

St. John's Law Review

Volume 38
Number 1 *Volume 38, December 1963, Number*
1

Article 1

May 2013

Condominium--Statutory Implementation

William K. Kerr

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Kerr, William K. (1963) "Condominium--Statutory Implementation," *St. John's Law Review*. Vol. 38 : No. 1 , Article 1.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol38/iss1/1>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

St. John's Law Review

VOLUME XXXVIII DECEMBER 1963

NUMBER 1

CONDOMINIUM — STATUTORY IMPLEMENTATION*

WILLIAM K. KERR †

The term "condominium" was practically unknown in this country until 1960 when residents of Puerto Rico sought an amendment to the National Housing Act authorizing Federal Housing Administration insurance of mortgages on individual apartments or units in multi-unit buildings. Their efforts were temporarily unsuccessful because the Housing Act of 1960 failed to pass, but a similar provision was included in the Housing Act of 1961 and became law effective June 10, 1961 as Section 234¹ of the National Housing Act. Section 234 is directly responsible for the advent of condominium in the continental United States.

What is this new kind of ownership which was described enthusiastically by the Puerto Ricans before the Con-

*This article is based in part on a paper by the author, entitled, "Condominium, a Preview," copyright 1962 by the Association of Life Insurance Counsel, delivered before a meeting of said Association on May 29, 1962. This material is used with the permission of the copyright owner.

† William K. Kerr is a native of Brooklyn, New York. He received the B.S. degree from Princeton University in 1925 and LL.B. from Brooklyn Law School in 1930. He is a member of the New York Bar and of the Association of the Bar of the City of New York and the American and New York State Bar Associations. He is a member of the Committee on Real Property Law, and of the Committee on New Developments in Real Estate Practice of the Association of the Bar of the City of New York. Mr. Kerr is a Second Vice-President and Associate General Solicitor of The Equitable Life Assurance Society of the United States.

¹ 75 Stat. 160, 12 U.S.C. § 1715Y (Supp. IV, 1963).

gressional Subcommittee² and which was fully implemented under the Horizontal Property Act of their Commonwealth³ only as recently as 1958?

Condominium is a combination of two kinds of ownership: one, the ownership in severalty of a part of a building, generally called the apartment; the other, undivided ownership in common (co-dominion) with the owners of other apartments, of the "common elements," that is, the land and those parts of the building intended for common use, such as the foundations, columns, main walls, roofs, halls, corridors, lobbies, stairways, elevators, entrances, utility services and the like. The undivided ownership is in a fixed ratio, generally that which the value of the apartment bears to the value of the entire property at the time the condominium is established.

Under condominium, apartments in a building acquire the attributes of separate parcels of real estate: they may be separately owned, conveyed, devised, inherited and mortgaged and the deeds and mortgages are recordable. The apartments are separately assessed and taxed for ad valorem real estate taxes. Thus the owner of the apartment is solely responsible for the mortgage charges and taxes on his unit, and it is only the remaining charges which he shares with the other apartment owners. This sharing is in the ratio of his co-ownership of the common elements.

The relations of the apartment owners to the common elements, to each other and to their respective apartments are controlled by the enabling statute and the by-laws adopted pursuant thereto. The property may also be subject to restrictive or other covenants.

The term "apartment," often used to designate the unit in a multi-unit structure under condominium, is not limited to residential use but applies equally well to all types of business, commercial and industrial uses, due, no doubt, to the literal translation of the Spanish-American

² *Hearings on Various Bills to Amend the Federal Housing Laws Before a Subcommittee of the Senate Committee on Banking and Currency*, 86th Cong., 2d Sess. 585 (1960).

³ P.R. LAWS ANN. tit. 31, §§ 1291-93k (Supp. 1962), the text of which (omitting unimportant amendments of 1959) appears in *Hearings*, *supra* note 2, at 600.

“apartamento” into “apartment.” The former has a much broader meaning than is usually attributed to its English counterpart.

In this article “apartment” and “unit” will be used interchangeably to designate the part of the building owned in severalty, whatever its use. The owner of the apartment or unit will sometimes be called for brevity the “co-owner,” but this term must be understood to include the ownership in severalty as well as the ownership in common. The condominium statute will sometimes be referred to as “Horizontal Property Act” or “HPA.”

Historical Background

While doubt is being cast upon the statement that condominium was used by the ancient Romans,⁴ a correspondent of the New York Law Journal⁵ calls attention to a papyrus in the Brooklyn Museum demonstrating that it was used by the ancient Hebrews in the Fifth Century B.C. Leyser⁶ states that the separate ownership of parts of buildings in Western Europe goes back to the Middle Ages in some cities in France. It was accorded statutory recognition in France by a brief addition to the Code Napoleon (1804),⁷ after judicial authorities in certain cities to whom drafts of the Code were submitted, and where this type of ownership was prevalent, objected to the absence of any covering provision. In more modern times, its use was given great impetus by the housing shortages and rent control following the First and Second World Wars.

⁴ See generally Berger, *Condominium: Shelter On A Statutory Foundation*, 63 COLUM. L. REV. 987, 987 n.5 (1963) for a most useful and enlightening exposition.

⁵ See letter from Louis H. Samuels furnishing translation of ancient deed. 150 N.Y.L.J., July 26, 1963, p. 4, col. 3.

⁶ See generally Leyser, *The Ownership Of Flats—A Comparative Study*, 7 INT'L & COMP. L.Q. 31, 33 (1958) for an informative analysis of condominium in Western Europe.

⁷ Art. 664, freely translated: “When the different stories of a house belong to different owners, if the deeds do not specify the responsibility for repair and reconstruction it shall be as follows: The main walls and roof are the responsibility of all the owners, each in proportion to the value of his story; The owner of each story takes care of the floor on which he walks; The owner of the first story [*i.e.* the first above the ground floor] takes care of the staircase leading to it; The owner of the second story takes care of the staircase leading to it; and so forth.”

Leyser⁸ points out that the greatly increased use of condominium combined with the increased number of units in the projects, created a need for more detailed legislation: (1) to clarify the rights and obligations of apartment owners regarding the common elements, (2) to give binding force, both as to present and future owners, to the regulatory agreement (by-laws) between the owners, (3) to give a majority of the owners the right to make decisions binding on all, and (4) to provide for the appointment of a person authorized to represent the apartment owners and to contract in their behalf. The result was the enactment of more complete statutes regulating such ownership: in Italy in 1934 and 1935, France 1938 and 1939, Austria 1948, Netherlands 1951, and in Germany in 1951 after such ownership had been outlawed in the Civil Code of 1900. Significantly, Leyser states:

The small number of cases which have come before Continental courts in this part of the law is remarkable, especially if one recalls the gloomy forecasts of those who prophesied that ownership of flats would lead to continuous quarrels between the flat owners.⁹

From Europe condominium went to Latin America, bypassing the continental United States. Statutes or decrees recognized the system—Brazil in 1928, Chile 1937, Uruguay 1946, Argentina 1948, Venezuela 1958, Cuba in 1952. In 1958 it approached its liaison with the continental United States when Puerto Rico passed an HPA.

Puerto Rico had long experienced over-population, notwithstanding its overflow to the continent. "Operation boot strap" brought new industries in the 1950's. A business and construction boom followed. The pressures of population and shortages of usable land fostered construction of high rise buildings. The enactment of the HPA in 1958 gave impetus to the construction of condominium apartments, which had been in limited use for some years under a less adequate statute.¹⁰ In the late 1950's the lack of adequate

⁸ Leyser, *supra* note 6, at 35.

⁹ *Id.* at 33.

¹⁰ P.R. LAWS ANN. tit. 31, § 1275 (Supp. 1962).

mortgage funds became apparent. Banking interests appealed to the FHA to insure mortgage loans on condominium apartments but it was felt that this could not be done without authorizing legislation. The result was the enactment of Section 234 of the National Housing Act. The authorization of FHA insurance of mortgages on individual apartments brought condominium suddenly to the attention of lawyers, real estate interests and mortgage investors throughout the United States.

Current Statutes

Hawaii was ready and waiting for the passage of section 234 and ten days after its effective date it was the first state to adopt an HPA.¹¹ Arkansas followed suit shortly thereafter.¹² At their legislative sessions in 1962, the following states adopted HPA's: Arizona,¹³ Kentucky,¹⁴ Louisiana,¹⁵ South Carolina,¹⁶ and Virginia.¹⁷ At the 1963 legislative sessions HPA's were adopted by 31 more states.¹⁸ In New York a bill sponsored by the Joint Legislative Committee on Housing and Urban Development, with the endorsement of the Association of the Bar of the City of New York, the New York County Lawyers Association

¹¹ HAWAII REV. LAWS §§ 170A-1 to -33 (Supp. 1961), as amended by Hawaii Laws 1962, Act 9, and by Hawaii Laws 1963, Act 101.

¹² ARK. STAT. ANN. §§ 50-1001 to -1023 (Supp. 1962).

¹³ ARIZ. REV. STAT. ANN. §§ 33-551 to -561 (Supp. 1962).

¹⁴ KY. REV. STAT. §§ 381.805-910 (1962).

¹⁵ LA. REV. STAT. §§ 9:1121-:1142 (Supp. 1962).

¹⁶ S.C. CODE §§ 57-471 to -493 (Supp. 1962).

¹⁷ VA. CODE ANN. §§ 55-79.1 to -79.33 (Supp. 1962).

¹⁸ Alaska Laws 1963, ch. 44; Cal. Laws 1963, ch. 860; Colo. Senate Bill No. 290; Conn. Laws 1963, Public Act 605; Fla. Laws 1963, ch. 63-35; Ga. Laws 1963, Act 452; Ill. Laws 1963, ch. 30; Ind. Laws 1963, ch. 349; Iowa Laws 1963, ch. 293; Kan. Laws 1963, ch. 329; Md. Laws 1963, ch. 387; Mass. Laws 1963, ch. 493; Mich. Laws 1963, Public Act 229; Minn. Laws 1963, ch. 457; Mo. House Bill No. 309; Neb. Legislative Bill No. 288; Nev. Assembly Bill No. 172; N.M. Laws 1963, ch. 221; N.C. Laws 1963, ch. 685; Ohio Laws 1963, ch. 5311; Okla. Law 1963, ch. 288; Ore. Laws 1963, ch. 541; Pa. Laws 1963, Public Act 117; R.I. Senate Bill No. 600; S.D. Laws 1963, ch. 293; Tenn. Public Laws 1963, ch. 124; Tex. Senate Bill No. 28; Utah Laws 1963, ch. 111; Wash. Laws 1963, ch. 156; W. Va. House Bill No. 147; Wis. Laws 1963, ch. 78.

and other organizations, failed to come to a vote on the last day of the session.¹⁹

It is perhaps an understatement to say that condominium has spread across the states like wildfire. However, it is still only in its statutory form. There has not been sufficient time for it to materialize in brick and mortar, nor has there been time for any body of case law to evolve,²⁰ although the number of articles which have appeared in legal publications is considerable.²¹

¹⁹ N.Y. Senate Bill Int. No. 928, as passed by the Assembly, amended, April 6, 1963 (A. Print No. 5992) (hereinafter referred to and cited as the New York Bill).

