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Elizabeth Snider

University of Michigan Law School

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TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH — HELP FOR FLORIDA'S FRAZZLED CONDOMINIUM BUYERS?

The condominium has become an increasingly familiar arrangement in the United States. In 1972, some 235,000 condominium units were built; this number swelled to about 420,000 in 1973, an increase of almost 79 percent.¹ Accompanying this tremendous increase in building and selling has been an increasing awareness of the need for regulation of this multi-million dollar industry.² This note explores the legislative background of condominium regulation; examines the recent Florida Condominium Act amendments,³ focusing on the Act's disclosure requirements, what they mean, and what their impact will be on developers and purchasers; and offers alternatives to the Florida scheme.

¹ National Association of Home Builders, courtesy of L. E. Brown, Jr., of Insurance Services Office, Chicago, from an unpublished report. The current economic conditions, especially the "slump" in the home construction industry, have had an impact on both the construction and sales of condominium projects. The exacting disclosure requirements of the Florida Condominium Act may further retard the industry's growth at this time; however, the law's stringent requirements may be necessary to protect buyers at a time when developers may be more inclined to cut corners and hedge on the truth to sell a vacant condominium unit.

² Wenig & Schulz, *Government Regulation of the Condominium in California*, 14 HASTINGS L. J. 222 (1963); Rohan, *The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool*, 2 CONN L. REV. 1, 11 (1969); Note, *Cooperative Housing Corporations and the Federal Securities Law*, 71 COLUM. L. REV. 118, 122 (1971); Comment, *Legal Protection for Florida Condominium and Cooperative Buyers and Owners*, 27 U. MIAMI L. REV. 451, 458 (1973); Note, *Florida Condominiums—Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 FLA. L. REV. 350, 351 (1973); Note, *Federal Securities Regulation of Condominiums: A Purchaser's Perspective*, 62 GEO. L. REV. 1403 (1974). On condominiums generally, see 4A R. POWELL, REAL PROPERTY, ¶¶ 631-633.33 (1973) [hereinafter cited as R. POWELL]; P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE (1974) [hereinafter cited as P. ROHAN & M. RESKIN]; Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963); Cribbet, *Condominium—Home Ownership for Megalopolis?*, 61 MICH. L. REV. 1207 (1963); Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1 (1963). 1A P. ROHAN & M. RESKIN, *supra*, Appendix A, contains a thorough and current bibliography on the topic of condominiums.

³ Ch. 74-104, [1974] GEN. LAWS OF FLA. 108-46.

I. HISTORY OF CONDOMINIUM STATUTES

Although the condominium form of ownership⁴ is of ancient origin and relatively common in Europe,⁵ it is a recent phenomenon in the United States. Puerto Rico, faced with the problem of an expanding population and rapidly diminishing reserves of space and land, borrowed from the European experience and enacted the first condominium statute in the United States in 1958.⁶ Some commentators reasoned that condominiums could be created on a non-statutory, common-law basis,⁷ and there were attempts in California to create this type of ownership without a statutory scheme.⁸ However, the real impetus for condominium enabling legislation was given by the United States Congress which, in 1961, enacted Section 234 of Title II of the National Housing Act,⁹ which granted to the Federal Housing Authority the power to insure mortgages on condominiums authorized by state law. In 1962, the FHA released a Model Act¹⁰ and the legislative race was on. The Florida Condominium Act¹¹ was passed in 1963, along with thirty other state statutes. By 1969, all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands had enacted condominium legislation.¹²

All of these original statutes had one common aspect—they were merely enabling legislation designed to legitimate condominium

⁴ BALLENTINE'S LAW DICTIONARY (1969) defines a condominium:

a multi-unit dwelling, each of whose residents, known as unit owners, enjoys exclusive ownership of his individual apartment or unit, holding a fee simple title thereto, while retaining an undivided interest, as tenant in common, in the common facilities and areas of the building and grounds which are used by all the residents.

⁵ 1 P. ROHAN & M. RESKIN, *supra* note 2; Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 3-5 (1963); Leyser, *The Ownership of Flats—A Comparative Study*, 7 INT'L & COMP. L.Q. 31 (1958); Note, *Land Without Earth—The Condominium*, 15 FLA. L. REV. 203, 205 (1962).

⁶ P.R. LAWS ANN. tit. 31, §§ 1291-93k (1968).

⁷ Berger, *supra* note 2, at 1002; Cribbet, *supra* note 2, at 1215-15; Note, *supra* note 5.

