

Phasing Condominiums

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PHASING CONDOMINIUMS

The condominium concept, simply stated, permits a purchaser to acquire his residence in fee simple and, in addition, allows him to acquire the right to use the common facilities of the development, e.g., pool, golf course, recreational center, etc. Although the owner receives the right to exclusive possession of his unit, certain customary ownership rights, such as lease and resale, are usually limited by the offering plan. The cost of the development's operation is shared by the individual owners in proportion to their respective interests in the common facilities. This proportionate interest usually must be established upon the filing of the condominium declaration.¹

Recently, there has been a phenomenal growth in "low-rise" (usually townhouse)² developments designed to be built in successive sections.³ As each building or row of buildings is completed, it is sold. Additional lands are held for future development if sales records indicate potential profits. This marketing plan offers an earlier return on income than that available from apartment house investments, which seldom yield rental income until the entire structure is completed.

METHODS OF PHASING

In order to maximize their investments — building neither fewer nor more units than they can sell — developers have sought to apply marketing concepts proven successful in non-condominium contexts to both high- and low-rise condominiums. These entrepreneurs wish to file declarations in which both the number and size of units will be contingent on the demand created by the first section.⁴ Detached single-family units, row-houses, and multi-structure high-rise developments are all suggested as appropriate models for such "phasing." The objective of "phasing" is to provide the developer with an option to expand his original condominium, if sales warrant, instead of building multiple and adjacent, but legally separate, condominiums.⁵

¹ See generally Schlitt, *Condominiums*, 147 N.Y.L.J. 2 (1962). For statutory definitions see CAL. CIV. CODE § 783 (West Supp. 1974); FLA. STAT. ANN. §§ 711.03(7)-(9) (1969).

² The term "townhouse" refers to the construction of low-rise, attached dwellings, often referred to as "row-houses." This term precludes the concept of high-rise multi-unit developments.

³ I P. ROHAN & M. RESKIN, *CONDOMINIUM LAW AND PRACTICE* § 16.03[2] (1973) [hereinafter cited as ROHAN & RESKIN].

⁴ This method has been sanctioned in New York and other jurisdictions. See I ROHAN & RESKIN § 16.03[2], at 16-14 & n.53.

⁵ Another description of "phasing" is the "expanding condominium concept." This is an "arrangement whereby the developer . . . will begin his condominium development with one or two buildings occupying only a portion of the total tract to be used ulti-

A typical phasing procedure is to prepare a declaration covering only those buildings that are to be constructed in the initial stage. Subsequently, if the developer believes further marketing is advisable, a new declaration will be prepared for the new series of units. However, the problem confronting the developer is his ability to develop a condominium in separate stages and make it both legally detailed and structurally flexible. If he waits to see how each stage sells before constructing the next, is it possible to meet the requirement of filing a declaration which portrays the finished complex, enumerates the units to be built, and states what the undivided interests will be?⁶

Phasing plans will not be feasible until developers are allowed to convey units in the original part of the complex before additional units are built or even put in final design. Such flexibility is seriously obstructed by existing condominium legislation.⁷ Enabling statutes provide that detailed plans and descriptions must be filed, including the specific size and number of units in the condominium. Declarations and bylaws must specify each unit's undivided fractional interest for voting and other ownership rights.⁸ Since ownership interests are usually permanent, establishing them becomes virtually impossible unless the final size of the condominium and the total number of units are known at the time of filing.

The Problem of Indeterminate Interest

When interests remain indeterminate after the initial sales and the cost of each unit is fixed according to its fair market value, prob-

mately in the condominium development." Growold, *Trends in Condominiums*, 46 TITLE NEWS 11, 13-14 (1967).

⁶ A problem related to the construction of the common facilities is that developers now tend to build these facilities fragmentally. The recreational areas are usually dictated by the size of the planned complex and in earlier condominiums such facilities were usually built first. Developers now are attempting to wait until the success of the complex is assured before constructing these areas.

⁷ Some states preclude conveyance of units until all are constructed. See, e.g., FLA. STAT. ANN. § 711.09(1)(e) (Supp. 1969); N.Y. REAL PROP. LAW § 339-p (McKinney 1968). In other states, no unit may be conveyed until final, detailed building plans have been filed for all units. See, e.g., CAL. CIV. CODE § 1351 (West Supp. 1974) (condominium plan consists of a survey map and floor plans identifying each unit) and CAL. BUS. & PROF. CODE § 11535(d) (West Supp. 1974) ("[a] parcel map . . . shall be filed [in the county] in which the land is located prior to sale, . . . Conveyances may be made of parcels shown on the map by number or other such designation."); COL. REV. STAT. ANN. § 118-15-5(1) (1963); DEL. CODE ANN. tit. 25, § 2220 (Supp. 1968); HAWAII REV. STAT. tit. 28, § 514-13 (1969).

