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COMMENT
THE ILLINOIS CONDOMINIUM ACT AND
THE ILLINOIS MECHANICS LIEN ACT:
A TRANSACTIONAL ANALYSIS*

Since the 1963 enactment of the Illinois Condominium Property Act1 thousands of condominiums have been constructed and sold in this state.2 During the 1960's they were built mainly as highrises in the urban centers. The more recent trend, however, is to build condominiums in suburban and recreational areas3 as "staged developments,"4 which

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1. ILL. REV. STAT. ch. 30, §§ 301 et seq. (1973) [hereinafter cited as CONDOMINIUM ACT].

2. In 1968, more than 8,000 condominium units, with an aggregate value in excess of $200 million, were constructed in Illinois. A. Burek, FACTS, FIGURES, AND FUNDAMENTALS IN REPRESENTING THE CONDOMINIUM PURCHASER 3, 7 (P. Vishny ed. 1969). In 1974, the Census Bureau reported that approximately, 175,000 condominium units were started in the United States and of these approximately 17,000 units were in the North Central region. (This region encompasses the following states; Kansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin). In addition, the Census Bureau reported that in 1974, approximately half of all private housing starts were intended for sale. Of these, approximately one-fourth were intended for condominium ownership. In effect, one out of every eight private housing starts was intended for condominium ownership. U.S. BUREAU OF THE CENSUS, DEP’T OF COMMERCE, BULL. No. C20-75-6, CONSTRUCTION REP., HOUSING STARTS 16-17 (June 1975). Condominium growth is likely to continue. Home Data Corporation, a market research firm, found in a recent survey that while 63% of potential buyers in the Chicago area prefer single family homes to condominiums, 84% of the potential buyers could not afford single family homes. See Chicago Daily News, Aug. 12, 1975, § 12, at 1, col. 1; interview with Edward F. Havlik, President of Home Data Corp., in Chicago, Oct. 23, 1975.

3. See generally HOME DATA CORPORATION, INFORMATION BULLETIN (1973 to present) and REAL ESTATE NEWS (1927 to present) for market trends in the Chicago metropolitan area.

4. Staged developments (also known as add-ons or phased developments) consist of several buildings, containing separate condominium units, which are constructed in accordance with an overall master plan, such as a planned unit development. As each building is constructed and added to the condominium development, the survey and declaration are amended so that percentage interests in the common elements are redistributed among the unit owners. See Groman, Phasing Condominiums, 48 ST. JOHN’S L. REV. 872 (1974); Krasnowiecki, Planned Unit Development: A Challenge to the Established Theory and Practice of Land Use Control, 114 U. PA. L. REV. 47 (1965); Krasnowiecki, Townhouse Condominiums Compared to Conventional Subdivision with Homes Association, 1 REAL ESTATE L. J. 323 (1973) [hereinafter cited as Townhouse Condominiums]; Schreiber, The Lateral Housing Development: Condominium or Home

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allows the developer to plan for the construction of a number of buildings to be built and marketed over a period of years. While these staged developments afford a developer great flexibility, they simultaneously have created numerous legal, practical and financial risks for the unit purchasers. These problems, coupled with the high mortgage rates and the drastic decline in funds for housing construction, have made condominium owners potential victims in mortgage and lien foreclosure actions. Similarly, the economic hazards which accompany a "tight

Owner's Association?, 117 U. PA. L. REV. 1104 (1969). An analogous form of construction has been employed in the highrise buildings in the Chicago area. The developer conveys title to the units on the lower level, while continuing construction on the upper floors. As each floor, or "stage" is added, the developer amends the survey and declaration to include the new units. See Kane & Helms, The Illinois Condominium Property Act, 1970 U. ILL. L. F. 157, 165-66 [hereinafter cited as Kane & Helms].

These methods, and others, have been developed in order to circumvent the Illinois statute which requires that percentages in the common elements cannot be changed without the unanimous consent of all the unit owners. CONDOMINIUM ACT § 306. To date, no state has declared these or similar arrangements illegal. See note 5 infra.

5. Since the percentage of interest in the common elements determines financial rights and obligations (e.g., the amount of taxation, common expense maintenance fees, proceeds from a sale of the entire property), any ability by a third party to alter these interests will have far-reaching effects. For an excellent article discussing the conveyancing, statutory and psychological problems created by the staged developments, see Joliet, The Expandable Condominium: A Technical Analysis, 1972 A.B.A. L. NOTES 19, and Bohan, A Lawyer Looks at Residential Condominiums, 7 A.B.A. REAL PROPERTY, PROBATE & TRUSTS J. 7, 14 (1972).

6. In June, 1975 the average national conventional mortgage interest rate was 8.96%, up 50 basis points from Dec., 1973. In the Chicago area, the average was 8.73%, up 67% basis points from a year ago. (A basis point is equivalent to .01%). FEDERAL HOME LOAN BANK BOARD, NEWS 1 (June 1975).


8. In the usual situation the construction mortgagee in new construction will pay off the liens. See note 62 and accompanying text infra. In addition, title insurance with mechanics lien coverage will protect the unit owners' financial interest and will put the cost of litigation on the title company. Nationwide, there have been only two reported cases on the appellate level in which condominium owners were victims of mechanics lien foreclosure actions because of developers' defaults. See State Sav. & Loan Ass'n v. Kauaian Dev. Co., 50 Haw. 540, 445 P.2d 109 (1968) and notes 48,66 infra; Plateau Supply Co. v. Bison Meadows Corp., 31 Colo.App.205, 500 P.2d 162 (1972) (contractor who had done work on the common elements was allowed a blanket lien against the entire condominium development but was entitled to satisfy his lien only out of the unsold portion of the project pursuant to Colorado statute which allows for apportionment of lien). In Illinois, there are at least two unreported cases, Dunbar Builders Corp. v. Hobbs Concrete Constr. Co., Civil No. 71-C1185 (N.D. Ill., filed May 17, 1971) and Summit Elec. Co. v. Metropolitan Dev. Co., No. 74-CH8160 (Cook County, filed Dec. 23, 1974). Other foreclo-
money" economy have a deleterious effect on the contractors and subcontractors involved in staged developments.

It is obvious that the drafters of the Condominium Property Act did not consider the problems endemic to "staged developments" and a tight money economy. Nor did they afford adequate protection for unit purchasers in the more traditional highrise construction. Contractors and subcontractors can create havoc in the condominium environment. Their statutory rights are in no way limited with regards to condominiums although this unique form of property ownership should merit special consideration. The result is that these individuals, who "in good faith, furnish labor or materials for construction or remodeling of buildings," \(^{10}\) can bring valid lien claims against all the owners of the condominium pursuant to the Illinois Mechanics Lien Act.\(^ {11}\)

The first part of this Comment will evaluate the Illinois Condominium Act and the safeguards which are afforded the unit purchaser of a new residential condominium\(^ {12}\) vis-à-vis a mechanics lien claimant. It will further analyze the interests of the lien claimants pursuant to the Illinois Mechanics Lien Act, and determine whether or not their interests are adequately protected in relation to the Condominium Act. This discussion will be divided into three sections which reflect the problems at different stages of ownership and control of condominiums: contracts with the developer,\(^ {13}\) contracts with the board of managers,\(^ {14}\) and contracts with unit owners.\(^ {15}\) In the second part of this Comment, the author will suggest both statutory and contractual options which would remedy the present inadequacies of the Condominium Act.

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12. This Comment will be concerned only with new residential construction built pursuant to the Condominium Act. Information applicable to conversions will be incorporated as supplemental footnote material. See note 23 infra.

13. See Section I-A infra.

14. See Section I-B infra.

15. See Section I-C infra.
I. Analysis of Existing Statutes: The Illinois Condominium and Mechanics Lien Acts

A. Contracts with the developer when the property is under the control of the developer

When the property is under the control of the developer, there are three situations which create different liabilities for condominium owners regarding mechanics liens: contracts prior to sale of the units; contracts subsequent to sale of the units, but prior to submission of the property to the Condominium Act; and contracts after submission of the property to the Condominium Act. If litigation arises during the period when the condominium is still being supervised by the developer and there are no unit purchasers, there are two major legal inquiries: first, is the mechanics lien properly perfected and, second, who has priority among the mechanics lien claim claimants. The method of perfection is detailed in the Mechanics Lien Act and varies only when there is a claim involving a third person. Therefore, the perfection discussion will be considered in a later section, after the unit purchaser enters the transaction.

