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The Florida Condominium Act

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Articles

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I. INTRODUCTION

In the twenty-eight years since the condominium concept was introduced in Florida, condominiums have not only changed Florida's skyline, but its economic and political climate as well. This article will briefly review, from this author's firsthand experience, past events which influenced the development of the Florida Condominium Act and provide insight into those factors which led to the extensive revisions of 1991.

Initially, we can appreciate the extent of the political, social and economic impact that condominium communities have had on the state. The Florida Division of Land Sales, Condominiums and Mobile Homes estimates that there are approximately 20,000 condominium associations operating more than one million residential units. An estimated 2.5 to 3 million Floridians presently reside in condominiums. In performing their management and administrative functions, condominium associations spend in excess of \$100 million each month for services, encompassing a diverse spectrum from lawn and pool maintenance to security and legal services. Tens of millions of additional dollars are spent every year on building repairs and replacements. These expenses are in addition to the billions of dollars spent on the initial condominium construction.

Real property taxes on condominiums pump hundreds of millions of dollars into state and local coffers annually. These dollars go toward the increased governmental support services required to meet the growing population of communities impacted by condominium development. Services include new roads, police and fire protection, hospitals, sanitation, shopping and entertainment.

The condominium association, established to provide a vehicle for coordinating the interests of co-owners in the maintenance and operation of their shared or owned facilities, has become a means of rapid dissemination of information to tens of thousands of individuals. As a result, condominium communities have become a focal point for candidates seeking political office. Legislators, keenly aware of the potential political clout of condominium communities, are quick to respond to alleged abuses within the condominium field. This is evidenced by the fact that the Florida Condominium Act has been amended nearly every year since its inception in 1963. While most amendments brought about reforms, some amendments were passed to placate the desires of local constituents without much forethought as to their impact on the

condominium concept.¹

II. STATUTORY HISTORY

The Florida Condominium Act was enacted in 1963 as enabling legislation designed to give statutory recognition to air right conveyances. At the time of its enactment, Florida was experiencing a period of economic growth, high employment and spiraling inflation. Florida led the nation in both population gain and construction growth. The boom was approaching its peak. Retirees and tourists were emigrating to Florida in unprecedented numbers. The demand for housing outstripped the available supply tenfold. Entire unbuilt condominium communities were sold out with little more than promises of future construction. Out of this chaos developed problems never envisioned by the authors of the Condominium Act.

Buyers were given unrealistic completion dates. Estimated operational budgets were purposely understated. Completed condominium units and support facilities differed in both design and quality from artists' renditions in sales brochures and model units. For instance, carpeting and fixtures in completed units substantially differed from the quality found in model apartments. In addition, use of devices such as "sweetheart management contracts," which usurped the owners' authority granted by the Condominium Act, and compulsory 99-year recreation leases with unconscionable escalation provisions, prompted one of the Condominium Act's authors to warn in 1964 that if developers persisted in perverting the Condominium Act, it would ultimately be necessary to qualify condominiums through a state regulatory commission. Condominium purchasers generally were unaware of the contracts and leases because, during this period, Florida law did not require disclosure to purchasers. Consequently, few disclosures, if any, were ever provided by developers.

With the sole exception of escalation clauses in compulsory leases, the area of abuse which created the greatest anguish to condominium purchasers was that of construction deficiencies. These defects had various causes. The most prevalent among these was the fact that con-

1. The amendment to section 718.115(1), which allowed the "cost of mangrove trimming" to be included as a common expense, is a classic example of a legislative response to a constituent request. See FLA. STAT. § 718.115(1) (Supp. 1990), *amended* by FLA. STAT. § 718.115(1)(a) (1991) (deleting the "cost of mangrove trimming" provision).

struction lenders were more concerned with the amount and profitability of their loans than the competence of the borrowers. Additionally, many of these condominium projects received virtually no municipal inspection. Consumers, inexperienced in the technical language of building codes, were forced to rely upon municipal building inspectors for assurance that their home or condominium would be built in accordance with the applicable building codes. Purchasers considered the issuance of Certificates of Occupancy as a stamp of approval, indicating that the buildings had met all code requirements and had been constructed in accordance with approved plans and specifications. In reality, many structures which did not meet current building codes were issued Certificates of Occupancy. In 1976, a grand jury investigating construction practices in Dade County during the early 1970s reported that a former inspector told us that inspection practices of the last several years have resulted in the construction of buildings which could be blown away in another 1926 hurricane. The evidence we heard supports this statement.

In 1971, in an effort to avoid the necessity of more severe regulatory control, the Florida Legislature passed amendments to the Condominium Act, in essence, finally acknowledging the existence of consumers. Minimal disclosures were required from developers. Unit owners were given the right, following transition, to cancel pre-transition contracts entered into by developers for the operation and maintenance of condominium property. However, these early efforts were mostly "too little, too late." In 1972, in response to pressures from consumer groups, an 18-member condominium commission was organized to bring together individuals representing the various interests of the industry. The commission concluded that amendment of the statutes had been deemed to be more important and more easily obtainable than the creation of a regulatory agency. They also concluded that even though a majority of the commission was philosophically opposed to the use of ground leases and leases of recreational and other commonly used facilities in the creation of condominiums it was not realistic to recommend the prohibition of such leases. Various other recommendations were made, but did not become law for several years.

In 1974, many of the recommendations of the condominium commission became law. Major revisions, requiring full disclosure by developers, were added to the Condominium Act. Included was a requirement of a prospectus describing everything from recreational and other commonly used facilities, to the number of units that would be served by each facility. A new formula for relinquishment of developer control

ended the developer's virtual perpetual control of condominium associations.

Open board meetings and access to records were also mandated. Tighter regulations were established for the use of buyers' deposits. To protect consumers from faulty construction, the common-law-evolved concept of "implied warranties" was statutorily imposed. The Act established broad guidelines affecting all aspects of condominium living, yet still lacked enforcement procedures and penalties for non-compliance.

This problem was partially rectified in 1975 with the creation of the Florida Division of Land Sales and Condominiums. The Division, established as a depository for the condominium documents of all Florida condominiums, has grown in the ensuing decade into a complete regulatory agency with rule-making and enforcement authority. Today, the Bureau of Condominiums is the largest of four bureaus that comprise the Division of Florida Land Sales, Condominiums and Mobile Homes, under the auspices of the Florida Department of Business Regulation, with offices in Tallahassee, Hollywood and Tampa.

Legislation designed to discourage the use of recreational leases was also adopted in 1975. Escalation clauses in leases or agreements for recreation or other commonly used facilities were prohibited. Courts would later restrict the application of this section to leases entered into after the effective date of the amendment.

In 1976, the entire Condominium Act was again rewritten. This action was the result of a mandate by the 1975 legislature to the Florida Law Revision Council (now defunct) to eliminate ambiguities and inconsistencies in the Condominium Act which were created by the patchwork amendments of the prior years. The revised and renumbered Act has been amended nearly every year since then. As a result of new concepts, experience and judicial interpretation, new legislation has been added addressing operational problems and other areas of potential abuse. Specifically, this new legislation has encompassed conversion to time-sharing, the manner of delivering notice to owners of the annual meeting, defining what documents constitute the "official" records of the association, mandatory reserves and the methods of accounting, removal of board members, and arbitration of disputes.

The decade of the 1980s was marked as a period of rapid development of appellate decisions providing guidance in interpreting legislative intent and areas not specifically covered by the Condominium Act. It was also a period which witnessed an increase in friction between unit owners and their boards concerning the manner in which the con-

dominium was being operated. For instance, unit owners commonly complained about the ability of boards to perpetuate themselves in offices through proxy abuse. As alleged incidents of board improprieties escalated, condominium unit owners began organizing legislative action committees. Among the groups advocating for legislative reforms to protect the interests of condominium unit owners was SCORN (Secure Condominium Owners Rights Now). SCORN persuaded State Representative Ron Silver to introduce legislation during the 1990 Legislative Session which created a commission to study alleged abuses. The legislature created the Condominium Study Commission with the following mandate:

It shall be the duty of the Commission to conduct public hearings throughout the State and to take testimony regarding issues that are of concern with respect to condominiums and to receive recommendations for any changes to be made in the Condominium Law.²

The commission held nine public hearings. The final report of the Condominium Study Commission was issued in February, 1991.

The legislature responded by enacting sweeping reforms governing the manner in which condominiums operate. The following is an examination of the impact of the 1991 amendments on the development and operation of Florida's condominiums.³

III. 1991 AMENDMENTS TO THE FLORIDA CONDOMINIUM ACT

A. *Operations*

1. Let The Sunshine In

Unit owner dissatisfaction with a board's conduct in operating the condominium is often exacerbated by the denial of an opportunity to speak out on issues being considered by the board or a committee. While unit owners were granted the right to attend board meetings,⁴ the right to speak was left totally up to the board's discretion. In many

2. 1990 Fla. Laws ch. 218.

3. The effective date of most amendments to the Condominium Act is April 1, 1992. Several became effective, however, on January 1, 1992; e.g., FLA. STAT. §§ 718.112(2)(b), (d); § 718.501(2)(a) (1991).

4. FLA. STAT. § 718.112(2)(c) (1991) (this provision first took effect January 1, 1977).

instances, boards merely rubber stamped recommendations made by committees which met behind closed doors.

Effective January 1, 1992, unit owners will be given the right to speak at membership meetings and the annual meeting with reference to all designated agenda items.⁵ This right will be extended to board meetings and committee⁶ meetings after April 1, 1992.⁷ While the association is given the right to adopt rules governing the frequency, duration and manner of unit owner statements, these rules must meet a reasonable standard. It is anticipated that most boards will adopt guidelines similar to those used by governmental bodies. Individuals desiring to speak should be required to complete a registration card indicating their name, unit number and the agenda item they wish to address. The board should establish time limitations for each speaker.⁸ In order to maintain decorum at the meeting, it will be important for the board and members to avoid turning the public forum section of meetings into public debates. While it may be appropriate for speakers to ask questions of the board, or vice-versa, there is no specific mandate compelling board members to engage in discourse with unit owners.

