

CHAPTER 5. APPROACHES TO THE DEVELOPMENT OF CONDOMINIUMS
WITH HORIZONTAL CONFIGURATIONS

5-1. DEPARTURES FROM THE BASIC CONDOMINIUM DOCUMENTS.

- a. Various methods are being used to sectionalize and add condominiums together to form a larger community that includes ownership of streets and recreational facilities. These various methods come about primarily because of the inconsistency of State condominium laws, local zoning requirements, and the new techniques being employed by the construction industry toward developing a total environment. Therefore, virtually all condominiums now being developed constitute some degree of departure from the model documents and instructions contained in this Handbook.
- b. Due to staff limitations in Headquarters, it is necessary to limit the amount of Washington review by establishing a framework of guidelines within which the Field Office will be responsible for the review and final approval of the plan and documents that support it. Headquarters personnel will be available for advice and assistance with respect to specific questions or problems when requested.
- c. Most of the departures that become necessary are in the form of additions to the existing model documents.
- d. All basic documents for creating condominiums can be found in Reference (1) of the Foreword. The documents merge various statutory and regulatory requirements into the legal framework of a condominium to make the unit estates eligible for insurance under the National Housing Act. All documents reviewed must contain the substantive language without qualification. Some language will be found throughout the documents which has the purpose of protecting the interest of the consumer (a statutory requirement in Section 234) and the interest of the Secretary in a default situation (an example of such language can be found in FHA Form 3276-A). A knowledgeable attorney should be able to recognize such requirements and either list them or "red line" them in a master set of forms.

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5-2. TERMINOLOGY AND EXPLANATIONS.

a. Terminology.

- (1) Condominium means an estate in real property which:

- (a) Has perimetric boundary lines (appropriately described by a metes and bounds description) and which contains within that estate a multiple number of individual unit estates, and
 - (b) Which upon recordation of the fees of individual estates, reduces the fee of the original estate to the stature of a common estate in which the owners of individual units have an undivided interest.
- (2) Individual Condominium Unit Estates means the dwelling unit coupled with its undivided interest in the common estate. An individual condominium unit estate is brought into existence by the recordation of the condominium documents. It may, however, be abolished by the grantor prior to conveyance of title to another party and the property would revert back to a single deed estate.
- (3) Condominium Regime is the pattern set and mode of self-rule established as a result of the recordation of condominium documents. The term is also used to refer to all the documents necessary to legally constitute a condominium and permit it to function as such.
- (4) Total Condominium Development means a number of separately constituted condominiums that form a part of a total planned community which may or may not merge into one master condominium.
- (5) Series Condominium means a number of adjoining but separately constituted condominiums that are being constructed for the purpose of limiting the size of the common estate and the number of units for each separate condominium to a financially workable and marketable measure.
- (a) Normally an Association of Owners will be established by the documents creating the separate condominium.

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- (b) Each Association of Owners will be responsible for the maintenance and upkeep of the common estate in its separate condominium.
 - (c) Cross easements between the separate condominiums may be created permitting the members of each separate condominium to use the facilities of the common areas of the other separate condominiums where the common facilities are of the same type and size.

- (d) Where a larger facility is proposed for use by all of the members of the separate condominiums, a single separate condominium should not be made responsible for its upkeep. In this type of situation the proposed large facility to serve all of the members of the separate condominiums should be constructed on land off-site from the separate condominiums.
 - (e) In addition, an off-site nonprofit corporation as described below should be created to hold title to such a large off-site facility.
 - (f) This corporation should be responsible for collecting assessments to maintain and operate the facility which is to be used by the members of all of the separate condominiums.
- (6) Off-Site Nonprofit Corporation means a corporation which is not in itself a condominium and in which all owners of individual condominium unit estates have a membership interest.

b. Explanation.

- (1) Off-site Nonprofit Corporation Documents - FHA Form 3236-B, Certificate of Incorporation, FHA Form 3277-A, By-Laws, and FHA Form 3276-B, Enabling Declaration, serve a special purpose.

