(b) To be valid, a claim of lien must state the description of the condominium parcel, the name of the record owner, the name and address of the association, the amount due, and the due dates. It must be executed and acknowledged by an officer or authorized agent of the association. No such lien shall be effective longer than 1 year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. The 1-year period shall automatically be extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. The claim of lien shall secure all unpaid assessments which are due and which may accrue subsequent to the recording of the claim of lien and prior to the entry of a certificate of title, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process. Upon payment in full, the person making the payment is entitled to a satisfaction of the lien.

(c) By recording a notice in substantially the following form, a unit owner or the unit owner's agent or attorney may require the association to enforce a recorded claim of lien against his or her condominium parcel:

NOTICE OF CONTEST OF LIEN

TO: (Name and address of association) You are notified that the undersigned contests the claim of lien filed by you on _____, (year), and recorded in Official Records Book _____ at Page _____, of the public records of _____ County, Florida, and that the time within which you may file suit to enforce your lien is limited to 90 days from the date of service of this notice. Executed this _____ day of _____, (year).

Signed: (Owner or Attorney)

After notice of contest of lien has been recorded, the clerk of the circuit court shall mail a copy of the recorded notice to the association by certified mail, return receipt requested, at the address shown in the claim of lien or most recent amendment to it and shall certify to the service on the face of the notice. Service is complete upon mailing. After service, the association has 90 days in which to file an action to enforce the lien; and, if the action is not filed within the 90-day period, the lien is void. However, the 90-day period shall be extended for any length of time that the association is prevented from filing its action because of an automatic stay resulting from the filing of a bankruptcy petition by the unit owner or by any other person claiming an interest in the parcel.

(6)(a) The association may bring an action in its name to foreclose a lien for assessments in the manner a mortgage of real property is foreclosed and may also bring an action to recover a money judgment for the unpaid assessments without waiving any claim of lien. The association is entitled to recover its reasonable attorney's fees incurred in either a lien foreclosure action or an action to recover a money judgment for unpaid assessments.

(b) No foreclosure judgment may be entered until at least 30 days after the association gives written notice to the unit owner of its intention to foreclose its lien to collect the unpaid assessments. If this notice is not given at least 30 days before the foreclosure action is filed, and if the unpaid assessments, including those coming due after the claim of lien is recorded, are paid before the entry of a final judgment of foreclosure, the association shall not recover attorney's fees or costs. The notice must be given by delivery of a copy of it to the unit owner or by certified or registered mail, return receipt requested, addressed to the unit owner at his or her last known address; and, upon such mailing, the notice shall be deemed to have been given, and the court shall proceed with the foreclosure action and may award attorney's fees and costs as permitted by law. The notice requirements of this subsection are satisfied if the unit owner records a notice of contest of lien as provided in subsection (5). The notice requirements of this subsection do not apply if an action to foreclose a mortgage on the condominium unit is pending before any court; if the rights of the association would be affected by such foreclosure; and if actual, constructive, or substitute service of process has been made on the unit owner.

(c) If the unit owner remains in possession of the unit after a foreclosure judgment has been entered, the court, in its discretion, may require the unit owner to pay a reasonable rental for the unit. If the unit is rented or leased during the pendency of the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent. The expenses of the receiver shall be paid by the party which does not prevail in the foreclosure action.

(d) The association has the power to purchase the condominium parcel at the foreclosure sale and to hold, lease, mortgage, or convey it.

(7) A first mortgagee acquiring title to a condominium parcel as a result of foreclosure, or a deed in lieu of foreclosure, may not, during the period of its ownership of such parcel, whether or not such parcel is unoccupied, be excused from the payment of some or all of the common expenses coming due during the period of such ownership.

(8) Within 15 days after receiving a written request therefor from a unit owner purchaser, or mortgagee, the association shall provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the unit owner with respect to the condominium parcel. Any person other than the owner who relies upon such certificate shall be protected thereby. A summary proceeding pursuant to s. 51.011 may be brought to compel compliance with this subsection, and in any such action the prevailing party is entitled to recover reasonable attorney's fees. Notwithstanding any limitation on transfer fees contained in s. 718.112(2)(i), the association or its authorized agent may charge a reasonable fee for the preparation of the certificate.

(9)(a) A unit owner may not be excused from payment of the unit owner's share of common expenses unless all other unit owners are likewise proportionately excluded from payment, except as provided in subsection (1) and in the following cases:

1. If authorized by the declaration, a developer who is offering units for sale may elect to be excused from payment of assessments against those unsold units for a stated period of time after the declaration is recorded. However, the developer must pay common expenses incurred during such period which

exceed regular periodic assessments against other unit owners in the same condominium. The stated period must terminate no later than the first day of the fourth calendar month following the month in which the first closing occurs of a purchase contract for a unit in that condominium. If a developer-controlled association has maintained all insurance coverage required by s. 718.111(11)(a), common expenses incurred during the stated period resulting from a natural disaster or an act of God occurring during the stated period, which are not covered by proceeds from insurance maintained by the association, may be assessed against all unit owners owning units on the date of such natural disaster or act of God, and their respective successors and assigns, including the developer with respect to units owned by the developer. In the event of such an assessment, all units shall be assessed in accordance with s. 718.115(2).

2. A developer who owns condominium units, and who is offering the units for sale, may be excused from payment of assessments against those unsold units for the period of time the developer has guaranteed to all purchasers or other unit owners in the same condominium that assessments will not exceed a stated dollar amount and that the developer will pay any common expenses that exceed the guaranteed amount. Such guarantee may be stated in the purchase contract, declaration, prospectus, or written agreement between the developer and a majority of the unit owners other than the developer and may provide that, after the initial guarantee period, the developer may extend the guarantee for one or more stated periods. If a developer-controlled association has maintained all insurance coverage required by s. 718.111(11)(a), common expenses incurred during a guarantee period, as a result of a natural disaster or an act of God occurring during the same guarantee period, which are not covered by the proceeds from such insurance, may be assessed against all unit owners owning units on the date of such natural disaster or act of God, and their successors and assigns, including the developer with respect to units owned by the developer. Any such assessment shall be in accordance with s. 718.115(2) or (4), as applicable.

(b) If the purchase contract, declaration, prospectus, or written agreement between the developer and a majority of unit owners other than the developer provides for the developer to be excused from payment of assessments under paragraph (a), only regular periodic assessments for common expenses as provided for in the declaration and prospectus and disclosed in the estimated operating budget shall be used for payment of common expenses during any period in which the developer is excused. Accordingly, no funds which are receivable from unit purchasers or unit owners and payable to the association, including capital contributions or startup funds collected from unit purchasers at closing, may be used for payment of such common expenses.

(c) If a developer of a multicondominium is excused from payment of assessments under paragraph (a), the developer's financial obligation to the multicondominium association during any period in which the developer is excused from payment of assessments is as follows:

1. The developer shall pay the common expenses of a condominium affected by a guarantee, including the funding of reserves as provided in the adopted annual budget of that condominium, which exceed the regular periodic assessments at the guaranteed level against all other unit owners within that condominium.

2. The developer shall pay the common expenses of a multicondominium association, including the funding of reserves as provided in the adopted annual budget of the association, which are allocated to units within a condominium affected by a guarantee and which exceed the regular periodic assessments against all other unit owners within that condominium.

(10) The specific purpose or purposes of any special assessment, including any contingent special assessment levied in conjunction with the purchase of an insurance policy authorized by s. 718.111(11), approved in accordance with the condominium documents shall be set forth in a written notice of such assessment sent or delivered to each unit owner. The funds collected pursuant to a special assessment shall be used only for the specific purpose or purposes set forth in such notice. However, upon completion of such specific purpose or purposes, any excess funds will be considered common surplus, and may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.

History.--s. 1, ch. 76-222; s. 1, ch. 77-174; s. 9, ch. 77-221; s. 7, ch. 77-222; s. 6, ch. 78-328; s. 8, ch. 84-368; s. 12, ch. 90-151; s. 9, ch. 91-103; ss. 4, 5, ch. 91-426; s. 6, ch. 92-49; s. 10, ch. 94-350; s. 87, ch. 95-211; s. 856, ch. 97-102; s. 7, ch. 98-322; s. 33, ch. 99-6; s. 1, ch. 2000-201; s. 56, ch. 2000-302; s. 7, ch. 2003-14; s. 6, ch. 2007-80.

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718.202 Sales or reservation deposits prior to closing.--

(1) If a developer contracts to sell a condominium parcel and the construction, furnishing, and landscaping of the property submitted or proposed to be submitted to condominium ownership has not been substantially completed in accordance with the plans and specifications and representations made by the developer in the disclosures required by this chapter, the developer shall pay into an escrow account all payments up to 10 percent of the sale price received by the developer from the buyer towards the sale price. The escrow agent shall give to the purchaser a receipt for the deposit, upon request. In lieu of the foregoing, the division director has the discretion to accept other assurances, including, but not limited to, a surety bond or an irrevocable letter of credit in an amount equal to the escrow requirements of this section. Default determinations and refund of deposits shall be governed by the escrow release provision of this subsection. Funds shall be released from escrow as follows:

(a) If a buyer properly terminates the contract pursuant to its terms or pursuant to this chapter, the funds shall be paid to the buyer together with any interest earned.

(b) If the buyer defaults in the performance of his or her obligations under the contract of purchase and sale, the funds shall be paid to the developer together with any interest earned.

(c) If the contract does not provide for the payment of any interest earned on the escrowed funds, interest shall be paid to the developer at the closing of the transaction.

(d) If the funds of a buyer have not been previously disbursed in accordance with the provisions of this subsection, they may be disbursed to the developer by the escrow agent at the closing of the transaction, unless prior to the disbursement the escrow agent receives from the buyer written notice of a dispute between the buyer and developer.

(2) All payments which are in excess of the 10 percent of the sale price described in subsection (1) and which have been received prior to completion of construction by the developer from the buyer on a contract for purchase of a condominium parcel shall be held in a special escrow account established as provided in subsection (1) and controlled by an escrow agent and may not be used by the developer prior to closing the transaction, except as provided in subsection (3) or except for refund to the buyer. If the money remains in this special account for more than 3 months and earns interest, the interest shall be paid as provided in subsection (1).

(3) If the contract for sale of the condominium unit so provides, the developer may withdraw escrow funds in excess of 10 percent of the purchase price from the special account required by subsection (2) when the construction of improvements has begun. He or she may use the funds in the actual construction and development of the condominium property in which the unit to be sold is located. However, no part of these funds may be used for salaries, commissions, or expenses of salespersons or for advertising purposes. A contract which permits use of the advance payments for these purposes shall include the following legend conspicuously printed or stamped in boldfaced type on the first page of the contract and immediately above the place for the signature of the buyer: ANY PAYMENT IN EXCESS OF 10 PERCENT OF THE PURCHASE PRICE MADE TO DEVELOPER PRIOR TO CLOSING PURSUANT TO THIS CONTRACT MAY BE USED FOR CONSTRUCTION PURPOSES BY THE DEVELOPER.

(4) The term "completion of construction" means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization issued by the governmental body having jurisdiction, and, in a jurisdiction where no certificate of occupancy or equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvements according to the plans and specifications.

(5) The failure to comply with the provisions of this section renders the contract voidable by the buyer, and, if voided, all sums deposited or advanced under the contract shall be refunded with interest at the highest rate then being paid on savings accounts, excluding certificates of deposit, by savings and loan associations in the area in which the condominium property is located.

(6) If a developer enters into a reservation agreement, the developer shall pay into an escrow account all reservation deposit payments. Reservation deposits shall be payable to the escrow agent, who shall give to the prospective purchaser a receipt for the deposit, acknowledging that the deposit is being held pursuant to the requirements of this subsection. The funds may be placed in either interest-bearing or non-interest-bearing accounts, provided that the funds shall at all reasonable times be available for withdrawal in full by the escrow agent. The developer shall maintain separate records for each condominium or proposed condominium for which deposits are being accepted. Upon written request to the escrow agent by the prospective purchaser or developer, the funds shall be immediately and without qualification refunded in full to the prospective purchaser. Upon such refund, any interest shall be paid to the prospective purchaser, unless otherwise provided in the reservation agreement. A reservation deposit shall not be released directly to the developer except as a down payment on the purchase price simultaneously with or subsequent to the execution of a contract. Upon the execution of a purchase agreement for a unit, any funds paid by the purchaser as a deposit to reserve the unit pursuant to a reservation agreement, and any interest thereon, shall cease to be subject to the provisions of this subsection and shall instead be subject to the provisions of subsections (1)-(5).

(7) Any developer who willfully fails to comply with the provisions of this section concerning establishment of an escrow account, deposits of funds into escrow, and withdrawal of funds from escrow is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, or the successor thereof. The failure to establish an escrow account or to place funds in an escrow account is prima facie evidence of an intentional and purposeful violation of this section.

