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New York Regulation of Condominiums

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NEW YORK REGULATION OF CONDOMINIUMS

Purchasers of condominium units often assume that state and federal agencies will protect them from unscrupulous practices by developers, only to later learn that the mere inclusion of a particular term in a "thick booklet of fine legal print" satisfies all of the regulatory requirements.¹ These misconceptions occur despite painstaking efforts to inform buyers of the limited role of state authorities.²

¹ N.Y. Times, Jan. 27, 1974, § 1, at 1, col. 4.

In response to a comment made by Assistant Attorney General David Clurman in defense of the New York scheme of condominium regulation, one unit owner wrote:

The rights of unit owners, which Mr. Clurman asserts are protected by the condominium act and the blue sky laws, do not, for all practical purposes, exist. The buyer of a condominium unit or any other form of joint ownership in land should be aware that the attorney general's office is unable to assist any buyer in enforcing the rights which the documents registered with the attorney general grant him. . . .

I am disgusted with Mr. Clurman for asserting that by requiring full disclosure the attorney general's office insures and protects the rights of unit owners.

Letter to the Editor from Mrs. Ernest Gans, N.Y. Times, Nov. 19, 1972, § 8, at 10, col. 4. The author of the letter had complained that the developer refused to hold the first annual meeting and that the building was not administered by a duly elected board of managers. *Id.* It is interesting to note that an individual with the same name and residing in the same locale was a defendant in an action by the board of managers to recover for delinquent charges some five months earlier. See *Board of Managers v. Gans*, 72 Misc. 2d 726, 340 N.Y.S.2d 826 (N.Y.C. Civ. Ct. 1972). Mr. Clurman had previously contrasted state regulation of condominiums with that of homeowners' associations. N.Y. Times, Nov. 5, 1972, § 8, at 10, col. 1.

Countering the unit owner's attack, Mr. Clurman drew an analogy to the publicly held corporation where stock issues are heavily regulated, but the rights of the individual shareholders must be privately enforced. Letter to the Editor from David Clurman, N.Y. Times, Nov. 26, 1972, § 8, at 8, col. 6. Mr. Clurman did not contradict Mrs. Gans' conclusions:

The law requires full disclosure of the details of the offerings but they do not suggest that the attorney general's office or any other agency govern the internal operation of condominiums or homeowners' associations once they are formed. Once an organization is formed the participants themselves, as owners, are responsible for self-government. . . .

Id.

In contrast to the complaints of Mrs. Gans, another unit owner had more favorable words for the Attorney General's office:

I will not linger over the problems common to all buyers of new homes except to say that we, too, had punch-list items that were never corrected. And our roofs leaked. Only after the Attorney General's office stepped in were we able to collect from our builder to pay for decent roofing.

Sanders, *Condominium Life Can Present Unexpected Challenges*, N.Y. Times, Apr. 8, 1970, § 8, at 34, col. 1.

² The outside cover of the offering plan must contain the following statement in 10 point type:

THE ATTORNEY-GENERAL OF THE
STATE OF NEW YORK DOES NOT PASS
ON THE MERITS OF THIS OFFERING.

13 N.Y.C.R.R. 19.2(a)(1) (1964). No other reference to the Attorney General or the Department of Law is permitted. Likewise, all literature and advertising in connection with the offer must contain a similar disclaimer. N.Y. GEN. BUS. LAW § 352-e(4) (McKinney 1968).

While the primary thrust of New York regulation exists in its stiff disclosure requirements, critics may have overstated their case. Considerable discretion does lie with the Attorney General to reject offering plans and to police fraudulent practices. New York's "blue sky" law, the Martin Act,³ is among the most extensive in the nation.⁴ Additional substantive protection is afforded the unit owner by the state's Condominium Act.⁵

Should he avail himself of the opportunity, the prospective unit buyer may acquire a wealth of information concerning the particulars of a given project. With the assistance of counsel versed in the pitfalls of unit buying, the individual can make a well informed judgment on the initial decision to purchase.⁶ From the developer's perspective, his counsel must be thoroughly informed on all options available under local law.⁷ Considerable time and expense will be necessary in meeting the nuts and bolts disclosure requirements.

This note seeks to survey New York law governing the development, sale and ownership of the condominium and its units.

MARKET TESTING

Unlike the regulatory scheme adopted by many states, New York places the sale of condominium units under the provisions of its securities law.⁸ Thus, the Bureau of Securities and Public Financing of the Department of Law (the Bureau) has a ready-made source of regulatory authority under the Martin Act. Its provisions apply equally to property located within and without the state, provided it is offered for sale in New York.⁹

³ N.Y. GEN. BUS. LAW § 352 *et seq.* (McKinney 1968) (also referred to as Article 23-A).

⁴ See 1 CONDOMINIUM REP., Oct. 1973, at 4, wherein the New York and California registration systems are referred to as being of the "regulation" variety as distinguished from the schemes used in "disclosure" states. A contrary view was expressed by an Assistant Attorney General. Remarks of Hon. Arthur S. Levine, Condominium Workshop, Oct. 26, 1973, reproduced at p. 688 *supra* [hereinafter cited as Levine].

