIONS

After a developer gives notice of intended conversion, a tenant may remain at least until the expiration of an existing rental agreement. If the rental agreement expires within a specified period after the notice, the Roth Act permits the tenant to extend the rental agreement, providing sufficient time to seek alternative housing in an orderly manner. The length of any extension of a rental agreement depends on how long the tenant has resided in the apartment and whether the extension period is subject to an increase by local ordinance.

age of units be under contract before the lending institution will release the financing. It is obviously easier to meet this percentage requirement when the base number of units is lower, as in a phased conversion. Developers may realize other benefits from phasing, including retention of rent revenue and reduction or postponement of costs.

49. See ROTH REPORT, *supra* note 3, at 41, 94-96.

50. FLA. STAT. § 718.402(2)(a) (1979) (repealed 1980).

51. 1980 Fla. Laws ch. 80-3, § 2 (adding FLA. STAT. § 718.103(21) (Supp. 1980)) defines "rental agreement" as "any written agreement, or oral agreement if for less duration than 1 year, providing for use and occupancy of premises."

52. FLA. STAT. § 83.43(7) (1979).

Tenants who have not resided in their apartments for at least 180 days preceding the date of notice of intended conversion may extend their rental agreements to expire no later than 180 days after the date of the notice.⁵³ On the other hand, the extension period is 270 days for tenants who have been residents for at least 180 days,⁵⁴ on the rationale that these tenants "had the expectation, although not the contractual right, to anticipate that their leases could be renewed."⁵⁵ The Roth Act authorizes a county to increase by local ordinance these rental agreement extension periods by ninety days upon a finding of local conditions aggravating the rental housing situation.⁵⁶ If the rental agreement does not expire within the applicable extension period, the tenant may not unilaterally extend the rental agreement,⁵⁷ unless the agreement provides otherwise.

A tenant may extend the rental agreement for the full extension period or a part of the period.⁵⁸ A developer may provide tenants entitled to extend their rental agreements up to 270 days the alternative of extending for not more than 180 days and receiving a cash "tenant relocation" payment equal to at least one month's

53. *Id.* § 718.606(1)(b) (Supp. 1980). This 180-day extension is the same as that granted to all residential tenants under prior law. *See id.* § 718.402(2)(a) (1979) (repealed 1980).

54. *Id.* § 718.606(1)(a) (Supp. 1980).

55. ROTH REPORT, *supra* note 3, at 46.

56. FLA. STAT. § 718.606(6) (Supp. 1980). A county commission may adopt the local 90-day extension upon a finding that the vacancy factor is three percent or less and that a housing emergency exists, "so grave as to constitute a serious menace to the general public." *Id.* Thus, a tenant who could otherwise extend for 180 days may, under such an ordinance, extend for 270 days; similarly, the ordinance would increase a 270-day extension to 360 days. Any municipality within the county, however, may vote to exempt itself from any such countywide ordinance.

The provision of 90 additional days provides tenants additional time to relocate in a clearly tight rental market. Congressional testimony cited by the Roth Report points out the impact of low vacancy factors:

[V]acancy rates lower than 6 percent tend to inflate rental rates and create a situation where tenants are forced to pay rents greater than they can afford, move to housing below pre-existing standards, or move to localities with higher vacancy rates. . . . [A]s vacancy rates fall further, low and moderate income households experience greater difficulty in locating comparable housing within their community, and when rates fall below 3 percent the impact is experienced by the middle income households.

ROTH REPORT, *supra* note 3, at 9 (quoting *Condominium Conversions: Hearings on S. 612 Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. 45-46 (statement of Daniel Lauber)).

57. FLA. STAT. § 718.606(1) (Supp. 1980).

58. *Id.* § 718.606(2)(c).

rent.⁵⁹ This cash relocation payment is optional for both the developer and the tenant.⁶⁰

The Roth Act provides that tenants may extend their rental agreements "upon the same terms."⁶¹ This ambiguous provision seems to permit a developer to increase rents during an extension period if the terms of the underlying rental agreement would permit such increases. The statutory text of the notice of intended conversion, however, includes the statement to the tenant that "[d]uring the extension of your rental agreement, you will be charged the same rent that you are now paying."⁶² During hearings held on the proposed legislation, an amendment deleting the "same rent" language was rejected.⁶³ Thus, a developer may not raise a tenant's rent during an extension period.

Each tenant has forty-five days after the date of the notice of intended conversion to give the developer written notice⁶⁴ of any intention to extend the rental agreement.⁶⁵ Tenants whose rental agreements expire within forty-five days after the conversion notice may similarly extend their rental agreements on the same terms for a period expiring forty-five days after the conversion notice and make their extension decisions during that period.⁶⁶ Prior law gave tenants thirty days from the date of receipt of conversion notices in which to decide whether to extend their rental agree-

59. *Id.* § 718.606(4).

60. Applicable only to tenants whose rental agreements expire within 180 days of the notice, the cash relocation payment option is the only incentive device specifically described in the Roth Act. It would be unreasonable to interpret the Roth Act as prohibiting developers from offering other incentives to tenants, unless the offer contravenes a policy reflected by a requirement of the Act. For example, the Act declares unenforceable any contract purporting "to waive the right of a purchasing tenant to bring an action for specific performance." *Id.* § 718.612(3). Otherwise, developers apparently may offer tenants incentives to waive the right of first refusal, the automatic rental agreement extension, or all or part of the regular rental agreement extension. *See, e.g., id.* § 718.612(4)(b) (waiver of first-refusal rights).

61. *Id.* § 718.606(1).

62. *Id.* § 718.606(2)(a)(3).

63. *April House Hearings, supra* note 7. Testimony before the legislative committee that later introduced the conversion legislation characterized the "same terms" provision as a form of short-term rent control. *March House Hearings, supra* note 13 (testimony of Mr. David B. Mursten).

64. Tenants' notices to a developer are deemed given when "deposited in the United States mail, addressed to the developer's address stated in the notice of conversion, and sent postage prepaid, return receipt requested; or when personally delivered in writing by the tenant to the developer at such address." FLA. STAT. § 718.61(1) (Supp. 1980).

65. *Id.* § 718.606(2)(a).

66. *Id.* § 718.606(2)(b).

ments.⁶⁷ The Roth Act expands this decisionmaking period beyond the thirty days provided under prior law, because the "prospect of relocation represents, to many tenants, a major and traumatic experience."⁶⁸ The additional time facilitates orderly and informed decisionmaking, permitting tenants to evaluate the rental market and comparable condominium units. Given more time to decide, tenants may re-examine their initial reactions to extend automatically, and fewer tenants may choose to extend their expiring rental agreements.⁶⁹

The forty-five-day "mini-extension," permitting tenants to remain in occupancy while they decide whether to extend, suggests but does not require that they give notice of their decision *both* within forty-five days after the conversion notice *and* before the expiration of their rental agreements. Indeed, the Division deleted such a dual requirement from its original draft bill.⁷⁰ Interpreting the forty-five-day rule to require only that the tenants be in lawful occupancy would preserve the extension rights of tenants whose rental agreements expire in the interval between the developer giving notice by mail and their first opportunity upon receipt to extend.⁷¹ Although the legislative record provides scant support for this interpretation, it is consistent with the purposes of the Act to reduce tenant trauma and promote reasoned decisionmaking and

67. *Id.* § 718.402(2)(a) (1979) (repealed 1980).

68. ROTH REPORT, *supra* note 3, at 50.

69. *Id.* at 51.

70. Proposed Roth Act (Mar. 23, 1980 Draft). The Division decided that the issue did not require detailed statutory attention because the proposed statute was sufficiently clear and any ambiguities in the Roth Act could be addressed by administrative rule. The language considered for inclusion in the Roth Act is as follows:

If the notice is mailed prior to the expiration of the rental agreement but received by the tenant subsequent to the expiration of the rental agreement, and the tenant has a present right of occupancy, the tenant may extend the rental agreement as provided in subsection (1) [Section 718.606(1)], provided the tenant notifies the developer in writing within 45 days from the date of the notice of conversion or the termination of the present right of occupancy, whichever occurs first.

Id.

