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COMMENTS

MISSOURI'S CONDOMINIUM PROPERTY ACT:
TIME FOR A CHANGE

I. INTRODUCTION

Condominiums have been a fast growing phenomenon in the United States. Over one-fourth of all housing units built in the last two years are condominiums. There are now more than 1,340,000 condominiums in the United States; 85% of them were purchased within the last six years. Some condominium projects have fallen on hard times, and the number of condominium starts has decreased from the boom of the early 1970's because of recession and overbuilding in certain localities. Nevertheless, condominiums are still the trend in housing. The number of condominium housing starts is predicted to rise to 129,000 this year from 94,300 in 1975. This figure does not include non-housing condominiums that are also on the increase.

Although the majority of condominiums are located in Florida, California, Colorado and the larger cities of the United States, Missouri has the potential for enormous growth in condominium projects. In out-state Missouri, land still abounds, and the price of building or buying one family dwellings is still within the reach of most people. However, in Kansas City, St. Louis and the lake-resort areas, land is less plentiful and more expensive. This tends to drive the purchase price of a one family dwelling out of the range of the average worker and forces him to live further away from his desired location. Enlightened promoters or developers could expand the condominium theory into areas such as commercial shops and shopping centers, industrial parks or plants, agricultural or livestock condominiums, cemeteries, mobile home parks, marinas, and camping areas,

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2. N.Y. Times, Feb. 1, 1976, § VIII at 1, col. 1. However, this represents less than three percent of all United States housing. N.Y. Times, Dec. 1, 1975, at 61, col. 1.
5. Id.
and even fractional time period ownership. But to foster the use and the expansion of condominiums in Missouri, the Missouri Condominium Property Act requires revision in order to insure the safety of the buyers' investments without unrealistically binding the developer with harsh and unjust requirements.

The purpose of this comment is to examine some changes required in the Act to allow many of the innovative ideas listed above and to clear up ambiguities which exist in the current law without jeopardizing protection of the consumer and the developer. No attempt has been made to suggest specific language changes to remedy any of the defects noted.

II. EXPANDING CONDOMINIUM USAGE

A. Leasehold Condominiums

One way to broaden condominium use is to allow them to be built upon leaseholds. Although the first generation of condominium acts did not provide for condominiums on leaseholds, the majority of states permit them today. Missouri does not allow leasehold condominiums but requires that the property submitted to condominium law be owned in fee simple.

The rationale for allowing a leasehold condominium is twofold. First, land that otherwise would not be available for condominium use would become available. Second, a leasehold condominium would be less expensive because of the decrease in the cost of the land as a part of the overall costs. The second rationale, arguably, is incorrect because the cost of long term leasing may reflect the costs to the owner of the land. Hence the cost would be equivalent. Although in Missouri the increase of land available for use in condominium housing projects may not be of great importance, the increase may be significant for industrial, commercial or recreational property.

Many comments on the advisibility of permitting leasehold condominiums warn of the possibility of the unit owner forfeiting his investment if other owners fail to make their required payments, causing

10. 1 P. ROHAN & M. RESKIN, supra note 6, at § 17C.01 discusses fractional time period ownership as a means of expanding condominium theory.
11. §§ 448.010 et seq., RSMO 1969.
breach of the underlying lease.\textsuperscript{16} There is also the problem of decreasing value of the condominium as the lease term decreases.\textsuperscript{17} The first problem can be alleviated by adopting a provision similar to one in the Virginia Condominium Act\textsuperscript{18} which provides that no lessor, successor in interest or assignee will have the power to terminate a leasehold interest of a unit owner if that unit owner makes his required payment of rent to the person designated.\textsuperscript{19} No lien attaches and no lease terminates as to any unit owner current in his payments.

The second problem, that of decreasing value and marketability, is inherent in all leasehold property. It could be handled adequately, as in any leasehold, through disclosure to the purchaser. This assumes that the purchaser of the condominium is knowledgeable with respect to the ramifications of a leasehold, or at least hires an attorney who is. However, several states also added or suggested additional requirements before leasehold condominiums were allowed. These included requirements that the term of the original lease be not less than a specified number of years,\textsuperscript{20} that a specified number of years be left on a lease if the condominium is to be resold, or that leaseholds be allowed only on certain types of condominiums, \textit{i.e.} non-residential.\textsuperscript{21} With these considerations in mind, it is possible for a leasehold condominium law to be drafted to permit leased real estate to be used with minimal constraints to protect the purchaser and the mortgagee.

