

St. John's Law Review

Volume 48
Number 4 *Volume 48, May 1974, Number 4*

Article 26

August 2012

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Elliot M. Stern

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Recommended Citation

Stern, Elliot M. (1974) "Condominiums and the Right of First Refusal," *St. John's Law Review*: Vol. 48 : No. 4 , Article 26.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss4/26>

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CONDOMINIUMS AND THE RIGHT OF FIRST REFUSAL

The ancient concept that "a man's home is his castle" into which "not even the king may enter" loses much of its efficacy in an era in which "high-rise apartment houses have piled castle upon castle for some twenty or more stories in the air."¹ The common law actions of trespass and nuisance, even when supplemented by landlord's rules and regulations, fall far short of preserving the sanctity of castle-life for the modern apartment dweller. To some extent, however, modern needs are fulfilled by the self-governing advantages of the cooperative and condominium.

The most significant advantage of the cooperative is the opportunity provided members to participate in the control and management of the building in furtherance of the ultimate goal of achieving harmonious living. To supplement this private system of self-government, cooperatives uniformly impose restrictions on the transfer of individual units. As landlords of the building, the cooperative members have a strong interest in the selection of co-members who are financially stable. As tenants, they have an equal concern in choosing neighbors who will be socially compatible. These interests have been recognized by the New York Court of Appeals in a case upholding a cooperative lease requiring board approval before a member could sell or lease his unit:

[T]here is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes.²

¹ *Louisiana Leasing Co. v. Sokolow*, 48 Misc. 2d 1014, 1015-16, 266 N.Y.S.2d 447, 449 (Queens County Civ. Ct. 1966):

That a man's home is his castle is an old Anglo-legal maxim hoary with time and the sanction of frequent repetition. It expressed an age when castles were remote, separated by broad moors, and when an intruder had to force moat and wall to make his presence felt within. The tranquillity of the King's Peace, the seclusion of a clandestine romance and the opportunity, like Hamlet, to deliver a soliloquy from the ramparts without fear of neighborly repercussions were real. Times however change, and all change is not necessarily progress

² *Weisner v. 791 Park Ave. Corp.*, 6 N.Y.2d 426, 434, 160 N.E.2d 720, 724, 190 N.Y.S.2d 70, 75 (1959). *Accord*, 68 Beacon St., Inc. v. Sohler, 289 Mass. 354, 194 N.E. 303 (1935). In *Mowatt v. 1540 Lake Shore Drive Corp.*, 385 F.2d 135 (7th Cir. 1967) the court, applying Illinois law, concluded that a similar provision was valid in a cooperative apartment building. Although no grounds for refusal of consent were contained in the lease, the court noted: "Consent can be withheld only on some reasonable basis in the light of the significant needs and purposes of the cooperative arrangement." *Id.* at 137. *Accord*, *Logan v. 3750 North Lake Shore Drive, Inc.*, 17 Ill. App. 3d 584, 308 N.E.2d 278 (1974). *See also* *Gale v. York Center Community Cooperative, Inc.*, 21 Ill. 2d 86, 171 N.E.2d

The courts have not yet passed on the validity of restrictions on the transfer of condominium units. However, two reasons are often cited to compel stricter scrutiny of such restraints in condominiums than in cooperatives. The first involves the availability of individual financing of condominium units. Since the spectre of foreclosure is individualized,³ thereby lessening the financial interdependence of members, the need for tenant-selection devices is less compelling. This difference can be overstated,⁴ however, and is unlikely, standing alone, to have much effect on whether a particular restraint is upheld as reasonable. The distinction which does point to disparate treatment, even if it does not justify it, is in the fact that the cooperative member occupies his unit as a mere tenant while the condominium owner has acquired a fee simple interest in real property. Although the distinction exists more in theory than reality since the cooperative "tenancy" continues indefinitely,⁵ the condominium draftsman, nevertheless, will be required to use a more delicate hand in drafting provisions restraining alienation of units.⁶

In most cases, this greater caution will manifest itself in what is termed a right of first refusal in the association. This preemptive option, first option, or first right to purchase, as it is often called, requires a unit owner, upon the receipt of a bona fide offer which he intends to accept, to first offer the unit to the association's board of managers, usually upon terms identical to those of the outside offer. The board may reject the offer, frequently without approval of the members, and allow

30 (1961) (dictum). For a discussion of the effectiveness of such clauses in condominiums see note 46 *infra*.

³ Cooperatives usually have a blanket mortgage on the entire project while condominium owners finance their units individually. *But see* *Gale v. York Center Community Cooperative, Inc.*, 21 Ill. 2d 86, 171 N.E.2d 30 (1961) for an example of how a cooperative can achieve the benefits of individual financing as well.

⁴ It is estimated that 75% of the cooperatives in New York and Chicago failed during the 1930's; but whether this was the result of any lack of effective tenant selection devices is highly questionable. Widespread failures in all forms of ownership existed, the cooperatives probably being hit the hardest because of the exorbitant profits of promoters and the excessive mortgaging of the units. *See generally* Note, *Co-operative Apartment Housing*, 61 HARV. L. REV. 1407 (1948).

In order to prevent speculation, FHA-insured projects now require cooperative organizations to provide a right of first refusal in the corporation exercisable at the book value of the unit. While this will undoubtedly curtail speculation, it will likely impair the marketability of the units, thereby depressing their value. *See* 1 P. ROHAN & M. RESKIN, *CONDOMINIUM LAW & PRACTICE* § 10.03[2][a] (1974) [hereinafter cited as ROHAN & RESKIN].

⁵ The distinction is all but nonexistent in the cooperative involved in *Gale v. York Center Community Cooperative, Inc.*, 21 Ill. 2d 86, 171 N.E.2d 30 (1961). There the corporation would convey a deed to the cooperative member so that each individual unit could be financed separately. The court upheld a provision requiring that the property be reconveyed when the mortgage was fully paid.

⁶ *See* note 46 *infra*.

the unit owner to accept the offer of the proposed purchaser. If the sale is not completed within a certain period of time, usually sixty days, or if the terms of the proposed sale are altered in any way, the procedure must be repeated before a sale may be consummated. In the event the board does not approve the prospective transfer, it may exercise its option, usually within thirty days and only after approval by a majority of unit owners.⁷

The right of first refusal may be distinguished from a blanket prohibition on alienation absent board approval in that its exercise does not leave the seller without a purchaser. Additionally, its use provides potential benefits for the unit owners as a group. Such benefits include the right to exclude those "undesirables" often mentioned in condominium literature. Moreover, the first refusal right may be exercised in an affirmative manner, enabling the remaining members to purchase the unit for resale to occupants deemed particularly desirable neighbors. The affirmative use of the option may hold even more significance for commercial or industrial condominiums where a businessman desiring to expand his activities can be ensured first preference when another owner wishes to sell.

Despite the potential benefits and minimal burdens of a first refusal right in the condominium association, a significant number of writers have expressed doubt as to its validity.⁸ Their concern is not so much with the rule against unlawful restraints on alienation as with the Rule Against Perpetuities. Since a specifically enforceable option creates an equitable interest in land, the Rule requires that it be certain to vest within a period usually measured by lives in being plus 21 years.⁹ Options not meeting this requirement are void from their inception. One obvious solution to the problem is to draft the option so that it does not extend beyond the allowable time period. In this way, the owners can be assured of its benefits for about a century. However, the sponsors of a project may prefer the option to last for the full life of the condominium. For this reason, a question arises as to the applicability of the timeworn Rule to this modern form of ownership.

⁷ See generally text accompanying notes 44-61 *infra*.

⁸ 4A R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 633.14 (P. Rohan ed. 1972); 1 ROHAN & RESKIN § 10.03; Boyer & Spiegel, *Land Use Control: Pre-emptions, Perpetuities and Similar Restraints*, 20 U. MIAMI L. REV. 148 (1965); Browder, *Restraints on the Alienation of Condominium Units (The Right of First Refusal)*, 1970 U. ILL. L.F. 231 [hereinafter cited as Browder]; Note, *Right of First Refusal—Homogeneity in the Condominium*, 18 VAND. L. REV. 1810 (1965). *Contra*, Moller, *The Condominium Confronts the Rule Against Perpetuities*, 10 N.Y.L.F. 377 (1964).

⁹ See generally 6 AMERICAN LAW OF PROPERTY §§ 24.12-16, 25.20 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY].

