Cubes of Air: Planning a Condominium Development Under the Minnesota Act

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol1/iss1/3
CUBES OF AIR: PLANNING A CONDOMINIUM DEVELOPMENT UNDER THE MINNESOTA ACT

1. INTRODUCTION

Though courts and legal scholars have long insisted that "space above land is real estate the same as the land itself," ownership of a cube of air is a unique real property interest. Bounded only by vertical and horizontal planes, the enclosed cube of space is as "intangible and impermanent as a mirage." However temporary or incorporeal his property and its boundaries may appear, the owner of a cubicle of air space has been unequivocally recognized as holding a fee interest in real property.

From a utilitarian standpoint, the ownership of enclosed spaces not appurtenant to the land provides an answer to the social demands and economic necessities of urban America. The tradition of individual ownership of land is being severely tested by soaring prices, an increasing scarcity of land, and the current phenomenon of urban sprawl. Thus, with an increasing frequency, ownership of individual living units within a horizontally divided vertical column of airspace is replacing individual ownership of land. To meet this trend, surface landowners, in need of a legal basis for these commercial transactions in super-adjacent airspace, developed the concept of condominium. The term "condominium" is derived from two Latin words, which, when combined, mean the joint control over property by two or more persons. More specifically, condominium is a system of fee simple owner-
ship of individual units in a multi-unit project, coupled with ownership of an undivided interest in all commonly used elements of the project. The unit owner, in addition to possessing a fee interest in his particular unit, is a tenant in common, without the right of partition, in those areas that are used

1964); D. CLURMAN & E. HEBARD, CONDOMINIUMS AND COOPERATIVES 2 (1970); 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 1.01 (perm. ed. rev. 1973); Reskin, Overview and Comparison with Cooperatives, in 4 P.L.I.-COOPERATIVES AND CONDOMINIUMS 219, 220 (1969). Dictionaries define the concept of "condominia" as "co-ownerships or limited ownerships." BLACK'S LAW DICTIONARY 367 (4th ed. rev. 1968). It is important to note that the term has developed a secondary meaning and can be used to refer to the entire building or group of buildings committed to the condominium system of ownership. P. ROHAN & M. RESKIN, supra at § 1.01 n.1, at 1-2 to 1-3. Throughout this note the term is used in both senses.

8. In the Minnesota statutory scheme those units are known as "apartments" and are defined in MINN. STAT. § 515.02, subd. 2 (1971), as amended Minn. Laws 1974 ch. 319, § 1 as:

[A] part of the property, including one or more rooms or enclosed spaces located on one or more floors, or part or parts thereof, in a building, or a part of a parcel of real estate situated in a mobile home park upon which one or more mobile homes may be erected, and with a direct exit to a public street or highway or to a common area leading to such street or highway, intended for any type of independent use, including, but not restricted to, commercial, industrial or residential use.

MINN. STAT. § 515.02, subd. 3 (1971) defines an "apartment owner" as: "[T]he person or persons owning an apartment in fee simple absolute and an undivided interest in the fee simple estate or leasehold estate of the common areas and facilities in the percentage specified and established in the declaration."

9. In Minnesota, the "apartment" is a part of the "building" which is a part of the "property" constituting the project. MINN. STAT. § 515.02, subd. 6 (1971), as amended Minn. Laws 1974 ch. 319, § 2, defines the building as: "[A] building containing one or more apartments, or two or more buildings, each containing one or more apartments, with a total of two or more apartments for all such buildings, and comprising a part of the property and includes a parcel of real estate in a mobile home park upon which one or more mobile homes may be erected."

MINN. STAT. § 515.02, subd. 5 (1971) defines the property as:

[T]he land, the building, all improvements and structures thereon, all owned in fee simple absolute and land held under a lease or leases the original terms of which are not less than 50 years, and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been or are intended to be submitted to the provisions of this chapter.

10. MINN. STAT. §515.02, subd. 7 (1971) defines those areas as follows:

"Common areas and facilities," unless otherwise provided in the declaration or lawful amendments thereto, means and includes:

1. The land on which the building is located;
2. The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes and entrances and exits of the building;
3. The basements, yards, gardens, parking areas and storage spaces;
4. The premises for the lodging of janitors or persons in charge of the property;
5. Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerating;
6. The elevators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;
7. Such community and commercial facilities as may be provided for in the declaration;
8. All other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use; and
9. Such noncontiguous property as may be provided for in the declaration.
This note will analyze the concept of condominium via the statutory

11. Such a system of collective ownership obviously requires a system of collective management. Management of the condominium is effectuated by a governing body authorized by statute to administer the project. These bodies are most commonly known as "owners associations." They are generally structured as non-profit corporations or associations, and their membership consists of the project's apartment owners. MINN. STAT. § 515.02, subd. 5 (1971); D. CLURMAN & E. HEBARD, supra note 7, at 218-230.

Details regarding the structure and operation of the owners association are generally contained in the project's governing documents. 1 P. ROHAN & M. RESKIN, supra note 7, at § 3.02. In Minnesota four basic documents, the declaration, the floor plan, the bylaws, and the apartment deed, are necessary for the creation of condominium ownership and in addition to meeting statutory requirements facilitate the collective management of the project.

The document that creates a condominium is the declaration. See D. CLURMAN & E. HEBARD, supra note 7, at 12-14. Minnesota law defines the declaration as "the instrument by which the property is submitted to the provisions of this chapter..." MINN. STAT. § 515.02, subd. 10 (1971). See also 1 P. ROHAN & M. RESKIN, supra note 7, at § 3.02. This instrument, executed by the owner of the property, is filed with the registrar of deeds or registrar of titles of the county in which the property is located. Compare MINN. STAT. § 515.03 (1971) with id. § 515.15 as amended Minn. Laws 1974 ch. 319, § 3 and id. § 515.02, subd. 5. The declaration states the location of the land and the description and the size of the project and describes the unit, common areas and facilities, the purpose for which the units may be used, and the value and percentage interest of each unit. Additional provisions are required to control the percentage of votes which authorize rebuilding or repair of the premises, the agent authorized to receive service of process, and the method of amending the declaration. Beyond these mandatory provisions, a declaration may contain any others not inconsistent with the Act. Id. § 515.11.

Floor plans must be filed contemporaneously with the declaration and must show the layout, location, number designations, dimensions of each apartment and the name, if any, of the building. They must be verified by a registered architect, licensed professional engineer, or registered land surveyor. Id. § 515.13. Some states require plat maps or land surveys instead of floor plans.

The use, control, and administration of each unit and the entire project is governed by the bylaws which must be annexed to the declaration for filing and which list the operating rules of the building and the owners association. Id. § 515.18. See also 1 P. ROHAN & M. RESKIN, supra note 7, at § 3.03. Typical bylaws provide for electing association officers; calling meetings of the apartment owners; maintenance, repair, and replacement of the common areas and facilities; collection of the common expenses from the owners; promulgation of regulations governing the use of the apartments and common areas; and any other matters necessary for the administration of the property.

Minnesota and a few other states require bylaws but do not mandate their contents. See, e.g., KAN. STAT. ANN. §§ 58-3118, -3119 (1964); MINN. STAT. §§ 515.18, .19 (1971); N.H. REV. STAT. ANN. §§ 479-A:17, :18 (1968); WIS. STAT. ANN. §§ 703.18, .19 (Spec. Pamphlet 1974). Most states, however, mandate at least the basic provisions. See, e.g., FLA. STAT. § 711.11 (West Session Law Serv. 1974); ILL. REV. STAT. ANN. ch. 30, § 318 (Smith-Hurd 1969).

The final document essential to a statutory condominium in Minnesota is the apartment deed. Any deed conveying a condominium unit must contain the legal description of the land, the unit number or any other proper identification, the use for which the unit is intended, and any restrictions on its use, the percentage of undivided interest that the unit owner has in the common areas and facilities, and any other details desired by the grantor and grantee that are consistent with the statute, including the post office address of the property, and the book, page, and date of the recording of the declaration. MINN. STAT. § 515.12 (1971). See also 1 P. ROHAN & M. RESKIN, supra note 7, at § 3.04.
schemes which govern its legal existence. The history of common law condominium and condominium statutes will be briefly discussed. Condominiums will be compared to other residential types of living to show that condominium is a flexible concept with a wide variety of applications to residential development. Following a general overview of condominium law, this note will specifically analyze the Minnesota Condominium Act and survey the condominium statutes of other states with particular emphasis upon the provisions governing 1) the title to the property upon which the condominium is to be built, 2) the structural designs permitted, 3) the degree of state control over the sale of condominium units, 4) a condominium unit owner’s percentage interest in the common areas, 5) the effect of vertical and lateral movement upon the legal description of condominium units, 6) the availability of stage or phase construction, and 7) liability of unit owners for judgments arising out of the actions of the owners association. This examination of some of the salient sections of the respective statutes will demonstrate how particular provisions can affect land use and development in the state.

II. A Brief History of Condominium

The origin of the concept of fee title ownership of a designated portion of a building and of an undivided interest in the common areas and facilities of that building is unknown. While there is a consensus that condominium dates from Europe during the Middle Ages, as early as the twelfth century floors and rooms within a house could be owned severally. The validity of a

---


The oldest condominium deed known is on display in the Brooklyn Museum. This document, written in ancient Aramaic and dated 434 B.C., contains a description of the apartment and its boundaries, specific instructions as to the right of conveyance, and title insurance. PLUM, supra at 5.

15. In Germany, as early as the twelfth century, many persons owned single floors of rooms within a particular house. PLUM, supra note 13, at 6; Leyser, supra note 14, at 34. In Paris, surrounded by walls as a means of protection from marauders, the concept of owning floors or “stories” of buildings developed in the early 1200’s as a means of containing the expanding urban population. When the danger of attack lessened, the population moved outside of the walled cities and the ownership of flats and floors of buildings dwindled until 1804. D. CLURMAN
fee ownership interest in a portion of a building was first recognized by statute in the early 1800's. Modern legislation permits that fee interest to be combined with an undivided proportional interest in the building's common areas and facilities.

While a statute is generally necessary before property can be condominiumized, the first residential condominium in the United States was created without legislative authority when, in 1947, 11 veterans acquired Veterans Administration mortgages to buy their respective apartments in a house in New York. Other examples of condominium ownership have existed in the United States prior to the enactment of enabling legislation. Some of the more familiar commercial condominiums so constructed are the Chicago Union Station, the Chicago Post Office, the Sun Times Newspaper, the Park Avenue Development in New York City, and the United Nations Plaza in Manhattan.

Many South American nations had condominium laws by the late 1940's.

16. The French Civil Code of 1804 established the right of a person to own a building or part of a building on land owned by another. Leyser, supra note 14, at 34. In the twentieth century Spain, Germany, Belgium, Italy, and France enacted legislation governing this type of ownership. D. CLURMAN & E. HEBARD, supra note 7, at 3; PLUM, supra note 13, at 6; 1 P. ROHAN & M. RESKIN, supra note 7, at § 2.01.

17. Modern legislation in France, Belgium, Italy, Netherlands, Germany, and Austria recognizes the right of separate ownership of an apartment combined with an undivided co-ownership in the common areas. See Leyser, supra note 14, at 37; 1 P. ROHAN & M. RESKIN, supra note 7, at § 2.01.

18. PLUM, supra note 13, at 9; 1 P. ROHAN & M. RESKIN, supra note 7, at § 4.02. The Veterans Administration Act was the only source of financing available to the G.I.'s. It precluded mortgages of anything less than a fee simple interest and required that each mortgage be made on an individual basis. PLUM, supra note 13, at 9. This was accomplished by making each of the 11 a tenant in common in the land and buildings, excluding the areas occupied by the apartments. Then, each veteran took a conveyance of the air space that constituted his apartment. A mortgage from the Veterans Administration was then granted on the fee title to the air space held by each mortgagor. 1 P. ROHAN & M. RESKIN, supra note 1, at § 4.02.

19. An excellent discussion of the legal theories used to create the ownership of a portion of a building may be found in 1 P. ROHAN & M. RESKIN, supra note 7, at §§ 4.01-03[4]. The various legal theories employed by the developers of commercial condominium structures erected in the United States prior to the enactment of enabling legislation are enumerated in Brennan, Lots of Air—A Subdivision in the Sky, 36 TITLE NEws 6, February, 1957, at 6, and Funk, Real Estate Togetherness: Two Buildings in One Structure, 3 REAL ESTATE REV. 52 (1973).

24. The Brazilian law was enacted in 1928. Chile adopted its condominium statute in 1937. The other countries followed with enactments in the late 1940's and 1950's. It is interesting to note that the word "condominium" was never employed in these statutes. Instead, they use descriptive terminology, such as "horizontal property," emphasizing the vertical division of
and the Central American countries followed suit in the next decade. Condominium as a statutory concept was not introduced in the continental United States until 1961 when the National Housing Act was amended to provide mortgage insurance for the purchase of single-family units in multi-unit projects. Although the amendment was designed to accommodate the recently enacted Puerto Rico condominium act, it became the impetus for legislation recognizing the fee ownership of a portion of a building in all 50 states, the District of Columbia, and the Virgin Islands.

Technically, these statutes are not enabling. Since condominiums could exist at common law, the statutes do not create a power or right which did not exist prior to their enactment. However, the common law condominium was plagued with major legal problems which prevented its universal acceptance, and thus, in the broad, practical sense of the term, modern condominium legislation is enabling. Legislation has provided a legal means for controlling the partition of property for common use, created a system of separate taxation for each unit, insured adequate security for lending institutions, thereby increasing the availability of mortgage loans, and required government officials to recognize and give effect to the documents which create and govern condominiums.

space by horizontal planes in high-rise buildings. D. Clurman & E. Hebard, supra note 7, at 3.

