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The California Condominium Bill

By PHILIP J. GREGORY, ESQ.*

RECENT interest in condominium problems,1 legislation on the subject in other states,2 federal legislation,3 and experience in the drafting of deeds, restrictions and other documents necessary to formation of condominium developments, and to approval of regulatory agencies under existing California law have resulted in general agreement among lawyers interested in the subject that legislation is desirable in California to facilitate the use of the condominium approach to ownership of community apartment, commercial and industrial properties. As a result, Preston N. Silbaugh, Chairman of the California State Board of Investment, caused a state-wide committee to be formed under my chairmanship to develop a condominium bill for introduction in the 1963 session of the California Legislature.

After receiving views of representatives of various public and private parties who might be interested in such legislation, our committee has prepared a draft bill which has been introduced in the 1963 session as Senate Bill 600, by Senator Edwin J. Regan, chairman,

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* A.B., LL.B., Chairman, State Board of Investments' Committee on Condominium Legislation; Legislative Representative for California Bankers' Association, California Mortgage Bankers Association, and California Investment Bankers Association.


Senate Judiciary Committee. Its provisions are quoted below with a brief comment after each provision to describe the intent of the draftsmen and the reason for its inclusion.

The draftsmen of this bill have taken an approach in its preparation quite different from that of draftsmen of other condominium bills and statutes. The basic intent has been not to enact an elaborate statutory scheme for condominium projects as a single act, but rather to make changes in existing California statutes which experience has indicated are essential, and to make as few additions to the California statutes as seem necessary to enable easy use of the condominium method of ownership. As much as possible, details of the rights of the parties in such projects have been left to private agreement, and many of the provisions of the proposed statute are subject to variation by agreement.

The sections are set out below with comments.

**Section 1.** Section 783 of the Civil Code is added to read as follows:

**Section 783.** A condominium is an estate in real property consisting of an undivided interest in common in portions of a parcel of real property together with a separate interest in space in a residential, industrial and/or commercial building on such real property, such as an apartment, office or store. A condominium may include in addition a separate interest in other portions of such real property.

Such estate may, with respect to the duration of its enjoyment, be either (1) an estate of inheritance or perpetual estate, (2) an estate for life, or (3) an estate for years.

This section defines a new estate in real property, called a “condominium,” in broad terms to include foreseeable uses of the condominium concept whether residential, industrial or commercial.

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4 See note 2 supra.

5 The FHA Model Act, the proposed New York legislation, the Puerto Rican Act, and, to some extent, all of the statutes which have been passed thus far set up condominium “regimes” which substantially limit the freedom of contract of persons adopting them. For example, limitations are placed on the minimum number of units in a condominium project (Model Act § 2(e) ), on the manner in which the voting rights of the owners, their interests in the common areas and their share of common expenditures are to be determined (Model Act § 6(a), (b) and (c), § 11(6); P.R. Civ. Code, §§ 1291f, 1291s), and on the separate alienation of parts of the condominium units; all apartments are required to have a direct exit to a public street or highway or to a common area leading to a public street or highway (Model Act § 2(a) ). While these restrictions may be appropriate to the typical FHA project, it is not difficult to imagine condominium projects, particularly commercial or industrial projects, for which they would be quite inappropriate, in part because the public is protected from sale of unworkable condominium schemes in California by administrative regulation of condominium sales (Cal. Bus. & Prof. Code §§ 11000ff, 11500ff; 39 Cal. Ops. Att'y Gen. 82 (1962)). The draftsmen of the statute have not wished to restrict all condominiums to one pattern where other patterns could reasonably be adopted.
The section expressly incorporates the provisions of Civil Code section 761, subsections 1, 2 and 3, to make it clear that condominiums may be owned in fee simple, or as life estates with remainders, or as terms for years. The third category may become increasingly important. As the value of land increases owners become less willing to sell and more willing to make long-term ground leases upon which condominium projects may be built. The exclusion of estates at will does not mean that one may not be a tenant at will of a condominium, but rather that in such event there must be a reversionary owner of the condominium. Condominiums may be conveyed, mortgaged, or transferred by will or intestate succession in the same manner as other interests in real property.

SECTION 2. Section 752b of the Code of Civil Procedure is added to read as follows:

Section 752b. Where several persons own condominiums, as defined in section 783 of the Civil Code, in a condominium project, as defined in section 1350 of the Civil Code, an action may be brought by one or more of such persons for partition thereof by sale of the entire project, as if the owners of all of the condominiums in such project were tenants-in-common in the entire project in the same proportion as their interests in the common areas, provided, however, that a partition shall be made only upon the showing that (1) three years after damage or destruction to the project which renders a material part thereof unfit for its use prior thereto, the project has not been rebuilt or repaired substantially to its state prior to its damage or destruction, or (2) that three-fourths or more of the project has been destroyed or substantially damaged, and that condominium owners holding in aggregate more than a 50 per cent interest in the common areas are opposed to repair or restoration of the project, or (3) that the project has been in existence in excess of 50 years, that it is obsolete and uneconomic, and that condominium owners holding in aggregate more than a 50 per cent interest in the common areas are opposed to repair or restoration of the project, or (4) that conditions for such a partition by sale set forth in restrictions entered into with respect to such project, pursuant to the provisions of Division Second, Part IV, Title VI, Chapter 1 of the Civil Code (commencing at section 1350), have been met.

One of the most disturbing theoretical problems of condominium projects is the state of title to the entire property if a condominium building is destroyed or turns into a slum, or otherwise is no longer suitable for the original purpose.