To ensure that unit owners are kept informed of topics which will be discussed at board and unit owners' meetings, notice of meetings must be conspicuously posted on the condominium property at least 48 continuous hours preceding the board meeting and fourteen days preceding the unit owners' meeting.⁹ Such notice must include the meeting agenda.¹⁰ In addition, fourteen days prior to a board meeting, written notice must be given of any non-emergency special assessments or

5. FLA. STAT. § 718.112(2)(d) (1991).

6. "Committee" means a group of board members, unit owners, or board members and unit owners appointed by the board to make recommendations to the board or take action on behalf of the board. FLA. STAT. § 718.103(6) (1991).

7. FLA. STAT. § 718.112(2)(c) (1991).

8. FLA. ADMIN. CODE ANN. r.7D-23.002 (proposed) (operations of the association would preclude any limitation greater than three minutes).

9. FLA. STAT. § 718.112(2)(c) (1991) (board meetings) and FLA. STAT. § 718.112(2)(d)2 (1991) (unit owner meetings). As to FLA. STAT. 718.112(2)(c) (1991), it is uncertain what repercussions would follow proof of 47.5 hours notice as opposed to the 48 hours mandated notice for board meetings. The law is silent concerning the burden of proof needed to demonstrate 48 *continuous* hours of notice. *See id.* One might speculate that a video camera focused on the notice in a manner similar to that used to guard the British Crown Jewels will suffice.

10. *See* FLA. STAT. §§ 718.112(2)(c), (d)2 (1991). The board must, by rule, adopt a specific location on the condominium property upon which all notices of unit owner meetings shall be posted. *See* FLA. STAT. § 718.112(2)(d)2 (1991).

amendments to rules regarding unit use that will be proposed, discussed, or approved.¹¹

Unit owners are also given the opportunity to tape record or videotape meetings of the board.¹² While the Division is mandated to adopt rules governing the tape recording and video taping of meetings,¹³ it is uncertain how this right will apply at Paradise Gardens Condominium, a large nudist condominium outside Tampa, Florida.

2. Democratization of the Elections Process

No single process has created more ill will or more vocal objection than the use of proxies for the election of board members. Notwithstanding the right of unit owners to be nominated from the floor at the annual meeting,¹⁴ the potential for election of such a candidate is nil in situations where board-solicited proxies constitute the overwhelming participation at the annual meeting.

After January 1, 1992, proxies will no longer be permitted in the election of directors.¹⁵ To ensure all unit owners equal access to the ballot box, the association must implement the following election procedure:

[60 Day Notice] Not less than 60 days before a scheduled election, the association shall mail or deliver, whether by separate association mailing or included in another association mailing or delivery including regularly published newsletters to each unit owner entitled to vote a first notice of the date of the election.¹⁶

[Qualifying for Office] Any unit owner or other eligible person¹⁷

11. FLA. STAT. § 718.112(2)(c) (1991).

12. *Id.*

13. *Id.*; FLA. ADMIN. CODE ANN. r.7D-23.002 (proposed) would only allow such audio and video equipment which does not produce distracting sound or light emissions and also would allow the board to adopt rules which preclude a unit owner recording a meeting from moving about the room.

14. FLA. STAT. § 718.112(2)(d)1 (Supp. 1990) (repealed effective January 1, 1991).

15. See FLA. STAT. § 718.112(2)(b)2 (1991). This provision does not apply to time share condominiums.

16. FLA. STAT. § 718.112(2)(d)3 (1991).

17. While most bylaws restrict board members to record unit owners, there is no statutory prohibition against anyone serving on a condominium board. In fact, the current board dilemma, coupled with the unwillingness of many unit owners to serve on condominium boards, may ultimately necessitate the hiring of professional directors.

desiring to be a candidate for the board shall give written notice to the secretary of the association not less than 40 days before a scheduled election.¹⁸

[Second Notice with Campaign Literature and Ballot] Not less than 30 days before the election meeting, the association shall mail or deliver a second notice of the mailing to all unit owners entitled to vote together with a ballot which shall list all candidates.¹⁹ Upon request of a candidate, the association shall include an information sheet, no larger than 8 ½ inches by 11 inches furnished by the candidate,²⁰ to be included with the mailing of the ballot, with the costs of mailing and copying to be borne by the association.²¹

[Prohibition Against Marking Another's Ballot] No unit owner shall permit any other person to vote his ballot, and any such ballot improperly cast shall be deemed invalid.²²

[Civil Penalty] Any unit owner violating the provisions of this section may be fined by the association.²³

18. FLA. STAT. § 718.112(2)(d)3 (1991).

19. The written ballot shall indicate in alphabetical order by surnames, each and every unit-owning eligible person who desires to be a candidate for the board and who gave written notice to the association not less than forty days before the scheduled election. No ballot shall indicate which candidate or candidates are incumbents on the board. FLA. ADMIN. CODE ANN. r.7D-23.0021(9).

20. The association may need to incorporate a disclaimer in its notice in order to avoid potential liability for the dissemination of libelous language. An association may not edit, alter or otherwise modify the content of the information sheet. FLA. ADMIN. CODE ANN. r.7D-23.0021(7).

21. FLA. STAT. § 718.112(2)(d)3 (1991). Not less than thirty days before the scheduled election, the association shall mail or deliver to the eligible voters at the addresses listed in the official records a second notice of the election, together with a ballot and any information sheets timely submitted by the candidate. Accompanying the ballot shall be an outer envelope addressed to the person or entity authorized to receive the ballots and a smaller inner envelope in which the ballot shall be placed. The exterior of an outer envelope shall indicate the name of the voter and the unit or unit numbers being voted and shall contain a signature space for the voter. The inner envelope shall be placed within the outer envelope and the outer envelope shall be sealed. If a person is entitled to cast more than one ballot, separate inner envelopes shall be used for each ballot. The voter shall sign the exterior of the outer envelope in the space provided for signature. The envelope shall either be mailed or hand-delivered to the association. FLA. ADMIN. CODE ANN. r.7D-23.0021(8).

22. *Id.* The prohibition against marking another's ballot does not preclude a unit owner needing assistance in casting a ballot from obtaining such assistance. *See id.*

23. *Id.* The right of an association to fine is conditioned upon the declaration or bylaws providing for fining authority. *See* FLA. STAT. § 718.303(3) (1991). It is not

3. Annual Budget/Statutory Mandated Reserves

In an effort to encourage condominium owners to set aside monies for future repair and maintenance, the Condominium Act was amended in 1984 to require that reserve funds be established for "capital expenditures" and "deferred maintenance."²⁴ A threshold of \$10,000 was established in 1986. Effective April 1, 1992, reserve accounts must be established for roof replacement, building painting and pavement resurfacing, regardless of the amount of deferred maintenance expense or replacement cost. In addition, reserve accounts will continue to be required for any other item when the deferred maintenance expense or replacement cost exceeds \$10,000.²⁵

The 1991 legislature addressed several other aspects of reserve requirements. First, it clarified the use of interest earned on reserve accounts by providing that the interest accruing on reserve accounts remain in the reserve account, unless its use for other purposes is approved in advance by a vote of a majority of the voting interest present at a duly-called meeting of the association.²⁶ Second, it further clarified the right of a developer-controlled association to waive statutorily mandated reserves. A developer-controlled association may vote to waive the reserves for the first two years of the operation of the association. Thereafter, waiver or reduction will require approval of a majority of non-developer voting interests present at a duly-called meeting of the association.²⁷

4. Kickbacks

In order to end what has become a growing problem for condominiums, namely, the practice of vendors bribing officers, directors and/or managers to secure favorable contracts, the 1991 amendments provide

clear whether a condominium whose declaration or bylaws fails to provide fining authority could levy a fine for violation of this section.

24. See FLA. STAT. § 718.112(2)(f) (1991). A "capital expenditure" is an expense that results from the purchase of an asset whose life is greater than one year in length or the replacement of an asset whose life is greater than one year in length or the addition of an asset which extends the life of the previously existing asset for a period greater than one year. FLA. ADMIN. CODE ANN. r. 7d-23.004 (1991). "Deferred Maintenance" is an expenditure for maintenance or repair that will result in extending the life of an asset for a period greater than one year. *Id.*

25. FLA. STAT. § 718.112(2)(f)2 (1991).

26. FLA. STAT. § 718.112(2)(f)3 (1991).

27. FLA. STAT. § 718.112(2)(f)2 (1991).

that no officer, director, or manager²⁸ "shall solicit, offer to accept, or accept any thing or service of value exceeding \$100.00, for which consideration has not been provided for his own benefit or that of his immediate family, from any person providing or proposing to provide goods or services to the association."²⁹ Any officer, director or manager who knowingly violates this provision is subject to civil penalty of up to \$5,000.³⁰

An exhaustive debate precipitated the commission's recommendation concerning the value of gifts which an officer, director or manager could receive without violating the laws. Of primary concern was the imposition of penalties in a situation in which a manager might receive a christmas gift given by one without intention of influencing the manager's decision. The commission ultimately recommended a \$10 ceiling, which was later changed to \$100 by the legislature. Specifically excepted from the application of this section are gifts or services received in connection with trade fairs or educational programs.³¹

5. Access to and Inspection of the Association Records

a. Access to Books and Records

In the beginning, unit owners who sought access to the association's books and records were denied such access or told that the books were maintained elsewhere. Over the years, the legislature addressed this problem by requiring that the official records be maintained in the county where the condominium is located, or within 50 miles (now reduced to 25 miles) if maintained in another county.³² In addition, the association is compelled to maintain the records from the inception of the association.³³

28. Applies to those managers who are required to be licensed pursuant to FLA. STAT. § 468.432 (1991). See FLA. STAT. § 718.111(1)(a) (1991).

29. FLA. STAT. § 718.111(1)(a) (1991). H.B. 841 being considered by the 1992 Legislature would repeal the \$100.00 cap precluding receipt of anything of value.

30. See *id.* (referring to FLA. STAT. § 718.501(1)(d) which allows the Division to impose a civil penalty individually against any officer or board member who willfully and knowingly violates a provision of Chapter 718, Florida Statutes, and sets a maximum fine for each offense of \$5,000).

