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Cover Page Footnote
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PROTECTING THE RIGHTS OF PURCHASERS OF CONDOMINIUM UNITS

*Jeffry R. Dwyer**

I. Introduction

The late 1960s and early 1970s have witnessed an unprecedented boom in both construction and conversion condominiums. The inflationary spiral of the 1970s caused many developers of partially-completed rental projects to seek substantial loan increases to cover cost overruns.[1] Such loan increases often could not be justified by rental income projections. Accordingly, many developers and lenders turned to condominium conversions as a panacea for project cost overruns. However, with a shortage of end loan money, developers and lenders were left with unsold "inventory," increasing in cost with each passing day. Indeed, many developers of condominium units found themselves in severe financial difficulties, with bankruptcy imminent for some. If the economy continues in its present state, foreclosures on some condominium projects are inevitable.[2] Thus, a prospective condominium purchaser would do well to ask: What rights does a holder of a sales contract on a condominium unit have in the event of a foreclosure by the construction lender on the entire project? It might come as a rude shock for purchasers to learn that the law provides them with little protection—if any—once they have waived most of their rights in a condominium sales contract.[3]

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1. *See generally* Note, *Missouri Condominium Property Act of 1963*, 29 Mo. L. Rev. 238, 247 (1964).

2. There will be too few buyers to pay enough to cover builders' costs and carrying charges.

3. Congress is slowly becoming aware of the magnitude of the plight of prospective condominium purchasers. On December 5, 1974, Senator Biden of Delaware stated: "The city of Miami, Fla., which has experienced expansive growth of condominium development, has also experienced some of the most complicated problems. At the exotic Emerald Isles West, many buyers put down a full 25 percent of the purchase price, and received a promise that they would get 10 percent of it back at closing. Now that

This article will briefly survey some typical provisions of condominium sales contracts, and examine various principles of equity for possible application to condominium foreclosures.

II. The Contractual Setting: Purchaser's Rights Under the Sales Contract

Condominium sales contracts are seldom identical, and any review of their provisons must entail generalities. Nevertheless, there are often conditions common to such contracts, which severely limit the right of purchasers. One frequent provision is that the purchaser has no right to specific performance, and upon default by the seller can insist only upon a return of the down payment. Another usual condition is that the contract not be recorded[4] and shall in no way create a lien or lien right in favor of the purchaser. In addition, the purchaser usually is required to waive and relinquish any lien right that may be available to him in law or equity.[5] The purchaser also usually agrees that the contract is at all times subject and subordinate to the building loan mortgage and all subsequent loans. Other provisions may condition performance by the seller upon recordation of the condominium regime.

Thus, the typical purchaser relinquishes most, if not all rights under the customary condominium sales contract, other than being entitled to a return of his good faith deposit in the event the seller has breached the contract. Even then, a purchaser might never recover his deposit[6] if the developer becomes bankrupt.

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the development corporation is discussing bankruptcy and already gone into foreclosure, the buyers, with $1.5 million in deposits at stake, may not recoup their investment. As Evan Cooper describes in the Miami Herald, many buyers out of State, are waiting to find out whether they will ever take title to the apartment or get their deposit back: While the future of the depositors' money is uncertain, one fact is clear: The emotional and physical toll on Emerald Isles West buyers has been enormous. As one said: 'I can't believe we have nothing left.'" 120 CONG. REC. 20638 (Dec. 5, 1974).

4. To better safeguard this position, most contracts lack a notarization, which is needed to record.

5. Such a waiver could affect a possible vendee's lien in state law. *See* Crockett, *Protecting the Deposit of the 'Consumer' Who Purchases a New Condominium Apartment*, 8 HAWAII B.J. 103, 104 nn.21-23 (1972) [hereinafter cited as Bar Journal].

