Legal Protection for Florida Condominium and Cooperative Buyers and Owners

Michel Anderson

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INTRODUCTION

The rapid increase in condominiums and cooperatives in Florida has been accompanied by a demand from the buyers and owners of these units for increased “consumer protection-type” legislation. The Florida Condominium Act has been the legislature’s answer to this demand. Several sections of the Act are designed to protect purchasers from unscrupulous and underfinanced developers and overzealous sales representatives.

In 1972, the legislature, recognizing the magnitude of the condo-

* Senior Law Student, University of Miami.

1. The condominium owner receives a deed to his individual unit; common areas are owned by the association. Each unit owner receives shares of stock in the association in proportion to his percentage of ownership in the condominium as a whole. Units are individually financed.

2. The cooperative is a corporation that owns or leases the land and building. Individuals own stock in the corporation guaranteeing their right to use the common areas. Each shareholder has a long term proprietary lease giving him the exclusive right to possession of his unit. Shareholders are the owners of the corporation by virtue of their stockholdings and tenants of the corporation by virtue of their leases. The mortgage is taken out on the entire building by the corporation. Each shareholder pays his pro rata share of the mortgage payments, and is jointly and severally liable on the blanket mortgage.


On May 13, 1963, the Florida legislature adopted the Condominium Act. The original purpose was to legitimize condominium ownership. Prior to its enactment, there was doubt as to the legality of vertical ownership without enabling legislation. The impetus for its passage came from developers and mortgage bankers who recognized the increasing demand for individually owned units. The former were unable to obtain financing and the latter were hesitant to provide financing without a statute expressly sanctioning the condominium form of ownership.

minium industry in Florida and the unsolved problems associated with it, enacted legislation providing for a condominium commission. The commission was charged with the duty of studying all aspects of condominiums and cooperatives and reporting its findings and recommendations for revisions of condominium and cooperative law to the 1973 legislature. The 18 member commission was composed of 5 condominium owners, 3 builders, 1 title insurer, 1 person actively engaged in financing condominiums, 4 members of the Florida Bar, 2 members of the Florida Senate, and 2 members of the Florida House of Representatives. After conducting public hearings throughout the state, the commission proposed several new sections and suggested amendments to existing sections of the Condominium Act. The thrust of the proposed legislation is toward increased consumer protection.

MANAGEMENT CONTRACTS AND ASSOCIATION CONTROL

Many owners of the original units developed in accordance with the Florida Condominium Act found themselves bound by long term management contracts. These contracts were generally entered into by the condominium developers both as officers of the condominium association and of the developer-owned management corporations before the closing of any unit sales. In one case where this situation occurred, the condominium owners brought an action to reform the contracts claiming the management fee was exorbitant. The owners argued that the association's officers had the same fiduciary duties as other corporate officers, and that entering into a contract at an (allegedly) exorbitant rate was a breach of a fiduciary duty. The District Court of Appeal, Third District, affirmed a dismissal of the complaint though agreeing in part with the plaintiffs.

5. Gen. Laws of Fla., 1972 ch. 72-171 reads in part: "WHEREAS, The Florida Condominium industry leads the nation on a per capita basis in number of units and dollar volume, there being approximately 85,000 units at a total value of $1,700,000,000..."
6. Id.
8. The commission also recommended reorganizing the Condominium Act into three separate parts. Part I would be composed of those provisions dealing only with condominium ownership. Part II would be composed of those provisions dealing only with cooperatives. Part III would be composed of those provisions common to condominium and cooperative ownership. The Senate Committee on Consumer Affairs and the House Committee on Business Regulation reacted favorably to the commission proposals. They drafted Senate Bill No. 836 and House Bill No. 2155 (respectively), each of which is almost identical in form and content to the commission recommendations. S.B. 836, Fla. Leg., Reg. Sess. (1973); and H.B. 2155, Fla. Leg., Reg. Sess. (1973).

In addition, the House Committee on Business Regulation drafted House Bill No. 2148 which provides for a bureau of condominiums and cooperatives within the Department of Business Regulation. The bill provides inter alia that the bureau shall have the power to insure compliance with the Condominium Act. H.B. 2148, Fla. Leg., Reg. Sess. (1973).