31. FLA. STAT. § 718.111(1)(a) (1991).

32. FLA. STAT. § 718.111(12)(b) (1991) (the 1991 amendments changed mileage from 50 to 25 miles).

33. FLA. STAT. § 718.111(12) (1984) (effective October 1, 1984). It was designed to require developer-controlled associations to have records available for unit owner

b. Inspection of the Books and Records

An important aspect of a unit owner's right to inspect the books and records involves a determination of what constitutes the "official records." This was clarified in 1984 with the addition of the "Official Records" section of the Act which lists those items constituting the official records.³⁴

At first, unit owners were gratified that they had the right to inspect the records. Following the decision in *Winter v. Playa del Sol, Inc.*,³⁵ the Act was further amended to provide that the right to inspect the records includes the right to make or obtain copies of said records.³⁶ However, in this age of electronic marvels, some unit owners abused the right. Unit owners have been known to appear at association meetings or the association office with a portable copier in tow. Following a circuit court's affirmation of an association's right to restrict excessive inspections,³⁷ the Act was again amended, this time to authorize the association to adopt reasonable rules regarding the frequency, time, location, notice and manner of record inspection and copying.³⁸

Concerned that some boards might use their rule-making authority to frustrate unit owner's efforts, the legislature amended the Act to provide that associations must deliver the records within five working days of receipt of a written request, or pay damages to the unit owner in an amount equal to three times the actual damages, but not less than \$500.³⁹

In addition to imposing a penalty for delaying access to the records, the legislature expanded the definition of official records to include, "all other records of the association not specifically included in the foregoing which are related to the operation of the association."⁴⁰ This expanded definition is certain to create controversy. For instance, attorneys are scrambling to figure out ways to avoid publication of le-

inspection.

34. FLA. STAT. § 718.111(12) (1984) (effective October 1, 1984).

35. 353 So.2d 598, 599 (Fla. 4th Dist. Ct. App. 1977) ("The right to inspect public records carries with it the right to make copies.").

36. FLA. STAT. § 718.111(12)(c) (1984) (effective October 1, 1984).

37. *O'Brien v. Sterling Village Condominium, Inc.*, No. 83-5997 (Fla. 15th Cir. Ct.), *aff'd*, 471 So. 2d 56 (Fla. 4th Dist. Ct. App. 1985).

38. FLA. STAT. § 718.111(12)(c) (Supp. 1990) (effective October 1, 1990).

39. FLA. STAT. § 718.112(12)(c) (1991).

40. FLA. STAT. § 718.111(12)(a)15 (1991).

gal opinions concerning pending litigation, which presumably now fall within the definition of official records. Additionally, associations should now explore potential conflicts with state or federal privacy legislation, insofar as the amended language will now compel associations to open, for unit owner scrutiny, confidential screening investigative reports.⁴¹

To insure that every unit owner has an opportunity to learn of his/her rights and responsibilities as a condominium owner, every purchaser may now request and receive a complete set of the current condominium documents, as well as the question and answer sheet provided for by section 718.504.⁴² The association must maintain, as part of the official records, an adequate number of copies of the declaration of condominium, articles of incorporation, by-laws, rules, and all amendments to each of the foregoing, as well as the question and answer sheet on the condominium property.⁴³ The association may charge its actual cost for preparing and furnishing these documents to those requesting same.⁴⁴

6. Hurricane Shutter Specifications

Having learned a lesson from the effects of Hurricane Hugo along the South Carolina coast in 1989, the legislature was quick to adopt a provision mandating boards to approve the installation or replacement of hurricane shutters, notwithstanding the fact that the installation of hurricane shutters might be determined to be a material alteration of the type normally requiring board or membership approval.⁴⁵ The board must adopt hurricane shutter specifications for each building within each condominium operated by the association. Specifications should include color, style, and any other factors deemed relevant by the board.⁴⁶

41. See Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 (1988), which limits disclosure of information obtained from credit reports.

42. FLA. STAT. § 718.111(12)(c) (1991).

43. *Id.*

44. *Id.*

45. FLA. STAT. § 718.113(5) (1991); see *Sterling Village Condominium v. Breitenbach*, 251 So. 2d 685 (Fla. 4th Dist. Ct. App. 1971).

46. FLA. STAT. § 718.113(5) (1991).

7. Fidelity Bonding

In an effort to identify dishonest individuals who could potentially misappropriate association monies, the Act was amended in 1978 to require all persons who control or disburse funds of the association be bonded.⁴⁷ The original legislation contained no stated amount for the bond. In 1981, the Act was amended to provide for bonds in the amount of \$10,000 per person.⁴⁸ Effective April 1, 1992, the amount will be increased to \$50,000 per person.⁴⁹ Previously, associations operating one or more condominiums, which in the aggregate contained 50 or fewer units, were exempt from bonding requirements.⁵⁰ The 1991 amendments deleted this exception; effective April 1, 1992, all associations must comply with the fidelity bonding provision, regardless of size or number of units.⁵¹

8. Insurance

Initially, condominium associations were responsible for maintaining insurance on the common elements and condominium property. Unit owners were responsible for insuring the non-supportive internal walls of their units and their personal property. This "bare wall" approach was mandated until the late 1970s when a fire destroyed much of the Sabal Palm Condominium. In the aftermath of the fire, it was discovered that most unit owners maintained traditional "tenant" type coverage, insuring only personalty, not the internal unit walls or fixtures. To avoid a recurrence of the Sabal Palm experience, the Act was amended to require that the association provide coverage for all improvements to the property initially installed by the developer or "replacements thereof."⁵² Difficulty with determining the replacement value of upgraded appliances and fixtures resulted in another amendment, deleting the reference to "replacements thereof."⁵³ That solution,

47. FLA. STAT. § 718.112(2)(l) (1978) (effective October 1, 1978).

48. FLA. STAT. § 718.112(2)(l) (1981) (effective July 1, 1981).

49. FLA. STAT. § 718.112(2)(j) (1991). H.B. 841 being considered by the 1992 Legislature would modify the bonding requirements by creating a sliding scale based upon the size of a community and its revenues.

50. FLA. STAT. § 718.112(2)(j) (Supp. 1990).

51. See 1991 Fla. Sess. Law Serv. 103 (West) (deleting exception from bonding requirement for 50 or fewer units).

52. FLA. STAT. § 718.111(9)(b) (1979) (effective October 1, 1979).

53. FLA. STAT. § 718.111(9)(b) (1980) (deletion of provision effective October 1,

analogous to throwing the baby out with the bath water, created more problems than solutions. Accordingly, the Act was again amended. This time, the Association was required to cover replacements of "like kind and quality" in addition to the initial improvements.⁵⁴ The amended law worked for a short time until a few shrewd unit owners found that by dropping bottles of bleach on their carpeting, they were able to compel the association's carrier to give them new carpeting. It readily became apparent that requiring the association to insure certain components, over which it had no maintenance control, was unreasonable. Thus, in 1984, the Act was once again amended to exclude from the association's coverage floor, wall and ceiling coverings within the condominium units.⁵⁵ Further experience suggested the need to expand upon the excluded coverage. In 1991, the pendulum swung back toward the center between the "bare wall" concept of 1963 and the full coverage approach of 1980. Effective April 1, 1992, in addition to floor, wall, and ceiling coverings, unit owners will become responsible for insuring electrical fixtures, appliances, air conditioning or heating equipment, water heaters and built-in cabinets contained within their units.⁵⁶ While it is clear that the amendment will not affect coverage in effect as of April 1, 1992, a determination must be made regarding the application of this legislation to condominiums created after October 1, 1979, if the condominium documents require the association to insure all improvements to the property.⁵⁷

9. Assessments and Liability; Lien and Priority; Interest Collection

a. *Collecting Assessments from Mortgagees*

A unit owner is liable for all assessments which come due while he is the unit owner, regardless of how title is acquired.⁵⁸ This includes owners who purchased at a judicial sale.⁵⁹ The grantee is jointly and severally liable with the grantor for all assessments left unpaid at the

1980).

54. FLA. STAT. § 718.111(9)(b) (1981).

55. See FLA. STAT. § 718.111(11)(b) (1991).

56. FLA. STAT. § 718.111(11)(b) (1991).

57. See *Pomponio v. The Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) (relating to re-retroactive statutes).

58. FLA. STAT. § 718.116(1)(a) (1991).

59. *Id.*

time title is transferred from grantor to grantee. This liability does not prejudice any right the grantee may have to recover from the grantor the assessments paid by the grantee⁶⁰—unless the acquirer of title is a first mortgagee.⁶¹ From inception of the condominium concept through April 1, 1992, first mortgagees have enjoyed a special status regarding payment of assessments. When the mortgagee of a first mortgage of record, or a purchaser at a public sale from the first mortgagee's foreclosure⁶² judgment or as a result of a deed in lieu of foreclosure, acquired title, the acquirer of title or his successors and assigns were not liable for assessments which became due prior to acquiring title. This privilege, coupled with the practice of delaying foreclosure until market conditions warranted, has created havoc within condominiums already experiencing tight financial conditions. Associations are often forced to carry delinquent units for years while waiting for the lender to foreclose. The condominium commission recommended that this privilege be abolished, thus placing lenders in the same shoes as all acquirers of title. But, the lender's lobby was successful in replacing the commission's recommendation with a compromise provision which does little to alleviate the problem.

