



About Condo

CREATING A CONDOMINIUM (A BASIC OUTLINE)

This memorandum provides an outline of the basic steps in creating a condominium pursuant to the Ontario *Condominium Act, 1998* (the "Act"). It is not intended to be an exhaustive checklist. Several details have been omitted. The purpose of this memorandum is to give people intending to enter the field of condominium development a simple overview of the steps and fundamental considerations involved as well as an idea about some of the roles that lawyers and other professional advisors can play.¹

Acquisition of Land

Condominium is a form of subdivision of land. It therefore virtually goes without saying (but is being said here in any event) that one of the first steps in creating a condominium is the acquisition of land. While this need not always be the very first step (i.e., one might have an idea first, and thereafter look for and acquire land that suits that idea), it is a necessary step, and one that necessarily arises very early in the process.

In reviewing land options, you will want to examine such matters as current zoning, environmental conditions, general geographic features of the site and its relationship to other locations (such as highways, railways, airports, bus routes, schools, shopping, industrial or commercial sites, etc.), provincial and/or municipal plans and policies relating to the site and its development or uses (including whether there are existing approved site plans), whether there is existing servicing or the capacity to service the land with necessary utilities, accessibility and plans affecting adjacent properties.

The land that you acquire, or are considering acquiring, could be undeveloped land or might already have buildings or other structures on it. If the land includes existing buildings or structures that you intend to incorporate into your project, you might also consider formal engineering studies that will help to determine the life-span and future repair and replacement costs of those elements of the property, as well as to identify code compliance issues in advance of your commitment to the project.

These and several other considerations will factor into your determination about (a) whether to acquire the site and (b) what you should do with it.

Note: If you require a mortgage to acquire the property, or will borrow money to complete the project with such loans registered as charges against title to the land you

¹ For a more detailed discussion of considerations relating to condominium development, including issues specific to each of the different types of condominium that can be created under the *Condominium Act, 1998*, see the CCI – Golden Horseshoe Chapter publication, *A Planners' and Municipalities' Guide to the Condominium Act, 1998*, (2005) by Craig Robson, Greg Carpenter, Michael Clifton, Ron Danks and Avril Lavallee.

acquire, you need to ensure that each such lender/mortgagee is in agreement with the proposed condominium, or that any dissenting mortgagee can be replaced in a reasonable period of time. Part of the documentation required to register the condominium is the consent of all mortgagees. A mortgagee cannot be forced to consent to condominium registration in the absence of a written agreement to so consent.

Project Conception

Another very early step in the creation of a condominium is the conception stage: you must decide what you are going to create.

If you already possess the land, your decision as to what can be done with it will depend on several factors including those outlined above. If you do not already possess the land, you will likely need to adjust your conception to suit that land you finally obtain. In addition, your determination of what product you wish to create should be influenced by market analyses as well as a determination of what resources are available to you.

When you have come up with the basic idea of what you would like to create, you should then flesh out the details including the type of condominium (i.e., standard, phased, vacant land, leasehold or common element) and its various features. This is generally done best in consultation with various professional advisors, including lawyers, planners, surveyors, engineers and others. You should also, on a preliminary basis, review your plans with the applicable municipal planning department(s) so that you can then refine the plan as necessary to help ensure their support and the future approval of the project with the minimum of conditions attached.

To some extent, there must be flexibility in your plans since there are likely going to be contingencies that might arise which require you to alter them (such things as unforeseen conditions of the land, legal issues or changes in the market). However, having said this, it can be frustrating for your development team, staff, the municipality and your customers if the plan changes too much or too frequently. It can also be frustrating for the developer who might feel that his plans are not being supported, or that nobody is quite keeping up with him, as his designs or intentions change from day-to-day. It is better to take time to carefully consider in advance what you can and will make, to study the lands and your options as fully as possible, so that once instructions are given, applications are made and marketing commences, the project will change as little as possible.

Draft Plan of Condominium Application and Conditions of Approval

You now have the land and a plan, and assuming that the municipality is on the side with the project, you are now ready to file a draft plan of condominium application with the municipal approval authority.

A significant part of this application is the draft plan print which is a graphic depiction of the site showing proposed unit and common element locations and at least the fundamental physical features of the project. This is usually prepared by the project surveyor, architect, planner or engineer. In our experience, surveyors and planners are generally the most qualified and able to produce this plan. It is often best to involve the surveyor in any event, as he or she will also be producing the final condominium plan for registration.

In addition to the draft plan print is a written application form. This can be prepared by any of the owner, surveyor, planner, project lawyer or engineer. However, it is usually prepared by the surveyor or planner who is preparing the draft plan print.

Once the documentation is ready, the required number of copies of the draft plan print and application, along with the application fee, are submitted to the applicable approval authority. The approval authority will then circulate the application to various relevant agencies including municipal departments such as traffic and building, utility providers, conservation authorities, Canada Post, CN Rail and others. The purpose of this circulation is to solicit such agencies' concerns, questions, comments and/or proposed conditions of approval for the project.

It is usually appropriate to engage the project planner and/or solicitor in following up with municipal staff and dealing with comments and proposed conditions as they arise, as well as generally to monitor the progress of the approval process. Questions and problems arise throughout the process and ought to be addressed quickly so that you are not caught short as the end with many issues that are not easily resolved.

