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SECOND GENERATION CONDOMINIUM PROBLEMS: CONSTRUCTION OF ENABLING LEGISLATION AND PROJECT DOCUMENTS

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In the short span of five years, every state in the union, save one, has enacted a condominium statute.¹ This pace has been matched by the actual construction of projects in almost as many jurisdictions, the more daring developers even venturing into the field prior to legislative action.² This burst of activity has, in turn, generated a steady stream of questions concerning statutory interpretation and the exact content of the condominium concept.³ In time, similar issues involving project declarations, bylaws and house rules will work their way into the courts, as the promoter, condominium association and individual unit owners litigate their differences.⁴ In this paper, an attempt is made to trace the background of these measures and to pinpoint various factors which must be weighed in interpreting them and project instruments. The arguments favoring strict and liberal construction are examined, as are some of the more troublesome questions which have arisen to date. Finally, the role of legislative amendments and non-judicial agencies in the interpretive process are evaluated.⁵

JURISDICTIONAL CONSIDERATIONS: LIBERAL, STRICT OR NEUTRAL CONSTRUCTION?

A threshold inquiry is whether judicial endeavors in this field should be characterized by liberal or strict construction, or perhaps by a neutral attitude midway between these extremes. It is possible that judicial handling of condominium legislation may be earmarked by detached neutrality, in much the same fashion as one might approach a motor ve-

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1. At this writing, only Vermont lacks an enabling statute; forty-nine states, the District of Columbia and the Federal Housing Administration have all enacted a condominium statute.

2. Pre-statutory condominiums appeared in California, Florida and New York. For an account of these pioneering projects, see McCAUGHAN, *LEGALITY OF CONDOMINIUM IN FLORIDA* (1962); RAMSEY, *CONDOMINIUM: THE NEW LOOK IN CO-OPS* 4 (1962); Borgwardt, *Vertical Subdivision, The Condominium*, 36 CAL. S.B.J. 603 (1961).

3. See, for example, the questions of statutory interpretation discussed at notes 38-68 *infra*.

4. See Gregory, *The California Condominium Bill*, 14 HASTINGS L.J. 189, 206 (1963).

5. New York alone has passed six amendments to its condominium statute within a two-year span, with numerous other additions and changes being considered and rejected.

hicle or other code possessing no distinctive character. It is probable, however, that either liberal or strict construction will become the prevailing mode, in view of the presence of several features which lend themselves to a hostile or benign reception.

Factors Favoring Liberal Construction.

On the affirmative side, there is a precedent in the enthusiastic welcome accorded the condominium concept by the legislatures.⁶ This, in retrospect, was grounded in the many advantages this form of ownership is believed to offer both constituent unit owners and society in general. In addition to spurring new construction, the condominium satisfies the psychological need for home "ownership"; restores some of the lost luster of city living, and provides several economic advantages not found in cooperative housing ventures (chief among them, a significant degree of financial independence by virtue of individual unit mortgages and tax bills).⁷ Again, condominiums are being constructed in every price range thereby affording a meaningful alternative to the purchase of medium-priced, suburban homes. Condominium's potential contributions to cluster zoning, urban renewal, antipoverty programs, as well as commercial and industrial complexes, have also been heralded.⁸

It is fair to assume that proponents of liberal construction can be counted upon to bring these considerations to the courts' attention. Added makeweights may be found in the novelty and communal nature of the enterprise. A judge is not likely to stunt the growth of an emerging social tool, nor to bring a fixed viewpoint to questions which are new to real property theoreticians and builders alike. The sympathetic attitude permeating partnership and cooperative housing decisions also may be expected to carry over to the condominium field to some extent, by virtue of the social and economic community of interest of the participants.⁹

Factors Favoring Strict Construction.

Despite the appeal of the above-cited considerations, there is no

6. Legal scholars and bar association real property committees also welcomed the condominium with open arms, as did the construction industry.

7. See Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 990-93 (1963); Note, *Community Apartments: Condominium or Stock Cooperative*, 50 CALIF. L. REV. 299, 323-24 (1962).

8. See, e.g., Harrison, *The FHA Condominium: Use as a Means of Meeting the Need for Moderate Income Housing*, 11 N.Y.L.F. 458 (1965); Welfeld, *The Condominium and Medium-Income Housing*, 31 FORDHAM L. REV. 457 (1963).

9. In the cooperative housing field, for example, some have expressed the view that courts have become too liberal in upholding and interpreting residential restrictions (so-called house rules), on this group benefit rationale.

guarantee that liberal construction will prevail, in view of the condominium acts' status as "enabling legislation."¹⁰ Other bases for strict construction may be found in the novel obligations and restraints upon alienation attached to condominium unit ownership. Finally, there is the need for certainty (and its corollaries, marketability and insurability) in matters affecting real property. Each of these features will be treated in turn.

