

# Note

## Suggested Adjustments to Indiana Condominium and Property Tax Laws

### I. INTRODUCTION

The following discussion analyzes the real property taxation of condominiums in Indiana. Such an analysis must begin with an examination of certain sections of the Horizontal Property Act (HPA)<sup>1</sup> and the tax laws dealing with real property assessment methods and procedures.<sup>2</sup> Examination of the HPA reveals that in certain respects it creates restrictions, requirements, and legal relations which are not in the best interests of the condominium unit owners and which contribute unnecessarily to the misconceptions of condominium ownership now held by the taxing authorities. Examination of the property tax laws reveals that no special statutes or regulations were enacted or promulgated in respect to assessing condominiums and townhouses as individual tax parcels; nevertheless, the assessing officials have been compelled to assess such properties. The results of these assessments indicate widespread lack of uniformity and inequality from one assessing district to the next and from one individual living unit to the next in the same project. In order to eliminate this inequality and to achieve justifiable assessments, it is necessary to reconsider some fundamentals of Indiana property tax law and amend certain statutory and regulatory provisions. The following analysis suggests that there should be a closer relationship among the property rights desired and those received by condominium homeowners and the adoption of a standard method for assessing individual living units in multi-unit buildings.

### II. THE NEED FOR GREATER FLEXIBILITY IN THE HORIZONTAL PROPERTY ACT

Occupant ownership of individual apartments on a large scale is a relatively recent phenomenon in Indiana.<sup>3</sup> In the last few years, the rate of growth in such ownership has been much more rapid than in the more traditional forms of housing.<sup>4</sup> There are two primary ways

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<sup>1</sup>IND. CODE §§ 32-1-6-1 to -31 (Burns 1973) [hereinafter referred to as the "HPA"].

<sup>2</sup>*Id.* §§ 6-1.1-1-1 to -37-13 (Burns Supp. 1976).

<sup>3</sup>The HPA was enacted in 1963. Prior to 1963 townhouses were known, but generally not popular.

<sup>4</sup>Particularly in 1972 through 1974 the rate of growth in the construction of condominiums and townhouses far exceeded the rate of growth of any other form of housing. With the drastic reduction in construction generally in the United States in 1975 and 1976, condominium and townhouse construction also decreased.

to own an "apartment" in Indiana: (1) pursuant to common law property principles, in which case the apartment is commonly referred to as a "townhouse,"<sup>5</sup> and (2) pursuant to the statutory provisions of the HPA, in which case the apartment is commonly referred to as a "condominium" unit.

The growth of condominium and townhouse ownership will probably continue for many years because of the advantages to both the builder/seller and the buyer. The builder/seller usually views the construction and sale of condominium and townhouse projects both as an escape from the long-term landlord problems inherent in a volatile apartment rental market and as an opportunity to earn his profit in a comparatively shorter time period.<sup>6</sup> The buyer will often be seeking to avoid the bother of exterior maintenance of a single-family house<sup>7</sup> while taking advantage of the financial benefits of home ownership, such as federal income tax deductions of mortgage interest and real property taxes<sup>8</sup> and increases in homeowner equity through inflation and debt amortization.<sup>9</sup>

While it may be impossible to distinguish a condominium from a townhouse by appearance alone, there are several important legal differences. First, while condominiums are created by the filing of a declaration and by-laws by the declarant-developer pursuant to the HPA,<sup>10</sup> townhouses are created by the filing of a lengthy "plat," in a

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<sup>5</sup>See generally Note, *Organizing the Townhouse in Indiana*, 40 IND. L.J. 419 (1965) [hereinafter cited as *Organizing the Townhouse*].

<sup>6</sup>Often the developer of an apartment project will not sell the project for a long period of time, usually at least five years, during which time the developer hopes to realize an annual cash flow. When a similar property is developed and sold as individual condominiums or townhouses the developer hopes to realize his profit in much fewer than five years.

<sup>7</sup>One of the strongest selling features of condominiums and townhouses is that, in most cases, the coowners' association is responsible for all exterior maintenance.

<sup>8</sup>I.R.C. §§ 163(a), 164(a)(1). Condominiums and townhouses are real property. See IND. CODE § 32-1-6-4 (Burns 1973).

<sup>9</sup>Most home purchases are partly financed with mortgage loans, thus permitting the buyer to invest less equity in the property than if he had paid cash. As the buyer makes mortgage payments, typically including principal payments as well as interest on the loan, his equity in the property increases. At the same time, any increase in resale value caused by inflation of building costs or neighborhood improvement will accrue to the property owner upon resale.

<sup>10</sup>IND. CODE § 32-1-6-2(i) (Burns 1973) provides the following definition: "'Declaration' means the instrument by which the property is submitted to the provisions of this act, as hereinafter provided, and such declaration as from time to time it may be lawfully amended." The HPA also requires that the declaration be recorded in the office of the county recorder and contain the following particulars: land description, building description, description of common property, description and assignment of limited common property, the percentages of undivided interest for each unit, percentage of votes required to rebuild, any covenants and restrictions on use, method

manner similar to that used for creating a subdivision.<sup>11</sup> Thus, the HPA supplies many parameters within which the condominium declarant and coowners must operate, whereas the common law leaves the townhouse developer considerably more flexibility in determining the terms of townhouse ownership. Further, while the HPA supplies many statutory legal relations as a matter of law, the townhouse developer must be careful to create and include all necessary legal relations in the "plat."

A second major legal difference between condominiums and townhouses is the manner of ownership of the common property. In the case of condominiums, the definition of common property differs from project to project, but almost always includes the land, recreation facilities, pool, exterior walls, and roofs of the dwelling buildings.<sup>12</sup> In the case of townhouses, the common property usually is limited to the community building, recreation facilities, and pool.<sup>13</sup> Under the HPA, common property is owned directly by the coowners as tenants in common,<sup>14</sup> each coowner having a percentage of

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of amendment, the by-laws, other desired provisions of the declaration, and a recording reference to the building floor plans. *Id.* § 32-1-6-12. In addition, the HPA requires that detailed floor plans, certified by a registered engineer or architect, be recorded with the declaration prior to the first unit conveyance. *Id.* § 32-1-6-13.

<sup>11</sup>See *Organizing the Townhouse*, *supra* note 5, at 422.

<sup>12</sup>In the definitional sections the HPA provides:

"Common areas and facilities," unless otherwise provided in the declaration or lawful amendments thereto, means and includes:

- (1) The land on which the building is located;
- (2) The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building;
- (3) The basements, yards, gardens, parking areas, storage spaces, swimming pools and other recreational facilities;
- (4) The premises for the lodging of janitors or persons in charge of the property;
- (5) Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air-conditioning and incinerating;
- (6) The elevators, tank, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;
- (7) Such community and commercial facilities as may be provided for in the declaration; and
- (8) All other parts of the property necessary or convenient to its existence, maintenance and safety or normally in common use.

IND. CODE § 32-1-6-2(f) (Burns 1973).

<sup>13</sup>See *Organizing the Townhouse*, *supra* note 5, at 421, 426.

<sup>14</sup>In the definitional sections the HPA provides:

"Coowner" means a person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns an apartment within the building in fee simple and an undivided interest in fee simple estate of the common areas and facilities in the percentage specified and established in the declaration.

IND. CODE § 32-1-6-2(b) (Burns 1973).

undivided interest in the common property equal to that percentage set forth in the declaration.<sup>15</sup> The manner of determining these percentages is left to the declarant,<sup>16</sup> and, once determined, may not be changed without unanimous consent of the coowners.<sup>17</sup> In townhouses, the common property is typically owned indirectly by the coowners as shareholders in a not-for-profit corporation which holds the legal title.<sup>18</sup> Each townhouse owner normally receives one share of the stock in the not-for-profit corporation, regardless of the size or value of the townhouse relative to the other townhouses in the project.<sup>19</sup>

A third significant legal difference between condominiums and townhouses is the extent of physical property acquired in fee simple. Under the HPA, the purchaser of a condominium unit acquires the fee simple to an "enclosed" space,<sup>20</sup> generally thought to be the inside of the apartment being purchased. All other property is common property and is held in common with all other coowners.<sup>21</sup> The townhouse purchaser generally acquires fee simple title to the apartment, including exterior walls and half of the common walls, a designated tract of land, and all physical structures located on the land.<sup>22</sup> The townhouse buyer, therefore, appears to acquire property rights very similar to those of the purchaser of a typical single-family residence on a platted lot.

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<sup>15</sup>*Id.* § 32-1-6-7(a), first sentence, provides: "Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration."

<sup>16</sup>*Id.* § 32-1-6-7(a), second sentence, provides: "Such percentage, unless the declaration specifically otherwise provides, shall be computed by taking as a basis the value of the apartment in relation to the value of the property as a whole."

<sup>17</sup>"The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all of the coowners expressed in an amended declaration duly recorded." *Id.* § 32-1-6-7(b).

<sup>18</sup>*See Organizing the Townhouse, supra* note 5, at 426.

<sup>19</sup>*See, e.g.,* the enabling documentation for Chatham Walk, recorded in the Office of the Recorder of Marion County, Indiana: the Plat is recorded as Instrument No. 72-2006, and the Declaration of Covenants, Conditions and Restrictions is recorded as Instrument No. 71-6745.

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"Apartment" means an enclosed space consisting of one or more rooms occupying all or part of a floor or floors in a building of one [1] or more floors or stories regardless of whether it be designed for residence, for office, for the operation of any industry or business, or for any other type of independent use, with either a direct exit to a public street or highway or an exit to a thoroughfare or to a given common space leading to a thoroughfare.

IND. CODE § 32-1-6-2(a) (Burns 1973).

<sup>21</sup>*Id.* § 32-1-6-2(f).

<sup>22</sup>*See* note 19 *supra*.

In general, the following discussion will emphasize that the Indiana HPA is unnecessarily rigid with respect to certain provisions that require great flexibility and, consequently, is inadequate to deal with the wide variety of situations which could arise under its provisions. In focusing on the above second and third major legal differences between condominiums and townhouses, frequent comparisons will be made between the HPA and the Florida condominium laws. While there are obviously many other states with which Indiana law could be compared, Florida was selected because, first, while every state now has its own condominium enabling legislation, most have been patterned after the FHA Model Statute<sup>23</sup> with little significant variety. Second, Florida has experienced the most rapid and widespread growth of condominiums of any state in the nation.<sup>24</sup> Third, the Florida Condominium Act undergoes frequent re-examination and was substantially revised in 1976.<sup>25</sup> Finally, Florida seems to have solved some of the problems inherent in the Indiana HPA.

#### *A. Uses and Abuses of the Undivided Percentage Interest*

Of particular importance to condominium coowners is the fact that the percentages of undivided interest in common property are used for a variety of purposes other than simply determining the degree of ownership in the common property. There are five principal uses of the percentage of undivided interest set forth in the HPA: voting, ownership of common property, release from common liens, payment of common expenses, and ownership following termination. As will be demonstrated below, many of the non-ownership uses of the fixed percentage of undivided interest cannot be supported when compared to other means of dealing with those situations.

##### 1. Voting

Under the HPA, the definition of that amount of votes or voters which constitutes a "majority" or "majority of the coowners" must be expressed in the total of percentages of undivided interest, rather

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<sup>23</sup>U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP, Form No. 3285 (1962) [hereinafter cited as MODEL STATUTE].

<sup>24</sup>For example, in 1973, of 104,241 United States condominium completions, 50,688 were built in Florida and 1,108 were built in Indiana. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, HUD SURVEY OF UNSOLD NEW HOMES (1973).

<sup>25</sup>1976 Fla. Laws, ch. 76-222, § 1 (eff. Jan. 1, 1977).

than in the total number of dwelling units.<sup>26</sup> Thus, unless the percentages of undivided interest are equal, the larger units have a larger voice in the democratic affairs of the condominium association.

Under Florida law the definition of "majority" is simply to be inserted by the declarant in the by-laws and, in the absence of a different provision therein, each coowner is to have an equal vote, unaffected by his percentage of undivided interest.<sup>27</sup>

The value which may be ascribed to the more flexible Florida approach depends upon one's view of the importance of the matters upon which the coowners must vote. Some Indiana developers have viewed the matter strongly enough to fix the percentages of each unit at exactly the same amount, despite the fact that in most cases the units were not at all similar in size or market value.<sup>28</sup> In the final analysis, the decision should be left to the individual developers, as in Florida, rather than to the legislature.

## 2. Ownership of Common Property

The relative ownership interests in the common property during the life of the horizontal property regime<sup>29</sup> are determined by the percentages set forth in the declaration.<sup>30</sup> These percentages may not be adjusted for any reason without the unanimous consent of the coowners.<sup>31</sup> While the HPA indicates a preference for setting the percentages in the same proportion as the "values" the individual units bear to the total of such individual unit values,<sup>32</sup> it is also expressly provided that the declarant may use any other formula for determining the percentages.<sup>33</sup> Having been granted this latitude,

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<sup>26</sup>IND. CODE § 32-1-6-2(k) (Burns 1973) provides the following definition: "'Majority' or 'majority of coowners' means the coowners with 51% or more of the votes in accordance with the percentages assigned in the declaration to the apartments for voting purposes."

<sup>27</sup>FLA. STAT. ANN. §§ 718.104(4)(i), .112(2)(b) (West Supp. 1977).

<sup>28</sup>See, e.g., the Declaration of the Kings Cove Horizontal Property Regime, recorded in the Office of the Recorder of Marion County, Indiana, as Instrument No. 72-64856, amended by Supplemental Declaration, recorded as Instrument No. 72-68672.

<sup>29</sup>A "horizontal property regime" is not a legal entity; rather, it may be treated as a situation which (1) arises at the time of the recording of a conforming declaration, (2) terminates only upon the occurrence of certain events, and, (3) during its pendency, allows the real estate included in the declaration to be owned only in the manner set forth in the HPA.

<sup>30</sup>IND. CODE § 32-1-6-7(a) (Burns 1973), first sentence, as set forth in note 15 *supra*.

<sup>31</sup>*Id.* § 32-1-6-7(b), as set forth in note 17 *supra*.

<sup>32</sup>*Id.* § 32-1-6-7(a), second sentence, as set forth in note 16 *supra*. While the HPA uses only the word "value," it is clear from the context that "market value" is intended.

<sup>33</sup>*Id.* § 32-1-6-7(a), second sentence, as set forth in note 16 *supra*.

many declarants have chosen different formulae for determining the percentages, such as relative actual square feet contained in the units,<sup>34</sup> adjusted relative actual square feet contained in the units,<sup>35</sup> and equal percentages for each unit regardless of size or value.<sup>36</sup>

Several reasons may be advanced for not choosing the preferred relative market values of the units as the sole determinant of the percentages of undivided interest. First, the declarant will have no more than an idea of the anticipated market values of the units at the time he must record the declaration.<sup>37</sup> Secondly, variations in value which occur as a result of location or condition of each individual unit have little relevance to the sharing of common expenses. Thirdly, the use of market value at the time of initial sale is particularly inappropriate when the project is erected in multiple phases covering a time span of several years, because of inflation of construction costs and deterioration of older units.<sup>38</sup> Fourthly, the argument has been advanced that adoption of the statutory language without revision would leave a portion of the common property unallocated.<sup>39</sup>

The Florida Condominium Act is similar to the HPA in not limiting the declarant to one formula for the assignment of percentages of undivided interest.<sup>40</sup> Apparently, the Florida legislature believed that, because of the wide variety of condominium designs in Florida, no single formula would be appropriate in all cases.

### 3. Release from Common Liens

Shortly after passage of the original HPA,<sup>41</sup> the Indiana General Assembly recognized by statutory amendment the possibility that a

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<sup>34</sup>See, e.g., the Declaration and By-Laws of The Villas of Oakbrook Horizontal Property Regime, recorded in the Office of the Recorder of Marion County, Indiana, as Instrument No. 73-32536.

<sup>35</sup>See, e.g., the Declaration and By-Laws of Lake Forest Horizontal Property Regime, recorded in the Office of the Recorder of Marion County, Indiana, as Instrument No. 73-80839.

<sup>36</sup>See, e.g., The Declaration of the Kings Cove Horizontal Property Regime, *supra* note 28.

<sup>37</sup>IND. CODE § 32-1-6-13 (Burns 1973). It is often the case that the original sales prices of the less popular units will need adjustment.

<sup>38</sup>Should the project require four years from the recording of the first phase declaration to the last, and ten percent annual building cost inflation is assumed, the units in the last phase would have sales prices of over 40 percent more than those in the first phase. In addition, changes in the market may cause many models to be replaced with designs not contemplated in the original declaration; therefore, a workable price deflator would not be possible.