⁸ The typical condominium enabling act is expressed in the following language: The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the Declaration shall have a permanent character and shall not be altered without the consent of all of the apartment owners expressed in an amended Declaration duly recorded.

FEDERAL HOUSING ADMINISTRATION, MODEL STATUTE FOR THE CREATION OF APARTMENT OWNERSHIP § 6(b), reprinted in 1A ROHAN & RESKIN App. B-3, at app-27.

lems necessarily arise. One of the purposes of phasing is to allow a developer to change the price of unsold units. Such a change, however, might contradict the formula used to determine the units' undivided interests in the project.⁹

Statutory requirements are designed to inform unit buyers of the size of the development and to offer them assurance that the complex will be completed.¹⁰ These statutes are not unduly harsh when the development consists of one building that must be constructed from one set of plans. However, in condominium designs of detached one-family houses, the statute imposes almost impossible requirements.

A developer simply cannot prepare final plans in advance for all units where they will depend largely on each individual purchaser's desires and specifications. The design and size of future units are not limited by those already sold and they may even differ radically. . . . [T]he developer may not even have decided upon the number of units to be included in the development, preferring to postpone this decision until he is able to measure the market reaction to his homes.¹¹

This argument is less persuasive, however, when applied to row-house or multi-structure apartment condominiums.

In 1965, the Association of the Bar of the City of New York issued a report disapproving a proposed amendment to section 339-i, subdivision 1, of the New York Real Property Law, that would simplify the phasing process. The section currently provides that the common interest may be in the proportion "that the fair value of the unit . . . bears to the . . . aggregate fair value of all the units . . ."¹² The amendment would have added

⁹ Slight rises of about 10-20% should not be so viewed. "To fully illustrate such a project [a condominium project that is to be phased] it would be necessary to show the largest possible development at the outset, and thereafter amend the papers to indicate which unsold (and perhaps unbuilt) areas were being withdrawn from the plan." ROHAN & RESKIN § 16.03(2), at 16-14. Alternatively, the developer could describe the first section only and amend the papers on subsequent addition of sections.

¹⁰ Statutes often do not require proof that common facilities in the condominium will be completed. See, e.g., N.Y. REAL PROP. LAW § 330-p (McKinney 1968), which provides that "there shall be filed . . . a set of floor plans . . . showing the layout, locations and approximate dimension of the units. . . ." (emphasis added). It may be argued that statutes should afford similar protection to unit owners with respect to common facilities as with respect to the units themselves.

¹¹ Schreiber, *The Lateral Housing Development: Condominium or Home Owner's Association*, 117 U. PA. L. REV. 1104, 1114 (1969) [hereinafter cited as Schreiber]. A possible solution to a developer of single, one-family units may be the use of a home owner's association. This may relieve the necessity of having to complete all the homes or file a detailed plan of the complex. For a further analysis and comparison of a condominium development and home owners association, see *id.*

¹² N.Y. REAL PROP. LAW § 339-i(1) (McKinney 1968), as amended, N.Y. SESS. LAW [1974], ch. 1056, § 2 (McKinney).

that the declaration may specifically provide for an increase or decrease of the common interest upon the happening of one or more of the following events: (a) the addition of units to the condominium; (b) the removal of units from the condominium.¹³

Subdivision 2 of section 339-i, which establishes the permanent character of the common interest and provides for the alteration thereof only upon consent of all unit owners affected, if amended, would have allowed the common interest to be changed if "a provision is made therefore in the manner specified in subdivision one hereof, or all unit owners affected consent thereto, and such consent is expressed in an amended declaration."¹⁴ The Association also refused to endorse this amendment.¹⁵

The problem of the "unknown common interest" is not an easy one to overcome. Condominium statutes require that the unit owner receive a specified undivided interest in the common facilities.¹⁶ In phasing, key aspects of the development are not known at the outset.

The present statutory scheme will prevent [the developer] from conveying any unit until he has obtained purchasers for all of the units planned for the subdivision. . . . Given the indeterminables of value, size, and number of units in the development, common interests cannot be allocated to any unit until the very last unit is sold, as long as the interest of each unit is made dependent by statute on the ratio of its value . . . to the aggregate value . . . of all units.¹⁷

In order for the condominium to operate, the developer must record the allocations of the common interests of all units, including unsold

¹³ ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE COMMITTEE ON STATE LEGISLATION, No. 125, at 466 (1965).

