A STATUTORY COMPARISON OF CONDOMINIUM LAW UNDER THE LEGAL REGIMES IN FLORIDA AND JAPAN

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Abstract

This Note examines the rights of condominium unit owners, the responsibilities of association managers, and the affects of association corporate structures on those stakeholders to provide a framework for academics, business people, and policymakers alike to understand the fundamental differences between the American and Japanese approaches to condominium law. It details the condominium management processes provided for in each country and draws conclusions regarding the relative strength of each party's rights and responsibilities.

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INTRODUCTION

In February 1946, a committee led by United States Army General Courtney Whitney was appointed by MacArthur to create a new, democratic constitution for the people of Japan following the end of World War II.[1] With "Whitney its James Madison,"[2] the committee created a constitution that has become "the oldest, unamended constitution in the world today."[3] However, despite their constitution's origins, Japanese laws which have subsequently flowed from it reflect the unique characteristics of their culture through the government's parliamentary structure.[4] This divergence from its American origins makes Japanese law on common subjects—such as those governing condominiums—ripe for comparison to American law, presenting a rare opportunity to see how the implementation of one culture's basic concepts of government and law are interpreted through an entirely different paradigm.

The comparison between condominium law under these two regimes is not a purely intellectual exercise, though. Japan's population is aging at a striking rate.[5] While speculation as to the benefits and detriments of such a shift will rage for decades, certain realities are emerging from this fact: among them, that property sales—including condominiums—will

1. *See* THEODORE COHEN, REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL 86 (Herbert Passin ed., 1987).

2. *Id.*

3. Kenneth Mori McElwain, *The Anomalous Life of the Japanese Constitution*, NIPPON.COM (Aug. 15, 2017), https://www.nippon.com/en/in-depth/a05602/the-anomalous-life-of-the-japanese-constitution.html [https://perma.cc/EN84-EPWM].

4. *See id.*

5. *See* Betsy Reed, *Japanese Population to Shrink by a Third by 2060*, THE GUARDIAN (Jan. 30, 2012, 1:35 PM), https://www.theguardian.com/world/2012/jan/30/japan-population-shrink-third [https://perma.cc/FD3U-MHUX].

likely increase as their owners pass on.[6] Over the last several decades, condominiums (or 分譲マンション, which roughly translates to "mansion": perhaps a statement on the perceived size of condominiums) and their usage have become increasingly popular in Japan, with almost one million new residential condominiums coming on the market over the last decade.[7] Thus, as aging Japanese citizens leave their homes, many of them will be leaving these condominiums behind, as well. An enterprising Floridian real estate group could very well take advantage of this glut in supply to snatch up condominium properties as demand simultaneously wanes due to a lower birthrate, seizing for themselves a large portion of the Japanese condominium market. However, even if one's interest in the Japanese condominium market is purely monetary, an understanding of the rights of unit owners, and how they differ from their American counterparts, will be instrumental in order to effectively take the fullest advantage of such purchases; as well as assist in the situation one is made the manager or director of an association themselves.

Even if the intellectual or monetary gains to be made from such a comparison are not beneficial, there is yet a third compelling reason for such a comparison: policymaking. By studying and understanding Japan's approach to condominium law, Florida lawmakers may be inspired to take a lesson from Japanese best practices and apply it to their own statutory code. Although Floridian condominium black letter law is vast and complex, no area of law is truly "complete" or perfect, and it is the duty of legislators to seek improvement wherever it may be found—at home, or abroad.

Thus, although there are myriad paradigms from which such a statutory comparison could be made, this Note is going to focus on comparing three specific concepts in Floridian and Japanese condominium law: (1) the rights of unit owners; (2) the responsibilities of association managers; and (3) how association corporate structures affect the previous two categories. Focusing on these three concepts will allow this Note the space it needs to zero in on legal issues most near-and-dear to the average person actually living in, or working with, a condominium association. Unit owners naturally want the greatest amount of rights possible, while association managers wish for the greatest amount of responsibility. Tying these two groups together is the corporate structure that binds the association and protects them in certain circumstances. This Note will observe how both Japanese law and Florida

6. *See* Jonathan Soble, *A Sprawl of Ghost Homes in Aging Tokyo Suburbs*, N.Y. TIMES, Aug. 24, 2015, at A1.

7. *Total Number of Residential Condominiums in Japan from 2009 to 2018*, STATISTA (Nov. 9, 2020), https://www.statista.com/statistics/667284/japan-condominium-numbers/ [https://perma.cc/L43H-UNFY].

law deal with these thorny issues, and come to a conclusion on which legal regime is "better" at handling them. Through such analysis, it can be hoped that the intellectually curious will be satisfied, the prospective investor will be better informed of differences to expect in the Japanese market, and lawmakers will see areas where Florida condominium law can be improved upon.

I. ANALYSIS

A. *Rights of Unit Owners*

It is no secret that individuals want the greatest amount of freedom possible. Even in a planned neighborhood environment such as condominium communities, people will still strive to maintain the maximum amount of rights tied to the least amount of restrictions. "Rights" is an amorphous term, however, and will need to be narrowed significantly in order to be an effective measuring rod for analysis. Thus, by "rights of unit owners," this Note is referring to three distinct, objective categories: (1) the right of unit owners to have a voice in their community's governance; (2) the right of unit owners to fully utilize their property; and (3) the right of unit owners to maintain ownership of their property.

By comparing the rights of unit owners in Florida to those in Japan through the lens of these categories, it will be seen that, overall, unit owners in Florida enjoy greater rights than their Japanese counterparts; however, there are areas where Japanese owners have a stronger voice in their association's governance, and thus lessons to be learned from their statutory law.

1. Right of Unit Owners to Have a Voice in Community Governance

Perhaps the most important right unit owners can enjoy is the freedom to be heard, and have their voices instigate change in their community. After all, condominium association boards have an outsized effect on unit owners' lives: determining assessments,[8] engaging in litigation on their behalf,[9] and maintaining common elements.[10] Being able to ensure that one's beliefs and priorities are reflected in their community allows unit owners of any association to feel heard and makes their living situation a much more pleasant experience. Thus, when determining which state provides greater "rights" in this section, the analysis looks to which state grants decision-making power to a majority (or as close to it as possible)

8. *See* FLA. STAT. § 718.111(4) (2019).

9. *See* Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 26, para. 4, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/5SNF-W8WX] (Japan).

10. *See, e.g.*, *id.* art. 26, para. 1.

of unit owners. If a state requires a higher-than-majority bar for unit owners' voices to be heard in the association's governance, that will be viewed as a diminishment of rights because it reduces the previously mentioned ability of individuals to be "heard," while protecting the status quo.

Before contemplating the differences between governance protocols of the Japanese and Floridian condominium statutes, it would be prudent to look at a similarity they share: the right for unit owners to speak at meetings. Under both regimes, speaking at board meetings is a statutory right extended to all unit owners.[11] Though seemingly insignificant, this basic right no doubt has roots in a shared view of government's role as beholden to the will of the people. In this way, both statutes work to ensure unit owners are heard by their governing bodies.

It is after this basic right to speak is established, however, that seemingly minor—but important—differences in governance begin to form. Specifically, unit owners' roles in association governance can be seen to diverge in three ways: (1) their voting rights; (2) their election and maintenance of directors; and (3) their ability to amend community declarations and bylaws.

a. Voting Rights

Before looking at the comparable rights granted to unit owners to engage in community governance, one must first look at the basic principle underlying such engagement: voting. Perhaps a byproduct of the "Americanization" of Japan's constitution, the *Act on Building Unit Ownership* extensively discusses voting requirements.[12] There, it is explained that unit owners' voting rights are in accordance with the proportion of the floor space they own.[13]

At first glance, this rule may strike one as archaic and unfair, given Western sensibilities of equal voting power. However, there are two points to be made on this front. First, the Florida statute also considers proportionality (as set out in the declaration of condominium) amongst unit owners when dealing with their ownership interest of common elements and common surplus.[14] Therefore, such consideration is not completely outside the purview of Florida condominium law. Second, though Japanese unit owner voting rights are granted in accordance with proportionality, every instance of voting referred to in the statute has two voting conditions that must equally be met: (1) a proportionality majority,

11. *See id*. art. 44, para. 1.