The lien first in time has priority, with priority determined as of the date of the execution of the contract between the owners and the contractor. If the mechanics lien is prior in time to all subsequent liens, it will have priority as to the land and the improvements. On the other hand, if the mechanics lien arises subsequent to other liens then these other claimants will have a prior claim as to the land. Even if another lien is first in time, the mechanics lien claimant may still have a prior lien as to the improvements to the extent he can prove enhancement of the land. These priorities apply to both contractors and subcontractors.

17. See notes 25-70 and accompanying text infra.
19. See note 42 infra.
20. E.g., mortgages, judgments, tax liens. See notes 62-70 and accompanying text infra for a discussion of the priority problems with a construction mortgagee.
23. The difference between the value of the land before and after the contract was performed constitutes the enhanced value. Moulding-Brownell Corp. v. E.C. Delfosse Constr. Co., 304 Ill.App. 491, 26 N.E.2d 709 (1st Dist. 1941). In conversions, where older buildings are remodeled for condominium use, it will be difficult to prove enhancement, and if the mortgage is recorded prior to the mechanics lien, then the mechanic's claim will be subordinate to the mortgagee's claim. If, however, enhancement can be proven,
since, under the Mechanics Lien Act, they are on equal status with each other.24

A more complicated situation is presented when the developer starts to sell the condominium units. In order for a property to become a condominium the property must be submitted to the Condominium Act.25 The developer must file three sets of documents with the Secretary of State: one, a plat describing the land and every unit in the development;26 two, the declaration,27 which will operate as the constitution of the condominium; and three, the bylaws,28 which will detail the procedures for operating the condominium association. However, there is no statutory requirement that these documents be filed prior to selling one or more of the individual units.29 Consequently, when a sale occurs prior to a condominium being submitted to the Act, there is a lack of statutory clarity in three areas: first, what law governs liens existing prior to the filing of the documents;30 second, who are the “owners” of the property and what are the consequences of ownership for purposes

the mortgagee will have no defense to a perfected mechanics lien. In situations where the mortgage contains a covenant against liens, the mortgagee must decide whether to let the mechanics lien holder foreclose first or to foreclose his lien in the same suit. The mortgagee’s decision will be based, in part, on the amount of his equity interest remaining in the property. If no mortgage is involved, the original contractor is entitled to a decree in the amount of the contract price, regardless of the enhancement issue. See Westphal v. Birthold, 273 Ill.App. 266 (2d Dist. 1934). The owners in this situation may be either the developer, the unit owners or the holders of a beneficiary interest in a land trust. Dunlap v. McAtee, 31 Ill.App. 3d 56, 333 N.E.2d 76 (2d Dist. 1975).

24. MECHANICS LIEN ACT § 15.

25. CONDOMINIUM ACT § 306. There is a dispute over whether the statute alone controls the field and thus precludes common law developments. See 1 P. ROHAN & R. RESKIN, CONDOMINIUM LAW AND PRACTICE § 4.01 n.1 (1974); id. at 28 (Supp. June 1975) [hereinafter cited as ROHAN & RESKIN]. Contra, Vishny, Financing the Condominium, 1970 U. ILL. L.F. 181, 189. On its face the statute does not indicate whether compliance is permissible or required.

26. CONDOMINIUM ACT § 305. A unit may be identified on the plat merely by a distinguishing number or other symbol.

27. Certain particulars must be contained in the declaration. Id. § 304. A declaration may be amended, although the method of amending it is not regulated by the statute. Id. § 302(a).

28. Id. § 318.

29. Id. § 303 provides: “Whenever the owner or owners in fee simple of a parcel intend to submit such property to the provisions of this Act, they shall do so by recording a declaration, duly executed and acknowledged, expressly stating such intent . . . .” (emphasis added). It is customary to file only after the buildings have been substantially completed in order to make the plat as accurate as possible. Thus, by the time the property is submitted to the Act, it is likely a blanket construction mortgage lien and mechanics lien may exist against the property.

30. See notes 33-42 and accompanying text infra.
of the mechanics lien claim;\textsuperscript{31} and third, will a construction mortgagee be bound to the provisions of the Condominium Act.\textsuperscript{32}

\textit{Pre-submission liens}

Although the Condominium Act is patterned after the FHA Model Act,\textsuperscript{33} the Illinois Act does not explicitly address the issue of pre-submission liens.\textsuperscript{34} Section 309 of the Illinois Act, which purports to consider "any lien [which] exists against two or more units," is not applicable to pre-submission liens because the statutory remedy for removal of the lien requires that it "be computed on the basis of the percentages set forth in the declaration."\textsuperscript{35} Without a declaration, there is no apparent means to remove the lien.\textsuperscript{36}

Legal scholars,\textsuperscript{37} lending institutions, the Cook County Assessor's office\textsuperscript{38} and title insurance companies\textsuperscript{39} concur in this interpretation of

\begin{itemize}
  \item \textsuperscript{31} See notes 43-61 and accompanying text infra.
  \item \textsuperscript{32} See notes 62-70 and accompanying text infra.
  \item In 1963, the Federal Housing Administration (FHA) drafted a Model Statute for Creation of Apartment Ownership in order to guide the states in drafting their own condominium legislation [hereinafter cited as FHA MODEL ACT], reprinted in 1A ROHAN \& RESKIN, supra note 25, at Appendix B-3, at app.25. See 12 U.S.C. § 1715y (1970), which authorized the FHA to insure condominiums in states which recognize this form of ownership by statute. See KANE \& HELMS, supra note 4, at 157-80 (1970), for several interesting comparisons between the two Acts. Section 14 of the FHA MODEL ACT requires that at the time of the first conveyance all liens affecting the unit must either (1) be paid and satisfied of record or (2) that a duly recorded partial release be given. The first provision of the section anticipates that no unit will be sold until the entire condominium is completed, including all common elements. While this might be desirable, it is economically unfeasible and an impossible requirement in the staged developments. The second provision which requires that units be conveyed with a partial release from all liens on the unit and the common elements, has been adopted by numerous states. See, e.g., CONN. GEN. STAT. ANN. §§ 47-87 (Supp. 1975); HAWAII REV. STAT. §§ 514-16 (1968); ME. REV. STAT. ANN. tit. 33, § 572 (Supp. 1973); N.Y. REAL PROP. LAW § 339-R (McKinney 1968); PA. STAT. ANN. tit. 68, § 700.404 (1965).
  \item CONDOMINIUM ACT § 309 (liens for non-payment of common expense fees); id. § 309.1 (blanket liens once there is a declaration); id. § 314 (lien transfers where insurance proceeds are insufficient for reconstruction); and id. § 316 (effect on lienholders when a property is removed from the provisions of the Act).
  \item Id. § 309.1 (emphasis added).
  \item The recently enacted Georgia Condominium Act is unique in that it provides that a recorded pre-submission lien is invalid against a bona fide purchaser. See GA. CODE § 1608e(b) (1975).
  \item See KANE \& HELMS, supra note 4, at 178.
  \item See A. BUREK, CONDOMINIUM—AND THE ILLINOIS CONDOMINIUM PROPERTY ACT, LAW—
section 309. Although to date there has been no Illinois court decision validating this opinion, it is unlikely that even the most artful judicial craftsmanship could render section 309 applicable to pre-submission situations. Consequently, attorneys for lien claimants, developers and unit owners at this stage of the development must look to the Mechanics Lien Act as the applicable law. If the contractors and subcontractors fulfill the necessary requirements, as prescribed in the Mechanics Lien Act, they will have a priority.

The Mechanics Lien Act, however, is fraught with problems of its own. A major problem is determining who are the "owners" of the condominium property under the Mechanics Lien Act in the event of a foreclosure action. Case law has determined that the term "owner" includes one who, as owner, made the contracts, or one who "knowingly permitted" the owner to make the contracts. In addition, the term
includes the owner of an equitable interest in the property, with the lien attaching to this equitable interest.44

There are at least three approaches for determining who is an owner under the Mechanics Lien Act. One approach is to treat the condominium development as a traditional fee simple.45 Under such a situation, a blanket lien could be attached to the entire property and a foreclosure sale could result.46 Everyone holding an interest in the development, including the unit owners of record and every unit owner who would make a purchase within the next four months would be subject to the lien.47 Similarly, the lien would attach to the equitable interest of a unit purchaser holding an executory sales contract.48 Even if we assume that

44. See City of Salem v. Lane & Bodley Co., 189 Ill. 593, 60 N.E. 37 (1901); Springer v. Kroeschell, 161 Ill. 358, 43 N.E. 1084 (1896); Paulson v. Manske, 126 Ill. 72, 18 N.E. 275 (1888), all of which stand for the proposition that a vendee in such a situation is an "owner" within the meaning of the Mechanics Lien Act. See also Henderson v. Connelly, 123 Ill. 98, 14 N.E. 1 (1887) (holding that a buyer's interest is subject to the seller's contract rights, and if the lien claimant proceeds only against the vendee's interest, then he takes it subject to the vendor's prior right to receive the unpaid remainder of the purchase price).

