

Fordham Law Review

Volume 31 | Issue 3

Article 2

1963

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Recommended Citation

Irving H. Welfeld, *The Condominium and Median-Income Housing*, 31 Fordham L. Rev. 457 (1963).
Available at: <https://ir.lawnet.fordham.edu/flr/vol31/iss3/2>

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The Condominium and Median-Income Housing

Cover Page Footnote

The author wishes to acknowledge the helpful suggestions of Alan Ivor Hyman, Esq. in the preparation of this article.

THE CONDOMINIUM AND MEDIAN-INCOME HOUSING†

IRVING H. WELFELD

I. INTRODUCTION

SINCE the 1930's the federal government, through its credit policies, has played a key role in the construction of housing. Whatever the effects on the industry, itself, the encouragement the Government has given to the production of homes in suburban areas has not been viewed as an unadulterated good. As one student of the subject has noted: "Government inducements to purchase in the suburbs have facilitated a remarkable increase in homeownership since the war but have endangered the future existence of the American city."¹

Perhaps realizing that a program aimed at having apartment dwellers move into homes could have as a consequence a city of the future containing square miles of rotting structures (the remains of former thriving middle-class neighborhoods),² and, at the same time, faced with the political impossibility of retracting the benefits accorded to homeowners, the Eighty-Seventh Congress did the next best thing. It attempted to rectify the imbalance in federal solicitude by bringing the home to the apartment dweller,³ thereby allowing him equal access to the Government's beneficence. To accomplish this, Congress, although with grave doubts as to the present legality of the form of ownership,⁴ extended mortgage insurance to the apartment owner in the condominium on the same terms as are available to the purchaser of a single-family home.⁵

† The author wishes to acknowledge the helpful suggestions of Alan Ivor Hyman, Esq. in the preparation of this article.

1. Haar, *Federal Credit and Private Housing* 209 (1960); see also Whyte, *Are Cities Un-American?*, in *The Exploding Metropolis* 1, 30-31 (1958).

2. See Vernon, *The Economics and Finances of the Large Metropolis*, in *The Future Metropolis* 58-63 (Rodwin ed. 1961).

3. If one's sense of order revolts at the thought of homes moving into apartments it should be noted that owners of mobile homes are seeking the designation "horizontal apartments."

4. Senator Sparkman: "Are you not putting the cart before the horse to pass Federal legislation before State legislation is passed?" Mr. Whatley: "Sir, has not that been the custom in most of the innovations and progressive moves . . . in the last 15 or 20 years?" Senator Sparkman: "Of course, if we passed this amendment authorizing FHA to do this, FHA would be powerless to act until the States passed legislation." *Hearings on Housing Legislation of 1960 Before a Subcommittee of the Senate Committee on Banking and Currency*, 86th Cong., 2d Sess. 593-94 (1960).

5. *Housing Act of 1961* § 234, 75 Stat. 160, 12 U.S.C. § 1715y (Supp. III, 1959-1961).

The most striking feature of the condominium as a legal entity, besides its exotic name, is that the unit owner not only has an apartment in fee simple, but also that he and the remaining unit owners jointly own and administer the common areas of the building. Unlike the housing cooperative familiar in this country, there is neither a shareholder-corporation nor a tenant-landlord relationship standing between the head of the household and his home. Like the owner of a home in a suburban subdivision, he has full title to his home, is solely responsible for its financing and is separately taxed. In effect, we have a "horizontal fee in a vertical subdivision."

The first question which this setup presents is whether it is compatible with present state law, in its common-law and statutory aspects, or what, if any, legislation will be either necessary or advisable.

The second problem encountered is the effect of the condominium on the housing industry. More specifically, will the condominium, backed as it now is by federal mortgage insurance or in the future as part of a state program, spur construction of housing within the means of median-income families?

II. STATE LAW ASPECTS

A. *Horizontal Fee*

The possibility of a fee simple in an apartment or of a horizontal fee unconnected with the earth was at one time viewed as heretical.⁶ Today, with the triumph of rationalism and sociological jurisprudence, it is merely viewed, by some, as impossible.⁷

Yet, despite these learned comments and the ancient Latin maxim, *superficies solo cedit*,⁸ outright ownership of apartments has a hoary lineage in the common law,⁹ tracing its ancestry figuratively and literally at least as far back as the Inns of Court.¹⁰ The Temple societies, facing at the end of the sixteenth century a severe shortage of space caused by the increasing number of admissions and by their own inability to finance

6. Challis, *Law of Real Property* 54 (3d ed. Sweet 1911).

7. Isaacs, "To Buy or Not to Buy: That is the Question" . . . What is a Cooperative Apartment?, 13 *Record of N.Y.C.B.A.* 203 (1958).

8. All that is on the soil goes with the soil.

9. For developments under the civil law see Leyser, *The Ownership of Flats—A Comparative Study*, 7 *Int'l & Comp. L.Q.* 31 (1958). For developments under the common law see generally Ball, *Division Into Horizontal Strata of the Landspace Above the Surface*, 39 *Yale L.J.* 616 (1930).

10. The possibility of a freehold in a chamber is discussed in the yearbooks without any definite conclusion being reached. See *Y.B. Mich.* 5 H. 7, f. 9 pl. 20 (1490). See also Brooke, *LaGraunde Abridgement*, tit. *Demaunde* f. 213, pl. 20 (1586).

new construction, allowed individual members to build new chambers over existing buildings. For their efforts, the individuals were given life interests with a right of assignment to any of the other members of the Inn on the same terms.¹¹ The legal profession being convinced of the utility and importance of allowing this type of ownership, its acceptance by the judiciary was not long after. Thus, as early as 1638, in a case of breaking and entering the reporter said: "And, first, it was resolved, that a chamber of any inns of Court or Chancery broken open may be *domus mansionalis* of him who is owner of the said chamber. . . ."¹² Similarly, Lord Coke tells us: "A man may have an inheritance in an upper chamber, though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery."¹³

The possibility of two or more distinct freeholds in a building also was recognized in some of the earliest cases in the United States. In 1808, a Massachusetts court stated: "[I]n legal contemplation, each of the parties has a distinct dwelling-house. . . ."¹⁴ Thus the defendant is seised in fee simple of a room on the lower floor and the plaintiff is seised in fee of a chamber over it.

The key problem remaining is whether space can be owned or conveyed—whether the rights of ownership extend to the space enclosed by the walls of the building or are limited to the materials defining the walls, with the use of the space being a result of an easement.¹⁵ This is a question of more than academic interest to the conveyancer, title insurer and above all, to the owners, occupants and mortgagees, if the building, itself, were destroyed.¹⁶

The old common-law maxim, *cujus est solum, ejus et usque ad coelum*¹⁷ would seem to answer the question in the affirmative. However, the advent of the flying machine made it painfully obvious that this doctrine would have to be qualified to a great extent. As acute a legal mind as Lord Ellenborough realized that the consequence of such a doctrine

11. See Williamson, *The History of the Temple London* 227-28 (1924).

12. *Evans and Finch's Case*, Cro. Car. 474, 79 Eng. Rep. 1009, 1010 (K.B. 1638).

13. 1 Coke, *The First Part of the Institutes of the Laws of England* § 59(1)(b) (13th ed. 1812). In England, horizontal ownership in buildings is now recognized by statute. Law of Property Act, 1925, 15 Geo. 5, c. 20, § 205(ix), at 717.