<sup>39</sup>Note, *Observations on Condominiums in Indiana: The Horizontal Property Act of 1963*, 40 IND. L.J. 57, 60 (1964).

<sup>40</sup>FLA. STAT. ANN. § 718.104(4)(f) (West Supp. 1977) provides that the declaration shall contain: "[t]he undivided share in the common elements appurtenant to each unit stated as percentages or fractions, which, in the aggregate, must equal the whole."

<sup>41</sup>1963 Ind. Acts, ch. 349, §§ 1-32, at 878.

lien could be valid against two or more coowners for obligations incurred by said coowners in proportions which were different from those found in the percentages of undivided interest. This amendment to the HPA permitted each coowner to obtain release "from the lien" on his portion of the common property "by payment of the fractional or proportional amounts attributable to each of the apartments affected."<sup>42</sup> This would seem to indicate a legislative recognition that it is not possible to solve all of the allocation, apportionment, or control problems which may arise in a condominium project simply by applying the percentages of undivided interest of the individual units to the total obligation.

The lien release provision in Florida is virtually identical to that now found in Indiana.<sup>43</sup> This represents an understanding that situations may occur involving fewer than all of the units or involving expenditures benefiting units in a manner different from their predetermined percentages of undivided interest.<sup>44</sup>

#### 4. Payment of Common Expenses

To the prospective condominium buyer, perhaps the most important use of the percentage of undivided interest is to determine the buyer's share of common expenses and common profits incurred by the coowners.<sup>45</sup> In many cases the percentage of ownership of the common facilities in a townhouse will also be used to determine the share of common expense paid by each owner.<sup>46</sup> Note that while this may initially sound fair to all concerned, the declarant is left free to choose the respective percentages of undivided interest in any manner he wishes. Furthermore, regardless of the method chosen, it

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<sup>42</sup>IND. CODE § 32-1-6-10(b) (Burns 1973), *formerly* 1963 Ind. Acts, ch. 349, § 10, at 883. Previously the second sentence was: "Such individual payment shall be computed by references to the percentages appearing in the declaration."

<sup>43</sup>FLA. STAT. ANN. § 718.121 (West Supp. 1977).

<sup>44</sup>Any time when two or more coowners become obligated for payments under a single contract for work to be performed on their premises, for example, repainting the interiors or recarpeting each unit, the possibility arises for mechanics' liens to be filed against the coowners and their units jointly. In such event it is unreasonable to require each coowner to pay an amount on the contract equal to his relative ownership in the common property in order to obtain release from the lien; rather, the amount to be paid should bear a close relationship to the relative benefits received under the contract.

<sup>45</sup>IND. CODE § 32-1-6-11 (Burns 1973) provides: "Profits and expenses.—The common profits of the property shall be credited to, and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common areas and facilities."

<sup>46</sup>*See, e.g.,* the enabling documentation of Chatham Walk, *supra* note 19.

will probably bear little relationship to the amounts of common expense actually expended on particular units. The basic reason for this disparity is that the common expenses are incurred upon and for the benefit of the common property, not the individual units;<sup>47</sup> therefore, any division of a class of expenses incurred upon common property is likely to bear little direct correlation to the benefits received by members of a class which is divided upon a basis not directly related to common area. Such disparity is particularly harsh upon coowners when, on the one hand, their respective percentages of undivided interest are determined by reference to the value or size of their dwelling units, but, on the other hand, the project is designed in such a manner that a higher proportion of the common expenses accrue to the benefit of a limited number of coowners.<sup>48</sup> Conversely, the disparity tends to be less when the percentages of undivided interest are declared to be equal and the common expenses tend to be more for activities which benefit all coowners equally.<sup>49</sup>

Interestingly, Florida law has been amended to require that the percentages of undivided interest should apply also to the payment of common expenses and the ownership of common surplus.<sup>50</sup> In other words, although a declarant in Florida had previously been free to better match the payment of common expenses to the units receiving

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"Common expenses" means and includes:

- (1) All sums lawfully assessed against the apartment owners by the association of apartment owners;
- (2) Expenses of administration, maintenance, repair or replacement of the common areas and facilities;
- (3) Expenses agreed upon as common expenses by the association of apartment owners;
- (4) Expenses declared common expenses by provisions of this act . . . , or by the declaration or the by-laws.

IND. CODE § 32-1-6-2(g) (Burns 1973).

<sup>48</sup>This situation will very often arise in low-rise construction where grounds upkeep will tend to benefit certain units disproportionately.

<sup>49</sup>The HPA followed the then prevailing trend of condominium legislation which commenced in Puerto Rico, an area which knew only high-rise construction. In high-rise buildings, of course, the problems of support, access, and utilities tend all to be common and are therefore best handled as common expenses.

<sup>50</sup>FLA. STAT. ANN. § 718.115(2) (West Supp. 1977), provides that: "Funds for the payment of common expenses shall be assessed [collected by assessments] against unit owners in the proportions or percentages provided in the declaration. In a residential condominium, unit owners' shares of common expenses shall be in the same proportions as their ownership interest in the common elements." *Id.* § 718.104(4)(g) provides that the declaration shall contain "the proportions or percentages of and manner of sharing common expenses and owning common surplus, which, for a residential condominium, must be the same as the undivided shares in the common expenses."

the benefits, respectively, without affecting the relative ownership structure, he is now as restricted as Indiana declarants.

Obviously, a flexible method is far superior to one which ties the common expense payment to the size or value of non-common property. So important has been the desire to properly distribute common expenses that some declarants in Indiana have chosen to disregard in whole or in part the fact that the percentages of undivided interest are used for other important purposes under the HPA.<sup>51</sup> If, as suggested, the declarant were allowed to provide for payment of the common expenses in any logical manner befitting the individual design of the project, he would be able to fix the percentages of undivided interest in the common property more nearly on relative values, if that method is preferred, without burdening the larger units with unjustifiably high common expenses.

### 5. Ownership Following Termination of the Horizontal Property Regime

There are three methods by which an Indiana horizontal property regime may be terminated: voluntary removal by consent of the coowners,<sup>52</sup> involuntary removal because of substantial casualty to the premises,<sup>53</sup> and involuntary removal through government action.<sup>54</sup> The HPA establishes guidelines for only the first two methods, leaving the determination of ownership rights in the third instance to the court's discretion.

#### *a. Voluntary Removal*

The HPA provides that the property may be withdrawn from the provisions of the HPA by approval of all coowners and consent of all mortgagees and other lien holders.<sup>55</sup> The property as a whole, including the portions formerly owned in fee simple, are then deemed

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<sup>51</sup>See the Declaration and By-Laws of Lake Forest Horizontal Property Regime, *supra* note 35. Other purposes include voting, ownership of the common property and ownership of the property upon removal or termination.

<sup>52</sup>IND. CODE § 32-1-6-28 (Burns 1973).

<sup>53</sup>*Id.* § 32-1-6-21.

<sup>54</sup>For example, eminent domain or removal of the property from the provisions of the HPA by judicial decree in an action to overturn the declaration.

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All of the apartment owners may remove a property from the provisions of this act . . . by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the apartments consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the percentage of the undivided interest of the apartment owner in the property as hereinafter provided.

IND. CODE § 32-1-6-28(a) (Burns 1973).

as owned in common. Each tenant in common would thereafter own an undivided interest in the units of all the others, such percentage to be equal to the former percentage of undivided interest in the common property.<sup>56</sup> Such a statutory provision could thus have the effect of creating executory interests in potentially unknown parties at an unknown future time,<sup>57</sup> and therefore could be in violation of the Rule Against Perpetuities.<sup>58</sup> Of course, any liens would be deemed to have been transferred and would attach to whatever interest the coowner then owned in the property.<sup>59</sup>

The section of the Florida Condominium Act setting forth the requirements for removal of the property from the provisions of the Act is similar to that of Indiana.<sup>60</sup> However, the declarant is not required to compel the coowners to use their original percentages of undivided interest in the common property as the only means of allocating the percentage of joint ownership after removal.<sup>61</sup> Liens would attach to whatever undivided shares of common property

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Upon removal of the property from the provisions of this act, the property shall be deemed to be owned in common by the apartment owners. The undivided interest in the property owned in common which shall appertain to each apartment owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities.

*Id.* § 32-1-6-28(b).

<sup>57</sup>Discussed in 4B R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 633.12[3], at 814-15 (1977). Each coowner would hold an executory interest in so much of the fee simple portion of the units of the other coowners as his percentage of undivided interest sets forth; however, this interest would not be executed until the removal or termination of the horizontal property regime.

<sup>58</sup>IND. CODE § 32-1-4-1 (Burns 1973) renders invalid any "interest in property" unless it vests within 21 years after a life or lives in beings when the supposed interest is created and, with few exceptions, adopts "the common-law rule against perpetuities."

<sup>59</sup>*Id.* § 32-1-6-28(a), as set forth in note 55 *supra*.

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Unless otherwise provided in the declaration, the condominium property may be removed from the provisions of this chapter only by consent of all of the unit owners, evidenced by a recorded instrument to that effect, and upon the written consent of all of the holders of recorded liens affecting any of the condominium parcels.

FLA. STAT. ANN. § 718.117(1) (West Supp. 1977).

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Unless otherwise provided in the declaration as originally recorded or as amended pursuant to s. 718.110(5) [*Id.* § 718.110(5)], upon removal of the condominium property from the provisions of this chapter, the condominium property is owned in common by the unit owners in the same undivided shares as each owner previously owned in the common elements.

*Id.* § 718.117(2), first sentence.

are used in the termination.<sup>62</sup> Particularly interesting is the apparent legislative intent to permit the declarant to place in the declaration a provision by which fewer than all of the coowners may select voluntary removal.<sup>63</sup>

Clearly, the HPA requirement for ownership in common of the common property in proportion to the percentages of undivided interest is too strict. Unless it is the legislative intent to discourage voluntary removal in all cases, some flexibility should be introduced into the HPA to permit an equitable division of the property when division is desirable. A small sample of possible fact situations will suffice to demonstrate the need for such flexibility. First, where the original percentages of undivided interest are all equal, despite the fact that the dwelling units are of varying sizes and values, there is no chance that time will cause the units to become equal in market value. Thus, upon sale of the project as a whole the former owners of the larger units would receive only an equal share of the net sales proceeds, as opposed to a greater share based on relative market values of the units. Second, the counterbalancing effects of deterioration and owner maintenance operate to different extents on different units, thereby substantially reducing the predictability of future market values. One method to achieve direct correlation between the market value and percentage of undivided ownership would be to require professional appraisal of the relative market values as of the date of the removal, such values being used to determine the percentage ownership for each tenant in common upon removal, assuming that the entire property is to be owned jointly.

While the relative ownership problem might be solved by means of a mandatory appraisal, a somewhat different solution may be required to resolve potential conflicts among the coowners concerning possession of individual dwelling units following removal. Apparently, the question of who is entitled to possession of which unit upon voluntary removal has not been litigated. The general rule is that no tenant in common may exclude another tenant in common without accounting for his exclusive use;<sup>64</sup> however, this rule is modified by the rule that possession by one tenant in common is deemed to be possession by all.<sup>65</sup> The corollary to the first rule is that

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<sup>62</sup>*Id.*, second sentence, provides: "All liens shall be transferred to the undivided share in the condominium property attributable to the unit originally encumbered by the lien in its same priority."

<sup>63</sup>*Id.* § 718.117(1), as set forth in note 60 *supra*.

<sup>64</sup>IND. CODE § 34-1-51-1 (Burns 1973); RESTATEMENT OF RESTITUTION § 125, Comment b (1937).

<sup>65</sup>Because unity of possession is an attribute of tenancy in common, each tenant in common has an equal right to possession of the whole. See *Hare v. Chisman*, 230 Ind. 333, 101 N.E.2d 268 (1951); 27 I.L.E., *Tenancy in Common* 12 (West 1960); 4A POWELL, *supra* note 57, ¶ 601, at 597, and authorities cited therein.

when the possession by one cotenant of non-income-producing property does not constitute exclusion of all other cotenants from the *whole* property, there is no duty to render an accounting or pay rent.<sup>66</sup>

Consider, however, an example where several condominium units are rendered untenable because of structural defects. In the event the builder could not be compelled to correct the defects, it would be natural for the original fee owner of a livable unit to desire to sever the untenable units from his own in an effort to save exorbitant common expenses; however, in the event the coowners elected to voluntarily remove the property from the HPA, the HPA would then cause all of the property to be owned as tenants in common. Thus, only some of the coowners would be occupying livable units but potentially all of the coowners would be entitled to possession of the entire property. Thus the questions are whether, in the absence of a prior agreement among the cotenants, one cotenant may hold exclusive possession of less than the whole and whether he may do so without rendering an accounting or paying rent. In the event of litigation, the court should find that by purchasing the condominium units the coowners had consented that the terms of the former declaration represented an agreement to allow continued quiet enjoyment by the original owners of their respective units to the complete exclusion of cotenants and determine that there is no need for an accounting or payment of rent by the remaining resident coowners.

There are at least three possible modifications to the HPA which might prevent the need to litigate one's continued quiet possession after voluntary removal from the HPA. One possible solution would be to delete those provisions of the HPA which force the conversion of fee simple estates into estates in common.<sup>67</sup> Instead of all of the property being suddenly owned in common, the HPA could provide that those portions of the property which were owned in fee simple under the declaration could still be owned in fee simple by the same respective parties, subject to easements for support, protection, and reciprocal maintenance. To provide access and utilities to the dwelling units, the former common area and facilities could be owned in common. At the same time, the rights of the cotenants could be limited by greatly restricting the common law rights of exclusive

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<sup>66</sup>See *Bowen v. Swander*, 121 Ind. 164, 22 N.E. 725 (1889); *Price v. Andrew*, 104 Ind. App. 619, 10 N.E.2d 436 (1937); 4A POWELL, *supra* note 57, ¶ 604, at 613, and authorities cited therein.

<sup>67</sup>IND. CODE § 32-1-6-28 (Burns 1973).

possession<sup>68</sup> and partition.<sup>69</sup> This method may also have the advantage of not violating the Rule Against Perpetuities.<sup>70</sup>

A second possible solution is to leave the HPA intact but attack the problem of possession simply by adding a separate provision stating that upon removal or other termination each cotenant would be entitled to exclusive possession and quiet enjoyment of so much of the whole property as he formerly owned in fee simple or enjoyed as limited common property. This method would appear neither to escape the Rule Against Perpetuities<sup>71</sup> nor be sufficiently flexible to deal with many diverse fact situations, such as limited insurance recovery from casualty, discussed below. Similarly, the rights of exclusive possession and quiet enjoyment might still be subject to termination in an action for partition.<sup>72</sup> Lastly, there may be some small doubt whether or not a tenancy by the entirety in the fee simple unit would remain such when the fee simple is converted to tenancy in common.<sup>73</sup>

A third possible solution would be to require that, before an election for removal could have any binding effect, the coowners have obtained a court decree setting forth all necessary guidelines for ownership and operation of the property. Of course, the court decree may simply be a ratification of a new agreement among the coowners to accomplish the above objectives. On the other hand, the court

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<sup>68</sup>See discussion in note 65 *supra*.

<sup>69</sup>An action for partition is prohibited by the HPA until removal of the property from its provisions. IND. CODE § 32-1-6-7(c) (Burns 1973).

<sup>70</sup>*Id.* § 32-1-4-1.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* § 32-1-6-7(c).

<sup>73</sup>Indiana recognizes the tenancy by the entirety for ownership of real property. *Id.* § 32-4-2-1. To create and maintain a tenancy by the entirety it has traditionally been necessary to have five "unities" at the time of conveyance: marriage of the husband and wife grantees, possession, time, interest, and title. See 4A. POWELL, *supra* note 57, ¶¶ 615-624.1, at 663-712.4, and authorities cited therein. Once the tenancy by the entirety is created it would seem that even following removal from the HPA and conversion of all fee simple estates into estates in common, that portion of the real property which is held as tenants in common, as between the entirety and the other tenants in common, would still be held as tenants by the entirety as between the husband and wife. The reason for this non-disturbance is that upon removal or termination none of the traditional unities will have been broken by the simultaneous conveyance of the fee simple and joint interests originally held by the coowners as tenants by the entirety to each other. By analogy, joint tenancies, the legal ancestor of tenancies by the entirety, have been held to have survived involuntary conversions and attached to the newer property. *Russell v. Williams*, 58 Cal. 2d 487, 374 P.2d 827, 24 Cal. Rptr. 859 (1962); *Fish v. Security-First Nat'l Bank*, 31 Cal. 2d 378, 189 P.2d 10 (1948); *Goldberg v. Goldberg*, 217 Cal. App. 2d 623, 32 Cal. Rptr. 93 (1963); *Zaring v. Glover*, 93 Cal. App. 2d 577, 209 P.2d 642 (1958). See also *Hewitt v. Biege*, 183 Kan. 352, 327 P.2d 872 (1958).

might need to appoint a trustee with powers to operate and govern the property according to equitable principles until such time as the cotenants are able to agree upon a method of self-government or another form of dissolution. Obviously, thoughtful and creative legislation is required if an inequitable result is to be avoided.