Initially, it must be conceded that condominium statutes are in the nature of enabling legislation. They affirmatively list the essentials for (as well as rights and duties accompanying) creation of a condominium project, thereby making clear what otherwise would have rested upon the less certain foundations of contractual promises and covenants and restrictions.¹¹ Similarly, financial institutions insist upon the presence of a condominium statute, as a condition precedent to mortgage lending. Thus, it may be argued that, as in the case of corporations, condominiums are solely a creature of statute, and hence exacting compliance with the precise terms of the legislation is essential. Logical, though unwise, extension of this line of thought could lead one to conclude that innovations in planning or construction (or use of provisions which are not found in the condominium act) are tacitly forbidden. The same result would flow from a court taking a hands-off attitude, reasoning that all innovations must first receive specific legislative approval. Nevertheless, the sounder view appears to be that the "enabling" characteristic of condominium legislation should have slight bearing upon its interpretation, at least in the absence of a direct conflict with substantive statutory provisions. Although corporations (in the absence of enabling legislation) were not recognized at common law, many jurisdictions recognized, or at least, had no clear authority prohibiting, common law counterparts of condominium.¹² For example, the separate ownership of parts of a building and conveyance of "air rights" were upheld, as were large-scale tenancy in common, cooperative, and community association arrange-

10. A basic issue here, of course, is whether the enactment of such legislation closes the field to "common law" condominiums. A related question is the effect of a failure to comply with the statute's terms in instances wherein the developer was attempting to create a statutory condominium.

11. See Berger, *supra* note 7, at 1001-03. It also should be noted that in most jurisdictions the enabling statutes appear to confer privileges upon condominium projects, which are not available to other real estate developments. Exemption of condominium restrictions on alienation from the operation of the Rule Against Perpetuities, and the right to separate tax bills for each unit are illustrative of this special treatment.

12. See Barber, *Co-op—The Deed Plan Community Apartment Project*, 36 CAL. S.B.J. 310 (1961); Kerr, *Condominium: Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 8-10 (1963); Note, *Community Apartments: Condominium or Stock Cooperative*, 50 CALIF. L. REV. 299, 301-04 (1962), for discussions of modern instances of non-statutory air right and community apartment projects.

ments.¹³ There is no basis for assuming that the various legislatures intended to ban such nonstatutory devices, or to embody the last word on statutory condominiums in their initial draft of the act.

A more serious obstacle to broad construction is presented by the far reaching obligations and restraints upon alienation attached to condominium unit ownership. Courts have traditionally sought to combat restrictions upon fee ownership, particularly covenants imposing novel duties or exacting the payment of money.¹⁴ The rule against perpetuities and prohibitions against direct restraints upon alienation also have a bearing; while the latter posed little difficulty for cooperatives (wherein the restrictions were placed upon mere leaseholds), the fee ownership of units which characterizes the condominium brings these traditional real property doctrines into play.¹⁵ Nevertheless, in the writer's view, the duties and restraints under discussion represent only a small segment of the condominium statute. Hence, the restrictive interpretation accorded them should not be carried over to the entire act, even if retained with respect to these matters.¹⁶

A related factor pointing to strict construction is the overriding need for certainty in the real property field. Absent some supervision, there undoubtedly would come a time when condominium instruments varied significantly from one another, even though the projects were located in the same jurisdiction. Nevertheless, uniformity may be purchased at too high a price. As long as stability exists within a particular development, there is no great gain in having it resemble every other local project. Consequently, it would seem sufficient to guard against arbitrary and capricious amendments to a condominium's documentation, while at the same time affording great leeway with respect to its original content.¹⁷

13. See, e.g., *Jameson v. Hayward*, 106 Cal. 682, 39 Pac. 1078 (1895); *Weaver v. Osborne*, 154 Iowa 10, 134 N.W. 103 (1912). See the bibliography on this topic set forth in Kerr, *supra* note 12, at 20.

14. See 5 POWELL, REAL PROPERTY §§ 674-76 (1954). Illustrative of the problems which may arise is the question whether an affirmative duty to "cooperate" with fellow unit owners and with the group can be enforced.

15. See Moller, *The Condominium Confronts the Rule Against Perpetuities*, 10 N.Y.L.F. 377 (1964).

16. A tendency to strict construction also might be grounded upon the long list of prohibitions contained in the act, among them bans on: partition; severance of a unit from its share of the common elements; and alteration of a unit's fractional interest in the project. However, it would be unfortunate if these sections, designed exclusively to guarantee the integrity of the unit owner's interest and the physical structure, were interpreted as indicia of strict construction generally.

