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SECURED TRANSACTIONS AND THE WYOMING CONDOMINIUM OWNERSHIP ACT

INTRODUCTION

The condominium concept is one of the most significant developments in the law of real property since the Statute of Uses was passed in the year 1593. The concept itself dates back to the Middle Ages when separate ownership of floors and rooms became quite common in certain areas of Europe. The moving force for condominium legal development in this country was the Commonwealth of Puerto Rico which in turn took its ideas from Cuba and Brazil. When the 1961 Housing Act authorized the FHA to insure mortgages on residential condominium units, the great pressure for condominium legislation began.¹ The Federal Housing Administration responded by drafting its own Model Act and this has served as a reference for much subsequent state legislation.² Enabling legislation now exists in all of the fifty states³ and although the approach taken by most jurisdictions is similar, there are significant differences as to terminology and the degree of detail in the various provisions.⁴

The Wyoming Condominium Ownership Act was adopted in 1965,⁵ and is the same as that which exists in Colorado.⁶ In comparison to many of the other state enabling acts, it is very short and generalized. The statute was probably meant to be drawn in such general terms because this allows maximum flexibility in setting up each condominium. This flexibility, however, has its drawbacks because it can create uncertainty to many questions which are specifically answered in a longer and more detailed statute.⁷

1. Federal Housing Act, 12 U.S.C. § 1715 (1964).

2. ROHN & RESKIN, *The Federal Housing Administration's Model Statute for the Creation of Apartment Ownership*, in CONDOMINIUM LAW AND PRACTICE, Appendix B-3 (1965) [hereinafter cited as F.H.A. Model Act].

3. King, *Problems of Financing Condominiums*, 24 BUS. LAWYER 445 (1969).

4. See ROHN & RESKIN, CONDOMINIUM LAW AND PRACTICE, §§ 5.01-.04 (1965).

5. WYO. STAT. §§ 34-389.7 to .10 (Supp. 1969).

6. COLO. REV. STAT. §§ 118-13-1 to -5 (1963); see also Groswood, *Colorado Condominium Act—How It Works*, 36 U. COLO. L. REV. 451 (1964).

7. See F.H.A. Model Act, *supra* note 2.

There are really two separate concepts involved with each condominium unit: (1) separate fee simple ownership of the air space occupied by a particular unit along with all the physical improvements within this air space;⁸ and (2) ownership of an undivided interest in the common elements. The Wyoming statute redefines the common elements into general common elements and limited common elements.⁹ The former includes those things which are used by all of the unit owners, such as hallways and stairs.¹⁰ The limited common elements refer to those things used by two or more but by less than all of the unit owners.¹¹ It is not clear from the statutes why there is a distinction between common elements and limited common elements, but it has been suggested by one writer that the reason is to bring about a more efficient method of assessing the unit owners for the costs of repairing and maintaining those elements which are not in fact used by all of the unit owners.¹²

Since the condominium scheme signifies separate fee ownership of a unit within a multi-unit building, a lien, whether it be a mortgage, a mechanic's or materialman's lien or a tax lien, can present some interesting issues to parties involved in such a project. The problems exist because most of the condominium acts which exist today, especially Wyoming's, have failed to deal expressly with the subject of liens.¹³ As a result, resort has had to be made to prior lien and mortgage statutes which are well suited for the ordinary situation for which they were enacted *e.g.*, a mortgage or lien on an apartment building, but appear to be unsatisfactory for the condominium form of ownership. Unlike an apartment building which is one property, a condominium by nature consists of two or more individually owned properties. Consequently, if a lien is considered to attach to the entire condominium project as one property, an individual

8. WYO. STAT. § 34-389.9(1) (Supp. 1969).

9. *Id.* § 34-389.9(2).

10. *Id.* § 34-389.9(2)(a).

11. *Id.* § 34-389.9(2)(b).

12. RUDOLPH, *THE WYOMING LAW OF REAL MORTGAGES*, at 15 (1969).

13. See F.H.A. Model Act, *supra* note 2.

unit owner will have to either redeem the entire debt upon foreclosure, which will ordinarily be greater than his interest is worth, or not redeem and suffer the consequences thereof; one of which could quite easily be the destruction of the condominium regime.

Perhaps the best method to illustrate this problem is to focus upon a mortgage agreement used in financing an apartment complex and then to view the use of the *same* mortgage agreement in a condominium project. Suppose a project developer has two separate lots. On one of the lots he desires to build a ten-unit apartment and on the other a ten-unit condominium. Since for the purposes of the illustration the mortgage agreements are the same, the description of the properties are likewise identical, *i.e.*, described in terms of one property rather than in terms of ten separate units. When the projects are completed, the developer will lease the units in the apartment and sell the ten units in the condominium. If the project owner defaults on the construction mortgages, foreclosure suits will follow and in both instances the properties as one will be sold at the foreclosure sale. This is the real crux of the problem in that the apartment building really is one property in the sense of one fee simple interest; the developer still owns the entire building and the tenants own a right to merely occupy the units. The picture changes under the condominium since at this stage there are now ten property owners, each with a separate interest in the realty. Each of these ten people will be faced with the very real possibility that if the redemption of the *entire* debt is not made the condominium regime will be terminated, which in effect means the destruction of his property interests. Significantly, this illustration is equally applicable to all types of liens since any time a particular lien is allowed to attach to the entire property rather than to the individual interests an inconsistency with the very nature of the condominium concept will develop, but for the purposes of a more orderly and understandable discussion it will be better to deal with the construction mortgage separately from the tax and the mechanic's liens.