²⁰ The separate ownership of parts of buildings is by no means strange to American law: "Not only may a building, by force of an agreement to that effect, belong to a person other than the owner of the land, but parts of a building may be owned by different persons in fee simple, as when an upper floor belongs to one person, and the lower to another, or separate rooms, or even parts of rooms, belong to different persons. A divided ownership of buildings, not in fee simple, but for years, obviously occurs with great frequency by reason of the leasing of separate apartments in a building to different persons." 2 TIFFANY, REAL PROPERTY §626 (3d ed. 1939). Many authorities support this doctrine as well as the doctrine that space above the surface of the ground may be separately owned. See, e.g., Jackson v. Bruns, 129 Iowa 616, 106 N.W. 1 (1906); Loring v. Bacon, 4 Mass. 575 (1808); Hahn v. Baker Lodge No. 47 AF and AM, 21 Ore. 30, 27 Pac. 166 (1891); Pearson v. Matheson, 102 S.C. 377, 86 S.E. 1063 (1915); Taft v. Washington Mut. Sav. Bank, 127 Wash. 503, 221 Pac. 604 (1923); Corbett v. Hill, L.R. 9 Eq. Cases 671 (1870). There are cases in roughly half the States and numerous cases in England and Scotland. Most of the cases arise out of controversies over the repair of property or reconstruction after damage or destruction by casualty. See generally Note, *The Air Space as Corporeal Realty*, 29 HARV. L. REV. 525 (1916); Ball, *The Vertical Extent of Ownership in Land*, 76 U. PA. L. REV. 631 (1928); Ball, *The Jural Nature of Land*, 23 ILL. L. REV. 45 (1928); Bell, *Air Rights*, 23 ILL. L. REV. 250 (1928); Ball, *Division Into Horizontal Strata Of The Landspace Above The Surface*, 39 YALE L.J. 616 (1930). Perhaps the most recent case is *Estate of Orastine Bolden*, 149 N.Y.L.J., April 9, 1963, p. 11, col. 8 (Surr. Ct., N.Y. County, April 9, 1963) in which Surrogate DiFalco upheld the devise of "the front room located on the third floor" of certain premises in New York City.

²¹ Ramsey, *Condominium—The New Look in Co-ops* (1961); Borgwardt, *The Condominium—Vertical Subdivision*, 36 CAL. S.B.J. 603 (1961); Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299 (1962); Kenin, *Condominium: A Survey of Legal Problems and Proposed Legislation*, 17 U. MIAMI L. REV. 145 (1962); Welfeld, *The Condominium and Median Income Housing*, 31 FORDHAM L. REV. 457 (1963); *The Condominium*, 14 HASTINGS L.J. (entire issue) (1963); Cribbet, *Condominium, Home Ownership for Megalopolis?*, 61 MICH. L. REV. 1207 (1963); Berger, *Condominium: Shelter On A Statutory Foundation*, 63 COLUM. L. REV. 987 (1963). See the Bibliography on Condominium compiled by Ernest Henry Breuer, State Law Librarian, New York State

A Fertile Field

The building of multifamily structures has been on the increase in the United States for a number of years. From 1955 to 1961 multi-unit as a percentage of all housing starts increased from 8.4 per cent to 26.3 per cent. On the other hand, the construction of single family houses fell 37 per cent from an all-time high of about 1.5 million starts in 1950 to approximately 940,000 starts in 1961. During the period from 1950 to 1961 the average cost of building lot sites for single family houses covered by FHA loans increased from \$1,035 or 12 per cent of total land-plus-house sale price, to \$2,594 or 17.1 per cent of combined sale price.²² Land cost is indeed a dominant factor in the increased cost of private dwellings and increases sharply as location approaches the metropolitan centers. For example, it is reported that a 3 bedroom, 2 bathroom house costing \$14,000 50 miles from Times Square costs \$35,000 15 miles from Times Square.²³

We read that a family moved into the 500,000th apartment unit under the federal low-rent housing program.²⁴ At the end of year 1961 there were 55,000 cooperative apartment units in New York City alone and about 38,000 such units in the construction or planning stages.²⁵ Under all FHA multifamily programs, mortgages on 59,367 housing units were insured in 1961, an increase of 20 per cent over the 49,101 insured in 1960.²⁶

In the first half of 1963, nearly 40 per cent of new housing starts were two-or-more family structures, compared

Library, Albany, N.Y., Title News, Dec. 1962. Among the foreign articles see Leyer, *The Ownership of Flats—A Comparative Study*, 7 INT'L & COMP. L.Q. 31 (1958); GEORGE, *THE SALE OF FLATS* (2d ed. 1959); Scamel, *Legal Aspects of Flat Schemes*, 14 CURRENT LEGAL PROBLEMS 161 (1961); RATH, GRIMES & MOORE, *STRATA TITLES* (1962). Useful to those linguistically equipped is GOMEZ GIL, *LA PROPIEDAD HORIZONTAL EN CUBA* (1952) with bibliography; THEVENOT, *GUIDE PRATIQUE DE LA COPROPRIETE* (1959); KISCHINEWSKY-BROQUISSE, *STATUT DE LA COPROPRIETE DES IMMEUBLES ET SOCIETE DE CONSTRUCTION* (1958) with bibliography.

²² Wall Street Journal, March 19, 1962, p. 1, col. 6.

²³ N.Y. Times, Aug. 18, 1963, § 8, p. 1, col. 8.

²⁴ N.Y. Times, March 25, 1962, § 8, p. 1, col. 4.

²⁵ N.Y. Times, March 11, 1962, § 8, p. 1, col. 1.

²⁶ 15 HHFA ANN. REP. 42 (1961).

with slightly over 30 per cent in the corresponding period of 1962.²⁷

Scope of Discussion

The writer will compare condominium with other approaches to horizontal division and ownership of property, will examine condominium's principal characteristics and the legal problems which they present, and will discuss some of the solutions afforded by existing legislation.

OTHER APPROACHES TO HORIZONTAL DIVISION AND OWNERSHIP

Condominium is not the only approach to the solution of the problems of the separate ownership of parts of buildings or the horizontal division into separate parcels of the space above the surface of the ground. One approach is so obvious that it is not generally thought of as related to this problem, namely, the renting or leasing for terms of years of parts of buildings. Probably the reason for this is that ownership is usually thought of as a freehold estate rather than an estate for years. Nevertheless, leases of parts of buildings have long served a wide and useful purpose in business and commerce.

A second approach to horizontal division is the stock-lease cooperative apartment, which will be considered below and its advantages and disadvantages compared with those of the condominium.

A third approach is the so-called air-rights ("space lots"),²⁸ used largely in the past in developing space above railroad tracks in large cities and more recently in developments over expressways.²⁹ This type of ownership is in practice more suitable where there are but two as distinguished from a large number of owners, one generally owning the surface of the land and the other some part of the space above the surface. It is not unusual for some

²⁷ *Id.* at 4.

²⁸ See material cited *supra* note 20.

²⁹ URBAN LAND INSTITUTE, *Airspace in Urban Development*, Technical Bulletin 46 (July 1963).

parts of the upper lot to extend indefinitely below the surface, thus affording the upper owner ownership of part of the ground for support, or support may be afforded by means of easements. In any case, easements are generally needed for access and utility services, and covenants are needed respecting maintenance and repair, and restoration in event of damage or destruction. Of course, the entire arrangement may be on the basis of a leasehold of the space lot instead of a freehold.

The distinguishing feature of condominium and the space lot is the latter's usual lack of one of the two essential estates of the condominium, namely, the common ownership of the land and common elements. Separate taxation of the space lots may be a problem. However, the two concepts are closely related and what can be accomplished with the space lot can be done under condominium with greater facility and with the advantages of statutory recognition and control.

Interesting possibilities are presented by the prospect of combining the space lot with condominium. For example, a space lot created out of a large portion of a building, or a space lot over a superhighway, might be developed into a condominium. The problem of complying with the requirement (at least implied by most of the statutes) that the land constitute a common element would have to be overcome. This problem would be less difficult under a statute permitting condominium on a leasehold estate, where the entire space lot would be created by a lease and the individual apartments would be "owned" under subleases.

A fourth approach to the problem of horizontal division is the tenancy-in-common cooperative (TIC), characterized by the conveyance of an undivided interest in the entire property to the apartment purchaser together with the exclusive right to use and occupy the apartment purchased, but reserving to the grantor the right to use and occupy all other apartments. Each deed is subject to identical covenants and restrictions—barring partition of the common property, governing the maintenance and repair of the building, and providing for the contingency of failure to

repair or rebuild in the event of substantial damage or destruction. The method of enforcing the covenants and restrictions is to make them conditions attached to a determinable fee in each apartment owner. Difficulties of documentation and the unattractiveness of determinable fees as mortgage security have hampered the spread of TIC. Moreover, the widespread enactment of HPA's probably means that there will be little use of this type of project in the future.

Some approaches to horizontal division are variations of condominium. For example in England, because of limitations on ownership of undivided interests, other means have been developed for holding title to the common elements—retention by the developer, title in a trustee for the benefit of apartment owners, or title in a corporation the stock of which is held by all the individual apartment owners.³⁰ The last mentioned bring us full circle to the cooperative apartment house as known in this country.

Reference to the various methods of horizontal division would not be complete without mention of the *84th Street Cooperative* in New York City. There a building was altered into twelve apartments. Fee title to each of the apartments plus an undivided interest in the common portions of the building was acquired by a World War II veteran. The mortgage on each apartment (there being twelve separate mortgages but only one mortgagee) was guaranteed by the Veterans Administration.³¹ The twelve apartment owners entered into an agreement, referred to in the deed and recorded, "defining their ownership in said premises and creating a plan for the management of the property for their mutual benefit . . . and by which the apartment project shall be conducted, and by which the relations of the parties to each other and to the group shall be fixed and determined." Title insurance was issued on the fees and the mortgages. This was an imaginatively conceived and well executed project which, as early as 1947, pioneered many of the features of condominium. The fact

³⁰ Leyser, *supra* note 21, at 51.

³¹ Formula No. 1 developed pursuant to 38 C.F.R. § 36.4343 (1948).

that it was not widely copied³² may have been due to the novelty of the plan and the natural reluctance of purchasers, mortgagees and title insurers to deal with unfamiliar situations; fear that unforeseen problems might arise with which owners and mortgagees could not cope; the lack of recognition of the kind of ownership either by statute or by familiar case law; and the technicalities of conveyancing, such as the necessity of procuring an engineer's survey of each individual apartment.