6. Comment, *Legal Protection for Florida Condominium and Coopera-*

In *Gulf Petroleum, S.A. v. Collazo*,[7] a purchaser (Gulf) deposited sums in escrow with the seller, an adjudicated bankrupt. The trustee in bankruptcy disaffirmed the sales contract. While the court ordered a return of the down payment, or so much as could be traced, the court acknowledged that "with respect to any portion of the funds which cannot be identified or traced into other property Gulf must perforce be relegated to proving its claim as a general creditor against the bankrupt estate."[8] Moreover, in some states[9] the developer can use the deposits in the construction of the building.[10]

III. Equitable Remedies Available to the Purchaser

Notwithstanding the legal rights expressly waived by the purchaser in the sales contract, or the rights granted the construction lender in the mortgage,[11] are there any remedies or relief available in equity to the purchaser? There is no case law dealing with the rights of purchasers of condominium units vis-a-vis the construction lender mortgagee and the borrower-developer. However, the creation of a condominium regime can be analogized to the traditional development subdivision of land,[12] with its well-developed body of

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tive Buyers and Owners, 27 U. MIAMI L. REV. 451, 460 (1973).

7. 316 F.2d 257 (5th Cir. 1963).

8. *Id.* at 261-62. Maryland, to further protect a purchaser's right to a return of deposit, requires all deposits for units not completed at the time of sale to be segregated in a separate escrow account by the seller or requires a corporate surety bond. MD. ANN. CODE § 10-301 (1974) (Real Property). Virginia, in its revised condominium act, not only requires deposits to be held in escrow, but states that "[s]uch escrow funds shall not be subject to attachment by the creditors of either the purchaser or the . . . [developer]." VA. CODE ANN. § 55-79.95 (Supp. 1974). Florida authorizes the use of deposits by the developer for construction of the condominium project, provided the sales contract has clearly stamped on its face the fact that the developer intends to use the deposit for construction. FLA. STAT. ANN. § 711.67 (Supp. 1975).

9. *See, e.g.*, HAWAII REV. LAWS § 514-14 (1968); N.Y. GEN. BUS. LAW § 352-h (McKinney 1968).

10. *See* Vishny, *Financing the Condominium*, 1970 ILL. L.F. 181, 187-93.

11. *See* Bar Journal 104.

12. *See generally* Thompson, *The Condominium as a Subdivision*, 14 HASTINGS L.J. 302 (1963).

cases and statutory law concerning subdivided land sold to successive grantors.[13]

A. The Right to a Partial Redemption or Partial Release in a Subdivision

A mortgagor or a party claiming through his interest cannot require a partial release of the property upon tendering partial repayment of the mortgage indebtedness.[14] The usual remedy available to an owner of part of the premises faced with a foreclosure would be to redeem for the full amount of indebtedness and become subrogated to the position of the mortgagee.[15] The mortgagor has the additional right to "marshalling" of the property prior to foreclosure.[16] The mortgagor and mortgagee, however, may contractually provide for a partial redemption.[17]

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13. Known as "inverse order of alienation," it is a familiar principle of equity that, in such a case, the parcels in foreclosure are to be sold in the inverse order of their alienation. 2A WARREN'S WEED, NEW YORK REAL PROPERTY § 14.18 (1973).

14. Gerber v. Karr, 231 Md. 180, 184-85, 189 A.2d 353, 355 (1963); Graham v. Linden, 50 N.Y. 547, 550 (1872); *see* G. OSBORNE, MORTGAGES 629 (2d ed. 1970) [hereinafter cited as OSBORNE]; 4 S. SYMONS, POMEROY'S EQUITY JURISPRUDENCE 658 (5th ed. 1941).

15. OSBORNE 630. Ordinarily, the subrogated mortgagor will be able to compel the giving of an assignment. An argument opposed to the granting of an assignment under these conditions stems from the fact that the mortgagor only has a duty to discharge the mortgage upon payment. However, since the granting of an assignment does not impose any additional burden on the mortgagee, courts should compel assignments if the mortgagor has shown a substantial need for this remedy as opposed to subrogation. *Id.* at 577.

16. Marshalling is "the ranking or ordering of several estates or parcels of land for the satisfaction of a judgment or mortgage to which all are liable." 1 H. BLACK, JUDGMENTS, § 440 (1902). For an exhaustive discussion of marshalling, see OSBORNE 579-97 & n.38.