71. For example, suppose that a developer "gives" notice of conversion by mail on July 30 to tenants whose rental agreements expire on July 31. The developer and tenants enter new rental agreements on July 31, to commence August 1. On August 2 the tenants receive the July 30 conversion notice and notify the developer to extend their rental agreements. Does failure to notify the developer before the old rental agreements expire bar the tenants from extending them? Because the tenants remain in lawful occupancy, they would have a choice between extending the old agreement or affirming the new one. On the other hand, a tenant receiving the conversion notice after the right of occupancy terminated would have no right of extension.

orderly relocation.

The Roth Act grants certain tenants an additional rental agreement extension upon the developer's failure to furnish them certain materials detailing terms and conditions on the right of first refusal to purchase their apartments.⁷² The developer must offer qualifying tenants their apartments within ninety days of the conversion notice by delivering to each tenant certain "purchase materials."⁷³ If the developer fails to do so, each tenant receives an automatic rental agreement extension "for that number of days in excess of ninety days that [have] elapsed from the date of the written notice of the intended conversion to the date when the purchase materials are delivered."⁷⁴

2. TERMINATIONS

The Roth Act includes guidelines on terminations⁷⁵ of rental agreements. After the developer gives notice of conversion, tenants may, upon thirty days' written notice, terminate rental agreements entered into, extended, or renewed after May 1, 1980.⁷⁶ A tenant may not unilaterally terminate a rental agreement entered into, extended, or renewed before May 1, 1980, but may terminate any extension period upon thirty days' written notice.⁷⁷ The Roth Act does not provide for a tenant's withdrawal of notice of termination once given.

The Act permits tenants to terminate rental agreements for several reasons, the primary one being that conversion materially changes the nature of the landlord-tenant relationship that existed when the parties executed the rental agreement. The tenants may find new individual landlords holding their rental agreements after the developer sells their apartments to individual investors.⁷⁸

72. See notes 92-98 and accompanying text *infra*.

73. FLA. STAT. § 718.612(1)(a) (Supp. 1980).

74. *Id.*

75. Because legal terms ordinarily receive consistent construction when used within the same statute, *termination* should receive the same meaning as established by the Florida Residential Landlord and Tenant Act. *Id.* § 83.56 (1979). Termination occurs upon the expiration of the term of the rental agreement or any rental agreement extensions, or upon the act or omission of a party as permitted by statute. See Williams & Phillips, *The Florida Residential Landlord and Tenant Act*, 1 FLA. ST. U.L. REV. 555, 581-82 (1973).

76. FLA. STAT. § 718.606(3) (Supp. 1980). To avoid unconstitutional impairment of contracts, the Roth Act restricts a tenant's right of unilateral termination to rental agreements entered into, extended, or renewed after the effective date of the Act. ROTH REPORT, *supra* note 3, at 52.

77. FLA. STAT. § 718.606(3) (Supp. 1980).

78. ROTH REPORT, *supra* note 3, at 53.

Moreover, the character of the building will change as the new owners of individual units become the occupants of the building.⁷⁹

The tenants' right to terminate rental agreement extension periods provides the flexibility essential to orderly relocation.⁸⁰ The intent of the rental agreement extension period is to provide tenants with sufficient time to locate alternative housing.⁸¹ "[I]f a tenant elects to extend the term of an expiring lease, and thereafter, during the period of extension, locates an alternative dwelling unit, the tenant may be placed in a position of carrying the costs of two dwelling units until the extension period expires."⁸²

The Roth Act virtually precludes termination of rental agreements by a developer.⁸³ In proposing this restriction, the Division reported, "[a]ssuming that the provisions of the legislative proposals offer needed protections, tenants—with little or no negotiating power, executing leases subsequent to the effective date of the statute—should not be required by landlords to execute leases waiving the protections afforded by the statute."⁸⁴ Developers may, however, unilaterally terminate rental agreements under two circumstances. First, the termination provisions of any rental agreement, unless entered into, extended, or renewed after the effective date of the Roth Act, are preserved and governed by prior law.⁸⁵ Second, after the developer delivers notice of conversion to all tenants, the developer may enter into rental agreements that provide for termination by the developer upon sixty days' written notice, provided that the agreement "conspicuously states that the existing improvements are to be converted."⁸⁶

79. *Id.*

80. *Id.* at 47.

81. *Id.* at 46.

82. *Id.* at 47.

83. FLA. STAT. § 718.606(5) (Supp. 1980).

84. ROTH REPORT, *supra* note 3, at 48-49.

85. FLA. STAT. § 718.606(5) (Supp. 1980). *Cf. id.* § 83.47(2) (1979) (similar legislative approach).

The developer termination provisions of the previous conversion law were "complex, difficult to understand, and internally inconsistent." ROTH REPORT, *supra* note 3, at 48; see FLA. STAT. § 718.402(3) (1979) (repealed 1980).

86. FLA. STAT. § 718.606(5) (Supp. 1980). A developer engaging in long-term planning might attempt to use the sixty-day termination provision to obtain later flexibility in evicting tenants. For example, suppose a developer plans to convert an apartment building to condominium in eighteen months and gives notice of conversion today. Within ninety days, the developer offers the units to the tenants at prices well above present market value, with the result that no tenants exercise the right to purchase. Subsequently, their rental agreements or extensions expire, and the developer inserts a sixty-day termination clause and conspicuous notice of the intended conversion in all new rental agreements and renewals.

C. Right of First Refusal

The Roth Act grants certain tenants the right of first refusal to purchase their apartments. Although the developer may offer all tenants their apartments, the developer must make the offering to each tenant who "for the 180 days preceding a notice of intended conversion has been a residential tenant of the existing improvements."⁸⁷ Each tenant's right of first refusal is to purchase the unit in which the tenant resides on the date of the notice of intended conversion.

The Division proposed the right of first refusal to protect tenants against unfair pricing practices.⁸⁸ "Some developers, realizing that many tenants have a significant investment in leasehold improvements, inertia to remain in the same unit, and difficulty in finding alternative housing, will set the initial offering price at a high level, reducing that price only after many existing tenants have purchased"⁸⁹ In addition to protection against unfair

The developer is now poised to evict the tenants.

This long-term planning strategy presents advantages to the developer by eliminating the inconvenience of the rental agreement extension period and perhaps the right of first refusal. The developer may now evict tenants on sixty days' notice, and phasing within a building becomes possible. The tenants lack any statutory right to terminate the rental agreement, and there are no extension periods under a rental agreement made subsequent to a notice of intended conversion.

This method also has several disadvantages for the developer. The tenants may terminate their rental agreements after receiving the notice of conversion. Offers of sale to tenants require the developer to provide costly disclosure documents to each tenant. Defeating the right of first refusal by setting artificially high prices violates the spirit, if not the letter, of the Roth Act. See note 102 and accompanying text *infra*. Moreover, a landlord attempting this ploy to make a building more attractive to a purchasing developer may risk adverse federal income tax consequences under I.R.C. § 1237 by converting an apartment building from a capital asset to an inventory of condominium units.

87. FLA. STAT. § 718.612(1) (Supp. 1980).

88. Legislative compromise over the extent of the right of first refusal reduced the effectiveness of the enacted provision. The combined operation of the Roth Act and the Little FTC Act, however, may still fulfill this policy goal. See note 102 *infra*.

89. ROTH REPORT, *supra* note 3, at 58. State Senator Paul Steinberg addressed this issue of developers selling to tenants the tenants' own furnishings.