14. *Loring v. Bacon*, 4 Mass. 574, 575 (1808); see also *Graves v. Berdan*, 26 N.Y. 498 (1863).

15. Compare P.R. Laws Ann. tit. 31, § 1291a (Supp. 1958), with Hawaiian Act No. 180, § 2(a) (1961).

16. See generally Ball, *The Vertical Extent of Ownership in Land*, 76 U. Pa. L. Rev. 631 (1928); Bell, *Air Rights*, 23 Ill. L. Rev. 250 (1928); Note, 1960 U. Ill. L.F. 303.

17. The owner of the soil owns the space above to the heavens.

would be "that an aeronaut [would be] . . . liable to an action of trespass . . . at the suit of the occupier of every field over which his balloon passes. . . ." ¹⁸

The Supreme Court, in 1938, rejected such a literal interpretation, but explicitly recognized that "the land owner owns at least as much of the space above the ground as he can occupy or use in connection with the land."¹⁹ The relevance of the decision is made even clearer by Mr. Justice Black who in dissenting found that

no rigid constitutional rule . . . commands that the air must be considered as marked off into separate compartments by imaginary metes and bounds in order to synchronize air ownership with land ownership.²⁰

In a large number of states, the adoption of the Uniform Aeronautics Act has brought in its wake the recognition that the space above land can be owned, subject only to the right of flight.²¹ New Jersey²² and Colorado²³ specifically authorize creation of estates in air space whether or not connected or owned by the surface owner.²⁴

Analogous cases are found in other branches of the law. Where a telephone wire was strung in the space above plaintiff's land, courts have allowed actions in ejectment on the rationale that "land includes not only the surface but also the space above and the part beneath."²⁵ Extending a hand into another's air space has been held to be a trespass,²⁶ while a Massachusetts court, in 1872, stated, "projecting . . . eaves over the plaintiff's land . . . if continued for twenty years, might give . . . a title to the land by adverse occupation."²⁷

That the space can be owned independently from the surface can be

18. *Pickering v. Rudd*, 4 Camp. 219, 220-21, 171 Eng. Rep. 70, 71 (1815).

19. *United States v. Causby*, 328 U.S. 256, 264 (1946).

20. *Id.* at 271.

21. Uniform Aeronautics Law §§ 3-4 (1938) which has been adopted in Arizona, Delaware, Georgia, Hawaii, Idaho, Indiana, Maryland, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont and Wisconsin.

22. N.J. Stat. Ann. § 46:3-19 (1940); 52 Harv. L. Rev. 335 (1938).

23. Colo. Rev. Stat. Ann. § 118-12-1 (1953); Comment, 25 Rocky Mt. L. Rev. 354 (1953).

24. Cal. Civ. Code § 659 which provides that "land is the solid material of the earth . . ." would seem to point in the opposite direction. However, it was held in *Hinman v. Pacific Air Transp.*, 84 F.2d 755 (9th Cir. 1936), cert. denied, 300 U.S. 654 (1937) that there was "nothing therein to negative the ad coelum formula." 84 F.2d at 757.

25. *Butler v. Frontier Tel. Co.*, 186 N.Y. 486, 491, 79 N.E. 716, 718 (1906).

26. *Hannabalsen v. Sessions*, 116 Iowa 457, 90 N.W. 93 (1902).

27. *Smith v. Smith*, 110 Mass. 302, 304 (1872).

adduced from cases in which it has been held that the space formerly occupied by mined minerals still belongs to the mine owner and not to the surface owner.²⁸ Similarly, in a different sphere a Washington court has upheld a municipal ordinance granting all space above a given height over a municipal alley to adjoining landowners.²⁹

In *Pearson v. Matheson*,³⁰ perhaps the only case directly in point, an "air lot" was conveyed before the building was erected, and a dispute arose after the building had been destroyed by fire. The court not only held the conveyance proper, but expressly recognized that the upper owner "was sovereign of the air over the . . . store which lay above the fourteen-foot line"³¹ and that title would survive destruction of the original building.³²

As a theoretical matter, a fee which is not necessarily connected with the ground raises no difficulties. "[A] fee simple absolute is a sector of space in time and no more tangible than a song or a patent."³³ Thus, there seems to be no good reason for not allowing ownership of space to a reasonable height above the land. Such space does have economic value, and as a practical matter, can be sliced into horizontal segments.³⁴ It would seem the least the law should do is "keep pace with the habits and usages of practical life."³⁵

B. *Restraints on Alienation*

1. *Covenant to Bar Partition*

The division of buildings into a series of apartments owned in fee simple is rapidly gaining favor in England.³⁶ It is usually employed in two and three-family houses, however, and where a large structure is

28. See, e.g., *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 22 Atl. 1035 (1891); *Massot v. Moses*, 3 S.C. 168 (1871).

29. *Taft v. Washington Mut. Sav. Bank*, 127 Wash. 503, 221 Pac. 604 (1923).

30. 102 S.C. 377, 86 S.E. 1063 (1915). Cf. *Weaver v. Osborne*, 154 Iowa 10, 134 N.W. 103 (1912).

31. 102 S.C. at 385, 86 S.E. at 1065.

32. See Note, *The Airspace as Corporeal Realty*, 29 Harv. L. Rev. 525 (1916); Ball, *supra* note 16.

33. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 361 (1954).

34. See note 69 *infra* and accompanying text. But see *Cleveland v. City of Detroit*, 322 Mich. 172, 33 N.W.2d 747 (1948) where the court rejected plaintiff's argument that a taking for a public use was vertically excessive on the ground that it had not been demonstrated that real estate can be sliced horizontally and vertically into segments. For critical comment of this decision see 24 N.Y.U.L.Q. Rev. 443 (1949).

35. *Massot v. Moses*, 3 S.C. 168, 196 (1871).

36. See George, *Sale of Flats* (2d ed. 1959); George, *The Sale of Flats*, 19 Convey. (n.s.) 3 (1955).

involved resort is made to a trust arrangement, a private act of Parliament,³⁷ or incorporation.³⁸ In Scotland, where flat ownership is common even in large projects, a good deal of trouble has arisen. Since each proprietor owns the walls bounding his apartment, with the upper and lower occupants owning the roof and ground respectively a cumbersome system of cross easements has resulted; further, expenses such as roof repairs have often been inequitably apportioned, and unified control of the building often sacrificed.³⁹

Coupling the ownership of the apartment with the joint ownership of all the common areas eliminates the need for various easements, since the occupant of an apartment (who is also a tenant in common) can make full use of the common facilities. Unified control is possible with an equitable sharing of expenses and some assurance that a uniform state of repair and maintenance will be found throughout the building. The use of the tenancy in common, however, requires some safeguard to bar an individual member from toppling the whole legal structure by seeking partition during the life of the enterprise. An agreement among co-owners not to partition will usually be honored by the courts. But although in form such an agreement does not bar an owner from conveying, the fact that the usual buyer will want to own severally substantially restricts marketability,⁴⁰ and courts have consistently held that such agreements must be limited in duration.⁴¹ In *Roberts v. Jones*,⁴² the time limit of the Rule Against Perpetuities was invoked to test for validity, and an agreement purporting to bind successive purchasers was held invalid.