The approval authority will generally provide draft conditions of approval (based on the comments it receives from the various commenting agencies) for your review before its final conditions are issued. This allows your team of professional advisors to review and possibly deal with the municipality on issues of concern in advance of final issuance of conditions. In some cases significant concerns could be resolved at this stage and proposed conditions can be changed before they are finalized so that you might have fewer or less daunting hurdles to go over in order to register your project. It also gives you some lead-time to begin the work required to satisfy the final conditions which is a pre-requisite to registration of the condominium.

Land Titles Application

It is possible that title to the lands you obtain for the condominium project will be required to be converted from an older land registration system to the current Land Titles system, with "Land Titles Absolute" status. This will usually involve both your surveyor and solicitor and is a process that can take several months. However, as it can be done at the same time as the draft plan application and other steps are being performed, in most cases it will not slow down your project. However, you need to be aware that if neighbours object to the conversion of title for any reason, this process can be significantly delayed. If a Land Titles conversion is needed, you will want to discuss the process and these risks with your project surveyor and solicitor.

Preparation of Condominium and Disclosure Documents

There are a number of legal and surveying documents to be prepared in relation to the condominium.

In order to create the condominium you will require at least a declaration and a description. The declaration is the "constitution" of the condominium. It sets out all of the basic rules of operation, occupancy and use of the property, and defines such details as the proportionate interests of each future unit owner, their proportionate shares in the costs of the condominium and whether there are any parts of the common elements to which a unit owner is entitled to have exclusive use. The description is a set of survey plans that delineate the perimeter boundaries of the project and the internal divisions

between units and common elements. Depending on the size and design of your project such plans can range from one or two sheets to several pages.

Both the draft declaration and description must be submitted to the Land Titles Office where the condominium is to be registered for review prior to registration. Most Land Titles Offices can perform this review in a matter of a few days to two weeks.

Depending on the design and proposed organization of your condominium, other basic organizational documents may be required, including by-laws and rules and, often but not always, certain fundamental agreements. Your lawyer will help prepare these.

There is also a “standard unit definition” which is a specialized document required by the Act for all condominiums other than common element condominiums to help organize insurance and some repair obligations between unit owners and the condominium corporation to be created. You should not use your standard statement of unit features as your standard unit definition. Your lawyer and surveyor should be able to help craft a standard unit definition that makes sense and fulfills the intentions of the same under the Act.

In addition, the Act requires the developer of a condominium to provide purchasers with a number of disclosure documents, including a disclosure statement with table of contents (which is a form under the Act) and a proposed budget for the first year of operation of the condominium. Your solicitor will be key in helping to prepare all such documentation; however, the precise contents of the budget must be determined by you. You may wish to have an experienced condominium property manager assist you in preparation of the first-year budget.

It is necessary for you to provide purchasers of the proposed units in your condominium with the draft creating documents and disclosure documentation required under the Act in order to make any agreement of purchase and sale final. Once the purchaser receives such documentation in addition to a fully executed agreement of purchase and sale, there is a 10-day “cooling-off” period during which the agreement can be rescinded. A further rescission period may arise if you thereafter make material changes to the disclosure materials. This is another reason it is best to be reasonably settled on the design and basic features of your condominium in advance of going to market.

Completion of Declaration

The developer must sign the main body of the declaration for the condominium before it can be registered. In addition, the declaration includes a number of schedules that are to be signed by various parties including the project solicitor, project surveyor and project engineer or architect. If there are mortgages registered against the lands, then the mortgagees must also sign consent forms that are to be included in the declaration. If the condominium is a common elements condominium, there will also be schedules to be signed by the owner(s) and mortgagee(s) of the proposed parcels of tied land. Your solicitor or project planner will usually be the person on your development team who coordinates completion of declaration schedules.

Clearance of Conditions and Registration

As noted above, after circulation of the application for approval of the draft plan of condominium, the municipal approval authority will issue conditions of approval (providing it does not reject the application altogether, which should not be the case if the

municipality was consulted at the earlier, conception stage). There may be a great deal of work involved in clearing such conditions. Often this includes making arrangements with the various commenting agencies (e.g., conservation authorities, utility service providers, etc.) and obtaining letters from them that confirm their conditions are satisfied ("clearance letters").

Once everything has been done to satisfy the conditions, you (or your surveyor) will provide the approval authority with the final condominium plans (description) for execution, along with which you should send a letter that specifies how each condition was met and includes copies of relevant clearance letters and other documentation and the approval authority's fee for executing the plans.

It generally takes at least a few days for the approval authority to review this package and determine whether the plans can be signed. When satisfied that all conditions have been duly met, the approval authority will sign off on the final copies of the plan and deliver the same to the Land Titles Office to be registered along with the registration copies of the declaration which your solicitors or surveyors will deliver directly to the Land Titles Office along with applicable registration fees.

When the declaration and description are registered, the condominium comes into existence. Within a further short period (anywhere from one to a few days) the Land Titles Office will open PINs for each of the units, which will allow title to them to be conveyed.

The balance of your work relating to the condominium² will be in regard to sales of units and the organization/turn-over of the condominium corporation, which are subjects of other memoranda.

Michael H. Clifton (June 2007)

² However, if your condominium is a phased condominium, note that many of these steps are repeated for each phase, though potentially with somewhat more ease and less cost for each phase depending on the design of your development.