Since the regular session of the Florida Legislature did not have time to enact any part of this legislation, review will be sought by the legislature in 1974. For the purpose of this comment, citations will be made to the commission report.
9. Fountainview Ass'n, Inc. v. Bell, 203 So.2d 657 (Fla. 3d Dist. 1967).
10. Id.
The court held that the association's officers were bound by the same fiduciary duties as other corporate officers; however, it followed the 1930 decision of the Supreme Court of Florida in *Lake Mabel Development Corp. v. Bird*, holding that in the instant case, where there were no other members of the association at the time of entry into the contracts, there could be no fiduciary relationship and no fiduciary duties could be breached. The Supreme Court of Florida affirmed without opinion. Justice Ervin wrote a strong dissent maintaining that the plaintiffs' allegations of having acquired interests in the condominium association by contract subscriptions had been overlooked. He also distinguished the *Lake Mabel* case from the instant case, noting that the majority of jurisdictions hold that where promoters contemplate selling subscriptions to the general public, they owe a fiduciary duty to future subscribers.

In a somewhat analogous case, the District Court of Appeal, Third District, held for the defendant-developers because all purchasers were aware of the charge for management services. Thus, in 1970, the stage was set for legislative action which would allow reformation of maintenance and management contracts.

The provisions of the 1970 amendments now allow the cancellation of any initial or original maintenance and management contract by a concurrence of 75 percent of the individual unit owners at any time after they assume control of the association. There has been no court test of the new legislation; however, the legitimacy of the management contract has been tested on other grounds.

The Condominium Act defines the association as the "entity responsible for the operation of a condominium" and provides that "[t]he operation of the condominium shall be by the association." "[O]peration of the condominium, means and includes the administration and management of the condominium property." On this authority, the Point East One Condominium Association brought an action to set aside long term contracts made between the developers as the original officers of a corporation cannot, while its promoters own all its outstanding stock, avoid in equity a purchase of property sold to it by its promoters at a large profit, represented by stock of the corporation issued to such promoters, since the corporation thus has full knowledge of the facts and the rights of innocent purchasers of stock have not arisen. However, here, no stock was ever issued or sold to the public.

11. 99 Fla. 253, 253, 126 So. 356, 358 (Fla. 1930) [hereinafter referred to as *Lake Mabel*]. The court held that a corporation cannot, while its promoters own all its outstanding stock, avoid in equity a purchase of property sold to it by its promoters at a large profit, represented by stock of the corporation issued to such promoters, since the corporation thus has full knowledge of the facts and the rights of innocent purchasers of stock have not arisen.

12. Fountainview Ass'n, Inc. v. Bell, 203 So.2d 657 (Fla. 3d Dist. 1967).
13. Fountainview Ass'n, Inc. v. Bell, 214 So.2d 609 (Fla. 1968).
14. *Id.* It is therefore apparent that a majority of jurisdictions would not need protective legislation in this area.

15. Riveria Condominium Apts., Inc. v. Weinberger, 231 So.2d 850 (Fla. 3d Dist. 1970).
of the condominium association and a management corporation. The District Court of Appeal, Third District, held that the contract divested the association of substantial control of the condominium contravening the provisions of the Act. In a concurring opinion, Chief Judge Swann indicated that the holding was limited to those specific contracts before the court.

The Supreme Court of Florida overturned the Third District Court's holding in Point East. The court found that the terms of the management agreement were available to all prospective purchasers and, since they entered into the agreement knowingly, they could not later be heard to complain of its terms. Moreover, the court considered the fact that the legislature later chose to allow cancellation of management contracts by 75 percent of the owners of individual units, thus indicative of the legislature's sanctioning such contracts.

By overturning the decision of the Third District, the supreme court appears to have disregarded the possibility of considering the contract one of adhesion. The decision allows the board of directors of a corporation to contract away its total management function and effectively extinguishes hope of relief for those condominium and cooperative owners saddled with unconscionable management contracts entered into before the 1970 reforms.

