



1968

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Recommended Citation

Johnson, J. Philip (1968) "Condominium: The Theory and North Dakota Practice," *North Dakota Law Review*: Vol. 44 : No. 3 , Article 2.

Available at: <https://commons.und.edu/ndlr/vol44/iss3/2>

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CONDOMINIUM: THE THEORY AND NORTH DAKOTA PRACTICE

J. PHILIP JOHNSON

Behold how good and how pleasant it is for brethren
to dwell together in unity. Psalm 133, verse 1.

While David was a talented writer of psalms and a farsighted ruler, he probably did not anticipate the modern real estate condominium. The description does have relevance, however, since the condominium is something of a compromise between the pure communal living of some religious orders and our own traditional concepts of home ownership. This is also a method of real estate ownership which promises to take over a large and increasing segment of the real estate market. Prominent industry sources have termed the American condominium "the greatest new force in U. S. building since F.H.A."¹ Commercial pressure is perhaps the most effective spur to new legislation. The tremendous pressure of the condominium may be seen by the fact that in a period of approximately eight years all but one of the fifty states passed condominium legislation.²

The initial question must be, what is condominium? For starting purposes a condominium unit may be defined as ownership of an apartment or other building segment, with an undivided interest, together with other apartment owners, in "common elements" of the real estate, such as stairs, yard, walkways and supporting members.³ The second question is, how did it come about?

HISTORY⁴

There is considerable basis for arguing that nothing new has been conceived in the law of real property since Henry VIII passed

* Ph.B. 1961, J.D. 1962, University of North Dakota School of Law; Pancratz, Wold and Johnson, Fargo, North Dakota.

1. PRACTICAL BUILDER, May 1966, at 117.
2. A. FERRER & K. STRECHER, LAW OF CONDOMINIUM (Vol. 1 & 2, 1967).
3. See KRATOVIL, REAL ESTATE LAW, 430 (4th ed. 1964).
4. See generally, POWELL, 4 REAL PROPERTY 730 (1966 Supp.); Laysen, *The Ownership of Flats—A Comparative Study*, 7 INT. & COMP. L.Q. 31 (1958); MacEllven, *Condominium—Historical*, TITLE NEWS 41:28 (D. 1962); ROHAN & RESKIN, CONDOMINIUM LAW & PRACTICE, chapt. 2 (1965).

the Statute of Uses in the year 1535. The condominium is an exception to that rule. The term "condominium" comes from Latin but to the Romans it simply meant "joint ownership" and there is little evidence of anything approaching the modern concept. During the Middle Ages in Europe separate ownership of floors and rooms became common in certain areas, but the disputes that later arose concerning the respective rights of the parties led to codifications which prohibited it or simply did not recognize it. France eventually set up provisions for single floor ownership before World War I and it became popular in Paris during the 1920's. In England no special legislation was forthcoming but flat ownership was developed through a bit of common law "muddling through."

The moving force for condominium legal development in the United States was the Commonwealth of Puerto Rico which, in turn, took its ideas from Cuba and Brazil. Puerto Rican interests, with their natural limitation upon land area arrayed against an increasing population, were instrumental in obtaining passage of section 234 of the Housing Act of 1961. This provision allowed federal insurance of condominium mortgages. When President John F. Kennedy signed the Housing Act on June 30, 1961, the great pressure for condominium legislation and development began. The Federal Housing Administration responded by drafting its own model condominium act and this has served as a reference for much subsequent state legislation. Such areas as California have since devoted millions of dollars in construction to condominium developments. North Dakota passed its Condominium Ownership or Real Property Act in 1965.⁵ The first condominium project in the state was begun in July of 1966, Oak Street Condominium, an eight unit apartment building on Fargo's North Side.

THE CONCEPT

The basic unit of the condominium involves two separate concepts: (1) Ownership of the apartment or building segment; in effect, ownership of designated airspace; (2) ownership of an undivided interest, in common with the other unit owners, in the "common elements;" the ground upon which the building sets and the supporting structures and fixtures for the apartment units.⁶

5. N.D. CENT. CODE § 47-04.1, (1967 Supp.)

6. " 'Condominium' is an estate in real property consisting of an undivided interest or interests in common in a portion of a parcel of real property together with a separate interest or interests in space in a structure, on such real property." N.D. CENT. CODE § 47-04.1-01, (1967 Supp.). "Ownership in common with others of a parcel of land and certain parts of a building thereon which would normally be used by all the occupants, such as yards, foundations, basements, floors, walls, hallways, stairways, elevator and all other related common elements, together with individual ownership in fee of a particular