¹⁴ *Id.*

¹⁵ The bill was disapproved

because it would, without safeguards, expose the owner . . . to an increase or decrease in his undivided interest in the common elements . . . and to corresponding fluctuation in his liability for expenses in connection with those common elements.

. . . .
It is the essence of the condominium concept that once the common interest has been established it may not thereafter be altered without the consent of all unit owners affected.

. . . .
The bill would make it possible to provide in the declaration . . . for an increase or decrease of the common interest if units are added to or removed from the condominium. . . . This would, without appropriate safeguards not found in the bill, place the unit purchaser in far too uncertain a position.

Id. at 467-68.

¹⁶ See, e.g., HAWAII REV. STAT. tit. 28, § 514-6(a) (1969); ILL. ANN. STAT. ch. 30, § 304(c) (Smith-Hurd 1969); N.Y. REAL PROP. LAW § 339-i(1) (McKinney 1968), as amended, N.Y. SESS. LAWS [1974], ch. 1056, § 2 (McKinney).

¹⁷ Schreiber, *supra* note 11, at 1117.

ones. This allocation is generally not subject to change unless permission is granted by the unit owners in the complex.¹⁸ In planning the common interests under present legislation, the developer can succumb to the rigidity of condominium statutes and fix the number of units and their prices in advance. Alternatively, he can retain some flexibility by giving the unit owners the option of making minor variations in the unit design, while disregarding such variations in the allocation of common interests.¹⁹

In addition to problems in construction, marketing, and common interests, one author points out difficulties respecting title to condominium units. "[T]itle considerations lead to a conclusion that an expanding condominium with the inflexible restrictions imposed by the title requirements is quite impractical from a development and marketing standpoint."²⁰ The author further notes that unit owners purchase a permanent, fixed interest in real property. This interest runs to their heirs, assigns, etc. Individual owners of other units, even acting together, do not have any right to affect this undivided interest. An argument, modeled on constitutional due process grounds, may be made that "[a]ction by other unit or apartment owners in reducing the property rights of any one owner can be considered the removal of property interests by other than governmental action, and certainly without compensation."²¹

¹⁸ In some jurisdictions, consent of all unit owners is required to change the common interest of any unit. See ILL. ANN. STAT. ch. 30, § 304(c) (Smith-Hurd 1969); P.R. LAWS ANN. tit. 31, § 1291(f) (1968); WASH. REV. CODE ANN. § 64.32.090(13) (1966).

¹⁹ If the prices of the units vary only slightly when such modifications are made by the owner, this arrangement will probably meet the requirements of allocating common interests in proportion to value. For example, N.Y. REAL PROP. LAW § 339-i(1) (McKinney 1968), as amended, N.Y. SESS. LAWS [1974], ch. 1056, § 2 (McKinney), provides in pertinent part, that the common "interest shall be (i) in the *approximate* proportion that the fair value of the unit at the date of the declaration bears to the then aggregate fair value of all the units or (ii) in the *approximate* proportion that the floor area of the unit at the date of declaration bears to the then aggregate floor area of all the units. . . ." (emphasis added).

²⁰ Buck, *Condominiums That Grow—Another View*, LAWYER'S TITLE NEWS, Mar.-Apr. 1972, at 11 [hereinafter cited as Buck].

²¹ *Id.* The author's reason for keeping the common interest permanent deals more properly with mortgaging the condominium. In mortgaging a particular unit, the mortgagee determines the appraisal value by looking at the present state of title. In addition, should the development be dissolved or destroyed, the entire value of the project is viewed as a single source of funds, to be distributed to owners in accordance with their percentage interests. The mortgage lender, therefore, must take his appraised value based on the share of the potential common fund to be claimed by the unit owner.

The possibility of the value being modified by unilateral action of the other apartment owners would make the mortgageability of the apartments more difficult. A mortgage lender can control his own mortgagor by contractual language in his mortgage forbidding the mortgagor from voting for a change of percentage ownership. However, the mortgagee obviously cannot control other apartment owners.

Therefore, the developer phasing a condominium is faced with a formidable task as a result of indeterminable interests. Before exploring how a condominium may successfully be built in stages, it may be helpful to briefly look at some alternative methods of developing large, multi-unit complexes and the problems peculiar to them.

Common Association as an Answer?

One way of avoiding phasing problems is to build several condominiums linked to each other by a common association that controls the recreational areas and other shared facilities. Subsequently built condominiums are guaranteed participation in and use of these facilities by means of easements, or shares in the association. The Department of Housing and Urban Development has issued forms suitable for a series of condominium projects with "off-site" community facilities owned by a non-profit corporation, e.g., the association.²²

An area that has been developed along the lines of a common association is the Meadow Hill complex in Connecticut. Under the scheme of development employed there, the builder retains the right to add properties in future condominiums in accordance with the declaration and general plan.²³ If additions are to be made, unit owners will not be liable for capital expenditures incurred with respect to structures built within the new areas. Subsequent development is to be accompanied by the filing of supplementary declarations, each es-

Id.

