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RECENT INNOVATIONS IN STATE CONDOMINIUM LEGISLATION

Although the true origin of the condominium concept is subject to speculation,¹ there is general agreement that its initial appearance in the United States and its possessions came with the passage in 1958 of the Horizontal Property Act in Puerto Rico.² Thereafter, state legislation was spurred by the provisions of section 234 of the National Housing Act of 1961,³ which authorized the Federal Housing Authority (FHA) to insure mortgages for condominium units where the condominium form of ownership had been sanctioned by state law.⁴ By 1969,⁵ all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands had passed enabling statutes.⁶

In the decade and a half following the inception of these enabling acts, there has been a phenomenal growth in the development of condominiums.⁷ This period has seen a number of problems arise, resulting in amendments to state laws in an attempt not only to ameliorate the difficulties but also to expand and improve upon the original condominium concept. It is the purpose of this note to explore some of these problem areas and to highlight various statutory approaches designed to alleviate them.⁸ Finally, some thought will be given to possible future legislative amendments.

¹ See, e.g., 25 VAND. L. REV. 271, 272 (1972), wherein the author suggests that condominiums were in existence in Biblical times. For a discussion of the status of condominiums in ancient Rome, see Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 987 n.5 (1963). Most writers agree that the condominium form of ownership existed in Europe in the Middle Ages. See Brown, *French Co-property of Apartments: A Model for English Law?*—I, 110 SOL. J. 591 (1966); Leyer, *The Ownership of Flats—A Comparative Study*, 7 INT'L & COMP. L. Q. 31, 33 (1958).

² P.R. LAWS ANN. tit. 31, §§ 1291-1293(k) (1968). This act considerably expanded a limited enabling act passed in 1951. P.R. LAWS ANN. tit. 31, § 1275 (1968).

³ 12 U.S.C. § 1715y (1970).

⁴ Subsequent to the passage of the Housing Act, the FHA drafted a model condominium statute. See U.S. FEDERAL HOUSING ADMINISTRATION, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP, FORM No. 3285 (1962), reprinted in 1A P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE App. B-3 (1973) [hereinafter cited as ROHAN & RESKIN].

⁵ Vermont, with the passage of its Condominium Ownership Act, was the last state to pass condominium legislation. VT. STAT. ANN. tit. 27, §§ 1301-1329 (Supp. 1973).

⁶ For a complete compilation of the condominium legislation of all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands, see 1A ROHAN & RESKIN App. A-1, app. 9-10.1 (1973).

⁷ See *Marketing Report: Condo Starts Soar from Coast to Coast*, 1 CONDOMINIUM REP. May 1973, at 3-4. For a brief summary of the history of the condominium boom in Florida, see R. REYNOLDS, FLORIDA CONDOMINIUMS 1-8 (1971).

⁸ For a comparison, analysis and commentary on the general provisions of the original acts, see 1 ROHAN & RESKIN, §§ 5.01-8.03 (1973).

BROADENING THE USAGE OF THE CONDOMINIUM

The Puerto Rican Horizontal Property Act and the FHA model condominium act⁹ served as prototypes for many of the state enabling acts which were passed in the early 1960's.¹⁰ As one author has noted,¹¹ many states blindly followed the provisions of the Puerto Rican act, which had been drafted to meet the needs of a crowded urban area where condominiums were intended to take the form of high-rise structures.¹² As a result of this initially narrow view of the condominium concept, questions arose as to whether the condominium form of ownership could be used in a lateral development¹³ and whether the concept could be adapted for commercial and industrial, in addition to residential, use under the enabling acts as originally drafted.¹⁴ In order to erase any doubts, a number of states have expanded their legislation to expressly permit both lateral developments¹⁵ and commercial condominiums.¹⁶ Since there is no reason for restricting the condominium form to high-rise residential developments, this is a sound course of action which has met with approval by the commentators.¹⁷

The Leasehold Condominium

Most of the original condominium statutes required that the underlying property be held in fee before it could be submitted to condominium development.¹⁸ Recently, however, a number of jurisdictions have provided for the development of condominiums on leaseholds.¹⁹

The rationale for permitting leasehold condominiums lies in the

⁹ See notes 2 & 4 *supra*.

¹⁰ See Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1110 & n.27 (1969) [hereinafter cited as Schreiber].

¹¹ *Id.* at 1109.

¹² See KERR, *Condominiums—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 4 (1963).

¹³ See generally Schreiber, *supra* note 10.

¹⁴ See 1 ROHAN & RESKIN § 5.01[2].

¹⁵ See, e.g., ARK. REV. STAT. ANN. § 33-551 (Repl. 1971); CONN. GEN. STAT. ANN. ch. 825, § 47-68 (Supp. 1973).

¹⁶ See, e.g., GA. CODE ANN. ch. 85-16B, § 85-1603b(a) (Supp. 1973); MASS. ANN. LAWS ch. 183A, § 1 (Supp. 1973).

¹⁷ See 1 ROHAN & RESKIN, § 5.01[1]-5.01[2].

¹⁸ See, e.g., N.Y. REAL PROP. LAW § 339-c(11) (McKinney 1968). It should be noted that the New York statute was recently amended to allow commercial and industrial condominiums based on a leasehold. See notes 37-39 and accompanying text *infra*.