- (5-2) (a) The Certificate of Incorporation contains language obviating the need for covenants, easements and restrictions running with the land owned by the off-site corporation. In the absence of such, the condominium owners and the Secretary, if involved, would be in a better bargaining position.
- (b) All conditions, easements, covenants and restrictions, deemed necessary, are imposed on the condominium properties in the Enabling Declaration (FHA Form 3276-B) and the owner/members of the off-site corporation are governed by corporate law.
- (c) The off-site corporation is controlled by the members. This corporation must have the authority to have rules and regulations relating to the use of the property which all the members have adopted and agreed, under the corporation, to abide by.

- (d) The corporation must, for example, be in a position to suspend use of the large off-site facility when, for example, members have not paid their dues or assessments of its upkeep. Likewise, the corporation must be able to suspend use of the facility by a member who violates the rules of conduct, and of course, the corporation must also be in a position to establish the hours when the facilities are opened for use and when the facilities are closed.
- (e) For the above reasons the granting of rights to the members as a land right or easement cannot be approved by HUD-FHA if such right were to infringe upon the authority of the corporation to maintain and operate the facility.
- (f) In the rare case where the streets for each separate condominium are not dedicated to the public but are instead owned as an off-site facility by the off-site nonprofit corporation there must be a land right established with respect to the streets affording ingress and egress without limitation. In this approach the FHA Form 3276-B, Enabling Declaration, is used in lieu of FHA Form 3276-A.

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- (5-2) (2) Add-on or Incremental Condominiums - In this approach the community facilities are an integral part of the condominium and are a part of the common estate. Unlike the series condominium the condominium unit owners have an undivided interest in all of the facilities contained in the common estate together with the separate fee of the unit estate. Consequently, the undivided interest in the facilities is a part of each mortgaged unit estate and the real estate taxes are imposed directly on the owners of each individual unit estate.
 - (a) The owners of the individual unit estates are also directly exposed to the tort actions that would be amplified by the existence of the community facilities, particularly in the rare instance where the streets are so owned.
 - (b) After the first separate condominium is completed and constituted, the construction of each successive condominium must be completed before it is merged into the first condominium.
 - (c) In short, if the No. 1 condominium is completed and constituted, then the No. 2 condominium cannot be merged into No. 1 until it is completed and

constituted, and No. 3 condominium cannot be merged into No. 1 and No. 2 condominiums until it is completed and constituted, etc.

- (d) If this procedure is followed, then there is no longer a danger of builders' liabilities running through a common estate and involving a prior or successive purchaser.
 - (e) Requirements that must be met in developing this type of add-on are listed in paragraph 5-6. of this Handbook.
- (3) Mergers Affecting the Common Estate and Mergers That Do Not Affect the Common Estate - When title has been conveyed to all the individual estates in a condominium, The Association of Owners (or corporation if incorporated) will not own any real property. Fees to the units will be owned by the individuals and they will all have an undivided interest in the fee representing the common

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estate. Real estate, therefore, is not one of the assets of the association and a merger of the common estates of separately constituted condominiums would require the prior approval of all owners.

- (a) Actual merger of common estates is necessary in the separate project phases of an incremental (add-on) condominium where the major community facility is in one project phase; otherwise, only the condominium unit owners in that phase would have an undivided interest in the community facilities and only they would be exposed to the real estate taxes imposed on it. Changing values requiring special treatment is also a problem in the (add-on) approach.
- (b) If State law permits there will be no need to merge the common estates of contiguous but separate condominiums to effect common administration and management of a composite condominium development. Without a merger of common estates the same objectives may be achieved by a merger of governing bodies or a provision in the condominium regime by which each condominium delegates certain powers to a master association. The Board of Directors of the master association is made up of a representative from each of the separate condominiums. By so doing the values attached to ownership in each separate condominium are not changed as in a merger of various

common estates.

- (c) In cases where the community facilities are spread out in each phase, cross easements will be necessary for use and enjoyment of the various facilities. Such easements must have HUD-FHA approval and must not extend use rights to non-condominium properties.

- 5-3. PLAN FOR TOTAL CONDOMINIUM DEVELOPMENT. There must be a plan that shows the total condominium units contemplated and the unit ratio, for assessment purposes, must be based on that total. When construction of community facilities is not phased in relation to the number of units that can support them, the developer must pay his proportionate share until sufficient units are built and sold.

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- 5-4. INFORMATION BULLETIN. The Subscription and Purchase Agreement (FHA Form 3279) was originally designed to provide a description of the condominium for the buyer. It has been found necessary to give a buyer an Information Bulletin (similar to that used in the cooperative programs) prior to the time he makes his downpayment and signs the agreement. The Bulletin must be given to a prospective purchaser at the time the developer is permitted to use the market testing procedure set forth in Reference (1) of the Foreword. The language in the Subscription and Purchase Agreement will be changed to indicate that the purchaser has received the Information Bulletin and if any changes in the plan have been made since the time of his receipt, then the changes must be itemized in the agreement. Information Bulletins must be written in a manner that describes the subject condominium development. The Information Bulletin, among other things, must inform the buyers that the corporation(s) do not provide Owners Title Insurance. If it is desired it is their responsibility to purchase it. They must also be told that, like any other homeowner, personal liability policies are their responsibility. A test of a good Bulletin is:

- a. Does it adequately inform the prospective purchaser of all his future rights and obligations as the owner of an individual condominium estate?
- b. Does it assure that consumer interests are well protected within the framework of HUD-FHA requirements? and
- c. Does it facilitate the job of review and processing by HUD-FHA personnel?

- 5-5. UNIT RATIOS.

- a. Condominiums in Which Units Extend Over or Under Other

Living Units. (Where State statutes permit).

- (1) Ownership of the common areas may be:
 - (a) In proportion to the value (as originally estimated by HUD-FHA) in the fraction or percentage obtained by dividing the value of subject unit by the total value of all units.

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 - (b) In proportion to living area (as originally determined) in the fraction or percentage obtained by dividing the living area of subject unit by the total living area of all units.
 - (c) In equal shares, in the fraction or percentage obtained by dividing 1 by the total number of units.
- (2) Voting in the Association of Owners may be:
 - (a) In proportion to the value (as originally estimated by HUD-FHA) in the fraction or percentage obtained by dividing the value of subject unit by the total value of all units.
 - (b) In proportion to living area (as originally determined) in the fraction or percentage obtained by dividing the living area of subject unit by the total living area of all units.
 - (c) In equal shares, in the fraction or percentage obtained by dividing 1 by the total number of units. The owner of each unit may have 1 vote.
- (3) Assessment for common expense may be:
 - (a) In proportion to the value (as originally estimated by HUD-FHA) in the fraction or percentage obtained by dividing the value of subject unit by the total value of all units.
 - (b) In proportion to living area (as originally determined) in the fraction or percentage obtained by dividing the living area of subject unit by the total living area of all units.

b. Condominiums in Which No Living Unit Extends Over or Under Another Living Unit. (Where State Statute Permits).

- (1) Ownership of the common area may be:

- (a) In proportion to the value (as originally estimated by HUD-FHA) in the fraction or percentage obtained by dividing the value of subject unit by the total value of all units.

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 - (b) In proportion to living area (as originally determined) in the fraction or percentage obtained by dividing the living area of subject unit by the total living area of all units.
 - (c) In equal shares, in the fraction or percentage obtained by dividing 1 by the total number of units.
- (2) Voting in the Association of Owners may be:
 - (a) In proportion to the value (as originally estimated by HUD-FHA) in the fraction or percentage obtained by dividing the value of subject unit by the total value of all units.
 - (b) In proportion to living area (as originally determined) in the fraction or percentage obtained by dividing the living area of subject unit by the total living area of all units.
 - (c) In equal shares, in the fraction or percentage obtained by dividing 1 by the total number of units. The owner of each unit may have 1 vote.
- (3) Assessment for common expense may be:
 - (a) In proportion to the value (as originally estimated by HUD-FHA) in the fraction or percentage obtained by dividing the value of subject unit by the total value of all units.
 - (b) In proportion to living area (as originally determined) in the fraction or percentage obtained by dividing the living area of subject unit by the total living area of all units.
 - (c) Where the units are approximately similar in either living area or value, assessment for common expense may be in equal shares, in the fraction or percentage obtained by dividing 1 by the total number of units. Where the condominium project contains unit types which differ considerably in both size and value, then the assessment shall be proportional to unit

value or unit living area as stated in (a) or (b) above.

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c. Off-Site Facilities.

- (1) Where several condominium projects will share a facility (such as a swimming pool) this facility may be located off-site from all of the condominium projects and may be owned by an off-site nonprofit corporation association which holds title. The equity in such circumstances is built up in the individual condominium unit (in equal shares), and not in the recreation property. The owners of condominium units in all of the projects may hold membership certificates in the association and proportion of ownership, voting, and assessment for expenses of the off-site recreation facility may be in equal shares, in the proportion of 1 unit divided by the total number of units in all projects. It is important that the total number of units to use the facility be known at the beginning (even though they are not yet in existence) since if there are to be 200 units, each unit in the first condominium project of 50 units will tend to increase in value by 1/200 of the value of the off-site facility.
- (2) Notwithstanding the above permissible variations no mortgage will be insured under Section 234(c) or 235(i) if Underwriting finds that the variation used results in a mortgage that exceeds the fair market value of the individual unit estates. Appropriate Underwriting consideration will be given to community facilities that are off-site but are-related through documentation to the individual unit estate and where the owner of the unit estate is subject to assessment by the non-profit corporation which owns the fee to such facility.

5-6. INCREMENTAL (ADD-ON) APPROACH. Following are the general requirements that must be met in the incremental approach to condominium development:

- a. The approach will be restricted to developers that have a good record with HUD-FHA or in the absence of such, only those that can show excellent financial responsibility.
- b. The developer must establish the total number of units to be constructed. The developer must build each section in accordance with an approved plan for the total condominium development that is supported by detailed plat and plans.

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- (5-6) c. The unit ratios for ownership, voting and assessment will be in accordance with the formulas set forth above.
- d. There must be reasonable evidence that a market does, in fact, exist for the total contemplated development.
- e. If substantial and marketable community facilities (to be determined by the Field Office Director) are to be included, then they must be included in the first section.
- f. Construction of the first and each subsequent section must be completed and 80% of the total value of units in the first section and each subsequent section (minimum number of units to be determined by the Field Office Director) must be sold to bona fide purchasers prior to conveyance of title to any unit.
- g. Each condominium regime must contain a covenant that it may not be amended or merged with a successor condominium regime without prior written approval by HUD-FHA. In this type of case HUD-FHA would not give its approval for amendment or merger until the successor condominium has been completed and constituted.
- h. Each condominium regime will also contain a covenant by the developer that as each individual unit estate is sold it shall be free and clear of all liens and that any mortgage covering such units shall be first mortgages.
- i. The total land area involved in the total development plan must be owned by the developer.
- (1) There must be a covenant running with the land requiring the developer, his heirs, successors or assigns to pay a proportionate share of cost related to community facilities based on the percentage attributable to each "unit/space" of the total number of units in the total development plan until title is conveyed to a condominium owner.
- (2) The condominium regime documents must provide that failure by the developer to pay the proportionate share of cost will result in a lien against the remaining land owned by the developer.

- (3) This requirement may be waived if the community facilities (including streets) are phased prior to merger and are fully supportable by the units in each phase.
 - j. The developer must agree to purchase (at his own expense) a general liability insurance policy in an amount determined by the Field Office Director to cover any liability to which owners of previously sold units might be exposed. This is particularly necessary where owners have an undivided interest in streets. This policy should be endorsed "as owners interest might appear."
 - k. For assessment purposes and to limit liens and liability, each space that appears on the total development plan must be treated as if a condominium unit were constructed on that space.
 - l. Where the final surface of streets are not completed at the time community facilities have been conveyed, completion of the streets must be assured.
 - m. To avoid controversy between the developer and the association Board the votes of the developer should be assigned to HUD-FHA and all annual and special assessments made by the Board must be approved by HUD-FHA.
- 5-7. SERIES (WITH OFF-SITE COMMUNITY FACILITIES) APPROACH. When condominiums are developed in series with an off-site corporation holding title to the community facilities the instruction sheet accompanying FHA Forms 3236-B, 3277-A, and 3276-B are applicable.
- a. The Instructions Require the off-site facilities to be conveyed unencumbered and free and clear of all liens to a nonprofit corporation if the facilities are to be constructed as an inducement to purchasers to buy.
 - b. Alternate Plan. HUD-FHA offices have the discretion to use the following alternate plan if there is doubt that a sufficient number of units can be sold to support a recreational area of the size shown in the plan and if the facilities cannot be phased in proportion to the phasing of the separate condominiums:

- (5-7) (1) Title to the land on which the community facilities will be constructed will be conveyed to a nonprofit off-site corporation (with an owners title policy insuring title, free and clear of all liens) that meets the requirements

of FHA Forms 3236-B (Certificate of Incorporation) and 3277-A (By-Laws). FHA Form 3276-B (Declaration) will be used to create the condominium regimes. Consideration should be given to the location of the community facility land with respect to the first condominium phase.

- (2) The Grantor/Developer will enter into a binding contract (acceptable to HUD-FHA) with the nonprofit corporation to construct the facilities at a fixed price. This price shall not exceed the aggregate sum of the values attributable to, and supportable by, the individual condominium estates to be served by such facilities. The contract shall have a termination date satisfactory to the HUD-FHA Director.
- (3) The project commitment will require that at the time each sale is consummated an amount equal to the value of the community facilities attributable to each condominium estate will be set aside in cash and deposited in an escrow account with an escrow agent satisfactory to the Field Office Director (the amount may be increased for an accelerated pay off).

c. The Construction Contract Shall Provide That:

- (1) The facilities will be paid for only from sums set aside and deposited in a cash escrow out of each condominium unit sale.
- (2) The developer shall not construct the facilities until there is sufficient cash in the escrow account to pay the contract price and until a 100% surety, completion and payment bond paid for by the developer satisfactory to HUD-FHA is issued covering completion and payment.
- (3) The developer shall not be entitled to be paid until construction is completed to the satisfaction of the off-site nonprofit corporation and until the owner's title policy has been brought down showing the completed facilities are free and clear of liens and marketable title is vested in the off-site corporation.

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- (5-7) (4) If the condominium sales fail to materialize or the contract period terminates, whichever is sooner, the Grantor/Developer will not be obligated to complete the facilities and the amounts held in the escrow account will be used for other purposes set forth in the escrow agreement.

d. The Escrow Agreement Shall Provide That:

- (1) The amounts in the escrow account may bear interest and may be paid to the developer upon completion of the facilities.
- (2) In the event the total community is not built, the members of the off-site corporation by majority vote, will have the option of constructing any facility on the site owned by the corporation or reducing the outstanding mortgages covering the condominium unit estates of its members by the amount of the escrow contribution. If the latter procedure is adopted purchasers who have paid all cash shall, be entitled to a refund of the amount contributed.
- (3) Taxes imposed on the unimproved property owned by the nonprofit corporation must be paid by the corporation. The corporation may pay such taxes by assessment against the individual condominium unit owners. The Grantor/ Developer will be obligated by covenant on the land to pay his proportionate share of the tax assessment based on the number of unsold units (and the spaces on which units have not been constructed) in the total planned community. Failure to pay his assessment to the nonprofit corporation will result in a lien against such undeveloped property owned by the developer. This requirement will terminate when subparagraph c.(4) above has been satisfied.

e. The Subscription and Purchase Agreement Will Contain the Following Statement:

- (1) Seller hereby agrees to deposit in escrow at the time of settlement, under an Escrow Agreement approved by HUD-FHA, the sum of \$_____ from the purchase price paid by the buyer, and like sums of \$_____ each from the purchase price paid by all other buyers of condominium units. The amounts so deposited will be held under the said Escrow Agreement to pay for community facilities to serve the development.

- (2) In the event that the contemplated facilities cannot be built because an insufficient number of condominium units is sold, the funds on deposit may, by vote of the majority of the members of the off-site nonprofit corporation, be:
 - (a) Utilized to build other facilities, or

- (b) All sums on deposit will be used to prepay the mortgage loans of buyers of the condominium units, in accordance with the requirements and the directions of HUD-FHA. If the latter procedure is adopted the purchasers who have paid all cash shall be entitled to a refund of the amount contributed.

5-8. SERIES (WITH PHASED ON-SITE COMMUNITY FACILITIES) APPROACH. A series of condominiums can be developed with a portion of the total planned recreational facilities made an integral part of each condominium common estate if the State condominium statute permits. The procedure is as follows:

- a. The community will be developed entirely as a community of condominium estates and will be phased in accordance with a total development plan.
- b. Each phase will have an incorporated condominium association which will ultimately be merged with the others so as to land up with one corporation that governs the use and maintenance of certain designated community facilities and areas.
- c. The common areas within each condominium phase will not be merged with other areas in other phases; therefore; the original ratio of ownership in each phase will remain unaffected by the merger of the corporations.
- d. Reciprocal easements of enjoyment (cross easements) will be used to tie the community areas together and form the basis of assessment.
- e. Notwithstanding the fact that living units extend over other living units, since all living units will be approximately the same value, ownership may be based on a ratio of one (1) over the total number of owners in each respective phase or such other ratio as the State law requires.

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- (5-8) f. After merger of the corporations the common assessment, to which the easements relate, and voting will be based on the ratio of one (1) over the total number of units that are effected by the ultimate merger of the corporations. State law must permit this, otherwise this approach may not be used.
- g. The living units will be so described and delineated that the roofs, among other things, will fall into the common area and become a part of the replacement reserve of each corporation.
 - (1) The various replacement reserves will then come under the control of the ultimate corporation resulting from the merger.

- (2) Until such ultimate merger, the assessment by each corporation for the facility under its jurisdiction shall be on the ratio of one (1) over the total number of units (1/Total) in the phase for which the particular condominium corporation is responsible.
- h. The streets must be publicly owned.
- i. The number of units in each phase must be in proportion to the community facilities in that phase so as to make the phase self-supporting in the event that other phases are not completed or marketed as condominium estates.
 - (1) It should be emphasized that this is the key to the acceptability of this proposal.
 - (2) As a result, there should be no need for "developer control" of the individual corporations (except as to merger) and there should be no need to require that the developer give monetary support to the completed condominiums.
- j. One person from each corporation will comprise a committee that will govern the use and maintenance of the community facilities.
- k. A regulatory agreement will be recorded on the land (common estate) of each phase which recognizes the control of its respective corporation. The language of each will dovetail in such a manner as to recognize that if and when a merger takes place the cumulative effect of the language in each regulatory agreement is in full force and effect and under the control of the ultimate corporation.

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- l. The conditions, covenants and restrictions imposed on each condominium declaration must be set up in such a manner that the cross easements between condominium properties will not become effective until HUD-FHA approves the merger in writing. Approval shall not be given to noncondominium properties.
- m. Each phase must be subject to the 80% presale requirement.
- n. When 80% of the condominium estates in each phase have been sold to bona fide purchasers the corporate merger may be implemented.
- o. Full disclosure of the impact of the total development plan will be made to each buyer in the form of an information bulletin.

- (1) The information bulletin, among other things, must inform the buyers that the corporation(s) do not provide Owners Title Insurance and if it is desired it is their responsibility to purchase it.
- (2) They must also be told that, like any other homeowner, personal liability policies are their responsibility.

5-9. HEADQUARTERS ASSISTANCE AND REQUIREMENT FOR SUBMISSION OF FINALLY APPROVED DOCUMENTS.

- a. When questions arise in connection with condominium documents, prior to final field office approval, the question together with a set of documents and a plan should be sent to Headquarters. The documents and total development plan, if necessary, must delineate the area in question to show the context in which it arose.
- b. After final field office approval, a set of condominium documents together with the total development plan must be sent to Headquarters, whereupon they will be reviewed for the purpose of coordinating National policy and development of model forms and advisories.
- c. Policy questions and the finally approved documents should be addressed to the Director, Office of Unsubsidized Insured Housing Programs.

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5-10. INSTRUCTIONS FOR SERIES DEVELOPMENT.

- a. FHA Forms 3236-B, 3276-B, and 3277-A. The captioned forms are for use where a series of adjoining condominium projects are planned to be built and all unit owners in all of the projects are to enjoy the use of, and, to share in the operation costs of a recreational facility, e.g., swimming pool, community hall, etc. These forms are also in use where the recreational facility is to be an improvement located on a section of land which is not included in the land sections on which any of the proposed separate condominium projects are to be located, i.e., the recreational facility will be "off-site" with respect to the land sections of the condominium projects.
- b. Methods and Procedures. In the type of case discussed above the following methods and procedures would be acceptable to HUD-FHA if otherwise acceptable under the local condominium statutes:

The developer should present to the Field Office the following:

- (1) A plat or survey showing the location of the section of land on which the "off-site" recreational facility will be built and the location of each section of the land to be included in each separate condominium together with the number and type of condominium units to be located on each section of land, and
 - (2) The design and size of the "off-site" recreational facility.
- c. Insurance. In cases of insurance upon advances, off-site recreational facilities must be installed or completed before initial endorsement of a blanket mortgage covering a condominium project. In insurance upon completion cases the off-site facilities must be completed prior to the endorsement of the project loan. This is required to assure that the off-site recreational facility will be available to the condominium purchasers and will support any value given to it in the first project mortgage as well as the succeeding project mortgages as an off-site recreational facility. The commitment as issued for each condominium project and the commitments for each individual unit will include this requirement and shall also require the following prior to HUD-FHA insurance endorsement:

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- (1) Evidence that the off-site facility has been conveyed by the developer to a HUD-FHA approved nonprofit corporation with title insured by an owner's title policy showing marketability in the nonprofit corporation, free and clear of liens;
 - (2) A bond covering latent defects which has been assigned to the nonprofit corporation in an amount and with the terms approved by HUD-FHA, or, in lieu thereof, a cash escrow or letter of credit in an amount and with the terms of escrow to be approved by HUD-FHA; and
 - (3) An in force Standard Fire and Extended Insurance Policy in an amount not less than 80% of the insurable value of the facility which can be assigned to the nonprofit corporation.
- d. Enabling Declaration. Each project will be built on its own section of land under its own project mortgage. After meeting HUD-FHA requirements for conversion to condominium ownership, a separate enabling declaration (including by-laws and regulatory agreement) for each project must be filed.
- (1) For example, the enabling declaration for the first

condominium should:

- (a) Refer to the whole development area and describe the same in the enabling declaration, and
 - (b) Describe the section for the first condominium as a part of such development area, and convey, grant, or subject only this first section to the condominium regime.
 - (c) The enabling declaration will also describe the condominium units and the common areas and facilities of said section covered by the enabling declaration.
- (2) It must be emphasized that only the section of land for each condominium regime will be subjected to the enabling declaration for that particular condominium regime. The only changes which will be necessary are those needed to conform to mandatory requirements of the state condominium law and such other changes approved by HUD-FHA to conform to the pertinent facts of the case. A copy of such Enabling Declaration Form is attached.

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- (3) Each enabling declaration likewise will create an association of owners to govern the affairs of that particular condominium. The association will be composed, as usual, of the owners of the units located on the section of land covered by that particular condominium regime.
 - (4) Each enabling declaration will establish the percentage of value that each unit bears to all units of that particular condominium. Percentage of ownership in the common areas, voting percentage, and percentage of common expenses allocated to that unit for the upkeep of the common areas within the boundaries of that particular condominium will be based on this percentage.
 - (5) It should be emphasized that these provisions only relate to the operation of the condominium within its boundaries. It does not relate to the ownership or operations of the off-site facility as described in subsection e.(2)(d), below.

e. Ownership and Operation of the Off-Site Facility.

- (1) Each enabling declaration of each condominium shall also refer to the off-site facility, by describing the improvements and the section of land on which it is located.

- (2) The enabling declaration should also state the number of total units which the developer intends to build on the other sections of the development area. This is essential in order to give to the consumer and HUD-FHA sufficient information in order to make a judgment as to whether there is a sufficient number of units planned to eventually carry the cost of the off-site facility and to pay for its maintenance and operation.
- (3) The enabling declaration for each condominium and the articles of incorporation of the nonprofit corporation which owns the off-site facility will provide that:
- (a) The owner of a condominium unit is automatically a member of the off-site facility nonprofit corporation and that upon the sale of the unit, membership is automatically transferred to the new owner/purchaser;

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- (5-10) (b) Each owner/member of the nonprofit corporation will have one vote at meetings of the corporation;
- (c) Each owner/member agrees to pay his share of the expenses of the nonprofit corporation as assessed by said corporation for upkeep, insurance, reserve fund for replacements, maintenance and operation of the off-site facility.
- 1 The share of said expenses shall be a fraction, the numerator of which is 1 and the denominator of which is the aggregate number of units the developer has stated in the enabling declaration that he intends to build in the whole development area.
 - 2 For example, if at the outset the developer intends to construct 200 condominium units on the whole development area, then each enabling declaration will provide that the units located in the condominium created by such declaration shall each be subject to the assessment of 1/200th of the amount determined by the nonprofit corporation as needed to pay the expenses of the off-site facility.
 - 3 Failure to pay such assessment shall result in a lien in the same manner as unpaid assessments by the association of owners of the condominium become liens against the units in that particular condominium.

(d) Until the developer has completed all of the intended condominium projects and converted each of them to condominium ownership by filing a separate enabling declaration approved by HUD-FHA for each project, the balance of the total sum of the expenses of the off-site facility not covered by the assessment against the unit owners shall be assessed against and payable by the developer.

1 If this balance is not paid, it shall become a lien against those parcels of land in the development area which are owned by the developer.

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2 The collection of such debt and enforcement of such lien may be by foreclosure or such other remedies afforded the nonprofit corporation under the local law.

(4) Until the first annual meeting the nonprofit corporation may be governed by an interim board composed of developer-representatives.

(a) It is recommended that the annual meeting of the nonprofit corporation take place within 45 days after the first condominium is established as this should allow sufficient time for 80% of the units to be conveyed to the consumer purchasers.

(b) At such annual meeting the interim board will be replaced by an elected board of directors composed solely of the owner/purchasers of the condominium units. (See copies of the attached articles of incorporation and by-laws of the nonprofit corporation.)

(5) The articles of incorporation of the nonprofit corporation will also provide that so long as the Secretary of Housing and Urban Development has any interest in the Units or property located in the development area that the Board of Directors (including the Interim Board) must obtain the prior written approval of the Secretary before taking any of the following actions:

(a) Failing to allocate a minimum amount equal to \$_____ annually for monthly payment to the reserve fund for replacements (amount to be approved by HUD-FHA),

(b) Making disbursements from the reserve fund for

replacements,

- (c) Annexing additional properties, merging or consolidating,
- (d) Leasing, mortgaging, or selling any real or personal property of the corporation,

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 - (e) Executing any management contract,
 - (f) Dedicating any of its property,
 - (g) Dissolving the corporation, and
 - (h) Amending the articles and by laws of the corporation.
- (6) In paragraph T. of the Enabling Declaration prepared for this type of case, the terms "declaration" and "condominium regime" as used therein are defined to include the terms "master deed" and "plan of apartment ownership." Accordingly, it is not necessary at this time to amend or change the existing form of by-laws and regulatory agreement for each condominium regime created; and the new enabling declaration form together with the existing forms for the by-laws and regulatory agreement may therefore be used.
- (7) When using the existing Regulatory Agreement (FHA Form 3278) and the existing By-Laws (FHA Form 3279), the references to Federal Housing Commissioner and Federal Housing Administration therein should be changed respectively to refer to the Secretary of HUD, and HUD-FHA.
 - (a) In these complicated types of cases, as well as in the ordinary condominium case, an Information Bulletin form should be used as is done in the cooperative housing programs. This allows the consumer to have a full explanation of the ownership and operation of the condominium regime and appurtenant facilities, if any.
 - (b) Until a model form has been prepared the cooperative form of Information Bulletin may be used as a guide.
- (8) Until a commitment form for this type of case can be prepared, existing forms with a rider attached may be used to reflect any special requirements.

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