(8) Every escrow account required by this section shall be established with a bank; a savings and loan association; an attorney who is a member of The Florida Bar; a real estate broker registered under chapter 475; a title insurer authorized to do business in this state, acting through either its employees or a title insurance agent licensed under chapter 626; or any financial lending institution having a net worth in excess of $5 million. The escrow agent shall not be located outside the state unless, pursuant to the escrow agreement, the escrow agent submits to the jurisdiction of the division and the courts of this state for any cause of action arising from the escrow. Every escrow agent shall be independent of the developer, and no developer or any officer, director, affiliate, subsidiary, or employee of a developer may serve as escrow agent. Escrow funds may be invested only in securities of the United States or an agency thereof or in accounts in institutions the deposits of which are insured by an agency of the United States.

(9) Any developer who is subject to the provisions of this section is not subject to the provisions of s. 501.1375.

(10) Nothing in this section shall be construed to require any filing with the division in the case of condominiums other than residential condominiums.

History.--s. 1, ch. 76-222; s. 7, ch. 79-314; s. 3, ch. 80-323; s. 3, ch. 81-185; s. 9, ch. 84-368; s. 5, ch. 87-117; s. 14, ch. 90-151; s. 860, ch. 97-102.

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718.203 Warranties.--

(1) The developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended as follows:

(a) As to each unit, a warranty for 3 years commencing with the completion of the building containing the unit.

(b) As to the personal property that is transferred with, or appurtenant to, each unit, a warranty which is for the same period as that provided by the manufacturer of the personal property, commencing with the date of closing of the purchase or the date of possession of the unit, whichever is earlier.

(c) As to all other improvements for the use of unit owners, a 3-year warranty commencing with the date of completion of the improvements.

(d) As to all other personal property for the use of unit owners, a warranty which shall be the same as that provided by the manufacturer of the personal property.

(e) As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or a building, except mechanical elements serving only one unit, a warranty for a period beginning with the completion of construction of each building or improvement and continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.

(f) As to all other property which is conveyed with a unit, a warranty to the initial purchaser of each unit for a period of 1 year from the date of closing of the purchase or the date of possession, whichever occurs first.

(2) The contractor, and all subcontractors and suppliers, grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them as follows:

(a) For a period of 3 years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one

unit.

(b) For a period of 1 year after completion of all construction, a warranty as to all other improvements and materials.

(3) "Completion of a building or improvement" means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization issued by the governmental body having jurisdiction, and in jurisdictions where no certificate of occupancy or equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

(4) These warranties are conditioned upon routine maintenance being performed, unless the maintenance is an obligation of the developer or a developer-controlled association.

(5) The warranties provided by this section shall inure to the benefit of each owner and his or her successor owners and to the benefit of the developer.

(6) Nothing in this section affects a condominium as to which rights are established by contracts for sale of 10 percent or more of the units in the condominium by the developer to prospective unit owners prior to July 1, 1974, or as to condominium buildings on which construction has been commenced prior to July 1, 1974.

(7) Residential condominiums may be covered by an insured warranty program underwritten by a licensed insurance company registered in this state, provided that such warranty program meets the minimum requirements of this chapter; to the degree that such warranty program does not meet the minimum requirements of this chapter, such requirements shall apply.

History.--s. 1, ch. 76-222; s. 1, ch. 77-221; s. 8, ch. 77-222; s. 3, ch. 78-340; s. 9, ch. 79-314; s. 11, ch. 91-103; s. 5, ch. 91-426; s. 8, ch. 92-49; s. 861, ch. 97-102.

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718.301 Transfer of association control; claims of defect by association.--

(1) When unit owners other than the developer own 15 percent or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect no less than one-third of the members of the board of administration of the association. Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration of an association:

(a) Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;

(b) Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;

(c) When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;

(d) When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business; or

(e) Seven years after recordation of the declaration of condominium; or, in the case of an association which may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or, in the case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase,

whichever occurs first. The developer is entitled to elect at least one member of the board of administration of an association as long as the developer holds for sale in the ordinary course of business at least 5 percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association. Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.

(2) Within 75 days after the unit owners other than the developer are entitled to elect a member or

members of the board of administration of an association, the association shall call, and give not less than 60 days' notice of an election for the members of the board of administration. The election shall proceed as provided in s. 718.112(2)(d). The notice may be given by any unit owner if the association fails to do so. Upon election of the first unit owner other than the developer to the board of administration, the developer shall forward to the division the name and mailing address of the unit owner board member.

(3) If a developer holds units for sale in the ordinary course of business, none of the following actions may be taken without approval in writing by the developer:

(a) Assessment of the developer as a unit owner for capital improvements.

(b) Any action by the association that would be detrimental to the sales of units by the developer. However, an increase in assessments for common expenses without discrimination against the developer shall not be deemed to be detrimental to the sales of units.

(4) At the time that unit owners other than the developer elect a majority of the members of the board of administration of an association, the developer shall relinquish control of the association, and the unit owners shall accept control. Simultaneously, or for the purposes of paragraph (c) not more than 90 days thereafter, the developer shall deliver to the association, at the developer's expense, all property of the unit owners and of the association which is held or controlled by the developer, including, but not limited to, the following items, if applicable, as to each condominium operated by the association:

(a)1. The original or a photocopy of the recorded declaration of condominium and all amendments thereto. If a photocopy is provided, it shall be certified by affidavit of the developer or an officer or agent of the developer as being a complete copy of the actual recorded declaration.

2. A certified copy of the articles of incorporation of the association or, if the association was created prior to the effective date of this act and it is not incorporated, copies of the documents creating the association.

3. A copy of the bylaws.

4. The minute books, including all minutes, and other books and records of the association, if any.

5. Any house rules and regulations which have been promulgated.

(b) Resignations of officers and members of the board of administration who are required to resign because the developer is required to relinquish control of the association.

(c) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation, by an independent certified public

accountant. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as prescribed by the Florida Board of Accountancy, pursuant to chapter 473. The accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine if expenditures were for association purposes and the billings, cash receipts, and related records to determine that the developer was charged and paid the proper amounts of assessments.

(d) Association funds or control thereof.

(e) All tangible personal property that is property of the association, which is represented by the developer to be part of the common elements or which is ostensibly part of the common elements, and an inventory of that property.

(f) A copy of the plans and specifications utilized in the construction or remodeling of improvements and the supplying of equipment to the condominium and in the construction and installation of all mechanical components serving the improvements and the site with a certificate in affidavit form of the developer or the developer's agent or an architect or engineer authorized to practice in this state that such plans and specifications represent, to the best of his or her knowledge and belief, the actual plans and specifications utilized in the construction and improvement of the condominium property and for the construction and installation of the mechanical components serving the improvements. If the condominium property has been declared a condominium more than 3 years after the completion of construction or remodeling of the improvements, the requirements of this paragraph do not apply.

(g) A list of the names and addresses, of which the developer had knowledge at any time in the development of the condominium, of all contractors, subcontractors, and suppliers utilized in the construction or remodeling of the improvements and in the landscaping of the condominium or association property.

(h) Insurance policies.

(i) Copies of any certificates of occupancy which may have been issued for the condominium property.

(j) Any other permits applicable to the condominium property which have been issued by governmental bodies and are in force or were issued within 1 year prior to the date the unit owners other than the developer take control of the association.

(k) All written warranties of the contractor, subcontractors, suppliers, and manufacturers, if any, that are still effective.

(l) A roster of unit owners and their addresses and telephone numbers, if known, as shown on the developer's records.

(m) Leases of the common elements and other leases to which the association is a party.

(n) Employment contracts or service contracts in which the association is one of the contracting parties or service contracts in which the association or the unit owners have an obligation or responsibility, directly or indirectly, to pay some or all of the fee or charge of the person or persons performing the service.

(o) All other contracts to which the association is a party.

(5) If, during the period prior to the time that the developer relinquishes control of the association pursuant to subsection (4), any provision of the Condominium Act or any rule promulgated thereunder is violated by the association, the developer is responsible for such violation and is subject to the administrative action provided in this chapter for such violation or violations and is liable for such violation or violations to third parties. This subsection is intended to clarify existing law.

(6) Prior to the developer relinquishing control of the association pursuant to subsection (4), actions taken by members of the board of administration designated by the developer are considered actions taken by the developer, and the developer is responsible to the association and its members for all such actions.

(7) In any claim against a developer by an association alleging a defect in design, structural elements, construction, or any mechanical, electrical, fire protection, plumbing, or other element that requires a licensed professional for design or installation under chapter 455, chapter 471, chapter 481, chapter 489, or chapter 633, such defect must be examined and certified by an appropriately licensed Florida engineer, design professional, contractor, or otherwise licensed Florida individual or entity.

(8) The division has authority to adopt rules pursuant to the Administrative Procedure Act to ensure the efficient and effective transition from developer control of a condominium to the establishment of a unit-owner controlled association.

History.--s. 1, ch. 76-222; s. 7, ch. 77-221; s. 10, ch. 79-314; s. 264, ch. 79-400; s. 4, ch. 81-185; s. 10, ch. 84-368; s. 3, ch. 88-148; s. 15, ch. 90-151; s. 12, ch. 91-103; s. 5, ch. 91-426; s. 9, ch. 92-49; s. 862, ch. 97-102; s. 4, ch. 98-195; s. 1, ch. 2005-192.

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718.302 Agreements entered into by the association.--

(1) Any grant or reservation made by a declaration, lease, or other document, and any contract made by an association prior to assumption of control of the association by unit owners other than the developer, that provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium shall be fair and reasonable, and such grant, reservation, or contract may be canceled by unit owners other than the developer:

(a) If the association operates only one condominium and the unit owners other than the developer have assumed control of the association, or if unit owners other than the developer own not less than 75 percent of the voting interests in the condominium, the cancellation shall be by concurrence of the owners of not less than 75 percent of the voting interests other than the voting interests owned by the developer. If a grant, reservation, or contract is so canceled and the unit owners other than the developer have not assumed control of the association, the association shall make a new contract or otherwise provide for maintenance, management, or operation in lieu of the canceled obligation, at the direction of the owners of not less than a majority of the voting interests in the condominium other than the voting interests owned by the developer.

(b) If the association operates more than one condominium and the unit owners other than the developer have not assumed control of the association, and if unit owners other than the developer own at least 75 percent of the voting interests in a condominium operated by the association, any grant, reservation, or contract for maintenance, management, or operation of buildings containing the units in that condominium or of improvements used only by unit owners of that condominium may be canceled by concurrence of the owners of at least 75 percent of the voting interests in the condominium other than the voting interests owned by the developer. No grant, reservation, or contract for maintenance, management, or operation of recreational areas or any other property serving more than one condominium, and operated by more than one association, may be canceled except pursuant to paragraph (d).

(c) If the association operates more than one condominium and the unit owners other than the developer have assumed control of the association, the cancellation shall be by concurrence of the owners of not less than 75 percent of the total number of voting interests in all condominiums operated by the association other than the voting interests owned by the developer.

(d) If the owners of units in a condominium have the right to use property in common with owners of

units in other condominiums and those condominiums are operated by more than one association, no grant, reservation, or contract for maintenance, management, or operation of the property serving more than one condominium may be canceled until unit owners other than the developer have assumed control of all of the associations operating the condominiums that are to be served by the recreational area or other property, after which cancellation may be effected by concurrence of the owners of not less than 75 percent of the total number of voting interests in those condominiums other than voting interests owned by the developer.

(2) Any grant or reservation made by a declaration, lease, or other document, or any contract made by the developer or association prior to the time when unit owners other than the developer elect a majority of the board of administration, which grant, reservation, or contract requires the association to purchase condominium property or to lease condominium property to another party, shall be deemed ratified unless rejected by a majority of the voting interests of unit owners other than the developer within 18 months after unit owners other than the developer elect a majority of the board of administration. This subsection does not apply to any grant or reservation made by a declaration whereby persons other than the developer or the developer's heirs, assigns, affiliates, directors, officers, or employees are granted the right to use the condominium property, so long as such persons are obligated to pay, at a minimum, a proportionate share of the cost associated with such property.

(3) Any grant or reservation made by a declaration, lease, or other document, and any contract made by an association, whether before or after assumption of control of the association by unit owners other than the developer, that provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium shall not be in conflict with the powers and duties of the association or the rights of the unit owners as provided in this chapter. This subsection is intended only as a clarification of existing law.

(4) Any grant or reservation made by a declaration, lease, or other document, and any contract made by an association prior to assumption of control of the association by unit owners other than the developer, shall be fair and reasonable.

(5) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in management contracts for condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium management contract which provides that the fee under the contract shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

(6) Any action to compel compliance with the provisions of this section or of s. 718.301 may be brought pursuant to the summary procedure provided for in s. 51.011. In any such action brought to compel compliance with the provisions of s. 718.301, the prevailing party is entitled to recover reasonable attorney's fees.