Owning v. Renting

Owning eliminates the landlord's profit as a component of the cost of shelter. Moreover, real estate taxes and interest on mortgage indebtedness are tax deductible by an owner, but not by a residential tenant when they are merely components of his rent. The income on the invested equity of the owner of a residence which he receives in the form of the use of real estate is not subject to income tax, while ordinary income to a tenant on an equivalent amount of invested wealth is subject to income tax. Renting is vulnerable to the forces of inflation whereas owning affords a measure of protection against these forces. These factors have fostered the purchase of apartments in certain European and Latin American countries where inflation has been particularly severe.³³

Rent includes factors representing the costs of turnover in occupancy, such as loss of rents, renting commissions and redecorating. Comparable costs exist also in ownership but they are more within the control of the owner, due in part to the fact that owners take better care of property than renters do and make less frequent changes in location. The renter of an apartment, however, may have advantages in bulk purchases of fuel, supplies and services not available to the owner of a private house. Owning has the advantage

³² According to information from the Veterans Administration, all projects of this type with mortgage guarantees by the VA yielded approximately 400 dwelling units in the entire country over the ensuing fifteen year period.

³³ See Leyser, *The Ownership of Flats — A Comparative Study*, 7 INT'L & COMP. L.Q. 31, 32 (1958) as to experience in Europe.

of greater permanency, but when quarters are desired for a short period or on a temporary basis, renting is preferred. By renting an apartment instead of owning a house it is frequently possible to reside nearer one's business, thus saving the expense, time and inconvenience of travel. However, higher costs in mid-town locations probably more than offset the cost of traveling to work. Outside of the economic factors there are psychological considerations related to permanence of location and security of ownership which are present to a greater degree in ownership than in renting, the degree depending at least in part upon cultural and ethnic factors.

Substantially the same advantages in owning a private house over renting an apartment are available to the owner of a condominium apartment. He is entitled to the same tax advantages. Moreover he has the benefits of the lower costs of less rapid turnover in occupancy and is more likely to save through bulk purchases of services and supplies. He is more likely to have the conveniences of central location.

Condominium v. Cooperative Apartment

In the typical cooperative apartment house³⁴ title to the land and building is owned by a corporation. Each owner of stock in the corporation by virtue of being a stockholder is entitled to a lease of an apartment. Varying numbers of shares in the corporation are allocated to apartments according to respective values. Mortgage charges, real estate taxes, and costs of maintenance, repairs, replacements and administration are budgeted annually and divided among the owners in proportion to the number of shares of stock allocated to each apartment, and are

³⁴ On cooperative housing see generally Note, *Federal Assistance in Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542 (1959); Note, *Cooperative Apartment Housing*, 61 HARV. L. REV. 1407 (1948); Yourman, *Some Legal Aspects of Cooperative Housing*, 12 LAW & CONTEMP. PROB. 126 (1947); Isaacs, "To Buy or Not to Buy: That is the Question"—*What is a Cooperative Apartment?*, 13 RECORD OF N.Y.C.B.A. 203 (1958); Anderson, *Cooperative Apartments in Florida: A Legal Analysis*, 12 U. MIAMI L. REV. 13 (1957); Whitbook, *The Cooperative Apartment*, 9 PRAC. LAW. 25 (April 1963).

payable by each owner in monthly instalments as rent. If an instalment is not paid it constitutes a default under the lease and the owner may be dispossessed as for the non-payment of rent.³⁵

On a specified date during the lease term and periodically thereafter, the owner of a cooperative apartment has the right to turn in his stock to the corporation, cancel his lease and be relieved of future obligations. This is a feature which was added to cooperatives because of experience during the depression of the 1930's when many owners were unable to pay their share of operating costs, let alone to carry the added burden caused by the failure of other owners to pay their share, and could not relieve themselves of these obligations short of bankruptcy. Hence the escape provision was developed, but of course the owner who turned in his lease lost his stock and his equity.

Does the condominium compete on equal terms with the cooperative in this respect? The pattern established by the Puerto Rico Act³⁶ was that the grantor could not relieve himself of responsibility for common charges by abandoning his unit, and that on a sale the grantor and grantee became jointly and severally liable for such charges, with the grantee having the right to recover against the grantor for charges accruing prior to the conveyance. Under the influence of the FHA Model Statute For Creation of Apartment Ownership³⁷ most of the later statutes provide that upon a conveyance a statement of accrued charges may be obtained from the management and that the grantee shall not be liable for, nor shall the property conveyed be subject to a lien for, any unpaid assessments against the grantor in excess of the amount set forth in the statement. This provision protects the grantee, but protects the grantor, if at all, only by implication. The New York Bill³⁸ in its

³⁵ For a helpful analysis of relative advantages of cooperative and condominium, see Berger, *Condominium: Shelter On A Statutory Foundation*, 63 COLUM. L. REV. 987, 990 (1963).

³⁶ P.R. LAWS ANN. tit. 31, § 1293e (Supp. 1962).

³⁷ FHA Model Statute for Creation of Apartment Ownership § 24 with commentary, promulgated by FHA in May, 1962 (hereinafter referred to and cited as the FHA MODEL ACT).

³⁸ New York Bill §§ 339-x, 339-z.

latest form expressly protects both the grantor and grantee in this situation and further provides that an apartment owner may, subject to such terms and conditions as may be specified in the by-laws, by conveying his unit to the management, exempt himself from common charges thereafter accruing.

A cooperative owner may sell and assign his stock and lease only to a purchaser approved by the board of directors of the owning corporation, or he may sublet his apartment on similar condition. However, in a cooperative apartment on which a mortgage is insured by the FHA, the apartment owner may not assign his stock and lease (even to a person approved by the cooperative corporation) until he has given thirty (30) days notice of such intention to the corporate owner, during which period the corporation has an option to purchase the shares at their book value. If the option is exercised the apartment owner loses any excess of the market value over book value. If the option is not exercised, the owner may then sell and assign his stock to anyone approved by the corporation.³⁹

While the HPA's do not contain any provision restricting the sale of apartments, it is likely that such restrictions will be employed in many projects because of the view that such restrictions are necessary to maintain the congenial atmosphere so desirable in community living. The validity of such restrictions is commented on later in the text.⁴⁰

In the condominium there is not even the theoretical possibility that an owner of an apartment will suffer loss due to the inability of an owner of another apartment to pay his mortgage charges or taxes, because these cover only the individual apartment. In the cooperative, if an owner does not pay his share of these charges as rent, they must eventually be distributed among the other owners.

The individual mortgage feature not only affords a substantial measure of protection but offers affirmative advantages to the owner of a condominium apartment. Pur-

³⁹ FHA recommended by-laws of "213" projects, art. III, § 5(b), (c).

⁴⁰ See text *infra*, *Restrictions on Sale*, at 45.

chases and sales of apartments can be made free and clear or subject to mortgages as large or small as the desires and financial resources of purchasers permit. The owner is therefore in a favorable position to recover increased equity in his apartment due to inflationary enhancement or the amortization of existing mortgage indebtedness. On the other hand, any mortgage of a separate cooperative apartment not only would be subordinate to the building or blanket loan, but would have as security a lease of limited unexpired term, probably five years or less. Either of these grounds alone would disqualify a mortgage for institutional investment.⁴¹

The owner of a condominium apartment should be entitled to the same tax deductions for real estate taxes and mortgage interest as the owner of a private home.⁴² Similar deductions are permitted the owners of cooperative apartments but only on the conditions and to the extent specified in Section 216 of the Internal Revenue Code of 1954. One of these conditions is that "80 per cent or more of the gross income . . . is derived from tenant-stockholders." In cooperatives covered by FHA insured mortgages, repeated purchases by the corporation of tenants' stock and leases, and the subsequent renting of such apartments to non-stockholder tenants, especially if coupled with a high delinquency rate and the renting of repossessed apartments to non-stockholder tenants, could result in a situation where the 80 per cent tenant-stockholder requirement of the Revenue Code would be endangered. Moreover, the Treasury Department unofficially takes the position that the portion of mortgage amortization attributable to tenant-stockholders must be deducted from gross income before ascertaining compliance with the 80 per cent requirement. Where

⁴¹ Two bills, pending in the 88th Congress, 1st Session, H.R. 4582 and H.R. 4583, have as their purpose the financing of the purchase of the "right of permanent occupancy" by tenants in government-assisted housing projects. Two bills introduced in the New York Assembly in 1962 (A. Int. Nos. 1452 & 1454) to permit the state and municipalities to make similar loans, were defeated in committee. Investigation of instances of the financing of the purchase of cooperative apartments by individual mortgage loans, indicates that these were in fact credit loans secured collaterally by the pledge of stock of the cooperative housing corporation.

⁴² See text *infra*, *Income Taxes*, at 39.

mortgage payments are on a level principal plus interest basis, amortization increases from year to year, thus progressively reducing the 80 per cent point.⁴³

If the 80 per cent level should be breached, the tenant-stockholders would be deprived of income tax deductibility of their respective shares of property taxes and mortgage interest. To guard against this situation, proprietary leases afford tenants the option of canceling their leases if gross income from tenant-stockholders drops below the 80 per cent level. If it should become necessary for the tenants to exercise this option, it would probably be to their advantage to convert the cooperative to a condominium, thus restoring the income tax deductibility of property taxes and mortgage interest by placing these on the basis of individual apartments. Assuming this motivation, the conversion could be readily accomplished. The corporation would file a declaration under the HPA and would then exchange deeds of individual apartments for the surrender of the respective proprietary leases and shares of stock, together with cash from each purchasing tenant (the proceeds of mortgage loans on the respective apartments) sufficient to liquidate the mortgage on the building. These transactions would probably have to be closed simultaneously in the absence of willingness on the part of the mortgagee of the building to give partial releases covering individual apartments. Even in the absence of a prepayment privilege in the building mortgage, it probably would not be difficult to persuade the mortgagee to accept his money in view of the rights in the tenants to cancel their leases.

One advantage of the cooperative over the condominium appears to be lessening, namely, the reduced expenses of acquiring a lease and stock as compared with closing the acquisition of a fee title. As increasing numbers of luxury cooperatives come on the market and equity payments reach substantial figures, more and more purchasers are requiring leasehold title insurance. Contributing factors to this demand may well be title complications resulting from ground or building leases.

⁴³ See discussion in Whitebook, *supra* note 34, at 41.

