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# CONDOMINIUM LENDING TRAP

MELVYN MITZNER\*

## INTRODUCTION

A recent amendment to Article 9-B of the New York Real Property Law<sup>1</sup> allows a condominium's board of managers to borrow money for capital purposes,<sup>2</sup> subject to the approval of a majority in common interest of the unit owners.<sup>3</sup> Since the New York legislature was concerned that sponsors rather than subsequent boards of managers would be able to use this statute as a financing tool, a provision was inserted that prohibited financing earlier than the fifth anniversary of the first conveyance of a unit.<sup>4</sup> The sum and substance of the statute is that the board of managers may assign rights in future income and common charges to the lender and create a security interest in those proceeds.<sup>5</sup> If there are other assets, such as real estate, the real es-

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<sup>1</sup> Condominium Act of Aug. 26, 1997, ch. 498, 1997 N.Y. Laws 1457 (codified at N.Y. REAL PROP. LAW § 339-jj (McKinney Supp. 1998)).

<sup>2</sup> See *id.* § 339-jj(1) (McKinney Supp. 1998) ("To the extent authorized by the declaration of the by-laws, the board of managers, on behalf of the unit owners, may incur debt . . . for any of the purposes enumerated in paragraph (b) of subdivision two of section three hundred thirty-nine-v of this article . . ."); see also *id.* § 339-v(2)(b) (stating that the by-laws may include "[p]rovisions governing . . . collection . . . of funds . . . for major and minor maintenance, repairs, additions, improvements, replacements, working capital, bad debts and unpaid common expenses, depreciation, obsolescence and similar purposes").

<sup>3</sup> See *id.* § 339-jj(1)(b) (providing that "incurrence of such debt shall require the consent of a majority in common interest of the unit owners").

<sup>4</sup> See *id.* § 339-jj(1)(a) (stating that "such debt is incurred no earlier than the fifth anniversary of the first conveyance of a unit"); Senate's Memorandum in Support of ch. 498, N.Y. Laws (Aug. 26, 1997), reprinted in 1997 N.Y. Laws 2471, 2472 (stating that section 339-jj was constructed to permit funding for needed capital repairs, especially to older buildings, but protecting unit owners from "improvident borrowing").

<sup>5</sup> See N.Y. REAL PROP. LAW § 339-jj(2) (providing that "the board of managers, on behalf of the unit owners, may (a) assign the rights in and to receive future income and common charges, (b) create a security interest in, assign, pledge, mort-

tate may be mortgaged.<sup>6</sup> The board of managers is charged with a trustee's obligation as to the trust funds coming into its hands to pay such debt before paying any other obligation, except that of mechanics lienors, whose rights were apparently not disturbed by the amendment.<sup>7</sup> The lender also has the power to increase the common charges to pay the debt, including the power to file a common charge lien against each non-paying unit owner, and has the right to foreclose those liens.<sup>8</sup> The amendment to the statute, to which this author contributed,<sup>9</sup> does not authorize the board of managers to lien the common elements.<sup>10</sup>

The Condominium Act<sup>11</sup> has always contained a provision allowing condominiums to create liens on the common elements.<sup>12</sup> This section of the statute is expressed in the negative and states as follows: "Subsequent to recording the declaration and while the property remains subject to this article, no lien of any nature shall thereafter arise or be created against the common elements, except with the unanimous consent of the unit owners."<sup>13</sup> The statute also provides that "[d]uring such period, liens may arise or be created only against the several units and their respective common interests."<sup>14</sup>

The following is a discussion of the problems that may arise from section 339-l of the New York Real Property Law and section 339-jj, the recent amendment. There are statutory pitfalls that may trap lenders, purchasers, or mortgagees of a condominium unit. Fortunately, as suggested by this Article, there are

gage or otherwise encumber funds or other real or personal property that it holds")

<sup>6</sup> See *id.* § 339-jj(2)(b).

<sup>7</sup> See *id.* § 339-jj(2)(c).

<sup>8</sup> See *id.* § 339-jj(2)(d).

<sup>9</sup> The members of the committee in no particular order were Matthew J. Leeds, Esq., Joel E. Miller, Esq., Perry Balagur, Esq., Stuart M. Saft, Esq., Richard A. Nardi, Esq., Richard Siegler, Esq., Daniel L. Krimmer, Esq., Alan Reis, Esq. and Melvyn Mitzner, Esq.