⁸ For discussions of the California experience, see 4A R. POWELL, *supra* note 2, at 853 ¶ 633.23; Berger, *supra* note 2, at 1002; Cribbet, *supra* note 2, at 1217; Note, *Community Apartments: Condominium or Stock Cooperative?* 50 CALIF. L. REV. 299 (1962).

⁹ 12 U.S.C. §§ 1715, 1715y (1970).

¹⁰ U.S. FEDERAL HOUSING ADMINISTRATION, DEPT. OF HOUSING & URBAN DEVELOPMENT, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP, form 3285 (1962).

¹¹ FLA. STAT. ANN., Ch. 711 (1963).

¹² See 1A P. ROHAN & M. RESKIN, *supra* note 2, App. B-1 for citations to all statutes currently in force.

ownership. In most instances, details of the rights of each party were left to private agreement, and many statutory provisions were subject to variation by agreement.¹³ The statutes did not address the possibility of improper conduct by developers.

In the late 1960's and early 1970's, certain abuses in the condominium development and sales area became apparent, the most noticeable of which were pre-elective self-dealing¹⁴ by the developer, especially with regard to long-term management contracts and oppressive land leases, and the use of fraudulent and misleading statements to induce purchase or rental of condominium units.¹⁵ Without statutory prohibition of these practices, courts were often reluctant to grant relief. In the 1967 Florida case of *Fountainview Association, Inc. v. Bell*,¹⁶ the plaintiff condominium owners' association sought relief against the defendant developers on the ground that the defendants, while in control of the association, sold and leased land to the association at inflated prices and entered into contracts containing exorbitant and oppressive terms. The trial court dismissed the complaint for failure to state a cause of action; this dismissal was affirmed by the district court and the state supreme court, relying on *Lake Mabel Development Corporation v. Bird*,¹⁷ which had held that

[a] corporation cannot, while its promoters own all its outstanding stock, avoid in equity a purchase of property sold to it by its promoters, since . . . the corporation thus has full knowledge of the facts and the rights of innocent purchasers of the stock have not arisen.¹⁸

Hence, the court reasoned, the fact that the developers contracted with themselves for the various contracts would not invalidate them. In another case decided shortly thereafter,¹⁹ the court, relying on *Fountainview* and *Lake Mabel*, denied rescission of certain land leases, even though the evidence disclosed that

¹³ Gregory, *The California Condominium Bill*, 14 HASTINGS L.J. 189, 190 (1963).

¹⁴ Pre-elective self-dealing is a common practice by which the developer enters into contracts and leases with himself on behalf of the unit owners' association during the construction of the project.

¹⁵ Note, *Florida Condominiums—Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 FLA. L. REV. 350, 353 (1973).

¹⁶ 203 So.2d 657 (Fla. App. 1967), *aff'd.*, 214 So.2d 609 (Fla. 1968).

¹⁷ 99 Fla. 253, 126 So. 356 (1930).

¹⁸ *Id.* at 257, 126 So. at 358.

¹⁹ *Wechsler v. Goldman*, 214 So.2d 741 (Fla. App. 1968).

the rental which [the developers] imposed on the condominium associations for the use of the represented recreational area was exorbitant, amounting to more per year than the assessed value of the property leases; and that thereby the promoters acquired for themselves an excessive profit at the ultimate expense of the purchaser-members of the condominium associations. . . .²⁰

These two cases effectively blocked suits for rescission of unfair contracts and oppressive land leases in the condominium context.²¹

By 1972, the condominium industry had grown to tremendous magnitude in Florida,²² and, as shown above, condominium-related problems had grown proportionately. Aware of the problems and of the judiciary's reluctance to act without some legislatively mandated standards,²³ the Florida legislature in 1972 created a Condominium Commission to study all aspects of condominiums and cooperatives and to report its findings and recommendations to the 1973 legislature. The Commission reported its findings in 1973²⁴ and the Florida legislature responded in 1974 by enacting comprehensive revisions to its Condominium Act.²⁵

²⁰ *Id.* at 744.

²¹ Later cases were usually dismissed, regardless of their merits, or of the theories which were advanced. *See, e.g.*, *Riviera Condominium Apartments, Inc. v. Weiberger*, 231 So. 2d 850 (Fla. App. 1970); *Hender v. Rogers House Condominium, Inc.*, 234 So.2d 128 (Fla. App. 1970); *Point East Management Corp. v. Point East One Condominium Corp.*, 282 So.2d 628 (Fla. 1973).

