Condominiums in Washington

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CONDOMINIUMS IN WASHINGTON

INTRODUCTION

The continued growth of our population, coupled with the movement of people from rural to urban areas, has created a host of problems not the least of which has been housing. This concentration of population near urban centers has resulted in the phenomenon of "urban sprawl" and is reflected in the startling increase in the price of land in these areas. Since this population trend is expected to continue, it has given rise to the practical necessity of making more efficient use of land by the construction of high-rise multi-family dwellings in reasonable proximity to facilities for employment, education, recreation, entertainment, and public services.

The problem of the developer and planner is to make living in multi-unit, high-rise structures attractive enough to induce a large segment of the urban population to desire to live in such projects. Condominium ownership has been touted as a solution to the problem, since unlike renting or owning shares in a cooperative apartment, it gives the apartment dweller a sense of ownership. This

1. This situation is illustrated by the following table, which appears in 1 TAMING MEGALOPOLIS 98 (H. Eldredge ed. 1967):

<table>
<thead>
<tr>
<th></th>
<th>1960</th>
<th>1950</th>
<th>1940</th>
<th>1930</th>
<th>1920</th>
<th>1910</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total U.S. Population</td>
<td>18.5</td>
<td>14.5</td>
<td>7.2</td>
<td>16.1</td>
<td>14.9</td>
<td>21.0</td>
</tr>
<tr>
<td>All Metropolitan Areas</td>
<td>26.4</td>
<td>22.0</td>
<td>8.1</td>
<td>28.3</td>
<td>26.9</td>
<td>34.6</td>
</tr>
<tr>
<td>Central Cities</td>
<td>1.5</td>
<td>13.9</td>
<td>5.1</td>
<td>22.3</td>
<td>25.2</td>
<td>33.6</td>
</tr>
<tr>
<td>Suburban Areas</td>
<td>61.7</td>
<td>35.6</td>
<td>15.1</td>
<td>44.0</td>
<td>32.0</td>
<td>38.2</td>
</tr>
<tr>
<td>Areas Outside Metropolitan Areas</td>
<td>7.1</td>
<td>6.1</td>
<td>6.5</td>
<td>7.9</td>
<td>9.6</td>
<td>16.4</td>
</tr>
</tbody>
</table>

2. During a recent five-year period 43 percent of the population increase in the United States took place in the fringe around metropolitan areas. Id. at 11.

3. Information issued by the Bureau of Labor Statistics and the forest products industry shows that the cost of a building site was the most rapidly increasing component in the purchase of a new home in the decade ending with 1968. With the index base at 1957-59 = 100, the index reached a level of 180 in 1968, or an increase of 80% in ten years. The general cost-of-living rose about 30% in the same period. Seattle Times, April 20, 1969, at C1, col. 2-5.

4. See Kerr, Condominium—Statutory Implementation, 38 St. John's L. Rev. 1 (1963) [hereinafter cited as Kerr].

5. The sense of ownership that goes with cooperatives in all forms, and which is strongest in condominium, may well be the principal advantage over a normal tenancy. The owner can sink his roots into his apartment with an assurance of tenure that would be lacking if he could be evicted by a landlord. . . .
psychological advantage and the financial advantages of condominium ownership make the condominium a promising device for alleviating at least some of the problems associated with urban sprawl.

The condominium does seem to offer an attractive alternative to the middle-income consumer who may otherwise be faced with the dilemma of either living in a rental unit all his life in order to be reasonably near his job and cultural, educational, recreational and entertainment facilities, or of owning his own house at a considerable distance from these facilities.

By owning his own apartment rather than paying rent, the condominium owner eliminates that portion of his housing cost which would be the landlord's profit. In this respect he is better off than his apartment-renting counterpart. Furthermore, he has many of the same derivative advantages the apartment dweller has, such as mass purchases of supplies and services. These advantages may also include access to such luxuries as a swimming pool, golf course, and other recreational facilities which are not normally as accessible to the average owner of a single-family dwelling.

The condominium also seems to be a promising means by which lower-income individuals, whose level of income and lack of means of transportation effectively preclude the possibility of home ownership in the urban fringes, may attain the status of home ownership with its concomitant advantages.7

I. THE CONDOMINIUM CONCEPT IN WASHINGTON

A. Development of the Condominium Concept

A pioneer commentator in the field has defined "condominium" as:8

[a] combination of two kinds of ownership: one, the owner-


6. Included in rent are also factors reflecting the costs of turnover in occupancy such as loss of rental payments because of vacancies in other apartment units, and costs of cleaning and redecorating units (which is generally done less frequently in condominium apartments, since owners probably take better care of the premises than renters). Note, however, that the condominium owner is losing the income he would otherwise realize on the capital he has tied up in the down payment. See Kerr, supra note 4, at 11.

7. For a more pessimistic view of the impact of the condominium concept on low-income housing, see Quirk & Wein, Homeownership for the Poor: Tenant Condominiums,
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ship in severality of a part of a building, generally called the apartment; the other, undivided ownership in common... with the owners of other apartments, of the "common elements," that is, the land and those parts of the building intended for common use, such as the foundations, columns, main walls, roofs, halls, corridors, lobbies, stairways, elevators, entrances, utility services and the like. The undivided ownership is in a fixed ratio, generally that which the value of the apartment bears to the value of the entire property...

Seldom in the development of our legal system has a property concept given rise to such a flurry of activity by both commentators and legislators as has the condominium concept in the past decade. This period of activity in the United States commenced with the passage of the Horizontal Property Act in Puerto Rico in 1958. After passage of the Act, builders and developers found it difficult to obtain financing for their condominium ventures. As a result of these financing problems, pressure was brought to bear on Congress to amend the National Housing Act, and in 1961 these efforts culminated in the passage of what is now Section 234 of the Act. The purpose of Section 234 is to provide an additional means of increasing the supply of privately owned dwelling units where, under the laws of the State in which the property is located, real property title and

8. KEIR, supra note 4, at 1.
9. P.R. LWS ANN., tit. 21, §§ 1291-1293k (Supp. 1963). Although the condominium concept was not new to Puerto Rico, having been provided for in the Spanish Civil Code of 1889 which became part of the law of Puerto Rico by virtue of a royal decree in the same year, these provisions and their subsequent amendments made the condominium too cumbersome a tool to adequately deal with the ever-increasing number of housing problems encountered by builders and planners on the overcrowded island. The Horizontal Property Act was passed in 1958 in response to these demands and one authority has remarked that "... a great deal of the credit for the urban progress achieved in Puerto Rico during the past few years, is directly attributable to the adoption of a modern, comprehensive horizontal property statute." A. FERRER & K. STECHE, LAW OF CONDOMINIUM § 56 (1967) [hereinafter cited as FERRER & STECHER].
10. 12 U.S.C. § 1715V (Supp. IV 1968). The section as originally enacted applied only to family units in a multifamily structure which had been covered by a project mortgage insured under some other section of the act (except section 213 dealing with cooperative housing insurance). The Housing Act of 1964, 78 stat. 769, greatly broadened the scope of section 234 by providing for the insurance of project mortgages directly under that section. The section was also broadened by permitting the conversion of investor-sponsored projects, constructed under section 213, to condominiums.
ownership are established with respect to a one-family unit which is part of a multi-family project.

