

# Condominium - Illinois Condominium Property Act: An Analysis

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## GOVERNMENTAL CONTROL

Hawaii, Virginia, and Michigan provide for rigid state regulation of "horizontal property regimes."<sup>23</sup> Breach of these regulations will result in fines of up to \$1,000 and for imprisonment of up to one year.

Hawaii and Virginia provide for the filing of a letter of intention, an inspection during construction, inspection of the books of the association, the issuance of a public report to each prospective purchaser, and suits by the state to enjoin violations of the act.

Michigan's act is not as detailed with respect to state regulation as the Hawaii or Virginia acts. It provides that a permit to sell must be obtained from the commission, and bylaws and all amendments thereto must be approved by the commission. The same penalties for violation of the act are provided. It appears that these three states, instead of encouraging are actually discouraging the development of condominium projects. Builders and investors will be reluctant to submit to this close regulation and possible sanction.

## CONCLUSION

The number of states which have passed condominium statutes in 1962 and 1963 demonstrates the interest in this type of land ownership, and the desire of the states to benefit by the expected lower cost housing.<sup>24</sup> The extent to which these desires will be achieved will depend to a great degree upon the effectiveness of the legislation enacted. Prospective buyers, builders, and mortgage investors may be reluctant to act if the state legislation is deficient. The purpose of condominium legislation is to anticipate every possible contingency which might arise because of the unique relationship of the owners with one another, and to provide a workable solution for each one within the framework of the law. Some of the acts passed thus far raise questions as to their comprehensiveness, especially in the areas discussed.

O. Bell

<sup>23</sup> Hawaii Act 180 Laws 1961, as amended by Act 9 Laws 1962, Part IV; VA. CODE §§ 55.79.16 to 55.79.33 (Supp. 1962); MICH. STAT. ANN. §§ 26.50(24) to 26.50(28) (Supp. 1963).

<sup>24</sup> For general background on condominium see RAMSEY, *CONDOMINIUM: THE NEW LOOK IN CO-OPS* (1961), Kerr, *Condominium, A Preview* (1962), Illinois Legislative Council Memorandum 4-440, *Condominium: The Puerto Rican Form of Joint Ownership*, May 7, 1962 and Comment, *Condominium: An Introduction to the Horizontal Property System*, 11 DEPAUL L. REV. 319 (1962).

## CONDOMINIUM—ILLINOIS CONDOMINIUM PROPERTY ACT: AN ANALYSIS

Condominium is one of the newest and fastest growing fields of law in the United States. Illinois has followed the recent trend by adopting the

Illinois Condominium Property Act,<sup>1</sup> which became effective July 1, 1963.<sup>2</sup>

In its modern legal sense, condominium means ownership in fee simple of a one-family unit in a multi-family structure, coupled with ownership of an undivided interest in the land and all other parts of the structure as a tenant in common with the other unit owners.<sup>3</sup>

Two events provided much of the impetus for the current torrent of condominium legislation. First, Puerto Rico passed the first condominium act in 1958. It has served as a model for the Illinois act and many of the other state acts.<sup>4</sup> Second, Congress added § 234 to the National Housing Act in 1961, authorizing the Federal Housing Administration to insure mortgages of individually owned units in multi-family structures in states where condominium is established by law.<sup>5</sup> This statute should encourage investors to finance the construction of condominiums in lieu of the stock-cooperative and other older forms of real estate developments.

#### CONDOMINIA AND COOPERATIVES

The primary distinction between a condominium and a stock-cooperative is that the owner in a cooperative merely owns a percentage of the stock of the corporation which owns the real estate. He also holds a long-term proprietary lease of his apartment.<sup>6</sup> On the other hand, the owner of a condominium unit holds title in fee simple. He is free to mortgage his own unit and is thereby protected against the defaults of co-owners. A cooperative, however, is under a blanket mortgage, and the default of a co-owner may cause the foreclosure of the entire property. This risk interrupted the growth of the cooperative movement after the Depression because many cooperatives were then lost through foreclosure. Only recently has the cooperative movement begun to revive.<sup>7</sup>

#### NEED FOR THE LEGISLATION

Though legislation is not necessary to create condominium in common law jurisdictions,<sup>8</sup> the advantage of legislation lies in the fact that it organizes the field of law and eliminates uncertainty as to what the law is.