For mortgages recorded after April 1, 1992, mortgagees who acquire title to the unit by foreclosure or by a deed in lieu of foreclosure are not liable for the share of common expenses or assessments which come due prior to taking title, as long as the mortgagee records its deed in lieu of foreclosure or files a foreclosure proceeding within six months after the last payment of principal or interest received by the mortgagee.⁶³ And in no event shall the mortgagee be liable for more than six months of the unit's unpaid common expenses of assessments accrued

60. *Id.*

61. FLA. STAT. § 718.116(7) (1991).

62. In amending section 718.116, the drafter deleted, in its entirety, the language of section 718.116(7) which addressed the rights of, not only a mortgagee of a first mortgage of record, but also a purchaser of a condominium unit at the public sale resulting from a first mortgagee's foreclosure. *See* 1991 Fla. Sess. Law Serv. 130 (deleting a portion of section 718.116(7)). The revised statute is silent as to the obligations of a purchaser from the first mortgagee's foreclosure. This has led some to speculate that a foreclosure purchaser might be liable for unit assessments to the same extent as any other judicial purchaser. The drafter also inadvertently deleted the language which imposed upon all the unit owners the liability for sharing in the assessments eliminated by the mortgage foreclosure. *Id.*

63. FLA. STAT. § 718.116(1)(a) (1991). The sixth month period is extended for any period of time during which the mortgagee is precluded from initiating such procedures due to the bankruptcy laws. *Id.*

before the acquisition of the title to the unit by the mortgagee.⁶⁴

b. Application of Assessment Payments

In 1990, the Condominium Act was amended to establish a priority for applying payments against a unit owner's obligation.⁶⁵ Section 718.116(3) provided that "[a]ny payment received by an association shall be applied first to any interest accrued by the association, then to any administrative late fees, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment."⁶⁶ It was unclear what impact, if any, a restrictively-endorsed check would have on the statutorily-mandated process. The Act has now been amended to provide that the statutory priority shall control "notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment."⁶⁷

c. Lien Priorities—The "Super Lien"

There had been an on-going debate as to whether an association's lien, once recorded, relates back to the date of recording of the declaration of condominium, or the date on which it is actually filed in the public records.⁶⁸ The determination of whether the lien is effective from recording, or whether it relates back to the date of recording the declaration, affects the lien's priority in relation to other intervening liens, judgments or claims against a unit. To insure that an association's lien will remain superior to all but a first mortgagee of record, effective April 1, 1992, an association's lien will be effective from and shall relate back to April 1, 1992, or the date of the recording of the original declaration of condominium, whichever occurs last.⁶⁹

64. *Id.*

65. FLA. STAT. § 718.116(3) (Supp. 1990).

66. *Id.*

67. FLA. STAT. § 718.116(3) (1991).

68. See FLA. STAT. § 718.116(5)(a) (Supp. 1990). The association has a lien on each condominium parcel for any unpaid assessment with interest and for reasonable attorney's fees incurred by the association which are incidental to the collection of the assessment or enforcement of the lien. Prior to the 1991 amendments, the Act provided that the lien did not become effective until recorded in the public records of the county where the condominium is located. *Id.*; see *In re Maas*, 69 B.R. 245 (M.D. Fla. 1986); *Bessmer v. Gersten*, 381 So. 2d 1344 (Fla. 1980).

69. FLA. STAT. § 718.116(5)(a) (1991).

d. Attorney's Fees

The right to recover reasonable attorney's fees is extended to both lien foreclosure actions and an action to recover a money judgment for unpaid assessments.⁷⁰

10. Bingo/The "Sunrise Lakes" Amendment⁷¹

After Broward County's Bingo Administrator refused to renew the bingo license of several large condominiums, legislators came to their aid by introducing legislation which would permit condominium associations qualifying as exempt organizations under Section 528 of the Internal Revenue Code to conduct bingo games.⁷² As amended, the law mandated that associations conducting bingo games do so in accordance with section 849.093, Florida Statutes.⁷³ In addition, section 718.114 provided that the right to conduct bingo games was conditioned upon the return of all the gross receipts from such games to the players in the form of prizes.⁷⁴ In addition, the gross receipts of the games were not to be used for any purpose other than payment of prizes.⁷⁵ If, at the conclusion of play on any day, there remained proceeds which had not been paid out in prizes, the association was precluded from imposing any charge on the players at the next scheduled game until the previous proceeds were exhausted.⁷⁶ Further, any person involved in conducting the game had to be a resident of the particular community sponsoring the game.⁷⁷

Section 849.093(2)(a) allows a qualified organization to deduct

70. FLA. STAT. § 718.116(6)(a) (1991).

71. On October 1, 1991, Circuit Judge George Reynolds, III, in the circuit court for the Second Judicial Circuit in Leon County, issued a temporary injunction in the case of Largo Veterans Council v. Department of Business Regulation, Case No. 91-3922. The court found that the public's interest would be served by enjoining the DBR from enforcing the criminal penalty and injunctive relief section of the Act. Subsequently, the Legislature, during a special session, eliminated the newly-adopted language and specifically readopted the former language, now modified to allow condominiums and other associations to conduct bingo games without a state license and without state taxation.

72. See FLA. STAT. § 718.114 (Supp. 1990).

73. FLA. STAT. §§ 718.114, 849.093 (Supp. 1990).

74. FLA. STAT. § 711.114 (Supp. 1990).

75. *Id.*

76. *Id.*

77. *Id.*

from the proceeds of bingo operations the actual business expenses which are directly related and essential to the operation, conduct and playing of bingo. While other associations were able to take advantage of these deductions, condominium associations were precluded from doing so. The 1991 amendments address this oversight. The amendment has been incorporated into the substantially revised text of section 849.093, governing all bingo operations within the state. These changes impose strict licensing, financial reporting and record-keeping requirements on associations conducting bingo operations. In so doing, the legislature has scrapped most of the changes to section 718.114 that were enacted in 1990.⁷⁸ The revised statute seemingly applies to all community associations, including mobile homeowner associations. As under the old version of the statute, in order to be "authorized" to conduct bingo games, an association must be tax exempt under either section 501 or section 528 of the Internal Revenue Code of 1986. However, even if authorized, the association must still obtain a license from the state. In addition, the association must have been in existence in the state for not less than three years prior to filing an application for a license.⁷⁹

The statute expressly preempts and supersedes all existing county and local ordinances on the subject (except zoning requirements) as of its effective date.⁸⁰ This means that condominium associations desiring to conduct bingo games must obtain a state license and comply with both the statute and supplemental regulations to be adopted by the Division of Pari-Mutuel Wagering, of the Department of Business Regulations. The new statute extensively regulates the actual conduct of games, including such matters as: game rules; qualification to work for the bingo game; equipment to be used; security; prize amounts; hours and frequency of operation; use of receipts and a prohibition against possessing or consuming alcoholic beverages in any room where bingo is held.⁸¹ Bingo games may only be conducted in facilities owned or leased full time by the association and are only open to association members, condominium residents and their guests.⁸²

78. See 1991 Fla. Sess. Law 103 (deleting certain provisions relating to the operation of bingo games).

79. See FLA. STAT. § 849.093 (1991).

80. *Id.*

81. *Id.*

82. *Id.*

11. Master Antenna Television Systems and Cable Television

The controversy surrounding condominium master cable or antenna television systems stems from the issue of whether unit owners can be compelled to pay for these services as a common expense. A look at an analogous situation which arose at Century Village with respect to bus transportation services may aid in understanding the controversy.

For most of the evolution of the Florida Condominium Act, the determination of what was chargeable as a common expense was fairly simple. As recited in the 1987 Act, common expenses included “[t]he expense of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, *and any other expense designated as a common expense by this Chapter, the declaration, the documents creating the condominium, or the by-laws.*”⁸³ Then came the Century Village bus case.⁸⁴ One of the Century Village condominium associations had contracted for bus transportation service for its members to areas outside the condominium property. The contract provided for the association to pay a lump sum for the service; the unit owners were not required to pay for individual trips. The association then assessed a pro rata portion of this lump sum as a common expense against all unit owners. Certain unit owners refused to pay the assessment and the association placed a lien on their units, ultimately pursuing a foreclosure claim, which the trial court granted.⁸⁵

On appeal, the Fourth District Court correctly noted that the condominium documents of Century Village did not provide for bus transportation to be chargeable as a common expense (the simple statement of which under the Act would have precluded charging the same as a common expense).⁸⁶ However, the court proceeded to muddy the waters regarding common expenses by boldly proclaiming, in direct contradiction of the Act, that:

In the instant case, the bus transportation service is not condominium property nor is it a recreational facility. As such, it does not fall within the realm of either 718.111 or 718.114, Florida Statutes

83. See FLA. STAT. § 718.115(1) (1987).

84. *Rothenberg v. Plymouth #5 Condominium Ass’n*, 511 So. 2d 651 (Fla. 4th Dist. Ct. App. 1987).

85. *Id.* at 651.

86. *Id.*

(1983), and therefore the association does not have the power to assess the cost for this service as a common expense against the unit owners.⁸⁷

As a result of this case, in 1988, an amendment was offered that continues to wreak havoc on the condominium concept. The Act already provided that any expense designated as a common expense by the Condominium Act, the declaration, or by-laws could be a common expense. But via the amendment, the legislators attempted to list those services which would constitute common expenses. This implied that a non-listed service would be precluded from being a common expense.⁸⁸ As amended in 1988, section 718.115(1) provided:

Common expenses include the expense of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, and any other expense designated as common expense by this chapter, the declaration, the document creating the condominium or the by-laws. *Common expenses also include reasonable transportation services, insurance for directors and officers, road maintenance and operation expenses, in-house communications, and security services, which are reasonably related to the general benefit to the unit owners even if such expenses do not attach to the common elements or property of the condominium. However, such common expenses must either have been services or items provided from the date the control of the board of administration of the association was transferred from the developer to the unit owners or must be services or items provided from the condominium documents or by-laws.*⁸⁹

Despite the rewording of the statute, condominium boards continued to wrestle with the question of whether they could enter into bulk cable television contracts, and charge the costs to unit owners as a common expense. On December 8, 1988, the Division, relying upon *Rothenberg v. Plymouth #5 Condominium Association*⁹⁰ and the 1988

87. *Id.* at 652.

88. See *Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674 (Fla. 1985) (applying the rule *expressio unius est exclusio alterius*, meaning the mention of one thing implies the exclusion of another).

89. FLA. STAT. § 718.115(1) (Supp. 1988) (effective July 1, 1988) (emphasis added).

90. 511 So. 2d 651 (Fla. 4th Dist. Ct. App. 1987).

amendments to section 718.115(1), declared that cable television services only constitute a common expense in two instances. First, cable television services could be defined as a common expense in the condominium documents or by-laws by amendment. Second, the services were chargeable as a common expense if they were being provided at the time control of the board of administration of the association was transferred from the developer to the unit owners.

