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## H.B. 404: Ohio Amends Its Condominium Act

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## H.B. 404: OHIO AMENDS IT'S CONDOMINIUM ACT

### I. INTRODUCTION

Post World War II America has witnessed the rapid expansion of its urban centers, as evidenced by the development of very large, widely spread-out cities.<sup>1</sup> As a result of this pattern of development, land for single-family dwelling units has become relatively scarce, and, consequently, more expensive.<sup>2</sup> Thus, a significant challenge to our society is the need to find feasible methods of housing large numbers of people at prices that they can afford. One response to this challenge emerged in the early 1960's when the concept of the condominium grew in popularity. This living arrangement is typically characterized by multiple dwelling units which are individually owned, with common areas and facilities which are for the use and enjoyment of all the tenants and in which each individual unit owner has an undivided interest as a tenant in common.<sup>3</sup> Condominium living thus has the advantage of housing large numbers of people in a limited amount of space while at the same time providing individuals with the economic and legal benefits of home ownership.<sup>4</sup>

As a result of this rise in the popularity of condominiums, many states, including Ohio,<sup>5</sup> passed condominium legislation in the early 1960's. The Ohio law, enacted in 1963, was similar to the other states' condominium acts in that it was primarily in the nature of an enabling act;<sup>6</sup> its purpose was to recognize the legality of the concept of the condominium by defining the characteristics of condominium property and the legal rights that attached to the development and ownership of such property.<sup>7</sup>

As condominiums became more popular in the 1970's, many legislatures recognized that their condominium statutes were inadequate in scope.<sup>8</sup> The consequent call for reform<sup>9</sup> of condominium

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1. See Smith, *Hybrid Housing in Ohio: Condominium*, 15 W. RES. L. REV. 597 (1964).

2. See, e.g., Comment, *Missouri's Condominium Property Act: Time for a Change*, 42 MO. L. REV. 271 (1977).

3. Smith, *supra* note 1, at 597.

4. Kreider, *The Ohio Condominium Act*, 33 U. CIN. L. REV. 463 (1964).

5. See OHIO REV. CODE ANN. ch. 5311 (Page 1963) for the original version of the law.

6. See Smith, *supra* note 1, at 599-601.

7. The Ohio Condominium Act, as originally passed, has been well examined in the literature. See Smith, *supra* note 1, and Kreider, *supra* note 4.

8. See generally Note, *Suggested Adjustments to Indiana Condominium and Property Tax Laws*, 10 IND. L. REV. 693 (1977); Comment, *Areas of Dispute in Condominium Law*, 12 WAKE FOREST L. REV. 979 (1976).

9. For example, the National Conference of Commissioners on Uniform State

legislation has led a number of states to amend their original condominium laws.<sup>10</sup> This second generation of condominium legislation enlarges the scope of the original enabling legislation by expanding upon the provisions that govern the sale, maintenance, operation, and future development of condominium projects. The legislation is an attempt to walk the fine line between providing protection for the potential condominium purchaser and not unduly restricting the condominium developer's ability to shape his project as he sees fit.<sup>11</sup>

Effective October 1, 1978, Ohio has joined in this reform movement with the enactment of House Bill 404,<sup>12</sup> which amends the 1963 version of Ohio's Condominium Act.<sup>13</sup> The bill expands the definition of what constitutes condominium property by specifically authorizing the establishment and regulation of expandable condominiums<sup>14</sup> and conversion condominiums.<sup>15</sup> The bill also provides new protection to the prospective purchaser of condominium property by imposing a number of disclosure requirements that developers must meet when selling condominiums to individual purchasers for residential purposes.<sup>16</sup> This analysis describes and examines the more important sections of the newly amended Ohio Condominium Act with the purpose of providing the reader with a working knowledge of what the new law requires.<sup>17</sup>

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Laws has drafted a Uniform Condominium Act. In February of 1978, the American Bar Association endorsed this act. It is likely that it will serve as the prototype of future second-generation state condominium laws. For a detailed analysis of this act, see Judy and Wittie, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437 (1978).

10. See, e.g., CAL. CIV. CODE §§ 1350-1360 (West Ann. Supp. 1979); ILL. ANN. STAT. ch. 30, §§ 301-322 (Smith-Hurd 1969 & 1978 Supp.); N.Y. REAL PROP. LAW §§ 339-d—339-ii (McKinney 1968 & Supp. 1978).

11. Judy and Wittie, *supra* note 9.

12. OHIO REV. CODE ANN. ch. 5311 (Page Supp. 1978).

13. House Bill 404 specifically amends §§ 5311.01-.09, .11, .13, .18, .21, .22 of the Ohio Revised Code. It also enacts as new law §§ 5311.051, .23-.27 of the Ohio Revised Code.