²² Ch. 72-171, [1972] GEN. LAWS OF FLA. 506 reads in part:

WHEREAS, the Florida Condominium industry leads the nation on a per capita basis in number of units and dollar volume, there being approximately 85,000 units at a total value of \$1,700,000,000. . . .

²³ In 1968 the Florida Appellate court said:

What occurred in this instance and in the Fountainview case may indicate a need for legislative action to amend the Condominium Act . . . to prevent unfair dealing by promoters of condominium associations. . . .

Wechsler v. Goldman, *supra* note 19, at 744.

²⁴ *See* I P. ROHAN & M. RESKIN, *supra* note 2, § 13,04[6], for a summary of the committee's findings.

²⁵ Ch. 74-104, [1974] GEN. LAWS OF FLA. 108-47.

II. GENERAL PROVISIONS

Florida's recent revisions, effective July 1, 1974, are aimed primarily at protecting buyers and owners in a residential condominium.²⁶ The powers and obligations of the unit owners' association²⁷ and the material to be contained in the condominium bylaws²⁸ were expanded and clarified; new definitions were added;²⁹ and the contents of the declaration (the recorded document by which a parcel of land is declared to be subject to the Condominium Act and which sets out the property interests involved) were clearly defined.³⁰

The revisions also contain entirely new sections which define the legal obligations of the developer and thereby attempt to protect purchasers of residential units from misconduct on the part of developers. The relationship between the developer and the unit owners' association is more clearly delineated than before, especially with regard to the transfer of control of the project by the developer to the association.³¹ The statute contains strict controls on leasehold condominiums and the provisions of any lease on which the condominium project or the unit owner is obligated,³² and purchasers must now receive a warranty of fitness and habitability from the developer and contractors or suppliers, covering both structural components of the building (three-year warranty) and all other property attached to or made part of the unit (one-year warranty).³³

²⁶ As defined in the Act, a residential condominium is

a condominium comprising condominium units any of which are intended for use as a private residence, domicile or homestead, except that a condominium shall not be deemed a residential condominium if the use for which the units are intended is primarily commercial or industrial and not more than three (3) units are intended to be used for private residence, domicile or homestead and are intended to be used as housing for maintenance, managerial, janitorial or other operational staff of the condominium. In the event that a condominium shall be a residential condominium under the definition herein contained, but otherwise have units whose use is intended to be commercial or industrial, then in such case the condominium shall be deemed a residential condominium with respect to those units which are intended for use as a private residence, domicile or homestead, but not a residential condominium with respect to those units which are intended for use commercially or industrially.

Ch. 74-104, § 711.03(17), [1974] GEN. LAWS OF FLA. 108.

²⁷ Ch. 74-104, § 711.12, [1974] GEN. LAWS OF FLA. 113-15.

²⁸ Ch. 74-104, § 711.11, [1974] GEN. LAWS OF FLA. 111-13.

²⁹ Ch. 74-104, § 711.03, [1974] GEN. LAWS OF FLA. 108-09.

³⁰ Ch. 74-104, § 711.08, [1974] GEN. LAWS OF FLA. 109-11.

³¹ Ch. 74-104, § 711.66, [1974] GEN. LAWS OF FLA. 127-30.

³² Ch. 74-104, §§ 711.63, 711.68, [1974] GEN. LAWS OF FLA. 123-25, 130-31.

³³ Ch. 74-104, § 711.65, [1974] GEN. LAWS OF FLA. 126-30.

The heart of the revisions consists of restrictions on the developer's conduct in the course of the sales transaction. The legislation provides not only that part of the purchase price be held in escrow until completion of the condominium project,³⁴ but also that detailed disclosure accompany the sale of any residential condominium.³⁵ Although many condominium statutes have disclosure requirements,³⁶ none contains provisions as detailed as those in the Florida legislation. Since these disclosure requirements constitute the major protection afforded by the Act, this note will focus on the meaning and purpose of full disclosure under the Act and its impact on developers and purchasers.

III. THE FULL DISCLOSURE PROVISIONS

The most extensive portion of the disclosure provisions is the prospectus requirement.³⁷ Before offering residential condominium parcels for sale or for lease terms exceeding five years, a developer of any residential condominium project which contains more than twenty units must prepare and deliver to prospective purchasers a prospectus. While some of the included information is similar to that required by the Securities Act of 1933,³⁸ the Florida condominium prospectus is intended to inform the purchasers of a residential condominium; hence, its thrust is more toward providing assurances of habitability than toward establishing the condominium's investment potential.

The prospectus itself must contain the following information:³⁹

— A caveat on the first page to the effect that oral representations cannot be relied upon.