If a partially destroyed building is to be rebuilt, some device is required to vest rebuilt portions thereof in the condominium owners

*The FHA is explicitly authorized to insure “leasehold” condominium projects (12 U.S.C. 1715y(b)).
whose units have been destroyed. If the building is to be removed and the property sold, the several rights of the condominium owners in portions of the building severally owned and in the airspace occupied thereby must be eliminated in order to make the property marketable. At such a time owners of the condominiums may be many and hard to locate. Under existing law if they all owned their condominiums in fee simple absolute, unanimous consent would be required to convey title to the entire parcel of land upon which the building was built. Lawyers and title men have been most concerned about the difficulty of clearing titles of projects of this kind under such circumstances.

The mechanism commonly used in California is to grant to each owner a fee in his unit which determines when the property is destroyed in whole or in part and when a specified majority of owners elect not to rebuild. Interests in the possibilities of reverter after the determinable fee of each owner are transferred or reserved to the owners of the various units in proportion to the interest of each of the common areas. Thus, when the fees to the units determine the whole project is owned in common. The determinable fee is conveyed in both a portion of the building and in airspace. If the project is rebuilt, the rebuilt apartments should fall within the airspace occupied by the original apartments and the owner of each parcel of airspace should accede to title to the reconstructed apartment that falls within it.

This mechanism raises questions as to the validity of conveyances of airspace and as to whether airspace is real property in California, as to whether possibilities of reverter can be transferred, as to the applicability of the Rule Against Perpetuities to any possibility of reverter or to the transfer of a fee excepting and reserving a determinable fee, which is characteristic of condominium deeds.

The partition device eliminates these problems, eliminates the use

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of the determinable fee, which is unacceptable to some lenders, and
ties in to the partition procedures already worked out and elaborated
in detail in the Code.\textsuperscript{11}

Judicial partition is provided for in subsections (1), (2) and (3)
in cases where the building is very unlikely to be rebuilt or where it
is demonstrably obsolete or uneconomic. Subsection 4 permits other
reasonable conditions for partition to be set forth in a declaration of
restrictions. Such conditions may be tailored to the type of construc-
tion, size and age of each particular project.\textsuperscript{12}

Section 3. This section adds a new Title VI to the Civil Code and
creates a condominium \textquotedblleft regime\textquotedblright{} to which a developer may voluntarily
submit his property. The provisions of the Title are designed to
eliminate doubts as to the validity of certain provisions that are com-
monly used in condominium documents and to simplify documenta-
tion of condominium projects. The Title does not purport, however,
to set forth the exclusive method of creating condominium projects.
The sections of this new title are taken up in order below.

Section 1350. Definitions. As used in this Title unless the context otherwise requires:
1. \textquotedblleft Condominium\textquotedblright{} means a condominium as defined in section 783
   of the Civil Code.
2. \textquotedblleft Unit\textquotedblright{} means the elements of a condominium which are not
   owned in common with the owners of other condominiums in the
   project.
3. \textquotedblleft Project\textquotedblright{} means the entire parcel of real property divided, or to
   be divided into condominiums, including all structures thereon.
4. \textquotedblleft Common Areas\textquotedblright{} means the entire Project excepting all units
   therein granted or reserved.
5. \textquotedblleft To divide\textquotedblright{} real property means to divide the ownership thereof
   by conveying one or more condominiums therein but less than the
   whole thereof.

This section creates definitions applicable only within the new
Title of the Civil Code. It incorporates by reference the general
definition of condominium set forth in section 1 above. For the pur-

\textsuperscript{11} Cal. Code Civ. Proc. § 752 and following.

\textsuperscript{12} See note 2 supra. The Arizona and Hawaiian statutes do not deal with the problems
of destruction or obsolescence at all. The Arkansas statute requires rebuilding in all cases
unless unanimously agreed to the contrary (5 Ark. Stat. §§ 50-1020 to 50-1022). The
Kentucky and Puerto Rico Acts provide for insurance of the project and for the conditions
upon which the project need not be reconstructed; they do not deal with the problem of
clearing title for the project if it is not reconstructed (3 Ky. Rev. Stat. §§ 381.890, 381.895;
P.R. Civ. Code, Tit. 31, p. 150, §§ 1293g, 1293h, 1293i). The provisions included in the
California draft are derived in part from the FHA Model Act § 26 and the New York draft
poses of the Title, it creates additional defined terms which are those used commonly in the drafting of documents relating to condominium projects.

Section 1351. Applicability. The provisions of this chapter shall apply to property divided or to be divided into condominiums only if there shall be recorded in the county in which such property lies a plan consisting of (i) a description or survey map of the surface of the land included within the project, (ii) diagrammatic floor plans of the building or buildings built or to be built thereon in sufficient detail to identify each unit, its relative location and approximate dimensions, and (iii) a certificate consenting to the recordation of such plan pursuant to this chapter signed and acknowledged by the record owner of such property and all record holders of security interests therein. Such plan may be amended or revoked by a subsequently acknowledged recorded instrument executed by the record owner of such property and by all record holders of security interests therein. Until recordation of a revocation, the provisions of this chapter shall continue to apply to such property. The term "record owner" as used in this section includes all of the record owners of such property at the time of recordation, but does not include holders of security interests, mineral interests, easements or rights of way.