Passage of this section by Congress was the signal the states had been waiting for, and statutes, many of which were modeled closely after the Puerto Rico Act or the FHA Model Act, were passed in state after state in rapid succession. Legal commentators also wasted no time, and a sizeable volume of literature on the condominium has already been amassed.

B. Condominiums in Washington

The problems of urban sprawl which provided impetus to the move for adoption of statutory authorization of condominiums have heretofore been encountered primarily on the eastern seaboard and in California, where the population densities are much higher than in the Northwest. However, this of course does not mean that the Northwest is immune to such problems. Indeed, it has been estimated by the Washington State Census Board that the population of the four most populous Puget Sound counties will reach almost two and three-quarters million by 1985.

In 1963 the Washington State Legislature passed the Horizontal Property Regimes Act, which gives statutory authorization for the development of condominiums in the state. It is the purpose of this

12. For a text of the Model Statute, see P. ROHAN AND M. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE Appendix B-3 (1967) [hereinafter cited as ROHAN & RESKIN].

13. Section 234 was signed into law by President Kennedy on June 30, 1961. Ten days later Hawaii passed a condominium enabling statute. Within two years after the passage of Section 234, 38 states had passed enabling legislation. See Kerr, supra note 4, at 5.

14. See E. BREUER, CONDOMINIUM (1962) a bibliography of condominium-related literature as of late 1962, published by the New York State Library. ROHAN & RESKIN, supra note 12, and FERRER & STECHER, supra note 9, both contain updated bibliographies on the subject.

15. Washington State Census Board, Population Forecasts, State of Washington 1965-1985 (State Planning Series #4 1966). This forecast covered the counties of King, Pierce, Snohomish and Kitsap, which had a combined population of 1,660,000 in 1966. A Foreward Thrust election bulletin issued in the Winter of 1967 predicted that the population of King County alone would increase by 750,000 between 1967 and 1980. Widespread Boeing Company cutbacks in employment in 1970 in King and Snohomish Counties will probably result in these projections being scaled down somewhat, but the long-term outlook probably remains unchanged.

16. WASH. REV. CODE ch. 64.32 (1969).

17. Under the common law it was possible in at least some jurisdictions for a condominium-type ownership scheme to exist without the express authorization of a statute. See Comment, Community Apartments: Condominium or Stock Cooperative, 50 CAL. L. REV. 299, 301 (1962). Flat ownership had long been recognized in England,
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comment to analyze the condominium concept in Washington from the perspective of the potential purchaser, to elaborate on the advantages of owning a condominium unit in Washington, and to point out the possible liabilities which the purchaser might incur as a result of such ownership. The discussion will of necessity be carried out on a somewhat abstract plane since experience with the statute during its seven-year existence has been limited and case law is as yet non-existent. There is a similar dearth of case law in other jurisdictions. Even so, identification of potential problems resulting from ownership of condominiums should enable the draftsman to avoid many of the potential risks of such ownership. A separate problem, which is not considered in this comment, is that the sale of an interest in a condominium may be considered to be the sale of a security which must be registered under federal or state securities laws.

II. MANAGEMENT

A. Types of Management

The Washington statute gives the apartment owners' association wide discretion in choosing the type of entity it wishes to have manage the condominium. The Association's bylaws may specify "whether administration of the property shall be by a board of directors elected from among the apartment owners, by a manager, or managing agent, or otherwise. . . ."18

Disputes over management, not unexpectedly, have produced a great deal of strife in cooperative housing ventures of various types, and there is no reason to believe that condominiums will be immune from such disputes. Characteristically the disputes arise over fiscal or maintenance policies of the managing entity. As a leading writer points out:20

and ownership of a part of a building is mentioned in Coke, On Littleton. See the discussion in Ferrer and Stecher, supra note 9, at § 54. Such projects were not common in the United States prior to passage of the various acts, however, and this author is aware of no such projects in Washington prior to the passage of our condominium statute.

18. Wash. Rev. Code § 64.32.090(11) (1969). This language does not seem to preclude incorporation of the apartment owners association as a non-profit corporation, but the author's investigation indicates that at least in residential condominium developments in Washington it is not the practice to do so.


20. Id. at 855-56.
[O]ne group favors expenditures for improvement of the property, such as installation of self-service elevators, central air conditioning, and similar features, or for nonessential services such as doormen and handymen on twenty-four-hour call. The opposing camp seeks to keep carrying charges to a bare minimum by paring expenditures wherever possible.

Aside from differences in policy, however, there is another significant area of potential strife. In some condominium ventures the mortgagees may insist on provisions for professional management to protect the value of their collateral, but in other condominiums, particularly those with but a few apartments, the owners may be tempted to economize by providing for management by a board of directors elected from among the apartment owners themselves. In many cases this turns out to be a false economy, since

[s]hortsighted economies and outright mismanagement may produce a decline in essential service, amenities, and eventually property values. Special assessments may become necessary to balance an overly optimistic budget or to eliminate a no-man's land created when an overly cautious board (uncompensated and possibly underinsured) refuses to assume jurisdiction over part of the property or over a community problem.

Furthermore, the efficiency of this mode of management is often hampered by dickering and petty squabbles among the members of the association's board of directors. Even if his mortgage lender does not so insist, the buyer would be well advised to be certain that the condominium under consideration is now managed by a professional manager and that it will continue to be so managed before he purchases an apartment therein.

B. Restrictions on Occupancy and Alienation

Since condominium living normally involves families living in close proximity to one another and sharing the use of common areas and

22. Rohan, supra note 19, at 856.
23. The story has been related to the author about a business executive in California who resided in a condominium apartment and served (uncompensated) on the condominium's board of directors. Much to his chagrin he found the position, because of repeated petty bickering among the board members, to be much more onerous than the duties demanded of him as a compensated board member of several corporations.
facilities, a relatively high degree of social compatibility among such families is necessary to the smooth functioning of the condominium. A condominium project may be designed for retired persons and cater to the leisure-time interests of such persons; it may be sponsored by a labor union which wishes to keep it exclusively for members of that union; or it may be designed for persons who want to live in an area free of small children and pets. Moreover, since decisions regarding the expenditure of money for improving the building or grounds are made by a majority of apartment owners, it is in the best interests of both present and prospective owners to assure that their general attitudes and views on such matters are reasonably consonant.