<sup>10</sup> See N.Y. REAL PROP. LAW § 339-jj(2)(d). The statute provides:

[The] board of managers . . . may . . . agree that at the lender's direction it will increase common charges to the extent necessary to pay any amount when due under any of the provisions of the agreements under which the debt was incurred. The preceding sentence shall not be construed to authorize the board of managers to create a lien on the common elements.

*Id.*

<sup>11</sup> See N.Y. REAL PROP. LAW §§ 339-d to -jj (McKinney 1989 & Supp. 1998).

<sup>12</sup> See N.Y. REAL PROP. LAW § 339-l(1) (McKinney 1989).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

ways to avoid these dangers.

#### I. THE COMMON ELEMENTS MAY BE USED FOR FINANCING

One potential problem created by the statute is a situation in which the purchaser is not made aware that the common elements may be used for financing. For example, a sponsor may use an offering plan to obtain authorization for a mortgage. In the offering plan example that follows, a sponsor has created an ongoing source of income by mortgaging the recreation areas. In this case, the sponsor can claim that the mortgage has been authorized by "all of the unit owners" because consent was given in the original offering plan and unit deed.

The language, redacted to eliminate identifying elements, set forth in the introduction portion of the offering plan states as follows:

The Condominium shall give to the Sponsor a first Mortgage on the property comprising the pool facilities in the sum of \_\_\_\_\_. Said Mortgage shall bear interest at the rate of \_\_\_ per annum, shall be self-liquidating and shall be paid in equal monthly installments of principal and interest. Completion of the recreational facilities is anticipated by \_\_\_\_\_ at which time said Mortgage shall be executed and recorded. The debt service will commence immediately following the date of the execution of such Mortgage. The Mortgage will be for a period of thirty (30) years with payments based upon a thirty (30) year payout commencing on the date of such Mortgage. Each monthly payment shall be in the amount of \_\_\_\_\_. The Mortgage shall be on the standard NYBTU form, with additional riders thereto as contained in Part II of the offering. The Sponsor will pay any mortgage tax and any other charges incurred in recording the Mortgage. The debt service for such Mortgage is to be paid by the Unit Owners as a Condominium Expense. The interest on such Mortgage is not tax deductible by Unit Owners.

The deed to each Unit Owner contains the following:

SUBJECT TO those additional items set forth on "Schedule A" annexed hereto and made a part hereof.

Schedule A contains the following provision:

Mortgage made by \_\_\_\_\_ to \_\_\_\_\_ in the original principal amount of \_\_\_\_\_ dated \_\_\_\_\_, and recorded in the Clerk's office on

\_\_\_\_\_ in Liber (Reel) \_\_\_\_\_ Page \_\_\_\_\_ (affects common areas only). If the foregoing Mortgage has not been made or recorded prior to the conveyance of title to the Unit, Grantee, nevertheless, shall take title subject to such Mortgage if, as and when made and/or recorded.

There is no provision in the special risk portion of the offering plan that advises the purchaser of the proposed financing of the recreation portion of the common elements. Thus, the purchaser may provide consent to the financing unknowingly.

## II. CONSENTS REQUIRED TO MAKE A VALID MORTGAGE

Another problem with section 339-1 is its vagueness. It is unclear what type of consent is necessary and from whom the consent must be obtained in order to make a valid mortgage. The statute states that the mortgage must be made with the "unanimous consent of the unit owners."<sup>15</sup> When a sponsor makes a mortgage to the sponsor affiliate, he is still the owner of all of the units. The question is, therefore, whether a valid condominium is created when all the units are still owned by the sponsor, or whether at least one unit must be sold before a valid condominium can exist. Another question is whether a sale of the first unit is complete when the first unit is contracted for and the sponsor no longer has the ability to terminate any contract of sale, due to the fact that all conditions on both the lender and borrower have been satisfied under the offering plan or the loan documents.

