

June 1964

The Florida Condominium Act Applied

Russell McCaughan

Follow this and additional works at: <https://scholarship.law.ufl.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Russell McCaughan, *The Florida Condominium Act Applied*, 17 Fla. L. Rev. 1 (1964).

Available at: <https://scholarship.law.ufl.edu/flr/vol17/iss1/1>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

THE FLORIDA CONDOMINIUM ACT APPLIED

RUSSELL McCAUGHAN*

On May 13, 1963, Florida adopted a statute¹ legitimizing condominium ownership. Regardless of the economic and social success of this form of property ownership, the event is noteworthy in its effect upon the real property law of this state.

This article is written with the purpose and desire of presenting some assistance to the practitioner in his efforts to analyze and evaluate the new legislation. Thus the following material is organized in a manner designed to set forth, discuss, and correlate the various statutory provisions.²

COMMON LAW CONDOMINIUM

Definition

Whether condominium form of ownership is possible without statutory sanction is a matter of definition as well as opinion. Although condominium ownership is said to have existed for long periods of time in some countries, such ownership did not always possess the same attributes currently ascribed to a condominium title. True, separate ownership of parts of buildings has long been recognized, but such did not necessarily include common ownership of the land or common ownership of various parts of the building; hence the need for a definition exists. The law dictionaries are not helpful.³ One authority has stated that condominium "means individual ownership in fee simple of a one-family unit in a multi-family structure coupled with ownership of an undivided interest in the land and in all other parts of the structure held in common with all of the other

*B.A. 1932, M.A. 1935, LL.B. 1940, University of Florida; member of Broward County and American Bar Associations; member of the Board of Governors, Florida Bar.

The author expresses his appreciation to Professor Ralph Boyer and Messrs. Robert B. Cole and Alston Fisher for their invaluable criticism and suggestions.

1. FLA. STAT. ch. 711 (1963).

2. See Table of Headings and Subheadings following this article.

3. CONDOMINIA. In the civil law. Co-ownerships or limited ownerships, such as *emphyteusis*, *superficies*, *pignus*, *hypotheca*, *ususfructus*, *usus*, and *habitatio*. These were more than *jura in re aliena*, being portion of the *dominium* itself, although they are commonly distinguished from the *dominium* strictly so called. BLACK, LAW DICTIONARY 367 (4th ed. 1951).

owners of one-family units."⁴ Although this definition expresses the practical result of condominium ownership, it does not include the prerequisite legal requirements.

Legal Requirements

Condominium ownership cannot exist unless the legal climate will permit the conditions implied in the term.⁵ These conditions include:

- (1) ownership of part of the building as an interest in land;
- (2) restraint against the partition of the commonly-owned land and portions of the building;
- (3) restraint against the separation of the share in the commonly-owned property from the separately-owned unit;
- (4) separate assessment of units for taxation;
- (5) provisions for the use, management, and maintenance of the commonly-owned property; or, more briefly stated, provisions for operation of the condominium.

If these requirements for a condominium can exist in the absence of an enabling statute, then a common-law condominium can be created by contract.⁶ Prior to the passage of the Condominium Act some attorneys had expressed the view that the condominium form of ownership was legal in Florida in the absence of statute.⁷ Even if such opinion had been accepted without objection, it was still unconfirmed by judicial or legislative sanction.

Need for Legislation

Several common-law condominiums were established in Florida by contract prior to adoption of the Condominium Act. The titles to the units were approved for title insurance and mortgage purposes, and units were sold.⁸ Nevertheless, money sources were reluctant to enter the condominium market; and builders, developers, and mortgage brokers wanted a statute expressly sanctioning the condominium form of ownership. It was hoped that a statute would provide assurances needed to expedite acceptance of the concept.

4. RAMSEY, *CONDOMINIUM: THE NEW LOOK IN CO-OPS* (1961).

5. McCaughan, *Legality of Condominium in Florida*, May 1962.

6. For a discussion of the Florida authorities bearing upon these questions before the adoption of the Condominium Act, see McCaughan, *op. cit. supra* note 5.

7. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 319; McCaughan, *op. cit. supra* note 5; see also 4 POWELL, *REAL PROPERTY* §§633.1(3), .8(1) (Boyer ed. 1964).

8. One of these condominiums is the Atlantic Cloisters, 1299 South Ocean Blvd., Boca Raton, Florida, the declaration for which is recorded in 877 O.R. 89

THE FLORIDA ACT

History

Due to increased demand for a statute, it became apparent that a bill providing for condominium ownership would be introduced in the 1963 Legislature. On March 22, 1963, several members of The Florida Bar decided to draft a bill in order to meet this demand.⁹ Although the authors of the bill were not members of the legislature, nevertheless an account of the drafting may be useful in illustrating the sources of the act, particularly when the sources include the laws of other jurisdictions. As the intent of the authors may be relevant in construction of the act,¹⁰ it is hoped that the comments offered will be of assistance in future use of the statute.

The Florida Condominium Act is original in form, but in its preparation the authors referred to the statutes and literature then available, and from these sources check lists were prepared.¹¹ The authors concluded that a bill might contain the following three categories of provisions:

- (1) mandatory or definitive provisions that would establish substantive law;
- (2) permissive provisions that would apply at the option of an author of an instrument creating a condominium;
- (3) administrative provisions that would govern a condominium in the event no provision is made in the condominium documents for the subject matter concerned.

The items in the check lists were first grouped into the above categories. They were next accepted or rejected, and the accepted ones were arranged in somewhat logical sequence. From this process the original draft took shape. This draft was subjected to thorough revision in order to incorporate the judgment of all of the authors and subsequently was submitted to a number of persons, including representatives of the Federal Housing Administration, for further judgment and comment.

of the Public Records of Palm Beach County, Florida.

9. The bill was drafted by the following members of The Florida Bar: Robert B. Cole, Miami; Edwin M. Clarke, Jacksonville; Robert M. Ervin, Tallahassee; and Russell McCaughan, Fort Lauderdale.

10. *Weiss v. Leonardy*, 160 Fla. 570, 36 So. 2d 184 (1948).

11. *E.g.*, HAWAII REV. LAWS ch. 180 (Supp. 1961); P.R. LAWS ANN. tit. 31, ch. 150 (1958); Senate Bill 600, 1963 Cal. Legislature (proposed California Condominium Act); Senate Bill 928, 1963 N.Y. Legislature (proposed New York Condominium Act); House Bill 136, 1963 Fla. Legislature (original condominium proposal for which the enacted bill was substituted); FHA Model Statute for Creation of

Purpose

The scope of the act was determined by acceptance of the concept that condominium is merely a manner of owning real property and is not a new estate created by statute. Consequently, the primary purpose of the act is to set forth the substantive law required for condominium ownership and to recognize the condominium as a form of ownership of real property. The desire was to treat a condominium unit in the same manner as any other parcel of real estate. Thus, distinctive treatment is limited to that which was deemed to be a minimum interference with private property and is stated in the form of governing principles that appeared to be desirable in the interest of condominium owners. The detail required for the creation and operation of a condominium is left, to a large degree, to the condominium documents. Inasmuch as common-law condominiums had previously been established by contract, it was intended that the statute should not cast any doubt upon the validity of such properties but instead would confirm such ownership. The delicacy of dealing with property laws was also of much concern.

The purpose is summarized in the second section of the act.¹²

The purpose of this law is to give statutory recognition to the condominium form of ownership of real property. It shall not be construed as repealing or amending any law now in effect except those in conflict herewith, and any such conflicting law shall be affected only insofar as they apply to condominiums.

Definition and Application of Terms

The need for a definition of condominium has been previously mentioned. A definition is included in the statute, but the very terms employed in the definition also require definition if they are to be sufficiently concise for use throughout the law. Some of the terms defined by the law will be discussed in light of the sections of the statute bearing upon them. They will be considered in an order designed to aid in an understanding of the act.

Apartment Ownership; Kerr, *Will Condominium Come to Connecticut?*, 36 CONN. B.J. 481 (1962); *The Condominium*, 14 HASTINGS L.J. 189 (1963); condominium declaration of the Atlantic Cloisters, *supra* note 8. For a comparison of the various state statutes see 4 POWELL, REAL PROPERTY §§633.18-.33 (Boyer ed. 1964).

In preparing these check lists the authors of the bill were aided by the suggestions of Hart McKillop, Winter Haven, Fla., member of The Florida Bar.

12. FLA. STAT. §711.02 (1963).

a. Condominium Property

The definition of condominium property embraces all of the property of a condominium and is stated as follows:¹³

Condominium property means and includes the land in a condominium, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant there-to intended for use in connection with the condominium.

In drafting the statute it became obvious that unless concise terms were employed, there would be endless repetition—the above definition provides a good example. Thus “condominium property” is the all-inclusive term employed, and it includes everything in the condominium that is in the nature of real property. “Personal property” was deleted from the first draft as being in conflict with the purpose of the statute.¹⁴ This does not, however, prevent the inclusion of personal property in the condominium property by provisions of a declaration, but the interest in such personal property would not be an interest in land.

Perhaps worthy of note is the provision that the land of a condominium need not be contiguous. Thus a condominium may include a noncontiguous golf course, parking area, or land for other uses.

b. Unit

The basic purpose of condominium ownership is to provide a means by which one may hold title to a part of a building. All known condominiums in Florida are residential structures in which a privately owned part is usually called an apartment, although the terms “unit” and “private dwelling” have been employed. One existing building does include apartments and offices. Some planning has been directed toward the use of condominiums for commercial purposes within the state, including an office building, a shopping center, and an apartment and hotel complex. In other jurisdictions this effort has gone farther. Even the construction of a condominium marina with privately owned portions including boat slips has been suggested.

13. FLA. STAT. §711.03 (9) (1963).

14. A basic purpose of the act is to recognize ownership of part of a building as real property, and section 711.04(1) provides that a condominium parcel is real property. A condominium parcel includes a share in the common elements and the common elements consist of all of the condominium property not within the units. If personal property were included in the statutory definition of condominium property, the effect would be to convert personal property into real property. It would also interfere with the plan of subsections of the act having to do with the common elements.

Hence the term "unit" is used rather than "apartment," which is employed in some statutes. Section 711.03 (13) defines "unit" as

a part of the condominium property which is to be subject to private ownership.

Although the term "unit" as defined in section 711.03 (13) is not limited to a building or even to improvements, it is limited to improvements by the definition of "condominium" in section 711.03 (7), which refers to units of improvements, and by section 711.06 in which all land is included in the common elements. Unit is not restricted to any particular type or design of the property as is the case under those statutes in which an apartment is defined to be a portion of the improvement capable of independent use. Instead, the term may refer to any part of the condominium property that is subject to private ownership, such as a storage room, the above-mentioned boat slip, or a neighbor's spare bedroom. Any restrictions against the subdivision of units must be stated in a declaration.

c. Common Elements

The property of a condominium is divided into two categories, the privately-owned portions that constitute the units and the remaining condominium property that constitutes the common elements. The definition states it just that simply:¹⁵

Common elements means the portions of the condominium property not included in the units.

Some common elements may be reserved for the use of a certain unit or units to the exclusion of other units, in which event such common elements are designated as limited common elements.¹⁶ Since limited common elements are defined as being a part of the common elements,¹⁷ wherever the latter term is used in the statute, it will include the former.

The simplicity of the definition of common elements is somewhat misleading for the term is modified by section 711.06, which enumerates certain common elements. The draft of section 711.06 as first presented to the committees of the legislature provided that the items therein listed would be included in the common elements "unless otherwise provided in the Declaration." This form was consistent with the definitions of both "unit" and "common elements." The phrase "unless otherwise provided in the Declaration" was deleted at

15. FLA. STAT. §711.03 (4) (1963).

16. FLA. STAT. §711.03 (11) (1963).

17. *Ibid.*

the request of the subcommittee of the House, so the section is now absolute in stating that the listed items are part of the common elements. The section provides as follows:¹⁸

(1) Common elements includes within its meaning the following items:

(a) The land on which the improvements are located and any other land included in the condominium property whether or not contiguous.

(b) All parts of the improvements which are not included within the units.

(c) Easements through units for conduits, ducts, plumbing, wiring and other facilities for the furnishing of utility services to units and the common elements.

(d) An easement of support in every portion of a unit which contributes to the support of a building.

(e) Installations for the furnishing of utility services to more than one unit or to the common elements or to a unit other than the unit containing the installation.

(f) The property and installations in connection therewith required for the furnishing of services to more than one unit or to the common elements.

(2) The declaration may designate other parts of the condominium property as common elements.

This section clearly states that all land in the condominium is part of the common elements. If part of the land, such as automobile parking areas or garden plots, is to be used only by a certain unit owner or owners to the exclusion of others, such parts must be treated as limited common elements.¹⁹

Although section 711.06 states that the items enumerated therein are part of the common elements, the items are in no way a restriction upon the author of a condominium except insofar as the land is concerned. Subsections (1)(c) to (1)(f) merely state requirements that would be included in a declaration were they not set forth in the statute; thus they make unnecessary the repetition of these provisions in the condominium documents, and also serve to protect the unit owner against the omission of such provisions in the documents. Subsection (1)(b) merely divides the improvements between the common elements and units, but makes no restrictions as to what portions of the improvements must be placed in either.