14. An expandable condominium is defined by OHIO REV. CODE ANN. § 5311.01(R) (Page Supp. 1978) as: "Condominium property the original declaration of which reserves the right to add additional property." There are a number of provisions in the new law which regulate the development and sale of such property. These will be cited when analyzed specifically in the text.

15. A conversion condominium is defined by OHIO REV. CODE ANN. § 5311.01(X) (Page Supp. 1978) as: "(a) condominium development that was originally operated as a rental property occupied by tenants prior to the time that the condominium property is submitted to the provisions of this chapter and the units are offered for sale." There are again a number of provisions in the new law which regulate the development and sale of this property. These will be cited when analyzed specifically in the text.

16. See OHIO REV. CODE ANN. §§ 5311.23-.27 (Page Supp. 1978) for the basic consumer protection portions of the bill.

17. Sections 5311.10, .12, .14-.17, .19-.20, of the Ohio Revised Code have not

## II. ANALYSIS

### A. *Definitional Changes*

Section 5311.01 provides the basic definitions operating throughout this chapter of the Ohio Revised Code. House Bill 404 adds a number of new definitions to this section.<sup>18</sup> Perhaps the most significant addition is a specific definition of the term "condominium development,"<sup>19</sup> a definition which curiously was lacking in the previous version of the law. This section also provides specific definitions for expandable condominiums,<sup>20</sup> leasehold condominiums,<sup>21</sup> and

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been changed by House Bill 404 and will not be discussed in this analysis. Furthermore, the bill makes only minor changes to a number of the sections of the Ohio Condominium Act. These changes can be found in OHIO REV. CODE ANN. (Page Supp. 1978) and will not be dealt with in the text. In brief summary, the changes include:

Section 5311.03 provides that units in a condominium development are to be considered real property for all purposes of the law. The only major change to this section is the addition of subsection G, which allows for the subdividing or combining of individual units, as long as the property is not residential condominium property. The significance of this provision is that the pattern of ownership interests embodied in the condominium concept is not restricted to residential units alone. Should this form of ownership become popular in the commercial or industrial setting, the property would likely be subject to the provisions of this act.

Section 5311.051 provides the procedural mechanism whereby property added to the original condominium development after the filing of the initial declaration becomes subject to this law.

Section 5311.06, though having undergone only minor change, is a significant section in that it provides that the declaration of the condominium development, along with any amendments or drawings, are to be filed with the county recorder in the county or counties in which the land is situated. Section 5311.07 describes those drawings that must be so filed.

Section 5311.09 requires that the unit owners' association maintain complete and correct books and account records in regard to the common expenses, assessments, profits, and losses of the development. Section 5311.11 provides that each unit of the development and the allocable percentage interest in the common areas is a separate entity for taxation and assessment purposes.

Section 5311.18 provides that the unit owners' association has a lien against the individual unit owner's unit or his share in the common areas and facilities for any portion of the common expenses chargeable to such unit owner that he has failed to pay.

Section 5311.21 provides that the common profits and expenses of the condominium property are to be distributed among the unit owners according to their percentage interest in the common areas and facilities. Further, this percentage interest serves to determine each unit owner's voting interest in the unit owners' association according to section 5311.22.

18. See OHIO REV. CODE ANN. § 5311.01(E), (F), (G), (H), (M)-(Y) (Page Supp. 1978).

19. See OHIO REV. CODE ANN. § 5311.01(S) (Page Supp. 1978) which provides: "Condominium development' means a condominium property in which two or more individual dwelling units, together with undivided interests in the common areas and facilities of the property, are offered for sale pursuant to a common promotional plan."

20. OHIO REV. CODE ANN. § 5311.01(R) (Page Supp. 1978).

21. *Id.* § 5311.01(W).

conversion condominiums.<sup>22</sup> The significance of including these definitions lies in the fact that the existence of such property is now expressly recognized in the law. Further, many of the later provisions in the bill apply only to condominiums of these types. Expandable condominium developments are those in which the developer, upon original filing of the condominium declaration,<sup>23</sup> reserves the right to add more units or land to the development at a future date. Leasehold condominiums are those in which the unit owners own a 99-year lease in their own unit and a concurrent leasehold interest in the common areas and facilities<sup>24</sup> of the development. Finally, conversion condominium developments are those multiple dwelling complexes originally operated as rental property, in which the owner has now decided to sell the units individually as condominiums instead of continuing to rent them. Thus, by enlarging upon the definition of what constitutes condominium property, two new sources of potentially lower-cost housing, original rental property and currently operating condominium developments capable of being expanded, are added to the consumer's housing investment possibilities.