*b. Termination Following Casualty*

The HPA provides that, following destruction of more than two-thirds of the building, reconstruction shall not be required and the proceeds of the insurance are to be distributed in the manner set forth in the by-laws.<sup>74</sup> In addition, should the coowners fail for any reason to commence reconstruction within 120 days following casualty of *any* degree, the entire property will be deemed to have been removed from the HPA. In such event the coowners would own undivided interests in the total physical property as tenants in common, the amount of such ownership to be equal to the former percentages of undivided interest in the common property.<sup>75</sup> At the same time, individual liens would attach to the respective interests of the tenants in common<sup>76</sup> and the property would become subject to being partitioned.<sup>77</sup> If a partition action were brought, the insurance

<sup>74</sup>IND. CODE § 32-1-6-19 (Burns 1973).

<sup>75</sup>

Failure to repair or rebuild—Effect.—If, within one hundred twenty [120] days of the date of the damage or destruction to all or part of the property, it is not determined by the association of apartment owners to repair, reconstruct or rebuild, then and in that event:

(a) The property shall be deemed to be owned in common by the apartment owners;

(b) The undivided interest in the property owned in common which shall appertain to each apartment owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities; . . . .

*Id.* § 32-1-6-21.

<sup>76</sup>*Id.* § 32-1-6-21(c) provides that: "Any liens affecting any of the apartments shall be deemed to be transferred in accordance with the existing priorities to the percentage of the undivided interest of the apartment owner in the property as provided herein; . . . ."

<sup>77</sup>

The property shall be subject to an action for partition at the suit of any apartment owner, in which event the net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and shall be divided among all the apartment owners in a percentage equal to the percentage of undivided interest owned by each owner in the property, after first paying out of the respective shares of the apartment owners, to the extent sufficient for the purpose, all liens on the undivided interest in the property owned by each apartment owner.

*Id.* § 32-1-6-21(d).

proceeds and the proceeds from the sale of the few remaining units would be pooled and divided according to the percentages of undivided interest.<sup>78</sup> Thus, there is a danger that a coowners' association could unintentionally allow the property to lose the benefits of the HPA by failing to settle a property damage insurance claim within 120 days following its occurrence.

Under the Florida Condominium Act there is a requirement that the "association" "use its best efforts to obtain and maintain adequate insurance" on the "association" and "common elements," but not otherwise.<sup>79</sup> The burden of maintaining, managing and operating "the condominium" is left with the association of coowners<sup>80</sup> and the replacement of the common elements is made a common expense.<sup>81</sup> Likewise, there is neither a provision with respect to the parties who should receive the insurance proceeds nor a provision for mandatory termination of the horizontal property regime upon destruction or failure to rebuild. Instead, upon substantial destruction and non-repair, any owner may sue for equitable relief, whether for termination, partition, or other relief.<sup>82</sup>

It is recognized that detailed insurance provisions of condominium enabling documents are among the most difficult sections to draft and administer;<sup>83</sup> clearly, the HPA has proven to be no exception. However, the tremendous inequity of forcing all coowners to be tenants in common at a time when only part of the common and fee simple property remains in its former tenantable condition<sup>84</sup>

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<sup>78</sup>*Id.*

<sup>79</sup>FLA. STAT. ANN. § 718.111(9) (West Supp. 1977).

<sup>80</sup>*Id.* § 718.111(1).

<sup>81</sup>*Id.* § 718.115(1) provides: "Common expenses include the expenses of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, and any other expense designated as common expense by this chapter, the declaration, the documents creating the condominium, or the by-laws."

<sup>82</sup>

In the event of substantial damage to or destruction of all or a substantial part of the condominium property, and if the property is not repaired, reconstructed, or rebuilt within a reasonable period of time, any unit owner may petition a court for equitable relief, which may include a termination of the condominium and a partition.

*Id.* § 718.118.

<sup>83</sup>No attempt is made herein to suggest remedies to all of the problems which might arise under the HPA, but much authority is available on the subject. See generally P. ROHAN & M. RESKIN, *CONDOMINIUM LAW & PRACTICE* (1977), and authorities cited therein; Rohan, Reskin, & Sanchirico, *Recent Developments in the Field of Insurance for Condominium Projects*, 48 ST. JOHN'S L. REV. 1084 (1974).

<sup>84</sup>For purposes of the following discussion it may be helpful to suppose that the project consists of many units located in several buildings on many acres of land, some of which are decimated and/or partially destroyed by very high winds.

demands further consideration of the insurance provisions of the HPA. Two arguments against a forced tenancy in common were mentioned in the section on voluntary removal,<sup>85</sup> namely, the significant disparity which is likely to exist between the current market value of a unit and the value of its percentage of undivided interest in the whole, and the difficulty of resolving potentially conflicting possessory interests.

When the termination is caused by a partial casualty to the premises, at least three other unique problems are caused by the HPA insurance provisions. First, it may not be a simple matter to determine whether or not the destruction constitutes two-thirds of the project,<sup>86</sup> in which case it may not be known if it is mandatory under the HPA to reconstruct.<sup>87</sup> Even if it is later determined that the project was only damaged to the extent of sixty percent, it is entirely possible that the association will not have been able to gather sufficient information with which to determine whether or not to reconstruct prior to the end of 120 days from the date of the casualty.<sup>88</sup> In such event, the property will be deemed to be owned in common, regardless of the wishes of the coowners.<sup>89</sup>

A second problem involving partial destruction can arise when it is determined that reconstruction shall not occur and the insurance settlement is being negotiated. If the property insurance policy included a "replacement cost endorsement"<sup>90</sup> the insurer could be

<sup>85</sup>See text following note 67 *supra*.

<sup>86</sup>

Application of insurance proceeds in case of disaster.

. . . .

Reconstruction shall not be compulsory where it comprises the whole or more than two thirds [2/3] of the building; in such case, and unless otherwise unanimously agreed upon by the coowners, the indemnity shall be delivered pro rata to the coowners entitled to it in accordance with provision made in the by-laws or in accordance with a decision of three fourths [3/4] of the owners if there is no by-law provision.

Should it be proper to proceed with the reconstruction, the provisions for such eventuality made in the by-laws shall be observed, or in lieu thereof, the decision of three fourths [3/4] of the coowners shall prevail.

IND. CODE § 32-1-6-19 (Burns 1973).

<sup>87</sup>*Id.* § 32-1-6-19 provides: "Application of insurance proceeds in case of disaster.—In case of fire or any other disaster the insurance indemnity shall, except as provided in the next succeeding paragraph of this section, be applied to reconstruct the building." The balance of this section is set forth in note 86 *supra*.

<sup>88</sup>*Id.* § 32-1-6-21 provides that the decision to rebuild must be made within 120 days or the property is removed from the provisions of the HPA, as set forth in notes 75-77 *supra*.

<sup>89</sup>The HPA leaves the coowners no options in the event they fail to elect to rebuild or reconstruct. *Id.*

<sup>90</sup>Such an endorsement prevents the carrier from deducting depreciation of the property from its settlement.

forced to rebuild the premises, at least to the extent of the face amount of the insurance policy;<sup>91</sup> however, when this same insurer is allowed merely to settle the claim it is typically permitted to deduct normal depreciation from the value of the improvements.<sup>92</sup> As a result, the cash received by the association or insurance trustee will usually be a fraction of the market value of the former living unit, after reduction for depreciation, land and improvements<sup>93</sup> below grade level. By forcing termination of the horizontal property regime the HPA could in many cases force the coowners to accept the insurance cash settlement in lieu of reconstruction, thereby untowardly reducing the total cash value of the property.

A third problem involving partial destruction can arise when an action for partition is litigated after the casualty and termination of the horizontal property regime. At that time, unless a partition in kind could be formulated, all the remaining units would be sold, whether damaged or not,<sup>94</sup> and the proceeds from the sales would be pooled with the insurance cash settlement.<sup>95</sup> In determining the respective shares in the cash proceeds the percentages of undivided interest would be applied to the total fund.<sup>96</sup> In the typical case, such a partition action would have the effect of forcing each cotenant who had not lost his unit in the casualty to share in the loss of equity of those cotenants who had. Whether this result is justifiable would depend upon the particular fact situations. For instance, it is possible that the cash settlement could be greater per unit than the actual sales prices of the remaining tenantable units. This could occur when it is obvious to potential home buyers that the remaining units do not constitute a viable horizontal property regime or townhouse project by reason of the high common expense per unit. In such case, the market value of the remaining units could be reduced to an amount less than the insurance settlement would have been in the event of their destruction.

It is apparent from the above discussion that the only meaningful solution is to delete those sections of the HPA which force a

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<sup>91</sup>The by-laws of a typical horizontal property regime will often compel the damaged property to be rebuilt by the coowners' association instead of placing such burden on the coowners individually. This duty is then usually passed on to the insurance carrier.

<sup>92</sup>Thus, all older buildings would receive substantial penalties upon casualty. This would force the coowners to carry much more insurance than the market value of the project. G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 54:101 (2d ed. 1966).

<sup>93</sup>By definition, such items are not destructible by ordinary fire and are therefore not covered by fire insurance.

<sup>94</sup>IND. CODE § 32-1-6-21(d) (Burns 1973), as set forth in note 77 *supra*.

<sup>95</sup>*Id.*

<sup>96</sup>*Id.*

termination of the horizontal property regime upon casualty to the property.<sup>97</sup> Such sections could be replaced with a provision that until the reconstruction of damaged portions of the premises, voluntary removal may be accomplished with the consent of a substantial majority of the coowners. To protect the values of the units for the coowners, the HPA should require that the association purchase and maintain insurance with a replacement cost endorsement in an amount equal to at least eighty percent of the full replacement cost of the improvements, the proceeds of which would be payable to a competent independent insurance trustee. The trustee would, of course, be obligated to demand that the insurer commence reconstruction as soon as possible, assuming that the coowners do not voluntarily remove the property from the provisions of the HPA. To protect the property of those coowners who are able to remain on the property following the casualty, the trustee should be required to use part of the insurance proceeds to completely rebuild all buildings which contain tenantable units, reconnect all severed utilities, rebuild all necessary access ways, remove all debris, and return the balance of the project to at least a stable condition. If, in the meantime, the coowners have selected voluntary removal, the trustee should be required to complete the work on the damaged portions of the property in order to return them to a normal condition and be permitted to deduct all sums expended from the insurance settlement before such funds are included in the assets available for partition.

If the above suggestions were followed in HPA revisions, it would also be possible to provide that, in any partition action following partial destruction, the court could, first, partition as a whole the property of the cotenants whose units have not been reconstructed *in kind* from the property of those cotenants whose units are livable; second, create such easements and covenants as might be necessary to retain full rights of access and enjoyment for the livable units over the land partitioned in kind to the other cotenants; and, third, grant such partition requests as might be equitable and in accord with the above two provisions, including, at the court's option, a new form of continued self-government for the remaining coowners. The effect of these provisions would be to let all of the immediate economic loss from the casualty and election of non-reconstruction fall on those coowners who suffered the physical loss. Of course, while the market value of the remaining units may have been reduced and the common expenses increased as a result of the casualty and non-reconstruction of part of the original physical property, the majority of the economic

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<sup>97</sup>*Id.* § 32-1-6-21.

impact on the remaining coowners would not be suffered until they chose to sell their units. Both the state<sup>98</sup> and federal governments<sup>99</sup> have expressed a preference for homeownership in lieu of rental; by encouraging reconstruction the above suggestions for revisions to the HPA may cause it to be more in harmony with such public policy.

### B. Description of a Condominium Unit

A problem related to both the insurance and taxation aspects of condominiums is whether a declarant may include within the description of the fee simple portion of the coowner's estate parts of the property which are not "enclosed" within the unit walls, floor, and ceiling.<sup>100</sup> It has been suggested that to include "external" property would subject the horizontal property regime to defeat and, if defeated, the coowners would be left without any statutory and/or agreed provisions for operation and maintenance of the external and common property.<sup>101</sup> Whether the coowners could adjust to these problems would depend upon the facts of each case; however, it is always preferable to avoid needless litigation.

The present definition of "apartment" unit was drawn from prior statutes designed to deal exclusively with highrise buildings;<sup>102</sup> however, virtually all condominium projects in Indiana have fewer than four stories.<sup>103</sup> In high-rise construction, almost all of the common property is involved in the mutual support of other units or the furnishing of other services common to all of the coowners; however, in low-rise construction, the emphasis is on individual use of common and limited common property with almost no need for support or the furnishing of common services.<sup>104</sup> In fact, in low-rise

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<sup>98</sup>Indiana allows a deduction from real property assessment of up to \$1,000.00 in the event such property is encumbered by a mortgage. *Id.* § 6-1.1-12-1 (Burns Supp. 1976). Thus, the Indiana General Assembly has increased the ability of persons to own real property in Indiana.

<sup>99</sup>Interest and real property taxes are deductible from the federal income tax of typical homeowners. I.R.C. §§ 163(a), 164(a)(1).

<sup>100</sup>See IND. CODE § 32-1-6-2(a) (Burns 1973), as set forth in note 20 *supra*. An excellent discussion of this problem can be found in Bruce, *Eleven Years Under the Indiana Horizontal Property Act*, 9 VAL. U.L. REV. 1, 17, 21 (1974).

<sup>101</sup>Upon separation from the HPA, the horizontal property regime would have no existence and much of the documentation upon which the interests of the coowners depend would be rendered highly ambiguous, most notably the deeds of conveyance from the declarant.

<sup>102</sup>See MODEL STATUTE, *supra* note 23.

<sup>103</sup>For example, in Indianapolis there are no condominiums containing more than three stories.

<sup>104</sup>Many units in low-rise construction are of "ranch" design, having no other units above or below them.

construction many parts of the property which are normally constructed outside of an "enclosed" apartment space are designed and intended solely for the use of one or two units, such as air conditioning compressors, covered parking, patios and fences, utility extensions, meters, foundations, roofs, and exterior walls. To attempt to legally describe each and every physical part of the "external" property which is to be held in fee simple would obviously be unreasonably difficult, if not impossible.

The Florida Condominium Act has addressed this very problem of unit description and adopted a very liberal definition of "unit"<sup>105</sup> and "residential condominium."<sup>106</sup> The emphasis in Florida is placed on the intended use of the property in determining which parts of the property not enclosed within the walls of the unit are deemed to be included within the fee simple estate of the coowner.

The obvious solution to the problem in Indiana is to redefine in the HPA the permissible extent of the fee simple portion of the coowner's estate. Definitions of "apartment" which rely on the *intended use* of the property have been found in declarations in Indiana<sup>107</sup> and, from the point of view of decreasing the amount of

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<sup>105</sup>FLA. STAT. ANN. § 718.103(16) (West Supp. 1977) provides: "Unit' means a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration."

<sup>106</sup>

"Residential condominium" means a condominium consisting of condominium units, any of which are intended for use as a private temporary or permanent residence, except that a condominium is not a residential condominium if the use for which the units are intended is primarily commercial or industrial and not more than three units are intended to be used for private residence, and are intended to be used as housing for maintenance, managerial, janitorial, or other operational staff of the condominium. If a condominium is a residential condominium but contains units intended to be used for commercial or industrial purposes, then, with respect to those units which are not intended for or used as private residences, the condominium is not a residential condominium.

*Id.* § 718.103(18).

<sup>107</sup>See Declaration of Horizontal Property Ownership, The Villas of Oakbrook Horizontal Property Regime, *supra* note 34, § 4 (a):

Description of Apartments.

(a) Appurtenances. Each Apartment shall consist of all space within the boundaries thereof as designated by the unit and building type together with all space within the garage area . . . and all portions of the Building situated within such boundaries . . . ; provided, however, that all fixtures, equipment and appliances designed or intended for the exclusive enjoyment, use and benefit of an Apartment shall constitute a part of such Apartment, whether or not the same are located within or partly within the boundaries of such Apartment and shall be maintained by the Owner. Also, the interior surface of all doors and windows (excluding frames) in the perimeter walls of the Apartment and garage, whether or not located within or partly within the

common expenses and increasing the accuracy of the definition of fee simple property, the "intent" method appears worthy of adoption in Indiana. If so adopted, it would be desirable to allow the broader definition to apply retroactively to the date of the original passage of the HPA in order to permit compliance by those horizontal property regimes which included more property in the unit description than is apparently permitted under current law. The present restrictive definition of "apartment" unit in the HPA also contributes to much of the misunderstanding in the assessing of condominium units for purposes of real property taxation.