18. FLA. STAT. §711.06 (1963).

19. FLA. STAT. §711.03(11) (1963).

d. Condominium

The terms "condominium property," "unit," and "common elements" are all employed in the definition of condominium:²⁰

Condominium is that form of ownership of condominium property under which units of improvements are subject to ownership by different owners, and there is appurtenant to each unit as part thereof an undivided share in the common elements.

Condominium is not a new estate or a different kind of property. It is merely a new form of ownership, the essential features of which are separate ownership of units of improvements and common ownership of the land and other common elements—undivided shares of the latter being appurtenant to the units.

e. Condominium Parcel

Although the term "unit" is often used without reference to any part of the condominium property, other than the unit itself, in many instances it is necessary to include both the unit and its appurtenant part of the common elements. This is particularly true when treating the subject of taxation. The word "parcel" was borrowed from the tax laws,²¹ and the term "condominium parcel" was devised to avoid repeating the phrase "unit together with the undivided share in common elements appurtenant thereto." The term is defined as follows:²²

Condominium parcel means a unit together with the undivided share in the common elements which is appurtenant to the unit.

Although the definition of condominium parcel refers generally to the undivided share in the common elements as being appurtenant to a unit, subsection (2) of section 711.04 describes the appurtenances in greater detail:

- (2) There shall pass with a unit as appurtenances thereto:
 - (a) An undivided share in the common elements.
 - (b) The exclusive right to use such portion of the common elements as may be provided by the declaration.
 - (c) An exclusive easement for the use of the air space occupied by the unit as it exists at any particular time and as the

20. FLA. STAT. §711.03 (7) (1963).

21. FLA. STAT. §193.01 (1963).

22. FLA. STAT. §711.03 (8) (1963).

unit may lawfully be altered or reconstructed from time to time, which easement shall be terminated automatically in any air space which is vacated from time to time.

(d) An undivided share in the common surplus.

(e) Such other appurtenances as may be provided in the declaration.

The purpose of subsection (b) is to assure exclusive use of limited common elements. Subsection (c) assures to a unit owner the exclusive right to use the air space occupied at any time by his unit, regardless of alteration, reconstruction, or shifting of the building or ground. This easement follows the unit and is terminated automatically in any space that is vacated. It protects against encroachments, and if the improvements are destroyed, it clears the air space of all private rights except title to air space when such has been granted.²³

f. Common Expenses

The definition in section 711.03 (5) states:

Common expenses means the expenses for which the unit owners are liable to the association.

This is supplemented by section 711.14 (1):

Common expenses shall include the expenses 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 law, the declaration or the bylaws.

Although the items listed in this section are common expenses, this list is not exclusive, and the declaration or bylaws may direct that any other expense shall be included within the term "common expense." Section 711.15 (6) adds another common expense by providing that assessments that remain unpaid after foreclosure of a first mortgage shall be a common expense. As hereafter suggested,²⁴ it seems that assessments unpaid after foreclosure of any lien or mortgage will also be common expense. The statute provides that the manner of sharing common expenses shall be set forth in the declaration.²⁵

23. See note 98 *infra* and accompanying text.

24. See 3. *Mortgagees* p. 16 *infra*.

25. FLA. STAT. §§711.08 (1) (g), .14 (2) (1963). See note 101 *infra* and accompanying text.

g. Assessment

Funds are provided for common expenses by assessment of unit owners. The term "assessment" is defined by section 711.03 (1) as

a share of the funds required for the payment of common expenses which from time to time is assessed against the unit owner.

The statute requires that the assessment be made²⁶

in the proportions or percentages of sharing common expenses provided in the declaration.

h. Association

All condominiums will require maintenance, and all will require administration for the making and collection²⁷ of assessments. Some will require the operation of equipment and service facilities, some the rendering of services. Administration and management of the condominium is defined as "operation,"²⁸ and the entity responsible for such operation is designated as "the association."²⁹

i. Declaration

The instrument or instruments used to create a condominium are designated, regardless of their nature or titles, as a declaration of condominium. Section 711.03 (10) provides:

Declaration, or declaration of condominium, means the instrument or instruments by which a condominium is created, and such instrument or instruments as they are from time to time amended.

This definition is helpful because it standardizes a simple term that is descriptive and easily understood.

Legal Requirements for Condominium

If the statute is to serve its purpose, it must set forth the legal requirements for the existence of condominium ownership. In the following subsections the statute will be applied to these requirements in the order in which they have been previously noted.³⁰

26. FLA. STAT. §711.14 (2) (1963).

27. FLA. STAT. §711.15 (1963). See *f. Operation — Collection of Assessments* p. 15 *infra*.

28. FLA. STAT. §711.03 (12) (1963).

29. FLA. STAT. §711.03 (2) (1963).

30. See note 5 *supra* and accompanying text.

a. Interest in Land

The definition of condominium in the absence of statute³¹ calls for fee simple ownership of units. Indeed, the very reason for condominium ownership is to give the unit owner a title to land and improvements that he can convey and mortgage. He cannot have this unless a condominium parcel, consisting of a part of a building and an undivided interest in the land, is by the terms of the statute considered as land. This requirement is met by section 711.04, which sets forth the attributes of condominium parcels:

A condominium parcel is a separate parcel of real property, the ownership of which may be in fee simple, or any other estate in real property recognized by law.

Additional property rights of the unit owner are set forth in section 711.04 (3):

The owner of a unit is entitled to the exclusive possession of his unit. He shall be entitled to use the common elements in accordance with the purposes for which they are intended, but no such use shall hinder or encroach upon the lawful rights of owners of other units.

b. Restraint Against Partition of Common Elements

Co-owners of real estate in Florida have had the right of partition for over one hundred years.³² If this right were asserted successfully against the common elements of a condominium, it would result in a division of the land and other common elements into separately owned parcels or result in a sale of the common elements. In either event, the ownership structure of the condominium would be destroyed. Such partition is precluded by section 711.05 (3):

The shares in the common elements appurtenant to units shall remain undivided, and no action for partition of the common elements shall lie.

This restraint will not apply after the termination of a condominium because the unit owners will then own the condominium property as tenants in common.³³

31. See note 4 *supra* and accompanying text.

32. FLA. STAT. §§66.01-08 (1963). These statutes were originally enacted in 1844.

33. FLA. STAT. §711.16 (2) (1963).

c. Restraint Against Separation of Units From Common Elements

Separation of the unit from its appurtenant share in the common elements, such as by execution sale or tax sale of one without the other, could be as damaging to a unit owner as partition of the common elements. In fact, separation of the unit from its appurtenant share in the common elements would be the result of partition. Section 711.05 not only prohibits such separation but also provides that the shares in the common elements shall always pass with the unit:

(1) The undivided share in the common elements which is appurtenant to a unit shall not be separated therefrom and shall pass with the title to the unit whether or not separately described.

(2) A share in the common elements appurtenant to a unit cannot be conveyed or encumbered except together with the unit.

In addition to this protection, section 711.04(2) provides that an undivided share in the common elements shall pass as an appurtenance to a unit, and section 711.07 provides that the description of a condominium parcel shall include the appurtenant share in the common elements and all other appurtenances whether or not separately described.

d. Separate Taxation of Units

One of the prime advantages of condominium ownership over other forms of cooperative ownership is the insulation of the unit owner from the liabilities of other owners. If a condominium were taxed as a whole, as is a corporate cooperative, the failure of one unit owner to pay his share of the taxes would either jeopardize the title of the entire project or force the other owners to pay the share of the defaulting owner. It was the opinion of some attorneys that tax assessors had the power, but not the specific authority, before enactment of the Condominium Act, to assess condominium parcels separately.³⁴ Nevertheless, there was no obligation to do so, and there was a question as to the survival of some covenants after tax sale.³⁵ The desire of mortgagees to have statutory protection against all tax liens except those upon the mortgaged unit was one of the principal reasons for the present statute.

34. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 381; McCaughan, *op. cit. supra* note 5.

35. McCaughan, *op. cit. supra* note 5.

The act affirmatively directs that condominium parcels shall be separately assessed, and it limits the lien of the tax to the condominium parcel assessed. Section 711.19 (1) provides as follows:

Property taxes and special assessments assessed by municipalities, counties and other taxing authorities shall be assessed against and collected on the condominium parcels and not upon the condominium property as a whole. Each condominium parcel shall be separately assessed for ad valorem taxes and special assessments as a single parcel. The taxes and special assessments levied against each condominium parcel shall constitute a lien only upon such condominium parcel so assessed and upon no other portion of the condominium property.

Survival of the terms of the declaration of condominium after tax sale is assured by section 711.19 (2):

All provisions of a declaration relating to a condominium parcel which has been sold for taxes or special assessments shall survive and be enforceable after the issuance of a tax deed or master's deed upon foreclosure of an assessment, [*sic*] certificate or lien, a tax deed, tax certificate, or tax lien, to the same extent that they would be enforceable against a voluntary grantee, immediate, mediate, or remote, of the owner of the title immediately prior to the delivery of the tax deed or master's deed.

Much of the language of this subsection is derived from section 192.33 of the Florida Statutes. The comma between the words "assessment" and "certificate" is a clerical error and was inadvertently inserted in one of the drafts. Since this subsection refers specifically to the declaration and does not mention bylaws, the question may arise whether provisions of the bylaws will survive a tax sale. The act provides that the bylaws must be either included in the declaration or annexed to it.³⁶ Nevertheless, in order to prepare for this question, it might be best for the declaration to recite the annexation of the bylaws as an exhibit if they are not included in the declaration itself.

The 1963 Legislature was highly conscious of the need to preserve sources of revenue, and there was concern that condominium ownership would result in an increase in the homestead exemption from taxation beyond that available to multiple dwellings. Section 711.19 (3), which negates any change in this exemption, was inserted at the direction of the Senate Committee.

36. FLA. STAT. §711.11 (1) (1963); see discussion pp. 39, 49.

e. Operation — Use and Maintenance of Common Elements

A distinctive feature of the ownership of a condominium parcel is the ownership of a share in the common elements as a tenant in common. The statute confirms the common-law right of a unit owner, as a tenant in common, to the use of the common elements:³⁷

The owner of a unit is entitled to the exclusive possession of his unit. He shall be entitled to use the common elements in accordance with the purposes for which they are intended, but no such use shall hinder or encroach upon the lawful rights of owners of other units.

Statutory protection of the common elements and establishment of responsibility for their maintenance is more important than affirmation of the right to use the common elements, because this right was clear before enactment of the statute.³⁸ At common law each owner of a part of a building had to use his portion with due regard for the rights of others, but in the absence of a contract the obligation to repair was not clear.³⁹ This obligation can be established by contract in the condominium documents, but it is a protection to owners to have the rights and responsibilities in this area spelled out in the statute. As before mentioned, section 711.06 (1) enumerates the common elements.⁴⁰ By these provisions all of the unit owners are granted such use of the property included within the boundaries of individual units as is required for the use of their respective units. The responsibility for the protection and maintenance of these and all other common elements is set forth in section 711.13 as follows:

(1) The maintenance of the common elements shall be the responsibility of the association.

(2) There shall be no material alteration or substantial additions to the common elements except in a manner provided in the declaration.

(3) No unit owner shall make any alterations in the portions of the improvements of a condominium which are to be maintained by the association or remove any portion thereof, or make any additions thereto, or do any work which would jeopardize the safety or soundness of the building containing his unit or impair any easement.

37. FLA. STAT. §711.04 (3) (1963).

38. 14 AM. JUR. *Cotenancy* §§23, 24, 27 (1962); 86 C.J.S. *Tenancy in Common* §§19, 20, 25, 26 (1954).

39. 17A AM. JUR. *Easements* §129 (1957); 2 C.J.S. *Adjoining Landowners* §27 (1936, Supp. 1964).

40. See note 18 *supra* and accompanying text.

Maintenance of the common elements by the association is aided by the right of access granted by section 711.12 (5):

The association shall have the irrevocable right to have access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any common elements therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common elements or to another unit or units.

f. Operation — Collection of Assessments

The requirement that assessments be made to defray the common expenses has been previously mentioned.⁴¹ An unpaid assessment is little comfort to other unit owners. Consequently, some means of enforcing collection is essential to the satisfactory operation of a condominium.

Personal Liability.

1. *In General.* Section 711.15 (1) provides for liability for assessments as follows:

A unit owner, regardless of how title is acquired, including without limitation a purchaser at a judicial sale, shall be liable for all assessments coming due while he is the owner of a unit. In a voluntary conveyance the grantee shall be jointly and severally liable with the grantor for all unpaid assessments against the latter for his share of the common expenses up to the time of such voluntary conveyance, without prejudice to the rights of the grantee to recover from the grantor the amounts paid by the grantee therefor.