One can also argue that the mortgaging of recreation facilities has the effect of creating a valid condominium—that the mortgage made prior to the conveyance of the first unit is the act that creates the condominium. An examination of the mortgaging documents is necessary to determine whether this would be effective against a blanket mortgagee who did not consent to the mortgage of the recreational portion of the common elements. Usually, a blanket mortgage contains provisions that the mortgagee will have to subordinate to a declaration of condominium when certain criteria have been reached, such as the sale of two-thirds of the units pursuant to contracts. The mortgaging of the common elements usually constitutes a default under the blanket mortgage and triggers an acceleration of the debt under the

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<sup>15</sup> *Id.*

blanket note and blanket mortgage. A sponsor does risk such a default in a successfully sold condominium. Therefore, the consent must be given while the sponsor still owns all the units. The mortgage is later recorded or financed only after the original blanket mortgage has been released against all of the units; recording the mortgage too early causes a blanket mortgage acceleration and a foreclosure against the remaining units and their common elements. Thus, sponsor strategy is a key factor.

In a case where the blanket mortgage does foreclose late in the sale and closing schedule, the blanket mortgagee would at best have title to the untransferred units subject to the mortgage on the common elements. The blanket mortgagee surrenders its lien on the common elements with a subordination of the blanket mortgage to the declaration of condominium. The sponsor can defeat the easy subsequent transfer of the units due to the mortgage on the recreation portion of the common elements. In fact, even though the lender, its nominee, or purchasers of the condominium units control the units through the board of managers, the lender is obligated to pay the sponsor mortgagee on the mortgage note or risk losing the common elements on a foreclosure, and it is also obligated to pay off the sponsor mortgage if such a right exists under the sponsor's note or mortgage.

If the sponsor commences foreclosure there is a right under statute to pay off the mortgage prior to judicial sale.<sup>16</sup> In such a case, the foreclosing mortgagee incurs additional expense in making its loan. It is clear that in order for a blanket mortgagee to prevent this type of dilemma, strict approval on the content of the offering plan, declaration and by-laws is necessary.<sup>17</sup> A blan-

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<sup>16</sup> See N.Y. REAL PROP. ACTS. LAW § 1341 (McKinney 1979). This section states: Where an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due, and another portion of either is to become due, and the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, the court shall:

1. Dismiss the complaint without costs against plaintiff, if the payment is made before judgment directing sale; or
2. Stay all proceedings upon judgment, if the payment is made after judgment directing sale and before sale; but, upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due.

*Id.*

<sup>17</sup> By forgoing strict approval of the offering plan, declaration, and by-laws, a blanket mortgagee would allow a sponsor to lien the common elements. The blanket

ket mortgagee should require language that no changes are permitted to an offering plan, declaration of condominium or by-laws without its consent.

### III. THE COMMON ELEMENTS: REAL PROPERTY OR PERSONALTY?

Another gray area created by the statute exists with respect to the definition of common elements. It is unclear whether common elements may be viewed as real or personal property for financing purposes. That is, whether a mortgage lien on all or a portion of the common elements is a lien on real or personal property. It is clear that the common elements fall under the statute's definition of property.<sup>18</sup> However, it is unclear whether they are real, personal, or mixed. In contrast to its vague treatment of the common elements, the statute clearly defines a unit as real property.<sup>19</sup> However, another section dealing with the definition of common elements states that the land can be a common element.<sup>20</sup> Under the offering plan used as an illustration above, both the land and the recreation area qualify as common elements. Here again the condominium documents must be examined to determine if any of the common elements were intended to be real estate.

### IV. INTEREST RATES

Can a sponsor mortgage the recreation package with an interest rate exceeding the rate permitted by the civil usury statutes? A leading case<sup>21</sup> held that a purchase money mortgage is neither a loan nor a forbearance<sup>22</sup> and is therefore not subject to

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mortgagee would then risk losing his priority to the common elements in the lending hierarchy.

<sup>18</sup> See N.Y. REAL PROP. LAW § 339-e(11) (McKinney 1989). It states as follows: "Property" means and includes the land, the building and all other improvements thereon, (i) owned in fee simple absolute, . . . and all easements, rights and appurtenances belonging thereto, and all other property, personal or mixed, intended for use in connection therewith, which have been or are intended to be submitted to the provisions of this article.

*Id.*

<sup>19</sup> *Id.* § 339-g ("Each unit, together with its common interest, shall for all purposes constitute real property.")

<sup>20</sup> *Id.* § 339-e(3) (" 'Common elements,' unless otherwise provided in the declaration, means and includes: (a) The land on which the building is located . . .").

<sup>21</sup> *Mandelino v. Fribourg*, 242 N.E.2d 823 (N.Y. 1968).