¹⁹ See, e.g., CAL. CIV. CODE ANN. § 783 (West. Supp. 1974); FLA. STAT. ANN. § 711.08 (Supp. 1972); GA. CODE ANN. ch. 85-16B, § 85-1603b(f)(1) (Supp. 1973); MINN. STAT. ANN. § 515.02 subd. 3 (Supp. 1974); MISS. CODE ANN. § 896-03(f) (Supp. 1972); S.C. CODE ANN. § 57-495(e)(i) (Cum. Supp. 1974); VT. STAT. ANN. tit. 27, § 1302(2) (Supp. 1973); V.I. CODE ANN. tit. 28 § 901(f)(i) (Cum. Supp. 1973); NEB. LEG. B. No. 730, § 1(6)(A), (11) (March 1, 1974).

belief that additional land will be available for condominiumization which, in turn, will allow condominium units to be marketed at lower purchase prices than would be the case where condominiums were constructed only on land owned in fee.²⁰ However, with leasehold condominiums come concomitant problems for which many statutes, as they now stand, do not provide sufficient safeguards. For example, those opposing the development of leasehold condominiums are concerned that a unit owner, current in all his rental payments, might nevertheless be forced to forfeit his investment if other unit owners became delinquent, resulting in breach of the underlying ground lease.²¹

This concern has been criticized as overcautious, since the unit purchaser could be protected by a clause in the lease limiting forfeiture to only those owners who have defaulted in their payments.²² However, it is unrealistic, as a protective measure, to place the burden of safeguarding his investment on a unit purchaser naive in the intricacies of real estate transactions and unable to wade through condominium documents with sufficient sophistication to discover hidden pitfalls.²³ A provision of the recently enacted Virginia Condominium Act²⁴ appears to have taken these considerations into account by offering a protective measure designed to insure the independence of the unit purchaser. The act provides:

[A]fter the recording of the declaration, no lessor who executed the same, and no successor in interest to such lessor, shall have any right or power to terminate any part of the leasehold interest of any unit owner who makes timely payment of his share of the rent to the person or persons designated in the declaration for the receipt of such rent and who otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease.²⁵

Another potential danger inherent in the purchase of a unit in a leasehold condominium concerns the duration of the underlying ground lease held by the developer. A number of state enabling statutes permitting leasehold condominiums contain no minimum requirement on the

²⁰ See Schreiber, *supra* note 10, at 1134.

²¹ *Id.*

²² *Id.*

²³ See *Ground Leases Hide True Cost of Condo Unit*, 1 CONDOMINIUM REP., Aug. 1973, at 6-7. Cf. Rohan, *Condominium Housing: A Purchaser's Perspective*, 17 STAN. L. REV. 842 (1965) [hereinafter cited as *Purchaser's Perspective*]. It should be noted that the purchase of a condominium unit is a far more complicated transaction than the purchase of a single family residence. Often, the condominium documents can amount to nearly two hundred pages of material.

²⁴ In March of 1974, the Virginia legislature passed a new comprehensive condominium act. VA. CODE ANN. §§ 55-79.39 to -17.103 (Supp. 1974).

²⁵ *Id.* § 55-79.54(e)(3).

term of the ground lease.²⁶ Others, while requiring that the original term be for a specified number of years, contain no requirements as to the balance of time remaining on the lease when a given unit is sold to an individual unit purchaser.²⁷ Thus, a prospective purchaser, unaware of the fact that the underlying lease has only a relatively short-term remaining, might be misled into an improvident investment.

Even where the prospective purchaser is made fully aware of the leasehold rather than fee arrangement, and where a fairly lengthy term remains, the leasehold condominium may present another hazard for the purchaser. As time progresses, the unit owner may experience difficulty in reselling his unit since the unexpired term of the lease will have become substantially shorter than when he originally purchased his unit. However, there exists the valid counter-argument that the original purchase price was lower than it would have been had the condominium been built on a fee.²⁸

These and other difficulties existing under many statutes require some form of legislative solution. The recommendations of the Florida Condominium Commission²⁹ may prove helpful. Noting that leasehold arrangements had generated numerous complaints,³⁰ it was reported that:

[a] majority of the Commission are of the opinion that the ownership of a unit and a share of the common elements, which together constitute a condominium parcel, should be owned in fee simple and be unencumbered by any ground lease or leases of recreational or other commonly used facilities.³¹

However, the Commission concluded that "it is not realistic to recommend the prohibition of such leases"³² and decided, instead, to pro-

²⁶ See, e.g., MISS. CODE ANN. § 896-03(F) (Supp. 1972).

²⁷ See, e.g., FLA. STAT. ANN. § 711.08(1) (Supp. 1972) (initial term must exceed 98 years); MINN. STAT. ANN. § 515.02 subd. 14 (Supp. 1974) (initial minimum term of 50 years).

²⁸ It should be noted, however, that the prospective purchaser may have been seduced by a sales pitch to the effect that "you can't live forever" and not have given serious thought to the possibility of future resale.

²⁹ The Florida Condominium Commission was created to conduct a study of the state's condominiums and cooperatives. FLA. SESS. LAW [1972] ch. 72-171. The Commission is composed of 18 members—five owners of condominium apartments, three representatives of builders and/or developers, one person engaged in the writing of title insurance for condominiums, one member engaged in financing condominiums, four Florida attorneys, two members of the Florida House of Representatives and two members of the Florida State Senate. The Commission was instructed to file a report of its findings and recommendations to members of the legislature at least sixty days prior to the opening of the 1973 legislative session. See AMENDED REPORT OF THE FLORIDA CONDOMINIUM COMMISSION TO THE 1973 SESSION OF THE FLORIDA STATE LEGISLATURE, 1 and Exhibit B (1973) [hereinafter cited as FLORIDA REPORT].

³⁰ *Id.* at 4.

³¹ *Id.*

³² *Id.*

mulgate a number of suggested legislative amendments designed "to safeguard the position of the unit owners under these leases as much as possible."³³ Among the suggested amendments is a requirement that there be an unexpired term of fifty years or more on the underlying lease,³⁴ and a provision, similar to the one enacted in Virginia,³⁵ that no lien shall attach, nor shall the lease be terminated, as to any unit whose owner is current in his payments.³⁶

Another approach to the problems surrounding leasehold condominiums has been suggested by the New York legislature.³⁷ Until recently, leasehold condominiums were prohibited under the New York enabling act.³⁸ A recent amendment allows the development of a condominium on a leasehold, provided the structure is for commercial or industrial use.³⁹ This approach would appear to be based on the proposition that the need for buyer protection is lessened when the purchaser is a commercial enterprise.⁴⁰ Such vendees are schooled in the ways of the business world and generally have the counsel of attorneys and accountants in evaluating a proposed investment.