The first sentence in this subsection establishes the personal liability of a unit owner for all assessments coming due while he is the owner of a unit. The second sentence comes from section 24 of the FHA Model Statute for Creation of Apartment Ownership. This sentence extends liability for unpaid assessments to the grantee of a conveyance of a condominium parcel. It does not mention the passing of title by death. Consequently, the liability of a decedent's estate for assessments unpaid at death would seem to be limited to payment of claims filed against the estate.⁴²

2. *Waiver.* Section 711.15 (2) provides:

41. See p. 10 *infra*.

42. FLA. STAT. §733.16 (1963).

The liability for assessments may not be avoided by waiver of the use or enjoyment of any common elements or by abandonment of the unit for which the assessments are made.

This provision is common to many condominium statutes.⁴³ Its obvious purpose is to preclude avoidance of liability for common expenses. The need for such a provision in the Florida statute is doubtful in view of the personal liability imposed by section 711.15 (1), and the directions concerning the making of assessments and the sharing of common expenses contained in section 711.14. It was included as a precaution in view of its prevalence in other statutes.

3. *Mortgagees.* Section 711.15 (6), which is another provision concerning liability for assessments, comes from section 23 (b) of the FHA Model Statute for Creation of Apartment Ownership. It provides as follows:

Where the mortgagee of a first mortgage of record or other purchaser of a condominium unit obtains title to the condominium parcel as a result of foreclosure of the first mortgage, such acquirer of title, his successors and assigns, shall not be liable for the share of common expenses or assessments by the association pertaining to such condominium parcel or chargeable to the former unit owner of such parcel which became due prior [to] acquisition of title as a result of the foreclosure. Such unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners including such acquirer, his successors and assigns.

The obvious omission of the word "to" following the word "chargeable" in the first sentence of this subsection (6) is verified by a comparison with the FHA provision.

The first sentence in section 711.15 (6) is appropriate in the FHA Model Act under which the lien for assessments is a continuing one and is not dependent upon recording a claim of lien. However, it seems unnecessary under the Florida act to state that a purchaser at or after foreclosure of a first mortgage will not be liable for assessments coming due prior to the acquisition of title as a result of foreclosure, because a purchaser at a judicial sale is liable only for assessments coming due while he is the owner.⁴⁴ Furthermore, the priority of liens is established by recording, and foreclosure of a mortgage would eliminate the lien of all assessments for which a claim of lien is filed subsequent to the mortgage and prior to the foreclosure sale.⁴⁵ On the other hand, it certainly was not the authors' intent that a claim

43. 4 POWELL, REAL PROPERTY ¶633.24 (Boyer ed. 1964).

44. FLA. STAT. §711.15 (1) (1963).

45. FLA. STAT. §711.15 (4); see note 59 *infra* and accompanying text.

of lien for assessments would be avoided by a subsequently recorded mortgage; and in view of the provision that the lien for assessments is effective from recording, it does not seem that such a result would follow. The likelihood of a mortgage being recorded subsequent to a claim of lien for assessments is, of course, remote. The singling out of first mortgagees for preference in the FHA form of statute is no doubt due to the interest of the Federal Housing Administration in first mortgages, but the liability for assessments coming due prior to a sale in foreclosure of any lien would seem to be the same as that provided by the Florida Statute after foreclosure of first mortgages.

The last sentence of section 711.15 (6), declaring assessments remaining unpaid after foreclosure of a first mortgage to be common expenses, may not be necessary, but it is helpful in clarifying liability for payment. Even though this provision mentions only the assessments remaining unpaid after foreclosure of a first mortgage, it must be recognized that the common expenses represented by assessments remaining unpaid after foreclosure of any lien must be paid from some source. The lien for the share of the common expenses in question would have been eliminated by foreclosure of the prior lien. A reassessment in the amount of the unpaid assessment cannot be made against the new unit owner because (1) common expenses must be assessed against unit owners in the proportions provided in the declaration; (2) a purchaser at a judicial sale is liable only for assessments coming due while he is an owner; and (3) such would violate the priority of the liens established by recording. The common expense represented by the unpaid assessment is still common expense; thus unless the collection of the unpaid assessment can be made upon the personal liability of the former owner, it seems that provision for payment must be included in a future assessment against all owners under section 711.14 (2).

The statute may go too far in protecting mortgagees from assessments. The mortgagee is not an owner⁴⁶ and hence is not liable under section 711.15 (1). The priority of liens for assessments is established by recording, and a lien for assessments cannot be filed until an assessment is due.⁴⁷ Consequently, if a mortgage is so great as to leave no equity in a unit for the owner, and if the owner is judgment proof, there is no way to enforce payment of assessments until a mortgage is foreclosed and title is taken by a new owner. This situation might be avoided if the statute provided that all mortgages and other liens will be subordinated to the lien of the assessment after the association gives notice of the owner's default in the payment of assessments.⁴⁸

46. See note 83 *infra*.

47. FLA. STAT. §711.15 (4) (1963).

48. The Illinois statute on condominiums has a similar provision. See ILL.

4. *Statement.* The association operating the condominium is required to furnish a certificate showing the amount of unpaid assessments against a unit owner.⁴⁹ The certificate shall be furnished to the owner and to the holders of liens upon his condominium parcel. A person, other than the owner, relying thereon will be protected.

Limitation of Liability.

1. *Assessments.* The rights and liabilities of tenants in common at common law are well established. A cotenant's relief from expenditures is ordinarily obtained by right of contribution or subrogation, which requires an initial expenditure in excess of the cotenant's share.⁵⁰ In order to insure that the initial liability of a unit owner for common expense does not exceed his established share, the act limits such liability as follows:⁵¹

(1) The liability of the owner of a unit for common expenses shall be limited to the amounts for which he is assessed from time to time in accordance with this law, the declaration and bylaws.

(2) The owner of a unit shall have no personal liability for any damages caused by the association on or in connection with the use of the common elements. A unit owner shall be liable for injuries or damages resulting from an accident in his own unit to the same extent and degree that the owner of a house would be liable for an accident occurring within his house.

The personal liability of a unit owner does not arise until payment of an assessment made against him is due,⁵² and subsection (1) of the foregoing section limits this liability to the amounts assessed. The question immediately arises as to liability for debts of the association for which no assessment has been made, particularly tort liability in connection with the common elements. The owner is purportedly exempt from such liability by section 711.18 (2). Inasmuch as section 711.14 (2) affirmatively states that assessments shall be made for the payment of common expenses, it seems that a creditor of the association should be able to obtain relief through enforcement of that section.

2. *Mechanics' Liens.* A further limitation of the unit owner's liability is set forth in section 711.20, which concerns liens against the condominium property. Section 711.20 (1) provides that no liens

ANN. STAT. ch. 30, §309 (Smith-Hurd).

49. FLA. STAT. §711.15 (7) (1963).

50. See note 39 *supra* and accompanying text.

51. FLA. STAT. §711.18 (1963).

52. FLA. STAT. §711.15 (1) (1963).

of any nature will arise against the condominium property as a whole without unanimous consent of the unit owners. Without such consent liens will be created only against the individual condominium parcels.

If labor or materials furnished to the common elements are properly authorized by the association, section 711.20 (2) allows liens to be filed against each of the condominium parcels in proportion to the owner's liability for common expenses. In such event the lienors are relieved of the burden of dealing with each unit owner.⁵³ Service and delivery of notice may be effected upon the association, and suits to enforce such liens may be brought against the association without joinder of the unit owners. This seems to be a practical solution to the problem of enforcing liens granted against condominium parcels alone for labor and materials that were delivered to the association for the benefit of the common elements.

The intention of the authors of the act was to insure that all liens under the Mechanics' Lien Law shall attach only to each condominium parcel; and it was intended that where the work or materials for the benefit of the condominium were duly authorized by the association, liens would attach upon effecting the required service or delivery of notice to the association alone. Unfortunately, section 711.20 (4) refers only to labor and materials furnished to the common elements, whereas in some condominiums the association is required to maintain as a common expense the structural parts of the building that are included in the boundaries of the units.⁵⁴ It is only equitable that the benefits of section 711.20 (4) should be available to lienors furnishing labor and materials duly authorized by the association as a proper common expense to the condominium property.

In the event a lien does become effective against more than one condominium parcel, section 711.20 (3) gives to each owner the right to secure a release of the lien as to his condominium parcel by payment of the proportionate amount attributed to his parcel.

Interest. An inducement for the prompt payment of assessments is found in provisions establishing liability for interest. Section 711.15 (3) provides:

Assessments and installments thereon not paid when due shall bear interest from the date when due until paid at the rate provided in the declaration, not to exceed the rate allowed by law, and if no rate is provided then at the legal rate.

Although personal liability for the interest is not mentioned, such

53. FLA. STAT. §711.20 (4) (1963).

54. This is proper under §711.14 (1), which allows any expense to be designated as a common expense by the declaration.

liability should exist because the liability for interest should be the same as for the debt.⁵⁵

Lien for Assessments. It seems reasonable to assume that a lien is the most effective device to enforce collection of debts. Presumably a contractual lien for assessments could be established by the condominium documents, but the authority of a statutory lien is desirable. A lien to secure payment of assessments is common to condominium statutes, but in some states the lien is a continuing one, creating the necessity of stating exceptions in favor of mortgagees and taxes.⁵⁶

The lien under the Florida act is established by section 711.15 (4):

The association shall have a lien on each condominium parcel for any unpaid assessments, and interest thereon, against the unit owner of such condominium parcel. If authorized by the declaration said lien shall also secure reasonable attorney's fees incurred by the association incident to the collection of such assessment or enforcement of such lien. Said lien shall be effective from and after the time of recording in the public records in the county in which the condominium parcel is located of a claim of lien stating the description of the condominium parcel, the name of the record owner, the amount due and the date when due, and the lien shall continue in effect until all sums secured by the lien shall have been fully paid. Such claims of liens shall include only assessments which are due and payable when the claim of lien is recorded. Such claims of liens shall be signed and verified by an officer or agent of the association and shall then be entitled to be recorded. Upon full payment the party making payment shall be entitled to a recordable satisfaction of the lien. All such liens shall be subordinate to the lien of a mortgage or other lien recorded prior to the time of recording of the claim of lien.

Since provision for a lien is the key to collection of assessments, and since the lien affects the title to a unit, it is desirable to determine the property subject to the lien, the liability secured, the effective date of the lien, and the manner of perfecting the lien.

1. *Property Subject to the Lien.* Assessments are made against unit owners and not against units.⁵⁷ The lien merely secures payment of

55. *Parker v. Brinson Constr. Co.*, 78 So. 2d 873 (Fla. 1955); 30 AM. JUR. *Interest* §2 (1958); 47 C.J.S. *Interest* §70 (1946).

56. 4 POWELL, *REAL PROPERTY* ¶633.26 (2) (Boyer ed. 1964).

57. FLA. STAT. §711.14 (2) (1963).

a debt of the unit owner and is enforceable against his condominium parcel.⁵⁸

2. *Liability Secured.* In essence, section 711.15 (4) states that the lien secures:

- (1) unpaid assessments and interest thereon;
- (2) reasonable attorney fees if authorized by the declaration;
- (3) only assessments that are due and payable when the claim of lien is recorded.

The first draft of the act provided that the lien would secure all assessments coming due after filing the claim of lien. This provision was subsequently modified so that assessments made subsequent to a claim of lien would be secured only if the claim of lien so stated. Before the draft of the act was submitted to the committees of the legislature, this provision was deleted and the present one inserted for unknown reasons. Assessments coming due after filing a claim of lien may be secured by filing a subsequent claim of lien.

3. *Effective Date.* The lien is made effective from the time of recording.⁵⁹ The time of recording is the time of filing.⁶⁰ The lien continues until all sums secured have been paid.

4. *Manner of Perfecting the Lien.* No lien exists until a claim of lien is filed, and a claim must contain: a description of the condominium parcel, the name of the record owner, the amount due and date when due, and the signature and verification of an officer or agent of the association.⁶¹ Whether the claim of lien must specifically include attorneys' fees when such are allowed by the declaration is not stated, but it would seem prudent for the lienor to do so.

In view of section 695.11 of the Florida Statutes it seems unnecessary to provide in the last sentence of subsection 711.15 (4) that the lien is subordinate to prior recorded mortgages and liens.

Actions. The manner of enforcing liens is provided by section 711.15 (5):

Liens for assessments may be foreclosed by suit brought in the name of the association in like manner as a foreclosure of a mortgage on real property. In any such foreclosure the unit owner shall be required to pay a reasonable rental for the condominium parcel, if so provided in the declaration or by-laws, and the plaintiff in such foreclosure shall be entitled to

58. FLA. STAT. §711.15 (4) (1963).

59. *Ibid.*

60. FLA. STAT. §695.11 (1963).

61. FLA. STAT. §711.15 (4) (1963).

the appointment of a receiver to collect the same. The association shall have the power, unless prohibited by the declaration or bylaws, to bid in the condominium parcel at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same. Suit to recover a money judgment for unpaid assessments may be maintained without waiving the lien securing the same.