<sup>22</sup> See *id.* at 824.

the usury statute.<sup>23</sup> In another case, the sponsors formed a corporation to administer a cooperative housing conversion plan that would finance tenants' purchases of their apartments.<sup>24</sup> The court held that such financing was not a loan subject to the prohibition and forfeiture provisions of usury statutes.<sup>25</sup> The court stated that "[s]ince it is an intention to sell property rather than to lend money that governs the characterization of any given transaction,"<sup>26</sup> a sponsor financing above the legal civil rate will not be usurious. The sum and substance of the determination is, therefore, whether the transaction is an extension of credit for a purchase or a loan. An extension of credit differs from a loan in that its focus is the sale, not the transfer, of funds. In the sample offering plan used as an example in this Article, it is clear that the sponsor is selling units—and the definition of "units" includes a percentage of the common elements—but not the common elements themselves. Whether this mortgage is exempt from the usury statutes is unclear because the sponsor is not selling the common elements directly but, rather, incidentally to the sale of the units. Only the courts can determine what rights will arise under such circumstances.

## V. RIGHTS OF A COURT-APPOINTED RECEIVER

Another area of confusion involves the rights of a court-appointed receiver in the foreclosure of a mortgage on the common elements. Assuming the mortgage provides for the ap-

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<sup>23</sup> See *id.* at 826 (citing *McAnsh v. Blauner*, 226 N.Y.S. 379, 381 (App. Div. 1928)). However, "[a]n instrument which appears on its face to be a purchase-money mortgage may in truth be a cloak for an actual loan at excessive interest and in this situation it may be deemed usurious." *Id.*

<sup>24</sup> See *DeSimon v. Ogden Assocs.*, 454 N.Y.S.2d 721 (App. Div. 1982). Under the plan the sponsor was to establish a fund of \$85,000, from which tenants who had twice been refused bank financing could draw funds to purchase their apartments. See *id.* at 722-23. The agreement prescribed an interest rate and origination fee equal to that charged by Citibank on its cooperative housing loans, determined on the date of closing. See *id.* at 723. The tenants in *DeSimon* sought a declaration that the loans were usurious, alleging "that the interest rate and origination fee were each a point higher than Citibank[s]." *Id.* The resulting interest rate was 15%. See *id.* Further, the tenants attempted to argue that the financing was not a purchase money loan "because the seller of plaintiffs' shares was the corporation, not the sponsor." *Id.* The court rejected this argument, saying it "ignore[d] the reality of the parties' transaction by deleting from the flow of consideration . . . the sponsor's consideration—its real property—conveyed to the corporation." *Id.* at 728.

<sup>25</sup> *Id.* at 728 ("Sponsor financing simply does not constitute money lending.")

<sup>26</sup> *Id.* at 726.

pointment of a receiver, and a court appoints one, what would such a receiver do? Can the receiver stand in place of the board of managers and collect the common charge for the sponsor-mortgagee or for any other mortgagee of the common elements? If the declaration of condominium or by-laws do not expressly allow for the receiver to take the common charges and pay the sponsor mortgage first, it appears that no court has the authority to appoint a receiver.<sup>27</sup> In fact, one statute makes it clear that mechanics lienors who perform work for the common elements are entitled to the first monies coming into the possession of the board of managers.<sup>28</sup> A similar provision apparently has been drafted into the condominium finance bill<sup>29</sup> which would allow the board of managers to assign and create a security interest, subject to section 339-1(2), on the common charges for borrowing by the board of managers. The statute makes it clear that:

[A]ll common charges received and to be received by [the board of managers] and the right to receive such funds, shall consti-

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<sup>27</sup> See N.Y. REAL PROP. LAW § 339-aa (McKinney Supp. 1998). It states that in foreclosure of a lien for common charges:

[T]he unit owner shall be required to pay a reasonable rental for the unit for any period prior to sale pursuant to judgment of foreclosure and sale, *if so provided in the by-laws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same.*

*Id.* (emphasis added); see also *Societe Generale v. Charles & Co. Acquisition, Inc.*, 597 N.Y.S.2d 1004, 1009 (Sup. Ct. 1993) (refusing to appoint a receiver on the grounds that "the language of the statute *and by-laws* only authorize appointment of a receiver to collect rent from the 'unit owner' " and here "there [were] neither rents nor profits to be collected as the unit [was] vacant") (emphasis added).