Reallocation of Unit Area

Consistent with the trend of expanding the uses to which the condominium form of ownership may be put, several states have passed bills permitting the subdivision and consolidation of condominium units.⁴¹ This flexibility is especially useful in the area of commercial projects. For example, under these provisions, the owner of a large unit in a shopping center condominium could subdivide his unit and sell these smaller units to other business entities. Thus, commercial and

³³ *Id.*

³⁴ *Id.* at Exhibit D, proposed amend. to § 711.08. The proposed fifty-year term is to be in addition to the existing requirement that the property be held under a lease with an original term in excess of 98 years. See note 27 *supra*.

³⁵ See VA. CODE ANN. § 55-79.54(e)(3) (Supp. 1974). See text accompanying note 25 *supra*.

³⁶ FLORIDA REPORT, *supra* note 29, at Exhibit D, proposed § 711.53(4) & (5).

³⁷ N.Y. SESS. LAWS [1974], ch. 1056, § 1 (McKinney).

³⁸ Under the New York act, property was defined to include "the land, the building and all other improvements thereon, owned in fee simple absolute . . ." (emphasis added). N.Y. REAL PROP. LAW § 339-e(11) (McKinney 1968).

³⁹ The recent amendment also requires that the lease have a minimum term of thirty years. N.Y. SESS. LAWS [1974], ch. 1056, § 1 (McKinney). See N.Y. Times, Feb. 3, 1974, sec. 8 (Real Estate), at 6, col. 6; 171 N.Y.L.J. 23, Feb. 1, 1974, at 1, col. 6.

⁴⁰ This conclusion is supported by the fact that commercial and industrial condominiums are exempted from some of the protective regulatory measures under the new Virginia legislation. See VA. CODE ANN. § 55-19.87 (Supp. 1974).

⁴¹ See MD. ANN. CODE art. 21, § 11-107(D) (Supp. 1974); Neb. Leg. B. No. 730, § 8 (March 1, 1974); Ky. H.B. No. 223, § 16 (April 1, 1974). These bills also provide machinery for the reallocation of percentage interests resulting from any action taken under these sections.

industrial enterprises would have the ability to expand or contract their units in accordance with their business needs.

The most liberal of these statutes, recently passed by the Maryland legislature, permits, unless otherwise provided in the bylaws, the consolidation and subdivision of units without the consent of the council of unit owners.⁴² Only the removal of a wall in order to consolidate two adjacent units requires the consent of the council of unit owners.

Nebraska⁴³ and Kentucky⁴⁴ have adopted similar provisions. Under both statutes, however, the approval of the council of unit owners is required before any reallocation of unit area. The effect that such requirements will have on the usefulness of these sections remains to be seen.

These various amendments represent a substantial move toward greater ease in the formation and administration of commercial condominiums and provide the flexibility greatly needed if condominiums are to be effective for commercial and industrial enterprises.

THE ROLE OF THE DEVELOPER IN THE CONDOMINIUM VENTURE

The developer of the fledgling condominium has a substantial interest in the success of the venture, and, therefore, often seeks to play a significant role in the direction of its affairs. However, revelations of developer abuses⁴⁵ have caused a number of states to amend their statutes to more strictly regulate certain developer activities and transactions.

Deposits

Misuse of a buyer's deposit money is one area that has drawn legislative attention. Frequently, a developer may be tempted to accept deposit money and use it for his own purposes, such as financing part of the construction. If the project fails, the buyer will either lose his deposit or, at best, have it returned, with the developer retaining any income generated by it.

Virginia and Florida have amended their statutes to protect a

⁴² MD. ANN. CODE art. 21, § 11-107(D)(3) (Supp. 1974).

⁴³ The Nebraska law makes the approval of three-fourths of the co-owners a prerequisite to any subdivision or consolidation of unit area unless otherwise provided for in the bylaws or master deed. Neb. Leg. B. No. 730, § 8 (March 1, 1974).

⁴⁴ Under the Kentucky statute, the approval of a majority of the unit owners is needed before consolidation or subdivision is permitted, unless the master deed provides otherwise. No provision is made in this amendment for the consolidation of units. Ky. H.B. No. 223, § 16 (April 1, 1974).

⁴⁵ See Dickinson, *Clouds Speckle the Condominium Horizon*, N.Y. Times, Sept. 23, 1973, § 8 (Real Estate), at 1, col. 1.

purchaser's deposit.⁴⁶ The Virginia statute imposes a complete bar on use of the deposit:

Any deposit made in regard to any disposition of a unit, including a nonbinding reservation agreement, shall be held in escrow until delivered at settlement. Such escrow funds shall be deposited in a separate account designated for this purpose . . . Such escrow funds shall not be subject to attachment by the creditors of either the purchaser or the declarant.⁴⁷

The Florida provision prohibits commingling of deposit money with other funds, and requires that the money be held in escrow.⁴⁸ The developer is barred from using the money to defray construction costs unless the contract of sale so provides,⁴⁹ in which case a notice to that effect must be clearly printed on the face of the contract.⁵⁰

The Florida provision is better suited to meet contemporary needs because it allows for a greater degree of flexibility.⁵¹ Small developers may be unable to operate without use of purchaser deposit money, and parties to a condominium purchase agreement should be allowed to contract to permit such use. Of course, the obligation should remain on the developer to make a purchaser aware of the intended use of his deposit.⁵²

Maintenance, Management and Recreational Facility Contracts

During the infancy of a condominium, the developer who holds a number of unsold units usually occupies an influential position on the board of directors.⁵³ Often, developers have used this advantageous arrangement to enter into "sweetheart" management contracts with the condominium.⁵⁴ These developer abuses have taken a variety of forms.