To the extent that persons with the same types of interests fall within the same general economic or income groups, the price of the condominium units will automatically insure a rough degree of homogeneity. In addition, other, more precise devices are normally utilized by the condominium management to insure compatibility among the owners. Primary among these are the right of first refusal on resale, and general "house rules" governing the use of the common areas, permissible levels of noise, and the like.

1. Right of First Refusal on Resale

The right of first refusal, or pre-emptive option as it is sometimes called, is a method by which the association can exercise control over who will become an apartment owner. Pursuant to such a right, an apartment owner desiring to sell his apartment, having found a prospective purchaser, must first offer the apartment to the managing entity. Commonly he is also required to furnish certain information about the prospective purchaser to the owners' association, and if the owners do not approve of the prospective purchaser they may purchase the apartment upon the same terms (or provide another prospective purchaser who is willing to do so) within a period of time specified in the declaration or bylaws of the condominium project.24

24. See Hershman, Operating Problems of the Condominium, Symposium on the Practical Problems of Condominium 38, May 11, 1964. The declaration of the Highlander, one of the first condominiums in Washington, provides that the board of directors of the association has seven days within which to match the offer of purchase, lease, or rent received by the prospective seller. The declaration of Mercer West provides for a period of thirty days within which the board may match the offer.
Most scholars have concluded that a provision such as this, since its terms are not unreasonable, is not invalid as a restraint against alienation, but the matter is not entirely settled.26

Even if a right of first refusal is not held invalid as an unreasonable restraint on alienation, there may be other grounds for holding it invalid. A number of commentators have discussed the possibility that such a provision would be in violation of the rule against perpetuities.27 Since the right of first refusal is essentially an option to purchase real property, it may be deemed to create an interest in real property which cannot vest until the option is, or may be, exercised. It may thus be necessary to limit the option period to a period which would be valid under the rule, measured from the delivery of the deed.28 In addition, the problem might be circumvented by con-

25. Id. at 41. Berger, Condominium: Shelter on a Statutory Foundation, 63 COLUM. L. REV. 987, 1018 (1963) [hereinafter cited as Berger].

26. This type of provision is certainly more reasonable than some which have been upheld in the stock cooperative situation, such as every prospective purchaser’s being subject to approval by the board, or the board’s having the right to purchase the seller’s interest at book value rather than market value. See Berger, supra note 25, at 1017. However, there is a significant distinction between the situation of a tenant-cooperator in a cooperative housing venture and that of the apartment owner in a condominium venture: the former has merely a leasehold, whereas the latter has a fee interest. The rule against restraints on alienation applies to fee interests, but it does not apply to leasehold interests; this is perhaps why the stringent restrictions on attempted resale by the tenant-cooperator have been judicially upheld. See, e.g., Weisner v. 791 Park Avenue Corp., 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 348 (1959). The necessity for compatibility among occupants is certainly as compelling in the condominium as it is in the stock cooperative, however, and “the reasonableness of a restraint ought not to depend on a mechanical distinction between freeholds and leaseholds.” Berger, supra note 25, at 1019.


28. This potential problem has apparently been either disregarded or overlooked by the Washington legislature; neither the statute nor any of the condominium declarations examined by the author contains even a fleeting reference to the rule. ROHMAN & RESEK, supra note 12, point out at § 10.03 that legislative action on this problem has been taken only in Utah and Rhode Island.

It may be that courts will be extremely hesitant to apply the rule in the condominium setting since there are policy arguments militating against its application. See Leach, Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 HARR. L. REV. 1318, 1321-22 (1960). The drafter of condominium documents should be able to minimize problems stemming from application of the rule, however, by referring to some specific standard by which the period is to be measured as an alternative to the period of existence of the condominium project. This could be done by a provision similar to the following: The right of first refusal shall be valid so long as this condominium project is in existence, but if such right is found to violate the rule against perpetuities, then it shall be valid for a period measured by the lives of all the original purchasers of the apartments plus twenty-one years after the death of the survivor of them.
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veying only a determinable fee to each apartment owner, but as a practical matter it would probably be impossible to obtain the acceptance of purchasers and mortgagees of such a scheme.

There is another possible ground on which a right of first refusal might be struck down by the courts. If it is exercised so as to discriminate against prospective purchasers on the basis of race, color, religion, or national origin it would probably be held to be illegal. There are three basic approaches under which the right of first refusal, if it is being used as a tool of discrimination, could be attacked. The first is the straight constitutional approach by finding a large enough element of state action to invoke the self-executing provisions of the fourteenth amendment. The second is based on 42 United States Code § 1982, taken from the Civil Rights Act of 1866 and reinterpreted in a recent case to "bar all racial discrimination, private as well as public, in the sale or rental of property. . . ." The third approach involves invoking the Open Housing Act of 1968 which proscribes discrimination on racial grounds in the terms and conditions of a housing sale and makes illegal a refusal to sell or negotiate after a bona fide offer is received. It is thus clear that the right of first refusal will be vulnerable to attack if it is used to discriminate against prospective purchasers on racial or other proscribed grounds.

2. General "House Rules"

The Washington statute provides that the declaration shall contain a statement of the purposes for which the building and each of the apartments are intended and restricted as to use. . . .

29. See generally Morris & Powe, Constitutional and Statutory Rights to Open Housing, 44 Wash. L. Rev. 1 (1968).
31. Ch. 31, 14 Stat. 27.
33. Open Housing Act of 1968, 82 Stat. 83. If the determinable fee devise were used to discriminate against prospective purchasers on a basis such as race it might be immune from attack under Shelley since the estate of the prospective seller would terminate automatically, by operation of law, but it would still most likely run afoul of 42 U.S.C. § 1982 (1964) and/or the Open Housing Act of 1968.
34. Open Housing Act of 1968, § 804(a), (b), 82 Stat. 83. It is possible that the sale of a condominium apartment might fall within the single-family-dwelling exception of the statute, § 803(b)(1), but since it would be the other apartment owners and not the seller attempting to discriminate, the exception might be held inapplicable.
The statute also provides for the adoption of bylaws "for the administration of the property or for other purposes. . . ." These two provisions are the statutory base for the promulgation of rules governing use of apartments in a condominium project and conduct in the common areas, such rules generally being necessary for the maintenance of harmony in any type of multi-family housing. It is one thing to have such rules regulating the use of condominium apartments and the conduct of their occupants; it is quite another to have adequate measures at hand to enforce them. In most cases informal social pressure will probably cause the errant apartment owner to take appropriate steps to remedy the offending situation or to refrain from engaging in the offending conduct. To deal with those owners who do not succumb to such informal coercive measures, however, the Washington statute gives a broad mandate to the owners association to remedy the situation:37

Failure to comply with the rules specified in the declaration or adopted in the bylaws pursuant thereto shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or by a particularly aggrieved apartment owner.