### III. REAL PROPERTY TAXATION OF CONDOMINIUMS AND TOWNHOUSES

All real property is, with few exceptions, subject to an ad valorem tax in Indiana.<sup>108</sup> The amount of the tax is calculated by multiplying the assessment of the property (net of any deductions or exemptions applicable to the property or the taxpayers)<sup>109</sup> by the local tax rate,<sup>110</sup> and subtracting therefrom the appropriate property tax replacement credit.<sup>111</sup> Inasmuch as the tax rate and replacement credit rate are supposed to be approximately equal for all similarly situated properties,<sup>112</sup> property tax liability is determined in large part by the assessed value of the property.

A general reassessment of all real property in Indiana is scheduled for completion in the near future.<sup>113</sup> Although some other

boundaries of an Apartment, and all interior walls within the boundaries of an Apartment and garage are considered part of the Apartment.

<sup>108</sup>IND. CODE § 6-1.1-2-1 (Burns Supp. 1976) provides: "Property subject to tax.— Except as otherwise provided by law, all tangible property which is within the jurisdiction of this state on the assessment date of a year is subject to assessment and taxation for that year." *Id.* § 6-1.1-1-19 provides: "'Tangible property' defined.— 'Tangible property' means real property and personal property as those terms are defined in this chapter." *Id.* § 6-1.1-1-15 provides:

"Real property" defined.—"Real property" means:

- (1) land located within this state;
- (2) a building or fixture situated on land located within this state;
- (3) an appurtenance to land located within this state; and
- (4) an estate in land located within this state, or an estate, right or privilege in mines located on or minerals, including but not limited to oil or gas, located in the land, if the estate, right, or privilege is distinct from the ownership of the surface of the land.

<sup>109</sup>*Id.* §§ 6-1.1-10-1 to -38, -12-1 to -28.

<sup>110</sup>*Id.* §§ 6-1.1-17-1 to -19.

<sup>111</sup>*Id.* §§ 6-1.1-21-1 to -12. Rather than operating as a reduction in assessment, the replacement credit is a direct reduction in the amount of tax owed by every taxpayer in the taxing district, *e.g.*, each taxpayer is to receive a twenty percent reduction in the amount of tax payable.

<sup>112</sup>IND. CONST. art. 10, § 1.

<sup>113</sup>IND. CODE § 6-1.1-4-4(a) (Burns Supp. 1976) provides in part: "A general reassessment of the real property of all counties of this state shall begin January 1,

states profess to reassess each property at market value every year, Indiana attempts to assess each property much less frequently.<sup>114</sup> All real property is assessed at the time of general reassessment<sup>115</sup> according to a set of standardized values promulgated by regulation and incorporated into the Indiana Real Estate Property Appraisal Manual by the Indiana State Board of Tax Commissioners.<sup>116</sup> After a complete reassessment has been accomplished for all existing properties it is theoretically possible to add newer properties to the tax assessment rolls by assessing them according to the values which were found in the 1968 Appraisal Manual used for the previous complete reassessment. The intended effect is to assess new properties at the values they would have had if they had been erected at the time of the last general reassessment.

Traditionally, at the commencement of each general reassessment a new manual is prepared in order to realign each type of property in relation to other types on the basis of "value."<sup>117</sup> In the past, such manuals have contained a great deal of cost-oriented data for use by the field assessors, but very little data related to resales of existing properties or calculation of the economic value of income-producing property.<sup>118</sup> The 1968 Appraisal Manual is very influential upon the assessing officials and it is unusual for them to assess anything not described in the 1968 Appraisal Manual or to select

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1976. This reassessment shall be completed on or before March 1, 1978 and shall be the basis for the taxes payable in 1979."

<sup>114</sup>*Id.*, third sentence, provides: "A similar reassessment of real property shall begin January 1, 1982, and each sixth [6th] year thereafter."

<sup>115</sup>*Id.*, as set forth in note 113 *supra*.

<sup>116</sup>*Id.* § 6-1.1-31-1 provides for the prescription and promulgation by the Indiana State Board of Tax Commissioners [hereinafter referred to as the Board] of various forms, rules, and regulations, including those "concerning the assessment of tangible property." Under former law, 1961 Ind. Acts, ch. 319, § 1401 at 927 (amended by 1963 Ind. Acts, ch. 333, § 29 at 824, to substantially the same effect as the above), the Board adopted on February 29, 1968 an amendment to Regulation No. 17, entitled "Indiana Real Estate Property Appraisal Manual." 1 BURNS' IND. ADMIN. RULES AND REGS. ANN. § (6-1.1-4-26)-1 (1976). The full text of the new Regulation No. 17 is reproduced in a looseleaf binder: STATE BD. OF TAX COMM'RS, INDIANA REAL PROPERTY APPRAISAL MANUAL (1968) [hereinafter cited as 1968 Appraisal Manual].

<sup>117</sup>The 1968 Appraisal Manual replaced the former manual, adopted as Regulation No. 17 on May 22, 1961: STATE BD. OF TAX COMM'RS, REAL ESTATE ASSESSMENT GUIDE NO. 2 (2d ed. 1961).

<sup>118</sup>*See, e.g.*, 1968 Appraisal Manual, *supra* note 116, which sets forth a few general ideas about methods of appraising which are different from cost computation, but stresses very heavily the weight to be given replacement cost in the final assessment: *id.* at R57, and R69 (Residential), C1-C2 (Commercial and Apartment), I1 (Industrial), and F1-F4 (Agricultural and Rural).

values contrary to those listed therein.<sup>119</sup> In fact, the law is quite strict in its requirements for disclosure by such officials should they select criteria for valuation other than those available in the 1968 Appraisal Manual.<sup>120</sup>

While the ad valorem tax has been a source of state revenue from the beginning,<sup>121</sup> it is unremittingly subject to scrutiny and revision,<sup>122</sup> even to the point of constitutional amendment.<sup>123</sup> Recent changes have placed much responsibility and decision-making power in the hands of the Board.<sup>124</sup> Whether this responsibility can be fulfilled in respect to condominium and townhouse assessment is not known at this time because the 1976 Appraisal Manual now being used for the general reassessment represents a substantial change from the 1968 Appraisal Manual.<sup>125</sup> The discussion below will

<sup>119</sup>IND. CODE § 6-1.1-31-5 (Burns Supp. 1976) provides:  
Bases for determining true cash value.—

(a) The rules and regulations promulgated by the state board of tax commissioners are the basis for determining true cash value. Local assessing officials shall:

(1) comply with the rules, regulations, appraisal manuals, bulletins, and directives adopted or promulgated by the state board of tax commissioners;

(2) use the property tax forms, property tax returns, and notice forms prescribed or promulgated by the board; and,

(3) collect and record the data required by the board.

<sup>120</sup>*Id.* § 6-1.1-31-5(b) provides:

In assessing tangible property, the township assessors may consider factors in addition to those prescribed by the state board of tax commissioners if use of the additional factors is first approved by the board. Each township assessor shall indicate on his records for each individual assessment whether:

(1) only the factors contained in the board's rules, regulations, forms, and returns have been considered; or

(2) factors in addition to those contained in the board's rules, regulations, forms and returns have been considered.

<sup>121</sup>IND. CONST. art. 10, § 1.

<sup>122</sup>For example, Pub. L. No. 47, § 1, 1975 Ind. Acts 247, recodified the entire property tax article, current version at IND. CODE §§ 6-1.1-1-1 to -37-13 (Burns Supp. 1976), and made many substantive changes.

<sup>123</sup>A, most significant recent constitutional amendment permitted for the first time the exemption from taxation of certain classes of tangible personal property, intangible personal property, motor vehicles, mobile homes, airplanes, boats, trailers and similar property. IND. CONST. art. 10, § 1(a)(2)-(3), (b) (amended 1966).

<sup>124</sup>IND. CODE § 6-1.1-31-5 (Burns Supp. 1976), as set forth in notes 119 and 120 *supra*.

<sup>125</sup>It will require about two years to reassess all of the real property in Indiana, during which time it may be possible to analyze whether or not the use of the new manual has resolved the questions hereinafter raised. The new manual does not, however, appear to contain any sections dealing only with condominiums. STATE BD. OF TAX COMM'RS, INDIANA REAL PROPERTY APPRAISAL MANUAL (1976) [hereinafter cited as 1976 Appraisal Manual]; *but see id.* at RF-03, RF-04.

concentrate on the techniques currently used for assessing multi-family buildings, a comparison of these methods with the current law, and suggestions for amendments to the applicable statutes and regulations in order to provide for a more equitable method by which to assess condominiums.

### A. *The Effect of Taxation*

For many Indiana property owners the amount of real property tax paid each year is the largest single expense of home ownership.<sup>126</sup> Accordingly, it is not surprising that the relative obligation for real property taxes payable can significantly affect the market value of property.<sup>127</sup> The effect of an excessive real property tax obligation can be financially devastating to an owner of a large parcel of real property; similarly, the owner of a smaller parcel may find that unusually high real property taxes may cause his home to have a lower resale value than would otherwise have been the case. The Indiana Constitution would appear to have adopted an approach requiring assessing officials to use their sound judgment in determining the relative values, and hence the relative assessed value, of property.<sup>128</sup> It is difficult to see how an approach utilizing sound judgment could lead to the conclusion that condominium properties having significantly different market values should receive *similar or equal* assessments merely because such properties also include an equal percentage of undivided interest in certain common property. Unfortunately, it is the latter approach which prevails in the current assessing practices of condominiums in Indiana.<sup>129</sup> As a result, to the extent that the percentages of undivided interest as set forth in the declaration do not represent the respective fair market values of the various units, those units with high percentages of undivided interest

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<sup>126</sup>Mortgage payments may or may not be greater than the property tax; however, mortgage payments represent a repayment of money borrowed, not an incidence of home ownership. Utility expenses may foreseeably exceed property tax obligations in some cases.

<sup>127</sup>For instance, at a home mortgage interest rate of nine percent per annum, the mortgage payment for principal and interest is equal to about ten percent of the amount borrowed on the mortgage note. If, therefore, a buyer were comparing two properties of equal size and condition, one property having annual property taxes equal to an amount \$100 greater than the other, the buyer would be justified in paying \$1,000, or ten times the annual difference in real property taxes, more for the property with the lower taxes. This is an example of a reverse multiplier.

<sup>128</sup>IND. CONST. art. 10, § 1 provides in part: "Assessment and taxation.—(a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal."

<sup>129</sup>For example, compare the methods used in Exhibits D and E to Exhibit C *infra*.

and low total market values will bear an inequitably larger share of the real property tax burden than those with low percentages of undivided interest and high market values.<sup>130</sup>

### B. *Current Methods of Assessing Multi-Family Dwellings*

Although the 1968 Appraisal Manual occasionally makes references to other methods of appraising,<sup>131</sup> the bulk of the 1968 Appraisal Manual deals with estimating the depreciated replacement cost of improvements.<sup>132</sup> In addition, although taxes are imposed on the owners of the assessed real property,<sup>133</sup> the 1968 Appraisal Manual does not provide a method of separating a given parcel of real property according to various ownership interests, particularly where such ownership interests are of the type typically found in condominiums. The following four examples indicate the various ways in which the same hypothetical parcel of real property might have been assessed under current practice, depending on the manner of ownership.

#### 1. Current Assessment Method for Apartments

There is a standard assessment method used for assessing apartment projects in Indiana.<sup>134</sup> In making such an assessment, the assessing official will typically follow these steps:

- a. Visit the property and make note of the physical dimensions of buildings, garages, porches, patios and the like.
- b. Count the number of special features, such as fireplaces, extra plumbing fixtures, air conditioners and the like.
- c. Observe the percentage of brick exterior as opposed to mere frame exterior, observe the general level of quality and design and make note of estimated depreciation.

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<sup>130</sup>For example, compare Units A and D on Exhibits C and D *infra*.

<sup>131</sup>See note 118 *supra*.

<sup>132</sup>To find depreciated replacement cost the 1968 Appraisal Manual sets forth ranges of various cost factors to be applied to the areas of the buildings being assessed. The cost factors are found in the 1968 Appraisal Manual, *supra* note 116, at R62-R64, C52, C67, I35-I36, and F49-F50, and vary according to the type of property being assessed. Unfortunately, not all possible forms of improvement may be covered in any manual; therefore, the assessing official must use his judgment in either assigning a value to something not covered in the 1968 Appraisal Manual or disregarding it for tax purposes.

<sup>133</sup>IND. CODE § 6-1.1-2-4(a) (Burns Supp. 1976) provides: "The owner of any tangible property on the assessment date of a year is liable for the taxes imposed for that year on the property."

<sup>134</sup>Exhibit B *infra* is an example of the standard method. See generally real property assessments for various apartment projects located in Pike and Washington Townships, Marion County, Indiana, available at the respective Township Assessors' offices in the City-County Building, Indianapolis, Indiana.

- d. Using some of the above data, estimate from the Apartment Pricing Schedule<sup>135</sup> the cost per square foot per floor of the building.
- e. Add air conditioning as an additional cost factor per square foot.
- f. Multiply the total square foot cost factor by the appropriate number of square feet to find a subtotal base value before additions.
- g. Add all additional appropriate items, such as patios, to the subtotal base value. The cost factors for these items are found in the Commercial or Residential sections of the 1968 Appraisal Manual.<sup>136</sup>
- h. Multiply the total of the above amounts by a "Grade Factor"<sup>137</sup> which is based upon the judgment of the assessing official as to the relative quality of the building.
- i. Multiply the above result by a cost and design factor to adjust for quality of design and cost differences based on the county where the real property is located.<sup>138</sup>
- j. Allow for estimated depreciation.<sup>139</sup> The result is known as the "true cash value" of the improvements.
- k. Divide the above true cash value by three to find the assessed value of the improvements.<sup>140</sup>
- l. Multiply the land area of the project, usually expressed in acres, by the standard value per acre used in the general locale for apartment land. The value per acre is generally fixed at the time of general reassessment by the Board and not varied within a district, regardless of differences in location, topography, or desirability. The result is known as the true cash value of the land.
- m. Divide the true cash value of the land by three to find the assessed value of the land.<sup>141</sup>
- n. The true cash values of improvements and land are added to find the total true cash value of the property. The assessed values of improvements and land are added to find the total assessed value of the property. The tax rate is applied only to the total assessed value.

## 2. Current Assessment Method for Townhouses

A standard method for assessing townhouse projects has also developed in Indiana.<sup>142</sup> In many ways this method is identical to that

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<sup>135</sup>See 1968 Appraisal Manual, *supra* note 116, at C67, reproduced as Exhibit A *infra*.

<sup>136</sup>*Id.* at C1-C2, C57-C67, R4-R5, and R57-R59.

<sup>137</sup>*Id.* at R4-R6.

<sup>138</sup>*Id.* at R7.

<sup>139</sup>*Id.* at R57-R59.

<sup>140</sup>IND. CODE § 6-1.1-1-3 (Burns Supp. 1976).

<sup>141</sup>*Id.*

<sup>142</sup>An example of the standard townhouse assessment method, applied to the same hypothetical project as the apartment method, is contained in Exhibit C *infra*. This

used for assessing apartment projects; however, there are a few significant differences:

a. Instead of applying cost factors to the building as a whole, similar factors are applied to each townhouse unit, measured to the centerlines of party walls<sup>143</sup> and the outside of exterior walls.

b. Additional features are assigned individually to the townhouse units instead of spreading the value of such features uniformly over the entire project.

c. A separate tax parcel is created for the common property which, as mentioned above, is typically owned by a not-for-profit corporation.

d. The land owned by each townhouse owner is separately assessed to such owner together with the total for his respective townhouse unit. Thus, each townhouse owner pays a tax computed on his own unit, including all improvements and a separate parcel of land. Each townhouse owner also shares in the payment of the real property tax on the common property by payment of his monthly common charge to the not-for-profit corporation.

### 3. Current Assessment Method for Condominiums Using Percentage Interest for Allocation

Two methods of assessing condominiums have been developed by the Board. The first method<sup>144</sup> is identical to that used for assessing apartment projects, except that in dividing the total assessed value of the project among the various coowners the Board apportions the assessed value on the basis of the percentage of undivided interest which each coowner owns in the common property. While this method may be appropriate for allocating the assessed value of the *common* property to the unit owners, it is obviously inappropriate for allocating those parts of the property owned in *fee simple*, for in many cases the percentages of undivided interest will have no relation to the relative values of the fee simple estates. The fact that such a

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method is similar to the one employed on Chatham Walk townhouses, as found in the Office of the Warren Township Assessor, located in the City-County Building, Indianapolis, Indiana.

