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North Carolina Adopts the Uniform Condominium Act

In 1986 the North Carolina General Assembly joined a minority of state legislatures by passing a second-generation condominium statute based on the Uniform Condominium Act.¹ Passage of the North Carolina Condominium Act² substantially alters the law in North Carolina regarding condominiums³ by providing needed statutory guidance in troublesome areas of condominium development.⁴ The Act's greatest innovation is its protection of the consumer.⁵ It also provides previously missing structure to the relationship between developers, condominium unit owners, and unit owners' associations⁶ and exerts substantial control over the rights and liabilities of those parties during the development of the condominium. This Note examines the history and development of North Carolina law dealing with condominiums. It explores the scope and structure of the North Carolina Condominium Act, and analyzes its substantive provisions dealing with the transition from developer to association control, potential party liabilities, consumer protections, and statutory liens.⁷ The Note concludes that although the Act is incomplete and ambiguous in some respects, its adoption is of significant benefit to all parties in the condominium relationship.

I. BACKGROUND

Condominiums, as a form of property ownership, date back at least as far as the Middle Ages.⁸ The word "condominium" is Roman in origin and signifies co-ownership.⁹ Conceptually, property ownership in a condominium¹⁰ involves fee title ownership of an individual unit and undivided co-ownership of the com-

1. North Carolina Condominium Act, ch. 877, 1986 N.C. Sess. Laws 129 (codified at N.C. GEN. STAT. §§ 47C-1-101 to -4-120 (Interim Supp. 1986)).

2. N.C. GEN. STAT. §§ 47C-1-101 to -4-120 (Interim Supp. 1986).

3. See *id.* §§ 47A-2 to -37 (1984).

4. "A need for a revision of the previous 'first generation' North Carolina statute was evident because that statute did not reflect the actual day to day experience of those who have contact with the condominium form of ownership." N.C. GEN. STAT. ch. 47C N.C. comment (Interim Supp. 1986).

5. Article 4 of the North Carolina Condominium Act is devoted solely to the protection of purchasers. *Id.* §§ 47C-4-101 to -120.

6. Articles 2 and 3 of the Act deal with "Creation, Alteration, and Termination of Condominiums" and "Management of the Condominium," respectively. *Id.* §§ 47C-2-101 to -3-119.

7. Due to the length and extensive nature of the North Carolina Condominium Act, it is not possible to deal effectively with every aspect of it in a Note; therefore, the areas chosen for discussion are generally those identified by the General Statutes Commission as most significant. *Id.* ch. 47C N.C. comment.

8. "[B]y the Middle Ages separate ownership of floors and even rooms was common in various parts of Europe. Recorded history of such . . . ownership goes back as far as the twelfth century in the case of German cities." 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 2.01, at 2-1 to 2-2 (1987).

9. *Id.* § 1.01[1], at 1-3.

10. The term "condominium" denotes a form of property ownership, not a type of property. W. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 9 (1981). Nor does it indicate a use of property in North Carolina. See *Graham Court Ass'n v. Town Council*, 53 N.C. App. 543, 547, 281 S.E.2d 418, 420 (1981) (holding that for pur-

mon elements by all tenants.¹¹ The fee and cotenant interests are generally indivisible and fully alienable.¹² Condominium ownership also brings with it most of the other aspects of real property ownership.¹³

Condominiums first appeared in the United States in Puerto Rico in response to desires of private individuals to own residential property where land values were high.¹⁴ Condominiums did not become commonplace in the United States proper until the passage of the 1961 amendments to the National Housing Act,¹⁵ which authorized issuance of Federal Housing Administration (FHA) insurance to condominium mortgages.¹⁶ This action provided the initial impetus for a dynamic and continuing growth in condominiums in this country.¹⁷

While the bulk of condominium growth has been in the primary residential market,¹⁸ substantial development has also occurred in industrial condominiums¹⁹ as well as timeshare condominiums.²⁰ The reasons for the popularity of condominiums include the desire to own property rather than lease it, high dollar values on real estate, savings of landlords' profit margins,²¹ individual financing, individual tax treatment, and the attractiveness of condominiums as an investment vehicle.²² But just as these factors have proven attractive to consumers, investors, and developers, the peculiarities of the condominium relationship have posed a number of questions which traditional property law simply is not equipped to answer.

poses of a local zoning ordinance conversion of apartments into condominiums constituted a mere change in ownership of the property and not a change in use).

11. W. HYATT, *supra* note 10, at 9. As a matter of definition, the common elements of a condominium are "all portions . . . other than the units." N.C. GEN. STAT. § 47C-1-103(4) (Supp. 1986). Limited common elements are "portion[s] of the common elements allocated . . . for the exclusive use of . . . fewer than all of the units." *Id.* § 47C-1-103(16). Unit owners pay for the maintenance and repair of both the common and limited common elements. *See infra* notes 134-50 and accompanying text. These payments are commonly designated assessments.

12. *See* N.C. GEN. STAT. § 47A-5 (1984).

13. Condominium unit owners are subject to potential tort liability arising from their property interest, face the potential that liens will be imposed against it, and enjoy the individual financing, tax benefits, and other attributes of property ownership. *See infra* notes 192-223, 252-73 and accompanying text; *see also* Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 249, 307 S.E.2d 181, 188 (1983) (holding that for annexation purposes a condominium unit is to be treated as a separate residential lot), *disc. rev. denied*, 310 N.C. 156, 311 S.E.2d 296 (1984).

14. I P. ROHAN & M. RESKIN, *supra* note 8, § 2.03, at 2-8.

15. National Housing Act of 1961, Pub. L. No. 87-70, § 234, 75 Stat. 160, 160-62 (1961) (codified at 12 U.S.C. § 1715y (1961)).

16. I P. ROHAN & M. RESKIN, *supra* note 8, § 2.03, at 2-9.

17. Condominium projects grew in number from 1,000 in 1960 to over 95,000 in 1985 and currently house more than 15% of the United States' population. More significantly, in 1985 they represented greater than 50% of new construction sales in urban areas. Bowler & McKenzie, *Invisible Kingdoms*, CAL. LAW., Dec. 1985, at 55.

18. Note, *Commercial Condominiums: Statutory Roadblocks to Development*, 34 U. FLA. L. REV. 432, 433 (1982).

19. C. GOLDSTEIN, *COMMERCIAL AND INDUSTRIAL CONDOMINIUMS* 5-15 (1974). Industrial condominiums are those used for business, production, or other nonresidential purposes. *Id.* at 5, 6, 10-12.

20. Comment, *North Carolina's Time Share Act: Guidelines For Those Who Buy and Sell Time*, 20 WAKE FOREST L. REV. 931, 932-33 (1984).

21. Seeber, *Condominiums in North Carolina: Improving the Statutory Base*, 7 WAKE FOREST L. REV. 355, 356 (1971).

22. I P. ROHAN & M. RESKIN, *supra* note 8, § 1.01[2] & n.1.

Condominium ownership is dominated by the interaction of three interested parties. These parties are the unit owner, the association of unit owners that governs the condominium, and the developer who initially creates the condominium. Each of these parties has separate but overlapping interests in the condominium property. Unit owners are interested in retaining the value, control, and enjoyment of their property interests in both their individual units and the common areas of the condominium. The owners' association, although vicariously concerned with the same interests, is additionally concerned with its own power to manage all aspects of the condominium for the benefit of the unit owners as a group. The developer is interested primarily in efficiently and profitably conveying the units of the condominium.

The overlapping and sometimes conflicting interests of these three parties create distinct legal questions that cannot be answered fully by resort to traditional property law,²³ nor, as one commentator has suggested, by analogy to corporate law.²⁴ The legal problems posed by condominiums range from issues of constitutional due process²⁵ and procedural questions of standing²⁶ to traditional property issues such as liens²⁷ and warranties.²⁸ Consequently, the necessity of addressing issues created by the condominium form of ownership through statutory regulation, as opposed to reliance on the common law of property, has been recognized by the federal government,²⁹ state governments,³⁰ and multiple promulgations of model codes.³¹ Although the need for statutory regulation has been widely recognized, the scope and effectiveness of the resulting legislation has varied.³² North Carolina condominium regulation, as in most states, has followed an evolutionary course.³³ The culmination of this course has been the North Carolina General Assembly's adoption, with modification, of the Uni-

23. See Payne, *Condominiums and the Ancient Estates in Land: New Context for Old Learning*, 14 REAL EST. L.J. 291, 291 (1986); Comment, *Areas of Dispute In Condominium Law*, 12 WAKE FOREST L. REV. 979, 979 (1976).

24. Comment, *supra* note 23, at 984-89.

25. See *infra* notes 154-73 and accompanying text.

26. See *infra* notes 120-28 and accompanying text.

27. See *infra* notes 252-73 and accompanying text.

28. See *infra* notes 246-51 and accompanying text.

29. See National Housing Act of 1961, Pub. L. No. 87-70, § 234, 75 Stat. 160, 160-62 (1961) (codified at 12 U.S.C. § 1715y (1961)).

30. At least 49 states and the District of Columbia have statutes that sanction and control the condominium form of ownership. 1 P. ROHAN & M. RESKIN, *supra* note 8, § 2.03, at 2-9.

31. The National Conference of Commissioners on Uniform State Laws has passed several acts that deal with condominiums, including, the UNIF. PLANNED COMMUNITY ACT (1980), THE MODEL REAL ESTATE TIMESHARE ACT (1982), and the UNIF. COMMON INTEREST OWNERSHIP ACT (1982). NORTH CAROLINA BAR FOUNDATION, NEW NORTH CAROLINA CONDOMINIUM ACT, at I-5 (1986). The Condominium Research Institute has promulgated a Model Condominium Code. For a comparison of the Uniform Condominium Act and the Model Condominium Code, see Rohan, *The "Model Condominium Code"—A Blueprint For Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587 (1978).

32. UNIF. CONDOMINIUM ACT, 7 U.L.A. 421-23 (1985) (prefatory note). For a discussion of the need for a statutory base for condominiums, see Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963).