[Tenants] have put carpeting in, drapes in, built in furniture, wall trim, mirrors, marble floors, in many cases—spent thousands of dollars, and now they are basically told, "Well, although you did it, you've got to realize you only had a one year lease That investment is for naught, you'll have to leave at the end of your lease or you'll have to pay a tremendous price to buy your units." And I know some converters who before they price their building, go through their building on an inspection tour to check air conditioning or something. But the main thing they are doing is checking to see what the people have put in their units If someone has spent \$20,000 fixing up their place, they're not going to leave and they'll pay five or ten thousand dollars more than a third party would if it was bare, because what they [the developers] are doing is selling these

pricing, tenants need economic information to understand the financial aspects of ownership. "Many tenants, facing for the first time the prospect of owning their dwelling unit, are not aware of the income tax benefit resulting from the deductibility of interest and real estate taxes."⁹⁰ Tenants may also need assistance in understanding the nature of the condominium form of real property ownership.⁹¹

The developer must provide each tenant who has a right of first refusal a packet of "purchase materials,"⁹² which include an "offer to sell"⁹³ that states the price and terms of purchase, the disclosure documents required in all condominium sales,⁹⁴ and certain "economic information." The economic information consists of three elements. The first element is information in summary form about mortgage financing, the estimated down payment, alternative financing and down payments, monthly payments of principal, interest, and real estate taxes, and federal income tax benefits.⁹⁵ The second element is market information contributed voluntarily

people back their own investment in their apartment. They are selling them back their investment in the friendships that they have created in the building.

They are selling them back the neighborhood

March House Hearings, *supra* note 13 (testimony of Senator Paul B. Steinberg).

90. ROTH REPORT, *supra* note 3, at 67.

91. Complaints received by the Division indicate that many condominium unit owners "either fall into the category of 'fee simple mentality' or 'renters' mentality,' in that they either perceive their relationship as one of absolute ownership, or at the other end of the spectrum, one of a tenant for whom someone is to supply necessary services." Division of Florida Land Sales and Condominiums, Proposal for Division Task Force at 4 (Aug. 1979) (in part proposing an expansion of the Division's educational program conducted pursuant to FLA. STAT. § 718.503(1)(c) (1979)) (on file *University of Miami Law Review*).

92. FLA. STAT. § 718.612(1)(a) (Supp. 1980).

93. *Id.* One may distinguish an *offer to sell* under the Roth Act from the ordinary judicial meaning of the phrase. The Act expresses a clear legislative intent that tenants receive at least 45 days to exercise their purchase rights; the *offer to sell* is in effect a 45-day option to purchase. Judicially, however, "[a]n offer to sell merely contemplates the proffer, proposal, presentation or exhibition of something to another for acceptance or rejection. It is not based on a valuable consideration and prior to acceptance it may be withdrawn at the pleasure of the one making it." *Frissell v. Nichols*, 94 Fla. 403, 407-08, 114 So. 431, 433 (1927).

94. See FLA. STAT. § 718.503, .504 (Supp. 1980).

95. *Id.* § 718.614(1). This information need not be a lengthy analysis. The tax explanation is designed to inform tenants of federal income tax benefits realized by deducting interest payments and real estate taxes. See I.R.C. §§ 163, 164, 216. The Roth Report contains a brief sample summary of financial information, including an illustration of tax deductions based on assumed levels of income. See ROTH REPORT, *supra* note 3, at 66. In practice, developers probably will provide tenants with summaries that more thoroughly describe these financial matters. Advising a prospective purchaser of cooperative residential housing about the federal income tax deductibility of interest payments and property taxes does not raise an "expectation of profit" bringing the offering within the federal securities laws. See *United Hous. Foundation, Inc. v. Foreman*, 421 U.S. 837 (1975).

by developers and prepared by the Division, consisting of a description of the condominium units offered for sale within the last twelve months in the county in which the tenant resides.⁹⁶ The third element consists of any other materials published by the Division that it determines will help tenants decide the feasibility of the purchase.⁹⁷

The developer must deliver the purchase materials to each tenant within ninety days after the date of the notice of intended conversion. When a developer fails to deliver the purchase materials within the ninety-day period, the tenant receives an automatic rental agreement extension. The length of the automatic rental extension is "for that number of days in excess of 90 that [have] elapsed from the date of written notice of intended conversion to the date when the purchase materials are delivered."⁹⁸ The automatic extension serves as a lever motivating developers to provide tenants with purchase materials promptly and ensures that tenants will have sufficient time to relocate if they decide not to purchase.

Each tenant has at least forty-five days to consider the developer's offer, beginning with the mailing or personal delivery of the purchase materials.⁹⁹ A developer may provide tenants with more than forty-five days to consider the purchase materials. A developer may also offer tenants their units at a discount. The discount, however, if offered pursuant to the right of first refusal, must be offered for at least forty-five days.¹⁰⁰

Each tenant has an additional right of first refusal if the developer reduces the offering price of a unit after a tenant's forty-

96. FLA. STAT. § 718.614(2) (Supp. 1980). The implementation of this element is subject to the Division's adoption of rules setting forth the descriptive information that developers may volunteer. It is intended that the market information consist of the condominium name, address, and telephone number, the price and square footage of each class of units, the date of construction, the type of condominium (e.g., detached, cluster, or multi-level), and a description of amenities (e.g., golf course, swimming pool, waterfront, or tennis courts). ROTH REPORT, *supra* note 3, at 70-71.

97. FLA. STAT. § 718.614(3) (Supp. 1980). As originally proposed, the Roth Act's provision for disclosure of economic information directed the Division to adopt rules requiring developers to disclose the economic information to tenants. FLA. P.C.B. 42, § 1 (1980) (House Judiciary Comm.); FLA. S.B. 825, § 1 (1980). The Florida Home Builders Association successfully objected to the implementation of this policy by rule and proposed an amendment statutorily establishing and implementing this policy.

98. FLA. STAT. § 718.612(1)(a) (Supp. 1980). For example, if the developer delivers the purchase materials to the tenant on the 119th day after the date of the conversion notice, the tenant receives an automatic twenty-nine-day extension of the rental agreement.

99. *Id.* § 718.612(1)(b). Because purchase materials are not subject to the Roth Act's notice provisions, they may be personally delivered.

100. *Id.*; memorandum from David B. Mursten to Jim Kearney (Aug. 18, 1980).

five-day right of first refusal has expired. The developer must notify the tenant in writing before the publication of the offer.¹⁰¹ The tenant has ten days after the date of the developer's notice to consider the offer.¹⁰² A developer may provide tenants with more than ten days to consider purchasing the unit at the reduced price.¹⁰³

The Roth Act provides certain remedies if a developer fails to respect the tenant's additional ten-day right of first refusal. The tenant may bring an action for damages or seek equitable relief, including specific performance, before the developer closes the sale of the unit to a third party.¹⁰⁴ The Act provides, however, that a tenant can recover only damages after closing, thereby avoiding

101. FLA. STAT. § 718.612(1)(c) (Supp. 1980). Because this subsequent offer requires written notice, it must comply with the Act's provision governing notices from developers to tenants. *Id.* § 718.61(2).

The Act provides that the term "offer" includes any solicitation to the general public by means of newspaper advertisement, radio, television, or written or printed sales literature or price list." *Id.* § 718.612(1)(c). Because the second right of refusal is triggered by other offers only after the first right expires, a tenant's second right is unaffected when the developer offers the tenant the unit at an initial price followed by a lower price during the period for the right of first refusal. *Id.*

102. *Id.* § 718.612(1)(c). As originally proposed by the Division, the Roth Act provided that a tenant have an additional right of first refusal each time the developer reduced a unit's price, provided that the tenant still had a right of occupancy. FLA. P.C.B. 42, § 1 (1980) (House Judiciary Comm.); FLA. S.B. 825, § 1 (1980); ROTH REPORT, *supra* note 3, at 56-57. The industry objected to this multiple right of first refusal and successfully proposed an amendment reducing it to an initial 45-day right and one 10-day right.

This limitation creates the possibility of attempts by a deceptive developer to terminate a tenant's right of refusal, as follows: a developer offers a tenant the unit at a price far above market price; the tenant declines to purchase and the forty-five day refusal period expires; the developer slightly reduces the price, which remains far above market; the tenant again declines to purchase; the right of first refusal then terminates. This conduct might constitute an unfair or deceptive act or practice under a rule adopted pursuant to the Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. §§ 501.201-.213 (1979). The rule provides that "[i]t shall be an unfair or deceptive act or practice for a developer to: . . . (2) Engage in any sales or advertising promotion which is deceptive or misleading." FLA. ADMIN. CODE Rule 2-16.04 (1980). The rule is enforceable by the aggrieved individual, appropriate State Attorney, or the Department of Legal Affairs. FLA. STAT. §§ 501.203(4), .207, .208, .211 (1979).