The benefits of the balance of the sections in the Title are invoked by recordation of a survey of the land to be included in the project and of a simplified plan of the building built or to be built on it.\textsuperscript{13} It is anticipated that the plan will be used as a convenience in conveying condominium units by reference, much as flat subdivision maps are used in the conveyance of lots. Plans will show each unit, identified by number or letter. Good title practice will require substantial accuracy of the building plan (to be drawn, however, in broad outline) and of the drawing showing location of buildings on the land and a statement, by drawing or language, of the elevation of each floor above a datum point established in or near the foundation of the building. Detailed drawings of the building will not be necessary in view of the provisions of section 1353(a) which tie the boundaries of condominium units to the physical surfaces of the building as constructed. The diagrammatic floor plan, however, will show the intention of the parties with respect to the rooms in the building and spaces outside it which are to be included in each unit or to be parts of the common area.\textsuperscript{14}

\textsuperscript{13} The survey and plan need not be signed by the holders of easements or of mineral interests. A conveyance of a condominium, however, would be subject to their interests, and prior to any conveyance of condominiums the condominium developer will normally be required to obtain their signatures on a subdivision map under the provisions of the Subdivision Map Act (CAL. BUS. & PROF. CODE §§ 11586-11587).

\textsuperscript{14} In contrast, the provisions of the FHA Model Act are invoked by filing an elaborate declaration containing, among other things, the value of the property, the value of each
Provision for amendment is made, so that alterations to the building, re-allocations of rooms and spaces between units, or changes in design of a building not completed when the original plan is recorded may be reflected on the record for permanent use. Revocation of the plan is permitted so that if owners of property decide to remove it from the condominium scheme of ownership in order, for example, to turn it into a rental housing project, this can be done of record. The plan and survey may also be a subdivision map recorded pursuant to new section 11535(f) of the Business and Professions Code added by section 4 of the bill.

Section 1352. Conveyance of Condominium. Unless otherwise expressly stated therein, any transfer or conveyance of a unit or an apartment, office or store which is a part of a unit, shall be presumed to transfer or convey the entire condominium.

This section is intended to avoid inadvertent splitting of part of a condominium from the balance; for example, the apartment from the right to use the common areas. It is anticipated that wills, deeds and other documents of conveyance or transfer may in time refer to condominium units as “Apartment No. 5” or “my apartment at 1350 Black Street,” and any argument that such references do not convey the entire condominium is intended to be answered by this section. Provision is made, however, for a deed by express language to transfer a part of a condominium. Thus, unless prohibited by provisions of the restrictions permitted under section 1355(g), an owner of one condominium may sell a room in it or one of his garage spaces to a neighboring owner.

Section 1353. Incidents of Condominium. Unless otherwise expressly provided in the deeds, declaration of restrictions or plan, the incidents of a condominium grant are as follows:

This language permits parties to alter incidents of condominium grants set forth below in the section by the provisions of the plan, the restrictions or the deed. The incidents set forth below are those which

apartment, descriptions of the land, the building, the number of stories of the building, and the principal materials of which it is to be constructed, the approximate area of each apartment, description of the common areas and facilities, and the purposes for which the apartments are to be used (FHA Model Act §§ 3, 11). The simpler requirements of the California Act seem preferable. Under the Model Act provision, a project might lose the benefits of the Act entirely if the declaration did not comply substantially with the requirements of section 11. The loser in such a case would not be the person drafting the declaration but the purchasers of the apartments in the building. It seems doubtful, likewise, that all of the information required in section 11 is really essential to a well-drawn declaration.
the draftsmen believe would normally be intended in usual condominium projects.

(a) The boundaries of the unit granted are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the unit includes both the portions of the building so described and the airspace so encompassed. The following are not part of the unit: bearing walls, columns, floors, roofs, foundations, elevator equipment and shafts, central heating, central refrigeration and central air conditioning equipment, reservoirs, tanks, pumps and other central services, pipes, ducts, flues, chutes, conduits, wires and other utility installations, wherever located, except the outlets thereof when located within the unit. In interpreting deeds and plans the existing physical boundaries of the unit or of a unit reconstructed in substantial accordance 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.

The philosophy adopted by this section is that, as to his rooms in a building, a condominium owner owns exclusively only the space within the walls. All tangible parts of the building, other than movable or nonbearing partitions, interior doors, utility outlets and fixtures, are owned in common with other owners of the building. The owners, therefore, have an insurable interest in the building as a whole.

The duty of repair and maintenance of the building is likewise borne by the owners as tenants in common, except for interior refinishing. Subsection (d) permits the owner to refinish the interior walls of his unit. A unit owner may not alter the parts of the building which are owned in common with his neighbors. On the other hand, he has exclusive ownership of the space within his unit. His rights therefore are substantially the same for the duration of his estate as those of a typical lessee of an apartment or of other building “space” during his term of years.

(b) The common areas are owned by the owners of the units as tenants in common, in equal shares, one for each unit.

This paragraph creates a presumption that owners of condominiums in the project have equal interests in the common area. The developer, however, will often wish to rebut this presumption by providing that the interests in the common areas will be divided in fractions proportionate to the sales prices of the units at the initial sale or to the floor area of the units.

(c) A nonexclusive easement for ingress, egress and support throughout the common areas is appurtenant to each unit and the common areas are subject to such easements.
Although tenants in common have equal rights to use of commonly held property, the bill creates easements to protect the owners of condominium units against the possible loss of their rights to use of the common areas, due, for example, to loss of the owner's interest in the common areas by inadvertent separation of the two interests forming the condominium in conveyancing.

(d) Each condominium owner shall have the exclusive right to paint, repaint, tile, wax, paper or otherwise refinish and decorate the inner surfaces of the walls, ceilings, floors, windows and doors bounding his own unit.