With support from cable television industry, legislation was introduced which bifurcated the delineation of common expense under section 718.115. Category one included:

the expense of the operation, maintenance, repair, replacement, *or protection* of the common elements and *association property*, costs of carrying out the powers and duties of the association, and any other expense, *whether or not included in the foregoing*, designated as common expenses by this chapter, the declaration, the documents creating the *association*, or the by-laws.⁹¹

Also included within this category was the following:

If approved by the board of administration, the cost of mangrove trimming⁹² and the cost of a master television antenna system or duly franchised cable television service obtained pursuant to a bulk contract are common expenses.⁹³

The second set of common expenses consisted of those categories created in 1988, which, as previously noted, must have either been provided from date of transition or as part of the condominium documents.

The condominium commission heard testimony from senior citizens on fixed incomes, widows and widowers, and individuals with sight and hearing impediments, all of whom opposed compulsory cable television. The commission recommended that the board's ability to obligate unit owners to cable television be limited to those situations in which the members approve the cable contract in advance by a majority of *all* voting interests. The commission further recommended that individuals with hearing and visual impediments be exempted from the

91. FLA. STAT. § 718.115(1)(a) (1991) (emphasis added) (it reflects additions to the section effective October 1, 1990).

92. See 1991 Fla. Sess. Law Serv. 103 (deleting the "mangrove trimming" provision from section 718.115).

93. FLA. STAT. § 718.115(1)(b) (1988).

cable television obligation.

Assisted by an effective lobbyist,⁹⁴ the cable television industry was successful in modifying the commission's recommendations to place the burden of cancellation of a cable contract on the unit owners, and to provide for a minimum term of two years.⁹⁵

As amended, the new law provides that the cost of a master antenna television system or duly franchised cable television service obtained pursuant to a bulk contract shall be deemed a common expense if provided for in the declaration, *or* if designated as such in a written contract between the board and company providing the service.⁹⁶ Any contract made by the board after April 1, 1992 for a community antenna system or duly franchised television service may be canceled by a majority of the voting interests *present at the next regular or special meeting of the association*.⁹⁷ Any member may make a motion to cancel the contract, but if the motion fails to obtain the required majority, the contract is deemed to be ratified for its full term.⁹⁸

Contracts for a master antenna television system or duly franchised cable television service shall provide for the right of any hearing-impaired or legally blind unit owner, who does not occupy the unit with a non-hearing-impaired or sighted person, to discontinue the service without incurring disconnect fees.⁹⁹

An interesting twist to the common expense equation occurs in situations when less than 100% of the units are connected to a master television antenna system or cable television. In situations of 100% participation, the expense is apportioned among the unit owners in accordance with the percentage or fraction of sharing common expenses contained in the documents. If less than 100%, everyone pays equally, regardless of the common expense formula in the documents.

12. Proxies

To the condominium unit owner activist, it is the proxy¹⁰⁰ which

94. Peter Dunbar, formerly a State Representative and Counsel to Florida State Governor Bob Martinez.

95. FLA. STAT. § 718.115(1)(b)1 (1991).

96. *Id.*

97. *Id.*, § 718.115(1)(b)1.

98. *Id.*

99. FLA. STAT. § 718.115(1)(b)2 (1991).

100. "Proxy" is defined as the "authorization given by one person to another so that the second person can act for the first" BLACK'S LAW DICTIONARY 1103-04

lies at the root of all condominium operational problems. For it is through the misuse of proxies that SCORN contends dishonest directors were able to perpetuate themselves in office and control all aspects of an association's operation.

Effective January 1, 1992, unit owners will not be able to vote by general proxy, except for a very limited number of purposes.¹⁰¹ Limited proxies¹⁰² shall be used for the following purposes:

- i. for votes taken to waive or reduce reserves.
- ii. for votes taken to amend the declaration pursuant to section 718.110, Florida Statutes.
- iii. for votes taken to amend the articles of incorporation or bylaws
- iv. for any other matter for which the Condominium Act requires or permits a vote of the current officers.¹⁰³

As previously noted, no proxy, limited or general, may be used in the election of board members.¹⁰⁴ To insure that unit owners have the benefit of knowing how their fiduciaries vote, the prohibition against proxy voting by directors is expanded to include a prohibition against the use of secret ballots.¹⁰⁵

(5th ed. 1979). As applied to the condominium setting, it refers to the granting of one's right to vote at an association meeting to a third party.

101. FLA. STAT. § 718.112(b)(2) (1991). General proxies may be used to establish a quorum (a quorum is the minimum voting interest which must be present to conduct association meetings). *Id.* In addition, general proxies are permitted to be used in other matters for which limited proxies are not required, and may also be used for non-substantive changes to items for which limited proxies are required and given. *Id.* This latter right is critical for it allows some corrective measures to be taken concerning proposed amendments, which otherwise would necessitate re-noticing of an amended item for a future meeting.

102. A limited proxy is the assignment of one's right to vote to a third party when the assignment is restricted to that of voting in a predetermined manner. An example of a limited proxy would be: "I hereby instruct my proxy to vote for the proposed amendment to Article X(2)(1)."

103. *Id.* Notwithstanding the apparent mandated use of limited proxies as evidenced by the phrase, "limited proxies shall be used," the clarifying statement at the end of the subsection, namely, that "notwithstanding the provisions of the subparagraph, unit owners may vote in person at unit owner meetings," would indicate the use is permitted, but not mandatory. *See id.*

104. *Id.*

105. FLA. STAT. § 718.111(1)(b) (1991).

13. Vote Required to Acquire, Convey or Lease Real Property

The vote required to acquire, convey, lease, or mortgage association property¹⁰⁶ is generally stated within the declaration of condominium. If the declaration fails to specify the procedures for acquiring, conveying, leasing or mortgaging association property, then approval of seventy-five percent of the total voting interests will be required.¹⁰⁷

14. Commingling

A condominium association is an entity which is responsible for the operation and management of the condominium property, as distinguished from "the condominium" which is the form of property ownership. An association may operate more than one condominium.¹⁰⁸ When an association operates more than one condominium, since there is no mutuality of ownership of the condominium(s), the association must maintain separate books and records for each condominium it operates.¹⁰⁹ Prior to the 1991 amendments, it had been common practice for an association operating more than one condominium to commingle the funds into a single operating account, so long as it maintained separate records. Also, management companies operating one or more condominiums often established accounts in the name of the management company for the benefit of the condominium. Reserve funds were often commingled with the operating funds.

However, effective April 1, 1992, all monies of a condominium must be maintained separately in the association's name.¹¹⁰ And, no manager or business entity required to be licensed under section 468.432,¹¹¹ and no agent, employee, officer or director of a condomin-

106. "Association property" is property, real and personal, owned, leased, or dedicated to the association, for the use and benefit of the members. FLA. STAT. § 718.103(3) (1991). Association property is not part of the "common elements," which denotes that part of the property submitted to condominium ownership which is an appurtenance to the condominium units. See FLA. STAT. § 718.103(12) (1991).

107. FLA. STAT. § 718.111(7) (1991).

108. FLA. STAT. § 718.111(1)(a) (1991).

109. See FLA. STAT. § 718.111(12)(a)11 (1991).

110. FLA. STAT. § 718.111(15) (1991). It is still unclear whether the requirement that the funds be separately maintained in the association's name will preclude the practice of commingling multiple condominium funds into a single association account, as long as separate records are maintained.

111. Companies and individuals performing management services for associa-

ium association, will be permitted to commingle any association funds with his funds or with the funds of any other condominium association or community association.¹¹²

15. Waiver of Audit Requirement by Developer-Controlled Association

A condominium association is required to deliver to each unit owner a complete financial report of actual receipts and expenditures for the previous twelve months, within sixty days following the end of the fiscal or calendar year.¹¹³ In lieu of this requirement, the Division may require the association to deliver a complete set of either compiled, reviewed or audited financial statements for the preceding fiscal year.¹¹⁴ However, the requirement of providing a complete compiled, reviewed and audited financial statement does not apply to associations for which a majority of the voting interests of the association present at a duly-called meeting¹¹⁵ vote to waive the requirement for a particular year.¹¹⁶

In order to preclude a developer-controlled association from being able to circumvent the legislative intent by continuously voting to waive the reporting requirements, the Act has been amended. The amendment provides that, in an association in which turnover of control has not occurred, the developer may vote to waive the audit requirement for the first two years of the operation of the association, after which,

tions operating more than 50 units or having a budget(s) in excess of \$100,000 must be licensed if the company or individual controls or disburses funds of a community association, prepares budgets or other financial documents for a community association, assists in the noticing or conducting of community association meetings, and coordinates maintenance for residential development and other day to day services involved with the operation of a community association. *See* FLA. STAT. § 468.431(2) (1989).

112. FLA. STAT. § 718.111(15) (1991).

113. FLA. STAT. § 718.111(13) (1991).

114. FLA. STAT. § 718.111(14) (1991).

115. *Id.* Meetings called pursuant to this section must be held prior to the end of the fiscal year, and the waiver is only effective for one year. *Id.*

116. Associations having annual receipts in excess of \$100,000 but less than \$200,000 shall at a minimum prepare and deliver compiled financial statements; associations having annual receipts of at least \$20,000 but less than \$400,000 shall at a minimum, prepare and deliver reviewed financial statements, and associations having annual receipts of \$400,000 or more shall prepare and deliver audited financial statements. Fla. Admin. Code Ann. r.7D-23.004 (1991). Section 718.111(14) and Rule 7D-23.004 do not apply to a condominium of 50 or fewer units.

waiver of an applicable audit requirement shall be by a majority of voting interests other than the developer.¹¹⁷ A strict interpretation of the amendment would limit its application to associations with annual receipts of \$400,000 or more because these are the only ones for which financial reports must be audited. An association voting to waive the financial reporting requirements of section 718.111(14) must still comply with section 718.111(13). In addition, provisions in a condominium declaration requiring a stricter reporting standard than that mandated by section 718.111(13) or (14) will control.