History.--s. 1, ch. 76-222; s. 1, ch. 77-174; s. 11, ch. 79-314; s. 11, ch. 84-368; s. 43, ch. 86-175; s. 863, ch. 97-102.

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REAL AND PERSONAL PROPERTY

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CONDOMINIUMS

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718.3025 Agreements for operation, maintenance, or management of condominiums; specific requirements.--

(1) No written contract between a party contracting to provide maintenance or management services and an association which contract provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium shall be valid or enforceable unless the contract:

(a) Specifies the services, obligations, and responsibilities of the party contracting to provide maintenance or management services to the unit owners.

(b) Specifies those costs incurred in the performance of those services, obligations, or responsibilities which are to be reimbursed by the association to the party contracting to provide maintenance or management services.

(c) Provides an indication of how often each service, obligation, or responsibility is to be performed, whether stated for each service, obligation, or responsibility or in categories thereof.

(d) Specifies a minimum number of personnel to be employed by the party contracting to provide maintenance or management services for the purpose of providing service to the association.

(e) Discloses any financial or ownership interest which the developer, if the developer is in control of the association, holds with regard to the party contracting to provide maintenance or management services.

(2) In any case in which the party contracting to provide maintenance or management services fails to provide such services in accordance with the contract, the association is authorized to procure such services from some other party and shall be entitled to collect any fees or charges paid for service performed by another party from the party contracting to provide maintenance or management services.

(3) Any services or obligations not stated on the face of the contract shall be unenforceable.

(4) Notwithstanding the fact that certain vendors contract with associations to maintain equipment or property which is made available to serve unit owners, it is the intent of the Legislature that this

section applies to contracts for maintenance or management services for which the association pays compensation. This section does not apply to contracts for services or property made available for the convenience of unit owners by lessees or licensees of the association, such as coin-operated laundry, food, soft drink, or telephone vendors; cable television operators; retail store operators; businesses; restaurants; or similar vendors.

History.--s. 5, ch. 78-340; s. 12, ch. 79-314; s. 7, ch. 86-175.

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Title XL
REAL AND PERSONAL PROPERTY

Chapter 718
CONDOMINIUMS

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718.3026 Contracts for products and services; in writing; bids; exceptions.--Associations with less than 100 units may opt out of the provisions of this section if two-thirds of the unit owners vote to do so, which opt-out may be accomplished by a proxy specifically setting forth the exception from this section.

(1) All contracts as further described herein or any contract that is not to be fully performed within 1 year after the making thereof, for the purchase, lease, or renting of materials or equipment to be used by the association in accomplishing its purposes under this chapter, and all contracts for the provision of services, shall be in writing. If a contract for the purchase, lease, or renting of materials or equipment, or for the provision of services, requires payment by the association on behalf of any condominium operated by the association in the aggregate that exceeds 5 percent of the total annual budget of the association, including reserves, the association shall obtain competitive bids for the materials, equipment, or services. Nothing contained herein shall be construed to require the association to accept the lowest bid.

(2)(a)1. Notwithstanding the foregoing, contracts with employees of the association, and contracts for attorney, accountant, architect, community association manager, timeshare management firm, engineering, and landscape architect services are not subject to the provisions of this section.

2. A contract executed before January 1, 1992, and any renewal thereof, is not subject to the competitive bid requirements of this section. If a contract was awarded under the competitive bid procedures of this section, any renewal of that contract is not subject to such competitive bid requirements if the contract contains a provision that allows the board to cancel the contract on 30 days' notice. Materials, equipment, or services provided to a condominium under a local government franchise agreement by a franchise holder are not subject to the competitive bid requirements of this section. A contract with a manager, if made by a competitive bid, may be made for up to 3 years. A condominium whose declaration or bylaws provides for competitive bidding for services may operate under the provisions of that declaration or bylaws in lieu of this section if those provisions are not less stringent than the requirements of this section.

(b) Nothing contained herein is intended to limit the ability of an association to obtain needed products and services in an emergency.

(c) This section shall not apply if the business entity with which the association desires to enter into a contract is the only source of supply within the county serving the association.

(d) Nothing contained herein shall excuse a party contracting to provide maintenance or management services from compliance with s. 718.3025.

History.--s. 13, ch. 91-103; s. 5, ch. 91-426; s. 10, ch. 92-49; s. 44, ch. 95-274.

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Title XL
REAL AND PERSONAL PROPERTY

Chapter 718
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718.303 Obligations of owners; waiver; levy of fine against unit by association.--

(1) Each unit owner, each tenant and other invitee, and each association shall be governed by, and shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws and the provisions thereof shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against:

(a) The association.

(b) A unit owner.

(c) Directors designated by the developer, for actions taken by them prior to the time control of the association is assumed by unit owners other than the developer.

(d) Any director who willfully and knowingly fails to comply with these provisions.

(e) Any tenant leasing a unit, and any other invitee occupying a unit.

The prevailing party in any such action or in any action in which the purchaser claims a right of voidability based upon contractual provisions as required in s. 718.503(1)(a) is entitled to recover reasonable attorney's fees. A unit owner prevailing in an action between the association and the unit owner under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. Actions arising under this subsection shall not be deemed to be actions for specific performance.

(2) A provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the provision, except that unit owners or members of a board of administration may waive notice of specific meetings in writing if provided by the bylaws. Any instruction given in writing by a unit owner or purchaser to an escrow agent may be relied upon by an escrow agent, whether or not such instruction and the payment of funds thereunder might constitute a waiver of any provision of this chapter.

(3) If the declaration or bylaws so provide, the association may levy reasonable fines against a unit for the failure of the owner of the unit, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. No fine will become a lien against a unit. No fine may exceed $100 per violation. However, a fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, provided that no such fine shall in the aggregate exceed $1,000. No fine may be levied except after giving reasonable notice and opportunity for a hearing to the unit owner and, if applicable, its licensee or invitee. The hearing must be held before a committee of other unit owners. If the committee does not agree with the fine, the fine may not be levied. The provisions of this subsection do not apply to unoccupied units.

History.--s. 1, ch. 76-222; s. 1, ch. 77-174; s. 12, ch. 84-368; s. 16, ch. 90-151; s. 14, ch. 91-103; s. 5, ch. 91-426; s. 11, ch. 92-49; s. 864, ch. 97-102; s. 14, ch. 2003-14.

Condo Mania

Issues Facing Homeowner Associations and Unit Owners When the Developer Goes Broke

Selected Provisions of the Alabama Uniform Condominium Act

Section 35-8A-101

Short title.

This chapter shall be known and may be cited as the "Alabama Uniform Condominium Act of 1991."

(Acts 1990, No. 90-551, p. 858, §1-101.)

Section 35-8A-103

Definitions.

In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this chapter:

(1) Affiliate of a declarant.
Any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing more than 20 percent of the voting interest in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than 20 percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing more than 20 percent of the voting interest in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than 20 percent of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) Allocated interests.
The undivided interest in the common elements, the common expense liability, and votes in the association.

(3) Association or of unit owners' association.
The corporation organized under section 35-8A-301.

(4) Common elements.
All portions of a condominium other than the units.

(5) Common expenses.
Expenditures made by or financial liabilities of the association, together with any allocations to reserves.

(6) Common expense liability.
The liability for common expenses allocated to each unit pursuant to section 35-8A-207.

(7) Condominium.
Real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(8) Conversion building.
A building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

(9) Declarant.
Any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of, or (ii) reserves or succeeds to any special declarant right.

(10) Declaration.
Any instruments, however denominated, that create a condominium, and any amendments to those instruments.

(11) Development rights.
Any right or combination of rights reserved by a declarant in the declaration to (i) add real estate

to a condominium; (ii) to create units, common elements, or limited common elements within a condominium; (iii) to subdivide units or convert units into common elements; or (iv) to withdraw real estate from a condominium.

(12) Dispose or disposition.

A voluntary transfer to a purchaser of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.

(13) Board.

The body, regardless of name, designated in the declaration to act on behalf of the association.

(14) Identifying number.

A symbol or address that identifies only one unit in a condominium.

(15) Leasehold condominium.

A condominium in which all or a portion of the real estate is subject to a lease, the expiration or termination of which will terminate the condominium or reduce its size.

(16) Limited common element.

A portion of the common elements allocated by the declaration or by operation of section 35-8A-202(2) or (4) for the exclusive use of one or more but fewer than all of the units.

(17) Master association.

An organization described in section 35-8A-220, whether or not it is also an association described in section 35-8A-301.

(18) Offering.

Any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a condominium not located in this state, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the condominium is located.

(19) Person.

A natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity.

(20) Purchaser.

Any person, other than a declarant or a person in the business of selling real estate for his own account, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than 20 years, or (ii) as security for an obligation.

(21) Real estate.

Any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(22) Residential purposes.

Use for dwelling or recreational purposes, or both.

(23) Security interest.

An interest in real estate or personal property created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, vendor's lien, deed of trust, contract for deed, land sales contract, lease intended as security, assignment of lease, rents intended as security, or any similar security device, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

(24) Special declarant rights.

Rights reserved for the benefit of a declarant (i) to complete improvements indicated on plats and plans filed with the declaration (section 35-8A-209); (ii) to exercise any development right

(section 35-8A-210); (iii) to maintain sales offices, management offices, signs advertising the condominium, and models (section 35-8A-215); (iv) to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (section 35-8A-216); (v) to make the condominium subject to a master association (section 35-8A-220); (vi) or to appoint or remove any officer of the association or any master association or any board member during any period of declarant control (section 35-8A-303(d)).

(25) Time share.

A right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with an estate or interest in a condominium or a specified portion thereof.

(26) Unit.

A physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to section 35-8A-205(a)(5).

(27) Unit owner.

A declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation. In a condominium, the declarant is the initial owner of any unit created by the condominium.

(Acts 1990, No. 90-551, p. 858, §1-103.)

Section 35-8A-104

Variation by agreement.

Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration.

(Acts 1990, No. 90-551, p. 858, §1-104.)

Section 35-8A-205

Contents of declaration.

(a) The declaration for a condominium must contain:

(1) The name of the condominium, which must include the word "condominium" or be followed by the words "a condominium," and the name of the association;

(2) The name of every county in which any part of the condominium is situated;

(3) A legally sufficient description of the real estate included in the condominium;

(4) A statement of the maximum number of units which the declarant reserves the right to create;

(5) A description of the boundaries of each unit created by the declaration, including the unit's identifying number;

(6) A description of any limited common elements, other than those specified in section 35-8A-202(2) and (4), as provided in section 35-8A-209(b)(10);

(7) A description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements, other than limited common elements specified in section 35-8A-202(2) and (4), together with a statement that they may be so allocated;

(8) A description of any development rights specified in section 35-8A-103(11) and other special declarant rights specified in section 35-8A-103(24) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(9) If any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

(10) Any other conditions or limitations under which the rights described in subdivision (8) may be exercised or will lapse;

(11) An allocation to each unit of the allocated interests in the manner described in section 35-8A-207;

(12) Any restrictions on (i) use, occupancy, leasing or alienation of the units, provided that reasonable rules and regulations related to conduct by unit owners or esthetic considerations which are adopted by the association from time to time need not be included in the declaration, and (ii) the amount for which a unit may be sold or the amount that may be received by a unit owner on sale, condemnation, casualty loss to the unit or to the condominium, or on the termination of the condominium;

(13) The recording data for recorded easements and licenses appurtenant to or included in the

condominium or to which any portion of the condominium is or may become subject by virtue of a reservation in the declaration;

(14) A statement of the number and identity of units which the declarant reserves the right to dispose of in time shares; and

(15) All matters required by sections 35A-8A-206 through 35-8A-209, 35-8A-215, 35-8A-216, and 35-8A-303(d).

(b) The declaration may contain any other matters the declarant deems appropriate.

(Acts 1990, No. 90-551, p. 858, §2-105.)

Section 35-8A-210

Exercise of development rights.

(a) To exercise any development right reserved under section 35-8A-205(a)(8), the declarant shall prepare, execute, and record an amendment to the declaration as specified in section 35-8A-217 and comply with section 35-8A-209. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created, and, except in the case of subdivision or conversion of units described in subsection (b), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by section 35-8A-208.

(b) Development rights may be reserved within any real estate added to the condominium if the amendment adding that real estate includes all matters required by section 35-8A-205 or 35-8A-206, as the case may be, and the plats and plans include all matters required by section 35-8A-209. This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to section 35-8A-205(a)(8).

(c) Whenever a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both:

(1) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain; and

(2) If the declarant subdivides the unit into two or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(d) If the declaration provides, pursuant to section 35-8A-205(a)(8), that all or a portion of the real estate is subject to the development right of withdrawal:

(1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(2) If a portion or portions are subject to withdrawal, no portion may be withdrawn after a unit in that portion has been conveyed to a purchaser.

(Acts 1990, No. 90-551, p. 858, §2-110.)

Section 35-8A-219

Rights of secured lenders.