C. Termination

Since the apartment owner will normally have a sizeable investment in his apartment, it is important for him to ascertain what his rights are upon termination of the condominium venture. There are apparently two ways in which termination can be effected. First, the apartment owners may by unanimous agreement remove the property from condominium status by recording an instrument to that effect38 and thereafter they will be deemed to be owners in common of the property in the same percentages as they previously owned the common areas.39 The second method of termination occurs by operation of law if all or part of the property is damaged and the apartment

36. WASH. REV. CODE § 64.32.090(11) (1969).
37. WASH. REV. CODE § 64.32.060 (1969).
38. WASH. REV. CODE § 64.32.150(1) (1969). Note that all mortgagees and lien holders must also consent to the change in status, and an instrument to that effect must also be recorded. Id.
39. WASH. REV. CODE § 64.32.150(2) (1969).
owners do not decide within ninety days to repair or reconstruct the buildings. The apartment owners thereby become owners in common of all the property. In the latter case the statute explicitly provides for the right of an apartment owner to bring an action for partition, and although there is no similar provision for when the venture is consensually terminated, the apartment owner here will probably have the same right.

III. FINANCING

A. Individual Financing of Units

Most commentators agree that the condominium's most striking advantage to the individual desiring some type of community housing is the availability of separate financing. The Washington statute specifies that each apartment, together with its undivided interest in the common areas and facilities, is to be considered real property. It also provides:

[L]iens or encumbrances shall arise or be created only against each apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment in the same manner and under the same conditions in every respect as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership....

The purchaser of a condominium apartment can thus finance his purchase by giving a note secured by a mortgage or deed of trust on his separate parcel. He can arrange his own individual plan of

41. Id.
42. See W. BURBY, REAL PROPERTY § 101 (1965). Certain fact patterns may present some practical difficulties, however; see, e.g., Carter v. Weona Beach, 71 Wn. 2d 498, 429 P.2d 201 (1967).
43. Kerr, supra note 4, at 14-15; Berger, supra note 25, at 994; Cribbet, supra note 5, at 1237.
45. Wash. Rev. Code § 64.32.070 (1969). This provision is taken directly from § 9(a) of the FHA Model Act, and is found in condominium statutes in virtually all of the states. See FERRER AND STECHER, supra note 9, at Part Four, for texts of all the state statutes.
46. Wash. Rev. Code § 64.32.070 speaks of "liens or encumbrances"; other sections of the statute refer specifically to mortgages. It is assumed that in both instances the
financing, including the amount of the down payment, the term of
the mortgage or deed of trust, and provisions for accelerated payments.

B. Assessments for Common Expenses

The condominium declaration may contain a provision for the
collection of sums assessed by the association of apartment owners
for the share of common expenses chargeable to each owner. Assess-
ments may be made for such routine expenditures as janitorial and
lawn care, normal building maintenance, garbage and refuse collec-
tion and insurance premiums on the structure, and they may be made
for some major new project such as a swimming pool or sauna bath
facilities. Declarations seldom require unanimous consent of the
apartment owners for approval of projects requiring even large ex-
penditures, and a dissenting owner may find himself obliged to
contribute toward a project he does not want or cannot afford.48
Measures permitted by the Washington statute to enforce these
assessments can be quite severe.49

[T]he collection may be enforced in any manner provided in
the declaration including but not limited to (a) ten days notice
shall be given the delinquent apartment owner to the effect that
unless such assessment is paid within ten days any or all utility
services will be forthwith severed and shall remain severed until
such assessment is paid, or (b) collection of such assessment may
be made by such lawful method of enforcement, judicial or extra-
judicial, as may be provided in the declaration and/or bylaws.

In contrast to the ordinary home owner who owns a single family
dwelling and who can generally defer a major capital outlay until he
can make provision for it in his budget, the condominium apartment
owner is tied to the financial decisions of the specified majority of
apartment owners. According to a noted authority on condominiums,
the most common items necessitating a special assessment of the apartment owners are: (1) post casualty repairs to the extent not covered by insurance, (2) renovation and improvement projects, (3) purchases of apartments by the association through exercise of a right of first refusal or on foreclosure, (4) uncollected assessments from a defaulted owner, and (5) budget deficits occasioned by poor planning or by non-recurring expenses such as the costs of litigation in which the association is involved. 50

Viewed from the perspective of the dissenting apartment owner, the provisions in the statute and the declaration and bylaws permitting imposition of financial decisions of the majority on all apartment owners with recourse to severe enforcement procedures may seem unfair. But if unanimous consent of the apartment owners were required before any significant expenditure could be made for any purposes, such as those in the preceding paragraph, one or a very few recalcitrant owners could effectively cripple the operation of the condominium. It is thus necessary to have a provision of this type in the declaration. The prospective purchaser should be cognizant of the problems which may arise with respect to condominium special assessments, and should make it a point to inform himself of the specific provisions relating to special assessments in the particular condominium development under consideration.

Before the buyer purchases a condominium apartment he should also apply to the managing entity of the condominium for a statement of the amount of unpaid assessments, if any, of the grantor, since the statute provides that the grantee will be jointly and severally liable with the grantor for the amount of any unpaid assessments, or for the amount specified in the manager’s statement. 51 The buyer should take into consideration the amounts of such unpaid assessments when arriving at the amount he is willing to offer the grantor for the apartment.

50. Rohan, supra note 19, at 857.
51. See WASH. REV. CODE § 64.32.210 (1969). It is not clear from this section whether the buyer is entitled to the statement prior to his actual purchase of the apartment, since the statute speaks in terms of “the grantee.” However, the provision would certainly be of limited utility to him if he were not entitled to the statement until after he had committed himself to the purchase. The estoppel provision in the statute would also be virtually meaningless if the buyer were not entitled to the statement until after his purchase.
IV. TAXATION

A. Individual Income Tax Aspects of Condominium Ownership

The Internal Revenue Code offers several significant tax advantages to owners and buyers of homes. These same benefits are also available to owners of condominium apartments. Briefly stated, they are: (1) the deduction of interest paid on mortgage indebtedness; (2) the deduction of payments for real property taxes; and (3) the non-recognition of gain on the sale of one’s principal residence if the owner reinvests in a new residence within one year. In addition, certain business deductions may be available where the condominium apartment owner rents his apartment.