B. A "Unit"

Another method of expanding condominium usage in Missouri is by redefining the term "unit" in the Missouri statute.\textsuperscript{22} The definition given "unit" basically describes rooms in an enclosed structure. Although the statute allows for "any type of independent use,"\textsuperscript{23} the rigid definitional

\textsuperscript{18} VA. CODE §§ 55-79.39 to 79.103 (Supp. 1976).
\textsuperscript{19} VA. CODE § 55-79.54(e) (Supp. 1976).
\textsuperscript{20} See, e.g., FLA. STAT. ANN. § 718.401 (Supp. 1977) (initial lease must exceed 50 years); MINN. STAT. ANN. § 515.02 subd. 14 (West Supp. 1976) (initial lease must be at least 50 years.)
\textsuperscript{21} N.Y. REAL PROP. LAW § 339-e(11) (McKinney Supp. 1976). The theory of this limitation is based upon the theory that commercial purchasers are more likely to understand the ramifications of a leasehold and are more likely to hire an attorney when purchasing a condominium. This law also provides for a 30 year minimum term for the underlying ground lease.
\textsuperscript{22} § 448.010 (10) RSMO 1969. "‘Unit,’ a part of the property including one or more rooms, occupying one or more floors or a part or parts thereof, designed and intended for any type of independent use, and having lawful access to a public way.”
\textsuperscript{23} Id.
requirements would seem to rule out a marina, a campsite, or a cemetery. States vary on how to define the term "unit," but two definitions are worth noting because they demonstrate the freedom which may be provided to expand condominium usage. Louisiana defines unit as "a part of the condominium property subject to individual ownership." Virginia units need not have horizontal boundaries, need not be part of a multi-unit building, and need not consist of enclosed space. Either of these definitions or another which does not limit the use of the condominium to structures or rooms would be an improvement and are worth consideration by the General Assembly.

C. Non-Contiguous Lands

A further definitional point which should be considered is whether a condominium in Missouri can consist of non-contiguous lands. The Missouri Act is silent on this point, and the definitions of "parcel" and "property" do not clearly state whether contiguous lands are required. To further complicate the matter, the statute states that the declaration may not be amended to include a parcel which is not contiguous with the parcel in the original declaration, but makes no statement whether the original declaration must consist only of contiguous land. To avoid litigation and to further broaden the use of condominiums, the statute should be amended to allow non-contiguous lands be used in condominiums.

D. Limited Common Elements

The Missouri Condominium Property Act also is silent on whether limited common elements are allowed and, if they are allowed, how the assignment and expenses thereof are to be allocated. A limited common element is an area designated for the use of a specific unit owner or owners only to the exclusion of the rest. Common examples are balconies, patios, parking spaces and storage areas. Other possible examples could be

24. For an analysis of the various definitions given the term “unit”, see, A. FERRER & K. STECHER, LAW OF CONDOMINIUM § 112(a) at 134 (1967).
26. VA. CODE § 55-79.41(y) (Supp. 1976). "'Unit' shall mean a portion of the condominium designed and intended for individual ownership and use."
27. § 448.010(5), RSMO 1969.
28. § 448.010(8), RSMO 1969.
31. See, e.g., FLA. STAT. ANN. § 711.03(11) (Supp. 1977), which defines "limited common elements" as " . . . those common elements which are reserved for the use of a certain unit or units to the exclusion of other units." See also, VA. CODE § 55-79.40(q) (Supp. 1976).
garden plots, boat launching ramps, tennis courts, and washrooms. Many states allow limited common elements. Missouri's statute should be amended to clarify this questionable area and allow limited common elements.

To accomplish this task two additional problems must be considered. The first problem concerns the method of allocation among unit owners of the cost of up-keep of the limited common elements. If each unit was assigned one parking space then the cost could be apportioned as with all common elements, i.e. based on a unit's proportional share. But if one unit has three parking spaces and another unit has only one, then to base it on the same percentage as the common elements would be unfair. Therefore, some states require that persons entitled to limited common elements should pay a special assessment for that privilege.

The second problem involves the point in time when these limited common elements must be assigned to the individual units. This may be accomplished when the units are platted or when sold. Once assigned, the question arises whether the entitlement thereto may be transferred to another unit holder. The Missouri Condominium Property Act requires that all common elements be assigned and percentages fixed when the declaration is made. It would be preferable that the assignment of the limited areas not be required to be included in the declaration because until the units are sold, the developer cannot be certain of how to assign them. While it is certain to which unit a balcony will be assigned as a limited common element, it would be unduly restrictive to require that all limited common elements be assigned to particular units in the declaration. For example, the developer cannot know whether unit A will want one or three parking spaces when he files the declaration. Under the Virginia law, the developer must specify in the declaration which common elements may be assigned as limited common elements. The declaration may later be

33. Almost any area could be made a limited common element. Through the use of this concept, the cost of the monthly maintenance fee to non-users of these items could be kept down, thereby making it more attractive for one to buy into a recreational condominium with a golf course and tennis courts if he wanted to play only one of the sports. The tennis courts and golf courses could be limited common elements and only those who desired those recreational areas would bear the expense.