Developers have little incentive for attempting to avoid sales to tenants; this conduct is inconsistent with developers' business purpose—to create, market, and sell units. The Division estimates that an average of 25 to 50% of a building's existing tenants purchase their converted units. ROTH REPORT, *supra* note 3, 19-20, noted in STAFF OF FLORIDA SENATE COMM. ON ECONOMIC, COMMUNITY AND CONSUMER AFFAIRS, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON S.B. 825 at 3 (Apr. 22, 1980) (on file *University of Miami Law Review*) [hereinafter SENATE REPORT]. A recent report estimates that approximately 40% of South Florida tenants purchase their converted units. Hersker & Associates, The Impacts of Condominium Conversion at 9 (1980) (consultants' unpublished report, on file *University of Miami Law Review*).

103. FLA. STAT. § 718.612(1)(c) (Supp. 1980).

104. *Id.* § 718.612(2).

possible clouds on the title that could result from an award of equitable relief. The Act defines recoverable damages as the difference between the price that the developer offered the tenant during the forty-five-day refusal period and any lower price for which the unit was sold, plus court costs, attorney's fees, and any damages otherwise recoverable by law.¹⁰⁵

A tenant who exercises the right of first refusal may seek damages or equitable relief under general contract principles if the developer defaults on the contract for purchase and sale of the unit. The Roth Act prohibits the enforcement of contract provisions purporting to waive the right of a purchasing tenant to sue for specific performance.¹⁰⁶

A tenant's right of first refusal terminates: 1) upon termination of the rental agreement and all rental agreement extensions; 2) when the forty-five-day right of first refusal and any applicable ten-day additional right of first refusal has expired; or 3) upon waiver of the right.¹⁰⁷ A tenant's waiver of the right of first refusal must be in writing and executed after the date of the conversion notice; therefore, a waiver executed before or on the same date as the conversion notice is unenforceable.¹⁰⁸ "A tenant who waives the right of first refusal waives the right to receive the purchase information."¹⁰⁹ The Roth Act fails to define the effect of a waiver on a tenant's automatic rental agreement extension. A reasonable interpretation would treat the date of the execution of the waiver as the date of the delivery of the purchase materials.¹¹⁰

105. *Id.* Clouds on the title are still possible. The developer might close after the tenant filed suit for specific performance, but before the developer learned of the suit. This possibility was discussed during the House Hearings, but no amendments were adopted. See *April House Hearings*, *supra* note 7.

106. FLA. STAT. § 718.612(3) (Supp. 1980). Most condominium purchase contracts "provide for a return of the purchaser's deposit as the sole remedy in the event that the developer refuses to close the transaction." ROTH REPORT, *supra* note 3, at 58. A tenant's right of first refusal would be hollow if it did not include the right to specific performance. The tenant would be assured the right to contract to purchase a unit, but would lack the power to enforce the contract.

107. FLA. STAT. § 718.612(4) (Supp. 1980).

108. *Id.* § 718.612(4)(b).

109. *Id.* This paragraph of the Roth Act contains a statutory misnomer: it refers to "purchase information" when the correct term is "purchase materials."

110. The automatic extension exists to ensure that after receipt of the purchase materials the tenant will have sufficient time to relocate if the tenant decides not to purchase. Waiver, however, does not mean that the tenant does not need the extension. Further, the tenant may execute the waiver during the time when occupancy is based on the automatic extension. It would be unreasonable to assert that the waiver of first refusal also waived the automatic extension; that would result in the tenant's instant termination of the right of occupancy.

In addition to ensuring tenants the opportunity to purchase their apartments and continue residency, the right of first refusal has another effect: it blocks a developer from establishing restrictions on the ownership and occupancy of units when such restrictions would defeat a tenant's right of first refusal. In *White Egret Condominium, Inc. v. Franklin*,¹¹¹ the Supreme Court of Florida concluded that "age limitations and restrictions may be enforced if reasonably related to a lawful objective and not applied in an arbitrary or discriminatory manner."¹¹² Thus, a restriction that would prohibit certain tenants from purchasing their units would be unenforceable as an unlawful contravention of the right of first refusal provided in the Roth Act.¹¹³ A developer intent on establishing restrictions might provide a grandfather clause in the condominium documents that would exempt the units of purchasing tenants from the restrictions until resold. Alternatively, a developer could negotiate the tenant's purchase of a unit to which the proposed restriction would not apply.

D. Disclosure of Building Condition

The Condominium Act requires developers to provide certain disclosure documents to prospective condominium purchasers.¹¹⁴ When a developer creates a condominium by conversion, the disclosure documents must contain information about the condition

111. 379 So. 2d 346 (Fla. 1979).

112. *Id.* at 352 (emphasis added). The Condominium Act permits associations to establish restrictions on the use of units and common elements. FLA. STAT. § 718.112(3) (1979). In *White Egret*, the court upheld restrictions that prohibited children under the age of twelve from residing on condominium premises and restricted the use of a condominium unit to single-family occupancy. Two co-owners of a unit challenged the restriction, asserting a violation of "a condominium purchaser's constitutional rights to marriage, procreation, and association and his right to equal protection of the laws." 379 So. 2d at 348. The court rejected this argument, adopting the principle that unit owners, because "they are living in such close proximity and using facilities in common, . . . must give up a certain degree of freedom of choice which [they] might otherwise enjoy in separate, privately owned property." *Id.* at 350 (quoting *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. 4th DCA 1975)). Further, the court explained that "[t]here are residential units designed specifically for young adults, for families with young children, and for senior citizens. The desires and demands of each category are different." 379 So. 2d at 351. The court declined to enforce the restrictions in *White Egret*, however, because the condominium association applied them selectively and arbitrarily. *Id.* at 352.

113. Similarly, tenants' rights of first refusal may block enforcement of the restrictive covenants necessary to convert an apartment building to time-share estates or nonresidential condominiums. Both forms of ownership are by definition unsuitable for purchase and occupancy by residential tenants; thus, absent some accommodation of tenants' rights under the Roth Act, such conversions might be unlawful.

114. FLA. STAT. §§ 718.503, .504 (Supp. 1980).

of the building.¹¹⁵ The Roth Act requires building condition disclosures to give prospective purchasers "a more meaningful evaluation of the economic impact of unit ownership, particularly in the case of older buildings."¹¹⁶ Prior law contained two sets of disclosure requirements, the application of which depended upon the number of units in the building.¹¹⁷ The Roth Act establishes a single set of disclosure requirements.¹¹⁸

The disclosure documents must state the date and type of construction and prior use of the improvements being converted.¹¹⁹ The documents must reveal if there is termite damage or infestation and whether it has been properly treated.¹²⁰ For certain components, the developer must disclose the age of the component, as well as its structural soundness, remaining useful life, and estimated current replacement cost.¹²¹ The developer must disclose the replacement cost information as a total replacement amount for each component and as a unit amount based upon each condominium unit's proportional share of the common expenses.¹²²

The disclosure requirements are intended to apply to each component to the extent that repair, replacement, or maintenance of the component is not the sole responsibility of an individual

115. *Id.* § 718.503(2)(l), .504(15)(a), .616.

116. ROTH REPORT, *supra* note 3, at 76. The Roth Report notes approvingly that the required disclosure of estimated remaining useful life and replacement costs "could discourage conversion of severely deteriorated buildings." *Id.*

117. FLA. STAT. § 718.503(2)(l), .504(15) (1979) (amended 1980).

118. The legislature amended the former conversion disclosure provisions of the Condominium Act, *id.*, to incorporate by reference the disclosure requirements of the Roth Act, *id.* § 718.616 (Supp. 1980). See *id.* § 718.503(2)(l), .504(15)(a). The legislature did not, however, repeal the now-superseded *id.* § 718.504(23)(l).

119. *Id.* § 718.616(2)(a) (Supp. 1980).

120. *Id.* § 718.616(2)(c).

121. *Id.* § 718.616(3). The enumerated components are the roof, elevators, heating and cooling systems, plumbing, electrical systems, swimming pool, seawalls, pavement, parking areas, and drainage systems. An architect or engineer authorized to practice in Florida must substantiate the disclosure.

