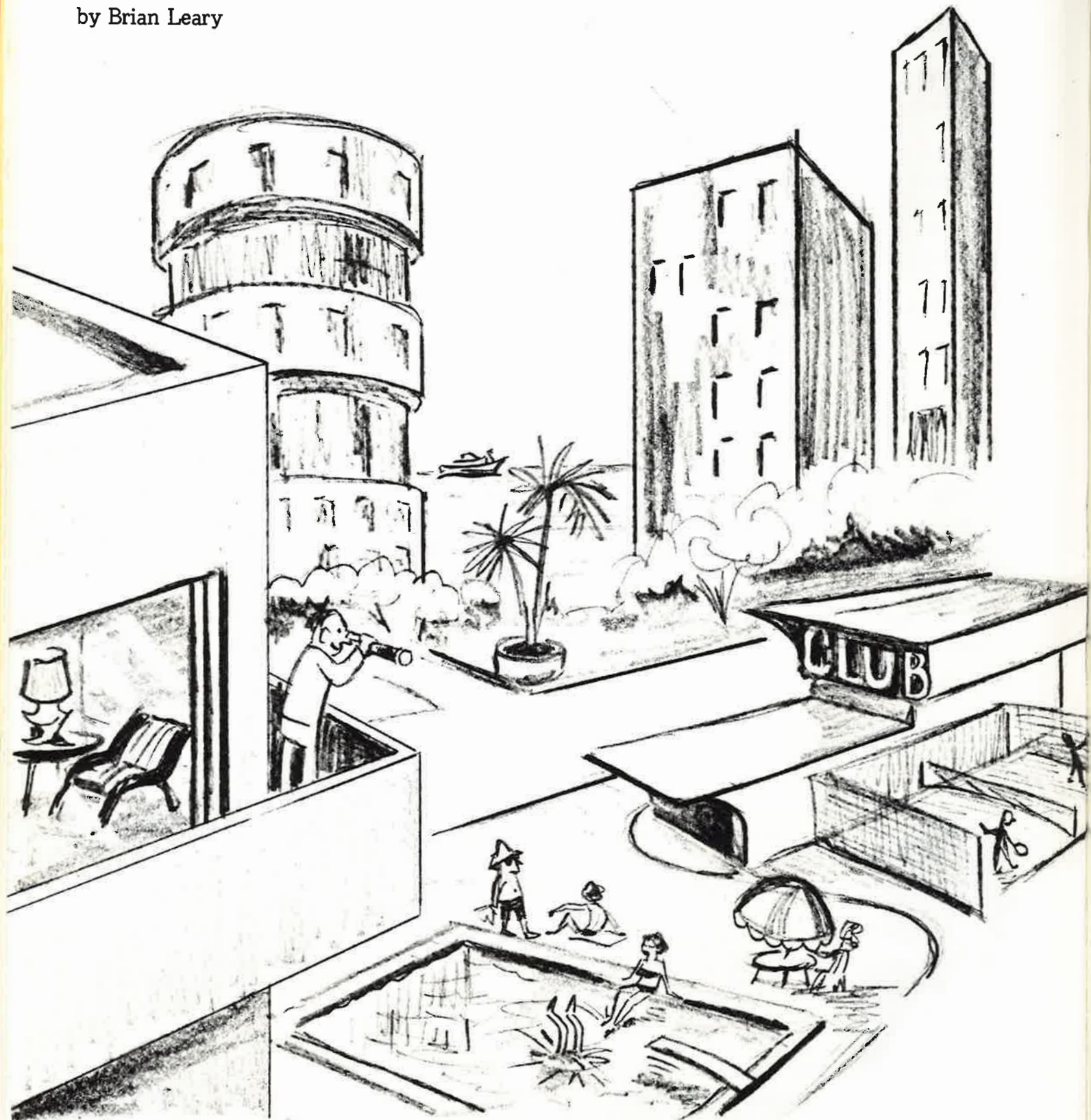


# The First Institute on Condominium and Cluster Housing

by Brian Leary



On Friday and Saturday, October 22 and 23, 1976, the First Institute on Condominium and Cluster Housing was held at the Americana Hotel on Miami Beach. The Institute was sponsored by the University of Miami Law Center and directed by Professor Ralph E. Boyer.