12. *See id*. arts. 34, 35, and 39 (illustrating examples of detailed rules regarding voting requirements for various actions to be taken by the association).

13. *Id.* at art. 38, para. 1.

14. § 718.115(2) (2005).

and (2) a unit owner majority.[15] "Proportionality" votes, as stated, are determined in accordance with one's proportional allocation of floor space,[16] but "unit owner" votes are counted equally between all owners.[17] This is important because the "archaic" nature of proportionality voting diminishes significantly with the added context. Now, more affluent unit owners are unable to force their will on an association's less wealthy members merely as a result of owning more property.

With the above in mind, it seems the answer to the question of which regime better protects the voting rights of its unit owners is a close one. On one hand, it can be argued that Florida law better protects the interest of the "average" unit owners, by allowing their votes to count as much as their wealthier counterparts. However, on the other hand, an equally valid argument can be made that Japan's statute better protects the rights of unit owners with more property by giving them a stronger (though unoppressive) voice in a community which they contribute towards more than their peers.[18] The fact that Japan's voting system accounts for proportionality, while also requiring unit owner votes be counted individually, speaks to a nuanced balance between these interests that is unseen in Floridian law. As a result, Japan should be deemed to hold the advantage with regard to protecting the voting rights of its unit owners.

b. Election and Maintenance of Managers

To best determine which legal regime best protects the rights of unit owners with respect to the election and maintenance of managers (referring to hired managers, board members, and Japanese directors; essentially anyone with managerial authority over the association), this Note will break the analysis down into three sections, comparing the right of unit owners to: (1) choose their association's governance model; (2) decide how long managers may remain on the board; and (3) recall board members.

B. *Choice of Association Governance Model*

To start, the Florida Condominium Act provides that, if an association is comprised of more than five units, its board of administration will be composed of five members.[19] If the association is comprised of five or

15. *See, e.g.*, Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 47, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/C8KZ-NRF7] (Japan).

16. *Id.* art. 38, para. 1.

17. *See, e.g.*, *id.* art. 55, para. 2.

18. *See id.* art. 29, para. 1 (stating that proportionality determines liability of unit owners in relation to director's actions); *id.* art. 53, para. 1 (requiring unit owners to make up any shortcomings in association assets in accordance with proportionality of ownership).

19. FLA. STAT. § 718.112(2)(a)(1) (2019).

less units, then that number drops to three.[20] Three of these positions must include a secretary, treasurer, and president.[21] On the other hand, Japan's *Act on Unit Building Ownership* dictates no minimum number for the board; instead stating only that an association: (1) may have a manager;[22] (2) "shall have a director," if incorporated,[23] and, if that is the case; (3) may have multiple directors.[24] There are also no mandated roles for the board members to take on, although they must hire an auditor, if incorporated.[25]

It would appear that Japanese unit owners have greater freedom in the self-determination of their governance model because they are not beholden to a fixed system such as the Floridian Condominium Act anticipates. Granted, the Florida system is likely not overly burdensome, and the roles it anticipates for board members are ones that would likely be taken up by many even if it were not provided for in the statute. However, it is plain that lesser legislative restrictions win the day in the battle of rights and freedoms, and thus Japanese unit owners can be deemed to have greater rights with regard to choice of governance model than their Florida peers.

C. *Length of Board Members' Terms*

The statutes do not only provide for how many board members must exist, however. They also each describe how long these members can serve.

Florida allows board members to serve up to a period of eight years; however, with a two-thirds vote of all unit owners, this period may be prolonged.[26] Japan is not so liberal, allowing members to stay on the board only two years (even the bylaws may not allow a stay of longer than three years).[27]

Here, Florida's unit owners would seem to enjoy greater rights in maintaining board members. Though both statutes put caps on how long a member may serve on the board, Florida law allows members to both stay on the board for a longer period of time, and its cap can be overcome

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20. *Id.*

21. *Id.*

22. *See, e.g.*, Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 25, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/EUB2-A3SN] (Japan).

23. *Id.* art. 49, para. 1.

24. *Id.* art. 49, para. 2.

25. *Id.* art. 50, para. 1.

26. FLA. STAT. § 718.112(2)(d)(2) (2019).

27. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 49, para. 6, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/EUB2-A3SN] (Japan).

with a two-third vote.[28] Such statutory privilege allows members to maintain on the board members they deem most capable, for as long as both parties desire, thereby giving Florida unit owners more say in who governs their association.

D. *Recall of Board Members*

The unfortunate situation where a member of the board must be removed is also broached in both statutes. Here, Florida law allows recall to happen "with or without cause," and with a majority of all voting interests, after 10% of the voting interests have convened a special meeting.[29] In Japan, first, a meeting must be convened by 20% of the voting interests in the association.[30] Second, although recall also comes about by a simple majority vote, it can only be proposed in the wake of a "wrongful act" or "circumstances whereby it is not fitting for [the member] to carry out [their] duties . . . ."[31]

Seeing that Florida requires a lower number of unit owners to initiate recall proceedings than Japan, and that unit owners can effectively recall board members "at will," whereas Japanese unit owners must find some cause for their board members' dismissal, it is clear that Florida unit owners have greater freedom with respect to ejecting unwanted board members.

Because Florida provides its unit owners greater rights in allowing their preferred association directors to remain on the board, and it grants them broader recall power over those directors, Florida's law overall provides greater rights to unit owners in the election and maintenance of its directors than Japan's does. However, Japan's statute does allow unit owners greater flexibility in determining their model of association governance.

1. Amendments

While the board of administration's selection is a crucial outlet of unit owner representation, it is not the only way for owners to have their voice heard. In order to fully understand the rights of unit owners in this regard, it is pivotal to consider how easy (or difficult) the statutes make it for them to amend their governing documents.

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28. FLA. STAT. § 718.112(2)(d)(2).

29. FLA. STAT. § 718.112(2)(j).

30. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 34, para. 3, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/EUB2-A3SN] (Japan).

31. *Id.* art. 25, para. 2.

In Florida, condominium associations are largely governed by both declarations of condominiums[32] and bylaws.[33] The Florida Condominium Act provides for amendments to both, prescribing a two-thirds majority of unit voting interests in order to affect change in the documents.[34] Meanwhile, in Japan, the statute allows for amendments after a slightly higher bar—three-fourths of all unit owners—is met.[35] More interesting is the second half of the provision, which states when an "amendment . . . of the bylaws will have a special influence on the rights of some unit owners, the approval of such unit owners shall be obtained."[36]

While the threshold to pass an amendment is higher in Japan than Florida, the secondary provision requiring approval of specific unit owners in cases where their rights will be specially affected by the amendment being considered is arguably more important to consider. It is hard to imagine a greater protector of an individual's rights than being allowed to withhold one's vote in one's own interest against a three-fourths majority, and prevailing. The Florida statute provides a similar rule in regard to very specific amendments,[37] but the fact that Japanese law applies the rule to all amendments[38] speaks to the protections provided to individual unit owners under it.

