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## Amendments to the Florida Condominium Act: A Proposal

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# Amendments to the Florida Condominium Act: A Proposal

**John G. Mac'Kie, III\***

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On June 4, 1984, pursuant to the creation of the Florida Mobile Home Act,<sup>1</sup> the Division of Florida Land Sales and Condominiums was redesignated as the Division of Florida Land Sales, Condominiums, and Mobile Homes. In drafting the Mobile Home Act, the objective of the Florida Legislature was to strike a balance between the interests of the park owners and tenants of the mobile home parks. This legislation, like its Condominium Act<sup>2</sup> predecessor, continues the trend toward consumer protection in the real property area.

While the original Condominium Act provided only a basic framework for the creation and operation of condominiums, amendments adopted in the early 1970's began increasingly to detail the rights and duties of developers and unit owners.<sup>3</sup> It has been suggested that the numerous amendments to the Condominium Act are evidence that the legislature sought to address problems without a clear understanding of the concept of condominium ownership.<sup>4</sup> The view that the frequent modifications of the Condominium Act is indicative of the legislature's inability to effectively deal with condominium problems is unwarranted. Certainly, the Florida Legislature has acted frequently to regulate the development and operation of residential condominiums. In doing so through amendments to the Condominium Act, however, the legislature has responded positively to the pleas of constituents for legislation to establish rights and protections for purchasers, developers, unit owners, lending institutions, and the associations that are established to operate the condominiums. Analysis of the Mobile Home Act suggests two additional amendments to the Condominium Act be

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1. FLA. STAT. § 720 (1983).

2. FLA. STAT. § 718 (1983).

3. FLA. STAT. Chs. 711 et seq. and 718 et seq. (1974 & 1979).

4. Andrews, *Governmental Considerations: A Proposed Common Interest Community Act*, FLA. BAR J. 144, 145 (Feb. 1981).

adopted to better serve the interests of both condominium unit owners and developers. The first amendment would impose, on those condominium associations that have reserved a right-of-first-refusal, a forty-five day limit<sup>5</sup> in which to decide whether or not to exercise the preemptive right. The amendment is a necessary response to the judicial enforcement of right-of-first-refusal provisions that chill sales and remove property from commerce by granting condominium associations unreasonably long periods of time to decide whether or not to purchase.<sup>6</sup> The second amendment would require the Condominium Division to furnish standardized prospectus forms to developers. This would facilitate compliance with section 718.504 and curtail the perpetual findings by the Condominium Division that such filings are deficient, causing costly delays to developers.

### *Amendment One: 45-Day Limit on the Right-of-First-Refusal*

During the century and a half that followed the Norman Conquest, the landowner who attempted to convey his property might meet with opposition from his feudal overlord who objected to the transfer because the proposed transferee was not a suitable person to perform the feudal services due for the land.<sup>7</sup> The enactment in 1290 of the Statute of Westminster III, commonly known as *Quia Emptores*, however, abolished such restrictions on alienation by providing "[t]hat from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them . . . This statute extendeth but only to lands holden in fee simple."<sup>8</sup> Since the passage of *Quia Emptores*, the right of free and unlimited alienation has been

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5. The imposition of a 45-day limit on the time condominium associations have to decide whether or not to purchase would be in keeping with prior legislative expressions of reasonableness concerning the duration of rights-of-first-refusal. Section 720.110 of the Mobile Home Act provides for a 45-day period during which the mobile home park tenants, through the Homeowners' Association, have the right to purchase the park before it can be sold to a third party. Additionally, section 718.612 of the Condominium Act gives a tenant of an apartment being converted into a condominium a 45-day period within which to exercise a right-of-first-refusal to purchase the unit in which he resides.

6. Florida courts have consistently upheld right-of-first-refusal provisions without regard to the duration of the time period granted the association to make its preemptive election. See *infra* notes 41-61 and accompanying text.

7. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 1 (1954).

8. BARRINGTON, MAGNA CARTA AND OTHER GREAT CHARTERS OF ENGLAND, 279 (2d ed. 1300).

recognized as an inherent quality of a fee simple estate.<sup>9</sup> Today, however, some condominium owners in Florida are being deprived of this right by the judicial enforcement of unreasonable right-of-first-refusal provisions.