The Maryland statute for phasing deals with the problem of the mortgagee by allowing "the interest of any mortgagee [to] attach, by operation of law, to the new percentage interests in the common elements appurtenant to the unit on which it is alien." MD. CODE ANN. § 11-117(c)(2) (Supp. 1974).

²² The forms, reprinted in 1 ROHAN & RESKIN § 16.03[2], provide, *inter alia*:

(a) That each project be built on its own section of land and under its own project mortgage. Each project must file its own enabling declaration that will create an association of owners to govern that particular condominium's affairs and that will establish the proportionate value of each unit in the separate condominium. The provisions of each declaration do not relate to the operation of the off-site facilities.

(b) That the enabling declaration state the number of total units to be built by the developer on the other sections of the development. This information enables the consumer and HUD to determine whether there are enough units planned to ultimately bear the cost of the off-site facility.

(c) That the owner of a unit automatically be a member of the off-site facility non-profit corporation and pay his share of expenses of the association for the upkeep and operation of the off-site facility. (The fractional share is one over the total number of units stated in the enabling declaration for the entire development area).

(d) That until the developer has completed all of the intended projects and converted them to condominium ownership, the balances of expenses incurred due to the off-site facility not covered by assessments against the unit owners shall be assessed against the developer.

²³ The development scheme is reprinted in 1A ROHAN & RESKIN App. C-10.

tablishing a non-stock,²⁴ nonprofit corporation of the unit owners to operate and govern the affairs of the condominium. The association is responsible for the operation, care, and upkeep of the common areas.

Criticism of the common association approach is two-pronged. At the first and more elementary level, objection is directed toward problems of establishing a nexus between parallel condominiums. Creating a union adequate to permit sharing of facilities but sufficiently limited to meet statutory requirements will necessitate complicated contracts, covenants, or easements. Connecting areas by easements has practical objections since title lines drawn from one area to another may violate local zoning codes, *e.g.*, as to side guards, area requirements, and frontage restrictions.

A second and more sophisticated argument against the common association approach deals with the valuation of individual units. If the off-site facility is to be appraised as part of each unit's value when sold, and the unit's market value is to account for a part of the value of the facility, a method is needed to afford the unit owner "an ownership interest in the recreational facility, which is flexible enough to allow the expansion of the number of people using the recreational facility, but permanent enough to be infeasible from the unit."²⁵

Use of Powers of Attorney

Another alternative to phasing is for the developer to reserve irrevocable powers of attorney coupled with an interest and proxies to vote on any amendments to the declaration. The objection to this solution is that such "irrevocable power over otherwise alienable property is looked upon with disfavor by the courts and the interest itself may be examined carefully on behalf of a challenging party."²⁶ Another problem created by reserving this power is that it may not bind a subsequent unit purchaser. This is particularly likely if the subsequent buyer did not see a copy of the declaration prior to his receipt of the deed, did not read the declaration if he had received it, or did not understand the declaration if he had read it.

²⁴ The corporation is composed of unit owners only, and ownership of a condominium unit is automatic membership in the Association. No "stock" is issued, since ownership of the unit represents membership. Voting is on a percentage basis, with the percentage vote being equal to the percentage of the undivided ownership assigned to each unit. Although "stock" in the traditional sense is not issued to represent ownership and voting privileges, proxy voting may still be provided for by individual owners. *Id.* at 378.251-378.253.

²⁵ Buck, *supra* note 20, at 13.

²⁶ *Id.* at 12. This power of attorney may also be viewed as a cloud on title unless specified in the purchasing papers as an encumbrance on the property.

Developers who wish to avoid the problems inherent in a common association, may delay fixing the interests by selling units without immediately transferring title, and without recording the condominium charter. This postpones legal formation of the project and thereby eliminates the need to determine the common interest beforehand. As an alternative to delay in fixing the interest, there may be a "tentative fixing of common interests," whereby the developer

can sell homes, establish the condominium organization, tentatively fixing common interests for the units planned, and, at the same time, obtain an authorization from every purchaser to change the common interests of the units at a specified future date. Such alteration would be made in accordance with a stated formula which would be based upon the ultimate number and prices (or sizes) of the units at that time.²⁷

It has been argued that this type of expandable condominium may put a strain on the marketability of condominium units.²⁸

For the developer who does not wish to deal with the problems of establishing a common association, retaining a power of attorney, or delaying legal formation of the condominium itself, phasing offers an additional course of action.