45. While the development as a whole can be viewed as property held in fee simple, it is difficult to consider the individual units as such in light of section 306 of the Condominium Act. This section provides that not until the property is submitted to the Act can the units be capable of ownership in fee simple or any lesser estate. CONDOMINIUM ACT § 306.

46. MECHANICS LIEN ACT § 7. As a general proposition, a mechanics lien filed within the four month period will have the following results: first, it will be held superior to the rights of the unit purchasers of the property; second, it will be on parity with the other lien claimants; and third, it will be on parity or held superior to other encumbrancers (i.e. mortgagees, judgment holders, tax liens).

47. A so-called "secret lien" could attach during this four month period when the lien claimant filed his lien claim or brought suit on his completed contract. In this situation, the lien exists from the date of the contract with the contractor and is binding on anyone who purchases a unit after execution of the contract, even if the purchaser is ignorant of the existence of the contract or lien. See Clark v. Moore, 64 Ill. 273, 279 (1872). See generally MECHANICS LIENS, supra note 41, § 25.

48. This is the most probable situation, i.e., an individual has made a down payment and the developer has given him the contract to the unit with the promise that he will "cause to deliver this unit to him as a condominium." See Schedule C, issued by Chicago Title & Trust as an example of this type of document. In State Savings & Loan Ass'n v. Kauaian Dev. Co., 50 Haw. 540, 445 P.2d 109 (1968), the only reported decision on point, the court considered a condominium unit purchaser, under a contract to buy, as the owner of the improvement and held that the mechanics' liens attached to the purchaser's equitable interest. This decision was based on the 1961 Hawaii Horizontal Property Act, Sess. Laws Hawaii, Act 180 (1961) which like the Illinois Act contains no provision regarding pre-submission liens. See also note 66 infra.
a unit purchaser's percentage ownership could be determined in order to pay off his part of the lien, the rest of the building could still be sold. Consequently, he could be the sole owner in a development which has now become an apartment rental complex. Arguably, the unique qualities of condominium marketing and ownership make it unreasonable and unjust for courts to attempt to fit this new type of property interest in the traditional fee simple pattern.

A second approach for determining ownership, which would give some protection to innocent purchasers, is for the courts to analogize to the cases involving subdivisions and multiple residential buildings on adjacent lots. For example, in *Malicki v. Holiday Hills, Inc.* the court said that a blanket lien could not be placed against an entire subdivision, but was valid only against those individual houses which had been worked upon within the two years prior to filing suit. The court emphasized the public policy implications of holding otherwise:

> In this era when subdivisions include hundreds and even thousands of homes, it would not be unusual or unlikely that a mechanic would have ten or even twenty years or more in which to impress a lien of many thousands of dollars on a single home which had been completed for years. This was not the intention of the legislature, nor does such an interpretation represent the plain meaning of the statute.

Moreover, since the lien claimant could not identify the material used in the one house to which the lien could apply, the case was dismissed.

If the analogy to the subdivision cases were accepted by the courts, the lien claimant would be forced to file suit against the developer

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49. See, e.g., Calumet Concrete Constr. Co. v. Fillipovich, 227 Ill.App. 250 (1st Dist. 1922) (holding that a lien claimant cannot transfer the amount due on a lot which is not lienable to a lienable lot adjacent thereto); Schmidt v. Anderson, 253 Ill. 29, 97 N.E. 291 (1911)(holding that a contractor's blanket lien on four houses was only valid against the one house on which he had worked within the last four months). See generally M. Stone, *Illinois Mechanics' Lien Act: Area of Land Subject to Lien, Lawyer's Supplement to the Guarantor* (1965); *Mechanics Liens, supra* note 41, § 17.


51. *Id.* at 466, 174 N.E.2d at 918. *Accord, Florida Steel Supply Corp. v. Carpenter, 188 Fla. 243, 66 So. 2d 476 (1953).*

52. 30 Ill.App.2d at 464, 174 N.E.2d at 917.

53. *Id. Accord, Schmidt v. Anderson, 253 Ill. 29, 33, 97 N.E. 291,292 (1911).*

54. See Summit Elec. Co. v. Metropolitan Dev. Co., No. 74-CH.8160 (Cook County, filed Dec. 23, 1974), where the defendant unit owners in a mechanics lien foreclosure action relied upon the analogy of the *Schmidt* and *Malicki* cases. The court ordered that those unit owners, who had purchased their units more than four months prior to filing the subcontractor's lien, be dismissed from the case. Unit owners who had purchased units less than four months prior to filing remain party defendants in the pending suit.
within two years after completing his contract. However, in the case of a unit purchaser, the lien claimant must file his lien or bring suit within four months after the completion of the work or the final delivery of the material. In order for the lien to be valid against the unit purchaser, the filing or court action must occur within four months after the unit purchaser takes title.

Moreover, the lien claimant could not transfer his claim from the units proper to the common elements as a whole, but could transfer it only to the percentages of the common elements which were purchased within the preceding four months or which are still owned by the developer. Meeting the level of proof required in such circumstances would seem an impossible task for the unfortunate lien claimant, especially in light of the fact that common elements are described in deeds and sale contracts only in percentage terms.55

If the court refuses to accept the subdivision analogy, a third approach to the ownership problem could be for the court to order a partition sale pursuant to the Mechanics Lien Act either by exercising its discretion under section 18,56 or by giving a liberal interpretation to section 1.57 Both approaches are possible in those situations where sev-

55. See Mechanics Liens, supra note 41, §§ 65-69, 96, 97.
56. Condominium Act § 307. The deed conveying the property to the owner (or the sales contract) contains a description of the unit which corresponds to a symbol or number on the plat and the declaration. This simple form of identification simultaneously conveys the owner’s corresponding percentage of ownership in the common elements, even though the same is not expressly described.
57. Mechanics Lien Act § 18 provides: “If any part of the premises can be separated from the residue, and sold without damage to the whole, and if the value thereof is sufficient to satisfy all the claims proved in the case, the court may order a sale of that part.”
58. Id. § 1 provides in part:

Any person who shall by any contract or contracts, . . . with the owner of a lot or tract of land, or with one whom the owner has authorized or knowingly permitted to contract to improve the lot or tract of land, . . . is known under this Act as a contractor, and has a lien upon the whole of such lot or tract of land and upon adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place or residence or business. . . .

By liberally interpreting this section, the court could find that the premises are used as several “lots or tracts” and order only a partial sale of the “lot or tract” upon which the improvement is located. See Van Lone v. Whittemore, 19 Ill.App. 447 (2d Dist. 1886)(allowing a lien to attach to one section because the materials used to construct a house were only in one tract); Woodburn v. Gifford, 66 Ill. 285 (1872)(allowing a lien to attach to one-half of one hundred acres of land owned by joint owners because this area was not used as one tract and a practical division could be made). See generally 10 G. Thompson, Real Property § 5201 (1957); 53 Am. Jur. 2d Mechanics Liens § 171 (1971).
eral buildings are involved and one or more of them contains as yet unsold units, or where recreational facilities could easily be separated from the development. If a partition sale were ordered, the unit purchaser might find himself still in ownership of his unit but now obligated to pay fees or dues in order to use recreational or other facilities for which he has already paid in his purchase price. However, if the blanket lien were for work done on common elements, such as wiring, carpeting, plumbing or roofing, the court would not have these two options available to it. In this event, a foreclosure sale for the entire property could be ordered.

At first glance, the unit owner seems to be protected from this partitioning by section 308 of the Condominium Act, which prohibits separating the common elements from the units. However, a careful reading of this section indicates that only unit owners are proscribed from initiating such action; a judicial partition is not prohibited, as it is in some states. Moreover, partitions are only prohibited after the property is submitted to the Act.

Foreclosure sale on a blanket lien for work on common elements is typically not necessary because the construction mortgagee will usually pay off the liens and eliminate the need for a sale. Such action will enable construction to continue and will assure that a marketable title will be issued by the title companies.