The condominium act will ordinarily provide that two components are automatically conveyed together.⁷

The concept of airspace ownership is an imaginative legal development which is achieving increasing prominence in high intensity, high cost, urban areas. The concept does, however, run contrary to the traditional principle of real estate ownership embodied in the phrase, "cujus est solus, ejus est usque ad coelum et ad infernos." (By literary translation, "he who owns the soil owns from the heavens to hell.") This absolute principle has already been modified by modern air travel. Ownership of land has come to mean ownership of so much of the space above the surface as the owner can use and occupy in connection with the land.⁸ The concept of air space ownership is not firmly established in a number of states, but the North Dakota Supreme Court has given it specific recognition. In a 1922 case, the court commented upon advice that an association which paid for the second floor of a building could not be given a deed for that floor.

This advice was erroneous. Caldwell could have granted or reserved the second story alone, as the parties desired. Real estate may be granted or leased divided upon perpendicular or lateral lines. (authorities cited).⁹

The other portion of the condominium unit is the undivided interest in the common elements, which are, essentially, the remaining portions of the real estate. These common elements would be described and defined in one of the basic condominium documents, the declaration. The individual owner's interest in the common elements would ordinarily be expressed as a given percentage which, together with the ownership of the other units, would add up to 100%.

THE BASIC DOCUMENTS

As with any other legal concept, the condominium can only be put into effect by certain basic documents. The first and most essential of these documents is called the "condominium declaration", "declaration of condominium ownership", or, in some areas, the "master deed". The term "master deed" is not often used but it is descriptive of the document's effect. This instrument serves as a form of basic conveyance, a document which, when recorded,

unit or apartment in such building." Ramsey, *Condominium: New Look to an Old Concept*, 28 LEGAL BULLETIN, U.S. SAVINGS & LOAN LEAGUE 33 (1962).

7. See N.D. CENT. CODE § 47-04.1-06, (1967 Supp.).

8. Eagan, *Ownership of Air Space*, TITLE NEWS 41:30 (D. 1962).

9. *Piper v. Taylor*, 48 N.D. 967, 188 N.W. 171 (1922).

defines the very nature of the condominium. The declaration will ordinarily include the following:¹⁰

- (1) The legal description of the land involved;
- (2) An exact description of the units or apartments;
- (3) A full description of the common elements of the condominium;
- (4) Provision for the percentage of ownership in the common elements which is attributable to and conveyed with each unit;
- (5) Establishment of an association of the unit owners to govern the condominium;
- (6) Provisions for sharing of common expenses among the unit owners;
- (7) Restrictions upon partition of the condominium premises;
- (8) Grant of a right of first refusal or option to purchase to the owner association covering any subsequent resale of a unit.

A certain number of these items will be required provisions. The North Dakota act requires only items (1) through (4).¹¹

A second basic document for the condominium is a supplement to the declaration and this is the bylaws for the association of unit owners. In common with other forms of bylaws, this document is designed to set up rules of operation for the association of unit owners. Matters of maintenance, assessment of expenses, insurance coverage, and the like would ordinarily be covered.¹² The declaration of restrictions provides a third basic instrument in the condominium legal structure. It is designed to set out the restrictions upon use necessary to successful operation of the condominium. The importance of this document may depend upon how many of the major restrictions are, in fact, contained within one of the other recorded documents. In this area it has been treated as essentially part of the declaration. The declaration of restrictions is often treated distinctly in other areas and may contain exhaustive listings of restrictions, including limitations on the right of partition,

10. See generally Powell, *supra* note 17, at 834; Rohan & Reskin, *supra* note 3, chap. 7.

11. N.D. CENT. CODE § 47-04.1-03, (1967 Supp). This statute does also mention one additional item, a description of limited common elements. These would be elements of facilities available to only a given segment of the unit owners.

12. See N.D. CENT. CODE § 47-04.1-07, (1967 Supp).

limitations on use of the premises, and the right of first refusal.¹³

A fourth basic document and one used last in the creation of a going condominium is the individual unit deed. Many condominium statutes set out the specifics of the individual condominium deed. The North Dakota act does not. The deed would, in all cases, contain:

- (a) the legal description of the land,
- (b) the unit description as given in the declaration,
- (c) the restrictions upon use, which might be incorporated by reference to other documents.
- (d) the given portion of undivided interest in the common elements.¹⁴

DESCRIPTION

The question of the legal description to be used for individual condominium units should be examined in a bit more detail since it is the most likely source of title problems in practice. As was earlier stated, the individual unit consists of two parts: the apartment or airspace, and the undivided interest in the common elements. Description of an undivided interest, stated by fraction or percentage, is not unusual or unfamiliar to the real estate practice. The manner of describing the apartment or airspace itself is unfamiliar and difficult.¹⁵ Several methods of description are available.¹⁶

Subdivision Plat: Under this system a plat, similar to those plats required for new community subdivisions, is prepared and recorded. This plat reflects the dimensions of the respective apartment units within the condominium, describing the airspace to be conveyed. Subsequent conveyances may refer to the plat and convey the units by letter or number. The inflexible descriptions required under this system—abstract cubes of air—may cause problems in the event of changes, settling, or other encroachments.