THE RULE AGAINST PERPETUITIES AND THE CONDOMINIUM'S
RIGHT OF FIRST REFUSAL

In the 17th century, common law judges were confronted with testators' wills which attempted to tie up property for generations by creating successive future interests, at times lasting into perpetuity.¹⁰ These unvested future interests clogged the alienability of the land, impaired its marketability, and prevented its full utilization for the benefit of society as well as the present owners.¹¹ Although the courts might have prohibited the creation of all such interests and freed the land of all manner of fettering, they instead chose to strike a compromise between the competing desires of the present and future generations.¹² Grantors were permitted to create future interests, limited only by the time in which the interest must become certain of vesting. While the compromise reached may have added certainty to the law, it permitted many future interests which virtually destroyed the marketability of the land for over a century. At the same time, it invalidated others having little or no undesirable consequences, but which were not limited within the period of the Rule.

Options present one of the best examples of the failure of the Rule's compromise.¹³ Certain options are thoroughly offensive to the Rule's underlying policy of freeing the land from indirect or practical restraints on alienation. Examples of such options are those exercisable at a fixed price and contingent upon some event beyond the control of the present owner, usually the will of the optionee. An illustration is an option to purchase property currently worth \$10,000 for \$12,500. Clearly, such a provision would inhibit investments in, improvements on, or even repairs to existing structures. Yet, the Rule Against Perpetuities would permit such a device to operate, thereby destroying the marketability, usefulness, and productivity of the land for over a cen-

¹⁰ See generally 6 AMERICAN LAW OF PROPERTY § 24.4; GRAY, THE RULE AGAINST PERPETUITIES § 123 *et seq.* (4th ed. 1942) [hereinafter cited as GRAY]; 4 RESTATEMENT OF PROPERTY, Introductory Note at 2123 (1944); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1211 *et seq.* (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

¹¹ GRAY, *supra* note 10, § 2; 4 RESTATEMENT OF PROPERTY, Introductory Note at 2130 (1944); SIMES & SMITH, *supra* note 10, § 1117. Although these seem to be the most compelling reasons for limiting the time in which future interests must become certain of vesting, other rationales have been advanced: furthering the competitive struggle, 4 RESTATEMENT OF PROPERTY, Introductory Note at 2132 (1944); preventing too much dead hand control of property, SIMES & SMITH, *supra* note 10, § 1117, at 13; and curbing "the power and grandeur of ancient families," *Edgerly v. Barker*, 66 N.H. 434, 455, 31 A. 900, 906 (1891).

¹² SIMES & SMITH, *supra* note 10, § 1117, at 13.

¹³ See generally 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 771 (P. Rohan ed. 1972); SIMES & SMITH, *supra* note 10, § 1244; Berg, *Long-Term Options and the Rule Against Perpetuities*, 37 CALIF. L. REV. 1, 235, 419 (1949).

ture.¹⁴ At the same time, the Rule would invalidate a right of first refusal extending beyond the allowable period even though its exercise were under the sole control of the present owner of the land, it could only be exercised on the identical terms of the outside offer, and it served some socially desirable purpose, thus increasing the value of the land.¹⁵

It is not surprising, therefore, that many commentators have argued that options should not be governed by the Rule Against Perpetuities, but rather by a more liberal application of the rule against restraints on alienation.¹⁶ However, courts have failed, with rare exceptions,¹⁷ to consider the underlying policy of the Rule in its application to options and continue to apply it with devastating certainty.¹⁸ Even

¹⁴ Examples of options upheld because limited to the period of the Rule but impairing the marketability of the land because they could be exercised at a fixed price include *Roemhild v. Jones*, 239 F.2d 492 (8th Cir. 1957); *Rountree v. Richardson*, 268 Ala. 448, 108 So. 2d 152 (1959) (Rule held inapplicable); *In re Estate of Maguire*, 204 Kan. 686, 466 P.2d 358, *modified*, 206 Kan. 1, 476 P.2d 618 (1970); *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955); *Hall v. Crocker*, 192 Tenn. 506, 241 S.W.2d 548 (1951); *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (Dist. Ct. App. 1960).

A number of courts though have invalidated fixed-price options as unreasonable restraints on alienation. *See, e.g.*, *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 A. 138 (1919) (violated both rules); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. 1955) (fixed price plus cost of improvements); *Ross v. Ponemon*, 109 N.J. Super. 363, 263 A.2d 195 (1970) (violated both rules); *Brace v. Black*, 51 N.J. Super. 572, 144 A.2d 385 (1958); *Kowalsky v. Familia*, 71 Misc. 2d 287, 336 N.Y.S.2d 37 (Sup. Ct. Orange County 1972); *Trustees of Casa View Assembly of God Church v. Williams*, 414 S.W.2d 697 (Tex. Civ. App. 1967).

¹⁵ This discussion of the validity of the right of first refusal presupposes that the option may only be exercised at the same price as the outside offer or at the fair market value of the property determined by a fair appraisal. Although provisions do appear in cooperatives limiting the price of the option to the book value of the property, their utility has been questioned, *see note 4 supra*, and in the condominium they may well be considered unlawful restraints on alienation. *See generally* 6 AMERICAN LAW OF PROPERTY § 26.65; 4 RESTATEMENT OF PROPERTY § 413 (1944); SIMES & SMITH, *supra* note 10, § 1154.

For cases holding preemptive options invalid although they could only be exercised at the market value or the identical terms of the outside offer see *Atchison v. City of Englewood*, 463 P.2d 297 (Colo. 1970); *Neustadt v. Pearce*, 145 Conn. 403, 143 A.2d 437 (1958); *Holien v. Trydahl*, 134 N.W.2d 851 (N.D. 1965) (repugnant to fee); *Melcher v. Camp*, 435 P.2d 107 (Okla. 1967) (option to lease); *Bing v. Burtus*, 106 Va. 478, 56 S.E. 222 (1907) (repugnant to fee). *Accord*, 4 RESTATEMENT OF PROPERTY §§ 393, 394 (1944). *See generally* 6 AMERICAN LAW OF PROPERTY § 24.56; GRAY, *supra* note 10, § 330; 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 770 (P. Rohan ed. 1972); SIMES & SMITH *supra* note 10, § 1244; Berg, *Long-Term Options and the Rule Against Perpetuities*, 37 CALIF. L. REV. 419, 439-45 (1949).

¹⁶ *See, e.g.*, 6 AMERICAN LAW OF PROPERTY §§ 24.56, at 143, 26.66; SIMES & SMITH, *supra* note 10, § 1244, at 159; Browder, *supra* note 8, at 246.

¹⁷ *Weber v. Texas Co.*, 83 F.2d 807 (5th Cir.), *cert. denied*, 299 U.S. 561 (1936) is a notable exception. The court, confronted with a preemptive option that could be exercised only at the same price as the outside offer, did not apply the Rule after deciding that the option did not in any way restrain alienation. *Weber* was followed in *Beets v. Tyler*, 365 Mo. 895, 290 S.W.2d 76 (1956), and *Courseview, Inc. v. Phillips Petroleum Co.*, 258 S.W.2d 391 (Tex. Civ. App. 1953) (conditional option). *See also* notes 30-34 and accompanying text *infra*.

¹⁸ Part of the inflexibility in applying the Rule may be attributable to Professor

so, there is hope that the modern concept of the condominium will elicit a new and more sensible approach to judicial treatment of the right of first refusal.

Since the Rule has been judicially applied to the right of first refusal in the great majority of jurisdictions, it is somewhat surprising that few condominium statutes exempt such a provision from the Rule's operation. Nearly every state's enabling act provides that the interest of the unit owner shall, for all purposes, constitute real property.¹⁹ Most statutes expressly authorize restrictions on the use of the units but remain silent as to the validity of restrictions on their occupancy and transfer.²⁰ Three states go so far as to specify that the units shall be as freely alienable as real property.²¹ None of these provisions,

Gray's treatise, *The Rule Against Perpetuities*. While agreeing that "[t]he rules disallowing restraints against alienation and the Rule Against Perpetuities have . . . the same ultimate end—forwarding the circulation of property"—he emphasized the fact that "they serve that end by different means." GRAY, *supra* note 10, § 2.1. To correct the "grave errors" some courts had fallen into by confounding the two, he emphasized the Rule's concern with remoteness. *Id.* §§ 2, 3. This emphasis on theoretical consistency rather than practical alienability is still with us today.