— A brief description of the condominium, which must include its name and location and the maximum use load that will be placed upon the common facilities.

— A statement relating whether any units will be leased rather than sold; as to those units being sold subject to a lease, there must be a warning that such units are transferred subject to a lease and the lessee's interest will terminate on expiration of the lease.

³⁴ Ch. 74-104, § 711.67, [1974] GEN. LAWS OF FLA. 130-31.

³⁵ Ch. 74-104, §§ 711.69 - .71, [1974] GEN. LAWS OF FLA. 132-44.

³⁶ See, e.g., CAL. BUS. & PROF. CODE § 11027 (West 1964); HAWAII REV. STAT. § 514-41 (1968); N.Y. GEN. BUS. LAWS § 352-e (McKinney 1968); VA. CODE ANN. § 55-79.23 (1974).

³⁷ Ch. 74-104, § 711.69, [1974] GEN. LAWS OF FLA. 130-41.

³⁸ 15 U.S.C. § 77j (1971).

³⁹ Ch. 74-104, § 711.69(1)-(17), [1974] GEN. LAWS OF FLA. 130.

— A detailed description of the condominium, including a schedule of buildings showing the number of units in each building and the number of bedrooms and bathrooms in each unit, and the total number of units in the entire project. There must also be a reference to the condominium document, which is a copy of the site plan showing the location of all residential buildings and recreational facilities and an estimated date of completion.

— A highly detailed description of the recreational and other common facilities to be used only by the unit owners; it must describe with particularity the location, size, and approximate service capacity of each facility.

— A description of the recreational and other common facilities that will be used in common with other condominiums (if the use or payment of expenses is a mandatory condition of unit ownership). The developer must also include a statement as to what facilities are not committed to be built except under stated conditions.

— A list of improvements (if the condominium is created by conversion of an existing building).

— A summary of any restrictions concerning the use of the condominium units.

— The manner in which utilities and other services will be provided.

— The arrangements for management of the association and maintenance and operation of the condominium, as well as a detailed description of each contract.

— An explanation of the apportionment of common expenses and ownership of the common elements.

— A highly detailed estimated operating budget and a schedule of a unit owner's expenses, including fees payable to the association and fees payable to others.

— A schedule of the estimated closing expenses to be paid by the purchaser.

— The identity of the developer and a statement of his experience in the condominium field.

As an exhibit to the prospectus, a developer must include copies of the declaration; the articles of incorporation, charter, or constitution of the association; the ground lease or other underlying lease of the condominium property; management, maintenance, and other contracts for the management of the association and the operation of the condominium; the estimated operating budget and schedule of unit owner's expenses; the lease of recreation and other common facilities; and the sales or lease agreement.⁴⁰

⁴⁰ Ch. 74-104, § 711.69(19), [1974] GEN. LAWS OF FLA. 140-41.

In addition to the prospectus and exhibits, or if no prospectus is required (*e.g.*, in condominium projects involving fewer than twenty units), a developer must provide a separate document entitled: **IMPORTANT MATTERS TO BE CONSIDERED IN ACQUIRING A CONDOMINIUM UNIT**.⁴¹ This document is aimed at controlling the more serious abuses connected with leasing and management arrangements. Its cover page must identify the condominium project, the developer, and the condominium documents or disclosure materials to which the pamphlet refers. The following information must follow, in boldface type:

- Whether the condominium is being sold based on fee simple interests or on leasehold interests.
- Whether any facilities are offered on a lease or club basis and whether payment under such an arrangement is a mandatory condition of unit ownership.
- Whether land use fees are involved with any facilities.
- Whether lien rights are created on any units to secure the payment of assessments for recreational facilities.
- Whether the developer has reserved the right to expand recreational facilities without consent of the unit owners.
- Identification of persons with whom the developer has made a management contract.
- Whether the developer has retained the right to control the unit owners' association after a majority of the units has been sold.
- Whether there will be any restrictions on the sale or transfer of a unit.

Disclosure affects not only the amount of information to be given to a prospective purchaser, but also the terms of contracts for sale or lease of residential units.⁴² The developer must deliver to the prospective purchaser or lessee a copy of the floor plan of the unit and a copy of the prospectus before the contract for sale may become binding on the purchaser.⁴³ In addition, any items required for disclosure constitute part of the contract, and no changes may be made in them without the consent of the purchaser or lessee.⁴⁴ The contract for sale must also contain a disclaimer of

⁴¹ Ch. 74-104, § 711.69(18), [1974] GEN. LAWS OF FLA. 138-40.