17. For a discussion of the liberal construction accorded the Horizontal Property Act of Puerto Rico, see Antongiorgi, *Some Practical Aspects of Condominium*, A.B.A. SECTION OF REAL PROPERTY, PROBATE & TRUST LAW PROCEEDINGS, Part II, at pp. 35, 39-40 (1965).

Internal Evidence Bearing Upon Construction

In the last analysis, a court's perspective will be strongly influenced by indicia of a constructional preference contained within the condominium statute itself. Yet, for some unexplained reason, the vast majority of legislatures neglected to include a simple proviso to the effect that the act was to be liberally construed to effectuate its purposes. A section calling for liberal construction should be promptly inserted in any condominium statute now lacking such a direction. In fashioning the amendment, it might be well to incorporate two provisions found in the California statute: one indicating that the act contains the basic features of a condominium which the developer may expand upon or alter by the terms of his project's declaration;¹⁸ the other, a concluding section to the effect that instruments executed pursuant thereto are to be liberally construed.¹⁹ It is advisable to extend this constructional preference to a project's documentation, as opposed to restricting it to the act itself as some states have done.²⁰ Undoubtedly, it is novel to do so. It may also be argued that the legislature should not give such a direction, in advance, regarding provisions which it will neither write nor review. However, the cited language will not constitute a blank check for project draftsmen; their instruments must still square with statutory requirements and public policy, while at the same time imposing no unconscionable burden on unit owners or their mortgagees.²¹ On the other hand, there are compelling reasons for insertion of a liberal constructional preference relating to a project's documentation. In point of fact, the quantity of litigation stemming from such instruments should far exceed the number of cases calling for interpretation of the underlying act. Disputes involving promoters, the ruling management group, minority interest and defaulting or recalcitrant unit owners, will find their solution largely within the terms of the individual development's documentation. If these instruments are interpreted as merely a conglomeration of contractual promises and covenants and restrictions, all of the previously cited real property doctrines favoring unfettered fee ownership will come into

18. CAL. CIV. CODE § 1353. See also Gregory, *The California Condominium Bill*, 14 HASTINGS L.J. 189, 195-96 (1963).

19. "Any deed, declaration or plan for a condominium project shall be liberally construed to facilitate the operation of the project, and its provisions shall be presumed to be independent and severable." CAL. CIV. CODE § 1359.

20. *E.g.*, N.Y. REAL PROP. LAW § 339(ii). Curiously, the California statute cited *supra* note 19, goes to the opposite extreme of providing liberal construction for subordinate instruments, without mentioning construction of the statute itself.

21. Condominium instruments must also pass the close inspection of counsel for the prospective lender, as well as that of the title company, before they see the light of day.

play (to the detriment of the community's legitimate interests).²² Moreover, in one quite recent lawsuit²³ an existing housing cooperative (not the promoter) was viewed as the author of its proprietary lease in a dispute which pitted an individual cooperator against the corporation. Consequently, the court strictly construed its terms against the alleged draftsman. While the case may be discounted on the ground that it involved construction of a landlord's lease, there is a real danger that a condominium project may similarly be viewed as the draftsman of the package of instruments it hands to unit purchasers. Such a conclusion would be unfortunate since the condominiums' documentation (as well as that of a cooperative) are three-sided affairs, embodying the mutual rights and obligations of the individual, the management and fellow participants. The latter group is dealt an injustice in any case where strict construction results in an individual receiving a windfall. For these reasons, condominium enabling acts should call for liberal construction of both the statute and individual projects' declaration and bylaws.

FACTORS COMPLICATING THE TASK OF CONSTRUING CONDOMINIUM ACTS

As in the case of any recent legislation, the lack of meaningful experience and precedents will add to the difficulty of construing condominium measures, as will the fact that these statutes literally had no predecessor in a single jurisdiction. The caution this realization will engender, will be reinforced by a desire to protect constituent unit owners and their mortgagees from the frauds and near-fraud perpetrated in the last generation by promoters of cooperatives and syndications.²⁴ Apart from these considerations, construction problems will be complicated by the genesis and terminology of the various acts.

Lack of Legislative History.

Despite the fact that condominium statutes tend to be quite detailed and intricate, there is a widespread lack of legislative history to assist in their interpretation. With a few notable exceptions,²⁵ there is a dearth of comment from the committees which actually fashioned the various statutes. While law reviews did synopsize the content of these measures

22. See text *supra*, at notes 14-15.

23. *Susskind v. 1136 Tenants Corp.*, 43 Misc. 2d 588, 251 N.Y.S.2d 321 (1964).