17. Courts are split upon whether such contractual provisions should run with the land or be personal to the mortgagor. *See, e.g.*, Kerschensteiner v. Northern Mich. Land Co., 244 Mich. 403, 221 N.W. 322 (1928) (run with the land); Gilman v. Forgione, 129 Me. 66, 149 A. 620 (1930) (personal unless "or his assigns" is included in the provision); Rugg v. Record, 255 Mass. 247, 151 N.E. 95 (1926) (personal). In considering whether the contractual provision should be personal it has been suggested

In many states the construction mortgagee, by joining in the recordation of the master deed, subordinates the construction mortgage to the condominium regime.[18] In effect, the mortgagee encumbers each and every unit in the condominium. Since the mortgagee has consented to the subdivision-platting of one project into a condominium regime, an argument can be made that, at least with regard to payment of the indebtedness, the construction mortgage should also be viewed as divisible. Indeed, with the creation of a condominium regime, the method available for the repayment of the construction loan money is by way of sales of individual units,[19] with the proceeds of each sale being used to reduce the indebtedness of the outstanding mortgage loan by a stated amount.[20] Upon creation of a condominium regime, the developer and mortgagee could of course negotiate a partial release[21] of individual units.[22] Absent such an agreement, the right to receive an individual unit free and clear of a construction lien upon payment of the partial release amount stipulated in the construction loan documents by a contract purchaser is not possible if the developer defaults.[23]

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that where the subdividing of the tract was contemplated from the creation of the mortgage such a right to a partial release should run with the land since "a rule limiting the privilege to the mortgagor will either diminish considerably the sale value of the property, or result merely in the release money changing hands twice." 31 COLUM. L. REV. 894, 895 (1931).

18. *See, e.g.*, FLA. STAT. ANN. § 711.08 (1969), *as amended*, (Supp. 1975).

19. The unit owners of a condominium are personally liable for their individual debt. This provides flexibility in financing and assures the mortgagee of payment. The debt is financed separately and the payment of the construction loan can be made directly by each unit owner. P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 9.01 (1974) [hereinafter cited as ROHAN].

20. The amount could be the cost of the unit less the developer's profit.

21. Almost every condominium contract of sale, however, provides for the subordination of the interest of the unit purchaser to the construction mortgage.

22. Bar Journal 104.

23. Many prudent lenders insist that the mortgagor is entitled to a partial release only if a loan is not in default. Whether a court would set this aside to allow the purchasers a right to have a partial release remains to be seen.

B. Right to a Sale in Parcels

1. Post-Regime

A basic issue is whether foreclosed property should be sold in parcels or in gross. A Minnesota court, despite a statute that required separate sales if the property were composed of distinct areas or tracts, nevertheless found for the mortgagee:

> If, at the time of the giving of the mortgage, the mortgaged premises did not consist of separate and distinct tracts, within the meaning of the statute, a foreclosure sale of the entire tract as mortgaged would have been rightful, and not invalid, even though, by reason of a subdivision of the property by the mortgagor, subsequent to the giving of the mortgage, and an acquisition of interests by other persons in separate portions of the property, such equities may have arisen that a court of equity, upon timely application, would have required the sale to be made in separate parcels.[24]

The inference is that if the subsequent purchasers from the original mortgagor had made timely objections, the court would have required the sale to have been made in separate parcels.

In *Meador v. Johnson*,[25] the court held that where a statute required that sales be made in separate parcels, sales *en masse*, "are voidable only and not void."[26] Moreover, in order to set the sales aside "it must appear that the interests of the debtor have been sacrificed, or that there was some attending fraud or unfair dealing."[27]

An early California case involved a deed of trust, permitting the trustee at his option to sell the foreclosed property as a whole or in parcels.[28] Analyzing this provision, the court recognized that the

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24. Clark v. Kraker, 51 Minn. 414, 415, 53 N.W. 706, 707 (1892).
25. 27 Okla. 544, 112 P. 1121 (1910).
26. *Id.* at 551, 112 P. at 1124.
27. *Id.* at 550-51, 112 P. at 1124.
28. While the equitable relief is the same, the method of pursuing such relief differs in a judicial foreclosure state from a power of sale state. In the power of sale state, the trustee of the deed of trust sells the property in a private sale to the highest bidder, who is normally the construction lender. However, in many states the sale must be confirmed by a state court. It is at the confirmation hearing that the aggrieved purchasers would object to a sale in gross. In other power of sale states after the private sale an aggrieved party could commence an equity suit for a new sale of prop-

rights of the debtor and his successors, as well as the mortgagee, must be protected:

> But in the case at bar the parties did not make an absolute stipulation that the property should be sold as a whole. The provision . . . gave the trustees a discretion to sell as a whole or in parcels. This discretion they were bound to exercise in good faith for the best interests of their beneficiaries, who included, not only the creditor, but the debtor and his successors in interest.[29]

Plaintiff, representing the purchaser of the entire property at the foreclosure sale, argued that as a condition of setting aside the sale the defendant mortgagor should pay the entire indebtedness. The court rejected this argument, stating:

> [I]t is certainly not the law that an offer to pay the debt must be made, where it would be inequitable to exact such offer of the party complaining of the sale. Under the circumstances . . . the defendant would be subjected to very evident injustice and hardship if her right to attack the sale were made dependent upon an offer by her to pay the whole debt. The debt was not hers, and she was not liable for any part of it.[30]

This same reasoning is applicable to the rights of a condominium purchaser to request a sale in parcels without conditioning that sale on the ability of a purchaser of a single parcel to pay the entire debt. Indeed, recent court decisions have strongly leaned towards requiring the sale of foreclosed property in parcels,[31] indicating that the

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erty. In a judicial foreclosure state, the foreclosure suit is at its inception a court action. *See* OSBORNE 660-742.

29. Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 119 P. 82, 84 (1911).

30. *Id.* at 285, 119 P. at 84-85.

31. In Champlain Valley Federal Sav. & Loan Ass'n v. Ladue, 35 App. Div. 2d 888, 316 N.Y.S.2d 19 (3d Dep't 1970), the court, addressing itself to an order of a sale in parcels, held: "While the court has the power . . . to order a sale of all the parcels, its equitable powers also include the power to direct the order of sale of different parcels in order to protect the rights and preserve the equities of all." *Id.* at 888, 316 N.Y.S.2d 21. And a Florida court decided: "It is the rule in Florida that a sale in parcels is preferred over a sale en masse where the former is practical and equitable to all parties." Applefield v. Fidelity Federal Sav. & Loan Ass'n., 137 So. 2d 259, 261 (Fla. Dist. Ct. App. 1962). In Manhattan Ry. v. Central Hanover Bank & Trust Co., 99 F.2d 789 (2d Cir. 1938), the federal district court was found to have the power and discretion to direct the sale of only

equitable desire to protect the interests of all the parties has not changed very much.[32]

Where a condominium regime has been established by recordation of the condominium master deed,[33] the court should allow the property to be sold in parcels, *i.e.*, individual condominium units, in the event of foreclosure by the construction mortgagee. Such a sale in parcels should be ordered regardless of what the sales contract or the conditions contained within the mortgage or building loan agreements set forth. By recording the master deed, the property is divided into separate and distinct units. In certain states,[34]

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part of the mortgaged property. A provision in the mortgage which required the property to be sold as a whole apparently did not apply to foreclosure. *Id.* at 792.

32. In Gaskill v. Neal, 77 Idaho 428, 293 P.2d 957 (1956), the Supreme Court of Idaho took a conservative approach to the question of when a mortgagee is obligated to sell a tract in parcels. "The general rule is that where there is no division of the mortgaged property into parcels adapted for separate and distinct enjoyment, the property should be sold as a whole, unless the party interested should show in some intelligible manner the distinct manner in which the property might be profitably divided for sale." *Id.* at ____ , 293 P.2d at 960. Jones, in his treatise on mortgages, 3 L. JONES, LAW OF MORTGAGES OF REAL PROPERTY (8th ed. 1928) [hereinafter cited as JONES], discusses the right to require a sale in parcels: "When the mortgage describes the land as one tract, it is said that it is the right of the mortgagee by the contract to sell the whole of the mortgaged premises in satisfaction of his debt; but the better opinion would seem to be that the obligation to sell in lots has reference to the situation of the property at the time of sale, irrespective of the description in the mortgage." *Id.* at 918. Elaborating on this point, Jones concluded: "The criterion in all cases is, What [*sic*] mode of sale will realize the largest amount of money? If this object can be obtained by the sale of the whole mortgaged premises together, that is the proper mode to pursue, even if they are readily divisible. If the land is divisible into separate parcels, and is better adapted for use in parcels, then the presumption would seem to be that it would produce a larger amount of money if sold in that way, and the sale should be made accordingly." *Id.* at 918-19.