33. See *infra* notes 35-53 and accompanying text.

form Condominium Act.³⁴

II. THE PRIOR LAW IN NORTH CAROLINA

North Carolina's first attempt at statutory regulation of condominiums was the enactment of the Unit Ownership Act in 1963.³⁵ This Act was "substantially a codification of the F.H.A. Model Statute,"³⁶ which was adopted for the primary purpose of making mortgage insurance available to potential condominium owners.³⁷ The Unit Ownership Act was permissive in nature and, as one commentator noted, "fail[ed] to recognize and give treatment to . . . many important condominium problems."³⁸ This failure to recognize important condominium problems³⁹ was for the most part a result of North Carolina's lack of experience with the condominium form of ownership,⁴⁰ and was common to many first generation statutes.⁴¹

The Unit Ownership Act was by its express provisions voluntary in nature. It was applicable and controlling only when all of the owners submitted the property to its provisions by executing and recording a declaration.⁴² Substantively, it provided a statutory scheme that established the skeletal structure for condominium development within the State.⁴³ The Act has been sharply criticized for its inadequacy in addressing many problems of condominium development, promotion, and ownership.⁴⁴ The Act, however, has not been the subject of extensive litigation at the appellate level.⁴⁵ Despite the lack of litigation pressure it was significantly amended in 1983⁴⁶ and effectively repealed in 1986.⁴⁷

34. North Carolina Condominium Act, ch. 877, 1986 N.C. Sess. Laws 129 (codified at N.C. GEN. STAT. §§ 47C-1-101 to -4-120 (Interim Supp. 1986)).

35. Unit Ownership Act, ch. 685, 1963 N.C. Sess. Laws 814 (codified as amended at N.C. GEN. STAT. § 47A-2 to -37 (1984)).

36. Seeber, *supra* note 21, at 357.

37. Comment, *supra* note 23, at 979 n.2.

38. Seeber, *supra* note 21, at 357.

39. The shortcomings of the Unit Ownership Act have been noted by several commentators. See Seeber, *supra* note 21, at 359-71 (discussing problems with respect to the Rule Against Perpetuities, destruction of the condominium, control of the condominium, withdrawal of the condominium from the scope of the Unit Ownership Act, unit owner liability, insuring the condominium, and taxation); Comment, *supra* note 23, at 979 (discussing continuing problems of condominium ownership in the face of the Unit Ownership Act as including promoter abuse, specific performance, lien priorities, U.C.C. applicability, warranties, and common area ownership).

40. Seeber, *supra* note 21, at 358.

41. UNIF. CONDOMINIUM ACT, *supra* note 32, at 421-22 (prefatory note).

42. N.C. GEN. STAT. § 47A-4 (1984).

43. The Act defined the essential attributes of the condominium, *id.* §§ 47A-3, -5; delineated the basic relations between owner associations, developers, and unit owners, *id.* §§ 47A-6 to -12; and superficially addressed such topics as liens, unit taxation, liabilities, and insurance, *id.* §§ 47A-21 to -24.

44. See *supra* note 39.

45. One explanation offered is that the Act was insufficiently specific to allow for litigation. Comment, *supra* note 23, at 980 n.4.

46. Act of June 27, 1983, ch. 624, 1983 N.C. Sess. Laws 556 (codified at N.C. GEN. STAT. §§ 47A-33 to -36 (1984)).

47. The Act remains in effect as to condominiums originally brought within its scope for most actions occurring prior to October 1, 1986. N.C. GEN. STAT. § 47C-1-102 (Supp. 1986).

The only major amendment to the Unit Ownership Act occurred in 1983,⁴⁸ when the general assembly enacted a second article⁴⁹ that dealt specifically with lessees in conversion condominiums.⁵⁰ For various reasons, owners of existing apartments in the early 1980's were converting them into condominiums and Article 2 of the Unit Ownership Act was enacted in response. The general assembly recognized the potential for abuse by apartment owners and condominium developers whenever lessees were forced to buy or vacate as a result of a condominium conversion.⁵¹ This concern was greatest when the lessees faced with such a choice were the aged or disabled.⁵² Article 2 of the Unit Ownership Act remains in effect and is incorporated by reference into the North Carolina Condominium Act.⁵³

The specific provisions of the Unit Ownership Act will not be set forth here. Instead, they will be contrasted with the superceding provisions of the North Carolina Condominium Act.

III. THE NORTH CAROLINA CONDOMINIUM ACT

By 1985, a number of commentators had criticized the Unit Ownership Act as being inadequate to deal with the plethora of problems associated with the condominium relationship. To cure these deficiencies the general assembly turned to the Uniform Condominium Act. The Uniform Condominium Act was first promulgated by the National Conference of Commissioners on Uniform State Laws in 1977 in response to the inadequate and inconsistent provisions of various first generation state laws regulating condominiums.⁵⁴ The Conference of Commissioners subsequently amended the Act in 1980.⁵⁵ The Uniform Act is organized into five articles, the first four of which form the basis for the North Carolina Condominium Act.⁵⁶ These four articles are: (1) general provisions; (2) creation, alteration, and termination of condominiums; (3) management of condominiums; and (4) protection of condominium purchas-

48. The Unit Ownership Act underwent several minor amendments. In 1969 and 1971 it was amended to expand the definitions of "condominium unit" and "building." Act of June 16, 1969, ch. 848, §§ 1-2, 1969 N.C. Sess. Laws 946, 946-47 (codified at N.C. GEN. STAT. § 47A-3(12), (15) (1984)); Act of May 21, 1971, ch. 418, § 1, 1971 N.C. Sess. Laws 345, 345 (codified at N.C. GEN. STAT. § 47A-3(1a) (1984)). In 1973 the requirement to attach bylaws to the deed of the first unit was eliminated. Act of May 23, 1973, ch. 734, § 1, 1973 N.C. Sess. Laws 1092, 1092 (codified at N.C. GEN. STAT. § 47A-18 (1984)). In 1981 the provisions governing conveyance of a condominium were simplified. Act of June 8, 1981, ch. 527, § 2, 1981 N.C. Sess. Laws 799, 799 (codified at N.C. GEN. STAT. § 47A-14.1 (1984)); Act of June 16, 1981, ch. 587, § 1, 1981 N.C. Sess. Laws 858, 858 (codified at N.C. GEN. STAT. § 47A-15 (1984)).

49. Act of June 27, 1983, ch. 624, § 1, 1983 N.C. Sess. Laws 556, 556-57 (codified at N.C. GEN. STAT. §§ 47A-33 to -36 (1984)).

50. A conversion condominium is a preexisting building that "at any time before the creation of the condominium was occupied wholly or partially by persons other than the purchasers and persons who occupy with the consent of the purchasers." N.C. GEN. STAT. § 47A-34(1) (1984).

51. Note, *Statutory Protection Against Condominium Conversions for North Carolina Residential Tenants*, 62 N.C.L. REV. 1346, 1347-48 (1984).

52. *Id.* at 1350-51.

53. N.C. GEN. STAT. § 47C-4-106 (Interim Supp. 1986).

54. UNIF. CONDOMINIUM ACT, *supra* note 32, at 421-22 (historical note).

55. UNIF. CONDOMINIUM ACT, *supra* note 32, at 421 (historical note).

56. NORTH CAROLINA BAR FOUNDATION, *supra* note 31, at I-5.

ers.⁵⁷ The fifth article, which is not incorporated into the North Carolina Act, creates a state administrative agency to regulate condominiums.⁵⁸ By February 1986, the Uniform Condominium Act had been adopted by nine states.⁵⁹ North Carolina adopted Articles 1 through 4 of the Uniform Act. Apart from the deletion of Article 5, the North Carolina Act made a number of changes to Articles 1 through 4. Some of these changes were merely procedural, but several were substantive and these will be noted throughout the discussion of the North Carolina Condominium Act.

A. *The Statutory Scope*

The first significant change in North Carolina condominium law wrought by the Act relates to the scope and nature of its application. In contrast to the Unit Ownership Act, the North Carolina Condominium Act provides for a mandatory and highly controlled application of its provisions upon a determination that a development is a condominium. As of October 1, 1986,⁶⁰ a condominium in North Carolina is defined as "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions."⁶¹ No real estate is a condominium "unless the undivided interests in the common elements⁶² are vested in the unit owners."⁶³ The Unit Ownership Act definition was much broader, providing only that a condominium is "the ownership of single units in a multi-unit structure with common areas and facilities."⁶⁴ This definition permitted inclusion of associated forms of ownership⁶⁵ not permitted under the North Carolina Condominium Act. Arguably this narrowing is some evidence of the regulatory intent underlying the Condominium Act in comparison to the permissive intent behind the Unit Ownership Act.

A second important aspect of the scope of the Condominium Act is its mandatory application. The Act expressly states that it "applies to all condominiums created within this State after October 1, 1986,"⁶⁶ and precludes avoid-

57. UNIF. CONDOMINIUM ACT, *supra* note 32, at 425-26 (table of contents).

58. UNIF. CONDOMINIUM ACT, *supra* note 32, §§ 5-101 to -110, at 567-78.

59. UNIF. CONDOMINIUM ACT, *supra* note 32, at 45 (Cum. Supp. 1986) (table of jurisdictions).

60. N.C. GEN. STAT. § 47C-1-102(a) (Supp. 1986). The Act's primary application is prospective.

61. *Id.* § 47C-1-103(7).

62. Common elements are defined by the Act as "all portions of a condominium other than the units." *Id.* § 47C-1-103(4).

63. *Id.* § 47C-1-103(7).

64. *Id.* § 47A-3(5) (1984).

65. Other forms would include incorporated associations whose "interests" in the units and common areas were not vested property interests but instead share interests. The drafters of the North Carolina Condominium Act, the General Statutes Commission, initially attempted to maintain this broad coverage in the modification of the Uniform Act, but later abandoned this notion in favor of a more restrictive definition of condominium in accordance with the Uniform Act. NORTH CAROLINA BAR FOUNDATION, *supra* note 31, at I-6.