A right-of-first-refusal is a covenant often included in the condominium declaration whereby the association is granted the opportunity to purchase a unit in the project before it can be sold to a third party. In order to exercise the right, the association must purchase for the same price and on the same terms that the owner is willing to accept from a third party in a bona fide offer. Restraints in the form of a right-of-first-refusal are being upheld by the Florida courts as a legitimate device for association retention of control over unwanted transferees.<sup>10</sup> As a consequence, a condominium owner in Florida who wishes to sell his unit may find his conveyance unduly hindered, not by a feudal overlord, but by the condominium association's right-of-first-refusal that grants the association an unreasonable time period to decide whether or not to exercise its preemptive option.

The rule against restraints on alienation is designed to free property from unjustifiable encumbrances tending to make it less marketable.<sup>11</sup> The policy against such restraints is based on the belief that restraints "remove property from commerce, concentrate wealth, prejudice creditors, and discourage property improvements."<sup>12</sup> Clearly, a right-of-first-refusal which grants the association an unreasonable period of time to decide whether or not to exercise its preemptive option defeats the rule against restraints on alienation by taking property out of commerce.<sup>13</sup> Where such a right-of-first-refusal exists, both the prospective purchaser and the seller must be prepared to wait until the association decides whether or not to exercise the option. If the right-of-first-refusal grants an unreasonably long period of time for the association to decide whether or not to purchase, many prospective buyers

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9. See, e.g., In re Estate of Dees, 308 P.2d 90; Christmas v. Winston, 67 S.E. 58.

10. See *supra* note 6 and accompanying text.

11. Parker, *Right of First Refusal — Homogeneity in the Condominium*, 18 VAND. L. REV. 1810, 1816 (1965).

12. CASNER & LEACH, CASES AND TEXT ON PROPERTY 1008 (1969).

13. FLA. STAT. § 718.104(5) (1983) provides that the rule against perpetuities shall not be applied to defeat a right given any person or entity by the declaration for the purpose of allowing unit owners to retain reasonable control over the use, occupancy, and transfer of condominium units. Thus, preemptions, rights-of-first-refusal, options, and similar devices are exempted from the rule against perpetuities in the condominium context.

would not make offers because they would not want to be bound for a long period of time without an assurance that they would get the property.<sup>14</sup> Thus there definitely would be a restraint on alienation.

The background for the Florida courts' interpretation of the right-of-first-refusal clauses as reasonable can be found in cases dealing with cooperatives.<sup>15</sup> In a New York case in 1886,<sup>16</sup> the court upheld the right of the cooperative association to enjoin the tenant's proposed sublease of his apartment.<sup>17</sup> In upholding the injunction because the proposed subletting would violate the cooperative's rules and would result in "an invasion and demolition of the design of construction,"<sup>18</sup> the court intimated that the cooperative apartment was a special arrangement which should be protected by the law.<sup>19</sup> Half a century later, in *68 Beacon Street v. Sohler*,<sup>20</sup> the Massachusetts Supreme Court upheld a non-assignability clause in a ninety-nine year proprietary lease of a stock cooperative.<sup>21</sup> The court reasoned that

[t]he rule against restraints on alienation is not violated because an inalienable estate was not created. The corporation as owner of the estate could sell the property at any time and such sale could be authorized by the written consent of the holders of eighty-seven and one-half percent of the capital stock.<sup>22</sup>

During the latter years of the depression, Mrs. Belle Harris assigned her ninety-nine year lease and shares of stock in 1158 Fifth Avenue, Inc. to Penthouse Properties, Inc.<sup>23</sup> Mrs. Harris' cooperative asso-

14. BOYER, SURVEY OF THE LAW OF PROPERTY 68 (1981).

15. A cooperative apartment consists of "[d]welling units in a multi-dwelling complex in which each owner has an interest in the entire complex and a lease of his own apartment, though he does not own his apartment as in the case of a condominium." BLACK'S LAW DICTIONARY 302 (5th ed. 1979). See Ross, *Condominiums and Preemptive Options: The Right of First Refusal*, 18 HASTINGS L.J. 585 (1967) for a general discussion of this line of cases.

16. *Barrington Apt. Ass'n. v. Watson*, 83 Misc. 114, 98 N.Y.S. 132 (1886).

17. *Id.* at 548.

18. *Id.*

19. *Id.* Even from the beginning a distinction was drawn between the cooperative form of ownership and estates in fee simple.

20. 289 Mass. 354, 194 N.E. 303 (1935).

21. 289 Mass. at 361, 194 N.E. at 306-09.

22. *Id.* The fact that the entire property could be sold on the authorization of tenants holding 87½% of the stock does not address that particular tenant's right of free alienability.