35. See, e.g., VA. CODE § 55-79.83(b) (Supp. 1976), which states that if any common elements benefit less than all the units, then those units so benefited shall be specially assessed.


amended by the developer assigning the limited common elements to particular units. This act also allows a unit owner to transfer a limited common element to another unit owner without consent of the other unit owners.39

E. Flexible Boundaries

The Virginia law also provides for flexible boundaries if the declaration so permits; i.e., boundaries between units may be changed or larger units may be subdivided into smaller units by a declaration amendment. Again, only the consent of the owners directly involved is required.40 Missouri law is to the contrary, specifically stating that no unit shall be subdivided.41 Therefore, the law requires a unit owner who desires to subdivide or consolidate to gain the approval of all unit owners to amend the declaration and plat.42 By requiring that the declaration allow for subdividing or consolidation, or by requiring that the declaration or by-laws name a certain percentage of owners who must approve any boundary change or subdivision, adequate safeguards are available for the home and recreational condominium owner. This still would allow sufficient flexibility for commercial, industrial and office condominiums to expand or contract units in accordance with business needs. Several other states allow this practice. Maryland permits a reallocation of unit areas unless otherwise provided in the by-laws.44 Nebraska and Kentucky allow reallocation but require approval of the board of managers.

F. Time Sharing Condominiums

Fractional time period ownership is a relatively new concept which could substantilly increase condominium usage. Although all statutes but one are silent on this concept, it is being used currently in several western states in recreational areas under common law theories. The time sharing

39. Id.
41. § 448.050.2, RSMO 1969.
42. § 448.040, RSMO 1969.
44. MD. CONVEYANCING CODE ANN. art. 21, § 11-107(D) (3), (Supp. 1974).
45. NEB. REV. STAT. § 76-812.01 (Supp. 1974). This law requires approval of 3/4 of the co-owners unless otherwise provided in the by-laws or master deed.
46. KY. REV. STAT. § 381.827 (Supp. 1974). The approval of a majority of unit owners is required unless the master deed provides otherwise.
47. This concept allows a purchaser to buy the fee simple of a condominium unit for a portion of a year during which time he has the sole use of the property. All time periods, totaling one year less needed maintenance times, are sold in fee. Roodhouse, Fractional Time Period Ownership of Recreational Condominiums, 4 REAL ESTATE L.J. 35 (1975).
48. I P. ROHAN & M. RESKIN, supra note 6, at § 17C.01; Utah Condominium Ownership Act, UTAH STAT. ANN. §§ 57-8-3 through 57-8-36 (Supp. 1975).
concept entails the ownership in fee of a unit for a period of time. For example, the developer builds a condominium of apartments in a ski area. The developer would sell each unit apartment twelve times (or more if he desires). Each buyer would purchase the fee for a specific one month period and during that period enjoy all the incidents of ownership. Some developers have attempted fractional time ownership but with a rotation of dates of ownership.

The advantage of a system of time sharing is the reduced price for the buyer and the increased profit for the developer. The buyer may not be able to purchase a condominium in Colorado, but he may be able to purchase a one month fee in a Colorado condominium. The developer can gain additional profits while keeping the price down. This would enable more people to afford a second or third home at a lake resort area or even in another area of the country.

Depending on how the fee ownership is set up in time sharing arrangements, the Rule Against Perpetuities may cause some difficulties. The rule provides that no interest in property is valid unless it must vest, if at all, within lives in being plus twenty-one years. If the interests are set up such that each owner has an individual fee during his period of possession rather than a portion of the fee as a tenant in common, the traditional concept of the rule may well be violated. Such an arrangement would give each participant a defeasible fee while he was in possession and a shifting executory interest while he was out of possession. The executory interests would operate to re-vest a participant with another defeasible fee whenever he was entitled to possession of the property. Strictly speaking, after the perpetuities period had run, all of these outstanding executory interests would violate the rule. One commentator believes that the interval ownership time sharing configuration, i.e., a tenancy for years of an interval interest with a remainder over as tenants in common does not violate the Rule Against Perpetuities. However, until the courts have stated that the Rule Against Perpetuities does not apply or until a statute excepts time sharing from the Rule, title companies may be hesitant in giving title insurance without which most condominiums will not be viable.

50. Id. at 39.
51. This could be accomplished by use of tenancy in common theories. Thus each purchaser owns a percentage of the unit in an undivided interest. Under this system an owner of a one month period, would own January this year, February next year and so on.
52. The price will be substantially lower. This enables more people to buy a condominium. For example in one Florida condominium, the average price for a two week interval in a time sharing condominium is only $3000. 1 P. ROHAN & M. RESKIN, supra note 6, at 17C-2.
Missouri law currently provides that the Rule Against Perpetuities shall not be applied to defeat any provisions of the Act. But because the Missouri Act does not specifically allow time-sharing, it is doubtful if this acts to provide a statutory exception to the Rule. To avoid possible litigation and enable time-sharing, the Act should be clarified to specifically exempt time-sharing and the declaration and bylaws from the Rule.