24. These practices are detailed in Miller, *Cooperative Apartments: Real Estate or Securities*, 45 B.U.L. REV. 465 (1965).

25. Among the few jurisdictions wherein reliable legislative histories are available are California, Colorado, District of Columbia, Florida, Illinois and New York. Continuing Legal Education programs conducted by draftsmen of the various acts could remedy the shortage of reliable background information.

as they appeared, the assumptions and theories acted upon by the draftsmen (and perhaps more important, the ideas they rejected) are nowhere published. As a result, it is unclear in many states whether the act proceeds on an "air lot" or "part of a building" theory with respect to the nature of a condominium unit, or if either approach may be employed. Examples of other basic items left in doubt are the powers of the condominium association, as well as its legal structure or classification.²⁶

Problems Stemming from Mass Production.

As previously noted, condominium statutes appeared throughout the country in an amazingly short span of time. While due deliberation preceded some of the enactments, many did not go through this maturation process. Instead, wholesale borrowing from the Puerto Rican,²⁷ F.H.A.²⁸ and sister states' statutes took place.²⁹ Therefore, there is not one brand of condominium act, but a half-dozen strains, in addition to a handful comprised of sections lifted from a number of different jurisdictions. As a consequence, precedents from other states must be scrutinized to ascertain whether they concern statutes similarly constructed and similarly worded. It would also be of assistance to the court to trace the geneology of the local act, especially in the absence of any meaningful legislative history.

Preoccupation with High-Rise Residential Condominiums.

Many condominium statutes were outmoded as soon as enacted, due to the draftsmen's concentration upon high-rise residential projects, which rendered many acts unfit for commercial and industrial condominiums, as well as town houses, cluster and detached housing.³⁰ This oversight may be traced to two sources: the presence of a similar concentration in the pioneering statute (the Horizontal Property Act of Puerto Rico, enacted in 1958),³¹ and the understandable assumption that condominiums in the United States would cut their broadest swath in the

26. In most statutes, the organizational entity is labelled a unit owner's association (or similarly described). However, it is doubtful that the word association was used in a technical sense, thereby precluding incorporation or the adoption of some other legal format.

27. P.R. LAWS ANN. tit. 31, §§ 1291-93 (Supp. 1965).

28. FHA Model Statute for Creation of Apartment Ownership (promulgated in May, 1962).

29. The chronological order in which these statutes were passed is traced in Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 5-6 (1963).

30. See ROHAN & RESKIN, *CONDOMINIUM LAW & PRACTICE* § 5.01 (1965). Other difficulties may be traced to a requirement that there be a specified number of units in a building.

31. See note 27 *supra*.

high-rise residential field.³² However, contrary to the foreign experience,³³ domestic condominium projects have made greatest headway in the cluster, town house and retirement home field—for the most part low-rise projects.

It is not surprising, therefore, to find that the first series of amendments to these measures has been aimed at broadening the language employed in the act to remedy this oversight.³⁴ In jurisdictions wherein remedial action is not taken, the courts will be forced to choose between finding nonapartment projects excluded from the act, on the one hand, and expansively construing away the defect by finding that such things as a store, factory or town house do constitute an "apartment" or similarly described entity.

Neglect of Planning and Marketing Aspects.

A corollary of the previously mentioned concentration upon high-rise condominiums, is the lack of attention to the planning as well as the marketing aspects of real estate developments. Legislative draftsmen undoubtedly envisaged two principal alternatives, either the project would come to fruition as originally planned or would be abandoned and all deposits refunded.³⁵ Accordingly, they failed to consider the fact that a builder might want to alter prices, up or down, on particular units to meet supply and demand fluctuations, or to consolidate or revamp units to meet buyer preferences.³⁶ Similarly, the builder's traditional practice of constructing developments in stages (with subsequent sections to be built when, and if, the earlier one was satisfactorily marketed) was not considered.³⁷ Of course, there are no insurmountable difficulties in the path of accommodating the condominium concept to prevailing building techniques; the legislative defect is almost entirely one of omission.

32. Concentration of cooperative housing in the high-rise field may also have led to misplaced emphasis in the condominium statutes.

33. See Watson & Grimes, *The Strata Titles of New South Wales*, 30 SASK. B. REV. 265, 273 (1965), for an illustration of the foreign experience.