This subsection is taken almost verbatim from section 23 (a) of the FHA Model Statute for Creation of Apartment Ownership. Taken literally, the second sentence directs the court to appoint a receiver in a proceeding for foreclosure of the lien for assessments if the declaration requires a unit owner to pay rent pending such foreclosure. As a general rule the appointment of a receiver is within the discretion of the court.⁶² It has been held, however, that statutes relating to the appointment of receivers limit the discretion of the court in such matters.⁶³ Florida has held that the power to appoint a receiver may be given or withdrawn at any time.⁶⁴ No Florida cases have been noted that considered the effect of a statute directing the appointment of a receiver, although there are a number of statutes to this effect in this state alone.⁶⁵

The provision that a unit owner shall be required to pay a reasonable rental during foreclosure when the declaration so provides, if effective, would seemingly relieve the owner from liability for assessments for the term for which his rent is paid. The receiver would pay the assessments, and surplus existing after satisfying the debt of the lien being foreclosed would be returned to the owner. If the owner is not in possession, it would be inequitable to require the payment of rent by the owner. Since the lien includes only assessments due at the time the claim of lien is recorded,⁶⁶ other claims of liens must be filed for assessments made subsequent to the filing of the claim of lien that is being foreclosed. This requirement for payment of rent pending foreclosure does not conform to the announced judicial policy of this state that allows a mortgagor of a dwelling house to continue occupancy until the foreclosure sale is made and confirmed.⁶⁷ In the case giving rise to this statement of policy, the mortgage included an agreement for the appointment of a receiver without notice. The last sentence of section 711.15 (5), which allows

62. 45 AM. JUR. *Receivers* §§6, 18 (1943); 75 C.J.S. *Receivers* §16 (1952); 27 FLA. JUR. *Receivers* §6 (1959).

63. *Stoner v. Hannan*, 113 Mont. 210, 127 P.2d 233 (1942).

64. *Sells v. Jones*, 151 Fla. 38, 9 So. 2d 160 (1942).

65. FLA. STAT. §§243.04 (9), 349.06 (1), 543.28, 735.11 (2) (1963).

66. FLA. STAT. §711.15 (4) (1963).

67. *Martorano v. Spicola*, 110 Fla. 55, 148 So. 385 (1933).

a suit for money judgment without waiving the lien, is an enlargement of the relief available to a mortgagee,⁶⁸ for a suit upon notes secured by a mortgage results in abandonment of the security.⁶⁹ Similarly, a decree entered upon a prayer for a deficiency decree is res judicata as to the debt.⁷⁰ These provisions, which are in conflict with established law, were included merely because they were part of the section taken from the FHIA form and without realization of the conflict.

Homestead Exemption From Creditors. Two questions arise with reference to homestead exemption of condominium parcels from the claims of creditors of the owners. The first is whether a condominium parcel can qualify for the exemption. If it can, the second question is whether the exemption will prevail against an attempt to collect an assessment made by the association for operation of the condominium.

Section 222.05 of the Florida Statutes grants to the owner of a dwelling house the right to the homestead exemption even though the house is located upon land owned by another. Under this provision the exemption would seem to apply to a condominium parcel if the land included in the condominium does not exceed the constitutional limitation as to acreage.⁷¹ The cases allowing a person owning less than the freehold to use the defense of homestead indicate that the land in which the owner is interested must be within the constitutional limits as to acreage.⁷² The exemption in those cases, as well as the limitation, seems to be predicated upon the ground that the coparcener or tenant in common is entitled to possession of the whole and is in possession. An owner of a condominium parcel is entitled to use of the areas used in common, but he is not entitled to possession of portions of the land, such as that covered by buildings, that are otherwise employed. If the exemption is to be available to the owner of a condominium parcel located upon land that exceeds the constitutional limitation, the owner must be considered as owning only that share of the area of the land that is proportionate to his share in the common elements.

68. A similar enlargement of relief is granted in the Mechanics' Lien Law, FLA. STAT. §84.301 (1963); see also *Coronet Kitchens, Inc. v. Mortgage Mart, Inc.*, 146 So. 2d 768 (2d D.C.A. Fla. 1962) construing §84.32 of the 1961 Florida Statutes.

69. State *ex rel.* *Teague v. Harrison*, 138 Fla. 874, 190 So. 483 (1939).

70. *Provost v. Swinson*, 109 Fla. 42, 146 So. 641 (1933).

71. FLA. CONST. art. 10, §1: The limitation under this provision is "one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town. . . ."

72. *Hill v. First Nat'l Bank*, 73 Fla. 1092, 75 So. 614 (1917); *Milton v. Milton*, 63 Fla. 533, 58 So. 718 (1912); see also *Anemaet v. Martin-Senour Co.*, 114 So. 2d 23 (2d D.C.A. Fla. 1959) (dictum).

Assuming that a unit can be the subject of homestead exemption, the question arises whether the head of a family owning and residing in a unit may employ the defense of homestead in an action to foreclose the lien for assessment. The assessments are made for the purpose of preserving and operating the unit for the owner's use as a part of the condominium and are owed to the association of which the owner is a member. If the unit owner instead of the association contracted for the labor or materials or other services for the benefit of his unit, the owner's obligation would seem to be one "for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same."⁷³ Such an obligation is excepted from the constitutional exemption.⁷⁴ On the other hand, it has been held that money borrowed to be used for such purposes is not within this exception.⁷⁵ Moreover, if the association contracted for the labor, materials, or services, the owner might defend on the ground that the obligations for which the assessments are made are not incurred by the owner. Nevertheless, the owner by his acceptance of title voluntarily becomes obligated to pay those assessments that are required by the statute, and the association in some respects is the owner's agent. If this agency relationship is not sufficient to create a lien by agreement that would be beyond the exemption for the same reasons that a mortgage is excepted from the exemption,⁷⁶ then it is hoped that an equitable lien would exist.⁷⁷ Such a lien would relieve the other unit owners of the burden that otherwise would be cast upon them for the maintenance and operation of exempt units.

g. Operation — Management by the Association

Notwithstanding the statutory rights and obligations concerning the common elements, such rights and duties are not self-executing, and it is necessary to provide some means of establishing and managing a condominium. Everybody's business is nobody's business, and the right to statutory relief is little comfort to a unit owner when the roof leaks. This need is adequately met by section 711.12, which provides for the operation of a condominium by an entity designated as the "association." Section 711.12 is significant in several respects.

Incorporated Association. The use of either a profit or nonprofit corporation is authorized by section 711.12 (1):

73. FLA. CONST. art. 10, §1.

74. *Ibid.*

75. *Lewton v. Hower*, 18 Fla. 872 (1882).

76. *Hart v. Sanderson's Adm'r*, 18 Fla. 103 (1881).

77. *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925).

The operation of the condominium shall be by the association, the name of which shall be stated in the declaration. The declaration may require the association to be organized as a particular entity, such as but not limited to a corporation for profit or corporation not for profit, in which the owners of units shall be stockholders or members.

Prior to the act a corporation not for profit had been employed to operate a condominium,⁷⁸ but there was no specific authorization. Under the act the operating entity is not limited to a corporate form, but whatever form is used, the unit owners must be stockholders or members of the association.

Unincorporated Association. Whether the association is incorporated or not, under section 711.12 (2) it is accorded certain attributes of a corporation:

The association, whether or not incorporated, shall be an entity which shall act through its officers and shall have the capability of contracting, bringing suit and being sued. If not incorporated the association shall be deemed to be an entity existing pursuant to this act. Service of process upon the association if not incorporated may be had by serving any officer of the association or by serving the agent designated for service of process. Service of process upon the association shall not constitute service of process upon any unit owner.

Since the attributes mentioned follow a corporation as a matter of law, this section is significant in its establishment of a statutory association as a legal entity. At common law an unincorporated association has no character other than that of a partnership.⁷⁹

Powers. The association, whatever its form, is given adequate authority to operate the condominium by the remainder of section 711.12:

(3) No unit owner, except as an officer of the association, shall have any authority to act for the association.

(4) Unless limited by the declaration the powers and duties of the association shall include those set forth in this law. The power and duties of the association shall include also those set forth in the declaration and bylaws.

(5) The association shall have the irrevocable right to have access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or re-

78. See note 8 *supra*.

79. *Johnston v. Albritton*, 101 Fla. 1285, 134 So. 563 (1931).

placement of any common elements therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common elements or to another unit or units.

(6) The association shall have the power to make and collect assessments, and to lease, maintain, repair and replace the common elements.

(7) The association shall maintain accounting records according to good accounting practices which shall be open to inspection by unit owners at reasonable times. Such records shall include: (a) A record of all receipts and expenditures [and] (b) An account for each unit which shall designate the name and address of the unit owner, the amount of each assessment, the dates and amounts in which the assessment comes due, the amounts paid upon the account and the balance due.

The powers set forth in subsection (6), except that of leasing common elements, are inherent in the managing of a condominium. The power to lease common elements may be most desirable, and if not expressly granted, might not have been available to an unincorporated association. A condominium may include in the common elements property designed or adaptable to leasing for commercial use, such as a restaurant, barber shop, beauty parlor, or retail shops. Also, it may be desirable to provide, by lease, for professional operation of recreational facilities such as a golf course or yacht basin.

Another significant power is given to the association by section 711.15 (5):

The association shall have the power, unless prohibited by the declaration or bylaws, to bid in the condominium parcel at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same.

This power "to acquire and hold, lease, mortgage and convey" a unit sold at foreclosure sale under the lien for assessments is a further recognition of the association's entity. Such power in a corporation for profit or a corporation not for profit is established by the applicable corporation laws.⁸⁰ In each instance the power is available unless prohibited by the declaration or bylaws, or by the articles of incorporation. At common law and in the absence of this statute an unincorporated association has no power to acquire, mortgage, or convey real property.⁸¹

80. FLA. STAT. §§608.13 (8) (a), 617.021 (1) (i), (k) (1963).

81. *Johnston v. Albritton*, *supra* note 79; see also *Ross v. Gerung*, 69 So. 2d 650 (Fla. 1954).

*Creation of Condominiums**a. In General*

Given the legal climate to permit condominium ownership, it is necessary to have an adequate method for the creation of condominiums. Prior to enactment of the statute this was accomplished by contract, and the documents, as well as the procedure, were cumbersome. The act establishes a procedure requiring the filing of a declaration of condominium⁸² and sets forth what were believed by the authors of the act to be minimal requirements for the protection of unit owners. Section 711.08 is one of the longest sections of the act and treats the declaration in some detail under the heading "Creation of condominiums; contents of declaration." The introduction to the first subsection contains the following:

A condominium may be created by recording in the public records of the county wherein the land to be included is located a declaration executed with the formalities of a deed by all persons having title of record to such land. . . .

The permissive word "may" was used advisedly in saying that "a condominium may be created." This is because the authors of the act did not wish to jeopardize the legality of existing condominiums or to lay down a legal strait jacket, which would preclude those benefits of condominium ownership that might otherwise arise.

b. Mortgagees

Although a declaration must be executed by all persons having record title to the land of the condominium, it need not be executed by mortgagees. A mortgagee is not a holder of title.⁸³ Requiring joinder by mortgagees would be an unnecessary interference with private property and might handicap construction financing. There are no public areas in a condominium to be dedicated, so the need for joinder of mortgagees is not present as in the case of subdivision plats. Nevertheless, if there is a mortgage upon the land at the time the declaration is recorded, and if the mortgage is not to be satisfied before sales of units are closed, one of two courses should be followed before units are released from the mortgage. One alternative is for the mortgagee to join in the execution of the declaration, thereby subordinating the lien of the mortgage to the declaration so that, in effect, the mortgage would thereafter be a lien upon the

82. FLA. STAT. §711.08 (1963).

83. FLA. STAT. §697.02 (1963); see also *American Freehold Land & Mortgage Co. v. Maxwell*, 39 Fla. 489, 22 So. 751 (1897).

condominium parcels instead of the development as a whole. The other alternative is for the mortgagee to amend the description in the mortgage after recording the declaration so as to substitute the description of the units for the description of the land. If one or the other of these procedures is not followed, and the mortgagee releases a unit from his mortgage and thereafter forecloses upon the remaining units, there might be some question concerning obligations of the purchasers at the foreclosure sale toward the condominium.

c. Leaseholds

The requirement in section 711.08 (1), that a declaration be executed "by all persons having title of record" to the land included in the condominium, immediately raises a question as to the use of "leaseholds." The quoted provision would not be satisfied by the joinder of a lessee without joinder of his lessor. Neither would a description of a leasehold interest satisfy the requirement of section 711.08 (1) (c) that the declaration contain the legal description of the land included. Section 711.04 (1) concerning condominium parcels is also pertinent:

A condominium parcel is a separate parcel of real property, the ownership of which may be in fee simple, or any other estate in real property recognized by law.