26. Cf. Plum, supra note 13, at 8; I P. Rohan & M. Reskin, supra note 7, at § 2.03.


29. Separate taxation and assessment of each unit was impossible. Liens could only attach to the entire structure and not just to one of its units. No fee interest existed upon which a mortgagee would lend purchase money. No Federal Housing Administration mortgage insurance was available because in order to obtain coverage the mortgagor was required to have a unit deed valid under local law, the mortgagor was required to have good and marketable title, and separate taxation and assessment of each unit had to be available. See 24 C.F.R. §§ 234.1(d), .273, .274, .505(e), .520 (1974). Moreover, the restrictions of alienation and use found in the documents governing most condominiums ran afoul of the common law rules forbidding equitable servitudes, unreasonable restraints on alienation, and perpetuities. Finally, partition of a building could not be prevented at common law. For a discussion of all of these problems, see Ross, Condominium in California—The Verge of an Era, 36 S. Cal. L. Rev. 351, 356-60 (1963).

30. Obviously, the refusal of local officials to record the documents creating the condominium may thwart the entire project. With the enactment of the condominium legislation, the courts are more willing to require the recording officers to accept these documents. See Kaufman &
III. USES OF AND Need FOR CONDOMINIUMS

While a residential use is most frequently contemplated, the Minnesota statute provides that an apartment may also be utilized for commercial and industrial purposes. However, there is no evidence that apartments have been used for any other than residential purposes in Minnesota. Therefore, this apparent trend in the use of the condominiums for residential purposes requires that this note focus upon those issues relevant to residential condominiums.

The residential condominium may take any one of three basic structural forms. The appropriate form for any given development depends upon the purpose for which it is to be used. The high-rise building is probably the design that most legislators originally envisioned. It typically resembles an apartment building with rental units, and in fact, may have been converted from an apartment building. In this, the most conventional structure, each owner has a fee interest in and exclusive possession of the enclosed space constituting his apartment and an undivided fee interest in a certain percent of all common areas and facilities. Vertically and horizontally adjoining owners share common walls, floors, and ceilings. Another, somewhat similar, structural design for residential condominiums is the townhouse. Under the townhouse plan the units are usually attached in rows or clusters. The owners

---

31. MINN. STAT. §§ 515.02, subd. 2, as amended Minn. Laws 1974 ch. 319, § 1, .04-.05 (1971). 1 P. ROHAN & M. RESKIN, supra note 7, at § 5.01[2] criticizes the use of the term “apartment” because of its residential connotation.
32. All 39 declarations filed in Hennepin County to date have been for residential apartments. Apartment Ownership Index, Hennepin County Register of Deeds Vault. Nevertheless, the vast potential for the application of the statutes to commercial and industrial property should not be ignored. Other states have developments composed of multiple service businesses, shopping centers, office buildings, savings and loan associations, restaurants, light industry, freight warehouses, and pre-existing structures converted to commercial condominiums. 1A P. ROHAN & M. RESKIN, supra note 7, at § 21.06.
33. For a discussion of the manner in which condominium acts limit the use of these styles see notes 137 to 149 infra and accompanying text.
34. The earlier condominium statutes define condominium as the ownership of a single unit in a multi-unit building, and refer to the system of ownership as a horizontal property regime. See Ross, supra note 29, at 364.
35. An example of a conversion is the Towers Condominium at 115 Hennepin Avenue, Minneapolis, consisting of two high-rise buildings with residential apartments on all floors except the first and the basement which contain small shops and offices. Whether the commercial spaces will be sold as condominium apartments remains undecided.
36. MINN. STAT. §§ 515.02, subd. 2 (1971), as amended Minn. Laws 1974 ch. 319, § 1, subd. 7, .05.
37. D. CLURMAN & E. HEBARD, supra note 7, at 11.
share common walls at the point where the units are attached and may also share common roofs and floors if the row style is used. Unlike the high-rise condominium, the owner's interest in a townhouse-style condominium usually touches the land upon which the project is built. However, unless the declaration specifically provides to the contrary, that land is part of the common area. The final design is a group or groups of detached one-family homes which collectively constitute a condominium project. Although this style most closely resembles the traditional individual ownership of single family dwelling units, it presents some distinct advantages to that mode of home ownership. The condominium units are normally grouped so that the owners do not have large individual lots, but they have ready access to common areas which are many times the size of the typical suburban lot and which often contain elaborate entertainment and recreational facilities available to few owners of the single family home.

A condominium project may utilize one or any combination of the three general designs. While the choice of design may determine the type of purchaser, the fact remains, regardless of the design, that residential condominiums provide an alternative style of home ownership, attractive to persons from all strata of society, while achieving a more efficient utilization of the available land.

A. The Need for Condominiums — Urban Sprawl

The continued compulsive construction of the ubiquitous single family home, compounded by large lot zoning has produced the phenomenon known as urban sprawl. This thoughtless and wasteful use of the land has resulted in soaring taxes and an inefficient, expensive distribution of poor quality municipal services. Although recent studies in Minnesota indicate some local concern about urban sprawl, their conclusion remains that if the current geographical scattering of urban development continues, sociological, economic, financial, and ecological losses will result. Urban sprawl is inefficient in its consumption and use of land and wasteful of the nation's energy.

38. See id.
39. The definition of common area includes the land upon which the building is located. MInn. Stat. § 515.02, subd. 7 (1971).
40. See D. Clurman & E. HEBARD, supra note 7, at 11.
41. See generally R. Freilich & J. Ragsdale, supra note 5.
42. Id. at 2, 51.
44. See Citizens League Planned Unit Development Committee, supra note 43; Twin Cities Metropolitan Council, supra note 43; R. Freilich & J. Ragsdale, supra note 5, at 1-2, 5-6; Regional Plan Ass'n, Inc. & Resources for the Future, Inc., Regional Energy Consumption Second Interim Report (1974); Lewis, Waking Up, N.Y. Times, January 3, 1974, at 35, col. 1. It has been estimated that over one-half of the increased demand for transport fuels from 1970 to 1985 will be attributable to the increased use of highway fuels. Regional Plan Ass'n, Inc. & Resources for the Future, Inc., supra at 18. The rate at which such fuels are consumed is
Urban sprawl is also one cause of the present shortage of quality housing for those with low and moderate incomes. Because of limited financial resources those persons are unable to purchase lots in areas zoned for minimum lot sizes, to purchase automobiles suitable for commuting into the city, and to pay the continually increasing real estate taxes and special assessments for public services and utilities. Consequently, they must seek housing in principally developed urban areas with their concomitant higher frequency of substandard homes.

If low- and moderate-income persons are to live in the suburbs, it is essential that the home developer consider a higher density form of housing, such as condominium. High density housing facilities, if available in suburban as well as urban areas, can conserve energy, promote the efficient utilization of municipal services, and provide low-cost housing alternatives for the urban poor.

B. Condominiums Compared to Other Forms of Residential Housing.

The Twin Cities Metropolitan Council has made those urban areas with less than 35 percent undeveloped land its top priority for land allocation reform. It is the very nature of these problem areas which makes high density developments a necessity and condominiums a more than palatable option. While apartment developments can be used to provide high density housing, they have not proven to be viable alternatives to single-family homeownership. For a variety of reasons, Americans still prefer to own rather than to rent their residential property. The condominium offers the benefits of home ownership while meeting the requirements of modern urban land use planning. Moreover, it would appear to do so in a slightly more efficient and closely correlated with population density. For example, only one-half as much energy is consumed in transporting persons within New York City as in consuming an equal number of persons outside of the area of urban concentration. Id. at 14-15. The consumption of fuels for purposes other than transportation is similarly related to population density. The per capita consumption of electricity by the residents of New York City, for example, is only about one-half of the per capita national average. Id. at 6.

45. See R. Freilich & J. Ragsdale, supra note 5, at 2. Most urban developments consist of new homes built on lots larger than those common in the inner-city. Thus, many people, because of their income, must turn to older, existing houses which naturally "suffer from housing quality problems usually associated with age." Twin Cities Metropolitan Council, Report Shows Area's Housing Conditions, 5 NEWSLETTER, January, 1972, at 1. An urban planning professor at Rutgers University suggests that low-income groups are victims of a process by which housing is passed along for use by successively lower income groups, and that there comes a time when even those with the lowest incomes abandon the deteriorating housing, thus creating a shortage in low-income housing. Weinstein, Abandoned Housing: Cities Consuming Themselves, 3 REAL ESTATE REV. 108 (1973).


47. See H. Aaron, Shelter and Subsidies 62-63 (1972); Reskin, supra note 7, at 226-27. (1972).
economical manner than the cooperative or the townhouse, two other modern housing alternatives.

The owner of a condominium unit, regardless of its particular style, is eligible for the tax benefits available to an individual home owner. On the other hand, the actual expenses of maintenance, recreational facilities, repairs, and insurance are spread over large numbers of persons. However, this tax advantage is not peculiar to owners of condominium units. The tenant-stockholder of a cooperative housing corporation may deduct his proportionate share of the corporation's real estate taxes and interest on indebtedness incurred in the development of the cooperative. Nonrecognition of gain upon the sale of a residence and the homestead exemption are also available to the tenant-stockholder.

Townhouses and mobile homes are also eligible for the homestead exemption. Because these two types of home ownership are recognized under state law as separate entities for real estate taxation, any real estate taxes paid are deductible as an itemized expense on the owner's federal income tax return. Any interest payments on a purchase money mortgage on a townhouse or on an installment loan used to buy a mobile home qualify as deductions under the federal income tax laws.

The tax treatment of condominiums is at least as favorable as that afforded other methods of home ownership. Moreover, when compared to the coop-


50. In the cooperative mode of ownership, a corporation owns the project which may consist of residential, commercial, or industrial space. Each of the shareholders is entitled to occupy a unit and to use the common areas under a lease agreement with the corporation. See generally 2 P. Rohan & M. Reskin, Cooperative Housing Law and Practice § 2.02 (1973); Reskin, supra note 7, at 222.

51. To qualify for deductions under this section, Int. Rev. Code of 1954, § 216(a), the corporation must have but one class of outstanding stock, and each shareholder must have the right, though he need not exercise it, to occupy for dwelling purposes a house or apartment in a building owned or leased by the corporation. Id § 216(b). Further limitations may be found in Int. Rev. Code of 1954, § 216.


53. The corporation receives the homestead exemption for each unit that is occupied by a stockholder. Minn. Stat. § 273.133 (Supp. 1973).

54. Id. § 273.011, subd. 3.


56. See id. § 163.
ative or townhouse, condominium offers some other significant advantages that may account for the rising popularity of this form of ownership during recent years.\(^7\)

One of the reasons for condominium's enthusiastic acceptance is the financial flexibility it offers.\(^5\) Often the stockholder in a cooperative corporation is unable to obtain independent financing for his unit because financing for the purchase of stock allocated to a cooperative unit is generally limited to short-term personal loans,\(^5\) and the terms of the blanket mortgage over the entire cooperative are not within the control of the individual stockholder. This form of development does not afford the dweller in each unit the choice to finance or not or to determine the extent, term, or rate of any financing, or whether prepayment or refinancing is appropriate.\(^6\) Independent financing is available to the owner of a condominium unit just as it is to the owner of a conventional home. However, in the current inflationary money market with its high interest rates, a restrictive state usury law, and lending institution requirements of large down payments on home mortgages, it is arguable that the mortgagor of a condominium unit is without sufficient bargaining power to take advantage of the various financing options or to dictate the terms of any financing.

Another advantage of the condominium is that it can provide a sound investment opportunity. Where an owner uses his unit on a seasonal basis, he can lease it during the vacant periods and obtain a deduction for the expenses incurred in the production of this income.\(^6\) On the other hand, while the cooperative shareholder is usually permitted to sublease his unit,\(^6\) he is generally unable to obtain a tax shelter in this manner, since it is the cooperative which is entitled to claim the tax deduction for business expenses arising from

\(57\). That growth is truly amazing in light of the fact that most enabling legislation has been enacted within the last 11 years. In Hawaii, one of the first states to recognize condominiums by statute, 21,000 units had been purchased as of September, 1971. Crockett, Protecting the Deposit of the "Consumer" Who Purchases a New Condominium Apartment, 8 Haw. L.J. 103 (1972). Thirty-nine declarations have been filed in Hennepin County since September of 1970. One estimate places the number of units in Hennepin, Carver, and Dakota counties at more than 3,000. Simah, Condominiums Grow in Twin Cities, Minneapolis Sunday Tribune, November 25, 1973, at 13F, col. 1. One of the leading authorities in condominium law states that it will become "the most important form of unit ownership [for] the future." 1 P. Rohan & M. Reskin, supra note 7, at Intro-7.

\(58\). For a discussion of condominium financing, see 1 P. Rohan & M. Reskin, supra note 7, at §§ 9.01-03.

\(59\). An interest in a cooperative, unlike that in a condominium, is not realty to which a long-term mortgage may attach. But see 2 P. Rohan & M. Reskin, supra note 50, at § 5A.02; Reskin, supra note 7, at 224-26. New York has enacted legislation permitting lending institutions to finance the purchase of stock certificates or other interest in a corporation formed for the purpose of cooperative ownership of real estate. N.Y. Real Prop. Law § 339-ff (McKinney 1968).

\(60\). Reskin, supra note 7, at 225-26.