<sup>143</sup>A party wall is one which separates two units from each other, as opposed to a wall located entirely within a unit or an exterior wall.

<sup>144</sup>An example of this type of condominium assessment method, applied to the same hypothetical project as the apartment method, is contained in Exhibit D *infra*. This method was applied to the Lake Forest Horizontal Property Regime property, the assessments of which are located in the Office of the Pike Township Assessor, located in the City-County Building, Indianapolis, Indiana. A joint appeal by the declarant and the coowners to the county board of review has resulted in a revision of the assessment substantially in conformance with the method demonstrated in Exhibit F *infra*.

method may be simple for the assessing official and easily understood by the taxpayer is superficially persuasive; however, it should not be allowed to be conclusive.

#### 4. Current Assessment Method for Condominiums Deducting Fifty Percent Fee Before Allocation

The second method<sup>145</sup> used in Indiana for assessing condominiums is identical to that used for townhouses up to but not including the point of determining the true cash value of the improvements. Under this method, the assessing official arbitrarily allocates one-half of the buildings to the common property true value and apportions the new sum of all common property true value to the units according to their respective percentages of undivided interest in the common property. Use of this method appears more often in buildings where there are semi-public halls contained within the buildings. The values of the halls are also estimated separately and allocated to the common property. This method may provide less distortion of assessed value vis-a-vis market value; however, it suffers from many of the same basic inequities and legal difficulties as the first method for assessing condominiums.

#### C. *The State of the Law*

In order to provide more meaningful guidance to assessing officials in their task of equitably distributing the property tax burden among condominium coowners, the Indiana General Assembly should (1) carefully redefine "assessed value" for purposes of property tax law, (2) redefine "apartment" under the HPA in terms such that it may be assessed according to typical assessment methods, and (3) set forth the limits of "discretion" which may be exercised in assessing condominiums before the assessing officials become subject to judicial criticism.

##### 1. The Requirement of Separate Tax Parcels

It is perhaps less time-consuming to assess an apartment building as a whole than to divide it into various hypothetical parts. Similarly, as the number of tax parcels increases the amount of time and money required to maintain proper records and process tax bills increases. However, both the HPA and the property tax laws prescribe that

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<sup>145</sup>An example of this second type of condominium assessment method, applied to the same hypothetical project as the apartment method, is contained in Exhibit E *infra*. This method was applied to the Kings Cove Horizontal Property Regime property, the assessments for which are located in the Office of the Washington Township Assessor, located in the City-County Building, Indianapolis, Indiana.

each owner is under a personal obligation to pay his own taxes,<sup>146</sup> whatever they may be, thus requiring the assessing official, with few exceptions, to divide the real property assessment according to legal ownership.

## 2. Difficulty of Administrative and Judicial Relief

The requirement of separate parcels may prove to be a disadvantage for the coowner as well. When combined with the additional

<sup>146</sup>As set forth in the HPA:

Taxes and assessments.—Taxes, assessments and other charges of this state, or of any political subdivision, or of any special improvement district, or of any other taxing or assessing authority shall be assessed against and collected on each individual apartment, each of which shall be carried on the tax books as a separate and distinct entity for that purpose, and not on the building or property as a whole. No forfeiture or sale of the building or property as a whole for delinquent taxes, assessments or charges shall ever divest or in anywise affect the title to an individual apartment so long as taxes, assessments and charges on said individual apartment are currently paid.

IND. CODE § 32-1-6-17 (Burns 1973). As set forth in respect to property tax: "Owner" defined.—(a) For purposes of this article [6-1.1-1-1 — 6-1.1-37-13], the "owner" of tangible property shall be determined by using the rules contained in this section.

(b) Except as otherwise provided in this section, the holder of the legal title to personal property, or the legal title in fee to real property, is the owner of that property.

(c) When title to tangible property passes on the assessment date of any year, only the person obtaining title is the owner of that property on the assessment date.

(d) When the mortgagee of real property is in possession of the mortgaged premises, the mortgagee is the owner of that property.

. . . .

(f) When a life tenant of real property is in possession of the real property, the life tenant is the owner of that property.

*Id.* § 6-1.1-1-9 (Burns Supp. 1976); *id.* § 6-1.1-1-15 (1) (definition of real property) and *id.* § 6-1.1-1-19 (definition of tangible property), as set forth in note 108 *supra*; *id.* § 6-1.1-2-4 ("Person liable for taxes"), as set forth in note 133 *supra*; *id.* § 6-1.1-4-1 provides: "Place of assessment—To whom assessed.—Real property shall be assessed at the place where it is situated, and it shall be assessed to the person liable for the taxes under IC 1971, 6-1.1-2-4 [*Id.* § 6-1.1-2-4]"; *id.* §§ 6-1.1-4-2, -3. Under former law as under current law, general taxes were a personal liability of the owner. The courts have held that such personal liability did not by itself relieve the real property from the property tax lien without payment of the tax. *Schofield v. Green*, 115 Ind. App. 160, 56 N.E.2d 506 (1944). It was early established that the owner of property, as evidenced by the legal title, as of the assessment date, the first day of March, is the person liable for payment of the property taxes levied thereon for that year, even though not due and payable until the next succeeding year. *Riggs v. Board of Comm'rs*, 181 Ind. 172, 103 N.E. 1075 (1914); *Mullikin v. Reeves*, 71 Ind. 281 (1880); *City of Richmond v. Scott*, 48 Ind. 568 (1874); *see Lose v. State*, 72 Ind. 285 (1880); *King v. City of Madison*, 17 Ind. 48 (1861); *Corr v. Martin*, 37 Ind. App. 655, 77 N.E. 870 (1906).

requirement that appeals of assessments must be brought by taxpayers,<sup>147</sup> the above requirement would indicate that a condominium coowner is at a disadvantage under the current method of assessing condominiums, for he must be prepared to challenge the assessment of the entire property, not just his unit.<sup>148</sup> The burden of proving that the total assessment is unjustified would be much more difficult for a large project than for one house.<sup>149</sup> The alternatives for the complaining taxpayer are to organize as many of his coowners as possible for a joint appeal or convince the Board of Directors of the coowners' association to prosecute the appeal.<sup>150</sup> A successful class

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<sup>147</sup>Standing appears to be required to the extent that in order to "obtain a review by the county board of review of a county or township official's action with respect to the assessment of the taxpayer's tangible property" the complainant must be the *taxpayer*. IND. CODE § 6-1.1-15-1 (Burns Supp. 1976). To "obtain a review by the state board of tax commissioners of a county board of review's action with respect to the assessment of that taxpayer's tangible property" the complainant must be the *taxpayer*. *Id.* § 6-1.1-15-3. But the "appeal" of "the state board of tax commissioner's final determination regarding the assessment of his tangible property" may be taken by "[a] person." *Id.* § 6-1.1-15-5. It is probably intended that the "owner" is the person entitled to prosecute the appeal, regardless of level. *Id.* § 6-1.1-2-4. The courts of Florida have inferred the same view. *Cf.* *Commodore Plaza at Century 21 Condominium Ass'n, Inc. v. Saul J. Morgan Enterprises, Inc.*, 301 So. 2d 783 (Fla. Dist. Ct. App. 1974) (condominium association held to have no standing to bring a quiet title action on behalf of the coowners); *Hendler v. Rogers House Condominium, Inc.*, 234 So. 2d 128 (Fla. Dist. Ct. App. 1970) (no class action to quiet title to common property in the coowners was allowed).

<sup>148</sup>See, for example, the calculation of individual assessments based entirely upon a total assessment, as in Exhibit D *infra*, and the even more complex adjustments involved in the assessment shown in Exhibit E *infra*.

<sup>149</sup>Ordinarily, the burden of proof is on the complainant. However, the complainant must prove more than that the contested assessment is somehow inappropriate; rather, he must allege and prove that the assessing official acted arbitrarily and capriciously in assessing the property. If he does not fulfill this second requirement, the court will not change the assessment of complainant's property, regardless of how unreasonable it may appear when compared to other similar properties. *State Bd. of Tax Comm'rs v. Traylor*, 141 Ind. App. 324, 228 N.E.2d 46 (1967). The *Traylor* case is approvingly cited in the 1968 Appraisal Manual, *supra* note 116, at 29.

<sup>150</sup>Although the HPA appears to grant standing to the coowners' association board of directors for this purpose, this does not mean that an aggrieved taxpayer has an unlimited right to compel the Board of Directors to prosecute tax assessment appeals.

Suits on behalf of apartment owners—Service of process upon apartment owners.—Without limiting the rights of any apartment owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two [2] or more of the apartment owners, as their respective interests may appear, with respect to any cause of action relating to the common areas and facilities or more than one apartment. Service of process on two [2] or more apartment owners in any action relating to the common areas and facilities or more than one apartment may be made on the person designated in the declaration to receive service of process.

IND. CODE § 32-1-6-30 (Burns 1973).

action would appear unlikely because of the possibility that not all members of the class would gain from successful prosecution of the appeal.<sup>151</sup> Therefore, an assessment would probably be appealed only when a majority of the coowners were adversely effected by the property tax assessment and instructed the Board of Directors to act on their behalf. The expenses of such an appeal could be borne as a common expense.<sup>152</sup>

### 3. Effective Date of Valuation v. Effective Date of Assessment

Another issue involves the proper assessment of nonagricultural land.<sup>153</sup> Under the present statute<sup>154</sup> land is to be reassessed upon any change in use or zoning. In contrast, improvements are only required to be reassessed upon a change in the physical structure.<sup>155</sup> In the past, the 1968 Appraisal Manual has made it possible to add *new improvements* to the tax rolls at assessed values similar to those of older properties;<sup>156</sup> however, because the 1968 Appraisal Manual does not set forth the values to be applied to vacant *land*, some doubt has been raised as to whether such land, when put to a new use or rezoned, should be added to the tax rolls at its current market value or at the market value it would have had if its new use had been effective on the date of the last general reassessment.<sup>157</sup> If the land is reassessed at its current market value, then the combined effects of

<sup>151</sup>IND. R. TR. P. 23(a)(1), (2), (4).

<sup>152</sup>IND. CODE § 32-1-6-2(g) (Burns 1973).

<sup>153</sup>*Id.* § 6-1.1-4-13(a) (Burns Supp. 1976) provides: "In assessing or reassessing land, the land shall be assessed as agricultural land as long as it is devoted to agricultural use." By implication, all land not devoted to agricultural use would be classified as nonagricultural land. The effective date of all assessments is March 1st. *Id.* § 6-1.1-1-2.

<sup>154</sup>

Reassessment of subdivided and rezoned land.—If land assessed on an acreage basis is subdivided into lots, the land shall be reassessed on the basis of lots. If land is rezoned for, or put to, a different use, the land shall be reassessed on the basis of its new classification. If improvements are added to real property, the improvements shall be assessed. An assessment or reassessment made under this section is *effective* on the *next* assessment date. However, if land assessed on an acreage basis is subdivided into lots, the lots may *not* be *reassessed* until the next assessment date following a transaction which results in a change in legal or equitable title to that lot.

*Id.* § 6-1.1-4-12 (emphasis added).

<sup>155</sup>*Id.*

<sup>156</sup>The effective date for determining the *value* of all *improvement* assessments is set at January 1967. See the 1968 Appraisal Manual, *supra* note 116, at R7.

<sup>157</sup>IND. CODE § 6-1.1-4-12 (Burns Supp. 1976), fourth sentence, as set forth in note 154 *supra*, is ambiguous in respect to the point in time of valuation of the land, as opposed to the date the reassessment changes the tax rolls.

infrequent general reassessments and rapid inflation of land values will cause many landowners to pay more than their proper share of property tax.<sup>158</sup> Surely it is well-recognized that land value is determined by more factors than simply its present use or zoning status.<sup>159</sup> Therefore, it seems unwise to allow two such narrow factors to so greatly influence the assessing procedure and valuation. Perhaps in partial recognition of the inequity of this provision, the most recent amendment<sup>160</sup> to this section of the statute relieved subdivision developers from the reassessment of their newly-developed lots until such time as the lots had been sold.<sup>161</sup> Unfortunately the amendment did not specify whether at the time of such reassessment to use the current or historic values of the lots.<sup>162</sup> This question is important to condominium developers because it typically requires a period in excess of two years to rezone, build and finally sell all of the units in a project of average size. The obviously harmful effects of this discriminatory valuation process, if so applied by the assessing official, would be contrary to the apparent intent of the law.

#### 4. Determination of Correct Assessed Value

Before using a term such as "assessed value" it is necessary to define "value." Unfortunately, the Indiana General Assembly and the courts appear to disagree as to both the underlying definition of "value" and who shall have the final right to define it.

##### *a. Market Value vis-a-vis True Cash Value*

Currently, "assessed value" is defined in the law as one-third of "true cash value."<sup>163</sup> However, "true cash value" is not defined therein. The search for judicial interpretation of "true cash value" reveals that the basic constitutional directive for determining the proper valuation of property for purposes of taxation has remained unchanged since the passage of the Indiana Constitution of 1851: "The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe

<sup>158</sup>A similar situation is examined in note 38 *supra*.

<sup>159</sup>AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 1-2 (5th ed. 1967) lists 24 forces which create value.

<sup>160</sup>Pub. L. No. 49, § 1, 1975 Ind. Acts 470.

<sup>161</sup>IND. CODE § 6-1.1-4-12 (Burns Supp. 1976), fifth sentence, as set forth in note 154 *supra*.

<sup>162</sup>*Id.*

<sup>163</sup>*Id.* § 6-1.1-1-3 provides: " 'Assessed value' or 'assessed valuation' defined.— 'Assessed value' or 'assessed valuation' means an amount equal to thirty-three and one third percent [33 1/3%] of the true cash value of property."

regulations to secure a just valuation for taxation of all property, both real and personal."<sup>164</sup> The question of whether an assessment of a specific property was correct has more often than not become overshadowed by other issues in the same litigation, such as whether "value" meant "true cash value" or "assessed value,"<sup>165</sup> or the definition of "true cash value."<sup>166</sup> Thus, neither the courts nor the Indiana General Assembly have forthrightly defined the constitutional requirement as one requiring that all property must be assessed at its "market value"<sup>167</sup> or some fraction thereof.<sup>168</sup>

In contrast, the courts of Florida have avoided this difficulty by defining "assessed value" as "fair market value" concomitant with interpreting a constitutional section almost identical to that of the Indiana Constitution.<sup>169</sup> The Florida legislature, in a manner similar to that of Indiana, has delegated to an administrative agency the duty to determine assessment standards. However, the regulations

<sup>164</sup>IND. CONST. art. 10, § 1.

<sup>165</sup>See *Allen v. Van Buren Twp.*, 243 Ind. 665, 184 N.E.2d 25 (1962), in which carefully chosen words were presumed to have been used in the Indiana Constitution, e.g., "just valuation." In holding that "value" in art. 13, § 1 of the Indiana Constitution means one-third of that value found by use of the rules and regulations of the Board, the supreme court disassociated the definition of "value" from its connection with the market place and associated it with government-created standards for some purposes.

<sup>166</sup>See *Smith v. Stephens*, 173 Ind. 564, 91 N.E. 167 (1910).

<sup>167</sup>See *State Bd. of Tax Comm'rs v. Chicago, Mil., St. P. & Pac. R.R.*, 121 Ind. App. 302, 310, 96 N.E.2d 279, 283 (1951), wherein it was held that the taxpayer was not entitled to the lowest assessed value which could be found by all various methods of appraising, and that the Board need not apply specified methods or use specified facts in reaching its decision if the final result is not fraudulent, capricious or arbitrary, citing *Southern Ry. v. Watts*, 260 U.S. 519, 527 (1923). The Board appears to have used decisions such as this to relieve it of any requirement to achieve market value in its assessments. This case is set forth as an example of the above proposition in the 1968 *Appraisal Manual*, *supra* note 116, at 29.

<sup>168</sup>Some older holdings appeared to define "true cash value" in terms which might be construed as implying "market value." In *Willis v. Crowder*, 134 Ind. 515, 34 N.E. 315 (1893), the supreme court interpreted the meaning of "true cash value" contained in former REV. STAT. 1881, § 6330, to be equal to "market selling price"; however, the court held that if there were no market for the property, the "true cash value" was to be defined as the actual value to the owner, as set forth in the owner's statement of assessment. See *Allen v. Van Buren Twp.*, 243 Ind. 665, 681-84, 184 N.E.2d 25, 32-34 (1962) (dissenting opinion), wherein Landis, J., expressed the view that "value" was most frequently interpreted to mean "market value," e.g., related to the sale of properties, as perhaps opposed to "assessed value" or other artificially constructed "values"; *Smith v. Stephens*, 173 Ind. 564, 91 N.E. 167 (1910), wherein it was held that the fact that all other property may be undervalued is irrelevant to the legal mandate that property be assessed at full cash value, *State ex rel. Lewis v. Smith*, 158 Ind. 543, 565, 63 N.E. 25, 216 (1902) (dissenting opinion), citing *Willis v. Crowder*.