Although at first glance this seems to require some time limitation on any restriction to be placed on the right to partition, upon closer examination this conclusion becomes somewhat dubious. A scheme involving a building, unlike land, has an inherent limitation on its length. As a New York court has recently stated:

The fear expressed that the covenant imposes an undue restriction on alienation or

37. Tolson, "Land" Without Earth: Freehold Flats in English Law, 14 *Convey.* (n.s.) 350, 353 (1950).

38. George, *Sale of Flats*, ch. 5 (2d ed. 1959). It might also be noted that the tenancy in common has been ruled out by the Law of Property Act, 1925, 15 *Geo. 5*, c. 20, §§ 1-209, at 563-722.

39. See Dickson, *Freehold Title to Flats?*, 28 *L. Inst. J.* 133 (1954).

40. See Schnelby, *Restraints Upon the Alienation of Legal Interests*: III, 44 *Yale L.J.* 1380, 1398 (1935).

41. See 6 *American Law of Property* § 26.74 (Casner ed. 1952); *Annot.*, 132 *A.L.R.* 666 (1941).

42. 307 *Mass.* 504, 30 *N.E.2d* 392 (1940).

an onerous burden in perpetuity is dispelled by the fact that by its terms it may run with the land only as long as both buildings are standing and in use.⁴³

There is also the clear distinction between the classical buyer of land and the purchaser of an apartment in a condominium as far as the substance of the restraint is concerned. As in the case of covenants restricting the use of property in a residential subdivision (which may be said to make the land less marketable), the actual effect of the covenants, if widespread, will be to increase marketability because of the assurance of stability afforded the potential homeowner. Finally, there is the reasonableness of the restraint when viewed in the perspective of the results of a partition decree. The consequence of equity granting a decree would be the destruction of a cooperative scheme of home ownership involving scores of families. Over a hundred years ago, an interesting case⁴⁴ arose, the resolution of which, with but slight alterations, could be invoked a hundred years hence in a suit to partition a condominium.

In 1787, various owners of iron furnaces and forges, who also jointly owned three contiguous hills which contained the iron ore that supplied their operations, covenanted that these hills shall "remain 'together and undivided, as a tenancy in common . . . in order to remove all difficulties.'"⁴⁵ As explained by the court, the difficulties involved the necessity of each owner having a local source of raw materials and the inability to make an equal partition due to the irregular pattern of the seams of ore and the difference in their quality and quantity. Sixty-seven years later, a suit for partition was brought, and denied. The court said:

We have seen what the difficulties in the way of parting this estate into severalty were, and that they were inherent and enduring. So long as the ore [building] should last the estate would be incapable of equal partition; and yet so long as these furnaces and forges [apartments] should continue to manufacture iron [house families], that ore [building] would be wanted. They used words to obviate the difficulty. The remedy was commensurate with the evil. Experience had proved it possible for these tenants in common to supply the wants of their respective establishments . . . [and] that this was the nearest to a partition in severalty to which these hills [building] could be brought, without "the greatest injustice to some of the parties." Just in that condition, therefore, shall the mine-hills [building] be left. . . . How long, it is asked? I answer, as long as the "difficulties" remain. As long as the ore [building] endures and continues to be wrought in these furnaces and forges [used to house families in its apartments].⁴⁶

43. *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 246, 164 N.E.2d 832, 835, 196 N.Y.S.2d 945, 950 (1959).

44. *Coleman v. Coleman*, 19 Pa. 100 (1852).

45. *Id.* at 104.

46. *Id.* at 107. See also *Appeal of Latshaw*, 122 Pa. 142, 15 Atl. 676 (1883).

2. Right of First Refusal

To assure the owners of the building some choice as to their future neighbors, a right of first refusal is granted to the council of owners and to the individual owners. This pre-emption right, however, lapses within a short period after the seller produces a prospective buyer. In contradistinction to the case of the corporate cooperative, the prime motive here is not financial protection (since the increase in maintenance charges in case of default will usually be small), but rather a desire to choose one's neighbors. Also, unlike the traditional cooperative, the restraint is placed directly on the fee.

In considering condominium-enabling legislation, the Hawaiian legislature, brought face to face with this prospect, shied away and refused to include the right of first refusal fearing that it might be struck down as an invalid restraint.⁴⁷ Whether or not this fear is justified, it assumes the judiciary will espouse a position that not only overlooks the distinction between an option agreement and a pre-emption agreement,⁴⁸ but also turns a rule based on a social policy of increasing marketability of land into an immutable law. If the pre-emptor must pay the offeror's price (as opposed to a price fixed when the agreement was made, and now possibly so low as to restrict a sale), there is no material impediment to alienation.

In general, courts have upheld restrictions on shares of cooperative housing corporations which were far more severe—the decisions resting not on the fact that stock rather than a fee was involved, but rather on a conscious weighing of social policies. Thus in a New York case where sale was forbidden without consent of the board of directors or two-thirds of the stockholders, the court upheld the restriction saying, "the residential nature of the enterprise, the privilege of selecting neighbors and the needs of the community are not to be ignored."⁴⁹ And, in *Gale v. York Center Community Co-op., Inc.*,⁵⁰ where the restraint was directly on the fee, the court stressed

that the crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that will flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fulfillment, such a restraint should be sustained.⁵¹

47. Hawaiian Legis. Standing Comm. Rep. No. 846, at 2 (April 26, 1961).

48. See 6 American Law of Property § 26.65 (Casner ed. 1952).

49. *Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc.*, 256 App. Div. 685, 691, 11 N.Y.S.2d 417, 422 (1st Dep't 1939). See generally Note, 61 Harv. L. Rev. 1407 (1948).

50. 21 Ill. 2d 86, 171 N.E.2d 30 (1960).

51. *Id.* at 92, 171 N.E.2d at 33.

It is also conceivable that a court may follow a primrose path and test the restriction by applying the Rule Against Perpetuities. Thus, the duration and not the actual effect of the device would be the controlling factor. Since the right of first refusal need not vest within the period of perpetuity, such a right can, and has been, struck down as a violation of the rule.⁵² As mentioned earlier, however, the court, to do this with the condominium, would have to ignore social and economic considerations, as well as the fact that the life of a building is fairly limited in a period when our destructive devices have outrun our constructive techniques.⁵³

3. Bar to Severance: Agreement to Convey

A similar problem and analysis would be involved (1) where the owners agree to bar severance of the unit from the common areas; and (2) where each owner agrees to convey his property (on a vote of a designated percentage of the owners) if the building is totally or partially destroyed. The latter agreement is especially valuable when the interests of the owners survive the destruction of the building, for in the absence of such an agreement, a difficult adjustment of rights might well be in the offing. In this case the application of the rules would cause precisely that which the rules seem designed to combat. The limitation assures that the property is kept in the flow of commerce and does not forever remain as a charred ruin, a monument to one man's obstinacy.

C. *Real Covenants*

For the condominium to achieve any sort of permanence, provision must be made that assignees and successors are bound by the original agreements and any subsequent agreements of which they should have notice. Thus, agreements as to the means by which owners will exercise control over the administration of the building and share expenses as to its maintenance, contracts restricting the use to be made of the individual fee (generally to residential use and perhaps more specifically, to do nothing that will increase the fire insurance rates of the building or otherwise unduly annoy the other occupants) and finally, the previously discussed agreements barring partition and creating a pre-emption right or

52. *Neustadt v. Pearce*, 145 Conn. 403, 143 A.2d 437 (1958). See generally Sparks, *A Decade of Transition in Future Interests*, 45 Va. L. Rev. 493 (1959); see also 6 *American Law of Property* § 26.66 (Casner ed. 1952).