⁵ N.Y. REAL PROP. LAW § 339-d *et seq.* (McKinney 1968).

⁶ For a discussion of the role of the buyer's attorney see Rohan, *Condominium Housing: A Purchaser's Perspective*, 17 STAN. L. REV. 842 (1965) [hereinafter cited as *Purchaser's Perspective*].

⁷ See, e.g., notes 8-19 (market test) & 33-34 (prefiling conference), and accompanying text *infra*.

⁸ N.Y. REAL PROP. LAW § 339-ec(1) (McKinney 1968) provides that for the purposes of N.Y. GEN. BUS. LAW § 352-e (McKinney 1968), a condominium is deemed a cooperative interest in realty.

⁹ N.Y. GEN. BUS. LAW § 352-e(1)(a) (McKinney 1968) makes it illegal "to make or take part in a public offering or sale in or from the state of New York" of real estate syndication offerings. There is surprisingly little litigation on the application of the Martin Act to sales of out of state securities within New York. This may be due in part to the strict criminal penalties for noncompliance. See N.Y. GEN. BUS. LAW § 352-c (McKinney 1968). Nevertheless, the Attorney General has reported:

The Attorney General's office has provided a limited exemption from the rigorous filing requirements in the case of a developer who merely seeks to gauge the availability of a market for unit sales in a given area. Upon application, permission may be granted to the sponsor to solicit nonbinding reservations of up to fifty dollars for a period of twenty-one days.¹⁰ The period will be extended only upon a showing that the initial period was inadequate.¹¹ All advertising material must be submitted for approval and must contain specified disclaimers.¹² If an offering plan is eventually filed, the sponsor must inform the depositor, giving him an option to purchase within fifteen days.¹³

There are few limitations on the purposes for which the market test may be used.¹⁴ It may be employed in conjunction with new construction as well as conversions. The test may effectively be used in deciding whether to proceed with a proposed project, or in determining the number, style and price of the units.¹⁵ Furthermore, it may be influential in attracting institutional lenders. An initial check should be made with prospective lenders to determine their views on the timing of the market test. They may require certain supervision to insure the validity of the test as a barometer of the potential success of the project. If financing arrangements have already been made, the market test may be a means of taking advantage of a particularly bright selling season while the offering plan is still being drafted.

A separate procedure has been devised by the Bureau for tenants seeking to explore the possibility of converting their apartment building to either a condominium or a cooperative.¹⁶ Solicitations of up to two hundred and fifty dollars from co-tenants may be made for the purposes of retaining counsel, conducting engineering studies and

Despite public awareness of the requirement to file offering plans for condominium offerings being made in the State of New York, a number of out of state condominium sponsors have attempted to evade this requirement. Investigations made of these and other violations of Article 23-A of the GBL resulted in the Cooperative and Condominium section obtaining approximately \$125,000 in costs under Section 63 subdivision 15 of the Executive Law.

1972 N.Y. ATT'Y GEN. ANN. REP. 20.

¹⁰ Cooperative Policy Statement No. 1 (also applicable to condominiums) [hereinafter cited as CPS-1]. A complete set of forms and statements applicable to the condominium are available by writing to the Department of Law, Bureau of Securities and Public Financing, 2 World Trade Center, New York, N.Y. 10047.

¹¹ *Id.* at 5, n.B.

¹² *Id.* at 1, § 5. See also Suggested CPS-1 Advertising Guidelines.

¹³ CPS-1 at 3, § 7.

¹⁴ The prospective sponsor must have an interest of some kind in the property. Levine, *supra* note 4, at p. 697.

¹⁵ Levine, *supra* note 4, at p. 690.

¹⁶ Cooperative Policy Statement No. 3 (also applicable to condominiums) (available at the Bureau of Securities and Public Financing, 2 World Trade Center, New York, N.Y. 10047).

exploring possibilities of financing.¹⁷ Contributing tenants are entitled to the return of any unspent balance. Representations must be made by the tenants who promote the conversion that the landlord has not in any way solicited their efforts.¹⁸ The Attorney General reports that the introduction of this procedure has reduced the number of complaints of harassment by fellow residents wishing to convert.¹⁹

THE OFFERING PLAN

From the developer's point of view, the most troublesome aspect of the Martin Act is the requirement of filing an offering plan or prospectus. To insure that the proper information is disclosed, extensive and detailed regulations have been promulgated governing the content of the offering plan. No fewer than 44 separate items of disclosure, many with their own subsections, are required to be included in the plan. In addition, some 33 documents and 21 exhibits must also be filed.²⁰

There is statutory authority for discretionary filing exemptions when the offering is made to a group of less than forty, or has been registered with the Securities and Exchange Commission (SEC) or exempted by the SEC for reasons other than its being an intrastate offering.²¹ While the Bureau has not yet indicated to what extent that discretion will be exercised, a recently proposed policy statement would exempt from filing an offering which fully complies with the new SEC Rule 146.²² Separate and apart from a possible SEC-based exemption, the regulations provide that in the case of a wholly nonresidential condominium, the filing of a declaration of submission to the Condominium Act and bylaws may be sufficient.²³

Counsel for the sponsor who is registering property within the state will find that there is great interplay between the substantive provisions of the Condominium Act and the regulations governing the

¹⁷ *Id.* The policy statement sets forth specific guidelines as to how the collected monies should be handled and the type of information to be disclosed to contributing tenants.