Despite the abovementioned protection of individual unit owner rights, however, this section of analysis deals exclusively with rights of unit owners to amend their governing documents. Because the individual Japanese unit owner essentially has veto power in the amendment process where his property is concerned, and because Florida requires only a two-thirds majority to amend their rules while Japan requires a three-fourths one, the amendment process of Florida condominium associations is better for the rights of unit owners than the Japanese one.

As a result of the above analysis, one can see that deciding which legal regime better protects the rights of unit owners results in a conflicted

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32. *See* PETER M. DUNBAR, THE CONDOMINIUM CONCEPT: A PRACTICAL GUIDE FOR OFFICERS, OWNERS, REALTORS, ATTORNEYS, AND DIRECTORS OF FLORIDA CONDOMINIUMS 12 (15th ed. 2017).

33. *See id.* at 15.

34. *See* FLA. STAT. § 718.110(1)(a) (2022) (stating requirement to amend declaration of condominium); FLA. STAT. § 718.112(h)(1) (stating requirement to amend association bylaws).

35. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 23 of 2008, art. 31, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/EUB2-A3SN] (Japan).

36. *Id.*

37. *See, e.g.*, FLA. STAT. § 718.110(4) (2022) (requiring all affected unit owners agree to amendments changing configuration or size of units); FLA. STAT. § 718.403(1) (2022) (requiring all unit owners agree to amendment allowing phased development).

38. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 23 of 2008, art. 31, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/EUB2-A3SN] (Japan).

choice. While the procedures for the election and maintenance of directors, as well as amending governing documents, favors Florida's Condominium Act, Japan's *Act on Building Unit Ownership* does a better job protecting the voting rights of unit owners. However, all things being equal, the Florida statute wins two of the three categories considered. As a result, it has the edge in providing greater rights to unit owners in governance of their association than does the *Act on Building Unit Ownership*.

E. *Freedom of Unit Owners to Utilize Their Property*

The ability of condominium unit owners to use their properties to their greatest benefit is another metric by which we can appreciably quantify rights under the Floridian and Japanese legal regimes. In this section, it is assumed that, barring the exceptions mentioned in Section III below, unit owners in both states can peacefully enjoy the private use of their property; they are, after all, its owners. Therefore, in order to best evaluate freedom of utility, the metric used will be the right to turn one's unit into a short-term rental, like an Airbnb. A primary reason for singling out short-term rentals through Airbnb as a metric for freedom of utilization in this Note is that, in Japan, "[o]ne of the main sources of complaints about Airbnb rentals has been condominium owners and tenants who object to neighboring units being used as de facto hotels without their approval."[39] Similar complaints are common in the United States.[40] Thus, as a metric for freedom of utility, seeing how each regime handles troublesome Airbnb rentals in their condominium communities serves as a strong indicator of how much freedom unit owners have overall to monetize and use their property as they see fit.

Given the relatively recent rise of Airbnbs, it is unsurprising to find that neither the Japanese or Floridian condominium statutes mention them explicitly. Thus, while the previous section was largely guided by black letter condominium law, here the condominium statutes must be augmented by other statutes, as well as case law, and primary and secondary accounts. Because this is a statutory comparison, though, emphasis will be placed first on the condominium statutes, and then any other statutes held in equal esteem by the respective governments.

To start, in Florida, the only true statutory restrictions on unit owners trying to rent their condominium is in Section 718.110(13) of the Condominium Act. There, it is explained that if an amendment to the

39. Philip Brasor & Masako Tsubuku, *New Minpaku Law Will Alter Japan's Rental and Hospitality Landscape*, THE JAPAN TIMES (Apr. 1, 2018), https://www.japantimes.co.jp/community/2018/04/01/how-tos/new-minpaku-law-will-alter-japans-rental-hospitality-landscape/ [https://perma.cc/5LXY-GSTX].

40. *See* Ronda Kaysen, *The House Next Door Is an Airbnb. Here's What You Can Do About It.*, N.Y. TIMES, Apr. 22, 2018, at RE2.

association's declaration of condominium is made that restricts or prohibits owners from renting their units, that amendment cannot be applied to unit owners who did not agree to the amendment.[41] Such a restriction on inhibiting rentals of any sort—which would, by definition, include Airbnbs—grants unit owners strong rights to rent their properties for short terms without fear of legislative interference through Florida's Condominium Act. Thus, in Florida, it is sufficient to say that statutory laws allow for restrictions by condominium associations on using one's property as an Airbnb; however, the statutes themselves do nothing to prohibit such practice, and, in fact, seem to encourage such use of property.

In this case, it is advantageous to also consider Florida court decisions regarding the short-term renting of property. By doing so, one is better able to decipher how Florida law views condominiums whose unit owners rent through Airbnb. For instance, in 2015 the First Judicial Circuit Court of Florida decided that the use of zoning restrictions to prevent the creation of short-term rentals like Airbnbs was in violation of existing law.[42] Specifically, the judge in that case cited Florida Statute Section 509.032(7)(b), which states "[a] local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals."[43] Additionally, the Florida Attorney General, in 2014, was quoted as saying "zoning may not be used to prohibit vacation rentals in a particular area where residential use is otherwise allowed."[44] Nevertheless, Florida courts have also found that zoning laws that prohibit nonresidential use of property are enforceable against short-term rental agreements under a "frequency and intensity" test.[45] Such a test requires the court to look at whether a property is being rented to such an extent of frequency and intensity that it is no longer "residential."[46]

Case law also shows that restrictive covenants may be found not to exclude short-term rentals if they do not expressly state such an intention. In *Santa Monica Beach Prop. Owners Assn., Inc. v. Acord*, the court found that the plaintiff property owners association failed to prove the restrictive covenants on defendant's property forbade them from renting out their beachside residence.[47] There, the court stated:

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41. FLA. STAT. § 718.110(13) (2022).

42. Will Isern, *Escambia Loses Short Term Rentals Case*, PENSACOLA NEWS J. (Dec. 21, 2015, 5:44 PM), https://www.pnj.com/story/news/2015/12/21/escambia-loses-short-term-rentals-case/77695078/ [https://perma.cc/9QZC-FL7X].

43. FLA. STAT. § 509.032(7)(b) (2022).

44. Isern, *supra* note 42.

45. Bennett v. Walton Cnty., 174 So. 3d 386, 389 (Fla. Dist. Ct. App. 2015).

46. *Id.*

47. Santa Monica Beach Prop. Owners v. Acord, 219 So. 3d 111, 116 (Fla. Dist. Ct. App. 2017).

> [E]ven if the restrictive covenants were susceptible to an interpretation that would preclude short-term vacation rentals, the omission of an explicit prohibition on that use in the covenants is fatal to the position advocated by the Association in this case because "[t]o impute such a restriction would cut against the principle that such restraints 'are not favored and are to be strictly construed in favor of the free and unrestricted use of real property.'"[48]

As a result, the case law shows Florida courts' general reluctance to encumber the rights of property owners from renting their residences. However, if an owner rents the property for non-residential purposes to such an extent that it "dr[aws] the ire of neighbors," courts may find they fail the "frequency and intensity" test and enforce existing restrictive covenants against them.[49]

Similar to Florida, in Japan statutes outside the governing condominium law deal with short-term rentals. To specifically address the issue of Airbnbs, in 2017 Japan's Parliament passed the *New Private Lodging Business Act*.[50] This law expanded the rights of unit owners to rent their property as an Airbnb.[51] Before its passage, Airbnb was technically illegal in many parts of Japan.[52] Through recognition of this burgeoning industry, the *New Private Lodging Business Act* implicitly legalizes it at the same time.[53]

Moreover, for condominium associations specifically, the law raises significant hurdles to forbidding the renting out of units as Airbnbs. Under the old laws, if a prefecture's condominiums didn't want their units to be rented out short-term, the director could simply ban them outright without any formal declaration in writing.[54] However, now such a ban can only come about via bylaw creation, which requires a three-fourths majority of all unit owners.[55] Such a divesture of power from the managers to the owners will certainly make it more difficult to ban the use of units as rental property in the future, thus granting unit owners more freedom to utilize their property as they deem best.

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48. Acord, 219 So. 3d at 16 (citing Leamer v. White, 156 So. 3d 567, 572 (Fla. Dist. Ct. App. 2015)).

49. Bennet, 174 So. 3d at 389.

50. Minpaku shinpō [New Private Lodging Business Act], Act No. 65 of 2017 *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/LB6C-YZT5] (Japan).

51. *See* Brasor & Tsubuku, *supra* note 39.

52. *Id.*

53. *See id.*

54. *Id.*

55. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 31, para. 1 (Japan), *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/LB6C-YZT5] (Japan).

Even so, a host of regulatory bureaucracy now awaits aspiring Airbnb host unit owners. They must get their *minpaku* (民泊) licenses, which requires their holders registration numbers,[56] submission of required bi-monthly reports to the prefecture government, and the meeting of a long list of requirements regarding the safety and hygiene of their property.[57] Additionally, "private lodging business operators" may only rent out their property for a maximum of 180 days and nights a year under the new law.[58]

It is interesting to note that, statutorily, Japan's legislature has been far more involved than Florida's in the regulation of Airbnb and other short-term rental companies. Also unlike in Florida, some of this legislation has touched directly upon condominiums and their role in this industry. However, although the *New Private Lodging Business Act* is kind to unit owners in some ways, it still largely hamstrings usage of condominiums as Airbnbs through licensing and reporting requirements, as well as a 180 day annual cap on renting out one's unit.[59] When compared to Florida's near-nonexistent legislation on the issue, and Florida courts' seeming reluctance to restrict use of private property, it is clear that Floridian unit owners have a stronger right to utilize their property as Airbnb short-term rentals than do the Japanese.

F. *Right of Unit Owners to Maintain Ownership of Their Property*

1. Comparing Floridian Termination with Japanese Dissolution

In the United States, the right to maintain one's property is commonly considered among the most fundamental freedoms one possesses. It should serve as no surprise, then, that Floridian condominium law provides broad protection for unit owners from having their exclusive elements removed.[60] However, though "[e]very man may justly consider his home his castle and himself as the king thereof . . . his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others."[61] Part of this sacrificed "fiat" includes the right of a unit owner to maintain ownership

56. Brasor & Tsubuku, *supra* note 39.

57. Ministry of Land, Infrastructure, Transp., & Tourism, *Private Lodging Business Operators*, MINPAKU, https://www.mlit.go.jp/kankocho/minpaku/business/host/index_en.html [https://perma.cc/46AS-XBT4] (last visited Nov. 29, 2020).

58. *Id.*

59. *Id.*

60. *See, e.g.*, FLA. STAT. § 718.303(3) (2022) (disallowing the use of fines to create liens against unit owners); FLA. STAT. § 718.116(6)(b) (2022) ("No foreclosure judgment may be entered until at least 45 days after the association gives written notice to the unit owner of its intention to foreclose its lien to collect . . . unpaid assessments.").

61. Sterling Vill. Condo., Inc. v. Breitenbach, 251 So. 2d 685, 688 (Fla. Dist. Ct. App. 1971).

of their property in the face of certain challenges: key among these being termination. With 80% of all unit owners voting to terminate the condominium form of ownership, and less than 5% voting to maintain it, all individual interests in the condominium will be extinguished.[62] If termination occurs, fair market value will be paid to the unit owners.[63]

Japan has a very similar structure in place, called "dissolution."[64] However, dissolution presents two key disadvantages to unit owner rights when compared to Floridian termination. First, dissolution can be triggered by a 75% majority of unit owners and voting rights.[65] No amount of votes in favor of maintaining the condominium form of ownership can preserve it.[66] Thus, with less owners in favor of it, and regardless of how many oppose it, a unit owner may have their ownership interest dissolved against their will.

Second, unlike Floridian termination, Japanese dissolution does not take into account fair market value of the properties. Rather, upon dissolution, liquidation of the property occurs, and each owner receives assets in accordance with the proportion of floor space they owned.[67] Because of this, unit owners are not guaranteed any money back upon dissolution of their ownership right, much less the fair market value Floridians enjoy upon termination.

Because dissolution has a lower voting threshold to meet than termination, and because it does not guarantee unit owners will be paid a fair market value for their dissolved property like termination, the Florida Condominium Act's termination clearly provides greater unit owner rights to maintain ownership of—and be paid for—condominium property, than Japanese dissolution.

2. Comparing Floridian Reconstruction and Termination with Japanese Reconstruction

Both Florida and Japan anticipate the need for reconstruction following property loss in their statutes. Under Florida's Condominium Act, the sections referring to reconstruction largely deal with the thorny issue of whether repairs are the responsibility of the association, or the

62. FLA. STAT. § 718.117(3) (2022).

63. *Id.* § 718.117(3)(c)(3).

64. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 55, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/J72P-M83S] (Japan).

65. *Id.* art. 55, para. 2.

66. *See id.*

67. *Id.* art. 56, para. 1.

unit owners individually, following property loss.[68] Japan, however, uses its section on reconstruction to grant broad rights to the association, which may infringe upon the ownership interests of its members;[69] and, in fact, a strong parallel can be drawn between Japan's concept of reconstruction, and Florida's abovementioned concept of termination.

In its *Act on Building Unit Ownership*, the Japanese government lays out a process for reconstruction that does not require the condominium properties first be destroyed or deteriorated.[70] Rather, the Act allows for an 80% majority of unit owners and voting rights to vote for the demolition of the properties, and their subsequent rebuild in a manner agreed upon by that same majority.[71] Such a clause places a limit on unit owners' ability to maintain ownership of their condominium units as they bought them. The statute anticipates such a situation, and requires those who vote in favor of such reconstruction to purchase the units of those who opposed the motion at "current value."[72] While such a remedy may soften the impact of losing one's home, it cannot be said to be of equal value, and thus reconstruction under the Japanese condominium regime would appear to create an impediment to unit owners' freedom to maintain possession of their property.

As mentioned, Japanese reconstruction closely resembles Florida's abovementioned termination in some ways. However, a key difference exists which disadvantages it to that scheme, as well. Because the 80% majority cannot be overcome by a 5% vote against the motion[73] as occurs in a Florida termination,[74] freedom of maintaining ownership of one's property is more strongly protected by Floridian termination law.

Japanese reconstruction allows condominium associations to completely tear down and rebuild exclusive elements with an 80% majority, regardless of whether property loss preceded the vote, or if 5% or more of unit owners disapprove of such action. Because of this, it fails to protect the unit owners' right to maintain possession of their units to the same extent as Floridian reconstruction or termination.

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68. *See, e.g.*, FLA. STAT. § 718.111(11)(g)(2) ("Unit owners are responsible for the cost of reconstruction of any portions of the condominium property for which the unit owner is required to carry property insurance. . . ."); FLA. STAT. § 718.111(11)(j) ("In the absence of an insurable event, the association or the unit owners shall be responsible for . . . reconstruction. . . .").

69. *See* Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 62, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/J72P-M83S] (Japan).

70. *Id.*

71. *Id.* art. 62, para. 2.

72. *Id.* art. 63, para. 4.

73. *See id.* art. 62, para. 1.

74. FLA. STAT. § 718.117(3) (2019).

3. Comparing Floridian Fines and Foreclosures with Japanese Auctions

A third check Japanese law places on the right of unit ownership, that is without direct parallel in Florida, is forced auctioning of a unit. When a unit owner in Japan:

> [E]ngage[s] in any conduct that is harmful to the preservation of the building or any other conduct that is contrary to the common benefit of the unit owners with regard to the management or use of the building . . . [and] there is difficulty in removing such impediment . . . all of the other unit owners or the incorporated management association may, based on a meeting resolution, file an action that the unit ownership and the right to use the grounds held by the unit owner who is involved in such conduct be auctioned.[75]

This section of the statute is a severe restraint on the right of a unit owner to maintain possession of their property, and the fact that there is no parallel in Floridian law speaks to that. This is not to say that the statute is a complete abrogation, however. Such action requires the support of 75% of all unit owners and voting interests, and a claim must successfully withstand judicial discretion before auction can take place.[76] Additionally, if the auction has not taken place within six months of the court's decision in favor of the plaintiff association, then a petition for auction on the unit owner's property is no longer valid.[77] Such time limits work to provide the owner with a sense of safety in their property rights after the statutory period has elapsed.

Despite these mitigating factors, though, if a court agrees with the plaintiff association, and the association files a petition of auction within six months of the court's decision, then the unit owner's property will be put up for auction and they will be disallowed from bidding on it.[78]

To find a parallel in the Florida Condominium Act requires looking at two separate provisions. This is required because the Japanese auction system seems to have two purposes underlying its existence, which together are not met by a single element of the Florida statute. First, the Japanese law has a punitive aspect for those unable to conform to the

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75. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 6, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/J72P-M83S] (Japan); Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 59, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselaw translation.go.jp [https://perma.cc/J72P-M83S] (Japan).

76. *Id.* art. 59, para. 2.

77. *Id.* art. 59, para. 3.

78. *See id.* art. 59, para. 4.

norms of the association as a community.[79] Such a punitive measure can be compared to Florida's condominium fines. Such fines "may not exceed $100 per violation, or $1,000 in the aggregate."[80] After the fines are imposed, additional rights may be taken away, such as the use of common elements[81] and the right to vote at meetings.[82]

Second, the Japanese law has a practical effect: dislocating the unit owner off their property.[83] Under Florida condominium law, such displacement of the individual is largely only available through a lien. Although one may initially think a lien could be imposed through the fining system mentioned in the previous paragraph, under Florida law unit owner fines cannot become a lien against the unit.[84] Thus, the most likely way to produce a lien which could lead to foreclosure would be through the failure of a unit owner to pay their assessments.[85] This process, in keeping with the American tradition of upholding property rights, is a rigorous process for the association to pursue, requiring notice periods for the unit owner,[86] as well as providing opportunities for the owner to pay the assessment,[87] and even allowing the owner to continue living in the unit following foreclosure if they pay rent.[88]

Neither of these Florida statutory measures truly compares to the Japanese auction system. However, in it you have the combined punitive force of fines, along with the practical realities of foreclosure and eviction. Whereas in Florida, a "bad" unit owner (one accruing fines) who pays their assessments cannot be forced out of the community,[89] in Japan they can be both forced out of the community, and lose their property all in one fell swoop.[90] Additionally, while such an auction must first receive authorization through a claim filed on behalf of the association,[91] this

79. *See id.* art. 59, para. 1 ("[W]hen [unit owner] conduct . . . significantly impedes the [other] unit owners' community life . . . all of the other unit owners . . . may . . . file an action demanding that the unit ownership . . . be auctioned.").

80. FLA. STAT. § 718.303(3) (2019).

81. *Id.* § 718.303(3)(a).

82. *Id.* § 718.303(5).

83. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 59, para. 4, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/J72P-M83S] (Japan) ("In the auction . . . the unit owner [cannot] . . . make a purchase offer.").

84. FLA. STAT. § 718.303(3).

85. *See* FLA. STAT. ANN. § 718.116(6)(a) (West 2022).

86. *See* FLA. STAT. ANN. § 718.116(6)(b) (West 2022).

87. *See* FLA. STAT. ANN. § 718.116(5)(b) (West 2022).

88. *See* FLA. STAT. ANN. § 718.116(6)(c) (West 2022).

89. *See* FLA. STAT. ANN. § 718.303(3) (West 2021).

90. *See* Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act. No. 69 of 1962, art. 59 para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/J72P-M83S] (Japan).

91. *See id.*

singular point of protest and defense for the offending unit owner is nowhere near as robust as the opportunities to maintain ownership and possession provided to foreclosed unit owners in Florida.[92] As a result, it is clear that while community harmony may be more cohesive in a Japanese condominium association as a result of these auctions, the rights of property owners are far less protected in terms of maintaining ownership against the will of the association's 75% majority.

Through the preceding analysis of Japanese dissolution, reconstruction, and auction, it can be seen that the right of unit owners in those condominium communities to maintain ownership of their units is significantly weaker than it is for their Floridian counterparts.

II. RESPONSIBILITIES OF MANAGERS

While unit owners want to maximize their rights within the community, association managers likewise naturally want to maximize their responsibility over it. In determining which sovereignty better allocates responsibility to its condominium association managers, this Note will consider three elements related to the responsibilities of managers in Japan and Florida: (1) qualifications to become a manager; (2) manager ownership of real property; and (3) legal responsibilities and duties of managers.

As a note, the term "managers," as it is used throughout this section, refers to any type of leading figure in the association regardless of their actual title. Some titles will be given further clarification and definition when the statutory law's understanding requires it.

A. *Qualifications for Managers in Their Respective Regimes*

As mentioned in the preceding pages, the Japanese system of association governance allows for greater freedom in residents' determination of their governance model. This is because Japan's *Act on Unit Building Ownership* has no strict managerial mandate. Associations "may . . . appoint or dismiss a manager," but there is no requirement that they must.[93] In keeping with this more lax approach to governance, the

92. *See, e.g.*, FLA. STAT. ANN. § 718.116(5)(b) (West 2022) (giving unit owners opportunity to remove lien through payment of delinquent assessments); FLA. STAT. ANN. § 718.116(6)(b) (West 2022) (requiring timely notice be given to delinquent unit owners); FLA. STAT. ANN. § 718.116(6)(c) (West 2022) (allowing unit owners to maintain possession following foreclosure if they pay rent).

93. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act. No. 69 of 1962, art. 25 para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/J72P-M83S] (Japan).

qualifications for such a manager are virtually nonexistent in the black letter law beyond a general requirement that they avoid bad behavior.[94]

Beyond someone in the role of "manager," Japanese law does allow for others to be put in management positions under a different title: directors.[95] Directors are to be appointed when a condominium association becomes incorporated.[96] Directors hold similar authority to board members under Florida law,[97] and are bound by similar restraints.[98] However, as will be discussed shortly, Florida has a significantly higher bar to qualify as a board member than Japan does for directors. The *Act on Unit Building Ownership* provides no guidance for who should become a director, or how they should be selected.[99] Although more will be said concerning the corporate structures of condominium associations, for now it is enough to note that whether one is discussing managers or directors, qualifications for managing personnel are hard to come by in Japanese law.

Florida black letter law, on the other hand, holds several barriers to entry for prospective managers. First, as discussed, is the general requirement that all condominium associations have a board consisting of (at least) a secretary, treasurer, and president.[100] In order for these offices to be filled, elections must be held, unless there are not enough candidates for the number of vacant positions.[101] Each board member serves a one-year term in office and can run for reelection at the end of their term.[102] However, as noted earlier, one cannot qualify to run for the board if they have served eight consecutive terms prior, unless they are either approved by a two-thirds vote of all the association's voters, or if

94. *See id.* art. 25, para. 2 ("When the manager has committed a wrongful act or where there are other circumstances whereby it is not fitting for to [sic] him/her to carry out those duties, each of the unit owner may file for the dismissal of such manager.").

95. *See id.* art. 49, para. 1.

96. *See id.*

97. *See id.* art. 49, para. 2 (stating that directors will make decisions for the community through closed voting procedures); *id.* art. 49, para. 3 (stating that directors represent the association); *id.* art. 49, para. 8 (granting powers given to managers to directors under a theory of *mutatis mutandis*).

98. *See id.* art. 49 para. 6 (placing term limits of two years on a directorship).

99. In fact, the only time the term "election" appears in the *Act on Building Unit Ownership* is with regard to directors electing a representative amongst themselves. *See* Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act. No. 69 of 1962, art. 49 para. 5, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselaw translation.go.jp [https://perma.cc/J72P-M83S] (Japan). ("The provisions of the preceding paragraph shall not preclude an incorporated management association from designating a director to represent the . . . association . . . the director who will represent the incorporated management association is to be chosen by the election of a director from among the directors themselves under the provisions of the bylaws.") (emphasis added).

100. *See* FLA. STAT. § 718.112(2)(a)(1) (2019).

101. FLA. STAT. § 718.112(2)(d)(2) (2019).

102. *Id.*

there are not enough candidates to fill the vacancies available.[103] Another bar to qualification for board membership is that co-owners of a unit cannot sit on the board together if the association is comprised of more than ten units.[104] Again, though, exceptions are made for situations where there are not enough candidates to fill the vacancies on the board, otherwise.[105] Finally, one is barred from qualifying for board membership if they are a convicted felon (or would be in the state of Florida), and have not had their civil rights restored for at least five years.[106]

As in Japan, Florida law allows for more than one group of people to manage condominium associations. As such, the board is not the only managing entity in a Florida condominium association in many cases. If an association wishes to pay for someone to manage their community for them, they can.[107] However, if the community is either comprised of more than ten units, or has a budget exceeding $100,000,[108] then their manager has certain qualifications that he or she must also meet.[109] A manager in this situation is required to pass an examination, as per the Florida Administrative Code.[110] In addition, the manager must also pass a moral character background check.[111]

Looking at the various bars to qualification as a manager—either as a board member or managing entity—there can be little doubt that Florida law requires more of its potential managers than Japanese law. As an aside though, it must be reiterated that this analysis is largely contained to the black letter law of both sovereigns, and thus ignores any cultural and societal norms that might arise in different localities. Thus, though Florida law deals much more intimately with the qualifications of potential association managers, there is ample chance that in practice their Japanese counterparts are just as qualified. Still, when comparing the two bodies, it is clear that in the category of qualification Florida does more to ensure its managers are well-qualified and suited for the job than Japan.

B. *Ownership of Real Property*

The ownership stake that managers have in their communities is another angle from which their level of responsibility can be measured.

103. *Id.*

104. *Id.*

105. *See id.* ("[C]o-owners of a unit may not serve as members of the board of directors at the same time . . . unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy.").

106. *Id.*

107. *See* FLA. STAT. § 468.431(2) (2020).

108. *See id.*

109. *See* FLA. STAT. § 468.431(4) (2020).

110. *See* FLA. ADMIN. CODE ANN. r. 61E14-1.002 (2022).

111. *See* FLA. ADMIN. CODE ANN. r. 61.20.001-2 (2022).

This is because the more real property the managers are in direct ownership of, the more power they have to control the usage and availability of that property for other unit owners.

In Japan, the manager "has the right and bears the obligation to preserve the common elements and the grounds and ancillary facilities" of the community.[112] However, the manager's power over the common elements can be furthered. Through the bylaws of the individual community, the manager may come to "own the common elements."[113]

Florida law grants its managers different powers. "The condominium association has the general power to acquire title to real property and to otherwise hold the property for the use and benefit of its members . . . ."[114] Such real property includes the purchase of leases[115] and units.[116] However, there is no provision within the Florida Condominium Act allowing for managing personnel to take direct control over common elements in the community. Rather, those elements are inseparable from one another under joint ownership of all unit owners.[117]

A state of ambiguity is thus left to third parties trying to decide which regime better enables its managers to take greater ownership—and thus greater responsibility—of the community: Florida by allowing its boards to purchase leases and units, or Japan by allowing managers to gain control of the community's common elements? Here, practicality weighs in favor of Japan. While condominium boards in Florida can theoretically buy real property, the use of community ownership over a unit or lease seems limited. The most likely situation where such power comes in handy would be where the association buys a unit and transforms it into a community center or lobby of sorts.[118] Such additions would be encompassed by the "common elements" Japanese managers are entrusted with, though. Additionally, real value can be gleaned for the community by putting all of the common elements in the hands of its managers: upkeep and maintenance can be better served, and because the

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112. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 26, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/J72P-M83S] (Japan).

113. *Id.* art. 27, para. 1.

114. DUNBAR, *supra* note 32, at 169.

115. FLA. STAT. § 718.111(8) (2019).

116. FLA. STAT. § 718.111(9) (2019).

117. *See* FLA. STAT. § 718.107(2) (2019) ("The share in the common elements appurtenant to a unit cannot be conveyed or encumbered except together with the unit."); *see also* FLA. STAT. § 718.107(3) (2019) ("The shares in the common elements appurtenant to units are undivided, and no action for partition of the common elements shall lie.").

118. *See, e.g.*, *Community FAQs*, GATHERINGS OF LAKE NONA, https://www.beazer.com/orlando-fl/gatherings-of-lake-nona [https://perma.cc/V842-WHCZ] (last visited Aug. 3, 2021) ("Gather with neighbors in the elegant lobbies and enjoy conversations over coffee and a game of cards.").

elements are under the manager's name there are higher personal stakes for the manager to take care of those elements for the other unit owners since their future election may depend upon how those elements are maintained. Because Japan's law allows for more practical real property ownership by managers and directors, it grants them greater responsibility in that regard than Florida.

C. *Legal Representations and Duties*

While qualifications and ownership can shed some light on the level of responsibilities entrusted to community managers, no greater responsibilities are granted to condominium association leaders than their legal ones. Under both Japanese and Floridian law, managers of associations must represent their groups in certain forums and hold certain legal obligations to their associations. However, as with the other areas discussed, both regimes split on where these duties lay. By examining this split, it can be determined which sovereign places more responsibility in the hands of its managers.

Japan requires that managers—and, through Article 49(3) of the *Act on Building Unit Ownership*, directors[119]—"represent the unit owners."[120] Such representation encapsulates more than just elected managerial oversight of the community; it also includes various legal representations. Managers are required to stand in for the community as a trustee for insurance monies based off claims for damages to the common elements.[121] They are also to stand-in as trustees in instances of unjust enrichment at the cost of the community.[122] Beyond a trustee-trustor relationship, managers also represent unit owners as plaintiffs and defendants in matters relating to the association.[123] When this is the case, the manager is responsible for informing the unit owners "without delay."[124] In turn for this representation, the liability of unit owners for

119. *See* Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 49, para. 3, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/34N9-PRXN] (Japan) ("The director represents the incorporated management association.").

120. *Id.* art. 26, para. 2.

121. *See id.*

122. *See id.*

123. *See id.* art. 26, para. 4 ("The manager may, pursuant to the provisions of the bylaws or meeting resolutions, serve as a plaintiff or defendant for the unit owner(s), in connection with his/her duties . . . .").

124. *See* Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Act No. 69 of 1962, art. 26, para. 5, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/34N9-PRXN] (Japan).

the legal actions of their managers is proportionate to the percentage of exclusive element floor space they possess.[125]

Florida's Condominium Act likewise places legal burdens upon those managing the community. As in Japan, the various managers of a Florida condominium association hold a fiduciary duty to the unit owners.[126] Part of this relationship stems from corporate law, with directors and officers of a corporation owing a fiduciary responsibility to the shareholders.[127] Under Florida law, the "owners of units shall be shareholders . . . [and] [t]he officers and directors of the association have a fiduciary relationship to the unit owners."[128] Thus, the fiduciary relationship between managers and unit owners can be understood through a corporate lens. This fiduciary relationship extends to the same trustee-trustor obligation imposed upon Japanese managers: "The association is the entity responsible for insuring the condominium on behalf of the association members and is the collection and disbursement agent of the common funds of the members."[129] However, as in Japan, the legal obligations of the board and managers goes beyond trustee-trustor. The association's managers are given the ability to "institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members" in courts of equity.[130] Such "common interests" include common elements such as roofing, structural components, and plumbing elements.[131] Also like the Japanese, Floridian condominium owners can be held liable for the legal actions of their managers, in proportion to their ownership of the common elements in the community.[132]

Additionally, Florida "association[s] may contract, sue, or be sued with respect to the exercise or nonexercise of [their] powers" generally,[133] which suggests that with the managers' responsibility to act on behalf of

125. *See id*. art. 29, para. 1 (citing Act on Building Unit Ownership, art. 14, para. 1, which states "The share of each co-owner shall be in proportion to the floor space of the exclusive element held by such co-owner.").

126. *See* FLA. STAT. § 718.111(1)(a) (2019).

127. *See* DUNBAR *supra* note 32 at 93 (citing B & J Holding Corp. v. Weiss, 353 So. 2d 141, 143 (Fla. Dist. Ct. App. 1977) ("We hold that where an officer and director of a corporation occupies a quasi-fiduciary relationship toward the corporation and its stockholders and is bound to act with fidelity and the utmost faith, he (or she) in accepting the office impliedly agrees and undertakes to give the corporation the benefit of his (or her) best care and judgment and to exercise his (or her) powers in the interest of the corporation and the stockholders . . . .")).

128. FLA. STAT. § 718.111(1)(a) (2019).

129. DUNBAR, *supra* note 32, at 167 (citing FLA. STAT. § 718.111(4) (2019)).

130. FLA. R. CIV. P. 1.221.

131. *See* FLA. STAT. § 718.111(3).

132. *See* DUNBAR, *supra* note 32, at 168 ("The condominium association is liable for its acts or its failure to act, and may pass this liability on to unit owners if it arises in connection with the common elements.").

133. *Id.*

the association also comes the possibility of legal backlash from the unit owners they are meant to represent. The managers can also "defend actions in eminent domain on the unit owners' behalf,"[134] as well as "bring inverse condemnation actions" on behalf of the association.[135]

A broad departure from the Japanese black letter law, can be found further in the Condominium Act. The association board is authorized to hire an attorney to advise them in certain matters, separate and apart from the open meetings the board is required to have with unit owners.[136] More than being authorized, under the view that the board-owner relationship falls under a corporation-shareholder heading, it can be argued that having an attorney on retainer for consultations is required in order for the board to fulfill their duties in a prudent manner.[137] It is also assumed that if a board hires a manager, as discussed in the previous section, that manager will have their own attorney on retainer; these attorneys must be separate to avoid a conflict of interest.[138]

Having looked at the legal duties and obligations placed on the managers of Japanese and Florida condominium managers, it is clear that many similarities exist. Both allow their managers to sue and be sued on behalf of the association as a whole, both have a trustee-trustor relationship between the managers and unit owners with regard to insurance, and both create liability for the unit owners on behalf of the legal actions taken by the managers. However, beyond this, Florida law allows for the managers to bring "inverse condemnation actions"[139] and fight eminent domain movements by the government[140] whereas the *Act on Building Unit Ownership* provides no such protection for unit owners against governmental encroachment. Indeed, as discussed earlier, where the *Act* does discuss one losing their property, it does so in the affirmative, granting power to other unit owners to take away the property of other unit owners with a large enough majority.[141] Additionally, Japan

134. *Id.* at 167.

135. FLA. STAT. § 718.111(3).

136. *See* FLA. STAT. § 718.112(2)(c)(3)(a) ("[T]he requirement that board meetings and committee meeting be open to the unit owners does not apply to . . . [m]eetings between the board or a committee and the association's attorney, with respect to proposed or pending litigation . . . .").

137. *See* FLA. STAT. § 617.0830 (2020) ("A director shall discharge his or her duties as a director . . . [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances . . . [i]n discharging his or her duties, a director may rely on . . . [l]egal counsel . . . .").

138. *See* FLA. STAT. § 718.111(3) ("An association may not hire an attorney who represents the management company of the association.").

139. *Id.*

140. *See* DUNBAR, *supra* note 32, at 167.

141. *See, e.g.*, Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 59, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/34N9-PRXN] (Japan).

does not take a corporate-shareholder view of the board/manager-association relationship like Florida does, which means that unlike in Florida, managers in Japan are not beholden to corporate fiduciary duties to unit owners. Because of this, there is less pressure on Japanese managers to consult legal counsel than there is in Florida, and a lower level of legal responsibility to the association on the whole, as a result. Because of these distinctions, it is clear Florida places greater legal responsibilities on its association managers than does Japan.

III. CORPORATE STRUCTURE

An element that has been touched on throughout this Note, but not fully addressed, is the corporate structure that condominium associations can take on. As has been noted previously, the corporate makeup of the association can have wide-reaching effects on both unit owner rights and manager responsibilities. Thus, to provide a fully comprehensive comparison between the two legal regimes, and to best understand what lessons can be incorporated to Florida condominium law from Japan, a brief examination of the corporate structures these associations can take on in both regions is necessary. It should be noted that this examination will not be comprehensive. The focus of this Note is on two aspects: unit owner rights and manager responsibilities in condominium associations. As such, a look at the corporate structures of condominium associations in this context will be limited to how such structures affect these two aspects and will not go more in-depth to look at possible tax or reorganization advantages they may provide.

As mentioned earlier, Japanese condominium associations have a choice as to whether or not they will incorporate.[142] Such a decision must be made by a "three-fourths [sic] majority of the unit owners and a three-fourths majority of the votes" within the community.[143] If the unit owners decide to incorporate, then the association becomes a "juridical person" under the law[144] and must put a corporate identifier in its name.[145]

Many unit owner rights and manager responsibilities will not change upon incorporation, which may be a bad or good thing for unit owners depending on the situation. On the bad side, it appears that incorporation of a Japanese association does not provide much protection to unit owners. For instance, unit owners are still liable for actions of the association if the incorporated association is unable to perform its obligations.[146] Creditors can also still get at the assets of unit owners if

142. *See id.* art. 47, para. 1.

143. *Id.*

144. *Id.*

145. *See id.* art. 48, para. 1 ("An incorporated management association shall use the characters 'kanrikumiaihoujin' (incorporated management association) in its name.").

146. *See id.* art. 53, para. 1.

the incorporated association cannot produce adequate funding.[147] On the good side, though, incorporated associations are able to proceed against "bad actor" unit owners in a way similar to unincorporated associations.[148] Additionally, all the prior responsibilities and duties of an unincorporated manager are subsequently effective against the incorporated managers,[149] meaning the rules and bylaws created by the unit owners will continue to be respected by the new association.

Incorporation of an association in Japan does entail one major difference that affects both managers and unit owners: requirement of an auditor.[150] The responsibilities of an auditor include: (1) "auditing the status" of the association's assets;[151] (2) auditing the "business management" of the association;[152] and (3) reporting any discrepancies that violate "the applicable laws and regulations or the bylaws, or any significant impropriety with respect to the status of the assets or the management" of the association[153] and calling a meeting to present such a report.[154] The auditor is loyal to the association, not to any one manager, and thus his or her oversight of the board is meant to be that of a neutral third party.[155]

Unlike their Japanese counterparts, since 1977, Florida condominium associations have had to incorporate as either not-for-profit or for-profit entities.[156] As a result, there is little merit in discussing the pros and cons

147. *See* Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 53, para. 2, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/34N9-PRXN] (Japan). ("The preceding paragraph shall also apply when a compulsory execution against the assets of the incorporated management association has not been successful.").

148. *See, e.g.*, *id.* art. 57, para. 1 ("Where a unit owner has engaged in conduct set forth in Article 6, paragraph (1) . . . the incorporated management association may, for the common benefit of the unit owners, demand that the relevant unit owner discontinue such conduct, remove the outcome of such conduct, or take the necessary measures to prevent such conduct.").

149. *See id.* art. 47, para. 5 ("The meeting resolutions, the bylaws, and the acts engaged in within the scope of the duties of a manager before the establishment of an incorporated management association, shall be effective against the incorporated management association.").

150. *See id.* art. 50, para. 1 ("An incorporated management association shall have an auditor.").

151. *Id.* art. 50, para. 3.

152. *Id.*

153. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 50, para. 3, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/V5UJ-SERU] (Japan).

154. *See id.*

155. *See id.* art. 51, para. 1 ("With regard to any matter involving a conflict of interest between an incorporated management association and a director(s), the auditor shall represent the incorporated management association.").

156. *See* FLA. STAT. § 718.111(1)(a) (2019) ("The operation of the condominium shall be by the association, which must be a Florida corporation for profit or a Florida corporation not for

of incorporation of an association under Florida law. Additionally, there is only one key difference for managers between incorporating as a not-for-profit organization rather than a for-profit one: a not-for-profit cannot distribute profit to its members, directors, or officers.[157] However, exceptions can be made under the statute to allow for such distribution,[158] and the Condominium Act provides firmer restrictions on disbursement of profits of condominium associations than either the statutes governing for-profit or not-for-profit corporations, regardless.[159]

Because there is little difference between a not-for-profit and a for-profit condominium association, and because all modern associations are incorporated in Florida, there is little reason to discuss the intricacies of what rights and responsibilities are granted to managers and unit owners as a result of incorporation. Everything already discussed with respect to Florida condominium associations already falls under the "incorporated" heading. However, one benefit incorporation does provide to both unit owners and managers that has not been discussed is in the case of association bankruptcy. Unlike in Japan, unit owners and managers are protected by the corporate status of their associations in case of bankruptcy. "While many typically think of financial reorganization under Chapter 11 as being reserved exclusively for large corporations, condominium . . . associations are also entitled by law to file for this form of bankruptcy relief."[160] Being able to file under Chapter 11 allows these associations to reorganize and restructure their debt.[161] By doing so, the assets of managers and unit owners are protected, and cannot be reached by the association's lenders and creditors.[162] This is because "[a]n association in Chapter 11 has the opportunity to negotiate with its creditors, cancel or renegotiate onerous contracts and leases, and avoid

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profit. However, any association which was in existence on January 1, 1977, need not be incorporated.").

157. *See* FLA. STAT. § 617.01401(5) (2020).

158. *See, e.g.*, FLA. STAT. § 617.0505(2) F.S. ("A corporation may pay compensation in a reasonable amount to its members, directors, or officers for services rendered, may confer benefits upon its members in conformity with its purposes, and, upon dissolution or final liquidation, may make distributions to its members as permitted by this chapter.").

159. *See, e.g.*, FLA. STAT. § 718.115 (governing the payment of common expenses and handling of common surplus in condominium associations, regardless of their corporate status).

160. Jeffrey S. Berlowitz, *Filing for Chapter 11 Bankruptcy Reorganization*: *Viable Option for Condo Associations, HOA's*, MIAMI HERALD (Mar. 22, 2015, 3:00 PM), https://www.miamiherald.com/news/business/biz-monday/article15559916.html [https://perma.cc/9DSD-VWCA].

161. *See Chapter 11 Bankruptcy*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/chapter_11_bankruptcy [https://perma.cc/BN7U-D8N5] (last visited Aug. 3, 2021).

162. *See* Berlowitz, *supra* note 160 ("For associations that are incapable of meeting all of their financial obligations, seeking relief through a Chapter 11 bankruptcy reorganization plan has now become a viable option in order to avoid forcing some unit owners to pay more than their proportionate share of the assessments.").

the seizure of assets and garnishing of bank accounts by creditors holding judgments."[163]

As can be seen in the above analysis, each regime's corporate structures can be seen to grant additional rights to unit owners and responsibilities to managers in different ways.

Japan requiring a neutral auditor to ensure the managers are properly handling the finances of the association and reporting any misconduct to the unit owners creates a higher level of accountability for the managers towards the owners. At the same time, it increases the rights of the owners by allowing them greater insight to the goings-on of the managers, and informs them of any managerial misconduct without their having to personally instigate an investigation.

Florida, by comparison, does not have such oversight, but does protect unit owners' rights in the case of mismanagement in the form of Chapter 11 bankruptcy. By preventing the association's lenders and creditors from getting to the owners' assets, Florida's bankruptcy protections (through mandated incorporation of associations, which can then navigate federal bankruptcy laws) stop owners from being "liable for the performance of such obligations"[164] as the association is liable for itself. This also places additional responsibility on the shoulders of association managers, because it will be up to them to properly file for Chapter 11 bankruptcy and navigate the reorganization efforts on the association's behalf.[165]

As a result, for the purposes of this Note, the real difference between the two regimes' association corporate structures is one of a proactive (Japan) versus reactive (Florida) approach to managerial misconduct leading to bankruptcy. Japanese law provides a third-party to oversee the board and ensure it complies with its obligations to unit owners; however, if the auditor fails in their job and the association suffers bankruptcy, then unit owners are liable for the obligations of the association.[166] Florida law instead provides no initial oversight of the board beyond the unit owners themselves. However, if the owners fail in their oversight, they are protected by the incorporated status of their association.[167] Thus, determining which corporate structure is "better" for unit owners and managers is essentially a coin toss, since both provide adequate protection for unit owners at different points in time.

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163. *Id.*

164. Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 53, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/C27J-C4WA] (Japan).

165. *See* Berlowitz, *supra* note 160.

166. *See* Tatemono no kubun shoyū tō nikansuru hōritsu [Act on Building Unit Ownership, etc.], Art. No. 69 of 1962, art. 53, para. 1, *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp [https://perma.cc/C27J-C4WA] (Japan).

167. *See* Berlowitz, *supra* note 160.

CONCLUSION

Ultimately, the question of which legal system is "better" is subjective. After all, "better" entails far more than may appear on the surface; there are considerations of culture and personal taste that are far beyond the scope of this Note. However, the question of which legal regime is better at providing greater rights to its condominium unit owners, while also placing more responsibility in the hands of its association managers is far more objective in scope, and thus within the realm of legal discourse. As a result of such discourse, it can be seen that greater rights are, on the whole, afforded to unit owners in Florida than in Japan, despite certain advantages Japanese unit owners enjoy regarding association governance. The same can be said for the responsibilities of association managers: while more responsibilities are placed in the hands of Florida managers, Japanese ones can hold title to the community's common elements, which is certainly more responsibility in one area than Florida managers have. Finally, from the perspective of association management and bankruptcy, it can be seen that both regimes' corporate structures provide roughly equal treatment. However, Japanese corporate associations are more proactive in handling these issues, while Florida incorporated associations are more reactive.