23. *Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc.*, 256 A.D. 685, 11

ciation refused to accept the transfer, refused to take rental payments from the assignee, and sued Mrs. Harris for past-due rent.<sup>24</sup> The New York court stated that while there is a rule against restraining the transfer of property, in the case of a proprietary lease, "the special nature of ownership of cooperative apartment houses by tenant owners requires that they be not included in the general rule"<sup>25</sup> against such restraints. The court observed that the special nature of cooperative ownership extends from the fact that the failure of one tenant to pay his portion of maintenance charges increases the liability of the other tenant stockholders.<sup>26</sup> Another New York case<sup>27</sup> in 1959 upheld a stock cooperative's refusal to consent to an assignment of stock and the lease, and implied that the discretion of a cooperative corporation based on non-discriminatory grounds was not reviewable by the courts.<sup>28</sup>

A case that exemplifies the misguided liberality with which the courts treat right-of-first-refusal clauses is *Gale v. York Center Community Cooperative, Inc.*<sup>29</sup> The cooperative in this Illinois case took a curious form. Characteristically, the cooperative housing association held legal title to the real estate, and the members were entitled to the perpetual use and occupancy of their respective dwellings. This cooperative, however, was atypical in that it was not an apartment complex, but consisted of a subdivision of seventy-two single family homes. The form of ownership was further distinguishable from the traditional stock cooperative in that the residents, although members of the cooperative association, had obtained their own financing, made their own mortgage payments, arranged and paid for the insurance on their homes, and otherwise conducted themselves as the owners of the dwell-

N.Y.S.2d 417 (1939).

24. *Id.*

25. 254 A.D. 692, 11 N.Y.S.2d 423.

26. *Id.*

27. *Weisner v. 791 Park Ave. Corp.*, 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959).

28. 6 N.Y.2d at 434, 160 N.E.2d at 724, 190 N.Y.S.2d at 75.

The statute which prohibits discrimination in co-operatives because of race, color, religion, national origin or ancestry is not involved in this case. Absent the application of these statutory standards, . . . there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes. *Id.*

29. 171 N.E.2d 30 (N.Y. 1960).

ings they occupied.<sup>30</sup> The membership contract provided that when a member sought to withdraw, the association had twelve months in which to purchase the membership at any of three prices: 1) the selling price in the seller's notice to the association; 2) an agreed-on price; or 3) an impartial appraisal. If the association's right was not exercised within the twelve-month period, the membership could be sold on the market, but the association still retained a ninety-day right of redemption.<sup>31</sup> These provisions were challenged as unlawful restraints on alienation, and despite the exceedingly long period of time allowed the association to exercise its option, and even though the association was not a traditional stock cooperative, the Illinois court upheld the restraint on transfer.<sup>32</sup> In reaching its decision, the court said:

From the authorities . . . examined, it would appear that the crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that will flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fulfillment, such a restraint should be sustained. No restraint should be sustained simply because it is limited in time, or the class of persons excluded is not total, or all modes of alienation are not prohibited. These qualifications lessen the degree to which restraints violate general public policy against restraining alienation of property and should be considered to that extent; but they are not, in themselves, sufficient to overcome it. In short, the law of property, like other areas of the law, is not a mathematical science but takes shape at the direction of social and economic forces in an ever-changing society, and decisions should be made to turn on these considerations.<sup>33</sup>

Thus, in *Gale* the court balanced the utility of the restraint with the injurious consequences that flowed from its enforcement and found the restrictions to be both reasonably necessary to the continuance of the cooperative association and not productive of injurious consequences since their effect in keeping "property out of commerce was entirely problematical."<sup>34</sup> The court's reasoning is unsound. Clearly, the restrictions were not necessary to the continuance of the coopera-

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30. *Id.* at 32.

31. *Id.*

32. *Id.* at 33.

33. *Id.*

34. *Id.* at 34.

tive association. There was no blanket mortgage on the property. Instead, each resident procured his own financing. Consequently, the risk of foreclosure in *Gale* was individualized. There was no financial interdependence among the members of the cooperative association, and in the absence of such financial interdependence, the need for the restraint simply was not compelling. Further, the injurious consequences which can flow from enforcement of such restraints are not problematic; they are very real. A prospective buyer faced the possibility of waiting a year to purchase, finally doing so, and then having the cooperative association exercise its right of redemption ninety days later. Such a prospect has a chilling effect on sales and works to remove property from commerce.