1. Deduction of Interest Payments on Mortgage Indebtedness

Section 163 of the Internal Revenue Code of 1954 allows as a deduction "all interest paid or accrued within the taxable year on indebtedness." A Treasury Regulation issued pursuant to this section provides that a taxpayer may deduct interest paid on a mortgage upon real property of which he is the legal or equitable owner, as long as it is his personal indebtedness. The purchaser of the condominium should encounter no problems in availing himself of the interest deduction permitted by section 163.

2. Deduction for Payment of Property Taxes

Section 164 of the Internal Revenue Code of 1954 allows a deduction for property taxes paid (or accrued if the taxpayer uses the accrual accounting method) during the taxable year. The regulations promulgated under that section make it clear that such taxes are deductible only by the person upon whom they are imposed. It appears clear that the owner of a condominium apartment in Washington will be able to deduct property tax payments since the Washington statute provides that

57. Wash. Rev. Code § 64.32.190 (1969). This section is taken nearly verbatim from Section 20 of the FHA Model Act.
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Each apartment and its undivided interest in the common areas and facilities shall be deemed to be a parcel and shall be subject to separate assessments and taxation by each assessing unit for all types of taxes authorized by law including but not limited to special ad valorem levies and special assessments. . . .

As with other types of real property, the condominium owner cannot deduct assessments for benefits such as street or sewer improvement projects which tend to increase the value of the property assessed. 58

3. Non-recognition of Gain on Sale of Residence

Section 1034 of the INTERNAL REVENUE CODE OF 1954 provides that, subject to some restrictions, the gain realized from the sale of a taxpayer's principal residence is not recognized if the proceeds are reinvested in another residence within one year prior to or subsequent to the date of sale. 59 In a 1964 Revenue Ruling, the Commissioner stated that 60

[a]n individual who sells his principal residence and uses the proceeds within one year after the sale to purchase an apartment in a "condominium" apartment project which he uses as his new principal residence is entitled to the relief provided for by section 1034(a) of the Internal Revenue Code of 1954.

The "principal residence" requirement of section 1034 will, of course, effectively preclude those persons who buy a condominium apartment for recreational or other purposes and maintain a principal residence elsewhere from taking advantage of the provisions of this section. 61

B. Status of the Association for Income Tax Purposes

The Washington statute defines an "association of apartment owners" as 62

all of the apartment owners acting as a group in accordance with the bylaws and with the declaration as it is duly recorded or as they may be lawfully amended.

58. INT. REV. CODE of 1954, § 164(c)(1).
61. A survey by the author of County Auditors in April 1969 indicated that of the approximately 1600 condominium units then legally in existence in Washington, 266, or approximately 15%, could be classified as being held for recreational purposes. See Appendix, infra.
62. WASH. REV. CODE § 64.32.010(4) (1969).
The condominium apartment owners have wide discretion in choosing the exact entity which will manage the project, but it is clear that whatever form the managing entity takes, it may possibly be subject to income taxation as a business association or corporation. However, it should be noted that condominium associations will only rarely have a material amount of taxable income, and that such circumstances may in most cases be planned against.

Commentators have pointed out the possibility of adverse tax consequences to the condominium apartment owners if the management association is taxed as a corporation. The Internal Revenue Code of 1954 makes it clear that an "association" is taxed as a "corporation," and the regulations specify six characteristics relevant to a determination of whether or not the organization will be treated as an "association" for tax purposes. These are: (1) associates, (2) an objective to carry on business and divide the gains therefrom,

63. Wash. Rev. Code § 64.32.090(11) (1969) states that the bylaws required by that section may specify "whether administration of the property shall be by a board of directors elected from among the apartment owners, by a manager, or managing agent, or otherwise. . . ." This language seems broad enough to include a corporate form of organization as well. See the discussion regarding types of management at notes 18-23 and accompanying text, supra.


67. Neither the Code nor the Regulations contains a definition of "associates," but it seems clear from the plain meaning of the word that the individual members of the association of apartment owners would fall within its scope.

68. This characteristic would probably be considered to exist if some of the condominium apartments are operated on a part-time rental basis for the profit of the whole organization. A question may be presented, however, when the condominium apartments are rented only temporarily and only as a result of purchase on exercise of management's right of first refusal. A recent case held in a somewhat analogous situation that a trust, which had as its principal asset an apartment building, was conducting a business for the purpose of gain where the trust was responsible for the maintenance of the building, the rental of the apartment units, and the collection of rents. Mid-Ridge Inv. Co. v. United States, 214 F. Supp. 8 (E.D. Wis. 1962). The possibility that the association of apartment owners of a residential condominium will be deemed to be carrying on a business for the purpose of gain is thus very real, and perhaps could be avoided only by judicious drafting of the declaration and bylaws, omitting any power to rent apartments acquired by the exercise of a right of first refusal. Of course such a provision might be undesirable for other reasons. The remaining apartment owners might end up with several units purchased by the exercise of a right of first refusal. Then while seeking buyers for them they would be assessed for the mortgage payments and other common expenses which would normally be borne by the owners of such apartments, and the apartments would not be producing any rental revenue to offset these expenses. Furthermore, it is possible that by regularly exercising a right of first refusal and reselling the apartments so acquired for a price greater than the purchase price, the association may be deemed to be in the business of selling apartments and thereby be taxed on the profit therefrom at ordinary income rates rather than at capital gains rates.
(3) continuity of life, 69 (4) centralization of management, 70 (5) limited liability for debts, 71 and (6) free transferability of interests. 72

69. It seems clear from the definition of "continuity of life" in the Regulations that the condominium has this attribute, since "death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will not normally cause a dissolution" of the association of apartment owners. Treas. Reg. § 301.7701-2(b)(1) (1960). The provisions of the Washington statute do not seem to preclude the possibility of providing for a dissolution of the association every time one of the quoted events occurs, but such a provision would be of limited practicality, particularly in an association with a large number of members. The condominium venture will normally be terminated only by the assent of all the unit owners and the consent of their mortgagees pursuant to Wash. Rev. Code § 64.32.130 (1969), or by the destruction of or damage to all or a part of the property as specified in Wash. Rev. Code § 64.32.230 (1969).

70. Treas. Reg. § 301.7701-2(c)(3) (1960) provides:

[Clentralized management means a concentration of continuing exclusive authority to make independent business decisions on behalf of the organization which do not require ratification by members of such organization.