¹⁹ See, e.g., ALA. CODE tit. 47, § 289 (Cum. Supp. 1971); DEL. CODE ANN. tit. 25, § 2204 (Cum. Supp. 1970); GA. CODE ANN. § 85-1604b (1970); IND. ANN. STAT. § 32-1-6-4 (1973); KAN. STAT. ANN. § 58-3104 (1964); ME. REV. STAT. ANN. tit. 33, § 563 (Supp. 1973); MINN. STAT. ANN. § 515.04 (Supp. 1974); N.H. REV. STAT. ANN. § 479-A:3 (1968); N.M. STAT. ANN. § 70-4-4 (Supp. 1973); N.Y. REAL PROP. LAW § 339-g (McKinney 1968); OHIO REV. CODE ANN. § 5311.03 (1970); VT. STAT. ANN. tit. 27, § 1304 (Cum. Supp. 1973); V.I. CODE ANN. tit. 28, § 903(a) (Supp. 1973); WASH. REV. CODE ANN. § 64.32.030 (1966); W.VA. CODE ANN. § 36A-2-1 (1966); WIS. STAT. ANN. § 703.04 (1973).

Other statutes further provide that the units shall be treated as if they were entirely independent of the other units. See, e.g., ARK. STAT. ANN. § 50-1004 (1971); KY. REV. STAT. § 381.820 (1972); LA. REV. STAT. § 9-1124 (1965); MONT. REV. CODES ANN. § 67-2304 (Supp. 1973); N.C. GEN. STAT. § 47A-5 (1966); ORE. REV. STAT. § 91.605 (1971); P.R. LAWS ANN. tit. 31, § 1291b (1968); S.C. CODE ANN. § 57-497 (Supp. 1973); TENN. CODE ANN. § 64-2704 (Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 1301a, tit. 31, § 4 (Supp. 1974).

²⁰ See, e.g., ALA. CODE tit. 47, § 304(j) (Supp. 1971); GA. CODE ANN. § 85-1611b(c) (Supp. 1973); ILL. ANN. STAT. ch. 30, § 318(j) (Smith-Hurd 1969); IND. ANN. STAT. § 32-1-6-12(g) (1973); KAN. STAT. ANN. § 58-3111(7) (1964); ME. REV. STAT. ANN. tit. 33, § 576(10) (Supp. 1973); MINN. STAT. ANN. § 515.11(7) (Supp. 1974); MO. ANN. STAT. § 448.180(10) (Supp. 1974); N.H. REV. STAT. ANN. § 479A:10(VII) (1968); N.M. STAT. ANN. § 70-4-19(J) (Supp. 1973); N.C. GEN. STAT. § 47A-13(6) (1966); ORE. REV. STAT. § 91.560(8) (1971); VT. STAT. ANN. tit. 27, § 1311(7) (Cum. Supp. 1973); V.I. CODE ANN. tit. 28, § 910(7) (Supp. 1973); WASH. REV. CODE ANN. § 64.32.090(7) (1966); WIS. STAT. ANN. § 703.11(7) (Supp. 1973).

²¹ ARIZ. REV. STAT. ANN. § 33-557 (Supp. 1973); IOWA CODE ANN. § 499B.10 (Supp. 1973); S.D. COMPILED LAWS ANN. § 43-15-7 (Supp. 1973). Each provides in part that the units "shall be completely and freely alienable as any separate parcel of real property is or may be under the laws of this state, except as limited by the provisions of this chapter."

The Delaware Act similarly provides that the "[u]nits may be sold, conveyed, mortgaged, leased or otherwise dealt with in the same manner as like dealings are conducted with respect to real property and interests therein." DEL. CODE ANN. tit. 25, § 2223 (Cum. Supp. 1970). But this section seems more concerned with the manner in which the property will be dealt with from a formal and procedural standpoint in contrast to the other statutes which deal directly with alienability.

however, should be construed as evidencing a legislative intent to limit the use of the right of first refusal to the period of the Rule Against Perpetuities. More likely, the legislators intended to leave the decision to the courts, which might act in a less hurried manner in resolving the issue than did the legislatures in adopting the condominium enabling acts. This theory is somewhat supported by the fact that all the statutes sanction the use of further retractions if deemed necessary.²²

A number of the acts do consider the applicability of the Rule Against Perpetuities and the rule against restraints on alienation to the condominium. Some provide that neither shall apply to defeat any of the provisions of the act.²³ These sections, however, are not speaking to the validity of a right of first refusal, but only to the validity of those restrictions expressly authorized by the act — the restriction on partition of the common elements, the restriction on the severance of the unit from the common elements, and the provision for reorganization of ownership in the event of destruction or obsolescence of the building.²⁴ Other states provide the identical safeguard but extend its protection to the provisions of any declaration or bylaw consistent with the act.²⁵ Apparently this is mere surplusage if "consistent" means "authorized by the act." Since these statutes may be construed to exempt from the two rules only those provisions which are expressly authorized by the acts, it might be argued that both rules were intended to apply to all other types of restrictions, including the right of first refusal.²⁶

A few states actually authorize restrictions on the sale, lease, and

²² See, e.g., ALA. CODE tit. 47, §§ 296(11), 304(1) (Supp. 1971); ALASKA STAT. § 34.07.020(12) (1971); GA. CODE ANN. § 85-1611b(e) (Supp. 1973); IDAHO CODE § 55-1505(2)(q), (3) (Supp. 1973); IND. ANN. STAT. § 32-1-6-12(h) (1973); KAN. STAT. ANN. § 58-3111(10) (1964); ME. REV. STAT. ANN. tit. 33, § 576(12) (Supp. 1973); MINN. STAT. ANN. § 515.11(10) (Supp. 1974); N.M. STAT. ANN. § 70-4-19(L) (Supp. 1973); N.C. GEN. STAT. § 47A-13(8) (1966); VT. STAT. ANN. tit. 27, § 1311(10) (Supp. 1973); V.I. CODE ANN. tit. 28, § 910(10) (Supp. 1973); WASH. REV. CODE ANN. § 64.32.090(12) (1966); WIS. STAT. ANN. § 703.11(10) (Supp. 1973).

²³ ILL. ANN. STAT. ch. 30, § 320 (Smith-Hurd 1969); MO. ANN. STAT. § 448.210 (Supp. 1974); NEB. REV. STAT. § 76-807 (1971); NEV. REV. STAT. § 117.103 (1973).

²⁴ The language of exemption in NEB. REV. STAT. § 76-807 (1971), is directly preceded by language prohibiting any partition of the common elements. The Colorado statute expresses exactly this interpretation:

If such declaration provides for the disposition of condominium units in the event of the destruction or obsolescence of buildings in which such units are situated and restricts partition of the common elements, the rules or laws known as the rule against perpetuities and the rule prohibiting unlawful restraints on alienation shall not be applied to defeat or limit any such provisions.

COLO. REV. STAT. ANN. § 118-15-5(1) (1964).

²⁵ R.I. GEN. LAWS ANN. § 34-36-28 (1970); UTAH CODE ANN. § 57-8-28 (1963).

²⁶ This interpretation is supported by the caveat added by two states: "This exemption shall not apply to estates in the individual condominium units." D.C. CODE ANN. § 5-926 (1966); VA. CODE ANN. § 55-79.36 (1969). Thus, the exemption will not apply to restrictions affecting the alienability of individual units but will only apply to those restrictions affecting the common elements.

occupancy of units.²⁷ Of these, only Florida specifically exempts the right of first refusal from the operation of the Rule.²⁸ The possibility exists, therefore, that courts in other states will allow the restriction but require it to vest within the period of the Rule.²⁹ Although the likelihood of such a result is remote, it highlights the failure of the legislatures to achieve certainty in this area of the law by expressly defining the scope of permissible restrictions on condominium ownership.

This is not to say that uncertainty exists in every state. In New York³⁰ and Michigan,³¹ among other states,³² the statutory rule against suspension of the power of alienation is not applied to options because persons always exist who can, by joint effort, convey a fee simple. In other states the courts have considered options contractual, creating no interest in land, and therefore outside the scope of the Rule.³³ In Illinois all rights of first refusal are expressly exempted by statute from

²⁷ FLA. STAT. ANN. § 711.08(l)(1), (2) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 183A, § 12(c) (1969) (limited to sales); MICH. COMP. LAWS ANN. § 559.12 (1967); MISS. CODE ANN. §§ 89-9-17(7), 89-9-19 (1973); N.Y. REAL PROP. LAW § 339-v(2)(a) (McKinney 1968); VA. CODE § 55-79.85 (Supp. 1974).

²⁸ The declaration provided in subsection (1), may include such covenants and restrictions concerning the use, occupancy and transfer of the units as are permitted by law with reference to real property; provided, however, that the rule of property known as the rule against perpetuities shall not be applied to defeat a right given any person or entity by the declaration for the purpose of allowing unit owners to retain reasonable control over the use, occupancy and transfer of units.