However, if the construction mortgagee has insufficient funds to pay for the development, or if he decides not to pay off the liens because of his reappraisal of the financial success of the development, a foreclosure sale could be ordered. At this point, a court would have to determine

60. Condominium Act § 308 provides:
   As long as the property is subject to the provisions of this Act the common elements shall, except as provided in Section 14 hereof [permitting partition where insurance proceeds are insufficient for reconstruction of a condominium] remain undivided and no unit owner shall bring any action for partition or division of the common elements.
62. Although not considering the mortgagee in this earlier section, if the construction mortgagee had dispersed the proceeds of the construction loan on the strength of a statement from the lien claimant as to the amount or non-existence of his lien, the mortgagee would have a limited priority over the mechanics lien. See Hughes v. McCasland, 122 Ill.App. 365, 367-68 (2d Dist. 1905).
63. Mechanics Lien Act § 21. See generally Mechanics Liens, supra note 41, §§ 14-15. Section 16 of the Mechanics Lien Act provides rules for establishing the priorities between the mortgagee and mechanics lienor. If the mechanics lien claimant has filed his claim or his suit within four months of the completion of the performance of his contract and his contract has been made after the recording of the construction mortgage, the proceeds
whether the construction mortgagee will be bound to the Condominium Act even though the property as a whole has not been legally submitted to the Act.

A court may decide that the construction mortgagee is not bound to the Act because he had little contact with the condominium development and, in fact, had hired a third party to handle the disbursing of the proceeds of the loan. If this is the court's decision, a unit purchaser holding a sales contract will have a right to his unit, but subject to the mortgagee's and mechanics' blanket liens. The construction mortgagee will be able to sell the rest of the building free and clear of the condominium regime. Since the potential buyers will not be forced to continue building a condominium development which one construction mortgagee has already deemed a failure, there is a greater opportunity for attracting more buyers and obtaining a higher selling price. Both of these factors will be of benefit to the lien claimants.

On the other hand, even if the property has not been officially submitted to the Act, the construction mortgagee can be deemed knowledgeable of the intent to do so. Consequently, a court might find him bound by implied consent to submit to the Act, and estopped from acting in any manner which would end the condominium regime. Such a result of the sale will be divided into two funds. The mortgagee will receive a percentage of the sale in proportion to the value of the land and whatever was on it at the time of the contract for the improvement. The mechanics lien claimant will receive a proportion representing the value of the improvements made on the property. Moulding-Brownell Corp. v. E.C. Delfosse Constr. Co., 304 Ill. App. 491, 26 N.E.2d 309 (1st Dist. 1940). On the other hand, if the contract for the improvement was made prior to the recording of the construction mortgage, the mechanics lien takes precedence over the mortgage, both as to the land and the improvements. Pittsburgh Plate Glass Co. v. Kranz, 291 Ill. 84, 125 N.E. 730 (1919). If the mechanics lien claimant does not file his claim within the four month period after completion of his contract, then the mortgagee has an absolute and complete priority over the mechanics lien claimant, Denkman v. Newbanks, 220 Ill. App. 515 (2d Dist. 1921). See generally Mechanics Liens, supra note 41, § 22.

64. This is the usual arrangement established by a construction mortgagee. Interview with Judge Harold A. Siegan, Supervising Judge, Land Title Section, Circuit Court of Cook County, in Chicago, Nov. 12, 1975. See Callaizakis v. Astor Dev. Co., 4 Ill.App.3d 163, 280 N.E.2d 512 (6th Dist. 1972) where the court held that since the construction mortgagee had little direct involvement in the building of a condominium, it was not independently liable to the condominium association for faulty construction. Both parties in this case relied upon Connor v. Great Western Sav. & Loan Ass'n, 69 Cal.2d 850, 447 P.2d 609, 73 Cal. Rptr. 389 (1968) which held that the construction lender did have such a duty. The Illinois court distinguished the cases by considering the amount of involvement by the lender and held that in Callaizakis the amount was insufficient to create such a duty.

65. The more likely remedy, and the unit purchaser's only other alternative would be to sue the developer for breach of contract.

might occur in Illinois because of the mortgagee’s legal status, which allows him to maintain an action of ejectment, not to confirm title, but only to secure possession until indebtedness is satisfied.  

This estoppel theory is buttressed by the fact that the construction mortgagee would generally join with the “owner” in submitting the property to the Condominium Act in order to assure a marketable title.

If this latter line of reasoning is adopted by the court, the unit purchaser will still have a right to his own unit subject to the mortgagee’s and mechanics’ blanket liens. However, in this situation, if he chooses to take a title to his unit subject to the liens, he will at least be living within a condominium environment. Since only buyers willing to continue the development as a condominium will be able to participate in the foreclosure sale, the proceeds inevitably will be less.

**Liens after submission to the Condominium Act**

The uncertainties of which law applies are resolved when the property
is submitted to the Condominium Act. The property usually remains under the control of the developer for a certain period of time, until the board of managers takes over. This period of time is either specified in the declaration or regulated by the Condominium Act. Since it is usually to the developer's benefit to maintain control for as long as possible, especially in the staged developments, this is a particularly difficult period for the unit owner. During this interim phase, unscrupulous developers frequently have abused their positions and entered into long-term contracts or agreements which result in excessive costs to the unit owners. Moreover, since they are the only individuals authorized...

71. Most developers provide that when 51% of the units have been conveyed that they will relinquish control; others retain control until 75% of the units have been conveyed. In the case of a staged development, the developer may be in control for several years. See generally Ronan & Reskin, supra note 25, § 17.04; Ronan, Condominiums and the Consumer: A Checklist for Counseling the Unit Purchaser, 48 St. John's L. Rev. 1028, 1037-59 (1974).

72. Condominium Act § 318.2. This provision specifies that if the time for election of the board is not contained in the declaration or bylaws then it shall occur within 12 months from the date of recording or be determined by a majority vote of the unit owners.


74. Developers have devised numerous schemes whereby they can maintain control for an extended period of time. Illustrative of some of these methods are those mentioned in Hawaii H.R. No. 421 (1974), discussed in Rohan, supra note 71, at 1037. Developers have kept control of the board indefinitely by: (1) retaining ownership of just over 50% of the units; (2) selling a significant number of units to strawbuyers or employees of the developer; (3) packing the initial board with friends and associates by drafting the declaration to allow non-unit owners to be elected to the board; and (4) getting control of the proxies of the unit owners by carefully written clauses in the declaration.

75. Some states have enacted legislation which describes the duties of the developer to include the duty not to disclose misleading information. See, e.g., Haw. Rev. Laws § 514-45 to 50 (1970); Mich. Comp. Laws Ann. § 559.28 (1968). In these states, if the developer makes full disclosure to the unit purchasers, the contracts would not be void but at most voidable. There is a three-way split among the states for determining voidability: (1) on the basis of a conflict of interest alone; (2) on the basis of a conflict of interest plus bad faith or fraud; or (3) on the basis of a conflict of interest plus the additional factor of unfairness (this is the more modern “fairness” test). See H. Henn, Law of Corporations §§ 235, 238 (2d ed. 1970). In the usual situation, the developers disclose at the time of purchase a document entitled “Management Agreement” whereby the unit owner delegates the authority to manage the condominium to the developer or to an agent that he appoints. See Hennessey, supra note 73, Appendix A, at 1072-78 for a copy of such an agreement. Frequently, courts will uphold subsequent long-term or self-serving contracts made by the developer to the detriment of the unit owners, because they were disclosed and were not voidable by any of the standards listed above. See, e.g., Point East Mgmt. Corp. v. Point East One Condo. Corp., 282 So.2d 628 (Fla. 1973), cert. denied, 415 U.S. 921 (1974) (upheld a 25-year management contract made by a developer with himself); Fountainview Ass'n, Inc. #4 v. Bell, 214 So.2d 609 (Fla. 1968) (holding a complaint of a
to contract for all the condominium owners, it can be said that the contracts were entered into by one "authorized and knowingly permitted to contract." Therefore, if a mechanics lien claim were brought against the property, the unit owners would be liable for its payment.

Another problem which occurs during this transitional period involves the payment of the maintenance or common expense fees. If the developer is having financial difficulties, he easily may collect the fees from the unit owners and use them for purposes other than maintenance. In addition, unless it is clearly indicated in the declaration that the developer is responsible for the payment of the common expense fees, or a percentage thereof, for the unsold condominium units, he is not required to pay them. Consequently, each unit owner’s financial responsibilities will be greatly increased until all the units are sold. Even if the declaration does make the developer responsible for these unsold units, if the unit owners’ association did not state a cause of action against a condominium promoter who had made an unconscionable profit on the sale or lease of condominium land and improvements.

As a result of developer abuses, several states have adopted or are in the process of adopting, statutes which prohibit developers from entering into long-term contracts and/or give subsequent unit owners the right to cancel such contracts. See, e.g., Md. Ann. Code Real Prop. § 11-125 (Supp. 1975); Va. Code Ann. §§ 55-79.74(b)(1) (Supp. 1975); Fla. Stat. Ann. § 711.13(4), repealed by Sess. Law ch. 74-104, § 8 (1974) which had required that all contracts entered into by the developers be deemed "fair and reasonable" and in addition allowed the unit owners to cancel any contract by a 2/3 vote of all owners.