66. N.C. GEN. STAT. § 47C-1-102(a) (Supp. 1986). Designated provisions of the Act apply to condominiums already in existence as of October 1, 1986, but only with respect to "events and circumstances occurring" thereafter. *Id.*

ance of its terms by contract, waiver, or other device.⁶⁷ In comparison, the Unit Ownership Act was voluntary in nature. Property potentially subject to the Unit Ownership Act only became subject to it when the owners of the condominium project filed a declaration.⁶⁸ Application of the Unit Ownership Act, therefore, could be avoided at the whim of the developer. This change in approach to the regulation of condominiums evinces a clear legislative intent to exert control over the parties and actions in the condominium relationship.⁶⁹

B. *The Statutory Structure*

If an existing or planned development falls within the statutory definition, the developer is required to take certain administrative steps to validate the development as a condominium. The primary condition precedent to legal existence as a condominium is the filing of a declaration.⁷⁰ This declaration must be filed, as a deed would be, in all counties wherein any of the condominium property lies.⁷¹ The declaration is filed by the declarant,⁷² who is typically the developer of the condominium project. The declaration must include: descriptions as to name,⁷³ location,⁷⁴ and specifications of individual units;⁷⁵ size of the condominium project;⁷⁶ apportionment of common elements,⁷⁷ voting power of association members,⁷⁸ and common expense liabilities;⁷⁹ restrictions on use or alienability;⁸⁰ and full disclosure of any reserved rights as to future development of the condominium project.⁸¹ The declaration requirements perform two functions. They require definitive provisions on aspects of condominium ownership which if undefined could be troublesome, and they provide some notice to potential buyers. Thus, the declaration is not only the legitimizing legal document of the condominium project, but is also an important means of disseminating con-

67. *Id.* § 47C-1-104(a). The Act does permit a written waiver of rights after violation of the statute. *Id.* § 47C-1-104(b). The use of *other* devices includes use of proxies or powers of attorney. *Id.* § 47C-1-104(d).

68. *Id.* § 47A-4 (1984).

69. The Act does not presume, however, to be all-encompassing and provides that "[t]he principles of law and equity supplement the provisions of this chapter except to the extent inconsistent with this chapter." *Id.* § 47C-1-108 (Supp. 1986).

70. The Act defines "declaration" as "any instruments, however denominated, which create a condominium, and any amendments to those instruments." *Id.* § 47C-1-103(10).

71. *Id.* § 47C-2-101(a). This section makes the filing of a declaration a mandatory act that creates the condominium. This section further requires substantial completion of the condominium by evidence of the recording of a certificate of completion certified by a licensed architect or registered engineer. *Id.* § 47C-2-101(b). The Act also requires the filing of the condominium's plat or plan, which is considered part of the declaration but is required to be filed separately. *Id.* § 47C-2-109. For a discussion of possible conflicts between local platting ordinances and state condominium statutes, see Tudzarov, *Platting the Condominium: Is it Required?*, 15 REAL EST. L.J. 22 (1986).

72. N.C. GEN. STAT. § 47C-1-103(a) (Supp. 1986).

73. *Id.* § 47C-2-105(1).

74. *Id.* §§ 47C-2-105(2), (3).

75. *Id.* §§ 47C-2-105(5) to (7).

76. *Id.* § 47C-2-105(4).

77. *Id.* § 47C-2-105(11).

78. *Id.*

79. *Id.*

80. *Id.* § 47C-2-105(12).

81. *Id.* §§ 47C-2-105(8), (9).

sumer information.⁸²

In comparison, the Unit Ownership Act's requirements for filing a declaration⁸³ were similar in form,⁸⁴ but substantially less specific in content.⁸⁵ Under the Unit Ownership Act the declaration was required to contain a general description of the apportioned interests,⁸⁶ restrictions on use,⁸⁷ and "any further details . . . which the person executing the declaration may deem desirable."⁸⁸ This approach reflects the essentially skeletal nature of the Unit Ownership Act. The Condominium Act also provides guidance as to the priority, interpretation, and continuing viability of a declaration.⁸⁹ The Act expressly declares all provisions of the declaration severable,⁹⁰ and controlling when they conflict with the bylaws of the owners' association.⁹¹ As previously noted, the declaration is required to define certain fundamental aspects of the unit owners' rights and responsibilities in relation to those of the owners' association and the developer. As such, the power to control the contents of the declaration is critical to the stability and fairness of the tripartite relationship it creates.

To this end the Condominium Act provides for amendment to the declaration,⁹² with exceptions,⁹³ on a sixty-seven percent affirmative vote of the unit owners' association.⁹⁴ Conversely, the Unit Ownership Act permitted amendment to the declaration as provided for therein.⁹⁵ Because the declaration is virtually always drafted by the developer, the potential for abuse of the amendment procedure contained in the Unit Ownership Act is obvious. The supermajority voting requirement in the North Carolina Condominium Act, combined with the statutorily mandated provisions of the declaration, ensure the

82. For a detailed description and discussion of these purchasers' rights, see *infra* notes 224-51 and accompanying text.

83. N.C. GEN. STAT. § 47A-13 (1984).

84. The Unit Ownership Act, like the Condominium Act, required the filing of the declaration in the county register of deeds' office, and required inclusion of general information describing the condominium and the allocation of its elements. *Id.*

85. The Unit Ownership Act did not require any revelation of future development rights, common expense liabilities, unit owner voting rights, or any of the other information required by the Condominium Act. *Id.*

86. *Id.* § 47A-13(1) to (5).

87. *Id.* § 47A-13(6).

88. *Id.* § 47A-13(8).

89. *Id.* § 47C-2-103 (Supp. 1986).

90. Severability avoids the wholesale invalidation of declarations when one provision is determined invalid. *Id.*

91. *Id.* § 47C-2-103(c).

92. *Id.* § 47C-2-117.

93. The exceptions to the power to amend by 67% vote of the unit owners' association are those instances in which the declarant, the association, or the unit owner may execute an amendment as provided for in the Act. *Id.* § 47C-2-117(a). These include instances in which development rights are exercised, common element or unit interests are reallocated, and the condominium is terminated. *Id.* Additionally, unless permitted or required by other sections of the Act, unanimous consent of the unit owners is required to amend the declaration so as to "increase special declarant rights, increase the number of units, or change the boundaries of any unit, the allocated interest of a unit, or the uses to which any unit is restricted." *Id.* § 47C-2-117(d).

94. *Id.* § 47C-2-117(a). The unit owners' association may raise the majority vote required to amend the declaration, but may lower it only if all units are exclusively nonresidential. *Id.*

95. *Id.* § 47A-13(9) (1984).

stability of the primary document in the condominium relationship,⁹⁶ while protecting against developer overreaching.

C. Unit Owners' Association

The allocation of interests in the condominium relationship and the mandatory nature of the North Carolina Condominium Act are both important aspects of its structure. The most notable structural provisions of the Act, however, relate to the organization and powers of the unit owners' association. As previously discussed, many of the complexities of law resulting from condominium ownership result from the tripartite relationship between the developer, the unit owner, and the unit owners' association. The Condominium Act delineates the form of the unit owners' association and gives it impressive statutory powers to conduct its business.

Section 3-101 of the Condominium Act requires establishment of a unit owners' association "no later than the date the first unit in the condominium is conveyed."⁹⁷ The section permits the association to be "organized as a profit or non-profit corporation or as an unincorporated association"⁹⁸ and limits membership to all unit owners.⁹⁹ The Act requires the unit owners' association to form an executive board that can act with the full authority of the association, unless restricted by declaration, bylaw, or statute.¹⁰⁰ Board members are expressly designated as fiduciaries of the association, and their conduct with respect to the association is controlled by requirements of "good faith, and . . . diligence and care which ordinarily prudent men would exercise . . ."¹⁰¹ These provisions suggest that the general assembly envisioned the executive board accomplishing functional day-to-day management of the condominium, with only annual supervision from the entire association.

Section 3-102 of the Act delineates the powers of the association once it is formed.¹⁰² These include the power to govern itself,¹⁰³ manage the condominium,¹⁰⁴ make contracts,¹⁰⁵ bring suit,¹⁰⁶ acquire property,¹⁰⁷ and impose fines

96. The continuing viability of the declaration is ensured by the Act's express exclusion of the Rule Against Perpetuities. *Id.* § 47C-2-103(b). Black's Law Dictionary defines the Rule Against Perpetuities as the "[p]rinciple that no interest in property is good unless it must vest, if at all, not later than 21 years, plus period of gestation, after some life or lives in being at time of creation of the interest." BLACK'S LAW DICTIONARY 1195 (5th ed. 1979). The Rule Against Perpetuities poses potential problems to certain property allocations in the declaration, such as rights of first refusal and allocations of interest on the destruction of the condominium. See Natelson, *Avoiding Perpetuities Problems in Condo Declarations*, 13 COLO. LAW. 2229, 2229-31 (1984); Rohan, *Drafting Condominium Instruments: Provisions for Destruction, Obsolescence and Eminent Domain*, 65 COLUM. L. REV. 593 (1965); Seeber, *supra* note 21, at 359-64.

97. N.C. GEN. STAT. § 47C-3-101 (Supp. 1986).

98. *Id.*

99. *Id.* If the condominium is terminated, membership in the association may include all persons entitled to the proceeds from the termination. *Id.*

100. *Id.* § 47C-3-103(a).

101. *Id.* This standard of fiduciary care is identical to that set out in the North Carolina Business Corporation Act. *Id.* § 55-35 (1982).

102. *Id.* § 47C-3-102 (Supp. 1986).

103. *Id.*

104. *Id.* §§ 47C-3-102(1) to (3), (6) to (7).

on association members.¹⁰⁸ These powers are supplemented by the general power to "[e]xercise any other powers necessary and proper for the governance and operation of the association."¹⁰⁹ This grant of statutory authority is impressive, particularly because it allows an unincorporated association to perform a number of functions heretofore reserved to legal entities.