Section 216 of the Internal Revenue Code defines "Cooperative Housing Corporation" in such manner that each stockholder must occupy an apartment for dwelling purposes. This in effect prevents commercial tenants from owning stock in the corporation and occupying space under proprietary leases lest the tax exemption be lost to all the residential tenants. Thus it is necessary that rent from commercial tenants count against the 20 per cent leeway. This principle has no applicability to the condominium where commercial facilities can be owned as apartments or units without affecting the taxable status of the owners of residential apartments or of the association of co-owners. However, if commercial facilities are made a part of the common elements and are rented by the association of co-owners, then there are income tax consequences.

The purchaser of a cooperative apartment for use as his principal residence is entitled to the non-recognition of capital gain provided for in the Internal Revenue Code,⁴⁴ and the purchaser of a condominium apartment for such purpose is entitled to the same advantage.⁴⁵

In the condominium there is no legal entity comparable to the corporate owner of the cooperative apartment house which holds title to the land and building, and stands between the apartment owner and the public. The manager or management of the condominium does not hold title to the building or any part thereof and may have only limited legal personality. Thus the apartment owner may be subject to suit by reason of personal injury occurring in or on the common elements or he may be sued in contract involving the purchase of goods or services by the management. A claim on which all the owners are liable may be collected from only one of them and he may be forced to pursue the others for contribution. On the other hand, the owner of a cooperative apartment is in legal contemplation only a stockholder and a tenant, and would be exempt from liability for the acts of the corporate owner unless he participates in them. This discrepancy on the

⁴⁴ INT. REV. CODE OF 1954, § 1034(f).

⁴⁵ INT. REV. CODE OF 1954, § 1034(a).

part of the condominium is one which can be largely remedied by suitable amendments to existing HPA's and by appropriate provisions in those yet to be enacted.

The stockholder-tenant in his relations with the corporate owner is in quite a different position from the condominium apartment owner in his relations with the management of the condominium. If the former violates the terms of his lease he may be dispossessed in like manner as a defaulting tenant. This gives the corporation a strong weapon in enforcing compliance with lease provisions by the tenant-stockholder but by the same token falls short of affording the cooperative owner the security of possession of a true owner. On the other hand the condominium owner cannot, in the absence of special statutory authorization, be ousted from possession for infraction of the by-laws or regulations.⁴⁶

SECTION 234 OF THE NATIONAL HOUSING ACT

The statute which gave rise to the excitement over condominium merits a few comments. Section 234 must of course be read in connection with related Regulations of the FHA.⁴⁷

The stated purpose of Section 234 of the National Housing Act is "to provide an additional means of increasing the supply of privately-owned dwelling units where, under the laws of the State in which the property is located, real property title and ownership are established with respect to a one-family unit which is part of a multifamily structure." While the legal recognition of title to and ownership of a part of a structure is an essential element of condominium, much more is involved; for example, the regulation of the rights and duties of the several owners with respect to each other, to their several units, to the common elements, and to the public. These include, among other things, maintenance and repair of the apartments and of the common elements, repair or reconstruction of the structure in the

⁴⁶ See text *infra*, *Recalcitrant Owners*, at 35.

⁴⁷ 24 C.F.R. §§ 234.1- .300, as amended and revised 1962. FHA Release Series No. MF-22, Control No. F-439, dated May 25, 1962 has appended model forms of Plan of Apartment Ownership (Master Deed), By-Laws, Regulatory Agreement and Subscription and Purchase Agreement.

event of damage or destruction by casualty, liability of the unit owners to the public in contract and in tort, and preservation of the condominium relationship from premature destruction and its final voluntary termination.

Section 234 adopts the definition of "mortgage" set forth in Section 201 of the National Housing Act⁴⁸ except that for the purposes of section 234, "mortgage" "may include a first mortgage given to secure the unpaid purchase price of a fee interest in, or a long-term leasehold interest in, a one-family unit in a multifamily structure. . . ." While the statute thus authorizes insurance of mortgages on long-term leasehold estates, the FHA Model Act does not provide for the creation of condominium projects on leasehold estates, nor do more than a handful of the HPA's.

For the mortgage to qualify for insurance, the mortgagor must be acquiring, or must have acquired, the family unit for his own use and occupancy and must not own more than four one-family units covered by mortgages insured under the section.⁴⁹

Under the section, "common areas and facilities" include the land and may also include such commercial facilities as are approved by the Commissioner. If the reference to land means the surface of the land, and it would seem necessarily so in the context, the provision would exclude the right to insure mortgages which cover space lots only without a common interest in the land surface. Moreover, the inclusion in common areas and facilities of commercial facilities and the production by these of rental income have income tax implications.

The applicability of section 234 is limited to structures which are or have been covered by a mortgage insured under another section, except section 213,⁵⁰ of the act. The purpose of this requirement is to "assure that all of the structures would have been built or rehabilitated with

⁴⁸ 48 Stat. 1247, 12 U.S.C. § 1707 (1958).

⁴⁹ Berger, *Condominium: Shelter On A Statutory Foundation*, 63 COLUM. L. REV. 987, 988 n.6 (1963). The article points out that this provision was based on objections by the Cooperative League of the United States that apartments might be the object of speculation.

⁵⁰ *Ibid.* Professor Berger indicates that this exception was due to questionings by the Cooperative League of the United States.

the benefit of FHA minimum property requirements, inspections and appraisals."⁵¹

Subject to the overall limitation of \$25,000 on individual mortgages and to dollar limitations per room under section 207 of the National Housing Act, the loan-to-value ratios under section 234 are 97 per cent of the first \$13,500, 90 per cent of the next \$4,500 and 70 per cent of the excess over \$18,000. Included in value is the pro rata value of common areas and facilities. Maximum loan maturity is 30 years or 3/4 of the Commissioner's estimate of the remaining life of the structure, whichever is the lesser.

Each project must comprise at least five family units. These may be located in one building or in a row of (attached) buildings or in any combination of units, so long as each building contains at least two units. This rules out single family detached houses.⁵²

The Regulations⁵³ require that the building be committed to a plan of apartment ownership and require the filing of a master deed or declaration with provisions similar to those called for by many of the HPA's. The basic values of the building and of the individual units are those stated in the FHA appraisal. Each owner of a family unit and his successors are required to be members automatically of the association or cooperative of owners, which is required by the Regulations.

The FHA Commissioner is authorized by the Regulations⁵⁴ to require a regulatory agreement between the owners and the Commissioner. The agreement which has been drafted by the FHA requires the payment of a sum monthly, estimated to cover operating expenses of the common elements, an additional sum for the purpose of establishing a reserve for replacements of fixtures and certain other parts of the building, and a further sum to serve as working capital for the association of owners. These provisions also have income tax implications.

⁵¹ *Hearings on Various Bills to Amend the Federal Housing Laws Before a Subcommittee of the Senate Committee on Banking and Currency, 87th Cong., 1st Sess. 227 (1961).*

⁵² 24 C.F.R. § 234.1(k) (1962).

⁵³ 24 C.F.R. § 234.26(b) (1961).

⁵⁴ 24 C.F.R. § 234.26(f) (1961).

Finally, and not least in importance, section 234 creates the Apartment Unit Insurance Fund and authorizes the Commissioner to transfer one million dollars to such Fund from the War Housing Insurance Fund.

PROBLEMS OF HORIZONTAL DIVISION AND OWNERSHIP —
ATTEMPTED SOLUTIONS THROUGH CONDOMINIUM

Some Terms

A variety of terminology will impress the readers of the condominium statutes. "Condominium" itself is used, and with different meanings, even though the word is absent from the Puerto Rico statute and from its immediate ancestor, the Cuba Act. In Puerto Rico and Cuba the statutes are known as Horizontal Property Acts and this designation has been followed in some of the states. Strangely enough, in Puerto Rico "condominio" (Latin American for condominium) is used only in conjunction with the name of the building which is submitted to the act, such as "Condominio Atlantico." In the United States "condominium" is sometimes used as the name of the statute or of the type of ownership or as the designation of the apartment in the building which is submitted to the act, to mention a few.

Two terms which may lead to confusion are "horizontal" and "vertical." Generally, properties submitted to a condominium statute are composed of horizontal layers in different ownerships. This is not to say, however, that the units or apartments do not also have boundaries in the nature of vertical planes. "Vertical" here is used in a different sense from its use in the subtitle, "Vertical Subdivision," to Borgwardt's article,⁵⁵ meaning that there the units are stacked one atop another instead of being spread out horizontally as in the case of a subdivision for private houses. But in the private house subdivision the boundaries consist solely of vertical planes. Perhaps "strata titles,"

⁵⁵ Borgwardt, *The Condominium—Vertical Subdivision*, 36 CAL. S.B.J. 603 (1961).

used in the Antipodes,⁵⁶ is an appropriate alternate for "horizontal property" or "condominium."

Submitting Property to the Act

The HPA's prescribe the exclusive means whereby property may be submitted to the terms thereof, namely, by the sole owner or all the co-owners executing and filing for record an instrument in the nature of a declaration or master deed. The acts are applicable only to properties which are so brought within their purview. Thus there can be no room for doubt as to whether a particular property has or has not been submitted to the terms of the act. It should go without saying that the submission of a property to an HPA is a matter that is voluntary on the part of the owner.

The acts prescribe the contents or minimum contents of the declaration. These are important to the establishment and subsequent functioning of the condominium. First, the declaration must describe the land on which the building is located. The usual metes and bounds description or reference to a recorded or filed plat fills this requirement.

The declaration must then describe the apartments. Generally this may be done in one of three ways, namely, by a metes and bounds description in accordance with an engineer's survey, by reference to a three dimensional subdivision or resubdivision plat or by reference to architect's plans. The first method can be costly and time consuming, and either of the last two methods is to be preferred. There should, however, be some means of verifying that the apartment when completed conforms to the boundaries shown on the plat or architect's plans. Many a change is made during the course of construction. It is for this reason that some of the statutes, the FHA Model Act and the New York Bill, require certification "as built" by an architect before the first conveyance of an apartment is made. The California Act accomplishes this purpose, and much more, by this provision:

⁵⁶ RATH, GRIMES & MOORE, STRATA TITLES (1962).

In interpreting deeds and plans the existing physical boundaries of the unit or of a unit reconstructed in substantial accordance with the original plans thereof shall be conclusively presumed to be its boundaries rather than the metes and bounds expressed in the deed or plan, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building.⁵⁷

It is a great aid to future conveyancing if the act requires apartment designations to be shown on the survey, plat or plans, and permits future conveyances to be made by reference to such designations. In all cases there should be appropriate means of filing surveys and architect's plans among the official records of the governmental subdivision. The declaration must of course set forth the other matters specified in the HPA in addition to the description of the land and apartments.