⁴⁶ VA. CODE ANN. § 55-79.95 (Supp. 1974); FLA. STAT. ANN. § 711.25 (Supp. 1973).

⁴⁷ VA. CODE ANN. tit. 55, ch. 4.2 § 55-79.95 (Supp. 1974).

⁴⁸ FLA. STAT. ANN. § 711.25(1) (Supp. 1973).

⁴⁹ *Id.* § 711.25(2).

⁵⁰ *Id.* The statute requires that the following legend be printed on the face of the contract and immediately above the place for the buyer's signature: "ADVANCE PAYMENTS MADE PURSUANT TO THIS CONTRACT MAY BE USED FOR CONSTRUCTION PURPOSES BY THE DEVELOPER." *Id.*

⁵¹ *But see* Note, *Florida Condominiums—Developer Abuses and Securities Law Implications Create a Need For a State Regulatory Agency*, 25 U. FLA. L. REV. 350, 358 (1973) [hereinafter cited as *Developer Abuses*].

⁵² *See* note 50 and accompanying text *supra*.

⁵³ *See Purchaser's Perspective*, *supra* note 23, at 849. The author points out that: the developer will be in a position to elect the entire board of managers until most units have been sold. Since cumulative voting is seldom, if ever, prescribed for association meetings, purchasers will be unable to elect a single member of the board of managers when an opposition slate is supported by the builder in possession of several votes.

Id.

⁵⁴ *See* Dickinson, *Clouds Speckle the Condominium Horizon*, N.Y. Times, Sept. 23,

For example, the developer may construct recreational facilities on property adjacent to the condominium and rent them under a long-term lease at an exorbitant rate. Or, the developer (or a related corporation) may enter into a long-term management and/or maintenance contract whereby he contracts to handle the everyday operations of the condominium. Frequently, these contracts call for fees far in excess of the value of the services performed.

Among those states which have attempted to curb such abuses, Virginia and Florida have again taken the lead.⁵⁵ Virginia's original attempt to thwart these practices called for prohibiting the developer from entering into any management contract with the condominium which would exceed a period of five years.⁵⁶ However, this provision, founded upon a presumption that all management contracts between a developer and the condominium were abusive, was too rigid. Limiting such contracts to no more than five years may have deprived unit owners of beneficial management contracts which developers might only have been willing to enter into under the security of long-term arrangements. Accordingly, the Virginia legislature adopted a more flexible approach. Under the new provision, no management contract, lease of recreational facilities or other contract or lease which is entered into by the association of unit owners, while the association is under the control of the developer, is binding upon the association after the unit owners have assumed control "unless then renewed or ratified with the consent of unit owners of units to which a majority of the votes in the unit owners' association appertain."⁵⁷

This approach is similar in effect to one adopted by the Florida legislature in 1970. Under the Florida statute, there is no limitation as to the length of time a management contract may run. However, the statute provides that any initial contract entered into by the original condominium association shall be subject to cancellation at any time after the individual unit owners assume control, upon the concurrence of 75 percent of the unit owners.⁵⁸

1973, § 8 (Real Estate), at 1, col. 1. These abuses have prompted the Connecticut legislature to amend the section of the statute dealing with the election of a board of directors in order to regulate the ability of the developers to place outsiders on the board. See CONN. GEN. STAT. ANN. § 47-80(b)(1) (Supp. 1973).

⁵⁵ See VA. CODE ANN. § 55-79.21:2 (Supp. 1973); FLA. STAT. ANN. § 711.13(4) (Supp. 1972).

⁵⁶ VA. CODE ANN. § 55-79.21:2 (Supp. 1973).

⁵⁷ VA. CODE ANN. § 55-79.74(b) (Supp. 1974).

⁵⁸ FLA. STAT. ANN. § 711.13(4) (Supp. 1972). The section also makes provision for cancellation of management contracts that apply only to one building in a multi-building condominium, and for contracts that apply to the whole of a multi-building project. Another statute, similar to Florida's, which requires affirmative action by the

The current Virginia and Florida statutes provide a more beneficial solution than did the earlier Virginia enactment, for unit owners can evaluate for themselves the merits of a management contract. If the contract is unfair to the association, there should be little trouble in getting the votes necessary for rescission. Furthermore, the association may free itself of an unconscionable contract immediately upon gaining control, without having to labor under it for a number of years. On the other hand, if the contract is advantageous, the association will be able to reap the full benefit of it, with no statutory limitation on its duration.

In the area of leased recreational facilities, the Florida Condominium Commission has suggested a number of legislative amendments to deal with developer abuses.⁵⁹ One recommended provision would require that: 1) rent under a lease of a recreational facility would "not commence until some of the facilities are completed";⁶⁰ 2) the lease shall state the number of units the recreational facility is to serve;⁶¹ 3) any provision in the lease granting a right to use the facilities to anyone other than a unit owner is subject to cancellation by the unit owners;⁶² 4) the rental for the facility shall be a fixed sum and may only be adjusted every ten years to reflect actual cost of living increases;⁶³ and 5) all leases of recreational facilities must contain an option to purchase at certain intervals which may be exercised by a vote of 75 percent of the unit owners.⁶⁴

Disclosure

In other attempts to frustrate developer abuses and protect consumers, at least two states have amended their statutes to require full disclosure by a developer to his prospective unit purchaser.⁶⁵ The Illinois statute requires that, on the initial sale or offering for sale of a condominium unit, the "seller must make full disclosure of, and provide

unit owners to void the contract can be found in a recent addition to the Maryland law giving the unit owners three years after the developer loses control of the council in which they may terminate any lease or contract the council of unit owners entered into before such time. MD. ANN. CODE art. 21, § 11-125 (1974).

⁵⁹ The Commission was philosophically opposed to such leases but declined to recommend they be abolished for fear that such a recommendation would jeopardize the rest of the report. See text accompanying notes 29-33 *supra*; FLORIDA REPORT, *supra* note 29, at 4.