Section 5311.01 also provides a number of new definitions which have relevance to the sale of condominiums. It describes who is to be deemed a developer of condominium property,<sup>25</sup> and who can be charged with being his agent.<sup>26</sup> Further, it defines what constitute the "condominium instruments"<sup>27</sup> that are required by the later consumer protection provisions<sup>28</sup> to make certain disclosures. Finally, this section also defines what constitutes a sale of a condominium interest.<sup>29</sup> Because the bill primarily regulates transactions between developers and individuals purchasing the units for purposes of residing therein, it exempts sales from one developer to another or to a financial institution from the requirements of the act.<sup>30</sup>

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22. *Id.* § 5311.01(X).

23. Section 5311.02 of the Ohio Revised Code provides that the condominium law is only applicable to that property which is submitted to its provisions via a filing of a declaration. Sections 5311.05 and 5311.06 of the Ohio Revised Code provide for the mechanics of filing such a declaration.

24. "Common areas and facilities" are defined by section 5311.01(B) of the Ohio Revised Code and have not been changed by House Bill 404. They consist primarily of the land the units are situated on, along with all other "facilities, places, and structures" that aren't part of the units, including basements, yards, central services, gardens, parking areas, offices, and the like.

25. Ohio Rev. Code Ann. § 5311.01(T) (Page Supp. 1978).

26. *Id.* § 5311.01(U).

27. *Id.* § 5311.01(P).

28. *Id.* §§ 5311.23-.27.

29. *Id.* § 5311.01(N).

30. This distinction is in keeping with the general consumer protection nature of

### B. Declaration Requirements

Section 5311.02 is the registration provision which activates the remainder of the Condominium Act. It provides that chapter 5311 of the Ohio Revised Code applies only to property for which a declaration is filed under sections 5311.05 and 5311.06. This section has not been substantively altered by House Bill 404.<sup>31</sup>

Section 5311.05 previously required that a declaration registering a condominium development include a description of the land,<sup>32</sup> any restrictions on the use of the property,<sup>33</sup> descriptive information about each unit<sup>34</sup> and the common areas and facilities,<sup>35</sup> and provisions requiring the establishment of a unit owner's association to administer the condominium property.<sup>36</sup> House Bill 404 requires additional information in the declarations that establish expandable condominium property<sup>37</sup> and leasehold condominium property.<sup>38</sup>

Section 5311.05(C) sets out the declaration requirements for expandable condominiums. The law now requires that the original declaration explicitly reserve the declarant's right to expand his development in the future.<sup>39</sup> Absent such a reservation, the property registered is not subject to expansion. Further, the act requires that any limitations on the declarant's option to expand his development be stated, including whether consent of the unit owners to expansion is required.<sup>40</sup> The declaration must also contain a legal description of any property

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this bill. Commercial entities are presumably on an equal bargaining basis with each other and do not need the protections that an individual consumer would when dealing with a commercial entity.

31. Thus, to a certain extent, the Ohio Condominium Act is a voluntary measure. A developer may conceivably choose not to file his property as condominium property so that he is not subject to the law's consumer protection provisions. In such a case, any transactions he enters into are presumably governed by the common law. From a practical standpoint, however, this decision is unlikely to occur. Apart from the problems that such a developer would encounter in obtaining financing from lending institutions, the developer would find himself at a competitive sales disadvantage with those who had chosen to submit to the act and its disclosure requirements in that most, if not all, potential purchasers would choose to take advantage of the bill's protective provisions by buying from a seller whose actions would be governed by the act. See Smith, *supra* note 1, at 605.

32. OHIO REV. CODE ANN. § 5311.05(B)(1) (Page Supp. 1978).

33. *Id.* § 5311.05(B)(3).

34. *Id.* § 5311.05(B)(5).

35. *Id.* § 5311.05(B)(6).

36. *Id.* § 5311.05(B)(7)-(8).

37. *Id.* § 5311.05(C).

38. *Id.* § 5311.05(D).

39. *Id.* § 5311.05(C)(1).