In some instances this disclosure may constitute statutory overkill, requiring the developer to list the replacement cost of a component that should not require replacement. For example, the statute requires disclosure of the condition of the plumbing. If the plumbing is of copper or PVC (pipe made from rigid, durable plastic), it normally has a useful life at least as long as the building itself. Nevertheless, the developer must disclose the current estimated replacement cost of the plumbing, an estimated cost that probably will be extremely high: the cost would include labor and materials, and the task would include the replacement of pipes located in floors, walls, and elsewhere. The possibility that this cost disclosure may scare away purchasers is reduced by the disclosure of the estimated remaining useful life of the component—in effect, stating that the plumbing will probably not require replacement.

122. *Id.* § 718.616(3)(b)(3).

unit owner. Although such components are ordinarily part of the "common elements," occasionally the condominium association may own them in fee simple absolute or lease them, in which case the unit owners, as members of the association, would still bear a proportional share of the expense of maintenance or replacement.¹²³ A developer would be unsuccessful in asserting that property escapes the disclosure requirement because it is not technically a common element. Such an assertion would be inconsistent with the legislative intent to apprise purchasers of the condition and estimated replacement cost of the statutorily listed components. Further, the Roth Act does not express the disclosure-of-condition requirement in terms of common elements, but bases it on each unit's proportional share of the common expenses.¹²⁴ This provision indicates that the test is not ownership; the test is whether the unit owners share the financial responsibility for the repair or replacement of the component.¹²⁵

E. *Post-Purchase Protection*

Each developer who creates a condominium by conversion must either establish and fund "converter reserve accounts" or give implied warranties.¹²⁶ The Division recommended the provision for reserve accounts or warranties as a post-purchase protection for unit owners. Prior law permitted developers to state in their disclosure documents "a caveat that there are no warranties unless they are expressly stated in writing by the developer."¹²⁷ Purchasers of units created by conversion had no protection

123. The term *common elements* means "the portions of the condominium property not included in the units." *Id.* § 718.103(6) (1979). Thus, for example, a swimming pool or a parking lot not submitted to the condominium form of ownership would not be a common element, yet would require disclosure under *id.* § 718.616(3)(a) (Supp. 1980).

124. *Id.* § 718.616(3)(b)(3) (Supp. 1980). The Roth Report explains the disclosure requirement in terms of common elements. ROTH REPORT, *supra* note 3, at 76. The statute did not use the term *common elements*, however, because of the limitations of that term.

125. The same rationale applies the disclosure requirements to condominium property owned by an umbrella or master association of property owners. "The disclosure of condition requirement applies to property owned by a master property owners' association when the repair, replacement or maintenance of such property constitutes a common expense or when such property is condominium property." Division of Florida Land Sales and Condominiums, Disclosure of Building Condition, Proposed Rule No. 7D-24.04(1)(c) (notice of workshop published in Fla. Admin. Weekly, Jan. 9, 1981) (on file *University of Miami Law Review*).

126. FLA. STAT. § 718.618 (Supp. 1980).

127. *Id.* § 718.504(15)(e) (1979). The provision as amended now allows "[a] caveat that there are no express warranties unless they are stated in writing by the developer." *Id.* § 718.504(15)(b) (Supp. 1980).

against defects that, within a short time after conversion, might require substantial assessments to mend.¹²⁸

The Division did not include the warranty alternative to reserve accounts in its published recommendations or initial drafts of the proposed legislation. The Division proposed the warranty alternative to give developers a choice, to reduce the cost of granting post-purchase protections to unit owners, if possible, and to increase the likelihood that the legislature would adopt a post-purchase protection plan—in particular, the reserve account proposal.¹²⁹

1. CONVERTER RESERVE ACCOUNTS

Reserve accounts are funded by an assessment against the developer. The assessment establishes accounts for the future repair or replacement of the building's roof and certain plumbing and air conditioning systems. The developer may fund the reserve account in cash or by posting a surety bond.¹³⁰ The Roth Act ties the funding of reserve accounts to the sale of units or expenditure of reserve account funds.¹³¹ The association and the unit owners determine the use of reserve account funds.¹³²

A developer electing the reserve account alternative must fund a roof reserve account.¹³³ The Roth Act requires a plumbing reserve account only when the water supply plumbing is of galvanized pipe.¹³⁴ The developer must fund an air conditioning system reserve account only when the converted improvements include an

128. ROTH REPORT, *supra* note 3, at 84-85.

129. Legislators had indicated to the Division an interest in providing some form of post-purchase protection to unit owners; warranties are a traditional manner of providing such protection. During the 1980 Regular Session of the Florida Legislature, five bills establishing a requirement of warranties were introduced: FLA. H.B. 640; FLA. H.B. 1049; FLA. H.B. 1591 (contained the Roth Act); FLA. S.B. 374; FLA. S.B. 825 (contained the Roth Act). It was the Division's expectation that developers would strongly oppose the requirement of warranties and would embrace the reserve account alternative. Thus, the Division included the warranty alternative in view of the proposal's merit and possible leverage for compromise. Unexpectedly, although the developers expressed an aversion to the reserve account concept, they acquiesced to the entire proposal. The developers failed, however, to reduce the term of the warranty period from three years to two years.

130. FLA. STAT. § 718.618(8) (Supp. 1980); *see* note 142 and accompanying text *infra*.

131. *Id.* § 718.618(2).

132. *Id.* § 718.618(3).

133. *Id.* § 718.618(1)(a)(3). The Roth Act provides an exception in the rare event that the roof is of copper. A copper roof has an expected useful life that normally exceeds the expected useful life of a building. Memorandum from Joel B. Channing to James S. Roth (Dec. 28, 1979) (on file *University of Miami Law Review*).

134. FLA. STAT. § 718.618(1)(a)(2) (Supp. 1980).

air conditioning system serving more than one unit or serving property that the condominium association is responsible to repair, maintain, or replace.¹³⁵ For example, if the only building air conditioning system consists of independent systems serving individual units, the developer need not establish an air conditioning reserve account. Of course, if the air conditioning system serves a facility such as a recreation room, lobby, hallway, laundry room, or other common area, the developer must fund an air conditioning reserve account.

The statute establishes a step-by-step formula to determine the amount of funding required for each reserve account:¹³⁶ 1) Determine the square footage of the roof or the square footage of the floor area served by the common air conditioning system or galvanized plumbing;¹³⁷ 2) Identify from the statute the applicable dollar cost factor for each component; 3) Using the statute's age formula, determine the age of the component—if the component is more than eighteen years old, consider it eighteen years old;¹³⁸ 4) For each component, multiply the square footage (step one) by the dollar factor (step two) by the age (step three); and 5) divide the product (step four) by twenty. The resulting quotient is the particular component's reserve account funding amount.

The reserve account formula is complex but achieves objectivity and accuracy, thereby reducing the likelihood of litigation over the funding of reserve accounts.¹³⁹ The formula establishes a dollar amount per square foot, representing an approximation of the average cost to replace each component.¹⁴⁰ It provides the estimated

135. *Id.* § 718.618(1)(a)(1).

136. *Id.* § 718.618(1).

137. For galvanized plumbing the square-foot size is the measure of the floor area of the entire building. For an air conditioning system, the square-foot size is the measure of the floor of the area cooled by the air conditioning system. *Id.* § 718.618(1)(a)(1)-(2).

138. The age of the component is measured from the date of completion of installation or construction, or from the date of replacement or renewal of the component if the replacement or renewal met the requirements of the then applicable building code, whichever date is later. *Id.* § 718.618(1)(b). If the replacement or renewal met building code requirements, the developer must verify this fact by affidavit. *Id.* § 718.618(1)(c).

139. A less complex formula would be inaccurate. For example, the statute could require funding as a percentage of the unit's selling price. Such a formula, however, would produce backward results: buildings in the worst condition would be most likely to need repairs but would sell for the lowest prices and thus have the lowest level of reserve account funding. Eliminating the formula and basing the calculation on an architect's or engineer's estimate is also undesirable, since it would invite developers to shop for favorable estimates and provide purchasers broad opportunity to challenge the subjective calculation.

