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ADVERSE POSSESSION OF ABANDONED URBAN HOUSING

Two contrasting figures walk the streets of Manhattan. One is tall, erect. His wide-brimmed hat looks distinctly out of place. His companion exhibits a perceptible limp. The little man talks incessantly, punctuating his remarks with a consumptive cough. The two men rip down a boarded-up doorway to enter a barren building. Still chattering, the small man leads the way up the staircase and into a stark room. Gesturing broadly he proclaims, "This is my home."

Fans of Dustin Hoffman will recognize the scene from *Midnight Cowboy*.¹ Critically minded legal theorists will question the legal accuracy of Hoffman's claim.

The right to adversely possess abandoned urban housing has not been firmly established in any jurisdiction. On the other hand, the steady increase in abandonment makes it appropriate to explore the desirability of adverse possession in the urban context, the feasibility of its application in California, and the potential utility of the condominium concept to the problem of abandoned urban housing.

I. NATURE OF THE PROBLEM

Landlord abandonment of housing is a phenomenon currently plaguing the portion of the United States called Megalopolis,² that urban triangle bordered by the cities of Boston, Cleveland, and Washington, D.C. Owners have walked away from over 130,000 apartments and houses in New York City alone during the last four years,³ and it has been estimated that as many homes have been abandoned during that period as have been destroyed during twenty years of slum clearance.⁴ While rent controls⁵ may render New York somewhat

1. *United Artists* (1969) directed by John Schlesinger, taken from J. HERLIHY, *MIDNIGHT COWBOY* 158 (1965).

2. See D. STOLOFF, *THE NATIONAL SURVEY OF HOUSING ABANDONMENT 1* (1971) [hereinafter cited as STOLOFF].

3. *When Landlords Walk Away*, *TIME*, March 16, 1970, at 88 [hereinafter cited as *TIME*]. See, e.g., *No Vacancy: Shortage of Housing in New York City Gets Worse with Every Day: Abandonments, Withdrawal of Capital and an Old Law Exacerbates City's Crisis*, *Wall Street J.*, Dec. 2, 1970, at 1, col. 1.

4. *Hollow Shells*, *NEWSWEEK*, Jan. 12, 1970, at 36 [hereinafter cited as *NEWSWEEK*]. This estimate was advanced by Fred Kristoff, Director of Housing Research for the New York Development Corporation.

5. See N.Y. AD. LAW §§ Y51-1.0 to 18.0 (1963); Comment, *Residential Rent Control in New York City*, 3 *COLUM. J.L. & SOC. PROB.* 30 (1967).

unique, the problem is not confined to that city. In 1970, Philadelphia had 20,000 abandoned apartments and Baltimore more than 5,000 vacant buildings.⁶

If this process were one of natural selection, paring out the oldest and most dilapidated dwellings, it might be defended as an informal means of building code enforcement. Likewise, the problem of abandonment would be minimized if the buildings could be quickly razed, the residents easily moved to other adequate housing, and new apartments promptly constructed on the cleared lots. Such is not the case, however, and the buildings are often as structurally sound as, and no older than, most inner-city homes.⁷ A Baltimore housing official described the more usual pattern:

On the first night, the building is looted. With the plumbing gone, the building is no longer habitable. The next night, or soon, the kids on dope slide in. Then the neighborhood's apprentice arsonist pays a visit.⁸

As time passes, the hulk becomes a "haven for rats, junkies and sundry other derelicts."⁹ The tragic result is that displaced residents are forced to find other housing in the constricted ghetto sub-market.¹⁰

Although there is no single explanation for the abandonment phenomenon,¹¹ a recognizable pattern is discernible. One Atlanta landlord summarized:

It used to be . . . that you could make a fortune in slum housing. But now the tenants tear up the place as fast as you fix it up. The

6. TIME, *supra* note 3; L. Downie, Jr., *Homes Stand Empty Despite D.C. Housing Shortage*, Washington Post, Mar. 1, 1970, at 1, col. 1.

7. Cf. STOLOFF, *supra* note 2, at 5-6.

8. TIME, *supra* note 3.

9. Allen, *A Frontier Challenge to the Urban Lawyer: Squatters in New York*, 49 J. URBAN L. 323, 336 (1971).

10. M. HARRINGTON, *THE OTHER AMERICA* 147 (1961).

[I]n 1959, for instance, the Mill Creek area of St. Louis was cleared as part of an urban renewal effort. In the place of a Negro slum there arose a middle income housing development. Typically, the majority of those evicted were forced to find housing within the existing, and contracted, Negro ghetto.

Id. See also W. GRISBY, *HOUSING MARKETS AND PUBLIC POLICY* 286 (1963) which states:

When, as is typically the case, housing in blighted areas is replaced by new homes for higher-income groups, there is no assurance that the displaced family will be better or even equally well housed. Their fate hinges on vagaries of the filtering process, which cannot function effectively when the excess of supply over demand is being diminished rather than increased.

11. For an in depth treatment of abandonment of urban housing wherein the author contends that rent withholding is a major factor, see Comment, *Rent Withholding Doesn't Work: The Need for a Realistic Rehabilitation Policy*, 7 LOY. L.A.L. REV. 66 (1974) [hereinafter cited as Comment].

city gets on your back and you just can't afford to keep it up. Every time you fix up a place the insurance and taxes go up. You've got only two choices—either raise the rent and then the people move out—or tear it down.¹²

*"It used to be . . . that you could make a fortune in slum housing."*¹³ Previously, slumlords were large scale operators holding numerous rentals in ghettos.¹⁴ Those days are gone.¹⁵ Having depreciated the property and taken their profits, many large scale landlords have sold their holdings to small investors.¹⁶ In fact, the National Urban League's Center for Community Change has described the potential for profit in the ghetto as "[i]ntense but short-lived."¹⁷

*"But now the tenants tear up the place as fast as you fix it up."*¹⁸ The Urban League refers to these neighborhoods as "crisis ghettos,"¹⁹ areas where social problems are terribly intertwined. In such an area the apartments are "[t]ypically unmanageable since [they are] located in a high crime, high vandalism neighborhood with economically unstable tenants"²⁰

*"The city gets on your back"*²¹ This declaration may merely be a perception of more strenuous building code enforcement engendered by the increasing difficulties of slum management. At least through the mid-sixties, code enforcement was lax in slum areas.²²

12. NEWSWEEK, *supra* note 4.

13. *Id.*

14. *Id.* Cf. G. STERNLIEB, RESIDENTIAL ABANDONMENT: THE ENVIRONMENT OF DECAY 6 (1972).

15. In low income areas, it has been noted that landlords actually come from three basic categories: "elderly, small scale absentee, and ethnic minorities." Comment, *supra* note 11, at 80, citing G. STERNLIEB, ABANDONMENT AND REHABILITATION, PAPERS SUBMITTED TO SUBCOMMITTEE ON HOUSING PANELS ON HOUSING PRODUCTION, OF BANKING AND CURRENCY COMMITTEE OF THE HOUSE, HOUSING DEMAND, AND DEVELOPING A SUITABLE LIVING ENVIRONMENT, pt. 1, H.R. 92d Cong., 1st Sess. 316 (1971).

16. See NEWSWEEK, *supra* note 4; cf. Sternlieb, *Abandonment and Rehabilitation: What Is To Be Done?*, in HOUSING 62, 64 (G. Sternlieb ed. 1970-1971) [hereinafter cited as Sternlieb].

17. STOLOFF, *supra* note 2, at 1.

18. NEWSWEEK, *supra* note 4. See G. STERNLIEB, RESIDENTIAL ABANDONMENT: THE ENVIRONMENT OF DECAY 15 (1972).

19. *Housing Abandonment*, ARCHITECTURAL F., Apr. 1971, at 42. [hereinafter cited as ARCH. FORUM].

20. *Id.*

21. NEWSWEEK, *supra* note 4.

22. Cf. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 801-02 (1965). The authors conducted interviews with approximately 130 housing officials in eastern cities.

Inspectors had difficulty contacting owners when owners of record were either corporations or out-of-town residents.²³ Fictitious names or chains of title added to the problem.²⁴ When cases finally arrived in court, judges were often sympathetic to landlords believing that the tenants would destroy the repairs and that code violations were the neighborhood norm.²⁵ Only in the late sixties did many cities begin to insist that ghetto housing comply with the code.²⁶

"[Y]ou just can't afford to keep it up."²⁷ Ironically, the large scale slumlord was in a better position to make improvements than the small investor. The small investor often lacks the capital, long term commitment to the property, and economies of scale that his predecessor enjoyed. Having purchased the property with hopes of profit, the economically less sophisticated owner bears the legacy of years of neglect, a most unwelcome inheritance. The backlog of improvements needed is so great that a Rand Corporation study estimated costs of maintenance in slum housing at \$24 per room per month.²⁸

On both an individual and group level, actual abandonment is preceded by a loss of mental commitment. A study of slum landlords in eastern cities, indicated that owners psychologically abandon property long before they shut off the services vital to the life of the building.²⁹ For example, when a neighborhood suffers a three to six percent abandonment rate, there is an ostensible collective shrug of resignation followed by a wave of further abandonments.³⁰

When landlords shut off the utilities and make no effort to collect

23. *Id.* at 813.

24. *Id.*

25. *Id.* at 822-23.

26. See NEWSWEEK, *supra* note 4. It has been argued that housing codes have not in fact been enforced because of the cost of rehabilitation (Grigsby, *Economic Aspects of Housing Code Enforcement*, 3 URBAN LAW. 533, 537 (1971)), and that when they have, only minimal fines have been imposed, thus rendering enforcement ineffectual. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 287 (1968). See also Comment, *supra* note 11, at 68. To a landlord, however, even a minimal fine may be perceived as "the city getting on your back."

27. NEWSWEEK, *supra* note 4. See G. STERNLIEB, RESIDENTIAL ABANDONMENT: THE ENVIRONMENT OF DECAY 6 (1972).

28. NEWSWEEK, *supra* note 4. See also G. Sternlieb, ABANDONMENT AND REHABILITATION, PAPERS SUBMITTED TO SUBCOMMITTEE ON HOUSING PANELS ON HOUSING PRODUCTION OF BANKING AND CURRENCY COMMITTEE OF THE HOUSE, HOUSING DEMAND, AND DEVELOPING A SUITABLE LIVING ENVIRONMENT, pt. 1, H.R. 92d Cong., 1st Sess. 318 (1971).

29. STOLOFF, *supra* note 2, at 16.

30. See ARCH. FORUM, *supra* note 19, at 45.

rent, tenants without a lease have no recourse but to move.³¹ After the taxes on the building remain unpaid for a statutorily defined period, the land is "sold" to the state subject to a redemption upon payment of the money due.³² This right of redemption is lost at the end of a statutorily defined period whereupon the state assumes ownership of the property.³³

II. ADVERSE POSSESSION AS A POSSIBLE SOLUTION

Concern with the problem of abandonment has generated numerous suggestions.³⁴ Significantly, two elements are common to this plethora of proposals.

31. Cf. STOLOFF, *supra* note 2, at 6. For a brief discussion of the possibility of suing for damages for breach of contract, see Comment, *supra* note 11, at 71.

32. CAL. REV. & TAX. CODE ANN. § 3352 (West 1970) provides in part:

The notice shall be in the form of an affidavit and shall show: (a) That unless the total amount due is paid, the real property on which the total amount due is a lien will be sold to the state. . . . (c) . . . the real property may be redeemed by payment of the amount of sold taxes together with such additional penalties and fees as prescribed by law. . . .

(emphasis added).

33. *Id.* § 3362(f). The statutorily defined period is now fixed at five years. *Id.* § 3511.

34. Initially, it has been advanced that an infusion of money is needed because both landlords and tenants often lack the financial resources to restore buildings to an acceptable building code level. See Sternlieb, *supra* note 16, at 66. See also Comment, *supra* note 11, at 90.

A complementary suggestion is that building codes are unrealistically demanding for poor areas and that standards should be lowered to avert abandonment. Sternlieb, *supra* note 16, at 66. Cities could be divided into zones and enforcement of codes could be dependent on the zone. This would alleviate the pressure to abandon housing that is basically sound but unable to meet the demands of current building codes. See generally G. Barnhart, *Powers and Procedures for Ordering Repair and Demolition of Existing Buildings*, in URBAN LAND USE POLICY 141 (R. Andrews ed. 1972).

At one time the paramount suggestion would have been to plow under the empty hulks and erect public housing. See R. LINESBERRY & I. SHARKANSKY, URBAN POLITICS AND PUBLIC POLICY 326 (1971).

Some of the sluggish growth of public housing has resulted from the rude facts of political power. Such housing has its proponents, but it also has a formidable array of opponents. . . . Recently public housing has suffered a further challenge . . . the "disillusionment of the experts." "The cause of public housing . . . has been psychologically abandoned by many of its former supporters. In the past ten years, assessment of public housing has been more and more negative." Catherine Bauer has claimed that the program has reached a "dreary deadlock," that it is strong enough to survive in the incremental budgeting process but too weak to counter emasculation by its critics.

Id., quoting L. FREDMAN, PUBLIC HOUSING 191 (1969). Even if one were willing to posit that the city would be a better landlord than a private owner, urban renewal has a most unwelcome side effect. Owners of abutting buildings often discontinue all but the most minimal services to their tenants in the belief that the city will soon buy their building for renewal, thus creating a domino effect lowering the quality of

One element is the use of government regulatory tools to provide subsidies to the current owners either in the form of direct payments or manipulation of the tax structure. The other ingredient is the installation of the government as the landlord of last resort, thereby allowing it to serve as landlord of all abandoned buildings.

The underlying assumption of both these approaches is that ownership should remain in the hands of someone other than the tenant. This is by no means an unassailable premise. Cities in the past have exhibited a pronounced inability to conduct massive renewal through renovation.³⁵ Furthermore, it is unlikely that current owners are enthusiastic about remaining since profits are marginal and management is difficult.³⁶ In light of these difficulties, a new approach merits discussion.

III. ADVERSE POSSESSION OF ABANDONED BUILDINGS UNDER CALIFORNIA LAW

California cities have been fortunate in that there have not been mass abandonments on the scale of eastern cities.³⁷ The problem to date is of manageable dimension, yet the time to formulate policy is before the problem has grown to grand proportions.³⁸

housing. Cf. Sternlieb, *supra* note 16, at 62; G. STERNLIEB, *THE TENEMENT LANDLORD* 164 (1966).

For a good discussion of alternative approaches to resolving the problem of abandonment see also STOLOFF, *supra* note 1.

35. See E. BANFIELD, *THE UNHEAVENLY CITY* 40-41 (1968).

The owners of the brownstone buildings in these blocks were given the choice of either bringing their buildings up to a high standard or selling them to someone—either a private purchaser or the City—who would. In May 1960, the letters to the owners went out. Nearly ten years later (September 1969) the City had bought eighteen of the buildings. Four of them were offered for sale to qualified bidders at auction in 1963, but only one was bid upon and that by only one bidder. In 1965, the City announced that it had arranged negotiated sales to eighteen "sponsors" who would rehabilitate the buildings and create a racially integrated neighborhood. The sponsors would pay from \$21,000 to \$34,000 for the buildings, which was about 10 percent less than their estimated market value. Since they were in very poor condition ("nothing but four walls," said Mrs. Kenneth Clark, who with her husband was one of the sponsors), rehabilitation costs would be high—about \$15,000 per floor . . . and the City was hoping to sell the remaining buildings at about 50 percent of their current market value.

Id.

36. See ARCH. FORUM, *supra* note 19, at 42.

37. Interview with land assessor Rodney Madsen, Imperial Savings and Loan, Torrance, California, Apr. 26, 1973.

38. Sternlieb, *supra* note 16, at 76. Mr. Sternlieb stated:

I cannot stress too strongly here that we must broaden the state of the art. The phenomenon of abandonment is not a transient [one]. It will deepen and increase. What will be required to deal with it are a whole armory of weapons and they must be developed. Abandonment is an immediate emergency, and it should not be forgotten, but that emergency will be with us for many years. Un-

A. "Abandonment" under California Law

The discussion thus far has been of the social problem of urban abandonment. In this context, abandonment might be defined as a process of disengagement, culminating "[w]hen a landlord no longer provides services to an occupied building, or pays taxes and mortgages."³⁹ The generic definition of "abandonment" used by California courts would appear to coincide with this meaning. In *Lawrence v. Fulton*,⁴⁰ the California supreme court defined "abandonment" as the "voluntary surrender and giving up of the thing by the owner because he no longer desires to possess it, or thereafter to assert any right or dominion over it."⁴¹

In contrast, however, two early cases established that land in fee can not be considered "abandoned."

In *Ferris v. Coover*,⁴² the court held that:

The doctrine of abandonment only applies where there has been a mere naked possession without title. . . . Where there is title, to preserve it there need be no continuance of possession, and the abandonment of the latter can not affect the rights held by virtue of the former.⁴³

Thus abandonment would exist only where one adverse possessor voluntarily left the land against which he was claiming.

Eight years later in an ejectment case, the court reiterated this view, "[A]s a title in fee, neither abandonment or [*sic*] disclaimer has any application to or effect upon such title or the right to the possession flowing therefrom."⁴⁴

These cases have not been overruled, yet they need not be considered determinative. The term "abandonment," as used in California law, developed during the formative years of a rural state. The current problem could hardly have been within the contemplation of the judges who considered whether a fee owner had an obligation to exercise dominion over his rural pastures.

less we make the investment in securing added know-how now, we will be no better equipped in the future than we are presently.

Id.

39. ARCH. FORUM, *supra* note 19, at 42.

40. 19 Cal. 683 (1862).

41. *Id.* at 690-91.

42. 10 Cal. 589 (1858).

43. *Id.* at 631.

44. *Davis v. Perley*, 30 Cal. 630, 636 (1866).

B. The Government . . . Owner of Last Resort

Regardless of a landlord's intent to "abandon," failure to pay taxes will eventually result in the state becoming owner by default. The California Revenue and Taxation Code provides an orderly procedure.

On or before each June 8, the county tax collector publishes a list of property on which taxes have not been paid for the year.⁴⁵ An affidavit is then sent by him as notice: (1) that unless all taxes are paid, the property will be sold to the state; (2) of the time and place that the property will be sold to the state; (3) that if the property is sold, it can be redeemed by payment of the taxes due; (4) that unless redeemed, the property can be sold at public auction or otherwise conveyed.⁴⁶

If the taxes remain unpaid by June 30, a curious non-event occurs. The land is declared "sold" to the state "by operation of law and the declaration of the tax collector."⁴⁷ Despite the statutory language about sale, the landowner has five years in which to redeem his property by payment of back taxes to the government.⁴⁸

The question naturally arises as to the nature of the legal status of the title to the land during the five year redemption period. The delinquent owner is not free to convey the land, for it is tax-deeded property,⁴⁹ but legal title still rests in his hands. The California supreme court has held that "[t]he 'sale' which occurs . . . starts the running of the five-year period at the expiration of which the state may acquire legal title."⁵⁰

Thus, during the five year period, the property resides in a legal netherland. If the landlord has an undisputed possessory right to the estate, then the statute of limitations will not toll.⁵¹ It should be noted

45. CAL. REV. & TAX. CODE ANN. § 3351 (West 1970).

46. *Id.* § 3352.

47. *Id.* § 3436.

48. *Id.* § 3511.

49. *Id.* § 127 which provides:

"Tax-deeded property" is property which has been deeded to the State for taxes and which has not been sold to a private purchaser or a taxing agency, or to an administering agency after being classified for public use, and has not been redeemed.

50. *Weston Inv. Co. v. State*, 31 Cal. 2d 391, 393, 189 P.2d 262, 264 (1948); *accord*, *Ducey v. Dambacher*, 27 Cal. App. 2d 658, 662, 81 P.2d 597, 599 (1938).

51. *See Franz v. Mendonca*, 131 Cal. 205, 208-09 (1900); *Lawrence v. Webster*, 44 Cal. 385, 388 (1872); *Potrero Nuevo Land Co. v. All Persons*, 29 Cal. App. 743, 753, 156 P. 876, 880 (1916); CAL. CODE CIV. PRO. § 326 (West 1970):

When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, where there has been

that the statutory language draws no distinction between continuing tenants paying rent and tenants at sufferance.⁵² One might argue that the status of landlord and tenant ended when the landlord shut off services and ceased collecting rent.⁵³ Consequently, the occupant would no longer be a tenant and would be free from the restrictions against adverse possession by tenants.

While extensive revision of the Revenue and Taxation Code would be required to distinguish the state of the title in abandonment from mere tax delinquency, it might be more advantageous to promote adverse possession against the government rather than against the landlord. Despite the present language of the code,⁵⁴ it is the government rather than the abandoning landlord who has an enduring interest in the building. The landlord no longer cares enough to provide rudimentary services to the tenants, maintain his property, or even pay taxes. The landlord is relinquishing his title, and the government will become the eventual owner.

At common law and in most jurisdictions in this country, no right to adversely possess against the government has existed.⁵⁵ Government exemption from the laws of adverse possession may be traced to Hobbesian thought. In *Leviathan*,⁵⁶ Hobbes wrote that men ceded all of their rights to the sovereign and that they gained social order in return;

And because they are essential and [inseparable] rights, it follows necessarily, that in whatsoever words any of them seem to be granted away, yet if the sovereign power itself be not in direct terms re-

no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited.

52. See CAL. CODE CIV. PRO. § 326 (West 1970).

53. The reason for the rule against adverse possession may be summed up by the maxim: "If the possession is consistent with or in subordination to the title of the real owner, it is not adverse." *Mills v. Laing*, 38 Cal. App. 776, 779, 177 P. 493, 494 (1918). The tenant paying his monthly rent is giving no notice of his hostility or claim of right. C. CALLAHAN, ADVERSE POSSESSION 67 (1961). When the landlord-tenant relationship is severed by removal of all services and no further collections of rent, the presumption of subordination could be removed. Note, however, that California precludes the development of this position through statutory language in circumstances "where there has been no written lease, until the expiration of five years from the time of the last payment of rent . . ." CAL. CODE CIV. PRO. § 326 (West 1970).

54. See CAL. REV. & TAX. CODE ANN. § 3362 (West 1970).

55. See Annot., 55 A.L.R.2d 554, 559-63 (1957).

56. T. HOBBS, LEVIATHAN 30 (Collier Bks. ed. 1962).

nounced, and the name of sovereign no more given by the grantees of him that grants them, the grant is void⁵⁷

This philosophy, hallowed in most jurisdictions, was pungently expressed in *Ralston v. Weston*.⁵⁸

Every law-abiding citizen, who loves, respects, and cherishes the institutions of his country, is charged with the patriotic duty, through fealty to the people, to preserve all public rights intact. If there are those whose sentiment of public obligation is so weak as to cause them, through their promptings of private gain, to become exploiters of public rights, they should find no countenance in the decisions of the courts. The law can never be made the instrument of its own destruction in the hands of lawbreakers, nor should it afford protection where allegiance is wanting.⁵⁹

California views the problem differently.⁶⁰ In *People v. Kerber*,⁶¹ the California supreme court stated:

It is true that the public may, by some lawful act of public authority, be discontinued or abandoned and that, in that event, the property may thereupon cease to be protected by this rule [no adverse possession against the government]. If the title is at that time held by the state, it will thereafter hold it as proprietor and not as a public agent or sovereign in charge of public use. If an adverse possession can be maintained, or if the statute of limitations can run against the state, in regard to proprietary property, it will begin from the date when the public use ceased and not before. If the power is left to the legislature, it may then provide for the sale of such property in order that it may become the subject of private ownership.⁶²

57. *Id.*

58. 33 S.E. 326 (W. Va. 1899). In that case, plaintiff's land abutted a public street. The street was in a small town and had never been graded, curbed, and paved, as the work would have involved great labor and expense, and public needs did not seem to require it. Plaintiff claimed a right to the street by adverse possession. In rejecting this claim, the judge stated that if the plaintiff's right were upheld, "[s]uch sovereignty would be as helpless as Gulliver when staked to the ground by Lilliputians with hairs from his own head." *Id.* at 330.

59. *Id.*

60. One may not adversely possess against the government whenever the property is "dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity. . . ." CAL. CIV. CODE § 1007 (West Supp. 1973).

Where there has been no public use or dedication, the state may pursue no remedy after a ten year period. CAL. CODE CIV. PRO. § 315 (West 1970).

The relevant question then becomes—when is land not invested with a public trust? Case law provides few clues.

61. 152 Cal. 731 (1908).

62. *Id.* at 734-35.

This widely noted case,⁶³ by itself, provides little illumination. It has been employed as a talisman in later cases, most frequently to introduce what is *not* proprietary property. Thus, there developed a definition by exclusion. Land held by the state for public squares is invested with a public trust.⁶⁴ Property held by a housing agency embraces a public trust.⁶⁵ A ritual nod to *Kerber* has found public dedication in land owned by school districts⁶⁶ as well as flood control districts.⁶⁷

Where the state attempts to sell the land, its function has been considered merely proprietary just as that of any other private landowner.⁶⁸ In the leading case, *Henry Cowell Lime & Cement Co. v. State*,⁶⁹ the state donated land to a city for business and commercial use. The city sold the land to plaintiff's business. Due to irregularities in the proceedings prior to the sale, the tax deed was declared void.⁷⁰ Despite this development, the plaintiff continued to possess, adversely. The supreme court held that, under the circumstances, the land only belonged to the state in a proprietary sense.⁷¹ When the state acted in a sovereign capacity, it could employ the prerogatives of the sovereign; but when the state acted to protect land that it wished to sell, then the state came before the court with no greater rights than any other corporate entity.

In a real sense, the state holds abandoned apartments in a proprietary capacity. The landlord may repurchase the land from the state for the price of his back taxes plus the added penalty.⁷² If not, the

63. *Cf., e.g.*, *People v. Chambers*, 37 Cal. 2d 552, 556-57, 233 P.2d 557, 560 (1951); *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 136, 287 P. 475, 490 (1930); *City of Los Angeles v. Anderson*, 206 Cal. 662, 668, 275 P. 789, 791 (1929); *Humboldt County v. Van Duzer*, 48 Cal. App. 640, 643, 192 P. 192, 194 (1920).

64. *Richert v. City of San Diego*, 109 Cal. App. 548, 553, 293 P. 673, 676 (1930).

65. *Manwell v. Public Housing Admin.*, 165 F. Supp. 439 (N.D. Cal. 1958).

66. *Howard v. Oroville School Dist.*, 22 Cal. App. 544, 551, 135 P. 689, 692 (1913).

67. *Fresno Irrigation Dist. v. Smith*, 58 Cal. App. 2d 48, 59, 136 P.2d 382, 388 (1943).

68. *Henry Cowell Lime & Cement Co. v. State*, 18 Cal. 2d 169, 172, 114 P.2d 331, 332 (1941).

69. 18 Cal. 2d 169, 114 P.2d 331 (1941).

70. *Id.* at 170, 114 P.2d at 332, *citing, e.g.*, *Pimental v. City of San Francisco*, 21 Cal. 351, 360 (1863).

71. 18 Cal. 2d at 172, 114 P.2d at 332.

72. CAL. REV. & TAX. CODE ANN. § 3352(c) (West 1970). The penalties imposed are also delineated in the code. "All taxes due November 1st, if unpaid, are delinquent December 10th at 5 p.m. and thereafter a delinquent penalty of 6 percent attaches to them." *Id.* § 2704. "The second half of taxes on the secured roll,

state may sell the land to someone else at the termination of the five year period.⁷³

One may legitimately ask whether the state should make such a sale. Assuming the building has been stripped of its plumbing and gutted by vandals, it will be of little use to speculators as a building. Investors would be paying solely for the potential future value of the land. Needless to say, prospective tenants would find little value in such a building either. Even if the building had not been vandalized and the tenants had remained, the speculator might have purchased merely with the hope that land value in the area would increase. In that case, the new owner would again be one who was disinterested in the continued habitability of the building. Given the constrictions of the ghetto housing market,⁷⁴ would not the land be put to better use as a dwelling than as the repository of some uncertain, future, speculative value? Lastly, if the party were to purchase with hopes of renovation, he would become heir to the insuperable difficulties experienced by cities and other outside parties.⁷⁵ Perhaps, as an alternative, the concept of individual home ownership could give rise to a more permanent and effective use of the land.

C. Adverse Possession

The preconditions for adverse possession are settled in California.⁷⁶ Initially, California law requires that adverse possession be hostile.⁷⁷ This requirement does not necessarily mean that there must be enmity between the parties. The hostility as such merely means that the possessor holds adversely to the record holder's rights, either express or implied.⁷⁸ Conceptually, the urban adverse possessor would hold his claim in contravention of the state's right to sell the land. The fact that the state did not exercise that right would not necessarily mean that the use would be permissive.⁷⁹ The claim is based on hostility to a right; it is not dependent on an exercise of that right.

if unpaid, is delinquent April 10th at 5 p.m. and thereafter a delinquent penalty of 6 percent attaches to it." *Id.* § 2705.

73. *Cf. id.* § 3362(b).

74. *See* note 10 *supra*.

75. *See* note 35 *supra*.

76. *See* *Laubish v. Roberdo*, 43 Cal. 2d 702, 706, 277 P.2d 9, 12 (1954); *West v. Evans*, 29 Cal. 2d 414, 417, 175 P.2d 219, 220 (1946); *Harvey v. Nurick*, 268 Cal. App. 2d 213, 214-15, 74 Cal. Rptr. 94, 96 (1968).

77. *Ross v. Burkhard Inv. Co.*, 90 Cal. App. 201, 211, 265 P. 982, 986 (1928); *Huling v. Seccombe*, 88 Cal. App. 238, 243-44, 263 P. 362, 364 (1928).

78. *Fugl v. Edwards*, 96 Cal. App. 2d 460, 464, 215 P.2d 802, 804 (1950).

79. Permissive use is characterized in California as "a license exercised in subordi-

A second element of adverse possession is that the claimant must possess the property exclusively.⁸⁰ In the context of urban housing, possession could not be exclusive in the sense of one person claiming the entire building. Each occupant would exclusively claim his own dwelling.

Theoretically, the arrangement would parallel a condominium.⁸¹ Condominium dwellers generally own in fee, "the interior surfaces of the perimeter walls, floors, ceilings, windows, and doors thereof, and the unit includ[ing] both the portions of the building so described and the airspace so encompassed."⁸² Ownership of the common areas is held in equal shares, one for each unit.⁸³ In addition, each resident has a nonexclusive easement of ingress and egress and support.⁸⁴ Each adverse possessor would occupy a horizontal plane of space, the parameters of which would be defined by vertical planes (walls) intersecting the horizontal plane.

A difficulty arises, however, in deciding the rights to the land under the building. Generally, condominium residents control disposal of their property through the condominium association. Each member has an equal voice.⁸⁵ One might argue that the adverse possessors could become tenants in common of an undivided 1/nth portion of the land,⁸⁶ with "n" representing either the number of dwellings in

nation to . . . [the owner's] claim." *Alper v. Tormey*, 7 Cal. App. 8, 11, 93 P. 402, 404 (1907). In *Davis v. Martin*, 157 Cal. 657, 108 P. 866 (1910), an action involving water rights, the California supreme court analyzed one type of conduct as indicative of permissive use:

It appears, however, that application . . . [for the water] was always made to the owners of the Martin Ranch when they were using the water at the time, that sometimes the plaintiffs were refused any part of the water, and from all the evidence it is a fair inference that the plaintiffs and their predecessor always recognized the superior right of the Martins to the water and yielded to their wishes.

Id. at 662, 108 P. at 868. Tenants need not explicitly exhibit such deferential conduct and the lack of aggressively antagonistic character does not prevent the claim from being hostile. See *Ortiz v. Pacific States Properties*, 96 Cal. App. 2d 34, 37, 215 P.2d 514, 516 (1950).

80. See, e.g., *Straux v. Canty*, 169 Cal. 101, 105 (1915).

81. CAL. CIV. CODE § 783 (West 1970): "A condominium is an estate in real property consisting of an undivided interest in common in a portion of a parcel of real estate *together with* a separate interest in space in a residential . . . building on such real property . . ." (emphasis added).

82. CAL. CIV. CODE § 1353 (West 1970).

83. *Id.*

84. *Id.*

85. Comment, *Fee in Condominium*, 37 S. CAL. L. REV. 82, 87-88 (1964).

86. By analogy, for example, condominium owners own "an undivided interest in common in a portion of a parcel of real property." CAL. CIV. CODE § 783 (West 1970). The land can be considered a common area.

the building or the proportion of the total floor space taken up by the occupant's home.

California provides no mechanism by which the stealthy entrant can acquire a possessory interest in property.⁸⁷ Instead, adverse possession must be "open" so that an owner might discover his presence.⁸⁸ The building would have to serve as a home rather than just an occasional dwelling. Consequently, the tenant's commitment to the building would have to be quite serious since a substantial amount of maintenance and repair would ordinarily be required. Note, however, that tenants would not have to *proclaim* their presence and intent because the landlord is put on notice by the fact of their continuous presence.⁸⁹

Finally, California requires that the adverse possessor pay all taxes levied and assessed on the land that he wishes to claim.⁹⁰ Historically, this requirement is traceable to the railroad influence on early California government.⁹¹ The railroad was interested in gaining early notice of squatters on their large tracts of undeveloped land.⁹² Of the fifteen states requiring payment of taxes, eight are western states where the owners of substantial acreage found it impractical and virtually impossible to discover potential adverse takers by mere visual inspection of their vast possessions.⁹³

87. See *Cave v. Crafts*, 53 Cal. 135, 138 (1878); *Klein v. Caswell*, 88 Cal. App. 2d 774, 779, 199 P.2d 689, 692 (1948). In *Klein* the court stated:

The possession required by the statutes and by the decisions is one that must be so open, notorious and continuous as to give notice to others that it is hostile to the record owner and must be such as to indicate a claim of right, at least to the extent of putting a prudent man upon inquiry. "It must, in other words, be an open, unequivocal, actual possession—notorious, apparent, uninterrupted and exclusive—carrying with it marks and evidences of ownership, which apply in ordinary cases to the possession of real property."

Id., quoting *Lofstead v. Murasky*, 152 Cal. 64, 69, 91 P. 1008, 1010 (1907).

88. *Cave v. Crafts*, 53 Cal. 135, 138 (1878); *Klein v. Caswell*, 88 Cal. App. 2d 774, 779, 199 P.2d 689, 692 (1948).

89. *Shelton v. Malette*, 144 Cal. App. 2d 370, 376, 301 P.2d 18, 22 (1956). See also CAL. CIV. CODE § 19 (West 1970):

Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.

90. CAL. CODE CIV. PRO. § 325 (West 1970). That the payment of taxes serves as a form of notice to the record owner is not clearly a purpose of the statute, nor is a definitional alternative purpose apparent from its face. See Comment, *Real Property: Payment of Taxes By an Adverse Possessor*, 20 CALIF. L. REV. 432, 433 (1932). Defenders of the tax payment requirement, however, have proffered notice as a basis of support for their position. See Comment, *The Payment of Taxes Requirement in Adverse Possession Statutes*, 37 CALIF. L. REV. 477, 479 (1949).

91. Comment, *Payment of Taxes as a Condition of Title by Adverse Possession: A Nineteenth Century Anachronism*, 10 SANTA CLARA LAW. 244, 245-49 (1969).

92. *Id.* at 249.

93. *Id.* at 253.

In the context of urban adverse possession, the tax requirement may be eliminated while still remaining true to the exigency that prompted its institution. Notice to the prior owner is irrelevant when the prior owner has made the decision to relinquish his property. One is not dealing with vast uncharted lands where the state could discover the presence of squatters *only* through taxation. Instead, the state should be consciously formulating a policy of home ownership.⁹⁴ Taxation should not be an artificial impediment to this result. Furthermore, the tax requirement in this context is not merely unnecessary, it is positively harmful.⁹⁵ The same taxes that contributed to the landlord's ouster, would bar poor city dwellers from exercising a claim.

One must question the utility of a modern state demanding tax money from these people. It should not require too great a leap of faith to accept the proposition that a considerable number of the people forced to live in such housing are poor. If they are poor, then the

94. There may be some overlap between the concept of adverse possession as applied to abandoned dwellings and the concept of homesteading. At least one popular article has used the term homesteading for what is essentially adverse possession. G. Bronson, *The Old Homestead*, Wall Street J., Sept. 21, 1973, at 1, col. 1. (The Federal Homestead Act provided that settlers could stake a claim not to exceed 160 acres, on unappropriated federal lands. 43 U.S.C. § 161 (1970). "Every person who is the head of a family, or has arrived at the age of 21 years, and is a citizen of the United States . . . shall be entitled to enter one-quarter section, or less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of the land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.")

The claimant must file an affidavit stating that the application is made for himself and not someone else, that he is not acting as agent for another party, that he will make a good-faith effort to comply with the law, and that he has paid the required fee (\$5 for less than eighty acres, \$10 for more than eighty acres). *Id.* § 162. Three years later, the homesteader, or his wife or devisee if he is deceased, is entitled to a patent to the land. *Id.* § 164.

While the position taken in this Comment recommends the application of adverse possession to the urban market, the Federal Homestead Act could also serve as a model for legislation. A too literal reproduction of the act should be avoided. For example, the Supreme Court has held that lands within the limits of towns or municipalities are excluded from homestead entry. *Burfening v. Chicago*, 163 U.S. 321, 322, 324 (1896).

95. The ensuing result is that money which could be used to renovate individual dwelling spaces instead is diverted to the government in the form of taxes. Furthermore, this tax requirement may render adverse possession prohibitive for low income residents who would be most likely to utilize it. Note, however, that since the claimants will no longer be paying rent, the requirement of payment of 1/nth of the taxes per year may still be less than one year's rent to the previous landlord.

state would be drawing funds from the most economically vulnerable group in society. If they are on welfare, then the county would only be transferring funds from welfare payments to tax payments.

IV. STATUTORY ALTERNATIVES

Presently, adverse possession of abandoned urban housing is an inchoate concept in California law. Thus far, cases and statutes have been utilized to suggest a base upon which the idea might grow. Extensive legislation will be necessary, however, in order for the idea to take practical effect. Such legislation necessarily must answer questions such as: who is to be the title holder against whom the property will be adversely possessed; what organizational scheme is necessary to manage the privately owned dwellings; how is tort liability to be determined; how will landlord eviction be curtailed; and finally, will the governmental cost be prohibitive? These problems and possible legislative solutions must be examined.

A. *The Government as Title Holder*

Currently, property owners may redeem their property by payment of delinquent taxes prior to the expiration of five years.⁹⁶ Only at that time does the state become the title holder of the property. Consequently, if a claimant is to obtain a dwelling space by adverse possession, under current law he would be adversely possessing against the state only upon the termination of the five year period. Prior to that time, possession would be hostile only to the interests of the previous landlord who continues to hold legal title; even that hostility is currently not recognized.⁹⁷ Assuming that the government's interest is merely proprietary (thus rendering it conducive to adverse possession⁹⁸), to implement such an adverse possession scheme, legislation must be enacted to enable the state to become the holder of record prior to the expiration of the five year period.⁹⁹ If a landlord has irrevocably abandoned the property, there is no harm in installing the state as owner in fee. On the other hand, if the landowner has made

96. CAL. REV. & TAX. CODE ANN. § 332 (West 1970).

97. See note 52 *supra* and accompanying text.

98. See text accompanying notes 55-75 *supra*.

99. The alternative to this would be legislation allowing adverse possession against a landlord who has "abandoned" his property, and allowing taking when the government subsequently becomes title holder. Either alternative would suffice and the problems involved are quite similar, *i.e.*, determining true abandonment, redemption, etc.

a business decision to leave the building unoccupied in the hope of selling it, or as a prelude to destruction and erection of another building, then installation of the state as owner would be a bold usurpation.

Therein lies the rub: to draft legislation limiting swift government takeover only to truly abandoned buildings. The Urban League has pinpointed the two criteria for abandonment that would be vital to such legislation: (1) discontinuation of services and (2) failure to pay taxes.¹⁰⁰ Since the county tax collector currently must prepare a list of tax delinquent property,¹⁰¹ it would seem appropriate that he also prepare a list of that property which meet these criteria.

In addition, since the tax collector presently must publish an affidavit of "sale" to the government,¹⁰² he could also be required to publish affidavits which might include the following statements:

- (1) Taxes are delinquent on the property;
- (2) The land has been classified as abandoned based on:
 - (a) Discontinuation of services to the building;
 - (b) Failure to pay taxes;
- (3) As abandoned property, it is subject to irrevocable forfeiture by —(a short statutorily determined period);
- (4) The landowner may:
 - (a) Contest the classification of the property as abandoned by requesting an administrative hearing;
 - (b) Contest the classification of the property by injunctive suit;
 - (c) Contest the delinquency of the taxes.

Even assuming the efficacy of this accelerated title transfer, California currently demands a ten year adverse possession against the government. This figure would surely be a prohibitive one to low income tenants in this mobile society and should be substantially reduced.¹⁰³

100. STOLOFF, *supra* note 2, at 3.

101. CAL. REV. & TAX. CODE ANN. § 3351 (West 1970).

102. *Id.* § 3362.

103. The Federal residency requirement for homesteading, for instance, is five years. 43 U.S.C. § 164 (1970). Also, in a recent scheme implemented in Detroit utilizing the concept of homesteading abandoned urban housing, the required period is five years. L.A. Times, Sept. 20, 1973, § 1-A, at 3, col. 5. For discussion of homesteading see note 94 *supra*.

B. *Does the Condominium Concept Offer
An Organizational Solution?*¹⁰⁴

If legislation is adopted enabling low income families to adversely possess abandoned urban housing, the problem of how to implement

104. With rising population, increasing density in smaller concentrations of land, and diminishing availability in land supply, today's condominium housing is a viable form of home ownership. 4A R. POWELL, REAL PROPERTY § 633.32 (1968) [hereinafter cited as POWELL]; 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 10A.01 (1972) [hereinafter cited as ROHAN & RESKIN]; Alpren & Hassenfeld, *Condominium: A Functional Freehold in the Metropolis*, 5 AM. BUS. L.J. 127 (1967); Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1024 (1963) [hereinafter cited as Berger, *Condominium Shelter*]; Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association*, 117 U. PA. L. REV. 1104 (1969) [hereinafter cited as Schreiber]. Although the condominium has existed since ancient times in various parts of the world (1 A. FERRER & K. STECHER, LAW OF CONDOMINIUM 14-81 (1967) [hereinafter cited as FERRER & STECHER]; POWELL, *supra*, § 633.1), the initial spark for its wide acceptance in the United States began with the 1961 amendment of the National Housing Act, authorizing the Federal Housing Administration to insure mortgages on condominium units. National Housing Act § 234, 75 Stat. 180 (1961); 12 U.S.C. § 1715y (1970). It was amended in 1964 to insure mortgages for financing construction and rehabilitation of condominiums. Harrison, *The FHA Condominium: Use as a Means of Meeting the Need for Moderate Income Housing*, 11 N.Y.L.F. 458 (1965) [hereinafter cited as *FHA Condominium*]. More recently, the Veteran Housing Act of 1970, 38 U.S.C. § 1810, provided condominium loan insurance for veterans.

This amendment to the National Housing Act was part of a trend sparked by the National Housing Act, originally enacted in 1934, to meet the needs of expanding urban population and to encourage improvement in housing standards. Implementation of these goals was provided by establishing a mortgage and loan insurance system administered by the FHA. With the FHA as insurer, lending institutions became more willing to give loans to individuals. Insuring condominium ownership followed the trend of insuring loans on other types of housing, such as cooperative housing (§ 213) and nursing homes (§ 232). Welfeld, *The Condominium and Median-Income Housing*, 31 FORDHAM L. REV. 457, 475 (1963).

The FHA recommended that states pass enabling legislation to implement the mortgage insurance program on condominiums, and it drafted a Model Statute for Creation of Apartment Ownership as a guide. FERRER & STECHER, *supra* §§ 2, 4. In the past decade, condominium legislation was passed in every state and the District of Columbia, generally following the Model Statute. Currently, condominium projects have been mushrooming throughout the United States. Buhan, *A Lawyer Looks at Residential Condominiums*, 7 A.B.A. REAL PROP., PROB. & TR. J. 7, 19 (1972); Note, *Florida Condominiums-Developer Abuses and Securities Law Implications Create a Need for State Regulatory Agency*, 25 U. FLA. L. REV. 350, 351 (1973) [hereinafter cited as *Florida Condominiums*].

In combining the concepts of adverse possession and condominium structure, theoretically the problems of financing are avoided. Adverse possessors need not finance their claim because they are not in fact purchasing it. For a discussion of the problems of financing condominium purchases by low income families see Quirk, Wein & Gomberg, *A Draft Program of Housing Reform: The Tenant Condominium*, 53 CORNELL L. REV. 361, 373-90 (1968); Comment, *Condominiums and the 1968*

such a scheme becomes of immediate concern. While the legal mechanism for transferring title to the state and ultimately to the adverse possessor has been examined and dealt with, the practical problems of day to day living—management of common areas, application for mail and utility services, and dwelling repair—require extensive exploration. The analogy to condominiums, as used previously, may provide a potential solution to this problematic living arrangement.

Condominium is generally defined as "a system of separate ownership of individual units in multiple-unit buildings."¹⁰⁵ Each unit is owned individually in fee simple thus rendering its utilization conducive to the adverse possession scheme. There are two types of common areas: the general which is used by all the owners, such as the hallways, and the limited, which is used only by a specific owner, such as a parking space.¹⁰⁶ The common areas, also called the common elements, are owned by all the unit owners as tenants in common.¹⁰⁷ This

Housing and Urban Development Act: Putting the Poor in Their Place, 43 S. CAL. L. REV. 309, 317-28 (1970).

105. *Susskind v. 1136 Tenants Corp.*, 251 N.Y.S.2d 321, 327 (Civ. Ct. City N.Y. 1964); POWELL, *supra* note 104, § 633.1(2); ROHAN & RESKIN, *supra* note 104, § 1.01. A more elaborate definition is:

[The] condominium is a multi-unit dwelling each of whose residents enjoys exclusive ownership of his individual apartment. With "title" to an apartment goes a cotenant's undivided interest in the common facilities— the land, the hallways, the heating plant, etc. Remarkably flexible, the condominium is susceptible of an endless variety of legal formulations and can be adapted to a multiplicity of land uses or project designs. But in all of its forms its principal goal remains constant: to enable occupants of a multi-unit project to achieve more concomitants of ownership than are now available either to renters or to cooperators. The realization of this goal depends mainly on whether the individual units will gain independent dignity as mortgage security and as a basis for property taxation.

Berger, *Condominium Shelter*, *supra* note 104, at 989. The condominium concept was broadened in 1964 by the National Housing Act to include single family units that were separate from the other units in a multifamily project. 12 U.S.C. § 1715y (1970). This was designed to include condominiums developed in suburbs where individual owners had their private unit unattached to the common areas. Some states followed by amending their statutes to include the broader definition, so that a condominium can be a high-rise or a lateral development. IND. CODE § 32-1-6-2 (1973); N.M. STAT. ANN. § 70-4-2 (Cum. Supp. 1967); VA. CODE ANN. § 55-79.2 (1969). Although many articles have been written on condominiums, the application of the condominium concept to adverse possession of urban housing is relatively unexplored. For comprehensive bibliographies about condominiums, see E. BREVER, *CONDOMINIUM* (1962); FERRER & STECHER, *supra* note 104, pt. VI; ROHAN & RESKIN, *supra* note 104, app. A.

106. Nachman, *Residential Condominium Representing the Purchaser*, 51 MICH. ST. B.J. 371, 373 (1972) [hereinafter cited as Nachman].

107. *Susskind v. 1136 Tenants Corp.*, 251 N.Y.S.2d 321, 327 (Civ. Ct. City N.Y. 1964); FERRER & STECHER, *supra* note 104, § 3; Wenig & Schulz, *Government Regulation of Condominium in California*, 14 HASTINGS L.J. 222, 224 (1963).

The tenancy in common could be in a fee simple, a leasehold, or a life term. Sometimes only the recreational area is leased for a certain period of time. See,

combination of two types of ownership, of individual units and common areas, distinguishes condominiums from cooperatives and traditional home ownership.¹⁰⁸ Conceptually, the natural division of abandoned apartment houses into individual units and common areas lends itself to the utilization of the condominium concept.

1. Creation of the Condominium

Although condominiums can be created without enabling legislation,¹⁰⁹ the structure and operation of the condominium—the declaration, bylaws, and individual apartment deed—are usually established by statute.¹¹⁰

The declaration is a recorded master deed containing the description of the land encompassing the condominium project, the individual units, and the common areas. It also has provisions designed to secure com-

e.g., Wechsler v. Goldman, 214 So. 2d 741 (Fla. 1968); Ackerman v. Spring Lake of Broward, Inc., 260 So. 2d 264, 266 (Fla. Ct. App. 1972).

108. The traditional home ownership does not include a common interest area, shared and owned with neighbors. The cooperative, most often compared with the condominium, does not give any fee simple interest to the individual unit dweller. Although there is no fee simple interest given for the individual unit, the undivided fractional interest in the land and the entire building can be owned by all the owners in fee simple. POWELL, *supra* note 104, § 633.2(3). For comparative advantages of the cooperative, see Alpren & Hassenfeld, *Condominium: A Functional Freehold in the Metropolis*, 5 AM. BUS. L.J. 127, 129 (1967); Note, *Legal Characterization of Individual's Interest in a Cooperative Apartment: Realty or Personalty?*, 73 COLUM. L. REV. 250, 258 (1973).

There are many different forms of cooperative housing. The most common is the stock cooperative in which ownership of stock entitles an individual to a proprietary lease to possess a unit in a building owned by a corporate or business trust entity. POWELL, *supra* note 104, §§ 633.1(3), 633.2.

Even though tax advantages are similar in all forms of homeownership, the units of a cooperative complex are not financed separately, as in a condominium. Fokes, *Legal and Practical Aspects of Condominium*, 19 BUS. LAW. 233, 234 (1963); Note, *Legal Characterization of Individual's Interest in a Cooperative Apartment: Realty or Personalty?*, 73 COLUM. L. REV. 250, 259 (1973). For practical aspects of tax deductions, see Anderson, *Some Tax Aspects of the Condominium*, 1970 U. ILL. L.F. 220. If one person should default on mortgage payments, others in the building become liable for that share. Because each condominium unit is financed independently by individual owners, default by one does not affect anyone else financially. This financial independence is one of the major advantages of the condominium over the cooperative. Alpren & Hassenfeld, *Condominium: A Functional Freehold in the Metropolis*, 5 AM. BUS. L.J. 127, 129 (1967); Fokes, *Legal and Practical Aspects of the Condominium*, 19 BUS. LAW. 233, 234 (1963).

109. POWELL, *supra* note 104, § 633.8.

110. POWELL, *supra* note 104, § 633.7; Grosword, *The Modern Concept of Condominiums*, 47 TITLE NEWS 83, 84 (1968); Rohan, *Second Generation Condominium Problem: Construction of Enabling Legislation & Project Documents*, 1 VAL. U.L. REV. 77, 79 (1966); Comment, *Condominium*, 77 HARV. L. REV. 777, 778 (1964).

patibility and financial security of the entire project: restriction on use, occupation, and transfer;¹¹¹ consequences of destruction, severance, and termination;¹¹² establishment of an association of owners; voting rights and percentage ownership; method of sharing common expenses; and organization of the management.¹¹³ The bylaws are usually incorporated by reference into the declaration.¹¹⁴

The bylaws of the condominium can be divided into two categories. The "condominium bylaws" contain provisions for administering the day-to-day affairs: resolution of disputes, maintenance and repair, general use restrictions, membership eligibility, and procedure for sale.¹¹⁵ The "corporate bylaws" provide rules for voting, election and duties of the board of directors and officers, and calling meetings.¹¹⁶ The deed for the individual unit contains the vital information necessary to transfer title to the unit owner.¹¹⁷

The creation of the adversely possessed condominium, likewise, would best be established by an enabling statute. Such a statutory scheme, however, must do more than merely allow the creation of a condominium. Instead, since its creation will not be initiated by a private individual or group, the statutory scheme must establish a governmental administrative agency to begin the process. This agency would serve a management function in preparing the declaration, the bylaws, and the individual deeds which would ultimately be transferred to the dwelling owners upon the termination of the statutory period required for adverse possession.

The various provisions of these documents encompass a wide variety of management functions which will be discussed in the following section. A preliminary factor which the enabling statute must define is the practical limitations on adverse possession, which will be prerequi-

111. Nachman, *supra* note 106, at 373; Note, *Real Property—Georgia's Apartment Ownership Act—Its Scope Analyzed in View of Emerging Condominium Litigation in Other Jurisdictions*, 23 MERCER L. REV. 405, 406 (1972) [hereinafter cited as Ga.'s Apt.].

112. Fokes, *Legal and Practical Aspects of Condominium*, 19 BUS. LAW. 233, 238 (1963); Ga.'s Apt., *supra* note 111, at 406.

113. Tully, *Castle in the Air—The Condominium*, 34 ALA. LAW. 28 (1973).

114. Nachman, *supra* note 106, at 373.

115. *Id.* POWELL, *supra* note 14, § 647.

116. *Id.* In the context of adverse possession, "corporate bylaws" may imply a business sophistication not readily enjoyed by the low income adverse possessor. With management by the government, however, such organizational tools as voting, officers and directors, and calling of owners' meetings could be significant as tools of collective bargaining with the governmental management unit.

117. POWELL, *supra* note 104, § 633.27(4).

site to the creation of the condominium. In Detroit, a plan has been implemented whereby abandoned homes are being awarded to families.¹¹⁸ The Detroit scheme requires five elements to qualify: (1) those applying must be 21 years of age or the head of a family; (2) they must be United States citizens or declare their intention of being naturalized; (3) they must be financially able to provide \$8,000 in rehabilitation work to the home, or have trade skills to carry out such improvements; (4) they must begin renovating the home within sixty days of taking residence and be able to bring it up to city building codes within two years; (5) and they must live in the home at least five years.¹¹⁹ Although the financial commitment and the requirement of complying with building code standards within two years may be prohibitive to the low income adverse possessor, the Detroit plan at least advances the type of considerations which should be included in the bylaws and/or the declaration. The governmental administrative agency and the enabling statute, therefore, would be crucial not only in the initial creation of the condominium, but also in insuring that the governmentally condoned adverse possessor would in fact intend to make a substantial commitment to the dwelling unit and would not be a mere transient looking for a temporary place to sleep.

2. Management of a Condominium

Since each unit owner in a residential condominium¹²⁰ is also an owner of the common elements as a tenant in common, theoretically, each has an equal voice in the policies and decisions affecting the condominium project. For the sake of efficiency, however, most condominiums elect to have a board of directors or officers who represent the owners.¹²¹ The technique of the elections, the size of the group, and the powers it possesses vary from condominium to condominium depending on the declaration and bylaws outlined in the particular condominium or by ad hoc agreements among the owners.¹²² Usually the association of the owners elects a board of directors that enforces

118. See L.A. Times, Sept. 20, 1973, § 1-A, at 3, col. 5. See also Wall Street J., Sept. 21, 1973, 1, col. 1.

119. L.A. Times, Sept. 20, 1973, § 1-A, at 3, col. 5.

120. Discussion will be limited to the residential type of condominium, not commercial or resort, even though the general principles involved in all three are similar. For commercial condominiums, see POWELL, *supra* note 104, § 633.8(2). For resort condominiums, see 68 REAL ESTATE L. & PRAC. 1-707 (1973).

121. This is especially practical in large condominium projects where there may be varying interest among the owners in being part of the administrative unit.

122. See notes 111-14 *supra*.

the restrictions pertaining to use and occupancy. Typically, the directors are also empowered to enter into management contracts with professionals to carry out the daily maintenance and repair of the common elements.¹²³ The hiring of professional management, though not necessarily essential to a small condominium complex, is preferred by the FHA and conventional mortgagees.¹²⁴ The duties of the management hired by the officers of the association of owners (hereinafter referred to as the management) vary according to the agreements with the officers. Generally, the duties or powers of the officers include enforcement of the use and occupancy restriction, some or all of which can be delegated to the management. In addition, assessment of common expenses, which include maintenance and repair costs,¹²⁵ insurance,¹²⁶ cost of renovation or construction of an addition to the common elements,¹²⁷ and special assessments, such as for the acquisition of an individual unit through foreclosure¹²⁸ or exercise of the right of first refusal,¹²⁹ are made by the officers or the management before collection from the unit owners. Sometimes, the units are able to vote on a particular course of action,¹³⁰ such as major construction or renovation in a common area.

Once again, the adversely possessed condominium (hereinafter referred to as a government condominium) requires a managerial structure different from the privately owned condominium. Initially, the professional management hired by the directors of the association must be replaced by the governmental administrative agency which will exercise all of the powers and duties traditionally relegated to the board of directors.¹³¹ In essence, the government is acting as the developer

123. Cf. POWELL, *supra* note 104, § 633.36.

124. HUD, MORTGAGE INSURANCE FOR CONDOMINIUM HOUSING § 5-4(a) (1973). Rohan, *Condominium Housing: A Purchaser's Perspective*, 17 STAN. L. REV. 842, 856 (1965) [hereinafter cited as Rohan, *Purchaser's*].

125. ROHAN & RESKIN, *supra* note 104, § 6.02(3); Berger, *Condominium Primer for Fiduciaries*, 104 TRUSTS & ESTATES 21, 23 (1965).

126. D. CLURMAN & E. HEBARD, CONDOMINIUMS AND COOPERATIVES 96-101 (1970); Takabuki, *Condominium Insurance: A Case History*, 1967 A.B.A., SEC. INS., NEGL. & COMP. L. 206.

127. *Amoruso v. Board of Managers of Westchester Hills Condominium*, 330 N.Y.S. 2d 107 (Sup. Ct. 1972).

128. POWELL, *supra* note 104, § 633.36(2).

129. FERRER & STECHER, *supra* note 104, ch. 31; POWELL, *supra* note 104, § 633.36(5); ROHAN & RESKIN, *supra* note 104, § 10.03; *Mowatt v. 1540 Lake Shore Drive Corp.*, 385 F.2d 135 (7th Cir. 1967).

130. POWELL, *supra* note 104, § 633.36(5); ROHAN & RESKIN, *supra* note 104, § 10.02.

131. See notes 125-129 *supra* and accompanying text. Since the state will hold

of a private condominium before most of the units are sold and before the occupants have sufficient cumulative interest in the project to organize and control it. Furthermore, since the adverse possessors will not gain title for a statutorily defined period, there are in fact no "owners," in the traditional sense of the word, who could constitute an association capable of electing officers. The result is that the enabling statute must create a managerial unit within the governmental structure which not only will have the initial responsibility of screening potential owners, but also of securing utility services, supplying daily maintenance and repair of the common elements, and controlling use¹³² and occupancy¹³³ restrictions, as well as assessing and collecting

title, it logically follows that the administrative agency should exercise the powers and duties which the officers or directors usually have. This does not, however, exclude the possibility of the government contracting with a professional management organization as would a private ownership association. For the sake of simplicity, reference will be made solely to governmental management.

132. Use restrictions deal with the house rules regulating the right of the individual unit owner to use the property as he sees fit. They include conduct and activity inside the individual unit as well as that related to the exteriors and common elements, such as keeping a pet, storage of things in the common areas, and the hanging of an awning, canopy, or shutter on the outside walls of the building. *ROHAN & RESKIN, supra* note 104, § 10.02. Alteration or construction of anything new is usually allowed only with permission from the board of directors. Naturally, there is much more freedom in the use of the inside of an apartment than the common elements or exterior. At times it is difficult to determine the common elements. In one Florida case, for example, an owner was ordered to remove the glass jalousies he had added and to return the enclosures to their original screened condition. *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. Ct. App. 1971). The officers and directors of the managing corporation, drawn from the owners of the condominium, had sought a mandatory injunction to require the defendant unit owner not to make the material alteration he desired, after he had originally requested permission as required by the declaration, but was denied the permission. *Id.* at 686. Compare *Vinik v. Taylor*, 270 So. 2d 413 (Fla. Ct. App. 1972), where one unit owner sought to enjoin another unit owner from enclosing his balcony, after the board of directors had given the defendant permission to make the alteration. In upholding the defendant's contention that the balcony is not a common element, the court of appeals affirmed the lower court's decision in denying the injunction. *Id.* at 417. Perhaps the distinguishing feature between the two cases is the approval or lack of it by the board of directors of the condominium, presumably representing the consensus of the majority of the owners.

133. Occupancy restriction is enforced in the form of the right of first refusal or preemption right. *See* note 129 *supra*. Although this right can be expressed by the management, it is often retained by the board of directors or is determined by vote of the majority of the unit owners. This is a form of restraint on alienation regulating who the prospective buyers can be by requiring that: (1) the unit owner sell his condominium only with the approval of a specified entity, or (2) that the faction representing the owners be allowed to exercise the option to match the selling price and acquire the unit, or (3) that the buyer will be supplied by the aforementioned faction. *Gale v. York Center Community Cooperative, Inc.*, 171

common expenses.¹³⁴ Enforcement mechanisms must also be deline-

N.E.2d 30 (Ill. 1960); POWELL, *supra* note 104, § 633.36(4)(b). There is a general public policy against restraints on alienation, for they keep property out of commerce while allowing it to concentrate in a few and they prevent income or improvements to be made. ROHAN & RESKIN, *supra* note 104, § 10.3(1). In order to overcome this public policy, the restraints must be reasonable. RESTATEMENT OF PROPERTY § 406 (1944). The reasonableness has been determined by the balancing, among other things, of the utility of the restraints against the harm of such enforcement. *Gale v. York Center Community Cooperative, Inc.*, 171 N.E.2d 30 (Ill. 1960). See also *Mowatt v. 1540 Lake Shore Drive Corp.*, 385 F.2d 135 (7th Cir. 1967).

Despite social and economic benefits, the restraints would still be invalid if used to discriminate against race, color, or creed. See Berger, *Condominium Shelter*, *supra* note 104, at 1017-19. The Civil Rights Acts of 1964 and 1968, or an applicable state or local fair housing code, are likely to be used as authority to attack racial restraints in condominiums. Note, however, that a racial or religious restraint on alienation is not likely to appear as an express ingredient of a right of preemption. The blanket authority in a condominium management to exercise its right for any reason lends itself to use as a racial restraint without express statement of such an objective in the condominium declaration. Browder, *Restraints on the Alienation of Condominium Units (The Right of First Refusal)*, 1970 U. ILL. L.F. 231, 256-57 [hereinafter cited as Browder].

Another hurdle to be considered before exercising the right of first refusal is the rule against perpetuities, which limits the time of exercising the right. It is usually held to be an option in gross to be limited to continue until the expiration of twenty-one years after the life of the last survivor of a specified group. *Id.* at 256. Writers have argued that the rule against perpetuities should not apply to the condominium ownership (*id.*), although only a few states have enacted statutes which hold that the rule against perpetuities shall not defeat any right of the unit owner of use, occupancy, or transfer of the units given by a declaration or bylaw of a condominium. See FLA. STAT. ANN. § 711.08(2) (1969); ILL. REV. STAT. ch. 30, § 320 (1969); NEB. REV. STAT. § 76-807 (1971); NEV. REV. STAT. § 117.103 (1967); R.I. GEN. LAWS ANN. § 34-36-28 (1970); UTAH CODE ANN. § 57-8-28 (1963).

To remain within the limits of the rule, where it is still held to be applicable, writers suggest the use of an arbitrary standard which would not exceed the period of the rule. POWELL, *supra* note 104, § 633.14(2); Browder, *supra* at 256.

Occupancy restrictions are generally viewed with favor since they are designed to promote harmony among people living in close proximity of each other. Their validity is upheld unless there is a strong countervailing policy against them, such as the policy against racial discrimination. In the context of government condominiums, occupancy restrictions will probably be statutorily defined initially in view of the nature of acquisition by the adverse possessor. See text accompanying note 119 *supra*. Sale after title has transferred from the state to the adverse possessor may render further occupancy restrictions necessary, and provisions dealing with such problems can be included in the bylaws and/or declaration. The economic background of the potential purchaser may be an unnecessary criterion.

134. The assessment and collection of common expenses is central to the survival of the private condominium. The assessment is based on expenses declared as such by provisions of the condominium statutes, or the declaration, or the bylaws, or by separate agreement of the unit owners.

Common expenses often approach 10%-15% of total monthly expenses. Ross, *Condominium and Preemptive Options—the Right of First Refusal*, 18 HASTINGS L.J. 585, 601 (1967). California and Nevada have statutes specifying that each unit has an

ated.¹³⁵

equal share in the common areas, rather than on a percentage basis. CAL. CIV. CODE § 1353(b) (West 1970); NEV. REV. STAT. § 117.090 (1969); ROHAN & RESKIN, *supra* note 104, §§ 6.01(3), 6.02(2), 6.03. The proportionate share paid by each unit owner may be prorated according to the declaration or bylaws, or it may be according to the value of the unit. The share paid by each could be equal or according to the proportionate share of the common elements owned. Where individual units vary in prices and ownership of the common elements, the higher priced unit owners would have to pay a larger share of the common expenses than those of the lower priced units.

Ostensibly, the requirement of such extensive assessments may render the concept of adversely possessed condominiums inefficacious. Since the claimants will most likely have low incomes, it is arguable that requiring the payment of assessments will exclude many potential owners, but an adverse possessor would not pay rent, thus freeing money usually used for rent to cover assessments for common expenses. But, also, see note 95 *supra*. If a scheme similar to the Detroit plan is implemented, however, an initial investment is mandatory, thus tending to exclude many families. See text accompanying note 119 *supra*. Clearly, at least an incipient infusion of governmental funds would be necessary to insure an open market to all claimants. See notes 166-68 *supra* and accompanying text.

In private condominiums, there is usually no controversy over payment of expenses which are regularly expected, such as tax, insurance, and cost of maintenance and repair, but differences are likely to arise for a special assessment, an unexpected expense. Even if approval by the unit owners by a vote is necessary before incurring the special common expense, often only a majority, not a unanimous, vote is required. POWELL, *supra* note 104, §§ 633-36(2). The leeway given the board of directors or management for use of common funds for additions or improvements is often authorized by statute, the declaration, or the bylaws. *Cf.* Amoruso v. Board of Managers of Westchester Hills Condominium, 330 N.Y.S.2d 107, 109 (Sup. Ct. 1972).

135. The remedies available for violations of the use and occupancy restrictions and for delinquent payment of common expenses are similar in private condominiums. They include imposition of a fine, attachment of a lien, or institution of a law suit for damages, breach of covenant, or injunction. See N.M. STAT. ANN. § 70-4-7 (Supp. 1973); Berger, *Condominium Shelter*, *supra* note 104, at 1012; Comment, *Community Apartments: Condominium or Stock Cooperative*, 50 CALIF. L. REV. 299, 319 (1962) [hereinafter cited as *Community*]. The effectiveness of these remedies on a low income adverse possessor appears tenuous at best. If the claimant is sincere in his bid for a home and has devoted time and energy so that he may become an owner of decent housing, these possible remedies may be adequate.

Legal actions are generally appropriate for conduct or activity violating the use or occupancy restrictions. Berger, *Condominium Shelter*, *supra* note 104, at 1012. See, e.g., Gale v. York Center Community Cooperative, Inc., 171 N.E.2d 30 (Ill. 1960). Fines are effective for minor infractions. The attachment of a lien to an individual unit is usually done in reference to unpaid common expenses or assessments. See, e.g., FHA MODEL STATUTE FOR THE CREATION OF APARTMENT OWNERSHIP §§ 9, 23 (Form No. 3285, 1962); N.Y. REAL PROP. LAW § 339-z (McKinney 1968); POWELL, *supra* note 104, § 633.31; ROHAN & RESKIN, *supra* note 104, § 6.04(2)(a); Berger, *Condominium Shelter*, *supra* note 104, at 1010-11; *Community*, *supra* at 319; Comment, *Condominium*, 77 HARV. L. REV. 777, 779-80 (1964). One way to impose the lien is to make it effective when the unit is sold. The lien then ripens and the delinquent payments are collected from the sale proceeds. ARK. STAT. ANN. § 50-1018 (Supp. 1967); N.Y. REAL PROP. LAW § 339-z (McKinney 1968).

As the dwelling fills, the claimants can elect officers as do the owners of private condominiums. The primary distinction should be that the officers of the government condominium will serve solely as representatives of the claimants in voicing opinions and lodging complaints with the governmental managerial unit. Consequently, their function will be essentially representative and not managerial.¹³⁶

3. Tort Liability¹³⁷

What is to happen if someone is injured in a common area? The answer should depend on who that someone happens to be.

If the injured person were a third party, non-resident of the building,¹³⁸ his recovery might be governed by the common law rule of

Note that an effective and practical method may be illustrated by the statutes of Alaska and Washington. See ALAS. STAT. § 34.07.220 (1971); WASH. REV. CODE ANN. § 64.32.200(a) (1966). They authorize the discontinuance of all utility services until the assessment is paid, as long as notice is given to the delinquent owners and the majority of the other owners approve. ROHAN & RESKIN, *supra* note 104, § 6.04(1). It is debatable whether this remedy is viable in the context of government condominiums.

136. Perhaps, when the abandoned dwelling is filled and the statutory period has run thus resulting in the transfer of title to the individual claimants, the officers can gradually assume more of the managerial tasks. Eventually, governmental management may be phased out completely, and the governmental condominium can become a private condominium.

137. Contractual liability is also an area of potential difficulty. As representatives for the association of owners of a private condominium, contracts entered into by the officers are binding on the owners. Cf. Berger, *The Condominium-Cooperative Comparison*, 11 PRAC. LAW. 37, 40 (1965).

If the officers are empowered to hire professional management, contracts made on behalf of the association by the management are also binding upon the owners due to the agency principle. CAL. CIV. CODE § 2330 (West 1970). Even though there is no express or written authority for the management to enter a particular contract, the owners can still be held based on the theory of ostensible agency. CAL. CIV. CODE § 2334 (West 1970). Additionally, it is difficult for the unit owners to cancel a contract if they had knowledge of it previously. *Wechsler v. Goldman*, 214 So. 2d 741, 744 (Fla. 1968); cf. *Fountainview Ass'n, Inc. v. Bell*, 201 So. 2d 657 (Fla. Ct. App. 1967). Note that in the context of government condominiums, many of the contractual difficulties would be avoided by the fact that the government administrative agency would be the contracting party and the government would hold legal title to the building and land. Consequently, any contractual liability would fall upon the government rather than upon the adverse possessors.

138. Whether or not a plaintiff has standing to sue in a tort action depends on his relationship to the managerial unit. A third party, non-resident of the condominium, of course, has such standing. In California at least, the condominium owner also has standing to sue the unincorporated association if the condominium association possesses an existence separate from its members and if the members do not retain direct control over the operations of the association. *White v. Cox*, 17 Cal. App. 3d 824, 829, 95 Cal. Rptr. 259, 262 (1971). See also Note, *White v. Cox*:

joint and several liability among owners of an unincorporated association.¹³⁹ The primary danger of joint and several liability is the risk of an injury within the common elements being used as a basis for an action against one or a limited number of owners. Even if the negligence were attributable to the management, the owners could be sued because of the ownership or agency relationship.¹⁴⁰ Some states do not allow the right of contribution from the other owners¹⁴¹ thus permitting the plaintiff to select a few defendants to bear the burden of the many.

Such is the danger connected with private condominium ownership. Under the government condominium concept, no such risk exists in the early stages of condominium creation. The government is the sole title holder with exclusive control over the common areas. Consequently, any tort action must necessarily be brought against the government, for the adverse possessors are neither owners nor members of an unincorporated ownership association and are thus not subject to tort actions in this context.

Significantly, however, upon the termination of the statutory period, the adverse possessors become the owners. Unfortunately, the beneficent transfer of title will be accompanied by a newly acquired tort lia-

Tort Actions Against the Condominium Association—Implications for the Individual Owner, 8 CAL. W.L. REV. 536 (1972); Note, *Condominiums—Member of Unincorporated Association of Condominium Owners Permitted to Bring Personal Injury Action Against Association for Negligent Maintenance of Common Areas*, 40 FORDHAM L. REV. 627 (1972); Annot., 45 A.L.R.3d 1171 (1972). For a discussion of whether or not a management organization can sue third parties for damages to the condominium see *Friendly Village Community Ass'n, Inc. v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 225, 107 Cal. Rptr. 123, 126 (1973).

139. See W. PROSSER, TORTS § 72 (4th ed. 1971); Berger, *Condominium Primer for Fiduciaries*, 104 TRUSTS & ESTATES 21, 22 (1965). Clearly, the traditional prohibition against unincorporated associations suing and being sued is beginning to erode. FED. R. CIV. P. 17(b); CAL. CODE CIV. PRO. § 388 (West 1970); *Inglis v. Operating Eng'rs Local 12*, 58 Cal. 2d 269, 270, 373 P.2d 467, 467-68, 23 Cal. Rptr. 403, 403-04 (1962); *Marshall v. International Longshoremen's Union*, 57 Cal. 2d 781, 784, 371 P.2d 987, 989, 22 Cal. Rptr. 211, 213 (1962); *People v. Sobiek*, 30 Cal. App. 3d 458, 467-68, 106 Cal. Rptr. 519, 524-25 (1973); *White v. Cox*, 17 Cal. App. 3d 824, 827, 95 Cal. Rptr. 259, 261 (1971); H. OLECK, NON-PROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS § 226 (2d ed. 1965); Crane, *Liability of Unincorporated Association for Tortious Injury to a Member*, 16 VAND. L. REV. 319, 320 (1963).

140. See CAL. CODE CIV. PRO. § 384 (West 1970); ROHAN & RESKIN, *supra* note 104, § 10A-6.1; *Community*, *supra* note 135, at 312-14. See also *Coats v. Construction Local 185*, 15 Cal. App. 3d 908, 913, 93 Cal. Rptr. 639, 641 (1971); *Hinson v. Olson*, 23 Cal. App. 2d 227, 230, 72 P.2d 890, 892 (1937); W. PROSSER, TORTS § 72 (4th ed. 1971); 86 C.J.S.2d *Tenancy in Common* § 143 (1954).

141. W. PROSSER, TORTS § 50 (4th ed. 1971).

bility.¹⁴² It will not suffice to argue that the claimants in government condominiums are low income families and that judgments against them would be unenforceable. If they were to have any assets at all, for example, the newly acquired housing unit, a judgment could prove extremely detrimental. Although it might be contended that given the choice between suing the governmental management unit and suing low income condominium owners, the tort plaintiff would invariably reach for the deep pocket, such legal strategy does not immunize the owner from potential liability. Furthermore, if an action were successfully advanced against the government, it is quite possible that the judgment would be satisfied from owner assessments. In light of these possibilities, condominium tort liability must be considered.

In some states, statutory limitations have helped to ease the risk of unlimited liability. Only a few states, however, directly provide for this protection,¹⁴³ and all too often the statutes are unclear and incomplete in their protection against unlimited tort liability. Many states, including California, have no such statutes.¹⁴⁴ In surveying the statutory provisions dealing with tort liability, it becomes apparent that most statutes address themselves to few of the many problems connected with this area.¹⁴⁵

Statutes in Florida,¹⁴⁶ Mississippi,¹⁴⁷ and New Jersey,¹⁴⁸ for example, expressly state that owners are not held personally liable for damages caused by the management association or for damages connected with the use of the common elements. Presumably, this would mean

142. See text accompanying notes 139-141 *supra*.

143. For statutes which do, however, make provision for the tort liability of the unit owners' association see FLA. STAT. ANN. § 711.18 (1969); IDAHO CODE § 55-1515 (Supp. 1966); MICH. STAT. ANN. § 26-50(22) (Supp. 1971); MISS. CODE ANN. § 896-15 (Supp. 1971); N.C. GEN. STAT. § 47A-26 (1966); VA. CODE ANN. § 55-79.37(2) (1969).

144. See CAL. CIV. CODE § 1357 (West Supp. 1971). No reference is made to tortious acts, only to labor, service, or materials.

145. See ROHAN & RESKIN, *supra* note 104, at § 10A.03(3).

146. (1) The liability of the owner of a unit for common expenses shall be limited to the amounts for which he is assessed from time to time in accordance with this law, the declaration and bylaws.

(2) The owner of a unit shall have no personal liability for any damages caused by the association on or in connection with the use of the common elements.

FLA. STAT. ANN. § 711.18 (1969).

147. MISS. CODE ANN. § 896.15 (Supp. 1968).

148. N.J. STAT. ANN. § 46:8B-16(c) (Supp. 1973). Despite the lack of personal liability for the torts of the association, the resulting judgment against an association would probably be paid by the owners as part of the common expenses. ROHAN & RESKIN, *supra* note 104, § 10A.03(2).

that liability would be spread to all the owners through a common expense. Similarly, Alaska¹⁴⁹ and Washington¹⁵⁰ allow tort actions for damages arising out of the common elements to be brought against the association only. Individual liability is absolved by paying the proportionate share of the resulting judgment as a special assessment of a common expense. Some statutes¹⁵¹ merely limit the liability to the unit owner's proportionate share of the judgment without mention of who the party defendant would be. This does not necessarily mean that a plaintiff cannot hold one owner completely liable; it only implies that the owners must contribute among themselves.¹⁵² Also, multiple suits may be necessary to enforce payment by each owner.¹⁵³

Virginia gives very limited protection by holding the owner not liable for the negligence of the other owners unless "the negligent co-owner is acting for the council of co-owners."¹⁵⁴ This offers no help in determining tort liability in connection with the common areas.¹⁵⁵ There may also be an implication of unlimited personal liability for the torts of management personnel.¹⁵⁶

149. (a) Without limiting the rights of an apartment owner, a cause of action 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 or more apartment owners, as their respective interests may appear, with respect to a cause of action relating to the common areas and facilities of more than one apartment.

(b) A cause of action relating to the common areas and facilities for damages arising out of tortious conduct shall be maintained only against the association of apartment owners and a judgment lien or other charges is a common expense. The judgment lien or charge is removed from an apartment and its percentage of undivided interest in the common areas and facilities upon payment by the respective owner of his proportionate share based on the percentage of undivided interest owned by him.

ALAS. STAT. § 34.07.260 (1971).

150. WASH. REV. CODE § 64.32.240 (Supp. 1966). The tort judgment contemplated is also a common expense. Michigan's statute may be similar in providing that suits "against the co-owners shall be in the name of the condominium project." MICH. STAT. ANN. § 26-50(22) (Supp. 1966).

151. In the event of entry of a final judgment as a lien against two or more unit owners, the unit owners of the separate units may remove their unit and their percentage interest in the common elements from the lien thereof by payment of the fractional proportional amounts attributable to each of the units affected. Said individual payment shall be computed by reference to the percentage established pursuant to section 5-906. After such partial payment, partial discharge, or release or other satisfaction, the unit owner and his percentage interest in the common elements shall thereafter be free and clear of the lien of such judgment.

D.C. CODE ANN. § 5-924 (1967). Compare IDAHO CODE ANN. § 55-1515 (Supp. 1966); MD. ANN. CODE, art. 21, § 138 (Supp. 1967).

152. Schwartz, *Condominium: A Hybrid Castle in the Air*, 44 B.U.L. REV. 137, 147 (1964) [hereinafter cited as Schwartz].

153. Comment, *Condominium*, 77 HARV. L. REV. 777, 778 (1964).

154. VA. CODE ANN. § 55-79.37(2) (Supp. 1972).

155. ROHAN & RESKIN, *supra* note 104, § 10A.03(2); Comment, *Condominiums Incorporation of the Common Elements—a Proposal*, 23 VAND. L. REV. 321, 346 (1970).

156. ROHAN & RESKIN, *supra* note 104, § 10A.03(2).

Another statutory variation expressly permits the claimant to proceed against the unit owners after first exhausting the available remedies against the association of unit owners.¹⁵⁷ Uncertainties here include whether or not exhausting the available remedies would include levying an execution on the condominium; what effect a unit owner's negligence would have on the suit; whether or not payment of an aliquant share of the unpaid balance would exonerate an owner from further liability; and whether or not the liability for the unpaid balance would be joint and several.¹⁵⁸

The FHA Model Statute, from which most enabling state statutes were drawn, contains no provision for the limitation of tort liability.¹⁵⁹ With statutory aid lacking, the condominium owner must look elsewhere. Liability insurance could ease the burden of the problem if there were adequate coverage,¹⁶⁰ but, even then, the coverage obtained by the officers or management might be inadequate, the terms or conditions might not be fulfilled, or the policy could lapse without a renewal.¹⁶¹ Without other means of protection, the individual unit owner might be dangerously exposed.

Tort liability arises out of ownership of the common areas. Conceptually, therefore, if ownership is removed, so is liability. This logic appears to support the idea that while title to the individual units should transfer, title to the common areas should remain in the state. This is similar to the suggestion that the common elements should be incor-

157. Any individual, corporation, partnership, association, trustee, or other legal entity claiming damages for injuries without any participation by a unit owner shall first exhaust all available remedies against the association of unit owners prior to proceeding against any unit individually.

N.C. GEN. STAT. § 47A-26 (Supp. 1966).

158. ROHAN & RESKIN, *supra* note 104, § 10A.03(2).

159. F.H.A. MODEL STATUTE FOR THE CREATION OF HOME OWNERSHIP § 9 (Form No. 3285, 1962). Most of the state statutes were modeled after this statute.

In the event a lien against two or more apartments becomes effective, the apartment owners of the separate apartments may remove their apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment from the lien by payment of the fractional or proportional amounts attributable to each of the apartments affected. . . . Such partial payment . . . shall not prevent the lienor from proceeding to enforce his rights against any apartment

Id. § 9(6), quoted in FERRER & STECHER, *supra* note 104, § 1015.2.

160. See D. CLURMAN & E. HEBARD, *CONDOMINIUMS & COOPERATIVES* 95-102 (1970); POWELL, *supra* note 104, § 633.36; ROHAN & RESKIN, *supra* note 104, § 10A.05(2)(A); Rohan, *Disruption of the Condominium Venture: The Problems of Casualty Loss and Insurance*, 64 COLUM. L. REV. 1045, 1050 (1964).

161. POWELL, *supra* note 104, § 633.36; Knight, *Incorporation of Condominium Common Areas? An Alternative*, 50 N.C.L. REV. 1, 6 (1971); Schreiber, *supra* note 104, at 1144.

porated so that suit must be brought only against the corporation, thus shielding the owners.¹⁶² As in the case of incorporation, however, the shield of separate ownership may be penetrated, and the owners may be held liable as undisclosed or partially disclosed principals in an agency relationship.¹⁶³

Ultimately, statutory enactment must outline two requirements. Initially, if a judgment is entered against the association, each unit owner must be responsible only for his aliquant share. Payment of this aliquant share should absolve the owner from further liability. Secondly, mandatory insurance must be required to cover negligence of both the owners and the management in connection with the common elements. Such insurance will be obtained by the governmental managerial unit and financed by owner assessment. The adoption of this two-prong measure will insure that low income claimants will be protected from tort liability, thus guaranteeing that the commitment to their homes, in both time and money, will not be for naught.

D. Landlord Eviction

Abandonment is an unfortunate but organic process. There must be a delicate balance, however, between promoting adverse claims once apartments have been abandoned, and forcing landlords out by making life intolerable. Currently, the legal process is ineffective. The law has extended remedies to tenants for the obnoxious behavior of landlords.¹⁶⁴ A corollary right has not been established protecting landlords from the conduct of their tenants. The California Civil Code specifies minimal affirmative obligations on the part of tenants,¹⁶⁵ but

162. Schreiber, *supra* note 104, at 1143-44; Teaford, *Homeownership for Low-Income Families: The Condominium*, 21 HASTINGS L.J. 243, 267-68 (1970).

163. See Note, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 312 (1962); cf. ROHAN & RESKIN, *supra* note 104, § 6.04(1).

164. *Aweeka v. Bonds*, 20 Cal. App. 3d 278, 281, 97 Cal. Rptr. 650, 652 (1971) (plaintiff tenant allowed to sue for intentional infliction of emotional distress where defendant landlord attempted a retaliatory eviction against the tenant).

165. CAL. CIV. CODE § 1942.2 (West 1970):

(a) No duty on the part of the lessor shall arise under Section 1941 or 1942 if the lessee is in substantial violation of any of the following affirmative obligations:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

(2) To dispose from his dwelling unit of all rubbish, garbage, and other waste, in a clean and sanitary manner.

(3) To properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(4) Not to permit any person on the premises, with his permission to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure

these merely act as a condition precedent to the landlord's obligation to repair. Eviction is a possible legal tool, but the effort involved in repeated evictions can predispose a landlord to leave a marginal venture. Predatory tactics could drive the landlord out, for the statute provides no remedy other than to refuse repair, a move which can only mean that abandonment is one step closer.

To ask the question, however, is to answer it. The problem is whether or not tenants will destroy a building in order to force abandonment and thereby gain ownership by adverse possession. It must be recognized that there is a limit to deterioration, a point at which governmentally condoned adverse possession would no longer be practical. Tenants who will eventually have to repair and maintain the condominium unit, have no incentive to inherit a useless mound of rubble. Consequently, those desiring to own their own housing would be less likely to destroy the premises, especially at the risk of condemnation.

E. Cost v. Benefit

Money is the central dilemma of most urban projects. The need for funds, however, neither detracts from nor distinguishes the concept of adverse possession of abandoned urban housing.

Senators Cranston and Goodel introduced legislation addressed to "[t]he growing problem of abandoned properties and neighborhoods."¹⁶⁶ The bill would have empowered the Secretary of HUD to

make grants . . . for the purpose of assisting such localities in carrying out programs to alleviate harmful conditions or prevent deterioration in neighborhoods where the local governing body has determined that a substantial number of properties have been abandoned or foresees that the problem of abandonment may arise.¹⁶⁷

Money could be expended on public utilities, sidewalks, streets, improvement of private properties, and demolition of gutted buildings.¹⁶⁸ Unfortunately, the bill never reached the floor of the House.

or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself to do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which are respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the lessor has expressly agreed in writing to perform the act or acts mentioned therein.

166. S. 4087, 91st Cong., 2d Sess. (1970).

167. *Id.*

168. *Id.*

Assuming that money were available, the question remains: who should receive it? One might urge that present landlords, the rightful owners of the property, should be granted money to subsidize their continued stay. Such a solution presumes the comparative advantage of their continued presence, a presumption not supported by experience. In a survey of landlords in Newark, New Jersey, for example, three-quarters of the landlords questioned responded negatively to the question: "Would you improve the property if given a long-term mortgage?"¹⁶⁹ Prominent among this group of negative respondents were many aged owners, people disinterested in *any* rehabilitation.¹⁷⁰ These results should be contrasted with other findings of the same study. The researchers discovered that maintenance expenditures of resident owners were significantly larger than those for equivalent units with non-resident owners.¹⁷¹ The Rutgers Urban Studies Center thus concluded, "[T]he prime generator of good maintenance is owner-residence. It is the only factor that produces the degree of close supervision required for good maintenance of slum properties."¹⁷² From the standpoint of the building's future, therefore, it would be better to have resident owners closely interested in the property. Thus, it would appear that the better solution would be to utilize any available funds to establish the governmental management agency and to perhaps provide low income renovation loans to claimants willing to repair their newly acquired dwellings.

In terms of a cost-benefit analysis, the social benefits presumably outweigh the economic detriment. The pride and dignity ingrained in home ownership are part of the American heritage of self-reliance. The general policy to use land to its maximum efficiency can only be furthered if low income tenants know that they have the potential for a permanent economic stake in abandoned property. The stability engendered should minimize vandalism (now infesting abandoned housing) and alienation. Thus, the reduced period of statutory abandonment would serve to minimize the period during which further waste to the property might be committed. The governmental agency necessary to manage the condominium projects should be established in light of the emerging awareness of the need for adequate housing for the poor, as evidenced by the 1968 amendment to the National Housing Act.

169. G. STERNLIEB, *THE TENEMENT LANDLORD* 196 (1966).

170. *Id.* at xvi.

171. *Id.* at 174.

172. *Id.* at xiii.

The expenses of the agency would be partly reimbursed by the claimants as a common expense. After all the units are occupied, the common expenses paid by each occupant might possibly offset the cost of managing the common areas. Thus, the cost of the agency would only be significant at the inception, when most of the units are unoccupied. Those costs would be offset in the long run by savings in areas which would have required additional expenditure due to the problems arising from the social and economic ramifications of neighborhoods infested with abandoned housing.

CONCLUSION

Adverse possession of abandoned urban housing is an untried solution to the inner-urban housing dilemma. It is a means of curtailing urban waste and destruction by providing low income families with an opportunity for home ownership. Ingrained in this scheme is the element of self-help. Tenants who previously may have added to the destruction of urban dwellings will now have an interest in their homes—an interest embodied with the pride of ownership. Potential contributors to the problem will have the opportunity and incentive to alleviate the problem and to participate in its solution.

Although the implementation of this scheme gives rise to many structural difficulties, they could be surmounted by statutory changes. A material element of this alteration would be the utilization of condominiums as a solution to management and liability difficulties. Condominiums have been recognized as a potential source of low income housing.¹⁷³ The major difficulty in adoption of such a scheme, however, is obtaining the necessary enabling statutes. One author summarizes:

The Housing and Urban Development Act of 1968 dedicates itself to the idea that private home ownership is a beneficial social institution in the United States in which lower-income families should participate. In the urban environment condominiums appear to be the most promising form of private ownership housing since they make efficient use of the land but retain, to the maximum extent possible, the values associated with private home ownership . . . [I]f the strengths of condominiums can be effectively promoted through legislation, and if

173. See Hick, *Lower Income Housing: Condominium vs. Cooperative*, 59 ILL. B.J. 62 (1970); Quirk, Wein & Gomberg, *A Draft Program of Housing Reform—the Tenant Condominium*, 53 CORNELL L. REV. 361 (1968); Comment, *Condominiums and the 1968 Housing and Urban Development Act: Putting the Poor in Their Place*, 43 S. CAL. L. REV. 309 (1970) [hereinafter cited as *Condominium*].

its forward-looking provisions can be fully implemented, private urban home ownership may one day be available to all the people of America, not just the wealthy.¹⁷⁴

Adverse possession of abandoned urban housing has the potential for abuse. It may also, however, provide alternatives to abandonment, destruction, and two midnight cowboys seeking refuge in the wind.

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174. *Condominium*, *supra* note 173, at 328.