"Phasing" is not a narrowly defined concept and a phased condominium may take several forms. Under one plan, the first stage, usually consisting of a small number of units, may constitute a separate complex. The common facilities will then be tailored to the size of the first complex alone. A second stage, when erected, may also remain a distinct entity with its own recreational building or facilities.

In order to market a condominium in New York, the developer must comply with the Attorney General's procedures.²⁹ The developer may stipulate that he plans to build one, two, or three separate sections, stating the percentage interests in each. Such documentation makes it easier for a prospective purchaser to estimate the size of his holding, his potential voting power and share of maintenance expenses, because

²⁷ Schreiber, *supra* note 11, at 1123.

²⁸ The purchaser usually obtains a fixed share of the common facilities. See note 16 and accompanying text *supra*.

The developer may be able to legally reserve an executory ownership interest in such interests, but unless the appraisal of such an interest is readily available at the time of purchasing and mortgaging, there will remain a very practical cloud on the title of the apartment.

Whether such an executory interest is "marketable" under the marketable title doctrine and the first lien requirements of the banking laws is also doubtful. Buck, *supra* note 20, at 12. For the effect of changing interests on the mortgageability of units, see note 19 *supra*.

²⁹ See Rohan, *Problems in the Condominium Field*, in PRACTICING LAW INSTITUTE, COOPERATIVES AND CONDOMINIUMS 292, 304-08 (J. McCord ed. 1969).

the developer is required to finally determine the ultimate number of units to be built before title to the first unit is conveyed.

The Chinese Menu Approach

A second method of phasing, the "chinese menu" approach,³⁰ provides both flexibility and foreseeability. For example, three columns, *A*, *B*, and *C*, may be set up, and under *A* the interests of the owners are established if only one section is built. Corresponding percentage interests are set out, if the second and third stages are added, under *B* and *C* respectively. The schedule specifies the dates when the options to add the next stages are to be exercised. If no action is taken by the deadlines, the developer loses the right to build additional sections.³¹

The menu approach is illustrated by the declaration filed for the Wellesley Green development in Massachusetts.³² The complex

³⁰ *Id.* See also Outen, *Condominiums That Grow*, LAWYER'S TITLE NEWS, Sept.-Oct. 1971, at 11.

³¹ Marketing factors must be considered when the developer utilizes this approach to phasing. A problem arises as to the effect that added recreational facilities have on the carrying charges and expenses of already built sections. One effect of phasing is to reduce monthly payments as more units are added. The developer, however, being unsure of the development's success, might delay construction of more expensive facilities, e.g., pool or golf course, until the latter stages are added. If such a unique, expensive addition overly burdens the original unit owners, the developer might be violating the declaration. However, if all stages have similar units and carrying charges, no real problem in phasing should develop.

³² A copy of the entire declaration is reprinted in IA ROHAN & RESKIN App. C-8. Below is a schedule of the percentage interests and monthly charges for the units in Phase I if only one stage is built, if two are built, and ultimately if all three are completed.

EXHIBIT E
OF
WELLESLEY GREEN CONDOMINIUM PRESENTATION
PERCENTAGE INTEREST IN COMMON ELEMENTS AND ESTIMATED YEARLY TAXES
AND MONTHLY COMMON CHARGES FOR UNITS IN PHASE I

Unit Number	Unit Name	Percentage Interest in Common Elements			Estimated Yearly Estate Taxes	Estimated Monthly Charges		
		Phase I	If Phase I & IIA	If Phase I, IIA & IIB		Phase I	If Phase I & IIA	If Phase I, IIA & IIB
1	Arlington South	1.7883	.9332	.6224	1550	\$122	92	89
2	Berkeley	1.7883	.9332	.6224	1550	122	92	89
3	Arlington	1.5575	.8127	.5421	1350	106	80	77
4	Berkeley South	1.5575	.8127	.5421	1350	106	80	77
101	Arlington South	1.8460	.9633	.6425	1600	126	95	92
102	Berkeley	1.8460	.9633	.6425	1600	126	95	92
103	Fairfield	1.8316	.9557	.6375	1585	125	95	91
104	Newbury	1.8027	.9407	.6274	1562	123	93	90

was designed in three phases. The developer had provided for the modification of the undivided interest of those who had purchased in the first stage as subsequent phases were completed. He had also