140. Other comparable statutes establish standard dollar amounts. For example, Florida's Workers' Compensation Law establishes standard compensation amounts based on the

total replacement cost, based on a determination of the expired useful life of the component. As indicated above in step five, the formula presumes the useful life of the component to be twenty years. The few subjective determinations required by the formula, such as component type, size, and weight, are simple to verify and can be made with relative ease and precision.

After determining the funding amounts, the developer must establish the reserve accounts in the name of the condominium association. When the developer funds the accounts in cash, the Roth Act ties the funding to the sale of units. Upon the sale of each unit, the developer must deposit an amount in the reserve account at least equal to the particular unit owner's percentage of ownership of the condominium's common elements.¹⁴¹

A developer may promise to fund reserve accounts and post a surety bond payable to the condominium association. The bond must be "readily available in the open market," in an amount equal to the calculated amount of reserve account funding, and issued by a Florida licensed bonding company.¹⁴² The funding of reserve accounts with the posting of a surety bond permits a developer to avoid the immediate deposit of cash in reserve accounts. This alternative saves a developer the interest income from the cash and avoids the need to follow the cash-funding deposit formula, but costs the developer the expense of purchasing the bond. Moreover, the developer must ultimately pay when the association calls on the reserve account funds.

The condominium association authorizes and controls the expenditure of reserve account funds. The association may spend reserve account funds only for the purpose of repairing or replacing the specific components for which the developer established the reserve account, "unless, after assumption of control of the association by unit owners other than the developer, it is determined by a three-fourths vote of all unit owners to expend the funds for other purposes."¹⁴³ If the association spends reserve account funds

statewide average weekly wage calculated by the Florida Department of Labor and Employment Security. FLA. STAT. § 440.12 (1979).

141. *Id.* § 718.618(2)(a) (Supp. 1980). The developer may credit the amount of any overfunding against subsequent deposit requirements. *Id.*

142. *Id.* § 718.618(8); see Memorandum from David B. Mursten to Jim Kearney (Jan. 14, 1981) (on file *University of Miami Law Review*).

143. *Id.* § 718.618(3)(b). As proposed, the Roth Act prohibited the spending of reserve account funds by a developer-controlled association. STAFF OF FLA. HOUSE JUDICIARY COMM., SUMMARY OF P.C.B. 42, at 4 (Apr. 15, 1980) (on file *University of Miami Law Review*) [hereinafter cited as SUMMARY P.C.B. 42]; FLA. S.B. 825, § 1 (1980); see ROTH REPORT, *supra* note

before the developer has sold all units and completely funded the accounts, the developer must make a deposit for each unsold unit. The amount of the deposit depends on the proportion of the amount of reserve account funds expended to the total amount the developer must eventually deposit in the reserve account.¹⁴⁴ When the developer subsequently sells the units, the remainder of each unit's obligation to the reserve account must be deposited.¹⁴⁵

The Division favors the reserve account alternative over warranties and expects the developers to share that bias.¹⁴⁶ Developers electing to establish reserve accounts rather than give warranties should do so with great attention to the statutory requirements. *A developer who fails to establish reserve accounts in the statutorily prescribed manner is deemed to have given warranties.*¹⁴⁷

2. WARRANTIES

A developer may give a statutorily implied warranty as an alternative to funding a reserve account. This warranty of fitness and merchantability inures to each purchaser and successor owners and covers the roof and structural components of the improvements and all mechanical, electrical, and plumbing elements, except mechanical elements serving only one unit.¹⁴⁸ A developer may satisfy the warranty requirement by obtaining coverage of an

3, at 84. At the recommendation of the Division's Condominium Advisory Board, this prohibition was deleted by an amendment adopted during committee hearings. The amendment saves developers from the difficult situation of having funded reserve accounts for component repairs, yet being unable to spend the funds if the component fails. Although this provision gives developers an opportunity to self-deal by binding the association to potentially lucrative repair contracts with the developer, such conduct would expose the officers of the association to an action for breach of fiduciary duty. *See, e.g., Avila South Condominium Ass'n v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977); FLA. STAT. § 718.302 (1979).

144. FLA. STAT. § 718.618(2)(b) (Supp. 1980). For example, if the association spends an amount equal to one-fourth of the total amount that the developer will ultimately deposit in the reserve account, the developer must deposit one-fourth of each unsold unit's obligation to the reserve account. If, however, the developer has already funded the reserve account to this extent, no deposit would be required. *Id.*

145. *Id.* § 718.618(2)(a).

146. The Roth Report states:

While the Division of Florida Land Sales and Condominiums is of the opinion that statutory warranties would be desirable in the case of condominium conversions, it is the opinion of the Division that the converter reserve assessment is a far superior method of accomplishing the objective that warranties would seek to achieve.

ROTH REPORT, *supra* note 3, at 85.

147. FLA. STAT. § 718.618(7) (Supp. 1980).

148. *Id.*; *cf. id.* § 718.203(1)(e) (1979) (parallel implied warranty by developer for same components and elements in sale of new condominium units).

insured warranty program underwritten by an insurance company.¹⁴⁹

The Roth Act's provision on the term of the warranty is inartfully phrased:

Such warranty shall be for a period beginning with the notice of intended conversion and continuing for 3 years thereafter, or the recording of the declaration to *[sic]* condominium and continuing for 3 years thereafter, or 1 year after unit owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.¹⁵⁰

This incomprehensible provision awaits administrative and judicial interpretation and further legislative attention. One may gain a clearer understanding of the problem by referring to section 718.203(1)(e) of the Condominium Act,¹⁵¹ which provides an implied warranty for the same components and elements of new condominium structures. The time period for that warranty begins with the completion of construction, "continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years."¹⁵² In this Condominium Act warranty, the beginning of the period is fixed, and the disjunctive *or* merely provides alternative ending dates. The Roth Act provides an alternative beginning date as well, either the notice of conversion or the recording of the declaration. On first reading, the Roth Act warranty provision suggests several alternative interpretations,¹⁵³ none of which conforms

149. *Id.* § 718.618(7)(d) (Supp. 1980). This provision is identical to the insured warranty program alternative provided in the Condominium Act's warranty section. FLA. STAT. § 718.203(7) (1979). This alternative has been permissible since the adoption of 1976 Fla. Laws ch. 76-222, § 1, effective January 1, 1977; however, no insurance program that meets the minimum requirements of the Condominium Act has been available on the insurance market to supplant developers' warranty responsibilities.

150. FLA. STAT. § 718.618(7) (Supp. 1980). The legislature adopted no amendments during its consideration of this subsection.

151. *Id.* § 718.203(1)(e) (1979).

152. *Id.* (emphasis added).

153. For example, one could interpret the provision to mean that the warranty is for a three-year period beginning with the date of the notice of intended conversion, or for a three-year period beginning with the date of the recording of the declaration of condominium, or for a one-year period beginning with the date when unit owners other than the developer obtain control of the association, whichever period begins last, excluding any period that begins more than five years after the date when one of the other periods began. But turnover of control always occurs last. Thus, this interpretation would limit the warranty to one year, except when turnover occurs more than five years after the notice or declaration. In that event, one of the two alternative three-year warranties would apply. It would be impossible to determine whether the association had a warranty when the claim

to the legislative intent expressed during committee hearings that purchasers receive a three-year warranty.¹⁵⁴ But, as with the Condominium Act warranty, the legislature intended that the Roth Act warranty period continue beyond three years if the developer delayed turnover of the association to the unit owners. Thus, a proper reading of the Roth Act warranty provision is:

When a developer is deemed to have granted to the purchaser of each unit an implied warranty, the term of the warranty is as follows:

- (1)(a) For a three-year period beginning with the date of the notice of intended conversion, or
- (b) For a three-year period beginning with the recording of the declaration of condominium,

whichever period begins last, and continuing thereafter through

- (2) One year after the date when owners other than the developer obtain control of the association;

*provided that the term of the warranty shall in no event exceed five years.*¹⁵⁵

arose until turnover occurred or the five years elapsed.