<sup>28</sup> See N.Y. REAL PROP. LAW § 339-1(2) (McKinney 1989). The statute mandates: Labor performed on or materials furnished to a unit shall not be the basis for the filing of a lien pursuant to article two of the lien law against the unit of any unit owner not expressly consenting to or requesting the same, except in the case of emergency repairs. No labor performed on or materials furnished to the common elements shall be the basis for a lien thereon, but all common charges received and to be received by the board of managers, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor or materials performed or furnished at the express request or with the consent of the manager, managing agent or board of managers, and the same shall be expended first for such purpose before expending any part of the same for any other purpose.

*Id.*

<sup>29</sup> See N.Y. REAL PROP. LAW § 339-jj (McKinney Supp. 1998) ("In connection with a debt incurred by it, the board of managers, may (a) assign the rights in . . . common charges, (b) create a security interest . . . , subject to the provisions of subdivision two of section three hundred thirty-nine-1 of this article.").

tute trust funds for the purpose of paying such debt and the same shall be expended for such purpose before expending any part of the same for any other purpose.<sup>30</sup>

It is clear that a receiver appointed pursuant to a sponsor mortgage or a mortgage of the common elements stands subordinate to a receiver or lender exercising its rights under the financing bill. However, if the declaration or by-laws contain provisions allowing a receiver to be appointed for a sponsor mortgaging the common elements, it is unclear who will have priority in a later common charge financing pursuant to the condominium finance bill. It seems the net effect will be to discourage financing by lenders on the common charges where such provisions are contained in the declarations.

## VI. OWNER CONSENT AND SPONSOR MORTGAGES

The issue of owner consent is not a clear one. One case that discussed the statute's consent requirement stated in dictum that the unanimous consent of unit owners is not "evident nor may it be implied."<sup>31</sup> While this case, and other reported cases, deal with mechanics liens, the courts have yet to rule on the issue of owner consent regarding sponsor mortgages. However in light of the aforementioned rulings, it seems likely that the courts will also require full consent of the purchasing unit owners to validate sponsor mortgages.

As an illustration, consider a mortgage that is recorded against the recreation area, described by metes and bounds. There is a mortgagor default—the board of managers refuses or is unable to pay the sponsor-affiliate—and the mortgagee is the sole bidder at the foreclosure sale. When the mortgagee purchases the recreation package, it ceases to be part of the common elements.<sup>32</sup> Since it is no longer a part of the common elements,

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<sup>30</sup> *Id.* § 339-ij(2)(c).

<sup>31</sup> *Diamond Architecturals, Inc. v. EFCO Corp.*, 578 N.Y.S.2d 553, 554 (App. Div. 1992) (discussing a lien filed by a subcontractor who imposed a blanket lien on an entire building). The court stated that "Section 339-1(1) prohibits creation of a lien against the common elements of the condominium subsequent to the recording of the condominium declaration without the unanimous consent of the unit owners." *Id.*

<sup>32</sup> *Cf. In re M.M.E. Power Enters., Inc.*, 613 N.Y.S.2d 266, 267 (App. Div. 1994) (affirming lower court's cancellation of the liens on the grounds that the property description contained therein was inadequate, but stating that the liens would have been invalid even with an adequate description because they were executed without the unanimous consent of the homeowners' association members); see also *In re At-*

the recreation package could theoretically be separately added to the tax rolls.<sup>33</sup> However, in most municipalities this would violate subdivision laws.<sup>34</sup> It would also require consent from various municipal zoning boards and taxing authorities.<sup>35</sup> A local municipal corporation counsel, or town or village board, could commence an action to set aside a conveyance from a referee in a foreclosure of a mortgage on the common elements to the purchaser of a portion of the common elements at a foreclosure sale.<sup>36</sup>

Finally, anyone who purchases at a foreclosure sale purchases subject to the provisions of the declaration of condominium, which usually affords rights and privileges to the unit owners in the use of the recreation area.<sup>37</sup> However, the declaration need not mention the payment of fees.<sup>38</sup> If it does not, common charges might not be appropriated or collected for the payment of the recreation charge, since the property is no longer a com-

las Tile & Marble Works, Inc., 595 N.Y.S.2d 10, 10-11 (App. Div. 1993) (affirming lower court's vacatur of lien for inadequate property description and failure to obtain unanimous consent of unit owners); *Westage Towers Assocs. v. ABM Air Conditioning & Refrigeration, Inc.*, 590 N.Y.S.2d 118, 118 (App. Div. 1992) (holding that "a 'blanket lien' . . . is not valid as against the individual units").