<sup>1</sup> ILL. REV. STAT. ch. 30, §§ 211-31 (1963).

<sup>2</sup> The act was drafted by a joint committee of members of the Real Property Committees of the Illinois State Bar Association and the Chicago Bar Association; it was approved June 20, 1963.

<sup>3</sup> RAMSEY, *CONDOMINIUM: THE NEW LOOK IN CO-OPS*, 1961, p. 3.

<sup>4</sup> RAMSEY, *op. cit. supra* note 3, at 8. P. R. LAWS ANN. tit. 31, §§ 1291-93k (Supp. 1961).

<sup>5</sup> 12 U.S.C. § 1715y (Supp. 1962). Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963). Ramsey, *Condominium*, 9 PRAC. LAW. 21 (March, 1963).

<sup>6</sup> Ramsey, *The Proposed Illinois Condominium Act*, 51 ILL. B.J. 554 (1963).

<sup>7</sup> RAMSEY, *op. cit. supra* note 3, at 3.

<sup>8</sup> 51 ILL. B.J., *op. cit. supra*, note 6. Cribbet, *Condominium—Home Ownership for Megalopolis?*, 61 MICH. L. REV. 1207 (1963).

The Illinois Condominium Property Act innovates recording procedures, provides procedures for dissolving the condominium or disposing of the property after its destruction, and provides for separate taxation for each unit. Another advantage is that the legislation anticipates and wards off possible judicial antagonism involving matters such as partition and covenants real<sup>9</sup> by prohibiting partition of the common elements<sup>10</sup> and abrogating the "twin terror" rules of property<sup>11</sup> (the Rule Restricting Unreasonable Restraints on Alienation and the Rule Against Perpetuities).<sup>12</sup>

SUBJECTING THE CONDOMINIUM TO THE ACT—THE  
DECLARATION AND PLAT

1. *The Declaration*

Before the act will apply to a condominium, the co-owners must voluntarily submit the property to the provisions of the act by means of the "declaration."<sup>13</sup> This is a public deed, i.e. a recorded instrument which, in accordance with § 214 of the act, must contain:

- (a) The legal description of the parcel.
- (b) The legal description of each unit, which may consist of the identifying number or symbol of such unit as shown on the plat.
- (c) The percentage of ownership interest in the common elements allocated to each unit. Such percentages 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 and set forth as herein provided, such percentages shall remain constant unless thereafter changed by agreement of all owners.
- (d) Such other lawful provisions not inconsistent with the provisions of this Act as the owner or owners may deem desirable . . .

By the catchall in subsection (d), the co-owners are empowered to make other provisions in the declaration. §§ 227 and 228 ("Bylaws") enumerate minimum requirements for the practical day to day administration of the condominium, such as electing a board of managers; collecting, budgeting, and disbursing assessments; and adopting rules for the maintenance and orderly use of the common elements.<sup>14</sup> Therefore, optional inclusions under § 214(d) are most likely to deal with covenants and rights of ownership of the real property.

The most important of these is a right of first refusal.<sup>15</sup> If a co-owner

<sup>9</sup> 63 COLUM. L. REV., *op. cit. supra* note 5.

<sup>10</sup> ILL. REV. STAT. ch. 30, § 218 (1963).

<sup>11</sup> 61 MICH. L. REV., *op. cit. supra* note 8, at 1232.

<sup>12</sup> ILL. REV. STAT. ch. 30, § 230 (1963).

<sup>13</sup> ILL. REV. STAT. ch. 30, § 212(a) (1963).

<sup>14</sup> ILL. REV. STAT. ch. 30, § 228 (a), (g), (i), (j), (k), (1963).