Since under paragraph (a) the condominium owner does not own any tangible part of the walls of his unit, his right to resurface the walls must be provided for.

Section 1354. Partition. Except as provided in section 752b of the Code of Civil Procedure, the common areas shall remain undivided, and there shall be no judicial partition thereof. Nothing herein shall be deemed to prevent partition of a cotenancy in a condominium.

Since owners of condominium units need their undivided ownership of the common areas in order to use their units, it is necessary to prohibit judicial partition of these areas during the period the condominium project continues as such. While such a prohibition in restrictions is valid, it is important; and the possible questions about the period for which it may endure make desirable such a statutory provision. Cotenants of a single condominium continue to have the usual rights of partition between themselves.

Section 1355. Declaration of Restrictions. The owner of a project may, prior to the conveyance of any condominium therein, record a declaration of restrictions relating to such project, which restrictions shall be enforceable equitable servitudes where reasonable, and shall inure to and bind all owners of condominiums in the project. Such servitudes, unless otherwise provided, may be enforced by any owner of a condominium in the project, and may provide, among other things:

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Condominium projects, being in effect vertical subdivisions, normally require recordation of a declaration of restrictions governing all the owners in their interrelation in the operation of the building.\(^8\)

Considerable care has been required under present law in drafting such a declaration of restrictions to assure that its provisions will be enforceable as equitable servitudes.\(^9\) The section is intended to eliminate the need for the recitals otherwise required to assure validity of the servitudes,\(^2\) and to remove all question as to the validity of the servitudes provided that they are reasonable.\(^2\) The restrictions may be enforced by any owner of a condominium in the project or, if the restrictions so provide, by a management body or Board of Governors. The following subparagraphs then list the provisions which are ordinarily included in such restrictions. The subsections are not only intended to establish the validity of reasonable provisions of the types described\(^2\) but are also intended to suggest to future draftsmen matters which should ordinarily be dealt with in an adequate declaration of restrictions. The enumeration is, however, only of matters for

\(^{18}\) A landowner setting up a condominium involving only two or three units might not wish to go to the expense of drafting and recording a declaration of restrictions, preferring to rely on the common law governing relationships between tenants in common (see 2 Witkin, Summary of California Law, Rights, Powers and Obligations of Cotenants, 963-67 (1960)). A declaration of restrictions is, therefore, not required by the statute. Most of the statutes enacted or proposed in other states (see note 2, supra) require filing of a declaration or of by-laws (e.g., 5 Ark. Stat. § 50-1015 (Supp. 1961)) and require that specified types of provisions be included in the by-laws, in the restrictions, or in the deeds, or in each of them (e.g., FHA Act §§ 11, 12, 19). It is by no means clear that any appropriate sanction can be devised for failure to comply with such requirements. In any case, the California draftsmen preferred not to attempt to impose a single mold on all projects.

\(^{19}\) Because of the lack of privity between grantees of condominiums, the restrictions can not be enforced by the Board or owners as covenants running with the land (14 Cal. Jur. 2d 23, 24, 115 (1954)). If the provisions are to be enforceable as equitable servitudes under present law, the declaration must contain a statement that the restrictions are for the benefit of all owners, a clear description of the dominant tenement, a clear expression of the general scheme of development, and an express provision that the restrictions are to burden the land conveyed. Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P.2d 720 (1944). See generally, 14 Cal. Jur. 2d Covenants §§ 102 and following, §§ 116 and following (1954).

\(^{20}\) See Burkhardt v. Lofton, supra note 18.

\(^{21}\) Because the drafters have provided that the restrictions are enforceable as servitudes they will be enforceable only so long as major changes in the character of the property do not frustrate their purpose (Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931)).

\(^{22}\) Most of the provisions described would be enforceable in a carefully drafted set of restrictions under present law. Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919); Robertson v. Nichols, 92 Cal. App. 2d 201, 206 P.2d 898 (1949); In re Bangle, 54 Cal. App. 415, 201 Pac. 968 (1921) (approving a servitude which created a maintenance charge and lien); cf. Madera C. & I. Co. v. K. Arakelian, Inc., 103 Cal. App. 592, 284 Pac. 971 (1930) (contractual lien for charges incurred by grantor valid against grantee with notice). The type of provisions described in subsections (b) (9) (f) and (g) would, however, be of quite doubtful validity absent statutory sanction.
which the restrictions “may provide among other things.” Other reasonable provisions may be added, and any or all of the enumerated provisions may be omitted.

(a) For the management of the project by one or more of the following management bodies: the condominium owners, a board of governors elected by the owners, or a management agent elected by the owners or the board or named in the declaration; for voting majorities, quorums, notices, meeting dates, and other rules governing such body or bodies; and for recordation from time to time, as provided for in the declaration, of certificates of identity of the persons then composing such management body or bodies, which certificates shall be conclusive evidence thereof in favor of any person relying thereon in good faith.

Restrictions applying to large projects normally provide for boards of governors and also often for management agents and have provisions regulating the procedure of selecting the board similar to those contained in corporate by-laws.