The declaration may require that all or a specified number or percentage of the mortgagees or beneficiaries of deeds of trust encumbering the units approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association by the unit owners or the board, or (ii) prevent the association or the board from commencing, intervening in, or settling any litigation or proceeding, or receiving and distributing any insurance proceeds except pursuant to section 35-8A-313.

(Acts 1990, No. 90-551, p. 858, §2-119.)

Section 35-8A-301

Organization of unit owners' association.

A unit owners' association must be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners or, following termination of the condominium, of all former unit owners entitled to distributions of proceeds under section 35-8A-218, or their heirs, successors, or assigns. The association must be organized as a profit or nonprofit corporation.

(Acts 1990, No. 90-551, p. 858, §3-101.)

Section 35-8A-302

Powers of unit owners' association.

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association may:

(1) Adopt and amend bylaws and rules and regulations, except that an association may not adopt a bylaw or enforce an existing bylaw to restrict an owner from renovating or decorating the interior walls, ceiling, or floor of his or her unit in a manner that does not substantially alter the exterior appearance of the condominium;

(2) Adopt and amend budgets for revenues, expenditures, and reserves and impose and collect assessments for common expenses from unit owners;

(3) Hire and discharge managing agents and other employees, agents, and independent contractors;

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;

(5) Make contracts and incur liabilities;

(6) Regulate the use, maintenance, repair, replacement, and modification of common elements;

(7) Cause additional improvements to be made as a part of the common elements;

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to Section 35-8A-312;

(9) Grant easements, encroachments, leases, licenses, and concessions through or over the common elements;

(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in Section 35-8A-202(2) and (4), and for services provided to unit owners;

(11) Impose against owners of units charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, and rules and regulations of the association;

(12) Impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 35-8A-409, or statements of unpaid assessments;

(13) Provide for the indemnification of its officers and board and maintain directors' and officers' liability insurance;

(14) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;

(15) Exercise any other powers conferred by the declaration or bylaws;

(16) Exercise all other powers that may be exercised in this state by legal entities of the same type as the association; and

(17) Exercise any other powers necessary and proper for the governance and operation of the association.

(b) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

(Acts 1990, No. 90-551, p. 858, §3-102; Act 98-149, p. 252, §1.)

Section 35-8A-303

Board members and officers.

(a) Except as provided in the declaration, the bylaws, the articles of incorporation in subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board are required to exercise (i) if appointed by the declarant, the care required of fiduciaries of the unit owners other than the declarant and (ii) if elected by the unit owners other than declarant, ordinary and reasonable care.

(b) The board may not act on behalf of the association to amend the declaration specified in section 35-8A-217, to terminate the condominium described in section 35-8A-218, or to elect members of the board or to determine the qualifications, powers and duties, or terms of office of board members as provided in section 35-8A-303(f), but the board may fill vacancies in its membership for the unexpired portion of any term.

(c) Within 30 days after adoption of any proposed budget for the condominium, the board shall provide a copy of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after delivery or mailing of the budget to the unit owners. Unless at that meeting a majority of all the unit owners present in person or by proxy or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners shall be continued unit such time as the unit owners ratify a subsequent budget proposed by the board.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by him, may appoint and remove the officers and members of the board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earliest of (i) 60 days after conveyance of 75 percent of the units which may be created to unit owners other than a declarant; (ii) two years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) two years after any development right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the board before termination of that period, but in that event he may require, for the duration of the period of declarant control, that specified actions of the association or board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(e) Not later than 90 days after conveyance of 25 percent of the units which may be created to unit owners other than a declarant, at least one member and not less than 25 percent of the members of the board must be elected by unit owners other than the declarant. Not later than 90 days after conveyance of 50 percent of the units which may be created to unit owners other than a declarant, not less than 33 1/3 percent of the members of the board must be elected by unit owners other than the declarant.

(f) Except as otherwise provided in section 35-8A-220(e), not later than the termination of any period of declarant control, the unit owners shall elect a board of at least three members, at least a majority of whom must be unit owners other than declarant. The board shall elect the officers. The board members and officers shall take office upon election.

(g) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons present in person and entitled to vote at any meeting of the unit owners at which a quorum in person is present, may remove any member of the board with or without cause, other

than a member appointed by the declarant.

(Acts 1990, No. 90-551, p. 858, §3-103.)

Section 35-8A-304

Transfer of special declarant rights.

(a) No special declarant right specified in section 35-8A-103(24)created or reserved under this chapter may be transferred except by an instrument evidencing the transfer recorded in every county in which any portion of the condominium is located. The instrument is not effective unless executed by the transferee.

(b) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this chapter. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.

(2) If a successor to any special declarant right is an affiliate of a declarant specified in section 35-8A-103(1), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the condominium.

(3) If a transferor retains any special declarant right, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this chapter or by the declaration relating to the retained special declarant rights and arising after the transfer.

(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument or deed of trust or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under federal bankruptcy law or receivership proceedings, of any units owned by a declarant or real estate in a condominium subject to development rights, a person acquiring title to all the real estate being foreclosed or sold succeeds to all special declarant rights related to that real estate held by that declarant, or only to any rights reserved in the declaration pursuant to section 35-8A-215 and held by that declarant to maintain models, sales offices and signs.

(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under federal bankruptcy law or receivership proceedings, of all units and other real estate in a condominium owned by a declarant:

(1) The declarant ceases to have any special declarant rights, and

(2) The period of declarant control specified in section 35-8A-303(d) terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

(e) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:

(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all

obligations and liabilities imposed on the transferor by this chapter or by the declaration.

(2) A successor to any special declarant right, other than a successor described in subdivisions (3) or (4), who is not an affiliate of a declarant, is subject to all obligations and liabilities imposed by this chapter or the declaration:

a. On a declarant which relates to his exercise or nonexercise of special declarant rights; or

b. On his transferor, other than:

1. Misrepresentations by any previous declarant;

2. Warranty obligations on improvements made by any previous declarant, or made before the condominium was created;

3. Breach of any fiduciary obligation by any previous declarant or his appointees to the board; or

4. Any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs pursuant to section 35-8A-215, may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide an offering statement and any liability arising as a result thereof.

(4) A successor to all special declarant rights held by his transferor who is not an affiliate of that declarant and who succeeded to those rights pursuant to a deed in lieu of foreclosure or a judgment or instrument conveying title to units under subsection (c), may declare the intention in a recorded instrument to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the board in accordance with the provisions of section 35-8A-303(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, he is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under section 35-8A-303(d).

(f) Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this chapter or the declaration.

(Acts 1990, No. 90-551, p. 858, §3-104.)

Section 35-8A-305

Termination of contracts and leases of declarant.

If entered into before the board elected by the unit owners pursuant to section 35-8A-303(f) takes office, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the board elected by the unit owners pursuant to section 35-8A-303(f) takes office upon not less than 90 days' notice to the other party. This section does not apply to any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section.

(Acts 1990, No. 90-551, p. 858, §3-105.)

Section 35-8A-307

Upkeep of condominiums.

(a) Except to the extent provided by the declaration, subsection (b), or section 35-8A-313(h), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

(b) In addition to the liability that a declarant as a unit owner has under this chapter, the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the condominium is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.

(Acts 1990, No. 90-551, p. 858, §3-107.)

Section 35-8A-311

Tort and contract liability.

Neither the association, any association mortgagee, nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain. Otherwise, an action alleging a wrong done by the association shall be brought against the association and not against any unit owner. If the wrong occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner: (i) for all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) for all costs which the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all reasonable litigation expenses, including reasonable attorneys fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from bringing an action contemplated by this section solely because he is a unit owner, or a member or officer of the association. Liens resulting from judgments against the association are governed by section 35-8A-317.

(Acts 1990, No. 90-551, p. 858, §3-111.)

Section 35-8A-315

Assessments for common expenses.

(a) Until the association makes a common expense assessment, the declarant must pay all common expenses. After any assessment has been made by the association, assessments must be made at least annually, based on a budget adopted at least annually by the association.

(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to section 35-8A-207(a) and (b). Any past due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding 18 percent per year.

(c) To the extent required by the declaration:

(1) Any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;

(2) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and

(3) The costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.

(d) Assessments to pay a judgment against the association under section 35-8A-317(a) may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense liabilities.

(e) If any common expense is caused by the misconduct of any unit owner or such unit owner's invitee, the association may assess that expense exclusively against his unit after notice and an opportunity to be heard.

(f) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

(g) All assessments shall also constitute the personal obligation of the unit owner to the association.

(h) No unit owner other than the association shall be exempted from any liability for any assessment under this code section or under any condominium instrument for any reason whatsoever, including, without limitation, abandonment, nonuse, or waiver of the use or enjoyment of his unit or any part of the common elements.

(Acts 1990, No. 90-551, p. 858, §3-115.)

Section 35-8A-404

Offering statement - Condominiums subject to development rights.

If the declaration provides that a condominium is subject to any development rights, the offering statement must disclose, in addition to the information required by section 35-8A-403:

(1) The maximum number of units, and the maximum number of units per acre, that may be created;

(2) A statement of how many or what percentage of the units which may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

(3) If any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas, and the maximum percentage of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

(4) A statement of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;

(5) A statement of the maximum extent to which each unit's allocated interests may be changed by the exercise of any development right described in subdivision (3);

(6) A statement of the extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the condominium will be compatible with existing buildings and improvements in the condominium in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;

(7) General descriptions of all other improvements that may be made and limited common elements that may be created within any part of the condominium pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(8) A statement of any limitations as to the locations of any building or other improvement that may be made within any part of the condominium pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(9) A statement that any limited common elements created pursuant to any development right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the condominium, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

(10) A statement that the proportion of limited common elements to units created pursuant to any development right reserved by the declarant will be approximately equal to the proportion existing within other parts of the condominium, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

(11) A statement that all restrictions in the declaration affecting use, occupancy, and sale or lease of units will apply to any units created pursuant to any development right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

(12) A statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

(Acts 1990, No. 90-551, p. 858, §4-104.)

Section 35-8A-316

Lien for assessments.

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien may be foreclosed in like manner as a mortgage on real estate but the association shall give reasonable advance notice of its proposed action to the unit owner and all lienholders of record of the unit. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to section 35-8A-302(a)(10), (11) and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. The lien is also prior to the mortgages and deeds of trust described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 35-8A-315(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. The lien under this section is not subject to the provisions of homestead or other exemptions.

(c) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this or the preceding section must include costs and reasonable attorney's fees actually incurred for the prevailing party.

(h) Any unit owner, mortgagee of a unit, person having executed a contract for the purchase of a condominium unit, or lender considering the loan of funds to be secured by a condominium unit shall be entitled upon request to a statement from the association or its management agent setting forth the amount of assessments past due and unpaid together with late charges and interest applicable thereto against that condominium unit. Such request shall be in writing, shall be delivered to the registered office of the association, and shall state an address to which the statement is to be directed. Failure on the part of the association to mail or otherwise furnish such statement regarding amounts due and payable if specified in the written request therefor within 10 business days from the receipt of such request releases the association's lien against the unit for the amount of the assessment as of that date, but does not discharge the unit owner's debt to the association. The information specified in such statement shall be binding upon the association and upon every unit owner. Payment of a fee not

exceeding $10.00 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

(Acts 1990, No. 90-551, p. 858, §3-116.)

Section 35-8A-317

Other liens affecting the condominium.

(a) Except as provided in subsection (b), a judgment for money against the association if recorded is not a lien on the common elements, but is a lien in favor of the judgment lienholder against all of the units in the condominium at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(b) If the association has granted a security interest in the common elements to a creditor of the association pursuant to section 35-8A-312, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(c) Whether perfected before or after the creation of the condominium, if a lien other than a deed of trust or mortgage, including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium, becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(d) A judgment against the association must be indexed in the name of the condominium and the association and, when so indexed, is notice of the lien against the units.

(Acts 1990, No. 90-551, p. 858, §3-117; Acts 1991, No. 91-553, §1(3).)

Section 35-8A-408

Purchaser's right to cancel.

(a) A person required to deliver an offering statement pursuant to section 35-8A-402(c) shall provide a purchaser of a unit with a copy of the offering statement and all amendments thereto before conveyance of that unit, and not later than the date of any contract of sale. Unless a purchaser is given the offering statement more than seven days before execution of a contract for the purchase of a unit, the purchaser may cancel the contract, or rescind the conveyance if a conveyance has already occurred, within seven days after first receiving the offering statement.

(b) If a purchaser elects to cancel a contract or conveyance pursuant to subsection (a), he may do so by hand-delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation shall be refunded promptly.

(c) If a person required to deliver an offering statement pursuant to section 35-8A-402(c) fails to provide a purchaser to whom a unit is conveyed with that offering statement and all amendments thereto as required by subsection (a), the purchaser, at the purchaser's option and in lieu of any rights to damages or other relief, is entitled to receive from that person an amount equal to five percent of the sales price of the unit at anytime prior to the expiration of six months from the date of conveyance of the unit, plus five percent of the share, proportionate to his common expense liability, of any indebtedness of the association secured by security interests encumbering the condominium.