The approach taken by Florida courts when asked to rule on the validity of right-of-first-refusal provisions is similar to that taken by the Illinois Supreme Court in *Gale*. The test applied by Florida courts with respect to restraints on alienation is that of reasonableness.<sup>35</sup> The validity or invalidity of a restraint is said to depend upon its long-term effect on the improvement and marketability of the property.<sup>36</sup> In practice, this test of reasonableness involves a balancing of the interests of communal harmony against the policy favoring free alienation and use of property. It is apparent that, to date, Florida courts find that maintaining a community that is both socially and financially homogenous is of paramount importance because the close proximity of condominium living presupposes social compatibility among tenants.

The Florida courts refuse to address the reasonableness of the duration of the time period within which condominium associations may exercise the right-of-first-refusal.<sup>37</sup> Like the Illinois Supreme Court in *Gale*, Florida courts fail to distinguish between cases involving stock cooperatives and those involving the condominium form of ownership. This distinction is critical in order to properly determine whether a particular restraint is reasonable or unreasonable. A restriction that is valid for a cooperative may well be an unreasonable restraint on alienation when applied to condominium ownership. This is due to the special nature of the cooperative in that it requires permanence of tenancy,

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35. *Iglehart v. Phillips*, 383 So. 2d 610, 614 (Fla. 1980).

36. *Id.*

37. See Boyer & Spiegel, *Land Use Control: Pre-emptions, Perpetuities and Similar Restraints*, 20 U. MIAMI L. REV. 148, 180 (1965) (discusses why the length of time during which the preemptor has to decide should be a factor in determining reasonableness).



social compatibility, and financial responsibility for its very existence.<sup>38</sup>

The policy dictated by the special nature of the cooperative does not apply to condominiums. The distinctions that demand disparate treatment are two-fold. First and foremost, there is no financial interdependence of condominium unit owners as there is in cooperative ownership. While cooperatives generally have a blanket mortgage on the entire project, condominium owners finance their units individually. Therefore, the need for a financial screening device is not crucial for condominium associations. The objective of obtaining financial compatibility may adequately be served by setting a sales price that tends to discourage "undesirables". Secondly, the condominium unit is exclusively a fee interest rather than a hybrid-type leasehold.<sup>39</sup> While the cooperative member occupies his unit as a mere tenant, the condominium owner acquires a fee simple interest in the real property. Thus, in cooperatives, restraints on alienation may be more easily upheld, while restrictions on the transfer of condominium units demand stricter scrutiny.

Regarding restraints on the alienation of condominium parcels, the Florida cases may be broken down into two categories; those involving restraints on leasing which are quite sensibly upheld as partial restraints,<sup>40</sup> and those granting a right-of-first-refusal to the interested condominium association, which warrant closer analysis.

A 1961 decision, *Blair v. Kingsley*,<sup>41</sup> illustrates the lengths to which Florida courts will go to find that restraints on alienation in the form of preemptive rights are reasonable. In that case, the plaintiffs alleged that the restrictive covenant in their deed was an unreasonable restraint upon alienation in that it allowed the grantor a right-of-first-refusal to purchase the property for one year, should the property be

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38. Parker, *supra* note 11, at 1819.

39. *Id.*

40. See, e.g., Pine Island Condominium "F" Ass'n, Inc. v. Waters, 374 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1979) (not unreasonable for association to withhold approval where owner in default); Seagate Condominium Ass'n, Inc. v. Duffy, 330 So. 2d 484 (Fla. 4th Dist. Ct. App. 1976) (leasing restrictions not unlimited and, therefore, reasonable since owners could change restriction by amending declaration); Kroop v. Caravella Condominium, Inc., 323 So. 2d 307 (Fla. 3d Dist. Ct. App. 1975) (amendment to declaration allowing owners to rent units no more than once held not an unreasonable restraint); Holiday Out in America at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. 4th Dist. Ct. App. 1975) (rental restriction valid since owners could sell at any time).

41. 128 So. 2d 889 (Fla. 2d Dist. Ct. App. 1961).

offered for sale within twelve years of the deed.<sup>42</sup> The plaintiffs alleged several grounds on which they contended the court could find the restraint unreasonable,<sup>43</sup> including “that the one year allowed to the defendant for the exercise of this covenant would require . . . a very patient purchaser.”<sup>44</sup> The defendant-developer offered several justifications for inclusion of the covenant, indicating that the plaintiffs had notice of it at the time of purchase and that many of the other grantees were in favor of the restriction.<sup>45</sup> Further, the developer insisted that he would not have sold the land to the plaintiffs without inclusion of the covenant in the deed.<sup>46</sup> In finding the one-year restraint to be reasonable, the court stated:

We are favored by the citation of numerous cases and annotations, including several Florida cases. From our study of both the research books and the decisions, we are convinced that the instant covenant is valid and should be upheld, whether it be called a pre-emption . . . or an option to repurchase.<sup>47</sup>

The court offered no further explanation of its reasoning in upholding the restraint. If there was any balancing of interests by the court, the scale was certainly weighted in favor of the developer in find-

42. *Id.* at 890. The covenant read in pertinent part:

Grantees herein, by acceptance of this deed, and in consideration of the sale and conveyance of the herein described property, hereby agree and covenant with the grantor herein, his heirs or assigns, that in the event grantees, their heirs or assigns, shall offer for sale the above described property within a period of 12 years from date, that said grantor, his heirs, assigns or nominee, shall have the first right of refusal to purchase said property and shall have a period of one year in which to purchase same. The purchase price shall be the fair market value, which shall be determined by the owner of the above described property appointing one appraiser, the grantor herein appointing one appraiser, and the two appraisers appointing a third, and the determination of any two of the three appraisers shall fix a fair value. *Id.*

43. *Id.* The other two rationales offered by the plaintiffs were 1) “that the appraisers’ valuation will not reflect those subjective factors which influence prospective purchasers;” and 2) “that a flexible real estate market could easily change values during the same one year period.” *Id.*

44. *Id.*

45. *Id.*

46. *Id.* The defendant further pointed out that he had waived his right every time a grantee had wanted to sell so far. *Id.*

47. *Id.* at 891.

ing that the restraint was reasonable. The court appeared to give little weight to the fact that if the plaintiff attempted to sell his property, it was subject to repurchase by the developer for *twelve years*.

In *Chianese v. Culley*<sup>48</sup> the plaintiffs contracted to purchase a condominium unit from Culley, who refused to close the transaction because the condominium association asserted its rights under the declaration. The declaration provided that the association had sixty days within which to either approve of a proposed purchaser or furnish another purchaser on terms equally favorable to the seller.<sup>49</sup> The association provided an alternate purchaser as provided in the declaration, but at that point, Chianese, who had originally contracted to purchase from Culley, brought this lawsuit, alleging that the covenant in the declaration was an "illegal restraint against alienation of property and that the defendants were discriminating against the plaintiffs on the basis of their religion or national origin."<sup>50</sup> Culley then issued a deed to Chianese, but the condominium association refused to recognize the trans-

48. 397 F. Supp. 1344 (S.D. Fla. 1975).

49. *Id.* at 1346. The declaration provided in pertinent part:

Election of Association. Within sixty (60) days after receipt of such notice, the Association must approve the transaction or furnish a purchaser or lessee approved by the Association who will accept terms as favorable to the seller as the terms stated in the notice. Such purchaser or lessee furnished by the Association may have not less than sixty (60) days subsequent to the date of approval within which to close the transaction. The approval of the Association shall be in recordable form and delivered to the purchaser or lessee.

*Id.* at 1345.

50. *Id.* at 1345. This article is not focusing on the discriminatory aspects of rights-of-first-refusal but on the purely legal question of reasonableness of the restraint itself, based primarily on the amount of time allowed for exercise of the right-of-first-refusal.

For a case considering the possible discriminatory results, see *Capital Fed. Sav. & Loan Ass'n v. Smith*, 136 Colo. 265, 316 P.2d 252 (1967). The court there stated:

No matter by what various terms the covenant under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment to the Federal Constitution. That this is so has been definitely decided by the decisions of the Supreme Court of the United States. High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the hands of Esau to a blind Isaac, the voice is definitely Jacob's. We cannot give our judicial approval or blessing to a contract such as is here involved.

*Id.* at 255.

action.<sup>51</sup> In deciding whether or not the clause constituted an illegal restraint on alienation, the court held that the provision granting the association sixty days either to approve the sale or furnish another purchaser on the same terms was a valid right-of-first-refusal.<sup>52</sup> The court stated that covenants restricting the use of land are not favored, but that they will be upheld "if they are confined to lawful purposes, *are within reasonable bounds*, and are expressed in clear language."<sup>53</sup> Despite this language, the court never addressed the issue of whether or not the sixty-day duration of the preemptive right was *reasonable*, but relied instead on the fact that the case did not involve an *absolute* restraint. Under the court's analysis, the restraint was not absolute because the property could be sold at the close of the period granted the association to exercise its preemptive right. Presumably, the provision would be upheld as a valid right-of-first-refusal regardless of whether the period was of a duration of sixty days or sixty years. It appears that in balancing the interests represented by this case, the need for a socially homogenous community weighed heavily, while the policy favoring free alienation of property was essentially ignored.