Although only one state statute specifically addresses time sharing, several states have been studying the idea and eventually will allow period ownership. Missouri, with her wealth of recreational areas, would do well to study this novel idea.

III. PROTECTING THE BUYER

Much has been written about the need to protect the buyer from unfair and dishonest practices of developers. These practices include use of deposits, misleading and fraudulent advertising, sweetheart leases, management contracts, extended control and underestimating monthly payments (lowballing).

A. Deposits

The Missouri Condominium Property Act is silent on the use of deposits by the developer. It is possible, therefore, for the developer to use a deposit for financing construction, paying wages, or buying a new car. If the condominium goes bankrupt, the buyer loses his deposit. Even if the buyer's deposit is returned, the developer would retain the income derived from the deposit. Virginia's answer to this problem was to bar completely any use of the deposit by the developer, and require it be held in escrow until delivered at settlement. In Florida, the developer is barred from using the money unless the contract of sale specifically provides for such use. The Florida approach appears preferable but it is not as safe for the buyer as the Virginia approach. Inability of the buyer and developer to

55. § 448.210, RSMo 1969.
56. In the 1974 legislative session, the Hawaii Legislature passed a time sharing proposal. However, the measure was vetoed by the governor. See, P. Rohan & M. Reskin, supra note 6, Current Developments 29.30; in addition to Hawaii, South Carolina, Maryland and Colorado are studying a statutory basis for time sharing. Davis, Time-Sharing Ownership: Possibilities and Pitfalls, 5 REAL ESTATE REV. 49 (1976).
60. FLA. STAT. ANN. § 711.25 (Supp. 1977).
contract for the use of the deposit may cause the developer to become short of funds and increase the possibility of failure.\textsuperscript{61} The developer should be required to inform the buyer of the fact that the developer may use the money, if in fact he plans to do so. This gives the buyer an additional opportunity to consider the wisdom of his purchase and his risk of loss.

Louisiana allows the developer to use the deposit for construction and development only.\textsuperscript{62} A warning of possible use must appear in the contract. If the developer violates the warning requirement, the contract is voidable at the buyer's option. The developer may not use any deposit money prior to commencement of construction or at anytime to pay for advertising, salaries, commissions or other sales expenses.\textsuperscript{63}

\section*{B. Sweetheart Contracts}

Another area of potential danger to the buyer in the early stages of condominium development is developer self-dealing through maintenance, management or recreational facilities contracts made by the unit owners' association while the developer still controls it. These contracts, referred to as "sweetheart contracts," take many forms. For example, the developer may enter into a long term contract whereby he manages or performs maintenance for the condominium. The fees may be just or unconscionable.\textsuperscript{64} However, the problem is generally not the amount of the fee, but the fact that the association has had a contract over which it had no say thrust upon it for an extended period of time (usually 25 to 99 years).

The developer may lease the recreational facilities to the condominium instead of making them part of the common area.\textsuperscript{65} Again the fee may or may not be fair, but the association is locked into a contract for something most condominium owners think they own instead of lease. Courts have had mixed reactions to these contracts. Some hold such contracts are unconscionable,\textsuperscript{66} while others uphold their validity entirely.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{61} Comment, \textit{Recent Innovations in State Condominium Legislation}, 48 St. John's L. Rev. 994, 1000 (1974).
\item \textsuperscript{63} Id.
\item \textsuperscript{67} Point East Management Corp. v. Point East One Condominium Corp.,
\end{itemize}
Missouri currently has no provisions in the Condominium Property Act dealing with these problems. Three methods have been tried by various states. One method limits any sweetheart contract to a specific number of years. Virginia prohibited the developer from entering into management contracts for longer than five years.\footnote{68} This has the drawback of not allowing the association to continue a fair or favorable contract which the developer made.\footnote{69} Hence the association may lose a good contract which they would desire to keep. In 1974, Virginia amended its law by removing the five year maximum and establishing that a contract between the developer and the association under his control is not valid unless the association ratifies it after the owners assume control.\footnote{70} This allows the owners to maintain a favorable contract, but limits them to all or nothing, \textit{i.e.}, they must either accept the contract for the full term or reject it altogether.