Another interpretation of the passage would provide the warranty for a three-year period beginning with the date of the conversion notice, or for a three-year period beginning with the declaration, or for a period beginning one year after turnover of control and lasting five years thereafter, whichever period begins last. Since turnover always occurs last, unit owners would always receive a five-year warranty, and they would potentially receive it a significant time after the purchase of their unit. Clearly, the legislature did not intend this result. If it had, the passage would not refer to the three-year period beginning with the conversion notice or the recording of the declaration.

A third interpretation reading the alternative periods *conjunctively* comes closest to providing purchasers a three-year warranty: the warranty is for a three-year period beginning with the date of the conversion notice *and* for a three-year period beginning with the date of the recording of the declaration *and* for a one-year period beginning with the date when the unit owners obtain control, whichever occurs last, except to the extent that any period ends more than five years after the beginning of another period. Although this interpretation is more reasonable than the other two, it nevertheless does violence to the clearly *disjunctive* phrasing of the statute. Moreover, because it is unnecessary to choose between conjunctive periods, this interpretation makes the phrase "whichever occurs last" mere surplusage.

These three interpretations share a common fault: they regard the warranty as three separate and distinct periods. The key, of course, is to read the provision as a *single* warranty period with alternative beginning dates and alternative ending dates.

154. *April House Hearings*, *supra* note 7.

155. Under this reading of the Roth Act, the warranty period could conceivably range from zero to five years. The length of the warranty period is largely under the developer's control. To achieve a zero-year warranty, a developer would have to wait five years after giving notice and recording the declaration before closing on any units. Economic considerations, however, make this tactic unfeasible. The developer's next best alternative is to mini-

The advantages of reserve account funding over warranties encourage developers to choose the reserve account alternative. Giving warranties exposes a developer to expensive litigation, in which the plaintiff association will undoubtedly seek the maximum recoverable judgment. For example, if a roof leaks, the association will seek to recover the cost of its replacement rather than the cost of its repair, even though professional opinions might vary widely over whether replacement is necessary. Moreover, warranty coverage is significantly broader than reserve account funding, which covers only three components, two of which are not present in many buildings.¹⁵⁶ Developers may thus find that establishing contingency funds to cover potential warranty exposure is more costly than funding reserve accounts.¹⁵⁷ Of course, the reserve accounts are a definite expense, while the warranty alternative may cost the developer nothing if the building needs no repairs during the limited warranty period.¹⁵⁸

Purchasers receiving funded reserve accounts in lieu of warranties also will realize benefits. The reserve account funds remain with the association until spent, are independent of the developer's future solvency,¹⁵⁹ reduce the likelihood of litigation, and allow the

mize the warranty period by turning over control of the association before the second year of the warranty period ends. The result in the usual course of events will thus be a three-year warranty, as the legislature intended.

156. "It should be recognized that the vast majority of apartments [contain] individual air conditioning units, and either copper or PVC piping. This eliminates from the converter reserve assessment all components other than the roof, in a majority of cases." ROTH REPORT, *supra* note 3, at 90. In contrast, recall that a developer giving warranties must warrant structural components (for example, support pilings, which at best are difficult and expensive to inspect) plus mechanical, electrical, and plumbing elements, except for mechanical elements serving only one unit. FLA. STAT. § 718.618(7) (Supp. 1980).

157. A developer giving warranties must anticipate litigation expenses. Thus, "[i]t is the opinion of the Division of Florida Land Sales and Condominiums that any increase in unit prices which is attributable to the requirement of reserves will not be as great as would be the price increase which required warranties would carry: Developers would establish a contingency reserve for potential litigation." ROTH REPORT, *supra* note 3, at 90.

158. Because the amount of reserve account funding is an established dollar amount, it may seem to be a greater expense than the cost of a warranty, which is a hidden, not separately stated, dollar amount. The Division has not estimated the cost of warranties; reserve accounts cost 1 to 3% of the sales price of the units in a building. Division of Florida Land Sales and Condominiums, Average Cost of Converter Reserve Account (April 1980) (on file *University of Miami Law Review*). One set of erroneous estimates, which was presented to the legislative committee considering the Roth Act, predicted that reserve funding could be as high as 5.1% of gross sales revenue. The estimate incorrectly calculated the amount of roof reserve funding based on the floor area of the multi-story building, rather than on the roof area of the building. *Id.*; Division of Florida Land Sales and Condominiums, Overstatement of Reserve Account Amounts (April 1980) (on file *University of Miami Law Review*).

159. "By the time when warranty litigation is concluded, a developer, whether a corpo-

condominium association "to make decisions regarding repairs versus replacements on a purely economic basis, without regard to considerations such as the expiration of the statute of limitations on warranties."¹⁶⁰ In addition, reserve accounts place unit owners in a position to commit reserve account funds "to a sound long range cost effective maintenance and replacement program."¹⁶¹ Yet purchasers may suffer by receiving reserve accounts in lieu of warranties when a building contains a costly defect requiring repairs that exceed the amount of a reserve account. The disclosure of building condition requirements, however, makes this misfortune less likely.

F. *Discrimination Against Nonpurchasing Tenants*

The Roth Act provides that nonpurchasing tenants, during the remaining term of their rental agreement and any extension period, are entitled to the same rights, privileges, and services that all tenants received before conversion.¹⁶² The Act does not directly address the issue of temporary unavailability of services during renovation and restoration.¹⁶³ The purpose of the discrimination provision is to ensure tenants' continued equal access to amenities and to prevent "the withholding of services, which is sometimes practiced, so as to encourage existing tenants to vacate prior to the expiration of their lease term."¹⁶⁴ This provision, however, does not prevent a developer from offering new services and amenities solely to purchasers.

ration or an individual, may have insufficient assets to satisfy any judgments that may be entered." ROTH REPORT, *supra* note 3, at 86. Developers may attempt to limit warranty liability by setting up a "shell" corporation—a corporation with limited assets on which to levy a judgment. Purchasers attempting to pierce the corporate entity might contend that the use of a shell corporation is a form of fraud, evading the statute and rendering the warranty requirement meaningless; or, under applicable circumstances, they might make "alter-ego" or "business conduct" arguments. Several factors might bear on a court's consideration of the legitimacy of the shell corporation: the legislature's goal of providing significant post-purchase protections to unit owners; the availability of alternatives to the warranty requirement (insured warranty programs and converter reserve accounts); the condition of the building, indicating whether the developer should have anticipated substantial warranty claims; and other matters.

160. ROTH REPORT, *supra* note 3, at 86.

161. *Id.* at 90.

162. FLA. STAT. § 718.62 (Supp. 1980); see ROTH REPORT, *supra* note 3, at 92-93.

163. The Division explained why it made no recommendation, leaving this issue to the legislature: "In view of the competing interests of existing tenants, on the one hand, and the benefits to be derived by renovation and restoration, these matters are best left to the common law to be handled on a case-by-case basis." ROTH REPORT, *supra* note 3, at 93.

164. *Id.*

III. LOCAL OPTION INCENTIVE FOR APARTMENT DEVELOPMENT

As recommended by the Roth Report, the legislature amended the Condominium Act to allow local governments to adopt building regulations or zoning requirements providing incentives for the construction or retention of rental apartments.¹⁶⁵ Prior law required that local governments regulate condominiums in the same manner as buildings that would be condominiums except for the form of ownership.¹⁶⁶ As amended, this "equal treatment" statute is inapplicable when a landlord covenants with the local government not to convert the property to condominium within five years after the date of the covenant or the completion date of construction, whichever occurs later.¹⁶⁷ One suggested incentive is an ordinance or "variance permitting greater density in the construction of apartment units, as compared to condominium units."¹⁶⁸ Higher density permits lower rental rates by reducing average unit construction costs and increasing gross rental income. This allowance increases the profitability of apartment building ownership, an essential requirement in encouraging the creation of additional rental housing.¹⁶⁹

A memorandum prepared for the Division considered the constitutionality of the local option provision,¹⁷⁰ concluding that contract zoning is not per se invalid¹⁷¹ and that local governments may impose conditions upon land use if reasonably related to a public purpose.¹⁷² The memorandum pointed out, however, that the legis-

165. 1980 Fla. Laws ch. 80-3, § 6 (amending FLA. STAT. § 718.507 (1979)); see ROTH REPORT, *supra* note 3, at 94-96.