The determination of whether or not centralization of management is present apparently turns on the ministerial-discretionary dichotomy, since that Regulation goes on to provide:

[T]here is no centralized management when the centralized authority is merely to perform ministerial acts as an agent at the direction of a principal.

This suggests that centralization of management could possibly be avoided by drafting the bylaws to permit the managing entity to perform only the barest minimum of functions without the necessity of some type of ratification by the members of the apartment owner association. Such a scheme would be extremely impractical if the condominium had more than a few apartment owners, however, and this fact is recognized in the Regulation. See Treas. Reg. § 301.7701-(2)(c)(1) (1960). It is likely that condominiums with more than a few apartment owners would not be able to avoid meeting the centralization of management criterion.

71. Treas. Reg. § 301.7701-(2)(d)(1) (1960) provides that "an organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of or claims against the organization." Generally, members of an unincorporated association are liable as principals on all contracts made by officers or agents acting within the scope of their agency, and the rule in Washington is in accord. See Lumber Mart. Co. v. Buchanan, 69 Wn. 2d 658, 419 P.2d 1002 (1966); Abel v. Firs Bible Missionary Conf., 57 Wn. 2d 853, 360 P.2d 356 (1961); Ginnis v. Southerland, 50 Wn. 2d 557, 313 P.2d 675 (1957).

Washington's condominium statute contains no reference to the contractual liability of the apartment owners on contracts entered into by the managing entity; the common law rule would thus apparently be applicable. The Washington statute does not preclude incorporation of the association, however, and if such were done it would most likely result in limited liability of the members. Wash. Rev. Code § 64.32.240 (1969) does contain a unique provision regarding the tort liability of the apartment owners which in effect limits the individual liabilities of the owners. See the discussion thereof at notes 87-94 and accompanying text, infra. Viewed on the whole, however, it is not likely that the individual members will be deemed to have limited liability unless the association is incorporated.

72. Treas. Reg. § 301.7701-2(e)(1) (1960) states:

[An organization has the corporate characteristics of free transferability of interests if each of its members or those members owning substantially all of the interests in the organization have the power, without the consent of other members, to substitute for themselves in the same organization a person who is not a member of the organization.

There can be no doubt that membership in the association of apartment owners has this characteristic since each owner generally owns a fee interest in his apartment. Wash. Rev. Code § 64.32.030 and § 64.32.120 (1969). Note that by virtue of the definition of
In order for an organization to be taxed as a corporation it is not necessary that all these characteristics be present, but the regulations specify that a majority of them, including associates and an objective to carry on business, must be present before the group will be so taxed.

An analysis of these factors as applied to an ordinary condominium as may exist in Washington suggests that there is a very real possibility that the managing entity of the condominium will be taxed as a corporation. The resulting double taxation of the apartment owners if the association is taxed as a corporation is a factor to be considered by the potential buyer before purchasing an apartment.

C. Real Property Taxes and Assessments

Each apartment and its undivided interest in the common areas and facilities is separately assessed and taxed by each local assessing unit. In theory the total assessed value of a condominium building containing fifty condominium apartments should be the same as that of a similar apartment house with the same number of rental apartments. But as a noted commentator has pointed out,

“apartment owner” in WASH. REV. CODE § 64.32.010(2), a person who owns or possesses an apartment “by way of leasehold or by way of a periodic estate, or in any other manner in which real property may be owned, leased or possessed in this state . . .” can also be an “apartment owner.” The quoted portion in the preceding sentence is not contained in the FHA Model Act.

This conclusion of free transferability is not altered by the presence of a right of first refusal provision in the declaration or bylaws, although the Internal Revenue Service has recognized that the presence of such a provision may have some effect on the transferability of the interest. Treas. Reg. § 301.7701-2(e)(2) (1960) states:

"If each member of an organization can transfer his interest to a person who is not a member of the organization only after having offered such interest to the other members at its fair market value, it will be recognized that a modified form of free transferability of interests exists. (Emphasis added).

73. Treas. Reg. § 301.7701-2(a)(3) (1960): “An unincorporated organization shall not be classified as an association unless such organization has more corporate characteristics than non-corporate characteristics.”


75. One writer has suggested a manner in which the adverse tax effect in the condominium situation may be minimized. He suggests the formation of a corporation, after which each of the apartment owners leases his interest in the common areas to the commonly-owned corporation. The rent to be paid by the corporation is then set at an amount equal to each tenant's pro-rata share of all rent charged by the corporation to any outside tenants. In this manner, the corporation's income would be minimized or eliminated. Anderson, Tax Aspects of Cooperative and Condominium Housing, in N.Y.U. TWENTY-FIFTH ANNUAL INSTITUTE ON FEDERAL TAXATION 79, 97-98 (1967).

76. WASH. REV. CODE § 64.32.190 (1969).

tax assessors are intensely practical human beings, and faced with the insistent demand for ever larger tax base and given the awareness that individual condominium owners may be less able to protect themselves in the clinches than the single large property owner, one should not be surprised if some tax assessors react like intensely practical human beings.

The apartment owner need not be overly concerned with his neighbor's being in default on his property tax or other assessment, however, since tax liens arise only on the individual apartment and its undivided interest in the common areas, and the common areas cannot be divided or partitioned as long as the project remains a condominium under the statute.

V. LIABILITY AND INSURANCE

By his ownership of a condominium apartment and his attendant membership in the association of apartment owners, the purchaser may be exposed to liability stemming from both contractual and tortious activities of the association or its managing entity. Furthermore, he and his fellow apartment owners face the possibility of a large casualty loss if the casualty insurance coverage is not adequate and all or a portion of the condominium is destroyed by fire or other casualty.

A. Contractual Liability

Although there is no implied liability of the members of a non-profit association on contracts of the association, the general rule is that the members are jointly and severally liable as principals on contracts purporting to have been made by, for or in the name of the association, when they have given either their assent or their subsequent ratification thereto. The Washington rule seems to be in accord with this
general rule. It is therefore possible that the apartment owners in a condominium will be jointly and severally liable on the contracts made by the apartment owners association or its managing entity. To minimize the potentially harsh economic effects on an individual owner of this joint and several liability, the purchaser should insist on a clause in the declaration or bylaws making any judgment paid and costs incurred as a result of such liability a common expense, assessable among all the apartment owners in the same manner as other common expenses are assessed. This problem also suggests an appropriate area for legislative action. A statute covering contractual liability should be enacted by the legislature, similar to that which it enacted with respect to tort liability, by which an action can be brought only against the association and each apartment owner is liable only for his pro rata portion of any judgment obtained.

