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A Horizontal Property Law,[1] (hereinafter referred to as the HPL), which constitutes an entirely new property law concept in Kentucky, was adopted by the 1962 session of the General Assembly The act originated in the Senate where it was designated as Senate Bill No. 31, to be known as the Scott Miller, Jr., Bill.

Indirectly, the HPL was initiated by President Kennedy when he sent his housing message to Congress on March 9, 1961. From this message, the United States Senate Committee on Banking and Currency received the impression that the President desired to renew the pledge of Congress in the Housing Act of 1949 of "a decent home and suitable living environment for every American family"[2] As stated by the Committee on Banking and Currency, the President's Message was aimed at three basic national objectives. These are:

1. The renewal of our cities and the assurance of sound growth in rapidly expanding metropolitan areas;
2. The provision of a decent home for all of our people;
3. The encouragement of a prosperous and efficient construction industry as an essential component of general economic prosperity and growth.[2a]

To carry into effect the objectives sought by the President, Congress enacted the Housing Act of 1961.[3] Section 104 of the Housing Act of 1961[4] adds another section to the National Hous-

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1 Ky. Acts 1962, ch. 205, §§1-23, KY. REV. STAT. §§381.805-.910 (1962) [hereinafter cited as KRS].

2 S. Rep. No. 281, 87th Cong., 1st Sess. 1 (1961).

2a *Ibid.*

3 75 Stat. 149, 12 U.S.C. §§871 et seq. (Supp. III 1959-61).

4 75 Stat. 160, 12 U.S.C. §1715y (Supp. III 1959-61).

ing Act,[5] authorizing the Commissioner of the Federal Housing Administration (hereinafter referred to as FHA) to insure a mortgage covering a family unit in a multifamily structure. As stated by the draftsmen of the Housing Act of 1961,

> The purpose of this section is to provide an additional means of increasing the supply of privately owned dwelling units where, under the laws of the State in which the property is located, real property title and ownership are established with respect to a one-family unit which is part of a multifamily structure.[6]

With Congress paving the way for real property ownership of individual units of a multi-unit structure by authorizing FHA insurance on mortgages covering such units, it was virtually inevitable that the several states would adopt laws enabling their residents to avail themselves of the opportunities thus afforded. Kentucky was among the earliest to adopt such a law However, while the FHA provisions are by their terms limited to residential units, the Kentucky HPL goes one step further by permitting the application of the concept to either residential or commercial buildings.[6a]

The horizontal property concept is generally referred to as *condominium*. Buildings placed under a horizontal property regime are often referred to as *condominiums* to distinguish them from other types of ownership.

The concept of condominium is founded in ancient laws, including civil and Roman law The slight information available indicates that under civil and Roman law, title to property could be held by two or more individuals owning undivided fractional interests in the entirety with the right of exclusive occupancy of a specified portion of the premises and with the right of alienation.

The title "Horizontal Property Law" is derived from the fact that under the condominium concept, a building may be divided into horizontal units or floors, each being a distinct legal entity However, the condominium goes one step further in permitting the sub-division of a horizontal unit into vertical units. This occurs anytime two or more units are established on one floor of a building.

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[5] 73 Stat. 654 (1959), 12 U.S.C. §§1703 et seq. (Supp. III 1959-61).
[6] 75 Stat. 160, 12 U.S.C. §1715y (a) (Supp. III 1959-61).
[6a] KRS 381.810(1), (3).

The reader will note the use of the word "co-owner" throughout this article in referring to the owners of individual units in a condominium. Co-owners may be individuals, corporations, partnerships and/or any other legal entity or any combination of such entities.[7] This is to be contrasted with the common law concept of "joint owners." Joint ownership under common law connotes an undivided interest in the entirety Under condominium, an undivided interest in the entirety is limited to the common elements of the property These common elements may be either general common elements or limited common elements. The HPL contains an enumeration of some of the general common elements, which include the land, foundations, main walls, roofs, halls, lobbies, stairways, etc.[8] The general common elements are those areas or portions of the land and building which are enjoyed by all the co-owners equally and which are necessary to the proper maintenance of the property Limited common elements are those which all co-owners agree should be reserved for the use of certain units to the exclusion of other co-owners, such as special corridors, elevators, etc.[9]