105	Arlington East	1.5864	.8278	.5522	1375	108	82	79
106	Dartmouth	1.6008	.8353	.5572	1387	109	83	80
107	Arlington	1.6152	.8429	.5622	1400	110	83	80
108	Berkeley South	1.6152	.8429	.5622	1400	110	83	80
109	Clarendon	1.6008	.8353	.5572	1387	109	83	80
110	Berkeley West	1.5864	.8278	.5522	1375	108	82	79
111	Charles	1.8027	.9407	.6274	1585	123	93	90
112	Exeter	1.4132	.7375	.4918	1225	96	73	70
201	Arlington South	1.9613	1.0235	.6827	1700	133	101	98
202	Berkeley	1.9613	1.0235	.6827	1700	133	101	98
203	Fairfield	1.9469	1.0160	.6776	1687	132	101	97
204	Newbury	1.9181	1.0010	.6676	1662	131	99	96
205	Arlington East	1.7018	.8880	.5923	1475	116	88	84
206	Dartmouth	1.7162	.8955	.5973	1487	117	89	85
207	Arlington	1.7306	.9031	.6023	1500	118	89	86
208	Berkeley South	1.7306	.9031	.6023	1500	118	89	86
209	Clarendon	1.7162	.8955	.5973	1487	117	89	85
210	Berkeley West	1.7018	.8880	.5923	1475	116	88	84
211	Charles	1.9181	1.0010	.6676	1662	131	99	96
212	Exeter	1.5719	.8203	.5470	1362	107	81	78
301	Arlington South	2.1056	1.0987	.7329	1825	143	109	105
302	Berkeley	2.1056	1.0987	.7329	1825	143	109	105
303	Fairfield	2.0911	1.0912	.7278	1812	142	108	104
304	Newbury	2.0623	1.0762	.7178	1787	140	106	103
305	Arlington East	1.8460	.9633	.6425	1600	126	95	92
306	Dartmouth	1.8604	.9708	.6475	1612	127	96	93
307	Arlington	1.8748	.9783	.6525	1625	128	97	93
308	Berkeley South	1.8748	.9783	.6525	1625	128	97	93
309	Clarendon	1.8604	.9708	.6475	1612	127	96	93
310	Berkeley West	1.8460	.9633	.6425	1600	126	95	92
311	Charles	2.0623	1.0762	.7178	1787	140	106	103
312	Exeter	1.6584	.8653	.5772	1437	113	86	83
401	Arlington South	2.5669	1.3395	.8933	2225	175	132	128
402	Berkeley	2.5669	1.3395	.8933	2225	175	132	128
403	Fairfield	2.5237	1.3169	.8783	2187	172	130	126
404	Newbury	2.4804	1.2945	.8633	2150	169	128	123
405	Arlington East	2.1632	1.1287	.7528	1875	147	112	108
406	Dartmouth	2.1632	1.1287	.7528	1875	147	112	108
407	Arlington	2.2497	1.1739	.7830	1950	153	116	112
408	Berkeley South	2.2497	1.1739	.7830	1950	153	116	112
409	Clarendon	2.1632	1.1287	.7528	1875	147	112	108
410	Berkeley West	2.1632	1.1287	.7528	1875	147	112	108
411	Charles	2.4804	1.2944	.8633	2150	169	128	123
412	Exeter	1.8170	.9481	.6324	1575	124	94	90
	26 Additional Parking Spaces	.7514	.3926	.2626	*	52	52	52
	Total	100.0000	52.1827	34.8054				
	Each Additional Parking Space	.0289	.0151	.0101	*	2	2	2

* Real estate taxes on additional parking spaces will be paid as a component of the Unit Owner's taxes on his Unit and there will be no separate real estate tax bill rendered for the additional parking space.

allowed himself the option to finish only one, two, or all three phases, depending on the market demand for the units. Furthermore, each phase was restricted to similar type units. Thus, townhouses could not be built in one area if the other two areas contained apartments. Under the purchase and sale agreement, the buyer executed all documents required to authorize the sponsor to complete the project as it was described in the declaration, but the sponsor retained an irrevocable power of attorney to amend the charter deed and include the second and third phases. The master deed provided for amendment by a vote of 66.67 percent of the unit owners. However, the sponsor also retained the power to amend the deed, without the consent of any owner, to allow construction of subsequent stages. Each unit was conveyed with an undivided fractional interest, but the deed provided that in the event later stages were added, the interest would diminish accordingly.

PHASED GROWTH UNDER STATUTORY SCHEMES

At present, few states have statutes specifically permitting phasing. Oregon was one of the first states to provide for flexible common interests.³³ The statute states that if a condominium is to be phased, the declaration must contain a general description of the development, including:

- (1) the maximum number of units in each phase;
- (2) the dates for the commencement of each phase;
- (3) a general description of the nature and proposed use of additional common areas "if such common elements might substantially increase the proportionate amount of the common expenses payable by existing unit owners;"³⁴ and
- (4) a showing of the percentage interests in the common areas held by the original unit owners at each stage of the development.