53. A saving clause might be included to allow the court to reform any interest that would violate the rule. However, there is some doubt as to whether a court would accept such jurisdiction. Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 Harv. L. Rev. 1141, 1146 (1961).

requiring a conveyance under certain situations, will have to satisfy the technical requirements that there be "privity" between the parties and that the covenants "touch and concern" the property before they will be held to run with the land.

The agreements among the tenants in common on the care and repair of the property would raise no problems with regard to privity.⁵⁴ Having the restrictions as to the use and sale of the original conveyances to the parties would satisfy the privity doctrine⁵⁵ in the sense it refers either to succession to the estate of one of the parties or succession of estate between the covenantor and covenantees.⁵⁶ Nevertheless, under the latter interpretation difficulties may arise in enforcing later alterations of the agreements. Problems would also exist in Massachusetts, which posits the need for mutual and simultaneous interests of the parties in the same land.⁵⁷ However, despite the fact that they do not meet the technical requirements of privity, these provisions will be enforced as equitable servitudes.⁵⁸

With respect to the touch and concern requirement, the only difficulty that could arise would be in a jurisdiction following the so-called English rule⁵⁹ that affirmative burdens will not run with the land even in equity. Although almost all the states disregard this rule, lip-service is still given to it in New York.⁶⁰ But it is doubtful that a decision adverse to the condominium would be rendered even there. Albeit the agreement by a co-owner to pay his share of the maintenance charges is an affirmative burden, it would certainly be upheld in light of the *Neponsit* case,⁶¹ which upheld a covenant calling for payments for the upkeep of land that was not even owned by the covenantor. The agreement to convey

54. See Walsh, *Covenants Running with the Land*, 21 N.Y.U.L.Q. Rev. 28, 33 (1946).

55. See generally Clark, *Real Covenants and Other Interests Which "Run with the Land,"* ch. 4 (2d ed. 1947).

56. *Wheeler v. Schad*, 7 Nev. 204 (1871).

57. *Morse v. Aldrich*, 36 Mass. (19 Pick.) 449 (1837).

58. See *Parker v. Nightingale*, 88 Mass. (6 Allen) 341 (1863); 2 *American Law of Property* § 9.26 nn.2 & 3 (Casner ed. 1952).

59. See *London & So.W. Ry. v. Gomm*, 20 Ch. D. 562 (C.A. 1882). There is some question as to whether this is still the rule in England. See *Law of Property Act, 1925*, 15 Geo. 5, c.20, § 78(1), at 616; *Smith v. River Douglas Catchment Bd.*, [1949] 2 All E.R. 179 (C. A.); *Leysen*, supra note 9.

60. *Miller v. Clary*, 210 N.Y. 127, 103 N.E. 1114 (1913). See also *Guaranty Trust Co. v. New York & Queens County Ry.*, 253 N.Y. 190, 170 N.E. 887, appeal denied, 282 U.S. 803 (1930).

61. *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

the fee simple on a vote of a majority of the owners in case of destruction would, it seems, also bind successors in interest. First, it does not offend any of the policies which the rule was meant to express, *viz.*, the reluctance of courts to force the holder of encumbered land to dip into his pocket to satisfy the burden; the hesitancy of courts to supervise specific performance;⁶² the desire to remove the restraint on alienation which enforcement would effect. Second, the New York courts have come close to abandoning the rule in recent years.⁶³ The test applied in determining when a covenant is personal or real—namely,

a covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general⁶⁴

—would put the covenant to convey in the latter real category and, therefore, it would be allowed to run with the land.

D. Zoning

Just like any other structure, a condominium building would have to satisfy the local zoning ordinances. As a multifamily structure it should and would be treated as any other building in that category. However, a unique problem might arise in the sale of units in a structure previously subject to single ownership where the zoning ordinance would require, as the one upheld in *Clemons v. City of Los Angeles*,⁶⁵ that no lot held under separate ownership at the law's effective date and used for dwelling purposes shall be reduced in any manner below the minimum lot area, size or dimension (5,000 square feet). Such an ordinance, if applied to the sale of units in a condominium, would prohibit the division of ownership.⁶⁶ In *Clemons*, the law barred a subdivision of bungalow courts into separate parcels, although no change in use was effectuated by the sale. An attack on the ordinance's constitutionality, based on the claim that it had no relation to the public health, safety, morals or general welfare, was rebuffed. The court, however, rested its decision quite heavily on the trial court's finding that this was a justified use of the police power on the basis that such a

subdivision . . . tends "to create slum conditions" because it would be unlikely that a uniform state of repair would be maintained by the various owners and a "hodge-

62. See Note, 51 Harv. L. Rev. 320 (1937).

63. *Nicholson v. 300 Broadway Realty Corp.*, *supra* note 43. See Million, *Amandes, Lesar, Martz, Real and Personal Property*, 36 N.Y.U.L. Rev. 357 (1961).

64. 278 N.Y. at 257, 15 N.E.2d at 796.

65. 36 Cal. 2d 95, 222 P.2d 439, 64 Harv. L. Rev. 326 (1950).

66. See suggested problem in Haar, *Land-Use Planning* 228 (1959).

podge appearance" would result, with a consequent depreciation in value of the entire property; . . . "and where there is no one to make or enforce any rules touching items of common necessity" . . . the situation could create disturbing tensions.⁶⁷

In a later case, the same ordinance was held to violate the Constitution when such a justification could not be found.⁶⁸ The condominium which makes provisions for unified control and maintenance of the property should, therefore, be able to survive an onslaught directed merely at the change in ownership which takes place.

E. *Conveyancing and Recording*

Moving into the more mechanical realms of real property, the description of the property for conveyancing purposes will have to include a third dimension—height. Although a bit more complex, it raises no insuperable problems. In Chicago, during the late twenties, the Marshall Field building, erected over railroad property, was conveyed so as to require no easements of support. This was accomplished by platting and conveying not only the air lots to be occupied by the building, but also the caisson and prism lots so that Marshall Field would have fee title even to its supporting columns.⁶⁹ The deed to a New York City condominium in 1947, accomplished the same result by metes and bounds conveyancing.⁷⁰ Thus, after conveying the entire property to twelve joint tenants, the deed went on to make the following exception:

All the space or area . . . above described which lies between two horizontal planes the lower of which has an elevation 94.46 feet above datum and the upper of which has an elevation 105.63 above datum and the vertical limits of which are bounded . . . (distance from Madison Avenue and East 84th Street respectively).⁷¹

The federal regulations require that, the multifamily structure in which the family unit is located shall have been committed to a plan of apartment-ownership by enabling deed, deed of constitution, public deed, or other recorded instrument . . . binding within the jurisdiction⁷²

67. 36 Cal. 2d at 100-01, 222 P.2d at 443.

68. *Morris v. City of Los Angeles*, 116 Cal. App. 2d 856, 254 P.2d 935 (Dist. Ct. App. 1953).