The condominium concept is a creature of statute in Kentucky, having no counterpart at common law The HPL sets up a framework for recording titles to the individual units of a condominium project. This framework includes provisions for the recording of a master deed or lease whereby the property is submitted to a horizontal regime by the owner or co-owners of the property;[10] a description in the master deed or lease of the land, buildings, common elements and units;[11] and directions to the county clerk to set up the mechanics and methods of recording the master deed or lease.[12] The description in conveyances of individual units includes only the number or letter by which the particular unit is designated in the master deed or lease, and the name of the horizontal property regime in which it is located.[13]

The day-to-day administration of the horizontal property regime is to be governed by a set of by-laws adopted by the

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[7] KRS 381.810(4).
[8] KRS 381.810(7).
[9] KRS 381.810(8).
[10] KRS 381.815.
[11] KRS 381.835(1)-(4).
[12] KRS 381.835.
[13] KRS 381.845.

council of co-owners.[14] The by-laws may be amended from time to time by act of the council of co-owners.[15] The HPL does not state whether unanimous or only majority approval is required for adoption and amendment of the by-laws. As the council of co-owners is defined as meaning all the co-owners,[16] it could be argued that unanimous consent is required. However, as the HPL refers to the act of approval and adoption of the by-laws and amendments as that of the council, it would appear that only a majority vote would be required. If the General Assembly intended to require unanimous consent of all co-owners, it may be presumed that they would have so stated. This position is supported by other provisions of the HPL. For example, pro-rata contribution by all co-owners toward administration, maintenance and repairs of common elements and any other expenses lawfully agreed upon by the council of co-owners is required.[17] Liability for contribution cannot be avoided by waiver of use or enjoyment of common elements, or by abandonment of the apartment.[18] KRS 381.870, while referring to the act of the council of co-owners, clearly indicates that unanimous consent is not required in order to hold a co-owner liable for proper expenses incurred and assessed by act of the council.

Any unpaid assessments at the date of sale or conveyance of a unit constitute a lien upon the sale price inferior only to unpaid state taxes and duly recorded mortgages.[19] These assessments shall first be paid out of the sale price or by the purchaser in preference to all other claims except those for taxes or mortgages.[20] While this provision apparently imposes a trust upon the proceeds of the sale price to the extent of any such unpaid expenses, the purchaser who fails to insist upon payment of such expenses by the seller or fails to require such amount to be placed in escrow for such purpose at the closing will assume liability for the expenses. The co-owners or administrator of the regime could proceed against either the seller or purchaser for the unpaid amount.

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[14] KRS 381.860.
[15] *Ibid.*
[16] KRS 381.810(5).
[17] KRS 381.870.
[18] *Ibid.*
[19] KRS 381.880.
[20] *Ibid.*

Unpaid assessments "shall first be paid out of the sale price *or* by the purchaser."[21] (Emphasis added.) Such expenses are thereby made a joint and several liability of the seller and purchaser with the ensuing right of the co-owners to seek joint and several judgments against both parties. The attorney representing the purchaser can avoid this area of possible conflict and litigation by ascertaining from the counsel of co-owners or the administrator of the building the amount of any such expenses and advising his client to insist that the seller pay such expenses in full as a condition precedent to the closing of the transaction or provide that such an amount shall be withheld from the purchase price and paid directly by the purchaser or by the lending agency

One of the most interesting features of the HPL is that each *unit* in the structure is taxed as an entity[22] The only common law analogy is the principle that one joint owner of property who pays taxes may seek contribution from the others. However, under the HPL co-owners are liable solely for taxes assessed against their unit. The value of the common elements is assessed proportionately among the co-owners. The default of one or more co-owners has no effect upon the co-owner who has paid his taxes. With the exception that taxes are to be assessed by unit rather than on the building in its entirety, all other mechanics of assessment of real estate taxes remain the same as for any other real property interest.

After providing for separate taxation by unit, KRS 381.900 continues:

> no forfeiture or sale of the building or property as a whole for delinquent taxes, assessments or charges shall ever divest or in any wise affect the title to an undivided apartment so long as taxes, assessments and charges to said individual apartment are currently paid.

