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## Condominium - A Comparative Analysis of Condominium Statutes

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# LEGISLATION NOTES

## CONDOMINIUM—A COMPARATIVE ANALYSIS OF CONDOMINIUM STATUTES

The term "condominium" signifies a dual form of ownership: individual fee ownership of apartment space, plus fee ownership of an undivided interest in the land and all parts of the building, excluding all the apartment spaces, as a tenant in common with all other apartment owners. Condominium offers economic advantages over apartment rental in that high land costs are spread over many units, ownership equity is built up, and the landlord's profit is eliminated.

Since 1961, thirty-four states have enacted condominium statutes, twenty-seven having been enacted during 1963 legislative sessions.<sup>1</sup> The rapid growth of condominium legislation was prompted by the passage in 1961, of section 234, an amendment to the National Housing Act, which provided for Federal Housing Administration insurance on condominium mortgages *where such ownership is recognized under the laws of the state where located*.<sup>2</sup> The state legislatures passed these condominium enabling acts clarifying their state laws with respect to condominium to make certain that low down payment F.H.A. insured mortgages would be available.<sup>3</sup>

<sup>1</sup> 1961: Hawaii Act 180 Laws 1961 as amended by Act 9 Laws 1962. See also Senate Judiciary Report No. 340 recommending passage of S.B. 497 to bring Hawaiian statute into substantial accordance with F.H.A. MODEL CONDOMINIUM STATUTE; ARK. STAT. ANN. §§ 50-1001 to 50-1023 (Supp. 1961).

1962: ARIZ. REV. STAT. §§ 33-551 to 33-561 (Supp. 1962); KY. REV. STAT. §§ 381.805 to 381.910 (1962); LA. REV. STAT. §§ 9:1121 to 9:1144 (Supp. 1962); So. CAR. CODE tit. 57 §§ 471-493 (Supp. 1962); VA. CODE (1950) tit. 55 §§ 79.1 to 79.33 (Supp. 1962).

1963: ALASKA STAT. ANN. §§ 34.07.010 to 34.07.460 (Supp. 1963); Cal. Laws 1963 ch. 860; Colorado Regular Session 1963 Senate Bill 290, approved April 30, 1963; Fla. Laws 1963 ch. 63-35; ILL. REV. STAT. ch. 30 §§ 211 to 231 (Cum. Supp. 1963); Iowa Laws 1963 ch. 293; Kan. Laws 1963 ch. 329; MD. CODE ANN. art 21 §§ 17A to 142 (Supp. 1963); MICH. STAT. ANN. §§ 26.50(1) to 26.50(30) (Supp. 1963); Minn. Laws 1963 Ch. 457; Mo. STAT. ANN. §§ 448.010 to 448.220 (Cum. Supp. 1963); Neb. Reg. Sess. 1963 Leg. Bill No. 288, approved June 20, 1963; Nev. Reg. Sess. 1963 Assembly Bill No. 172, approved March 25, 1963; N.M. STAT. ANN. §§ 70-4-1 to 70-4-27 (Supp. 1963); No. Car. Sess. Laws 1963 ch. 47A; OHIO REV. CODE §§ 5311.01 to 5311.22 (Supp. 1963); OKLA. STAT. ANN. tit. 60 §§ 501 to 530 (Supp. 1963); Ore. Sess. Laws 1963 Ch. 541; PA. STAT. ANN. tit. 68 §§ 700.101 to 700.805 (Supp. 1963); So. Dakota Reg. Sess. 1963 House Bill No. 732, approved March 13, 1963; TENN. CODE ANN. tit. 64 §§ 2701 to 2722 (Supp. 1963); Tex. Sess. Laws 1963 ch. 191; UTAH CODE ANN. tit. 57 §§ 8-1 to 8-35 (Supp. 1963); Wash. Laws 1963 Ch. 156; W. VA. CODE §§ 3581(34) to 3581(73) (Supp. 1963); Wisc. STAT. ANN. §§ 230.70 to 230.97 (Supp. 1963).

<sup>2</sup> 75 Stat. ch. 161 Sec. 234.