This subsection designates a condominium parcel as real property, but a leasehold is a chattel real and not real property.⁸⁴ Section 711.06 (1) (a) establishes as a part of the common elements:

The land on which the improvements are located and any other land included in the condominium property whether or not contiguous.

If a condominium were built upon a leasehold, there would be no land in the common elements; only the leasehold in the land would be included. The condominium parcels are to be separately assessed for taxation,⁸⁵ but ad valorem taxes are assessed against the fee title and cannot be assessed against a leasehold.⁸⁶ In view of these pro-

84. 32 AM. JUR. *Landlord and Tenant* §§16, 17 (1941); 51 C.J.S. *Landlord and Tenant* §26 (1947); *Thalheimer v. Tischler*, 55 Fla. 796, 46 So. 514 (1908); see *Oliver v. Mercaldi*, 103 So. 2d 665 (2d D.C.A. Fla. 1958); *DeVore v. Lee*, 158 Fla. 608, 30 So. 2d 924 (1947); *Matthews v. McCain*, 125 Fla. 840, 170 So. 323 (1936).

85. FLA. STAT. §711.19 (1) (1963).

86. *Jacksonville Expressway Authority v. Milford*, 115 So. 2d 778 (1st D.C.A. Fla. 1959); *Wolfson v. Heins*, 149 Fla. 499, 6 So. 2d 858 (1942); *Spratt v. Price*, 18 Fla. 289 (1881).

visions it seems that a condominium cannot be created upon a leasehold. The attorney general has so indicated in an opinion dealing with taxation.⁸⁷

The sale of a unit with reservation of ground rent under a long-term lease also seems to be precluded by the statute. The effect would be to place the condominium upon a leasehold, and this would be subject to the foregoing objections. Since the unit owner would purportedly receive title to his unit, but only a leasehold in his share in the land, it would also violate the statutory prohibition against separation of a share in the common elements from the unit to which the share is appurtenant.⁸⁸ On the other hand, the long-term leasing of a unit is permissible because the fee title to the entire condominium parcel remains in the lessor, and the lessee receives only a leasehold.

The authors of the act did not intend to preclude the creation of a condominium upon a leasehold. Such a prohibition was considered but rejected as being an undesirable interference with private property. Nevertheless, the creation of a condominium upon a leasehold instead of a fee title is inconsistent with the very concept of condominium ownership. It is the ownership of a unit with its appurtenant undivided share in the land and the freedom from the liability of other owners that distinguish a condominium from other forms of cooperative ownership. This is not to say that a cooperative ownership cannot be created upon a leasehold, but in the opinion of the writer it would not be a condominium within the contemplation of the statute.

A hybrid creature has recently made its appearance in at least one part of the state. It purports to be a condominium with the apartment buildings constructed upon land owned in fee, but the recreational areas are placed upon a leasehold. A purchaser thus obtains a purported fee simple title to his condominium parcel, but in one way or another the title is encumbered with the obligation to pay rent for the leased area that otherwise would be a part of the common elements. If there would not be a "condominium" without the leased portion, and if a condominium cannot be created upon leasehold as indicated above, then the hybrid would not be a condominium. On the other hand, if the leased portion is not essential to the use of the condominium property, a condominium may exist, but the determination of the question is not within the scope of this

87. OPS. ATT'Y GEN. FLA. 064-20 (1964). This opinion is confirmed in a subsequent opinion that distinguishes between the creation of a condominium upon a leasehold and the lease or sale of a condominium unit subject to a reservation of rent. OPS. ATT'Y GEN. FLA. 064-62 (1964).

88. FLA. STAT. §711.05 (1963).

article.⁸⁹ It may not be amiss to suggest, however, that if developers persist in perverting the Condominium Act, it may ultimately be necessary to qualify condominiums through a state regulatory commission.

Declaration — Required Provisions

In the absence of statute, the condominium documents could provide for satisfactory management as a matter of contract, and it was with some reluctance that the authors of the act sought to impose regulatory measures upon the establishment of condominiums. Nevertheless, it was deemed desirable to provide certain minimum requirements in order to protect unit owners against omissions in condominium documents and to give clear authority for the powers to be exercised by the association. The required contents of a declaration are enumerated in section 711.08 (1), subsections (a) to (k). These subsections will be quoted, and in some instances discussed, in the order in which they appear in the statute.

a. Execution

A declaration must be “executed with the formalities of a deed by all persons having title of record” to the land included in the condominium.⁹⁰

b. Statement of Submission

Section 711.08 (1) (a) states that the declaration shall contain:

A statement submitting the condominium property to condominium ownership.

The statement required is in the nature of a dedication of a plat.⁹¹ A statement that the purpose of the declaration is to submit the land and improvements to the condominium form of ownership and use in the manner provided by the statute seems to be sufficient.

c. Name

The statute provides that the declaration shall include:⁹²

89. For a discussion of the distinction between creation of condominium upon a leasehold and sale or lease of condominium units subject to reservation of rent, see OPS. ATT’Y GEN. FLA. 064-62 (1964).

90. FLA. STAT. §711.08 (1) (1963); cf. FLA. STAT. §689.01 (1963).

91. FLA. STAT. §177.06 (1963).

92. FLA. STAT. §711.08 (1) (b) (1963).

The name by which the condominium is to be identified, which name shall include the word condominium or be followed by the words a condominium.

If a condominium is to be recognized as subdivided real property, there will be a need for some identification to which reference can be made in describing the units. The need is similar to that for a name of a plat.⁹³ A name is perhaps more of a convenience than a necessity, for reference could be made only to the place of recording, but it was deemed advisable to have some name, for indexing purposes if for no other reason. A name consisting of the street address would seem to be sufficient.

d. Legal Description

The declaration must contain the⁹⁴

Legal description of the land included.

It is necessary to include a description of the land in order that the terms of the declaration will apply to it. Otherwise the constructive notice afforded by the recording of the declaration would not be obtained.⁹⁵

e. Identification of Units

The declaration must include:⁹⁶

An identification of each unit by letter, name, or number, or combination thereof, so that no unit bears the same designation as any other unit.

The need for this requirement is similar to that for the identification of lots in a subdivision.⁹⁷ A method of identification is essential to the simple legal description of a condominium parcel that is provided by section 711.07:

Following the recording of the declaration, a description of a condominium parcel by the number or other designation by which the unit is identified in the declaration together with the recording data identifying the declaration shall be a sufficient legal description for all purposes. Such a description shall include all appurtenances to the unit concerned whether

93. FLA. STAT. §177.04 (1963).

94. FLA. STAT. §711.08 (1) (c) (1963).

95. FLA. STAT. §711.09 (1963).

96. FLA. STAT. §711.08 (1) (d) (1963).

97. FLA. STAT. §177.08 (1963).

or not separately described, including but not limited to the undivided share in the common elements appurtenant thereto.

Accordingly, the following is a sufficient legal description of a condominium parcel lying in Sunshine County, Florida:

Unit 12-B of Lincoln's Inn, a condominium, according to the Declaration thereof recorded in Official Records 3000, Page 300, of the Public Records of Sunshine County, Florida.

f. Survey and Description of Improvements

It is necessary to describe both the units and common elements of a condominium and to tie these descriptions to the description of the land. The purpose of the act is to make this as simple as possible. Section 711.08 (1) (e) provides that the declaration shall contain:

Survey of the land and a graphic description of the improvements in which units are located and a plot plan thereof which together with the declaration are in sufficient detail to identify the common elements and each unit and their relative locations and approximate dimensions. Such survey, plot plan and description may be in the form of exhibits consisting of building plans, floor plans, maps, sketches, surveys or other means, provided that there shall be included or attached a certificate or certificates of an architect, engineer or surveyor authorized to practice in this state that such material, together with the wording of the declaration, is a correct representation of the improvements described, and that there can be determined therefrom the identification, location, dimensions and size of the common elements and of each unit.

These statutory requirements will be discussed, although not in the foregoing order.

Survey and Plot Plan. In all probability a survey will be necessary in order to obtain a building permit, and its inclusion in the declaration will be an aid in examination of title and a protection to unit owners. A plot plan is necessary in order to show the relation of units and other improvements to the description of the land. Ideally, the survey and plot plan may be shown together in a survey locating the improvements.

Graphic Description of Improvements. Surveys of individual units have been mentioned as one method of describing the units. Floor plan sketches may also be employed to show identification and loca-

tion, but they must include dimensions in order to supply a description. It is also necessary to identify the common elements, and it is possible that these may not appear in floor plan sketches of units. It is possible to make use of building plans. They are correct and complete if followed in construction, and will be preserved for such future use as may be required. It is not necessary to incorporate the entire set of plans, but plans should be included for the following: basement (if any); ground floor; typical floor for those floors that are identical; atypical floor for any floor employing a different layout; and an elevation sketch showing elevations of horizontal unit boundaries so that vertical location of any unit can be computed. If outlines of units are difficult to follow on building floor plans, floor plan sketches that would merely show location of units in outline form can also be used. Where all units fall into a few typical floor plans, a set of typical unit sketches would suffice for this purpose.

Copies of the building plans may be attached to the original declaration as exhibits, but they should be sufficiently clear for recording purposes. When copies of documents are printed for distribution, it is practical to reduce the building plans photographically and to print the reduced plans. Such reproductions can be made from the original tracings of the plans.

Whatever method is used to graphically describe the improvements, it is necessary to furnish a connection between the survey of the land and each unit. This can be done by showing the elevation of a reference point on the lowest level of the building, which will serve as the beginning point for the measuring of elevations within the building. This point is usually designated as 0.0 feet on the basement or first floor plan. This point's elevation, with reference to the datum plane, must be shown on the building plan or survey. In coastal areas this datum plane will probably be mean low water.

Description of Units. In addition to the graphic descriptions that may be attached as exhibits, it will usually be desirable to include some general description of the units in the declaration itself. This is especially true in the case of unit boundaries because it will be difficult to show sufficient detail in the exhibits. The boundaries can be defined in the declaration so that they can be ascertained from the building plans or from the building itself. This requires a statement as to the upper and lower horizontal boundaries and the vertical boundaries, the location of which depends upon the manner in which the improvements are divided between units and common elements. If the main structure of the building is included within the common elements, the boundaries will be in some part of the interior side of the boundary walls, floors, and ceilings. This may be the interior finished surface, the unfinished surface, or some other part such as

subflooring and lath. The author prefers to include the main structure of the building within the units and to require maintenance of this structure by the association as a common expense. This gives the unit owner a more tangible piece of property, and it simplifies the description of exterior portions of the building that are included in a unit. A suggested form is as follows:

Apartment Boundaries. Each apartment shall include that part of the building which lies within the boundaries of the apartment, which boundaries shall be determined in the following manner:

(a) *Horizontal Boundaries.* The upper and lower boundaries of the apartment shall be (1) upper boundary — the plane of the lower surfaces of the ceiling slab; and (2) lower boundary — the plane of the lower surfaces of the floor slab.

(b) *Vertical Boundaries.* The vertical boundaries of the apartment shall be: (1) exterior building walls — the exterior of the outside walls of the apartment building bounding an apartment, and where there is attached to the building a balcony, loggia, terrace, canopy, stairway, or other portion of the building serving only the apartment being bounded, such boundaries shall be deemed to include all of such structures and fixtures thereon; (2) interior building walls — the center line of walls bounding an apartment.

These methods of describing a unit utilize the air easement theory.⁹⁸ Briefly, under this theory a unit owner has title to his unit as a tangible piece of property, but he has only an easement for the use of the air space occupied by it. It is analagous to the ownership of a mobile home parked on another's land. In contrast to this is the air title theory under which a unit owner receives title to the air space occupied by his unit. Insofar as the statute is concerned, it is possible to employ either the easement or title theories for use of the air space and to put as much or as little of the structural parts of a building in the common elements or units as the author of a condominium prefers. No matter which theory is used, an easement for the use of the air space is assured by section 711.04 (2) (c), which provides that there shall pass as an appurtenance to a unit:

An exclusive easement for the use of the air space occupied by the unit as it exists at any particular time and as the unit may lawfully be altered or reconstructed from time to time,

98. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§39.15[3], .24 (1964); 4 POWELL, REAL PROPERTY ¶¶633.8 (4), .12 (5) (Boyer ed. 1964); McCaughan, *Legality of Condominium in Florida* at 4, May 1962.

which easement shall be terminated automatically in any air space which is vacated from time to time.

If the easement theory is used, the easement is confirmed by the statute. If the air title theory is used, the statutory easement provides for encroachment by the improvements.

Description of Common Elements. The statute requires that the common elements also be described, and the statutory definition of the term serves as a guide:⁹⁹

Common elements means the portions of the condominium property not included in the units.

This does not preclude a detailed description of common elements, but it is much easier to state that the common elements are all of the parts of the condominium property not included within the units. More important, this method cures any omissions in descriptions and places the omitted property within the common elements. If a part of a condominium is to be within a unit, it must be so described, and all parts of condominiums not so particularly described will be part of the common elements.