Florida’s solution to sweetheart contracts is to allow the owners’ association to cancel the contract anytime 75\% of the unit owners agree.\footnote{71} On its face this may appear to give the unit owners the most flexibility in choosing how long a contract may run, but it has several serious drawbacks. First, it allows the sweetheart contract to remain in force until at least 75\% of the units are sold. If the developer is allowed disproportionate voting until a certain percentage of the units are sold, it would be possible for the developer to control the voting and retain the sweetheart contract even after 75\% of the units were sold. In times of a slumping economy or in a poorly timed or located condominium, years may pass with the developer owning more than 25\%, thereby keeping the contract in effect. In fact, if the contract is lucrative enough, it may be financially advantageous to the developer to retain control over 26\% of the units. A second problem is that it may be nearly impossible to get 75\% of a group of owners to agree on anything that involves money unless the contract was grossly unfair.

Another possible method of handling the problem of developer self-dealing and sweetheart contracts is to require that the developer be considered a fiduciary in any dealings with the owners or the association.\footnote{72} If the

\footnote{68} VA. CODE § 55-79.21:2 (Supp. 1976).
\footnote{70} VA. CODE § 55-79.74(b) (Supp. 1976).
\footnote{71} FLA. STAT. ANN. § 711.13(4) (Supp. 1977).
developer violated his duty, this would result in a voidable sales contract.\textsuperscript{73} Statutory guidelines dealing with a developer should be superior to the whims of a judge who might allow the contract to stand. There is always the chance that a Missouri court would hold that the developer is not a fiduciary to the buyer for a contract entered into before the buy-sell agreement.\textsuperscript{74} Therefore, a statutory enactment, like Florida's, Virginia's or a combination thereof, is the best protection available.

C. Extended Developer Control

A related area where buyer protection may be required and on which the Missouri Condominium Property Act is silent is that of extended developer control of the board of managers. The statute enables the developer to maintain control longer than may be necessary and after he has no interest therein. The Act requires that the board of managers be set up so the one-third of the members' terms expire annually.\textsuperscript{75} Although this provides continuity of management, it could allow the developer to retain control for almost two years after he sold the last unit. For example, if the developer of a 100 unit condominium sold 49 units before and during construction which could vote 49\% of the votes, when the board of managers was established he would still be in position to elect the entire board because he would still own units that have 51\% of the votes. Because one-third must expire annually, one-third would expire in one year. The second third would expire in two years, and the remaining third would expire in three years. If the developer could sell the rest of the units the following month, he would have 100\% control of the board of managers for one year and 66 2/3\% control for two years, even though he would have no interest remaining in the condominium project. Only after two years could the true owners elect enough members to the board to take control of the condominium project. But even at the end of two years the developer still would control one-third of the board of managers and might be able to block or delay measures which he considers detrimental to his interests. Hence, the developer may control the condominium for two years longer than necessary and exert unnecessary influence for up to three years.\textsuperscript{76}

A statutory change could correct this injustice by requiring that the developer turn over control after the occurrence of some event, such as after a certain percentage of the units are sold or after a certain time period

\textsuperscript{74} See note 66 supra.
\textsuperscript{75} § 448.180(1), RSMo 1969.
\textsuperscript{76} Through this control and influence, the developer could block almost any move by the unit owners to remove the property from condominium status, sell the property, or for a minimum of three years, take any action which required a 3/4 vote by the board. Florida has limited the control of the developer by a system of amortization. Fla. Laws 1974, ch. 74-104, § 16.
beginning with the sale of the first unit. However, it should be remembered when drafting this statute that while units remain unsold the developer has a great interest in the operation of the condominium to insure that he will have a fair opportunity to sell the remaining units. A balance must be struck between these two interests.

One non-statutory method of control over sweetheart contracts, extended control, etc., is provided by long-term lenders. They closely monitor such transactions and generally will not approve a project for lending if they believe it has any unfair restriction which may jeopardize their loans to buyers. Because of the need of the developer to have long-term lender approval, they are able to assert a great deal of pressure on the developer to correct any unconscionable actions. However, this is not an infallible method and offers no statutory protection to the buyer.

If the problems of sweetheart contracts, extended control and deposits can be controlled as discussed, how should misleading advertising or underestimated monthly payments, etc., be handled? The best method would be to permit rescission of the contract or damages if the buyer reasonably relied on the false or misleading statements or promises of the developer.

To insure that the buyer gets the correct information, several states have required complete disclosure by the developers, control of the developer by a regulatory agency, or both.

D. Developer Disclosure

Several states require the seller to furnish the buyer with copies of the declaration, by-laws, projected operating budgets, including an estimated monthly charge, floor plans, leases, management contracts and the like. Some states additionally require that certain provisions, leases or other important areas be flagged, set apart or printed in bold type to insure that even a cursory reading will bring them to the attention of the buyer. Although a pure disclosure statute is superior to the Missouri law which requires no disclosure, it has a serious handicap. Pure disclosure places the burden of protection on the buyer himself, because although the buyer is

78. Id.
81. Most states that have amended their statute to include safeguards for the purchaser have used a combination of disclosure and a regulatory agency. See, e.g., HAWAII REV. STAT. § 514-29 (Supp. 1975); MICH. STAT. ANN. §§ 26.50(24)-(28) (1974).
83. Id.
given all the relevant information, it is left to him to decide if the condominium is sound and fair. Considering the numerous pages of legal jargon, ideas and terms, plus the length and complexity of the documents, an ordinary buyer would have difficulty making an intelligent decision. Even if the buyer employed an attorney to digest the material, if the attorney were unfamiliar with this condominium offering and the disclosure papers, the task would be difficult and expensive for the client. Most lawyers may be able to handle intelligently a routine residential condominium under the Missouri law as it now stands, but they may be hard pressed to make an adequate evaluation of a livestock or time-sharing condominium under a new and more complex condominium law.