⁴² Ch. 74-104, § 711.70, [1974] GEN. LAWS OF FLA. 141-43.

⁴³ Ch. 74-104, § 711.70(1), [1974] GEN. LAWS OF FLA. 141.

⁴⁴ Ch. 74-104, § 711.70(3), [1974] GEN. LAWS OF FLA. 142.

oral representations, a statement identifying any leases applicable to the unit, and a statement regarding lien rights under recreational leases.⁴⁵ In addition, sales brochures must include a description and location of recreation, parking, and other common facilities, together with a statement indicating which of the facilities will be owned by the unit owners in common and which will be owned by outside interests.⁴⁶ The purchaser or lessee has the right to void any contract for sale or lease within fifteen days after its execution or within fifteen days after delivery of all disclosure items, depending on which event occurs later. Notice of this right must be printed in boldface type within the contract itself.

In order to put enforcement "teeth" into the stiff disclosure requirements, the Act provides remedies for injuries incurred in reliance on false or misleading information.⁴⁷ Any person who reasonably relies on any material statement that is false or misleading, including statements made in a prospectus or its exhibits, or brochures, or newspaper advertising, and who pays anything toward the purchase or lease of a condominium unit has a cause of action to rescind the contract or collect damages for any loss he suffers as a result of such reliance prior to closing the contract. After closing, the purchaser or lessee may have a cause of action against the developer from the time of closing until one year after the last of the following three events occurs: (1) the closing, (2) the first issuance of a certificate of occupancy, or (3) the completion of the common areas and any recreational facilities which the developer is obligated to complete. The prevailing party is entitled to recover reasonable attorney fees.

IV. DISCLOSURE: ITS POLICY AND PRACTICAL EFFECTS

The basic policy behind these extensive disclosure requirements (especially those relating to leases and management contracts) and the remedies provided may be the protection of purchasers and lessees of residential condominiums from the type of overt overreaching found in *Fountainview Association, Inc. v. Bell*.⁴⁸ This policy decision is based on certain assumptions about the effects of disclosure .

⁴⁵ Ch. 74-104, § 711.70(4), [1974] GEN. LAWS OF FLA. 142-43.

⁴⁶ Ch. 74-104, § 711.70(6), [1974] GEN. LAWS OF FLA. 143.

⁴⁷ Ch. 74-104, § 711.71, [1974] GEN. LAWS OF FLA. 143-44.

⁴⁸ See note 6 and accompanying text *supra*.

It may be assumed that disclosure requirements will force developers to proceed with more caution in planning and selling residential condominium units. This assumption is based upon two grounds. First, the remedies available under the Act provide the purchaser with a cause of action regarding any material omissions or misleading statements in all materials, including sales brochures and advertising, regardless of the developer's intent. If such material omissions or misleading statements exist, a developer's sole defense is a good faith effort to comply, coupled with actual substantial compliance with the Act's disclosure requirements.⁴⁹ These strict disclosure standards and the availability of purchasers' remedies should make developers more circumspect in their claims. Second, since detailed disclosure of all expenses, especially those connected with leasing arrangements, is required,⁵⁰ developers will have to present their projects with financial candor.

It may be further assumed that purchasers will receive notice of many items heretofore undisclosed and may tread more warily when entering a sales contract. To ensure notice, the Act not only requires copies of various documents—most notably copies of all leases and management contracts — but it also states that references to such contractual arrangements must be conspicuously displayed throughout the sales literature. The disclosure of all expenses, especially fees levied upon the owner of any given unit, should result in more informed decisions on the part of purchasers. The fifteen-day statutory rescission period should insulate purchasers from the pressures exerted by sales personnel. Finally, the sheer volume of material required to be disclosed should encourage purchasers to seek legal advice prior to closing contracts.

However, some undesirable effects may flow from the disclosure requirements. For example, the cost of preparing such elaborate material will increase the ultimate cost to the purchaser. Although the alternative methods of affording purchaser protection discussed in part V of this note would also tend to increase cost, the offsetting benefit to the purchaser under the alternative protection scheme might be greater than that afforded by merely supplying him with the materials required by the Act. Moreover, as terms and conditions of sales become more complex, the transaction may exceed the understanding of the average purchaser and of attor-

⁴⁹ Ch. 74-104, § 711.69(22), [1974] GEN. LAWS OF FLA. 141.