<sup>3</sup> See Comment, *Condominium: An Introduction to the Horizontal Property System*, 11 DEPAUL L. REV. 319, 320, n. 7 (1962).

This paper will point up some of the legal problems inherent in condominium, how the various states have attempted to solve these problems, and an analysis of their effectiveness. The more significant aspects are: 1) Legal description of condominium units; 2) Ownership of the common elements; 3) Use of the common elements; 4) Torts in the common elements; 5) Enforcement of payment of common expenses; 6) Future interest problems; and 7) Governmental control.

#### LEGAL DESCRIPTION OF CONDOMINIUM UNITS

Since a condominium unit is essentially a cube of airspace, the legal description of the unit poses a problem. Every state having condominium legislation provides that the developer or sole owner record an instrument, i.e. "declaration," which specifically submits the property to the act. All of these statutes further provide that some description of the individual apartment units be filed simultaneously with the declaration.<sup>4</sup> Some states provide that the legal description be made with reference to a survey of the unit, others with reference to a copy of the building plans.

Illinois, Michigan, Missouri and Utah provide for the filing of a survey of each apartment unit.<sup>5</sup> Typical of these states is Michigan which provides for "a complete description for each apartment identified with the applicable condominium subdivision plan number and sufficient to enable a competent land surveyor to relocate accurately the space enclosed by the description without reference to the structure itself with elevations therein referenced to an official bench mark of the United States coast and geodetic survey."<sup>6</sup>

None of the acts mentioned above take into consideration the eventual settling and/or lateral movement of the building except Utah, which provides: "In interpreting the record of survey map or any deed or other instrument affecting a unit or building, the boundaries of the building or unit constructed or reconstructed in substantial accordance with the record of survey map shall be *conclusively presumed* to be the actual boundaries, rather than the description expressed in the record of survey map, regardless of the settling or lateral movement of the building and regardless of minor variance between boundaries shown on the record of survey map and those of the building."<sup>7</sup> This provision would appear to resolve the question presented by the eventual settling and lateral movement of

<sup>4</sup> Most states also provide that a copy of the bylaws of the association of apartment owners also be filed with the declaration. This is a good practice as it makes the rules of the association a matter of public record which all prospective buyers may inspect.

<sup>5</sup> ILL. REV. STAT. (1961) Ch. 30 § 230 (Cum. Supp. 1963) MICH. STAT. ANN. §§ 26.50(2)-(K) (4) (Supp. 1963). MO. STAT. ANN. § 448.050 (Supp. 1963).

<sup>6</sup> *Supra* note 5.

<sup>7</sup> *Supra* note 6.

the building, but since the actual boundaries of the apartment unit control, the survey is unnecessary.

A survey without a "settling clause" will create problems when the building settles, as the apartment units would then encroach on the common elements, and upon one another. When the settling clause is used with a survey, it makes the survey a costly, needless technicality, because, in any event, the survey does not control.

The F.H.A. Model Act and the states which follow it in this regard, provide that a copy of the floor plans be filed.<sup>8</sup> These states do not provide for settling and lateral movement, but presumably recognize that a survey is of little practical value and is a burden on the developer.

Perhaps the best approach to this problem is that taken by Nebraska whose act provides that a copy of the floor plans be filed and that there is a conclusive presumption that the actual boundaries of the apartment are the legal boundaries.<sup>9</sup> This approach is most practical in that it avoids the over-technicality of the survey and provides for the eventual settling and lateral movement of the building. A developer must have building plans with which to construct the building, and these should be sufficient for the legal description of apartment units built in accordance thereto.

Since the purpose of condominium legislation is to lay the ground rules and make condominium a workable means of holding title to real estate, undue technicalities should be avoided if there is another, more practical solution.<sup>10</sup>

#### OWNERSHIP OF COMMON ELEMENTS

Fundamental to condominium is the concept of co-ownership of the common elements by the fee simple owners of the individual apartment units as tenants in common. The extent of an apartment owner's undivided interest in the common elements is important for two reasons: It expresses: 1) his share in the common expenses and liens against the building; 2) the weight of his vote in the meetings of the Association of Apartment Owners. The method of determining the interest in the common elements varies from state to state. The states following the F.H.A. Model Act provide that the value of the apartment as compared with the value

<sup>8</sup> F.H.A. Release Series No.M.F.-22 Control No. F.439.