40. *Id.* § 5311.05(C)(2).

that may be added later to the condominium development,<sup>41</sup> along with any limitations on how much of this property is to be added at a time,<sup>42</sup> or when additions can be made.<sup>43</sup> The bill requires that the declaration state the maximum number of units that can be built on the additional property,<sup>44</sup> as well as any architectural style limitations that will be imposed on the new units<sup>45</sup> or on any other structures on the additional property.<sup>46</sup> The declaration must list any improvements that must be made to the additional property before it can be developed.<sup>47</sup> The declarant is further required to expressly reserve his right to create common areas and facilities on the additional land.<sup>48</sup> The declaration must also specify a time limit, not greater than seven years from the date the declaration is filed, within which the developer must exercise his option to expand.<sup>49</sup> This option is renewable for another seven years if the developer seeks renewal within six months of the expiration of the original option period and the majority of the unit owners consent to the extension.<sup>50</sup> Finally, the declarant must submit any drawings and plans he thinks appropriate to supplement the information required by this section.<sup>51</sup>

In sum, section 5311.05 leaves developers essentially free to develop their condominiums as they see fit; but they must make their intentions known in the declaration creating the property. In this way, potential purchasers of condominiums, who have a right to see the declaration, are informed of the conditions that might affect their decisions to purchase. Other than factual disputes as to whether the required information was properly included in the declaration, this section is not likely to be the object of litigation.

### C. *Ownership Rights Affected*

A number of modifications have been made to individual unit owners' property rights by the passage of House Bill 404. Although the

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41. *Id.* § 5311.05(C)(4).

42. *Id.* § 5311.05(C)(5).

43. *Id.* § 5311.05(C)(6).

44. *Id.* § 5311.05(C)(8).

45. *Id.* § 5311.05(C)(12).

46. *Id.* § 5311.05(C)(10).

47. *Id.* § 5311.05(C)(11).

48. *Id.* § 5311.05(C)(13).

49. *Id.* § 5311.05(C)(3).

50. *Id.* This imposition of a time limit in which the owner can expand his development is arguably an anomaly in the bill in that most of the other provisions of this section require the declarant to do nothing more than make his intentions known. The state's purpose may be just as well served by requiring only that the declarant make known his intent to someday expand the condominium development, rather than limiting the period of time during which he can expand.

51. *Ohio Rev. Code Ann.* § 5311.05(C)(14) (Page Supp. 1978).

unit owners continue to own common areas and facilities as tenants in common, the new law does make substantial changes in how this ownership interest is computed.<sup>52</sup> Under prior law, an individual unit owner's share in the common areas was equivalent to the proportion of the fair market value of his unit to the aggregate fair market value of all the units at the time of the filing of the original declaration. Thus, if at the time of filing, the individual's unit had a fair market value of "X" and the entire complex had a fair market value of "10X", the individual would have a ten percent share in the common areas and thus be entitled to share in ten percent of the profits or be required to pay ten percent of the expenses arising from such common areas.

The amended version of the Ohio Condominium Act still requires the declaration to describe the interest each unit owner has in the common areas; however, the interest may be computed not only on the basis of the relative fair market value as before, but alternatively, on the basis of each unit's size or on the basis of each unit's "par value."<sup>53</sup> The bill provides that if par values are assigned for any unit, they must be assigned for all units. Units that are substantially identical must be given the same par value, but the bill makes clear that otherwise identical units can be assigned different par values based on their location within the complex, the view they have, or other similar factors. Par values need not be directly proportional to the sale price or fair market value of any unit.

The importance of this allocation of ownership is that the tax assessments and other expenses of maintaining the common areas is allocated among the unit owners based on their proportional interest in the whole. Under the old law, those individuals who owned the higher priced units had to pay a larger share of the condominium assessments. This, however, was felt to be unfair because use of the common areas and facilities did not always bear a relationship to the value of one's unit. By establishing alternative methods of computing one's ownership in such areas, the legislature has attempted to provide a plan whereby maintenance costs can be distributed more equally among the unit owners, thereby eliminating a possible disincentive to invest in the more expensive condominium units that the prior law contained.

The earlier version of the Ohio Condominium Act provided that all condominium property be administered by a unit owners' association,<sup>54</sup> which in turn operated through an elected board of

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52. *Id.* § 5311.04(B).

53. *Id.* "Par value" is defined by section 5311.01(Y) of the Ohio Revised Code as "a number expressed in dollars or points attached to a unit by the declaration."

54. *Id.* § 5311.08(A).

managers.<sup>55</sup> The law was silent as to how such associations were to be formed and how the association's board of managers were to be elected. House Bill 404 fills this gap by adding two provisions<sup>56</sup> that provide the procedural framework for forming such associations and electing the board of managers.

According to subsection 5311.08(C) of the new law, the unit owners' association is to be formed immediately after the first sale of a unit in the condominium development. Membership in the association is limited to unit owners only, and all unit owners are members. When units holding at least twenty-five percent of the interests in the common areas and facilities have been sold, the unit owners, excluding the developer, must elect at least twenty-five percent of the board of managers. When fifty percent of the interests in the common areas and facilities have been sold, the unit owners must elect at least one third of the board of managers.