Independent of statutory requirements, it can be said that developers have a fiduciary duty to the unit owners. Unit owners have a pecuniary interest in the condominiums’ fiscal affairs and expenses similar to ordinary stockholders. Any fraud, mismanagement, conflict of interest, or diversion of money will be reflected in extra costs and losses to the membership. The purchaser of a unit does not sign a contract in an arm’s length relationship. If the project at its initiation is based on fraudulent and overreaching promises, its viability is threatened. See Point East Mgmt. Corp. v. Point East One Condo. Corp., 282 So. 2d 632 (Fla. 1973) (Ervin, J., dissenting); G. Bogert & G. Bogert, Law of Trusts § 86 (5th ed. 1973); Henn, supra, § 235.

76. The developer may decide to add “extras” to the development because of the decline in the selling market. This is not an unrealistic possibility in light of the fact that there are over 200,000 unsold condominiums at present in the United States. U.S. News & World Report, Sept. 8, 1975, at 54. A developer may be required to make major repairs or renovations due to shoddy construction. In the large staged projects unexpected construction problems, cost overruns, delays in obtaining materials, and inflationary factors may result in liens being placed on the units sold in the earlier phases of the development. These factors were represented as the reasons for the failure and resultant foreclosure sale of the Village Mall Condominium in New York. See Condominium Report 7 (1975).

77. See cases cited in note 43 supra.

78. The priority line-up would be the same as that which occurred in the section on pre-submission liens. See notes 33-70 and accompanying text supra.
developer is having monetary problems and is not able to meet these expenses, the brunt of the cost of the condominium upkeep will fall on the unit owners. The unit owners only legal recourse is to file a lien upon the units still owned by the developer and then, if necessary, bring a foreclosure action.  

B. Contracts with the Board of Managers during the Period in which the Condominium is under their Control.

At the end of the transitional period, a board of managers is either elected or appointed by the condominium association. It is the board members' responsibility to see that the condominium development is properly managed during their term of office. The bylaws will usually contain information regarding the board's responsibilities, assessment procedures, method of election of board members and so forth. Generally the board of managers acts as the governing body and is responsible for assessing the common expenses, which include the monies needed for "maintenance, repair and replacements of the common elements" as well as "any other expenses lawfully agreed upon." Typically, the bylaws provide that the board can make expenditures up to a specified amount, with further expenditures requiring a vote of the unit owners.

When the board of managers enters into a contract (which is within the scope of their authority) for work to be done on the common elements, the unit owners are assessed for its cost in an amount proportionate to their percentage interest in the common elements. If a unit owner fails to pay his assessed fees, the board is authorized to place a lien on

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79. Section 309 of the Condominium Act provides that both the recording of the lien and the bringing of the foreclosure action are the responsibility of the board of managers. Since at this stage of the development the board has not yet been elected or appointed, it is questionable whether or not the unit owners will have the legal authority to take action against the developer.

80. The declaration usually provides that all the owners of the condominium units are members of the condominium association. The association may incorporate as a "not-for-profit corporation under the General Not-For-Profit Corporation Act of the State of Illinois for the purpose of facilitating the administration and operation of the property." CONDOMINIUM ACT § 318.1. The board of managers then becomes the board of directors for purposes of the Not-For-Profit Corporation Act. Id.

81. CONDOMINIUM ACT § 318. See generally 1 Rohan & Reskin, supra note 25, § 17.05. 82. CONDOMINIUM ACT § 318(f).

83. Id. § 318(g).

84. The Illinois Bar Association in its Model Declaration recommends that the board of managers be given the authority to spend up to $5,000 without prior approval of 2/3 of the owners, reprinted in ILLINOIS REAL PROPERTY PRACTICE II § 1.38, at 1-48, 1-49 (Ill. Inst. Cont. Legal Educ. ed. 1969). The Olympic Towers Condominiums in New York City
his unit. Under section 309 unpaid assessments represent liens on a unit which, when recorded, attain priority over all other recorded and unrecorded liens and encumbrances. The only exceptions are taxes, special assessments, special taxes, and previously recorded encumbrances which expressly contain a mailing address in Illinois where notice of a lien can be mailed.

There are two possible results if a unit owner defaults on his payment of common assessments. First, the board of managers, pursuant to section 309, can notify the unit mortgagee of the defaulting unit owner that the common assessments for that unit are in arrears. For a period of 90 days after that notice, the unpaid assessments will be a lien on the unit owner's property which has priority over the first mortgage, if it has been previously recorded and has a mailing address on file with the board. The usual result will be that the mortgagee, after receiving notice of the default, will bring pressure to bear on the unit owner to cure the default or, in the alternative, the mortgagee will pay the assessments, add them to the mortgage debt, and foreclose on the unit if necessary.

A second result, occurring if a large number of owners cannot pay their share of the assessments, is that the contractor could bring a lien action against the common elements covered by his contract and cloud the titles of all the unit owners. This blanket lien will be superior to the rights of the unit owners under the theory that the contract was entered into by one "authorized or knowingly permitted" to execute the contract. However, section 309.1 of the Condominium Act permits a lien permits expenditures by the board of up to $50,000 without prior approval of 2/3 of the owners, reprinted in 1A Rohan & Reskin, supra note 25, Appendix C-1, at app. 112.

85. Condominium Act § 309.
86. Id. § 309(a).
87. Id. § 309(b).
88. Under most mortgage agreements a non-payment of assessments is defined as a default and gives the mortgagee the right to declare the entire debt due. See R. Kratovil, Real Estate Law 359 (5th ed. 1969).
89. The contractor or subcontractor will have to consider several factors. How much of the contract is still owing? What would the cost of service be? In the large developments this could amount to several hundred dollars alone. How much would attorney’s fees be? What are the chances of settling if a suit were filed and all the titles of the units were clouded? What are the consequences if a suit is filed against only one unit owner? Would the unit owner pay off the debt due on the contract or would he in turn bring suit against all the other unit owners as party defendants? This latter course would result in an economic savings since the cost of service would be paid by another. What actions are necessary in order to trigger the board to bring a lien claim against the defaulting unit owners?
90. See cases cited in note 43 supra; Bowers v. Jarrell, 210 Ill.App. 256 (1st Dist. 1918) (lien claimant can subject all owners to the claim if he can establish a contractual
claimant to give a partial release from the blanket lien against the common elements to a unit owner who pays off the lien applicable to his percentage interest in the common elements. This partial release will not prohibit the lien claimant from proceeding against the other owners.

While the possibility of unit owners defaulting en masse seems remote, it could occur in two circumstances: first, during a depressed economic period, and second, in a large staged development when percentage interests have been greatly altered and unit owners are unable to pay their pro rata share of the common expenses. If the majority of the mortgages are held by a lender who is having financial difficulties, or if the mortgage lenders in general are in economic trouble, foreclosure actions will be instituted. At this point, the mechanics lien claimant will join in the process. If he has filed his claim or commenced suit within four months after completing his contract, he will have a prior lien as to the improvement in the common elements to the extent he can prove enhancement. If he has not filed within the four months, the mechanics lien will be totally inferior to the mortgagee's lien.

In addition to the general common elements, condominium declaration among everyone); Rubendall v. Tarbox, 200 Ill.App. 260 (2d Dist. 1916) (allowing a blanket lien without apportioning it among the various owners).

91. Condominium Act § 309.1. The unit owner who originally paid the assessment which covered the contract could end up paying for it a second time in order to get a release from the lien. See Berger, Condominium: Shelter on a Statutory Foundation, 63 Colum. L. Rev. 987, 1022 (1963).

92. Condominium Act § 309.1.

93. During the 1930's, numerous foreclosures of cooperatives occurred in Illinois because the owners could not pay either their assessments or make up the deficit for the other owners who defaulted. These events prompted the drafters of the Condominium Act to place the burden of unpaid assessments on the lenders, who generally will have more money than the unit owner. See Condominium Workshop, 48 St. John's L. Rev. 677, 708-09 (1974).

94. For example, a unit owner might have title to a unit in the first building of a staged development which is eventually to contain nine other buildings of ten units each and a large recreational facility. After completing the first building and the recreational facility, the developer becomes insolvent. The owner originally assumed his interest in the common elements would be 1%. However, since the other units will never be built, he now finds that he owns (and will be liable for) 10% of the recreational facility and other common elements. Such alteration of ownership interest can easily occur. The developer may have retained the right to alter the percentage of interest by so providing in the declaration, or by obtaining the power of attorney through the conveyance deed to amend the declaration. See Joliet, supra note 5, at 20; Bohan, supra note 5, at 7. It also should be noted that it is very likely that recreational facilities will be built early in the development because such items boost sales.