<sup>9</sup> Neb. Reg. Sess. 1963 Leg. Bill 288, § 10(2), approved June 20, 1963.

<sup>10</sup> See RAMSEY, CONDOMINIUM—AND THE ILLINOIS CONDOMINIUM PROPERTY ACT 3 (1963), suggesting that to avoid the encroachment problem when surveys are used, the declaration should contain mutual covenants granting easements for the maintenance of such encroachments as long as the property is owned in condominium; that they be declared appurtenant, running with the land, and for the benefit of and binding upon all present and future owners, purchasers, mortgagees and other persons having an interest in the property. This is not the most direct and practical approach to the problem.

of the entire building determines the percentage interest in the common elements, and that this percentage is permanent unless changed by a vote of all the apartment owners. Many states provide no method of computing the percentage, leaving it to the developer to provide a method in the bylaws.

California and Nevada provide that the ownership in the common elements shall be in equal shares, one share for each unit, regardless of value.<sup>11</sup> Using this method, the owner of the least expensive unit in the building would have to pay a higher percentage of his unit's value for common expenses than the owner of the most expensive unit. On the other hand the vote of the owner with the least financial stake in the building would have equal weight with the vote of the owner with the most expensive unit. Neither result seems reasonable.

The Illinois act is the better practice. It provides that the percentage of ownership interest in the common elements allocated to each unit shall be computed ". . . by taking as a basis the value of each unit in relation to the value of the property as a whole, and having once been determined . . . such percentages shall remain constant, unless thereafter changed by agreement of all unit owners."<sup>12</sup>

#### USE OF THE COMMON ELEMENTS

Tenants in common have equal rights to the use and enjoyment of the property owned in common. As long as the apartment owner also owns an interest in the common elements as a tenant in common, he is entitled to the use and enjoyment of the common elements. But should this ownership be severed he might lose his right to the use of the common elements. The states have attempted to provide against this contingency in several ways.

Alaska, Nevada, and Washington, in their condominium statutes have provided for non-exclusive easements in the common elements for ingress and egress, and that these easements are appurtenant to each unit.<sup>13</sup> Since these same statutes also provide that the transfer of an apartment unit also conveys the proportionate interest in the common elements, it would seem that the former provision is unnecessary.

The states which follow the F.H.A. Model Act in this regard, including Illinois, provide that the undivided interest in the common elements shall not be separated from the apartment to which it appertains, and shall be

<sup>11</sup> Cal. LAWS 1963 ch. 860 § 1353 (b); Nev. Reg. Sess. 1963 Assembly Bill No. 172 § 5(2), approved March 25, 1963.

<sup>12</sup> ILL. REV. STAT. ch. 30 § 214(c) (Cum. Supp. 1963).

<sup>13</sup> ALASKA STAT. ANN. § 34.07.11. Nev. Reg. Sess. 1963 Assembly Bill No. 172 § 5(3), approved March 25, 1963; Wash. LAWS 1963 Ch. 156 § 5(4).

deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the instrument.<sup>14</sup> This is the better practice.

#### TORTS IN THE COMMON ELEMENTS

Most of the condominium statutes enacted to date do not provide a satisfactory means of protecting the unit owner against liability for torts arising from his ownership of the common elements. In a case in which the tenants in common have joint tort liability, a plaintiff could receive a judgment against all of the unit owners and enforce the judgment against a single unit owner. Since the purpose of condominium legislation is to foresee problems which might arise and supply answers to avoid unnecessary litigation, this condition should be remedied.