FLA. STAT. ANN. § 711.08(2) (1969).

²⁹ The question will arise only with respect to the Massachusetts, Mississippi, and Virginia statutes because New York and Michigan do not apply the Rule Against Perpetuities to options. See notes 30 & 31 and accompanying text *infra*.

³⁰ *In re City of New York*, 246 N.Y. 1, 29-30, 157 N.E. 911, 920 (1927) (dictum); *Tramontano v. Catalano*, 23 App. Div. 2d 894, 260 N.Y.S.2d 269 (2d Dep't 1965); *Epstein v. Werbelovsky*, 193 App. Div. 428, 184 N.Y.S. 330 (2d Dep't 1920), *aff'd*, 233 N.Y. 525, 135 N.E. 902 (1922); *In re Abbondandolo's Estate*, 10 Misc. 2d 418, 168 N.Y.S.2d 251 (Sur. Ct. Nassau County 1957).

³¹ *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929); *Windiate v. Lorman*, 236 Mich. 531, 211 N.W. 62 (1926).

³² *Graham County Elec. Cooperative v. Town of Safford*, 84 Ariz. 15, 322 P.2d 1078 (1958); *Blakeman v. Miller*, 136 Cal. 138, 68 P. 587 (1902); *Mercer v. Lemmens*, 230 Cal. App. 2d 167, 40 Cal. Rptr. 803 (1964). *Contra*, *Alamo School Dist. v. Jones*, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (Dist. Ct. App. 1960).

³³ See, e.g., *Warren v. City of Leesburg*, 203 So. 2d 522 (Fla. App. 1967). In Alabama, courts have interpreted options held by the grantor as possibilities of reverter to which the Rule is inapplicable. *Rountree v. Richardson*, 268 Ala. 448, 108 So. 2d 152 (1959); *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So. 2d 537 (1956) (per curiam); *Libby v. Winston*, 207 Ala. 681, 93 So. 631 (1922). The possibility of drafting the option as a reversion would most likely be unsuccessful in other states. The distinction between executory interests, held within the Rule, and reversions, held outside the Rule, has been uniformly criticized, see, e.g., 6 AMERICAN LAW OF PROPERTY § 24.62; SIMES & SMITH, *supra* note 10, § 1239, and the *Restatement* provides for a strong constructional preference in favor of finding options. 4 RESTATEMENT OF PROPERTY § 394, Comment (c) (1944).

the limits of the Rule.³⁴ A few courts have considered the underlying policy of the Rule — freeing the circulation of land from practical restraints on alienation — and have upheld options which did not adversely affect alienation,³⁵ even though they lasted in perpetuity.

In those jurisdictions where the Rule's applicability to the condominium's preemptive option is uncertain, the draftsman of a declaration is confronted with a number of alternatives. He may comply with the requirements of the Rule by limiting the life of the option to the period of the Rule. This would ensure validity, but would unnecessarily limit the period of the provision in the event the court held the Rule inapplicable. The better approach would be to draft the option so as not to violate the Rule, while at the same time allowing for the benefit of an unlimited option should the Rule be deemed inapplicable.

In states which have adopted the "wait and see" doctrine,³⁶ the draftsman may achieve the above result by providing that the option will last the *longer* of a period measured by lives in being plus 21 years *or* the life of the condominium. If the court applies the Rule, the provision will not be invalid *ab initio* since a *possibility* exists that vesting will occur within the period of the Rule. The court will instead "wait and see" whether the option *actually* extends beyond the permissible period, thereby allowing the association to benefit from the preemptive provision for a period measured by lives in being plus 21 years.³⁷ The same result is achieved in those jurisdictions which have adopted, either judicially³⁸ or by statute,³⁹ a *cy pres* approach. Here,

³⁴ ILL. ANN. STAT. ch. 30, § 1947 (Smith-Hurd Supp. 1973).

³⁵ See cases cited note 17 *supra*.

³⁶ See, e.g., CONN. GEN. STAT. ANN. § 45-95 (Supp. 1973); PA. STAT. ANN. tit. 20, § 6104(b) (Spec. Pamphlet 1972).

³⁷ In *Mumma v. Hinkle*, 20 Pa. D. & C.2d 621 (C.P. Ct. 1959), the court held that under the Pennsylvania statute a perpetual option would be enforceable if it took place within a life in being. In *Southeastern Pa. Transp. Authority v. Philadelphia Transp. Co.*, 426 Pa. 377, 233 A.2d 15 (1967), *cert. denied*, 390 U.S. 1011 (1968), the court stated that a perpetual option could now be exercised for 21 years. See also *Gilbert v. Union College*, 343 S.W.2d 829 (Ky. 1961); *SIMES & SMITH, supra* note 10, §§ 1230, 1439.

³⁸ See, e.g., *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 469 P.2d 183 (1970); *Carter v. Berry*, 243 Miss. 321, 140 So. 2d 843 (1962); *Edgerly v. Barker*, 66 N.H. 434, 31 A. 900 (1891).

³⁹ These statutes allow the court to reform the interest to vest within the limits of the Rule so as to best conform to the grantor's intent. See CAL. CIV. CODE §§ 715.5, 715.6 (West Supp. 1974) ("validate such interest to the fullest extent"); IDAHO CODE § 55-111 (1947) ("There shall be no rule against perpetuities [T]he interest shall be so construed as to eliminate parts violating the Rule"); KY. REV. STAT. ANN. § 381.216 (1972); MO. REV. STAT. § 442.555 (Supp. 1974); OHIO REV. CODE ANN. § 2131.08(c) (1968) ("shall be reformed, within the limits of the rule"); OKLA. STAT. ANN. tit. 60, § 77 (Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 1291b (Supp. 1974); VT. STAT. ANN. tit. 27, § 501 (1967).

if the Rule is held to apply, the court will rewrite the provision deleting the words "the longer of," and inserting "the shorter of." In those jurisdictions which have adopted neither of these approaches, the same effect could be achieved by drafting the first refusal on an alternative basis. Thus, the option would last for the life of the condominium, but, should the Rule be held applicable, it would last only for a specified period within the Rule.⁴⁰ In that event, the provision would be unassailable under the rule that where an interest is limited by two contingencies stated in the alternative (here, the lives in being plus 21 years and the life of the condominium), the contingency vesting within the period of the Rule will be valid even though the other must fail.⁴¹

Should the association's members have the power to renew the option indefinitely, the question of the Rule's application becomes largely academic. Current owners could establish option periods within the Rule's prescriptions knowing that the right to extend the option rested securely with subsequent purchasers. Thus, the effect of the Rule's prohibitions might be successfully circumvented. However, it is conceivable that the power to renew itself may be held to violate the Rule since some jurisdictions have determined that an option, renewable indefinitely by the optionee, is invalid.⁴² The extension of this principle to the condominium would be unfortunate. The Rule developed to protect future generations from the present generation's competing desire to tie up the land. Thus, it would be anomalous for it to operate to prevent these same future generations from effectuating, through renewals, their desire to adopt a reasonable restraint on alienation. Furthermore, future members may be protected against

⁴⁰ See Model Declaration of Condominium Ownership, Chicago Bar Association (1967), reprinted in part in Browder, *supra* note 8, at 266-68.

⁴¹ 6 AMERICAN LAW OF PROPERTY § 24.54; GRAY, *supra* note 10, §§ 331-54; SIMES & SMITH, *supra* note 10, § 1257; Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459, 465-68 (1968). In this respect the draftsman may create his own "wait and see" rule for the condominium. Even where it is expressly stated that the longer of the two contingencies would control, courts have held that the invalid contingency would be excised where a testamentary plan would not be distorted. *In re Estate of Freeman*, 195 Kan. 190, 404 P.2d 222 (1965); *In re Jutkovitz' Will*, 139 N.Y.S.2d 120 (Sur. Ct. Queens County 1954). *Contra*, *Halsey v. Goddard*, 86 F. 25 (D.R.I. 1898).

⁴² See, e.g., *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1907). *But see* *Beets v. Tyler*, 365 Mo. 895, 290 S.W.2d 76 (1956). The *Beets* court cited *Weber v. Texas Co.*, 83 F.2d 807 (5th Cir.), cert. denied, 299 U.S. 561 (1936), see note 17 *supra*, but it is not entirely clear whether the court felt the Rule should not apply to the option because it initially lasted only 20 years or because it did not act as a practical restraint on alienation. The option gave the adjoining landowners the right to buy on the identical terms of an outside offer. It applied to a tract of over 1800 lots and could be extended by a majority vote of the owners every 20 years.

the disadvantageous effects of any practical restraints on alienation by their full and complete power to repeal the provision at any time. If legislatures deem it necessary, they could provide that a majority of the members must be given the right to repeal the restriction. With this limitation, there would seem little purpose in applying the Rule Against Perpetuities to the condominium's right of first refusal.