(Acts 1990, No. 90-551, p. 858, §4-108.)

Section 35-8A-410

Escrow of deposits.

(a) Except as provided in subsection (b), any deposit made in connection with the purchase or reservation of a unit from a person required to deliver an offering statement pursuant to Section 35-8A-402(c) shall be placed in escrow and held either in this state or in the state where the unit is located in an account designated solely for that purpose by a licensed title insurance company, an attorney, a licensed real estate broker, or an institution whose accounts are insured by a governmental agency or instrumentality until (i) delivered to the declarant at closing; (ii) delivered to the declarant because of purchaser's default under a contract to purchase the unit; or (iii) refunded to the purchaser. Except as provided in subsection (b) and as otherwise provided herein, the funds representing the deposit shall be held in an interest bearing account and the interest shall belong to the party entitled to the principal deposit. Notwithstanding anything in this subsection to the contrary, funds deposited pursuant to a reservation agreement that provides the prospective buyer is not bound to purchase a unit and that the prospective buyer may choose to have the deposit returned to him or her, need not bear interest unless the reservation agreement specifically states that the deposit will bear interest.

(b) Notwithstanding subsection (a), if the time period during which a purchaser may cancel an agreement to purchase a unit pursuant to Section 35-8A-408 has expired without the purchaser's having exercised the right to cancel and construction of the project in which the unit is located is not substantially completed, if the purchase contract between the declarant and the purchaser so provides, and if the declarant has acquired the land on which the condominium will be built, the declarant may do either of the following: (1) Withdraw deposited funds in excess of 10 percent of the purchase price from the escrow account for use in the actual construction and development of the condominium project provided at least 10 percent of the purchase price remains on deposit after any withdrawals, or (2) after the declarant has caused a bond to be issued by a surety insurer licensed in this state in favor of the purchaser, withdraw deposited funds from the escrow account for use in the actual construction and development of the condominium. The declarant may not withdraw more than the face amount of the bond. The bond shall name the purchaser as the beneficiary thereof and shall be payable to the purchaser if the purchaser obtains a final judgment against declarant requiring the declarant to return the deposit to the purchaser pursuant to the purchase contract. The declarant may satisfy this bond requirement by causing one or more blanket bonds to be issued in favor of all purchasers whose deposited funds may be used pursuant to this subsection. In the event of a withdrawal pursuant to this subsection, the withdrawn funds need not bear interest and the declarant shall not owe the purchaser interest on any withdrawn funds if the purchase contract provides that interest on withdrawn funds will not accrue or be owed. However, no part of these funds may be used for salaries, commissions, or expenses of salespersons or for advertising purposes. A purchase contract that permits use of deposits for these purposes shall include the following legend conspicuously printed or stamped in boldfaced type on the first page of the contract and immediately above the place for the signature of the purchaser: ANY DEPOSIT MAY BE USED FOR CONSTRUCTION PURPOSES BY DECLARANT. Additionally, an offering statement given to a prospective purchaser whose deposit may be used as provided in this subsection shall contain the same legend, which may be contained within the body of the offering statement. In determining whether more than 10 percent of the purchase price has been deposited, the face amount of any letter of credit accepted by declarant as part of the deposit shall be considered.

(Acts 1990, No. 90-551, p. 858, §4-110; Act 2005-300, 1st Sp. Sess., §1.)

Condo Mania

Issues Facing Homeowner Associations and Unit Owners When the Developer Goes Broke

South Carolina Horizontal Property Act

CHAPTER 31.

HORIZONTAL PROPERTY ACT

ARTICLE 1.

GENERAL PROVISIONS

SECTION 27-31-10. Short title.

This chapter shall be known as the "Horizontal Property Act."

SECTION 27-31-20. Definitions.

Unless it is plainly evident from the context that a different meaning is intended, as used herein:
(a) "Apartment" means a part of the property intended for any type of independent use (whether it be for residential, recreational, storage, or business) including one or more rooms or enclosed spaces located on one or more floors (or parts thereof) in a building or if not in a building in a separately delineated place whether open or enclosed and whether for the storage of an automobile, moorage of a boat, or other lawful use, and with a direct exit to a public street or highway, or to a common area leading to such street or highway;
(b) "Building" means an existing or proposed structure or structures, containing in the aggregate two or more apartments, comprising a part of the property;
(c) "Condominium ownership" means the individual ownership of a particular apartment in a building and the common right to a share, with other co-owners, in the general and limited common elements of the property;
(d) "Co-owner" means a person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns an apartment within the building;
(e) "Council of co-owners" means all the co-owners as defined in subsection (d) of this section; but a majority, as defined in subsection (h) of this section, shall, except as otherwise provided in this chapter, constitute a quorum for the adoption of decisions;
(f) "General common elements" means and includes:
(1) The land whether leased or in fee simple and whether or not submerged on which the apartment or building stands; provided, however, that submerged land developed or used under this chapter is subject to any law enacted relating to the leasing of submerged lands by the State for the benefit of the public;
(2) The foundations, main walls, roofs, halls, lobbies, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed;
(3) The basements, flat roofs, yards, and gardens, in existence or to be constructed or installed, except as otherwise provided or stipulated;
(4) The premises for the lodging of janitors or persons in charge of the property, in existence or to be constructed or installed, except as otherwise provided or stipulated;
(5) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like, in existence or to be constructed or installed;
(6) The elevators, garbage incinerators, and, in general, all devices or installations existing or to be constructed or installed for common use;
(7) All other elements of the property, in existence or to be constructed or installed, rationally of common use or necessary to its existence, upkeep, and safety;
(g) "Limited common elements" means and includes those common elements which are agreed upon by all the co-owners to be reserved for the use of a certain number of apartments to the exclusion of the other

apartments, such as special corridors, stairways, elevators, finger piers, sanitary services common to the apartments of a particular floor, and the like;
(h) "Majority of co-owners" means fifty-one percent or more of the basic value of the property as a whole, in accordance with the percentages computed in accordance with the provisions of Section 27-31-60.
(i) "Master deed" or "master lease" means the deed or lease establishing and recording the property of the horizontal property regime;
(j) "Person" means an individual, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof;
(k) "Property" means and includes (1) the land whether leasehold or in fee simple and whether or not submerged, (2) the building, all improvements, and structures on the land, in existence or to be constructed, and (3) all easements, rights, and appurtenances belonging thereto;
(l) "To record" means to record in accordance with the provisions of Sections 30-5-30 through 30-5-200, 30-7-10 through 30-7-90 and 30-9-10 through 30-9-80, or other applicable recording statutes.

SECTION 27-31-30. Establishment of horizontal property regime.

Whenever a lessee, sole owner, or the co-owners of property expressly declare, through the recordation of a master deed or lease, which shall set forth the particulars enumerated in Section 27-31-100, their desire to submit their property to the regime established by this chapter, there shall thereby be established a horizontal property regime. Property may be submitted to a horizontal property regime prior to construction or the completion of any building or apartment, improvements, or structures on the property if all proceeds from its sale are deposited into an escrow account with an independent escrow agent until construction or completion of the proposed property as evidenced by issuance of a certificate of occupancy from the appropriate municipal or county authority. In lieu of any escrow required by this section, the escrow agent may accept a surety bond issued by a company licensed to do business in this State as surety in an amount equal to or in excess of the funds that would otherwise be placed in the escrow account with the South Carolina Real Estate Commission designated as beneficiary of any such surety bond.

SECTION 27-31-40. Apartments may be purchased, owned, and the like.

Once the property is submitted to the horizontal property regime, an apartment in the property may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of juridic acts inter vivos or mortis causa, as if it were sole and entirely independent of the other apartments in the property of which it forms a part, and the corresponding individual titles and interests shall be recordable.

SECTION 27-31-50. More than one person may own apartment.

Any apartment may be held and owned by more than one person as tenants in common or in any other real estate tenancy relationship recognized under the laws of this State.

SECTION 27-31-60. Property rights of apartment owner.

(a) An apartment owner shall have the exclusive ownership of his apartment and shall have a common right to a share, with the other co-owners, in the common elements of the property, equivalent to the percentage representing the value of the individual apartment, with relation to the value of the whole property. This percentage shall be computed by taking as a basis the value of the individual apartment in relation to the value of the property as a whole.

The percentage shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and shall not be altered without the acquiescence of the co-owners representing all the apartments of the property.
The basic value, which shall be fixed for the sole purpose of this chapter and irrespectively of the actual value, shall not prevent each co-owner from fixing a different circumstantial value to his apartment in all types of acts and contracts.
(b) The owner of any apartment embraced in the master deed and building plan shall have the right to require specific performance of any proposed common elements for recreational purposes set out in the master deed which are included in the next stage of the development that applies to recreational facilities in the event the additional stages of erection do not develop.

SECTION 27-31-70. Common elements shall not be divided.

The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the contrary shall be void.

SECTION 27-31-80. Use of common elements.

Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.

SECTION 27-31-90. Incorporation of co-owners.

Nothing herein contained shall prohibit any council of co-owners from incorporating pursuant to the laws of South Carolina for the purpose of the administration of the property constituted into a horizontal property regime. In the event of such incorporation, the percentage of stock ownership of each co-owner in the corporation shall be equal to the percentage of his right to share in the common elements as computed in accordance with the provisions of this chapter.

SECTION 27-31-100. Master deed or lease; contents.

The master deed or lease creating and establishing the horizontal property regime shall be executed by the owner or owners of the real property making up the regime and shall be recorded with the register of mesne conveyance or clerk of court of the county where such property is located. The master deed or lease shall express the following particulars:
(a) The description of the land whether leased or in fee simple, and the building or buildings in existence or to be constructed, if applicable, expressing their respective areas;
(b) The general description and number of each apartment, expressing its area, location and any other data necessary for its identification;
(c) The description of the general common elements of the property, and, in proper cases, of the limited common elements restricted to a given number of apartments, expressing which are those apartments;
(d) The value of the property and of each apartment, and, according to these basic values, the percentage appertaining to the co-owners in the expenses of, and rights in, the elements held in common; and
(e) The name by which the horizontal property regime is to be known followed by the words "HORIZONTAL PROPERTY REGIME."
(f) A description of the full legal rights and obligations, both currently existing and which may occur, of the apartment owner, the co-owners, and the person establishing the regime. The master deed of any horizontal property regime developed under the provisions of this chapter that contains any submerged land shall contain a notice of restriction stating that all activities on or over and all uses of the submerged land or other critical areas are subject to the jurisdiction of the South Carolina Department of Health and Environmental Control, including, but not limited to, the requirement that any activity or use must be

authorized by the South Carolina Department of Health and Environmental Control. The notice shall further state that any owner is liable to the extent of his ownership for any damages to, any inappropriate or unpermitted uses of, and any duties or responsibilities concerning any submerged land, coastal waters, or any other critical area.

(g) In the event the owner of property submitting it for establishment of a horizontal property regime proposes to develop the property as a single regime but in two or more stages or proposes to annex additional property to the property described in the master deed, the master deed shall also contain a general description of the plan of development, including:

(1) The maximum number of units in each proposed stage of development;

(2) The dates by which the owner submitting such property to condominium ownership will elect whether or not he will proceed with each stage of development;

(3) A general description of the nature and proposed use of any additional common elements which the owner submitting property to condominium ownership proposes to annex to the property described in the master deed, if such common elements might substantially increase the proportionate amount of the common expenses payable by existing unit owners;

(4) A chart showing the percentage interest in the common elements of each original unit owner at each stage of development if the owner submitting property to condominium ownership elected to proceed with all stages of development.

(h) Any restrictions or limitations on the lease of a unit including, but not limited to, the amount and term of the lease.

SECTION 27-31-110. Plot plan and building plan.

There must be attached to the master deed or lease, at the time it is filed for record, a map or plat showing the horizontal and vertical location of any building which is proposed or in existence and other improvements within the property boundary, which shall have the seal and signature of a registered land surveyor licensed to practice in this State. There must also be attached a plot plan of the completed or proposed construction showing the location of the building which is proposed or in existence and other improvements, and a set of floor plans of the building which must show graphically the dimensions, area, and location of each apartment therein and the dimension, area, and location of common elements affording access to each apartment. Other common elements, both limited and general, must be shown graphically insofar as possible and must be described in detail in words and figures. The building plans must be certified to by an engineer or architect authorized and licensed to practice his profession in this State.

SECTION 27-31-120. Designation of apartments on plans; conveyance or lease of apartment.

Each apartment must be designated, on the plans referred to in Section 27-31-110, by letter or number or other appropriate designation and any conveyance, lease, or other instrument affecting title to the apartment, which describes the apartment by using the letter or number followed by the words "in Horizontal Property Regime," is deemed to contain a good and sufficient description for all purposes. Any conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner in the common elements, both general and limited, appertaining to the apartment without specifically or particularly referring to same.