The developer still maintains significant control over the unit owners' association because, except for members elected pursuant to subsection 5311.08(C) discussed above, he has the right to directly appoint and remove members of the board of managers and to exercise the powers of the association that are granted by law or by declaration.<sup>57</sup> The developer maintains this power for a period of three years after the formation of the association<sup>58</sup> or for thirty days after the sale of seventy-five percent of the condominium instruments, whichever is earlier. After this control period expires, the unit owners are entitled to elect all members of the board of managers.

This section of the Ohio Condominium Act is a reasonable compromise in that it protects the condominium developer's investment while providing for a gradual takeover of the management association by the unit owners themselves. Since the association is the administrative body of the condominium development and makes important decisions regarding the project, it seems fair that control of this body should rest with the ones who have the greatest interest at stake. In the early stages of the project, the developer retains administrative control; as more and more units are sold, the purchasers' interests are protected by the gradual relinquishment of control of the association by the developer to the unit owners.

Section 5311.13 subjects condominium property to the same general regulations with respect to liens and encumbrances as other

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55. *Id.* § 5311.08(B).

56. *Id.* §§ 5311.08(C)-(D).

57. *Id.* § 5311.08(D).

58. In the case of expandable condominiums, this period is for five years.

real estate<sup>59</sup> with certain minor exceptions.<sup>60</sup> The bill has made some changes in regard to mechanics' liens in order to protect the purchaser of the condominium unit. The new law provides that in the case of mechanics' liens for labor, machinery, material, or fuel furnished for property which later becomes condominium property by properly filing a declaration, the liens are only enforceable against the condominium property owned by the declarant.<sup>61</sup> The liens are unenforceable against purchasers of the units for residential purposes, unless the lien has been filed and recorded prior to the filing and recording of the instrument of conveyance to the unit purchaser.<sup>62</sup>

#### D. Consumer Protection Provisions

Sections 5311.25 and 5311.26 comprise the basic consumer protection provisions of the new Ohio Condominium Act. Section 5311.24 limits the application of the above two provisions<sup>63</sup> by stating that they are not applicable to sales of condominiums that are made solely for commercial or industrial purposes;<sup>64</sup> sales pursuant to a court order<sup>65</sup> or by the federal, state, or local government;<sup>66</sup> and sales by those who are not the declarant, developer, or his agent.<sup>67</sup> Thus, this section makes clear that the Ohio Condominium Act intends to regulate only the transactions between condominium developers and purchasers who buy with the purpose of residing in the unit. The sale of interests by one business entity to another or by one resident to another prospective resident are not regulated because these parties are presumed to be on an equal footing with respect to bargaining power and in less need of the act's protection.

Section 5311.25 is one of the major changes in the Ohio Condominium Act. It requires that certain terms be contained in the condominium instruments and that no developer or agent sell condominium property unless such instruments contain this information. Failure to comply with this section will subject the seller to the remedies provided in section 5311.27.<sup>68</sup>

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59. OHIO REV. CODE ANN. § 5311.13(A) (Page Supp. 1978).

60. *Id.* § 5311.13(B)-(D).

61. *Id.* § 5311.13(E).

62. *Id.* § 5311.13(F).

63. Section 5311.24 of the Ohio Revised Code also excludes the transactions discussed in notes 64-67 *infra* from the enforcement provisions of section 5311.27 of the Ohio Revised Code.

64. OHIO REV. CODE ANN. § 5311.24(A) (Page Supp. 1978).

65. *Id.* § 5311.24(B).

66. *Id.* § 5311.24(C).

67. *Id.* § 5311.24(D).

68. See notes 99-113 and accompanying text *infra*.

Under the new law, the condominium instrument must provide that any deposits or down payments made in connection with the sale are to be held in trust or escrow until credited toward the purchase or returned to the purchaser.<sup>69</sup> If the deposit is greater than \$2,000, interest of at least four percent per year must be credited to the purchaser for any period of time that such deposit is held for more than ninety days.<sup>70</sup> Further, the deposits and down payments are not subject to attachment by creditors of the developer or purchaser.<sup>71</sup>

The condominium instrument must also contain several provisions detailing the rights of the developers and the unit owners. First, the developer is treated as the unit owner of all unsold condominium interests and consequently has the rights and obligations, including payment of common expenses, of those unit owners.<sup>72</sup> Except in this capacity as the unit owner of unsold interests, the developer or his agent retains no property interest in the common areas and facilities once control of the development is taken over by the unit owners' association.<sup>73</sup> Finally, the unit owners' association is bound only for a period of one year by any contracts executed prior to the assumption of control of the association by the unit owners.<sup>74</sup> Again, these provisions define for the potential purchaser what he can expect regarding his rights and liabilities should he purchase a condominium unit.