⁶⁰ FLORIDA REPORT, *supra* note 29, at Exhibit D, proposed § 711.53(6).

⁶¹ *Id.* § 711.53(3).

⁶² *Id.* § 711.53(2). For the method of cancellation, see note 58 and accompanying text *supra*.

⁶³ *Id.* § 711.53(7).

⁶⁴ *Id.* § 711.53(8)(a) & (b).

⁶⁵ See FLA. STAT. ANN. § 711.24 (Supp. 1972); ILL. ANN. STAT. ch. 30, § 322 (Smith-Hurd 1973).

copies to the prospective buyer of . . . information relative to the condominium project."⁶⁶ The documents required to be provided to the prospective purchaser include copies of the declaration and bylaws, a projected operating budget for the unit, including estimated monthly charges, and a floor plan of the unit.⁶⁷ This material, if available, must be provided to the purchaser before execution of the contract of sale.⁶⁸ If the information is unavailable prior to sale, the contract is voidable at the buyer's option until five days after the receipt of the last required item or the closing, whichever occurs sooner.⁶⁹ After the contract of sale has been executed, no material amendment which in any way affects the value of the unit or the rights of the buyer can be made without approval of 75 percent of the unit owners.⁷⁰ Further, the statute provides that the buyer can rescind the contract and have his deposit, along with any accrued interest, returned to him at any time before closing if the seller has failed to fully disclose.⁷¹

The Florida disclosure provision⁷² is substantially similar in scope to the Illinois statute. However, the Florida statute is more comprehensive and will probably better protect the purchaser. In addition to providing that the seller must supply those documents required by the Illinois law, Florida goes further by insisting that the purchaser be presented with a floor plan which specifically points out those common elements owned by the condominium as opposed to the elements held under a lease.⁷³ The Florida provision also differs from the Illinois scheme in that no amendment of the documents can be made which substantially affects the rights of the buyer or the value of the unit without the buyer's approval.⁷⁴

Another significant change contained in the Florida provision relates to the buyer's rights when information is unavailable at the time of execution of the contract of sale. The Florida law allows the buyer to void the contract until fifteen days after the last item is furnished, with the further stipulation that the last piece of information be supplied at least ninety days prior to the closing of the sale.⁷⁵ This arrangement is far superior to the Illinois plan in that it gives the prospective

⁶⁶ ILL. ANN. STAT. ch. 30, § 322 (Smith-Hurd 1973).

⁶⁷ *Id.* § 322(a)-(d).

⁶⁸ *Id.* § 322.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² FLA. STAT. ANN. § 711.24 (Supp. 1972).

⁷³ *Id.* § 711.24(1)(g).

⁷⁴ *Id.* § 711.24(2).

⁷⁵ *Id.*

purchaser the time necessary to scrutinize the voluminous material involved — something which could not be achieved in a period as short as five days.

The Florida statute also provides a remedy to a buyer in the event he reasonably relies on a misrepresentation made by a seller. In such a case, the buyer, until the time of closing, may bring an action to rescind the contract or collect damages.⁷⁶ After closing, the buyer's remedy is limited to an action for damages.⁷⁷ The statute also provides for a statute of limitations of one year after the occurrence of any one of a number of specified events,⁷⁸ with a maximum limit of five years from the date of closing.⁷⁹

It is submitted that while these disclosure requirements are a step in the right direction and do afford the purchaser a degree of protection, they are insufficient.⁸⁰ The primary inadequacy of the Illinois and Florida statutes is that they place the burden of protection upon the buyer himself.⁸¹ The statutes insure that the buyer is supplied with all relevant information concerning the project, but they leave it to him to determine if the purchase is a sound investment. Considering the bulk of material to be digested and the legal complexities involved, it is, at best, a difficult task for the purchaser, even with the aid of an attorney, to fully evaluate the merits of a project.⁸²

Perhaps a more effective way to regulate condominiums is through the establishment of a regulatory agency.⁸³ In creating such an agency, care must be taken to insure that the regulations which are imposed are not so onerous as to discourage developers from employing the condominium form, while at the same time providing protection of

⁷⁶ *Id.* § 711.24(3).

⁷⁷ *Id.*

⁷⁸ *Id.* The buyer can bring an action for damages any time within one year after the date upon which the last of these events occur: a) the closing of the transaction; b) the issuance of a certificate of occupancy or other evidence of substantial completion of construction; c) the completion by the seller of all common elements or other facilities which he is required to complete under the contract; d) the completion by the seller of any facility he is required to complete under any rule of law.

⁷⁹ *Id.* A recent Maryland enactment is substantially similar to the Florida statute in all particulars except the time allowed for the potential buyer to scrutinize the condominium documents. It requires all documents be furnished the buyer only 15 days prior to closing and although any material amendment to these documents is subject to buyer's approval, the buyer is given only five days in which to make his decision to rescind. MD. ANN. CODE art. 21, § 11-124 (1974).

⁸⁰ See *Developer Abuses*, *supra* note 51, at 358-59.

⁸¹ *Id.* at 359.

⁸² *Cf. Purchaser's Perspective*, *supra* note 23.