E. State Regulatory Agencies

Several commentators have called for a combination of pure disclosure law with some form of state regulatory agency control or approval. Arizona law provides that a state agency shall approve a condominium project before it is offered to the public. The Michigan statute requires the agency to determine if the disclosure is fair and full. Virginia requires that the disclosure to filed for approval by the agency. Other states require that the agency prepare a public report to be given each prospective buyer based on its own investigation and information provided by the developer. In addition, state agencies may have powers ranging from the power to seek injunctions against persons engaged in violating the protective regulations to the power to issue cease and desist orders.

The agency system of prior approval does have several advantages. The agency could more rapidly adapt its regulations to deal with unforeseen problems arising from the broadened use of condominiums. It could deal with previously unseen or untried abuses by developers. However, the prior approval approach also has its disadvantages. It would impose another layer of government with additional red tape; plus, the added expense of running that bureaucratic office will be borne by the taxpayers. The buyers will bear the added expense of registration fees or inspection expenses.

89. VA. CODE § 55-79.90 (Supp. 1976).
92. Id. at 909.
93. E.g., VA. CODE § 55-79.89(d) (Supp. 1976).
Although the agency concept has support among many scholars, its major functions, control of sweetheart contracts, deposits, extended promoter control or lowballing, can be handled as well by proper statutory safeguards. Even with a state agency, the buyer would have to read the disclosures plus any state report (if required by state law) before determining if the condominium project was sufficient for his purposes. He would still have to make the decision. At the present, state agency regulation of condominium offerings is not warranted in Missouri. The recommended statutory changes should curb most developer abuses or at least give the injured buyer a remedy. A disclosure law requiring the developer to provide the prospective buyer with material information and additionally providing appropriate remedies for revocation of the contract or damages to the buyer should be sufficient in Missouri to protect adequately the buyer.

IV. EMINENT DOMAIN

Eminent domain is a problem that was not addressed in the first generation of condominium statutes. To remedy this oversight, Missouri, in 1969, added a section on condemnation, but failed to solve all of the problems in this area. The Missouri statute is limited to discussion of condemnation of common elements only and does not discuss the problem of condemnation of less than all the units. Evidently, this is because even at this late date the General Assembly still considered that condominiums meant high rise apartments and only certain parts of the condominium project would be condemned—those areas not within the building such as tennis courts, golf courses, or parking spaces. But today, with the broadened concept of a condominium, it is entirely possible that the condemnation will be of both common elements and units.

In order to alleviate the lack of guidance given in the Missouri Condominium Property Act, the statute should be amended to address specifically several distinct problems of partial condemnation. This entails legislative choices between competing policy considerations. The condemned portion of the condominium could be valued as a whole, or each unit of the

97. Florida started with pure disclosure but later amended their statute to add a regulatory agency. FLA. STAT. ANN. §§ 711.69-.808 (Supp. 1974). Their situation may be unique because of the large number of condominiums in the state and a greater opportunity for developer abuses of out of state buyers.
100. § 448.195, RSMo 1969.
portion could be valued separately. It must be determined if the common elements are to be valued separately, or as the difference between the value of the land with the common elements and without the common elements. Each of these methods of valuation could cause vast differences in the amount of the condemnation award. Any law should address whether the board of managers will be allowed to negotiate for the unit owners when their units are involved, or whether the board should be allowed to negotiate for the common elements only. When limited common elements are condemned the amount of the compensation and who should receive it should be discussed. The limited common elements may be treated like common elements, units or as a hybrid class. The statute should address when a condemnation should be treated like a substantial destruction of the condominium. Finally, when units are lost to condemnation, whether the remaining owners' share of the community expense goes up must be decided. Because the number of unit owners has decreased, some party must bear this burden.

The Missouri statute currently requires that all unit owners agree before any change in the percent of ownership. Will any owner want to increase his percentage of ownership of the common elements when he will receive nothing more than an increase of the monthly fees he must pay? Basically, there have been two approaches adopted by other states to handle these problems. The first is to require that the problem be addressed in the declaration or by-laws and allow the document to control. This is inadequate because to insure that the proper issues are addressed in the declaration or by-laws, the statute would have to be so detailed and directory that requirements could be detailed in the condemnation section with equal facility.