The new law also requires the condominium instrument to contain certain warranties. The developer must provide at least a two-year warranty covering the cost of labor and materials for any repair or replacement of elements serving the entire development, including the roof, structural components, and the mechanical, electrical, plumbing and common service elements.<sup>75</sup> He must also provide a similar one-year warranty pertaining to each unit.<sup>76</sup> These warranties cover any defect in material and workmanship.<sup>77</sup> The two-year warranty begins to run

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69. OHIO REV. CODE ANN. § 5311.25(A) (Page Supp. 1978).

70. *Id.*

71. *Id.* § 5311.25(G).

72. *Id.* § 5311.25(F).

73. *Id.* § 5311.25(B). This provision also allows certain exceptions to the general rule given in the text in that, in the case of leasehold condominiums, the developer can retain the same interest in the common areas that he retains in the development as a whole. In the case of expandable condominiums, he can retain an interest consistent with the terms of the declaration. Finally, the developer retains any property interest in the recreational facilities furnished to the unit owners that he has retained or acquired by a contract with them.

74. *Id.* § 5311.25(D).

75. *Id.* § 5311.25(E).

76. *Id.*

77. *Id.*

following the sale of the first unit;<sup>78</sup> the one-year warranty period begins as each unit is sold.<sup>79</sup> In the case of appliances installed and furnished by the developer, the developer can meet his warranty obligations by assigning to the unit owners any express or implied warranties made by the appliance manufacturer.<sup>80</sup> The developer must assign to the unit owners any warranties made by manufacturers to the developer that are in excess of the one-year and two-year limits stated in this act.<sup>81</sup> These warranty provisions make clear to the developer that he will have to meet certain standards of quality in building his project.

Finally, in the case of a conversion condominium, the developer must assure prospective purchasers that he gave all his previous tenants a ninety-day option to purchase a condominium interest in the development. Tenants deciding not to purchase must have been given at least 120 days notice to vacate the premises.<sup>82</sup> The stated purpose of these requirements is to "facilitate the conversion."<sup>83</sup>

Section 5311.26 is the other major consumer protection portion of House Bill 404. It prohibits a developer or agent from selling a condominium unless he has provided the potential purchaser with a "reliable and understandable written statement" of all material information concerning the condominium development.<sup>84</sup> This provision attempts to insure that the prospective buyer is fully aware of those factors that may influence his decision to purchase.

The statement can not intentionally omit any material fact or contain any untrue statements. In addition, the statement must contain a number of factual items, including the name and address of the condominium development, the developer, or his agent;<sup>85</sup> a general description of the development, including the number, type, and price

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78. *Id.* § 5311.25(E)(1).

79. *Id.* § 5311.25(E)(3).

80. *Id.* § 5311.25(E)(4).

81. *Id.* § 5311.25(E)(5).

82. *Id.* § 5311.25(G).

83. *Id.* This provision treats owners of conversion condominiums differently than the law treats other landlords. Landlords who rent other residential property and then decide to sell it are not similarly restricted. One of the reasons for this provision may be to protect condominium purchasers from potential problems of access, but that protection could probably be just as well provided by notifying them that the property has been converted from rental property. Since no legal wrong is perpetrated on the tenant as long as the landlord stays within the bounds of the lease agreement, the Ohio Legislature has perhaps inappropriately expanded the rights of the former tenant beyond his formal contractual arrangement with his landlord.

84. *Id.* § 5311.26. It is likely that much of the litigation arising from this bill will focus on the interpretation to be given to the term "material information."

85. *Id.* § 5311.26(A).

of present and future units;<sup>86</sup> information as to the status of construction and projected completion dates of buildings and common areas and facilities;<sup>87</sup> financing terms offered by the developer along with a clear notice that the purchaser is free to obtain his own financial arrangements;<sup>88</sup> a description of warranties;<sup>89</sup> the terms of any matters of title affecting the property;<sup>90</sup> a notice of any restraints on the free alienability of the property;<sup>91</sup> and a description of any present litigation concerning the development.<sup>92</sup> With conversion condominiums, the statement must include the age, the condition, the developer's estimate of the remaining useful life of the structural elements and the developer's five-year estimate of repair and replacement costs for the development. This information is to be based upon facts reasonably ascertainable by the developer through inspection of the relevant drawings and records pertaining to the development and by a personal inspection of the premises where feasible.<sup>93</sup>