*Watergate Corporation v. Reagan*<sup>54</sup> involved a right-of-first-refusal, not in the condominium context, but with respect to a parcel of raw land. The case merits note, however, in light of the court's cavalier sanctioning of the preemptive right that was at issue. In fact, neither the time the right-of-first-refusal was executed, nor the time of its exercise is ever mentioned in the decision. In ruling that the right-of-first-refusal did not impose an unlawful restraint upon the free alienation of the property, the court stated its absurd rationale: "[A]lienability is not restrained at all, but is in fact enhanced because the seller has two potential buyers instead of one."<sup>55</sup>

The Supreme Court of Florida addressed the question of the reasonableness of the right-of-first-refusal in 1980.<sup>56</sup> In that case, the Fifth Circuit Court of Appeals certified questions to the Florida Supreme Court to determine the state's law concerning whether a repurchase option in a deed violated the rule against unreasonable restraints on

51. 397 F. Supp. at 1345.

52. *Id.* at 1347.

53. *Id.* at 1346 (citing *Zoda v. Zoda*, 292 So. 2d 412 (Fla. 2d Dist. Ct. App. 1974)) (emphasis added).

54. 321 So. 2d 133 (Fla. 4th Dist. Ct. App. 1975).

55. *Id.* at 136.

56. *Iglehart v. Phillips*, 383 So. 2d 610 (Fla. 1980).

alienation.<sup>57</sup> The deed in question provided that, should the grantee desire to sell his property, he must offer it to the grantor for the price of the amount paid by the grantee plus the cost of all permanent improvements on the land. The covenant provided the grantor sixty days to exercise their option, after which the grantee had the right to sell the property to other parties.<sup>58</sup> The Florida Supreme Court set forth the policy underlying the rule against unreasonable restraints, stating that the rule "is principally concerned with the *duration* of a restraint on the property."<sup>59</sup> Incongruously, in the next paragraph of the decision, the court stated that "[i]t is generally agreed that an option restraint is reasonable if the option price is at market or appraised value, *irrespective of the duration of the option*".<sup>60</sup> The court's failure to consider the duration of the preemptive option flies in the face of the court's stated rule of reasonableness<sup>61</sup> in restraint-on-alienation cases.

The position taken by the Florida courts that the duration of restraints is immaterial to their validity is untenable. The stubborn fact is that where a right-of-first-refusal is granted, alienation cannot take place until either the preemptor makes the election to purchase or the time allotted expires. The more extended the preemption period, the less likely it is that a purchaser will be willing to be bound for the period of time during which he is committed, but the condominium association is not. Such a prospect has a chilling effect on sales and works to remove property from commerce. Despite this, condominium associations that have included a right-of-first-refusal in the condominium declaration are presently under no legislative or judicial time constraint whatever to decide whether or not to exercise their preemptive right. As the cases discussed have shown, provisions granting condo-

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57. *Id.* at 611. The Fifth Circuit also questioned whether the covenant violated the rule against perpetuities, and whether or not the deed could be rescinded if the covenant was void. *Id.*

The Florida legislature settled the perpetuities question with regard to condominiums by statute: FLA. STAT. § 718.104(5) (1983). *See supra* note 5 and accompanying text.

58. 383 So. 2d at 611.

59. *Id.* at 614 (emphasis added).

60. *Id.* (emphasis added). The court noted several Florida decisions that have so held: *Watergate Corp. v. Reagan*, 321 So. 2d 133 (Fla. 4th Dist. Ct. App. 1975) (*see supra* notes 48 & 49 and accompanying text); *Blair v. Kingsley*, 128 So. 2d 889 (Fla. 2d Dist. Ct. App. 1961) (*see supra* notes 35-41 and accompanying text); and *Wing, Inc. v. Arnold*, 107 So. 2d 765 (Fla. 3d Dist. Ct. App. 1958).

61. 383 So. 2d at 614.

minium associations unreasonably long periods of time to purchase are routinely upheld by the courts. The judicial enforcement of these unreasonable right-of-first-refusal provisions amounts to the sanctioning of illegal restraints on alienation.

