

About Condo

TYPES OF CONDOMINIUM

In Ontario, the *Condominium Act, 1998* (the “Act”) provides for a wide range of development options that were not available under previous legislation. These options give land developers significant flexibility in deciding how their property will be subdivided and governed.

This memorandum provides a brief overview of the basic characteristics of the five types of condominium development allowed by the Act. It does not discuss condominium conversions or amalgamations, which are additional concepts that can be factored into almost any development plans. To determine which condominium type or development strategy (or what combination of them) is best suited to your land and development aims, you should retain planners, lawyers and/or other professionals who have knowledge of and are experienced in condominium development.

PRELIMINARY MATTERS

Before proceeding, it may help to define a few terms relevant to condominium.

Units, Common Elements and Common Interest

Almost all condominiums consist of land and buildings that are partitioned into “units” and “common elements”.

- **A “UNIT”** is the part of the condominium land, and/or all or part of a building on the land, that is available for individual ownership and title transfer.
- **THE “COMMON ELEMENTS”** are all those parts of the condominium lands or property that are not designated as units.

That is, any part of the condominium property that is not a unit is common element. The common elements are owned by all of the unit owners as tenants in common.

In most types of condominium, the unit owner’s title will be to a unit (legally described in the form of: “Unit ..., Level ..., ... Condominium Plan No. ...”) and to “its appurtenant common interest.”

- **THE TERM, “COMMON INTEREST”** refers to the proportionate share in the common elements and assets of the condominium that the owner of that unit owns. The common interest comes with the unit and cannot be separated from title to it.

Declarant, Declaration and Description

It will also be useful to understand (if only in the most summary manner) how a condominium is created.

Skipping over all of the steps and issues relating to acquisition of land, financing of the development, the planning and approval processes, engineering, architectural and surveying requirements, and so forth, it is sufficient for the purposes of this memorandum to know that a condominium is created by the registration, subject to municipal approval, of two documents on title to the subject lands: a “declaration” and a “description”.

- **THE TERM “DECLARANT”** *refers to the person who possesses either freehold or leasehold title to the lands on which the condominium is made, and in whose name the declaration is registered.*

- **THE “DECLARATION”** *is the statement of the declarant that the lands in question are to be subject to the Act, and upon registration creates a “condominium corporation” that will be responsible to govern the condominium in accordance with the Act.*

The declaration sets out various matters pertaining to the governance of the condominium to be created, including a legal description of the subject lands, a written definition of the components of the lands that make up the units, the proportionate shares of the common interest appurtenant to each unit, the proportionate shares of the common expenses of the condominium to be paid by each unit owner, and other matters.

The declarant also has discretion to write various rules and other provisions into the declaration that can determine such matters as permitted uses of the units and common elements, conditions and restrictions on occupancy, sales or leasing of the units, and conditions under which unit owners must indemnify or pay additional common expenses to the condominium.

- **THE “DESCRIPTION”** *of the condominium, upon registration, creates or defines what is the “condominium plan” (and can be referred to by that name). It is a survey (by a qualified Ontario Land Surveyor) that illustrates the boundaries of the property over all and of each of the units and all of the interests appurtenant to the lands.*

The description and the declaration must both be referred to in order to determine precisely the extent of the condominium lands and of the common elements and units. The complete registered description may also include architectural and structural plans for the property.

Having completed all those preliminary explanations, it should now be somewhat simpler to set out and provide summary explanations of the various types of condominium that are available to be registered under the Act.

TYPES OF CONDOMINIUM

The types of condominium provided for under the Act fall within two basic categories: *freehold* and *leasehold*. There are four sub-categories of freehold condominium, filling out the number of basic condominium types available for developers' consideration to five.

Leasehold Condominiums

A Leasehold Condominium is created on lands for which the declarant possesses only a leasehold interest in title, and has consent of the holder of actual ("fee simple") title to develop the condominium on the lands.

The purpose for which the Leasehold Condominium concept was created was to broaden the range of options for land use (and revenue making) for institutions, such as hospitals and universities, that cannot sell their lands.

In order to qualify as a Leasehold Condominium, the declarant must possess a leasehold interest in land that covers the whole of the proposed condominium property, and the term of the lease cannot be less than 40 years less a day nor more than 99 years. (One condominium expert¹ suggests that the purpose for these minimum and maximum periods is, on the one hand, to ensure leases are neither unattractively short nor longer than the reasonable lifespan of the property.)

Since the declarant possesses only a leasehold interest in the property, this is all that can be conveyed to the purchasers. Thus, while they may be referred to as unit "owners" they really also possess only a leasehold interest in their units.