The proposed legislation in the area of management contracts seeks to avoid the assumption of control of the association by individual unit owners as a prerequisite to the cancellation of maintenance and management contracts. According to the recommended legislation, owners may cancel maintenance and management contracts, if the association operates only one condominium or cooperative, on the concurrence of 75 percent of the unit owners, when 75 percent of the units are owned by persons other than the developer. Where an association operates several condominiums or cooperatives and unit owners have not assumed control, owners could cancel contracts which affect only a single condominium or cooperative under the same conditions and in the same manner provided for associations that operate only one condominium. When the association operates more than one condominium or cooperative and unit owners have assumed control, maintenance and management contracts

20. Point East Mgt. Corp. v. Point East One Condominium Corp., 258 So.2d 322 (Fla. 3d Dist. 1972) [hereinafter referred to as Point East].
21. Id. at 326.
22. Point East Mgt. Corp. v. Point East One Condominium Corp., 282 So.2d 628 (Fla. 1973). The Florida Supreme Court accepted jurisdiction based on the conflict between its decision in Lake Mabel, supra note 11, and the decision of the Third District Court of Appeal in the instant case. As Justice Ervin ably pointed out in his dissenting opinion, the supreme court should not have accepted jurisdiction as there was no conflict. Lake Mabel was based on general corporate law, while the decision in the case at bar was based on the specific requirements of the Condominium Act.
24. Id., proposing FLA. STAT. § 711.56(5)(b).
may be cancelled on the concurrence of 75 percent of the total number of units in all condominiums or cooperatives operated by the association other than units owned by the developer. However, when there are a number of associations, no contract concerning a recreation area or other commonly used property could be “cancelled until the unit owners other than the developer have assumed control of all of the associations operating the condominiums or cooperatives” intended to be served by that property.

The time for assumption of control by unit owners is not established in the existing act. The condominium commission received several complaints during public hearings regarding the developers’ refusal to relinquish control of the condominium associations for long periods of time. Furthermore, complaints indicated that little or no information regarding operation and control of the association was available to unit owners while the developers retained control and that no accounting of funds was made upon transfer of the association control to unit owners.

In order to insure unit owner participation in control of the association, the commission proposed legislation permitting unit owners to elect at least one third of the governing body of the association when they own 15 percent or more of the units that will ultimately be operated by that association. The suggested legislation provides for assumption of control of the association by the unit owners at certain times after stated percentages of the units are individually owned. New legislation would also require that the developer give a full accounting for all association funds collected and disbursed while he is in control.

**Leases of Land and Recreational Facilities**

A second problem facing early Florida apartment buyers was that, after purchasing their apartments, they found that they had entered into recreational leases or ground leases at exorbitant costs. While in some cases, unit buyers realized that they were entering into these leases, they were generally not apprised of their cost. The cost of the leases, as well as the cost of maintenance and management contracts, was buried in an estimated monthly maintenance charge which, according to the developers, included every anticipated expense for the particular unit involved. No breakdown of expenses was required and one was given.

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26. Id., proposing Fla. Stat. § 711.56(5)(d). The proposed legislation, like existing legislation, would permit unit owners to cancel contracts affecting only their own association or building.
27. Id. at 2 Exhibit C.
29. Id., proposing Fla. Stat. § 711.56(1).
31. In 1969, the writer was actively engaged in purchasing condominiums and cooperatives for investment purposes. In one instance, an estimated monthly maintenance fee of $108 was quoted orally for a one bedroom luxury apartment. The saleslady stated that
only in rare instances. Developers often underestimated monthly maintenance charges in order to attract purchasers. In many condominiums and cooperatives, monthly maintenance charges had to be increased almost immediately upon assumption of control of the association by the unit owners in order to meet current expenses.

In *Wechsler v. Goldman,* the plaintiff-condominium owners sought to cancel or reform their leases, alleging that an exorbitant land lease had been imposed upon them. The District Court of Appeal, Third District, denied the relief requested, but recognized the need for legislative action saying that

[w]hat occurred in this instance and in the *Fountainview* case may indicate a need for legislative action to amend the Condominium Act (Ch. 711, Fla. Stat., F.S.A.) to prevent unfair dealing by promoters of condominium associations.