<sup>169</sup>*Compare* FLA. CONST. art. VII, § 4 with IND. CONST. art. 10, § 1. Fair market value has been defined as "the amount a 'purchaser willing but not obligated to buy, would pay to one willing but not obligated to sell.'" *Walter v. Schuler*, 176 So. 2d 81, 86 (Fla. 1965), quoting *Root v. Wood*, 155 Fla. 613, 618, 21 So. 2d 133, 138 (1945).

promulgated by said agency are no longer deemed to be prima facie in conformance with the Florida Constitution but merely "deemed prima facie correct."<sup>170</sup> In addition, the Florida Department of Revenue, an administrative agency similar to the Indiana State Board of Tax Commissioners, is required by statute to prepare a manual for assessments which is continually revised<sup>171</sup> in order to permit assessments to be at correct levels of "just valuation."<sup>172</sup> The courts of Florida seem to have accepted the idea that the legislature has the power to define "market value." This follows from the fact that the courts will set aside an assessment only when there is an allegation that the assessment was not in compliance with the statute, rather than permitting a challenge to the constitutionality of the definition of market value as expressed in the statute.<sup>173</sup>

As mentioned above, the Indiana General Assembly has attempted to define "uniform and equal rate of property assessment"<sup>174</sup> and "just valuation"<sup>175</sup> by delegating to the Board<sup>176</sup> the authority to establish regulations for determining such values.<sup>177</sup> The 1968 Appraisal Manual reproduces the statutory language setting forth the methods and instructions for classifying and valuing real property for the use of the assessing official.<sup>178</sup> However, in many assessment appeals, the question initially raised before the county board of review<sup>179</sup> is not

<sup>170</sup>Compare FLA. STAT. ANN. § 195.032 (West Supp. 1977) with *id.* (West 1971).

<sup>171</sup>FLA. STAT. ANN. §§ 195.042, 195.052 (West 1971).

<sup>172</sup>FLA. CONST. art. IX, § 1 (current version at *id.* art. VII, §§ 2 and 4); as interpreted in *Walter v. Schuler*, 176 So. 2d 81 (Fla. 1965).

<sup>173</sup>The courts do not decide the ultimate constitutional issue of whether or not the contested assessment is equal to "market value." See *Powell v. Kelly*, 223 So. 2d 305, 308 (Fla. 1969), in which the court announced the rule that it would not overturn an assessment made pursuant to the guidelines of the statute unless the complainant establishes bad faith and essential inequality or unjustness of the assessment by allegation and proof, to the exclusion of every reasonable hypothesis of legal assessment; *Dade County v. Salter*, 194 So. 2d 587, 591 (Fla. 1967), in which the court set up a potentially enormous burden of proof for the complainant when it stated that he might obtain a reduction in assessment if he could prove that the assessing official had systematically valued property in his jurisdiction at less than 100 percent of fair market value, *citing* *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923). The assessed value is supposed to be "fair market value." *Walter v. Schuler*, 176 So. 2d 81, 85-86 (Fla. 1965); *Lanier v. Overstreet*, 175 So. 2d 521 (Fla. 1965); *Graham v. City of West Tampa*, 71 Fla. 605, 71 So. 926 (1916); *McArthur Jersey Farm Dairy, Inc. v. Dade County*, 240 So. 2d 844, 847 (Fla. Dist. Ct. App. 1970).

<sup>174</sup>IND. CONST. art. 10, § 1(a).

<sup>175</sup>*Id.*

<sup>176</sup>IND. CODE §§ 6-1.1-31-1, -2-2 (Burns Supp. 1976).

<sup>177</sup>*Id.* § 6-1.1-31-5, as set forth in notes 119-20 *supra*.

<sup>178</sup>See 1968 Appraisal Manual, *supra* note 116, at 17-18.

<sup>179</sup>The county board of review is the first level of appeal for an aggrieved taxpayer. IND. CODE §§ 6-1.1-13-1, -6 (Burns Supp. 1976).

whether the assessing official acted in accordance with the statute and regulations, but rather the justness of the assessed value of the complainant's property in relation to similar properties.<sup>180</sup> This type of appeal, therefore, consists of an allegation that the assessment of complainant's property is "too high" vis-a-vis some ascertainable standard of "value" other than that contained in the 1968 Appraisal Manual. In real property appraisal terminology, the question would be whether or not the assessment was supposed to approximate "market value"<sup>181</sup> or be left to the discretion of the assessing official within the limitations of the 1968 Appraisal Manual. Thus, the challenge is very often necessarily directed not at the actions of the assessing official but rather at the regulations as contained in the 1968 Appraisal Manual.

Assuming that the Indiana Constitution requires that real property assessments should bear a direct correlation to market value, the question then becomes one of deciding if the current assessment practices typically develop market value. An accurate estimate of market value is often a difficult undertaking. As a result, several professional real property appraisal groups have been formed in an effort to standardize and organize the appraisal of real estate. A comparison of the professionally accepted definition of market value with the operation of the assessment system in Indiana reveals some interesting dissimilarities. All major professional real estate appraisal organizations would agree with the definitions of "market value" published by the American Institute of Real Estate Appraisers:

- (1) [T]he highest price estimated in terms of money which a property will bring if exposed for sale in the open market allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used.
- (2) Frequently, it is referred to as the price at which a willing seller would sell and a willing buyer would buy, neither being under abnormal pressure.
- (3) It is the price expectable if a reasonable time is allowed to find a purchaser and if both seller and prospective buyer are fully informed.<sup>182</sup>

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<sup>180</sup>With the exception of the general reassessment, the only way that a taxpayer would know or suspect that the assessment on his property is significantly high or low would be by comparing it to other similar properties. The reason the taxpayer would make such a comparison is, of course, because he believes that there should be a direct correlation between the market values and assessed values of similar properties.

<sup>181</sup>See the definition of "market value" in the text accompanying note 182 *infra*.

<sup>182</sup>AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, APPRAISAL TERMINOLOGY AND HANDBOOK 131 (5th ed. 1967).

These definitions all include subjective elements of judgment on the parts of buyer and seller in arriving at the sale price.<sup>183</sup> The purpose of most real estate appraisal publications is to aid appraisers in the accurate prediction of the market value of real property.<sup>184</sup> The appraiser's estimate is almost invariably communicated to his client by written report.<sup>185</sup> Such reports will, with rare exception, contain an extended analysis of the reasons for the appraiser's estimate.<sup>186</sup> In this analysis the appraiser will typically indicate the consideration given to each of the three principal methods for estimating value: the cost approach, the income approach, and the market data approach.<sup>187</sup> Thus, to achieve an estimate of "market value," the professional real estate appraiser must have the knowledge and training to apply as many as three different methods for estimating value. While there is currently not a requirement that all persons who may testify as to real property values must be qualified experts, there remains considerable reliance upon such experts in eminent domain actions and at other times when the court or the jury needs guidance with respect to valuation of a particular property. Therefore, it would seem reasonable that the county board of review should recognize the

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<sup>183</sup>AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 20-22 (5th ed. 1967).

<sup>184</sup>*Id.* at 2.

<sup>185</sup>*Id.* at 3.

<sup>186</sup>*Id.* at 373-74.

<sup>187</sup>*Id.* at 327-50. The extent of the consideration and the weight of the value estimate found under each approach will depend to a great extent upon the type of property being appraised. *Id.* at 374-77. In valuing real property, the appraiser is well-advised to view the property as much as possible through the eyes of the typical buyer. For instance, the reproduction costs and sales prices of single-family residences are typically well known to buyers and sellers, although rental and expense information is not well known; therefore, the cost and market data approaches have considerable validity while the income approach is almost meaningless in appraising single-family residences. Conversely, the typical investor in income-producing property is one who emphasizes return on investment to the exclusion of other measures of value; therefore, because the income approach strives to achieve an estimate of market value based upon a desired rate of return on investment, it is more valid for these types of property than the other two approaches. *Id.* at 374. The reason for this is that income-producing projects are unique in many respects and rely on so many extraneous factors for value that it would neither be valid to compare such projects to dissimilar property nor informative to estimate mere reproduction cost without adjustment in each case for factors related to the determination of the value estimated by means of the income approach. For example, the cost approach requires an analysis of depreciation, which in turn requires an analysis of economic obsolescence, which requires an adjustment for lost net income due to location and competition. *Id.* at 217-18. Similarly, in order to apply the principles of the market data approach, the professional appraiser often uses the gross rent multiplier, thus utilizing much of the same information as is needed in the income approach. *Id.* at 351-55.

validity of the principles used by virtually all professional appraisers to the same extent as they are recognized by the courts.

An analysis of the 1968 Appraisal Manual discloses that except for a few general words with respect to the use of market data<sup>188</sup> and income and expense<sup>189</sup> information, there is almost a total reliance upon cost factors for estimating the value of real property for assessment purposes. In fact, at the assessment level, there is very little activity directed toward collecting current market information with respect to sales of land or improved property.<sup>190</sup> The manual sets forth the following general principle for income-producing real property valuation: "As with residential property, the object of the appraiser is to reproduce the replacement value based upon actual material and labor cost as of January 1967."<sup>191</sup> As has been true with the past manuals and 1968 Appraisal Manual, it appears that the purpose of the 1976 Appraisal Manual is the estimation of reproduction cost to the almost total exclusion of value as found under the income and market data approaches to value.<sup>192</sup> Thus it is probable that in many cases the assessment of real property in Indiana will bear a less direct correlation with its market value than might be the case if the Board had promulgated rules and regulations which included more use of market data and income and expense information.

*b. Delegation of Power to Determine "True Cash Value"*

Assuming, arguendo, that in many cases competent assessing officials using either the 1968 or 1976 Appraisal Manual in good faith, to the best of their abilities, cannot accurately estimate the market value of real property, it does not necessarily follow that such assessments can be successfully challenged on appeal. Both the Board and some courts have accepted a literal interpretation of the statute<sup>193</sup> by holding that any assessment performed in accordance with the manual will be left unaltered unless the complainant can show substantial and harmful wrongdoing on the part of the assessing official.<sup>194</sup> There has, however, been a closer reading of the

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<sup>188</sup>See the 1968 Appraisal Manual, *supra* note 116, at R69, C1-C2, I1.

<sup>189</sup>*Id.* at R57, C1-C2, F1-F4, I1.

<sup>190</sup>Strict adherence to the forms of the Board used in assessing does not require collection or use of comparative data. *Id.* at R81-R82.

<sup>191</sup>*Id.* at C1.

<sup>192</sup>See 1976 Appraisal Manual, *supra* note 125.

<sup>193</sup>IND. CODE §§ 6-1.1-31-1(3), -5(a) (Burns Supp. 1976).

<sup>194</sup>State Bd. of Tax Comm'rs v. Traylor, 141 Ind. App. 324, 228 N.E.2d 46 (1967); State Bd. of Tax Comm'rs v. Chicago, Mil., St. P. & Pac. R.R., 121 Ind. App. 302, 96 N.E.2d 279 (1951).

statute by a recent case which,<sup>195</sup> when contrasted with an earlier holding,<sup>196</sup> indicates that perhaps the courts of Indiana are tending toward the view that "true cash value" should be defined as "market value" for purposes of conforming to the Indiana Constitution.

In the earlier case, *Indiana State Board of Tax Commissioners v. Pappas*,<sup>197</sup> the court adopted the position that the 1968 Appraisal Manual, once having been fully adopted as a regulation pursuant to statutory requirement, "ha[s] the force of law and [is] the state-wide standard used by the State Board of Tax Commissioners (as well as all assessing officials) in determining the correctness of an assessment on appeal."<sup>198</sup> In *Pappas*, the complainant had appealed the assessment of his home to the county board of review and, not being satisfied with the result, appealed next to the Board for more relief. Complainant was granted no further relief and appealed to the Superior Court of Marion County. The court heard evidence which had not been presented to the Board and entered judgment in favor of the complainant in the form of a further reduction of his assessment. Appeal to the court of appeals was taken by the Board in an effort to have the judgment of the superior court set aside and the case remanded to the Board for reassessment. The only issues on appeal were the admission by the superior court of evidence which had not been heard at the administrative level, whether the hearings before the Board met the requirements of constitutional due process, and whether the superior court had exceeded its authority in revising the assessment instead of remanding the case to the Board. The court of appeals quoted extensively from the then current version of the present tax laws<sup>199</sup> and held that the 1968 Appraisal Manual has the *force of law*.<sup>200</sup> This holding was unsupported by authorities and appears to have been unnecessary to decide any of the points raised by the parties on appeal. More particularly, the question of whether the statute which allows the Board to set forth the definition of assessed value, without requiring that the assessed value bear a direct relation to market value, represents an unconstitutional delegation of power appears not to have been raised by the parties.

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<sup>195</sup>State Bd. of Tax Comm'rs v. Valparaiso Golf Club, 330 N.E.2d 394 (Ind. Ct. App. 1975).

<sup>196</sup>Indiana State Bd. of Tax Comm'rs v. Pappas, 302 N.E.2d 858 (Ind. Ct. App. 1973).

<sup>197</sup>*Id.*

<sup>198</sup>*Id.* at 864.

<sup>199</sup>IND. CODE § 6-1-33-3 (Burns 1972) (current version at *id.* § 6-1.1-31-6 (Burns Supp. 1976) as set forth in note 203 *infra*); *id.* § 6-1-1-17 (Burns 1972) (current version at *id.* §§ 6-1.1-31-1, -2 (Burns Supp. 1976)); *id.* § 6-1-33-2 (Burns 1972) (current version at *id.* § 6-1.1-31-5 (Burns Supp. 1976)).

<sup>200</sup>302 N.E.2d at 864.

Until the question is raised, however, *Pappas* will stand for the proposition that where the property assessed is of a type contemplated by the then current assessment manual, the only substantive basis for appeal of the amount of the assessment must involve an allegation of improper application of such manual.

In the more recent case, *State Board of Tax Commissioners v. Valparaiso Golf Club*,<sup>201</sup> several of the issues in *Pappas* were also raised. As in *Pappas*, the complainant in *Valparaiso* had exhausted its administrative remedies<sup>202</sup> in an effort to reduce the amount of the assessment on its property in question, a golf course. The superior court found that the Board had not properly considered all of the statutory elements<sup>203</sup> and remanded the case to the Board for

<sup>201</sup>330 N.E.2d 394 (Ind. Ct. App. 1975).

<sup>202</sup>Complainant had already appealed to the county board of review, the Board, and the superior court.

<sup>203</sup>IND. CODE §§ 6-1-22-1 to -8 (Burns 1972) (current version at *id.* §§ 6-1.1-31-1 to -8 (Burns Supp. 1976)), in particular *id.* § 6-1-33-3 (Burns 1972) (current version at *id.* § 6-1.1-31-6 (Burns Supp. 1976)), which was quoted by the court as follows:

For the purpose of securing a just valuation for the taxation of real property, the rules, regulations, standards and conversion tables adopted by the state board of tax commissioners shall provide for the classification of lands on the basis of acreage, lots, size, location, use, productivity or earning capacity, applicable zoning provisions, accessibility to highways, sewers and other public services and advantages, and such other bases as may be just and proper; . . . The rules, regulations and standards shall set forth the methods and instructions for determining the following:

- (a) The proper classification of lands and improvements;
- (b) The size thereof;
- (c) The effect of location and use on value;
- (d) The depreciation, including physical deterioration, or functional, economic or social obsolescence;
- (e) The cost of reproduction of improvement;
- (f) The productivity or earning capacity;
- (g) The capitalization of income;
- (h) The valuation of lands and improvements on the basis of the foregoing elements and such other elements as may be just and proper.