¹⁸ *Id.* By the same token, a landlord's consent form must be obtained before the solicitation will be permitted.

¹⁹ 1972 N.Y. ATT'Y GEN. ANN. REP. 19.

²⁰ 13 N.Y.C.R.R. § 19.1 *et seq.* (1964). See Instructions for Submission of Documents on Review of a Proposed Offering Plan (1973) (available at the Bureau of Securities and Public Financing, 2 World Trade Center, New York, N.Y. 10047).

²¹ N.Y. GEN. BUS. LAW § 352-g (McKinney 1968).

²² See Proposed Policy Statement No. 100 (Nov. 12, 1974). SEC Rule 146 was adopted in Securities Act Release No. 5487 (Apr. 23, 1974) and is codified at 17 C.F.R. § 230.146 (1974). For a discussion of the application of Rule 146 to condominium projects subject to federal securities law, see Erwin, *Marketing Investment Condominiums and Real Estate Syndications Without Securities Registration: SEC Rule 146*, 3 REAL ESTATE L.J. 119 (1974).

²³ 13 N.Y.C.R.R. 19.2(b)(xliii) (1964).

offering plan. This may be used effectively to minimize some of the work involved. For example, many of the specific rights and duties of the sponsor, the board of managers, the unit owners and third parties, which must be disclosed in the offering plan, are spelled out in detail in the Condominium Act itself.²⁴ For registration of properties located in other states, the New York act may serve as a convenient guide in drafting provisions which are to be included in the offering plan but are not covered by local legislation. It will be most helpful in the drafting process to examine offering plans which have already been accepted for filing.

As required by both the offering plan regulations and the Condominium Act, the sponsor's counsel will draft bylaws and house rules for the project.²⁵ He should keep in mind that these provisions will

²⁴ For example, 13 N.Y.C.R.R. 19.2(b)(iii) (1964) inquires as to "[w]hether each condominium interest is to be separately assessed for real estate taxes, and the effect upon an owner of such interest of the nonpayment of real estate taxes by any other such owner." N.Y. REAL PROP. LAW § 339-y (McKinney 1968) outlines the method of separate taxation. The chart below may be useful in cross referencing the sections.

Disclosure requirement of 13 N.Y.C.R.R. 19.2(b) (1964)	Relevant Section of N.Y. REAL PROP. LAW (McKinney 1968)
(i)	339-d <i>et seq.</i>
(ii)	339-e(3)(5), 339-g
(iii)	339-y
(iv)(a)	339-l, 339-ff
(iv)(b)	339-ff
(v)	339-v(2)(a)
(vi)	339-s
(vii)	339-e
(xi)	339-h, 339-g, 339-i(1)(4), 339-n, 339-t, 339-cc, 339-i(1), 339-m
(xii)	339-i(1), 339-m
(xiii)	339-j
(xiv)	339-l
(xv)	339-z, 339-aa
(xvii)	339-j
(xviii)	339-x
(xix)	339-bb
(xxii)(b)	339-l
(xxii)(d)	339-v(i)(b)
(xxii)(g)	339-v(h)(i)
(xxii)(h)	339-w
(xxii)(j)	339-e(8), 339-v(i)(b)(j)
(xxii)(l)	339-t
(xxii)(n)	339-i(5)
(xxii)(o)	339-cc
(xxii)(p)	339-dd

²⁵ 13 N.Y.C.R.R. 19.2(b)(xxiii) (1964) provides that in lieu of certain disclosure items, the sponsor may submit the bylaws, provided they contain the same information. N.Y. REAL PROP. LAW § 339-u (McKinney 1968) requires that the bylaws be recorded with the declaration of submission to the Act.

govern the condominium long after the client's interest has ended. Furthermore, saddling the condominium with a system of unworkable regulations may well affect the saleability of the units. On the other hand, the discriminating purchaser will no doubt desire some protection from his yet unseen neighbors. Assistance from the developer and his marketing experts will be helpful in this regard.

In new constructions, the project's architect will be able to provide most of the required technical data concerning structure, design, materials, storage space, plumbing and the like.²⁶ An engineering survey and a real estate appraisal may be necessary in the case of a conversion.²⁷

The aid of an independent public accountant will be required in order to prepare a profit and loss statement for existing buildings reflecting the operating figures for at least the past two years.²⁸ A projection of income and expenditures for the condominium, together with estimates of the common charges, must be submitted. While the developer must outline the cost, percentage of appurtenant interest, and expenses for each particular unit, he may alter the selling price of a unit subsequent to filing, provided the proper caveat is given in advance.²⁹

A broker-dealer license must be obtained by the sponsor, his selling agent and any salesmen to be employed.³⁰ Inquiry into the individual's prior employment and criminal records are made at the time of application.³¹ Case law indicates that this requirement does not apply to a real estate broker who is engaged in the resale of a unit.³²

When all the necessary data have been compiled and the offering plan is near completion, the sponsor may avail himself of the optional pre-filing procedure.³³ After submitting the proposed offering plan and advertising material to the Bureau, a conference will be arranged at which any possible deficiencies and potential trouble spots may be worked out. The time from initial submission to formal acceptance for filing may take anywhere from fifteen days to two months, depending upon the type of project and its complexities.³⁴

²⁶ 13 N.Y.C.R.R. 19.2(b)(viii)(c) (1964).