Assuming the Rule is found inapplicable, courts should consider the effect of the particular right of first refusal on the unit's transferability. Factors creating an unreasonable restraint on alienation would include: (1) the length of time permitted for board deliberation before the option may be exercised — if too great, no purchaser would be willing to await approval; (2) the terms under which the option may be exercised — if a fixed price option is involved, a time will come when owners would be foolish to sell; and (3) the fee, if any, required to obtain a certificate of approval to sell — if unreasonable it would deter transfers. Previously, courts have not considered these factors, relying solely on the Rule Against Perpetuities to limit an option's possible restraint. Once the Rule is held inapplicable, the reasonableness of the restraint can no longer be disregarded.

OTHER CONSIDERATIONS IN DRAFTING RESTRICTIONS ON UNIT TRANSFERS

The main consideration in drafting restrictions, whether they relate to use, occupancy, or transferability of units, is to satisfy the needs of those who must eventually be governed by them. Depending upon whether the condominium is a retirement, resort, commercial, or industrial type, the owners will have differing needs. For example, if the condominium is a resort type purchased by investors who will run it like a hotel, the declaration might be drafted without any restrictions on the sale or leasing of units. On the other hand, if the condominium is for retirement, the future owners may desire to restrict occupancy by children or even by those below retirement age.⁴³ Most urban resi-

⁴³ See, e.g., Declaration, Illini (Fort Lauderdale, Fla. 1966), § 10.1, reprinted in 1A ROHAN & RESKIN app. 350 ("no children under 12 years of age may reside in an apartment except temporarily"). In *Lamont Bldg. Co. v. Court*, 147 Ohio 183, 70 N.E.2d 447 (1946) a provision restricting occupancy to adults was upheld in a lease, but in some states such a restriction might be against public policy. See, e.g., N.Y. REAL PROP. LAW §§ 236-37 (McKinney 1968), which states that it is a misdemeanor to refuse to rent a dwelling solely on the ground that such person has a child and prohibits the use of a discriminatory clause to the same effect in the lease.

One attorney who has drafted a number of declarations commented:

I guess it is against public policy to preclude someone from having children, but we have a practical problem. The people want to have some type of protection, so what you do is you put a restriction in the document that says that no unit may be permanently occupied by any child under the age of sixteen years unless he is a house guest or a visitor. Then you pray. I think that is the

dential condominiums will desire to exclude transients and will therefore prohibit leases of short duration.⁴⁴

The most important aspect of drafting restrictions is to allow flexibility. It is impossible to predict what the needs and desires of the owners will be twenty years hence. Similarly, it is impossible to predict exactly how the courts will deal with restrictions in the condominium setting. Conceivably, they could limit the right of first refusal to the period of the Rule Against Perpetuities and require a unanimous vote of the members to renew it.⁴⁵ Conversely, provisions prohibiting the sale or leasing of the units absent board approval might be sanctioned.⁴⁶ Even a requirement that all *occupants* be approved by the board might be sustained.⁴⁷ Consequently, the declarations of restrictions and bylaws must include carefully drafted provisions authorizing the creation, amendment, and repeal of all types of restraints. Since the needs and desires of the members may change as time passes,

real answer, because I believe ultimately there is no way in the world that you are going to keep children out if somebody is bound to have one in there. However, again, be practical about it. People that have children are not going to want to buy a law suit, and they just won't buy in this place all filled up with old people, who don't want them.

Address by Harvey J. Abel, *The Condominium and Co-ops Comm. of the Real Property, Probate and Trust Law Section of the Florida Bar*, Dec. 17, 1971, at 6.

At one time occupancy restrictions were uniformly upheld. Before judicial enforcement of restraints on alienation to blacks was held violative of the fourteenth amendment, the majority of courts upheld such restrictions. *See Shelley v. Kraemer*, 334 U.S. 1 (1948). The few that did not found some theoretical distinction between a restriction on occupancy by a particular group and a restraint on alienation to the same group and upheld the former. *See generally* 6 AMERICAN LAW OF PROPERTY § 26.34, at 462-63. It is not likely that these cases will have much persuasive force today.

⁴⁴ *See, e.g.*, Condominium #3 Declaration, in 1 D. HARVEY, *LAW OF REAL PROPERTY AND TITLE CLOSING* 933 (1973) (less than 30 days).

⁴⁵ *See* note 42 and accompanying text *supra*.

⁴⁶ The qualification upon a disabling restraint on alienation by allowing transfer with the consent of a third party has generally been ignored by the courts in considering the validity of the restraint. 6 AMERICAN LAW OF PROPERTY § 26.81. While such restraints have been upheld in the few cases where they have appeared in cooperatives, *see* note 2 *supra*, the fact that the condominium units are owned in fee and are expressly stated to constitute real property for all purposes in the enabling acts, *see* note 20 and accompanying text *supra*, may be sufficient reason for the courts to arrive at a different result.

In two cases involving home owners' associations, the courts invalidated prohibitions on alienation to anyone not a member of the association where membership was subject to the approval of the association's board of directors. *Mountain Springs Ass'n v. Wilson*, 81 N.J. Super. 564, 196 A.2d 270 (1963); *Lauderbaugh v. Williams*, 409 Pa. 351, 186 A.2d 39 (1962). However, a covenant not to sell without the consent of the adjoining landowners was upheld in *Ink v. Plott*, 175 N.E.2d 94 (Ohio Ct. App. 1960). If such provisions are upheld, they should be required to be exercised reasonably.

⁴⁷ A number of declarations contain such a provision, *see, e.g.*, Declaration, Clinton Center Professional Condominium (Hempstead, N.Y. 1966), art. XV, § 2(c), *reprinted in* IA ROHAN & RESKIN app. 240, although its validity is doubtful. *See* note 43 *supra*. What may be more useful and valid is a limitation on the number of persons who may occupy a unit without board approval.

the enactment of amendments should not require an unrealistically high proportion of votes. It is, of course, imperative that the draftsman initially set out a liveable and workable system of rules and restrictions. Through his greater insight into potential problems that are likely to arise, he may save the owners a great deal of future trouble.

Regarding the right of first refusal, a number of problems requiring initial answers are readily apparent. One concerns the unit owner who desires to take unconscionable advantage of the association. He may approach the board with a fraudulently inflated offer from an undesirable prospective purchaser. The board might approve the sale in the hope the offer is not, in fact, bona fide. Some condominium declarations, however, provide an alternative to the board in this situation by allowing the association to purchase either at the price of the outside offer or at the fair market value of the property as determined by an impartial appraiser.⁴⁸

Problems may be greater where the leasing of units is involved. Tenants are less likely to be desirable neighbors since they will not have a long-term interest in the success of the project. Furthermore, the right of first refusal is not as effective in controlling the selection of tenants as it is in selecting owners. It might be difficult for the association to find another tenant, especially if the lease is not renewable. Also, if speculators acquire a unit, the possibility exists that there will be a steady stream of new tenants. Since each tenant would require approval, the association's time, energies, and finances might be diverted from other important matters. For these reasons, many condominiums prohibit any lease not approved by the board,⁴⁹ leaving the right of first refusal applicable only to sales. In all likelihood, such a provision would be upheld in the condominium setting.⁵⁰ Even if

⁴⁸ See, e.g., Declaration, Illini (Fort Lauderdale, Fla. 1966), § 11.3(a)(1), reprinted in 1A ROHAN & RESKIN app. 353-54; Declaration, Villa D'Este (Gulf Stream, Fla. 1965), § 12.3(a)(1), reprinted in 1A ROHAN & RESKIN app. 137.

⁴⁹ See, e.g., Offering Plan, Parkchester North Condominium (Bronx, N.Y. 1972) Bylaws, pt. II, art. VII § 1(b), at 310-11; Declaration, Villa D'Este (Gulf Stream, Fla. 1965), § 12.3(b), reprinted in 1A ROHAN & RESKIN app. 137.

⁵⁰ In *Holiday Out in America at St. Lucie, Inc. v. Bowes*, 285 So. 2d 63 (Dist. Ct. App. Fla. 1973), the court upheld a rental pool arrangement in a 600-unit travel trailer resort condominium which gave the developer the exclusive right to rent the units. The arrangement was viewed as a valid restriction on the use of the property:

An unlimited restraint on alienation is void. . . . But in this case there is no restraint on alienation. The plaintiffs are free to convey the fee title to the property at anytime and to anyone in exactly the same state as they acquire it.