The above requirements, which are designed to clearly inform the purchaser, do not seem to be too restrictive on the developer. Some of the informational requirements provided for in section 5311.26, however, present some practical problems. First, subsection 5311.26(E) requires that the developer provide a two-year projection, updated every six months, of annual expenditures necessary to maintain and operate the common facilities. The developer must also provide estimates of the monthly costs per unit of taxes, insurance, utilities, and maintenance expenses. Some of these costs are highly unpredictable. It is unclear to what extent a developer would be liable for making estimates that vary widely from actual costs. To argue that estimates need not be accurate would seem to defeat the purpose of this provision. If the enforcement remedies available under this act<sup>94</sup> are applied for inaccuracies, this section might place hardship on developers. At a minimum, preparing these detailed cost projections imposes ongoing, additional costs on the developer which likely will be passed on to the purchasers.

Three other provisions of this section present a similar problem. Subsection 5311.26(H) requires a statement of significant provisions

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86. *Id.* § 5311.26(B).

87. *Id.* § 5311.26(C).

88. *Id.* § 5311.26(D).

89. *Id.* § 5311.26(E).

90. *Id.* § 5311.26(L).

91. *Id.* § 5311.26(N).

92. *Id.* § 5311.26(O).

93. *Id.* § 5311.26(G).

94. See notes 99-113 and accompanying text *infra*.

for management of the condominium development, including the contractual rights and responsibilities of the unit owners' association. Subsection 5311.26(I) requires that a facsimile of any management contract affecting the operation of the development be made available to the potential consumer along with a statement of the effect of each agreement upon the purchaser. Subsection 5311.26(J) requires a conspicuous statement of the purchaser's right to review the condominium instruments, his right to void the contract, and his rights under the remedy provision of this act.<sup>95</sup> These provisions, though all laudable in their attempt to protect the consumer, place the developer and his lawyer in the position of having to predict the effects of certain contracts and statutory rights. Since the interpretation and effect of any one contract or statute are items upon which reasonable minds can differ, it is uncertain what errors will constitute inadequate compliance with this provision and might permit voiding of the contract under subsection 5311.27(A).

#### *E. Enforcement Provisions*

Two entirely new sections of the Ohio Condominium Act create the mechanism for its enforcement.<sup>96</sup> Section 5311.23 is of special importance to the practitioner because it authorizes certain statutory causes of action. First, the declarant, developer, his agent, or unit owners are liable in a civil action for any damages caused by their failure to comply with the provisions of the condominium instruments.<sup>97</sup> Also, the new law allows any interested person to bring a declaratory judgment action to determine his rights under the condominium instruments. He may also seek an injunction to assure that the declarant, developer, his agent, or unit owner comply with the provisions of the instrument. Finally, the law specifically allows any unit owner to bring a class action on behalf of all the unit owners.

In specifically authorizing these several forms of action when there is noncompliance with the requirements of the condominium instruments, section 5311.23 removes any doubt as to the legal effect that these instruments are to have. Perhaps the most troublesome aspect of this section is the provision for a class action. The fear of having to pay a large class judgment plus the other party's possibly large

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95. See OHIO REV. CODE ANN. § 5311.27 (Page Supp. 1978).

96. *Id.* §§ 5311.23, .27.

97. See note 27 and accompanying text *supra* for the definition of condominium instruments. See notes 68-83 and accompanying text *supra* for a discussion of what information these instruments must contain.

attorney's fees,<sup>98</sup> should he be unsuccessful in defending against a class action suit, may well force a developer to settle out of court rather than go through extended, complex litigation even when the developer is not at fault or has a good defense. On the other hand, class actions increase the likelihood that those with low incomes, who might not otherwise be able to afford legal action, will have a way to vindicate their rights.

Sections 5311.25 and 5311.26 provide the basic disclosure requirements of the new Ohio Condominium Act. Section 5311.27 serves to make those sections effective by providing remedies for contracts violating those provisions.