(b) As to any such management body:

(1) for the powers thereof, including power to enforce the provisions of the declaration of restrictions;

(2) for maintenance by it of fire, casualty, liability, workmen’s compensation and other insurance insuring condominium owners, and for bonding of the members of any management body;

(3) for provision by it of and payment by it for maintenance, utility, gardening and other services benefiting the common areas; for employment of personnel necessary for operation of the building, and legal and accounting services;

(4) for purchase by it of materials, supplies and the like and for maintenance and repair of the common areas;

(5) for payment by it of taxes which would be a lien upon the entire project or common areas, and for discharge by it of any lien or encumbrance levied against the entire project or common areas;

(6) for payment by it for reconstruction of any portion or portions of the project damaged or destroyed;

(7) for delegation by it of its powers;

(8) for entry by it or its agents into any unit when necessary in connection with maintenance or construction for which such body is responsible;

(9) for an irrevocable power of attorney to the management body to sell the entire project for the benefit of all of the owners thereof when partition of the project may be had under section 752b of the Civil Code, which said power shall: (i) be binding upon all of the owners, whether they assume the obligations of the restrictions or not; (ii) if so provided in the declaration, be exercisable by less than all (but not less than a majority) of the management body; (iii) be exer-
cisable only after recordation of a certificate by those who have power to exercise it that said power is properly exercisable hereunder, which certificate shall be conclusive evidence thereof in favor of any person relying thereon in good faith.

This section lists the principal powers which have been thought necessary for management bodies to operate condominium buildings.

Paragraph 5, in so far as it relates to taxes, will ordinarily have little operation in view of section 6 of the bill, which requires separate assessment of condominiums owned in fee. However, general tax liabilities may arise against a condominium project under federal or state law for income of the management body, for personal property taxes, or for real property taxes on condominiums not owned in fee.

Paragraph 9 makes effective a provision often included in such restrictions delegating to the management body the power to sell the entire project when partially or totally destroyed, or under other circumstances where it should be sold. This avoids the necessity of bringing a partition action to permit conveyance of title without signatures of all of the owners.

It also, however, eliminates the benefits and safeguards of automatic judicial control. A draftsman employing such a power of sale should exercise the greatest care to assure that fair and reasonable procedures for exercise of the power are provided for, lest a court find the power of sale unreasonable, and, therefore, not enforceable as a servitude. Title companies will, of course, be unlikely to insure any sale made pursuant to such a power unless adequate procedures are provided for and unless adequate provision is made for establishing on the record that the various conditions for exercising the power of sale have occurred as set forth in proposed section 752b of the Code of Civil Procedure or, pursuant thereto, set forth in the restrictions.

(c) for amendments of such restrictions, which amendments, if reasonable and made upon vote or consent of not less than a majority in interest of the owners in the project given after reasonable notice, shall be binding upon every owner and every condominium subject thereto, whether the burdens thereon are increased or decreased thereby, and whether the owner of each and every condominium consents thereto or not;

Operation of a project is likely to reveal necessity for amendments to the original declaration of restrictions. Requiring unanimous con-

28 The section is intended to eliminate doubts as to whether, under present law, such a power of attorney would be binding upon grantees of the initial condominium owners and to eliminate any question as to whether such a provision would be enforceable for the life of the building.

sent of all condominium owners to such amendments would make them extremely difficult to obtain in large projects. The paragraph sanctions reasonable amendments reasonably made, whether or not the burdens on the condominium owners are thereby increased. The basic requirement of the section that provisions of the declaration are enforceable as servitudes only if reasonable requires that amendments not only be made by a majority in interest upon notice, but also that the amendment procedure be otherwise reasonable. The particular machinery and limitations to be used in making amendments are left to the terms of each declaration of restrictions.

(d) for independent audit of the accounts of any management body;

Restrictions commonly provide for audits by independent accountants of the books of the management body.

(e)(1) for reasonable assessments to meet authorized expenditures of any management body, and for a reasonable method of notice and levy thereof, each condominium to be assessed separately for its share of such expenses in proportion (unless otherwise provided) to its owners' fractional interest in any common areas;

(2) for the subordination of the liens securing such assessments to other liens either generally or specifically described;

To pay the expenses of operating a condominium building it is necessary to levy assessments on the owners. Such assessments are typically made by the management body to provide it with funds to meet the building expenses and are allocated to condominium owners in fractions, sometimes based on the size of the unit, sometimes on the amount paid for it initially, and usually the same as the fraction of the common areas owned by the condominium owner. This provision contemplates and validates such assessment provisions in a declaration

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25 Responsibility for assessments is usually proportionate to ownership in the common areas, and ownership in the common areas proportionate to the initial sale price of the unit. This arrangement is not always appropriate, however, in projects where the price of apartments depends not on their size but upon the view or upon other intangibles, as is commonly the case in the San Francisco "high rise" apartments. The ownership in the common areas should reflect the investment of the purchaser in order that he may recover his investment in case of partition, but the responsibility for maintenance of the various unit owners may better be proportionate to floor space, since the apartment with the better view costs no more to maintain. Likewise, in a small unit where variations between the initial cost of the apartments are slight, it may be more convenient to have the interest in the common areas and the responsibility for maintenance of all owners equal. The condominium statutes enacted in other states and the FHA Model Act are inflexible in this regard (e.g. Model Act § 6a, b, c, § 11(6); P.R. CIV. CODE §§ 1291(f), 1291(s)).
of restrictions and permits the declarations to provide for subordina-
tion of liens securing such assessments.

(f) for the conditions upon which partition may be had of the project pursuant to section 752b of the Code of Civil Procedure. Such right to partition may be conditioned upon failure of the condominium owners to elect to rebuild within a certain period, specified inadequacy of insurance proceeds, specified damage to the building, a decision of an arbitrator, or upon any other reasonable condition.