⁸³ See *Developer Abuses*, *supra* note 51, at 365-67. It should be noted that a number of states regulate condominiums when the condominium constitutes a security under the state's blue sky law. See *Special Report: Blue Sky Regulation of Condominiums — The Disclosure States*, 1 CONDOMINIUM REP., Oct. 1973, at 4-5.

buyers' interests.⁸⁴ This necessitates giving the agency power to evaluate condominium projects, inspect project documents and sites to insure compliance with both the legislation and regulations promulgated thereunder, and serve as a grievance body to hear and investigate complaints.⁸⁵

The Florida Condominium Commission was empowered to study, *inter alia*, "the need or feasibility of a state regulatory agency regarding condominiums."⁸⁶ However, the Commission felt unable to fully and properly appraise the merit of such an agency in the time allotted, and so, while indicating that it favored the establishment of such an agency, recommended further study before any action be taken.⁸⁷

More recently, the Virginia legislature, in enacting its comprehensive new enabling act, established the Virginia Real Estate Commission (the "Agency")⁸⁸ empowering it to regulate the development and sale of condominiums in that state. The act requires that no condominium be offered for sale or lease in Virginia until it has been registered with the Agency.⁸⁹ Furthermore, the Agency is authorized to 1) "prescribe reasonable rules," including regulation of advertising standards and provisions "to assure full and fair disclosure;"⁹⁰ 2) bring an action to enjoin developer activity deemed to be in contravention of the statute or the Agency's rules;⁹¹ 3) perform investigatory functions in order to, *inter alia*, insure that "all proposed improvements will be completed as represented;"⁹² 4) issue cease and desist orders to prevent an individual from engaging in an illegal practice;⁹³ and 5) revoke a

⁸⁴ *Developer Abuses*, *supra* note 51, at 365. See FLORIDA REPORT, *supra* note 29, at 2-3. See also Schreiber, *supra* note 10, at 1155. For examples of the structures of regulatory agencies as they presently exist in some states, see CAL. BUS. & PRO. CODE § 11001 (West 1964); HAWAII REV. STAT. §§ 514-1 to -55 (Supp. 1973). For a report on the status of the New York system of regulation, see Note, *New York Regulation of Condominiums*, *supra*.

⁸⁵ See *Developer Abuses*, *supra* note 51, at 366, wherein the author also suggests empowering the regulatory agency to seek injunctive relief against abuses of state statutes, and allowing the agency to promulgate rules and regulations. *Id.* at 366-67.

The Florida Condominium Commission, on the other hand, suggests that the agency should not be empowered to set down rules and regulations for fear that this would be overly burdensome on developers and discourage them from using the condominium form. See FLORIDA REPORT, *supra* note 29, at 2-3. As an alternative, the Commission recommends that the regulatory agency serve in an advisory capacity, proposing new legislation where appropriate, and educating and informing the public as to the rights and responsibilities of condominium ownership. *Id.* at 3.

⁸⁶ FLA. SESS. LAWS [1972], ch. 72-171(3)(1)-(a).

⁸⁷ See FLORIDA REPORT, *supra* note 29, at 2-3.

⁸⁸ VA. CODE ANN. § 55-79.86 (Supp. 1974).

⁸⁹ *Id.* § 55-79.88(a).

⁹⁰ *Id.* § 55-79.98(a).

⁹¹ *Id.* § 55-79.98(c).

⁹² *Id.* § 55-79.91(b).

⁹³ *Id.* § 55-79.100.

registration if the developer has "made intentional misrepresentations or concealed material facts in an application for registration."⁹⁴

The Virginia enactment is a laudable approach to protection of prospective purchasers of condominium units. It is to be hoped that other states will follow its lead.

POWERS AND DUTIES OF THE ASSOCIATION OF UNIT OWNERS

Because common ownership is inherent in the condominium concept, all state enabling acts contain provisions relating to management.⁹⁵ Most statutes call for the formation of an organization of unit owners, under one designation or another,⁹⁶ which is required to make various decisions affecting the project and to take appropriate action in accordance with the bylaws and declaration.⁹⁷ Recent statutory amendments have been directed toward the powers and duties of this body.

Tax Protests

Assessing real estate taxes to be paid by a condominium unit owner has been an area of some difficulty.⁹⁸ Two recent statutory amendments⁹⁹ allow an association of unit owners to "appeal from any decision of the local board of tax review on behalf of all owners of the property . . ." ¹⁰⁰ Such provisions are helpful in that they allow the costs of the appeal to be spread among the unit owners as common expenses,¹⁰¹ rather than force a single unit owner to bear the entire financial burden.

⁹⁴ *Id.* § 55-79.101(a)(5). The registration may also be revoked if the declarant has 1) failed to comply with a cease and desist order issued by the agency; 2) been convicted of fraudulent practices in a real estate transaction subsequent to the filing of the registration; or 3) misused the funds of unit purchasers. *Id.* § 55-79.101(a)(1)-(4).

⁹⁵ See 1 ROHAN & RESKIN § 5.04.

⁹⁶ Although the organization of unit owners may be called "council of co-owners," "association of apartment owners," or "association of unit owners," the functions of each are the same. *Id.*

⁹⁷ *Id.*

⁹⁸ For a discussion of some of the tax problems in the area of condominiums, see Note, *Condominium Unit Real Estate Tax Assessment Problems*, *supra*.

⁹⁹ CONN. GEN. STAT. ANN. ch. 825, § 47-89(b) (Supp. 1973); ILL. ANN. STAT. ch. 30, § 310 (Smith-Hurd 1973).

¹⁰⁰ CONN. GEN. STAT. ANN. ch. 825, § 47-89(b) (Supp. 1973). This section also provides that the association of unit owners may incorporate. *Id.* § 47-89(a). This is typical of recent legislative thinking in the area. For a discussion of the merits and drawbacks of incorporation, see Knight, *Incorporation of Condominium Common Areas? An Alternative*, 50 N.C.L. REV. 1 (1971); Note, *Condominiums: Incorporation of the Common Elements — A Proposal*, 23 VAND. L. REV. 321 (1970).

¹⁰¹ The Illinois statute specifically provides that all expenses incurred in connection with such an appeal are to be charged and collected as common expenses. ILL. ANN. STAT. ch. 30, § 310 (Smith-Hurd Supp. 1973). This writer feels that the same results are achieved under the Connecticut statute.