The association's power to govern itself is primarily constrained by the declaration and bylaws.¹¹⁰ The statute provides that the declaration and bylaws shall govern the association,¹¹¹ with the declaration being the primary governing document.¹¹² Subordinated to the declaration are the bylaws of the unit owners' association, which control its form and function.¹¹³ The Condominium Act does not circumscribe the substantive content of the bylaws, but does require certain notice-serving provisions to be included.¹¹⁴ The Act also authorizes the association to enforce violations of the declaration, bylaws, or rules and regulations of the association by fines.¹¹⁵

In addition to the ability to govern itself, the unit owners' association is also empowered to manage the condominium.¹¹⁶ This is its primary function, and its primary goal in carrying out this function is the preservation of the economic value of the condominium. The Act specifically charges the association with responsibility "for causing the common elements to be maintained, repaired, and replaced when necessary"¹¹⁷ This responsibility extends to ensuring that damage caused to common areas by unit owners is repaired.¹¹⁸ Conversely, the association may not manage with impunity because it is vicariously liable for damages caused to any unit of the condominium by agents of the association.¹¹⁹

The Act also gives the unit owners' association authority to bring suit in its own name.¹²⁰ This authorization is not a significant change from the authority granted in the Unit Ownership Act, which permitted the association to bring suit, but required it to be brought by the manager, board of directors, or an aggrieved owner.¹²¹ Although this seems a minor distinction, less than three

105. *Id.* § 47C-3-102(5).

106. *Id.* § 47C-3-102(4).

107. *Id.* § 47C-3-102(8).

108. *Id.* § 47C-3-102(a)(11).

109. *Id.* § 47C-3-102(a)(16).

110. *Id.* § 47C-3-102.

111. *Id.* § 47C-3-102(a).

112. *Id.*

113. *Id.*; see *id.* § 47C-3-106.

114. *Id.* § 47C-3-106. These provisions include mandatory descriptions of the size, duties, powers, and procedures for election of board members, as well as descriptions of how and by whom the executive board powers may be exercised. *Id.* § 47C-3-106(3) to (5).

115. *Id.* § 47C-3-107A.

116. See *id.* § 47C-3-102(a).

117. *Id.* § 47C-3-107(a).

118. *Id.* § 47C-3-107(b).

119. *Id.* § 47C-3-107(c).

120. *Id.* § 47C-3-102(a)(4). This provision is different from the Uniform Condominium Act requirement that the association must sue on behalf of "2 or more unit owners." *Id.* § 47C-3-102 N.C. comment; UNIF. CONDOMINIUM ACT, *supra* note 32, § 3-102(a)(4), at 502.

121. *Id.* § 47A-10 (1984).

months before the Condominium Act became effective, the North Carolina Court of Appeals denied an association standing to bring suit in its own name based on this distinction.

In *Laurel Park Villas Homeowners Association v. Hodges*¹²² a unit owners' association sought to enjoin a unit owner's actions that violated rules promulgated by the association.¹²³ These violations included parking in unauthorized areas, playing a stereo too loudly, and having a child in the member's unit.¹²⁴ On these facts the court of appeals extended its prior strict construction rule for determining property associations' standing to sue to the provisions of the Unit Ownership Act.¹²⁵ In *Hodges* the court of appeals held that section 47A-10 of the Unit Ownership Act was to be construed strictly; therefore, such an action could only be maintained by the manager or board of directors, neither of whom had instigated the action in the case.¹²⁶

The Condominium Act would appear to favor a different result on the facts in *Hodges*. Section 3-102 of the Act expressly provides that "the association, even if unincorporated, may . . . [i]nstitute, defend, or intervene in its own name in litigation or administrative proceedings on matters affecting the condominium."¹²⁷ The requirement that the action be maintained by the manager or board of directors has been eliminated; the logical inference is that the general assembly intended to remove this requirement and thereby broadened the ability of the association to bring suit.

It is not entirely clear, however, that section 3-102 would necessarily require such a result. A court could find that, as a practical matter, no one but the directors of the association can logically institute suit for the association. The *Hodges* court did not appear to question that the association, not the individual unit owners, was suing. Nonetheless, it is difficult to envision how the association was bringing suit when its directors were not involved. *Hodges* is arguably no longer good law in North Carolina.¹²⁸

122. 82 N.C. App. 141, 345 S.E.2d 464 (1986).

123. *Id.* at 142, 345 S.E.2d at 465.

124. *Id.*

125. This prior strict construction rule was set forth in *Beech Mountain Property Owners' Ass'n v. Current*, 35 N.C. App. 135, 240 S.E.2d 503 (1978). In *Current* an incorporated property owners' association was denied standing to sue when it attempted to enforce restrictive covenants contained in deeds to a resort development so as to collect unpaid assessments. *Id.* at 135, 240 S.E.2d at 504. This case was governed by the common law of real property. Existing restrictive covenants granted enforcement rights to "the owners of lots in the neighborhood or subdivision, or any of them jointly or severally." *Id.* at 138, 240 S.E.2d at 506. The court determined that the grantor did not intend to convey standing to enforce the restrictive covenants on the property owners' association. *Id.* at 139, 240 S.E.2d at 507. The court of appeals concluded that because restrictive covenants were to be strictly construed as "in derogation of the free and unfettered use of land," so also was standing to enforce them. *Id.* at 138, 240 S.E.2d at 506 (quoting *Reed v. Elmore*, 246 N.C. 221, 224, 98 S.E.2d 360, 363 (1957)).

126. *Hodges*, 82 N.C. App. at 144, 345 S.E.2d at 466.

127. N.C. GEN. STAT. § 47C-3-102(a)(4) (Supp. 1986).

128. This is so for two reasons. The first is that the Condominium Act provision is facially broader than the corresponding Unit Ownership Act section. The second is that in the absence of a specific provision on who may maintain an action under the Condominium Act, precedent favors a liberal determination of standing. In *Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill*, 63 N.C. App. 244, 304 S.E.2d 251 (1983), the court of appeals granted an incorporated property

Another manifestation of the association's statutory authority is its ability to convey or encumber the condominiums' common elements,¹²⁹ although such action requires approval of eighty percent of the unit owners' association.¹³⁰ Any contract of conveyance or encumbrance of common areas requires recordation, execution, and ratification as if it were a deed.¹³¹ The Act authorizes the association to contract for the sale or encumbrance of common areas, but such a contract is not enforceable until ratified by the association members.¹³²

Finally, the Act makes void any purported conveyance, encumbrance, or judicial sale of the common elements, unless such transactions conform with the eighty percent ratification requirement.¹³³ Conceptually, this power to convey common elements is troubling. Common elements are owned by all unit owners as tenants in common. Conveyance thereof over the dissenting vote of any cotenant is contrary to traditional concepts of fee ownership. Although the basis for such a conveyance could be contractual if included in the declaration, the Act does not require this. The power to convey on less than the unanimous consent of cotenants abrogates common law rights of property ownership, and because of its statutory basis, implicates due process rights of dissenting cotenants. Although contracts controlling alienation of real property exist and are enforced, they typically take the form of restraints on alienation. A cotenant's normal remedy in dissent of a sale of jointly owned property is partition. This remedy evidently is not available under the Act. The obvious purpose of the alienation provision is to permit the association some flexibility with respect to future contingencies. Given the supermajority voting requirement, this seems a reasonable provision. Nevertheless, unit owners may choose a condominium specifically because it has substantial common areas, and given the absence of notice requirements for this provision, it is likely that the unit owner so situated would be both surprised and disadvantaged by a sale of the common elements over his dissenting vote.

The powers of the unit owners' association over its membership are also extensive. Its primary function with respect to its membership is to allocate the general and specific expenses of the condominium. The primacy of this function, from the perspective of the unit owners, does not require elaboration. The Act

owners' association standing to sue, even though it had no property interest, because the association represented property owners who did have an interest. *Id.* at 247, 304 S.E.2d at 253. In *Piney Mt.* the association sought to contest a public housing development being considered for property adjacent to the neighborhood represented by the association. *Id.* The court of appeals noted this was a case of first impression and cited a "trend in other jurisdictions toward relaxing strict procedural requirements involving standing." *Id.* The court seems to have implicitly distinguished between bald association assertions of standing (viewed liberally), association assertions of standing based on statute as in *Hodges* (viewed strictly), and assertions of standing based on assignment as in *Current* (viewed strictly).

129. N.C. GEN. STAT. § 47C-3-112(a) (Supp. 1986).

130. *Id.*

131. *Id.* § 47C-3-112(b).

132. *Id.* § 47C-3-112(c).

133. *Id.* § 47C-3-112(d). This provision protects the common elements from loss due to liabilities of the association and goes hand-in-hand with § 47C-3-117 regarding outside liens affecting the condominium.

provides the framework for the exercise of this assessment power, but does not substantially limit it.

The general power to assess relates to the association's ability to distribute the costs of recurring common expenses.¹³⁴ Common expenses are "expenditures made by or financial liabilities of the association, together with any allocations to reserves."¹³⁵ The general assessment power allows the association to assess monies from unit owners to pay for regular costs associated with the maintenance of the condominium. The Condominium Act permits allocation of the common expenses to individual units in accordance with the declaration.¹³⁶ The Act, however, does not control the apportionment of such allocation, except to implicitly require some contribution by each unit¹³⁷ and to explicitly require inclusion of the apportionment formula in the declaration.¹³⁸ Thus, although the Act generally does not require equality of apportionment among the unit owners,¹³⁹ it does require consistency of apportionment with concurrent notice to any potential buyer.¹⁴⁰ The Act contains three important exceptions to the requirement of an assessment by declaration formula. The first exception occurs when common expenses are associated with limited common elements,¹⁴¹ common expenses benefit less than all units,¹⁴² or insurance costs and costs of utilities are allocated.¹⁴³ The second exception limits common expense liability resulting from a judgment against the association.¹⁴⁴ The last exception is triggered when common expenses result from a specific owner's misconduct.¹⁴⁵

The more specific power to assess follows from the association's duty to repair the condominium.¹⁴⁶ In fulfilling this duty the association may "assess the unit owners as necessary to recover the costs of . . . maintenance, repair, or replacement" of common elements.¹⁴⁷ Further, should the association repair damage to common areas caused by a unit owner, it may assess the owner the cost of such repair up to five hundred dollars.¹⁴⁸ This assessment, if unpaid, may result in the creation of a statutory lien on the unit owners' property interest in the condominium.¹⁴⁹ Such action may be taken after a voluntary hearing

134. "[A]ll common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration" *Id.* § 47C-3-115(b).