16. Application of Excess Special Assessments

Funds collected pursuant to a special assessment can only be used for the specific purpose or purposes for which the special assessment was levied.¹¹⁸ Up until the passage of the 1991 amendments, it was unclear whether any excess funds from the special assessment had to be refunded to the unit owner, or whether they could be placed in the general revenue accounts of the associations. The question has now been answered. Any excess funds remaining after completing the project for which the special assessment was levied may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.¹¹⁹

17. Contracts for Products and Services; In Writing; Bids; Exceptions

Related to the kickback amendment¹²⁰ are the contract and competitive bid requirements of section 718.3026. Designed to assure unit owners that the board is acting in their best interest, the provisions establish certain criteria for letting contracts for the purchase, lease, or rental of materials or equipment to be used by the association in accomplishing its purposes under the Act.¹²¹ It governs all contracts for the provision of services.¹²² A contract which will not be fully per-

117. FLA. STAT. § 718.111(14) (1991).

118. FLA. STAT. § 718.116(10) (1991).

119. *Id.*

120. *See* FLA. STAT. § 718.111(1)(a) (1991) ("No officer, director or manager . . . shall solicit, offer to accept, or accept anything or service exceeding \$100 . . .").

121. *See* FLA. STAT. § 718.3026(1) (1991).

122. *Id.*

formed within one year from its making,¹²³ or one which requires payment by the association in the aggregate amount of \$5,000 on behalf of any condominium operated by the association, must be in writing.¹²⁴ Additionally, all contracts entered into by the association on behalf of a condominium in the aggregate amount exceeding \$5,000, are subject to competitive bidding.¹²⁵

The statute is silent as to the number of bids required. But it specifically provides, despite the competitive bid requirement, that an association is not required to accept the lowest bid.¹²⁶ Also, an association may obtain needed products and services in an emergency without submitting to the competitive bid process.¹²⁷ In addition, competitive bids are not required in those situations in which the business entity with which the association desires to enter into a contract is the only source of supply within the county serving the association.¹²⁸ Exempted from the application of the section are contracts with attorneys and accountants.¹²⁹

It is important to remember that the provisions of section 718.3026 are in addition to those in section 718.3025. Parties providing maintenance or management services to a condominium must, in addition to complying with section 718.3026, also include within their contract the specified provisions mandated by section 718.3025.

18. Enforcing the Covenants Against Tenants and Invitees of a Unit Owner

The law is well-developed concerning the enforcement of covenants and restrictions against a violating unit owner. However, the ability to enforce the covenants against a violating tenant or guest of an owner is in doubt without following the circuitous process of suing the owner to compel him to enforce the restriction against his tenant. In an effort to expedite the process, thereby giving an association the authority to proceed directly against an owner's tenant or invitee, the legislature

123. Given the literal translation, the provision would apply to all contracts which will not be fully performed within one year of their execution as opposed to one year from the effective date, which is obviously not the intent.

124. FLA. STAT. § 718.3026 (1991).

125. *Id.*

126. *Id.*

127. FLA. STAT. § 718.3026(2)(b) (1991).

128. FLA. STAT. § 718.3026(2)(c) (1991).

129. FLA. STAT. § 718.2036(2)(a) (1991).

amended the Act to incorporate into the lease the provisions of the Act, as well as those of the declaration and by-laws.¹³⁰ In addition, the association is empowered to seek relief directly against any tenant or invitee violating the Act or the condominium documents.¹³¹

19. Unit Owner Enforcement

A unit owner sued by the association for an alleged violation of the covenants must pay his/her pro rata share of the common expense assessed to cover the cost of the litigation, even when the unit owner is determined by the courts not to be in violation of the covenants. To afford a unit owner who has prevailed in action brought by the association the opportunity to be "made whole," a provision was added to the Act to allow the unit owner the right to recover reasonable attorney's fees and such other amounts as determined by the court to be necessary to reimburse the unit owner for his share of the assessment levied by the association to fund its expenses of litigation.¹³² Of course, the unit owner will be obligated to pay his pro rata share of the assessment levied for said purpose.¹³³

20. Fines

One alternative means of enforcing minor violations of the covenants and restrictions is fining. The authority for fining was initially found in the not-for-profit corporation laws. Section 617.10(3), Florida Statutes, provided that the corporation might, in its by-laws, delegate to its board the power to assess fines in such sums as may be fixed, or the limits or occasions determined by said by-laws. The first reported use of the fining authority occurred at the Winston Tower 100 Condominium in North Dade County.¹³⁴ Mr. Rosenthal was fined by the association for repeatedly leaving the condominium parking garage through the entrance, rather than the exit. The trial court confirmed

130. FLA. STAT. § 718.303(1) (1991).

131. *Id.*

132. *Id.*

133. No unit owner may be excused from paying his pro rata share of the common expenses unless all unit owners are similarly excused. Although the unit owner cannot theoretically be made 100 percent whole, he will be able to recover most of the costs and expenses.

134. *Rosenthal v. Winston Tower 100 Ass'n, Inc.*, No. 75-23064 (SP Dade County Ct. 1976).

the association's authority to levy fines.¹³⁶ It wasn't until several years later that the ability to place a lien on the unit and foreclose the lien, in order to collect the fine, was resolved.

In *Elbadaramany v. Oceans Seven Condominium Association*,¹³⁶ the condominium association attempted to foreclose a lien it placed on the unit of Mr. Elbadaramany for parking his boat and boat trailer in the condominium parking lot. The Florida Fifth District Court of Appeal determined that a fine against a unit was not a common expense assessable against all units, and thus was not susceptible to being liened or foreclosed.¹³⁷ The *Elbadaramany* decision was codified by the legislature the same year, with the addition of fining authority to the enforcement provision of section 718.303.¹³⁸ The enactment specifically prohibited a fine from becoming a lien against a unit, and limited the maximum amount of a fine to \$50.¹³⁹ In addition, it required notice and an opportunity for a hearing to the unit owner.¹⁴⁰ Still unresolved was the question of whether a fine could be levied for each day of a recurring violation, and whether there was any limitation on the total amount of a fine. These questions were answered by the 1991 amendments. Effective April 1, 1992, the maximum amount of each fine was increased from \$50 to \$100; however, a ceiling of \$1,000 for a continuing violation was imposed.¹⁴¹

21. Frequently Asked Questions and Answers

A future condominium purchaser will be provided with a separate sheet entitled "Frequently asked Questions and Answers" by the association.¹⁴² The intent is to provide prospective purchasers with a summary of key questions affecting elements of ownership of their condominium units. Included in the question answer sheet must be information pertaining to the following: voting rights; unit use restrictions, including restrictions on the leasing of a unit; recreation rental, if applicable; assessments, including the basis for levying assessments.¹⁴³

135. *Id.*

136. 461 So. 2d 1001 (Fla. 5th Dist. Ct. App. 1984).

137. *Id.*

138. FLA. STAT. § 718.303(3) (1984) (effective October 1, 1984).

139. *Id.*

140. *Id.*

141. FLA. STAT. § 718.303(3) (1991).

142. FLA. STAT. § 718.504 (1991).

143. *Id.*

The question and answer sheet must also state and identify any court cases in which the association is currently a party of record and for which the association may face liability in excess of \$100,000.¹⁴⁴ The question and answer sheet shall be maintained as part of the association's official records.¹⁴⁵

22. Alternative Dispute Resolution; Voluntary Mediation; Mandatory Nonbinding Arbitration

While there have been many advocates for alternative means of resolving internal condominium disputes,¹⁴⁶ early legislative efforts¹⁴⁷ failed because they were neither mandatory nor binding. Furthermore, the absence of prevailing party legal fees provided little incentive for an association to utilize the voluntary arbitration procedures of the Division. With the enactment of the 1991 amendments, alternative dispute resolution is now mandatory within certain defined parameters,¹⁴⁸ and voluntary mediation is encouraged.¹⁴⁹ While parties to any dispute may voluntarily agree to binding arbitration, in the condominium setting, only disputes which fall within the specified provisions of the Act are subject to its "mandatory nonbinding arbitration" provisions.¹⁵⁰ The term "dispute," as defined in the Act, only covers disagreements between two or more parties which involve the authority of the board of directors, or arises under any law or association document requiring a owner to take action, or not take action regarding its unit.¹⁵¹ Also in-

144. *Id.*

145. FLA. STAT. § 718.111(12)(a)(14) (1991).

146. *See* *Martin v. Key Largo Kampground, Inc.*, 501 So. 2d 645 (Fla. 3d Dist. Ct. App. 1987) ("We remain hopeful, though not optimistic that the legislature will provide a forum to settle disputes of this nature without employing the full panoply of trial and appellate procedures.").

147. *See, e.g.*, FLA. STAT. § 718.1255 (1982); FLA. STAT. § 718.112(2)(L) (1986).

148. FLA. STAT. § 718.1255 (1991). The language of the Act was modeled after provisions of the Montgomery County, Maryland Community Association Dispute Resolution Law [Bill 44-89 adopted February 27, 1990]

149. *See* FLA. STAT. § 718.1255(2) (1991).

150. The term "mandatory non-binding arbitration" appears to be contradictory of itself. It is necessary due to the provision in the Florida Constitution which provides that "the courts shall be open to every person for redress of any injury . . ." *See* FLA. CONST. art 1, § 21. As a result, any mandatory alternative dispute resolution in process must afford the parties the right of review by the courts.

151. FLA. STAT. § 718.1255(1) (1991). *See* FLA. STAT. § 718.111(12)(c) 1991

cluded in the definition of a "dispute" is a disagreement between the parties involving the alteration or addition to a common area or element, the failure of the association to properly conduct meetings or elections, the failure to give proper notice of a meeting, and the failure to allow inspection of the books and records.¹⁵² While disagreements that primarily involve title to any unit or the common elements, warranties and the levy of and collection of assessments are specifically excluded from mandatory arbitration.¹⁵³ These are not the only disagreements excluded, other disputes not specifically covered by the provisions of the Act would be excluded as well.