34. *E.g.*, D.C. CODE ANN. §§ 5-902-09; IND. ANN. STAT. § 56-1203 (Supp. 1965); MINN. STAT. ANN. § 515.02 (Supp. 1965); N.M. STAT. ANN. § 70-4-2 (Supp. 1965); VA. STAT. ANN. § 55-79.2 (Supp. 1966); WISC. STAT. ANN. § 230.71 (Supp. 1965).

Query: Could statutory language defining a condominium as a "building" or "sub-division" be construed as negating use of non-contiguous parcels? This is unlikely, as long as the distant parcel contains general common elements (such as parking or recreational facilities) and no individual units.

35. Some developers and their mortgagees prepare for possible marketing failures by readying contingent arrangements for renting the property. In one instance, the St. Tropez condominium in New York City, the reverse situation occurred, with an apartment building intended for rentals being converted to a condominium project upon completion of construction.

36. See ROHAN & RESKIN, *CONDOMINIUM LAW & PRACTICE* § 13.02 (1965) for a discussion of this marketing problem.

37. See text at notes 53-58 *infra*.

ILLUSTRATIVE CONSTRUCTION PROBLEMS

Must All Condominium Property Be Contiguous?

In several jurisdictions a serious question has arisen as to whether contiguous property is required for a condominium. The issue was sharply posed when the District of Columbia authorities refused to accept the documentation of the "Tiber Island Condominium" for filing on the ground that the project's property was non-contiguous. Curiously, the developer had won the right to bid in the property by virtue of an architectural contest sponsored by the federal government, in connection with the disposal of urban renewal blocks.³⁸ The architect's rendering showed four groups of sixteen town houses (one group on each corner of the block) separated by high-rise apartments and green areas located in the center of the site. The sixty-four town houses were planned as a single condominium project, and would possess easements of ingress and egress, as well as parking privileges, in the basement of the high-rise structure.³⁹ Miscellaneous utility easements would be used in common, although the high-rise apartments were not part of the condominium. In addition to the lack of specific statutory authority for a non-contiguous condominium, rejection was also based on the proposition that parcels on opposite ends of the city could be offered as a single condominium, if contiguity was not insisted upon. Fortunately, an appeal to higher authority eventually led to acceptance of the condominium documents as originally drawn.⁴⁰

Research on the question reveals some authority pro and con, as well as practical considerations indicating that contiguity should not be required. Neither the Puerto Rican nor American statutes contained a reference to the point as originally enacted. However, subsequent amendments may have made contiguity a prerequisite in at least two jurisdictions. An addition, enacted in 1963, to the Hawaiian Horizontal Property Act stipulates: "A property [for purposes of creating a condominium] may include two or more parcels of land separated only by pub-

38. Curiously, the blending of high-rise apartments, low level structures and green areas which earmarked superior planning, led to the construction problem. Nevertheless, this difficulty could have been avoided by making both the low-rise and apartment structures part of one condominium.

39. This case may not represent a true instance of non-contiguity, since easements were possessed by the condominium owners over the area alleged to be non-contiguous. Nevertheless, this argument was not well received by the objecting authorities.

40. The dispute was settled on a hearing before the District Commissioners, thereby avoiding a court contest. It remains to be seen whether the Tiber Island precedent will be limited to its peculiar facts, or whether non-contiguous condominiums will be accepted for filing. It will be noted that, despite the break in contiguity, all of the property was contained in a single city block.

lic streets or ways.”⁴¹ The clear import of this provision seems to be that a break in contiguity stemming from something other than a public street or way would render the property ineligible for condominium status. Similarly, an amendment added to the Florida Act in 1965, stipulates as follows:

In addition to any other provisions of this chapter, an association may acquire and enter into agreements whereby it acquires leaseholds, memberships and other possessory or use interests in lands or other facilities including, but not limited to, country clubs, golf courses, marinas, and other recreational facilities, *whether or not contiguous to the lands of the condominium*, intended to provide for the enjoyment, recreation or other use or benefit of the unit owners. . . .⁴² (Emphasis added.)