Id. at 64 (citations omitted). Since the unit owners could, by a three-fourths vote, terminate the agreement at anytime, the court felt the restriction was not unlimited in time. If all restrictions on leasing are treated as restrictions on use and subject to the test of

not, the threat of litigation might discourage prospective tenants who are disapproved by the board. Similarly, speculators may be discouraged from buying units for rental purposes by provisions requiring board approval of occupants who are not members of the family of the unit owner or approved lessee.⁵¹

The draftsman must also determine which owners and transferees, if any, will be exempt from restrictions on the sale and leasing of units. A common exemption, and the one that is recommended, relates to all gifts and devises as well as sales or leases to members of the immediate family of the unit owner.⁵² Additionally, in recognition of financing considerations, most declarations free a mortgagee, as well as the purchaser at a mortgage foreclosure sale, from the operation of the restraints.⁵³ Another quite common exception is the purchaser at a judicial sale.⁵⁴ It has been commented that it is unnecessary for the option to apply in this case since the board may, if it desires, bid at the sale.⁵⁵ Problems with this reasoning result since the board normally does not desire to purchase the unit unless the prospective purchaser would be an undesirable member. It would be impossible to assess the desirability of each bidder at the sale, many of whom would likely be speculators and thoroughly undesirable. Thus, it would appear preferable to allow the right of first refusal to operate in such a situation.

Another question which arises is how the purchase will be financed if the board exercises the option. It is normally provided that the money must come from working capital or, if that is insufficient, from

reasonableness, the courts should experience no difficulty in sustaining the requirement of board approval.

⁵¹ See, e.g., Offering Plan, Parkchester North Condominium (Bronx, N.Y. 1972) Bylaws, pt. II, art. VII, § 1(b), at 310-11; Declaration, Villa D'Este (Gulf Stream, Fla. 1965), § 12.2(c), reprinted in 1A ROHAN & RESKIN app. 137.

⁵² See, e.g., Offering Plan, Parkchester North Condominium (Bronx, N.Y. 1972) Bylaws, pt. II, art. VII, §§ 7 & 8, at 312-13; Bylaws, Wellesley Green (Wellesley, Mass. 1971), art. VIII, § 7, reprinted in 1A ROHAN & RESKIN app. 378.75. Those which do not exempt these transactions allow the board an option to purchase at the appraised value of the unit. See, e.g., Declaration, Illini (Fort Lauderdale, Fla. 1966), §§ 11.2(b)(3), 11.3(c)(1), reprinted in 1A ROHAN & RESKIN app. 353, 354-55.

⁵³ See, e.g., Offering Plan, Parkchester North Condominium (Bronx, N.Y. 1972) Bylaws, pt. II, art. VII, § 7, at 312; Declaration, Villa D'Este (Gulf Stream, Fla. 1965), § 12.5, reprinted in 1A ROHAN & RESKIN app. 138.

⁵⁴ See, e.g., Declaration, Illini (Fort Lauderdale, Fla. 1966), § 11.5, reprinted in 1A ROHAN & RESKIN app. 355. The bylaws of the Parkchester North Condominium do not contain that exception. Although there is dicta in New York that a right of first refusal may not apply to a judicial sale, *Blankman v. Great Western Food Distribs., Inc.*, 57 Misc. 2d 754, 293 N.Y.S.2d 368 (Sup. Ct. Nassau County 1968), other states have allowed it to operate in this instance; see, e.g., *Richfield Oil Corp. v. Security-First Nat'l Bank*, 159 Cal. App. 2d 184, 323 P.2d 834 (1958); *Cities Serv. Oil Co. v. Estes*, 155 S.E.2d 59 (Va. 1967).

⁵⁵ See, e.g., Note, *Right of First Refusal—Homogeneity in the Condominium*, 18 VAND. L. REV. 1810, 1813 n.77 (1965).

an assessment of the members or a mortgage on the particular unit being purchased.⁵⁶ Additionally, a useful provision allows the board to purchase the property subject to the current mortgage.

Allocation of the purchase price among unit owners, should assessments be necessary, merits particular attention. Normally, the board may sanction a sale or lease without the approval of the members⁵⁷ but may exercise the option to purchase only upon the consent of a majority of unit owners.⁵⁸ To protect those owners who fear large assessments for the dubious honor of excluding those whom they do not consider undesirable, it may be preferable if only those owners who vote to exercise the option are assessed for the unit's purchase price. This would considerably allay the fears of prospective purchasers not as financially secure as other unit owners, and, to that extent, increase the marketability of the units.

Many bylaws provide that the unit owner desiring to sell or lease must pay a reasonable fee before receiving a certificate of approval from the board.⁵⁹ The Florida Condominium Commission, after receiving a number of complaints of unreasonable charges, recommended an amendment to the statute that no fee exceed \$50.⁶⁰ Conceivably, if a fee is required and not limited by reasonable standards, a court would find the right of first refusal to be an unreasonable restraint on alienation. Conflict with the rule against restraints could also be encoun-

⁵⁶ See, e.g., Bylaws, Wellesley Green (Wellesley, Mass. 1971), art. VIII, § 6, *reprinted in* 1A ROHAN & RESKIN app. 378.75; Bylaws, The St. Tropez (New York, N.Y. 1965), art. VII, § 6, *reprinted in* 1A ROHAN & RESKIN app. 109.

⁵⁷ See, e.g., Offering Plan, Parkchester North Condominium (Bronx, N.Y. 1972) Bylaws, pt. II, art. VII, § 1(a), at 309-10; Bylaws, Wellesley Green (Wellesley, Mass. 1971), art. VIII, § 1, *reprinted in* 1A ROHAN & RESKIN app. 378.73-74.

⁵⁸ See, e.g., Offering Plan, Parkchester North Condominium (Bronx, N.Y. 1972) Bylaws, pt. II, art. VII, § 2, at 311; Bylaws, Wellesley Green (Wellesley, Mass. 1971), art. VIII, § 2, *reprinted in* 1A ROHAN & RESKIN, app. 378.74. The unanimous approval of the members might be required in a high-rise office building condominium. See, e.g., Street Condominium Association, Bylaws, art. VIII, § 8.2, *reprinted in* 1A ROHAN & RESKIN app. 378.391. Others give sole discretion to the board. See, e.g., Bylaws, Clinton Center Professional Condominium (Hempstead, N.Y. 1966), art. XVI, *reprinted in* 1A ROHAN & RESKIN app. 240-41. One of the more restrictive declarations gives full authority to the board to supply a purchaser, but not to buy the unit. Declaration, Illini (Fort Lauderdale, Fla. 1966), § 11.3(a), *reprinted in* 1A ROHAN & RESKIN app. 353.

⁵⁹ See, e.g., Bylaws, Wellesley Green (Wellesley, Mass. 1971), art. VIII, § 5, *reprinted in* 1A ROHAN & RESKIN app. 378.75 ("reasonable fee, not to exceed \$20"); Bylaws, New York Industrial Condominium (New York, N.Y. 1972), art. VII, § 5, *reprinted in* 1A ROHAN & RESKIN at app. 378.180 ("reasonable fee, not to exceed One Hundred Fifty (\$150.00) Dollars"); Declaration, Illini (Fort Lauderdale, Fla. 1966), § 11.2(5), *reprinted in* 1A ROHAN & RESKIN app. 352 ("reasonable fee . . . to cover the costs incident to the determination of approval"). No fee is required in a number of others. See, e.g., Bylaws, Clinton Center Professional Condominium (Hempstead, N.Y. 1966), art. XVI, § 6, *reprinted in* 1A ROHAN & RESKIN app. 241; Offering Plan, Parkchester North Condominium (Bronx, N.Y. 1972) Bylaws, pt. II, art. VII, § 5, at 312.

⁶⁰ Amended Report of the Florida Condominium Comm'n to the 1973 Session of the

tered if the time allowed for the board to exercise the option is too generous.⁶¹ The usual time is thirty days, which is more than reasonable in the case of a sale. If the time extends too long, prospective purchasers will be markedly deterred from buying. Consequently, the draftsman must make certain that reasonable fees and time limitations on board action are set forth in the restrictive provisions.