⁵⁰ Ch. 74-104, § 711.69(15), [1974] GEN. LAWS OF FLA. 136-37.

neys unfamiliar with condominium transactions; full disclosure may lose its effectiveness. Finally, the enforcement burden is placed totally on the purchaser, with no guarantee that developers will adhere to the disclosure requirements. Two results follow from placing this burden on purchasers. First, enforcement can occur only after the fact. The developer retains control of any money until (and unless) the purchaser either rescinds the contract or sues for damages. If suit is brought, the burden of maintaining the suit and the cost of delays fall initially on the purchaser. Second, the duty of enforcement is placed upon individuals who are already in an unfavorable bargaining position and who may not be aware of their rights against the developer.

V. ALTERNATIVES TO THE FLORIDA SCHEME

The basic problem with the Florida disclosure requirements is not the type of disclosure required, but the enforcement scheme. Other states which have condominium statutes have solved this problem with one of two solutions. Most states have vested the power to enforce disclosure requirements in agencies which deal with either securities or real estate.⁵¹ California⁵² has granted not only enforcement power but also regulatory authority to its agency.⁵³

An example of the enforcement approach is the Michigan condominium statute,⁵⁴ which places the enforcement burden on the Michigan Corporation and Securities Bureau of the Michigan Department of Commerce. The Bureau is given the power to promul-

⁵¹ See, e.g., HAWAII REV. LAWS §§ 170A-1-170A-44 (1968); MICH. COMP. LAWS ANN. §§ 559.1-559.31 (1967); N.Y. REAL PROP. LAW §§ 339-d - 339-ii (1968); VA. CODE ANN. §§ 55-79.1 to 55-79.38 (1974).

⁵² CAL. CIV. CODE § 1350-59 (West 1954); CAL. BUS. & PROF. CODE § 11000 *et seq.* (West 1964).

⁵³ The rationale justifying an agency enforcement scheme is that the agency approach is generally more flexible than the statutory approach. Agencies, at least theoretically, remain on top of emerging, unforeseen problems and are better able to adjust to new situations than is a legislative body. Of course, the assumptions underlying agency and regulatory effectiveness are twofold: first, the agency will not be controlled by those it regulates but will function in the public interest; second, adequate funding will be provided to insure agency efficiency and expertise. These assumptions have often been questioned; see generally W. CARY, *POLITICS AND THE REGULATORY AGENCIES* (1967); W. GELLHORN, *WHEN AMERICANS COMPLAIN* (1966); L. KOHLMEIR, JR., *THE REGULATORS* (1969); R. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* (1969); J. MICHAEL, *WORKING ON THE SYSTEM* (1974); R. NOLL, *REFORMING REGULATION* (1971); White, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis*, 1974 DUKE L. J. 195; Note, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835 (1971).

⁵⁴ MICH. COMP. LAWS ANN. §§ 559.1- .31 (1967).

gate rules and forms necessary to carry out the provisions of the Act.⁵⁵ Prior to any sale, a developer must file an application for a permit to sell apartments within the condominium project.⁵⁶ If it is satisfied that the application "clearly and fairly represent[s] the property offered for sale and will not tend to work a fraud or imposition on purchasers,"⁵⁷ the Bureau issues a sale permit. The Act prescribes various penalties for misrepresentation and violations and gives the attorney general the power to prosecute.⁵⁸

The New York condominium statute⁵⁹ places the requirement for registration of condominium offerings under the Law Department, Bureau of Securities and Public Financing.⁶⁰ The attorney general, upon ascertaining that the prospectus clearly sets forth the information required,⁶¹ must allow the offering to be filed. The various penalties prescribed for violation of the New York securities law⁶² apply to condominium registration violations.

The Securities and Exchange Commission has determined that certain types of condominium offerings come within the ambit of SEC regulations as "securities."⁶³ Since it appears that the Commission has been following almost literally the language of its release,⁶⁴ developers can side-step these regulations by not making an offering connected overtly with a rental-pool agreement.⁶⁵ How-

⁵⁵ MICH. COMP. LAWS ANN. § 559.31 (1967).

⁵⁶ MICH. COMP. LAWS ANN. § 559.24 (1967).

⁵⁷ MICH. COMP. LAWS ANN. § 559.26 (1967).

⁵⁸ MICH. COMP. LAWS ANN. § 559.28 (1967).

⁵⁹ N.Y. REAL PROP. LAW §§ 339-d - 339-ii (McKinney 1968).

⁶⁰ N.Y. GEN. BUS. LAWS § 352-e (McKinney 1968).

⁶¹ N.Y. GEN. BUS. LAWS § 352-e-(1)(b) (McKinney 1968).