166. FLA. STAT. § 718.507 (1979).

167. *Id.* § 718.507 (Supp. 1980). The Staff Analysis prepared by the Senate Committee on Economic, Community and Consumer Affairs summarizes the amendment as follows: "Local governments could grant incentives to apartment developers provided the developer agreed not to convert the building until after a number of years specified by the local government, but not less than five years . . ." SENATE REPORT, *supra* note 102, at 3 (citation omitted); see SUMMARY P.C.B. 42, *supra* note 143, at 5; DEPARTMENT OF BUSINESS REGULATION, ROTH ACT EXECUTIVE SUMMARY 3 (April 14, 1980).

168. ROTH REPORT, *supra* note 3, at 95.

169. *Id.* at 95-96.

170. Memorandum from Harry Purnell, General Counsel, and Helen C. Ellis, Staff Attorney, to James S. Roth (March 11, 1980) (on file *University of Miami Law Review*) [hereinafter cited as Purnell Memo].

171. *Id.* at 1 (citing Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968)); see *Broward County v. Griffey*, 366 So. 2d 869 (Fla. 4th DCA 1979), *cert. denied*, 385 So. 2d 757 (Fla. 1980). But see *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956).

172. Purnell Memo, *supra* note 170, at 1 (citing *Miami Beach v. Eason*, 194 So. 2d 652, 655 (Fla. 3d DCA 1967)). For a discussion of the issues raised by state and local regulation of condominium conversions, see Comment, *The Legality and Practicality of Condominium*

lature may lack the power to limit the zoning authority of municipalities, since municipalities derive such authority from the state constitution.¹⁷³ The memorandum also discussed whether the incentive is unconstitutional as a violation of the equal protection clause. It determined that the classification makes a valid, reasonable distinction: "The difference between condominium housing, where purchase is required, and rental housing furnishes justification for a different classification for the purpose of furthering the public welfare by insuring [*sic*] an adequate housing supply."¹⁷⁴

IV. EFFECTIVE DATE

The Roth Act and accompanying amendments to the Condominium Act took effect on May 1, 1980.¹⁷⁵ During consideration of the bill on the Senate floor, an amendment added a "saving clause."¹⁷⁶ At the request of the bill's sponsor in the Senate, the Division drafted the saving clause as a technical amendment to clarify the application of the Roth Act.¹⁷⁷ The applicability of the provisions for conversion notice, rental agreement extension and termination, right of first refusal, mandatory disclosure, and post-purchase protections depends on the timing of various steps the developer took toward conversion.

After May 1, 1980, notice of intended conversion must comply with the Act.¹⁷⁸ The developer must grant tenants the longer rental agreement extension periods and the right of first refusal required by the new law.¹⁷⁹ These requirements apply even though a developer may have already filed with the Division and recorded a declaration of condominium. Notice of intended conversion is a dis-

Conversion Moratoriums, 34 U. MIAMI L. REV. 1199 (1980).

173. Purnell Memo, *supra* note 170, at 1-2 (citing FLA. CONST. art. VIII, § 2(b); FLA. STAT. § 166.042 (1979)).

174. Purnell Memo, *supra* note 170, at 2.

175. The bill containing the Roth Act and other amendments to the Condominium Act provided that it would "take effect upon becoming a law." FLA. H.B. 1591, § 16 (1980). When the governor signs such a bill, its provisions are law for that entire day, unless "justice demands" that it become law at the exact time of its signing. [1961] FLA. ATT'Y GEN. BIENNIAL REP. 145, 149 (No. 061-91) (June 2, 1961). Governor Graham signed House Bill 1591 into law after the close of the business day on May 1, 1980. Therefore, it did not affect papers filed on May 1.

176. 1980 Fla. Laws ch. 80-3, § 13 (codified at FLA. STAT. § 718.622 (Supp. 1980)).

177. See COMM. SUBSTITUTE FOR FLA. S.B. 825, amend. 8, *reprinted in* FLA. S. JOUR., 1980 Reg. Sess., at 198.

178. FLA. STAT. § 718.622(1) (Supp. 1980); see notes 36-49 and accompanying text *supra*.

179. See notes 50-113 and accompanying text *supra*.

crete act in the conversion process, a separate step from filing or recording. The notice provision of the saving clause recognizes this distinction and makes it clear that a developer who has failed to give the notice required by the prior law must meet the requirements of the amended law.

The Roth Act requires more disclosures about a building's condition than did the prior conversion law.¹⁸⁰ The saving clause requires that if a purchaser did not receive the disclosure documents before May 1, 1980, the developer must provide disclosure documents meeting the new requirements.¹⁸¹ The effective date of these additional disclosure requirements is somewhat unfair to developers. Even if a developer has filed with the Division, obtained approval of the disclosure documents, converted a building to a condominium, and sold nearly all the units, the Roth Act nevertheless requires the developer to obtain a new architect's or engineer's report and to reprint the disclosure documents. At best, compliance is expensive; at worse, impossible: if the developer has already turned over control of the building to the buyers, the association may deny access to the condominium property that requires inspection.

The manner of imposition of this new disclosure requirement deviates from former legislative policy. Previously, when amendments to the Condominium Act required increased disclosures, the Act exempted disclosure documents that had complied with the prior law.¹⁸² The immediate imposition of the Roth Act's disclosure requirements is not only potentially impractical, but also difficult to enforce. As a practical matter, it is unlikely that the Division will actively enforce the requirement that developers amend previously approved disclosure documents; instead, it will marshal its limited resources toward the enforcement of other matters, unless circumstances require executive action.¹⁸³

180. See notes 114-25 and accompanying text *supra*.

181. FLA. STAT. § 718.622(2) (Supp. 1980).

182. *Id.* § 718.504(24) (1979).

183. If a developer fails to provide the required disclosure documents, a purchaser could independently pursue the matter or file a complaint with the Division. The Division might exercise its discretion to investigate the complaint and institute enforcement proceedings as provided in *id.* § 718.501(1)(a). The Division has the power and the duty to enforce the Condominium Act as it may apply to the development, construction, sale, lease, ownership, operation, and management of residential condominium units. In carrying out that function, the Division "shall receive, and may investigate" complaints, exercising subpoena powers and taking statements under oath. *Id.* The Division may issue cease and desist orders, bring a class action in circuit court on behalf of unit owners or lessees, and impose civil penalties of up to \$5,000 for each offense in violation of the Condominium Act. *Id.* §

The provision for converter reserve accounts or warranties¹⁸⁴ does not apply to developers who filed with the Division before May 2, 1980, provided that the documents are proper for filing and, not later than six months after the filing, the developer recorded a declaration of condominium and gave a notice of intended conversion.¹⁸⁵

V. CONCLUSION

The Roth Act addresses long-term problems created by the current housing market, problems whose ultimate solution lies in the creation of more rental housing. Incentives for developers to build rental units must come from the market, and may come from state and local governments. In addition, a change in federal taxation policy is necessary. As an interim measure, the Roth Act will relieve many of the symptoms affecting Florida residents, though it does not purport to solve the entire problem.

The Roth Act is a significant measure, much stronger than what many observers had expected the legislature to adopt. The provisions for notice, rental agreement extensions, right of first refusal, and disclosure are obviously designed to protect tenants; yet the Act is not likely to cause any real harm to developers, whose bargaining position is extremely strong in the housing market today. It is a balanced measure, adequate to fulfill the aspirations of James S. Roth, its namesake, who said: "In summary, the theme of the legislative proposals is to respond decisively to the current pressing needs, and address the problems from a long range point of view, while recognizing the detrimental effects of excessive governmental intrusion on the free marketplace."¹⁸⁶

718.501(1)(b).

184. See notes 126-61 and accompanying text *supra*.

185. FLA. STAT. § 718.622(3) (1979). For the purpose of determining whether a developer has filed before the effective date of House Bill 1591, the Division considers the bill to have become law and taken effect after the close of business on May 1, 1980. See note 175 *supra*.

186. Letter from James S. Roth to Governor Bob Graham (Feb. 11, 1980), reprinted in ROTH REPORT, *supra* note 3, preface.