CONCEPT OF CONDOMINIUM OWNERSHIP

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I. INTRODUCTION AND COMMON-LAW BASIS

A. [§1.1] Introduction

The concept of the condominium as a legal form for the ownership of real property is one of the most significant developments in the common-law history of real property. It permits a system of ownership of horizontally stacked or divided spaces and has made home ownership of apartments available to almost 10% of the American population. The key characteristic that distinguishes the condominium from other forms of property ownership is that a unit owner also owns an undivided interest with other unit owners in the “common elements,” which interest cannot be separated from the unit. As a form of real property ownership, condominiums require a comprehensive allocation of rights and responsibilities regarding property use, maintenance, management, and costs; ad valorem taxation; and regulation of human behavior due to the sharing of common areas and close proximity of living. Condominium law has become one of the most burgeoning areas of law in the state of Florida and also in the most urbanized areas of the nation. This chapter is intended to provide an overview of the concept of condominium ownership while serving as an introduction to the following chapters that more specifically detail the major issues involved in condominium law and practice.

B. [§1.2] Common-Law Principles

The concept of common property and common interest ownership involves the sharing of certain facilities by numerous owners of real property. This is, in large part, a function of supply and demand caused by the decreasing amount and increasing cost of developable land in close proximity to urban centers, transportation services, and other modern conveniences. The result of these market pressures is a transformation of the American dream. The concept of each American family owning their single-family detached home on their own plot of land has largely been transformed into a concept of cluster development that generally signifies a tighter grouping of housing and use of the saved land for common areas or facilities. In the case of nonresidential development, similar supply and demand concerns have resulted in pockets of intense commercial and industrial development. Thus, regional malls, mixed use (retail/office/residential) urban skyscrapers, and planned industrial developments, as well as suburban office campuses, are a result of the modern acceptance of the common property form of development. Environmental concerns and the requirements of comprehensive governmental planning have fostered the growth of common interest ownership and common property
developments.

The fundamental basis for the sharing, management, and maintenance of property for the benefit of all concerned lies within basic real property doctrines such as covenants running with the land and equitable servitudes. In the seminal case of *Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank*, 15 N.E.2d 793, 795 (N.Y. 1938), 118 A.L.R. 973, the eminent Judge Lehman extolled the importance of the concept of covenants running with the land:

Regardless of the intention of the parties, a covenant will run with the land and will be enforceable against a subsequent purchaser of the land at the suit of one who claims the benefit of the covenant, only if the covenant complies with certain legal requirements. These requirements rest upon ancient rules and precedents. The age-old essentials of a real covenant, aside from the form of the covenant, may be summarily formulated as follows: (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one “touching” or “concerning” the land with which it runs; (3) it must appear that there is “privity of estate” between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant.

The court reasoned that although the subject covenant was an affirmative covenant to pay money, it constituted a covenant running with the land because it was a covenant to pay money for maintenance of the land and, therefore, satisfied the element of touch or concern. The court, in a detailed analysis, referred to the party wall cases whereby a covenant between adjoining property owners sharing party wall obligations was enforced for the maintenance, repair, and eventual replacement of that wall between the parties benefitting from the wall as well as their successors and assigns.

As an alternative theory to covenants running with the land, covenants discussed in this chapter are also based on the principles of equitable restrictions and equitable servitudes. The basis for enforcement of such equitable servitudes is the doctrine of notice, which is recognized in the equity courts in that one
who takes land with notice of a restriction thereon cannot in equity and good conscience be permitted to violate that restriction. Such an equitable servitude constitutes a restriction on the use of land that is enforceable in a court of equity. It is more than a mere covenant running with the land in equity, because it is an interest in the land. An equitable servitude is created by any writing complying with the statute of frauds evidencing an intention that such servitude exists.

Under modern recording statutes, either a common-law easement or an equitable servitude may be enforced against one who purchases servient land with actual or implied notice of the existence of the easement or the equitable servitude. Conversely, under such statutes, a common-law easement or equitable servitude cannot be enforced against a bona fide purchaser who takes the servient land for value and without notice of the easement or the equitable servitude. The intention of the parties determines who may enforce the equitable servitude, which intention is determined from the terms of the instrument and circumstances surrounding its execution. Instances exist when a court acting in equity may refuse to enforce an equitable servitude. In such cases, the court may find that the equitable servitude’s purpose is contrary to public policy, the granting of relief would do more harm than good, the granting of the relief prayed for would be futile, or the plaintiff is guilty of laches or violation of the servitude. In essence, the imposition of a declaration of covenants and restrictions in the form of a declaration of condominium, deed restriction, or, as commonly referred to in noncondominium developments, a declaration of “CCRs” (covenants, conditions, and restrictions) is itself a covenant running with the land and therefore is an equitable servitude.

The mere imposition of such covenants on the land would be futile and have no value or effect without enforcement capability. In a common interest or common ownership community or development, the mandatory membership association is the essential ingredient for the successful enforcement of covenants and restrictions. It is for that reason that the laws of every state have recognized the importance of the property owners’ association as the operational and managerial linchpin of the common property regime.

C. [§1.3] Historical Foundations

The term “condominium” generally connotes a system of separate ownership of individual units in multiple-unit buildings, but the term is also used to refer either to the building or to the individual units themselves. It is a form of real property ownership whereby individual units may be owned by one