<sup>15</sup> Ramsey, *Condominium—And the Illinois Condominium Property Act*, THE GUARANTOR (Lawyers' Supplement), July, 1963.

receives a firm offer to purchase or mortgage, ". . . he must submit the offer to the remaining co-owners and afford them the opportunity to purchase [or take the mortgage on] his apartment on the same terms within a reasonable time. If they do not exercise the option within the prescribed time, he may then proceed to sell to the offeror . . ." <sup>16</sup> This restraint has been upheld because it is in the public interest to keep a co-operative building cooperative. <sup>17</sup> Of course, covenants restrictive as to race are not enforceable, since they come within the doctrine of *Shelley v. Kraemer* and would be stricken as unconstitutional; <sup>18</sup> also, the building would not then be eligible for FHA mortgage insurance. <sup>19</sup>

Hand in hand with the right of first refusal goes the right of redemption. This allows the co-owners to repurchase the unit from the taker of a tax deed or from the buyer after the seller violated the covenant for first refusal. <sup>20</sup> The rights of first refusal and redemption "might . . . be extended to include a gift or devise of the unit, the price to be at fair value as determined by appraisal or arbitration." <sup>21</sup> In the usual declaration, the two rights are made to apply to gifts and devises only when the donee or devisee is not an heir at law of the donor or devisor.

The declaration should also include statements that all covenants and easements run with the land, and that all subsequent purchasers and mortgagees take subject thereto. A useful covenant ordinarily included is one which provides reciprocal easements of encroachment in the event the building settles and shifts, with the result that one's unit is in the air space conveyed to another. <sup>22</sup> Another is the granting of an easement of way through one's unit to repair utilities and maintain the property. The declaration also should state that all legal and equitable remedies necessary to enforce the provisions are preserved. Under § 213, recording the declaration with the plat submits the property to the act.

## 2. *The Plat*

The plat is defined as a survey of the parcel of real estate and of all units in the parcel. The plat "may consist of a three-dimensional horizontal and vertical delineation of all such units." <sup>23</sup> The word "may" is inserted because plats were previously two-dimensional surveys of subdivisions. <sup>24</sup>

<sup>16</sup> RAMSEY, *op. cit. supra* note 3, at 21.

<sup>17</sup> *Gale v. York Center Com. Cooperative*, 21 Ill. 2d 86, 171 N.E.2d 30 (1961).

<sup>18</sup> 334 U.S. 1 (1948).

<sup>19</sup> 24 C.F.R. §§ 234.50, 234.66 (1962).

<sup>20</sup> This circumstance probably would not occur in Illinois because the title insurance company would not issue a policy to such a purchaser.

<sup>21</sup> THE GUARANTOR (Lawyers' Supplement), *op. cit. supra* note 15.

<sup>22</sup> THE GUARANTOR (Lawyers' Supplement), *op. cit. supra* note 15. Eagan, *Title Insurance for Condominiums*, 14 HASTINGS L.J. 210 (1963).

<sup>23</sup> ILL. REV. STAT. ch. 30, § 212(i) (1963).

<sup>24</sup> ILL. REV. STAT. ch. 109, § 1 (1961).

§ 215 of the Illinois Condominium Property Act prescribes the contents of the plat. Of primary importance is the survey of the unit, because this determines exactly what air space the purchaser is to own. How is a unit described legally? "The boundaries of the unit . . . would be the horizontal and vertical planes formed by the interior floor, ceiling, and perimeter wall surfaces. The horizontal planes (floor and ceiling surfaces) are located with reference to their distances above or below an official datum elevation . . .<sup>25</sup> The vertical planes are located "with respect to the exterior boundaries of the parcel projected vertically upward."<sup>26</sup> Each unit on the plat is identified by a distinguishing number or other symbol. § 217 provides that this number or symbol is all that is necessary on subsequent instruments of conveyance to transfer title. § 217 also facilitates conveying by providing that any transfer or encumbrance of the unit automatically transfers the corresponding interest in the common elements.

The plat of the condominium is subject to the Plat Act, with some exceptions, because the condominium is considered a subdivision.<sup>27</sup>

§ 216, "Recording—Effect," declares that all units are capable of ownership in fee simple *or any lesser estate*, subject to the limitations of the Act. This section also prevents the separation of one's unit ownership from his corresponding interest in the common elements, and it preserves the cooperative aspect of the property by forbidding the alienation of part of a unit.