Here, again, the detailed authority spelled out for leasing non-contiguous land for specified purposes appears to negate any inherent power in the condominium to subsequently acquire a fee interest in such property. It is less clear whether non-contiguous parcels may be used at the outset.⁴³

The only reported court decision on the matter is *Castle Enterprises, Inc. v. Registrar of Property*,⁴⁴ decided by the Supreme Court of Puerto Rico in 1963. There a high-rise structure was erected with the first floor devoted to commercial stores and the remaining seven floors set aside for offices. The condominium’s documentation specified that a non-contiguous parcel located nearby: “is a common element to the seven open floors to be used for the parking of motor vehicles.” The Registrar of Property refused to accept the papers contending, among other things, that non-contiguous parcels could not be made part of a single condominium. The supreme court rejected this viewpoint, finding the parking lot to be a limited common element vital to the property’s enjoyment.⁴⁵

The latter viewpoint appears preferable as a matter of policy. Many properties may be desirable sites for a condominium, but with continuity of land areas broken up by a road, railroad, waterway, greenbelt, public building, holdout landowner, or any number of inconsequential

41. HAWAII REV. CODE § 170A-2 (Supp. 1965).

42. FLA. STAT. ANN. § 711.121 (Supp. 1965).

43. See text at notes 50-52 *infra*.

44. 87 P.R. — (1963). At this writing, the official report is not available.

45. Undoubtedly, condominium projects would be greatly benefitted by having parking spaces and recreational facilities available for use, which could not be accommodated on the building site itself.

obstructions.⁴⁶ Similarly, the project's contiguity may be disrupted by a public taking⁴⁷ under the eminent domain power.⁴⁸ Other ramifications of such a requirement must also be considered. Thus, the right to dispose of a destroyed structure in a multi-building project would be severely hampered if the contiguity question were raised.⁴⁹ Lastly, as the *Tiber Island* case indicates, the alternative of multiple, pocket-sized condominiums is inefficient and impractical.⁵⁰

The objections to non-contiguous parcels appear to be two in number: the horrible hypothetical concerning sites so widely separated as to make their joinder nonsensical; and the fear that legitimation of such an arrangement might induce projects to acquire additional land elsewhere, thereby overtaxing an individual unit owner's resources. However, neither objection can withstand close scrutiny. The joinder of distant parcels for no apparent reason would not be attempted because of the difficulty of marketing such a project. Even if a promoter were fool-hearted enough to attempt such a venture, institutional lenders would be certain to refuse financial backing for it. Similarly, outlandish proposals could be rejected for filing on an *ad hoc* basis if need be, if the cited non-legal forces do not inhibit such a proposal.⁵¹ The possibility that minority unit owners might be forced to support unnecessary land purchases (for recreational or other purposes) is also not well taken, for the same levy could be made for extension of the condominium upward or over onto contiguous property.⁵²

May a Condominium Be Built in Successive Sections?

As previously noted, condominium has experienced phenomenal growth in low-rise (usually town house) developments. Unlike an apartment building, which usually cannot be inhabited by anyone until fully

46. See Antongiorgi, *Some Practical Aspects of Condominium Law*, A.B.A. SECTION OF REAL PROPERTY, PROBATE & TRUST LAW PROCEEDINGS, Part II, pp. 35, 39-40 (1965).

47. See ROHAN & RESKIN, *CONDOMINIUM LAW & PRACTICE* § 12.04 (1965), for an analysis of the questions arising upon a public taking of condominium property.

48. The District of Columbia statute specifically preserves the right of District authorities to condemn condominium property. D.C. CODE ANN. § 5-929(d) (Supp. IV 1965). This section was urged by the developer in the *Tiber Island* case referred to in the text.

49. Some statutes specifically authorize the disposition of one or more buildings where destruction has taken place and repairs have been vetoed. *E.g.*, HAWAII REV. LAWS § 170A-15(b) (Supp. 1965).

50. In any case where contiguity is lacking, there would be no objection to formation of as many condominiums as there are parcels. However, much would be lost in terms of the purchasing power, cooperation, management and other aspects of a unified development. In the *Tiber Island* case, the alternative solution would have produced four condominiums, each consisting of sixteen attached units.

51. See note 40 *supra*.

52. See text at notes 59-68 *infra*.

completed, builders can convey low-rise structures as each building or row of buildings is finished. Similarly, it is possible to hold additional land (or options thereon) for future development if the initial offering sells well. Accordingly, many developers have sought authorization to plan a condominium of indeterminate size, with the number of units to be determined by the demand generated by the initial section.⁵³ While perfectly logical from a marketing viewpoint, such a sales program raises serious problems when attempted in the condominium field. First, the enabling statutes (and in some states the Attorney General's Regulations) stipulate that detailed plans and exact descriptions of the condominium must be filed, along with the declaration and bylaws.⁵⁴ Similarly, the latter documents must specify the undivided fractional interest attached to each unit for ownership, voting and related purposes. The plans and documents cannot adequately depict these things if the overall size of the project (and number of participants) will not be known until after the first section has been largely or completely sold. To fully illustrate such a project, it would be necessary to show the largest possible development at the outset, and thereafter amend the papers to indicate which unsold (and perhaps unbuilt) areas were being withdrawn from the plan. An alternative approach would consist in describing the first section only, and thereafter amending the papers to depict subsequent sections brought into existence and added to the original section. Neither device is entirely satisfactory, since the initial purchasers and their mortgagees can never be certain what the extent of the finished development will be, and hence what the unit owner's fractional interest, share of expenses and fractional voting strength will be.⁵⁵ Nevertheless, absent such a device, developers would no doubt continue their marketing practices by building a series of small, separate condominiums, one after the other.⁵⁶ Any cooperation between the projects, or sharing of common facilities or utilities, would have to be worked out by means of contractual arrangements, easements, covenants and restrictions. These, in turn, might generate problems of their own. Accordingly, it would appear advisable to authorize construction of a condominium in successive sections, even though the exact size of the completed project is not known in advance.