\(62\). Unless the lease contains a covenant to the contrary, it is the tenant's perogative to sublet the leased premises.
the maintenance, repair, and administration of the unit and from the building’s depreciation. Also, because the condominium purchaser owns his unit in fee, he benefits directly from any appreciation in the market value.

At first, the advantages of a condominium over a cooperative may seem relatively slight, and indeed both are viable alternatives to the conventional urban development. The tax and financing differences between the two are being rapidly removed. Perhaps the ultimate advantage of the condominium is that it permits the individual to own real property in fee rather than to own only stock in a cooperative. It may be this very real, albeit psychological, advantage that tips the scales in favor of a condominium.

The choice between the townhouse and condominium forms of development is a difficult one. Each has its own strengths and weaknesses, though on balance, the condominium’s virtues of a certain statutory basis and architectural flexibility seem more desirable than the avoidance of statutory formality and potential for future expansion that a townhouse offers. A townhouse is identical to a condominium with respect to the available tax treatment, and interests in both are eligible for the homestead exemption. The major distinction between the two is in the method of formation.

Because a townhouse is a creature of common law, the technical requirements for its valid creation are not particularly onerous. On the other hand, creation of a condominium requires full compliance not only with the title

---

63. The tenant stockholder does receive deductions for his proportionate share of the real estate taxes and mortgage interest that the cooperative pays. He also receives the homestead exemption for his apartment as long as it is his principal place of residence. Int. Rev. Code of 1954, §§ 163, 164. See 1 P. Rohan & M. Reskin, supra note 7, at § 14.01[4].
64. See Reskin, supra note 7, at 226.
65. See 1 Rohan & M. Reskin, supra note 7, at § 14.01[4]; 2 P. Rohan & M. Reskin, supra note 50, at § 5A.02.
66. The term refers to a mode of home ownership as well as to an architectural style. The owner of a townhouse unit holds a fee simple interest in the land beneath his unit and has an easement for the use of common walls. If each unit is a separate building, the unit owner has a fee simple interest in the entire building. When the townhouse is built in the cluster or quadplex style, one of the residential units may be built so that it does not touch the land. If it is constructed above the garage, for example, the unit owner will own the land beneath the garage and the other unit owners must obtain an easement to use it. Each unit owner is a member of the non-profit corporation which owns the project’s common areas, and the corporation grants each owner a non-exclusive easement for the use of those areas. Address by Robert Davidson, Seminar on Condominiums, Townhouses and Riparian Rights, November 30, 1973 (sponsored by University of Minnesota Continuing Legal Education and Minnesota State Bar Association).
68. To create a townhouse, the developer must file, in the office of the registrar of titles or register of deeds, a subdivision or plat map and a declaration of covenants and restrictions, which serves the same purpose as a condominium’s declaration. A non-profit corporation is then formed, and each unit purchaser is issued shares.
PLANNING CONDOMINIUMS

standards, but also with the statutory technicalities. The difficulty of compliance could persuade a developer to choose the townhouse style. On the other hand, the difficulty of describing in the declaration of covenants the interest of each townhouse with its numerous cross-easements provides persuasive impetus for the developer's counsel to file the development as a condominium. The townhouse, by definition, is a fee interest in a residential unit plus numerous exclusive and non-exclusive appurtenant easements over driveways, garage spaces, stairs, recreational spaces, and other common areas and facilities. In the declaration and on the floor plans the developer must describe in detail each easement that is appurtenant to the particular unit. On the balance, this seems to be equally as burdensome as the statutory requirement that the condominium developer file a floor plan that accurately describes each apartment, and file a declaration that, inter alia, gives the description of and percent interest in the common areas and facilities that accompanies each apartment.

One advantage of the townhouse form of development is the unlimited potential for future expansion, both in additional units and facilities. Since the Minnesota condominium statute does not expressly provide for expandable condominiums, the difficulty of stage or expandable developments presents a very real problem. That advantage may be somewhat offset, however, by the fact that each residential unit of a townhouse must touch the land. Since the statute authorizes condominiums of all designs, this latter manner of ownership offers a much greater variety of architectural styles.

69. Minnesota Title Standard No. 94 sets forth the minimum elements that an abstract must contain to be sufficient evidence of title under the Condominium Act. MINNESOTA STATE BAR ASS'N—SECTION OF REAL PROPERTY LAW—MINNESOTA STANDARDS FOR TITLE EXAMINATION No. 94 (1971).

70. Condominiums must comply, not only with statutory restrictions governing easements, but also with those controlling the description of common areas and units, the provisions of the declaration and bylaws, the accuracy of the floor plans, and the administration of the condominium after it is occupied. See MINN. STAT. §§ 515.11-13, .19 (1971).

71. Minnesota Title Standard No. 88 requires that all easements appurtenant to a townhouse unit be specified in the declaration. At a minimum the described easements should include: 1) access, 2) party walls, 3) parking, 4) overhangs and encroachments, 5) utility, water, and sewer. MINNESOTA STATE BAR ASS’N—SECTION OF REAL PROPERTY LAW—MINNESOTA STANDARDS FOR TITLE EXAMINATION No. 88 (1971).

72. See MINN. STAT. § 515.13 (1971).

73. Id. § 515.11(4); (6).

74. See notes 221 to 246 infra and accompanying text.

75. Townhouses may not take advantage of MINN. STAT. § 515.04 (1971). It would appear that the townhouse mode of ownership is totally unsuited to the high-rise residential complex, since it would be impossible for all of the units in such a structure to touch the land. Further, extensive easements would be required to allow owners to use the elevators, the common walls, ceilings, floors, parking spaces, and other facilities.

76. More precisely, there appear to be no provisions in the Act which would restrict the permissible architectural styles. See id. § 515.02.
The condominium provides an extremely attractive, if not the most desirable, alternative in residential living.\textsuperscript{77} It has vast potential for creative future use. The effective development of that potential requires not only an understanding of the possible applications of this relatively new mode of home ownership, but also a statutory scheme designed to permit maximum flexibility in those applications. The present scheme, despite its obvious advantages, has not entirely kept pace with the evolving concept of condominium.

IV. COMPARATIVE ANALYSIS OF THE MINNESOTA ACT

A. Condominium Acts and Their Construction—
Basis for Comparative Analysis

The Minnesota Condominium Act is similar to the Federal Housing Administration Model Statute.\textsuperscript{78} Its basic provisions govern definition of terms,\textsuperscript{79} status and ownership of apartments,\textsuperscript{80} percentage interest in common areas and facilities,\textsuperscript{81} liens against apartments,\textsuperscript{82} requirements for governing documents,\textsuperscript{83} blanket mortgages,\textsuperscript{84} separate taxation of each apartment,\textsuperscript{85} priority of liens,\textsuperscript{86} liability for unpaid common expenses,\textsuperscript{87} insurance requirements,\textsuperscript{88} termination and dissolution of the condominium,\textsuperscript{89} legal actions,\textsuperscript{90} and application of the statute.\textsuperscript{91}

Some of the schemes adopted in other states are less thorough than Minnesota's.\textsuperscript{92} Others are more far-reaching, particularly those which regulate the sale of units and the disclosure of information to prospective purchasers.\textsuperscript{93} Unique among condominium acts is that of Virginia,\textsuperscript{94} which not only deals...
with those areas which have proven troublesome in construing other states' condominium statutes, but also seeks to protect the unit purchaser by implying, for example, a 1-year developer's warranty against structural defects. This elaborate statutory scheme may provide guidance for future amendments to other state acts.

Since condominium legislation is so recent, there is a dearth of material available to aid in the construction of the bare statutory provisions. Construction is generally controlled by any constructional preferences contained within the statute and by judicial precedent. Although 15 states have included constructional preferences in their condominium legislation, Minnesota has chosen not to do so. Neither is there any reported case law construing the Minnesota Condominium Act. Thus, it is necessary to look to case law construing similar statutes in other jurisdictions for guidance. Unfortunately, cases construing or even citing other condominium acts number less than one reported case per state. There is, nevertheless, sufficient guidance available to the developer and the unit purchaser.

95. E.g., Va. Code Ann. §§ 55-79.86 to .103 (Supp. 1974) (pre-sale registration and full disclosure); .56 (permanency of percentage interest); .54(c), (d) (expandable condominiums).
96. Id. § 55-79.79(b).
97. 1 P. Rohan & M. Reskin, supra note 7, at § 16.01(3).


99. Minnesota law does contain canons of construction which are applicable to all state statutes. Minn. Stat. §§ 645.16-.17 (1971). These constructional preferences are of necessity very general, however, and not particularly helpful in interpreting the Condominium Act.

100. Approximately 30 decisions have been reported. Slightly more than one-third of these decisions...
diversity in these few cases to gain some insights into the possible future interpretation of the Minnesota Act.


101. See I. P. ROHAN & M. RESKIN, supra note 7, at § 16.01[1].

102. See id. § 16.01[2].

103. Condominium legislation does produce such a result. See, e.g., MINN. STAT. §§ 515.07, 12(3) (1971). The owner is restricted in the repairs and work he may do in his apartment. Id. § 515.08. The declaration may restrict the use of a unit. Id. § 515.11(7). The by-laws may impose restrictions on the use and maintenance of an apartment. Id. § 515.19(j). Restrictions and covenants affecting the use of a unit may be included in the deed to a unit. These restrictions may control to whom the unit may be sold or leased, who may visit the unit owner and for how long, whether pets or children are permitted, the procedure for offering the unit for sale to the association, and the improvements which may be made to a unit without the consent of the association.

104. I. P. ROHAN & M. RESKIN, supra note 7, at § 16.01[2].
PLANNING CONDOMINIUMS

schools of thought.105

A few generalizations may be made, however, regarding the construction
of condominium legislation similar to Minnesota's. First, the owners association's power to control alterations, repairs, and improvements of the units by individual owners appears to be determined by the probable effect upon the integrity and common scheme of the entire project.106 Second, the courts will not relieve the owners association of the consequences of contracts it entered into while under the control of the developer, though he is guilty of self-dealing at the association's expense.107 Third, the declaration and bylaws of a condominium not only supplement and clarify the requirements of the statute, but they also may be controlling.108 Fourth, the association may sue or be sued in its own behalf as a separate legal entity, or it may sue on behalf of its members.109 Finally, some courts have attempted to coordinate the condominium acts with the substantive real-property law.110

This scant volume of case law will provide virtually the only guidance for courts and practitioners construing the Minnesota Act until a body of Minnesota case law develops or until the Act is amended to include constructional preferences. In the interim, coordinating the Minnesota Act's provisions with the balance of the substantive law can raise a number of legal and practical issues. A number of key provisions of the act are unclear,


while others hinder or even forbid desirable development techniques. Particularly troublesome, as well as of great practical import, are the provisions governing the title to the property upon which the condominium is to be built, the structural designs permitted, unit owners’ percentage interests in the common areas, and legal descriptions of the units. Altogether omitted from the statute are provisions concerning the liability of owners for damages arising out of acts of the owners association, the method of unit sales, and procedures for stage or phase construction.

Through creative interpretation of the statute, careful planning, and prophylactic implementation, developers and prospective purchasers can largely avoid the pitfalls of the statutory scheme. Nevertheless, certain of the statutory provisions will probably require amendment if the Act is to realize its full potential. Coping with the potential problem areas of the statute requires that its provisions be considered in some detail.

B. Interpreting the Act—Some Legal and Practical Issues

1. The Title to the Land upon Which the Condominium Is To Be Built

Creation of a valid condominium requires that the land underlying the project meet certain statutory requirements as to its physical characteristics and the status of its title. Although an attempt to submit the property to the statute may fail if these criteria are not met, the present statutory language contains a number of ambiguities which may make it difficult to determine whether a particular parcel of property is eligible for submission. It is clear that the land which underlies a condominium must be held in fee simple or under a lease with a term of at least 50 years. The implications of that threshold requirement, however, are less certain.

The first apparent difficulty arises with the requirement that the “owner” submit the property to the statute by executing and recording a declaration. Since “owner” is not a term of art and since it is not defined in the statute, the interesting fact is that we could talk about the law of property and never mention ownership if it weren’t for the significant lay meaning of the term. “Who owns Blackacre?”... [T]his is a meaningless question except as interpreted to read, “Who owns various estates or interests in Blackacre?”...

The simple truth is that Anglo-American law has not made much use of the term ownership in a technical sense. Id.
the provision is puzzling, particularly where the property is held subject to a long-term ground lease.\textsuperscript{115} Arguably, the lessee is an owner within the meaning of the statute. He holds an estate in the land,\textsuperscript{116} even though it is not a freehold estate, but merely a chattel real.\textsuperscript{117} That legal interest should be sufficient to make him an owner within the meaning of the statute. For the legislature to permit the lessor to submit the property to the statute without the lessee’s consent is an absurd result\textsuperscript{118} that cannot have been intended. It is the lessee, and not the lessor, who will “own” the buildings on the land, and who, it would seem, should have some control over whether these buildings are to be used as condominiums and the property submitted to the statute. Yet, one hesitates to rely upon the equitable argument alone. An amendment clarifying the legal status of the lessee would be a desirable addition.

Even less clear is the application of the statute to land which the developer is purchasing under a contract for deed. First, it is not altogether certain that anyone has a fee simple interest in such property.\textsuperscript{119} According to the doctrine of equitable conversion, the vendee holds the equitable title and the vendor holds the legal title in trust until delivery of the deed merges the two in the vendee.\textsuperscript{120} Yet, it is unlikely that the legislature intended to preclude the submission to the statute of land financed in this manner. Since land subject to a purchase money mortgage may apparently be submitted,\textsuperscript{121} interpreting the statute to exclude land subject to an outstanding contract for deed\textsuperscript{122} would seem to serve no regulatory purpose.