The second approach is a detailed statutory reallocation of the owner percentages and the distribution of compensation. This method can be very effective if care is taken to insure that all of the issues above are addressed. The Virginia statute uses this method. It specifically states what will happen if common elements, a unit or a part of a unit are condemned, and what will happen to the votes, liabilities and the rights thereof. However, it is not sufficiently detailed to answer the questions on valuation and negotiation. Unfortunately, it places the responsibility for added cost

102. Id. at 693.
103. Id.
106. KY. REV. STAT. § 381.830(1)(b) (Supp. 1976).
108. Id.
of increased monthly payments on an already financially depressed owner.\textsuperscript{109}

Maryland has combined these two approaches but allows the detailed statutory reallocation to apply only if the matter is not otherwise provided for in the declaration or the by-laws.\textsuperscript{110} This approach provides the needed flexibility to cope with the broadening uses available for condominiums and would suit Missouri. Still, there must be an adequately detailed statutory reallocation to insure that the developer does not fail to cover some important area or problem which may arise from condemnation.

V. RENOVATION AND OBSOLESCENCE

Because condominiums are relative new in Missouri, obsolescence and complete condominium renovation may be rare. But as the use of condominiums increases and time passes, these problems will have to be solved. A building may become structurally or functionally obsolete because of age, advanced technology or outside forces such as changes in the neighborhood.\textsuperscript{111} When this happens, the board of managers needs sufficient power to insure that owners do not lose their investment and the condominium is not abandoned. The current Missouri Condominium Property Act allows for two methods of handling the major task of obsolescence. Under the first method, the property may be sold with the approval of 75\% of the unit owners.\textsuperscript{112} This may be sufficient, but if the property is in fact totally obsolete, there may be no market or the loss to the individual owner may be great. Likewise, if many of the owners are on fixed incomes or poor, they may be unwilling or unable to sell and move, making it difficult to get the required 75\% agreement to sell.

Under the second method, the property is removed from condominium status.\textsuperscript{113} This requires approval by all unit owners and lienholders. It is highly unlikely that all owners and lienholders would ever agree to this. But it remains as one possible solution if the building can not be sold.

The Missouri law, other than as stated above, provides no method of affecting renovation necessary to prevent obsolescence or of financing any large expenditure to improve the condominium project. The statute mentions only that the bylaws shall include a section addressing "maintenance,

\begin{itemize}
  \item \textsuperscript{109} A partial condemnation may make the property worthless. For example, if one-half of a garden apartment complex was condemned and replaced by an airport, the value of the land remaining would decrease so that an owner of a noncondemned apartment could not sell without a substantial loss. Also, if one-half of the apartments are gone and the recreational facilities remain the same, the unit owners monthly fee would increase drastically, thereby causing hardship and possibly default.
  \item \textsuperscript{110} Md. Real Prop. Code Ann. § 11-112 (Supp. 1976).
  \item \textsuperscript{111} Galton, Condominiums: The Experience of the Past Decade, 66 Brief 91, 110 (1970-71).
  \item \textsuperscript{112} § 448.150, RSMo 1969; Ewing, Condominium in Missouri, 20 J. Mo. Bar 65, 66, 68 (1964).
  \item \textsuperscript{113} § 448.160, RSMo 1969.
\end{itemize}
repair and replacement of common elements and payment therefor."

This relates to ordinary repairs, which should be distinguished from renovation. The unit owners need a voice in the decision whether to undertake a major overhaul of the project or to add a major improvement, such as a new pool. By allowing the by-laws to control, the statute makes it possible for a majority to "improve" some fixed income or poor owners out of their property by causing an excessively high assessment that they would be unable to pay.

Several states have added the requirement that if a major renovation or improvement is to be made that could not be considered ordinary maintenance or repair, then a higher percentage of unit owners must consent, generally from 75% to 90%. The Massachusetts statute allows 50-75% to approve major expenses, but the total expense would be paid only by those voting in favor. If more than 75% approve, then all are bound and must share the expense. Initially, this may appear to be equitable, but it may allow a unit owner who can afford the renovation or improvement, and who will benefit from it, to vote against it hoping that it will pass with only 50-75% of the vote, thus, he could gain the advantage without paying for it. Obviously, if enough people tried this approach the vote would fail for a lack of the required majority. Therefore, a straight percentage vote requirement, which increases directly with the cost of the improvements or renovation (expressed as a percentage of the appraised value of the project), may be more workable. For example, a project costing 5-10% of appraised value would require a 75% vote of the unit owners to approve, while a project costing 10-15% of appraised value would require an 85% vote, and so on.