135. *Id.* § 47C-1-103(5).

136. *Id.* § 47C-3-115(b).

137. Under §§ 47C-2-107 and 47C-3-115, the Act implicitly requires some contribution by all units.

138. N.C. GEN. STAT. § 47C-2-107A (Supp. 1986).

139. The act does require equality or nondiscrimination with respect to the declarant vice nondeclarant-owned units. *Id.*

140. *Id.* The Act also requires proportional repayment of excess funds, unless the declaration provides otherwise. *Id.* § 47C-3-114.

141. *Id.* § 47C-3-115(c)(1).

142. *Id.* § 47C-3-115(c)(2).

143. *Id.* § 47C-3-115(c)(3).

144. *Id.* § 47C-3-115(d).

145. *Id.* § 47C-3-115(e).

146. *Id.* § 47C-3-107.

147. *Id.* § 47C-3-107(a).

148. *Id.* § 47C-3-107(d).

149. *Id.*

summarily described by the Act.¹⁵⁰

This last statutory provision is more notable for what it fails to say than for what it does say. Specifically, what is the nature of the hearing required by the Act? Should the association choose not to incorporate the hearing into its assessment procedure, it is also unclear what limitations on the association's assessment power exist. The implicit limitation seems to be the presumption of court supervision of an action to enforce the assessment. This raises a question as to what rights of appeal, if any, follow the hearing procedure outlined in the statute.¹⁵¹ If the answer is the same as that for the association's general assessment power—resort to state courts—then the rationale for prescribing such a procedure is questionable. That is, if the hearing is only a pro forma proceeding with no precedential value in any action enforcing or challenging it, then unit owner compliance with its result is at most voluntary.¹⁵² Last, the enforcement of any such assessment implicates constitutional due process concerns.¹⁵³

D. *Quasi-Governmental Status of the Unit Owners' Association*

Perhaps the most striking facet of the Condominium Act's empowerment of the unit owners' association is the association's resulting quasi-governmental status. Under the Condominium Act the association is an entity that, through both the power of the state and the consent of its members, may exercise broad and extensive authority over unit owners.¹⁵⁴ Yet this power is not subject to the constitutional safeguards restricting the actions of local, state, and federal governments.¹⁵⁵ Actions by owners' associations may implicate a number of constitutional rights stemming primarily from fundamental constitutional guarantees made applicable to the states by the fourteenth amendment.¹⁵⁶ Potential claims arising from the quasi-governmental nature of the association include denial of equal protection when variations in enforcement of bylaws or regulations occur, or when alteration of the one person-one vote model in association elections is

150. *Id.*

151. "No detail is given concerning the composition or structure of such an adjudicatory panel, other than the statement that notice of the charge and the final decision, and an opportunity to be heard and present evidence must be given to the party sought to be charged." NORTH CAROLINA BAR FOUNDATION, *supra* note 31, at IV-9.

152. The critical aspect in such a case is whether a court asked to enforce such an assessment would review the merits of the assessment or simply look at the procedure used to arrive at the assessment. The former approach reduces the significance of the statutory hearing procedure. The latter could raise serious constitutional questions of due process and equal protection. *See infra* notes 154-74 and accompanying text.

153. Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 658 (1981).

154. The Condominium Act expressly grants the owners' association the power to assess, fine, and create rules and regulations governing the condominium. N.C. GEN. STAT. §§ 47C-3-102, -107A, -115 (Supp. 1986). Concurrently, the Act requires express notice of the existing governmental structure of the association to be provided to any prospective purchaser. *Id.* §§ 47C-2-101, -2-105, -4-103. Despite the originally consensual nature of the relationship, this characterization becomes strained with respect to future action by the association: it seems meaningless to say the unit owner *consented* in advance to unknown actions of the association.

155. Note, *supra* note 153, at 647. The unit owners' association is largely considered to be an essentially private entity. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1522 (1982).

156. Shifrin, *Community Associations and the Power to Levy Fines*, 71 ILL. B.J. 604, 605 (1983).

encountered;¹⁵⁷ and due process claims of both a substantive¹⁵⁸ and procedural¹⁵⁹ nature, when the association restricts certain types of behavior or fines its members for violations of the rules governing the condominium.¹⁶⁰

Several commentators have noted the quasi-governmental nature of the condominium¹⁶¹ and have posited that associations are at the same time similar to and different from a small municipal government.¹⁶² The similarity stems from an association's performance of governmental-type functions.¹⁶³ A primary distinction is that submission to the authority of a unit owners' association is fundamentally consensual in nature.¹⁶⁴ This dual character of the owners' association and the potential problems it poses reflect two competing state interests. The first is a desire to grant the owners' association the power to manage the condominium adequately and efficiently.¹⁶⁵ Effective administration enhances the viability of the condominium as a popular form of ownership, potentially relieves the state of some duties with respect to the condominium, and with luck reduces the judicial costs of condominium litigation. The second state interest is protection of the constitutional rights of the associations' members,¹⁶⁶ particularly when a violation occurs through association acts apparently authorized by the government.¹⁶⁷ If such violations may be attributed to state action, the state may be liable for them.¹⁶⁸

This dichotomy in the nature of the unit owners' association and the poten-

157. For a discussion of unit owners' constitutional rights with respect to owners' associations, see Weakland, *Condominium Associations: Living Under the Due Process Shadow*, 13 PEPPERDINE L. REV. 297, 310-20 (1986); see also Ellickson, *supra* note 155, at 1541-44 (comparing municipal voting rights to unit owner association voting rights).

158. See Weakland, *supra* note 157, at 310-13 (reviewing cases in which the court dealt with substantive due process claims brought by unit owners against owner associations).

159. See Weakland, *supra* note 157, at 314-16 (reviewing cases in which the court dealt with procedural due process claims brought by owner associations as individual owners).

160. The act of fining an association member, currently permitted by § 47C-3-107 of the North Carolina Condominium Act, presents a classic procedural due process problem. This situation requires notice of the charge, an opportunity to be heard and to present evidence, and notice of the decision, but the form and nature of the hearing are unclear. See N.C. GEN. STAT. § 47C-3-107 (Supp. 1986). It is further unclear whether the proceeding under § 47C-3-107 would constitute state action. If it does not, then the fourteenth amendment is not implicated. Weakland, *supra* note 157, at 320. If it does, then the question before the court will be whether the hearing satisfied due process.

161. "Each unit owner is subject to the dictates of local statutory and common law and is also bound by a more private law—one personally ratified and accepted upon consummation of the condominium purchase." Note, *Individual Property Rights Versus Majority Rule in the Condominium Community*, 23 ARIZ. L. REV. 483, 492 (1981).

162. Ellickson, *supra* note 155, at 1520-26.

163. These functions include both regulation and taxation. Ellickson, *supra* note 155, at 1522.

164. Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 478-81 (1985).

165. Note, *supra* note 153, at 652-53.

166. Note, *supra* note 153, at 653-55. Evidently the General Statutes Commission was aware of the potential for constitutional due process claims and commented that the adjudicatory hearing described in § 47C-3-107(d) "provides for minimal due process for the party charged." N.C. GEN. STAT. § 47C-3-107 N.C. comment (Supp. 1986).

167. Deprivation of constitutional rights by an association may incur liability for the state if such action is prescribed by statute, directed by an administrative agency, or enforced in the courts. Weakland, *supra* note 157, at 320.

168. Weakland, *supra* note 157, at 320.

tial constitutional problems it causes have been recognized by the courts,¹⁶⁹ but remains unresolved. The courts that have considered litigation involving owners' associations have fashioned a variety of approaches depending on the nature of the action.¹⁷⁰ Some courts have analogized to municipal law in cases in which an association has acted in a governmental capacity.¹⁷¹ Similarly, association restrictions have been subjected to constitutional analysis.¹⁷² Other courts have analyzed owner claims against the association on a consent theory.¹⁷³ Last, some courts have applied a standard of equitable reasonableness to association actions that restrict the rights of owners.¹⁷⁴ One thing is clear: this area of condominium law is far from settled. Although the issues are currently unlitigated in North Carolina, they are unlikely to remain so.

IV. THE NORTH CAROLINA CONDOMINIUM ACT'S SUBSTANTIVE PROVISIONS: EXPLANATION AND ANALYSIS

The North Carolina Condominium Act provides separate substantive regulation of three topics of concern in the condominium relationship: (1) the period of transition from developer control to owner control; (2) consumer protections; and (3) liens on condominium property. Although these three issues are not the only ones affected by the Act's provisions, most of the important provisions address these areas.

A. *Transition Period*

An express concern of the North Carolina General Statutes Commission in drafting the North Carolina Condominium Act was the inadequacy of the Unit Ownership Act in regulating "the important period of transition between the developer control and control by the owners association."¹⁷⁵ The Condominium Act provides for transfer of control in several ways. The Act allows control of the unit owners' association to shift from the developer to the unit owners,¹⁷⁶ permits the unit owners' association to terminate contracts made by the developer,¹⁷⁷ requires insurance to be maintained at a specified time in the transition period,¹⁷⁸ and requires the developer to pay all common expenses until the owners' association can make an assessment.¹⁷⁹ These provisions ensure smooth transition of functional control, continuous protection of unit owners' interests, and uninterrupted provision of essential services. Concurrently, the provisions

169. See Weakland, *supra* note 157, at 300-01.

170. Weakland, *supra* note 157, at 300-26.

171. Weakland, *supra* note 157, at 307-10.

172. See Weakland, *supra* note 157, at 310-20.

173. Weakland, *supra* note 157, at 300-03.

174. Note, *supra* note 153, at 658-63.

175. N.C. GEN. STAT. ch. 47C N.C. comment (Interim Supp. 1986).

176. N.C. GEN. STAT. § 47C-3-103 (Interim Supp. 1986).

177. *Id.* § 47C-3-105.

178. *Id.* § 47C-3-113.

179. *Id.* § 47C-3-115(a).

allow the owners' association to operate independently of developer-made contracts in certain circumstances.