This section complements the provisions in section 2 of the bill permitting judicial partition of condominium projects under circumstances set forth in the declaration of restrictions. Draftsmen of restrictions have arrived at different conclusions concerning specific events upon which a project should be sold. Normally these involve obsolescence or destruction of the building under circumstances which make it impossible or uneconomic to build it. The particular circumstances which evidence this may be described in a variety of ways, and may vary from project to project. For example, the type of provision appropriate to a small wooden structure might be quite inappropriate to a large concrete structure. Some common provisions are suggested by the section. Experience doubtless will suggest entirely new provisions for the termination of condominium projects.

(g) for restrictions upon the severability of the component interests in real property which comprise a condominium as defined in section 783 of the Civil Code. Such restrictions shall not be deemed conditions repugnant to the interest created within the meaning of section 711 of the Civil Code; provided, however, that no such restrictions shall extend beyond the period in which the right to partition a project is suspended under section 752b of the Code of Civil Procedure.

Some draftsmen of condominium restrictions feel that there should be an absolute prohibition against the sale or conveyance of a part of a condominium. Many feel that specific types of conveyances should be prohibited—for example, in garden apartment condominiums with accompanying swimming pool rights a conveyance by a condominium owner of a small fraction of his interest in the common areas to an outsider so that the outsider can use the pool.

See note 11 supra.

28 The FHA Model Act expressly prohibits separation of the interest in the common areas from the interest in the unit (FHA Model Act § 6(b)). The FHA interprets the act to prohibit any conveyance of a part of a condominium. See also 11 ARIZ. REV. STAT. § 33-555 (Supp. 1962).
The act itself does not prohibit conveyance of a part of a unit. Owners of units may wish to be able to transfer garages, storage spaces or rooms among themselves. This provision, however, validates any such restrictions included in the declaration so long as the project is not subject to judicial partition. Such restrictions will be required in projects financed by the FHA.

Section 1356. Assessment Lien. A reasonable assessment upon any condominium made in accordance with a recorded declaration of restrictions permitted by section 1355 shall be a debt of the owner thereof at the time the assessment is made. The amount of any such assessment plus any other charges thereon, such as interest, costs (including attorneys' fees), and penalties, as such may be provided for in the declaration of restrictions, shall be and become a lien upon the condominium assessed when the management body causes to be recorded with the county recorder of the county in which such condominium is located a notice of assessment, which shall state the amount of such assessment and such other charges thereon as may be authorized by the declaration of restrictions, a description of the condominium against which the same has been assessed and the name of the record owner thereof. Such notice shall be signed by an authorized representative of the management body or as otherwise provided in the declaration of restrictions. Upon payment of said assessment and charges in connection with which such notice has been so recorded, or other satisfaction thereof, the management body shall cause to be recorded a further notice stating the satisfaction and the release of the lien thereof.

Such lien shall be prior to all other liens recorded subsequent to the recordation of said notice of assessment except that the declaration of restrictions may provide for the subordination thereof to any other liens and encumbrances. Unless sooner satisfied and released or the enforcement thereof initiated as hereafter provided such lien shall expire and be of no further force or effect one year from the date of recordation of said notice of assessment; provided, however, that said one-year period may be extended by the management body for not to exceed one additional year by recording a written extension thereof.

Such lien may be enforced by sale by the management body, its attorney or other person authorized to make the sale, after failure of the owner to pay such an assessment in accordance with its terms, such sale to be conducted in accordance with the provisions of sections 2924, 2924b and 2924c of the Civil Code, applicable to the exercise of powers of sale in mortgages and deeds of trust, or in any other manner permitted by law. Unless otherwise provided in the declaration of restrictions, the management body shall have power to bid in the

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30 Letter and memorandum of Sept. 17, 1962, from Tom L. Davis, Chief, Cooperative and Condominium Housing Section, Office of the General Counsel, Federal Housing Administration, to Richard H. Howlett of Title Insurance and Trust Co.
condominium at foreclosure sale and to hold, lease, mortgage and convey the same.

The nature of the obligation raised by an assessment made by the management body and the method of enforcing payment of the assessment are matters of great importance in condominium projects. Although each condominium may be separately mortgaged and each is separately assessed for taxation purposes (see section 6 of the bill), the owners are nevertheless financially interdependent to the extent of the cost of operation and maintenance of the property. Failure of one owner to pay his agreed share of these costs increases the burdens on the others. It is therefore important that assessments be made collectible and secure within reasonable limits. The section provides that they are a debt of the person who is the condominium owner at the time the assessment is made, secured by a lien upon his condominium. Upon recordation of a notice of the assessment the lien is given priority in order of recordation except for subordinations provided for in the declaration of restrictions (for example, the restrictions may provide that the assessments are subordinate to first mortgage liens). The lien continues only for one year from recordation but may be extended for one additional year and may be enforced by a sale similar to a nonjudicial sale under a deed of trust. Foreclosure of a prior recorded mortgage would extinguish a subsequently recorded assessment lien and result in an increase in burdens on other owners in the condominium project unless they were able to collect