Assuming that this objection is overcome so that such land comes within the statutory definition, it is then necessary to determine who must execute the declaration. If the vendee owns the equitable interest, while the vendor retains the legal title as security,\textsuperscript{123} the identity of the statutory “owner”
remains uncertain, as the Act does not distinguish between legal and equitable ownership. Logically, the phrase should include the equitable owner. It would be most unfair to permit the vendor to submit the property to the statute without the consent of the vendee, since in nearly every instance the vendee will have the right to possession and physical control of the property. His interest is undeniably relevant to a decision to submit the land to the Condominium Act.

While the substantial interests of the vendee under a contract for deed and the long-term lessee militate in favor of interpreting the statute so as to include them within the definition of an owner, a cautious approach will nevertheless dictate that all persons holding a legal or equitable interest in the property execute the declaration. Even if the lessee or the vendee is an "owner" he is not the sole owner, but merely an owner of one of several interests in the property. The lessor or vendor also has a cognizable interest in the land. The statutory scheme clearly contemplates various types of multiple ownership and in such cases requires that all owners join in the declaration. Since the statutes of the other states offer little guidance in interpreting these provisions, and since there is as yet no Minnesota case law delineating the nature of the interest which one must have in the property before he may prevent its submission to the statute, both vendee and ven-

Minn. 487, 7 N.W.2d 484 (1942); Summers v. Midland Co., 167 Minn. 453, 209 N.W. 323 (1926).
124. See cases cited notes 116 & 123 supra.
125. MINN. STAT. § 515.03 (1971).
126. The statutes of a majority of states define "property" so that it may be held in fee simple or subject to a lease, but require that the "owner" submit it to the statute. See, e.g., Md. ANN. CODE art. 21, §§ 11-101(m), -102 (1974); VT. STAT. ANN. tit. 27, §§ 1302(13), 1303 (Supp. 1973); WIS. STAT. §§ 703.02(13), 03 (1974).
Some states not only permit the land to be held under a lease but also permit either the owner or lessee to submit the property to the statute or are silent as to who should execute the declaration. See, e.g., CONN. GEN. STAT. REV. §§ 47-68(m), -69 (Supp. 1974); HAWAII REV. STAT. § 514-2(18), -3 (1968); S.C. CODE ANN. §§ 57-495(j), -496 (Supp. 1973).
A few statutes do not permit condominium property to be held subject to a lease. See, e.g., PA. STAT. ANN. tit. 68, §§ 700.102(10), .103 (1965).
A few states do not specify as to whether a leasehold is permissible or as to who must submit the property to the statute. See, e.g., MICH. COMP. LAWS ANN. ch. 559 (1967); WYO. STAT. ANN. §§ 34-389.7 to .10 (Cum. Supp. 1973).
A few states solve the problem by expressly permitting the developer to submit the property to the statute. See, e.g., KY. REV. STAT. ANN. §§ 381.810(12), .815 (1971); TEX. REV. CIV. STAT. art. 1301a(2)(a), (3) (Cum. Supp. 1974).
Florida has the most comprehensive solution to the problem. It requires that all persons having interests of record in land held subject to a long-term lease join in submitting the property to the statute. In addition, it prescribes the major terms of the lease. FLA. STAT. § 711.08(1) (West Session Law Serv. 1974).
127. According to MINN. STAT. § 515.03 (1971), the Condominium Act is applicable only where the sole owner or all of the owners have submitted the property to the Act. Thus, where more than one party has an interest in the property, one party may prevent its submission to the statute by refusing to execute or record the declaration.
Dor or lessee and lessor should execute the declaration. As a practical matter, procuring the consent of the lessor or vendor will seldom be a problem if the lessee or vendee has recognized the need for consent, and protected himself by obtaining it in advance of development. By such legal planning, the developer may take advantage of the economic benefits of leasing and contract financing and devote his capital to the construction process rather than divert it to the purchase of land.

A final difficulty in attempting to determine whether a particular property may be submitted to the statute arises because the definition of property is unclear as to whether non-contiguous parcels of land may be submitted pursuant to a single declaration. Frequently, a developer will choose to build a project which extends from one parcel to another, with parking lots, recreational, and other common facilities by necessity being built upon land not contiguous to the land upon which the residential units are constructed. The issue is significant, since a restrictive definition of property would require that a separate declaration be filed for each parcel developed. A few states permit non-contiguous land to be part of the project by expressly so providing in their acts’ definitions of the term “property.”

Despite the fact that the Minnesota Act does not so specify, it would appear that the developer may safely include non-contiguous parcels in the declaration. The definition of “common areas and facilities” demonstrates that the statute contemplates the submission of some non-contiguous land by referring to “such non-contiguous property as may be provided for in the declaration.” It would be anomalous for the statute to permit non-contiguous land to be used for common areas and facilities but not for residential units. More consistent with the broad remedial purposes of the act is a construction of “property” which includes non-contiguous land, without regard to the purpose for which it is used.

While the problems which arise in attempting to determine whether a parcel of land is eligible for submission to the statute may seem technical, their practical effect demonstrates that some refinement of the statutory language

128. The lease or contract should specify the uses that may be made of the land. If it expressly authorizes the development of a condominium, the developer will be protected if the lessor or vendor later refuses to execute the declaration.
129. See Minn. Stat. § 515.02, subd. 14 (1971).
131. See Minn. Stat. § 515.03 (1971).
133. Minn. Stat. § 515.02, subd. 7(9) (1971).
134. See Rohan, supra note 130, at 85-87.
is called for. Since an incorrect interpretation of the statute will result in a failure of the attempt to submit the property to the statute, counsel for the developer will tend to construe its language conservatively. Thus, the developer's goal of selecting whatever scheme of land acquisition requires the minimum capital may be sacrificed. Only when the statutory language specifies in detail what type of property may be submitted to the statute and what the status of the title of that property must be, can counsel for the developer safely approve the use of the most economically advantageous acquisition scheme, be it a long-term lease or sale and leaseback financing.

2. The Structures and Designs Permitted by Statute

When the developer has acquired a sufficient interest in the property, he must confront the statutory limitations upon the style and design of the project. Compliance with these restrictions is necessary to the creation of a valid condominium. The Minnesota Act defines an "apartment" as one or more rooms or enclosed spaces on one or more floors or parts of floors in a building. The term "building" is defined to include any number of structures each containing any number of apartments. It is apparently possible than an apartment may occupy space in more than one of the structures which together comprise the statutory building. The only limitation is that there be a total of at least two apartments for the entire project submitted pursuant to the declaration. Those definitions are sufficiently flexible to permit almost any style of residential housing to be submitted to the statute. Obviously, the definitions comprehend single or multiple high-rise units containing many apartments. Indeed, that may have been the only style contemplated when the statute was enacted. It seems clear, however, that the town-

135. See note 111 supra and accompanying text.
136. See generally 64 P.L.I., SALE AND LEASEBACK FINANCING 2D (1972).
137. The definitions of "building" and "apartment" are the source of these restrictions. See MINN. STAT. § 515.02, subds. 2, 6 (1971), as amended Minn. Laws 1974 ch. 319, §§ 1, 2.
138. Only "property" as defined can be condominiumized under the terms of MINN. STAT. § 515.03 (1971). Since property includes "the building" according to MINN. STAT. § 515.02, subd. 14 (1971), and the definition of "building" depends upon whether the structure in question contains apartments, a failure to meet the criteria for apartments and buildings will mean that there is no "property" which can be submitted to the statute. See id. § 515.02, subds. 2, 6 (1971), as amended Minn. Laws 1974 ch. 319, §§ 1, 2.
139. MINN. STAT. § 515.02, subd. 2 (1971), as amended Minn. Laws ch. 319, § 1.
140. Id. § 515.02, subd. 6 (1971), as amended Minn. Laws 1974 ch. 319, §§ 1, 2.
141. An apartment may be "parts" of "two or more buildings." Compare id. § 515.02, subd. 2, as amended Minn. Laws 1974 ch. 319, § 1 (an apartment may consist of "part or parts" of a building) with id. § 515.02, subd. 6, as amended Minn. Laws 1974 ch. 319, § 2 (a building may include "two or more buildings").
142. Id. § 515.02, subd. 6, as amended Minn. Laws 1974 ch. 319, § 2.
143. One author contends that most statutes were drafted to apply only to high rise condominiums, and for that reason, are outdated. He substantiates his contention by the fact that numerous condominium acts are entitled Horizontal Property Regimes. Rohan, supra note 130, at 83-84.
house or cluster design is also permissible.

The status of a project made up of single detached units is less clear, although the broad language of the definitions appears to permit such a style. Since an apartment may include all of the rooms and all of the floors in a single building when the project consists of two or more single buildings each containing at least one apartment, it follows that single-family dwellings may be submitted to the statute. Other complications may arise in submitting this style of project to the statute, however. Certainly, it does not lend itself to having the walls, support beams, entrances, exits, foundation, and underlying land treated as common areas. Those areas and facilities will be

144. See Minn. Stat. § 515.02, subs. 2, 6 (1971), as amended Minn. Laws 1974 ch. 319, §§ 1, 2. The statutory provisions of most states are very similar to Minnesota’s, permitting separate detached units so long as there are at least two units in the project. See, e.g., Iowa Code Ann. § 499B.2(9) (Cum. Supp. 1974-75); Mass. Gen. Laws Ann. ch. 183A, § 1 (Supp. 1974); N.Y. Real Prop. Law § 339-e(1), (11) (McKinney 1968).


A few states place minimum limits on the number of units in each building. See, e.g., Ala. Code App. tit. 47, § 287(e) (Cum. Supp. 1971) (five or more apartments per building or two or more buildings with two or more apartments per building); Kan. Stat. Ann. § 58-3102(e) (Cum. Supp. 1973) (same).


146. Id. § 515.02, subd. 6, as amended Minn. Laws ch. 319, § 2. If there is only one building, then there must be more than one apartment in that building. If there is more than one building, then there need only be two apartments among all the buildings. See Schreiber, The Lateral Housing Development: Condominium or Home Owners Association?, 117 U. Pa. L. Rev. 1104, 1109-12 (1969).

147. Under the Minnesota statute the maintenance and repair of the common areas and facilities are governed by the by-laws and carried out by the manager or board of directors of the owners association. The unit owner has no individual control over this process and may not make alterations or improvements to the common areas. Minn. Stat. § 515.06(e) (1971). In contrast, an apartment owner may perform work upon his own unit unless the alterations would jeopardize the soundness or safety of the property, reduce its value, or impair an easement. Id. § 515.08. Problems frequently arise when facilities which seem to be a part of the unit are treated as common areas and become subject to collective management. See Vinik v. Taylor, 270 So. 2d 413 (Dist. Ct. App., Fla. 1972) (owner could not be enjoined from enclosing his balcony without the consent of 75 percent of the owners because the declaration treated the balcony as part of the unit rather than as part of the common areas); Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685 (Dist. Ct. App., Fla. 1971), cert. denied, 254 So. 2d 789 (1971) (requiring unit owner to restore screen porch enclosure which he had replaced with glass jalousies without obtaining the approval of the association). Such problems would be compounded if the structural portions of a single family residential unit were treated as common areas.

While the unit owner will lose control over the alterations, maintenance, and improvement of the structure if its exterior is treated as a part of the common areas, he will, on the other hand, be allowed to spread the costs of alterations, maintenance, and improvements over all of the other unit owners. See Minn. Stat. § 515.10 (1971). For some, this may outweigh the disadvantages of treating the structure as a common area.
included in the common areas unless the developer provides otherwise in the declaration. The problem is not inherent in the statutory scheme but can be avoided by careful planning. The draftsman need only provide in the declaration that the apartment includes the structure of the dwelling unit and the land beneath it, as well as the enclosed air space.

In short, the definitions of apartment and building in the Minnesota Act are relatively modern and flexible. They do not limit the developer to a horizontal property regime, but permit the use of virtually all of the architectural styles in current vogue. With proper attention to the details of the governing documents, any of the usual structural patterns can comply with the Minnesota Act with a minimum of legal and practical problems.

3. Regulation of the Sale of Condominium Units

The increasing popularity of condominium has given rise to a host of developer abuses in the marketing and promotion of condominium units, and the need for regulation of the process has become apparent. Although the Act contains no provisions regulating the sale of condominium units, other Minnesota and federal regulatory acts may apply to condominium marketing schemes. Thus, a complete understanding of Minnesota condominium law necessarily entails a consideration of securities-regulation and land-sales legislation at both the state and federal levels. Like those few state condominium acts which regulate the sale of units, the securities and land sales acts require full disclosure to prospective purchasers of information which might affect the decision to purchase or invest. On the other hand, since such legislation was enacted with an eye toward the very different abuses connected with the sale of securities and undeveloped parcels of real estate, it fails to provide a complete or integrated approach to the problems of condominium promotion.