²⁷ *Id.* 19.2(xi); 19.3(b)(14).

²⁸ *Id.* 19.2(b)(xxvi).

²⁹ *Id.* 19.2(v)(ix)(xxxiv). The front cover must contain a warning statement in bold type. *Id.* 19.2(a)(4).

³⁰ N.Y. GEN. BUS. LAW § 359-e (McKinney 1968). Form M-10, available from the Bureau, will satisfy this requirement. The practitioner should note that a number of exemptions from this requirement are set forth in N.Y. GEN. BUS. LAW § 339-f (McKinney 1968).

³¹ *Id.* § 359-e(3)(b).

³² See *Maxine Gerard, Inc. v. Fisher*, 64 Misc.2d 291, 314 N.Y.S.2d 688 (Sup. Ct. N.Y. County 1970).

³³ 13 N.Y.C.R.R. 19.3 (1964).

³⁴ A recent legislative enactment extends the time period for processing offering

AUTHORITY OF THE ATTORNEY GENERAL

The Bureau is careful to note that the Attorney General does not pass upon the merits of an offering plan but merely accepts it for filing.³⁵ The statute on its face provides rather narrow grounds for refusing to file an offering plan: either a deficiency in the information to be disclosed or the failure to "clearly set forth the specific property . . . to be acquired"³⁶ Additional standards may be found among those provisions of the Martin Act describing certain fraudulent practices subject to criminal sanction.³⁷

Despite this seemingly limited basis for judging the prospectus, a good deal of discretion appears to be exercised by the Attorney General in reviewing the substantive aspects of a plan. To date, no challenge has been made to this arguably unfounded use of discretion. To some extent, the absence of a challenge may be attributed to the narrow standard of judicial review open to an individual who seeks a nullification of the Attorney General's decision to accept or reject the proffered plan for filing. Such decisions of the Attorney General are reviewable in the courts only by way of an Article 78 proceeding,³⁸ a special proceeding governed by a four-month statute of limitations.³⁹ In the leading case of *Schumann v. 250 Tenants Corp.*,⁴⁰ it was held

plans from fifteen days to sixty days. N.Y. SESS. LAWS [1974], ch. 1021, § 1 (McKinney), amending N.Y. GEN. BUS. LAW § 352-e(2) (McKinney 1968).

Under the prior law, there were indications of judicial displeasure over delays by the Attorney General. The court, in *In re 160 West 87th St. Corp.* (Sup. Ct. N.Y. County), in 170 N.Y.L.J. 30, Aug. 13, 1973, at 2, col. 2, granted relief when the Attorney General had not accepted for filing the offering plan for a conversion after three months. The Attorney General was ordered to either file the plan within ten days or determine that the plan contains an "untrue statement of material fact." See N.Y. GEN. BUS. LAW § 352-3(b) (McKinney 1968).

³⁵ See note 2 and accompanying text *supra*.

³⁶ N.Y. GEN. BUS. LAW § 352-e(2) (McKinney 1968).

³⁷ *Id.* § 352-c. See notes 49-53 and accompanying text *infra*.

³⁸ An Article 78 proceeding, N.Y. CIV. PRAC. LAW § 7801 *et seq.* (McKinney 1968), is a vehicle for private challenges to administrative action. Section 7801 provides, in part, that "[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article."

³⁹ N.Y. CIV. PRAC. LAW § 217 (McKinney 1972). The statute runs from the time the determination is made. In *Tuvim v. 10 E. 30 Corp.*, 32 N.Y.2d 541, 300 N.E.2d 397, 347 N.Y.S.2d 13 (1973), the court affirmed the dismissal of the plaintiff's attempt to seek review of the Attorney General's acceptance of a conversion plan on the ground that the complaint was time barred. The court held, *inter alia*, that "an amendment to the plan filed some months after its original acceptance, did not extend the time to challenge that acceptance. . . ." *Id.* at 545 n.2, 300 N.E.2d at 398 n.2, 347 N.Y.S.2d 14 n.2. See *In re 1625 Tenants Ass'n* (Sup. Ct. N.Y. County), in 170 N.Y.L.J. 78, Oct. 23, 1973, at 2, col. 3. *But see Grenader v. Lefkowitz*, 71 Misc. 2d 414, 336 N.Y.S.2d 355 (Sup. Ct. N.Y. County 1972) (amendment was of such a nature as to extend the statute of limitations).