69. See Becker, *Subdividing the Air A New Method of Acquiring Air Rights*, Extra Vol. Chi.-Kent L. Rev. 40 (1931); Reeves, *The Influence of the Metropolis on the Concepts, Rules and Institutions Relating to Real Property*, 177-84 (1948). See also Brennan, *Lots of Air—A Subdivision in the Sky*, 12 *Lawyers Title News* 1 (1957) describing a more recent deed involving the forty-one story Prudential Building in Chicago.

70. 4520 *Conveyances 466* (City Register of New York) (1947). Parts of the deed are cited and criticized in Ramsey, *Condominium: The New Look in Co-ops*, 6-7, 25-26 (1961) (Chicago Title and Trust Co.). See also N.Y. Times, Dec. 22, 1946, § 8, p. 1, col. 8.

71. 4520 *Conveyances 466* (City Register of New York) (1947).

72. 24 C.F.R. § 234.26(b) (1962).

in order to be eligible for mortgage insurance. In spite of the phraseology, it is likely that this requirement would be satisfied by a uniform building plan which would include: (1) a description of the land, structure, apartments and common areas; (2) a clear expression as to the use for which each of the family units is destined; and (3) the basic restrictions on the individual unit in the condominium previously discussed. Such a building plan would be binding on future apartment dwellers.⁷³

Once the subdivision plat is recorded, the conveying of an individual apartment could be fairly simple. To quote a leading title insurer, the apartment would be described in the conveyance as follows: "The fee simple title to the parcel of land, property and space designated as Apartment Parcel 100 in the plat of subdivision [which is] recorded in the Recorder's Office;"⁷⁴ whereas the common areas would be described in the conveyance thus:

The . . . fee simple title to an undivided 6.666 percent interest in the land, property and space known as Lot 1 in Block 1 in Jones Subdivision, in Section. . . . Township . . . excepting from said Lot 1 all the land, property and space designated as Apartment Parcels 1 to 100, both inclusive in the plat of subdivision recorded. . . .⁷⁵

It might be advisable to mention at this juncture that the condominium, which has all the physical manifestations of an apartment house, is within the scope of subdivision-enabling legislation of many states.⁷⁶ When conveyancing is done by the plat method, this might seem obvious. But even a conveyance by metes and bounds might fall within the scope of such regulation and be viewed as an attempt to evade the statute. It would hardly behoove a builder or investor to claim he was not subdividing "real property"⁷⁷ or that the condominium did not involve the "division of a lot, parcel or tract of land . . . for the purpose of sale or of building development . . ."⁷⁸ after contending that the space above land should be treated in the same manner as land. It is quite likely, however, that no difficulty would arise if the plan for the condominium were submitted to the local governmental agency in charge of regulation.

73. See *Wischmeyer v. Finch*, 231 Ind. 282, 107 N.E.2d 661 (1952); Annot., 4 A.L.R.2d 1364 (1949).

74. Ramsey, *op. cit. supra* note 70, at 29.

75. *Id.* at 28.

76. The condominium, being subject to laws aimed at developments along the urban-rural fringe, is analogous to the traditional cooperative in that it is held subject to "blue sky" laws which were not aimed at transactions involving the purchase of a home.

77. Cal. Bus. & Prof. Code § 11535(a).

78. Wis. Stat. Ann. § 236.02(8) (Supp. 1962).

Omission of this detail, nevertheless, could subject the sponsor to criminal sanctions,⁷⁹ or else make the conveyance either voidable at the option of the purchaser,⁸⁰ or null and void,⁸¹ depending upon the jurisdiction.

F. *Taxation*

A possible difficulty in a number of states is the Federal Housing Administration requirement that

real estate taxes must be assessed and be lienable against the individual units, together with their undivided interests in the common elements, and not against the multi-family structure, otherwise a tax lien could amount to more than the value of any particular unit in the structure and thus present a situation which would be unsatisfactory from the mortgaging standpoint.⁸²

This is basically a statutory matter and even if the taxes on the individual apartments were assessed to each owner,⁸³ the common areas would be taxed as a unit in a large number of jurisdictions.⁸⁴

G. *Legislation*

Although the above detail might have to be ironed out by legislation, it seems that the condominium could survive an encounter with any judicial authority willing to go beyond hornbook law. However, as a practical matter, since the federal program (or for that matter, any new innovation in housing) will hinge on its acceptance by the most practical of men, mortgagees, enabling legislation⁸⁵ would be deemed a judicious approach.

Such legislation would provide a basic guide to the rights and duties of the unit owners with respect to their individual apartments.⁸⁶ The common areas could be defined and provision made for their administration. Thus, the Puerto Rican statute requires that bylaws be recorded (along with the deed) which make provision for (a) the form of adminis-

79. N.J. Stat. Ann. § 40: 55-1.23 (Supp. 1961).

80. Wis. Stat. Ann. § 236.31(3) (1957).

81. Conn. Gen. Stat. Ann. § 8-25 (1960).

82. Letter From the Federal Housing Administration to Directors of Field Offices Oct. 9, 1961.

83. See *Cincinnati College v. Yeatman*, 30 Ohio St. 276 (1876).

84. See *Jarrett v. Osborne*, 84 W. Va. 559, 101 S.E. 162 (1919). See also *Mass. Gen. Laws Ann. ch. 59, § 11* (Supp. 1961); *McManus v. City of Boston*, 320 Mass. 585, 70 N.E.2d 819 (1947).

85. *Leyser, The Ownership of Flats—A Comparative Study*, 7 *Int'l & Comp. L.Q.* 31 (1958). See also *Ark. Stat. Ann. § 50-1001* (Supp. 1961); *Hawaiian Act No. 180, § 2(a)* (1961); *P.R. Laws Ann. tit. 31, § 1292* (Supp. 1958).

86. *P.R. Laws Ann. tit. 31, § 1291p* (Supp. 1958).

tration (specifying the powers of the administrator and the limitations thereon), (b) the procedure for co-owner meetings, (c) the maintenance of the property, (d) the proportionate sharing of expenses, (e) the procedure for amending the bylaws⁸⁷ and (f) the access which each owner is to have to the administrative records.⁸⁸ Attempts to partition the common areas or sever the unit from the common areas could be barred for the life of the enterprise; or in lieu of the latter, a provision that liability for a prorated share of administrative expenses cannot be avoided by renouncing rights in the common areas. To ease enforcement of common expenses against a recalcitrant or defaulting owner a statutory lien on his unit would be provided.⁸⁹

With respect to improvements, the Puerto Rican law requires a unanimous vote for all work affecting the common areas not essential for maintaining the property.⁹⁰ Although this protects the individual owner, it does so at the expense of the majority. It is submitted that the Italian Civil Code, Article 1120,⁹¹ which allows two-thirds of the owners to make a binding decision as to an improvement if the improvement is of a value-raising nature and not too costly, achieves a sounder accommodation of the respective interests. Article 1121(3)⁹² of the same statute allows installation of improvements (which would not otherwise qualify), and preserves the rights of dissenting co-owners to join at a later time, if they are willing to bear a proportionate share of the cost.

Common insurance should be allowed without affecting the rights of the individual unit owner to insure his apartment. The enabling act should provide for the inclusion in every agreement of a provision outlining the disposition of the property in the event of partial or total destruction—the act including in its own procedure a section to cover an agreement which either fails to make such a provision, or in which a gap is present. Thus, even as carefully drawn an agreement as the one setting up the New York condominium⁹³ left a curious lacuna by requiring an affirmative vote of eighty per cent of the owners either to rebuild the property or to convey it.