SECTION 27-31-130. Waiver of regime and merger of apartment records with principal property.

(A) All the co-owners or the sole owner of the property constituted into a horizontal property regime may waive the regime and regroup or merge the records of the individual apartments with the principal property, if the individual apartments are unencumbered, or if encumbered, if the creditors in whose

behalf the encumbrances are recorded agree to accept as security the undivided portions of the property owned by the debtors.
(B) Notwithstanding subsection (A), in the case of nonprofit long-term care retirement or life care facilities where there are co-owners, a two-thirds vote of the co-owners suffices to waive the regime and regroup or merge the records of the individual apartments with the principal property if the individual apartments are unencumbered, or if encumbered, if the creditors in whose behalf the encumbrances are recorded agree to accept as security the undivided portions of the property owned by the debtors.

SECTION 27-31-140. Merger as bar to subsequent horizontal property regime.

The merger provided for in Section 27-31-130 shall in no way bar the subsequent constitution of the property into another horizontal property regime whenever so desired and upon observance of the provisions of this chapter.

SECTION 27-31-150. Administration of property; bylaws.

The administration of the property constituted into horizontal property, whether incorporated or unincorporated, shall be governed by bylaws which shall be inserted in or appended to and recorded with the master deed or lease.

SECTION 27-31-160. Provisions required in bylaws; modification of system of administration.

The bylaws must necessarily provide for at least the following:
(a) Form of administration, indicating whether this shall be in charge of an administrator or of a board of administration, or otherwise, and specifying the powers, manner of removal and, where proper, the compensation thereof;
(b) Method of calling or summoning the co-owners to assemble; that a majority of at least fifty-one percent is required to adopt decisions; who is to preside over the meeting and who will keep the minutes book wherein the resolutions shall be recorded;
(c) Care, upkeep and surveillance of the property and its general or limited common elements and services;
(d) Manner of collecting from the co-owners for the payment of the common expenses;
(e) Designation and dismissal of the personnel necessary for the works and the general or limited common services of the property.
The sole owner of the property or, if there be more than one, the co-owners representing two thirds of the total value of the property, may at any time modify the system of administration, but each one of the particulars set forth in this section shall always be embodied in the bylaws. No such modification may be operative until it is embodied in a recorded instrument which shall be recorded in the same office and in the same manner as was the master deed or lease and original bylaws of the horizontal property regime involved.

SECTION 27-31-170. Compliance with bylaws, rules, and regulations; remedy for noncompliance.

Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the master deed or lease or in the deed or lease to his apartment. Failure to comply with any of the same shall be grounds for a civil action to recover sums due for damages or injunctive relief, or both, maintainable by the administrator or the board of administration, or other form of administration specified in the bylaws, on behalf of the council of co-owners, or in a proper case, by an aggrieved co-owner.

SECTION 27-31-180. Records of receipts and expenditures.

The administrator or the board of administration, or other form of administration specified in the bylaws, shall keep a book with a detailed account, in chronological order, of the receipts and expenditures affecting the property and its administration, and specifying the maintenance and repair expenses of the common elements and any other expenses incurred. Both the book and the vouchers accrediting the entries made thereupon shall be available for examination by all the co-owners at convenient hours on working days that shall be set and announced for general knowledge.

SECTION 27-31-190. Expenses shall be shared.

The co-owners of the apartments are bound to contribute pro rata in the percentages computed according to Section 27-31-60 toward the expenses of administration and of maintenance and repair of the general common elements and, in the proper case, of the limited common elements of the property and toward any other expense lawfully agreed upon.
No co-owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him.

SECTION 27-31-200. Unpaid assessments; payment upon sale.

Upon the sale or conveyance of an apartment, all unpaid assessments against a co-owner for his pro rata share in the expenses to which Section 27-31-190 refers shall first be paid out of the sales price or by the acquirer in preference over any other assessments or charges of whatever nature except the following:
(a) Assessments, liens and charges for taxes past due and unpaid on the apartment; and
(b) Payments due under mortgage instruments or encumbrances duly recorded.

SECTION 27-31-210. Lien for unpaid assessments; right of mortgagee or purchaser acquiring title at foreclosure sale.

(a) All sums assessed by the administrator, or the board of administration, or other form of administration specified in the bylaws, but unpaid, for the share of common expenses chargeable to any apartment shall constitute a lien on such apartment prior to all other liens except only (i) tax liens on the apartment in favor of any assessing unit, and (ii) mortgage and other liens, duly recorded, encumbering the apartment. Such lien may be foreclosed by suit by the administrator, or the board of administration, or other form of administration specified in the bylaws, acting on behalf of the council of co-owners, in like manner as a mortgage of real property. In any such foreclosure the apartment owner shall be required to pay a reasonable rental for the apartment after the commencement of the foreclosure action and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect such rents. The administrator, or the board of administration, or other form of administration specified in the bylaws, acting on behalf of the council of co-owners, shall have the power to bid in the apartment at foreclosure sale and to acquire and hold, lease, mortgage and convey the same. Suit to recover a money judgment for unpaid common expenses may be maintainable without instituting foreclosure proceedings.
(b) Where the mortgagee of any mortgage of record or other purchaser of an apartment obtains title at the foreclosure sale of such a mortgage, such acquirer of title, his successors and assigns, shall not be liable for the share of the common expenses or assessments by the co-owners chargeable to such apartment accruing after the date of recording such mortgage but prior to the acquisition of title to such apartment by such acquirer. Such unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the apartment owners, including such acquirer, his successors and assigns.

SECTION 27-31-220. Liability of purchaser of apartment.

The purchaser of an apartment (other than a purchaser at a foreclosure sale as described above in Section 27-31-210(b)) shall be jointly and severally liable with the seller for the amounts owing by the latter under Section 27-31-190 up to the time of the conveyance, without prejudice to the purchaser's right to recover from the other party the amounts paid by him as such joint debtor. The council of co-owners shall provide for the issuance and shall issue to any purchaser, upon his request, a statement of such amounts due by the seller and the purchaser's liability under this section shall be limited to the amount as set forth in the statement.

SECTION 27-31-230. Liens arising subsequent to recording of master deed or lease.

(a) No lien arising subsequent to recording the master deed or lease as provided in this chapter, and while the property remains subject to this chapter, shall be effective against the property. During such period liens or encumbrances shall arise or be created only against each apartment and the percentage of undivided interest in the common elements appurtenant to such apartment, in the same manner and under the same conditions in every respect as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership; provided, that no labor performed or materials furnished with the consent or at the request of a co-owner or his agent or his contractor or subcontractor, shall be the basis for the filing of a mechanic's or materialman's lien against the apartment or any other property of any other co-owner not expressly consenting to or requesting the same, except that such express consent shall be deemed to be given by the owner of any apartment in the case of emergency repairs thereto. Labor performed or materials furnished for the common elements, if duly authorized by the council of co-owners, the administrator or board of administration or other administration specified by the bylaws, in accordance with this chapter, the master deed, lease or bylaws, shall be deemed to be performed or furnished with the express consent of each co-owner and shall be the basis for the filing of a mechanic's or materialman's lien against each of the apartments and shall be subject to the provisions of subparagraph (b) hereunder.
(b) In the event a lien against two or more apartments becomes effective, the owners of the separate apartments may remove their apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment from the lien by payment of the fractional or proportional amounts attributable to each of the apartments affected. Such individual payment shall be computed by reference to the percentages appearing in the master deed or lease. Subsequent to any such payment, discharge or other satisfaction, the apartment and the percentage of undivided interest in the common elements appurtenant thereto shall thereafter be free and clear of the lien so paid, satisfied or discharged. Such partial payment, satisfaction or discharge shall not prevent the lienor from proceeding to enforce his rights against any apartment and the percentage of undivided interest in the common elements appurtenant thereto not so paid, satisfied or discharged.

SECTION 27-31-240. Insurance.

The council of co-owners shall insure the property against risks, without prejudice to the right of each co-owner to insure his apartment on his own account and for his own benefit.

SECTION 27-31-250. Repair or reconstruction; vote of co-owners; application of insurance proceeds.

(A) A portion of the property for which insurance is required pursuant to Section 27-31-240 and which is damaged or destroyed must be repaired or replaced promptly by the council of co-owners unless:
(1) repair or replacement is illegal under a state statute or local health ordinance; or
(2) eighty percent of the co-owners, including the owner of an apartment which is not to be rebuilt, vote not to rebuild; except that the property bylaws may expressly require a percentage greater, but not less than, eighty percent of the co-owners.

(B) The cost of repair or replacement in excess of insurance proceeds and reserve must be considered a common expense.
(C) If the entire property is not repaired or replaced, the insurance proceeds:
(1) attributable to the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the property;
(2) attributable to apartments and limited common elements that are not rebuilt must be distributed to the owners of those apartments and to the owners of those apartments to which limited common elements were allocated, or to the lienholders, as their interests may appear;
(3) remaining must be distributed to all of the co-owners or lienholders, as their interests may appear, in proportion to the percentage as described in Section 27-31-60.
(D) If the co-owners vote not to rebuild an apartment, that apartment's allocated interest must be reallocated automatically upon the vote and the council of co-owners promptly shall prepare, execute, and record an amendment to the master deed reflecting the reallocations.

SECTION 27-31-260. Sharing expenses in case of fire or other disaster.

Where the property is not insured or where the insurance indemnity is insufficient to cover the cost of reconstruction, the rebuilding costs shall be paid by all the co-owners directly affected by the damage, in proportion to the value of their respective apartments, or as may be provided in the bylaws; and if any one or more of those composing the minority shall refuse to make such payments, the majority may proceed with the reconstruction at the expense of all the co-owners benefited thereby, upon proper resolution setting forth the circumstances of the case and the cost of the works, with the intervention of the council of co-owners.
The provisions of this section may be changed by unanimous resolution of the parties concerned, adopted subsequent to the date on which the fire or other disaster occurred.

SECTION 27-31-270. Assessment and collection of taxes.

Taxes, assessments and other charges of this State, or of any political subdivision, or of any special improvement district, or of any other taxing or assessing authority shall be assessed against and collected on each individual apartment, each of which shall be carried on the tax books as a separate and distinct entity for that purpose, and not on the building or property as a whole. No forfeiture or sale of the building or property as a whole for delinquent taxes, assessments or charges shall ever divest or in anywise affect the title to an individual apartment so long as taxes, assessments and charges on the individual apartment are currently paid.

SECTION 27-31-280. Council of co-owner's right of access.

The council of co-owners shall have the irrevocable right, to be exercised by the administrator or the board of administration, or other form of administration specified in the bylaws, to have access to each apartment from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any of the common elements therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common elements or to another apartment or apartments.

SECTION 27-31-290. Limitation on liability of co-owners for common expenses.

The liability of each co-owner for common expenses shall be limited to the amounts for which he is assessed from time to time in accordance with this chapter, the master deed or lease and the bylaws.

SECTION 27-31-300. Effect on contracts entered into before June 6, 1967.

The provisions of this chapter shall in no way impair, alter or revise any contract entered into with regard to horizontal properties or condominiums prior to June 6, 1967.

ARTICLE 2.

CONVERSION OF RENTAL UNITS TO CONDOMINIUM OWNERSHIP

SECTION 27-31-410. "Conversion of rental units to condominium ownership" defined.

As used in this chapter, "conversion of rental units to condominium ownership" means the establishment of a horizontal property regime encompassing a preexisting building which, at anytime prior to the recording of the master deed or master lease, was wholly or partially occupied by persons as their residence on a permanent or at least a continuing basis other than persons who, at the time of such recording, had contractual rights to acquire condominium ownership within the building.

SECTION 27-31-420. Rights and duties of owners, landlords, and tenants when rental units are converted to condominiums; notices; offers; vacation; phased conversions.

(A) Whenever a lessee, sole owner, or co-owner of a building declares the undertaking of a conversion of rental units to condominium ownership through the recordation of a master deed or master lease, within thirty days of the date of recordation the lessee or owner shall deliver in writing to each tenant in possession of an apartment within the building to be converted:
(1) the disclosure items required by Section 27-31-430;
(2) written notice of the planned conversion which shall set forth generally the rights of tenants under this section;
(3) an offer to convey to the tenant the apartment occupied by the tenant at a specified price and upon specified terms.
The tenant shall not be required to vacate the apartment until expiration of his lease or for one hundred twenty days, or ninety days if the tenant is under the age of sixty, following delivery of the notice, whichever is longer, and the terms of the tenancy shall not be altered during that period. Any notice which under the terms of such tenancy is required to be given to prevent the automatic renewal or extension of the term of such tenancy may be given during such period. Failure to give notice as required by this section shall constitute a defense to an action by the lessee or owner for possession if initiated less than one hundred twenty days, or ninety days if the tenant is under the age of sixty, after delivery of the notice, except as provided in subsection (E).
(B) The price and terms offered to each tenant in possession shall be at least as favorable as the price and terms offered to prospective purchasers who are not tenants in possession of apartments in the building to be converted. The tenant shall be allowed sixty days in which to accept such offer and, in the event the tenant shall not have accepted the offer within the sixty days, the lessee or owner of the building shall be prohibited for an additional fifty days, or fifteen days if the tenant is under the age of sixty, from making an offer to convey the apartment to any other person at a price or upon terms more favorable then those offered to the tenant, unless such more favorable offer first shall have been extended to the tenant for his exclusive consideration for a period of ten days. Acceptance of an offer by a tenant in possession shall be in writing. If a declarant, in violation of this subsection, conveys a unit to a purchaser for value who has no knowledge of the violation, recordation of the deed conveying the unit extinguishes any right a tenant may have under the subsection to purchase that unit if the deed states that the seller has complied with the subsection, but does not affect the right of a tenant to recover damages from the declarant for a violation of this subsection.
(C) Where the conversion is to be accomplished on a phase-in basis, the notices required shall be given within thirty days of the undertaking of the conversion of each building.