⁴⁰ 65 Misc. 2d 253, 317 N.Y.S.2d 500 (Sup. Ct. N.Y. County 1970), *cited with approval* in *In re Greenthal & Co.*, 32 N.Y.2d 457, 299 N.E.2d 657, 346 N.Y.S.2d 234 (1973). In *Schumann*, tenants had alleged that the landlord used fraudulent means in obtaining the requisite 35% tenant approval for conversion of the building to cooperative status.

that the standard by which the Attorney General's decision to file a plan is to be judged is "whether his actions were arbitrary and capricious or based upon some rational and reasonable ground."⁴¹ Under this standard, a sponsor might find it difficult to convince a court that the Attorney General's rejection of a plan was without any basis in reason.

Ironically, the discretionary standard has proven, at times, to benefit the sponsor. Thus far, most of the litigation in this area has arisen when tenants in existing buildings have sought to nullify the acceptance for filing of an offering plan for conversion to cooperative or condominium status.⁴² To soften the impact of the rule on tenants, courts have relied upon their inherent equitable powers to deal with fraud.⁴³

If the sponsor has taken advantage of the prefiling conference procedure, he will become aware, at an early stage, of those aspects of the plan to which there are strong objections from the Attorney General's office. If attempts to iron out the difficulties are unsuccessful, the sponsor's dilemma will be whether to fly in the face of a possible rejection and hope for success based upon the "arbitrary and capricious" standard, or else eliminate the purportedly objectionable features of the plan. Apparently, the Bureau has created this Hobson's choice as a means of discouraging developer practices which the Bureau deems harsh and inequitable to the prospective unit owner.⁴⁴

A recurrent complaint of unit owners across the nation is the practice of developers entering into long-term recreational leases and

⁴¹ 65 Misc. 2d at 257, 317 N.Y.S.2d at 505.

⁴² See *Tuvim v. 10 E. 30 Corp.*, 32 N.Y.2d 541, 300 N.E.2d 397, 347 N.Y.S.2d 13 (1973); *Richards v. Kaskel*, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973); *In re Greenthal & Co.*, 32 N.Y.2d 457, 299 N.E.2d 657, 346 N.Y.S.2d 234 (1973). See also *Whalen v. Lefkowitz* (Sup. Ct. Bronx County 1973), 170 N.Y.L.J. 3, Sept. 18, 1973, at 19, col. 4, *rev'd sub nom.*, *Parkchester Apart. v. Lefkowitz*, 44 App. Div. 2d 442, 355 N.Y.S.2d 592 (1st Dep't 1974). *Grenader v. Lefkowitz*, 71 Misc. 2d 414, 336 N.Y.S.2d 355 (Sup. Ct. N.Y. County 1972). For a thorough discussion of the entire problem of tenant conversions, see *Note, Tenant Protection in Condominium Conversions*, *supra* at p. 688.

⁴³ *Schumann v. 250 Tenants Corp.*, 65 Misc. 2d 253, 258, 317 N.Y.S.2d 500, 505 (Sup. Ct. N.Y. County 1970). In *Richards v. Kaskel*, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973), the Court of Appeals permitted a class action by a group of tenants who alleged that false representations had been made in soliciting purchasers in a cooperative conversion.

⁴⁴ One of the major vices of the present regulatory system is absence of standards to which the practitioner may refer. Assistant Attorney General Levine notes that New York does not have a provision for review of the "fairness" of an offering plan, yet he mentions a number of practices which will not be tolerated notwithstanding full disclosure. Levine, *supra* note 4, at p. 688. For this reason, it is suggested that New York authorize the Attorney General or an independent regulatory body to draft substantive regulations governing the sale and ownership of the condominium unit. See note 82 and accompanying text *infra*.

"sweetheart" management contracts.⁴⁵ In the typical case, the sponsor, while in control of a majority of units, enters into a 99-year lease with his hand-picked board of managers for the use and maintenance of the swimming pool, tennis courts and other recreational areas.⁴⁶ The unit owners as lessees eventually pay many times over the true cost of these facilities, while the developer has a handsome source of continuing income. Similarly, long-term management contracts are often negotiated with sponsor-affiliated companies.⁴⁷ Certainly, a developer's continuing hold on the condominium by means of long-term contracts is inconsistent with the spirit of the Condominium Act, *viz.*, that the condominium be controlled by its unit owners. The Attorney General's office has responded to these practices by taking a dim view towards the filing of offering plans for New York projects containing management contracts in excess of three years or any form of recreational lease.⁴⁸ A more lenient view is taken in regard to projects located in other states.

The Attorney General's role in regulating condominiums is by no means related solely to the filing of offering plans. The Martin Act provides him with ample authority to curb so-called fraudulent practices.⁴⁹ Persons may be criminally prosecuted for false representations, whether made in the offering plan or elsewhere, when the person

(i) knew the truth; or (ii) with reasonable effort could have known

⁴⁵ See N.Y. Times, Jan. 27, 1974, § 1, at 1, col. 4. For a discussion of how a developer may increase his profits under a management contract which is not inequitable see 1 CONDOMINIUM REP., Mar. 1973, at 3.

⁴⁶ In one case, the sponsor drafted an offering plan in which all the recreational facilities comprise one "unit." The recreational unit, consisting of a swimming pool, shuffleboard courts, sauna baths, an auditorium, billiard room, exercise room, and miscellaneous facilities was rented to the owner's association under a 99-year lease at \$115,000 per year with an escalator clause. By declaring the common elements a condominium unit, he was able to maintain a voting interest in the condominium. Offering Plan, Winston Towers 200 Condominium (Miami Beach, Florida, Oct. 15, 1971).