In recent years, sales of condominiums and similar property interests have become a large and growing part of the housing market. The skyrocketing costs of construction of single family homes have resulted in price tags beyond the reach of many families, particularly in areas of housing shortage. For them, condominiums are the only means of home ownership. Before rising fuel prices curtailed travel, condominiums were in great demand in recreation areas as vacation homes. Thus condominiums became popular in areas with recent population increases or areas with recreational resources: New York, California, Colorado and Florida. As a result, these states have become pioneers in the area of condominium law.

New legislation and recent judicial and administrative decisions at both the state and federal levels have kept condominium laws in a state of constant change. Thus the Institute on Condominiums provides a valuable contribution to continuing legal education by reviewing the present state of the law, and identifying the issues facing the industry, government and the consumer. The Institute is a major source of information, not only for attorneys practicing in states like Florida which have a well-developed condominium industry and some experience in condominium regulation, but also for attorneys in those states which have the need to develop condominium law.



In 1963, the Florida legislature authorized the creation of a condominium interest in real property, and subsequently passed several regulatory statutes.<sup>1</sup> By 1974, however, the industry had grown in size and complexity. In reaction to this growth, the 1974 Condominium Act<sup>2</sup> was passed in an attempt to regulate the industry in a more complete and detailed fashion. Addressing the rights and duties of the parties involved in condominium development and sale, the Act included detailed disclosure requirements for the purpose of consumer protection.<sup>3</sup>

In 1975, the Condominium Act was amended to create an enforcing agency, the Division of Land Sales and Condominiums of the Department of Business Regulations.<sup>4</sup> The amendment required developers to file a detailed prospectus with the Division before condominiums could be offered for sale.<sup>5</sup> The 1976 Act<sup>6</sup> makes several changes in the rights, duties, and liabilities of the developer, owner, and owners' association, as well as changes in the disclosure and filing requirements. Thus the Institute began its first session with a survey of recent developments in state regulations.

The first speaker was Charles E. Commander, III,<sup>7</sup> who covered some of the changes made by the 1976 Condominium Act. The new Act<sup>8</sup> is organized into four areas: rights and duties of the developer, rights and duties of the condominium owners' associations, special types of condominium interests, and regulation of sales, filing and disclosure requirements.

The new Act defines a "developer" as one who sells condominium units in the ordinary course of business.<sup>9</sup> Thus a financier who forecloses a mortgage or construction lien, and becomes the proud new owner of a condominium project, could be a "developer." The new Act also provides that warranties of construction, and warranties as to personal property in the units, such as refrigerators or dishwashers, are assumed by one who forecloses a lien or mortgage.<sup>10</sup> Further, in the case of new construction, the Act now specifies the time at which the condominium project becomes a legal entity for the purpose of creating liens and obtaining financing. A developer may not create liens prior to commencement of construction, but may create the condominium form and liens upon the property prior to completion of construction.<sup>11</sup> Before condominium units legally can be offered for sale, a detailed prospectus must be drawn up and filed with

the Division of Land Sales and Condominiums, and a waiting period of thirty days must expire.<sup>12</sup>

The new Act makes the greatest changes in the condominium owners' association. The association is changed from partnership to corporate form.<sup>13</sup> Individual owners no longer have to file class actions; the association may sue on behalf of all owners as their agent.<sup>14</sup> The 1976 Act seeks to prevent the problems that may occur when the developer has control of the association by virtue of his interest in the unsold units in the project. This intention is manifested by setting forth the rights and duties between the individual owner and the association, including provisions for meetings of the association, notice to the individual owners, and solicitation of proxies.<sup>15</sup>

The next speaker was Richard C. Booth, director of the Division of Land Sales and Condominiums, the newly created agency which is to administer the new law. Mr. Booth painted a vivid picture of the difficulties of a brand new agency. Although he didn't state specific guidelines for the developers, he emphasized the Division's concern with consumer protection and the disclosure provisions of the Condominium Act. Mr. Booth promised to issue cease and desist orders in any case where an advisory board hearing demonstrated that use of this enforcement procedure was appropriate, or to seek judicial remedy when necessary.