B. Tort Liability

Unlike the situation with respect to contractual liability, the legislature has specifically provided for a limitation to tort liability of condominium apartment owners. The statute states that [a]ctions relating to the common areas and facilities for damages arising out of tortious conduct shall be maintained only against the association of apartment owners and any judgment lien or

83. See Lumber Mart Co. v. Buchanan, 69 Wn. 2d 658, 419 P.2d 1002 (1966); Abel v. Firs Bible & Missionary Conf., 57 Wn. 2d 853, 360 P.2d 356 (1961); Ginnis v. Southerland, 50 Wn. 2d 557, 313 P.2d 675 (1957). But see Wash. Rev. Code §§ 25.04.130 and 25.04.150 (1955) which specify that in the partnership situation liability is joint and several only for wrongful acts or omissions of a partner; all other obligations are joint only.


85. See note 87, infra. The failure of the legislature to enact such a provision with respect to contractual liability was possibly based on a belief that by analogy to the partnership situation, contractual liability of the individual apartment owners would be joint only. See note 83, supra. A provision such as that suggested in the text would be desirable to clarify this question.

86. This discussion relates solely to the apartment owner's liability with respect to injuries incurred in the common areas. His tort liability with respect to injuries taking place within his apartment would be the same as that of any homeowner. See Note, Land Occupier Liability in Washington, 43 Wash. L. Rev. 867 (1968). See also Comment, Liability of Landlord and Tenant to Persons Injured on the Premises, 39 Wash. L. Rev. 345 (1964).

87. Wash. Rev. Code § 64.32.240 (1969). This provision is not found in the FHA Model Act or the statute of any other state except Alaska. Alaska Stat. § 34.07.440 (1966). The text of all the state statutes and of the Model Act can be found in Ferrer and Stecher, supra note 9, at Part Four.
The purpose of this provision is laudatory, for in its absence the apartment owners would most likely be held jointly and severally liable for negligent activities of the management entity or its agents. The actual language chosen may create some problems, however, depending on how broadly the phrases “relating to the common areas” and “arising out of tortious conduct” are interpreted. Consider the example of an apartment owner or family member (or perhaps even a third party in no way associated with the condominium) who causes injury by his tortious conduct in the common areas. A negligence action brought by the injured party would seem to “relate to” the common areas, since the injury was caused by tortious conduct which took place there. Is the injured party’s recourse “only against the association of apartment owners”? Does the actual tortfeasor escape liability entirely by virtue of the statutory provision? Such a result would be patently absurd, but it cannot be denied that such a reading of the provision would be at least grammatically permissible.

It is much more likely that the statutory provision was intended to refer to the normal circumstances in which the owner of a building is liable in tort to someone injured as a result of improper maintenance of common areas, and that the association as a whole, and not the adjacent apartment owner, is to be liable therefor. Even read in this manner, however, the provision still presents some difficulty. What if the injury in question were caused by the negligent act of a single apartment owner acting solely in his own interests, and not on behalf of


89. See note 93 and accompanying text, infra.

90. For a recent discussion of land occupier liability law in Washington, see Note, Land Occupier Liability in Washington, 43 Wash. L. Rev. 867 (1968).
the association as a whole? Are the other apartment owners in the condominium, through the apartment owners association, deemed to be co-insurers for their negligent neighbor? 91

A rational approach to the problem would be to impose liability on the association for tortious injuries incurred in the common areas in a manner analogous to that in which liability is imposed on the owner of an apartment house. 92 Under this approach there would still be a problem with respect to tort liability in limited common areas which are reserved for the use of only certain apartments. 93 Legislative resolution of the problem could be accomplished by providing that liability arising from tortious conduct in such areas be limited to the owners of the apartments who share the use of the limited common area in question. As an alternative, the legislature could add a proviso to the effect that liens or other charges resulting from a judgment against the association arising out of its tortious conduct in a limited common area be assessed against only those apartment owners who have the exclusive use of that limited common area.

Although the position of the apartment owner in Washington with respect to his exposure to tort liability is better than that of his counterpart in practically any other state except Alaska (where it is the same 94), the foregoing discussion indicates that there are still some questions to be resolved before the buyer can accurately assess the extent of his exposure to tort liability as the owner of a condominium apartment.

C. Insurance Coverage

The Washington statute does not make insurance coverage mandatory. It provides that 95

91. See VA. CODE ANN., § 55-79.37(2) (Supp. 1966) which provides that a unit owner shall not be liable with respect to the negligence of another co-owner except when the negligent party is acting on behalf of the association.

92. See W. PROSSER, TORTS 418-19 (3d ed. 1964); F. HARPER & F. JAMES, TORTS § 27.17 (1956). Harper and James state, at 1516, that the owner has a "full duty of reasonable care to make conditions reasonably safe and [this] includes the obligation of care to discover unknown perils, as well as to remedy known ones." See also Comment, Liability of Landlord and Tenant to Persons Injured on Premises, 39 WASH. L. REV. 345, 361-62 (1964).

93. WASH. REV. CODE § 64.32.010(11) (1969) defines "limited common areas and facilities" as those "reserved for the use of certain apartment or apartments to the exclusion of the other apartments."


95. WASH. REV. CODE § 64.32.220 (1969).
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The manager or board of directors, if required by the declaration, bylaws, or by a majority of the apartment owners, or at the request of a mortgagee having a mortgage of record covering an apartment, shall obtain insurance for the property against loss or damage by fire and such other hazards... as shall be required or requested.

The statute makes it clear that the individual apartment owner is not precluded from obtaining insurance on his apartment merely because the managing entity has or has not procured insurance. In light of this rather broad mandate for the managing entity to procure insurance for the condominium on request, the potential buyer will thus want to know the answers to two questions: (1) Is it necessary for the apartment owner to procure insurance for himself in addition to that arranged for by the managing entity? and (2) If so, what types of coverage are necessary?

As a preliminary matter it should be noted that the statute does not make an explicit reference to liability insurance, focusing rather on loss or damage to the condominium property. But the reference to "loss or damage by fire and... other hazards..." is probably meant to refer to the types of losses covered by casualty insurance, and liability coverage has historically been included in the casualty line. In any event, insurance companies are writing broad casualty and liability coverage for condominiums.

The answers to the purchaser's questions regarding insurance coverage will require a rather detailed examination of the provisions

96. Id. Provision for insurance procured by the managing entity shall be without prejudice to the right of each apartment owner to insure his own apartment and/or the personal contents thereof for his benefit. Note that the statute says nothing about the individual apartment owner's right to insure his undivided interest in the common areas and facilities. He should be permitted to do so if he wishes, since he apparently has an insurable interest in them. The overall premiums would probably be less, however, if the association procured a blanket policy covering all owners' interests therein.