⁴⁷ A four year contract with an automatic renewal clause in favor of a management corporation owned by the sponsor's parent company was contained in the Offering Plan for Quadomain Towers I and IV Condominium Apartments (Hollywood, Florida, Oct. 1, 1973). Another Florida offering contained an eight year management contract. See Offering Plan, Hillcrest No. 23 Condominium (Hollywood, Florida, June 15, 1972).

⁴⁸ 1 CONDOMINIUM REP., Mar., 1973, at 6-7.

⁴⁹ The Martin Act, throughout its provisions, declares certain activities to be fraudulent practices. Among them are:

devices, schemes, artifices, fictitious or pretended purchases or sales of securities or commodities, deceptions, misrepresentations, concealments, suppressions, frauds, false pretenses, false promises, practices, transactions and courses of business. . . .

N.Y. GEN. BUS. LAW § 352(1) (McKinney 1968). The statutory language gives the Attorney General broad discretion to determine whether to challenge any practice. Unlike his administrative discretion in accepting or rejecting an offering plan, *see* text accompanying notes 41-42 *supra*, the Attorney General's *executive* discretion in proceeding against a party is not reviewable by the courts. See *People v. Bunge Corp.*, 25 N.Y.2d 91, 250 N.E.2d 204, 302 N.Y.S.2d 785 (1969). Cf. *Schumann v. 250 Tenants Corp.*, 65 Misc. 2d 253, 317 N.Y.S.2d 500 (Sup. Ct. N.Y. County 1970).

the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made.⁵⁰

Criminal sanctions are also imposed for fraud, concealment, and suppression, as well as representations "beyond reasonable expectation."⁵¹ The Act also authorizes the Attorney General to conduct formal investigations, with full subpoena power, of any fraudulent practices which are brought to his attention.⁵² He may seek the issuance of an injunction against those engaged in the activity, and the appointment of a receiver of any property obtained through the unauthorized means.⁵³

THE CONDOMINIUM ACT

Just as the Martin Act is intended to protect the prospective purchaser from fraudulent practices on the part of the selling sponsor, the Condominium Act⁵⁴ attempts to protect the unit owner's rights after title has passed. While the blue sky provisions place emphasis on disclosure and public enforcement, the Condominium Act places the burden on the unit owner to assert his own rights through private suit. The Condominium Act applies only to property submitted to its provisions by the recording of a declaration.⁵⁵

The permanent character of the unit owner's interest in the common elements is clearly established.⁵⁶ That interest may be computed based upon either the dollar value of the unit or the proportion of floor space.⁵⁷ A recent legislative enactment expands the method of computation to include a system whereby units within a single classification may be allocated equal percentage interests.⁵⁸ As an additional alternative, the new law permits allocation based upon floor space, subject to such factors as the relative value of the location, its uniqueness, accessibility to common elements, and overall dimensions.⁵⁹ The

⁵⁰ N.Y. GEN. BUS. LAW § 352-c (McKinney 1968).

⁵¹ *Id.*

⁵² *Id.* § 352.

⁵³ *Id.* § 353-a.

⁵⁴ N.Y. REAL PROP. LAW § 339-d *et seq.* (McKinney 1968).

⁵⁵ *Id.* § 339-f. Among the items to be contained in the declaration are a description of the land, the buildings, the common elements, the designation of each unit, and the uses of the property. *Id.* § 339-n. For a discussion of condominiums without statutory basis, see Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1001 (1963) [hereinafter cited as Berger].

⁵⁶ N.Y. REAL PROP. LAW § 339-i(2) (McKinney 1968).

⁵⁷ *Id.* § 339-i(1).

⁵⁸ N.Y. SESS. LAWS [1974], ch. 1056, § 2 (McKinney).

⁵⁹ *Id.*

new law takes a more realistic approach to allocating the common charges and eliminates absolute reliance on rigid formulae.

The limitations on the unit owner imposed by statute are relatively few. Strict compliance with the bylaws and house rules is a statutory mandate, the violation of which gives rise to an action for damages or injunctive relief.⁶⁰ The right to a partition of the common elements is expressly prohibited and provisions to the contrary are void.⁶¹ The unit owner may not perform any work which might threaten the safety or impair the value of another's property.⁶² Second mortgages also are greatly limited.⁶³

Several contingencies are given express recognition. If three-fourths or more of the building is destroyed, and 75 percent of the owners do not proceed to rebuild, an action to partition will lie with the proceeds of the sale and insurance divided according to each individual's common interest.⁶⁴ A provision in the declaration covering distribution of condemnation awards is contemplated but not required.⁶⁵ Eighty percent of the unit owners, or such number as specified in the bylaws may, at any time and without cause, withdraw the property from the Condominium Act, in which case it is subject to an action for a partition.⁶⁶

The statute provides for a board of managers to be elected by the unit owners, but details as to the board's powers and duties are left to the bylaws, which must be recorded with the declaration.⁶⁷ As a check

⁶⁰ N.Y. REAL PROP. LAW § 339-j (McKinney 1968).