#### RIGHTS OF OWNERSHIP

Now the condominium has been established. But who is a unit owner and what does he own? These problems are resolved in § 212 by the definition of three terms peculiar to condominium. The "*unit owner*" means "the person or persons whose estates or interests, individually or collectively, aggregate fee simple absolute ownership of a unit."<sup>28</sup>

The "*unit*", defined in § 212(d), is the space owned in fee simple. It may be "designed for any type of independent purpose." In Illinois, therefore, a condominium may be used for either dwelling or commercial purposes, or both, if the co-owners so allow. On the other hand, only condominiums consisting of dwelling units are eligible for FHA mortgage insurance.<sup>29</sup>

The "*common elements*" are "all portions of the property except the

<sup>25</sup> THE GUARANTOR (Lawyers' Supplement), *op. cit. supra* note 15.

<sup>26</sup> ILL. REV. STAT. ch. 30, § 215 (1963).

<sup>27</sup> 51 ILL. B.J., *op. cit. supra* note 6. ILL. REV. STAT. ch. 109, §§ 1-13 (1961). A condominium of less than one acre would not be subject to the Plat Act—ILL. REV. STAT. ch. 109, § 1 (1961).

<sup>28</sup> ILL. REV. STAT. ch. 30, § 212(g) (1963).

<sup>29</sup> 12 U.S.C. § 1715y (Supp., 1962). (Puerto Rico does not allow commercial condominiums.)

units.”<sup>30</sup> These include stairs, hallways, basement, etc., and are the areas in which the co-owners have undivided percentage interests as tenants in common. The all-inclusiveness of the definition of “common elements” in the Illinois act presents a problem. What is the status of a common element of limited access to which every co-owner apparently would have a right, such as a balcony outside of a unit or individual storage space in the basement? These problems have to be resolved by reciprocal exclusive covenants in the declaration.<sup>31</sup>

§ 214(c) above provides the manner in which a co-owner’s interest in the common elements is calculated. In all decisions regarding the condominium, the co-owner has a voice commensurate with his percentage interest in the common elements.<sup>32</sup>

#### ENFORCING PAYMENT OF ASSESSMENTS

§ 219 provides for sharing expenses and enforcing payment by a recalcitrant co-owner. It fixes upon the co-owner the duty to pay his proportionate share of the expenses lawfully agreed upon. Lawful expenses are determined under the bylaws.<sup>33</sup> The assessments are in proportion to the percentage interest the co-owner has in the common elements. Non-payment constitutes a lien upon the recording of notice, and the co-owners are given the power of foreclosure.

§ 219.1 enables an individual co-owner to acquire a release of his unit and interest in the common elements from a lien held upon the whole property by payment of his share of the debt. Without this provision, the property would not be eligible for FHA mortgage insurance.<sup>34</sup>

#### TAXATION

A very important section of the act, § 220, unequivocally provides for separate real estate taxation of each unit and its undivided interest in the common elements. Although the Assessor of Cook County had determined that he had legal authority to assess and levy taxes in this manner,<sup>35</sup> § 220 was included to remove all doubt, because only condominiums in which the units are individually taxed are eligible for FHA mortgage insurance.<sup>36</sup>

<sup>30</sup> ILL. REV. STAT. ch. 30, § 212(e) (1963).

<sup>31</sup> 14 HASTINGS L.J., *op. cit. supra* note 22.

<sup>32</sup> ILL. REV. STAT. ch. 30, §§ 212(h), 225 (1963).

<sup>33</sup> ILL. REV. STAT. ch. 30, § 228(g) (1963).

<sup>34</sup> 24 C.F.R. § 234.26c(2) (1962).

<sup>35</sup> 9 Prac. Law., *op. cit. supra* note 5. Ramsey, *op. cit. supra* note 3 at 23.

<sup>36</sup> 24 C.F.R. § 234.26d(3) (1962).

## INSURANCE

§ 222 charges the board of managers of the condominium with the duty to obtain casualty insurance for the property for the full insurable replacement cost of the common elements and the units. The board receives the payments from the insurance company as trustee for the individual owner in case his unit is damaged. However, to be able to negotiate a mortgage, the co-owner probably would have to purchase a fire insurance policy for his own unit.