33. *See* FHA Model Statute, FHA Form 3285, set out in ROHAN § 7.02[1]. Each state has its own variation. *See, e.g.*, N.J. STAT. ANN. § 46:8B-9 (Supp. 1975).

34. *See, e.g.*, FLA. STAT. ANN. § 711.08 (1969), *as amended*, (Supp. 1975).

the mortgagee is required to join in creation of the condominium regime by executing the master deed or subordinating the construction loan lien to the master deed. To allow a mortgagee to foreclose *en masse* would be to disregard the very condominium regime created.

2. Pre-Regime

Where a condominium regime has been created, can a court in equity insist upon a sale in parcels, which would necessitate a recording of a condominium regime? There is some case law and statutory support for such a proposition—albeit in analogous situations.

> [P]roperty should be divisible into parcels beyond any doubt, and . . . such division and sale would produce more advantageous results.[35]

Following this line of reasoning further:

> The mere fact that mortgaged property which is divisible is sold as a whole rather than by parcels is not itself evidence sufficient to justify annulment of the sale, but in addition to that it must appear that that method of selling it was prejudicial to the mortgagor, his privies, or creditors, and the burden of showing that is upon the one attacking the sale.[36]

A Michigan statute provides:

> If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as 1 parcel, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the cost and expenses allowed by law but if distinct lots be occupied as 1 parcel, they may in such case be sold together.[37]

In *Jerome v. Coffin*,[38] plaintiff purchased property from the defendant mortgagee with the intention of subdividing and selling the property. Upon default, the court required a sale in parcels, noting

35. Johnson v. Hambleton, 52 Md. 378, 386 (1879).

36. Webster v. Archer, 176 Md. 245, 249, 4 A.2d 434, 438 (1939).

37. MICH. COMP. LAWS ANN. § 600.3224 (1968).

38. 243 Mich. 324, 220 N.W. 675 (1928). An early case allowed property to be sold *en masse* where it was originally mortgaged as one parcel and later subdivided without the mortgagee's concurrence. Durm v. Fish, 46 Mich. 312, 9 N.W. 429 (1881).

that the intention to subdivide was obvious to all including the defendant.[39]

Although the Michigan statute is unique, similar circumstances should lead to the same equitable result. In the case of today's condominium projects, construction lenders are not only aware of the plans of the mortgagor to create and sell condominium units, but have treated the project as a condominium[40] from the inception of the loan. In most cases, the construction lender receives a higher interest rate because of the inherent risks involved in any condominium project.[41] While a court in a foreclosure proceeding must carefully balance the equities,[42] those equities require that the rights of subsequent purchasers contemplated by the construction mortgagee at the inception of the loan be protected. The court should of course determine whether the mortgagee's interest in the property would be impaired by requiring creation of the condominium regime. At first glance it appears that this method enhances the immediate position of the mortgagee: he realizes a partial reduction in the outstanding indebtedness upon the sale of units under existing contracts, and nothing prohibits him from renting the unsold units.[43]

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39. "That it was bought for that purpose [subdividing] all concede . . . . Knowledge that it had been subdivided was, we think, conveyed . . . in a letter to her from plaintiff in which he speaks of the property as the Jerome subdivision and says that but very little of the property has been sold." 243 Mich. at 327, 220 N.W. at 676. The court went on to note that "[t]wenty-eight of the lots have been sold on contract. Doubtless all the vendees in such contracts would insist, as interveners insist, that they have at least a constructive occupancy of the lots so purchased." *Id.* at 329-30, 220 N.W. at 677.

40. This is essential as the factors behind making the loan are significantly different from those involved in conventional lending. See, *e.g.*, the checklist for lenders provided in *Symposium—Condominium Workshop*, 48 ST. JOHN'S L. REV. 677, 734-35 (1974). *See also* ROHAN § 9.01[2].

41. *See generally* ROHAN § 9.01[2], citing a return under adverse circumstances of 16 percent.

42. In the foreclosure of a mortgage, equity is the primary jurisdiction. Ridings v. Johnson, 128 U.S. 212 (1888). See OSBORNE 661-63 for the historical development of the equitable court action to foreclose by judicial sale.

43. One possible reason for not renting units might be deterioration caused by renters which would affect the subsequent marketability of the unit as a condominium.