95. See notes 46 and 63 supra.
tions usually describe limited common elements. Limited common elements are not defined in the Condominium Act, but the term is generally understood to mean "those common areas and facilities designated in the declaration as reserved for use of certain [unit or units] to the exclusion of others." Most declarations in the Chicago area list the limited common elements and the units to which they are attached. Therefore, the mechanics lien claimant will have to look to the declaration to determine on which unit(s) he has a lien. For example, if it were specified in the declaration that an elevator was the limited common element appertinent to units A, B, and C, and A orders work to be done on it, all three unit owners could be subject to the lien under the theory that the work was "knowingly permitted" by the other unit owners. On the other hand, if the declaration allocated each unit a balcony as a limited common element, and a unit owner signed a contract for work to be done on his own balcony, that owner alone would be subject to the lien.

Frequently the bylaws indicate that the board must approve all the repairs made on the limited common elements and must appropriate the expenses to the unit owners most directly involved. If a unit owner purchases a unit with knowledge of this clause, he will be estopped from denying responsibility for the charge and his unit will be subject to the lien.

C. Contracts with the Unit Purchasers for Labor and Materials for their Individual Work

If the labor and materials furnished to the unit owner are confined to his unit proper, the lien will be asserted against the unit and its undivided interest in the common elements. Although a foreclosure sale could result, the outcome of such a sale probably would not interfere with the condominium regime because the proceeds from the sale would more than satisfy the lien claim and there would be no necessity to "touch" the common elements. A different situation is presented if the work done by the contractor or subcontractor is on areas contiguous to

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96. FHA Model Act, supra note 33, at § 2(j).
97. See note 43 and accompanying text supra.
98. G. Hennessey, Jr., The Condominium, in Illinois Real Property Practice II. (Ill. Inst. Cont. Legal Educ. ed. 1969). See id. § 1.38, at 1-48, V(h), for a contractual arrangement in a sample declaration which will guide a board of managers in discharging a lien where more than one owner is involved.
99. See 3 A. Corbin, Contracts § 538 (1951).
100. Mechanics Lien Act § 1. The lien problem herein involved would be no different than that incurred when filing against a free standing residence.
the unit, such as wiring or piping that is contained in the inner portions of common walls, ceilings, or floors. These contiguous areas are part of the common elements and, therefore, if a contractor works on them, a lien could be filed against the entire development, even if the work was ordered by an individual unit owner.

If the unit owner has defaulted in the payment of contracts applicable to his unit only, he probably has also defaulted in the payment of the common elements' assessment. When this situation occurs, there is a lien priority problem under section 309. Under section 309(b) of the Condominium Act, an "encumbrance" can attain priority over the common expense lien. Although a mechanics lien is generally considered an "encumbrance" most legal scholars have said that section 309 applies only to mortgages. Illinois case law, however, supports the position that a mechanics lien is in fact an "encumbrance." Therefore, in addition to compliance with the usual procedural aspects of perfecting a lien, a mechanics lien claimant must also comply with the following requirements of section 309(b): one, prior to starting work on a unit, obtain a written statement from the board that there are no recorded liens for common expenses on the unit; two, notify the board of an Illinois mailing address where notice can be sent; and three, obtain a subordination agreement from the board.

Compliance with these requirements presents an enormous policing responsibility for contractors and subcontractors in order to maintain priority. For example, if the board refuses to subordinate its right to a prior lien, a lien claimant will have to police the unit owner for any indication of financial deterioration. In the event that he is able to

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101. **Condominium Act** § 302(e) defines common elements as "all portions of the property except the units."

102. See notes 81-95 and accompanying text supra.

103. See notes 86-87 and accompanying text supra.

104. The term "encumbrance" is used to refer to "any right to, or interest in land which may subsist in another to the diminution of its value, but consistent with the passing of the fee." [Black's Law Dictionary](4th ed. 1968).

105. See statements made by Mr. Thomas Fegan, a drafter of the Illinois Condominium Act, regarding the history of this section in *Condominium Workshop*, 48 St. John's L. Rev. 677, 708-09 (1974).

106. See Pool v. Rutherford, 336 Ill.App. 516, 524, 84 N.E.2d 650, 653 (3rd Dist. 1949)(interpreting encumbrances and liens in a trustee's deed conveying trust real estate, the court said an encumbrance is "everything to which the property might possibly be subject"); Redmon v. Phoenix Fire Ins. Co., 51 Wis. 292, 301, 8 N.W. 226, 230 (1881)(holding that to make a distinction between an encumbrance and a mechanics lien "would be extremely technical and overnice, if not forced").

observe any economic difficulties, the lien claimant must record his lien before the board records its lien on the common elements' assessment. Since most contractors involved in work on individual units will be small firms or self-employed repairmen, it will be beyond their capacities to engage in such monitoring. Consequently, these mechanics liens generally will be inferior to the mortgage and the common expense liens.108

II. PROPOSALS FOR CHANGE

The preceding discussion has demonstrated that the Condominium Act fails miserably in giving security to the class of individuals it was designed to protect. Further, though the Mechanics Lien Act adequately protects the interests of contractors and subcontractors, it presents numerous problems when applied in relation to the Condominium Act. There are two alternatives to remedy this situation: contractual arrangements beneficial to unit purchasers and mechanics lien claimants, or legislative changes designed to protect both.

A. Contractual arrangements109

Ideally, unit purchasers could insist that their attorney read the condominium declaration in its entirety and then draft as many safeguards as possible into the sales contract.110 While in theory this would give adequate protection to the condominium buyer, it does not present a practical resolution of the problem. First, most declarations are long, complicated documents and it would require many hours of work to ascertain exactly what safeguards would be needed. The cost for such a thorough analysis would, in most cases, add several hundred dollars of attorney fees to an otherwise simple real estate transaction. Second, the

108. See generally Richard Powell, 4A THE LAW OF REAL PROPERTY (1974). [hereinafter cited as Powell] While most states have similar priorities, Oklahoma allows prior recorded judgments, mortgages, as well as mechanics liens to have priority over common expense liens. OKLA. STAT. ANN. ch. 11, § 524 (1971). California provides that any prior recorded lien has priority. CAL. CIV. CODE § 1356 (1970).

109. There are numerous books and articles giving advice to the attorney who is representing a condominium purchaser, see, e.g., W. Helms & P. Vishny, Representing the Unit Buyer/Seller, in ILLINOIS CONDOMINIUM LAW ch. 12 (Ill. Inst. Cont. Legal Educ. ed. 1974); R. Rothenberg, WHAT YOU SHOULD KNOW ABOUT CONDOMINIUMS (1974); Rohan, Condominium Housing: A Purchaser's Perspective, 17 STAN. L. REV. 842 (1965); Rohan, Condominiums and the Consumer: Checklist for Counseling the Unit Purchaser, 48 ST. JOHN'S L. REV. 1028 (1974).

110. For example, the attorney could arrange to have the down payment put in escrow; obtain a written assurance from the developer that there are no liens on the property; or require that the developer be bonded in an amount sufficient to cover potential liens.
buyer and the attorney may not be given a copy of the declaration until just before the execution of the sales contract. This would not provide the attorney adequate time to analyze the documentation. Third, most developers issue form contracts on a “take it or leave it” basis and claim that individual bargaining on a particular unit is economically prohibitive. Fourth, developers of staged developments will not alter their “master plan” in order to assure a single unit owner that his percentage interest in the common elements will not be changed.

Aside from the usual precautions which are drafted into a contractor’s contract, it is essential that no waivers of lien be included in the original contract or executed subsequent to the making of the contract. The subcontractor’s contract should also include an affirmation from the contractor that his original contract did not contain a waiver of lien and that no such waiver will be subsequently executed.

B. Legislative Changes

During the past few years, several states have redrafted or substantially amended their condominium acts for two major reasons: first, to give more protection to the unit owners who have suffered abuse at the hands of dishonest developers; and second, to make the statutes conform to the hitherto unforeseen marketing and construction realities of the condominium form of property ownership. In Illinois, the mechanics lien problems which have been outlined in this Comment add a third

111. CONDOMINIUM ACT § 322 requires disclosure before sale but does not specify how long before the sale.

112. While in the past, negotiations have generally been impossible because of the great demand for condominium units, the recent glut of unmarketable and unsold units has made developers more approachable on the issue. This is especially true in light of the fact that more and more construction lenders are requiring that a large percentage of units be pre-sold before making the loan effective and including a penalty clause for early prepayment.