The declaration may include provisions allowing initial developer control of the unit owners' association.¹⁸⁰ This control is probably desirable, because developers' interests and experience make them a likely choice to manage the condominium in its early stages. This period of developer control is strictly circumscribed by the Act and must end no later than two years after the last offering of a unit for sale by the developer.¹⁸¹ During this period the developer must afford gradually increasing representation on the executive board of the association to unit owners.¹⁸² After the period of authorized developer control has expired, the association may operate independently.

The Act also permits the independent association to terminate contracts entered into by the association when it was under developer control.¹⁸³ Termination of contracts may occur without regard to the substantive fairness of the contracts if they involve management of the condominium, employment, or leases of parking or recreational areas.¹⁸⁴ The association may also terminate a contract in that the developer was an interested party or a contract that was unconscionable to the unit owners when made.¹⁸⁵ This provision of the Act is a substantial protection of unit owners from potential self-dealing by unscrupulous developers; it is also a substantial abrogation of normal contract rights. In recognition of the potential burden it might pose on third parties acting in good faith, the Act requires express notice of this right of termination to appear on the face of contracts entered into by the developer.¹⁸⁶

Another substantive control on the transition period is the Act's provisions on insurance. Insurance is required from the outset of the transition period. The owners' association must maintain both property and liability insurance on all units and common elements, and such coverage must begin no later than "the time of the first conveyance of a unit to a person other than a declarant."¹⁸⁷ The Act describes in detail the minimum amount and mandatory provisions of the insurance.¹⁸⁸ The primary importance of this provision is protection it affords to both the developer's and the unit owners' interests at a time when control of

180. *Id.* § 47C-3-103(d).

181. *Id.*

182. *Id.* § 47C-3-103(e).

183. *Id.* § 47C-3-105.

184. *Id.* This provision precludes enforcement of long-term contracts of a self-serving nature entered into by the developer under the guise of the association.

185. *Id.*

186. *Id.* This right of termination may be exercised after 90 days notice. The General Statutes Commission altered the Uniform Condominium Act by requiring the declarant to provide notice on the face of contracts made with third parties regarding the association's right to cancel. Failure of the declarant to do so does not affect the association's ability to cancel. *Id.* This notice requirement was added by the General Statutes Commission out of "concern for persons who in good faith enter into a contract with the executive board and expend capital towards fulfilling that contract." *Id.* § 47C-3-105 N.C. comment.

187. *Id.* § 47C-3-115(a).

188. *Id.* §§ 47C-3-115(a) to (d). Most notably, the Act permits unit owners to have their own insurance in addition to that provided by the association, and denies subrogation of any claim the association may have against a unit owner to the association's insurer. For a general discussion of

the common elements and the units themselves may not be clear.¹⁸⁹

Further regulation of the transition period between total developer control and unit owner control is the requirement that the developer pay all common expenses until the unit owners' association makes an assessment.¹⁹⁰ This provision precludes any stoppage of vital services during a dispute between a developer and an owners' association. It does not, however, seem to preclude or deter the dispute itself, because the Act contains no dispositive provision allocating common expense liability during the transition phase. Instead, the Act precludes the developer from using such a stoppage as leverage in forcing the owners' association to assume liability.¹⁹¹

The substantial statutory structure provided to the transition period from total declarant control to total owner control is clear evidence of the general assembly's intent to correct perceived inequities occurring in this area. Although such provisions are clearly protective of unit owners, developers should also welcome them, because they serve to establish bright lines of required performance and ultimately should serve to curtail potential litigation arising from the transition period in condominium control. These provisions have no counterpart in the Unit Ownership Act.

B. *Tort and Contract Liability*

Another area affected by the North Carolina Condominium Act is that of potential liability of parties in the condominium relationship to each other and to outsiders. Some aspects of this issue with respect to the unit owners' association and outside liens are discussed below.¹⁹² The Act addresses this subject in section 3-111, which primarily separates and insulates the association from liabilities of the developer. The Act expressly declares that "[n]either the association nor any unit owner except the declarant is liable for that declarant's torts in

condominium-related insurance problems, see Rohan, *Disruption of the Condominium Venture: The Problems of Casualty Loss and Insurance*, 64 COLUM. L. REV. 1045 (1964).

189. See Rohan, *Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance*, 32 LAW & CONTEMP. PROBS. 305 (1967).

190. N.C. GEN. STAT. § 47C-3-115(a) (Supp. 1986).

191. The Act does allocate certain special declarant rights to the developer-declarant, some of which are exercisable during the transition period. These include the right to complete improvements; the right to maintain sales offices, signs, and models; the right to use easements through the common elements; and others. *Id.* § 47C-1-103(23). The Condominium Act deals with a second aspect of relations between the association and the developer, future development rights. Future development rights are one category of special declarant rights and relate to a developer's continuing interest in the condominium. Specifically, these development rights are "rights reserved by a declarant . . . to add real estate . . . ; to create units, common elements, or limited common elements . . . ; to subdivide units or convert units into common elements; or to withdraw real estate from a condominium." *Id.* § 47C-1-103(11). The Act permits the declarant to retain these development rights and to exercise and alienate them.

Development rights retained by a declarant must be recorded in the declaration and must be exercised within a specified time limit. *Id.* § 47C-2-105(8). When development rights are exercised, the developer must file an amendment to the condominium declaration. *Id.* § 47C-2-110. The Act contains several provisions to ensure that the exercise of these development rights is equitable with respect to existing unit owners. *Id.* § 47C-2-110(c) to (d). These rights are also alienable, though subject to some limitations depending on the nature of the conveyance. *Id.* § 47C-3-104.

192. See *infra* notes 252-73 and accompanying text.

connection with any part of the condominium which that declarant has the responsibility to maintain.”¹⁹³ Additionally, the declarant may be liable¹⁹⁴ to the association for wrongs, committed during the declarant’s control of the condominium, for which the association is sued.¹⁹⁵ Such liability expressly includes tort liability for losses suffered by the association not covered by insurance¹⁹⁶ and losses actually caused by declarant’s breach of contract.¹⁹⁷ The intent of these sections is apparently to shield the association from liability for torts or breaches of contract committed by the declarant. It is an absolute shield with respect to liability arising from areas of the condominium that the declarant had a duty to control. When the liability is an association liability, the shield is merely a right of indemnification.

The Act further makes declarants liable for all litigation expenses of the association if they are found liable on any other grounds,¹⁹⁸ and tolls any statutes of limitation while the declarant is in control.¹⁹⁹ This tolling provision gives the association an obvious advantage in pursuing claims against the declarant both for contract and tort claims. The Unit Ownership Act did not contain any similar provision. This aspect of the Condominium Act may alter a 1984 decision of the North Carolina Court of Appeals.

In *Colony Hill Condominium I Association v. Colony Co.*²⁰⁰ a unit owners’ association sought to recover tort damages from the condominium developer for negligent construction when an allegedly improperly installed fireplace and the absence of firewalls between units combined to cause substantial damage to one building in the complex.²⁰¹ The court of appeals affirmed the lower court’s grant of summary judgment for the developer, on the basis that a six-year statute of repose²⁰² barred plaintiff’s action.²⁰³ The court of appeals rejected plaintiff’s argument that defendant’s conveyance of a unit two years earlier tolled the statute until that date, reasoning that the conveyance in question occurred in a separate building from the one in question.²⁰⁴ This arguably arbitrary test for the tolling of statutes of limitation,²⁰⁵ based on the happenstance of continued developer interest in the building wherein the potential liability occurred, is no longer operative. The Condominium Act provides for tolling up to the date that

193. N.C. GEN. STAT. § 47C-3-111(1) (Supp. 1986).

194. This liability is contingent on reasonable notice and an opportunity for the declarant to defend. *Id.* § 47C-3-111(c).

195. *Id.*

196. *Id.* § 47C-3-111(c)(1).

197. *Id.* § 47C-3-111(c)(2).

198. *Id.* § 47C-3-111(d).

199. *Id.*

200. 70 N.C. App. 390, 320 S.E.2d 273 (1984).

201. *Id.* at 391-92, 320 S.E.2d at 274.

202. N.C. GEN. STAT. § 1-50(5) (1963).

203. *Colony Co.*, 70 N.C. App. at 394-95, 320 S.E.2d at 276.

204. *Id.* at 395, 320 S.E.2d at 276-77.

205. It is not clear that a statute of repose would be tolled at all under the Condominium Act. In *Colony Co.* the court explained the difference between statutes of repose and statutes of limitation, noting that “[i]n enacting the statute of repose . . . the legislature defined a liability of limited duration. Once the time limit on the plaintiff’s cause of action expired, the defendants were effectively ‘cleared’ of any wrongdoing or obligation.” *Id.* at 394, 320 S.E.2d at 276.

declarant control of the condominium association ends.²⁰⁶ This is a better provision than that provided by the court in *Colony Co.*, because notice of termination of the developer's control over the condominium is clear both to the unit owners' association and the developer. The Act also permits a reasonable tolling without any potential for extended tolling when a developer retains a long-term interest in one or more units.

A second issue with respect to potential tort and contract liability exists, but is addressed by the Act only in the context of insurance, the power of assessment,²⁰⁷ and, by inference, the power to incorporate.²⁰⁸ This second issue is the potential liability of unit owners for liabilities of the unit owners' association.²⁰⁹ This potential liability is substantial, and the Act addresses it in several ways. The Act first requires that liability insurance be maintained on the condominium.²¹⁰ Second, the Act limits assessments to pay judgments against the association to the units in the condominium at the time judgment was entered²¹¹ and requires apportionment consistent with the ratio of common expense liability.²¹² A money judgment against the association may also be the source for a lien on the units in the condominium at the time judgment is entered.²¹³ These provisions do provide some statutory limitation on the scope of unit owner liability, but they also leave some questions unanswered.