The legislature responded by providing for full disclosure before sale. The seller is now required to furnish the purchaser the following items: (1) a copy of the declaration of condominium; (2) a copy of the articles of incorporation; (3) a copy of the bylaws of the association; (4) a copy of the ground or recreational facilities lease; (5) a copy of management and maintenance contracts; (6) a copy of the projected operating budget, including all estimated charges for the purchaser's unit; and (7) a copy of the sales brochure and a floor plan of the apartment. The sales brochure must describe all common areas.

Where any of the required items are not available, the contract is

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32. 214 So.2d 741 (Fla. 3d Dist. 1968).
33. Id. at 744.
34. FLA. STAT. § 711.24 (1971) (condominiums); FLA. STAT. § 711.31 (1971) (cooperatives).
35. FLA. STAT. § 711.24 (1971). A copy of the proprietary lease is the first required item for cooperatives. FLA. STAT. § 711.31 (1971). Other than this first item, the two statutes are substantially identical.
36. While the condominium acts of other states, with the exception of Hawaii, are still relatively primitive, this requirement may be found in several jurisdictions. California requires that when property is to be subject to its condominium act, plans showing the property, together with building and floor plans, must be recorded in the county in which the property is located. The requirement is weakened by permitting revocation or amendment by all record owners and all holders of security interests of record. CAL. CIVIL CODE § 1351 (West 1973). Contract subscribers generally would not fall into these categories and, therefore, their interests may be affected without their permission. Since 1964, New York has required the filing of floor plans prior to the conveyance of any unit. N.Y. Real Prop. Law § 339-p (McKinney 1972). Conveyancing, however, refers to the time a deed is granted, and therefore, an enforceable contract to purchase may be entered into before the plans are filed. Hawaii has required the filing of floor plans under its Horizontal Property Act since its enactment in 1963. HAWAI. REV. STAT. § 514-13 (1972).
voidable at the option of the purchaser within 15 days after the last required item is supplied. In any event, all of the required items must be supplied no later than 90 days prior to closing. No changes may be made that would materially affect the purchaser's rights.\textsuperscript{37}

If the seller fails to comply with these requirements, the purchaser may rescind his contract at any time prior to closing.\textsuperscript{38} As additional protection, a purchaser may rescind his contract or collect damages from the seller if he has reasonably relied on any materially false or misleading statements published by or under the authority of the seller.\textsuperscript{39}

While existing legislation appears to afford complete protection to the prospective purchaser, the Condominium Commission received complaints that the required disclosure was not complete enough and that the requirements were not always complied with by developers.\textsuperscript{40} As a result, the commission proposed additional legislation regarding full disclosure prior to sale,\textsuperscript{41} as well as requiring a prospectus for any cooperative or condominium, or group of cooperatives or condominiums, containing more than twenty units where the owners use property in common.\textsuperscript{42}

Under the proposed legislation, cancellation provisions would have to be placed in bold faced type in the contract for sale.\textsuperscript{43} Caveats regarding the unreliability of oral representations,\textsuperscript{44} the expiration date of any lease upon which the buyer's interest will terminate, and liens for rent payable under a recreational facilities lease would also be required to be in bold faced type on the contract for sale when applicable.\textsuperscript{45} Since many existing buildings are being converted to cooperatives and condominiums, the contract would also require a statement as to whether the unit had been occupied previously.\textsuperscript{46} Complete building or remodeling plans would have to be available for inspection by the prospective purchaser where units are offered for sale prior to the completion of construction of all improvements.\textsuperscript{47} The sales brochure, if any, would be required to fully describe all common areas and the minimum and maximum number of units to be served by each facility.\textsuperscript{48} Where units sold are subject to a