⁶¹ *Id.* § 339-i(3).

⁶² *Id.* § 339-k.

⁶³ The prohibition does not run against the individual. Rather, it prohibits certain types of lending institutions from investing in other than a first mortgage on a condominium unit. *Id.* § 339-ff.

⁶⁴ *Id.* § 339-cc. The New York solution to this troublesome problem recognizes that in the usual situation insurance will have been obtained by the board of managers. *Id.* § 339-bb. Such an approach seems more realistic and practical than those employed in other states. See Berger, *supra* note 55, at 1013.

⁶⁵ N.Y. REAL PROP. LAW § 339-i(2) (McKinney 1968). While such provisions are optional, failure to provide for this contingency would probably be deemed a failure to "clearly set forth the specific property . . . to be acquired . . ." N.Y. GEN. BUS. LAW § 352-e(2) (McKinney 1968). See note 36 and accompanying text *supra*. Absent a provision, the proceeds would be distributed according to the common interest. N.Y. REAL PROP. LAW § 339-m (McKinney 1968). Of course, if the individual's unit were the only subject of the taking, the proceeds would be payable to him.

⁶⁶ N.Y. REAL PROP. LAW § 339-t (McKinney 1968).

⁶⁷ *Id.* § 339-v. Well deserved criticism has been aimed at this provision for failing to specify the organizational structure of the board. *Purchaser's Perspective, supra* note 6, at 858. Professor Rohan speculates that personal liability on the part of the unit owner might arise for unauthorized activities of the board. This problem may be partially alleviated by a recent amendment to N.Y. REAL PROP. LAW § 339-v(1) (McKinney 1968), which expressly permits the board of managers to incorporate. N.Y. SESS. LAWS [1974], ch. 1056, § 6 (McKinney).

against continual domination by one group, at least one-third of the board must undergo annual election.⁶⁸ The board is empowered to bring actions on behalf of the unit owners and may obtain a lien against an owner's unit for unpaid common charges.⁶⁹ Profits and expenses are distributed or charged according to the individual's fractional common interest.⁷⁰

Unfortunately, the Condominium Act does not directly address itself to the activities of the project sponsor. Conceivably the sponsor could retain control of the entire board of managers for at least as long as a majority of the units remain unsold. While some sponsors, as a gesture of good will, agree to vote for a certain number of unit owner candidates, no such mandate exists.⁷¹ A requirement that one-third of the board be comprised of unit owners other than the sponsor, from the time of sale of one-third of the units and until such time as a majority of units are sold, might eliminate much of the possible overreaching by the sponsor. The sponsor's liability for the common charges of the units that he holds should be explicitly stated.⁷²

The potential developer of a project is limited by the Condominium Act in the type of condominium he may construct. The Act contemplates a building or group of buildings, and there has been speculation that a condominium without them would not be permitted.⁷³ Thus, problems might arise if the developer sought to construct a marina condominium selling cubic feet of water space, where no buildings as such would be part of the project. Until recently, leasehold condominiums were not permitted in New York. However, the

⁶⁸ N.Y. REAL PROP. LAW § 339-v(1)(a) (McKinney 1968). Naturally, as long as the sponsor retains a majority of the units, this provision will offer little comfort to the unit owner.

⁶⁹ *Id.* §§ 339-z, 339-dd. The action may be brought by the board on behalf of two or more unit owners. *Id.* § 339-dd. *See id.* § 339-aa for methods of foreclosing a lien for common charges.

⁷⁰ *Id.* § 339-m.

⁷¹ *Purchaser's Perspective*, *supra* note 6, at 848. Not all sponsors are so generous. One Florida offering plan, approved in New York, contained a provision giving the sponsor the right to name the entire board of directors for as long as he owned a single unit, or two years from the recording of the declaration, whichever came first. Offering Plan, Hillcrest East No. 23 Condominium (Hollywood, Florida, June 15, 1972). The preoccupation with control of the board of managers is partially due to the developer's desire to keep the common charges to a minimum while he owns a large number of units. *See* 1 CONDOMINIUM REP. NO. 2, Mar. 1973, at 3.

⁷² Currently his liability can be predicated upon N.Y. REAL PROP. LAW § 339-m (McKinney 1968), which provides that the common expenses are charged according to ownership of the common interests. Furthermore, the Act prohibits a unit owner from exempting himself from liability for the common charges by waiving his rights to use the common elements. *Id.* § 339-x.

⁷³ *Purchaser's Perspective*, *supra* note 6, at 847.

Act has been amended to allow leasehold condominiums for exclusively nonresidential purposes.⁷⁴

The condominium is, of course, a form of real property and, as such, is subject to various requirements of local law applicable to realty.⁷⁵ For example, compliance with zoning laws is required.⁷⁶ An informal opinion of the Attorney General indicates that the Multiple Dwelling⁷⁷ and Multiple Residence⁷⁸ Laws apply to condominiums.⁷⁹ However, *Kaufman & Broad Homes v. Albertson*⁸⁰ indicates that the usual requirement of filing a subdivision map is not a prerequisite to the recording of the declaration.⁸¹

CONCLUSION

Ten years have elapsed since the passage of New York's Condominium Act.⁸² Thus far, New York has remained in the forefront of consumer protection in the area of condominium sales. If it is to remain so, it must adapt to the needs and problems of present and prospective unit owners. Likewise, insensitivity to the difficulties of the developer will stifle future growth in this mutually advantageous form of ownership.