In a typical case involving tort liability of property owners, the person and not the property of the tortfeasor is the subject of the liability. As the statute is written, the assessment liability and potential judgment lien apparently attach to the unit. This is potentially troublesome when a sale is attempted of units subject to a potential or extant liability assessment.²¹⁴ A reasonably wary buyer or a lawyer would likely find a pendent suit or docketed judgment lien, which would make it difficult if not impossible to alienate units subject to them (presuming that the liability remains with the unit and not with the unit owner). Should the unit be sold, either through the purchaser's inadvertence or subject to his knowledge of the liability, it is further unclear whether the purchaser is obligated to pay the assessment. If the Act is interpreted literally,²¹⁵ the liability attaches to the unit, and the new owner must pay the assessment or face the

206. N.C. GEN. STAT. § 47C-3-111(d) (Interim Supp. 1986). For a discussion of developer control see *supra* text accompanying notes 180-82.

207. N.C. GEN. STAT. §§ 47C-3-115 to 117 (Interim Supp. 1986).

208. *Id.* § 47C-3-102(a)(2), (10), (11).

209. Knight, *Incorporation of Condominium Common Areas? An Alternative*, 50 N.C.L. REV. 1, 5 (1971).

210. N.C. GEN. STAT. § 47C-3-113(a)(2) (Interim Supp. 1986).

211. *Id.* § 47C-3-115(d).

212. *Id.*; see Note, *Condominium Unit Owner Tort Liability: Owens v. Dutcher*, 35 BAYLOR L. REV. 189 (1983) (discussing Texas common-law apportionment of unit owner liability for association torts).

213. N.C. GEN. STAT. § 47C-3-117(a) (Interim Supp. 1986).

214. This is particularly true because the North Carolina Condominium Act deleted some of the notice requirements for resale of condominiums. See *infra* note 245.

215. The express wording of § 47C-3-115(d), that liability assessments may be made "against the units," and § 47C-3-117(a), that docketed money judgments against the association create a lien against "all of the units," leaves a strong impression that the liability attaches to the unit, and not the unit owner.

possible imposition of a lien.²¹⁶ This interpretation may seem harsh to an unknowing new owner and arguably may encourage sales of units in the face of significant liability litigation.²¹⁷ Conversely, to hold that the statute imposes liability on the unit owners at the time of judgment may make execution of a money judgment against an association a nightmare, because execution of the judgment would involve keeping track of every association member who subsequently conveys her interest in the condominium.

On closer examination a further problem arises in this area. Mortgage liens on the individual units, in most instances, will have priority over judgment liens. The amount of a unit owner's equity in each unit will vary. It follows that foreclosure of the judgment lien will exact varying payments from individual unit owners to the extent that their equity is insufficient to pay their full proportionate share of the judgment. This seems particularly inequitable given the unit owner's likely nonnegligent status. It follows that the deep pocket of liens on individual units may in fact be largely illusory in some instances, and may depend on aggregate unit owner equity.

Another potential limitation on unit owner liability is the Condominium Act's implicit authorization for the owners' association to incorporate.²¹⁸ Normally, incorporation permits shareholders of the corporation to enjoy limited liability with respect to torts and breaches of contract by the corporation.²¹⁹ Incorporation might insulate unit owners from association liability,²²⁰ however, the agency relationship between the unit owners and the association, and the owner's retained proprietary property interest, may preclude limited liability through incorporation.²²¹ The Condominium Act simply does not address this matter.

Thus, the Condominium Act deals adequately with assessment and indemnification of liability between the developer, owners' association, and unit owners at the time a judgment is entered against the association. The Act, however, does not satisfactorily address the larger issues of potential liability when third parties are involved or when unit owners attempt to utilize incorporation as a means to limit liability. This inadequacy is likely to be moot in a majority of cases given the Act's mandatory insurance provision, but remains a potential area of uncertainty in the law of condominiums in North Carolina.

Despite its failure to resolve the aforementioned issues, the Condominium Act is a significant improvement over the provisions of the Unit Ownership Act. The Unit Ownership Act made the owners jointly and severally liable with the

216. N.C. GEN. STAT. § 47C-3-117 (Interim Supp. 1986). This is not the case if the purchaser obtained title pursuant to foreclosure of a first mortgage or deed of trust, in which case unpaid assessments, which became due prior to acquisition of title by the purchaser, become common expenses paid by all owners proportionately. *Id.* § 47C-3-116(f).

217. Purchasers who bought in such a situation could presumably avail themselves of normal remedies for fraud or misrepresentation.

218. N.C. GEN. STAT. § 47C-3-101 (Supp. 1986).

219. *Id.* § 55-53(e) (1982).

220. See Hyatt & Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 947-48 (1976).

221. *Id.* at 947; Knight, *supra* note 209, at 7-8.

owners' association for judgments entered against the association.²²² The only protection for a unit owner was a provision requiring the judgment creditor to exhaust the assets of the association before pursuing the unit owner.²²³ The lack of any apportionment scheme or limitation as to what assets of the unit owner could be reached threatened truly draconian liability for nonnegligent unit owners under the Unit Ownership Act.

C. Consumer Protections

The most important aspect of the North Carolina Condominium Act is its substantial protection of the consumer, both as a potential buyer and as an owner.²²⁴ These protections were incorporated into Article 4 of the Condominium Act to preclude promoter abuses that the Unit Ownership Act did not address.²²⁵ The protections included in Article 4 are significantly greater than any provided by the common law. These provisions focus on required notice to the prospective purchaser, rescindability of sales contracts, and incorporation of the North Carolina common law dealing with express and implied warranties. These protections in most instances are mandatory, but may be waived by the purchasers if the condominium is exclusively nonresidential.²²⁶ Article 4 makes itself enforceable by creating a statutory claim for relief for failure to comply with its provisions, and authorizes the court to award attorney's fees to the prevailing party.²²⁷

The initial protection of consumers in the North Carolina Condominium Act takes the form of restrictions and prescriptions relating to offering²²⁸ units for sale to the public.²²⁹ Article 4 requires a declarant to prepare a public offering statement "prior to the offering of any interest in a unit to the public."²³⁰ This statement must contain information consisting of a general description of

222. N.C. GEN. STAT. § 47A-23 (1984).

223. *Id.* § 47A-26. For a discussion of insurance provisions and potential unit owner liability, see Schreiber, *The Lateral Housing Development: Condominium and or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1138-45 (1969).

224. Article 4 of the North Carolina Condominium Act is entitled "Protection of Purchasers." N.C. GEN. STAT. § 47C-4 (Interim Supp. 1986).

225. *Id.* ch. 47C N.C. comment; see also Note, *Consumer Protection in Oklahoma Condominium Sales*, 19 TULSA L.J. 100 (1983) (discussing the need for revision of Oklahoma's first generation condominium statute to provide for consumer protection).

226. N.C. GEN. STAT. § 47C-4-101(a) (Interim Supp. 1986). If the disposition of a condominium is gratuitous, court-ordered, subject to cancellation, or made to a realtor, an offering statement is not required. *Id.* § 47C-4-101(b).

227. *Id.* § 47C-4-117. The General Statutes Commission deleted a Uniform Condominium Act provision allowing for punitive damages for willful noncompliance with the Act, relying instead on general North Carolina law with respect to punitive damages. *Id.* § 47C-4-117 N.C. comment.

228. The Act defines "offering" as "any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation." *Id.* § 47C-4-117. The Act provides that an advertisement in a newspaper, magazine, or other broadcast media for a condominium in another state does not constitute an offering if the advertisement declares that an "offering may be made only in compliance with the law of the jurisdiction in which the condominium is located." *Id.*

229. *Id.* § 47C-4-102.

230. *Id.* The Condominium Act varies from the Uniform Condominium Act in this provision by making the declarant or realtor who delivers an offering statement liable for mistakes therein, regardless of who prepared the statement. *Id.* § 47C-4-102(a) N.C. comment.

the condominium;²³¹ copies of the declaration, bylaws, and any supplemental contracts that the buyer may sign at closing;²³² any warranties provided by the declarant;²³³ and any hidden association costs,²³⁴ as well as substantial information on the projected potential association expenses,²³⁵ and title status of the condominium.²³⁶

This offering statement must be delivered to prospective purchasers prior to the execution of a purchase contract.²³⁷ No conveyance pursuant to the purchase contract may be made for seven calendar days following its execution, during which time the purchaser is given the absolute right to rescind, without penalty, and receive a prompt refund of all payments.²³⁸ As an added protection, any payments received by a declarant pursuant to a purchase contract and subject to the offering statement and right of rescission must be placed in escrow in a North Carolina bank.²³⁹ These funds are expressly deemed to be the property of the purchaser during the rescission period.²⁴⁰ It is mandatory that the public offering statement include express notice of the offering statement requirement, right of rescission, and escrow deposit requirement.²⁴¹ Finally, the promoter is required to label all plats, plans, and promotional materials to show clearly what units will not necessarily be built²⁴² and may label what units must be built,²⁴³ with the concurrent obligation to complete anything labelled as mandatory.²⁴⁴ Thus, it appears the general assembly intended not only to provide substantive protections for purchasers, starting at the inception of the purchase and continuing through consummation, but also to ensure that prospective purchasers have notice of their legal rights under the Act.²⁴⁵

The Condominium Act similarly provides for consumer protections after purchase of the condominium is completed. These protections are the express²⁴⁶ and implied²⁴⁷ warranties concerning residences that exist at common

231. *Id.* § 47C-4-103(a)(2).

232. *Id.* § 47C-4-103(a)(4).

233. *Id.* § 47C-4-103(a)(9).

234. *Id.* § 47C-4-103(a)(6).

235. *Id.* § 47C-4-103(a)(5).

236. *Id.* § 47C-4-103(a)(8), (11).

237. *Id.* § 47C-4-108(a). The Uniform Condominium Act does not require delivery of the offering statement prior to the time a purchase agreement is made; however, the Uniform Act does allow a 15-day rescission period. UNIF. CONDOMINIUM ACT, *supra* note 32, 4-108, at 546-47.

238. N.C. GEN. STAT. § 47C-4-108(a) (Supp. 1986).

239. *Id.* § 47C-4-110(a).

240. *Id.*

241. *Id.* §§ 47C-4-103(a)(10), (12).

242. *Id.* § 47C-4-118.