\begin{itemize}
\item \textsuperscript{37} \textit{FLA. STAT.} § 711.24 (1971) (condominium); \textit{FLA. STAT.} § 711.31 (1971) (cooperatives).
\item \textsuperscript{38} \textit{FLA. STAT.} § 711.24 (1971) (condominiums); \textit{FLA. STAT.} § 711.31 (1971) (cooperatives).
\item \textsuperscript{39} \textit{FLA. STAT.} § 711.24(3) (1971) applies to both condominiums and cooperatives.
\item \textsuperscript{40} \textit{AMENDED REPORT OF THE FLA. CONDOMINIUM COMM’N TO THE 1973 SESSION OF THE FLA. STATE LEGISLATURE,} Exhibit C at 2.
\item \textsuperscript{41} \textit{AMENDED REPORT OF THE FLA. CONDOMINIUM COMM’N TO THE 1973 SESSION OF THE FLA. STATE LEGISLATURE, proposing FLA. STAT. § 711.60.}
\item \textsuperscript{42} \textit{Id., proposing FLA. STAT. § 711.59.}
\item \textsuperscript{43} \textit{Id., proposing FLA. STAT. § 711.60(2).}
\item \textsuperscript{44} This caveat would also be required by the sales brochure. \textit{Id., proposing FLA. STAT. § 711.60(6).}
\item \textsuperscript{45} \textit{Id., proposing FLA. STAT. § 711.60(4).}
\item \textsuperscript{46} \textit{Id., proposing FLA. STAT. § 711.60(4)(d).}
\item \textsuperscript{47} \textit{Id., proposing FLA. STAT. § 711.60(5).}
\item \textsuperscript{48} \textit{Id., proposing FLA. STAT. § 711.60(6).}
\end{itemize}
lease, a statement advising prospective purchasers of this fact would have to be included in all advertising.\(^49\)

In instances where a prospectus would be required, the law would demand that comprehensive information encompassing and describing all facilities, contracts, leases, and uses be disclosed to prospective purchasers. The identity of the principals, estimated expenses for each unit and building, and other aspects of the project would also have to be disclosed. A schedule of exhibits\(^50\) including those presently required by the full disclosure sections of the existing Act\(^51\) would also be required.\(^62\) New exhibits regarding a termite inspection,\(^53\) and a statement covering the condition of the building would be required for existing buildings being converted to condominiums.\(^64\) In addition, caveats concerning the unreliability of oral representations,\(^54\) the expiration date of leases upon which the buyers' interest will terminate,\(^56\) and liens for rent payable for the lease of recreational facilities would be required.\(^57\) The section of the present Act regarding the publication of false or misleading statements\(^68\) would be strengthened by allowing reasonable attorney's fees to the prevailing party.\(^69\)

Despite the diligence of the commission to correct inadequacies in the existing Act, two questions remain unanswered. The first is whether any prospective purchaser or his attorney, already faced with an enormous array of complicated legal documents, will have either the time or the inclination to read through any more documents. The second question is whether developers will adhere to the additional requirements to any greater degree than they do to the existing ones. In this writer's opinion, a permanent regulatory body will have to be established in order to ensure compliance with the provisions of the proposed Condominium Act.

In comparison, the Real Estate Commission in Hawaii is required to make a final public report on a project before a prospective purchaser may enter into a contract for the sale of a condominium.\(^60\) No final public report may be issued without (1) a verified statement of all costs of completing the project; (2) a verified estimate of the time for completion of the project; (3) evidence of funds to cover the total project cost;

\(^{49}\) Id., proposing Fla. Stat. § 711.60(7).
\(^{50}\) Id., proposing Fla. Stat. § 711.59.
\(^{51}\) Fla. Stat. § 711.60(7).
\(^{52}\) FLA. STAT. § 711.31 (1971) (condominiums).
\(^{54}\) Id., proposing Fla. Stat. § 711.59(18)(1).
\(^{55}\) Id., proposing Fla. Stat. § 711.59(18)(k).
\(^{56}\) Id., proposing Fla. Stat. § 711.59(3).
\(^{57}\) Id., proposing Fla. Stat. § 711.59(4).
\(^{60}\) HAWAII REV. STAT. § 514-41 (1972).
(4) a copy of the construction contract; (5) a performance bond; and (6) a copy of the escrow agreement, if the purchaser's funds are to be used. In addition, the recorded declaration and recorded deed or master lease, with by-laws and floor plans annexed, must be submitted for study. Thus, Hawaii requires full disclosure prior to the sale of condominiums and provides the machinery necessary to assure compliance with the requirements.