330 N.E.2d at 395-96.

The above statute was expanded in scope by Pub. L. No. 47, § 1, 1975 Ind. Acts, codified as IND. CODE § 6-1.1-31-6 (Burns Supp. 1976): Bases for classification of real property—Instructions for assessment.—

(a) With respect to the assessment of real property, the rules and regulations of the state board of tax commissioners shall provide for:

- (1) the classification of land on the basis of:
  - (i) acreage;
  - (ii) lots;
  - (iii) size;
  - (iv) location;
  - (v) use;
  - (vi) productivity or earning capacity;

reassessment. However, in its findings of facts, the superior court also found that the land was worth the same as surrounding land on an acreage basis, plus an amount equal to \$1,500 per green. On appeal by the Board, the court of appeals concurred in setting aside the Board's assessment but also eliminated the findings of the superior court concerning the value of the land and greens. In setting aside the assessment, two facts carried great weight with the court. First, it had been conceded at the trial "that the appraisal manual contains no rules, regulations or standards applicable to the appraisal of golf courses."<sup>204</sup> Second, "at the trial, the witnesses for the Board specifically testified that use was the only factor they considered or used in fixing the valuation."<sup>205</sup> The court then concluded that the 1968 Appraisal Manual, as prepared by the Board, did not fully embrace the statutes<sup>206</sup> and that the assessment had not been conducted in accordance with the requirement of the statute, namely, "that all assessments shall be on the basis of just valuations *taking*

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- (vii) applicable zoning provisions;
  - (viii) accessibility to highways, sewers, and other public services or facilities; and
  - (ix) any other factor which is just and proper.
  - (2) the classification of improvements on the basis of:
    - (i) size;
    - (ii) location;
    - (iii) use;
    - (iv) type and character of construction [*sic*];
    - (v) age;
    - (vi) condition;
    - (vii) cost of reproduction; and
    - (viii) any other factor which is just and proper.
  - (b) With respect to the assessment of real property, the rules and regulations of the state board of tax commissioners shall include instructions for determining:
    - (1) the proper classification of real property;
    - (2) the size of real property;
    - (3) the effects that location and use have on the value of real property;
    - (4) the depreciation, including physical deterioration and obsolescence, of real property;
    - (5) the cost of reproducing improvements;
    - (6) the productivity or earning capacity of real property;
    - (7) the capitalization of income received from the use of real property;
 and
    - (8) the true cash value of real property based on the factors listed in this subsection and any other just and proper factors.

The Indiana General Assembly seems, therefore, to have adopted standards which might tend to result in appraisals or assessments which more nearly approximate market value than those of the past.

<sup>204</sup>330 N.E.2d at 396.

<sup>205</sup>*Id.*

<sup>206</sup>*Id.*

into consideration all of the elements referred to in this article, [6-1-33-1—6-1-33-8], insofar as the same may be applicable.”<sup>207</sup> Thus, to the extent that a complainant can show that the then current manual does not set forth *proper* criteria for the assessment of his real property, *Valparaiso* would appear to have overruled the narrow holding of *Pappas*, which would otherwise have allowed any manual to stand unquestioned. By allowing other information to be brought to bear on the assessment problem than is set forth in the 1968 Appraisal Manual, the court, in *Valparaiso*, may also have avoided the potential issue of unconstitutional delegation of assessing authority, namely, the power to define “assessed value,” from the Indiana General Assembly to the Board. In fact, it is possible to construe the holding in *Valparaiso* as being in direct conflict with the section of the tax laws which declares that the Board has the power to define true cash value.<sup>208</sup>

The *Valparaiso* holding should not be distinguished on its facts from *Pappas* simply because of the lack of rules in the 1968 Appraisal Manual for the assessment of golf courses, for such fact is irrelevant. Rather, the rule announced in *Valparaiso* is contrary to the *Pappas* rule because the Board is *now* required to *always* consider *each* of the guidelines set forth by the legislature *and utilize all those applicable* to the property being assessed.

##### 5. Effect of Omitting Classes of Property from the Regulations

It will be observed that, when the division of an assessment of a condominium project is made on the basis of the percentages of undivided interest, some of the taxpayers will have been assessed for property they do not own and other taxpayers will not have been assessed for as much property as they own. Thus, as to those units which have been under-assessed it is possible to assert that such property as was not included within their respective parcels was “omitted.”<sup>209</sup> The courts of Indiana have dealt at some length with the effect of omitting whole classes of property and have reached the conclusion that insofar as the regulations of the Board fail to prescribe standards by which such property may be assessed the Board is deemed to have elected to not impose the ad valorem tax on such property.<sup>210</sup> Based on such authority it might be possible to

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<sup>207</sup>*Id.* at 395, quoting IND. CODE § 6-1-33-2 (Burns 1972) (current version at *id.* § 6-1.1-31-5 (Burns Supp. 1976)) (emphasis by the court).

<sup>208</sup>IND. CODE § 6-1.1-31-5(a) (Burns Supp. 1976).

<sup>209</sup>*Id.* §§ 6-1.1-1-6, -9-1, -13-3.

<sup>210</sup>*See State Bd. of Tax Comm'rs v. Holliday*, 150 Ind. 216, 49 N.E. 14 (1898), a case involving the taxation of insurance policies, wherein the supreme court held that,

assert that the failure of the Board to provide standards by which it is possible to divide the assessments of condominium projects into separate parcels is such a serious defect as to fail to create any liability for property taxes on the part of the affected coowners. More likely, an appeal of the allocation of a condominium project into separate parcels on the ground that the manual contained no rules for such allocation would probably have the effect of voiding the assessment on the entire project.

#### 6. Effect of Easements and Covenants on Definition of "Apartment" for Assessment Purposes

The Board treats condominiums and townhouses differently for purposes of allocating the total assessed value of the project to the respective units.<sup>211</sup> The assessment method currently used on condominiums assumes that the value of the respective interests of the coowners in their *dwelling units* is identical to the percentages of undivided interest in the *common property*, as set forth in the declaration. This is often not the case<sup>212</sup> and should therefore not be used for assessment purposes. Much of the conceptual difficulty in assuming a separation of the fee simple dwelling unit, as defined in the HPA,<sup>213</sup> from its surrounding common property<sup>214</sup> stems from the fact that without the surrounding common property the value of the "enclosed space" owned in fee simple would be zero. Obviously, without support, protection, utilities, and access, an "enclosed space" is useless. Unfortunately, the 1968 Appraisal Manual sets forth no comprehensive manner of assessing real property other than on a "physical" basis,<sup>215</sup> thus forcing the assessing official to equate the required ownership separation with an impracticable physical separation.

The Board is presented with a dilemma when forced to assess condominium units as separate parcels: on the one hand, the extent of

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because (1) the taxing power was inherent in the legislature, (2) art. 10, § 1 of the Indiana Constitution was a limitation on the taxing power, (3) said power was limited to merely prescribing permitted rules and regulations, and (4) the legislature had failed to provide for taxation regulations for insurance policies, no other department could provide such regulations and insurance policies were deemed exempt from ad valorem taxation. State *ex rel.* Lewis v. Smith, 158 Ind. 543, 63 N.E. 25, 214 (1902) (dissenting opinion) (amount of mortgage lien should be subtracted from assessed value for tax purposes); Riley v. Western Union Tel. Co., 47 Ind. 511 (1874) (poles and wires of an out-of-state telegraph corporation not taxable).

<sup>211</sup>See Exhibits C, D and E *infra* and text accompanying notes 142-45.

<sup>212</sup>*Id.*

<sup>213</sup>IND. CODE § 32-1-6-2(a) (Burns 1973), as set forth in note 20 *supra*.

<sup>214</sup>*Id.* § 32-1-6-2(f), as set forth in note 12 *supra*.

<sup>215</sup>See discussion at notes 188-91 *supra*.

the ownership of the fee simple estate is only to the inside faces of the surrounding walls; yet, on the other hand, the 1968 Appraisal Manual provides cost factors and guidance only for assessing buildings as a whole. If it is practically impossible to determine the cost or value of only the interior part of a physical structure in the *absence* of the surrounding exterior then the Board should consider ways in which the legal estates may be separated. An ideal solution to this dilemma would be achieved if the assessing officials were to assess condominiums in a manner similar to townhouses, for such assessments would be both easily understood by the coowners and ascertainable by use of the 1968 Appraisal Manual with but few modifications.

There are several alternative legal theories available by which the assessing official may view condominium projects in a manner similar to townhouse projects. Each theory relies upon acceptance of the basic proposition that every condominium coowner demands, expects and enjoys the exclusive *use* of some parts of the common property which, by definition, lay outside of the fee simple portion of the property. Examples of such exclusive uses abound in low-rise condominiums: roofs, exterior walls, foundations, land under the unit, garages, patios, walkways, air-conditioning compressors and buried utility connections. While multi-story construction does not offer such simple examples of exclusive use of common property, these buildings are even more difficult to assess if it is necessary to assume a physical separation instead of a legal separation.

The first legal theory which may be used by the Board is to assume that each coowner has such *easements* in the common property over which he has exclusive or near-exclusive use as to confer on him a quasi-fee simple estate in such common property, and that such quasi-fee simple estate is substantial enough to cause the coowner to incur the tax liability for such common property. Such easements might be assumed to rest on one or more of three bases. The first basis might be the familiar easement by necessity, whereby one owner is allowed an easement on the property of another where there was an original unity of ownership, an actual necessity for the easement, and an original intent of the parties that the easement should exist.<sup>216</sup> In condominiums, of course, the nature of the use of some parts of the common property by the coowners exceeds the degree of need typically required to create the easement by necessity for, in such cases, the use is *totally* exclusive of the other coowners. The second basis for finding easements in the common property might be the implied reciprocal easement.<sup>217</sup> This theory is typically

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<sup>216</sup>See 3 POWELL, *supra* note 57, ¶ 410 (1977), and authorities cited therein.

<sup>217</sup>*Id.* ¶ 411.

employed by the courts where two or more parties share a party wall without an agreement with respect to their respective rights and duties for support and maintenance. Such theory would be particularly applicable to high-rise condominiums with respect to the maintenance of the semi-public passageways and interior supportive parts of the building. The third basis for finding easements in common property in favor of the coowners might involve judicially created easements.<sup>218</sup> These easements typically arise when an owner of a servient tenement attempts to obtain an injunction to prevent the use of an area by the dominant tenement and fails to do so. In this manner, the court will have made it impossible to remove the dominant tenement or his use of the servient tenement and in effect will have created an easement. Such an easement might occur in condominiums when the coowners' association sues to prevent the enclosure and exclusive use by one coowner of a part of the common yard area but the court allows such enclosure and use. Note the similarity between the above example and the rights of the parties to the use of limited common area.<sup>219</sup> The assessing official should not be unmindful of the importance and value of these forms of use to the coowners of condominiums.

The combination of exclusive use by one coowner and the inability to separate the physical property into viable parcels due to the statutory requirement that the common property never be separated from the fee simple estate<sup>220</sup> leads to a second theory by which the assessing official might assess condominiums. The theory here is that the *use* by the coowners of certain parts of the common property, as per the HPA, the declaration and physical construction, is such that it might be *executed* into fee simple title by the Statute of Uses.<sup>221</sup> While it is not true that the HPA was intended to create the types of unacceptable practices which caused the passage of the Statute of Uses, nevertheless, if the recommendations for the above modifi-

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<sup>218</sup>*Id.* ¶ 412.

<sup>219</sup>IND. CODE § 32-1-6-2(j) (Burns 1973) provides: " 'Limited common areas and facilities' means and includes those common areas and facilities designated in the declaration as reserved for use of certain apartment or apartments to the exclusion of the other apartments."

<sup>220</sup>*Id.* § 32-1-6-7(b).

<sup>221</sup>*Id.* § 30-4-2-9 (Burns 1972) provides: "Necessity of powers or duties.—Subject to IC 30-4-2-13, if the trustee has neither a power nor duty related to the administration of the trust, the title to the trust property will be treated as having vested directly in the beneficiary on the date of delivery to the trustee." *Id.* § 30-4-2-13 sets forth when the Statute of Uses does not apply to naked trusts. *See Elliott v. Travelers Ins. Co.*, 121 Ind. App. 400, 90 N.E.2d 274 (1951) (execution under the statute); *Nelson v. Davis*, 35 Ind. 474 (1871) (adoption of the English Statute of Uses, 27 Henry VIII, into the Indiana common law).

cations of the termination provisions of the HPA are enacted, the rights of the coowners in those parts of the common property used exclusively by other coowners will have been reduced to little more than naked legal title and the Statute of Uses might apply. When a party, other than a trustee, holds no more than legal title to property used entirely by another, there should be no reason to prevent the operation of the Statute of Uses for the limited purpose of real property taxation and assess the property as though all of the common property under such exclusive use were owned in fee simple by the user, assuming that such assessment is convenient for the Board and not objectionable to the coowner.

The property tax law provides a third theory upon which the assessing official may assess parts of the common property as though they were owned in fee simple by the exclusive user. Under such laws there are two cases where the owner of real property for purposes of taxation thereon may be a person other than the holder of the legal title: first, when the property is mortgaged, a mortgagee in possession is deemed to be the taxable owner;<sup>222</sup> and, second, a life tenant in possession is deemed to be the taxable owner.<sup>223</sup> Clearly, both of these exceptions to the legal title doctrine<sup>224</sup> involve the element of exclusive use by the outside party and are justified because such exclusive use temporarily confers the totality of benefits of ownership of the premises upon such user, including such benefits as are available from the government which levies the taxes. Although it is quite possible that those two exceptions were created in order to simplify the collection of taxes, the fact is that the law does not compel the taxing authorities always to seek the legal title holder for payment of real property taxes.

#### D. Summary

The following suggestions for adjustments in the property tax laws are based on the above discussion and are in addition to the suggestions contained in the section concerning the HPA.

##### 1. "True Cash Value" Should Be Defined as "Fair Market Value"

Too much emphasis is currently placed on equating reproduction cost to "assessed value" in the 1968 and 1976 Appraisal Manuals.<sup>225</sup> To

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<sup>222</sup>IND. CODE § 6-1.1-1-9(d) (Burns Supp. 1976), as set forth in note 146 *supra*.

<sup>223</sup>*Id.* § 6-1.1-1-9(f), as set forth in note 146 *supra*.

<sup>224</sup>*Id.* § 6-1.1-1-9(b) and (c), as set forth in note 146 *supra*; see authorities also cited therein.

<sup>225</sup>See discussion at notes 188-92 *supra*.

achieve the constitutional goal of uniformity and equality<sup>226</sup> and to protect the Board from continued litigation on the question of accurate use of such assessment manuals, the Indiana General Assembly should define "true cash value" as "market value." In addition, the Indiana General Assembly should prescribe to the Board that its rules and regulations should be intended to achieve "market value." The Indiana General Assembly is free, of course, to set forth the *extent* to which each approach to value should be considered before an assessment will be deemed to have been prepared in conformance with the statute.

## 2. Land Value Changes

The Indiana General Assembly or the Board should provide that when land undergoes a change in use or zoning, followed by a reassessment as of the following March 1st<sup>227</sup> based upon change in value caused thereby, the value placed upon the land should be that which the land would have had if the change and reassessment had occurred on the date of the last general reassessment of all real property, or the date being used by the Board for assessing improvements, whichever is then applicable.

## 3. Amendment of Regulations

The issues raised in condominium and townhouse assessment and *Valparaiso*<sup>228</sup> indicate that the Indiana General Assembly should anticipate that there will be assessment problems of a minor nature which will require swift action by the Board. The 1968 Appraisal Manual has not been modified *in part* since its promulgation in 1968.<sup>229</sup> The Indiana General Assembly should consider ways in which the Board may be more flexible in order to meet unanticipated situations.

## 4. Assessment of Condominiums and Townhouses as Separate Parcels

One suggested standard method for assessing condominiums<sup>230</sup> bears much resemblance to the method now used by the Board for the assessment of townhouse improvements.<sup>231</sup> Each condominium unit

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<sup>226</sup>IND. CONST. art. 10, § 1.

<sup>227</sup>IND. CODE § 6-1.1-1-2 (Burns Supp. 1976).

<sup>228</sup>330 N.E.2d 395 (Ind. Ct. App. 1975).

<sup>229</sup>The complete revision of the 1968 Appraisal Manual by promulgation of a revision to Regulation No. 17 in 1976-1977, the 1976 Appraisal Manual, is the first and only modification of the 1968 Appraisal Manual, despite the passage of Pub. L. No. 47, § 1, 1975 Ind. Acts 247, the complete revision of the property tax laws.

<sup>230</sup>See Exhibit F *infra*.

<sup>231</sup>See Exhibit C *infra*.

is assumed to be legally separable from the others for assessment purposes. All condominium common property which is subject to exclusive use by the respective coowner is included in his assessment as though owned in fee, with the exception of the land. The fact that some walls are common walls with other units is taken into consideration by the use of the Apartment Pricing Schedule.<sup>232</sup> Land and such other common property as is shared by all of the coowners is allocated to the units according to their respective percentages of undivided interest. Thus, this method allocates common property to those units which have its exclusive use, independent of the legal title, and allocates those portions of the common property which are not subject to exclusive use by one coowner according to the legal title. Use of this method for purposes of assessing real property may be based upon the three theories discussed at length above: the legal fiction of easements over commonly owned property,<sup>233</sup> the legal fiction of an execution of "uses" into fee simple title under the Statute of Uses,<sup>234</sup> and an extension of the two statutory exceptions to the otherwise strict requirement that the taxes should be paid by the legal title holder.<sup>235</sup> Unfortunately, although this suggested method would allow the assessing official to uniformly assess condominiums by using the 1968 Appraisal Manual, the resulting assessment would still lack the validity which could be generated by proper use of the market data approach to value.<sup>236</sup> This defect in validity is, however, inherent in many other property assessments and is not correctable without a change in direction from the Board, support from the Indiana General Assembly and the courts and dedication by the county and township assessing officials to such change in direction.