⁶² N.Y. GEN. BUS. LAWS § 353 (McKinney 1968).

⁶³ SEC Release No. 5347 [1972-1973 Transfer Binder], CCH FED. SEC. L. REP. ¶ 79, 163, at 82,535 (Jan. 4, 1973). The Commission views the following as securities:

1. Condominiums with any rental agreement or similar service that are offered and sold with emphasis on the economic benefit to the purchaser to be derived from the managerial efforts of the promoter, or third party designated or arranged for by the promoter, from rental of the units;
2. The offering of participation in a rental pool arrangement; and
3. The offering of a rental or similar arrangement whereby the purchaser must hold his unit available for rental for any part of the year, must use an exclusive rental agent or is otherwise materially restricted in his occupancy or rental of the unit.

Id. at 3, [1072-1973 Transfer Binder] CCH FED. SEC. L. REP. at 82,539-40 (Jan. 4, 1973).

⁶⁴ See note 63 *supra*.

⁶⁵ See Clurman, *Condominiums as Securities: A Current Look*, 19 N.Y.L.F. 457, 466 (1974).

ever, the New York federal courts have recently expanded the definition of federal securities to include shares in a cooperative housing corporation,⁶⁶ and it appears that many condominium offerings may now come within the definitional scope proposed by the New York courts. Although many commentators have thoroughly investigated the federal securities implications of condominiums,⁶⁷ it is still unclear whether residential condominiums are subject to regulation by the SEC.

The problem with this approach to enforcement is that, while full disclosure is required and made, the state agencies merely enforce the letter of the law and have no "fairness and feasibility" test;⁶⁸ that is, they cannot refuse to file an offering or to grant a permit to sell on the ground that the offering contains excessive or exorbitant prices, possible risks of loss to the purchaser, or harsh or oppressive terms. The theory behind such an approach is that the best protection to investors and purchasers is to provide them with an "adequate basis upon which to found their judgment."⁶⁹ This theory may be perfectly sound for investors in stocks and securities who usually deal with and through a professional trained in investments and who expect that certain risks, most notably the risk of loss, are inherent in this type of investment. However, the expectations of persons who purchase residential real estate may be vastly different. While it is true that the purchase of a residential

⁶⁶ *Forman v. Community Services, Inc.*, 500 F.2d 1246 (2d Cir. 1974); *1050 Tenants Corp. v. Jakobson*, 365 F. Supp. 1171 (1973).

⁶⁷ See generally Clurman, *Condominiums as Securities: A Current Look*, 19 N.Y.L.F. 457 (1974); Dickey & K-Thorp, *Federal Securities Regulation of Condominium Offerings*, 19 N.Y.L.F. 473 (1974); Hosington, *Condominiums and the Corporate Securities Law*, 14 HASTINGS L.J. 241 (1963); Rohan, *The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool*, 2 CONN. L. REV. 1 (1969); Sobieski, *Securities Regulation in California: Recent Developments*, 11 U.C.L.A. L. REV. 1 (1963); Note, *Federal Securities Regulation of Condominiums: A Purchaser's Perspective*, 62 GEO. L. REV. 1403 (1974); Note, *Securities Law—Coop Apartments—Shares of a Cooperative Housing Corporation are Securities*, 62 GEO. L. REV. 1515 (1974).

⁶⁸ Levine, *Registering a Condominium Offering in New York*, 19 N.Y.L.F. 493, 498 (1974); Wenig & Schulz, *Government Regulation of Condominium in California*, 14 HASTINGS L.J. 222, 238 (1963).

⁶⁹ N.Y. GEN. BUS. LAWS § 352-e(1) (b) (McKinney 1968). Similarly, the Real Estate Advisory Committee, in the forward to its report to the Securities Exchange Commission regarding regulation of condominiums, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,265, at 82,772 (Oct. 12, 1972), concluded that

the proper investor protection can best be achieved by the investor being able to make an informed investment decision based on full informative, understandable and uniform economic disclosures in real estate security offerings.

condominium is an investment in the same sense that the purchase of a home is an investment, the expectations of the parties and the risks inherent in the transaction differ from those of investors in stocks and securities. Mere disclosure may not provide adequate protection for a public which does not know how to interpret or apply the disclosed information.