The Act is mute on the question of title insurance and liability insurance. In practice, each co-owner purchases a title insurance policy to his unit;<sup>37</sup> and since the Act is silent, he is free to obtain damage and/or liability insurance insuring his interest in the property. It is wise, however, to include a provision in the declaration allowing the board of managers to procure public liability insurance for protection against injuries occurring in the common elements and in the units.<sup>38</sup>

§ 223 is probably the most stringent of the act. If the building is destroyed and the insurance proceeds are sufficient to reconstruct it, § 223 directs that the proceeds shall be applied to reconstruction that restores the building to "substantially the same condition in which it existed prior to the fire or other disaster, with each unit and the common elements having the same vertical and horizontal boundaries as before." A rather arduous task! This changes the common law rule that when a building containing superimposed freeholds is destroyed, the title to the land and the air space reverts to the owner of the soil.<sup>39</sup>

## ENDING THE CONDOMINIUM

There are three basic situations in which a condominium is ended.

*1. Disposition after destruction*

When the insurance proceeds are insufficient to finance reconstruction and the co-owners do not make provision for reconstruction, § 224 provides that the entire property shall be deemed owned in common by the unit owners and subject to an action for partition. The undivided interest of each owner in this situation is the same as that which the owner pre-

<sup>37</sup> THE GUARANTOR (Lawyers' Supplement), *op. cit. supra* note 15.

<sup>38</sup> Two problems arise when there is no provision in the declaration for liability insurance and each co-owner is left to individually obtain same. Insurance companies would be reluctant to protect the assured against any injuries occurring in the assured's interest in the common elements, which as a matter of fact is where the injuries are most likely to occur. In addition, a wealthy co-owner who is jointly and severally liable with his co-owners for an injury sustained in the common elements may be sued and burdened with the entire judgment, without being able to obtain contribution.

<sup>39</sup> 61 MICH. L. REV., *op. cit. supra* note 8.



vously held in the common elements. Under § 224(c), a lien affecting a unit is transferred to the undivided interest of the owner of that unit.<sup>40</sup>

## 2. Sale

§225 of the Act prescribes that owners voting in favor of sale must represent a specified minimum percentage of the total ownership in order to effectuate a sale. After the vote, all the owners are under a duty to execute and deliver all instruments and perform all acts necessary to effectuate the sale. An owner in the minority voting against the sale is "entitled to receive from the proceeds of the sale an amount equivalent to the value of his interest, as determined by a fair appraisal . . ."<sup>41</sup> § 225 is included because removal of the condominium from the provisions of the Act requires unanimous consent of the co-owners.<sup>42</sup> Sometimes it is advantageous to sell the property, but impossible, human nature being what it is, to achieve unanimous approval.<sup>43</sup> Therefore § 225 is an effective "escape hatch."

## 3. Removal from the act

Upon unanimous consent, the owners may remove the property from the property from the provisions of the act by recording an instrument to that effect. The unit owners then become owners of an undivided interest in the property as tenants in common, and a suit for partition will lie.<sup>44</sup>

### CONCLUSION

A modern, dynamic piece of legislation, the act establishes a firm foundation upon which condominium can build. There are however, inadequacies. First, the act should be amended to allow the board of managers to incorporate the condominium as a voluntary not-for-profit corporation. This has an advantageous psychological effect on the co-owners and enables the board of managers (which would become the board of directors) to sue as a corporation. A provision should also be added to give a co-owner a right of contribution from the other co-owners for defending suits involving injuries occurring in the common elements.

<sup>40</sup> The Illinois Partition Act, ILL. REV. STAT. ch. 106, § 57 (1961), has a similar provision.

<sup>41</sup> RAMSEY, *op. cit. supra* note 3, at 16. Section 225 also specifies majorities necessary to effectuate a sale of condominiums consisting of two, three, and four units. Before 1962, only condominiums with at least five units were eligible for FHA mortgage insurance. However, 24 C.F.R. § 234.1(k) was amended in 1962 and now condominiums with at least two units are eligible for such insurance.

<sup>22</sup> ILL. REV. STAT. ch. 30, § 226 (1963).

<sup>48</sup> THE GUARANTOR (Lawyers' Supplement), *op. cit. supra* note 15.

<sup>44</sup> THE GUARANTOR (Lawyers' Supplement), *op. cit. supra* note 15.