It appears that the suggested legislation for Florida has not effectively dealt with the topic of monthly maintenance charges. Developers find it advantageous to underestimate monthly maintenance charges as prospective purchasers are attracted by lower expenses. If a regulatory agency is to be established, one of its duties should be to review the first year's maintenance charges which are proposed and advertised by developers. Where the agency's figures differ significantly from those of the developer, an inclusion regarding the variance should be required in the prospectus. If no regulatory body is established, penalties for underestimating monthly charges below a stated percentage of actual requirements should be provided. The legislation should create a presumption that where monthly maintenance charges must be increased by more than a stated percentage in order to pay expenses during the first year of operation, the developer has deliberately misrepresented the projected costs to the buyer.

**USE OF DEPOSITS**

Originally, developers were permitted to use deposits received from purchasers for whatever purposes they desired. When, on occasion, the developer became insolvent, the purchasers generally lost their money. In 1970, the legislature afforded some protection to those who placed deposits with developers. Sellers are now required to place any deposits received prior to the filing of a Notice of Commencement in a special escrow account. Any money remaining in an account for more than three months earning interest must be credited to the proper party on closing or breach of contract.

After the filing of a Notice of Commencement, the developer may, if the contract so provides, withdraw the deposits from the special account and use them for the actual construction of the project where the unit for which the deposit received is located. No advance deposits may be used for salaries, commissions, expenses of salesmen, or advertising.

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63. FLA. STAT. § 711.25 (1971) (condominiums); FLA. STAT. § 711.32 (1971) (cooperatives).
64. FLA. STAT. § 711.25(1) (1971) (condominiums); FLA. STAT. § 711.32(1) (1971) (cooperatives).
65. FLA. STAT. § 711.25(2) (1971) (condominiums); FLA. STAT. § 711.32(2) (1971) (cooperatives).
Any contract that provides for the use of advance deposits by the developer for construction purposes must advise the prospective purchaser of this provision in bold faced capital type above the place for the buyer's signature. Failure to comply with the provisions of these sections makes the contract voidable at the option of the purchaser. Should the purchaser exercise this option, the developer must refund all deposits with interest.\(^6\)

In addition, the developer is guilty of embezzlement if he expends funds for any purpose not permitted by this section with a fraudulent intent.\(^7\)

These deposit sections in the present statutes appear to provide little protection for the prospective purchaser. Contracts for the sale of condominiums generally require the deposit of funds by the purchaser and provide for their use by the developer. The underfinanced developer may use all deposits received for the construction of the buildings. Other funds on hand may be shifted to uses for which deposit funds are not permitted. Should the developer become insolvent, the prospective purchaser will have little or no chance of recovering the money he paid to show a good faith desire to purchase a unit.

The proposed deposit sections provide somewhat more protection for the prospective purchaser, since deposits up to 5% of the unit sales price must be placed in escrow where no performance bond covering completion of the project is provided.\(^8\) The developer would be permitted to withdraw the escrow funds only upon completion of the building containing the units for which the escrow fund is established.

Many of today's condominium buyers are retired persons living on fixed incomes who have savings that cannot be replaced. For this reason, it is the responsibility of the legislature to restrain developers from using a purchaser's deposit and down-payment for the construction of the condominium. To allow otherwise is to permit a gamble that most prospective purchasers do not expect and cannot afford.

Another alternative would be the adoption of a provision similar to the Hawaii statute which provides that the developer place deposits in escrow and only use them for construction costs "in proportion to the valuation of work completed by the contractor as certified by a registered architect or professional engineer."\(^9\)

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66. FLA. STAT. § 711.25(2) (1971) (condominiums); FLA. STAT. § 711.32(2) (1971) (co-operatives).
67. FLA. STAT. § 711.25(3) (1971) (condominiums); FLA. STAT. § 711.32(3) (1971) (co-operatives).
69. HAWAII REV. STAT. § 514-14 (1972). The provisions of this section must be considered in conjunction with the other provisions of the Horizontal Property Act. Other sections of the Act provide for a performance bond and require evidence of funds to cover the total cost of the project. Moreover, the Act sets up the Real Estate Commission as the agency to review this information, and permits it to impose other restrictions relative to the retention and disbursement of funds. HAWAII REV. STAT. § 514-15 (1972).
AUTHORITY OF THE ASSOCIATION TO BRING CLASS ACTIONS

In Hendler v. Rogers House Condominium, Inc., the condominium association brought suit to quiet title to the swimming pool area. While it would seem obvious that the association would be a proper party to bring a class action on behalf of the unit owners, the court found that there was no showing by the association that it had a common interest with the members of the class it sought to represent, and that there was no statutory authority enabling the association to represent unit owners.