FAIR HOUSING AND THE RIGHT OF FIRST REFUSAL

One of the primary purposes of the right of first refusal is to exclude "undesirables." Determining the presence of undesirables, however, is fraught with the danger that illegal discrimination will be attempted. Thus, the present discussion would be incomplete without considering the impact of section 1982 of the Civil Rights Act of 1866⁶² and the Fair Housing Act of 1968.⁶³

Shortly after the enactment of the 1968 Act, the Supreme Court, in *Jones v. Alfred H. Mayer Co.*,⁶⁴ gave new life to the long-dormant 1866 Act. Therein, the Court held that section 1982 prohibited all racially motivated refusals to sell or rent real property. The racial discrimination involved in the sale and rental of real property which creates ghettos and denies blacks the same right as whites to purchase property was deemed a "relic of slavery." Thus, Congress commands the power, under the thirteenth amendment's enabling clause,⁶⁵ to

Florida State Legislature, Feb. 15, 1973, Exhibit D, § 711.08(m) & Exhibit E, § 711.08(2). The new amendment to the Virginia statute declares any restraint void unless provision is made for promptly furnishing a certificate where the restraint is not exercised. The fee may not exceed \$25. VA. CODE ANN. tit. 55, ch. 2, § 55-79.85 (Supp. 1974).

⁶¹The Massachusetts statute provides that the option period may not exceed 30 days. MASS. GEN. LAWS ANN. ch. 183A, § 12(c) (Supp. 1972). In *Gale v. York Center Community Cooperative, Inc.*, 21 Ill. 2d 86, 171 N.E.2d 30 (1961), the court seemed to approve a preemptive option in a cooperative where the board had one full year to exercise its rights. A period of this length would act as a significant deterrent to any purchaser and serves no justifiable purpose.

⁶²42 U.S.C. § 1982 (1970) provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

⁶³42 U.S.C. § 3601 *et seq.* (1970).

⁶⁴392 U.S. 409 (1968).

⁶⁵U.S. CONST. amend. XIII, § 2. Although it is clear that the thirteenth amendment applies both to private as well as state action, *see* Civil Rights Cases, 109 U.S. 3, 20 (1883), its scope, unaided by Congressional action, has never been clearly defined:

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."

prohibit all such discrimination, whether public or private.⁶⁶

The two Acts are totally separate and independent. By passing the 1968 Act, Congress did not intend in any way to limit the coverage or the remedies afforded under the 1866 Act.⁶⁷ Although the 1968 Act provides for public,⁶⁸ as well as private,⁶⁹ enforcement methods and extends its coverage beyond racial discrimination to discrimination based on religion and national origin,⁷⁰ the 1866 Act is more effective in other respects. Whereas the 1968 Act allows for certain exceptions to its coverage,⁷¹ section 1982 proscribes all racial discrimination in sales or rentals of real property.⁷² While the 1968 Act limits an award of punitive damages to \$1,000,⁷³ section 1982 encompasses no such

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (emphasis in original). See also *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (scope of Congress' power under the fourteenth and fifteenth amendments). When Congress earlier passed the 1968 Act, it had primarily relied on the commerce clause and the fourteenth amendment for its constitutional authority.

⁶⁶ See note 65 *supra*. "[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." 392 U.S. at 442-43.

⁶⁷ "The Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute." 392 U.S. at 416, 417 n.20. This is understandable since at the time the 1968 Act was passed, Congress was not aware that section 1982 applied to such activities.

⁶⁸ 42 U.S.C. § 3610 (1970) (enforcement by the Secretary of Housing and Urban Development); *id.* § 3613 (enforcement by Attorney General).

⁶⁹ 42 U.S.C. § 3612 (1970) (concurrent jurisdiction in federal courts without regard to amount in controversy and in state courts of general jurisdiction).

⁷⁰ *Id.* § 3604.

⁷¹ *Id.* § 3603(b)(1), (2). The broadest exemption applies to sales or rentals of single-family homes without the aid of brokerage services or any type of advertisement, and rooms or units intended to be occupied by four or less families, one of which is the owner. *Id.* § 3603(b)(1), (2). The other exemption involves property owned by religious organizations used for other than commercial purposes and the incidental lodging in a private club. *Id.* § 3607. Total coverage under the Act is estimated at 80% of the nation's housing inventory. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 141 (1971) [hereinafter cited as 1971 CIVIL RIGHTS REPORT].

When the coverage exists, it is broad, encompassing discrimination in the financing of housing, 42 U.S.C. § 3605 (1970), in the provision of brokerage services, *id.* § 3606, blockbusting, advertisements indicating racial preferences, as well as refusals to sell or negotiate "or otherwise make unavailable or deny a dwelling to any person because of race, color, religion, or national origin." *Id.* § 3604.

⁷² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Johnson v. Zaremba*, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,630 (N.D. Ill. 1973). Although section 1982 covers more persons, it would not seem to cover as wide a range of activities as the 1968 Act. See note 71 *supra*.

⁷³ 42 U.S.C. § 3612(c) (1970). It seems that the limitation applies only to those punitive damages that may be assessed against a single defendant and not to the total amount that may be awarded to a single plaintiff. See *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) (\$1,000 individually assessed against salesman and manager of realty company).

limitation.⁷⁴ Similarly, where the 1968 Act provides for a short 180-day statute of limitations,⁷⁵ section 1982 gives plaintiffs the benefit of the appropriate state's longer period of limitations.⁷⁶ Under both acts, however, the plaintiff may be awarded compensatory damages,⁷⁷ including those for humiliation,⁷⁸ and both allow reasonable attorney's fees to a prevailing plaintiff who is "not financially able to assume" them.⁷⁹ The court under either act may grant a preliminary injunction against the sale or leasing of the disputed property as well as a permanent injunction after trial.⁸⁰

Although both administrative⁸¹ and public enforcement⁸² methods

⁷⁴ *Allen v. Gifford*, 368 F. Supp. 317 (E.D. Va. 1973) (award of \$5,000 punitive damages against a developer).

⁷⁵ 42 U.S.C. § 3612(a) (1970).

⁷⁶ *Baker v. F & F Investment*, 420 F.2d 1191 (7th Cir. 1970) (adopting 5-year state statute of limitations for actions not otherwise provided for); *Johnson v. Ganino*, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,532 (N.D. Cal. 1972) (adopting 3-year state statute of limitations for statutory liability rather than the 1-year limit for personal injury claims).

⁷⁷ 42 U.S.C. § 3612(c) (1970); see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

⁷⁸ *Franklin v. Agostinelli*, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,555 (W.D. Wash. 1971) (\$1,000 awarded for humiliation to woman denied rental of housing because she was married to a black).

⁷⁹ 42 U.S.C. § 3612(c) (1970); *Steele v. Title Realty Co.*, 478 F.2d 380, 385 (10th Cir. 1973); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) (part of the effective remedy under section 1982 is the award of attorney's fees). *But see* *People v. Doughtie*, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,528 (M.D. Ala. 1971) (court refused to determine financial ability of plaintiff before awarding attorney's fees under section 1982).

⁸⁰ 42 U.S.C. § 3612(c) (1970).

⁸¹ The Secretary of Housing and Urban Development is empowered to investigate and correct the alleged discriminatory practices by "conference, conciliation, and persuasion." 42 U.S.C. § 3610(a) (1970). However, no money damages are available, and HUD's nationwide staff for the administration and enforcement of Title VIII was less than 120 in 1971. 1971 CIVIL RIGHTS REPORT, *supra* note 71, at 145. In the two years after the Act was passed, HUD had received only 1,500 complaints. Of 979 complaints received in 1969, only 100 had been successfully conciliated, 270 had been dismissed without investigation, and the rest were still being processed. *Id.* at 146. In this area of housing, where speed is essential if there is to be any effective remedy, this procedure is hardly adequate. The report's main criticism of HUD was its focusing on the resolution of complaints to the exclusion of other potentially more effective activities. *Id.* at 148, 175, 348. See also Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834 (1969) [hereinafter cited as *Discrimination Note*].