Federal as well as state agencies are involved in the regulation of condominiums. Brian J. Sherr,<sup>16</sup> who is currently involved in litigation with HUD regarding regulation of condominiums by that agency, spoke about federal regulation of condominiums. Mr. Sherr reviewed the various theories under which no less than four federal agencies, the SEC, FTC, HUD, and OILSR<sup>17</sup> claim jurisdiction over condominiums.

The SEC contends that any contract entered into for the purpose of profit on re-sale or sub-leasing is an investment contract under the Securities Act of 1933. Any continuing relation between buyer and developer—such as a collateral arrangement for a management contract, a recreation lease, or a sub-leasing agreement with pooled rents—coupled with any representation of financial benefit to the buyer, would create an investment contract. Such representations could include advertising to the public at large.

Mr. Sherr stated that the FTC, authorized to prevent unfair or deceptive trade practices or acts in restraint of trade, must show a substantial impact on interstate commerce to achieve jurisdiction. On the

other hand, HUD and OILSR base their claims of jurisdiction on the powers given them by Congress over sales of "land" involving fifty or more lots."

In the second part of its program, the Institute addressed a topic of controversy in Florida: the lease of common recreational facilities to the condominium owners by the developer. The recreation lease typically contained a clause which adjusted the rent in proportion to the cost of living index. Developers had used the lease for several reasons. Profits on sales of condominium units were exchanged for profits on the recreation lease (rec lease) which enabled the developer to sell the units at lower prices, spread the profits over several tax years, and assign his interest in the lease as security for financing. Usually such a lease was made a condition of sale of the unit and ran for ninety-nine years. The unit-buyer as lessee under a "net-net" rec lease would pay taxes, operating and maintenance costs, including replacement and repair, in addition to the rent, which would increase independently of the costs over the term of the lease.

In 1973, the cost of living began to increase at a rate two to four times as great as that of the previous decade; the rec lease brought windfall profits to developers, misery to condominium owners, and litigation to the courts. Ironically, these same inflationary forces were in part responsible for the now depressed housing market. Developers, now anxious to sell, have largely abandoned the rec lease because adverse publicity has produced an informed consumer, well-aware of its dangers. While the problem may become moot as to future developments, hard times have increased litigation involving existing and financially depressed developments with rec leases.

With excellent timing, the Florida Supreme Court, on the day before the Institute, denied certiorari in *Sheven v. Cenville*,<sup>18</sup> a case which challenged the validity of a rec lease, and raised the issue of the relationship between the little FTC Act<sup>19</sup> and the Condominium Act. The little FTC Act empowers the Department of Legal Affairs to stop unfair trade practices.<sup>20</sup> Pursuant to this section, the Department had instituted an administrative proceeding against a condominium developer, challenging the validity of rec leases connected with his project. The developer sought and was granted a writ of prohibition against the proceeding.

The developer contended that the Department of Legal Affairs lacked jurisdiction based on the little

FTC Act over condominiums.<sup>21</sup> Its first argument was that the little FTC Act exempted from the category of "unfair trade practices" any acts that were specifically permitted by law.<sup>22</sup> The 1974 Condominium Act had expressly authorized rec leases with a rent adjustment based on the cost of living index.<sup>23</sup> Therefore, the little FTC Act did not apply to such rec leases. The developer's second argument was that the legislature had intended to confer exclusive jurisdiction upon the Division of Land Sales and Condominiums under the Condominium Act.<sup>24</sup> The District Court of Appeals agreed that the Department of Legal Affairs lacked jurisdiction.<sup>25</sup> The Florida Supreme Court denied certiorari.<sup>26</sup>