Duty to Keep Unit Owners Informed

A statutory amendment to the Florida act, representative of provisions found in other statutory enactments, requires that the association maintain accounting records available for inspection by unit owners at reasonable times.¹⁰² The required data include records of all receipts and expenditures,¹⁰³ as well as an account for each unit.¹⁰⁴ The association is also required to issue written summaries of this information to all unit owners at least annually.¹⁰⁵

Remedies Against Delinquent Owners

Enforcement of bylaws of a condominium association is essential to the smooth operation of the project. An amendment to the Illinois act provides that if the declaration and bylaws so provide, the board of managers "may maintain for the benefit of all the other unit owners an action for possession" of a unit under that state's forcible entry and detainer statute whenever the owner is in default on any of his obligations under the condominium act, declaration, bylaws or house rules.¹⁰⁶

This approach is beneficial in that it provides the association with an effective means of insuring compliance with its rules and regulations. As one writer has noted, "[t]he threat of an immediate loss of the unit owner's right to possession appears to be a very serious threat that would, in all probability, be heeded by a reasonable owner."¹⁰⁷

Authorization of a Blanket Mortgage

A 1973 amendment to the Alabama statute authorizes a blanket mortgage covering the entire condominium project.¹⁰⁸ Such provision should prove helpful in the original financing of condominium developments.¹⁰⁹ However, it has been noted that this legislation does not

¹⁰² FLA. STAT. ANN. § 711.12(7) (Supp. 1972).

¹⁰³ *Id.* § 711.12(7)(a).

¹⁰⁴ *Id.* § 711.12(7)(b). See also MD. ANN. CODE art. 21, § 11-113 (1974).

¹⁰⁵ *Id.* § 711.12(7). The Florida Condominium Commission has suggested that these summaries should be issued at least semi-annually. See FLORIDA REPORT, *supra* note 29, at Exhibit D, proposed amend. to § 711.12(7).

¹⁰⁶ ILL. ANN. STAT. ch. 30, § 309.2 (Smith-Hurd Supp. 1973).

¹⁰⁷ Note, *Recent Changes in the Illinois Forcible Entry and Detainer Act Regarding Condominium Property*, 49 CHI.-KENT L. REV. 200, 204 (1972). See Note, *Promulgation and Enforcement of House Rules*, *infra*.

¹⁰⁸ ALABAMA LAWS [1973], ch. 1059 provides in part:

Notwithstanding any other provision of this chapter, if the declaration or bylaws so permit, the entire condominium property or some or all of the units included therein may be subject to a single or blanket mortgage constituting a first lien thereon created by a recordable instrument by all of the units covered thereby; and any unit included under the lien of such mortgage may be sold or otherwise conveyed or transferred subject thereto.

¹⁰⁹ See *A Condominium First: Legislation Authorizing a Blanket Condominium*

provide a facile means for financing capital improvements since the statute requires that the blanket mortgage be a first lien, a situation which can only occur where all units are free and clear, or where the individual unit mortgages contain subordination clauses.¹¹⁰

EMINENT DOMAIN AND THE CONDOMINIUM

The problem of whole or partial takings of condominium units or common elements by condemnation proceedings is another matter that has been treated recently by state legislatures.¹¹¹ Two major approaches to this problem have emerged. One of these methods is exemplified by the Kentucky statute, which merely permits provisions relating to the appropriation of condominium property by eminent domain to be included in the master deed.¹¹² The more favorable approach to the problem has been taken in the Virginia law, which provides a detailed method "to be used in determining a reallocation of unit owners' percentage interests and the distribution of compensation in the event that all or part of the condo[mini]um's land is taken by the state."¹¹³

A new Maryland statute¹¹⁴ combines the two approaches. It sets up a mechanism, similar to that provided in the Virginia act, to be followed in the event of taking of condominium property by eminent domain. But it further provides that much of the statutory machinery will only be triggered if the matter is not otherwise provided for in the declaration or bylaws.

Mortgage, 1 CONDOMINIUM REP., Jan. 1974, at 5-6. It should be noted that it was error to refer to the Alabama statute as "a condominium first." A substantially similar statute was passed by the New Jersey legislature in 1969. See N.J. STAT. ANN. § 46:8B-23 (Supp. 1973).

¹¹⁰ See *A Condominium First: Legislation Authorizing a Blanket Condominium Mortgage*, 1 CONDOMINIUM REP., Jan. 1974, at 5-6.

¹¹¹ Ky. H.B. No. 223, § 4 (April 1, 1974); MD. ANN. CODE art. 21, § 11-112 (1974); VA. CODE ANN. § 55-79.44 (Supp. 1974).

¹¹² Ky. H.B. No. 223, § 4 (April 1, 1974).

¹¹³ U.S. REAL ESTATE WEEK, March 25, 1974, at 16. The Virginia statute provides that 1) if any portion of the common elements is taken by eminent domain, the condemnation award is to be allocated to the unit owners in accordance with their undivided interests in the common elements; 2) if a unit be condemned, the undivided interest of that unit in the common elements shall appertain to the remaining units in proportion to their respective undivided interests in the common elements; 3) if part of a unit is taken, a portion of the undivided interests in the common elements appertaining to that unit will be divested from the unit and reallocated among the other units; 4) if a portion of a unit is taken and such taking renders the remaining portion useless, the remaining portion shall henceforth be a common element and the entire undivided interest in the common elements appertaining to such unit shall be allocated to the remaining units; and 5) votes in the unit owners association, liabilities for common expenses and rights to profits appertaining to any condemned unit shall henceforth be allocated to the remaining units. VA. CODE ANN. § 55-79.44 (Supp. 1974).

¹¹⁴ MD. ANN. CODE art. 21, § 11-112 (1974).

CONCLUSION

The condominium concept came upon the American scene rather rapidly with the flurry of state enabling acts in the early 1960's. In a land-tight and inflationary economy, the concept has received overwhelming approval by the American home purchaser as well as other prospective real estate investors.