⁸² The Attorney General may institute proceedings for injunctive relief where a person or group is engaged in a "pattern or practice" of discrimination and where the denial of rights protected by the Act "raises an issue of general public importance." 42 U.S.C. § 3613 (1970). Although the Attorney General's determination that the issue is one of general public importance is not subject to review, see *United States v. Northside Realty Associates, Inc.*, 474 F.2d 1164 (5th Cir. 1973), and the courts have been liberal in finding patterns and practices, see, e.g., *United States v. Pelzer Realty, Inc.*, 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3576 (U.S. Apr. 15, 1974), the full potential of this section has yet to materialize due to the small number of lawyers assigned to its enforcement. 1971 CIVIL RIGHTS REPORT, *supra* note 71, at 160. See also *Discrimination Note*, *supra* note 81.

are available to the aggrieved party under the 1968 Act, the Supreme Court has itself recognized that the private enforcement procedures will carry most of the burden of fighting racial discrimination.⁸³ Therefore, the courts have been liberal in their interpretations of the private remedy.⁸⁴ Consequently, the improperly motivated exercise of a right of first refusal may well leave the condominium association liable in a civil action instituted under the Acts.⁸⁵

In contrast to an individual's refusal to sell or rent, the association's exercise of the right of first refusal is a patently visible act which provides conclusive proof of the rejection of the prospective purchaser. The only further proof necessary would be evidence that the exercise of the option was racially motivated. The case law appears to indicate that a refusal to sell or rent to a member of a minority group protected by the acts, without more, would make out a prima facie case for damages.⁸⁶ The defendant would be well advised, if not required, to come forward with some explanation to show that his refusal was motivated by some factor other than race. Mere proof of nonracial differences between the plaintiff and other applicants, by itself, is insufficient to rebut the inference of discrimination:

Once there is a prima facie case of discrimination the owner must also show that he *actually considered* these other factors and used *them*, rather than race, as the basis for making his decision.⁸⁷

⁸³ *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). "It is apparent, as the Solicitor General says, that complaints by private persons are the primary method of obtaining compliance with the Act." *Id.* at 209.

⁸⁴ *See, e.g., id.*, wherein the Supreme Court held that any tenant in an apartment complex had standing to bring an action under section 3612 as a "private attorney general" even though he himself had not been the object of the discriminatory practice. The Court noted:

We can give vitality to [§ 3612] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of this statute.

Id. at 212.

⁸⁵ None of the exemptions would apply. Even in a lateral condominium where the owner might conceivably be exempt under section 3603 (single-family house), the association would still remain liable. The language of the Act is so broad that the members voting to exclude the prospective purchaser might even be held liable:

To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling

42 U.S.C. § 3604(a) (1970).

⁸⁶ This would at least be so where no other blacks resided in the apartment house. *See United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, (N.D. Miss. 1972); *United States v. Reddoch, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,569*, at 13,776 (S.D. Ala.), *aff'd*, 467 F.2d 897 (5th Cir. 1972) (per curiam).

⁸⁷ *Bush v. Kaim*, 297 F. Supp. 151, 163 (N.D. Ohio 1969) (emphasis added).

Subjective factors such as the applicant's appearance, his demeanor, the owner's estimate of his character, or even personal dislike may be sufficient to rebut the unfavorable inference. Such factors, however, may be considered by the trier of fact as little more than racial discrimination in disguise.⁸⁸ Therefore, the defendant is better protected if he can rely on differences that can be measured objectively such as

the credit standing of the applicant, his assets, his financial stability, his reputation in the community, his age, the size of his family, the ages of his children, his past experience as a lessee or a tenant, the length of time he plans to occupy the premises, and whether or not he is a transient.⁸⁹

But even here, proof that these factors were actually considered and used as the basis for the refusal is still necessary. Thus, it will be too late to inquire into a person's credit rating and background after his rejection.

An investigation into the applicant's finances and personal life may itself constitute evidence of discrimination if the practice is not followed for all applicants.⁹⁰ It is therefore incumbent on the board of directors of the condominium association to require *all* prospective purchasers and lessees to provide such information. Based on the

⁸⁸ In *Stevens v. Dobs, Inc.*, 483 F.2d 82 (4th Cir. 1973) (per curiam) the court found the claim that plaintiff was rejected because of an offensive odor "freighted . . . with all the earmarks of racial prejudice." *Id.* at 84. Interesting in this respect is the following comment:

Prospective compatibility with other tenants, though subjective, may be an appropriate rental consideration where its impact is nonracial. In the present case, however, all of the tenants of SVA are white, and the resident manager has acknowledged a fear that some may move out if blacks move in. Under these circumstances, to consider the prospective acceptance of an applicant by current tenants as a significant factor in passing on his application tends to operate against a black applicant and to promote the continued all-white character of the complex. To reject a black applicant for fear of his incompatibility is substantially equivalent, in these circumstances, to rejecting him on account of race.

United States v. Reddoch, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,569, at 13,776 (S.D. Ala.), *aff'd*, 467 F.2d 897 (5th Cir. 1972) (per curiam).

⁸⁹ *Bush v. Kaim*, 297 F. Supp. 151, 162 (N.D. Ohio 1969).

⁹⁰ A number of cases have relied on the fact that no objective and reviewable criteria existed for selecting among applicants. *See, e.g.*, *United States v. Youritan Constr. Co., P-H EQUAL OPPORTUNITY IN HOUSING* ¶ 13,582, at 13,831-32 (N.D. Cal. 1973); *In Bush v. Kaim*, 297 F. Supp. 151, 163 (N.D. Ohio 1969), although agreeing that nonracial distinctions existed, the court refused to believe that these differences motivated the refusal. *In Williamson v. Hampton Management Corp.*, 339 F. Supp. 1146 (N.D. Ill. 1972), the court rejected the claim that a written policy against renting to two single women was the motivation for the refusal where the manager said nothing about the alleged policy and had the plaintiffs fill out applications.

knowledge received, all such persons should be investigated and detailed and complete records of all past applications should be maintained. This procedure is also helpful if the right of first refusal is to serve its proper purpose. As one commentator noted:

Experience has shown that most boards of directors pay little attention to these matters and rather perfunctorily decline to exercise the rights of first refusal or to give approval without much thought or investigation until some undesirable person gets possession of a unit. When that happens accusations and recriminations are loud and acrimonious and the board reacts by being over-restrictive.

The wisest course is to create certain standard procedures for any transfer or lease transactions and distribute full information on those procedures to all owners as soon as possible.⁹¹

In most condominiums the right of first refusal may not be exercised by the board without the approval of a majority of the members. Thus, the question arises as to what percentage of votes must be shown to have been racially motivated to establish a violation of the civil rights acts. The courts have usually stated that the test for discrimination will be satisfied by proof that the refusal was motivated solely by racial factors.⁹² The potentially broad sweep of this rule can be demonstrated by assuming a condominium in which the association votes 51 to 49 to purchase a unit. If fifty members voted to exercise the option for nonracial considerations and only one were motivated by racial prejudice, it might still be argued that the prospective purchaser was rejected solely on the basis of his race. Had he not been a member of a minority the vote would have been deadlocked, and he would have been able to purchase the unit.⁹³ Clearly, then, the association's right of first refusal, absent sufficient safeguards, could be a dangerous device to exclude persons on the basis of race, religion, or national origin, and subject unit owners to corresponding liability.

Some associations, in an attempt to protect themselves from potential liability, have included a provision in the bylaws which prohibits the exercise of the right of first refusal on the basis of race, religion,

⁹¹ Hennessey, *Practical Problems of Residential Condominium Operation*, 2 CONN. L. REV. 12, 24 (1969).

⁹² *Bush v. Kaim*, 297 F. Supp. 151, 161-63 (N.D. Ohio 1969).

⁹³ See *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1971):

We read this [section 1982] to hold that the "same right" means that race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination.

or national origin.⁹⁴ If the association sincerely desires to implement this platitude, it might provide that only those voting to exclude the prospective purchaser may be assessed for any liability arising thereafter under the civil rights acts. Not only will this provision discourage racially-motivated voting, but it will also protect the innocent member from incurring liability for illegal acts in which he took no part.

CONCLUSION

As noted, legislatures have generally remained silent on the question of the applicability of the Rule Against Perpetuities to a condominium association's right of first refusal. Consequently, that question remains for the courts to resolve. However, it appears reasonably certain that the Rule should not operate to limit the time for which the right of first refusal may exist. The courts should, instead, scrutinize the restriction by considering whether it presents an unreasonable restraint on the transfer of the unit.

Nevertheless, during the period of uncertainty surrounding the Rule's applicability, skillful draftsmen may take steps to ensure that the right will be effective regardless of the controversy's eventual outcome. Additionally, all matters incident to the restriction must be carefully considered. Needed flexibility within the provisions must be provided for the protection of both present and future owners. Finally, the ramifications of the civil rights acts as they relate to the right of first refusal must be analyzed and possible discriminatory practices arising from the exercise of such right should be taken into account.

Elliot M. Stern

⁹⁴ Bylaws, Wellesley Green (Wellesley, Mass. 1971), art. VIII, § 1, reprinted in 1A ROHAN & RESKIN app. 378.74.