Where mandatory arbitration applies, the parties must arbitrate their disputes prior to instituting a court action.¹⁵⁴ Arbitration is to be conducted by the Division.¹⁵⁵ Arbitrators must be members in good standing with the Florida Bar, and full-time employees of the Division.¹⁵⁶ The arbitration is to be conducted pursuant to rules of procedure promulgated by the Division.¹⁵⁷ The decision of the arbitrators shall be final if a complaint for a trial de novo is not filed within thirty days.¹⁵⁸ In an effort to discourage unnecessary delays in the enforcement of the arbitration decision, a party seeking a review of the arbitrator's decision will be assessed the other party's arbitration costs, court costs, and other reasonable costs, including attorney's fees, investigation expenses, and expenses for expert or other testimony or evidence incurred after the arbitration hearing, if the judgment upon the trial de novo is not more favorable than the arbitration decision.¹⁵⁹ If the judgment is more favorable, the party who filed a complaint for trial de novo and won will be entitled to court costs and attorney's fees.¹⁶⁰ Enforcement of a final decision of the arbitrator is through the

(an additional penalty for failure to provide records within five working days after receipt of a written request).

152. *Id.*

153. *Id.*

154. FLA. STAT. § 718.1255(4)(a) (1991).

155. FLA. STAT. § 718.1255(4) (1991).

156. *Id.*

157. FLA. STAT. § 718.1255(4) (1991). As of the writing of this article, the proposed Rules of the Division of Florida Land Sales, Condominiums and Mobile Homes for mandatory non-binding arbitration, Rule 7D-45.001 to .048, were still in the drafting stage.

158. FLA. STAT. § 718.1255(4)(c) (1991). In a trial de novo, the decision of the arbitrator is admissible in evidence. FLA. STAT. § 718.1255(4).

159. FLA. STAT. § 718.1255(4)(d) (1991).

160. *Id.*

circuit court in the jurisdiction where the arbitration took place.¹⁶¹

B. *Creation, Application*

1. *Jungle Den*

Given the alternatives of either submitting property to condominium ownership or avoiding the complex regulatory scheme by adopting a non-condominium format, perhaps a homeowner association, most developers will elect the latter. It is therefore particularly disconcerting for one making that election to be told that the condominium laws will be applied to their "non-condominium" property owners' association. The question of whether a property owners' association¹⁶² that is responsible for the operation and maintenance of non-condominium property is subject to the condominium laws was first addressed in *Palm Beach Leisureville Community Ass'n v. Raines*.¹⁶³ A companion case¹⁶⁴ decided the question of prevailing party legal fees. Given the fact that attorney's fees are only awarded when provided by statute or contract, the determination of whether the prevailing party in the initial *Leisureville* case was entitled to recovery of attorney's fees under section 718.303(1) became critical. In *Raines v. Palm Beach Leisureville Community Association, Inc.*,¹⁶⁵ the court answered in the negative. Several years later, the Florida Supreme Court was given the opportunity to revisit the question. The Third District Court of Appeal had determined that a homeowners' association which had membership comprised solely of condominium unit owners, which operated on assessments of unit owners, and whose function encompassed some maintenance and control of condominium property, was an "association" under the Condominium Act.¹⁶⁶ On appeal, the Florida Supreme Court

161. FLA. STAT. § 718.1255(4)(e) (1991). A petition of enforcement cannot be granted unless the time for appeal by the filing of a complaint for trial de novo has expired. *Id.*

162. Homeowners Association (HOA) or Master Association, as distinguished from a Statutory Condominium Association.

163. 398 So.2d 471 (Fla. 4th Dist. Ct. App. 1981).

164. *Raines v. Palm Beach Leisureville Community Ass'n, Inc.*, 413 So. 2d 30 (Fla. 1982).

165. *Id.*

166. *See Siegel v. Division of Florida Land Sales & Condominiums*, 453 So. 2d 414 (Fla. 3d Dist. Ct. App. 1984).

reversed¹⁶⁷ and reaffirmed its decision in *Raines*. The court held that a homeowners' association which *might* eventually be partially comprised of non-condominium dwellers, and presently had authority to impose assessments upon properties which were not condominium property within the scope of the Condominium Act, was not a Condominium Association.¹⁶⁸

The issue became clouded in 1988 after the Florida Fifth District Court of Appeal determined that a recreation association, organized to provide an entity for ownership, operation, and management of recreational facilities for the use of all present and future condominium unit owners, was in substance and foundation acting as a condominium association, and therefore, subject to the Condominium Act.¹⁶⁹ In an effort to resolve the controversy, the definition of "association" in the Condominium Act has been amended to include "any entity which operates or maintains other real property in which condominium unit owners have use rights, where unit owner membership in the association is composed exclusively of condominium unit owners¹⁷⁰ or their elected or appointed representatives and where membership in the association is a required condition of unit ownership."¹⁷¹

2. Undivided Share in the Common Elements

An essential component of every unit is that unit's proportion of fractional interest in the common elements. In a residential condominium, the proportional or fractional share of the ownership must be the same as the fractional or proportional share of the common expenses.¹⁷² Beyond said requirement, there has never been any guideline for establishing a uniform relationship among units based upon size or location. In fact, as long as ownership and sharing were the same, and as long as the relationship was disclosed, it could be totally arbitrary and/or purposely designed to benefit a particular unit at the expense of others. To preclude the potential for abuse,¹⁷³ the legislature amended the act so

167. Department of Business Regulation v. Siegel, 479 So. 2d 112 (Fla. 1985).

168. *Id.*

169. Downey v. Jungle Den Villas, 525 So. 2d 438 (Fla. 5th Dist. Ct. App. 1988).

170. See *Siegel*, 479 So. 2d 112 (applying a constituency test).

171. FLA. STAT. § 718.103(2) (1991).

172. FLA. STAT. § 718.104(4)(g) (1991).

173. For example, a developer building the entire penthouse floor for his personal unit might allocate the percentage of ownership in the common elements and propor-

that for condominiums created after April 1, 1992, the ownership share of the common elements assigned to each residential unit shall be based upon the total square footage of each residential unit in uniform relationship to the total square footage of each of the other residential units in the condominiums or on an equal fractional basis.¹⁷⁴

3. Ceiling Imposed on Vote Requirement to Approve Amendments to the Declaration

Drafters of condominium documents have traditionally retained the ability to permanently control development concepts by imposing severe limitations on the ability of a condominium to amend its declaration of condominium without the written consent of every unit owner. For example, a developer selling to foreign investors could insure the purchasers of their long term ability to lease their units by restricting the right to prohibit leases without the consent of every owner. For condominiums created after April 1, 1991, the right to impose long term controls will be significantly diminished. Except for the right to continue to require 100% consent in order to materially alter or modify the appurtenances¹⁷⁵ to a unit, or create a time share unit,¹⁷⁶ no declaration recorded after April 1, 1992 shall require that amendments be approved by more than four-fifths of the voting interests.¹⁷⁷ The right of the developer to unilaterally amend the condominium documents without the consent of unit owners will be limited to certain specific situations.¹⁷⁸ In addition to the imposition of a ceiling, there is now a floor. The minimal threshold for approving amendments for condominiums recorded after April 1, 1992, is a majority of the total voting interest.¹⁷⁹

Requiring the consent of mortgagees to an amendment to the declaration for declarations recorded after April 1, 1992, will similarly be limited to amendments materially affecting the rights or interests of the

tional sharing in the common expenses at a nominal level, shifting the operational burden for his unit to the other unit owners.

174. FLA. STAT. § 718.104(4)(f) (1991).

175. FLA. STAT. § 718.110(4) (1991).

176. FLA. STAT. § 718.110(8) (1991).

177. FLA. STAT. § 718.110(1)(a) (1991).

178. FLA. STAT. § 718.110(2) (1991). This limitation does not apply to time share condominiums. *Id.*

179. FLA. STAT. § 718.110(4) (1991).

mortgagees.¹⁸⁰

4. Developer Maintenance Guarantee

A condominium developer may elect to guarantee the operating budget for a stated period of time, in lieu of paying assessments for developer-owned units.¹⁸¹ There has been an on-going controversy concerning the developer's right to extend the guarantee period without the consent of the unit owners. After April 1, 1992, the guarantee may provide that after the initial stated period, the developer has an option to extend the guarantee for one or more additional stated periods.¹⁸²

5. Transfer of Association Control

In the early years of condominiums, developers were able to maintain perpetual control over the operation of condominium communities through the use of devices such as long-term sweetheart management contracts or by reserving the right in the condominium documents to select or manage the association board. Among the first rights afforded unit owners during an era of consumer reforms was the right at a specified time to have representation on the board and, ultimately, to have the right to control the board.¹⁸³ These rights were tied to closing on a given number of condominium sales.¹⁸⁴ An economic downturn could leave a developer holding a large inventory of units and thus ensure virtually perpetual control. Provisions designed to force transition when the developer was no longer building or selling¹⁸⁵ did not alleviate the

180. FLA. STAT. § 718.110(11) (1991).

181. FLA. STAT. § 718.116(9)(a)2 (1991). A developer guaranteeing the budget must obligate itself to pay any amount of common expenses incurred during the guarantee period that is not covered by the assessments receivable from other unit owners. *Id.*

182. *Id.*

183. See FLA. STAT. § 711.66 (1974) (effective October 1, 1974).

184. Unit owners were entitled to elect a majority of the members of the board three years after seventy-five percent of the units that would be operated ultimately by the association were conveyed to purchasers; or, three months after ninety percent of the units that would be operated ultimately by the association were being conveyed to purchasers. See FLA. STAT. § 711.66(1) (1974) (effective October 1, 1974).

185. Developers were compelled to turn over control when all units were completed but some were no longer being offered for sale in the ordinary course of business. See FLA. STAT. § 711.66(1) (1974); see also FLA. STAT. § 718.301(1)(d) (1977) (providing for control when a developer is no longer constructing units).

problem. To insure the right of unit owners to ultimately take control of their associations, the Act has again been amended. Established is an outside turnover time requirement of seven years after recordation of the declaration of condominium for associations operating a single condominium, or seven years from recordation of the declaration of the first condominium it operates for an association operating more than one condominium.¹⁸⁶ In the case of a phase condominium, the time requirement is seven years after recordation of the declaration creating the initial phase.¹⁸⁷

Following transition, the developer, at the developer's expense, is obligated to turn over to the association the financial records of the association, reviewed by an independent certified public accountant.¹⁸⁸ The scope of the report is clarified by the 1991 amendments. It is now mandated that the financial records be audited for the period from the incorporation of the association or from the period covered by the last audit.¹⁸⁹

6. Warranties

The duty owed by a design professional to the ultimate purchaser of a condominium unit and the association was thought to have been well settled.¹⁹⁰ However, the question as to the liability of a design professional for negligence in design was clouded by the holding of the Second District Court of Appeal in *Seibert, AIA, Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n*.¹⁹¹ In order to resolve any doubt, the Florida Legislature amended section 718.203 to specifically add design professionals, architects and engineers to the list of those who warrant the fitness of their work in the construction of condominium buildings.¹⁹²

186. FLA. STAT. § 718.301(1)(e) (1991); a proposed division rule has construed this amendment as having prospective application only. It would apply to condominiums created after April 1, 1992. FLA. ADMIN. CODE ANN. r.7D-23.003(11) (proposed).

187. *Id.*

188. FLA. STAT. § 718.301(4)(c) (1991).

189. *Id.*

190. *See Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So. 2d 689 (Fla. 2d Dist. Ct. App. 1979).

191. 573 So. 2d 889 (Fla. 2d Dist. Ct. App. 1990).

192. FLA. STAT. § 718.203(2) (1991).

7. Leasehold Condominiums

The right to declare leasehold estates to condominiums was clarified in 1976 with the enactment of section 718.401. This section provides that a condominium could be created on lands held by a developer under lease, if, on the date the first unit is conveyed by the developer to a bona fide purchaser, the lease has an unexpired term of at least 50 years.¹⁹³ The 1991 amendments allow for the creation of commercial condominiums and time-share condominiums on leaseholds with unexpired terms of 30 years.¹⁹⁴

8. Powers and Duties of Division of Florida Land Sales, Condominiums and Mobile Homes

There was little to compel a recalcitrant officer or director of a condominium association to follow the strict mandates of the Act. Notwithstanding the pronouncement within the Act that the officers and directors have a fiduciary relationship to the unit owners,¹⁹⁵ a director was not personally liable for monetary damages to the corporation or any other person for any statement, vote, decision, or failure to act, regarding corporate management or policy, unless the director breached or failed to perform his duties as a director, and this breach or failure to perform constituted a violation of criminal law or was a transaction for which the director derived an improper personal benefit.¹⁹⁶ Although the Division had the authority to institute enforcement proceedings against an association violating the Act,¹⁹⁷ and assess a civil penalty for the violation,¹⁹⁸ the parties ultimately responsible to pay for the violation were the unit owners. As amended, effective April 1, 1991, the Act now allows the Division to seek enforcement directly against an officer or director, issue a cease and desist order directly against an officer or director, and/or impose a civil penalty directly

193. FLA. STAT. § 718.401 (1977).

194. FLA. STAT. § 718.401(1) (1991).

195. See FLA. STAT. § 718.111(1)(a) (1991). This language first appeared in the Act in 1974 in response to the lobby efforts of condominium activist David Osterer. See FLA. STAT. § 711.12 (1974).

196. See FLA. STAT. § 617.0831 (Supp. 1990). A director appointed by a developer to the board of directors of a condominium or cooperative association are not extended this protection. *Id.*

197. FLA. STAT. § 718.501(1)(d) (Supp. 1990).

198. FLA. STAT. § 718.501(1)(d)4 (Supp. 1990).

against an officer or director violating provisions of the Act.¹⁹⁹ The condominium commission recommended that the association be precluded from indemnifying the violating officer or director. However, this recommendation was not adopted by the legislature.

An important new tool in the Division's arsenal is the right of the Division to conduct random investigations of associations.²⁰⁰ Such investigations may be instituted without reasonable cause to suspect that a violation of the rules has occurred.²⁰¹ After giving an association twenty days advance written notice, the Division may review the financial operations and other operational aspects of the association. If a review reveals evidence of irregularity, the Division may perform a compliance audit.²⁰² If upon completion of the audit, a violation of statute or rule is determined to exist, the Division may recover the fees and costs of the audit from the association regardless of whether the violations are voluntarily reconciled by the association. At the conclusion of its investigation the Division shall give the association a reasonable opportunity to cure any operational deficiency. If the association agrees to do so, no civil penalty will be levied for a non-recurring violation.²⁰³

To assist condominium owners and the directors in understanding their rights and responsibilities, the Division is mandated to provide training programs.²⁰⁴ To insure unit owners access to the Division, it is statutorily-mandated that a toll-free number be provided.²⁰⁵

To pay for all these additional services, the annual fee paid by each unit increases from \$1 to \$4 for a period of two years. Thereafter, the fee shall be \$3 per unit.²⁰⁶

199. FLA. STAT. §§ 718.501(1)(d)(2), (4) (1991). H.B. 841 being considered by the 1992 Legislature defines "willfully and knowingly" to mean the division informed the officer or board member that his action or intended action violated the law and that the board member refuses to comply with the requirement.

200. FLA. STAT. § 718.501(1)(k) (1991). H.B. 841 being considered by the Florida Legislature would repeal this provision.

201. *Id.* Critics of this provision question the right of any agency to appear on private property without probable cause. Some equate the Division's new authority to that enjoyed by the KGB in pre-detente Russia.

202. *Id.*

203. *Id.*

204. FLA. STAT. § 718.501(1)(l) (1991).

205. FLA. STAT. § 718.501(1)(m) (1991).

206. FLA. STAT. § 718.501(2)(a) (1991).

9. Non-Developer Disclosure

In an effort to afford all prospective condominium owners an opportunity to learn of their rights and responsibilities as condominium owners prior to being obligated to purchase, the buyer must receive at the seller's expense a current copy of the declaration of condominium, articles of incorporation, by-laws and rules and regulations, as well as the "Question and Answer Sheet"²⁰⁷ required by the Act.²⁰⁸ The buyer has the right to unilaterally void the contract within seven days of the receipt by the buyer of the aforesaid documents.²⁰⁹ The seller may obtain a set of documents from the Association.²¹⁰

10. Ombudsman²¹¹

In an effort to assist condominium unit owners seeking Division assistance in avoiding bureaucratic entanglements, an office of the Condominium Ombudsman is created.²¹² The ombudsman will act as a liaison between the Division and unit owners, assisting the unit owner when necessary in the preparation and filing of a complaint to be investigated by the Division.²¹³ In addition, the ombudsman is granted such powers as are necessary to carry out the duties of his office,²¹⁴ including but not limited to having access to and use of all files and records of

207. See FLA. STAT. § 718.504 (1991) (requiring a page entitled "Frequently Asked Questions and Answers," in the format required by the Division).

208. FLA. STAT. § 718.503(2)(b)1 (1991). This provision only applies to resale of a residential unit by a unit owner who is not a developer.

209. *Id.*

210. See FLA. STAT. § 718.111(15) (1991) (the association may charge its actual costs for preparing and furnishing these documents to those requesting same).

211. H.B. 841 being considered by the Florida Legislature may repeal this provision.

212. FLA. STAT. § 718.5015(1) (1991). The Ombudsman, who must be an attorney licensed to practice in Florida, will be appointed by and serve at the pleasure of the Joint Legislative Auditing Committee. FLA. STAT. § 718.5015(2) (1991). Although the Ombudsman's principal office will be in Leon County on the premises of the Division, the Ombudsman is to be independent of the Division. FLA. STAT. § 718.5015(1) (1991). The Ombudsman and his/her staff are prohibited from political involvements. FLA. STAT. § 718.5015(2) (1991).

213. The Condominium Study Commission considered and rejected a proposal which would have provided legal assistance to unit owners filing complaints with the Division.

214. FLA. STAT. § 718.5016 (1991).

the Division.²¹⁵ The ombudsman is also granted the power to prepare reports and make recommendations, prepare legislation, and propose orders to the Division, the Governor, the Advisory Council on Condominiums, the President of the Senate, and the Speaker of the House of Representatives on any matter within the Division's jurisdiction.²¹⁶

11. Advisory Council on Condominiums

A seven-member Advisory Council on Condominiums was created as a vehicle for receiving input from the public regarding issues of concern and recommendations for changes to the Condominium law.²¹⁷ In addition, the Advisory Council is given the responsibility for reviewing, evaluating and advising the Division concerning the revision and adoption of rules, as well as recommending improvements, if needed, to the Division education program.²¹⁸

C. *Miscellaneous*

In an effort to conform the definition of a "time share estate" within the Condominium Act to that used in the Time Share Act,²¹⁹ section 718.103(22) was rewritten to provide that a "time share estate" means any interest in a unit under which the exclusive right of use, possession or occupancy of the unit circulates among the various purchasers of a time share plan pursuant to chapter 721 on a recurring basis for a period of time.²²⁰

IV. CONCLUSION

The beauty of our laws is their ability to change to meet the needs of society. As new concepts have been coupled with the condominium

215. FLA. STAT. § 718.5016(1) (1991).

216. FLA. STAT. § 718.5016(2) (1991).

217. FLA. STAT. § 718.5019(1) (1991). Two members are to be appointed by the Speaker of the House, two appointed by the President of the Senate, and three appointed by the Governor. *Id.* At least one appointee must represent time share condominiums. *Id.* To insure continuity on the Board, a staggered appointment will be effectuated by having one appointee of the Governor, the Speaker and President serve one year terms, while the others serve a two year term. *Id.*

218. FLA. STAT. § 718.5019(2) (1991).

219. 1990 Fla. Laws. ch. 721.

220. FLA. STAT. § 718.103(22) (1991).

format, as our experiences have expanded, and as court interpretations have suggested the need, new legislation has been added to address operational problems and new areas of potential abuse. Legislation conceived twenty-eight years ago to recognize the condominium concept of property ownership has grown into a body of law governing almost every aspect of communal living. The result is a mechanism designed to insure and protect the viability of the condominium concept.