At the same time, however, a number of difficulties with the condominium form of ownership have arisen as a result of shortcomings in the early statutes. A few jurisdictions have taken significant steps to cure defects in their legislation. At the same time, some states have had enough foresight to enact new provisions dealing with previously ignored areas. Legislation at the federal level, also addressed to some of these problems, may be forthcoming in the near future.¹¹⁵

A number of areas are still inadequately treated in the statutes. Questions involving the liability of a unit owner in tort,¹¹⁶ eminent domain,¹¹⁷ obsolescence, and destruction¹¹⁸ remain confused and re-

¹¹⁵ See H.R. 15071, 93d Cong. 2d Sess. (1974).

¹¹⁶ Because a unit owner holds an undivided interest in the condominium's common areas, he is potentially liable for injuries to others sustained therein. See Rohan, *Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance*, 32 LAW & CONTEMP. PROB. 305 (1967). The nature and extent of such liability should be defined and limited through legislative enactments. Some states have done so. The approaches used to accomplish this end have varied. For a discussion of some of them, see *id.* at 309-11. More recently, incorporation of the common elements has been proposed as a means of limiting the unit owner's personal liability. For a discussion of this approach see the material cited in note 100 *supra*.

The need for legislative action in this area is made manifest by the holding in *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971). There, a unit owner was allowed to bring a tort action against the association of unit owners when he was injured as a result of negligence in the maintenance of the common areas. For a more detailed discussion of the holding in that case, see *White v. Cox: Tort Actions Against the Condominium Association—Implications for the Individual Owner*, 8 CALIF. W.L. REV. 536 (1972). The *White* decision, if followed, will greatly increase the potential liability of a unit owner since fellow unit owners will be allowed to bring suit, and they are the ones most frequently in contact with the common elements and, thus, most likely to be injured.

¹¹⁷ For an account of the myriad fact situations and legal difficulties which may arise should all or part of a condominium project be taken by condemnation, see Rohan, *Drafting Condominium Instruments: Provisions for Destruction, Obsolescence and Eminent Domain*, 65 COLUM. L. REV. 593, 614-23 (1965). Professor Rohan points out that most enabling acts have been concerned primarily with the formation and operation of the condominium, leaving problems as to its termination and dissolution to a large extent untreated. *Id.* at 593.

¹¹⁸ Professor Rohan has noted that a number of problems exist where all or part of a condominium project is destroyed by casualty or where, through the passage of time, parts of the project become obsolete and capital repairs are needed. *Id.* at 595-613. For example, he feels that the requirement contained in certain statutes that decisions as to repair and replacement after a casualty loss be made within a stated time period (usually 90 days), is too rigid, and suggests that a more flexible approach be adopted. *Id.* at 599.

Another problem cited by Professor Rohan is the lack of capital to finance major

quire legislative attention. Areas such as warranties of fitness and habitability should be considered.¹¹⁹ Finally, the submission of condominiums to regulation under a state agency should be seriously studied.

The condominium in the United States is a creature of statute. The power to make it as viable a tool as possible lies in the hands of the state legislatures. Some have acted with more alacrity than others in meeting this challenge.¹²⁰

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repair of facilities which have become obsolete. *Id.* at 612. To alleviate this problem, it is suggested that the association of unit owners purchase cost of replacement insurance and/or establish a sinking common fund by assessing the unit owners a given amount each month in order to build up a capital account which would then be available to finance the needed repairs. The amount of the monthly assessment could be decreased as the fund grows. *Id.* Perhaps legislation requiring the use of such practices would be in order, especially when dealing with conversions of existing apartment buildings into condominiums since these buildings are often old and likely to need major repairs.

It should be noted that many of the statutes provide that, upon destruction of most of the units, the decision whether or not to repair is to be made by a vote of the unit owners. *See, e.g.*, MISS. CODE ANN. § 896-18 (Supp. 1972); OKLA. STAT. ANN. tit. 60, § 527 (1971). If the owners decide not to repair, the condominium must be dissolved and the development sold. *See, e.g.*, FLA. STAT. ANN. § 711.16,17 (1969); N.Y. REAL PROP. LAW § 339-t (McKinney 1968). One author has observed that while this procedure may be appropriate in a high-rise condominium,

[i]n a lateral development, . . . where the units are physically separate, the development can continue to operate even though the destroyed units are not restored. It is therefore unnecessary to bind the fortunes of all the unit owners to one another, and to penalize the owners of undamaged units by requiring them to pay for the reconstruction of units which do not belong to them.

Schreiber, *supra* note 10, at 1148. Legislative action should be taken to correct the inflexible position that unit owners must either decide to rebuild or terminate the condominium. *Id.* at 1159.

¹¹⁹ Implied warranties of fitness and merchantability on the sale of new homes is an emerging area of the law. *See, e.g.*, Rutledge v. Dodenhoff, 254 S.C. 407, 176 S.E.2d 792 (1970); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (1970); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970). In the recent case of Gable v. Silver, 258 So. 2d 11, *aff'd*, 264 So. 2d 418 (Fla. 1972), the court held that the implied warranty of fitness and merchantability should be extended to cover the purchase of a new condominium unit from a developer. At the same time, the Florida Condominium Commission has recommended passage of an amendment to the Florida statute which would expressly grant these warranties. *See* FLORIDA REPORT, *supra* note 29, at Exhibit D, proposed § 711.55.

The Virginia statute now requires that the developer issue a one-year warranty against structural defects in his units. VA. CODE ANN. § 55-79.79(b) (Supp. 1974).

¹²⁰ Of course, the need for innovation has been more pressing in some jurisdictions than in others. For example, the booming land development industry in Florida over the years clearly demanded that an investigatory commission be set up to revise legislative policy. But while the Florida legislature deliberates on the Commission's recommendations, Virginia has jumped ahead of the field with a brand new statute, which may prove to be the first of the second-generation condominium statutes. "Professor Rohan has termed the act 'the most comprehensive condominium statute passed to date.'" U.S. REAL ESTATE WEEK, March 25, 1974, at 16. Aside from the provisions already treated, the Virginia legislation deals with problems concerning zoning, nondisturbance clauses in leasehold condominiums, and no contiguous condominiums.