The federal securities laws are applicable only to a few types of con-

148. MINN. STAT. § 515.02, subd. 7 (1971).
149. If, on the other hand, it is desired that these areas and facilities be a part of the common areas so that the unit owner may take advantage of the collective financing provisions of the Act, the draftsman should consider defining them as "limited common areas and facilities." The statute permits common areas and facilities to be reserved to the use of certain apartments to the exclusion of others, a safeguard which would seem particularly useful when a detached-unit style project is involved. Id. § 515.02, subd. 11. The areas can be treated as common for the purposes of financing and management, but the unit owner need not fear that other unit owners will be able to obtain access to them for their own purposes.
151. See note 157 infra.
dominium development schemes. Generally, registration and full disclosure will be required under the Securities Act of 1933 only if the relationship between the developer and unit purchaser can be termed an investment contract. While the Securities Act will not apply if the purchaser simply resides in his unit, it does come into play when the owner occupies his unit seasonally or irregularly, leasing it to others for the balance of the year through a rental pool or other arrangement made available by the developer or owners association. Thus, only a few condominium developments, located for the most part in resort or vacation areas, are touched by the federal securities laws. Similarly, the early view that the common ownership and financing of a condominium were, without more, sufficient to bring it within the purview of the state blue sky laws has been largely discredited, and the states now generally follow the investment contract test. That the sale of units in any given condominium development will be subject to registration under the state or federal securities laws, then, is relatively improbable, although the possibility cannot be ignored where rental pools or similar arrangements are contemplated.

Land sales regulation may also apply, and multiple registrations may be required if a development is subject to both types of legislation. The potential for overlapping and duplicative regulation is limited by the fact that the Interstate Land Sales Full Disclosure Act appears to exempt all, or nearly

154. The Commission will consider the arrangement to be an investment contract only if one of the following criteria is met:
1. The units are marketed in a manner that emphasizes the profits that a purchaser can accrue through the promoter's or another's efforts in arranging to sublet the units;
2. A rental pool arrangement is made available to the unit owner; or
3. The purchaser is restricted in his occupancy of the unit, required to hold it open for rentals to others during any part of the use, or permitted to sublet only through an exclusive rental agent. SEC Release No. 5347, Securities Act of 1933 (June 10, 1973).
155. See id.
157. It is possible that registration of an offering will be required under both the Securities Act of 1933 and the Interstate Land Sales Full Disclosure Act. SEC v. Lake Havasu Estates, 340 F. Supp. 1318, 1322-23 (D. Minn. 1972) (dictum). Contra, MINN. STAT. § 83.26, subd. 3 (1971) (exempting from the state subdivided land act any offerings registered as securities under the Minnesota blue sky law).
158. 15 U.S.C. §§ 1701-20 (1970). The regulatory scheme established by the Act parallels that of the Securities Act of 1933. It forbids the use of the mails or instrumentalities of interstate commerce to offer to sell or lease "lots" in a subdivision unless a "statement of record," analogous to a registration statement and disclosing relevant information about the development and the developers, is filed with the Interstate Land Sales Administrator and a "printed property report," analogous to a public offering statement or prospectus, is furnished to all prospective purchasers.
all, sales of condominium units. The Minnesota Subdivided Land Sales Practices Act, on the other hand, may be interpreted to apply to at least some condominium sales, although that may not have been the Legislature’s intent. The statutory definition of subdivided land seems to include only land which is itself divided into parcels and sold. Arguably, that definition excludes condominiums entirely, since only the airspace is divided, while the land underlying the project is jointly owned by all of the unit purchasers. Yet, the Securities Division of the State Commerce Department, charged with administering the Act, has interpreted it so as to apply to condominiums and is administering it in that fashion. This interpretation must be accepted

159. When the Act was originally adopted in 1968, “lot” was undefined, and thus it was unclear whether the Act applied to offerings of condominium units. However, the regulations adopted pursuant to the Act were recently amended in an apparent attempt to include interests in real property which would not be commonly thought of as lots. The term now includes: “[A]ny portion, piece, division, unit or undivided interest in land if such interest includes the right to the exclusive use of a specific portion of the land.” 24 C.F.R. § 1710.1(h) (1974). Although this language is not totally free from ambiguity, it at least arguably includes the interest of the unit owner in a condominium.

However, only large developments are within the scope of the regulation since the definition of subdivision includes only “land” which is divided into 50 or more lots. 15 U.S.C. § 1701(3) (1970). This restriction is sufficient to render the Act inapplicable to most condominium projects.

Moreover, the exemption provisions of the Act are nearly certain to exclude all offerings of condominium interests. The sale or lease of any land upon which residential, commercial, or industrial structures have been erected or the sale or lease of land under a contract, requiring the seller to erect such buildings within 2 years, are exempt from the requirements of the Act. 15 U.S.C. § 1702(a)(3) (1970). It would appear that this exemption includes all offerings of interests in improved or about-to-be improved land, although the use of the term “improved land” rather than “improved lots” might permit an inference that the exemptions are intended to refer only to a disposition of the entire subdivision, for example, a sale of the project by one promoter to another. The regulations promulgated pursuant to the section do refer to improved “lots,” but, when discussing the land which is to be improved within 2 years, retain the reference to “land.” 24 C.F.R. § 1710.10(c) (1974). The question seems to present a suitable inquiry for an exemption advisory opinion from the Interstate Land Sales Administrator as provided for in 24 C.F.R. § 1710.15 (1974).

Finally, the Act exempts the sale or lease of real estate that is free from liens, encumbrances, and adverse claims if each purchaser and his spouse has made a personal inspection of the property purchased. 15 U.S.C. § 1702(10) (1970). When all of these factors are taken together it seems highly unlikely that the Act will apply to offerings of condominium units.


161. From the general tenor of the Act it seems clear that, like most other subdivided land sales acts, it is directed at the developer who is offering barren plots of distant land with grandiose promises and without any continuing commitment to construct houses, utilities, or other facilities. See authorities cited note 176 infra.

162. Minn. Stat. § 83.20, subd. 11 (Supp. 1973) defines “subdivision” as: “[A]ny land wherever located, improved or unimproved, whether adjacent or not, which is divided or proposed to be divided for the purpose of disposition pursuant to a common promotional scheme or plan of advertising and disposition by a single subdivider or a group of subdividers . . . .”

163. Id. § 83.21.

164. See, e.g., Minn. State Reg. Serv. SDiv 1613(3)(a) (1974); see generally id. 1613.
as controlling in the absence of judicial authority to the contrary. 165

The full disclosure requirements of the Subdivided Land Act are stringent. Each non-exempt offering of subdivided lands must be registered much as if it were a security. 164 The application for registration must disclose to the regulatory authorities a vast amount of information regarding the project and its promoters. 167 A public offering statement, disclosing similar information must be delivered to all offerees 168 and must be filed with the application for registration. 169 All advertising materials must be submitted to the Commissioner 170 who is granted authority to regulate advertising content. 171

The enforcement provisions of the Act are similarly strict. The purchaser of an unregistered interest has an absolute right to rescind, 172 as does a purchaser from one who has engaged in false or deceptive practices. 173 Further, the Commissioner is granted broad powers to refuse registration or issue a stop order if disclosure is less than complete or the offering is otherwise unfair or misleading, is in violation of the Act's regulations, or would work a fraud upon purchasers. 174 Certain criminal penalties are also included. 175

Despite its comprehensive nature, the Act's application to condominiums is incomplete at best, for most projects will probably be eligible for an exemption. Since the land promotion schemes at which the Act is directed are usually confined to undeveloped land in rural areas, 176 the Act exempts any subdivision within a municipality or near a city. 177 Although the Commissioner has the power to revoke or suspend this exemption, 178 his regulations

165. The Commissioner is granted the general power to make rules and regulations "to implement the provisions" of the Act. MINN. STAT. § 83.38, subd. 1 (Supp. 1973). In light of the ambiguous definition of "subdivision," this regulatory authority would appear to encompass regulations interpreting the term.
166. Id. § 83.23, subd. 1.
167. Id. § 83.23, subd. 3.
168. Id. § 83.24.
169. Id. § 83.23, subd. 3(14).
170. Id. §§ 83.23, subd. 3(13), .31.
171. Id. § 83.38.
172. Id. § 83.28, subd. 2.
173. Id. § 83.37.
174. Id. § 83.35.
175. Id. § 83.37, subds. 1, 2.
177. Specifically, the Act exempts developments:
[L]ocated within the corporate limits of a municipality as defined in section 462.352, subdivision 2, or within any subdivision located within a town or municipality located within 20 miles of the city limits of a city of the first class or within three miles of the city limits of a city of the second class, or within two miles of the city limits of a city of the third or fourth class of this state. MINN. STAT. § 83.26, subd. 1(g) (Supp. 1973).

The net effect is to exclude all urban and suburban developments.
178. Id.
promulgated pursuant to the Act do not do so. Moreover, the registration and public offering statement provisions of the Act are inapplicable to offerings of fewer than ten units made within 12 consecutive months. If more than ten but fewer than 50 units are to be sold in a 12-month period, the offering remains exempt if the developer supplies to the Commissioner a limited amount of financial and physical information about the development. Although this exemption, too, may be withdrawn, the Commissioner's failure to do so is in keeping with the clear legislative intent to focus regulation upon large developments.

While the exemptions are logical if the Subdivided Land Act is to apply only to undeveloped lots, they serve no apparent regulatory purpose when applied to condominiums. There is no reason to suspect that developers of small urban or suburban condominiums are less likely to engage in questionable practices or mislead prospective purchasers than the developers of large rural condominiums. Yet, only the latter will be regulated by the Act, an arbitrary and unfair result. Though some disclosure will be required of medium-sized rural condominium developers, information supplied to the commissioner pursuant to the short-form registration provisions of the Act will not necessarily be available to prospective purchasers. In addition to its haphazard application to condominiums, the Act contains provisions which appear to conflict with the Condominium Act, or at least to make that Act's use more difficult.

Minnesota should consider following the lead of the few states which have included full disclosure provisions in their condominium acts. Florida, Illinois, and Louisiana impose upon the developer a positive duty to disclose information, but to prospective purchasers only. On the other hand, the Hawaii, Montana, Michigan, and Virginia statutes utilize the enforcement mechanisms of the state and require the developer to make his disclosures to a regulatory agency. Though the regulatory approaches of these states

179. See Minn. State Reg. Serv. SDiv 1600-15.
181. Id. § 83.26, subd. 2(b).
182. Id. § 83.26, subd. 2.
183. See Minn. State Reg. Serv. SDiv 1600-15.
184. The Act requires that the registration be submitted to the Commissioner, but does not provide for the public's perusal. But see Minn. Stat. § 15.17, subd. 4 (1971); Minn. Laws, 1974 ch. 479.
185. See notes 203 to 208 infra and accompanying text.
186. See Fla. Stat. §§ 711.69-.71 (West Session Law Serv. 1974); La. Rev. Stat. Ann. § 9:1140 (West Session Law Serv. 1974); Ill. Rev. Stat. ch. 30, § 322 (1971). These acts are generally patterned after acts requiring the full disclosure of relevant information to prospective purchasers of securities or subdivided land. They differ, of course, from those kinds of statutes in the type of information that must be disclosed. These condominium statutes generally require the developer to supply the prospective purchaser with copies of all the project's governing documents, a rather detailed description of the project, and a good deal of financial and budgetary information about the project and developers.
187. The Real Estate Commission of Hawaii has inspection and investigatory powers over
differ, they have one important thing in common. Their full disclosure provisions are specifically tailored to the unique regulatory problems presented by condominium marketing and attempt to offer a uniform and comprehensive method of dealing with developer abuses.

4. Percent Interest in the Common Areas

The common ownership of a condominium complex, where each apartment owner's interest includes an undivided interest in the common areas of the entire project, requires some mechanism for the collective management and financing of the project. There must be an objective basis for determining condominium projects. HAWAII REV. STAT. §§ 514-14, -15, -29 to -50 (1968). Prior to the offering of condominium units for sale it publishes a final public report based on the following data supplied by the developer: 1) a statement of all costs yet to be paid upon completion, 2) the deadline date for completion, 3) evidence of sufficient funds to complete the entire project, 4) a copy of the construction contract, 5) a copy of the performance bond covering 100 percent of the cost, 6) a copy of an escrow agreement that provides: a) the developer can make no disbursement from the downpayment deposits of purchasers unless the bills to be paid by such disbursements have been certified for payment by the mortgagee or a financially disinterested party, and b) no final disbursements may be made until all mechanics and materialmen are paid or sufficient money is set aside for such payments. Id. § 514-15. The developer initiates the process by giving notice in writing to the Commission that he intends to offer condominium units for sale. Id. § 514-29. Then the developer fills in a questionnaire designed to provide full disclosure of all material facts reasonably available. Id. § 514-30. Following the receipt of the completed questionnaire, the Commission has the right to inspect the condominium. Id. §§ 514-31 to -33. A preliminary public report may be published by the commission before all of the statutory requirements are met. Id. §§ 541-15, -35, -36. If a sale is made pursuant to a preliminary public report, the terms of the purchase agreement are not enforceable against the buyer until he has full opportunity to read the Commission's final public report, and if it differs in any material respect from the preliminary public report the buyer may demand that his deposit be refunded and the purchase agreement voided. Id. §§ 514-38, -39. Anyone who makes misleading statements or omissions is guilty of a misdemeanor, and the Commission has wide statutory authority to investigate the developer's books and records, to issue cease and desist orders, and to use other legal remedies. Id. §§ 514-48 to -50.

Montana appears to have followed the example set by Hawaii. See MONT. REV. CODES ANN. §§ 67-2303.1 to .6 (Cum. Supp. 1974). Developers in Montana are subject to investigation by the Department of Business Regulation. A final public report is published by the Department following an inspection and an examination of documents as in Hawaii. Id. §§ 2303.3, .5. The buyer has the right of recission if the final public report differs from a preliminary public report on which he has relied. Id. § 67-2303.4.