Certificate. There must be evidence that the representations of the declaration and its exhibits constitute a "correct representation of the improvements described, and that there can be determined therefrom the identification, location, dimensions and size of the common elements and of each unit."¹⁰⁰ This evidence must be in the form of a certificate of an architect, engineer or surveyor authorized to practice in this state. Although the statute does not so state, the reference to improvements infers that the certificates should include evidence of completion. When a declaration is prepared in advance of construction and makes provision for the modification of buildings or the use of alternate plans, the certificates should clearly indicate which plans are utilized. It is likely that in most instances there will be several certificates, one by a surveyor relating to the surveys, and one or more from architects or engineers relating to the construction.

g. Share in Common Elements

Section 711.08 (1)(f) provides that the declaration shall contain:

The undivided shares, stated as percentages or fractions, in the common elements which are appurtenant to each of the units.

99. FLA. STAT. §711.03 (4) (1963).

100. FLA. STAT. §711.08 (1)(e) (1963).

There is no requirement that the share in the common elements be determined in any particular way. The only requirement is that the share appurtenant to each unit be stated in the declaration. In order to satisfy purchasers of units, the determination should certainly be reasonable; but when set out in the declaration, the share of common elements appurtenant to each unit is a matter of contract with a purchaser, and the manner of determination is not important.

Shares in the common elements can be based upon the relative values of the units determined by sale prices, upon relative values determined by cost, upon floor area, or any other reasonable basis. The use of floor area is a constant factor and is a reasonable basis. An objection to use of the floor area is that the unit owner who pays a premium price for a penthouse location has no more interest in the land upon termination of the condominium than does an owner of the same apartment plan on any other floor. One answer to this objection is that after destruction of the building the penthouse owner no longer has his premium location, but if the building is reconstructed he is still entitled to it. This answer is not valid if the condominium is terminated without destruction. An owner would not be able to insure for the premium value of his location. If shares in the common elements are determined by original sale prices, a change in prices to meet market demand will disrupt the relationship between price and share in the common elements; but these shares are a matter of contract, and the relationship is unimportant so long as there is no sales resistance. Cost values, if used, would probably be computed on the basis of floor area or cubic content with results similar to the use of floor area. As a matter of fact, the shares can be arbitrarily determined by assigning equal shares to similar units provided the similarity is such that there would be no sales resistance on the part of purchasers.

Perhaps more important than the manner of determining the share in the common elements is the desirability of being able to use this share as the measure in allocation of the burden of common expenses. If this is done, floor area bears a closer relation to maintenance and other operating costs, with a possible exception for elevator service, than does sale price. On the other hand, a purchaser of a more expensive apartment may be willing to pay a higher percentage of operating costs as part of the consideration for his premium location and a greater share in the common elements.

h. Sharing of Common Expenses and Common Surplus

The declaration shall set forth:¹⁰¹

101. FLA. STAT. §711.08 (1) (g) (1963).

The proportions or percentages and manner of sharing common expenses and owning common surplus.

Just as in the case of the sharing of common elements, there is no required manner of determining the shares of common expenses and common surplus. The common elements and common expenses need not be shared in the same way. The comments in the preceding subsection made with reference to the sharing of common elements are applicable here. Wherever possible it will be expedient to use a single factor to represent the shares in the common elements and to provide a basis for the sharing of common expense and common surplus. If shares in the common elements are determined according to value or some other means that does not afford a reasonable relation to operating costs, it may be desirable to use a different formula to determine the sharing of common expense. If this is done, the manner of determining the shares in common surplus will depend upon the expected source of the surplus. If the surplus comes from over-assessments for common expense, it should be shared in the same proportion as individual burdens for common expense; if the surplus comes from commercial operation of the common elements, it might be allocated according to the shares in the common elements.

Of course it is possible that different common expenses will be shared in different percentages, especially if the expense is not for the benefit of all unit owners. Elevator service is a good example of such an expense, particularly if some units are not served.

Sections 711.14 (2) and (3) also require that the sharing of common expenses and common surplus be stated in the declaration.

*i. Voting Rights*¹⁰²

As in the cases of common elements, common expenses, and common surplus, there is no statutory directory as to the manner of determining voting rights, but this will probably depend upon the purpose of the vote. The required approval for changes in the common elements might be expressed as a percentage of the ownership of the common elements. Changes in the condominium parcels would probably require unanimous approval of the owners of the units in question and their mortgagees. In the case of election of directors of the association, it might be arbitrarily determined that each unit should be entitled to one vote, if there is not too great a difference in the size or value of the units. Requirements for approval of changes in the condominium property and changes in the declaration will probably be stated in the declaration. Voting rights for the election of

102. FLA. STAT. §711.08 (1) (h) (1963).

directors of the association will most likely be included in the association charter or bylaws.

j. Method of Amendment of Declaration

Although the declaration must provide a method for its amendment, the section of the statute concerning amendment sets forth only the following requirement:¹⁰³

An amendment shall be evidenced by a certificate executed with formalities of a deed and shall include the recording data identifying the declaration.

The signatures required for amendment are not indicated; however, section 711.08 (1) requires all owners of the land to join in the execution of a declaration, so it would follow that all unit owners must join in the execution of an amendment unless the declaration itself provides otherwise.¹⁰⁴ In order to avoid the difficulty of obtaining signatures and acknowledgments of unit owners and to avoid the resultant cluttering of the public records, the declaration for a large condominium should provide that the action of the unit owners in amending the declaration may be evidenced by a certificate of the association executed and acknowledged by its officers.

Section 711.10 (3) places one limitation upon amendment:

Unless otherwise provided in the declaration as originally recorded, no amendment shall change any condominium parcel unless the record owner thereof and all record owners of liens thereon shall join in the execution of the amendment.

The declaration should make no change in this limitation. A condominium parcel is real property, and it should not be changed without joinder of all record owners of the title and of liens thereon. A change in the appurtenances to a unit, which includes the share in the common elements, would be a change in a condominium parcel. A change in the share of common expenses might be a change in a condominium parcel since it would be a change in the obligations of the owner. Thus joinder of the unit owner and his mortgagees in any of these changes seems to be indicated. The unit owner might well question the right of other owners, even if granted by the declaration, to change a condominium parcel without his consent. Such a power seems to be in the nature of a power of attorney and would not have been granted by the unit owner in the manner required for con-

103. FLA. STAT. §711.10 (2) (1963).

104. The declaration could provide otherwise under the authority of §711.08 (1) (i), Florida Statutes, 1963.

veyance of land.¹⁰⁵ A power of attorney is revocable at will unless coupled with an interest,¹⁰⁶ and the approving owners have no interest in a power to change the parcel of another owner. Hence an owner who does not consent to a change in his parcel might state his disapproval as a revocation of the power.

It may be desirable to limit amendment, or at least require a greater percentage of approval for amendment in the case of voting rights and the method of amendment. Notice, quorum, percentage of approval, and limitations upon the subject matter of the amendment are further provisions that should be considered in connection with the method of amendment.

If a declaration is to be recorded prior to construction of all contemplated improvements, it will be most desirable to reserve the right to amend the declaration by filing additional building plans and certificates required by section 711.08 (1) (e) and to provide that such is effective when signed and acknowledged by the developer. Unless this right is reserved, it may be necessary to secure the joinder of all purchasers. Section 711.10 (4) provides a similar simplification of amendment in the case of change of the designation of the agent upon whom process may be served. Section 711.08 (1) (k) requires that designation of an agent to receive service of process be included in declarations employing the statutory unincorporated association.

An amendment will be used to show construction of additional improvements, to show alterations in buildings, and to cure objections to the form of declaration. An amendment is not effective until recorded,¹⁰⁷ and an amendment of the bylaws must be effected by an amendment of the declaration.¹⁰⁸

*k. Bylaws*¹⁰⁹

The introductory part of section 711.08 (1) requires that the declaration "shall contain or provide for the" matters thereafter enumerated. The declaration is in the nature of a constitution, and the bylaws are more easily treated as an exhibit to the declaration. Such treatment is authorized by section 711.11 (1).¹¹⁰

105. FLA. STAT. §689.01 (1963).

106. 1 FLA. JUR. *Agency* §§15-21 (1955).

107. FLA. STAT. §711.10 (1) (1963).

108. FLA. STAT. §711.11 (1) (1963).

109. FLA. STAT. §711.08 (1) (j) (1963).

110. For a further discussion of the treatment to be given the bylaws see p. 49 *infra*.

l. Association

The declaration must contain:¹¹¹

The name of the association and whether or not it is incorporated. If the association is not incorporated, the name and residence address of the person designated as agent to receive service of process upon the association. Such agent must be a resident of the state.

The function of the association in the operation of a condominium has been previously discussed.¹¹² If the association is incorporated, the articles of incorporation must be consistent with the Condominium Act, the declaration, and the bylaws. It is good practice to attach a copy of the articles of incorporation as an exhibit to the declaration. The unit owners are entitled to have this information because it is part of their contract. If the unincorporated association is used, provisions analagous to a constitution or articles of incorporation should be included in the declaration, or a copy of the constitution of the association should be attached as an exhibit. In any event, the information required by the statute must be supplied.¹¹³

More often than not, condominium documents will be used to make sales before completion of construction and recording of the declaration. If a corporate association is used, it is wise to incorporate as soon as possible in order to preserve the desired name.¹¹⁴ A certified copy of the charter can then be used as an exhibit. If the unincorporated association is used, it may be well to consider registering the name with the Secretary of State. Although there is at present no specific statutory authority, the Secretary of State will register trade names of this nature under classification 50 of section 495.09 of the Florida Statutes.¹¹⁵

In several instances the Condominium Act provides that the association shall have certain stated powers unless prohibited by the declaration or bylaws. The general grant of power to the association is set forth in section 711.12 (4):

Unless limited by the declaration the powers and duties of the association shall include those set forth in this law. The powers and duties of the association shall include also those set forth in the declaration and bylaws.

Another grant of power is found in section 711.15 (5):

111. FLA. STAT. §711.08 (1) (k) (1963).

112. See p. 24 *supra*.

113. Required information is set forth in FLA. STAT. §§711.08 (1) (k), .12 (1) (1963).

114. FLA. STAT. §608.031 (1963).

115. Letter From Secretary of State to Russell McCaughan, Feb. 27, 1964.

The association shall have the power, unless prohibited by the declaration or bylaws, to bid in the condominium parcel at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same.

If any statutory powers granted to the association by the statute are not desired, the declaration should expressly negate their existence. It is the author's opinion that the power to purchase at foreclosure sale should be *denied* to the association, and if not denied, the amount of the bid should be limited to the amount of the debt. The costs of maintenance and operation of an owner's condominium parcel are recurring expenses that are expected and can be estimated, but the time and cost of purchasing an apartment are unknown elements. The exercise of this power by the association could bring about a special assessment in an unforeseeable amount to meet the purchase price, and could also require an increase in regular assessments in order to meet the cost of carrying the apartment. Exposure to such uncertain assessments is not only objectionable to a unit owner but is particularly objectionable to a mortgagee. If the authority to bid is limited to the amount of the debt at the foreclosure sale, the objection is not so great, but it is feared that the purchase of units by an association will lead to problems. The real interest of the association is to collect the assessment, and the association should incur the liability of carrying a unit only if the unit will not bring the price of the delinquent assessment.

Declaration — Optional Provisions

The contents of the declaration are not limited to the provisions required by the statute. In section 711.08 (1) (1), express permission is granted to include further provisions in the declaration that are not inconsistent with the act. These include, but are not limited to, provisions concerning the matters set forth in that subsection. In section eleven of the FHA Model Act these matters are required contents of a declaration, but the authors of the Florida Act thought it unnecessary to make their use mandatory. Such optional matters are discussed in the following subsections:

a. Amendment of Declaration

This appears to be a duplication of the requirement that the declaration state the method of amending the declaration.¹¹⁶ Although it is possible to state provisions relating to amendment that

116. See p. 38 *supra*.

do not concern the method, no attempt has been made in this article to make such a distinction.

*b. Values of the Condominium Property and of Each Unit
or Condominium Parcel*

Section 6 (a) of the FHA Model Statute requires that the shares of unit owners in the common elements be determined on the basis of the percentage of the value of their units with respect to the value of the whole. Consequently the provision for a statement of such values is a requirement of the declaration under the FHA Model Statute, but could not be a required provision in the Florida Act because there is no required manner of determining shares in the common elements. It is likely that shares in the common elements will be determined on some other basis.¹¹⁷

*c. Statement of Purpose for Which Condominium Property and
Units Are Intended*

Such a statement would relate to the use of the property, such as residential or commercial use.

d. Designation of Limited Common Elements

If limited common elements are desired, they must be described in the declaration; otherwise all property not within the units will be considered as common elements.¹¹⁸

e. Responsibility for Maintenance and Repair of Units

The control of maintenance and repair of units is a departure from the usual responsibility involved in the care of privately owned property. Consequently, specific authority may be helpful. It will be especially helpful in those condominiums where structural parts of a building are included within the units, and the maintenance and repair are designated as a common expense.¹¹⁹

*f. Insuring of the Condominium Property Against Loss; Protection
of the Owners and Association Against Liability*

Specific authority to govern the purchase of insurance is desirable because of the need to provide protection against damage to all the

117. See pp. 35, 36 *supra*.

118. FLA. STAT. §711.04 (2) (b) (1963); see discussion pp. 6, 35 *supra*.

119. See *Description of Units* p. 33 *supra*.

units and to assure availability of the proceeds for reconstruction. If some owners do not insure, there may be insufficient funds available for reconstruction in the event of damage, and even if owners do insure but do not make the proceeds available, reconstruction could not proceed. Unless all units are insured and all insurance proceeds are available, reconstruction after casualty might be seriously hampered or precluded.