113. Such precautions could include, for example, inserting specifications as to prices for the various services or materials to be provided, and arranging for a payment plan, which details the date and the amounts to be paid on these dates.

114. See generally MECHANICS LIENS, supra note 41, §§ 114-15,174-75.

115. A waiver of lien rights in the original contract will deprive a subcontractor of possible lien rights if there is proof: (1) that the subcontractor had actual notice of the waiver and (2) that the written waiver has been filed in the office of the recorder of deeds (a) prior to the commencement of work; or (b) within 10 days after the making of the original contract; or (c) not less than 10 days prior to the making of the subcontract. MECHANICS LIEN ACT § 21. See generally MECHANICS LIENS, supra note 41, §§ 114-15.

There are several general proposals which should be adopted in order to give continual protection to both purchasers and lien claimants. A state agency should be established to regulate the condominium industry in this state. The agency should be given the authority to promulgate rules in order to keep up with the changing needs of consumers, developers, and mechanics lien claimants. Moreover, this agency must be given sufficient funding in order to adequately supervise and investigate complaints made against developers throughout the state. The agency should be given the power to bring charges, through the attorney general, against anyone who violates the Condominium Act.

In addition, a comprehensive registration and disclosure procedure should be established to replace the vague and inconclusive requirements of the present Act. Developers should be required to give a prospective purchaser a full and complete disclosure of the proposed project in the form of a prospectus. If the development is a staged development, the alternative plans and percentage interests affected

117. H. Res. 877, 79th Ill. Gen. Assembly (Adopted June 14, 1974). A Legislative Condominium Study Committee was established and directed to "...conduct an exhaustive and comprehensive study of all aspects of the construction, sale, ownership and management of condominium property... and the need or feasibility of a state regulatory agency..." Id.

118. S.B. 110, 79th Ill. Gen. Assembly (Introduced Feb. 5, 1975) would amend the present Act to vest powers in the secretary of state to accept declarations for filing and to investigate improprieties in the sale of condominium property. If such a sale were to work a fraud on the public, the secretary would be authorized to suspend or prohibit the sale.

119. Real estate disclosure legislation is characterized by two basic approaches. Public report jurisdictions require the developer to submit comprehensive information to a state agency which then issues a report designed to inform a prospective purchaser of the important features of the condominium. This approach has a great deal of pre-regulation; each stage of the project requires state approval. See, e.g., HAWAI REV. STAT. §§ 514-1 et seq. (1968). Full disclosure jurisdictions require that developers disclose, in the form of a prospectus (similar to the SEC requirements), all material facts about the condominium. The form and content of the prospectus are closely regulated but the development itself is not subject to substantial pre-regulation. See MICH. COMP. LAWS ANN. §§ 559.1 et seq. (1968); N.Y. REAL PROP. LAW §§ 339 et seq. (McKinney 1968). The full disclosure approach has been more widely adopted.


120. All that Illinois requires to be disclosed is: (1) the declaration; (2) the bylaws; (3) a projected operating budget, including estimated monthly maintenance fees; (4) a floor plan of the unit to be purchased. CONDOMINIUM ACT § 322. Compare with Fla. STAT. ANN. § 711.69 (Supp. 1975) which occupies 10 pages of fine print in the statute; and 13 N.Y. Att'y Gen. Condo. Rules & Regs. § 19.1 et seq. (1964), which requires 44 separate items, with subdivisions thereof, and in addition some 33 documents and 21 exhibits.
thereby should be indicated. The prospectus should be written in terms that lay persons will be able to understand and should be subject to approval by the state condominium agency prior to its distribution. If the state regulating board determines that a development has inadequate financing, it should be empowered to insert in the prospectus a warning such as "if this offering is not consummated for any reason you may lose all or part of your investment." This warning would put the purchaser on notice of the financial condition of the seller. It might also prompt the developer to seek additional financing or to discontinue the project.

In addition to these two general proposals, the Condominium Act should be revised to include a comprehensive scheme, patterned after several of the newer statutes, to resolve the problems of staged developments. The Act should incorporate provisions to give the developer some flexibility by allowing him to record in the declaration "contractible land" and "convertible lands," as well as giving him the authority to reallocate the interests in the common elements and the common expenses. If the Act delineates all the details of how, when and where changes are permitted, a more orderly procedure will result. Since the developer's alternative plans will be indicated in the prospectus, a prospective purchaser can make a more informed decision on whether

122. See note 119 supra.
123. 13 N.Y. Att'y Gen. Condo. Rules & Regs. § 19(a)(1964). While such warnings are frequently ignored in the securities area, and may in fact offer an incentive to speculators, purchasers of condominiums are looking for safe, sure investments and will certainly take heed of this warning.
127. Contractible land is that portion of the land submitted to the condominium regime which may be withdrawn by the developer. This concept permits the size of the project to be reduced in the event that the developer has difficulty selling the units. It also presents an alternative to a construction mortgagee who does not want to have to complete the condominium if he should have to foreclose his lien and then bid the developer's interest in at the foreclosure sale. He could decide to withdraw the land and proceed no further. Va. Code Ann. § 55-79.61 (Supp. 1975).
128. Convertible land is simply a building site within which the developer intends to create units that are not in existence at the time of recordation. Id. § 79.41(i).
129. Id. § 79.56.
or not to buy. Purchasers will be able to consider whether they can meet the heavier financial responsibilities if the development is not completed as planned.

Further, all purchaser deposits in the staged developments must be held in escrow with a stipulation that they cannot be disbursed until there is proof that no liens exist on the property, or until a partial release from all liens is given to the purchaser. This type of provision will prevent developers from using down payments to defray construction costs or divert them to other uses. It will also assure prospective buyers that they will get a refund if the developer becomes financially insolvent. In order to compensate the developer for the cost of keeping separate escrow accounts, the interest on the deposits should be paid to the developer.

In order to adequately protect both contractors and unit purchasers in the blanket lien situation, the developer should be required to buy a payment bond in addition to the escrow requirement. A performance bond of 100 percent of the construction cost has been found insufficient since a surety under such a bond may not be obligated to satisfy the claims of unpaid mechanics if the developer defaults. Therefore, the

131. Although completely aware of the possibilities, the unit purchaser still pays for what could in effect be only a "dream" on the part of the developer. One can analogize to an insurance case in which Judge Osborne said, "It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered." Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W. 2d 616, 622-23 (Ky. App. 1970).

132. See generally Mann, Escrows, Their Use and Value, 1949 U. Ill. L. F. 395.


134. See Crocket, Protecting the Deposit of the 'Consumer' Who Purchases a New Condominium Apartment, 8 Haw. B.J. 103,104 (1972) (recounting the foreclosure of the Kauaian Development, discussed in notes 48 and 66 supra, where the developer had used purchasers' deposits to pay the general contractors).

135. "Under the payment bond coverage, if the contractor does not pay all subcontractors and material suppliers, the owner or other obligees under the bond are protected." A. Sokol, CONTRACT OR MANIPULATOR? A GUIDE TO CONSTRUCTION FINANCING FROM BEGINNING OF CONSTRUCTION TO COMPLETION 169 (1968).

136. "Under the performance bond coverage, if the contractor does not complete the structure, the bonding company guarantees to perform." Id. A 100% performance bond would be adequate if the general contractor fails to complete the project or to pay his subcontractors; a developer could look to the surety for the funding to complete the project. But if the developer runs out of money and fails to pay the general contractor, the general contractor will claim a lien for payments due. The surety will not be obliged
developer should be required to have a 100 percent payment bond.\footnote{137} However, there is a great deal of difficulty and expense involved in obtaining such a bond.\footnote{138} Moreover, the bond and escrow requirements combined increase the unit cost for the purchaser.

The problems of developer abuse\footnote{139} during the transition from control by the developer to control by the board of managers can be decreased by carefully limiting the time the developer is in authority. The new Act should indicate the maximum amount of time that a developer could stay in control, either by a specific period of time or by a specific percentage of units sold.\footnote{140} In the staged developments, the developer must relinquish control as each new stage meets either the time or percentage of units criteria. Criminal and civil penalties should be established in order to deter developers from using subversive means to avoid the time or percentage requirements.