The submission of a property to an HPA by recording the declaration brings into effect all the provisions of the act as respects the building or project, the apartment and the common elements. The acts generally provide that after such submission, the apartments or units may be the objects of all types of legal acts and the owner of the unit is entitled to the exclusive ownership and right to possession. Some of the acts provide that each unit or apartment together with its undivided interest in the common elements, "shall for all purposes constitute real property."

Fee or Leasehold

In about half of the states a condominium project is permitted on a leasehold as well as on a fee simple estate. The New York Bill and the FHA Model Act, by defining "property" as owned in fee simple absolute and "unit owner" or "apartment owner" as one who owns in fee simple absolute, would effectively limit condominium projects to fee simple absolute estates. Section 234 of the National Housing Act, however, expressly authorizes insurance of mortgages on leasehold estates.

⁵⁷ CAL. CIV. CODE § 1353(a).

A distinct advantage of the condominium is the limited obligation of the unit owner for expenses covering more than his unit. Taxes and mortgage charges are on a unit basis. However, if condominiums are to be created out of leasehold estates, the rent will be added to the items which are related to the entire project rather than the unit, unless it is possible to break up the lease into separate leases, one covering each unit, or to obtain a non-disturbance agreement from the owner of the fee in which he agrees not to disturb the possession of any unit owner whose proportionate part of the rent has been paid. Moreover, leasehold estates are not limited to the ground. Conceivably the lease might cover the improvements as well as the land, with the rent in a proportionately greater amount. Thus the danger to the interest of a unit owner, absent fractionalizing or non-disturbance agreements, if other unit owners default in paying their share of the rent, would be even greater financially than if the lease covered the land only.⁵⁸

The use of a ground or underlying lease may involve a further problem, namely, the legal authorization of the separate tax assessment. Since the apartment would probably rest on a sublease, it might not, absent specific statutory authority, be the proper object of a separate tax bill. If this is the case, another one of the principal financial advantages of condominium would be lost.

Ground rent would not be a tax deductible item for the owner of a residential unit unless it is redeemable and therefore classed as interest for tax purposes.⁵⁹

The solution to the lease problem probably is not found in fractionalizing the lease or in non-disturbance agreements but in dispensing with the lease entirely by changing the basic financing pattern of the project. Customarily a ground lease is used to avoid the necessity of the promoter's putting up cash for the value of the land. An alternative method is for the developer to obtain the use of the land by giving the landowner an interest in the project by means of stock

⁵⁸ Cf. Anderson, *Cooperative Apartments in Florida: A Legal Analysis*, 12 U. MIAMI L. REV. 13, 16, 28, 36, 38 (1957) as to the effect of underlying leases on stock-lease cooperatives.

⁵⁹ Treas. Reg. § 1.163-1(b), as amended, T.D. 6593 of Feb. 28, 1962.

in a corporation or an interest in a joint venture or partnership.

The Apartment

Is the apartment a part of a building or is it a cube of space? There is ample authority that both a part of a building and a cube of space constitute land and may be the object of the bundle of rights comprising ownership.⁶⁰ Those who favor the cube-of-space theory over the part-of-building theory seem to be in the majority. Unpleasant consequences are predicted by the adherents of each theory to result from the other. If, for example, an apartment is only a part of a building and the building is totally destroyed, then the owner has remaining only his common interest in the land. This result is not too different from the situation of one who owns a lot and private house, where the house is totally destroyed. In both situations the owner will doubtless be protected by fire insurance. True, the owner of the erstwhile private house will have fewer problems in rebuilding than the owner of the apartment, but these are matters which can and should be provided for in the HPA and in the by-laws. Discussions of what the apartment owner owns are complicated by such questions as: If the apartment owner owns only a part of a building, what is his relation to the space included within the walls, floor, and ceiling constituting such part? Does he have the right of user in the nature of an easement? Such questions seem to result from too narrow a concept of what is meant by owning a part of a building. Has it ever been seriously contended that when one leases part of a building, whether for one year or ninety-nine, he doesn't also lease the space enclosed by the walls? Or one may say that leases usually cover "space," but here again there is confusion, because leased space is generally thought of as floor space, and in fact is measured in terms of square footage and not cubage. But when one rents floor space, does he rent only the two dimensional area (if so it would be useless) and not the three dimensional space extending to the ceiling?

⁶⁰ See note 20 *supra*.

On the other hand, the proponents of part-of-building theory ask this pertinent question: If the apartment owner owns only three dimensional space, what does he own that he can insure against loss by fire?

Theories as to what the apartment owner owns are relevant not only to restoration after destruction but also to disposition of the remaining property if damage is not to be repaired. While under the part-of-building theory, the object of ownership may cease to exist, under the space-only theory the apartment owners may be left with inaccessible space lots, thus complicating the problem of disposition of the entire property. But here again, the HPA affords a solution by way of partition and division of sales proceeds.

Regardless of space-lot or part-of-building theories, how extensive should an apartment be? Should it include a non-adjoining maid's room or storage room, or should they be separate apartments? In France, where such rooms would normally be separate units, an occasional problem has been created by the sale of a maid's room separate from the apartment to which it would normally be appurtenant, and the occupancy of such room by an entire family. This could not be done without the filing of an amended declaration if the maid's room had been a part of the apartment, although not connected to it physically.⁶¹

Should the owner of a large apartment have the right, without approval of the other owners or of the condominium management, to divide his apartment into two or more smaller apartments or to convey a room to the owner of an adjoining apartment? While the Illinois Act⁶² forbids the subdividing of a unit, it should be considered as basic to the theory of condominium, even without such express prohibition, that once the declaration has been filed, the apartment may not be changed in size or rooms exchanged with other apartments without the filing of an amended declaration. Otherwise, the rights *inter se* of the owners, and the relations between the owners and the management

⁶¹ Conference by writer with attorneys in Paris, France.

⁶² ILL. ANN. STAT. ch. 30, § 216 (Smith-Hurd 1963).

would be seriously disrupted to say nothing of relations with taxing and recording authorities and with insurance carriers. In addition, the subdividing of an apartment or the occupancy of a maid's room by an entire family could seriously affect the tone of the project and the value of the owners' investments in their apartments.

The Common Elements

Condominium is a welding of two distinct tenures, one in severalty and the other in common. Both have long existed, but usually separately. In condominium they are inseparably joined. Moreover, the joining is a two-sided affair because, first, the subject of both ownerships is parts of the same property (*i.e.*, an estate in severalty in the apartment and an estate in common in the portions of the property devoted to common use), and second, the ownerships are joined in the same person or other legal entity.

The basis of the right to use the common elements is the ownership in common by the apartment owners. Ownership in common carries with it the right to use the thing owned in common, so long as such use does not interfere with similar use by the other owners.⁶³ Ownership in common is of the entire thing owned, although necessarily less than the entire interest. By the same token it is an ownership and possessory interest and not merely a right in the property of another. Similarly the right to use the common elements is not merely an easement appurtenant to the title to the apartment. It rests firmly on co-ownership and as such has the approval of the condominium statute.

The HPA's represent two distinct approaches to the definition or description of the common elements. Those which follow the Puerto Rico Act in this respect, and they are greatly in the majority, list the parts of the property which may, unless otherwise provided in the declaration, constitute common elements, such as the land, foundations, main walls, roofs, halls, stairs and so forth (concluding

⁶³ 4 POWELL, REAL PROPERTY ¶ 603 (Boyer ed. 1954).

with a broad catch-all provision). On the other hand, the Illinois Act defines common elements as "all portions of the property except the units." This would seem to serve the same purpose, and has the attribute of brevity.

The HPA's which establish the method of determining the ratio of common interest appurtenant to the respective apartments generally make the ratio dependent upon the relative value of the apartment and either, (1) the value of the entire property, or (2) the aggregate value of all the apartments. An element of confusion enters at this point in some of the acts because of references to the apartment as if it included the proportionate common interest. Usually this is not the case, by definition. For example, the ratio of the value of the apartment (exclusive of its appurtenant common interest) to the value of the entire property, will not be the same as the ratio of the value of the apartment (inclusive of its common interest) to the value of the entire property. Similarly, the aggregate value of all apartments (exclusive of their appurtenant common interest) will not be the same as the value of the entire property (inclusive of common elements). The confusion is probably due to the general lack in the statutes of suitable terminology for the apartment as such and for the apartment inclusive of its appurtenant common interest.⁶⁴

California is one of the states where the method of determining the ratio of common interest is not fixed by statute.⁶⁵ The argument is made that it is better not to specify the method and that realistically it need not accord with relative values. This affects the ratio particularly as a determinant of the pro rata liability

⁶⁴ Leyser, *The Ownership Of Flats—A Comparative Study*, 7 INT'L & COMP. L.Q. 31, 37 (1958), mentions that the lack of suitable terms for the apartment (exclusive of the common interest) and the apartment (inclusive of the common interest) caused some confusion in European statutes. California avoids this difficulty by using two terms, "unit" for the apartment as such and "condominium" for the apartment plus its common interest. CAL. CIV. CODE §§ 783, 1350.2.

⁶⁵ "Unless otherwise expressly provided in the deeds, declaration of restrictions or plans . . . the common areas are owned by the owners of the units as tenants in common, in equal shares, one for each unit." CAL. CIV. CODE §§ 1353, 1353(b).

for common expenses.⁶⁶ For example, an apartment on an upper floor with a view may be worth more than the same size apartment on a lower story without a view, but the cost of maintaining the common elements should not be any more for the more expensive apartment than for the other. However, this leads to the further question: Is the owner of the apartment with the view going to be satisfied with the lesser ratio when the time comes to liquidate the project? And what about voting rights? Will he be satisfied with voting rights in the same ratio as his neighbor without the view?

The general common elements are those which are useful to all the unit owners; the limited common elements to only some of the unit owners. Leyser⁶⁷ points out that under some of the European systems, statutes or common practice place a strict interpretation on these terms. For example, the apartments on the ground floor pay no part of the expenses of operating the elevators—they are limited common elements of the owners on the upper floors only. Likewise, the corridor on the first floor is a limited common element of the unit owners on that floor, and so on up. But care should be exercised not to carry the distinction between general and limited common elements beyond the realm of practicality. Is there a substantial difference between the cost of maintaining the corridors on the second floor and the sixth? Are the owners on the highest floor to be charged more for elevator service because they have a longer ride?⁶⁸ In the interest of simplicity and uniformity of management and maintenance, a multiplicity of limited common elements is to be avoided. The common elements in a condominium

⁶⁶ It should be noted that under the California statute, assessments are to be "in proportion (unless otherwise provided) to its owner's fractional interest in any common area." CAL. CIV. CODE § 1355(e).

⁶⁷ Leyser, *The Ownership Of Flats—A Comparative Study*, 7 INT'L & COMP. L.Q. 31, 42 (1958).