#### IV. CONCLUSION

In comparison with more traditional forms of housing, condominiums are quite new to Indiana. As a result, many serious problems involving internal operations and termination of condominium projects have not yet been experienced by the citizens of Indiana. On the other hand, real property taxation is one of the oldest forms of taxation, and it is clear that such tax laws create several unique problems when applied to condominiums. The above suggestions are intended to aid in legislative and administrative solutions to such problems before needless financial hardship is incurred by Indiana condominium owners.

PHILIP C. THRASHER

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<sup>232</sup>See Exhibit A *infra* and note 143 *supra*.

<sup>233</sup>See text accompanying notes 216-19 *supra*.

<sup>234</sup>See text accompanying notes 220-21 *supra*.

<sup>235</sup>See text accompanying notes 222-24 *supra*.

<sup>236</sup>See discussion in note 187 *supra*.

**EXHIBIT A**  
**APARTMENT PRICING SCHEDULE**

WOOD JOISTS					FIRE RESISTANT			REINFORCED CONCRETE			QUALITY		
Unit Area	BRICK		FRAME		Unit Area	First Flr.	Upper Flr.	Unit Area	First Flr.	Upper Flr.			
	First Flr.	Upper Flr.	First Flr.	Upper Flr.									
300	12.35	11.70	11.75	11.10	300	13.60	12.90	300	14.20	13.45	AA	+50	338
350	11.55	10.90	10.95	10.35	350	12.65	11.95	350	13.25	12.50		+25	281
400	10.85	10.20	10.30	9.70	400	11.90	11.20	400	12.45	11.70		+10	248
450	10.25	9.60	9.75	9.10	450	11.25	10.55	450	11.75	11.05			225
500	9.75	9.10	9.25	8.65	500	10.70	10.00	500	11.20	10.45		+40	210
550	9.30	8.65	8.80	8.25	550	10.25	9.55	550	10.70	9.95	+30	195	
600	8.95	8.30	8.50	7.85	600	9.85	9.10	600	10.30	9.55	+20	180	
650	8.60	7.95	8.15	7.60	650	9.45	8.75	650	9.90	9.15	+10	165	
700	8.35	7.70	7.90	7.30	700	9.15	8.45	700	9.60	8.80	+5	158	
750	8.10	7.45	7.75	7.10	750	8.90	8.25	750	9.30	8.55		150	
800	7.90	7.25	7.50	6.85	800	8.70	7.95	800	9.10	8.35	A	-5	143
850	7.75	7.10	7.35	6.70	850	8.50	7.80	850	8.90	8.15		±10	135
900	7.60	6.90	7.20	6.60	900	8.35	7.65	900	8.70	7.95		+5	128
950	7.40	6.75	7.05	6.45	950	8.15	7.40	950	8.55	7.80	B		122
1000	7.30	6.60	6.95	6.30	1000	7.95	7.25	1000	8.35	7.60		-5	116
1050	7.15	6.50	6.80	6.15	1050	7.85	7.15	1050	8.25	7.45	±10	110	
1100	7.05	6.40	6.70	6.05	1100	7.75	7.05	1100	8.10	7.35	+5	105	
1150	7.00	6.35	6.65	6.00	1150	7.70	7.00	1150	8.00	7.25	C		100
1200	6.90	6.30	6.60	5.95	1200	7.65	6.95	1200	7.95	7.20		-5	95
1250	6.85	6.25	6.55	5.90	1250	7.60	6.90	1250	7.90	7.15		±10	90
1300	6.80	6.15	6.50	5.85	1300	7.50	6.80	1300	7.85	7.10		+5	86
1350	6.75	6.10	6.45	5.80	1350	7.45	6.75	1350	7.80	7.05			82
1400	6.70	6.05	6.40	5.75	1400	7.40	6.70	1400	7.75	7.00	D	-5	78
1450	6.65	6.00	6.35	5.70	1450	7.35	6.65	1450	7.70	6.95		-10	74
1500	6.60	5.95	6.30	5.65	1500	7.30	6.60	1500	7.65	6.90		-20	66
Over	6.50	5.85	6.20	5.55	Over	7.20	6.50	Over	7.55	6.80		-30	57
													50
											E	-10	45
												-20	40
												-30	35
												-40	30
												-50	25

To obtain average unit area divide total finished areas of all floors by the number of apartment units. (High rise structures: the first floor may house a small lobby, and the balance devoted to commercial use. In this situation the first floor area should not be used in computing the average unit area and an appropriate square foot rate should be selected from the commercial schedule.)

**UNFINISHED BASEMENT:**

Wood joist buildings Use 2.70 S/F  
 Fire resistant buildings Use 3.80 S/F  
 Reinforced concrete buildings Use 4.30 S/F

**FINISHED BASEMENT:**

Use upper floor square foot price.

**HEIGHT ADJUSTMENT:**

Add 1% to total base price for each floor above three stories.

**PLUMBING:**

Base price includes standard plumbing for each unit. Add \$200.00 for each additional fixture.

**AIR CONDITIONING:**

Central system add .50 S/F Per Floor or  
 Efficiency Units 350 Per Unit  
 1 Bedroom Units 400 Per Unit  
 2 Bedroom Units 500 Per Unit  
 3 Bedroom Units 600 Per Unit  
 Window or wall type package units are Personal Property

**ELEVATORS:**

Use elevator schedule and convert price to square foot of building area.

**MINOR ADDITIONS:**

Price from dwelling schedule.

**TOWNHOUSE (ROW TYPE) APTS:**

Add 10% to unit base price for end units only.

**EXHIBIT B**  
**HYPOTHETICAL APARTMENT BUILDING ASSESSMENT**

Description: Unit A: 500 sq. ft., one bath, one story, end unit, all frame (no brick).  
 Unit B: 1,000 sq. ft., 1½ bath, one story, inside unit, half brick, 150 sq. ft. patio.  
 Unit C: 1,500 sq. ft., two baths, two story, inside unit, 25% brick, 150 sq. ft. patio, inside fireplace.  
 Unit D: 2,000 sq. ft., two bath, laundry room, two story, end unit, 100% brick, 150 sq. ft. patio, inside fireplace.

Building is 100% air conditioned, somewhat better than average quality, design is ten percent better than average, no depreciation (new building), no functional or economic obsolescence.

Land is one acre, including playground area.

Parking is on adjacent dedicated street.

Assessment: Average Unit Size = 5,000 sq. ft. ÷ 4 units = 1,250 sq. ft.  
 Average Brick estimated at 50%.

	1st	2nd	Total
Rate for 1st floor	\$6.70		
Rate for 2nd floor		\$6.08	
Air-Conditioning	0.50	0.50	
Total Rates	\$7.20	\$6.58	
Sq. Ft. per floor	X3,250	X1,750	5,000
Subtotal	\$23,400	\$11,515	\$34,915
Additions: Plumbing (9 extra fixt. @ \$200)			1,800
Patios (3 @ 150 sq. ft. X \$0.60/sq. ft.)			270
Fireplaces (2 @ \$1,000)			2,000
End Unit Factor (10% + 10% = 20%, ÷ 4 units = 5%, X \$34,915)			1,746
Total Base			\$40,731
Grade Factor for higher quality (C + 10 = 110%)			X1.10
			\$44,804
Cost and Design Factor			X1.10
Total for Improvements			\$49,284
			÷ 3
Assessed Value, Improvements, say			\$16,430
Land Value @ \$10,000/acre			\$10,000
			÷ 3
Assessed Value, Land say			\$3,330
Total Assessed Value			\$19,760

**EXHIBIT C**  
**HYPOTHETICAL ASSESSMENT OF TOWNHOUSE**

Description: Same as in Exhibit B. Land is sold as 4 equal lots of 1/5 acre each. Common Property consists of 1/5 acre with playground.

	Tax Parcels				Assoc.
	Unit A	Unit B	Unit C	Unit D	
Rate for 1st floor <sup>1</sup>	\$9.25	\$7.18	\$6.40	\$6.50	—
Rate for 2nd floor <sup>1</sup>	—	—	\$5.75	\$6.20	—
Air-Conditioning	\$0.50	\$0.50	\$1.00	\$1.00	—
<b>Total Rate</b>	<b>\$9.75</b>	<b>\$7.68</b>	<b>\$13.15</b>	<b>\$13.70</b>	<b>—</b>
Times: Sq. Ft. per floor	<u>X500</u>	<u>X1000</u>	<u>X750</u>	<u>X1000</u>	—
Subtotal	\$4,875.	\$7,680.	\$9,863.	\$13,700.	—
Additions: Patios (150 sq. ft. X \$0.60)	—	90	90	90	—
Plumbing, \$200/ extra fixt.	—	400	600	800	—
Fireplace, good quality	—	—	1000	1000	—
End Unit Factor (10% + 10% = 20%, ÷ 4 units = 5%, X Subtotal above)	<u>244<sup>2</sup></u>	<u>384<sup>2</sup></u>	<u>493<sup>2</sup></u>	<u>685<sup>2</sup></u>	—
<b>Total Base</b>	<b>\$5,119</b>	<b>\$8,554</b>	<b>\$12,046</b>	<b>\$16,275</b>	<b>—</b>
Grade Factor	<u>X 1.10</u>	<u>X 1.10</u>	<u>X 1.10</u>	<u>X 1.10</u>	—
	\$5,631	\$9,409	\$13,251	\$17,903	—
Cost and Design Factor	<u>X 1.10</u>	<u>X 1.10</u>	<u>X 1.10</u>	<u>X 1.10</u>	—
<b>Total Value, Improvements</b>	<b>\$6,194</b>	<b>\$10,350</b>	<b>\$14,576</b>	<b>\$19,693</b>	<b>—</b>
	<u>÷ 3</u>	<u>÷ 3</u>	<u>÷ 3</u>	<u>÷ 3</u>	—
Assessed Value, Improvements	<u>2,060</u>	<u>3,450</u>	<u>4,860</u>	<u>6,560</u>	—
Common Property (Land)	2,000	2,000	2,000	2,000	\$2,000
Assessed Value, Land	<u>670</u>	<u>670</u>	<u>670</u>	<u>670</u>	<u>670</u>
<b>Total Assessed Value (rounded)</b>	<b><u>\$2,730</u></b>	<b><u>\$4,120</u></b>	<b><u>\$5,530</u></b>	<b><u>\$7,230</u></b>	<b><u>\$670</u></b>
<b>Grand Total Assessed Value:</b>	<b><u>\$20,280</u></b>				

<sup>1</sup>Square foot cost factors are selected on a per unit basis, rather than a per building basis.

<sup>2</sup>End Unit Additions would more properly be applied to Units A & D only, not allocated to Units B and C.

## EXHIBIT D

HYPOTHETICAL ASSESSMENT OF CONDOMINIUM USING  
PERCENTAGE INTEREST FOR ALLOCATION

Description: Same as in Exhibit B. All land is owned in common. Each unit has 25 percent undivided interest in common property.

Total Assessed Value from Exhibit B \$19,760

Assessed Value for each unit found by multiplying Total Assessed Value for the property by the respective percentage of undivided interest.

	<u>Unit A</u>	<u>Unit B</u>	<u>Unit C</u>	<u>Unit D</u>
Total Assessed Value	\$19,760	\$19,760	\$19,760	\$19,760
Percentage of Undivided Interest	<u>X .25</u>	<u>X .25</u>	<u>X .25</u>	<u>X .25</u>
Assessed Value per Unit	<u>\$4,940</u>	<u>\$4,940</u>	<u>\$4,940</u>	<u>\$4,940</u>
Total Assessed Values of all units:			<u><u>\$19,760</u></u>	

## EXHIBIT E

HYPOTHETICAL ASSESSMENT OF CONDOMINIUM  
DEDUCTING FIFTY PERCENT FEE BEFORE ALLOCATION

Description: Same as Exhibit B. Ownership and percentages of undivided interest the same as Exhibit D.

In these cases the value of the units is split evenly, half being assigned to the fee simple portion and half being allocated to common property:

	<u>Unit A</u>	<u>Unit B</u>	<u>Unit C</u>	<u>Unit D</u>	<u>Common</u>
Total Value, Improvements from Exhibit C	\$6,194	\$10,350	\$14,576	\$19,693	—
Allocation of half to Common Property	<u>(3,097)</u>	<u>(5,175)</u>	<u>(7,288)</u>	<u>(9,846)</u>	<u>\$25,406</u>
Adjusted Total for Improvements	\$3,097	\$5,175	\$7,288	\$9,847	\$25,406
Other Common Property					<u>\$10,000</u>
Total Common Property					<u>\$35,406</u>
Allocation of All Common Property to Units per Percentage Interest	<u>\$8,851</u>	<u>\$8,852</u>	<u>\$8,851</u>	<u>\$8,852</u>	<u>(35,406)<sup>1</sup></u>
Total Valuation	\$11,948	\$14,027	\$16,139	\$18,699	
	<u>÷ 3</u>	<u>÷ 3</u>	<u>÷ 3</u>	<u>÷ 3</u>	
Total Assessed Value (rounded)	<u>\$3,980</u>	<u>\$4,680</u>	<u>\$5,380</u>	<u>\$6,230</u>	
Total Assessed Value of All Units:	<u>\$20,270</u>				

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<sup>1</sup>All Common Property is, of course, allocated to the Units.

## EXHIBIT F

## SUGGESTED STANDARD CONDOMINIUM ASSESSMENT

Description: Same as in Exhibit B. Ownership and percentage of undivided interest the same as in Exhibits D and E.

	Tax Parcels			
	Unit A	Unit B	Unit C	Unit D
<sup>1</sup> Rate for First Floor	\$9.25	\$7.18	\$6.40 <sup>2</sup>	\$6.50
<sup>1</sup> Rate for Second Floor	—	—	\$5.75	\$6.20
Air Conditioning	<u>\$0.50</u>	<u>\$0.50</u>	<u>\$1.00<sup>2</sup></u>	<u>\$1.00</u>
Total Rate	\$9.75	\$7.68	\$13.15	\$13.70
Times: Sq. Ft. per Floor	<u>X 500</u>	<u>X1000</u>	<u>X 750</u>	<u>X1000</u>
Sub Total	\$4,875	\$7,680	\$9,863	\$13,700
End Unit Factor <sup>3</sup>	488	—	—	1,370
Plumbing, \$200/fixt.	—	400	600	800
Patio, 150 sq. ft. ea. <sup>4</sup>	—	90	90	90
Fireplace, good quality	—	—	1000	1000
Total Base	\$5,363	\$8,170	\$11,553	\$16,960
Grade Factor	<u>X 1.10</u>	<u>X 1.10</u>	<u>X 1.10</u>	<u>X 1.10</u>
	\$5,899	\$8,987	\$12,708	\$18,656
Cost and Design Factor	<u>X 1.10</u>	<u>X 1.10</u>	<u>X 1.10</u>	<u>X 1.10</u>
Total for Improvements	<u>\$6,489</u>	<u>\$9,886</u>	<u>\$13,979</u>	<u>\$20,522</u>
Add: Balance of Unassigned Common Property Allocated per Percentage Interest	<u>2,500</u>	<u>2,500</u>	<u>2,500</u>	<u>2,500</u>
Total Valuation	\$8,989	\$12,386	\$16,479	\$23,022
	<u>÷ 3</u>	<u>÷ 3</u>	<u>÷ 3</u>	<u>÷ 3</u>
Assessed Value (rounded)	<u>\$3,000</u>	<u>\$4,130</u>	<u>\$5,490</u>	<u>\$7,670</u>
Total Assessed Value of All Units:	<u>\$20,290<sup>5</sup></u>			

<sup>1</sup>Rate used was interpolated between Brick and Frame rates in the manual, based on percent of Brick and actual square feet per unit.

<sup>2</sup>If Unit C were all on the second floor, there would be no rate for the first floor and the air-conditioning factor would be \$0.50 (one floor only).

<sup>3</sup>End Unit factor assigned to end units only.

<sup>4</sup>Patios are Limited Common Area, assigned to units having exclusive possessory interest.

<sup>5</sup>Difference from Exhibit B is in allocation of End Unit Factor.