53. This procedure has been sanctioned in several jurisdictions, including New York.

54. See ROHAN & RESKIN, *CONDOMINIUM LAW & PRACTICE* § 7.01-04 (1965).

55. This objection is enlarged upon in REP., COMM. ON STATE LEGISLATION, ASSOC. OF THE BAR OF NEW YORK CITY 466-68 (1965).

56. The developer denied the right to market a single condominium in successive sections would be in basically the same position as one denied the right to use non-contiguous parcels. In both cases, multiple small projects would be the logical, though inferior, alternative.

Adequate safeguards for both unit owners and their mortgagees can be provided by spelling out in the offering plan the rights and obligations of purchasers under the smallest and largest development possible. In this manner, prospective purchasers should be able to gauge the approximate size of their holdings, their potential voting strength, and fractional share of monthly maintenance charges.⁵⁷ As long as each section is relatively self-sufficient, the adding of additional units to the project (or failure to do so) should have relatively minor influence upon future carrying costs.⁵⁸ The units first sold will, of course, have individual mortgages and tax bills, and will most likely be billed individually for fuel consumption, as well as gas and electrical services. Accordingly, the remaining expenses to be shared in common should be minimal, consisting largely of charges to pay for maintenance of roads, parks and other recreational facilities.

Does the Association of Unit Owners Have Authority to Buy or Lease Condominium Units (or Additional Land or Facilities)?

Most of the discussion relating to the condominium association's powers in the original enabling legislation is directed to levying and collecting carrying charges, repairs and maintenance of the condominium's property. In many cases it is unclear whether the association may deal in units within the condominium on a temporary or permanent basis. Thus, for example, the association might desire to purchase or lease units to safeguard property values, enable the builder to close out his sales, eliminate an undesirable unit owner or prospective purchaser,⁵⁹ bid in on a foreclosure or convert to community facilities (such as a restaurant or recreation room).⁶⁰ It is conceivable that such activities might be questioned by a disapproving unit owner if the acquisition was not followed by prompt resale.⁶¹ Group ownership of a unit or units would decrease the number of constituent owners, and correspondingly increase each in-

57. Prospective purchasers would be well advised to estimate their share of expenses in light of the possibility that no other sections would come to fruition.

58. The carrying costs generated by each new section should be offset by the addition of corresponding new owners, if the project's declaration contains an appropriate allocation formula. Some question might arise if the subsequent sections were to contain facilities which greatly increased the first section's carrying charges.

59. It is quite common for project declarations to confer the right of first refusal upon the association, in the event a prospective purchaser on a unit resale was rejected. Some of the financial burden of exercising that right may be eliminated by stipulating further that the association would have the right to take over the outstanding mortgage, if any, of the seller.

60. For illustrative condominium documents, see ROHAN & RESKIN, *CONDOMINIUM LAW & PRACTICE*, Appendix C (1965).

61. A plausible argument could be made in support of the view that the association's authority extended only to maintenance of the premises and not to engaging in real estate transactions of a permanent character.

dividual's share of maintenance costs.⁶² Group leasing of the space would expand the functions of the association and raise additional income tax and other questions.⁶³ On balance, however, it would appear that such authority serves many useful purposes and will not be abused by the majority interests (which must, of course, absorb the largest share of costs which may be generated). Accordingly, some jurisdictions have amended their statutes to confer broad powers upon the association in dealing with ownership and possession of units within its project.⁶⁴

Acquisition or leasing of additional land or facilities located beyond the condominium's perimeter raises more difficult policy questions. As previously noted, the writer takes the position that contiguity should not be a condominium requirement.⁶⁵ Nor can any serious objection be found to a project, the original plan of which calls for the purchase or lease of land, golf, beach or other facilities some distance from the development's site. However, incorporation of such ideas into the condominium declaration by way of an amendment does raise the problem of a dissenting minority's rights. A recent addition to the Florida statute attempts to solve the problem by requiring authority for such leasing to be included specifically in the project's original declaration, or an amendment thereto.⁶⁶ However, this will merely increase the vote required to embark upon such a program, and will not eliminate the objection entirely.⁶⁷ In this writer's view, a distinction should be drawn between arrangements set forth in the original declaration, and those subsequently proposed. However, in addition, a dissenting unit owner should be given the option to sell his unit to the association when extraordinary expenses are voted by the controlling interests.⁶⁸

THE ROLE OF STATUTORY AMENDMENTS AND NONJUDICIAL AGENCIES IN THE INTERPRETIVE PROCESS

Statutory Amendments.