⁶⁸ Word comes from Italy of a coin-in-slot elevator. Since no distinction is made between long rides and short rides, it may be a reasonable assumption that it is intended to equalize costs between the old couple who seldom go out and the large, active family who are always running in and out.

could well be treated like their counterparts in a cooperative. Thus the elevators and corridors of all the floors would be general common elements and any difference in the degree of responsibility would be reflected in the ratio of interest in the general common elements.⁶⁹

This is not to say that limited common elements have no place in the condominium. A limited common element would be appropriate in the case of an elevator serving only penthouses; a freight elevator serving only commercial units; or the separate entrance and corridor serving only a group of doctors' suites, to mention a few samples. If such items as these, presumably used by only a small minority of the owners, were general common elements, it would probably be difficult to interest a majority of all the owners in their maintenance and repair.

How are the walls to be treated? The Acts provide that the outside walls are to be common elements, the term "main walls" having been generally carried over from the Puerto Rico Act. But what of the partition walls between apartments? And what of the pipes within such walls after leaving the main risers? Are they to belong to a particular apartment or if they happen to serve two adjoining apartments are they to be limited common elements and a separate account kept of them? Why isn't it simpler from every point of view, if within statutory limitations, for the partition walls (exclusive of decorated surfaces) to be classified as general common elements and the pipes and wiring to be so classified all the way to, but not including, the faucets on the pipes and the sockets at the ends of the electric lines? How could anyone be prejudiced? If a unit owner willfully or negligently damages a common element, whether general or special, he would be individually responsible. For the unforeseen events, such for example as leaking pipes, it is fairer for all to be responsible as a kind of mutual sharing

⁶⁹ This would have to be done within statutory limitations. The New York Bill, which requires that the common interest approximate relative values, provides that "the fair value of the unit shall reflect the substantially exclusive advantages enjoyed by some but not all units in a part or parts of the common elements." New York Bill § 339-i.1.

rather than for the burden to fall on the one or two owners who happen to be unfortunate.

Inseparability

It is essential that the ownership in severalty and the ownership in common, at least insofar as the essential common elements are concerned, remain joined if the condominium project is to continue to exist. The apartments would lose their value and usefulness without the availability, for example, of the means of access to the building. If someone were to gain exclusive possession of the essential common elements, as through the foreclosure of a lien, he would have it within his power to wreck the condominium project. It has been argued that even though the common elements should come into the hands of a stranger, the apartment owner would still have an easement of necessity. Few purchasers or mortgagees would be willing to rely on this theory unless it is clearly supported by local law. It is far safer, especially in view of the novelty of the condominium concept, that inseparability be expressly provided for in the HPA. One of the statutes even goes so far as to provide for easements in the common elements to take care of the contingency that use of them through common ownership might for some reason be cut off.⁷⁰

It has been suggested that in some cases separation of an interest in a common element from the apartment to which it is appurtenant should be expressly permitted so as to allow, for example, the sale of an undivided interest in a swimming pool or other recreational facility. Whether separation of such a *non-essential* facility should be permitted is a question of policy rather than a legal question.

Inseparability is not so clearly provided for in some of the early statutes as might be hoped. The original Hawaii statute has been amended to clarify this point.⁷¹ Inseparability is clearly provided for in the Model Act⁷²

⁷⁰ CAL. CIV. CODE § 1353(c).

⁷¹ Hawaii Laws 1963, Act 101, § 6(b).

⁷² FHA MODEL ACT § 6(b).

and the New York Bill⁷³ and has been followed rather consistently in the later statutes.

Any suggestion that inseparability might be a restraint on alienation is based on erroneous assumptions, at least insofar as essential common elements are concerned. Inseparability does not restrict sale, it promotes sale. No one would purchase an apartment if he thought that it might be deprived of the means of access. On the other hand, the essential common elements could not be sold separately from the apartments, except possibly to someone seeking to purchase nuisance value. Such issues are swept aside by the proper statutory provision barring separation of the unit and its appurtenant common interest.

Bar to Partitioning the Common Elements

If an apartment owner had the right to partition the common elements, he would have it within his power to destroy the condominium no less than would the person who might through some other method cause a separation of the common elements from the units. It is for this reason that HPA's generally embody a prohibition against such partition.⁷⁴ It is important that this prohibition be a statutory one because, if the bar to partition is attempted by agreement, legal obstacles will be encountered. Such agreements are usually valid for only a reasonable period of time, and this period has frequently been equated with the period permitted by the rule against perpetuities.⁷⁵ However, cogent argument may be made that the social and economic ends which are intended to be served by the rules prohibiting perpetuities and restraints on alienation, are inapplicable to agreements barring partition in a condominium.⁷⁶ There the barring of partition not only does not inhibit transfers but on the contrary makes

⁷³ New York Bill § 339-i.2.

⁷⁴ Such provision was lacking in the Hawaii and Virginia Acts, but has since been remedied in the former. Hawaii Laws 1963, Act 101, § 6(c).

⁷⁵ 4 POWELL, REAL PROPERTY ¶ 611 (Boyer ed. 1954); 6 AMERICAN LAW OF PROPERTY § 26.72 (Casner ed. 1952); Roberts v. Jones, 307 Mass. 504, 30 N.E.2d 392 (1940); RESTATEMENT, PROPERTY § 412 (1944).

⁷⁶ 6 AMERICAN LAW OF PROPERTY § 26.3 (Casner ed. 1952).

feasible the ownership and sale of apartments; it serves to preserve the apartment community and make possible the fulfillment of the purpose of cooperative living for which the condominium is intended.

By-laws, Covenants and Restrictions

The owner of a part of a building, even though he has an estate in fee simple therein, cannot, it appears, demand that the owner of the other part keep the roof in repair in order that it may afford protection from the elements, this according with the view ordinarily expressed that the tenant under a lease of a part of a building cannot demand that the landlord make repairs on the roof. Likewise, the owner of an upper part of a building cannot demand that the owner of the lower part make repairs so as to furnish support to the upper. The upper owner has an easement of support, but this involves no obligation on the owner of the servient tenement as to the making of repairs.⁷⁷

Accordingly, protection of the owner of a part of a building depends upon covenants between that owner and the owners of the other parts. To be effective against subsequent grantees these covenants must run with the land, which means that they must meet the requirements of privity and of "touching and concerning the land."⁷⁸ Some of the covenants may not be such that they will meet these requirements. The properly drawn HPA affords the solution to these problems by expressly obligating each owner to comply strictly with the by-laws, the administrative rules and regulations and the covenants and restrictions.

A major function of the by-laws is to provide for the administration, maintenance and repair of the common elements by authority of something less than all the owners — generally a majority in number or in interest of ownership. This is vital to the operation of the property and its importance cannot be overemphasized. If unanimous authorization were necessary for the operation of the property, management would cease to function.

⁷⁷ 2 TIFFANY, REAL PROPERTY § 626, at 625 (3d ed. 1939).

⁷⁸ Note, *Federal Assistance in Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542, 601 (1959); 5 POWELL, REAL PROPERTY §§ 674, 675 (Boyer ed. 1954); 3 TIFFANY, REAL PROPERTY § 851 & n.23, § 854 & nn. 55, 85 (3d ed. 1939) (Supp. 1963); RESTATEMENT, PROPERTY §§ 542, 547, 548 (1944).

Changes in the administration of the property requiring amendments of the by-laws often require a larger vote than a mere majority, say two-thirds or three-fourths. Where the statute permits latitude in fixing the requirements of quorum and voting, care should be exercised that these are not placed so high as to impede the tasks of management, particularly at times when major issues are lacking and the interest of apartment owners flags.⁷⁹

Common Expenses

The obligation on the part of the apartment owner created by the HPA for the payment of the proportionate share of common expenses is generally reinforced by a lien on the apartment or a right of first payment out of sales proceeds of the apartment. While this security is important to the management, obviously its enforcement is not as expeditious as the dispossession of a tenant delinquent in his rent. This is one of the characteristics of condominium ownership, and one of its merits. The apartment owner has a correspondingly greater security of tenure, coupled with the incentive of an equity to protect.

Management's lien is generally subordinate to at least a first mortgage on the apartment, thus removing a major obstacle to mortgage financing, particularly that furnished by institutional investors operating under the statutory requirement of a first lien.⁸⁰

HPA's generally provide that an apartment owner may not exonerate himself from liability for common expenses by abandoning his apartment or by waiving the use of any of the common elements.⁸¹ The Puerto Rico

⁷⁹ Leyser, *The Ownership Of Flats — A Comparative Study*, 7 INT'L & COMP. L.Q. 31, 42 (1958) points out that under some European systems, in the absence of a required quorum, the quorum requirements at subsequent meetings dealing with the same agenda are greatly eased or altogether waived. The writer has noted similar provisions in by-laws of projects in Puerto Rico, although not provided for in its HPA.

⁸⁰ But see ILL. ANN. STAT. ch. 30, § 219 (Smith-Hurd 1963), permitting the lien for common expenses to gain priority over a prior recorded encumbrance.

⁸¹ *E.g.*, P.R. LAWS ANN. tit. 31, § 1293c (Supp. 1962); FHA MODEL ACT § 21.

Act⁸² goes so far as to provide that the vendor and vendee of an apartment remain jointly and severally liable for common expenses, the vendee being given the right to recover against the vendor for expenses accrued prior to the sale. Other acts, while following the pattern of continuing liability of the grantor, provide for an estoppel statement from the management which sets the limit of the grantee's liability for unpaid assessments against the grantor. The New York Bill⁸³ would also extend this protection to the grantor, and goes even further by authorizing a by-law provision⁸⁴ pursuant to which an apartment owner may relieve himself from future liability for common expenses by conveying his apartment to the management of the condominium. These provisions of the New York Bill are important not only in the protection they would afford the seller of an apartment, but also because they would permit the condominium apartment owner to give up his apartment and relieve himself from further liability in like manner as the owner of a stock-lease cooperative apartment who elects to cancel his lease and transfer his stock to the corporate owner.

Recalcitrant Owners

The delinquencies of apartment owners may extend beyond the mere monetary and may present management with more difficult problems than the collection of money or foreclosure of liens. What will management do about the recalcitrant owner who persistently violates the covenants or by-laws with respect to the use or maintenance of his own property or the use of the common elements? If the recalcitrant owner were the owner of a stock-lease cooperative apartment, management would cancel his lease and dispossess or evict him. But in the condominium, management is dealing with a fee owner. Fee titles are not subject to termination, at least where the fee is absolute. On the other hand, conditional, base or qualified

⁸² P.R. LAWS ANN. tit. 31, § 1293c (Supp. 1962).

⁸³ New York Bill § 339-z.

⁸⁴ New York Bill § 339-x.

fees would not be attractive security to mortgage investors, particularly in the absence of a saving clause protecting mortgagees.