The Corporation and Securities Commission of Michigan has authority to investigate and inspect condominiums prior to sale. MICH. COMP. LAWS ANN. §§ 559.24-.28, .31 (1967). The developer must submit to the Commission a copy of the master deed (declaration). Id. § 559.24. However, no other documents are required to be approved, and the Commission does not issue any public reports, but instead approves the offering by issuing a permit to sell to the developer. Id. § 559.26. The Commission may seek injunctive relief against violations of the Act. Id. § 559.28(2), (3).

Virginia requires registration of the condominium and the preparation of a public offering statement. The effect of Virginia's full disclosure provisions is the same as those of the Minnesota Subdivided Land Sales Practices Act. VA. CODE ANN. §§ 55-79.86 to .103 (Supp. 1974).

188. MINN. STAT. § 515.02, subd. 3 (1971).

189. Although the structure of the owners association might lead one to assume that the
ing voting power in the owners association and apportioning common expenses, debts, profits, and the proceeds of insurance policies or eminent domain proceedings. Naturally, these matters must be provided for in the governing documents and, thus, must be planned by the developer prior to the conveyance of the first unit.

In the absence of a statutory formula for computing the interest of each apartment owner, there are a variety of ways to apportion the interests in the common areas. For example, the developer could base the apportionment upon floor space, disregarding such factors as view, location, unit design, or the value of the apartment. On the other hand, the developer could decide that all apartment owners, regardless of the size, location, or value of their units, should share equally in the common areas.

The Minnesota Act forecloses these options by providing a statutory formula for determining each apartment owner's percentage interest in the common areas. That interest may be expressed by a percentage, stated in the declaration, and is computed by taking the ratio of the value of the particular apartment to the value of the property. Deriving each owner's interest from the value of his unit appears to be the most equitable method of representing the owner's interest, particularly for voting purposes. It seems proper that the owner closest to the swimming pool and the elevators, with the best view, with the most rooms or most attractive design, and who, thus, probably paid the highest price for his unit be entitled to the greatest input in the manage-

management of the project is similar to that of a business corporation, the non-profit nature of the venture, as well as the intimate involvement of the unit owners in the project, results in some significant differences. The courts have generally been sympathetic toward the unit owner's strong emotional and financial interests in the management of the project. One court has held that the unit owner is entitled to vote for directors if he has legal title at the time of the election and that the right to vote one's shares automatically accrues when the unit is transferred, regardless of whether the transfer is recorded in the association's record books. Thisted v. Tower Mgmt. Corp., 147 Mont. 1, 409 P.2d 813 (1965). This is, of course, contrary to the general corporation law rule that it is the book owners who may vote the shares.


A few states use the ratio of the floor space of one unit to total floor space. See, e.g., Ky. Rev. Stat. § 381.830(1)(a) (Interim Supp. 1974); N.Y. Real Prop. Law § 339-i(f) (McKinney 1968) (either value or floor space permissible).

Virginia has a more complicated provision which permits the percentage to be based upon the number of units, floor space, or par value. See Va. Code Ann. §§ 55-79.41(u), .55(a)-(d) (Supp. 1974).


192. Since the term "value" is nowhere defined in the statute, presumably the developer may
ment of the association. It is he who has the greatest interest to protect or to lose as a result of possible mismanagement.

The advantages of the Minnesota statutory formula are somewhat overshadowed by the decision of Minnesota’s Legislature, following the example of many other states, to make permanent the percentage interest in the common areas at the time of the filing of the declaration. Permanency presents distinct disadvantages from the point of view of both the apartment owner and the developer.

While making the percentage unalterable assures a purchaser that his interest in the common areas and his voting power may not be diluted, it also means that his interest cannot change with the value of his unit. Thus, if one owner significantly improves his unit and increases its value disproportionately to the other units, which appreciate at the prevalent community rate or depreciate due to abuse or lack of care, the fixed proportional interest will no longer afford the industrious owner a sense of security. In the event of a taking by eminent domain, or a destruction or termination of the condominium by sale, he will receive a share of the proceeds based on the percentage interest stated in the declaration prior to the change in values, notwithstanding the fact that the share does not accurately reflect the relative value of his unit at the time of termination. Thus, the statute in its present form rewards the careless apartment owner, while penalizing the owner who meticulously maintains and improves his apartment. In small projects the economic implications may be significant. This disadvantage is only partially offset by the fact that an owner whose apartment appreciates in value more rapidly than the other units is not required to bear a larger burden of the common maintenance and repair value the units in any manner he chooses. A developer might undervalue certain units in order to reduce the control of the owners of those units. There is little evidence of such abuses in practice, however. The method of valuation most commonly used is to value each unit at the price for which it is to be sold and to value the entire project at an amount equal to the sum of the prices at which each of the units will be sold. This method should reflect the fair market value of each unit at the time it is offered for sale. See 1 P. ROHAN & M. RESKIN, supra note 7, at § 12.04[3].

193 See id. § 515.06(b).

194 All of the state statutes except those of Washington, California, Florida, Iowa, Michigan, North Dakota, and South Dakota make the percentage interest permanent. Nearly all allow amendments with the unanimous consent of the unit owners, however. See HAWAI Rev. Stat. § 514-6(b) (Supp. 1972); N.Y. REAL PROP. LAW § 339-i(2) (McKinney 1968); OHIO REV. CODE ANN. § 5311.04(B) (Page 1970); ORE. REV. STAT. ANN. § 91.610 (1973); W. VA. CODE ANN. § 36A-2-2 (1966).

Connecticut requires the consent of only 75 percent of the unit owners for such an amendment if the change will have the effect of making the percentage assigned to a unit equal to the ratio that the assessed value of that unit bears to the assessed value of all units. CONN. GEN. STAT. REV. § 47-74(b)(2) (Supp. 1974).

Alaska provides for periodic reappraisals of the apartments and common areas and a recomputation of the percentage if it is no longer accurate. ALASKA STAT. § 34.07.180 (1971).

195. See MINN. STAT. §§ 515.10, .16(b), .26(b) (1971).
The greatest disadvantage of the fixed percentage interest is felt by the developer, however, and it plagues his promotional and marketing schemes from the time the first unit is sold. No units may be sold prior to the filing of the declaration in the office of the registrar of deeds or registrar of titles since it is filing that creates the condominium. Because the declaration must express the interest of each owner in terms of a percentage based on the value of each unit, the declaration cannot be filed until the value of each unit is known, and the location and description of the common areas and facilities with the respective percentages of undivided interests have been determined. In short, the percentage interest in the common areas appurtenant to each apartment becomes fixed prior to the sale of the first unit. If the developer, after a few sales, wishes to change the valuation of the unsold units in response to fluctuations in the market, he must obtain the consent of all the owners. Since the interest of each owner is expressed as a percentage, change in the value of any unit will expand or dilute the interest of other owners. While the owners may grant unanimous consent in a declining market, since a decrease in the value of the unsold units would increase their own interests, they probably will not wish to consent to an increase in the valuation of unsold units, because to do so would dilute their percentage interests. If the owners withhold consent and the selling price has been used as the basis for the valuation of the units, the developer may even be unable to raise or lower his price for unsold units. If he were to do so, the valuation of those units expressed in the declaration might be considered inaccurate and the declaration thus invalid.

To counteract the inflexibility of the permanency rule, one commentator has suggested that the developer draft the purchase agreement so that the conveyance of an interest in the common areas is contingent upon a certain number of units having been sold by a date, specified in the agreement, upon which the declaration is to be filed. During the interim the developer may test the market, adjust prices, and alter the percentages tentatively assigned to each unit. While this scheme might be unnecessary where the units are nearly identical, it would appear to be most useful where the units are of a variety of different sizes and floor plans. Obviously, the developer might also desire to use this technique during a period of rapid or extreme market fluctuations. Although the suggestion is a useful and creative one, a developer in this era of increasing consumer consciousness might encounter buyer resis-

196. See id. § 515.10.
197. See id. §§ 515.02, subd. 15,.03,.15.
198. Id. § 515.11(6).
199. See id. § 515.06(b).
201. Schreiber, supra note 146, at 1120.
tance to a transaction in which the purchaser cannot be told what he is being sold. Further, purchasers and developers might find financing institutions rather reticent to loan money on that sort of a contingent sale arrangement.202

A plan which might cope with the statutory inflexibility more effectively than the contingent sale is the inclusion of an irrevocable power of attorney in each purchase agreement. The power could be limited in its scope, granting the developer authority to amend the declaration only for the purpose of altering the percentage interests, and then only in response to market conditions and only until all of the units are sold. This device seems consistent with the letter if not the broad spirit of the statute. Though altering the percentage interests requires unanimous consent, there is nothing in the Act to indicate that the power to consent cannot be delegated to another person, including the developer, in the absence of fraud or overreaching.

Use of the contingent sale and power of attorney techniques may be impossible if the development is subject to the Minnesota Subdivided Land Sales Practices Act.203 Since the developer may well be required to "identify exactly" in his submissions to the Commissioner the interest being offered,204 any device which permits the alteration of percentage interests without the permission of all of the unit owners may be forbidden. Moreover, the reservation of a power of attorney may violate some of the substantive rules promulgated by the Commissioner pursuant to the authority given him under the Act to regulate the operating procedures of land developments.205 Those rules require that voting rights in the owners association be allocated on some "reasonable and equitable"206 basis, and further provide that the Commissioner will consider "unreasonable" any provisions which "arbitrarily deny, limit, or abridge the right of unit owners with respect to the management, maintenance, preservation, operation or control of their interests."207 The result will ultimately depend upon whether the Commissioner considers the terms of the power to be arbitrary. Nevertheless, the technique should be

202. Nevertheless, the arrangement has worked in practice. For example, the Towers Apartment Building in Minneapolis, Minnesota, was converted to condominiums on the condition that if 100 apartments were sold by a certain date, the purchase agreements signed by the first buyers would become binding. If the contingency were not fulfilled, the purchase agreement could be terminated at the option of either the buyer or seller, in which case the earnest money paid pursuant to the purchase agreement would be returned to the buyer without interest and all parties would be released of any liabilities or obligations arising under the purchase agreement. Purchase Agreement River Towers Condominium, Clause 2.—Sale Contingency.

203. For a discussion of the application of that Act to condominiums, see notes 160 to 187 supra and accompanying text.

204. This information is required in the form for the statement of the subdivider promulgated by the Securities Division pursuant to Minn. Stat. § 83.26, subd. 2(b) (Supp. 1973). See Minn. State Reg. Serv. SDiv 1609 (1974).

205. Minn. Stat. § 83.38, subd. 1(c) (Supp. 1973).


207. Id. 1613(3)(ff).
used with great caution lest the entire offering be jeopardized. 208 Similarly, the power-of-attorney arrangement may violate state blue sky laws if they are applicable to the particular development. 209

The combination of the two statutes results in an unfortunate inflexibility which may make it impossible for the developer to respond to variable market conditions. Legal planning and careful drafting can do little to solve this problem, and it appears that legislative action will be necessary to coordinate the provisions of the two regulatory schemes.

5. "Crawling"—Legal Description of Units and the Effect of Vertical and Lateral Movement

The valid conveyance of a condominium unit, just as any other interest in real property, must include a sufficient description of the property to enable its proper identification. 210 Describing the owner's interest in his unit can be nearly as difficult as describing his interest in the common areas. Unfortunately, the Minnesota Act gives little guidance to the draftsman in selecting the best method of legal description. It merely requires that the apartment deed include the apartment number, as specified in the declaration, and "any other data necessary for its proper identification." 211 A plat map, floor plans, or a land survey are obvious possibilities for identifying data.

Although any of these is sufficient to locate the unit within the structure at the particular point in time at which it is prepared, it may not remain valid for long. During construction, and for a significant time thereafter, high-rise structures shift both laterally and vertically. 212 The resulting change in the precise location of the unit relative to invisible horizontal and vertical planes is known as crawling and causes units to encroach on other units and common areas. Although it is unclear whether crawling seriously impairs the marketability of title, 213 caution dictates that the method of identification chosen allow for settling and lateral movement. If partial destruction of the project occurs, or an action such as eminent domain, quiet title, or trespass for encroachment is brought, it may be necessary to identify precisely each party's interest. 214

Attempts by various jurisdictions to find a statutory solution differ in

208. Violation of the Act or regulations may result in denial of registration or the issuance of a stop order. MINN. STAT. § 83.35, subd. 1(1) (Supp. 1973).
209. Schreiber, supra note 146, at 1123.
211. Id.
213. Usually matters of this nature are dealt with by title examination standards. However, to date, Minnesota's standards have not addressed this issue. See MINNESOTA STATE BAR ASS'N—SECTION ON REAL PROPERTY—MINNESOTA STANDARDS FOR TITLE EXAMINATION (1971).
214. See I P. ROHAN & M. RESKIN, supra note 7, at § 12.04[4].
PLANNING CONDOMINIUMS

effectiveness. Some states have declared by statute that an apartment number or letter designation is sufficient legal description for a unit deed. However, since settling or lateral movement may still occur, a survey or plat map made and filed of record at the time of submission will contain descriptions of units as bounded by invisible horizontal and vertical planes and will reflect the resulting encroachments. The best statutory solution appears to be a conclusive presumption that the physical boundaries of the unit are the legal boundaries. Although a number of jurisdictions have adopted such a definition, Minnesota has lagged behind.