An acceptable manner of meeting this need is to give the association exclusive authority to purchase insurance on the condominium property, and to require that all insurance policies be made payable to and deposited with an insurance trustee. Such policies are for the benefit of the association, unit owners, and their mortgagees, as their interests may appear, and include provision for issuing certificates of mortgagee endorsements to mortgagees of unit owners. The insurance trustee is given instructions to collect the proceeds and to hold them for the benefit of the beneficiaries. It is also necessary to provide for use of the proceeds in reconstruction or repair, unless the condominium is terminated. A trust agreement between the association and the trustee, which includes the relevant terms of the declaration as a contract with the trustee, is required. It is important to irrevocably appoint the association as agent for each unit owner and to give the association the power to adjust all claims arising under policies purchased by the association and the power to execute and deliver releases upon payment of claims.

g. Reconstruction or Repair After Casualty; Voting Requirements

It is difficult to determine when and how a decision should be made in regard to whether damaged improvements should be reconstructed or the condominium terminated. There can be no absolute answer. It is a matter of judgment and will be influenced by the size and nature of the condominium. If only the common elements are damaged, they should be repaired. Relatively minor damage to the units should also be repaired. If greater damage occurs, the question arises as to the amount of damage that must exist before it is necessary to decide whether to reconstruct or to terminate. In such event a further question arises as to the extent of approval that must be required for a particular decision.

Due to the difficulty of providing satisfactory relief in this area, the act provides an alternative means of relief in the event such is not forthcoming under the declaration:¹²⁰

In the event of substantial damage to or destruction of all or a substantial part of the condominium property, and in the

120. FLA. STAT. §711.17 (1963).

event the property is not repaired, reconstructed, or rebuilt within a reasonable period of time, any unit owner shall have the right to petition a court of equity having jurisdiction in and for the county where the condominium property is located for equitable relief, which may, but need not necessarily, include a termination of the condominium and a partition.

h. Restrictions Upon Use

Provisions concerning the use of property are authorized by sections 711.08 (1) (1) and 711.08 (2). The restriction most likely to be stated in residential condominiums will limit the use of units to single-family residences. Consideration should also be given to including a restriction against the subdivision of units.¹²¹ Restrictions may be used in commercial condominiums to assure compatible uses by the unit owners. The developer should be excepted, for a reasonable period of time, from the enforcement of restrictions that would interfere with the completion of construction and sale of units.

i. Limitation Upon Conveyance, Sale, Leasing, Purchase, Ownership, and Occupancy of Units

The statute does not grant authority to place limitations upon the transfer of units when such would not be allowed in the absence of the statute. Section 711.08 (2) states that the permitted covenants and restrictions concerning the use, occupancy, and transfer of units are those permitted by law in the case of real property. The restriction often used to control occupancy of a residential condominium is sometimes designated as a prior right of purchase. The extent to which transfers can be controlled is beyond the scope of this article;¹²² but it may be said that if a restriction violates either the rule against perpetuities or the rule against restraints on alienation, it will be absolutely invalid.¹²³ Prior right of purchase gives the association control over transfers by requiring a unit owner to submit a proposed contract of sale for approval by the association. If approval is not obtained, the association or an individual is permitted to purchase. The author is of the opinion that such right should be limited by giving the association only the opportunity to furnish a purchaser if the proposed owner is not approved. The association should not be

121. See *b. Unit p. 5 supra*.

122. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* §§39.16-18 (1964); 4 POWELL, *REAL PROPERTY* ¶¶633.13-15 (Boyer ed. 1964); McCaughan, *Legality of Condominium in Florida* at 9, May 1962.

123. *Story v. First Nat'l Bank & Trust Co.*, 115 Fla. 436, 156 So. 101 (1934); *Cawthorn v. Stearns Culver Lumber Co.*, 60 Fla. 313, 53 So. 738 (1910).

given the right to purchase. This belief is based on the same reasons expressed in connection with the right to purchase at foreclosure sales,¹²⁴ except that the argument applies even more forcibly in the instant case where the price to be paid is likely to be greater. If unit owners wish to be protected against undesirable neighbors, it is better that they be prepared to make the required purchases and not involve the association.

Restrictions upon transfers are objectionable encumbrances insofar as mortgagees are concerned. Mortgagees will desire an exemption from such restrictions in the case of sales made to mortgagees, sales by mortgagees after acquiring title, and all foreclosure sales. Since unit owners have an opportunity to bid at public sales in order to protect themselves against undesirable purchasers, it seems prudent to except from such restrictions all public sales with open bidding as provided by law. This exception would at least avoid an attack upon restrictions that might otherwise prove fatal.

j. Termination of the Condominium

Section 711.16 (1) provides for the termination of the condominium in the following manner:

All of the unit owners may remove the condominium property from the provisions of this law by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the condominium parcels consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the percentage of the undivided interest of the unit owner in the property as hereinafter provided.

Section 711.16 (3) provides:

The condominium may be terminated in such other manner as may be prescribed in the declaration.

If termination by agreement of less than all owners and holders of liens is desired, then the declaration must so provide. Mortgagees may require their joinder in a voluntary termination when they are in a position to do so — for example, when they are financing construction. A requirement of unanimous approval subjects the majority of owners to unreasonable demands by a few, but termination by a lesser number may subject some owners to a real hardship by denying the use of the property without an immediate sale. Moreover, there may be legal problems, for there would be no joinder by the dissenting owners; thus the provisions of the declaration might be subject to the

124. See last paragraph *l. Association* p. 41 *supra*.

same objection made regarding the power to change condominium parcels without the approval of the owners.¹²⁵ On the other hand, in the case of termination, there is no diminution in the owner's property; there is merely a change in the form of ownership. The author has employed a compromise by giving to the owners desiring termination an option to purchase the units of the other owners at appraised values. There is a requirement of approval by a large percentage of owners and a limited time within the purchase from the dissenting owners must be made. Needless to say, this provision has not been tested in court.

Even if unanimous consent of owners and holders of liens is desired, there is a great convenience in providing for termination of a large condominium through action of the association instead of by the execution of an instrument under section 711.16 (1). In a condominium with many units execution of a terminating document in the manner required for recording by owners and holders of liens would be an onerous task and would unnecessarily encumber the record. Unanimous consent given to the association in accordance with the declaration and bylaws could be evidenced on the record by a simple certificate of the association.

The shares of unit owners after termination of a condominium are determined by section 711.16 (2):

Upon removal of the condominium property from the provisions of this law, the condominium property shall be deemed to be owned in common by the unit owners. Unless otherwise provided in the declaration, the undivided interest in the property owned in common by each unit owner shall be the percentage of undivided interest previously owned by such owner in the common elements.

In all instances the owners will be tenants in common after termination; and unless the declaration provides otherwise, the shares will be the same as those held in the common elements. Although the statute does not so state, it would follow that after termination in any manner the holders of liens upon units should have liens upon the respective shares of the unit owners as tenants in common.¹²⁶ In order to discourage an attack upon a termination by a mortgagee or other lien holder, the declaration should provide for transfer of the lien from the condominium parcel to the individual owner's share in the property after termination of the condominium.

125. See notes 103, 104 *supra* and accompanying text.

126. FLA. STAT. §711.16 (1) (1963).

Declaration — Additional Optional Provisions

Other portions of the act suggest further optional matters to be considered in preparing a declaration of condominium, and experience and judgment may suggest many others. Only a few will be considered here.

a. Appurtenances

Section 711.04 (2) provides in part:

There shall pass with a unit as appurtenances thereto: (e)
Such other appurtenances as may be provided in the declaration.

The additional appurtenances most often granted will probably be membership in the association (the mention of which is probably unnecessary) and the interest of the unit owners in the funds and assets of the association. An assured privilege in the common elements, which is not so limited to a particular part of the common elements as to constitute a limited common element, will often be granted. Attendant or unassigned automobile parking space and storage space to be assigned from time to time are examples of such appurtenances.

b. Common Elements

Section 711.06, which sets forth the common elements, also provides that:

The declaration may designate other parts of the condominium property as common elements.

If the common elements are described as all parts of the condominium property not within the units,¹²⁷ there is little room to designate additional common elements. It does seem advisable, however, to enlarge the provisions of section 711.06 concerning utility services so as to specifically include air conditioning and other services in order that the easements for utility services will include these items.¹²⁸ Even though it is planned to air condition the units individually, this may change in the future. The change can be accomplished by including a definition of utility services; for example:

Utility services as used in the Condominium Act and construed with reference to this condominium, and as used in the

127. See p. 35 *supra*.

128. FLA. STAT. §711.06 (c) (1963).

Declaration and Bylaws, shall include but not be limited to electric power, gas, hot and cold water, heating, refrigeration, air conditioning, garbage and sewage disposal.

If the association is to have authority to make substantial changes in the common elements, such authority must be specifically granted because section 711.13 (2) states the following restriction:

There shall be no material alteration or substantial additions to the common elements except in a manner provided in the declaration.

This restriction is valuable and should not be removed. If the common elements are to be increased or materially altered, this can be done by amending the declaration. In fact, authority to make additions to or substantial changes in the common elements might lead to an objectionable assessment of an unforeseeable amount.¹²⁹ In some condominiums it may be well to require unanimous consent for such changes, but in any event mortgagees will desire exemption from assessment for such work after they acquire title, unless they approve the alteration in question.

The restriction of section 711.13 (2) will prevent substantial additions to the common elements by purchase or lease unless authorized by the declaration.

c. Common Expense

The section enumerating the common expenses also provides that they shall include "any other expense designated as common expense by this law, the declaration or the bylaws."¹³⁰ It has been mentioned that the maintenance of the portions of the units that constitute structural parts of the building should be designated as common expense.¹³¹ If an association is to conduct or sponsor a service facility for which charges are to be made—such as a restaurant—consideration should be given to whether operating losses will be a common expense. If such losses will be a common expense, the declaration should so state; but this gives the association a power to make an assessment of an unforeseeable amount,¹³² and mortgagees will desire an exemption if they acquire title.

129. See last paragraph *l. Association* p. 41 *supra* and *i. Limitation Upon Conveyance, Sale, Leasing, Purchase, Ownership, and Occupancy of Units* p. 44 *supra*.

130. FLA. STAT. §711.14 (1) (1963).

131. See *Description of Units* p. 33 *supra* and *e. Responsibility for Maintenance and Repair of Units* p. 42 *supra*.

132. See last paragraph *l. Association* p. 41 *supra* and *i. Limitation Upon Conveyance, Sale, Leasing, Purchase, Ownership, and Occupancy of Units* p. 44 *supra*.

d. Collection of Assessments

Section 711.15, which concerns the collection of assessments, has been considered at length,¹³³ but several provisions that may be included in the declaration should be noted again. The declaration may provide for the rate of interest to be paid upon delinquent assessments.¹³⁴ It may require that the lien for assessments "shall also secure reasonable attorney's fees incurred by the association incident to the collection of such assessment or enforcement of such lien."¹³⁵ An owner may be required by the declaration to pay rent pending foreclosure of the lien for assessments.¹³⁶ Protection against loss of assessments pending foreclosure may be obtained by having assessments made on an annual basis payable in installments, with a provision for acceleration of the unpaid installments upon default. This would be of limited aid in the latter months of a year, but the assessment for the following year could be accelerated, and the claim of lien could be filed as soon as the first payment is past due.

e. Authority To Purchase Units

The association will have the power to purchase units at sales in foreclosure of the lien for assessments unless prohibited by the declaration or bylaws.¹³⁷ This power and its suggested limitation have been discussed in connection with the powers of the association,¹³⁸ and the limitation upon conveyances.¹³⁹

Bylaws

As has been noted,¹⁴⁰ the declaration must contain or provide for bylaws.¹⁴¹ The definitions set forth in the act state that the bylaws are for the government of the condominium.¹⁴² This suggests that bylaws should be limited to voting rights and matters of procedure. However, there is not a clear demarcation between the declaration and the bylaws. This is indicated by section 711.08 (1) (h), which requires that the declaration provide for the voting rights of owners, and by section 711.11 (1), which requires that the bylaws be "set forth in or

133. See p. 15 *supra*.

134. FLA. STAT. §711.15 (3) (1963).

135. FLA. STAT. §711.15 (4) (1963).

136. FLA. STAT. §711.15 (5) (1963; see *Actions* p. 21 *supra*).

137. FLA. STAT. §711.15 (5) (1963).

138. See *Powers* p. 25 *supra* and last paragraph *l. Association* p. 41 *supra*.

139. See p. 44 *supra*.

140. See *h. Bylaws* p. 39 *supra*.

141. FLA. STAT. §711.08 (1) (j) (1963).

142. FLA. STAT. §711.03 (3) (1963).

annexed to the declaration" and that amendments of the bylaws should be effected by an amendment to the declaration. The statute indicates that a number of matters may be set forth in either the declaration or bylaws: powers and duties of the association;¹⁴³ designation of common expense;¹⁴⁴ payment of rental by a unit owner pending foreclosure of the lien for assessments;¹⁴⁵ prohibition of the power of the association to purchase at sales in foreclosure of liens for assessments;¹⁴⁶ and assessments for common expenses.¹⁴⁷ These items have been previously considered and will not be treated here.