In the case of a sale, the managing agency and/or the individual unit

87. P.R. Laws Ann. tit. 31, § 1293a (Supp. 1958).

88. P.R. Laws Ann. tit. 31, § 1293b (Supp. 1958).

89. P.R. Laws Ann. tit. 31, § 1293d (Supp. 1958).

90. P.R. Laws Ann. tit. 31, § 1291n (Supp. 1958).

91. Cited in Leyser, *supra* note 85, at 43.

92. *Ibid.*

93. A copy of the agreement was made available to the author by Mr. William Kerr, counsel at the Equitable Life Assurance Society.

owners should be permitted to exercise a right of first refusal and a right of redemption⁹⁴ if the seller fails to notify the other owners of the sale. These rights should lapse a reasonable time (thirty days⁹⁵) after notice is given. In a large project, it might also be useful to require that some order of preference among the owners be established if the bids are equal.⁹⁶ To avoid any of the previously discussed problems, the statute should specifically exempt the agreements herein discussed from the rules concerning restraints on alienation, and should provide that the agreements, and any later recorded modifications, be deemed to run against assignees and successors in interest.

Finally (and perhaps most important in a world where even members of cooperatives are not necessarily cooperative and problems arise which were unforeseen even by the acutest legislative mind), easy access should be provided to the courts (with the managing agency being subject to process and allowed to conduct litigation) and/or if the parties agree, to an arbitrator—a speedier, cheaper, and perhaps more appropriate recourse for most intramural squabbles.

III. THE EFFECT ON THE HOUSING INDUSTRY

Having arrived at the conclusion that the condominium can be integrated into our legal system, the next query is whether it will be of any help in alleviating the housing problems of the majority of American families who have incomes below \$6,500.⁹⁷

Behind the provisions extending mortgage insurance to the condominium on the same basis as single family homes⁹⁸ was the belief that this would provide an incentive for investors to construct apartment buildings for moderate and lower-income groups.⁹⁹ The need for new

94. In spite of all the claims, e.g., statement of Dr. Pico, Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency, 86th Cong., 2d Sess. 249 (1960), the Puerto Rican legislation limits the rights to co-owners of the same unit. (P.R. Laws Ann. tit. 31, § 1291q (Supp. 1958)), although previous legislation allowed all the owners to exercise the right. P.R. Laws Ann. tit. 31, § 1275 (1956).

95. Time provided for in the New York Agreement, note 93 *supra*.

96. See P.R. Laws Ann. tit. 31, § 1275 (1956).

97. See statement of Mr. Robert Weaver, Administrator of the Housing and Home Finance Agency, Hearings on the Housing Act of 1961 Before the Subcommittee on Housing of the House Committee on Banking and Currency, 87th Cong., 1st Sess. 44 (1960).

98. The Commissioner is authorized to insure mortgages of up to 97% (up to \$13,500) of the appraised value of the unit and having a duration of up to thirty years. Housing Act of 1961 § 234(c), 75 Stat. 160, 12 U.S.C. § 1715y (Supp. III, 1959-1961).

99. See statement of Dr. Fernós-Isern in Hearings on the Housing Legislation of 1960 Before a Subcommittee of the Senate Committee on Banking and Currency, 86th Cong., 2d Sess. 585 (1960) [hereinafter cited as Senate Hearings 1960].

incentive to builders in this range of the market is quite evident from looking at the statistics.

The Housing and Home Finance Agency, in its 1960 report, after recognizing the need for low-cost housing,¹⁰⁰ frankly admitted, "little of last year's new home production was aimed at rehousing ill-housed families in the low and lower-middle income brackets."¹⁰¹ The portion of families not served by the federal program is by no means small. The median income of urban families in 1960 was \$5,623, whereas 44.5 per cent of all United States families had incomes below \$5,000.¹⁰² The average income of the occupant of the average new home covered by federal mortgage insurance was \$7,590.¹⁰³ In the field of rental housing, the class benefited is composed of individuals and families with incomes in the range of \$10,000.¹⁰⁴

Shifting the focus to the amount of activity stimulated and moving into the area of management cooperatives, in the ten years the section 213¹⁰⁵ program has been in existence, a grand total of 35,811¹⁰⁶ units have been produced—the 1960 figure being 4,425.¹⁰⁷ As a basis of comparison, under the New York State program, in December of 1961, an estimated 50,000 units (almost all in cooperatives) were under construction or being planned in New York City alone¹⁰⁸—with an apartment project covering but one square block, alone containing 1,317 family units.¹⁰⁹

From this brief survey it would appear that whatever other strong points the federal housing program may have, stimulation to production of homes for the median-incomed is not its forte. It would, therefore,

100. Housing and Home Finance Agency, Fourteenth Annual Report 10 (1960).

101. *Id.* at 10-11.

102. *Id.* at 325, Table A-23.

103. *Id.* at 126. The new home was valued at \$14,899. It would seem that even this figure is deceptive since a high proportion of the homes were built in warm climates (the four leading states under the § 203 program were Florida, California, Texas and Arizona), and therefore did not require heating facilities. This seems to be borne out by the fact that only one-third of the homes had any sort of basement.

104. *Id.* at 126. The average rental was \$165 a month. The income range figure assumes one-fifth of income goes out for rent. Lloyd Rodwin uses one-sixth as the percentage of income expended for rent by middle-income families, *Housing and Economic Progress* (1961).

105. 24 C.F.R. pt. 213 (1962).

106. Housing and Home Finance Agency, *op. cit.* supra note 100, at 81, Table III-14.

107. *Id.* at 78, Table III-11. It should be noted that over half were built in Florida and none in New York.

108. *N.Y. Times*, Dec. 10, 1961, § 1, p. 66, cols. 1-2.

109. The Ebbets Field Apartments, twenty-five story apartment house covering 25% of 5¾ acres.

seem worthwhile to examine any scheme put forward by Congress that intends to fill this gap. Hence the question immediately arises as to the advantages the condominium¹¹⁰ presents over the cooperative housing program¹¹¹ which, itself, has hardly been a booming success.

The prime advantage of the condominium over the traditional cooperative is its simplicity. It would seem that cooperative housing has not been met with a great deal of enthusiasm in most American cities. The concept of "owning but not owning" has been called a bit too sophisticated a concept for the average person in the market for a home.¹¹² The close parallel to the subdivision and the absence of a tenant-landlord relationship might make apartment dwelling a more palatable psychic experience.

Unlike the traditional cooperative, the unit owner retains his characteristic independence. His fate does not hinge on his neighbor's solvency as is the case where there is a single project mortgage. The financial arrangements he makes are determined solely by his own financial position. He can not only set his own down payment, but refinance the mortgage or prepay it, depending on personal circumstances. In the usual section 213 cooperative the unit owner is restricted on resale of his share to losing money or breaking even, since the bylaws usually grant the corporation an option to purchase the stock at book value.¹¹³ The condominium owner, however, although subject to a right of first refusal, will receive, even if the right is exercised, the offering price of a willing buyer.