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Footnotes:
31 This problem is dealt with in various ways in other condominium legislation. The FHA Model Act creates an assessment lien prior to all other liens except certain tax liens and first mortgage liens of record (FHA Model Act § 23); Puerto Rico provides a preference over all “credits” except those for taxes, insurance and mortgages (P.R. Civ. Code, Tit. 31, ch. 150, § 1293(d)); Arkansas, Hawaii, Kentucky, South Carolina and Virginia provides for payment of unpaid assessments out of the purchase price on sale of an apartment in preference to all liens other than taxes and recorded mortgages (5 Ark. Stats. § 50-1018 (Supp 1961)); Session Laws of Hawaii, Regular Session of 1961, p. 273; Horizontal Property Act, No. 180, § 15 (Hawaii, Jul. 10, 1961); Acts of the General Assembly of the Commonwealth of Kentucky, ch. 205 § 16; Acts and Joint Resolutions of South Carolina 1962, No. 750, § 19; 8 Va. Ann. Code, § 55-79.15 (Supp. 1962); Arizona does not provide for a priority or a lien. Under the statutory provisions requiring payment out of sale proceeds after payment of all recorded mortgages, an impecunious owner can live in the apartment without paying assessments, mortgage it to its full value, and then sell it for the value, if any, of the small equity remaining. The FHA provision, on the other hand, creates a “secret lien” the extent of which cannot be determined by title companies in searching the record. It further creates difficult questions as to the appropriate priority of other liens.
32 The recordation of the notice of assessment, the provision for recordation of a notice of ratification of the lien, and the automatic expiration of the lien assure that a prospective purchaser or mortgagor will be able to determine from the record with reasonable accuracy the extent of the assessment lien.
the unsecured assessment from the delinquent owner. Their protection against this lies in the normal rights of junior lienholders to reinstate prior deeds of trust while proceeding with their own foreclosure sale of the interests subject to their lien.\(^3\)

**Section 1357. Other Liens.** No labor performed or services or materials furnished with the consent of or at the request of a condominium owner or his agent or his contractor or subcontractor, shall be the basis for the filing of a lien against the condominium of any other condominium owner, or against any part thereof, or against any other property of any other condominium owner, unless such other owner has expressly consented to or requested the performance of such labor or furnishing of such materials or services. Such express consent shall be deemed to have been given by the owner of any condominium in the case of emergency repairs thereto. Labor performed or services or materials furnished for the common areas, if duly authorized by a management body provided for in a declaration of restrictions governing the property, shall be deemed to be performed or furnished with the express consent of each condominium owner. The owner of any condominium may remove his condominium from a lien against two or more condominiums or any part thereof by payment to the holder of the lien of the fraction of the total sum secured by such lien which is attributable to his condominium.

The rights of those furnishing labor and materials for work on condominium buildings at the request of the management body, under present law, are much the same as rights expressed in this section.\(^4\) Distinctions suitable to the condominium approach are made with respect to those who deal with individual condominium owners. Only those who expressly consent to performance of the work, or for whom emergency services are performed, are subject to liens on their condominiums,\(^5\) and the section permits a condominium owner to relieve his condominium from a lien which extends to other condominiums by paying his fraction of the debt secured by it.\(^6\) The fraction of the debt for which he is responsible will ordinarily be proportionate

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\(^3\) Cal. Civ. Code § 2924c.


\(^5\) Subsection (b) of section 1183.1 of the California Code of Civil Procedure would otherwise require timely filing of a notice of nonresponsibility. The provision is derived from section 9 of the FHA Model Act. The Arizona Statute contains a very similar provision (1 Ariz. Rev. Stat. § 33-559).

\(^6\) This provision is derived from section 9 of the FHA Model Act. Its purpose, of course, is to reduce the financial interdependence of the condominium owners. The balance of the debt secured by the lien will of course continue to be a debt of the management body. The FHA provision goes somewhat further than the California draft, providing that even a lien for work authorized by the management body is a lien on the various condominiums rather than on the property as a whole.
to his responsibility for assessments under the restrictions. The section is designed to remove any doubts as to the nature of such lien rights in such a project.

Section 1358. Common Personalty. Unless otherwise provided by a declaration of restrictions under section 1355, the management body, if any, provided for therein, may acquire and hold, for the benefit of the condominium owners, tangible and intangible personal property and may dispose of the same by sale or otherwise; and the beneficial interest in such personal property shall be owned by the condominium owners in the same proportion as their respective interests in the common areas, and shall not be transferable except with a transfer of a condominium. A transfer of a condominium shall transfer to the transferee ownership of the transferor's beneficial interest in such personal property.

The problem of determining the ownership of, and dealing with, personal property necessary to the operations of condominium projects such as furniture in the common areas, cleaning equipment, air conditioning and similar equipment when removed from the building, and the like, is a difficult one under existing law. This section creates a method by which an unincorporated management body may deal with such personal property on behalf of the condominium owners. The method may be varied by restrictions as to any project.

Section 1359. Interpretation. Any deed, declaration or plan for a condominium project shall be liberally construed to facilitate the operation of the project, and its provisions shall be presumed to be independent and severable.

Declarations of restrictions and other documents drawn to carry out condominium plans must necessarily be drawn in general terms and cover a great many fact situations which cannot be specifically dealt with in the documents. The purpose of such plans will be hampered if they are read narrowly. This provision calls for liberal construction to facilitate the operation of the project.

Section 1370. Interpretation of Zoning Ordinances. Unless a contrary intent is clearly expressed, local zoning ordinances shall be construed to treat like structures, lots, or parcels in like manner regardless of whether the ownership thereof is divided by sale of condominiums or into community apartments as defined in section 11,004.

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87 Section 9 of the FHA Model Act provides for computation of the payment to be made by reference to the percentages set forth in the declaration. This could be quite inappropriate where the work involved was principally for the benefit of the person making payment.

88 If the personalty were simply owned by all owners as tenants in common, all owners would have to join in any sale of worn out common personalty and specific provision would have to be made in deeds of condominiums for conveyance of common personalty.
of the Business and Professions Code, rather than by lease of apartments, offices or stores.