First, subsection 5311.27(A) provides that the purchaser has the right to void any contract made for the sale of a condominium unit if such sale was made in violation of any of the disclosure requirements of sections 5311.25 and 5311.26.<sup>99</sup> This right exists for a period of fifteen days after the sale or fifteen days after the purchaser has received the disclosure information required in section 5311.26, whichever comes later. If the contract is voided, the purchaser's deposit, plus any additional money he has paid on the purchase and any closing costs he might have paid, must be refunded in full. This remedy is available in addition to any other remedy the purchaser might have. Thus if the fifteen-day period has passed, the purchaser still can pursue any other action he might have for violation of the terms of the sale contract including, conceivably, rescission of the contract. The new law makes no distinction between major violations of the disclosure requirements and minor transgressions. The section, as currently enacted, may serve more to provide buyers who have perhaps acted too hastily with a fifteen-day period to look for technical violations of sections 5311.25 and 5311.26 that will permit them to void the contract should they decide not to carry through with the purchase. When considering the magnitude of the investment involved in purchasing a condominium, this "cooling-off" period does not seem to be an altogether unreasonable protective device for the consumer, especially since he still must prove some violation of the disclosure requirements.

Subsection 5311.27(B) provides the measure of damages that the purchaser can receive from the developer or agent who sells in violation of the disclosure requirements. The purchaser can receive the dif-

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98. Subsection 5311.27(B)(3) of the Ohio Revised Code provides for the recovery of reasonable attorneys' fees. It is unclear whether this provision applies to class actions, but since no restrictions other than reasonableness have been placed on this recovery, even attorneys' fees in a class suit are probably recoverable.

99. See notes 63-95 and accompanying text *supra* for a discussion of these provisions.

ference between the purchase price and the lesser of (1) fair market value of the property at the time the suit is brought,<sup>100</sup> (2) the price at which the property is sold after the violation but prior to suit,<sup>101</sup> or (3) the price at which the property is sold after the suit has been initiated but prior to judgment.<sup>102</sup> In the latter two cases, the sale must be a *bona fide* market transaction. Thus, the aggrieved purchaser can not sell his property at an artificially low price in order to increase damages against the developer. In any case, the purchaser is entitled to recover at least \$500 from the developer;<sup>103</sup> a penalty is imposed on the developer even if the purchaser has suffered no actual monetary damages. The purchaser can also recover court costs and attorney fees.<sup>104</sup> The law discourages frivolous suits by providing that if the court determines that the suit was in bad faith or that the purchaser knew the suit to be groundless, reasonable attorneys' fees will be awarded to the developer.<sup>105</sup>

In addition to the above private forms of action, the new law also contemplates a public form of action. The Ohio Attorney General may bring a declaratory judgment action<sup>106</sup> to determine that an act or practice of the developer is in violation of the consumer protection provisions of the law.<sup>107</sup> He may also seek an injunction against such a developer.<sup>108</sup> Furthermore, the Attorney General may institute a class action proceeding against the developer on behalf of those persons injured by the developer's violations of the disclosure requirements.<sup>109</sup> The Attorney General must bring any action within two years of the violation.<sup>110</sup> Also, he can only take action when he has reason to believe that a "substantial number of persons are affected and substantial harm is occurring"<sup>111</sup> as a result of the developer's actions or when the case is of "substantial public interest."<sup>112</sup>

This subsection of the law is designed to insure that individual consumers who do not have the resources to tackle a large development corporation in extended litigation may still be protected by the state ac-

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100. OHIO REV. CODE ANN. § 5311.27(B)(1) (Page Supp. 1978).

101. *Id.* § 5311.27(B)(2).

102. *Id.* § 5311.27(B)(3).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* § 5311.27(C)(1).

107. *Id.* §§ 5311.25-.26.

108. *Id.* § 5311.27(C)(1).

109. *Id.* § 5311.27(C)(2).

110. *Id.*

111. *Id.* § 5311.27(C).

112. *Id.*

ting in their behalf. The message is clear to all developers that major violations of the provisions of the Ohio Condominium Act will not go unredressed. Earlier comments on the possible use of frivolous class actions to coerce unmerited settlements from the developer<sup>113</sup> do not apply so strongly here. The Attorney General is much less likely to bring a frivolous action than an individual consumer might be, and the possibility of abuse is therefore less.

### III. CONCLUSION

With the enactment of House Bill 404, Ohio has amended its Condominium Act to make it more responsive to consumer concerns. The bill attempts to protect potential purchasers of condominiums while at the same time providing enough flexibility for developers to shape their projects as they see fit. The bill is well-drafted for the most part, but its occasional vagueness in terms of disclosure requirements may lead to litigation to determine whether there has been compliance with the law. Nevertheless, this lengthy, complex piece of legislation is workable and should help to create another alternative in the search for new types of affordable housing at costs below the often prohibitive price of the conventional single-family dwelling.

Code Sections Affected: §§ 5311.01-.09, .11, .13, .18, .21-.27.

Effective Date: October 1, 1978.

Sponsors: Brooks, et al. (H); Valiquette, et al. (S).

Committees: Judiciary (H&S).

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113. See notes 98-99 and accompanying text *supra*.