110. See generally Dr. Fernós-Isern, Senate Hearings 1960, at 585; Murray, Condominium, House and Home, Dec. 1961, p. 148; Vogel, New Break for Apartment Owners, Arch. Forum, Sept. 1961, p. 132. Cf. James Schever, Senate Hearings 1960, at 609.

111. See generally Vogel, The Co-op Apartment (1960); Isaacs, *supra* note 7; Note, Federal Assistance in Financing Middle-Income Cooperative Apartments, 68 Yale L.J. 542 (1959).

112. It would seem that the condominium because of its origin might be particularly attractive to Puerto Ricans. It is also claimed colored minorities have shied away from co-ops. See N.Y. Times, Nov. 23, 1961, p. 1, col. 3. Although the complexity of the concept may be a factor, Louis Winnick, who is Research and Planning Director of the New York Housing and Redevelopment Board, in an interview with the writer, doubted the accuracy of the claim and maintained that even if it were true, it would reflect more a reluctance to pioneer a move into an all-white neighborhood than anything else. Other difficulties are claimed to face middle-income cooperatives. See "Mid-income families shun subsidized co-ops in N.Y.," House and Home, Jan. 1962, p. 41. They would seem to rest on the location and the project-like appearance of the buildings. See N.Y. Times, Nov. 20, 1961, p. 19, col. 1 (Editorial).

113. See Art. III, § 5 of the recommended bylaws set forth in Appendix D of Vogel, *op. cit. supra* note 111, at 109. See also N.Y. Times, Jan. 4, 1959, § 8, p. 1, col. 8.

These factors might make the condominium attractive to the two fastest growing segments of our population—the newly formed family and retired couples.¹¹⁴ To the older couple who might have paid off the mortgage in a suburban home and now have lost their zest for mowing their half-acre lawn, the greater security of the condominium might be particularly appealing.¹¹⁵ While to the younger couple also in the market for “apartment-type accommodations that are easy to maintain, within their means and readily accessible to shopping and work centers,”¹¹⁶ the low down payment and the possibility of a later sale at the market price when they outgrow their present quarters might make this form of ownership inviting.

The condominium also offers advantages where the site has good commercial value. The federal regulations specifically allow part of the building to be devoted to commercial use, and if this is a part of the common areas, the expenses of maintaining the building can be defrayed by the income from the store. In the cooperative housing corporation, however, if this income exceeds twenty per cent of gross collections, the individual shareholders lose their right to deduct a proportionate share of the interest and taxes paid by the corporation.¹¹⁷ Another attractive feature is the more equitable allocation of voting control. Unlike the section 213 cooperative, voting rights in the condominium are allocated according to the value of the respective interests of the owner.¹¹⁸

The condominium may be more attractive to lenders, who, in spite of mortgage insurance and the facility of collection in case of default, have shied away from traditional cooperatives.¹¹⁹ The condominium is not only free from the tinge of socialism that some have claimed has interfered with the financing of housing cooperatives,¹²⁰ but it allows the lender to choose his risks, while at the same time limiting the size of his investment in any single project.¹²¹ The lender also is not faced with an all or nothing situation in the case of foreclosure.¹²²

114. By 1970, the number in the 20-30 age group will increase by 39%, the 65 and over age group will increase by 24%, Housing and Home Finance Agency, *op. cit. supra* note 100, at 14-15. It is estimated that there will be forty-three million people in those two groups.

115. There is also the benign tax treatment that would be accorded such a change in homes. Int. Rev. Code of 1954, § 1034.

116. Housing and Home Finance Agency, Thirteenth Annual Report 16 (1959).

117. Int. Rev. Code of 1954, § 216.

118. 24 C.F.R. § 234.26(b)(6) (1962).

119. See Note, *supra* note 111, at 569.

120. *Id.* at 573.

121. United Housing Foundation, Seward Park Cooperative, p. 9 (1961).

122. The Equitable Life Assurance Society which has never financed a § 213 cooperative

To the builder and investor the advantage posed for the consumer has the complementary effect of enhancing the marketability of their product. It further presents, as does the cooperative, the opportunity of involving but little of his own capital in a highly speculative enterprise,¹²³ and the possibility, unlike rental property, of not having to manage the property, which is viewed as, at best, an annoyance.¹²⁴ Even more important, he can withdraw his investment as soon as he can sell the individual units.

These advantages, however, will not cause the housing industry to drop everything it is doing and rush to build a castle in the air for every median-income dweller. In an inherently risky business no one wishes to make it even riskier by trying something new. Thus, all the paeans of praise by "ivory tower commentators" and witnesses to congressional committees will not create a market for a new form of ownership in areas where in the past the cooperatives have not sold, whereas, in areas such as New York, where cooperatives have been marketed successfully, and a backlog of experience with them has been built up, there is little incentive for the realtor to try something new. But this lag in educating the public is present in any new program and the industry is competitive enough for us to assume that an alert builder will take a calculated gamble on it.

There are, however, other countervailing considerations besides inertia. The advantage of financial independence can be overstated.¹²⁵ Not only are there instances in which the cooperative has helped an individual ride out a financial storm, but the cooperative housing experience over the last quarter of a century has been excellent, and if cooperative housing had a hard time in the depression, so did every other enterprise.

The previously discussed advantages to mortgagees have their corresponding disadvantages to mortgagors. Individual mortgages require more servicing than a single project mortgage.¹²⁶ Individual deeds will also involve individual closings as well as title insurance—all adding up to higher interest charges. The banks' ability to choose their risks can

has agreed to finance the purchase of individual units in a twenty story San Juan condominium. *Equitable Agency Item*, May 1961, p. 7.

123. See generally Winnick, *Rental Housing: Opportunities for Private Investment* (1958); Colean, *Realities of Today's Real Estate Investment*, *Arch. Forum*, April 1955, p. 125.

124. Interviews With Mr. Erwin S. Wolfson and Mr. M. Rosen of the Kratter Corp.

125. There is one other similarity to homeowning. If you missed payments on the mortgage, it could be foreclosed. *N.Y. Times*, Jan. 29, 1962, p. 27, col. 8.

126. See Note, *supra* note 111, at 603.

quite possibly work to the disadvantage of the median-income borrower, especially if colored. It thus seems that if mortgage money will be available, it will be at higher interest rates or greater discounts since the Federal Housing Administration has set a maximum of $5\frac{1}{4}$ per cent¹²⁷ for insured mortgages.

The prospect of a multiplicity of mortgagees can also be unnerving to a developer, since this presents the prospect of having to cope with varying appraisals of the units he is trying to market. The chance of getting a number of banks to arrive at the same set of appraisals the Federal Housing Administration and developer have arrived at, when, for example, the opposing virtues of the second and fourteenth floor are involved, or a view of the park is valued against that of factories (or the city skyline), is quite small. When to these difficulties is added the general practice of having the efficiency unit partially subsidize the three-bedroom apartment, the chances of uniform valuations become even slighter.