243. *Id.* § 47C-4-119. Notice of this is provided to prospective purchasers by the mandatory disclosure of financing accomplished with respect to improvements labelled "must be built." *Id.* § 47C-4-103(a)(16).

244. *Id.* § 47C-4-119.

245. The regulation of resales of condominiums is much less stringent and requires merely providing common expense assessment and other fee information. *Id.* § 47C-4-109. The North Carolina Comment to § 47C-4-109 explains that "[t]he Commission was of the opinion that a resale occurs in an arm's length bargaining setting and the requirements placed upon the seller in such a situation seem unjustified by the current experience in North Carolina." *Id.* N.C. comment.

246. *Id.* § 47C-4-113.

law in North Carolina. The sections of the North Carolina Condominium Act that involve express and implied warranties represent a substantial departure from the provisions of the Uniform Condominium Act.²⁴⁸ These sections were rewritten by the General Statutes Commission on its judgment that both the express and implied warranty law in North Carolina "applicable to single family residential dwellings should also be applicable to condominiums."²⁴⁹ The rationale for this departure was that the "law of North Carolina (based upon a theory of negligence as opposed to contract) provides as much protection to a purchaser as the . . . warranty provisions of the Uniform Act . . ."²⁵⁰ It is beyond the scope of this Note to examine the North Carolina common law on this subject. It should be noted, however, that the law in this area is evolving,²⁵¹ and had the warranty provisions of the Uniform Act been adopted, a bifurcation in the North Carolina law of real property warranties would have resulted.

In sum, the Condominium Act places significant duties on developers and promoters to take positive steps to ensure the substantive fairness of actions involving consumers. Whether these provisions will be effective depends largely on consumers. Should they fail to read or understand the information provided by the Act, their position will be no better than before the Condominium Act was passed, because they cannot exercise rights of which they are unaware. It is difficult to imagine, though, how the North Carolina Condominium Act could have gone farther in leading the horse to water.

D. Liens

As previously mentioned, the unit owners' association may, when necessary, avail itself of a statutory lien process incorporated into section 3-116 of the North Carolina Condominium Act. This lien is available for failure to pay assessments and/or fines levied by the association.²⁵² These assessment liens in favor of the association are foreclosable as if they were mortgage liens,²⁵³ and

247. *Id.* § 47C-4-114.

248. UNIF. CONDOMINIUM ACT, *supra* note 32, § 4-113, at 556-59.

249. N.C. GEN. STAT. §§ 47C-4-113, -114 N.C. comment (Supp. 1986).

250. *Id.* 47C-4-113 N.C. comment; see Pearlstein, *Developer Liability for Defects in Condominiums*, 74 ILL. B.J. 18 (1985) (discussing various theories of recovery for condominium purchasers against developers for faulty construction or defects). It is also interesting to note that condominium owners may maintain actions against negligent architects and contractors based on a third party beneficiary theory. See *Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 525-26, 268 S.E.2d 12, 17, *disc. rev. denied*, 301 N.C. 527, 273 S.E.2d 454 (1980).

The Act does permit a waiver of implied warranties for strictly nonresidential condominiums. N.C. GEN. STAT. § 47C-4-101(b) (Supp. 1986). A waiver for a specified defect may be effective if such waiver was part of the bargain. *Id.* § 47C-4-115(a); see also Comment, *Caveat Venditor in Maryland Condominium Sales: Cases and Legislation Imposing Implied Warranties in Sales of Residential Condominiums*, 14 U. BALT. L. REV. 116, 129 (1984) (discussing the Maryland law of implied warranties).

251. N.C. GEN. STAT. § 47C-4-114 N.C. comment (Supp. 1986); see *Oates v. JAG, Inc.*, 314 N.C. 276, 281, 333 S.E.2d 222, 226 (1985); Note, *Oates v. JAG: Let the Builder Beware—A Remedy for Subsequent Purchasers of Homes in North Carolina*, 64 N.C.L. REV. 1485, 1488-89 (1986).

252. The lien becomes effective "when filed of record in the office of the clerk of superior court of the county in which the unit is located in the manner provided therefor by Article 8 of Chapter 44 of the General Statutes." N.C. GEN. STAT. § 47C-3-116(a) (Supp. 1986).

253. *Id.*

have statutory priority over all other liens and encumbrances except those imposed by the government and those recorded prior to docketing the assessment lien.²⁵⁴ The life of an unexecuted assessment lien is limited to three years if no action is taken in the interim to enforce it.²⁵⁵ The assessment lien is not, however, an exclusive remedy for monies owed the association, and other legal action is sanctioned by the Act to recover sums for which the lien is imposed.²⁵⁶ To effectuate this section the Act mandates that any judgment in a subsequent action must award attorney's fees to the prevailing party.²⁵⁷ This scheme is substantially the same as that provided by the Unit Ownership Act.²⁵⁸

A second section of the Condominium Act addresses the issue of outside liens affecting the condominium.²⁵⁹ This section, which has no counterpart in the Unit Ownership Act, divides lienholders into judgment lienholders and those possessing valid security interests granted by the association in connection with section 3-112 of the Act.²⁶⁰ Judgment liens may not be liens on the common elements of the condominium, but when docketed become liens against all units of the condominium as of the date of entry of judgment.²⁶¹ Lienholders who possess secured interests conveyed by the association, as permitted by the Act,²⁶² must execute liens on common elements, if any, before attempting to levy on any unit of the condominium.²⁶³

Regardless of category, and excepting mortgages and deeds of trust, owners of units encumbered by a lien may pay their proportion of the lien and obtain a release as to their own property. Such apportionment is computed by using each affected unit's ratio of total common expense liability.²⁶⁴ Thus, individual unit owners may remove their units from encumbering liens by paying their share based on their proportion of common expense liability.²⁶⁵ Upon payment the association has no ability to assess that unit further with respect to the same

254. *Id.* § 47C-3-116(b). These prior docketed liens expressly include mortgages and deeds of trust. *Id.* Assessment liens must be docketed to be effective. *Id.* This is a variation from the Uniform Condominium Act, as is the priority given to purchase money mortgages. The former variation was as to be consistent with North Carolina law and the latter variation was made to comply with the requirements of federal mortgage agencies. *Id.* § 47C-3-116 N.C. comment, UNIF. CONDOMINIUM ACT, *supra* note 32, § 3-116 at 527-30.

255. *Id.* § 47C-3-116(c).

256. *Id.* § 47C-3-116(d).

257. *Id.* § 47C-3-116(e). This was an addition to the Uniform Condominium Act made to enhance the association's ability to enforce the lien. *Id.* § 47C-3-116 N.C. comment.

258. The General Statutes Commission varied from the provisions of the Uniform Act by "requiring that liens of the owners' association must be recorded to be perfected and by preserving the priority of purchase money mortgages in order to comply with requirements established by federal mortgage agencies." *Id.*; see Stewart, *Florida Condominium Law: Super Priority for Assessment Liens?*, FLA. B.J., Oct. 1985, at 92-96 (discussing pending Florida legislation aimed at giving assessment liens a super priority over mortgage liens).

259. N.C. GEN. STAT. § 47C-3-117 (Supp. 1986).

260. *Id.* § 47C-3-117(a), (b).

261. *Id.* § 47C-3-117(a). This lien is the sole lien available to unsecured creditors, because the statute expressly states that "[n]o other property of a unit owner is subject to the claims of creditors of the association." *Id.*

262. *Id.* § 47C-3-112.

263. *Id.* § 47C-3-117(b).

264. *Id.* § 47C-3-117(c).

265. *Id.*

lien.²⁶⁶

This section of the Act is expressly made applicable to laborer's and materialman's liens arising from work performed prior to declaration of the condominium²⁶⁷ and thus appears to modify the common law rule in North Carolina. In *W.H. Dail Plumbing v. Roger Baker & Associates*²⁶⁸ the North Carolina Court of Appeals required that a materialman's lien against a condominium, which arose out of work completed prior to the filing of the declaration,²⁶⁹ must be apportioned "based upon the materials and labor furnished to that unit, and its proportionate part of labor and materials furnished the common area . . ."²⁷⁰ Thus, in *Dail Plumbing* the court required apportionment of the lien, but its apportionment formula was based on work performed. The Condominium Act now requires, at least with respect to voluntary unit owner payment,²⁷¹ that such apportionment be based on common expense liability.²⁷² This appears to be a more equitable result insofar as it protects the interests of the lienholder while apportioning liability in accordance with a more predictable scheme, when in all likelihood the unit owner had no say in the original contract.²⁷³

V. CONCLUSION

The passage of the North Carolina Condominium Act in the absence of substantial litigation pressure is an indication of a general assembly desirous of exerting control over the condominium relationship. This indication is borne out by the terms of the North Carolina Condominium Act, both with respect to its scope and structure and its substantive regulations. Like most statutes, the Act falls short of complete clarity, and is at times ambiguous and incomplete. The primary issues so affected are those concerning the nature of the relation between unit owner and owners' association, and the methods for resolving claims and liabilities of one to the other. In contrast to its predecessor, however, the North Carolina Condominium Act is a quantum improvement in the regulation of the purchase, sale, and ownership of condominiums. Its enactment places North Carolina at the forefront of states recognizing the inadequacies of

266. *Id.*

267. *Id.*

268. 64 N.C. App. 682, 308 S.E.2d 452 (1983), *disc. rev. denied*, 310 N.C. 152, 311 S.E.2d 296 (1984).

269. A plumbing subcontractor brought suit against a developer and one unit owner after the condominium developer defaulted on payments due the subcontractor. *Id.* at 683, 308 S.E.2d at 452-53.

270. *Id.* at 685-86, 308 S.E.2d at 454.

271. It is not clear from the statute whether enforcement of a materialman's lien would also require apportionment based on common expense liability. Thus, *Dail Plumbing* is arguably still good law in North Carolina.

272. N.C. GEN. STAT. § 47C-3-117(c) (Supp. 1986).

273. Because the apportionment percentage only expressly applies to liens arising from work done before the condominium is declared, all nondeclarant owners would have no knowledge of or control over the contract that is the basis of the lien.

first generation condominium statutes and correcting those inadequacies through positive legislation.

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