98. A condominium policy written by the General Insurance Company (Safeco) covers the association for liability and fire and the individual unit owner for his interest in the building. Coverage for the contents of the individual's unit and his personal liability is handled by use of a tenant's-homeowner's policy, in the same manner as if he were a normal apartment dweller with no financial interest in the building. This information was obtained from Safeco's condominium insurance file, by permission of Mr. Ted Hull of Safeco's Head Office Underwriting Department, in April, 1969.
of the declaration and practices of the particular condominium venture in question. The two problems to minimize or eliminate are gaps in the insurance coverage, which could result in uncompensated-for losses, and overlapping coverage, which would result in a higher overall premium expenditure. It is likely that his prospective lender may also express an interest in these problems, particularly the gap problem, and a commitment by the lender will normally be contingent on the latter's satisfaction that there are no significant gaps in coverage.99

D. Standing of Owner to Sue in Tort

One significant question to which commentators have generally given short shrift is the right of an apartment owner to sue the association or a fellow apartment owner in tort.100 As discussed above101 the Washington statute has a unique provision which states that102

[a]ctions relating to the common areas and facilities for damages arising out of tortious conduct shall be maintained only against the association of apartment owners . . . . (Emphasis added).

This provision is certainly not free from ambiguity,103 and this ambiguity is compounded by the legislature's failure to distinguish between situations in which the plaintiff is an apartment owner and those in which the plaintiff is a stranger to the condominium venture. If the provision is meant to apply in both situations, its application would seem to produce anomalous results. An apartment owner injured by the tortious act of a fellow apartment owner (or even a non-owner) would be precluded from suing the tortfeasor, even if the tortfeasor were acting solely in his own behalf. In this situation, the owner's only recourse, if any, would be against the association.

The general common law rule is that members of an unincorporated association are engaged in a joint enterprise, and the negligence of each member in the prosecution of the enterprise is imputable to the


100. The most complete discussion found in the current literature is in Rohan, Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance, 32 LAW AND CONTEMP. PROB. 305, 312-14 (1967).

101. See text accompanying notes 86-94, supra.

102. WASH. REV. CODE § 64.32.240 (1969).

103. See the text accompanying note 88, supra.
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other members. Therefore, a member who has suffered an injury through the tortious conduct of a fellow member may not be able to recover from the association for such injury.\textsuperscript{104} Since the rule in Washington is apparently in accord with the common law rule,\textsuperscript{105} the question becomes whether or not the quoted portion of the statute grants the apartment owner a right of action against the apartment owners' association. It is submitted that it does not. Such a grant is not clear on the face of the statute, and statutes in derogation of the common law are to be strictly construed.\textsuperscript{106} Furthermore, the statute goes on to provide that\textsuperscript{107}

any judgment lien or other charge resulting (from an action against the association of apartment owners) shall be deemed a common expense, which judgment lien or other charge shall be removed from any apartment and its percentage of undivided interest in the common areas and facilities upon payment by the respective owner of his proportionate share thereof based on the percentage of undivided interest owned by such apartment owner.

This language quite clearly suggests that the statute is directed to the situation in which a third person has sued the association for damages, and its purpose is undoubtedly to immunize apartment owners from all but their fractional share of any tort judgment rendered against the association.\textsuperscript{108}

Inability to sue the association or a fellow owner would seriously diminish the desirability of owning a condominium apartment. However, it is doubtful that the Washington courts, when confronted with a case of an apartment owner injured directly by the tortious conduct of a fellow apartment owner (or a third person) in the common areas, would hold the injured owner to be precluded from bringing the suit under the above statute since to do so would be a radical departure from common law and common sense and it also would not be required by language of the statute, which is ambiguous. However, the apartment

\textsuperscript{105} See Carr v. Northern Pac. Benefit Ass'n, 128 Wash. 40, 221 P. 979 (1924), where plaintiff brought an action based on an allegation that defendant had negligently selected incompetent physicians and surgeons as employees of its hospital. No recovery was allowed since plaintiff himself was a member of the defendant association.
\textsuperscript{106} In re Tyler's Estate, 140 Wash. 679, 250 P. 456 (1926).
\textsuperscript{107} Wash. Rev. Code § 64.32.240 (1969).
\textsuperscript{108} See ROHAN AND RESKIN, supra note 12, at § 10A.
owner's right to sue the association for injuries resulting from improperly maintained common areas is more doubtful. As mentioned above, the rule in Washington is apparently that the association would be immune, and the section of the condominium statute under discussion is apparently not directed to that question. About the only clear conclusion one can draw from a careful consideration of the statute is that it is in serious need of clarification by the legislature.109

CONCLUSION

Real property law has characteristically lagged behind other branches of the law in responding to the changing demands and requirements of a rapidly evolving society. Although it is not a recent innovation, the condominium concept has been given new life by the passage of state enabling legislation, such as the Horizontal Property Regimes Act in Washington, and appears to be a promising response to a number of current housing problems. One of the principal attributes of the condominium concept is its versatility. It appears to be the most promising method by which lower-income families may experience the advantages of home ownership. It also affords advantages, both financial and otherwise, to middle- and upper-income families.

The foregoing discussion has focussed on potential problem areas in the present statutory scheme in Washington, although the advantages to the owner have also been suggested, with the aim of indicating to the legislature, drafters of condominium documents and current and prospective condominium owners some potential hazards which should either be remedied through public action or at the minimum protected against through private legal ordering.

Jerry W. Spoonamoore*

109. The common law immunity of the association from suit by a member is apparently based on an unarticulated notion that the member has a significant degree of control over the activities of the association and thereby over the physical condition of the premises. In a multi-apartment condominium this control is probably more illusory than real, and that basis for holding the association immune from suit by a member-apartment owner does not appear to be present. The legislature should remedy this situation by explicitly providing for suits against the association by the individual apartment owners. Note, however, that in the absence of some type of insurance or bond for the association this might have the anomalous result of having the injured apartment owner contribute to his own recovery.

### CONDOMINIUM DEVELOPMENTS IN WASHINGTON BY COUNTY

(As of April, 1969)

<table>
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<tr>
<th>County</th>
<th>Name of Condominium</th>
<th>Type</th>
<th>No. of Units</th>
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*This appendix was prepared as part of the initial research for this comment. It is not intended as a comprehensive listing of all condominiums in Washington, but rather as an aid to counsel in securing background for the drafting of instruments relating to condominiums.*
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