It is clear that the various condominium acts contain several short-

62. Each individual's share of common expenses would be automatically increased if units were "retired" and devoted to group purposes, thereby decreasing the number of participants (absent an offsetting income generated by the new community facility).

63. The tax ramifications of association income represent one of the largest areas of uncertainty in the condominium field.

64. *E.g.*, N.Y. REAL PROP. LAW § 339.

65. See text at note 45 *supra*.

66. FLA. STAT. ANN. § 711.121 (Supp. 1965).

67. A majority vote will control association affairs but approval of three-quarters of the parties in interest, or greater fraction, is usually required for amendment of the project's declaration.

68. Only the Massachusetts statute contains such a provision. See MASS. ANN. LAWS Ch. 183A, §§ 17-18 (Supp. 1966).

comings which should receive legislative attention. Since most amendments would be in the nature of beneficial clarifications and extension of the original act, little difficulty will be experienced with retroactivity or the unsettling of vested property interests. However, if the pace of legislative revision of other real property statutes is any indication, necessary revisions will be slow in coming. The press of other business may also lead to piecemeal amendments, lacking in thorough preparation. Accordingly, it would appear that the legislature does not provide the most appropriate medium for constant updating of the condominium concept. Instead, day-to-day developments should be committed to another agency, and long-range revisions developed through the formulation of a model act.

A Model Condominium Act.

Recently there has been discussion in real property circles of the feasibility of drafting a uniform act in the condominium field. While the F.H.A., Puerto Rican and other early statutes did serve as prototypes for later enactments, there has been little exchange of ideas on a national basis aimed at correcting defects and making refinements in this area.⁶⁹ Such a project should be undertaken in the near future, before the fifty jurisdictions go their separate ways and harden their positions. A model act would provide a convenient forum for passing upon policy questions, such as those discussed in this paper, while supplying viewpoints and information essential to an informed departure from practices prevailing in other states.

The Role of Nonjudicial Agencies in the Interpretive Process.

Few jurisdictions have seen fit to authorize the Attorney General to prescribe standards governing the construction and sale of condominium developments.⁷⁰ By failing to do so, these states have left the door open to possible imposition upon the public. Perhaps of greater importance is the fact that this omission leaves the state without a vehicle for treating practical problems as they arise. Not only would this agency supply ready answers to builders and their mortgagees (who cannot wait for legislative clarification), but it would develop valuable expertise in the construction and financing phases of condominium. By way of il-

69. While the FHA measure was labelled a "model act," it merely sought to sketch the essentials for a condominium which would be compatible with FHA financing. Consequently, many of the provisions necessary for a complete condominium statute are missing.

70. For regulations of the New York Attorney General, governing condominium offerings, see ROHAN & RESKIN, *CONDOMINIUM LAW & PRACTICE*, Appendix B (1965).

lustration, the "Division of Syndications, Cooperatives and Condominiums" of the New York State Attorney General's office, has established standards for condominiums and thoroughly examined the documentation of every project offered for sale within the state. It secured broader protection for purchasers under the terms of unit title policies,⁷¹ and is cooperating with the casualty insurance industry in an attempt to fashion coverage for the condominium project (as well as endorsements tailored to the unit owner's needs).⁷² This office has also established an advisory council on condominium developments, consisting of knowledgeable individuals in the real estate, construction, lending and title insurance industries, to provide practical insights into condominium problems. The nonsalaried council members meet periodically with the Attorney General's staff and are supplied with copies of the documentation of every condominium project accepted for filing. In its first six months of operation, the Council assisted in the drafting of three amendments eventually enacted into law. It would appear that the brightest future for condominium lies in this direction, and not in the spheres of judicial and legislative developments.

71. Such policies now cover both the soundness of the title, as well as compliance with the enabling act.

72. This effort resulted in issuance of an instructional pamphlet by the carriers to interested insurance agencies, delineating the coverage recommended for condominium projects, as well as individual unit owners.