In the Mobile Home Act, the Florida legislature provided for a forty-five day period during which the mobile home park tenants, through the homeowners' association, have the right to purchase the park before it can be sold to a third party. While this provision may have little practical significance for mobile home park tenants, who in most instances will lack the necessary financial resources to exercise the right-of-first-refusal, the forty-five day limitation lights the path for a much needed change in condominium law. Since the judiciary declines to consider the time period during which the condominium association may decide whether or not to purchase as a factor in determining whether alienation has been illegally impeded, it is incumbent on the legislature to redress the injurious effects of restraints. This could be accomplished by drafting a provision for the Condominium Act limiting the time which the condominium association has to declare its intention to purchase to forty-five days.

### *Amendment Two: Standardized Prospectus Form*

In 1979, the Division of Florida Land Sales and Condominiums conducted an in-house review of deficiency letters sent to developers and found that approximately ninety percent of the filings made with the Division were deficient.<sup>62</sup> The majority of the deficiencies related to the failure of the developer to provide the information required by the statute;<sup>63</sup> only a small percentage of the deficiencies were substantive in nature. Most of the deficiencies consisted of failure to include required caveats, improper budgeting or assessment calculations, confusion regarding which version of the Condominium Act is current, and a "failure to properly assimilate the necessary filing materials and organize those materials in the fashion required by the rules of the Division."<sup>64</sup> Clearly, a problem relating to compliance with the non-substantive filing requirements of the Condominium Act exists. A solution to this dilemma exists in standardization of forms delineating the items re-

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62. Andrews, *Governmental Considerations: A Proposed Common Interest Community Act*, FLA. BAR J. 144, 146 (Feb. 1981).

63. FLA. STAT. § 718.504 (1976).

64. Andrews, *supra* note 62.

quired by the Condominium Act for inclusion in the prospectus.

A standardized prospectus form could alleviate the plethora of unsuccessful though voluminous attempts by developers to comply with the "laundry list"<sup>65</sup> of items required for inclusion in the prospectus. Condominium documentation is copious enough — it is not uncommon for offering plans to run over two hundred pages of single-spaced type.<sup>66</sup> The requirement of extensive disclosure by the Bureau of Condominiums often results in "creative drafting."<sup>67</sup> While creative drafting is often the hallmark of a good lawyer, it may cause problems when the project at hand requires strict adherence to statutory requirements. Creative drafting of documents often produces lengthy, complex, and unreadable results.<sup>68</sup>

There is a call within the Real Property Bar for standardization of a multitude of documents in the condominium field.<sup>69</sup> These attorneys point out that standardization would simplify the various forms required by the Condominium Act, such as the declaration and bylaws. One commentator, in calling for a standardized set of condominium bylaws, equated them with "the procedural requirements for incorporation and for creation of the bylaws governing the operation of a corporation once it is legally created."<sup>70</sup> This writer, however, opposes an across-the-board standardization of all condominium documents, especially the standardization of bylaws. The day-to-day workings of a condominium cannot be equated to that of a commercial corporation. Greater flexibility must be allowed in drafting operating rules for unit owners. The formulation of bylaws is an area of condominium documentation that often calls for creative drafting on the part of an experienced real estate attorney. The prospectus, on the other hand, is

65. See, e.g., FLA. STAT. § 718.504 (1976): "(b) A description of the condominium property, including, without limitation:

1. The number of buildings, the number of units in each building, the number of bathrooms and bedrooms in each unit, and the total number of units," or

"2. A reference to the location in the disclosure materials of the lease or other agreements providing for the use of those facilities."

66. Rohan, *The "Model Condominium Code" — A Blueprint for Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587, 589 n. 13 (1978).

67. Andrews, *supra* note 62.

68. One enterprising developer went so far as to provide "a translation . . . written [in] humanese." See *Windjammer of Pensacola Beach File*, Bureau of Condominiums, Division of Florida Land Sales and Condominiums.

69. Andrews, *supra* note 62.

70. *Id.*

strictly statutory in its requirements, and those requirements could best be met by the Bureau of Condominium furnishing standardized forms for the prospectus.

A former chief of the Bureau of Condominiums<sup>71</sup> called the "filing of condominium documents with the Division . . . the most complicated and lengthy"<sup>72</sup> of the types of filings required by the Condominium Act. As evidenced by the Division's review of deficiency letters,<sup>73</sup> numerous errors in filing are made by developers attempting to comply with the statutory requirements. In an attempt to identify and eliminate these errors, the processing of the prospectus and other documents is divided into two phases. Initially, the Bureau reviews the documents to determine whether they have been submitted in the form prescribed by section 7D-17.05(1) of the Florida Administrative Code. The Bureau is allowed ten business days to make this determination. If the documents have not been submitted in proper form, the developer is so notified, and the documents are not reviewed until corrections are made. Once submitted in proper form, the documents are examined by the Condominium Division staff, which has another forty-five days in which to notify the developer of any deficiencies.<sup>74</sup> It is evident that the finding of a deficiency results in substantial delays. These delays become significant in light of the fact that closings on contracts are prohibited until the examination process is completed and notification is received from the Division. The delays are costly in terms of the additional legal expenses incurred, but much more significantly, in that failure to adhere to the project's original timetable may well jeopardize the developer's financing arrangements by cutting off the flow of down payments received from prospective unit purchasers.