Early condominium developers have encountered occasional problems under local zoning ordinances which, literally read, might be construed to require condominium apartments to have side yards, setbacks and back yards in accordance with rules written for single family dwellings. This section is designed to obtain for buildings which are, by their design and use, apartment houses, store, industrial or office buildings, treatment appropriate to their design and function under local zoning ordinances regardless of the manner in which they are owned. It is the view of the draftsmen that zoning ordinances should be applicable to condominium projects according to their use, without regard to the legal form of their ownership, just as they are applicable to other land uses without regard to the form of ownership.

SECTION 4. Subsection (f) of section 11535 of the Business and Professions Code is added to read as follows:

(f) "Subdivision" includes a condominium project, as defined in Civil Code Section 1350, containing five (5) or more condominiums; but maps of such projects need not show the buildings or the manner in which airspace above the property shown on the map is to be divided, nor shall the governing body have the right to refuse approval of a tentative or final map of such a project on account of the design or location of the buildings on the property shown on the map, nor on account of the manner in which airspace is to be divided in conveying the condominium. Fees and lot design requirements shall be computed and imposed with respect to such maps on the basis of parcels or lots of the surface of the land shown thereon as included in separate condominiums or owned in common.

Under the existing Subdivision Map Act questions have arisen as to whether a condominium is, or is not, a subdivision for which a map must be filed, and if so, what control local governing bodies may exercise over design of the condominium project. This section settles these questions while leaving to building codes and zoning ordinances the question of propriety of proposed building design and use. It is intended to prevent the use of the condominium form of ownership to achieve subdivisions of the familiar horizontal kind, involving division of the surface of the land into parcels to be occupied by separate owners, without compliance with the Subdivision Map Act. Local governing bodies passing upon subdivision maps will have no requirements to impose with respect to a typical single structure apartment house located on an existing city lot. Developments consisting of

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See 39 CAL. OPNS. ATT’Y GEN. 82 (1962).
small dwellings scattered about over a large area, and including in the condominium owner's separate interest parcels of the surface of the land, however, would be subject to the same treatment as horizontal subdivisions.

**SECTION 5.** Section 659 of the Civil Code is amended to read as follows:

**Section 659.** Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law.

Although the question appears settled at common law,\(^4\) some doubt may exist under California Civil Code sections 658 and 659 as to whether the space above the surface of the land is real property. This is particularly important in determining the appropriate form of security instrument for mortgage loans and in determining whether a loan secured by a deed of trust of a condominium is secured by a lien on real property under statutes regulating institutional lenders.\(^4\) This section is declaratory of existing law and clarifies the statute to make it clear that the space above the surface of the land, as well as below it, is land, and hence, by the operation of Civil Code section 659, real property.

**SECTION 6.** Section 2188.3 of the Revenue and Taxation Code is added to read as follows:

**Section 2188.3.** Whenever real property has been divided into condominiums, as defined in section 783 of the Civil Code, (a) each condominium owned in fee shall be separately assessed to the owner thereof, and the tax on each such condominium shall constitute a lien solely thereon; (b) each condominium not owned in fee shall be separately assessed, as if it were owned in fee, to the owner of the condominium or the owner of the fee or both (and the tax on each such condominium shall be a lien solely on the interest of the owner of the fee in the real property included in such condominium and on such condominium), if so agreed by the assessor in a writing of record; such an agreement shall be binding upon such assessor and his successors in office with respect to such project so long as it continues to be divided into condominiums in the same manner as that in effect when the agreement was made.

The protection of individual condominium owners arising from the fact that condominiums are not subject to liens securing debts

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\(^4\) See note 6 supra.

incurred by their neighbors would be greatly lessened if condominium projects were assessed to all of the owners for tax purposes by a single assessment which would be a lien upon all of their condominiums to secure the entire tax bill due from all of them. While under existing law assessors may assess condominiums separately to their owners, they are probably not required to do so, and this has caused some concern to prospective condominium purchasers and their lenders. This section requires separate assessment of condominiums owned in fee and permits local assessors to bind themselves and their successors in office to assess separately condominiums now owned in fee. If condominiums were established which were terms for years of short duration, presumably local assessors would be reluctant to assess such terms separately, which would be substantially equivalent to assessing every apartment in a leased building separately to its tenants. Condominium developments on long-term ground leases, however, are appropriate for separate assessment and this section permits an agreement to that effect.

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43 The undivided interest in the common areas probably need not be separately assessed. 37 Cal. Ops. Att'y Gen., supra; cf. Willmon v. Koyer, 168 Cal. 369, 374, 143 Pac. 694 (1914); People v. Shimmins, 42 Cal. 122, 124 (1871); Cal. Rev. & T. Code § 2803. Since the condominium units are ordinarily owned in determinable fee, the assessor would probably contend that he could assess them to the holders of the possibilities of reverter—that is, to the unit owners as tenants in common. Cf. Hammond Lumber Co. v. Los Angeles, 12 Cal. App. 2d 277, 55 P.2d 891 (1936) (value of leasehold assessed to holder of reversion).

44 FHA regulations require a certificate of the mortgagee to be insured that property taxes are assessed against each family unit as a taxable entity and not against the multi-family structures (24 C.F.R. § 234.26(b) (3)). Because an assessor presumably cannot issue a commitment binding upon himself and upon his successors to assess condominiums in a condominium project separately throughout the life of the project, there is some doubt as to whether the mortgagee can issue the necessary certificate under present law.