The current procedure for reviewing offering plans has the drawback of not delineating precise standards to guide the developer. Management contracts for two years might not be opposed whereas a three year contract might create a problem. Without the benefit of regulatory standards governing the substantive aspects of a project, the Bureau may at times take a "back door" approach to obtain minimum protection for unit owners. Failure on the part of the developer to comply with these unwritten standards of protection might result in "finding something wrong" with the offering plan. Furthermore, the current scheme provides only minimum protection for the unit owner after the sponsor has left the scene. "In-fighting" among groups

⁷⁴ N.Y. SESS. LAWS [1974], ch. 1056, § 1 (McKinney). The unexpired term of the lease must be at least thirty years. *Id.*

⁷⁵ The offering plan must contain a representation that there has been compliance with all local zoning and construction laws. Furthermore, it must state whether a certificate of occupancy or certificate from the board of fire underwriters must be obtained. 13 N.Y.C.R.R. 19.2(b)(xxi) (1964).

⁷⁶ *Id.* The application of zoning laws to condominiums is discussed in Note, *Condominiums and Zoning*, *supra*.

⁷⁷ N.Y. MULT. DWELL. LAW § 1 *et seq.* (McKinney 1974).

⁷⁸ N.Y. MULT. RESID. LAW § 1 *et seq.* (McKinney 1952) & (Supp. 1973).

⁷⁹ 1971 OP. ATT'Y GEN. 58.

⁸⁰ 73 Misc. 2d 84, 341 N.Y.S.2d 321 (Sup. Ct. Suffolk County 1972).

⁸¹ *Id.*

⁸² The Condominium Act took effect on March 2, 1964. Ch. 82, § 2, [1964] N.Y. Laws.

of unit owners is a common phenomenon and disputes may turn into costly and unnecessary court battles.⁸³

The Legislature should grant authority to promulgate substantive regulations governing the sale, management and control of condominiums to either the Attorney General or to a specially created independent regulatory body.⁸⁴ Control by the Attorney General's office would provide the benefit of expertise and economy in operation. An independent body, however, offers greater input from both developers and consumers and may be somewhat less susceptible to political pressure. Through the much criticized reservation of power clause,⁸⁵ regulations could be applied to existing condominiums as well.

Provision for a regulatory authority with continuing jurisdiction would provide greater responsiveness and flexibility than the current statutory and case law approach. Perhaps some of the fears that currently exist on the part of tenants faced with the possibility of conversion to condominium status might be partially abated by the knowledge that their investment would be well protected. With the benefit of ten years' experience, and the prospects for future expansion of condominiums, now is an excellent time for the New York Legislature to act.

P. Kevin Castel

⁸³ See *Board of Managers v. Gans*, 72 Misc. 2d 726, 340 N.Y.S.2d 826 (N.Y.C. Civ. Ct. 1972), wherein the board obtained judgment against the defendant unit owner for failure to pay common charges. A dispute between the defendant and the board had erupted over the change in the date of the board election. A more detailed discussion of the controversy appears in a letter written by the defendant to the Editor of the N.Y. Times. See note 1 *supra*. In *Amoruso v. Board of Managers*, 38 App. Div. 2d 845, 330 N.Y.S.2d 107 (2d Dep't 1972), a group of unit owners unsuccessfully sought to challenge a \$500 expenditure by the board for a basketball court. See also *Purchaser's Perspective*, *supra* note 6, at 855-56; Sanders, *Condominium Life Can Present Unexpected Challenges*, N.Y. Times, Apr. 8, 1972, § 8, at 34, col. 1.

⁸⁴ The concept of agency regulation of condominiums has been suggested by a number of sources. See Rohan, *Second Generation Condominium Problems: Construction of Enabling Legislation and Project Documents*, VALPARAISO L. REV. 77, 91 (1966). The author, however, points to existing New York regulation through the Attorney General's office as a model. New York's Advisory Council on Condominium Development, consisting of industry leaders, is cited as a major source of legislative proposals.

The Attorney General or the independent regulatory body should be given authority to promulgate minimum standards for consumer protection. Failure to meet these standards would be grounds for rejecting an offering plan. Furthermore, a vehicle for arbitrating disputes between a board and unit owner should be established. See also AMENDED REPORT OF THE FLORIDA CONDOMINIUM COMMISSION TO THE 1973 SESSION OF THE FLORIDA STATE LEGISLATURE (1973); 1 CONDOMINIUM REP., June 1973, at 3.

⁸⁵ N.Y. REAL PROP. LAW § 339-hh (McKinney 1968). Concern was expressed that the reservation of power clause might lead to the destruction of property rights. *Memorandum of the Association of the Bar of the City of New York*, N.Y.S. LEGIS. ANN. 356 (1964).