The proposed amendments to the Condominium Act grant the association the power to maintain a class action on behalf of the unit owners of a condominium with respect to the common elements, the roof and structural components of a building or other improvement, and the mechanical, electrical and plumbing elements serving an improvement or building as distinguished from mechanical elements serving only a unit. Where the association may be exposed to liability in excess of insurance coverage and the unit owners may be exposed to liability, the association would be required to give them notice so they may intervene and defend.

WARRANTIES

In 1972, the District Court of Appeal, Fourth District, in Gable v. Silver, held that an implied warranty of fitness attached to the original purchaser of new condominium realty. The Supreme Court of Florida affirmed per curiam without opinion. The decision, although clearly of great benefit to new condominium purchasers, conspicuously omitted the second purchaser who could conceivably purchase while the construction was still new. The court left it to the legislature to determine the remoteness of ownership to which the warranty should attach.

The proposed legislation provides that an implied warranty of fitness and merchantability would attach to each condominium or cooperative unit in a building less than five years old and to personal property that is transferred with each parcel. This extension of Gable appears to be a step in the right direction as it would protect a second or even third purchaser while the building was still relatively new.

70. 234 So.2d 128 (Fla. 4th Dist. 1970).
71. In a cooperative, the corporation owns the project, and therefore, the association as the governing body of the corporation would have no difficulty in bringing an action of the type contemplated by the recommended legislation.
73. Id., proposing FLA. STAT. § 711.12(9).
74. 258 So.2d 11 (Fla. 4th Dist. 1972).
75. Gable v. Silver, 264 So.2d 418 (Fla. 1972).
CONTENTS OF LEASES

The commission found that there have been many abuses with respect to leased facilities in addition to the exorbitant costs sometimes imposed upon unit owners for the use of those facilities. In some cases, developers have reserved rights in leased facilities both for themselves and others, who are not unit owners. In other cases, after the units are sold, the furniture has been removed from recreation areas by developers who stated that the furniture was not included in the lease.

Under the new provisions, developers would not be permitted to reserve property rights in persons other than unit owners or the association unless conspicuously disclosed. Even then, the lessee's rights would be subject to cancellation.77 In addition, a complete description of all leased facilities and an inventory of any personal property included would be required to be in the lease.78

Developer abuses have also included charging full rent for incomplete facilities. The suggested legislation provides that rent of leased facilities cannot begin until some of the facilities are completed; and then, rent would be prorated according to the value of the completed facilities.79

Developers who have encountered a greater than expected demand for units have, in some cases, decided to purchase more land in order to build additional apartments. At times, they have neglected to increase the size of the recreational facilities in order to accommodate the additional unit owners.80 Also, some developers, finding less than anticipated sales volume, have decided to build fewer units than originally planned, making each unit owner responsible for a greater share of the expenses.81 In order to remedy this situation, the proposed legislation provides that leases, other than the lease of a unit, would be required to show the minimum and maximum number of unit owners that would be required to pay the rent.82