But what of the value of the remaining security? To require the creation of a condominium regime might effectively prevent a construction mortgagee from selling the unsold units as a rental property to another purchaser since it would be almost impossible to secure a buyer willing to purchase such property or a lender willing to finance such a purchase.[44]

While these are valid problems, there are practical, if not completely satisfactory, solutions. Without question the original choice of condominium development would have proved most efficient. Any lessening of value because of an overbuilt market should be immediate and not long-term. Historically, in overbuilt areas within a year or a two-year period most unsold units are sold.[45] In the case of garden apartment condominiums, a condominium regime need be created for only certain buildings,[46] leaving the mortgagee with apartments not encumbered by a condominium regime. This can be accomplished by the expanding condominium concept which is statutorily authorized in such states as Virginia[47] and Maryland.[48] While at first glance such a solution appears impossible for a highrise, it is not necessarily the case. With careful planning a solution is possible. Already, in major cities such as New York and Chicago, highrise buildings are carved into multi-tiered layers of use and ownership.[49]

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44. Most permanent lenders would look askance at placing a permanent loan on a condominium regime where certain units were owned in fee simple, separate and apart from the security. There would also be a further problem as to the rights of the permanent lender in the common areas.

45. For a study of market absorption of condominium units, see Quarterly Apartment Rep., Southeast Florida, available from Reinhold P. Wolff, Economic Research, Inc., P.O. Box 1336, S. Miami, Fla., 33143.

46. *See generally*, Krasnowrecki, *Townhouse Condominiums Compared to Convention Subdivisions with Home Association*, 1 REAL ESTATE L.J. 323 (1973). Condominiums can be included as part of a planned unit development. See the model plan in ROHAN § 4.03[4].

47. VA. CODE ANN. § 55-79.2 (Supp. 1974).

48. MD. ANN. CODE § 11-101 (1974) (Real Property); *see* ROHAN § 16.03.

49. What is to prevent the top floors of a highrise project being submitted to a condominium regime with the bottom floors not being encumbered? *See* Frankel & Funk, *Real Estate Togetherness—Separately Owned Buildings in a Single Structure*, 27 RECORD OF THE BAR OF THE CITY OF N.Y. 586 (Nov. 1972).

No mechanical formula can be employed in deciding when to force subdivision of the property[50] so as to allow a sale in parcels. Courts should carefully review all the facts and not be bound to an "either/or" situation of allowing a foreclosure *en masse* or in parcels.[51] They must balance the equities of all the parties and the potential effects of the decision. The purchasers of condominium units anticipated by the construction mortgagee and actively sought and solicited by the developer have rights—as important as the mortgagee's—that must be protected in a suit to foreclose. Once this proposition is accepted, attention can be properly focused upon more equitable judicial resolution of the problem.

In the real estate and condominium market, no purchaser should be faced with the loss of down payment because of a seller's bankruptcy or insolvency.[52] In cases of severe hardship where purchasers changed their position by selling their houses and incurring moving expenses, a court should strongly consider creating that which was intended at inception—a condominium. It is one thing to expect purchasers to accept the fact that they cannot purchase non-existent or uncompleted condominiums. But where a project is completed, can purchasers be denied the right to purchase their units merely because the seller is insolvent and the construction mortgagee is foreclosing?

IV. Conclusion

This article has attempted to examine a problem existing in many areas of the country: the large number of unsold condominium units and the lack of prospective purchasers (to augment the existing purchasers) prevents a sellout and repayment of existing building

50. This can be achieved, *inter alia*, by requiring recordation of a condominium regime.

51. One of the leading purposes of a suit to foreclose is to enable the mortgagee to sell right and title to the property mortgaged. To do this all claims must be adjusted and all persons beneficially interested should be made parties to the action. *See, e.g.*, N.Y. REAL PROP. ACTIONS & PROCEEDINGS LAW § 1311(1) (McKinney 1963).

52. This risk is very real. New York requires that the prospectus warn the purchasers of potential loss, absent an escrow account. Wisner, *Financing the Condominium in New York: The Conventional Mortgage*, 31 ALBANY L. REV. 32, 51 (1967).

loan mortgages. Involved is the protection of the rights of a purchaser, including the right to receive his condominium unit for the contract price.