Recent legislation in Maryland³⁵ and Virginia³⁶ has also codified and clarified the means by which a phased condominium development may be "expanded." Both statutes unequivocally allow a developer to reserve the right to expand.³⁷ Under the Maryland scheme, "a developer may reserve the right to expand the condominium by subjecting additional sections of property to the condominium regime,"³⁸

³³ ORE. REV. STAT. § 91.530 (1971).

³⁴ *Id.* § 91.530(2)(c).

³⁵ MD. ANN. CODE art. 21 (Supp. 1974).

³⁶ VA. CODE ANN. tit. 55, ch. 4.2 (Supp. 1974).

³⁷ Compare VA. CODE ANN. § 55-79.54(c) (Supp. 1974) with MD. ANN. CODE art. 21, § 11-117 (Supp. 1974).

³⁸ MD. ANN. CODE art. 21, § 11-117 (Supp. 1974). In addition, the statute provides that upon the addition of subsequent sections

but the Act does not spell out how such a reservation should be made. In one recent filing, the condominium declaration gave the declarant the absolute right to expand the condominium through the reservation of a power of attorney, coupled with an interest, for the purpose of effecting the expansion.³⁹ The Virginia statute, on the other hand, explicitly provides that an expansion option described in the declaration may be exercised without the consent of the unit owners.⁴⁰ Thus, if the declaration is carefully drafted in compliance with the statute, it would appear unnecessary for the developer in Virginia to reserve a power of attorney in order to safeguard his interest.

(1) The percentage interests in the common elements of the unit owners in preceding sections shall be reduced and appropriate percentage interests in the common elements of the added sections shall vest in them; and

(2) Appropriate percentage interests in the common elements of the preceding sections shall vest in unit owners in the added sections.

Id. § 11-117(A).

In preparing for phasing, the developer in Maryland must describe in detail the lands reserved for the additional sections and establish a formula for determining the common interests and expenses under each section. This information must appear in the declaration, and the right to phase the condominium "shall be reserved in the developer for a period, not exceeding ten years from the date of recording of the declaration." *Id.* § 11-117(B)(4).

³⁹ See Offering Plan, Woodcrest Village (Hagerstown, Md. 1974), at art. VII.

⁴⁰ The statute states, in pertinent part, that the declaration of an expandable condominium shall contain:

(1) The explicit reservation of an option to expand the condominium.

(2) A statement of any limitations on that option, including, without limitation, a statement as to whether the consent of any unit owners shall be required, and if so, a statement as to the method whereby such consent shall be ascertained; or a statement that there are no such limitations.

(3) A time limit, not exceeding seven years from the recording of the declaration, upon which the option to expand the condominium shall expire, together with a statement of the circumstances, if any, which will terminate that option prior to the expiration of the time limit so specified.

. . . .

VA. CODE ANN. § 55-79.54(c) (Supp. 1974) (emphasis added).

The Virginia statute further calls for traditional limitations on phasing such as setting a maximum number of units to be added in the additional phases, *id.* § 55-79.54(c)(8) and a metes and bounds description of all land to be added to the condominium. *Id.* § 55-79.54(c)(4). Reallocation of interests in the common elements is governed by section 55-79.56.

What makes the Virginia statute unique is its exhaustive treatment of phasing. In addition to the above requirements, the declaration must also include provisions "as to whether portions of the additional land may be added to the condominium at different times," *id.* § 55-79.54(c)(6); "a statement . . . of the maximum percentage of the aggregate land and floor area of all units that may be created thereon that may be occupied by units not restricted exclusively to residential use," *id.* § 55-79.54(c)(9); and "a statement of the extent to which any structures erected on any portion of the additional land added to the condominium will be compatible with structures on the submitted land." *Id.* § 55-79.54(c)(10).

The spirit and intent of the new statute is set forth in VA. COMM. TO STUDY AND RECOMMEND REVISION OF THE CONDOMINIUM LAWS, REPORT TO THE GOVERNOR AND THE GEN. ASSEMBLY OF VA., HOUSE DOC. NO. 5 (1973). See Johnakin, *A Second Generation of Condominium Statutes*, LAWYERS TITLE NEWS, May-June 1974, at 2.

PRACTICAL CONSIDERATIONS

The developer who is able to phase his condominium has a distinct advantage over one who cannot. Not only does construction of the complex take place in phases, but investment also is phased.

Because large developments usually include sizeable and costly amenity facilities, the expandable condominium concept presents a workable plan for sharing these costs on an economic basis among many unit owners over several years of sales and construction activity.⁴¹

Capital risk is minimized since the money is invested only in a small number of unsold units.