The lessor (owner) of the lands must sign the declaration as well as the declarant (lessee), and the lessor's consent will later be required if there are to be any changes made to the declaration after registration.

The declaration must contain all the essential terms of the lease in a schedule. It may be advisable that the entire lease be included. Any provisions of the lease not included in the schedule to the declaration will not bind the resulting condominium corporation or unit "owners".

Freehold Condominiums

One should understand the use of the term "freehold" in this context. In the practice of real estate marketing and sales professionals, the term "freehold" is often used to suggest some special kind of condominium in which one owns more of the property than in another kind of condominium. This use of the term is not how it is used in the Act, and is not strictly accurate in any event.

A freehold condominium is simply one where the title held by the declarant, and being conveyed to the unit owners, is not leasehold. The condominium is created on lands for which the declarant holds title in "fee simple" and can convey the same to the purchasers of units in the condominium. This means that the owner actually owns the

¹ Mark Freedman, "Condominium Development Update," Canadian Institute Condominium Conference, March 2007.

unit and does not merely have a leasehold interest in it. This term applies equally to high-rise, low-rise and row condominiums, and regardless of whether the unit is limited to the internal components of the building or includes the building exterior and/or yard areas.

As noted above, there are four sub-categories of freehold condominium. They are: Standard, Phased, Common Elements and Vacant Land Condominiums.

a. Standard Condominium

The Act specifically defines Standard Condominiums as any condominium that is neither a Leasehold Condominium nor one of the other (following) types of freehold condominium. This is not a useful definition until the characteristics of the other kinds of condominium are known. However, in brief, it can be explained that a Standard Condominium is the traditional kind of condominium that was permitted under previous legislation, the one with which most consumers are familiar and consider to be common.

This type of condominium generally consists of buildings that are subdivided into units and common elements, with surrounding lands usually also being designated common elements. Some parts of the common elements might be further designated for the exclusive use of the owners of one or more of the units, but predominantly the common elements are common usage areas or facilities, such as hallways, recreational facilities, exterior lighting, walkways, driveways and visitor parking areas.

b. Phased condominium

A Phased Condominium is a condominium that is developed in stages. It is a condominium that keeps increasing in size until the project is complete.

A Phased Condominium development commences with the registration of a declaration and description plan creating the initial units and common elements of the condominium. Thereafter, from time to time (over a period not to exceed 10 years) further units and/or common elements are added to the condominium by the registration of amendments to the declaration and description.

Each such registered set of amendments is referred to as a “phase” of the condominium. Therefore, the initial components of the condominium are not a phase; rather, “phase one” is actually the *second* stage of the condominium development, consisting of the units and common elements brought into the condominium by registration of the first set of amendments to the registered declaration and description.

A primary advantage of this style of condominium is that the developer and unit owners do not have to wait until completion of a large or diverse condominium project before sales of individual units can actually be completed. Once a unit is created by registration of the declaration and description or a subsequent set of amendments, title to the unit can be transferred. This benefits both the developer, in terms of cash flow, and the purchaser in terms of reducing the amount of time in occupancy or awaiting title.

For a developer who is uncertain about the future market for the project, the Phased Condominium concept allows a reasonable amount of the proposed condominium to be

constructed and sold before funds are committed to development of the balance of the lands.

Since a developer can abandon completion of a phased condominium (after registration of any stage), or decide to alter the way future phases are designed and constructed, it is essential that each stage registered be entirely self sufficient. That is, an earlier stage of the condominium cannot be dependent in any way upon a later phase for its operation and use. Therefore the developer must think the project through carefully in advance and ensure that all necessary easements and services are in place when the first stage is registered.

In principle, any type of condominium should be able to be phased; however, the regulations under the Act restrict the right to phase to those condominiums that, if not phased, would be Standard Condominiums.

Unless and until these provisions are amended, none of the other types of condominium can be phased in this manner. They can, however, be “phased” in the manner allowed under previous legislation, by registering multiple individual condominiums. This requires cross easements and joint agreements covering the services and facilities that the multiple developments will share. This is not as efficient or effective as the Phased Condominium concept, but is a tested practice that can work where it is needed.

c. Common Elements Condominium

This form of condominium is unique in so far as it is the only type of condominium in which there are no units but only common elements. Whatever the common elements are, the common interest in them is made appurtenant to a number of parcels of land that are outside of the condominium lands and referred to as “Parcels of Tied Land” (typically, POTLs).