With regard to allowing a purchaser the right of a partial redemption, such a remedy has no historical basis in Anglo-American property law.[53] Perhaps an argument could be made that, with the creation of condominium regimes based upon statutory legislation,[54] a right of partial redemption is needed because of some intrinsic factors[55] present in the condominiums; nevertheless, the granting of a right of partial redemption may be unfair to the construction mortgagee whose interests must also be protected by a court in any foreclosure proceeding. A partial redemption, if permitted, could consist of a repayment of that portion of the mortgage loan allocated to a particular unit.[56] Such an amount would normally be less than the selling price of the unit. But if the developer has defaulted or is bankrupt, and the construction mortgagee is left holding unsold condominium units, it would be unjust to allow release based on partial redemptions.

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53. The mortgagee creditor can consent to a partial redemption, Union Mut. Life Ins. Co. v. Kirchoff, 133 Ill. 368, 27 N.E. 91 (1890), but this is an exception to the general rule requiring full payment of the mortgage debt. Graham v. Linden, 50 N.Y. 547, 550 (1872).

54. Whether under common law or statute the instruments creating a condominium are similar. ROHAN § 3.01.

55. This could be based on the language of the statute. New Jersey states: "[E]ach unit shall constitute a separate parcel of real property which may be dealt with by the owner thereof in the same manner as is otherwise permitted by law for any other parcel of real property." N.J. STAT. ANN. § 46:8B-4 (Supp. 1975).

56. If a court held for the partial redemption approach, it might consider the release schedule customarily set forth in either the building loan agreement or mortgage as a basis of such redemption. Such a release schedule (which is negotiated between the developer and the construction mortgagee), requires the construction mortgagee to release a unit upon payment of a stated percentage of the sales price of each particular unit. Such a release price could be as high as 95 percent of the sales price or as low as 50 percent, with the balance of the sales proceeds returned to the developer as profit. The higher the release price the faster a construction loan is paid off, with the developer receiving most of his profit out of the last sold units.

A sale of the whole project upon foreclosure is also not acceptable: it prevents purchasers from bidding for their respective units. Moreover, a traditional sale in parcels would not protect the rights of the purchaser, since a sale to the highest bidder could vitiate the original purchasers' contracts. To be guaranteed his unit, a purchaser would have to prevail at the sale.[57]

The fairest approach would be to require the mortgagee to "recognize" the existing contracts and allow those units to be sold to the purchaser at the contract price. In effect, a mortgagee would foreclose and take the property subject to the existing contracts. The sales would then be consummated at the original contract price, with the mortgagee receiving 100 percent of the purchase price. This approach should not be limited to cases where the condominium regime was created prior to the foreclosure. A court should not be bound by the fact that the condominium regime was not created because of some condition such as the borrower's failure to meet the construction lender's pre-sale requirements.[58] If the building is complete, with a reasonable number of binding purchase agreements having been signed, courts should require the recordation of the condominium regime.[59]

In this area of foreclosure law, the courts have rightfully abandoned such outmoded and artificial distinctions as whether the legal description contained in the mortgage was in gross or in parcels,[60]

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57. The officer in charge of the sale of property must use his discretion to bring the highest return while acting in the best interest of both the creditor and the debtor. Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 119 P. 82 (1911).

58. A condominium is created by the recording of the master deed. ROHAN § 3.02; *see, e.g.*, N.J. STAT. ANN. § 46:8B-8 (Supp. 1975). The fact that a governing body has not been established should not be significant in determining the interests of the unit owners as the first meeting is usually at the discretion of the builder. ROHAN § 17.02.

59. Another approach that deserves consideration is the appointment of a receiver by the court to advertise and sell unsold units. Admittedly, this represents somewhat of a departure from the traditional duties of a receiver, to protect, maintain, and operate the property. However, what better way for a receiver to protect the condominium project than to successfully market and sell it?

60. The court determines the amount to be sold. N.Y. REAL PROP. ACTIONS & PROCEEDINGS LAW § 1351(2) (McKinney 1963).

or whether the construction mortgagee had actual or constructive knowledge of subsequent subdivision. Similarly, courts dealing with foreclosures should not be bound by the language set forth in the sales contracts or mortgage instruments, nor constrained by creation of the condominium regime *rel non*. To do so would clearly be just as artificial a distinction, and hardly serve the interests of justice.