(D) Notices and offers required or permitted to be delivered to a tenant by this article may be:
(1) hand delivered to the tenant; or
(2) hand delivered to the apartment; or
(3) posted in the United States mails, postage prepaid, addressed to the tenant at the individual's apartment address.
Acceptances of offers of a lessee or owner may be:
(1) hand delivered to the lessee or owner; or
(2) hand delivered to an authorized representative of the lessee or owner; or
(3) posted in the United States mails, postage prepaid, properly addressed to the lessee or owner. If registered or certified mail is used, the postmark date of the registered or certified mail receipt received upon posting shall be the date of delivery for purposes of this article.
(E) Nothing in this section shall prevent termination of a lease according to law for violation of its terms.
(F) In the event of extended occupancy by the tenant pursuant to subsection (A), the rights and obligations of the landlord and tenant during the period of extended occupancy shall remain the same as prior to the period.

SECTION 27-31-430. Disclosure of physical condition of building.

Whenever the lessee, sole owner, or co-owner of a building declares the undertaking of a conversion of rental units to condominium ownership through the recordation of a master deed or master lease, written disclosure shall be made within thirty days of the date of the recordation to all prospective purchasers, including tenants in possession, as to the physical condition of the building. The disclosure shall contain a written report prepared by an independent registered architect or engineer licensed to practice his profession in this State, describing the present condition of all general common elements. The report shall contain a good faith estimate of the remaining useful life to be expected for each item reported on, together with a list of any notices of uncured violations of building codes or other county or municipal regulations, together with the estimated cost of curing those violations. The good faith estimate of useful life shall not constitute a warranty and, as to an independent registered architect or engineer licensed to practice his profession in this State, shall not be deemed a representation of material fact or an inducement to purchase and shall not give rise to any cause of action at law or in equity against such architect or engineer. A failure to make the disclosure required by this section shall constitute a violation of the South Carolina Unfair Trade Practices Act.

SECTION 27-31-440. Abandoning conversion program.

Nothing contained in this article shall require the lessee, sole owner, or co-owner to convert to a condominium if, after recording the master deed or master lease and giving the required notices, the lessee, sole owner, or co-owner finds that he cannot meet any presale requirements that he has established or that he no longer wishes to convert the property.

Condo Mania

Issues Facing Homeowner Associations and Unit Owners When the Developer Goes Broke

Deposit/Equitable Lien Cases

South Carolina Federal Sav. Bank v. San-A-Bel Corp.
S.C.App.,1992.

Court of Appeals of South Carolina.
SOUTH CAROLINA FEDERAL SAVINGS BANK, Appellant,
v.
SAN-A-BEL CORPORATION, Hal C. Neese, Jr., Robert J. Foster, Allen L. Teague, Maria F. Teague, Chris J. Chris, William C. Latham, Fred A. Serral, George B. Sasin, S.W. Rumph, Robert E. Bryan, Graham Bell, Paul Joseph, Martin Brann, John M. Hall, R.F. Kirkpatrick, Jr., John W. Davis, Diane R. Davis, Southern Coastal Outdoor Advertising, Inc., David W. Howe, D. Scott Scarborough, William S. Holland, Equipment Leasing and Robert O. Ziglar, Defendants,
of which D. Scott Scarborough, William S. Holland and Robert O. Ziglar, Respondents.
No. 1745.

Heard Oct. 16, 1991.
Decided Jan. 6, 1992.

Bank brought action to foreclose mortgage securing construction loan for **condominium** project. Purchasers of **condominium** units under preconstruction sales contracts joined as parties, asserting **equitablelien** on property superior to bank's mortgage lien. The Circuit Court, Horry County, Edward B. Cottingham, J., found that purchasers were entitled to return of their deposit money and that this liability of **developer** created **equitablelien** on property with priority over bank's mortgage lien. Bank appealed. The Court of Appeals, Bell, J., held that bank's construction loan mortgage was subject to prior equitable interests of purchasers, who deposited down payments with **developer** which **developer** could use to acquire and develop property.

Affirmed.

West Headnotes

[1] Liens 239 ⇐7

239 Liens
239k7 k. **EquitableLiens**. Most Cited Cases
Purchaser under executory contract for purchase and sale of real property has **equitablelien** on property in amount paid on purchase price; this equitable interest arises from payment of money and does not depend on purchaser's taking possession of real estate.

[2] Vendor and Purchaser 400 ⇐337

400 Vendor and Purchaser
400VII Remedies of Purchaser
400VII(A) Recovery of Purchase Money Paid
400k337 k. Lien for Purchase Money and Value of Improvements and Enforcement Thereof. Most Cited Cases
If vendor contracts to convey real estate to which he does not yet have title, purchaser's lien arises when money is paid and attaches to property as security for money when vendor acquires title.

[3] Vendor and Purchaser 400 ⇐128

400 Vendor and Purchaser
400IV Performance of Contract
400IV(A) Title and Estate of Vendor
400k128 k. Estate or Title to Be Conveyed. Most Cited Cases
In equity, there is no distinction between case where vendor contracts to sell realty to which he has existing title and case where he later acquires title.

[4] Mortgages 266 ⇐154(1)

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k152 Mortgagees as Bona Fide Pur-

chasers
266k154 Notice
266k154(1) k. In General. Most Cited Cases
Ordinarily, one who takes security interest in real property with notice of existing third party equity in property takes subject to third party's interest.

[5] Mortgages 266 ⚿154(1)

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k152 Mortgagees as Bona Fide Purchasers
266k154 Notice
266k154(1) k. In General. Most Cited Cases

Mortgages 266 ⚿154(2)

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k152 Mortgagees as Bona Fide Purchasers
266k154 Notice
266k154(2) k. Constructive Notice and Facts Putting on Inquiry. Most Cited Cases
For one to have notice of outstanding equitable interest in real property, it is not necessary to know identity of third party or extent of his interest; it is sufficient that one either knows or ought to know some third-party interest exists.

[6] Mortgages 266 ⚿154(1)

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k152 Mortgagees as Bona Fide Purchasers
266k154 Notice
266k154(1) k. In General. Most Cited Cases
Bank's construction loan mortgage was subject to prior equitable interests of purchasers of **condominium** units under preconstruction sales contracts, who deposited down payments with **developer** which **developer** could use to acquire and develop property, where bank required certain number of preconstruction sales contracts before making loan, and bank knew down payments were refundable if project was not completed.

****853 *77** Edward T. Kelaher, Surfside Beach, for appellant.
Susan C. Pardue, Myrtle Beach, for respondents.
BELL, Judge:
This is an action in equity to foreclose a mortgage. San-A-Bel Corporation, a real estate **developer**, granted the mortgage to South Carolina Federal Savings Bank to secure a construction loan for a **condominium** project in North Myrtle Beach. As a precondition for making the construction loan, the Bank required the **Developer** to "presell" a certain number of residential units in the project. D. Scott Scarborough, William S. Holland, and Robert O. Ziglar were among a number of purchasers who, prior to the loan from the Bank, executed preconstruction sales contracts with the **Developer** for the purchase of **condominium** units. Under the terms of these sales contracts, the Purchasers deposited a cash down payment with the **Developer** at the time the contracts were executed.***78** The sales contracts expressly permitted the **Developer** to use the deposit money in the development of the project, including acquisition. The sales contracts also obligated the **Developer** to refund the deposit money to the Purchasers if it did not complete the project within two years.

At the time it made the construction loan, the Bank knew the **Developer** had already entered these preconstruction sales contracts and had received the deposit money. Neither the sales contracts nor the ****854** Bank's note and mortgage contained any provision subordinating the rights of the Purchasers to the rights of the Bank. Instead, the Bank's mortgage obligated the **Developer** to pay any liabilities "which, if unpaid, would become a lien or charge

upon the Mortgaged Property prior to or equal to the lien of this Mortgage."

Thereafter, the **Developer** acquired the property and began construction. Before the project was completed, the **Developer** defaulted on its obligations to the Bank. It also failed to complete the project within two years, prompting the Purchasers to demand return of their deposit money. The **Developer** did not return the money.

When the Bank brought this foreclosure action, the Purchasers joined as parties, asserting an **equitablelien** on the property superior to the Bank's mortgage lien. The master in equity found that the Purchasers were entitled to the return of their deposit money and that this liability of the **Developer** created an **equitablelien** on the property with priority over the Bank's mortgage lien. The circuit court affirmed the master's order on appeal. The Bank now appeals from the judgment of the circuit court. We affirm.

The question presented for our review is whether the Bank's security interest in a **condominium** project under a later construction loan agreement and mortgage takes priority over a Purchaser's **equitablelien** under an earlier contract, of which the Bank had notice, for the purchase and sale of a **condominium** unit. This is a question of first impression in South Carolina.

[1][2][3] It is generally recognized that the purchaser under an executory contract for the purchase and sale of real property has an **equitablelien** on the property in the amount paid on the purchase price. See, e.g., ***79***Elterman v. Hyman,* 192 N.Y. 113, 84 N.E. 937 (1908), *reargument den.*192 N.Y. 583, 85 N.E. 1109 (1908); *Brown v. Cleverly,* 93 Utah 54, 70 P.2d 881 (1937); *Gribble v. Stearman & Kaplan, Inc.,* 249 Md. 289, 239 A.2d 573 (1968); *Hillblom v. Ivancsits,* 32 Ill.Dec. 172, 76 Ill.App.3d 306, 395 N.E.2d 119 (1979). This equitable interest arises from the payment of the money and does not depend upon the purchaser's taking possession of the real estate. *Elterman v. Hyman, supra.* If, as in this case, the seller contracts to convey real estate to which he does not yet have title, the purchaser's lien arises when the money is paid and attaches to the property as security for the money when the seller acquires title. *Mihranian, Inc. v. Padula,* 134 N.J.Super. 557, 342 A.2d 523 (1975), *affirmed*70 N.J. 252, 359 A.2d 473 (1976); cf. *Fibkins v. Fibkins,* 303 S.C. 112, 399 S.E.2d 158 (Ct.App.1990) (**equitablelien** relates back to the time it was created by conduct of the parties). In equity, there is no distinction between the case where the seller contracts to sell realty to which he has existing title and the case where he later acquires title. *Wayne Building & Loan Co. of Wooster v. Yarborough,* 11 Ohio St.2d 195, 228 N.E.2d 841 (1967).

[4][5] Ordinarily, one who takes a security interest in real property with notice of an existing third party equity in the property takes subject to the third party's interest. *See Barr v. Kinard,* 14 S.C.L. 38 (3 Strob. 73) (1848); *Smith v. McClam,* 289 S.C. 452, 346 S.E.2d 720 (1986). For one to have notice of an outstanding equitable interest, it is not necessary to know the identity of the third party or the extent of his interest. It is sufficient that one either knows or ought to know some third party interest exists. *See Barr v. Kinard, supra.; Maples v. Medlin,* 5 N.C. 220 (1809); *Marbury v. Ehlen,* 72 Md. 206, 19 A. 648 (1890).

[6] In this case, when the Bank made the construction loan, it knew there were existing contracts of sale between the **Developer** and purchasers of the **condominium** units. Indeed, it required the **Developer** to have contracts of sale on a certain number of units before it would make the construction loan. The Bank also knew the **Developer** had received down payments which it was liable to refund to the purchasers if the project was not completed. Thus, the Bank had notice of the Purchasers' equitable interest in ***80** the property. In these circumstances, the Bank took the construction****855** loan mortgage subject to the prior equitable interests of the Purchasers.[FN1]

FN1. Other courts have also upheld the pri-

ority of the purchaser's lien over a subsequent mortgage taken with notice of the contract of sale. *See Wayne Building & Loan Co., of Wooster v. Yarborough,* 11 Ohio St.2d 195, 228 N.E.2d 841 (1967); *National Indemnity Co. v. Banks,* 376 F.2d 533 (5th Cir.1967); *Flickinger v. Glass,* 222 N.Y. 404, 118 N.E. 792 (1918); *Ihrke v. Continental Life Ins. & Inv. Co.,* 91 Wash. 342, 157 P. 866 (1916); *Stahl v. Roulhac,* 50 Md.App. 382, 438 A.2d 1366 (1982); *Stanovsky v. Group Enterprise & Construction Co.,* 714 S.W.2d 836 (Mo.App.1986).