Complaints from unit owners that developers had refused to sub-

77. Id., proposing Fla. Stat. § 711.53(2).
78. Id., proposing Fla. Stat. § 711.53(1).
80. A decrease in the cost of leased facilities to the unit owner on a per unit basis does not necessarily follow. It should be noted that the requirement to show all expenses for a unit is not required until 90 days before closing. Therefore, until that time, the developer may increase the rent of the leased facility.
81. Unit owners in a good financial position might welcome less crowded facilities while those in a lesser financial position may have to cancel their contracts or strain to pay the increase.
82. Amended Report of the Fla. Condominium Comm'n to the 1973 Session of the Fla. State Legislature, proposing Fla. Stat. § 711.53(3). In large phase projects the developer would be required to make exact plans and specifications of leased facilities available to the prospective purchaser. The builder would be permitted up to two alternative plans. All would be combined in an exhibit called "Developer's Commitment to Phase Development." The developer's commitment would restrict the construction improvements on the land or leasehold to the greatest unit density and the highest lot coverage shown by the plans or alternates for a period of 30 years. Id., proposing Fla. Stat. § 711.54.
ordinate their leases to a mortgage or had allowed subordination to only certain mortgage lenders led the commission to propose legislation requiring subordination of the lien for rent to an institutional mortgage. The commission recommended legislation granting unit owners the option to buy leased ground and/or facilities at certain intervals. This recommendation was a compromise between those commission members who were absolutely opposed to permitting condominiums and cooperatives to be created on leased ground or with leased facilities, and those who believed that it should remain a permissible practice.

This writer believes that the proposal will not accomplish its intended purpose, and that it will prove to be a disservice to some purchasers. The purpose of the legislation appears to be to allow purchasers the additional security and mental comfort of knowing that they are, or can be, the sole owners of their property. Practically speaking, the majority of cooperative and condominium owners are senior citizens, many of whom will not be around at the time the option to purchase accrues. Furthermore, condominium and cooperative property is subject to maintenance costs and real estate taxes and, consequently, there is really no such thing as absolute ownership of a unit. The proposed legislation provides for a sale of leased property by agreement, or if none can be reached, by arbitration after 75 percent of the property owners have voted for the purchase. Persons contemplating the purchase of a condominium unit under this law will be in the unhappy position of attempting to anticipate their economic position at a distant point in time. Up to 25 percent of the unit owners may be forced into a purchase that they cannot afford.

If all charges for units are fully and accurately disclosed, prospective purchasers will be able to intelligently choose among the many condominiums and cooperatives on the market. Thus, the free enterprise system will deal with those who intend to impose unreasonable costs on the purchaser.

**Miscellaneous**

The commission received complaints regarding excessive charges imposed on unit owners who transferred or leased their units. As a result, an additional element to the declaration of condominium has been proposed which will ease unit transferability. The proposal provides that no charge in excess of the expenditures reasonably required for a credit

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83. Id., proposing Fla. Stat. § 711.53(5).
84. The denial of permission to create a condominium on leased ground or with leased facilities would be a neat solution to several problems. This is accomplished by the definitions section of the New York Act. Condominium property includes the land, building and other improvements owned in fee simple, and a unit owner means a person owning in fee simple absolute. N.Y. Real Prop. Law § 339-e (11, 15) (McKinney 1972).
86. Id., proposing Fla. Stat. § 711.53(8).
report would be permitted. In any event, the maximum charge allowable would be $50.00. No charges would be permitted for the renewal or extension of a lease.87

Florida statutes now provide that unit owners are governed by the terms and conditions of the by-laws and declaration.88 However, the existing section makes no reference to whether the association is governed by those terms. The proposed section requires the association to abide by the condominium documents.89 In addition, the new section adds a clause to the effect that the prevailing party in litigation shall be entitled to recover attorney's fees in a reasonable amount. Moreover, no waiver of rights that could adversely affect the rights of a unit owner would be permitted.90

**CONCLUSION**

It seems apparent that the inadequacies of the existing condominium act which allow developers to take advantage of purchasers will not retard the growth of the condominium industry in Florida. If market resistance does develop, a demand for reform will probably come from the developers themselves. At present, however, it is clear that the developer interests will be more inclined to delay change.

What appeared to be the most reprehensible practices were at least partially eliminated by the reform in 1970; however, it is evident that more reform is needed. The condominium acts in most states are relatively new, and since no state has experienced more condominium and cooperative activity than Florida, this jurisdiction is forced to assume a leading position, hopefully eliminating the current abuses that the law allows.

87. Id., proposing Fla. Stat. § 711.08(2) (condominiums); Fla. Stat. § 711.34(1)(h) (cooperatives).
88. Fla. Stat. § 711.23 (1971). Owners may seek damages, injunctive relief, or both for a breach of the by-law terms.
90. Id., proposing Fla. Stat. § 711.52(2).