The second approach is that of vesting both enforcement and regulatory power within a state's real estate regulatory body. The California condominium statute⁷⁰ places the regulation of all condominiums and condominium offerings under its Real Estate Commissioner, to be treated under his power to regulate subdivided lands.⁷¹ This statute requires not only full disclosure, but also requires that the commissioner determine the feasibility of the project,⁷² the adequacy of financing,⁷³ and the reasonableness and fairness of the method of financing,⁷⁴ with on-site as well as office investigations. The Act also provides penalties for its violation.⁷⁵ This statute, as contrasted with the Michigan and New York statutes,⁷⁶ provides that each prospective purchaser be given a public report containing certain information regarding the project and the Commissioner's authorization of the project.⁷⁷

While the California scheme is not one of total regulation, it does provide for a minimal "fairness and feasibility" test which, when combined with the publication of a report to be given to all prospective purchasers, may provide the

assurance that the conditions of the sale and the plan for management of the project have been analyzed and have been found to be fair, just and equitable, and that the builder will conduct the sale of apartment units justly and honestly.⁷⁸

Although either approach places the enforcement burden on government agencies which are more able than individual complainants to bear that burden, the regulatory approach provides the additional benefit of assuring thorough investigations of con-

⁷⁰ CAL. CIV. CODE §§ 1350-59 (West 1954).

⁷¹ CAL. BUS. & PROF. CODE §§ 11000-11023 (West 1964).

⁷² CAL. BUS. & PROF. CODE § 11018 (West 1964).

⁷³ CAL. BUS. & PROF. CODE § 11018.5 (West 1964).

⁷⁴ CAL. BUS. & PROF. CODE § 11025 (West 1964).

⁷⁵ CAL. BUS. & PROF. CODE § 11029.1 (West 1964).

⁷⁶ Both New York and Michigan agencies require a disclaimer to the effect that registration of the offering does not constitute approval by the agency of the sale, nor has the agency passed on the merits of the project. N.Y. GEN. LAWS § 352-e(4) (McKinney 1968); MICHIGAN CONDOMINIUM GUIDELINE NO. 4 (1974), promulgated by the Condominium Section of the Securities Division of the Michigan Department of Commerce.

⁷⁷ CAL. BUS. & PROF. CODE § 11018 (West 1964).

⁷⁸ Wenig & Schulz, *Government Regulation of Condominium in California*, 14 HASTINGS L.J. 222, 239 (1963).

dominium development projects' fairness (*i.e.*, fairness of financing, terms of contracts, monthly expenses). The latter approach also ensures that facts considered important to purchasers are disclosed, thus easing the burden on purchasers in increasingly complex sales arrangements.⁷⁹

VI. CONCLUSION

Although the Florida Commission recommended further study before a state supervisory agency be given control over condominiums and cooperatives,⁸⁰ it appears that a state administrative agency will be needed to enforce the Florida Act's disclosure requirements.⁸¹ The best approach, offering the greatest protection to purchasers and lessees of units in residential condominiums, is that of placing enforcement and at least minimal regulatory powers in a single state agency. The appropriate agency to deal with residential condominiums is one that deals in regulations of real estate transactions rather than one that deals with securities, since "expertise in real property developments [and] mortgage financing"⁸² appears to be necessary for a knowledgeable review of condominium projects.

These recommendations can be implemented by vesting the power of insuring compliance with and regulation of the Florida Condominium Act either within the existing Division of Land Sales and treating condominiums and cooperatives as subject to the provisions of the existing Florida Land Sales Act⁸³ (admittedly a stop-gap approach), or, more effectively, by placing the enforcement responsibility within a newly created Division of Condominiums and Cooperatives which would enforce the Act and regulate all sales and leases of residential condominiums subject to the Act.

—Elizabeth Snider

⁷⁹ The Real Estate Advisory Committee, in the forward to its report to the SEC, cited in note 63 *supra*, conceded the possibility of future regulatory action:

If, however, improved disclosure and enforcement does not achieve this end [of insuring proper investor protection in real estate security offerings], a regulatory approach . . . may be necessary.

SEC, REPORT OF THE SEC REAL ESTATE ADVISORY COMMITTEE at 4.

⁸⁰ See I P. ROHAN & M. RESKIN, *supra* note 2, § 13.04[6].

⁸¹ Note, *Florida Condominiums-Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 FLA. L. REV. 350 (1973).

⁸² 4A R. POWELL *supra* note 2, ¶¶ 633.42[5], 633.44[2] [c].

⁸³ FLA. STAT. ANN. §§ 478.011 - .33 (1965). This Act, which is very similar to the California Subdivided Land Act, CAL. BUS. & PROF. CODE §§ 11000-11023 (1964), requires that the project be feasible and the disclosure be both "full and fair." *Id.*, § 478.141(b), (c).