In order to eliminate the possibility of unit owners being bound to expensive long-term contracts for the benefit of the developer after the transition is accomplished, the developer should be held to a fiduciary duty to the unit owners during the transition period. This would mean that the developer is allowed to enter only into contracts which are considered "fair and reasonable."\footnote{141} Further, the Act should provide that all contracts entered into by the developer during this period will be subject to cancellation during the 12 months following the expiration of

to discharge the general contractor's lien because the surety's promise was conditioned on substantial performance by the developer of his promise to pay the amount in the contract. Provident Trust Co. v. Metropolitan Cas. Ins. Co., 152 F.2d 875 (3d Cir. 1945).

The unit purchasers may have an enforceable right as third party beneficiaries. A. Corbin, Contracts §§ 178-84 (1951). Cf. Ceco Steel Prod. Corp. v. Fidelity & Deposit Co., 309 Ill.App. 109, 32 N.E.2d 650 (1st Dist. 1941), dealing with Ill. Rev. Stat. ch. 29, §§ 15, 16, which requires that political subdivisions must require that the public work contract include a performance bond. The court held that a surety is chargeable with knowledge of this statute and its purpose and therefore that a subcontractor's claim, incorporated in the principal contract is part of the bond, and is within the guarantee of the bond. The subcontractors were deemed third party beneficiaries and their claim against the surety was actionable.

137. Certain contractors who deal with the federal government are required to supply both a performance bond and a payment bond. See Miller Act, 40 U.S.C. § 270(a) (1964).


139. See notes 71-79 and accompanying text supra.

140. For example, developers' control could be limited to three years for traditional condominium developments, seven years for phased developments, or in either case until 51\% of the units are sold.

141. See H.B. 1629, 1630, 79th Ill. Gen. Assembly (Introduced April 9 1975); repealed Florida provision, supra note 75.
his control, upon a majority vote of the unit owners.

During this interim period of condominium management, the common expense assessments must be segregated from the developer's funds. This provision will protect the maintenance fees from being diverted if the developer encounters financial difficulties. The Act should also define the developer as the owner of unsold units and require him to contribute his pro rata share of the common expense assessments for these units in order to keep down the level of common expense fees for other unit owners and make massive default an unlikely event.

The revised Act should incorporate provisions to govern the control of the condominium by the board of managers once the transition is completed. Minimum standards ought to be established in the Act to provide for annual elections, bonding of the treasurer in large developments, disclosure of annual budgets, and voting requirements for major common expenses. In addition, the board, like the developer during the transition stage, must be held to a fiduciary duty to the unit owners in order to make it more difficult for the entire board to act to the detriment of the unit owners.

Assuming this fiduciary duty, the board of managers should be given the authority to borrow money for making major repairs and additions to the common elements, upon approval of two-thirds of the unit owners. Repayment of the loans should be made by the unit owners in proportion to their percentage interest in the common elements, and should be considered in the same manner as a lien for common expense assessments. Although there are a great number of hidden dangers in granting this authority,\(^{142}\) the fiduciary duty should provide some protection. This provision would alleviate the problem of unit owners being assessed untimely and outrageous amounts when emergency major repairs are needed. In addition, the provision will eliminate the necessity of creating reserve funds which a recent Internal Revenue rule held taxable to the unit owners.\(^{143}\)

In order to protect unit purchasers from foreclosure actions, the lien section must be totally redrafted, with particular attention paid to the pre-submission stage and to the period when the property is under the control of the board. In the pre-submission stage, foreclosure sales of the property as a whole must be prohibited once any unit has been released from the lien, or if the lien is subordinate to the declaration. Conversely,

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foreclosure sales of the entire development will be permitted if the lien is not subordinate to the declaration and if no units have been released from the lien. In this event, the purchaser at such a foreclosure sale becomes the owner of all the units which have not been released from the lien prior to the sale.\textsuperscript{144}

Under the new provisions, any lien which is recorded after the declaration, whether it arises before or after the recordation of the declaration, will be considered subordinate to the declaration. This provision will prevent the possibility of a secret lien being attached to the property of the pre-submission purchaser. In addition, liens resulting from work completed in the original construction or any part of a staged development will be considered released if those units have been conveyed to a purchaser in a bona fide sale prior to the recording of the lien. This provision is an absolute necessity in light of the possibility that a staged development may continue expanding for many years.

Once the condominium is under the control of the board of managers, if a repair of a common element is either authorized by the board or is an emergency repair authorized by a unit owner, it should be considered authorized under the \textit{express} consent of all unit owners.\textsuperscript{145} The Act also should provide that the lien claimant in such a situation will have a beneficial interest in a trust whose corpus is the common expense assessments received and to be received by the board of managers, instead of a lien upon the real estate. This provision will provide that no monies can be expended for any other purpose until the lien claimant is fully paid. A real property lien will be allowed to attach to the common elements only with the unanimous consent of the unit owners.\textsuperscript{146}

Although many questions remain unanswered regarding this trust provision,\textsuperscript{147} Illinois courts probably would be able to accept this trust theory by analogizing to the case law established under section 23 of the Mechanics Lien Act.\textsuperscript{148} This section requires that a similar trust be

\textsuperscript{144} This provision is modeled after Ga. Code §§ 1608e(a),(b). \textit{Compare with} H.B. 1622, 79th Ill. Gen. Assembly (Introduced April 9, 1975).

\textsuperscript{145} \textit{See} FHA Model Act, \textit{supra} note 33, at § 9. Citations to other similar statutes can be found in Powell, \textit{supra} note 108, at § 633.31.

\textsuperscript{146} N.Y. Real Prop. §§ 339-L (McKinney 1968) provides that a lien claimant must look to the trust created out of the assessed common charges in order to satisfy his lien upon the common elements. \textit{See} Matter of County Village Heights Condo., 79 Misc. 2d 1088, 363 N.Y.S. 2d 501 (Sup. Ct. 1975) (upholding this provision as the exclusive method of satisfying a lien on the common elements, unless the unit owners agree by unanimous consent to allow the lien to be placed on the property directly).

\textsuperscript{147} For example, when does the trust start? Does the trust corpus consist of all common charges or only those based upon the mechanic's services?

established when work is done on a public improvement within the state.

Since this trust provision will put the burden of collection on the board of managers, unpaid common expense assessments must continue to constitute a lien in favor of the board as they presently do under section 309. Therefore, section 309.1, providing for the removal of such a lien by a unit owner, must be retained.

The definitional ambiguities under the Act as to what is a "limited" common element should be corrected. The Act should stipulate that the declaration is to specifically mention the limited common elements and the unit(s) to which they are attached. The declaration should require that all expenses incurred on the limited common elements, if duly authorized by the board or deemed emergency repairs, will be assessed equitably among the units which benefit from their use. Common element expenses occasioned by conduct of less than all the unit owners will be handled in the same way as limited common elements; the expenses will be equitably assessed against the unit owners who caused the expense. Mechanics lien claimants can then proceed against the trust, composed of the assessments made by the units benefited, just as was done under the section involving liens on common elements.

**CONCLUSION**

This Comment has highlighted the main problems which can occur in the event of a foreclosure action in a condominium development. In the pre-submission state, unit purchasers may find that a blanket lien exists against the entire development and that, as owners of an equitable interest in the property, they can be defendants in a mechanics lien foreclosure. Pre-submission foreclosure could leave the unit owner with an interest in a development which has been transformed into rental property or which may or may not have the promised recreational facilities. When the property has been submitted to the Condominium Act and is under the control of the developer or board of managers, unit owners may find that their percentage interest in the common elements again makes them liable for blanket liens against the property. Moreover, a unit owner who contracts for work to be done on his own unit,

149. See notes 103-08 and accompanying text *supra*. While this priority preference allows for foreclosures which characterized the cooperatives in the 1930's, without this provision lending institutions would not be willing to make mortgages for condominium units. Even today, under the present statute, Chicago area lending institutions require that assessment liens are subordinated to the mortgage, notwithstanding the notice requirement. *See* Kane & Helms, *supra* note 4, at 170.
but which involves work on contiguous common elements, may involve all his neighbors in a lien action on the common elements. One of the purposes of the Condominium Act was to give financial independence to unit owners. Clearly, the purpose is not being met.

Mechanics lien claimants, although secure in the knowledge that their rights will eventually be protected, are faced with several problems. To mention but a few, they must determine who are “owners” for the purpose of the Mechanics Lien Act and then be prepared to pay the costly expense for service of process on the potentially hundreds of individuals involved. Claimants must maintain a difficult, if not impossible, policing system in order to maintain priority over a common expense lien.

The Condominium Act should be amended to correct the inequities and unnecessary burdens which it causes. Further, it can be argued that the Mechanics Lien Act should also be amended to work in concert with the Condominium Act. The contractual and legislative changes suggested in this Comment, while by no means all-inclusive, are an attempt to give better protection to the thousands of contractors, subcontractors and condominium owners.

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