In order to remedy these costly delays, the developer must have a clear picture of the procedural requirements of the documents he must file with the Bureau of Condominiums. The Bureau examines a prospectus in order to ensure it meets the statutory requirements of disclosure. The examiner also compares the various documents filed with the Bureau in order to determine any internal inconsistencies or other deficiencies. From its examination of multitudes of condominium docu-

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71. Faye Mayberry, former chief of the Bureau of Condominiums, is now head of the Mobile Home Division.

72. Mayberry, *Governmental Considerations: The Bureau of Condominiums — Its Function and Goals*, FLA. BAR J. 139, 140 (Feb. 1981).

73. See *supra* note 62 and accompanying text.

74. Mayberry, *supra* note 72, at 141.



ments, the Bureau compiled a list of common deficiencies found in a prospectus, all consisting of failure to make required disclosures:

1. Omission of the estimated completion date in the prospectus or the purchase agreement as required by Section 718.504(4)(b)(3), F.S.

2. Failure to provide a description of facilities to be used in common with other condominiums as required by Section 718.504(7), F.S. and failure to include use agreements or other documents related to facilities serving unit owners but not owned by them.

3. Omission in the prospectus of the identity of the supplier of utilities and other services, as required by Section 718.504(18), F.S.

4. Omission in the prospectus of the purchaser closing expenses as required by Section 718.504(2)(1), F.S.

5. Omission in the prospectus of the relevant experience of the developer and chief operating officer as required by Section 718.504(22), F.S.

6. Failure to provide complete disclosure relating to recreational facilities as required by Section 718.504(6), especially the number of people the facility will accommodate.

7. Failure to specify the number of buildings, units in each building, bathrooms and bedrooms and the total number of units as required by Section 718.504(4)(b)(1), F.S.

8. Failure to explain the manner in which the apportionment of common expenses and ownership was determined as required by Section 718.504(19), F.S.<sup>75</sup>

By virtue of its experience and expertise in examination of the condominium prospectus and other documents, the Bureau of Condominiums clearly has the wherewithal to create a prospectus form that would avoid these common pitfalls. Again, it is the Mobile Home Act<sup>76</sup> that lights the legislative path. Section 720.302(7) of that Act requires the Mobile Home Division to provide a form prospectus which may be prepared and filed by park owners. The form allows the park owners to adhere to the disclosure requirements of section 720.303 by responding

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75. MAYBERRY, AVOIDING PITFALLS IN FILING WITH THE DIVISION (available upon request from the Bureau of Condominiums, Division of Florida Land Sales and Condominiums, Tallahassee).

76. FLA. STAT. § 720 (1976).

to questions and requests for specific information to be provided.<sup>77</sup> A similar form, provided by the Bureau of Condominiums, could alleviate the deficiencies in the filing of prospectus requirements for condominium developers, thereby eliminating delay and waste in the development of condominium projects.

### *Conclusion*

It is incumbent on the Florida legislature to act once again to improve the Condominium Act. The solution to the two problem areas discussed in this article is found in the Mobile Home Act. In that Act, a forty-five day time limit was placed on the preemptive right of mobile home park tenants to purchase a park before it can be sold to a third party. Such a limitation is reasonable in its duration and recommends itself for adoption into the Condominium Act. In order to protect condominium owners and purchasers, a forty-five day limit, similarly, should be imposed on the time period that condominium associations have to decide whether or not to exercise their rights-of-first-refusal. This limitation would redress the judicial sanctioning of preemptive options that are unreasonable in duration and chill sales, removing property from commerce. Finally, the Mobile Home Act requires that park owners be provided a form prospectus. An amendment to the Condominium Act should similarly require the Condominium Division to furnish standardized prospectus forms to developers in order to facilitate compliance with the extensive disclosure requirements of section 718.504 and eliminate costly delays that result from deficient filings.

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77. FLA. STAT. § 720.320(7) (1976).