Land and Apartment Surveys: Under the survey system some of the encroachment problems are avoided. After the building is built, a survey is made of the land, the building, and the individual units. The apartment, the building, and the land are exactly described with reference to each other. Here again, there are problems in the event of later settling or change in the building structure.

13. See Egan, *Declaration of Restrictions*, TITLE NEWS 41:36 (D. 1962).

14. For a suggested form of condominium deed for North Dakota use see Addendum A to this Article.

15. See MacEllven, *Descriptions*, TITLE NEWS 41:31 (D. 1962).

16. As to these methods see, Kratovil, *supra* note 2, at 433; MacEllven, *supra* note 14; Powell, *supra* note 3, at 844-846.

Floor Plan Certification: Under this system, which is essentially two dimensional, a set of floor plans for the building forms the basic document of description. The respective units are identified on the floor plan and the location of the building identified on the land. This method allows for greater flexibility and room for error or change. It is the system set up for use under the North Dakota act.¹⁷

Whatever the method of description used there is necessity for consistency. Real estate law and title standards are creatures of practice, and consistency is next to godliness in this area. A form of condominium description designed for the North Dakota practice is contained on the deed included as Addendum A.

COMPARISON WITH THE COOPERATIVE

Another form of ownership with great similarity to the condominium is the real estate cooperative. The cooperative has a longer history of use in this country, primarily in the Eastern metropolitan areas. It is organized around a corporation or business trust which holds title to the real estate with its buildings and appurtenances. The individual apartment dweller holds stock in the corporation and a long term lease for his particular apartment. It may be most helpful to compare the relative advantages of the condominium and the cooperative.¹⁸

Advantages of the condominium over the cooperative include:

- (1) The psychological advantages of apartment ownership in a traditional sense;
- (2) The individual units may be separately financed and more easily resold;
- (3) There can be no general foreclosure on the building arising from nonpayment on the part of other apartment dwellers;
- (4) There is no lease which might be terminated for breach of its conditions;

17. N.D. CENT. CODE § 47-04.1-03, (1967 Supp).

"In interpreting deeds and plans the existing physical boundaries of the unit or of a unit reconstructed in substantial compliance with the original plans thereof shall be conclusively presumed to be its boundaries rather than the metes and bounds expressed in the deed or plan, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building." N.D. CENT. CODE § 47-04.1-06 (1), (1967 Supp).

18. See generally, Berger, *The Condominium—Cooperative Comparison*, 11 PRAC. LAW. 37 (1965); Kratovil, *supra* note 2, at 431-33; Powell, *supra* note 3, at 714-20.

- (5) The apartment is separately taxed and not subject to a general tax lien.

The cooperative has, however, some advantages of its own:

- (1) There is more basis for control over the individual apartment dwellers through the lease and corporate bylaws, regulations, etc.;
- (2) The lender has greater security, since upon foreclosure he will take the entire building without further restrictions;
- (3) Because of the individual unit closings and the lessened security, the condominium may result in higher closing costs and higher mortgage rates;
- (4) There is likely to be less difficulty in financing improvements since the corporation may deal with the building as sole owner;
- (5) The individual apartment dwellers have the additional protection of the corporate structure against liabilities that might arise through operation or use of the building.

For all of these comparisons it must be said that the condominium has been substantially more popular among recent developments throughout the country.

CONDOMINIUM FINANCING

The financial institution which provides the mortgage financing will also have some specialized problems with the condominium. Its attorneys should review the condominium documents at an early stage to insure that the lender's interests are adequately protected and the documents meet minimum legal requirements. After the documents are recorded and individual units are sold, changes may become very difficult indeed. Under the abstract of title—attorney's opinion system prevailing in this area, certain adjustments must be made. It will not be feasible for the abstracter to recopy the extensive texts of the condominium documents. A practical solution is to have the abstracter reflect the recording of the documents and have the attorney examine the documents as recorded, certification of recording having been made on the documents by the register of deeds. The attorney will then give his opinion as to the legal effect of the documents in conjunction with his examination of the abstract of title.