At the Institute were Assistant Attorney General, J. Robert Olian, and the attorney for the developer in the *Cenville* action, Sam Spector. Olian, a graduate and adjunct faculty member of the University of Miami School of Law, gave the Attorney General's views on the litigation concerning rec leases under the little FTC Act. He argued that the Act expressly incorporates federal court decisions construing the powers of the Federal Trade Commission as a persuasive precedent for construing the powers of the state agency.<sup>27</sup> Therefore, the legislative intent behind the Act was to give the Department of Legal Affairs all the powers of the FTC. Under federal decisions such as *FTC v. Sperry Hutchison, Inc.*<sup>28</sup> the phrase "unfair and deceptive trade practices" was given the broadest possible meaning: the federal agency may enjoin not only those practices that are actually deceptive, or in restraint of trade, but also those which are unconscionable.

Olian argued that the Department of Legal Affairs would have concurrent jurisdiction with the Division of Land Sales and Condominiums if rec leases were found to be an unfair trade practice. He cited findings from the Governor's Report on Housing, and the Bosler Report. These reports demonstrated that demand for housing had outstripped supply; many families could not afford to own dwellings other than condominiums; industry practice was to make sales of units conditional on the execution of the rec lease; there was no competition in the leasing of recreation facilities to condominium owners. The Attorney General argued that a buyer in these circumstances had no choice as to the bargain; the tie-in between a lease of common recreation facilities and the typical boiler-plate condominium sales contract was in restraint of

trade. The Attorney General further argued that the use of sophisticated advertising and sales techniques, the lengthy fine print contract, and the escalating rent clause, in light of the relative bargaining power of the parties and the tie-in between lease and purchase, was oppressive to the consumer and an unfair trade practice.

Mr. Spector, a graduate of the University of Miami School of Law, presented the developer's arguments on the question of the jurisdiction of the Department of Legal Affairs. His first argument was that the rec leases in *Cenville* were specifically authorized by the 1974 Act. Thus, a rec lease drafted pursuant to the applicable provision of the 1974 Act<sup>29</sup> would be unlawful under the 1976 Act.<sup>30</sup> Mr. Spector argued that because the developer had relied on the specific authorization in the 1974 Act, this change should not be retroactive. Further, he raised the argument that any interference with contracts already executed would be a violation of constitutional rights under the Impairment of Contracts Clause,<sup>31</sup> and a denial of due process and equal protection under both the State and Federal Constitutions.

Although there was no judgment on the merits of the constitutional argument, the result was that the Attorney General was precluded from attacking rec leases under the little FTC Act. However, private parties, such as an association of condominium owners, have standing to attack rec leases under the little FTC Act.<sup>32</sup> Further, the Department of Business Regulations, or private parties can sue under the Condominium Act.<sup>33</sup> Indeed the constitutionality of retroactive application of the Condominium Act to existing recreation leases is pending before the Florida Supreme Court.<sup>34</sup>

With the Supreme Court silent on the merits, there was wide latitude for opinion, and heated debate as to the meaning of the decisions ensued at the Institute. Naturally enough, the meaning of the *Cenville* 35 decision was of special interest.

Whether the 1976 Condominium Act could be applied retroactively was not only a constitutional issue, but also a question of statutory construction and legislative intent in view of the legislature's about-face on the legality of the rec lease.<sup>36</sup> The developers and their attorneys argued that these two issues were so closely related as to be inseparable. The unit owners and consumer advocates argued that the issues were not interrelated. Also the two sides differed as to the

weight that should be given to the denial of certiorari. The owners' and consumers' attorneys argued that denial of certiorari had no meaning at all. The developers' attorneys argued that for practical purposes, the denial of certiorari in *Cenville* demonstrated the Court's attitude toward retroactive application of the Condominium Act and the little FTC Act to rec leases.

The final speakers on the rec lease topic addressed the effects on concerned parties should the Condominium Act be retroactively applied in conjunction with the little FTC Act. Ernest Samuels, president of the Point East Condominium Owners' Association, presented the consumers' point of view. Irwin Levy, president of Century Village, Inc. and a graduate of the University of Miami School of Law, presented the developers' argument. Mr. Levy discussed the commercial usefulness of the rec lease and noted that of all of the various attacks on the validity of his corporation's rec leases, not one was successful, whether decided on the merits or on jurisdictional defenses.