Section 711.11 (2) states:

The bylaws shall provide for the following:

(a) The form of administration, indicating the title of the officers and board of administration, if any, and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards.

(b) Method of calling or summoning unit owners to assemble at meetings; the percentage of unit owners or voting rights required to make decisions, and to constitute a quorum. The foregoing requirements as to meetings are not to be construed, however, to prevent unit owners from waiving notice of meetings or from acting by written agreement without meetings, if so provided in the bylaws, the declaration or this law.

(c) Manner of collecting from the unit owners their shares of common expenses.

(d) The method by which the bylaws may be amended consistent with the provisions of this law.

Although this section requires provision for amendment of the bylaws, the bylaws apparently must be amended in the same manner as the declaration inasmuch as the amendment of the bylaws must be effected by an amendment of the declaration.¹⁴⁸ The bylaws need not differ from those customarily used for the government of other associations, except that the powers will be those required for the operation of a condominium. Care should be taken to see that the voting rights stated in the bylaws do not conflict with the voting requirements in the declaration. Such voting rights need not be the same as those required for approval of matters set forth in the declaration, but their application should be clearly stated.

143. FLA. STAT. §711.12 (4) (1963); see *Powers* p. 25 *supra* and *l. Association* p. 40 *supra*.

144. FLA. STAT. §711.14 (1) (1963).

145. FLA. STAT. §711.15 (5) (1963); see *Actions* p. 21 *supra*.

146. FLA. STAT. §711.15 (5) (1963); see last paragraph *l. Association* p. 41 *supra*.

147. FLA. STAT. §711.18 (1) (1963).

148. FLA. STAT. §711.11 (1) (1963).

Consideration should be given to provisions for the waiver of notice of meetings and for action by written agreement, as suggested in section 711.11 (2) (b).

A developer will want to maintain control of the association pending construction and completion of sales, and this may be assured by naming the first board of directors and deferring the first election of directors for a reasonable time.

Section 711.11 also suggests optional provisions that may be included with the bylaws:

(3) The bylaws may provide for the following:

(a) Method of adopting and of amending administrative rules and regulations governing the details of the operation and use of the common elements.

(b) Such restrictions on and requirements respecting the use and maintenance of the units and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of the units and common elements.

(c) Such other provisions not inconsistent with this law or with the declaration as may be desired.

Recording

Section 711.08 requires that the declaration be recorded in the county in which the condominium is located, and section 711.09 sets forth the mechanics of recording.¹⁴⁹ The latter section is significant because it states that the declaration, with all of its exhibits and amendments, is entitled to record as an agreement relating to the conveyance of land. Without this statement a question might arise whether a declaration could be recorded and if so, where it would be recorded. Perhaps it is surplusage, but the section also states that recording will constitute constructive notice to creditors, subsequent purchasers, and all other persons. These provisions are included in section 711.09 (1), which provides as follows:

When duly executed with the formalities required for the execution of a deed, a declaration together with all exhibits thereto and all amendments thereof shall be entitled to record according to law as an agreement relating to the conveyance of land and when recorded in the public records of the county where the land described in the declaration is located shall constitute constructive notice to creditors, subsequent purchasers and all other persons.

149. See also FLA. STAT. §695.01 (1963).

As a result of fear that recording clerks might require, or that regulating bodies might assert, a need for approval of a declaration or its exhibits before recording, the statute includes the following provisions:¹⁵⁰

Graphic descriptions of improvements constituting exhibits to a declaration, when accompanied by the certificate of an architect, engineer or surveyor elsewhere required, shall be recorded as a part of a declaration without approval of any public body or officer.

The clerk, for his convenience, may "file or record the exhibits of a declaration in a separate book and indicate the place of filing or recording upon the margin of the record of the declaration."¹⁵¹

In view of the requirement that the declaration must include a description of the improvements, units, and common areas, and that it must be accompanied by a certificate of an architect, engineer, or surveyor stating that such are correct representations of the improvements described, it seems that a declaration cannot be recorded until improvements are sufficiently completed so as to permit the making of such a certificate.¹⁵²

Regulation

The act purportedly requires no greater regulation in the case of a condominium than would be required of the same development under a different form of ownership. The declaration and its exhibits do not require the approval of any public body in order to be entitled to record.¹⁵³ The act provides protection against an assertion that the setback lines and other zoning and construction requirements of single-family residences must be applied to a residential condominium. It also protects against the contention that single-family residences of a condominium cannot be erected under multiple-family zoning. Section 711.21 provides:

Laws and ordinances concerning buildings and zoning shall be construed with reference to the nature and use of such property without regard to the form of ownership.

Under this section it is necessary that condominium buildings comply with the same laws and regulations concerning the construction of buildings held other than by condominium ownership, but condominium ownership is protected from regulation applied to enterprises catering to the public, for section 711.22 provides:

150. FLA. STAT. §711.09 (2) (1963).

151. FLA. STAT. §711.09 (3) (1963).

152. FLA. STAT. §§711.08 (1) (e), .09 (2) (1963).

153. FLA. STAT. §711.09 (2) (1963).

Buildings included in a condominium property shall be subject to the authority, regulation or control of the Florida hotel and restaurant commission only to the extent provided in chapter 509. Such buildings not subject to the authority, regulation or control of the Florida hotel and restaurant commission under chapter 509 shall be subject to the provisions of chapter 399 with respect to elevators.

Section 509.211 (11) provides that the plans and specifications of all cooperative and condominium apartments, irrespective of the intended occupancy, must receive approval of the supervising architect of the hotel and restaurant commission; and the construction of such buildings must be in accordance with the requirements for public lodgings.¹⁵⁴ Section 509.211 (11) provides further that "such apartments shall not be required to be licensed under Chapter 509 so long as the owners of such apartments actually occupy them or none of the apartments are rented to tenants or guests." Under a strict construction of the quoted language, the rental of any unit in a residential condominium would require licensing by the hotel and restaurant commission. However, a reasonable application of the statute is indicated.¹⁵⁵

Remedies

The owner of a condominium parcel should be entitled to all remedies available to an owner of real property. The availability of such remedies is aided by section 711.08 (3):

All valid provisions of the declaration shall be enforceable equitable servitudes and shall run with the land and shall be effective until the declaration is revoked.

154. Chapter 509 was amended in 1963 by adding subsection (11) to §509.211.

155. Letter From Hotel Commissioner to Russell McCaughan, May 22, 1964. The commissioner's opinion is that the owner of one apartment in a condominium building could rent or lease his apartment without bringing that apartment or the building within the jurisdiction of the Hotel and Restaurant Commission; but if any person owned more than one apartment and rented at least one or more of such apartments to transients or permanent guests or tenants, this would bring the unit so rented and the common elements such as hallways, elevators, et cetera within the jurisdiction of this commission for licensing and inspection. It is the commissioner's opinion that the same situation would prevail where the condominium entity owned units, and they were leased to transient or permanent guests or tenants. Where the condominium entity operates a dining room catering only to its owners and their guests, it is the commissioner's opinion that the dining room would be a public food service establishment as defined in §509.241 (2) (a), Florida Statutes, 1963.

Perhaps of greatest interest to unit owners is section 711.15, which provides for the collection of assessments.¹⁵⁶

The statute requires each unit owner to comply with the act, the declaration, and the bylaws of his condominium. The association or any other unit owner is entitled to relief in the event this is not done. Section 711.23 provides as follows:

Each unit owner shall be governed by and shall comply with this law and the declaration and bylaws as they may exist from time to time. Failure to do so shall entitle the association or any other unit owner to recover sums due for damages or injunctive relief or both. Such actions may be maintained by the association or in a proper case by an aggrieved unit owner. Such relief shall not be exclusive of other remedies provided by law.

The above remedies are available to enforce valid provisions of the declaration, which would include the bylaws if made a part thereof, and to require compliance with the Condominium Act by unit owners. When the declaration and bylaws do not comply with the statute and its benefits are not available, there is no relief for unit owners unless they can cure the defects by amendment. This may not be possible if the defects involve the rights of persons other than unit owners. A failure to comply with the Condominium Act seemingly would deny unit owners the benefits of the statute. These benefits include the existence of units as condominium parcels with the appurtenances provided, restraint upon separation and partition of common elements, the use of the statutory unincorporated association, provisions for making and collecting assessments, limitation of liability, and separate taxation. Even though the declaration and bylaws are fatally defective so that the benefits accruing under the statute are lost, the statute could be incorporated by reference in order to obtain those benefits that can be a matter of contract between the owners.

CONCLUSION

The Condominium Act provides the legal basis for condominium ownership. It is flexible in its application, requiring no stated plan or theory to be followed. It establishes condominium ownership as merely another means of real property ownership and prescribes a minimum of regulation for the protection of condominium owners. The act has not been tested in the courts, but it is fostering condominiums at a rapid pace, particularly in the southeastern part of the

156. See p. 15 *supra*.

state. These condominiums range from the low-cost development, which offers apartment ownership at less than the cost of a home, to luxury establishments that bring country club living to a private residence. If the real estate advertisements in the daily newspapers are a criterion, then the Florida Condominium Act is a raging success.

TABLE OF HEADINGS AND SUBHEADINGS

Common Law Condominium	1
Definition	1
Legal Requirements	2
Need for Legislation	2
The Florida Act	3
History	3
Purpose	4
Definition and Application of Terms	4
a. Condominium Property	5
b. Unit	5
c. Common Elements	6
d. Condominium	8
e. Condominium Parcel	8
f. Common Expenses	9
g. Assessment	10
h. Association	10
i. Declaration	10
Legal Requirements for Condominium	10
a. Interest in Land	11
b. Restraint Against Partition of Common Elements	11
c. Restraint Against Separation of Units From Common Elements	12
d. Separate Taxation of Units	12
e. Operation — Use and Maintenance of Common Elements	14
f. Operation — Collection of Assessments	15
Personal Liability	15
1. In General	15
2. Waiver	15
3. Mortgagees	16
4. Statement	18
Limitation of Liability	18
1. Assessments	18
2. Mechanics' Liens	18
Interest	19
Lien for Assessments	20
1. Property Subject to the Lien	20
2. Liability Secured	21
3. Effective Date	21
4. Manner of Perfecting the Lien	21
Actions	21
Homestead Exception From Creditors	23
g. Operation — Management by the Association	24
Incorporated Association	24
Unincorporated Association	25
Powers	25
Creation of Condominiums	27
a. In General	27
b. Mortgagees	27
c. Leaseholds	28
Declaration — Required Provisions	30
a. Execution	30
b. Statement of Submission	30

c. Name	30
d. Legal Description	31
e. Identification of Units	31
f. Survey and Description of Improvements	32
Survey and Plot Plan	32
Graphic Description of Improvements	32
Description of Units	33
Description of Common Elements	35
Certificate	35
g. Share in Common Elements	35
h. Sharing of Common Expenses and Common Surplus	36
i. Voting Rights	37
j. Method of Amendment of Declaration	38
k. Bylaws	39
l. Association	40
Declaration — Optional Provisions	41
a. Amendment of Declaration	41
b. Values of the Condominium Property and of Each Unit or Condominium Parcel	42
c. Statement of Purpose for Which Condominium Property and Units Are Intended	42
d. Designation of Limited Common Elements	42
e. Responsibility for Maintenance and Repair of Units	42
f. Insuring of the Condominium Property Against Loss; Protection of the Owners and Association Against Liability	42
g. Reconstruction or Repair After Casualty; Voting Requirements	43
h. Restrictions Upon Use	44
i. Limitation Upon Conveyance, Sale, Leasing, Purchase, Ownership, and Occupancy of Units	44
j. Termination of the Condominium	45
Declaration — Additional Optional Provisions	47
a. Appurtenances	47
b. Common Elements	47
c. Common Expense	48
d. Collection of Assessments	49
e. Authority to Purchase Units	49
Bylaws	49
Recording	51
Regulation	52
Remedies	53
Conclusion	54