The usual form of mortgage is acceptable for the condominium

units but certain additional clauses are desirable.¹⁹ The financing itself would ordinarily take place in two stages: first, a mortgage upon the entire parcel of real estate to cover the costs of construction; second, release of the mortgage as to individual units in conjunction with their mortgage financing. The matter is simplified for the lender if it handles both phases of the financing and thus restrictions or premiums may be in order to assure this.²⁰

A FEW PROBLEMS

As a new concept in real estate ownership, the condominium has a few unresolved questions. There have been surprisingly few court decisions in the condominium area but the growth of condominium developments may be expected to develop a substantial body of case law. One of the questions asked most consistently concerns the options or rights of first refusal and similar restraints on alienation which are used to restrict membership in the condominium. The problem arises from the application of the rule against perpetuities. There is some dispute as to the validity of these provisions under the rule,²¹ though it may be argued that the rule against perpetuities does not apply to a situation where a given group, the association of owners, can convey an absolute fee in possession.²² It would be preferable if the North Dakota act were amended to provide specific approval for this basic element of condominium organization.

Another question that has been raised concerns the application of the securities statutes. Is the sale of condominium units a security transaction and thus subject to the restrictions of the blue sky laws?²³ The condominium is a more complex medium than the ordinary real estate transaction, involving a number of joint financial activities, and the definitions of "securities" contained in state law are usually extremely broad.²⁴ A comparison of the North Dakota statutes and the ordinary condominium sale does not reveal a direct problem but this matter too is best resolved by specific statutory exclusion.

At least one authority is convinced, "there is no doubt that, in

19. See Addendum B. to this article for suggested additional clauses for the condominium mortgage.

20. Antongiorgi, *A Practicing Lawyer's View*, A.B.A. SEC. OF REAL PROPERTY, PROBATE AND TRUST LAW 35 (1965); Kerr, *Problems of the Mortgage Lender*, 11 PRAC. LAW. 55 (1965); Rohan & Reskin, *supra* note 3, at chap. 9.

21. See *Gale v. York Center Community Cooperative, Inc.*, 21 Ill.2d 86, 171 N.E.2d 30 (1960); Hershman, *Condominium Operating Problems*, 11 PRAC. LAW. 59 (1965); MacEILLEN, *Perpetuities*, TITLE NEWS 41:34 (D. 1962); Powell, *supra* note 3, at 771-72, 6 AMERICAN LAW OF PROPERTY § 26.64-26.7.

22. See *In re Quigley's Will*, 37 Misc.2d 320, 236 N.Y.S.2d 180 (S. Ct. 1963); Hershman, *supra* note 20, at 66-71.

23. See Powell, *supra* note 3, at 787-790.

24. See *e.g.*, N.D. CENT. CODE § 10-04-02 (12) (1960).

the overwhelming majority of both domestic and foreign jurisdictions an apartment owner will be liable for damages due to negligence occurring on the common elements."²⁵ Considering the size of some condominium projects, this could be very broad liability indeed. There are complications regarding liability and fire and extended insurance coverage as well. The preferable method would appear to be a blanket policy or policies covering the whole of the condominium project.

Certain other of the major problems arising in the condominium are covered by the North Dakota act. The right of partition is not available to the owners unless three years after damage or destruction to the premises it has not been repaired.²⁶ After the declaration has been recorded, any lien must be individually applied against the units, including any assessment of taxes.²⁷

CONCLUSION

The future of the condominium is being painted in bright and glowing colors and it may be expected that other and even more sophisticated forms of real estate ownership will follow in the trail it has blazed. As some enterprising real estate man once noted, "They just aren't making any more land." The land we have will have to serve more varied and intensive purposes. The full development of the condominium has a great distance to go, particularly in this area. The potential of the condominium lies in more numerous and more varied services. This will require larger condominium projects with professional management, supplying built-in conveniences ranging from swimming pools to security protection.

Now that we have a major innovation in the field of real estate law it will require care and intelligent concern for its proper development. In addition to some statutory amendment to smooth off rough edges as they appear a consistent and well defined practice must emerge. This article has offered some guides for that practice. These suggestions do not offer the only available approach in the respective areas but are, in the author's view, reasonable and legally acceptable methods of practice.