POTLs need not be adjacent to the common elements and can be any parcel of land that is capable of being separately conveyed. That is, there must be no Planning Act or other restrictions that prohibit the separate conveyance of a POTL. However, the common interest in the Common Elements Condominium, once the declaration and description are registered, stays with title to the POTL (cannot be severed from it) when it is conveyed.

The POTLs’ legal descriptions are set out in the declaration for the condominium (along with the signed consent of the owners and mortgagees of the POTLs) and the declaration and description are registered on title to each POTL.

POTL owners bear similar obligations toward the common elements of the condominium as do owners of units in a Standard Condominium. The owners must pay common expenses, and if they are unpaid the delinquent owner’s POTL will be subject to a condominium lien. However, the condominium corporation does not have the same authority to make and enforce rules relating to the use, occupancy, appearance, condition or enjoyment of the POTLs as a Standard Condominium corporation has in relation to its units.

Typically, the Common Elements Condominium concept is used where the owners of existing properties wish to create and share the use of and responsibility for a facility or

service (such as a group of retail/business owners wishing to construct and share a parking facility, or a group of homeowners wanting to establish a community park or recreation centre). It is also used in conjunction with the development of subdivisions or small freehold townhome developments, where the streets, street lighting, community entrance features or other such things are shared. There are also other imaginative uses of the concept that are developing for uses in “interval” or “fractional” ownership developments.

d. Vacant Land Condominium

A vacant land condominium is one in which the units need not be constructed upon at the time the condominium is registered. They can consist only of bare land. Indeed, under the Act, one of the criteria to be categorized as a Vacant Land Condominium is that at least one unit must have no buildings or structures on it. This means that a Vacant Land Condominium plan can contain one or more buildings on its units at the time of registration, so long as at least one unit is empty. However, it is not permitted for any building existing at the time of registration to straddle a unit boundary or for one unit to be located above another.

The restrictions defining a Vacant Land Condominium effectively prohibit multi-dwelling properties from being registered as Vacant Land Condominiums, unless it is not the developer’s intention to make each dwelling a separate unit. That is, a multi-dwelling building could exist within a vacant land condominium, but it would either have to be a rental property located wholly within one of the units, or be built after registration of the condominium if the building will cross over unit boundaries or have stacked units.

For example, a developer may wish to have two or three types of multi-dwelling rental housing built using the condominium concept in order to have certain shared facilities (such as a club house) and services (such as roads). This could be done by having each complex built wholly within one of the units of a Vacant Land Condominium.

On the most imaginative level, it is technically possible to create a condominium within a Vacant Land Condominium unit after the first condominium is registered, provided the approval authorities support the plan. However, for the most part where a developer wishes to construct a property with multiple adjacent units in a single building, the Vacant Land Condominium concept is likely not going to be the most appropriate or efficient.

Where the Vacant Land Condominium concept works best is for condominium projects that are similar in design and use to regular plans of subdivision. Indeed, the concept has been described as one that is “the equivalent of a plan of subdivision without the requirement for public roads.”²

It has also been used to good effect in the creation of some large shopping complexes. It should be noted that the Vacant Land Condominium is the only form of condominium where the units cannot be offered for sale until the condominium plan has received draft plan approval.

² Ibid.

CONCLUDING COMMENTS

Having regard to all of the foregoing, and much that is not said in this memo, there is no limit to the types of real property to which the condominium concept applies.

There might also be no limit (other than imagination) to the various strategies for applying one or more of those concepts to any project. Current uses include (as noted above in some cases) interval and/or fractional styles of ownership; projects where condominiums are “nested” in other condominiums (i.e., Standard condominiums built within Vacant Land units); projects where various Vacant Land, Standard and/or Common Element Condominiums are used concurrently to create a diverse development that shares a variety of features or services. In our practice, we have obtained Ministry agreement for a variation on the Standard Condominium concept that allows for Vacant Land style units, although the practical application has yet to be tested by us.

One or more of the various types of condominium, or strategies for combining condominium types, may apply more appropriately to one project or land than another depending on the interests of the developer and proposed uses of the property, but almost any land use can accommodate and likely be benefited in some way by the application or one or more of the condominium concepts in the Act.

The flexibility afforded by these various development options, in addition to the various governance mechanisms that can be applied under the Act, invites not only developers to be creative in determining how to make effective communities (and maximum profit) from their properties, but municipal planning departments could also apply forward thinking and creativity to promote and support such development options for their communities. That is to say that it is, in our view, both possible and important for developers and municipalities to consider together how best to use the different types of condominium available to design and build communities – homes, work places and other facilities - that will endure, be self sustaining and beneficial from generation to generation.

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