The Bank vigorously argues it should have priority under the rule that a purchase money mortgage will ordinarily be given priority over other security interests in realty arising through the mortgagor. *See Citizens & Southern National Bank of South Carolina v. Smith,* 277 S.C. 162, 284 S.E.2d 770 (1981). The rationale for this special priority is that the mortgagor's interest in the property is made possible by the purchase money loan, so that the mortgage should come ahead of other interests that attach merely because the mortgagor acquires the property. In this regard, however, the Bank can claim no better equity than the Purchasers, who paid the deposit money before the Bank made the construction loan. The contracts of sale expressly contemplated the **Developer** would use the deposit money to finance construction of the project, including acquisition costs, just as the later construction loan was to be used. Thus, the Purchasers, like the Bank, also enjoy a "purchase money" equity in the property. Since, however, the Bank's interest arose later in time and the Bank made its loan with notice of the prior interests of the Purchasers, the Purchasers' liens are senior to the Bank's.

For the reasons stated, we hold that the **equitableliens** of the Purchasers under earlier contracts of sale, of which the Bank had notice, take priority over the Bank's lien under its later construction loan agreement and mortgage.

AFFIRMED.

SHAW, J., and BRUCE LITTLEJOHN, Acting Judge, concur.
S.C.App.,1992.
South Carolina Federal Sav. Bank v. San-A-Bel Corp.
307 S.C. 76, 413 S.E.2d 852

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LEXSEE

BANCFLORIDA, etc., Petitioner, vs. ROBERT T. HAYWARD, et ux., et al., Respondents.

No. 86,646

SUPREME COURT OF FLORIDA

689 So. 2d 1052; 1997 Fla. LEXIS 163; 22 Fla. L. Weekly S 95

February 27, 1997, Decided

PRIOR HISTORY: [**1] Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance Third District - Case Nos. 94-1586 & 94-0665 (Dade County).

DISPOSITION: Decision below quashed, remanded.

COUNSEL: Robert C. Grady of Katz, Barron, Squitero & Faust, P.A., Miami, Florida; and Herbert Stettin of Herbert Stettin, P.A., Miami, Florida, for Petitioner.

Mark V. Silverio and Cynthia Byrne Hall of Silverio & Hall, Miami, Florida; and Glenn J. Holzberg, Miami, Florida, for Respondents.

JUDGES: GRIMES, J., OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur.

OPINION BY: GRIMES

OPINION

[*1052] GRIMES, J.

We review *BancFlorida v. Hayward, 659 So. 2d 1329, 1333 (Fla. 3d DCA 1995)*, in which the court certified the following question as being of great public importance:

Where a lender requires a pre-qualified contract purchaser before it will lend on the construction loan which creates a purchase money mortgage, does the contract purchaser's prior equitable lien against the purchase money mortgagor have priority over the lender's subsequent purchase money mortgage?

We have jurisdiction under *article V, section* [**2] *3(b)(4) of the Florida Constitution.*

Shores Contractors, Inc. (developer) was in the business of developing lots and constructing single-family homes in several subdivisions. American Newlands owned the real property in these subdivisions. The developer held an option to acquire individual lots from American Newlands. The developer arranged for BancFlorida (bank) to provide funds for the acquisition of the individual lots and for the construction of single-family homes on those lots. The most frequent [*1053] method of lot acquisition and construction [1] required that the developer obtain a written purchase and sale agreement on a particular lot from a prequalified purchaser. The bank would then make a construction loan to the developer, with a portion of the proceeds being paid directly to American Newlands in exchange for deeds of the lots to the developer. None of the payments made by the purchasers on their contracts with the developer were used to acquire the lots.

1 Eighteen of the twenty-two lots in issue in this suit were acquired and financed in this manner.

[**3] Unfortunately, the developments failed, and the homes were not completed. The developer filed suit against the bank, alleging that breach of the construction loan agreements caused the failure. In turn, the bank sought foreclosure of its mortgages on the lots. Thereafter, the contract purchasers intervened and claimed equitable liens on the lots described in their purchase and sale agreements. The bank responded by claiming the superiority of its mortgages.

By agreement of all parties, summary final judgment of foreclosure was entered which permitted the bank to foreclose on the lots. They were sold at foreclosure sale, and the bank was the successful purchaser. By stipulation, the properties were then sold in bulk by the bank to a third party and the net proceeds were deposited in an escrow account pending the ultimate disposition of the competing claims.

The trial court entered summary judgment in favor of the contract purchasers, holding that they held equita-

ble liens on the lots which were entitled to priority over the bank's mortgages. The premise for the trial court's holding was that before the bank loaned any money to Shores for construction of the homes, the bank had actual **[**4]** notice of the purchase and sale agreements and the deposits paid by the contract purchasers to the developer. The court rejected the bank's contention that its mortgages were purchase money mortgages.

Contrary to the finding of the trial court, the Third District Court of Appeal held that the bank's mortgages were purchase money mortgages. Nevertheless, it affirmed the judgment in favor of the contract purchasers on the following rationale:

In the case at issue, knowledge is part and parcel of the same transaction in which the purchase money mortgage was created. BancFlorida structured this transaction and required the existence of pre-qualified contract purchasers before it would lend any money to Shores under the construction loan line of credit. It is well settled law in Florida that purchase money mortgage priorities may be subject to the equities of the particular transaction. *Van Eepoel Real Estate Co. v. Sarasota Milk Co., 100 Fla. 438, 129 So. 892 (1930).* Thus, we agree with the reasoning of *Caribank [v. **Frankel, 525 So. 2d 942 (Fla. 4th DCA 1988)]* that BancFlorida's actual knowledge of the contract purchasers' equitable liens against Shores, which arose before **[**5]** BancFlorida executed purchase money mortgages to Shores as part of the construction loan, and indeed, at BancFlorida's insistence, gave the equitable liens priority over the purchase money mortgages.

BancFlorida v. Hayward, 659 So. 2d at 1333.

At the outset, we agree with the court below that the bank's mortgages were purchase money mortgages. Traditionally, a purchase money mortgage was a mortgage given by the purchaser of real property directly to the seller to secure some or all of the purchase price. 1 Paul C. Gibson, *Florida Real Estate Transactions* § 4:01 (1996). However, it is well settled that where the proceeds of a third-party mortgage loan are used to purchase property, the mortgage on that property is also considered to be a purchase money mortgage. *Cheves v. First Nat'l Bank, 79 Fla. 34, 83 So. 870 (1920)*; *Sarmiento v. Stockton, Whatley, Davin & Co., 399 So. 2d 1057 (Fla. 3d DCA 1981).* 2 Ralph E. Boyer & William H. Ryan, *Florida Real Estate Transactions* § 32.22 (1996), explains:

The most common real property security transaction involves a "purchase money" loan from a bank, savings and loan association, or other lender, that enables the borrower **[**6]** to purchase the subject property. **[*1054]** The seller receives the loan proceeds, less whatever may be due to the seller's purchase money lender, if any, and conveys title to the purchaser. The purchaser, then being the owner, executes and delivers a mortgage in favor of the lender. As long as a mortgage is executed in conjunction with a purchase and given as security for a portion of the purchase price, it is a purchase money mortgage, even though the money is advanced by a third party and the mortgage is executed in the third party's favor.

The determination that a mortgage is a purchase money mortgage is important because purchase money mortgages take priority over all prior claims or liens that attach to the property through the mortgagor. *Id.* As this Court explained in *Van Eepoel Real Estate Co. v. Sarasota Milk Co., 100 Fla. 438, 450-51, 129 So. 892, 897 (1930)*:

[A] purchase-money mortgage, made simultaneously with the conveyance to the mortgagor, takes precedence over any lien arising through the mortgagor, even though the latter be prior in point of time.

This rule applies even though the purchase money mortgagee was put on constructive notice of the prior lien by virtue **[**7]** of its recording in the public records. Thus, a purchase money mortgage has been recognized to be senior to prior recorded judgment liens, *Citibank Mortgage Corp. v. Carteret Sav. Bank, 612 So. 2d 599 (Fla. 4th DCA 1992)*; *Sarmiento*; *Associates Discount Corp. v. Gomes, 338 So. 2d 552 (Fla. 3d DCA 1976)*, and a prior recorded welfare lien. *Pinellas County v. Clearwater Fed. Sav. & Loan Ass'n, 214 So. 2d 525 (Fla. 2d DCA 1968).*

Presumably, the rule giving superiority to purchase money mortgages came about because of the recognition that the prior lienholder is no worse off than before. Without the proceeds from the purchase money mortgage loan, the property would not have been acquired. However, purchase money protection applies only to the amount of the proceeds actually used to acquire the property and its existing improvements. *Carteret Sav. Bank v. Citibank Mortgage Corp., 632 So. 2d 599 (Fla. 1994).*

When these principles are applied to the instant case, it is clear that the court below erred in holding that the claims of the contract purchasers were superior to the bank's purchase money mortgages. That court relied heavily upon the fact that the bank had actual **[**8]** notice of the purchase and sale agreements. However, purchase money mortgages have superiority over prior recorded liens, and actual notice is simply the equivalent of constructive notice.

We cannot answer the certified question as worded because it presupposes that the contract purchasers had a

prior equitable lien on the lots. However, at the time the purchase and sale agreements were executed, the developer did not own the lots but merely held an option to purchase. Under Florida law, an option to purchase property creates neither an equitable interest nor an equitable remedy. *Wolfle v. Daugherty, 103 Fla. 432, 137 So. 717 (1931)*. Therefore, the developer had no real property interest upon which an equitable lien could attach.

The contract purchasers rely heavily upon ***Caribank v. Frankel, 525 So. 2d 942 (Fla. 4th DCA 1988)***. On facts analogous to those in the instant case, the district court of appeal held that a contract purchaser had a prior lien over a subsequent purchase money mortgage given by the developer to purchase the lot he had contracted to sell. It may be that the law applicable to the priority of purchase money mortgages discussed above was never raised because **[**9]** the opinion makes no mention of it. In any event, on its facts *Caribank* was erroneously decided.

We also reject the contract purchasers' argument for estoppel predicated upon this Court's decision in *Van Eepoel Real Estate Co., 100 Fla. at 438, 129 So. at 892*. That case involved a dispute between a purchase money mortgagee and a mechanic's lienor. A purchase money mortgage had been executed prior to the time the mechanic commenced work on the property. However, the mortgage was not recorded until after the work was done. Under these circumstances, the court held that the mortgagee was estopped to claim priority because of its failure to record the mortgage until after the mechanic had completed his work without any **[*1055]** knowledge of the existence of the mortgage. These facts are inapposite to the instant case. Here, there is no contention that the purchase money mortgages were not timely recorded, and the bank did nothing to mislead the contract purchasers.

The legal principles applicable to the remaining four lots in litigation are different but the outcome is the same. The developer had already acquired these lots through the execution of recorded purchase money mortgages at **[**10]** the time the purchase and sale contracts were executed. Thereafter, the bank entered into construction loan agreements with the developer which required that the previous bank mortgage be satisfied out of the funds advanced under the new loan. The construction loan agreement required a new first mortgage lien in favor of the bank to be placed on the subject property. Obviously, the parties intended that the bank would preserve the same security it held for its earlier loan. Under these circumstances, the bank was entitled to the priority established by its original mortgage under the doctrine of equitable subrogation.

In *Schilling v. Bank of Sulphur Springs, 109 Fla. 181, 147 So. 218 (1933)*, a third-party purchase money mortgage was utilized by the mortgagor to acquire certain property. Three years later, the purchase money mortgage matured, and the mortgagor went to the bank in order to obtain a mortgage loan to satisfy the purchase money mortgage. However, there was a judgment lien against the mortgagor which predated the purchase money mortgage. The bank loaned the money to the mortgagor to satisfy the original purchase money mortgage and recorded a new mortgage. On these facts, **[**11]** this Court held that equity required that the bank be subrogated to the rights of the original third-party money mortgage. We held that equity would not displace the purchase money mortgage since the result would leave the holder of the judgment lien in no worse position than if the original purchase money mortgage had not been discharged. *See also Federal Land Bank v. Godwin, 107 Fla. 537, 145 So. 883 (1933)*(new mortgage given by same mortgagee as renewal of old mortgage held to take priority over intervening mortgage).

Accordingly, we hold that the bank's mortgages on the twenty-two lots have priority over the claims of the contract purchasers but only to the extent that the bank's funds were used to purchase the lots. The bank loses its priority with respect to the additional construction monies advanced to the developer.

We quash the decision below and remand for further proceedings pursuant to this opinion.

It is so ordered.

OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur.