

# When a Condominium Falls Down

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## Buildings do not last forever.

Eventually, gravity and time will prevail over concrete, steel, wood, and glass. The risks associated with that life span are captured well in transactions related to single-family homes and commercial structures, where investors, lenders, buyers, and tenants attribute value to improvements based on their remaining service life. In the multi-owner regime of a condominium, however, we are

not yet appropriately accounting for the reality that, at some point, the useful life of a shared building will end.

A recent North Carolina Court of Appeals decision directs attention to a subtle, but important, issue related to termination of a condominium under North Carolina law. In [Howe v. Links Club Condominium Association, Inc.](#), a small group of condominium unit owners brought an action against the condominium owners association and its directors, challenging the propriety of the association's sale of the residual land and improvements to an investor buyer. The plaintiffs acknowledged that the termination was appropriately authorized under the NC Condominium Act (the "NC Act") by assent of the members holding at least 80% of the vote, but challenged the terms of the contract to sell the remaining land. Specifically, the plaintiffs alleged that the sale price was too low and that the majority vote holders and directors of the association engaged in unfair and deceptive trade practices when they sold the land below market price after the condominium was terminated.

Per the NC Act, each unit owner is entitled to a share of the proceeds of a sale of the residual real estate and the association is authorized as trustee to hold and sell the land that was once the common elements and units of the condominium. But, our current statute does not require any specific action to ensure that a reasonable deal is struck to sell that land. Understanding that limitation, the court in [Howe](#) found that the plaintiffs had a justiciable action against directors of the association based on those directors' failure of their fiduciary duty. In short, the court found that the directors of the association should have shopped for the best purchase price that the association, as trustee, could get for the property. This decision highlights an important limitation in the termination concept in the current NC Act and draws attention to others.

Under the current NC Act, an association is charged with repair and maintenance of the common elements and collection of assessments from unit owners to fund the same. But for the possibility of termination of the condominium by an affirmative 80% vote or by eminent domain, that obligation to maintain and assess is, on its face, perpetual. That perpetual maintenance of a physical condominium structure is not realistic for

several reasons.

First, materials wear out. The older a structure, the more expensive maintenance becomes, no matter how diligent the owners' care. At some point, the cost of maintenance exceeds the cost of replacement, and maintenance is no longer fiscally responsible. Large multifamily structures along the coast, and in the mountains, inevitably reach this horizon first, but all structures will, ultimately, get there.

Second, sometimes structures suffer damage so catastrophic that repair is not realistic. While the risk of large scale loss can, in some circumstances be offset by insurance, we have already seen several scenarios where the loss, or a substantial portion of it, was not insured. If the owners refuse to contribute to the cost of restoration of the uninsured loss, then the condominium cannot be restored. A condominium may also lose a significant portion of its land and improvements to eminent domain, such that restoration of the remainder is not viable.

Third, local building ordinances evolve over time, and, in some cases, restoration or repair is not permitted under the applicable building code. By way of example, an older condominium may have been constructed in a beach town prior to any freeboard requirement, and contain units on the ground floor. Current building code regulations require all living space and equipment to be located above the applicable flood level, including major restorations. So, if that condominium is significantly damaged, then the owners cannot restore the ground level units. The condominium must move the boundaries of the units to raise (or shrink) the location of each, or terminate the condominium, actions that require unanimous or 80% approval.

In these scenarios or others where repair, restoration, or maintenance are not practically viable, the condominium association is left with relatively few choices. If a supermajority of the owners cannot reach an agreement to terminate, then the land is a wasted state where it cannot be used, and cannot realistically be redeveloped.

Condominiums are the product of statute, and legislative attention is the best solution to address the challenges associated with condominium termination. Many other coastal states already adapted their condominium acts to contemplate mechanisms for condominium termination without the requirement of a supermajority vote, typically with the benefit of judicial determination that the facts and circumstances justify that termination. The NC Act could evolve in similar fashion.

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