A careful draftsman may be able to prevent title objections based on crawling. One possibility is to describe the apartment’s location, size, apartment number, and design solely by floor plans. There can be no gaps or overlaps between units when such a method is used because the floor plans represent the location of an apartment solely by reference to appurtenant units. Even though settling or lateral movement occurs, the dimensions, layout, and location cannot change; the internal relationships within the building must remain constant. Thus, through the use of floor-plan identification, a unit can be identified in a manner which satisfies the statute and which will remain accurate though the building settles or shifts. Since many statutes already require the filing of floor plans, all that is needed is an additional provision that they control. Another technique, where a survey or plat map which describes the units by vertical and horizontal planes is to be filed, is to provide easements for the encroachments which may result from shifting and settling.

Perhaps the best of all solutions, the conclusive presumption that the physical boundaries are the actual ones, can be achieved in Minnesota. Although the Legislature has not chosen to create such a presumption, the parties may attempt to do so in the declaration and deed. The terms of the Minnesota statute permit the declaration and deed to describe the apartments in any manner so long as it facilitates proper identification. It would seem that the language is broad enough to comprehend such a presumption. Thus, careful draftsmanship can probably overcome the statute’s failure to provide

219. See Minn. Stat. § 515.12 (2) (1971). Although there is no statutory bar to creating such a presumption, it should be noted that Minnesota’s title examination standards require that the apartment deed contain a legal description of the unit. Minnesota State Bar Ass’n—Section on Real Property—Minnesota Standards for Title Examination No. 94 (1971). Though the deed may still provide that the physical boundaries will control, the developer cannot be certain that such language will have effect unless the title standard is amended.
for a type of legal description which takes into account the unique aspect of condominiums and protects both the developer and the apartment owners.  

6. Stage Development—"Expandable Condominium"

One of the more limiting aspects of the Minnesota Condominium Act is its failure to provide for the phase or stage development of a condominium project. The Act requires that the developer file simultaneously with the declaration a certified floor plan or plat map that fully and accurately depicts the apartments in their completed state. In other words, no units can be conveyed until the floor plan is filed, and it cannot be filed until the construction of the project is complete. In addition to delaying the return of the developer's capital, this restriction conflicts with current development strategy. For example, the developer may wish to construct a small condominium, adding more buildings when the demand for units increases, rather than risk completing an entire project without testing the market to determine whether the size, quality, design, and price of the units are competitive. This strategy is known as stage development or expandable condominium.

It would appear from the face of the Minnesota statutory scheme that the developer who wishes to build in stages must file a separate declaration for each stage or obtain the consent of the unit owners to amend the existing declaration, bylaws, and floor plans to include the new units. Even then it seems that each stage must be totally complete before any unit contained within it could be conveyed.

Some states have attempted to accommodate stage development in their laws. A deed drafted to create such a presumption might take the following form:

Warranty Deed

The real estate conveyed in the County of ________, Minnesota; legally described as: Apartment Number _______, together with a ________ percent undivided interest in the common areas and facilities of ________ (Name of Condominium) ________ located at ________, in the City of ________, County of ________, Minnesota as stated in the Declaration of ________ (Name of Condominium) ________, filed of record on the ________ day of ________, 1974 in Book _______, Page ________ in the Register of Deeds Office in ________, County, Minnesota; subject to the floor plans of the condominium filed of record on the ________ day of ________, 1974 in Book _______, Page ________ in the Register of Deeds Office in ________, County, Minnesota; the physical boundaries of this unit constructed or reconstructed in substantial accordance with the floor plans shall be conclusively presumed to be the actual and legal boundaries rather than the description expressed in the floor plans, regardless of minor settling or lateral movement of the building in which this unit is constructed, and regardless of minor variations between boundaries shown on the floor plans and those of the unit as located and constructed or reconstructed. This unit is located upon real property in the County of ________, Minnesota, legally described as: (Legal description of land upon which the condominium project is built).

220. A deed drafted to create such a presumption might take the following form: Warranty Deed

The real estate conveyed in the County of ________, Minnesota; legally described as: Apartment Number _______, together with a ________ percent undivided interest in the common areas and facilities of ________ (Name of Condominium) ________, located at ________, in the City of ________, County of ________, Minnesota as stated in the Declaration of ________ (Name of Condominium) ________, filed of record on the ________ day of ________, 1974 in Book _______, Page ________ in the Register of Deeds Office in ________, County, Minnesota; subject to the floor plans of the condominium filed of record on the ________ day of ________, 1974 in Book _______, Page ________ in the Register of Deeds Office in ________, County, Minnesota; the physical boundaries of this unit constructed or reconstructed in substantial accordance with the floor plans shall be conclusively presumed to be the actual and legal boundaries rather than the description expressed in the floor plans, regardless of minor settling or lateral movement of the building in which this unit is constructed, and regardless of minor variations between boundaries shown on the floor plans and those of the unit as located and constructed or reconstructed. This unit is located upon real property in the County of ________, Minnesota, legally described as: (Legal description of land upon which the condominium project is built).

221. MINN. STAT. §515.13 (1971).
222. See Schreiber, supra note 146, at 1112-16.
223. See id. at 1112. Cf. Rohan, supra note 130, at 84.
224. See MINN. STAT. §§515.11, .13, .19 (1971).
225. See id. §515.13.
condominium acts. The Louisiana act provides a simple method, authorizing the developer to alter the percentage interests of the unit owners at the time of expansion if the declaration has stated his intent to expand, the size of the anticipated expansion, and a formula for readjusting the percentage interests.\textsuperscript{226} Similarly, Missouri permits the developer to alter the percentage interests of the unit owners if there is a change in the number of units in the project.\textsuperscript{227} Virginia has devised a more elaborate scheme, requiring that the declaration contain a rather detailed plan for the proposed expansion, limiting the manner in which the percentage interests may be recomputed, and requiring the recording of additional governing documents.\textsuperscript{228} A few other states either authorize or contemplate the stage condominium, but provide little detail.\textsuperscript{229}

By creative drafting and careful advance planning, however, it is possible to develop a condominium in stages in the absence of statutory authority. Both the two-tier and confederation development techniques permit expansion without violating the Minnesota statute or invalidating the attempt to submit the land to the statute. In the two-tier approach,\textsuperscript{220} the developer creates a new condominium pursuant to the statute as each stage of the project is completed. An umbrella owners association is created to manage all of the condominiums, and as each stage is completed, the owners of the new units are issued shares in, or become members of, the umbrella association as well as of the stage owners association, and become entitled to participate in the management of and to use the facilities of their own stage and the entire

---

\textsuperscript{226} LA. REV. STAT. ANN. § 9:1124.2 (West Session Law Serv. 1974).
\textsuperscript{227} MO. REV. STAT. § 448.030(3) (Supp. 1974).
\textsuperscript{228} VA. CODE ANN. §§ 55-79.54(c), .56, .58, .63 (Supp. 1974).
\textsuperscript{229} New Hampshire permits the floor plans to be amended prior to the first conveyance of a unit. Therefore, as each unit is completed its design, size, and location may be amended into the floor plan. Each unit may then be sold even though the building is not yet complete. N.H. REV. STAT. ANN. § 479-A:14 (Supp. 1973).

Oregon requires the declaration to state whether additional stages are proposed, but is unclear as to how the construction of additional stages is to be effectuated. Apparently, a supplemental declaration and floor plan must be filed for each new stage, and no unit in a stage may be sold until the entire stage is complete. ORE. REV. STAT. §§ 91.530, .545 (1973).

Wisconsin permits the developer to file floor plans and, consequently, begin conveying units when the building is substantially, though not entirely, complete. Wis. Stat. § 703.13 (1974).

Florida requires the developer contemplating phase development to disclose his plans and all relevant information to prospective purchasers, but provides no details as to how expansion is to be accomplished. FLA. STAT. § 711.64 (West Session Law Serv. 1974).

The statutes of Maine and Connecticut permit the floor plans to be amended at any time, thus giving rise to the inference that phase development is possible, though no other reference to it is made. CONN. GEN. STAT. REV. § 47-71(c) (Supp. 1974); ME. REV. STAT. ANN. § 571(3) (Supp. 1973).

development.\textsuperscript{231}

This method offers obvious advantages. First, the developer need not obtain the consent of present unit owners to amend the declaration to include the new units and common areas, nor to alter each owner's percentage interest in what is eventually to be the project's common areas.\textsuperscript{232} Second, a purchaser may take possession of his unit immediately following its construction and need not wait until the entire project is completed.

On the other hand, it presents numerous disadvantages. First, owners of each stage have no control over the architectural design, quality, number, and value of units nor the construction period of subsequent stages. They have no guarantee that subsequent stages and common areas will be integrated with the earlier ones so as to provide a well-designed and marketable whole rather than a disjointed series of structures.\textsuperscript{233} Theoretically, the owners in each stage may control the common areas of that stage so that the developer may not include its facilities in the common areas of subsequent stages without the consent of the owners in the earlier stage. Indeed, in the absence of an agreement to the contrary, they retain the power to exclude the developer from the premises entirely and thus prevent any future development of which they disapprove. In practice, however, the developer can deprive the owners of units in earlier stages of this power, one, by conveying the units subject to use easements covering the common areas so that these areas may be used by the owners of later stages, and, two, by retaining an access easement across any portions of the initial stages which abut the expansion site.\textsuperscript{234}

A second disadvantage from the point of view of the owners is that two-tier development subjects them to two sets of assessments, one by the stage owners association for the maintenance of that stage's common areas, and a second by the umbrella owners association for the costs of maintaining the common areas and facilities of the entire project. Thus, each owner's total liability for common expenses will depend, not upon the size of the development at the time of purchase, but upon the size of the final project and may not be ascertainable at the time the units in the first stage are sold. Moreover, the umbrella assessments may be very large during the process of expansion, since the owners of completed stages will be required to support common

\textsuperscript{231} See I P. ROHAN & M. RESKIN, supra note 7, at § 16.03[2][a]; Buck, Condominiums that Grow—Another View, LAWYERS TITLE NEWS 11, March-April, 1972.

\textsuperscript{232} Obviously, the fact that the Minnesota Act permits the percentage interests in the common areas to be altered only by the unanimous consent of the owners of the units exacerbates the difficulties present in stage development. See text accompanying notes 188 to 209 supra.

\textsuperscript{233} Indeed, it is questionable, even if his acts were motivated by self-dealing or bad faith, whether the developer could be held liable to the owners of the units in previous stages. See Point East Mgmt. Corp. v. Point East One Condominium Corp., 258 So. 2d 322 (Dist. Ct. App., Fla. 1973); Riviera Condominium Apartments, Inc. v. Weinberger, 231 So. 2d 850 (Dist. Ct. App., Fla. 1970); Wechsler v. Goldman, 214 So. 2d 741 (Dist. Ct. App., Fla. 1968); Fountainview Ass'n v. Bell, 203 So. 2d 657 (Dist. Ct. App., Fla. 1967), cert. discharged, 214 So. 2d 609 (1968).

\textsuperscript{234} The developer generally does take such precautions. See Buck, supra note 231.
areas large enough for the eventual development.

The technique also presents some disadvantages from the point of view of the developer. First, although he retains the power to control future stages, he may, as the entire project approaches completion, lose control of the owners association and thus of the management of the project as a whole. Second, the financial risks of the two-tier approach are difficult to control. If the number of units per stage is too small, the owners of initial stages may not be able to bear the common assessments of the umbrella association, and the lack of capital will halt future development. On the other hand, if the stages are too large, the return of capital to the developer will be delayed. Either alternative could lead to financial failure of the project. Finally, the developer contemplating stage development may be deterred by the technical complexity of the two-tier approach.

The confederation method of stage development appears to serve more satisfactorily the interests of both the developer and the unit owners. In confederation, the units of each stage are added to the declaration of the existing condominium project at the time that stage is completed. Although confederation avoids the problems of two-tier development, drafting the governing documents so that the developer can unilaterally amend the declaration is a complex task. First, the original declaration should contain a provision stating that by signing the purchase agreement and an addendum to the unit deed, the owner consents to an expansion at the option of the developer. The addendum to each deed should be drafted so as to give the developer an irrevocable power of attorney to amend the declaration to provide for expansion and should purport to bind subsequent purchasers of the unit. Next, the declaration and unit deeds should be drafted so that each owner receives a defeasible interest in the common areas. When each subsequent

235. See 1 P. Rohan & M. Reskin, supra note 7, at § 16.03[2]; Joliet, supra note 230, at 22-23.
236. See generally 1 P. Rohan & M. Reskin, supra note 7, at §§ 9.01-.07; 1 A P. Rohan & M. Reskin, supra note 7, at § 21.05.
237. The model governing documents and other forms developed by HUD to deal with two-tier developments run many pages and are exceedingly complex. They are reproduced in full in 1 P. Rohan & M. Reskin, supra note 7, at § 16.03[2][a].
238. The term “expandable condominium” is sometimes reserved for this method of development. Cf. Joliet, supra note 230, at 19.
239. Not only does the Act require the unanimous consent of the owners for an amendment altering the percentage interest of unit owners, but the declaration will probably also require that at least a majority of the owners agree to the other changes in the declaration which must be made to accommodate the new stage. Cf. Minn. Stat. § 515.11(11) (1971).
240. For a discussion of the use of a similar technique to permit alteration of the percentage interests by the developer in accordance with changing market conditions, see text accompanying notes 201 to 209 supra. The problems noted there may also impede the use of a power of attorney to create an expandable condominium.
241. Whether subsequent purchasers from the original owner of the unit may be bound thereby is subject to question. See Joliet, supra note 230, at 20.
stage is completed, title to the common areas should revert to the developer so that he may then convey to the purchaser of each new unit an undivided interest in the common areas of the entire project.\textsuperscript{242} Conversely, the declaration and deeds must provide that the owners of units in the stage each have a future interest in the common areas of proposed subsequent stages in proportion to their percentage interest in the project at the time of purchase.\textsuperscript{243} The completion of each new stage will be the specified event which will convert the future interest in the common areas of the new stage. The developer should have the option to expand the condominium, but exercise of that option must be limited as to time, and as to the number of units of each new stage in order to comply with the Rule Against Perpetuities.\textsuperscript{244}

The declaration for an expandable condominium should also contain\textsuperscript{245} a description of the real estate that will be used for subsequent stages; a guarantee that subsequent stages will conform to prior ones in quality, design, and value; a limitation on the number of units per stage; an easement in favor of the developer to cross existing stages to construct new stages; the retention of control of the owners association by the developer during development to insure completion of the proposed plan; and a condition that the method of valuation of subsequent units will be the same as that used for the first stage.\textsuperscript{246}

If a confederation plan is used and the governing documents drafted so as to incorporate all of the items discussed above, stage development can be effectuated under the present Minnesota statute and the disadvantages associated with two-tier development largely avoided. Although the present statutory language seems sufficiently flexible to permit the desired result, the challenge of the complex drafting tasks involved in phase development is

\textsuperscript{242} \textit{Id.} at 21; B. Outen, \textit{supra} note 230.