Systems exist in Germany and Austria whereby a court proceeding may be instituted for the forfeiture of the estate of an owner who persistently fails to comply with applicable covenants and by-laws.⁸⁵ But here again it must be remembered that if the apartment owner is to be something more than a mere tenant, the remedies of the management must be something less than those of a landlord. There is little to be gained from the apartment owner's point of view by making him nominally an owner and at the same time reducing his status to that of a tenant.

Fire Insurance, Repair and Restoration

The apartment owner's need to protect himself against damage to or destruction of the building is complicated by several factors. Unless the damage is confined, the apartment probably could not be restored without doing work on other apartments and on the common elements. The control of the owner as such does not go beyond his own apartment. His interest in the common elements probably would not be sufficient in extent to support repair or restoration without contributions by other co-owners. The solution which has been attempted in most of the HPA's is to permit or require the management or association of co-owners to insure the entire building (and to assess the premiums as common charges). Some such provision is necessary if this insurance is to be obtained because the association does not own the building and probably would not have an insurable interest. Most of the HPA's go one step further and provide that such insurance by the management is without prejudice to the right of the apartment owner to insure his apartment for his own benefit. There are a number of statutory variations, but this is the general scheme.

⁸⁵ Leyser, *supra* note 79, at 49.

Many problems are raised if the apartment owner exercises his prerogative to take out his own insurance in addition to insurance by the association. The principal problem is one of overlapping coverages, since the apartment coverage will overlap the building coverage not only on the particular apartment but also on its share of the common elements.

The situation is further complicated by the provisions of some statutes, following the Puerto Rico precedent,⁸⁶ to the effect that if coverage is not sufficient to repair or restore, co-owners may be assessed for the deficiency. This provision bespeaks at least the necessity of requiring coverage for full replacement value without deduction for depreciation.

Further questions arise as to whether under applicable statutes and practices a policy covering the entire building may bear mortgagee clauses in favor of the mortgagees of apartments and whether or not such clauses on the building policy and on policies on apartments would serve to outweigh problems of duplication or overlapping of coverages.

Generally speaking, repair and restoration are to be undertaken by the management unless loss exceeds a specified percentage of the building value, in which case it is necessary that repair and restoration be authorized by a specified percentage of co-owners within a specified period of time. If repair and restoration are not to be undertaken the insurance proceeds, under those statutes which follow the Puerto Rican pattern,⁸⁷ are to be delivered to the co-owners entitled thereto, and the remaining property is to be sold in partition and the proceeds of sale paid to the co-owners entitled thereto. This method of distribution can easily be complicated by fine distinctions as to who is entitled to share in which fund and to what extent.

⁸⁶ P.R. LAWS ANN. tit. 31, § 1293i (Supp. 1962).

⁸⁷ P.R. LAWS ANN. tit. 31, § 1293h (Supp. 1962).

A simple method is provided for in the New York Bill⁸⁸ and the FHA Model Act,⁸⁹ under which, if the property is not to be repaired or restored, the insurance proceeds and the proceeds of sale are to be combined in one fund and distributed to the co-owners in the ratio of their respective interests in the common elements.

The provisions of each statute relating to insurance and repair and restoration will need careful analysis and correlation with local practice and will require supplementing to a substantial degree in the by-laws.

Real Estate Taxes

Separate taxation is as important to the condominium as separate mortgageability. All of the acts require the separate taxation of the individual apartment or such requirement is set forth elsewhere in applicable statutes. Separate taxation is a prerequisite to qualification of an apartment as security for an FHA insured mortgage loan.⁹⁰

It is important economically that the method employed in assessing apartments will not result in a higher aggregate assessed value of the property than would result from the assessment of the property as a whole. If the condominium is exploited to get more assessed valuation out of apartment buildings than would otherwise be obtainable, the economic advantage of condominium ownership over renting may be largely lost.

In Puerto Rico the property is in practice valued as an entirety and the assessed valuations of the apartments are arrived at by applying against the over-all valuation the percentage of each owner's interest in the common elements. This appears to be not only simple but fair to the apartment owners and the taxpaying public. It should help to minimize any increase in the cost of operating an assessor's office which might otherwise be caused by the creation of condominiums. Complications

⁸⁸ New York Bill § 339-cc.

⁸⁹ FHA MODEL ACT § 26(d).

⁹⁰ 24 C.F.R. § 234.26(d)(3) (1962).

in the application of this method arising from the existence of limited common elements bespeak the advisability of minimizing the number of such elements.

It is important that each apartment be assessed together with its appurtenant common interest so as to avoid the possibility of a separate assessment of the common elements as such.

It has been suggested that, absent statutory authority for the separate assessment of apartments, reliance should be placed on the willingness of the board of assessors to make separate assessments nonetheless. This would probably be an unsatisfactory basis either for apartment owners or mortgagees.

A Taxpayer's Fantasy

Real estate taxes paid by the owner of a private home provide for such items as repairs and lighting of streets, refuse disposal and police and fire protection. In the high rise condominium, the streets are vertical instead of horizontal, refuse is collected by the management, and in the large developments the buildings may have special fire protection and the property may be protected by private police. To the extent that the condominium has to furnish what are essentially municipal services, the owner of the apartment is penalized by not being able to deduct the cost of such items as a part of municipal taxes. The solution to this problem may be found in amending the tax laws or, where projects are located in rural areas, it may be possible to incorporate a project as a village or other governmental subdivision which would levy taxes to provide the services.⁹¹

Income Taxes

There appears no reason why the apartment owner should not be entitled to United States income tax deductibility for the mortgage interest⁹² and taxes⁹³ on his apartment in like manner as the owner of a private house.

⁹¹ Cf. the issuance of tax exempt bonds by drainage districts.

⁹² INT. REV. CODE OF 1954, § 163.

⁹³ INT. REV. CODE OF 1954, § 164.

Whether the association of co-owners has to file income tax returns, it would probably not have to pay any tax so long as the periodic charges to the co-owners approximately equal the common expenses, and there is no other income to the association, such as the rentals from commercial facilities. In any case where other income is received, it would probably be taxable income to the co-owners even though applied in reduction of the common expenses. Any problem of taxable income from commercial areas could be avoided by selling the areas as separate units instead of renting them as part of the common elements. Logically and in practice they belong in the category of units and not common elements.

The "80 per cent rule" applicable to tenants of cooperative apartments has no application to the condominium because taxes and mortgage interest are on an individual apartment basis. Thus in the condominium even though rental income from tenants, including that from commercial tenants and from tenants of apartments owned by the association of co-owners, would be income tax includible, it should not affect the income tax deductibility by the individual co-owners of property taxes and interest payments.

Of course, commercial facilities as individual units or apartments may be separately owned as a source of income by a residential apartment owner or by a person otherwise a stranger to the condominium. This is the method of handling commercial facilities in Latin America and other areas where the use of condominium has been prevalent.

The accumulation of a reserve fund for replacements and a general operating reserve as required by the specimen FHA Regulatory Agreement⁹⁴ may create problems of taxable income. This problem, together with the tax status of the association of co-owners, is one requiring consultation between interested parties and the Treasury Department when the appropriate factual situation presents itself.

Sellers and purchasers of apartments should be entitled to the same non-recognition of capital gains as in the sale

⁹⁴ See 24 C.F.R. § 234.26(f) (1961).

and purchase of a private home serving as the principal residence of the taxpayer.⁹⁵ These provisions of the Internal Revenue Code are of course available to purchasers and sellers of cooperative apartments.⁹⁶

Representation, Mechanics' Liens, Tort and Contract Liability

What are the legal consequences of the apartment owners acting as a group and what is the juridical capacity of the manager or board of managers in representing such a group? The intention seems clear in the FHA Model Act⁹⁷ that the co-owners acting as a group constitute an association with membership automatic for all co-owners. The New York Bill has been so drawn as to bring the group of co-owners within the purview of the New York General Associations Law⁹⁸ so that it will constitute an unincorporated association. Both the FHA Model Act⁹⁹ and the New York Bill¹⁰⁰ clearly indicate the authority of the manager to sue and be sued on behalf of all the co-owners, and require that the declaration name a person for the service of process.

Closely related to the problems of the legal status of the co-owners and of the management of the condominium, is the susceptibility of the apartments to mechanics' liens and the liability of the apartment owners in tort and contract.

Each apartment should be protected against liens for work performed on or material furnished to (1) any other apartment, and (2) the common elements. At worst, an apartment should not be subjected to a lien for work performed on or material furnished to the common elements in an amount greater than the apartment's appurtenant interest in the common elements. In no case should it be legally possible for a lien to attach to the common elements

⁹⁵ INT. REV. CODE OF 1954, § 1034.

⁹⁶ INT. REV. CODE OF 1954, § 1034(f).

⁹⁷ FHA MODEL ACT § 2(d); 24 C.F.R. § 234.26(b) (6) (1961).

⁹⁸ N.Y. GEN. ASS'NS LAW §§ 12, 13.

⁹⁹ FHA MODEL ACT § 27.

¹⁰⁰ New York Bill § 339-dd.

as such so that they would be subject to sale, thus running head-on into the prohibition against separation of the common elements from the apartments. The Model Act¹⁰¹ forbids liens against the entire property once the property has been submitted to the Act. Labor performed or material furnished for the common elements if duly authorized is deemed to be performed or furnished with the express consent of each apartment owner and may result in a lien against each apartment and its undivided interest in the common elements. Each apartment owner may remove the lien from his apartment by paying a proportionate share of the lien in accordance with his ownership in the common elements. The New York Bill¹⁰² goes further by transferring the lien to the common charges received and to be received by the board of managers.

But few of the statutes attempt to protect the co-owner against liability for the contracts of the management or torts occurring in or on the common elements. Massachusetts would limit the co-owner's liability to his percentage of common interest after the common funds are exhausted, and Alaska provides that the lien of any judgment arising out of tortious conduct may be removed by a co-owner by paying a sum proportionate to his common interest. The New York Bill would give only the limited protection against suit afforded by the General Associations Law.¹⁰³ The Florida Act relieves the apartment owner from liability in contract beyond the amount of lawfully assessed common expenses,¹⁰⁴ and in tort completely as regards "damages caused by the association on or in connection with the use of the common elements."¹⁰⁵ The unit owner remains "liable for injuries or damages resulting from an accident in his own unit to the same extent and degree that the owner of a house would be liable for an

¹⁰¹ FHA MODEL ACT § 9.

¹⁰² New York Bill § 339-1.

¹⁰³ Sections 15 and 16 of the General Associations Law require, in effect, that action be brought against the association as such, and execution returned unsatisfied before action on the same cause may be brought against the constituent members.

¹⁰⁴ Fla. Laws 1963, ch. 63-35, § 18(1).