CONSTRUCTION MORTGAGES

The construction mortgage will usually cover the project property. Therefore, it becomes necessary to see that as each unit is sold, it is released from this mortgage otherwise, as illustrated above, it will be joined in a foreclosure of the blanket mortgage. In order to partially alleviate the problem, the blanket mortgage affecting the unit must either be satisfied to the extent of the value of the unit or the unit must be released from the lien of the mortgage. The usual form of construction mortgage is acceptable because the financing will ordinarily take place in two stages: (1) a mortgage upon the entire parcel of real estate to cover costs of the construction; and (2) release of the mortgage as to individual units in conjunction with their mortgage financing. The releasing agreement will be quite similar to a releasing agreement which is involved with a blanket mortgage on a tract house scheme except that the release on a condominium mortgage must include the fractional interest of the unit in the common and limited common elements. The consequences of such an arrangement will be that as each unit is released it will assume its own identity apart from the blanket mortgage which will in effect protect the unit purchaser from being joined in a foreclosure suit and thereby alleviate the situation of the individual having to redeem his unit by paying the full amount of the lien.

Another very interesting and related issue concerns the point in time at which the project actually becomes recognized as a condominium scheme. The Wyoming statute has failed to express itself on this issue, but many of the other acts provide that the condominium comes into existence at the filing of the declaration.¹⁴ A determination of such date is important when the sequence of events is such that the construction mortgage is executed before the creation of the condominium regime. It will at the moment of its execution be a mortgage on the entire property and will remain such after the creation of the condominium rather than a mortgage on the separate interests, unless the codominium scheme is

14. F.H.A. Model Act, *supra* note 2, § 3.

recognized by the mortgage and the mortgagee. The releasing agreement discussed above will provide the necessary recognition because, upon the release of one of the units, the mortgagee will be bound to treat the remainder of the property as a condominium. In other words, if he forecloses on the property after one of the units has been sold, he will be forced to treat the property in terms of individual units and undivided interests in the common elements. The description of the property should also be changed from a general description to one which describes the property in terms of individual units. The important point from this discussion is that if the construction mortgage predates the birth of the condominium scheme, the mortgage will not be bound by law to recognize the condominium scheme. Therefore, some type of affirmative action must be taken to see to it that the mortgage does in fact recognize the individual property interests.

If on the other hand the creation of the scheme predates the execution of the mortgage, the outcome by necessity will not be the same. Since at this point in time the building will be composed of subdivided horizontal and vertical interests, the mortgage will have to recognize these interests. The case of *State Savings & Loan v. Kawaian Development Co.*¹⁵ lends support to this conclusion as the facts were such that the mortgage came after the creation of the condominium and also subsequent to the execution of several sales contracts on the units. There was a default on the construction mortgage and the plaintiff-mortgagee attempted to join the individual unit purchasers in the foreclosure suit. The Supreme Court of Hawaii held that the contracts of sale created interests superior to the mortgage lien.¹⁶ The mortgage covered the land and all improvements in existence or to be built and was taken subject to the declaration, but no mention of the contracts of sale was made in the agreement. This is an important fact for even though the lender knew that the mortgage recognized the declarant's subdivided interest in the property, it does not appear that he intended such recognition of the individual property interests of the purchasers.

15. 50 Hawaii 540, 445 P.2d 109 (1968).

16. *Id.* at 119.

In other words, the mortgage on the property was made to recognize those interests which had been created prior to its execution regardless of whether the mortgage made reference to them.

It is important to note that until there is a sale of at least one unit, it makes no difference, at least from a practical standpoint, whether the condominium regime is recognized by the mortgage because until such time there will be only a single property interest involved. Consequently, the foreclosure of a blanket mortgage which covers the entire property will not be inconsistent with the nature of the concept.

MECHANICS' AND MATERIALMEN'S LIENS

A mechanic's or materialman's lien is more difficult to deal with than a construction mortgage as these claims fall under a statute which is based on a public policy by which parties who furnish labor and materials receive a lien against the property for the unpaid debt.¹⁷ This public policy will override any contractual rights created between the developer and the land, the construction lender, and the prospective purchaser, making it incumbent upon these parties to provide for the payment of all construction debts.