<sup>33</sup> That is, because the mortgagee now owns the recreation package in full, the unit owners are no longer tenants in common of the recreation package.

<sup>34</sup> See N.Y. REAL PROP. LAW § 339-i(3) (McKinney 1989) ("The common elements shall remain undivided and no right shall exist to partition or divide any thereof . . .").

<sup>35</sup> N.Y. GEN. CITY LAW § 34(1)(a) (McKinney Supp. 1998) ("No plat of a subdivision of land showing lots, blocks or sites shall be filed or recorded in the office of the county clerk or register until it has been approved by a planning board which has been empowered to approve such plats."); see also N.Y. TOWN LAW § 268(2) (McKinney Supp. 1998) (empowering "the proper local authorities of the town [to] institute any appropriate action or proceedings to prevent" an unlawful subdivision); N.Y. VILLAGE LAW § 7-714 (McKinney 1996) (similarly empowering "the proper local authorities of the village" to institute proceedings to prevent unlawful erection or construction).

<sup>36</sup> See N.Y. REAL PROP. LAW § 339-n(5) (McKinney 1989) ("The declaration shall contain . . . [a] description of the common elements and a statement of the common interest of each unit owner.").

<sup>37</sup> See *id.* § 339-n (setting forth the required elements of a declaration of condominium).

<sup>38</sup> Section 339-n sets forth all of the required elements of a declaration of condominium. *Id.* However, there is no express mention of the payment of fees. See *id.* Moreover, section 339-n(8) states that "any further details in connection with the property which the person or persons executing the declaration may deem desirable to set forth" may be included. *Id.* § 339-n(8). Thus, it appears that although the payment of fees may be mentioned in a declaration of condominium, it is not mandatory.

mon element. A lender or purchaser of a recreation area at a foreclosure sale must be very careful in order to establish a money stream from the recreation package. The declaration may also address the use of recreation areas by persons other than the unit owners. The lender or purchaser must also be mindful of such provisions. The Attorney General's office can only require notice of risk for the protection of purchasers and their lenders.

#### VII. EFFECT ON THE INDIVIDUAL UNITS

What about the lenders on the various units? The recreation area mortgage or other common element mortgage is *not* a lien on the unit or its common interest. Therefore, if a unit lender forecloses its mortgage, it does not foreclose on the recreation area or common element mortgage. The effect on such a unit lender would only be in the evaluation of the value of the unit being mortgaged. Certainly a unit without an interest in a recreation area would be worth substantially less than the same unit with such an interest. The possibility of loss of a recreation area may have an adverse effect on how a lender considers the value of a unit for making mortgages. Where there is no substantial equity down payment paid by a unit purchaser and the unit lender is loaning a substantial portion of the unit value or purchase price, the value for mortgaging purposes may be lowered by the fear of loss of the recreation area.

A lender on a recreation area or other portion of the common elements must also be concerned with the following: Will the consent of a sponsor who owns all of the units bind subsequent unit owners to the mortgage? In other words, does the consent of a sponsor who owns all the units constitute the unanimous consent as required by the statute? In foreclosing the mortgage, do the condominium documents afford a money stream even though the property is no longer a common element of the condominium? Does the board of managers of the condominium or unit owners of the condominium have to pay for the use of the recreation area or other common elements? Is it obligatory or permissive? If a foreclosure takes place, can the recreation package stand by itself? Does the recreation area have access to a public street, or are there easements for utilities, either through the condominium grounds or to a public street?

## VIII. CONCLUSION

The provisions of the statute that allow for a separate mortgage on either all or part of the condominium common elements create myriad problems and conflicts. The mortgagee of a portion of the common elements, a purchaser of either a condominium unit or a portion of the common elements at a foreclosure sale, or a blanket mortgagee loaning money to purchase or build a condominium must be mindful of the rights reserved in the condominium documents as to the mortgaging of all or a portion of the common elements.

One solution would be to eliminate the mortgaging provisions of the section 339-*l* regarding the unit owners' consent. Other than the practice mentioned herein, the section is now unnecessary since the passage of section 339-*jj*, the condominium financing law.