The Institute's review of condominium regulation by the state and federal governments, and its application to rec leases, shows that both governments are determined to regulate, but that the means are not clear at this time. In light of the broad trend toward consumer protection, it seems likely that government regulations for the purpose of equalizing the consumer's position with respect to that of the large developers will eventually be held constitutional and enforced. In Florida, it seems likely that the agency solely responsible for this enforcement will be the Division of Land Sales and Condominiums.

The First Institute on Condominiums and Cluster Housing provided a forum for spokespersons for the various constituencies of this sector of the housing market. Issues past, present and future were raised. By bringing these issues into focus, the Institute acts as a catalyst. Perhaps a Report on the Second Institute on Condominiums and Cluster Housing will reflect a resolution of some of these problems.

## FOOTNOTES

<sup>1</sup> § 711.01 *et seq.*, Fla. Stat. (1969).

<sup>2</sup> § 711.01 *et seq.*, Fla. Stat. (1974).

<sup>3</sup> § 711.70, Fla. Stat. (1974).

<sup>4</sup> § 711.801, Fla. Stat. (1975).

<sup>5</sup> § 711.802, Fla. Stat. (1975).

<sup>6</sup> § 718.101 *et seq.* and 719.101 *et seq.*, Fla. Stat. (1976).

<sup>7</sup> Special Counsel to the Council on Law Revisions of the Florida Condominium and Cooperative Housing Statutes.

<sup>8</sup> The 1976 Act has reorganized and renumbered those provisions of the 1974 and 1975 Acts which it has retained.

<sup>9</sup> § 718.103(13), Fla. Stat. (1976).

<sup>10</sup> § 718.203(1), Fla. Stat. (1976).

<sup>11</sup> § § 718.104, .121, Fla. Stat. (1976).

<sup>12</sup> § § 718.503, .504, Fla. Stat. (1976). The 30-day rule is an administrative regulation under § 718.501(1) (d), Fla. Stat. (1976).

<sup>13</sup> § 718.111(1), Fla. Stat. (1976).

<sup>14</sup> § 718.111(2), Fla. Stat. (1976).

<sup>15</sup> § 718.112, Fla. Stat. (1976).

<sup>16</sup> Member of the Co-op and Condominium Committee of the Florida Bar.

<sup>17</sup> Office of Interstate Land Sales Regulation.

<sup>18</sup> *Shevin v. Cenville Communities, Inc.*, 338 So2d 1281 (Fla. 1976).

<sup>19</sup> Ch. 501, Florida Statutes (1975).

<sup>20</sup> § § 501.203(4), .207 Fla. Stat. (1975).

<sup>21</sup> § 501.204(1), Fla. Stat. (1975).

<sup>22</sup> § 501.212(1), Fla. Stat. (1975).

<sup>23</sup> § 711.63(6), Fla. Stat. (1974).

<sup>24</sup> § § 711.801-804, Fla. Stat. (1975).

<sup>25</sup> See *Shevin v. Cenville*, *supra*.

<sup>26</sup> *Shevin v. Cenville*, 338 So2d 1281 (Fla. 1976).

<sup>27</sup> § 501.204(2), Fla. Stat. (1975).

<sup>28</sup> 405 U.S. 233 (1972).

<sup>29</sup> § 711.63(6), Fla. Stat. (1974).

<sup>30</sup> § 718.401(8), Fla. Stat. (1976).

<sup>31</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>32</sup> § 501.211, Fla. Stat. (1975).

<sup>33</sup> § 711.231, Fla. Stat. (1975); *Department of Business Regulation v. Johnson*, No. 48,752 (Fla. 1976); *Fleeman v. Case*, No. 48,488 (Fla. 1976).

<sup>34</sup> *Fleeman*, No. 48,488 (Fla. 1976).

<sup>35</sup> 338 So2d 1281 (Fla. 1976).

<sup>36</sup> See notes 25 and 26, *supra*.



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