It is difficult to rationalize the reference to a forfeiture or sale of the property as a whole for delinquent taxes, etc., with the provisions for fee simple title to individual units and for separate assessments for taxes and other charges. As each unit is a distinct entity, it would logically follow that any forfeiture or sale for non-payment of taxes, assessments or other charges would be of

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[21] *Ibid.*
[22] KRS 381.900.

the individual unit or units affected. So long as one co-owner is not in default it is inconceivable that the building or property as a whole could become the subject of forfeiture or sale. So long as the building continues as a horizontal property regime,[23] each unit therein is a distinct legal entity and any conveyance, whether by the title holder or through legal process, would of necessity be of individual units. Re-grouping or merger of the units requires approval of all of the co-owners.[24] It therefore follows that so long as units are owned by two or more persons, at least one of whom has paid all taxes, assessments and other charges, and who does not consent to a re-grouping or merger of the units, any attempted forfeiture or sale of the property as a whole would be a nullity Foreclosure or sale would be of the individual units in default and would have no effect whatsoever upon the title or incidents of ownership of those persons who have paid the charges against their units. This is the only conclusion which could be reached from a reading of the HPL in its entirety

Each person who is interested in the concept of condominium, and who undertakes to familiarize himself with the provisions of the HPL, is urged to read very carefully the definitions contained in the statute itself.[25] A casual glance may leave the reader with the impression that the HPL applies only to buildings to be used for residential apartment units, because all references are to an "apartment." However, an "apartment" is defined as

> an enclosed space consisting of one or more rooms occupying all or part of a floor in a building of one 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, provided it has a direct exit to a thoroughfare or to a given common space leading to a thoroughfare.[26]

For example, a professional building containing offices for attorneys may be placed in a horizontal property regime and units in the building sold to individual attorneys or law firms.

The HPL limits the use of the condominium concept by defining a condominium project as "a real estate condominium

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[23] KRS 381.815.
[24] KRS 381.850.
[25] KRS 381.810(1)-(4).
[26] KRS 381.810(1).

project; a plan whereby four or more apartments, rooms, office spaces, or other units in existing or proposed building(s) or structure(s) are offered or proposed to be offered for sale."[27] It would therefore obviously not be available for a duplex or triplex building. The fact that a building containing four or more units would presumably effect an economy of land usage is the apparent rationale for requiring that a condominium regime contain four or more units.

It is not altogether clear whether a building submitted to the horizontal property regime may contain a combination of commercial and residential units. In this regard, the definition of "apartment" states "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. "[28] It could be contended that since the HPL omitted to use the phraseology of "or any combination thereof," or similar language, following the word business, it was the legislature's intention to restrict a building to one use. Such a contention would appear to be too strict an interpretation of the HPL. The inclusion of the phrase, "or for any other type of independent use "[29] lends credence to the assumption that a building may be used in any manner desired, so long as such use is otherwise legal. Many buildings currently in existence contain both commercial and residential units. The most common example of this is the multi-story building containing a retail store or other business enterprise on the first floor and apartments on all other floors. It is believed that such a combination of usages would be permissable under the HPL. While the details concerning administration of the commercial unit or units of the building would be governed in accordance with the by-laws, the commercial unit could be dealt with in the same manner as any other unit in the building. The unit could be owned by an individual, corporation or any other legal entity or combination thereof and could be occupied by the owner or owners or leased to a business concern. Possibly one of the most advantageous methods of ownership would be for two or more of the co-owners of residential units to acquire title to the commercial unit and lease it to a business concern.

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[27] KRS 381.810(3).
[28] KRS 381.810(1).
[29] KRS 381.810(1).

To assure the right of interested co-owners to obtain insurance against all risks incident to their ownership in the building, and particularly the common elements, the HPL permits acquisition of such insurance upon resolution of a majority of the co-owners.[30] Each co-owner is liable for his proportionate share of the cost of such insurance.

A very unusual provision is that the insurance indemnity, in case of fire or any other disaster, shall be used to reconstruct the building unless more than two-thirds of the building is destroyed.[31] In the latter event, and unless otherwise agreed upon by unanimous vote of all co-owners, the proceeds are to be distributed pro-rata to the co-owners entitled to such in accordance with the by-laws or, in the absence of a by-law provision, as agreed upon by three-fourths of the owners.[32]

If the building is not insured or the proceeds of insurance are inadequate for reconstruction, the cost of reconstruction is to be borne proportionately by those directly affected by the damage unless otherwise provided in the by-laws.[33] If a minority of the co-owners refuse to pay their part of the costs, the reconstruction may nevertheless be accomplished by act of the council of co-owners and contribution from those benefited may be enforced by litigation, if necessary [34] The above provisions may be changed by unanimous resolution of the parties concerned, adopted after the date of the fire or other disaster.[35]

Ownership of a unit in a horizontal property regime is inferentially treated as an interest in personal property in order that the owner of such unit may be entitled to the "widows exemption" provisions of KRS ch. 391.[36] The only pertinent provision is KRS 391.030(c), wherein it is provided that personal property or money on hand or in the bank to the amount of 1500 dollars shall be exempt from distribution and sale and shall be set apart by the appraisers of the estate of an intestate to his widow and infant children, or, if there is no widow, to his infant children surviving him. A similar exemption is provided for the

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[30] KRS 381.885.
[31] KRS 381.890.
[32] KRS 381.890(2).
[33] KRS 381.895(1).
[34] *Ibid.*
[35] KRS 381.895(2).
[36] KRS 381.875.

surviving infant children of a widow It is not clear whether the ownership of individual units of a horizontal property regime is to be treated as a personal property interest for all purposes or merely for purposes of protection of a widow or infant children of an intestate co-owner.

The importance of this question can be seen by considering the applicability of the homestead exemption of KRS 427.060:

> In addition to any exemption of personal property, land, including the dwelling house and appurtenances, not exceeding one thousand dollars in value, owned by any bona fide housekeeper with a family resident in this state, is exempt from sale under execution, attachment or judgment, except to foreclose a mortgage given by the owner of a homestead or for purchase money due thereon. This exemption shall not apply if the debt or liability existed prior to the purchase of the land or the erection of the improvements thereon.

Also, KRS 427.090 requires that real property having a value in excess of one thousand dollars, and which is not divisible without great dimunition in value, be sold. One thousand dollars of the proceeds is to be paid to the defendant to enable him to purchase another homestead. If ownership of a unit in a horizontal property regime is to be considered as an interest in personal property for all purposes, it could be contended that the homestead exemption would not be available as it is applicable only to land. However, the Court of Appeals of Kentucky has construed KRS 427.060 as exempting only land upon which is located the dwelling house of the owner.[37] It is therefore apparent that the statute is to be interpreted as having as its objective the protection of the dwelling of the landowner rather than a mere interest in the land. It seems obvious that the Legislature was attempting to insure that a family would have a dwelling place, and did not intend to enable an individual to retain investment property free from levy of execution by creditors. There can be no doubt that each co-owner in a horizontal property regime owns an interest in real estate to the extent that each owns an undivided interest in the land upon which the dwelling is located and has fee simple title to his unit of the building. In view of the

[37] Lunsford v. Witt, 309 S.W.2d 348 (Ky. 1958).

interpretation given the statute by the Court of Appeals and the attributes of real property ownership of a unit in a horizontal property regime, it is believed that the Legislature intended that the co-owners would be entitled to the benefit of the "widows exemption" in addition to all exemptions incident to real property ownership. This interpretation is supported by KRS 381.905, which makes the HPL superior but cumulative to all other provisions of the Kentucky Revised Statutes. The provision for the "widows exemption" is believed to be a specific exemption in addition to all other general provisions of the Kentucky Revised Statutes, including the homestead exemption.

The so-called stock cooperative in Kentucky is the most analogous concept of ownership of multiple housing and/or business units to the condominium. However, the stock cooperative has many disadvantages in comparison with the condominium. Basically, the stock cooperative refers to a system of ownership whereby a corporation is organized to hold title to real estate. By-laws are adopted to govern the sale of stock, leasing of apartments and administration of the building. It is generally provided that a certain number of shares of stock will be sold to persons who wish to occupy an apartment in the building. The stockholder is then granted a long term lease of the apartment. The stockholders contribute their proportionate share of the expenses of management and maintenance as determined by the by-laws. It is customary to provide that a prospective stockholder-lessee be acceptable to the board of directors of the corporation. It is also generally provided that a stockholder-lessee who wishes to sell his interest must first offer the stock to the corporation or other stockholders.

Possibly the most serious disadvantage of the stock cooperative is the fact that title to the real estate is at all times in the name of the corporation. The corporate entity owns the property and all mortgages, assessments or levies are against the corporation. The property may be levied upon and sold as an entity upon default of any indebtedness by the corporation, even though one or more of the stockholders may have paid his full share of the debt.

The most notable distinction between a stock cooperative and a condominium is that in the condominium each apartment or

unit is a distinct entity capable of real property ownership. The purchaser of a unit in a condominium receives a recordable deed conveying a fee simple title to the unit and an undivided interest in the common elements. He may convey or encumber his unit in any manner he wishes but in so doing he does not jeopardize the interests of any co-owner in the project. Nor is he subjected to any financial loss or to dispossession by the act or default of any other co-owner. Each unit in a condominium is taxed separately and a co-owner has no responsibility for the individual debts of other co-owners.

To summarize the comparison of stock cooperatives with condominiums, it may be said that the condominium has three principal advantages over the stock cooperative: (1) each co-owner receives a deed conveying fee simple title to a specific and identifiable unit of the building and may encumber or dispose of his title in exactly the same manner as the owner of an entire tract of real estate, (2) as the owner of a fee simple title to a distinct unit in a condominium, each co-owner is responsible solely for the taxes and assessments levied against his unit and has no responsibility for the debts or defaults of his co-owners, nor will he suffer any loss due to default of any co-owner, and (3) the fee simple title to a unit in a condominium has the attributes of common law real property ownership and it is therefore believed that such an interest is entitled to the statutory homestead exemption.

A horizontal property regime established under the Kentucky HPL should qualify for FHA insurance under the new provisions of the National Housing Act.[38] However, the Commissioner is allowed great latitude in determining whether to insure any mortgage covering a condominium project:

> The Commissioner is authorized, in his discretion and under such terms and conditions as he may prescribe (including the minimum number of family units in the structure which shall be offered for sale and provisions for the protection of the consumer and the public interest), to insure any mortgage covering a one-family unit in a multifamily structure and an undivided interest in the common areas and facilities which serve the structure, if (1) the mortgage meets the requirements of this section and of sec-

[38] 75 Stat. 160 (1961), 12 U.S.C. 1715y (Supp. III 1959-61).

> tion 1709(b) of this title, except as that section is modified by this section, (2) the structure is or has been covered by a mortgage insured under another section (except section 1715e of this title) of this chapter, notwithstanding any requirements in any such section that the structure be constructed or rehabilitated for the purpose of providing rental housing, and (3) the mortgagor is acquiring, or has acquired, a family unit covered by a mortgage insured under this section for his own use and occupancy and will not own more than four one-family units covered by mortgages insured under this section. Any project proposed to be constructure or rehabilitated after June 30, 1961 with the assistance of mortgage insurance under this chapter, where the sale of family units is to be assisted with mortgage insurance under this section, shall be subject to such requirements as the Commissioner may prescribe.[39]

Specific limitations upon the eligibility of a mortgage for FHA insurance under section 1715y are that the mortgage shall:

> (A) involve a principal obligation in an amount not to exceed the limits per room and per family dwelling unit provided by section 1713(c)(3) of this title, and not to exceed the sum of (i) 97 per centum of such value in excess of $13,500 of the amount which the Commissioner estimates will be the appraised value of the family unit including common areas and facilities as of the date the mortgage is accepted for insurance, (ii) 90 per centum of such value in excess of $13,500 but not in excess of $18,000, and (iii) 70 per centum of such value in excess of $18,000 and (b) have a maturity satisfactory to the Commissioner but not to exceed in any event, thirty years from the date of the beginning of the amortization of the mortgage or three-fourths of the Commissioner s estimate of the remaining economic life of the structure, whichever is lesser.[40]

It is further provided that

> The Commissioner may require that the rights and obligations of the mortgagor and the owners of other dwelling units in the structure shall be subject to such controls as he determines to be necessary and feasible to promote and protect individual owners, the multifamily structure, and the occupants.[41]

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[39] 75 Stat. 160 (1961), 12 U.S.C. 1715y(c) (Supp. III 1959-61).
[40] *Ibid.*
[41] *Ibid.*

Thus, any attorney preparing by-laws for a horizontal property regime which is proposed to be eligible for FHA mortgage insurance should make certain that the proposed by-laws will be acceptable to the Commissioner. While the FHA provisions referred to were enacted with the specific purpose of encouraging condominiums and should facilitate high ratio mortgage financing of condominiums, the owners of the property should exercise diligence in ascertaining the exact requirements of the Commissioner at the time the building is placed under the condominium regime.

The condominium concept of ownership of real estate has the potential of creating a new frontier in the building industry in those areas where land is extremely valuable, such as in metropolitan areas. The economies to be effected by distributing the cost of the land among many unit owners make the concept very attractive for application in urban areas. However, the concept will in all likelihood receive little, if any, attention in rural areas where the land is more or less plentiful and the citizenry are generally of a more independent nature, preferring a little space between themselves and their nearest neighbor.

The Kentucky HPL opens the door to a new era of multiple family housing and multiple unit office buildings. The only remaining step is for the public to be made aware of the HPL. In view of the economies of real property ownership which may be effected through the condominium and the availability of FHA mortgage insurance, it may be anticipated that buildings will be submitted to condominium regimes in Kentucky within the current year.