Alaska, Florida and Michigan are the only states which provide against individual liability for torts occurring in the common elements.<sup>15</sup>

Alaska provides: "A cause of action relating to the common areas and facilities for damages arising out of tortious conduct shall be maintainable *only* against the Association of Apartment Owners, and judgment lien or other charge is a common expense. The judgment lien or charge is removed from an apartment and its percentage of undivided interest in the common areas and facilities upon payment by the respective owner of his proportionate share based on the percentage interest owned by him."<sup>16</sup>

The Alaska statute is the most comprehensive and exact in that it expressly states that these actions are only maintainable against the Association of Apartment Owners, and that the judgment is a common expense. It also provides for the removal of lien from the apartment by payment of the unit owner's percentage of liability. Because of its completeness, the Alaskan statute should be used as a model for future acts. However, the practice acts of the state should be examined closely to avoid any conflicts. If there is a conflict, then the practice act should be expressly amended in regard to condominium tort actions.

#### ENFORCEMENT OF PAYMENT OF COMMON EXPENSES

The individual unit owners in a condominium project are required to contribute toward the common expenses of the project, i.e. utilities, maintenance, and repair of the common elements. To facilitate an efficient operation of a condominium project, there should be a procedure for collection of these charges from a delinquent apartment owner.<sup>17</sup> The stat-

<sup>14</sup> ILL. REV. STAT. ch. 30 § 216 (1961).

<sup>15</sup> ALASKA STAT. ANN. § 34.07.20 (Supp. 1963); Fla. Laws 1963 ch. 63-35 § 18(2); MICH. STAT. ANN. § 26.50(13) (Supp. 1963).

<sup>16</sup> *Supra* note 15.

<sup>17</sup> See KERR, CONDOMINIUM, A PREVIEW 265-266 (1962).

utes meet the problem in a variety of ways, and with varying effectiveness.

Arizona, Colorado and South Dakota do not provide any means of enforcement. Kentucky provides only that unpaid common expenses become a lien against the apartment.<sup>18</sup>

The statutes which follow the F.H.A. Model Act provide that "all sums assessed by the Association of Apartment Owners, but unpaid, for the share of common expenses shall constitute a lien on the apartment prior to all other liens except tax liens and all sums unpaid on first mortgages of record."<sup>19</sup> These states leave the specific enforcement provisions to the bylaws.

Alaska spells out a more detailed collection procedure.<sup>20</sup> In Alaska the Association must receive a majority vote of the apartment owners to begin enforcement procedures. Once received, the association gives a ten-day notice to the delinquent that all utilities will be cut off until the assessment is paid. If not then paid a lien is filed. Alternate procedures may also be provided in the bylaws.

Illinois provides the most comprehensive method to insure payment of assessments for common expenses. In Illinois a lien comes into existence as soon as the assessment is due and unpaid, and upon recording of the notice thereof attains priority over all recorded and unrecorded liens and encumbrances except taxes and prior recorded encumbrances. Further, where a default occurs and notice is sent to the mortgagee, additional defaults occurring within ninety days of the mailing of the notice will be prior to the mortgage. The mortgagee may, however, pay the assessment and add the amount paid to the balance of the mortgage. These provisions eliminate the uncertainty found in most of the other condominium statutes.<sup>21</sup>

#### FUTURE INTEREST PROBLEMS

Some condominium bylaws include a provision for a right of first refusal by the Association of Apartment Owners in the event of a sale by an apartment owner. Since this is, in effect, an option to buy which runs for an indefinite time, it would fail under the Rule Against Perpetuities, unless saved by statute.

Three states including Illinois have specifically exempted condominiums from the operation of the Rule Against Perpetuities and from the rule respecting unreasonable restraints on alienation.<sup>22</sup> This provision should be included in all future acts in order to reduce litigation.

<sup>18</sup> KY. REV. STAT. § 381.835.

<sup>20</sup> ALASKA STAT. ANN. §§ 34.07.170 (Supp. 1963).

<sup>19</sup> F.H.A. MODEL ACT § 23 (a).

<sup>21</sup> ILL. REV. STAT. ch. 30 § 219 (Cum. Supp. 1963).

<sup>22</sup> Colo. Reg. Sess. Laws 1963 S.B. 290 § 5, approved April 30, 1963; ILL. REV. STAT. ch. 30 § 230 (Cum. Supp. 1963); UTAH CODE ANN. tit. 57 § 8-34 (Supp. 1963).