25. Ferre, *Some Practical Aspects of Condominium Law*, A.B.A. SEC. OF REAL PROPERTY, PROBATE AND TRUST LAW 27 (1965).

26. N.D. CENT. CODE § 47-04.1-09, (1967 Supp).

27. N.D. CENT. CODE §§ 47-04.1-12, 47-04-13, (1967 Supp).

ADDENDUM A

CONDOMINIUM WARRANTY DEED
(North Dakota Joint Tenancy)

THIS INDENTURE, Made this 1st day of May, 1967, between CONDOMINIA, INC., a corporation under the laws of the State of North Dakota, party of the first part, and HERMAN HOUSEHOLDER AND HERMIONE HOUSEHOLDER, husband and wife, whose post office address is Fargo, North Dakota, parties of the second part,

WITNESSETH, That the said party of the first part, for and in consideration of the sum of One dollar and other good and valuable consideration, to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, does hereby GRANT, BARGAIN, SELL AND CONVEY unto said parties of the second part, as joint tenants, and not as tenants in common, their assigns, the survivor of said parties, and the heirs and assigns of the survivor, FOREVER, all that tract or parcel of land lying and being in the County of Cass and State of North Dakota, and described as follows, to-wit:

Apartment and garage No. A in Paradise Condominium, created under a Declaration of Condominium recorded in Book 4 of Misc., page 87 et. seq., erected upon Lots 1 and 2, Block 1, Heavenly Heights Addition, City of Fargo, together with the undivided interest in the common elements declared in the Declaration of Condominium to be appurtenant to such unit.

Second parties, by acceptance hereof, and by agreement with the first party, hereby expressly assume and agree to be bound by and to comply with all the covenants, terms, provisions and conditions set forth in such Declaration of Condominium including, but not limited to, the obligation to make payment of assessments for the maintenance and operation of the condominium which may be levied against such apartment.

This conveyance is made subject to the following:

1. Real estate taxes for the year 1966 and subsequent years;
2. Applicable zoning regulations and ordinances;
3. All the terms, provisions, conditions, rights, privileges, obligations, easements and liens, if any, set forth in such Declaration of Condominium and the bylaws of such Condominium;
4. Such covenants, conditions, restrictions and easements of record, if any, which may now affect the above described property;

TO HAVE AND TO HOLD THE SAME, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said parties of the second part, their assigns, the survivor of said parties, and the heirs and assigns of the survivor, FOREVER. And the said party of the first part, for itself, its executors, administrators and assigns, does covenant with the parties of the second part, their heirs and assigns, that it is well

seized in fee of the land and premises aforesaid; that the same are free from all incumbrances, except installments of special assessments or assessments for special improvements which have not been certified to the County Auditor for collection and the above bargained and granted lands and premises in the quiet and peaceable possession of said parties of the second part, their assigns, the survivor and the heirs and assigns of the survivor, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will warranty and defend.

IN TESTIMONY WHEREOF, The said party of the first part has caused these presents to be executed in its corporate name by its President and its Secretary, and its corporate seal to be hereunto affixed the day and year first above written.

WITNESSES:

CONDOMINIA, INC.

By /s/Godfrey Godsend

Its President

By /s/Hortense Happiness

Its Secretary

(CORPORATE SEAL)

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF CASS)

On this 1st day of May, 1967, before me, a Notary Public in and for said County and State, personally appeared Godfrey Godsend and Hortense Happiness known to me to be the President and Secretary of the corporation named in and which executed the foregoing instrument, and acknowledged to me that such corporation executed the same and that they are duly authorized to execute the same on behalf of said corporation.

/s/ I. M. Honorable

Notary Public

(SEAL)

ADDENDUM B

Suggested Clauses for Condominium Mortgages

1. The Mortgagors agree to pay to the Mortgagee in additional monthly installments, such amounts as the Mortgagee shall estimate to be required for the purpose of accumulating a fund to pay, when due, maintenance charges on the mortgaged property, as defined in its declaration and bylaws. If such charges are not fully paid when due, the Mortgagee may at any time pay the same and such advances shall bear interest at the rate provided for in this mortgage and shall be fully secured by the lien of this mortgage.*

* This paragraph assumes the usual professional mortgage lender. Alternatively, the Mortgagor might simply be required to make such payments.

2. The Mortgagors agree to comply with the terms and conditions of the declaration and bylaws of this condominium project. Mortgagors further agree that they will not vote to amend, cancel or revoke such declaration and bylaws without the written consent of the Mortgagee.

3. If default be made at any time in the performance of the above agreements and covenants, at the election of the Mortgagee, all principal and interest and all other indebtedness secured by this mortgage may be declared due and payable, without notice of such election, and the Mortgagee shall then have the right immediately to collect the entire indebtedness by proceedings in Court or other lawful means.**

** This paragraph may be integrated with existing default provisions.