There are two periods in which such liens might be filed on a condominium project: (1) for work and materials supplied during the construction of the condominium; and (2) for labor, repair or improvements to an existing condominium unit. In the first situation, it does not matter whether the project was converted into a condominium before or after the work was started as such conversion would have no more effect than a transfer of a singly-owned piece of property into a tenancy in common, which is in effect what happens in relation to the common elements. In short, a unit purchaser will be subject to the possibility that a blanket lien will be filed against his unit regardless of when he purchased his interest. In a recent Colorado case the plaintiff-lienors filed a claim for labor and materials and for

17. WYO. STAT. §§ 29-3 to -26 (1957).

services which had commenced before the declaration had been filed.¹⁸ Subsequent to the filing, five of the units were sold and released, and the issue was whether the full sum of the mechanic's liens could become a lien against the remaining units. It was contended that some sort of a pro-rata formula should be developed whereby the amount of the lien could be proportionately reduced by the number of units sold. The District Court rejected this contention and held that such theory could not be supported by the condominium statute since it fails to provide any protection to individual unit owners as far as mechanic's liens are concerned.¹⁹ The court therefore resorted to general Colorado lien law and held that the entire lien would attach to the remaining property. The important thing from the case is that the court, in rejecting the pro-rata idea and applying the prior lien law, reached a holding which was inconsistent with the condominium concept because the individual property interests were not being recognized. Since the Wyoming act is identical to the Colorado statute,²⁰ the outcome of a similar case in this state could be about the same.

The F.H.A. Model Act, along with a few other statutes, provides that once the condominium regime has come into existence, a lien will no longer be able to attach against the property. Rather, the liens or incumbrances shall be effective only against

each apartment and the percentage of undivided interest in the common areas and facilities, appurtenant to such apartment, in the same manner and under the same conditions in every respect as liens or incumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership.²¹

This seems to be the most workable solution to the lien problem because the liens will still be given legal effect from the standpoint of the unpaid mechanic or supplier, yet the unit

18. *Plateau Supply Co. v. Bison Meadows Inc.*, Civil No. 4017 (D. Colo., filed Jan. 9, 1970).

19. *Id.*

20. COLO. REV. STAT. §§ 118-13-1 to -4 (1913).

21. F.H.A. Model Act, *supra* note 2, § 9.

owner will be relieved of the burden of having to pay the entire debt. Consistency will then be accorded between the lien and the condominium concept.

Additional lien questions arise in situations where claims for unpaid services or materials used in repairing or improving the common elements of the condominium go unsatisfied. The issue is the same question which has been presented throughout this article, *i.e.*, whether the lien will be considered to attach to the entire property or to the individual interests. A few of the statutes provide that all such claims will be satisfied first out of the common funds, and that each owner shall then be liable for his share of the balance due, as determined by his percentage interest in the common areas.²² These acts further provide that the liens may only be placed upon the common funds of the condominium organization and not upon the common areas.²³ Under this approach, the claimant will have to get a personal judgment against each owner for his pro rata share of the amount due. The F.H.A. Model Act on the other hand allows the lien claimant to file his lien against each unit but allows the unit owner to discharge his unit by paying the amount attributable to his unit.²⁴ This statute gives the claimant a more effective means to enforce his claim since he does not have to suffer the inconvenience of having to obtain a judgment against each owner.

The Wyoming-Colorado statute does not deal expressly with this question,²⁵ but since the repairs and improvements will usually be made under contracts with the management association it has been suggested that the owner's association might be considered the agent of the owners.²⁶ By reaching this conclusion, the separate unit holder is not going to be able to redeem his unit by paying his proportionate share but will have to redeem the entire lien debt or suffer a foreclosure suit. To prevent this result, a provision similar to the one in the F.H.A. Model Act should be incorporated into the statute.

22. *E.g.*, MASS. ANN. LAWS ch. 183 A, § 13 (1963).

23. *Id.*

24. F.H.A. Model Act, *supra* note 2, § 9.

25. WYO. STAT. § 34-389.10 (Supp. 1969).

26. RUDOLPH, *supra* note 12, at 18.

TAX LIENS

Tax liens for unpaid tax assessments are expressly recognized by the Wyoming Act. The statute provides that if a written notice of the creation of the condominium regime is filed with the county assessor, the individual interests will be taxed separately.²⁷ This goes back to the question left unanswered by the statute of the exact time that the condominium comes into existence. As in the case of the mortgage such determination will be very important because if the notice is not filed or is filed incorrectly the lien will attach to the entire property. In any event, at least for the purpose of tax liens, the required consistency between the lien and condominium concept is present.

CONCLUSION

The advantages which the condominium concept affords the lender, developer, or unit purchaser, far outweigh the disadvantages, and because of this one can do more than merely speculate as to the future importance of the condominium form of ownership in this country.

Several issues have been discussed in this comment and it should appear evident that the story of condominium ownership has just begun to unfold. It will take a lot of case law to reach the point where the handling of a condominium mortgage or a lien question will become as routine as the processing of a regular mortgage or lien situation. Hopefully, as new issues emerge from the cases, statutory amendments will be made. One thing seems clear, for a time in the future condominium cases "should continue to be engrossing and enlivening to those attorneys who will have to engage in them."²⁸

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27. WYO. STAT. § 34-390.10 (Supp. 1969).

28. King, *supra* note 4, at 457.