Secondly, the developer retains flexibility in deciding the final number of units to be added. Only one declaration need be filed for the entire project, and the individual units need not be built all at the same time. Finally, by experience gained in the marketing and operation of the first section, the developer can alter his plans to meet the requirements of a more successful completion of the final phases.

The advantages of phasing, however, should not be exaggerated. Important considerations must be made with respect to the condominium owner who, although contributing less as more owners are added, may be sharing his land and facilities with a decidedly larger number of people than he had anticipated. It must be made clear at the inception of the original condominium that a definite number of additional units is planned. The developer may then wish to add words explaining that upon filing for construction of Phase II, certain events will transpire:

- (1) The percentage interest of Phase I purchasers will be divested in part from such purchasers and revested in the developer.
- (2) The quantum of land and buildings to which the reduced percentage interest to Phase I purchasers has attached is automatically increased so as to extend to all of the newly added Phase II.
- (3) The percentage interests of all mortgagees and all other lienholders who claim any interest in Phase I are similarly reduced with compensating increase in newly added Phase II land and buildings.

⁴¹ Opelka, *Expandable Concept Permits Phased-In Construction, Sales, SAVINGS AND LOANS NEWS*, June 1973, at 98. Multiple building developments offer large facilities to be used in common by many condominium residents. Therefore, "it becomes legally important to tie these developments together as the units are created. Without such ties, the amenity facilities are sure to stand on unsound economic ground. The expandable condominium . . . does offer a solution to the multiple building . . . problem." Opelka, *Who Owns What in MHOA, CHOA and TSO?*, *SAVINGS AND LOANS NEWS*, July 1973, at 98.

- (4) The developer is revested with an appropriate percentage interest in Phase I and is divested of an appropriate percentage interest in Phase II in such manner that he is enabled to convey to Phase II purchasers constant, unvarying percentage interests in both Phase I and Phase II land and improvements.⁴²

Phasing may also produce an adverse psychological effect on the unit owner who believes himself to be acquiring fee simple title to his apartment. Should the developer attempt unilateral alteration of the owner's undivided percentage interest after conveyance, either by a right reserved in the declaration, by a power of attorney, or by the "chinese menu" approach, this alteration "may cast doubt upon the quality of title to the entire project."⁴³

The developer who reserves the right to alter percentages may be faced with the possibility that a purchaser will be able "to void [his] contract of sale because of uncertainty as to the future status of the percentage interest and because of possible inequitable reallocation of percentages and consequent unfair allocation of real estate taxes and maintenance assessments."⁴⁴

CONCLUSION

With the advantages and disadvantages of phasing thus laid out, one must question whether this procedure is worth all the trouble it seems to present. Regardless of individual reactions to this problem, the fact remains that expandable condominiums have been built, and are successfully working today. The unit purchaser is protected by a properly phrased declaration, and, if necessary, by court review of his investment. If the entire condominium has been completed with all proposed phases added, and it is decided by the court that there was an inequitable reallocation of percentage interests, then the court is free to either reform the contract or determine that a minor technical deviation in conveying the unit or a slight statutory violation in filing is harmless error. If the developer has acted in good faith and in a reasonable manner, the court is unlikely to substitute its judgment for his, despite slightly questionable reallocations of interests. However, if

⁴² Joliet, *The Expandable Condominium: A Technical Analysis*, 9 LAW NOTES 19, 20 (1972). A secondary problem confronts the developer under this approach. The conveyancing problem may be alleviated by the inflexibility in land area and unit size, but to this extent, "the developer paints himself into a corner . . . by obligating himself to proceed in a particular manner even though experience or unforeseen circumstances might call for a modification in unit numbers, values or mix." *Id.*

⁴³ *Id.* at 21.

⁴⁴ *Id.*

gross inequity results, a court may be more inclined to reform the percentage interests⁴⁵ than to award damages.

The task of phasing a condominium is not insurmountable. It is imperative, however, that the developer meet his statutory and legal obligations.

So long as the proper percentages distinguishing unit values are created initially; so long as they are maintained subsequently; and so long as a similar percentage interest, appropriate to the value of each and every other unit in the entire condominium property is also created and maintained, the result is a condominium project which is both harmonious and equitable⁴⁶

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⁴⁵ Should the court ever deem the expansion invalid, the worst that could happen is an order "that Phase I [remain] no larger than it was prior to the attempted addition of units and realignment of percentage interests." This would result in a series of separate condominiums each with percentage interests equal to 100. *Id.* at 22.

⁴⁶ *Id.* at 21. If the developer follows these guidelines "each unit will pay no more or less than its fair share of taxes, and . . . upon sale, destruction, or appropriation of the entire property, the proceeds of sale will be divided in the same ratio as the original unit values bore to one another." *Id.*