\textsuperscript{243} Joliet, \textit{supra} note 230, at 21; B. Outen, \textit{supra} note 230.

\textsuperscript{244} Unlike many other states, in Minnesota the Rule does apply to condominium interests. \textit{MINN. STAT.} § 500.13, subds. 1, 2 (1971) provides that a future interest in real estate must vest during the life of one of two lives in existence at the time of the creation of the interest. The safest procedure is merely to specify the number of years during which the option must be exercised. Virginia has so provided by statute. The option to expand the condominium expires 7 years after the declaration is recorded. \textit{VA. CODE ANN.} § 55-79.54(c)(3) (Supp. 1974).

\textsuperscript{245} See \textit{MINN. STAT.} § 515.11(10) (1971). The developer has great flexibility in the additional terms which may be included in the declaration.

\textsuperscript{246} If registration of the offering for sale of units in the project is required pursuant to the Minnesota Subdivided Land Sales Practices Act, such information must be revealed in the material filed with the Commissioner. \textit{MINN. STATE REG. SERV. SDiv} 1613(3)(cc) (1974). The regulation provides that the Commissioner will consider unreasonable, and hence impermissible, any provisions authorizing annexation of other property to the project if the assessments against owners or other burden upon community property and facilities will be thereby increased, unless a reasonable procedure for annexation is detailed in the filing or annexation is possible only upon the vote of a majority of the unit owners. Since, in order to take advantage of techniques which will permit him to control phase development, the developer must, in cases where registration is required, disclose such information, it would seem that the information must be included in the declaration.
a disadvantage in itself. Amendatory legislation, expressly permitting phase development and providing specific statutory procedures for its creation and for dealing with its problems, would be advantageous to the developer and unit owner alike.

7. Liability of Owners for Judgments Arising from Conduct of the Owners Association

Most condominium statutes, Minnesota's included, are silent as to the nature and extent of a unit owner's liability for damages for personal injuries suffered by persons using the common areas.247 Since each unit owner owns an undivided percentage interest in the common areas, he has a duty to maintain them in a safe condition.248 However, since it is the owners association, not the individual unit owners, that has control of the maintenance and repair of the common areas,249 the unit owner's personal liability will depend upon whether his duty to maintain the premises in a safe condition is delegable or non-delegable.250

Some states have provided a statutory answer. Alaska, for example, restricts actions for damages arising out of tortious conduct in the common areas to actions against the association.251 Other states provide that no unit

---

247. 1 P. ROHAN & M. RESKIN, supra note 7, § 10A.03 at 10A-61.
249. See MINN. STAT. § 515.06(e), (f) (1971). In some jurisdictions the matter is complicated by the persistence of the common law rule that an unincorporated association is not a legal person. Minnesota has, however, abrogated that rule by statute, so that both corporations and unincorporated associations are legal persons having standing to sue and be sued. See MINN. STAT. § 645.44, subd. 7 (1971).
250. Some commentators are of the opinion that the duty is non-delegable. See, e.g., R. POWELL, supra note 248, at § 633.25. There is no case law precisely on point. Nevertheless, the general rule that a landowner cannot delegate to a professional independent contractor his duty to maintain the land in a safe condition would seem to apply here. See W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS § 71, at 470-71 (4th ed. 1971). Minnesota follows that general rule. See Daly v. Bergstadt, 267 Minn. 244, 126 N.W.2d 242 (1964) (duty of a restaurant owner to maintain premises in safe condition for the public could not be delegated to an independent contractor) (dictum); Corrigan v. Elsinger, 81 Minn. 42, 83 N.W. 492 (1900) (duty of shop owner to maintain premises in safe condition could not be delegated to independent contractor).
251. ALASKA STAT. § 34.07.260(b) (1971) (judgment rendered against the association is a common expense assessed against each unit owner in proportion to his percentage interest in the common areas).
owner shall be personally liable for any damages caused by the association on or through the use of the common areas.252

The legislative decision to protect the unit owner against individual liability has a limited practical effect. A judgment obtained against the association is normally, by the terms of the statute or bylaws, a common expense to be charged against each apartment owner according to his undivided percentage interest in the common area and facilities.253 Since the association may have no assets, income, or profits, it may have no other method of meeting its obligations.254 Frequently, it will have provided for this contingency by purchasing liability insurance and treating the premiums as common expenses.255 If the bylaws prohibit assessments for judgments or insurance premiums, the injured victim with an unsatisfied judgment against the association might well be entitled to hold the unit owners directly liable, piercing the corporate veil if necessary to do so.256

Though it appears that the unit owners will bear the cost of injuries to users of the property, directly or indirectly, the extent of each unit owner's liability may vary according to whether the duty to keep the common areas in a safe condition is delegable. If it is non-delegable, all unit owners would

252. Fla. Stat. § 711.18(2) (1969); Miss. Code Ann. § 89-9-29 (1972); N.J. Stat. Ann. § 46:8b-16 (Supp. 1973) (the unit owner's immunity applies only if the injury is caused by the association's negligence, since under the statute and bylaws the association has the power to maintain, repair, and exercise control over the common areas).

253. See, e.g., Idaho Code § 55-1515 (Cum. Supp. 1973) (the unit owner is liable for the claims, judgments, or awards arising out of the use, operation, or management of the common areas, but only for a pro rata share).

254. Changing income tax treatment now makes it possible for the owners association to have some liquid assets on hand which may be used to meet such contingencies. See 1 P. Rohan & M. Reskin, supra note 7, at § 15.0611.

255. For the bylaws to define judgments and liability insurance premiums as common expenses is clearly permissible. See, e.g., Alaska Stat. § 34.07.450(7)(c) (1971); Ky. Rev. Stat. § 381.885 (Interim Supp. 1974); Minn. Stat. § 515.02, subd. 8 (1971); Wash. Rev. Code Ann. § 64.32.240 (1966).


If the duty is non-delegable, it is difficult to see how the individual unit owner's liability can be avoided by incorporating the common elements, for it would seem that the courts would pierce the corporate veil to afford the injured victim relief, if the corporation itself were so thinly capitalized that it could not satisfy the judgment.

It is the general rule that a corporation is an artificial person, created by law, or under authority of law, as a distinct legal entity, with rights and liabilities which are independent from those of the natural persons comprising the corporation. See Gallagher v. Germania Brewing Co., 53 Minn. 214, 54 N.W. 1115 (1893). It is equally well settled, however, that the general rule is conditioned by the caveat that where the corporate form is used as an instrument to hinder, delay, or defraud creditors, or for any other wrongful purposes, courts are justified in disregarding the separate and distinct existence to protect the interests of others. See, e.g., Di Re v. Central Livestock Order Buying Co., 246 Minn. 279, 74 N.W.2d 518 (1956); Central Motors & Supply Co. v. Brown, 219 Minn. 467, 18 N.W.2d 236 (1945); Matchan v. Phoenix Land Inv. Co., 159 Minn. 132, 198 N.W. 417 (1924).
be jointly and severally liable for damages and thus the affluent unit owner
might be required to bear a disproportionate share of the damages.\textsuperscript{257} If on
the other hand, the duty to maintain may be delegated to the owners association,
the owner is protected and will never be required to pay more than a pro
rata share of the judgment, regardless of the fact that all or most of the other
unit owners are impecunious.\textsuperscript{258}

The effect of a judgment upon the unit interests in the condominium may
depend upon whether the unit owners of the association are primarily liable.
In Minnesota, a judgment becomes a lien upon any realty owned by the
debtor in the county in which it has been docketed.\textsuperscript{259} Since the condominium
apartment is realty,\textsuperscript{260} the judgment creditor would have a lien upon each
apartment if the unit owners were held individually liable for his injuries. If,
on the other hand, the owners association has the duty to maintain the com-
mon areas and is the only proper party defendant in the injured victim's action,
no liens could attach to the units since the association does not own them.\textsuperscript{261}

In two states, the statutory scheme prevents such a result by providing,
without discussing the basis of liability, that judgments against the association
for damages arising out of injuries to persons using the common areas become
a lien against the units.\textsuperscript{262}

Whether the association or unit owners are to be held liable may also be
relevant when a unit owner rather than a third party is injured while using the
common areas. If the duty to maintain the common areas is wholly delegable,
then an owner should be permitted to recover against the association for its
failure to properly maintain the common areas.\textsuperscript{263} Thus, the cost of the

\textsuperscript{257} See generally W. Prosser, supra note 250, at §§ 46-51.
\textsuperscript{258} Minn. Stat. § 515.10 (1971) provides that common expenses are to be charged to
the apartment owners according to their percentage of undivided interest in the common areas
and facilities.
\textsuperscript{259} Id. § 548.09. Each owner may satisfy his proportionate share of the judgment and have
the lien discharged from his apartment. Id. § 515.09, subd. 2. If he does not satisfy it, it will
remain a lien upon that apartment for 10 years and require satisfaction upon a sale. Id. § 548.09.

\textsuperscript{260} Id. § 515.04.
\textsuperscript{261} Cf. Minn. Stat. § 515.09, subd. 1 (1971).
\textsuperscript{262} D.C. Code Encl. Ann. § 5-924(e) (1967) (any final judgment against two or more
unit owners becomes a lien on all units and is removed from each unit when the owner pays his
pro rata share of the judgment determined by his percentage in the undivided interest of the
common areas). Md. Ann. Code art. 21, § 11.123(b), (d), (e) (1974) (a judgment arising out of
the use or operation of the common areas is a lien upon each unit removable by the payment of
the owner's pro rata share of the judgment). See also N.C. Gen. Stat. § 47-A26 (1966) which
requires a claimant, seeking recovery for injuries not caused by a unit owner, to exhaust all
available remedies against the association.

\textsuperscript{263} See White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Ct. App. 1971). The
court compared the unit owner, who had a 1/60th interest in the common areas, to a stockholder
with no control over the operation and management. Arguing that the association was a
separate legal entity from the unit owners, it permitted the injured owner to recover against the
negligent association. The court did not decide whether the individual unit owners would also be
liable or upon what property execution could be levied.
owner's injuries could be spread among all of the other owners by assessments or through insurance. If, on the other hand, each owner is individually liable, it would appear that the injured unit owner's own breach of the duty to maintain the common areas would be an affirmative defense in an action against the other unit owners, and that his negligence would be apportioned with theirs under the comparative negligence law.264

Until the question is litigated in Minnesota, the injured victim should protect his interests by seeking a judgment against both the owners association and the individual unit owners. The unit owners may wish to protect themselves further by entering into an express indemnity agreement with the association.265 On the other hand, the association should provide in the bylaws that liability insurance is a common expense and procure coverage with high limits. Insurance offers the most certain mechanism for controlling the ultimate cost to the unit owners.

V. Conclusion

The Minnesota Condominium Act can best be understood when viewed with an eye toward the history of condominiums and the development of condominium legislation in the United States. The statutory schemes of other jurisdictions provide a standard by which to judge the efficacy of the Minnesota Act and an aid to the interpretation of its provisions. Since the Florida Act,266 for example, is similar to that of Minnesota, Florida case law will be of invaluable assistance in construing the Minnesota Act. The full disclosure provision of the Hawaii statute267 may offer a model for future amendments in Minnesota, and similarly, legislators concerned with the difficulties of phase development may wish to consider Virginia's creative solution to that problem.268

Construing the Minnesota law in light of the traditional law of real property and of common development strategies and practices raises a number of troublesome issues. Ripe for legislative or judicial resolution are the current controversies surrounding expandable condominiums, full disclosure to purchasers, and liability for tort judgments. Other provisions of the Minnesota Act give rise to legal and practical problems which, though narrower in scope, continue to be significant. Hopefully, many of the questions, issues, and problems discussed in this note will be resolved during the next few years as the increasing popularity of condominiums leads to more frequent litigation or gives rise to pressure for legislative refinement of the present statute. Even in the absence of legislative or judicial action, however, there is much that

265. There is some authority for the proposition that if the association breaches a contractual duty to insure it will be liable for the damages to the extent of the coverage it had a duty to procure. See White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Ct. App. 1971).
counsel for the developer can do to protect against the pitfalls which inhere in the uncertain status of the law. With proper planning and careful drafting many of the potential problems can be prevented while retaining the flexibility of the condominium concept. With the continuing efforts of private counsel, the legislature, and the courts, condominium can fulfill its destiny as a dynamic solution to the conflict between the American dream of home ownership and the growing blight of urban sprawl and inner city decay.