¹⁰⁵ Fla. Laws 1963, ch. 63-35, § 18(2).

accident occurring within his house.”¹⁰⁶ This is an area in which, in the present state of condominium legislation, heavy reliance must be placed on liability insurance.

Withdrawal from Statute

The earlier statutes uniformly provided that a property submitted to the provisions thereof could be withdrawn only by unanimous action of the apartment owners. But unanimity approximates an impossibility and this gave rise to fears that properties might remain permanently “locked-in” the statutes for lack of a practical method of withdrawal. Neighborhoods deteriorate and cease to be attractive for residences; buildings become obsolete and no longer adequately serve their original purpose. Accordingly, later acts contain provisions permitting withdrawal from condominium upon the votes of fewer than all the apartment owners. In most instances the vote required is a rather high percentage, ranging from 75% to 90%, and in some cases certain factual conditions must obtain, such as attainment of a specified age by the building or failure to repair or restore after damage or destruction. In many cases, the statute permits latitude in the by-laws as to the votes required. Florida goes further than any of the acts by providing that “the condominium may be terminated in such other manner as may be prescribed in the declaration.”¹⁰⁷

Provisions respecting withdrawal from the HPA are of vital concern to apartment owners. It is as important that the condominium not be terminated to the detriment of those who wish it to continue, as it is that termination be possible when the condominium no longer serves the needs of substantial numbers of owners. Where the statute permits, it might be well to require that the vote on withdrawal be taken on the combined basis of number of apartments and ownership interest, thus affording a maximum of protection to owners of both large and small units.

¹⁰⁶ *Ibid.*

¹⁰⁷ Fla. Laws 1963, ch. 63-35, § 16(3).

Governmental Regulation

The first condominium act enacted by any of the states, namely, Hawaii's provided for governmental regulation of the offering and sale of apartments. Virginia embodied identical provisions in its act. These provisions require notice to the Real Estate Commission, the answering and filing of a questionnaire, and the making of a public report by the Commission after examination, before any offering may be made of, or reservations taken for apartments. Contracts for sale are not to be entered into until after a true copy of the Commission report has been given to the prospective purchaser. No material changes may be made in a project after submission to the Commission without notice to the Commission and also to prospective purchasers. Criminal penalties are provided for making false statements or reports. The Commission is given investigative powers and the power of injunction.

Although the sale of apartments does not involve the offering or sale of shares of stock, it is by no means certain that state blue sky laws do not apply to the offering and sale of condominium apartments. For example, in Michigan,¹⁰⁸ the offering and sale of apartments is subject to the jurisdiction of the Corporation and Securities Commission. In New York, the Bill¹⁰⁹ expressly recognizes that condominiums come within the jurisdiction of the Attorney General over cooperative apartments.¹¹⁰

Zoning

Zoning ordinances must be examined to ascertain that condominium buildings would not be in violation. The fact that each apartment in a residential condominium is a separate dwelling unit owned in fee does not necessarily mean that such a condominium can be constructed in a zoning district which is limited to private residences. While the apartment may be the legal unit for some purposes, for

¹⁰⁸ Mich. Laws 1963, Public Act 229, § 24-28.

¹⁰⁹ New York Bill § 339-ee.

¹¹⁰ Cf. Anderson, *Cooperative Apartments in Florida: A Legal Analysis*, 12 U. MIAMI L. REV. 13, 16 (1957) as to the sale of stock-lease cooperatives.

zoning purposes the entire building may be the unit. On the other hand, if the apartment is considered the unit, there may result a violation of minimum lot size or livable area.¹¹¹

A number of the statutes contain provisions intended to ease or clarify the relationship of the apartment to existing zoning ordinances.

Restrictions on Sale

In the stock-lease cooperative it has been the practice to place restrictions on sales of apartments, that is, on the assignment of the proprietary lease. Joint responsibility for the common expenses of the property has been ascribed as the economic reason, close community of living as the social factor. Of course, the owner of a cooperative apartment lives no closer to his neighbors than the renter of an apartment, but the former cannot move away so readily from noisy neighbors, and besides he has an investment to protect. In any event, the prospective purchaser is expected to be an unobjectionable if not congenial neighbor. Restrictions on sale of a cooperative apartment usually consist of a lease requirement that prospective purchasers be approved by resolution of the board of directors, by a specified percentage of the members of the board or by the holders of a specified percentage of the stock.¹¹²

In the condominium the economic incentive to control the selection of apartment owners is not so strong as in the stock-lease cooperative because taxes and mortgages are on an individual apartment basis. It has been estimated that in the cooperative these items alone exceed forty per

¹¹¹ Cf. *Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 222 P.2d 439 (1950).

¹¹² As to the validity of these requirements see *Weisner v. 791 Park Avenue Corp.*, 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 348 (1959); *Penthouse Properties, Inc. v. 1158 Fifth Ave. Inc.*, 256 App. Div. 685, 11 N.Y.S.2d 417 (1st Dep't 1939); Note, *Cooperative Apartment Housing*, 61 HARV. L. REV. 1407, 1416 (1958); Note, *Federal Assistance in Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542, 610 (1959), which refers to the requirement in FHA §213 cooperatives that apartments be first offered to the corporation at the book value of the stock.

cent of all carrying charges.¹¹³ Nonetheless there is already strong indication that developers of condominiums will desire to place restrictions on the persons to whom apartments may be sold. One arrangement which has been suggested takes the form of a right of first refusal or pre-emption.

Counsel desiring to include a pre-emption in the by-laws must satisfy themselves, absent an enabling provision in the HPA, that it does not create an unlawful restraint on alienation.¹¹⁴ A sharp distinction exists between restricting the transfer of stock-lease cooperative interests and restraining the sale of fee interests because the rule against restraints on alienation has no application to restrictions on the transfer of leasehold estates.¹¹⁵ Absolute restraints on the alienation of a fee are generally invalid.¹¹⁶ Provision for a price closely related to the market will be less likely to offend the rule than a price substantially below, but even so the provision may be invalid if it exceeds the period permitted by the rule against perpetuities.¹¹⁷ Of course if the condominium is on a leasehold so that the apartment "owners" are in effect subtenants, the rule barring restraints on alienation would have no applicability.

Nonetheless, all restraints on transfer or alienation, whether of the fee or leasehold interests, are subject to prohibitions against discrimination on account of race, creed or color to the extent that if standards related to other qualifications, such as financial responsibility, are used for the purpose or with the motive of discrimination on account of race, creed or color, they will be invalidated. Not only federal and state laws, but also local ordinances against discrimination must be given consideration in this respect.

¹¹³ INSTITUTE OF REAL ESTATE MANAGEMENT, *Cooperative Apartments, How to Prepare the Budget for a Co-op* 34 (2d ed. 1961). Berger, *Condominium: Shelter On A Statutory Foundation*, 63 COLUM. L. REV. 987, 993 n.33 (1963), cites instances where aggregate estimated taxes and debt service range from 61.2% to 76.7% of the monthly assessment.

¹¹⁴ Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493, 510 (1959).

¹¹⁵ Note, *Cooperative Apartment Housing*, *supra* note 112, at 1416.

¹¹⁶ Schnebly, *Restraints Upon the Alienation of Legal Interests: I*, 44 YALE L.J. 961, 989 (1935).

¹¹⁷ See generally 6 AMERICAN LAW OF PROPERTY §§ 26.64-26.67 (Casner ed. 1952); RESTATEMENT, PROPERTY § 413 (1944).

WHAT TO LOOK FOR IN AN HPA

The newness of condominium and lack of practical experience as well as precedent make it impossible to be positive as to the requirements of the ideal statute. The following are some of the points which should be covered:

1. A convenient and exclusive method of submitting a property to the act. It should never be open to question whether a property has or has not been established as a condominium.

2. A convenient and usable definition of apartment applicable to all types of uses so that the apartments can readily be brought within the scope of the definition, and can be readily described, conveyed and mortgaged.

3. Description or designation of record of the common elements.

4. Recordability of the deeds and mortgages of units.

5. Separate ownership and exclusive possession of the unit, combined with ownership in common of the common elements.

6. Susceptibility of the unit to all acts affecting real property, according to the nature and quality of the estate.

7. Statement of record of the share of each unit owner in the common elements which share

(a) is fixed and not susceptible to change without the consent of all of the unit owners affected,

(b) is inseparable from the unit, and

(c) must be conveyed or encumbered along with the unit.

8. Bar to partition of the common elements.

9. Separate assessment and taxation of each unit and its appurtenant common interest.

10. Covenants either in the declaration or in the form of by-laws, authorized by statute, permitting some percentage (either in number or in value of interest, or both), but less than all, of the co-owners to control the administration, maintenance and repair of the common elements, and governing the conduct of the unit owners among themselves and with respect to the units and the common elements. These covenants should bind the purchasers of units and all subsequent owners and should provide the method by which they may be amended. Provisions should be included for the maintenance of insurance coverage, for the repair or replacement of property damaged or destroyed, for the eventuality of non-repair or replacement, and for discontinuance of the condominium under specified conditions.

11. Inability of the unit owner to avoid payment of any part of the common expenses by abandoning the unit or waiving the use of any of the common elements. Ideally, there should be provision so that unit vendors can exonerate themselves from responsibility for common charges accruing after sale.

12. A method of enforcing collection of the common expenses, such as a prior charge against the unit owner or a lien against the unit. If a lien, it should be subordinate to at least first mortgages.

13. Authority of the manager or board of managers to represent the co-owners and to sue and be sued on their behalf.

14. Protection of the co-owners against liability for damages caused by negligence in which the particular unit owner did not participate, and against more than a proportionate share of contract obligations of the condominium's management.

15. Provisions negating the application of other laws which are adverse to condominium.

CONCLUSION

If there ever was a time when the word "imported" meant that the commodity commanded a premium there also was a time when the common man in the United States thought that all new things of merit must of necessity bear the legend, "Made in U.S.A." But the common man will awake one morning to find that he lives in an apartment which he owns in fee simple in a building the non-apartment portions of which he owns in common with his fellow owners. He may not stop to consider that his dual ownership bears the stamp "imported" and that its progenitors had a long record of usefulness in the countries of origin. But let predictions eventuate as they will, the fact remains that there is need for condominium in this country at this time. Expanding population and the spread of vast urban areas necessitate ever longer trips to private dwellings in the suburbs. Multiple housing is on the increase to meet the pressing demand for lower cost shelter closer to work centers. The advantages of condominium over private houses, over the rental of apartments and over the ownership of cooperative apartments, mean that condominium will be an important factor in the multiple housing field.

Condominium in this country has just completed its first stage, that is, statutory implementation. More than three-fourths of all the states now have condominium statutes. Most of these are adequate to afford the framework for the solutions of the problems of condominium ownership and living which, experience in that field in other countries and in related fields in this country, indicates may reasonably be anticipated.