Yet these factors are overshadowed by the skyrocketing land and construction costs to which the federal legislation offers no solution. Suburban land is nearly three times as costly today as in 1946.¹²⁸ Nevertheless, this increase has not been at the benefit of city realty. The supply in large cities of vacant land suitable for residential use has become so scarce that land costs are astronomically high. Thus, the land acquisition costs for an unplush public housing project in an unfashionable section of the Bronx was \$4 a square foot¹²⁹ or \$80,000 for the small half-acre lot with barely enough room for the outdoor barbecue, let alone the stainless steel swimming pool. Matching this rise has been the rise in construction costs. Although construction figures are generally deceptive, it would seem that a 1,000 square foot apartment with its accompanying common areas cannot be built for less than \$16,000, with \$20,000 being a more realistic figure.¹³⁰ At these costs not only is a delineation of the

127. 24 C.F.R. § 234.29 (1962).

128. Housing and Home Finance Agency, *op. cit.* supra note 100, at 109.

129. Figure from Winnick, *supra* note 112.

130. See, e.g., (a) Cost of "unplush apartment project," Winnick, *supra* note 112. (b) At \$1.30 a cubic foot development cost for an apartment building (Interview With Mr. M. Rosen, *supra* note 124), it would cost \$14,576 to build a $4\frac{1}{2}$ room apartment (gross cubic footage of apartment 10,982). United Housing Foundation, *op. cit.* *supra* note 121. This does not include the cost of common areas. (c) The same apartment with common areas in the Seward Park Cooperative would have cost \$13,153. But note the following: 1. The United Housing Foundation has the reputation as the most frugal builder in New York. 2. There was a ten million dollar subsidy in the way of land costs through the use of the federal Title 1 program. 3. The construction contracts were signed over five years ago. (d) A

middle-income group in terms of "the ability to buy newly built space of some sort out of their private income"¹³¹ incomprehensible, but a federal program limited to manipulation of the credit trio which expects to bring the benefits of new construction within the means of most families, is illusory.

Returning to the condominium, it would seem that at least for the present, its use in urban areas will be limited to luxury apartment buildings. When the neighboring penthouse has a \$100,000 mortgage, it is comforting to know that even if the owner were to go broke only the bank is left holding the bag. The condominium might also be advantageously used in the suburban subdivision to allow the developer to take leave of his project and leave the sidewalks, swimming pool and golf club to the homeowners without having to resort to a corporation.

If the condominium is to do more than spawn a new upsurge in luxury accommodations in our cities, it will have to be integrated not only into the states' legal systems, but more important, into their housing programs. The success of the condominium as a spur to the construction of new median-income housing will hinge on how well it can be fitted into such projects as the one now being carried out in New York.

The Mitchell-Lama Act in New York,¹³² being based on the realistic premise that private enterprise, unaided, cannot produce new housing for most of the state's inhabitants,¹³³ goes far beyond the federal mortgage insurance programs. The state has directly entered into the finance field and qualified mortgagors may borrow from the state¹³⁴ or municipality¹³⁵ up to ninety per cent of the development cost of a project for

rough estimate of the costs of a recently completed project for the elderly in the Boston area ran to \$17,500 a unit. Figures received from Frank Morris, Director of the Massachusetts Housing Board. (e) In a letter from the Renewal and Development Corporation to the author, H. R. Taylor, Executive Vice President, stated that in most areas the high cost of money, labor, materials and land would mean that new construction could not be brought within the means of families with incomes below \$7,000.

131. Vernon, *The Myth and Reality of our Urban Problem* 11 (mimeographed text of the 1961 Stafford Little Lectures at Princeton). Compare N.Y. Priv. Hous. Fin. Law § 2(19) which uses the same formula, i.e., "Persons of low income" . . . who cannot afford to pay enough to cause private enterprise . . . to build a sufficient supply of adequate, safe and sanitary dwellings," to set the basis for a massive program for subsidized middle-income housing.

132. N.Y. Priv. Hous. Fin. Law §§ 10-37.

133. *Ibid.* See also Mitchell, Foreword to N.Y. Priv. Hous. Fin. Law at vii (McKinney ed. 1962).

134. N.Y. Priv. Hous. Fin. Law § 22.

135. N.Y. Priv. Hous. Fin. Law § 23.

up to fifty years with a rate of interest around three per cent.¹³⁶ The cities are also authorized to grant tax abatements of up to fifty per cent,¹³⁷ and to help in site assembly through their eminent domain power. The borrowers in turn are closely supervised by either state or local agencies and are limited as to their profit.¹³⁸

For the condominium to fit into this program, loans to individuals as well as corporations will have to be allowed. Although the construction stages of the project will proceed in the same manner as at present, with the sponsor forming a limited profit housing company, the second step will involve individual mortgages rather than the one large corporate mortgage. This increase of paper work will perhaps be balanced by the decrease made possible by the elimination of incorporation.¹³⁹ A direct loan from either a state or municipal agency would also eliminate the difficulty of conflicting valuations caused by a multitude of lending institutions being involved.

Paralleling the limitation on profits imposed on both the sponsor and the housing company, the powers of the unit owner will have to be limited to avoid a free ride at the expense of the state. If the owner were allowed to sell at the market price he would merely be cashing in on the subsidies previously made available. Any such sale would also have the effect of limiting potential purchasers to upper-income groups. An option would, therefore, be vested with the co-owners, exercisable at the book value, with perhaps the resale price geared to a cost of living index set by the supervising agency, with any increase in value flowing to either the state or local government coffers. Thus the owner, although barred from profiting, is insured against losing due to the large amount of subsidy originally involved; the co-owners can still control the choice of neighbors within the income limits set by the statute; and the governmental agencies can achieve a modest profit.

The condominium, besides its aforementioned advantages, would also offer a great deal of flexibility in dealing with the owner who has exceeded the income limits of the project. Whereas under the present cooperative scheme the Draconic measure of eviction is resorted to, the individual mortgage and tax assessment can encourage the values to be

136. N.Y. Priv. Hous. Fin. Law § 26(2).

137. N.Y. Priv. Hous. Fin. Law § 33(1).

138. For a good view of the operation of the law at the project level, see, e.g., *Information Bulletin of Lindsey Park Project* (1961).

139. Governor Rockefeller has urged the N.Y. Legislature to allow the State Housing Finance Agency to make direct low interest loans to purchasers of cooperative units. *N.Y. Herald Tribune*, Feb. 27, 1962, p. 21, col. 8.

gained by "a more stable project community with families having a greater diversity of income and background,"¹⁴⁰ by raising tax assessments and interest rates, thereby removing the unneeded subsidy and not the occupant.

IV. CONCLUSION

It would thus seem that under the present federal program the condominium is not going anywhere as far as the urban median-income family is concerned. This failure, however, lies not in the unattractiveness of the condominium as a form of ownership, but in the inability of the building industry to bring forth an adequate supply of housing (in an era when development costs in urban areas are rising faster than personal income) without an increase in the caloric content of the federal or local government's carrot. If this latter condition were met, the prediction of Lester Eisner that the condominium "will be the big thing in housing in about ten years or so"¹⁴¹ may be inaccurate only in the excessive length of time which he postulates will be needed.

140. Hon. McNeil Mitchell quoted in *N.Y. Times*, Jan. 29, 1962, p. 27, col. 8. It is submitted, however, that the State Senator is wrong in his view that federal mortgage insurance would be available at the present time to an individual who wishes to purchase an apartment in fee simple in an otherwise traditional cooperative. See 24 C.F.R. § 234.26 (1962).

141. *N.Y. Times*, Dec. 10, 1961, § 1, p. 66, col. 2. Ironically, Mr. Eisner is a Regional Administrator of the federal program.