VI. STAGED DEVELOPMENT

In Missouri, staged development is available only if 100% of the unit owners agree. Staged development is the method by which a developer can build a condominium project in phases. The developer and lender may prefer staged development in Missouri as projects expand and money available for condominium projects becomes tighter, or when the con-
dominium’s chance of success is unknown. For example, if a developer desires to build a 100 unit project, he may be able to finance only 25 units at one time. If staged development were allowed, he could build 25 and use the profits to assist in the construction of the later stages. This would also provide protection for the construction lender. If the developer went bankrupt, the lender would not be required to complete the unfinished stages and could contract the project to the number of units completed. If a developer wishes to attempt a staged development, he can never be sure of obtaining 100% approval of the unit owners in the future. Although the Missouri statute is not explicit as to the developer’s ability to change percentages unilaterally, there are several methods outside of the statute which could be used. These include a two-tiered or multi-tiered condominium project, the “power of attorney” method, and the “Chinese Menu” method.

In the two tiered project several separate condominium projects are built. After all of the projects are completed and sold, a master association is formed with responsibility for the management of the legally separate but interrelated condominium projects. The main function of the master association is to manage common elements which all of the unit owners of all projects may use but which are owned separately by the second-tier association and to assess common expenses.

The power of attorney method of expansion is where the purchasers of condominium units all initially give the developer a power of attorney to vary the common area percentages. This method has many drawbacks including the unchecked power of the developer and the automatic revocation on the death or incompetency of a unit owner.

The chinese menu method requires setting forth in the declaration the percentage interest each unit will have in the common areas as additional phases are added to the condominium project. While they have been used successfully in other states, there are questions as to their reliability if attacked by suit.

Although most states do not address the problem of staged development in their condominium statutes, several have attempted to allow the use of staged development. These statutes serve as an excellent starting place to find examples for amendments to the Missouri Act. The Virginia statute permits two staged development procedures—convertible land and contractable condominiums.

Convertible land is land on which the developer intends to create condominium units that are not in existence at the time of recording the

123. Id.
declaration. One hundred percent of the undivided interest of the common elements would be apportioned to the units in existence. As the developer completed further stages of his project, the new units would be merged with the original units to form a larger condominium with the undivided interests being reapportioned by amendments to the declaration. If the project did not continue or went bankrupt, the developer or lender could protect himself by stating in the declaration that the project could also be contractable.\textsuperscript{125}

A contractable condominium is one which can be reduced in size by withdrawal of a portion of the land. If the convertible land above was also designated contractable, the developer or mortgagee could simply withdraw the land from the condominium and would not be required to complete the project. To be contractable, the land which can be withdrawn must be described in the declaration and a maximum time limit of seven years must be set after which contractability is lost.\textsuperscript{126} A statute allowing expandable condominiums could be set up exactly in reverse, with land designated as a possible expansion of the condominium with a seven year maximum on the expansion.

Any statute with allows for expandable or contractable condominiums must have sufficient safeguards to insure that the buyer is informed and understands the possibility of such an occurrence. It must spell out the maximum amount of growth or shrinkage which may take place along with the effects thereon of monthly maintenance charges and percentage ownership.\textsuperscript{127}

\section*{VII. Conclusion}

This comment has discussed some of the problem areas within the Missouri Condominium Property Act. Other potential problem areas exist, such as the tort liability of the unit owner,\textsuperscript{128} warranties for condominiums,\textsuperscript{129} securities law problems,\textsuperscript{130} and taxing of condominiums and owners.\textsuperscript{131}

\bibitem{125} Id.
\bibitem{126} Id.
\bibitem{127} See, e.g., VA. CODE §§ 55-79.54 to -79.65 (Supp. 1976).
\bibitem{128} See, e.g. Comment, Tort Liability of the Condominium Unit Owner, 2 REAL ESTATE L.J. 789 (1974).
The Missouri General Assembly should either amend piecemeal the Missouri statute or completely rewrite it to insure continuity and fluidity. A complete revision embracing ideas from the statute cited above is most desirable. Condominium usage should be expanded to allow condominiums on leaseholds and non-contiguous lands. Furthermore, condominiums should be allowed to have limited common elements and flexible boundaries. Time-sharing condominiums may boost lagging resort home sales.

More important than expanding condominium usage is providing protection to the buyer from developer misuse of deposits, sweetheart contracts, and extended developer control. This could be accomplished by a rigid requirement of disclosure by the developer of all important provisions plus statutory limitations on the length of developer control and contracts. A state regulatory agency should be established only if developer restraint and unconscionable action requires such.

Staged development, eminent domain, renovation, and obsolescence also require legislative attention to allow flexibility and fairness to condominium owners and developers in times of contracting, expanding, or renovating condominiums.

These suggestions should be studied and molded to fit Missouri requirements in condominiums to increase usage while benefiting and protecting the buyer, the developer, and the mortgagee.

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