



About Condo

A BIT ABOUT UNIT BOUNDARIES

The question of where the unit ends and the common elements begin is relevant to various matters of significance in the operation of condominiums as well as in their design. It relates, for example, to issues of privacy, ownership, repairs, maintenance and insurance. Despite its importance, there is often a degree of uncertainty or confusion about unit boundaries.

This memorandum does not provide a comprehensive explanation of the subject, but is intended to help clarify the general options provided under the Condominium Act, 1998, (the "Act") and some of the reasons developers might have for choosing amongst them. It could be relevant for both condominium developers and the owners, directors and managers who have to live or work with what they have created.

Although the principles in this memorandum can be applied to leasehold condominium projects made pursuant to Part XIII of the Act, we write specifically about boundaries in standard condominiums, which includes phased condominiums made pursuant to Part XI of the Act. This memorandum is not relevant to vacant land condominium plans (pursuant to Part XII of the Act)¹ or common element condominium plans (pursuant to Part X of the Act).

WHAT ARE UNIT BOUNDARIES?

It is essential in the first place to understand what a unit boundary is. It is the line that divides unit from common element, and unit from unit. It is comparable in its effect to the lot line in a plan of subdivision.

Although this line represents a division of land, it is essentially a legal concept: a definition of what portion of the land can legally be owned by whom, and the means by which a "legal description" of the property (as opposed to its municipal address) can be assigned so that title documents (such as deeds and mortgages) can be registered.

Thus, a "unit", once it is defined, is that part of the condominium plan that is available for individual ownership. All the balance of the condominium plan lands make up the common elements, which are owned by all of the unit owners as tenants-in-common. (Each unit is assigned a share (interest) in the common elements of the condominium. This is known as the "common interest" and is represented as a percentage figure in the condominium declaration.)

¹ However, that is not to say that developers of vacant land condominium plans should not pay attention to this general subject. We have seen a declaration for a vacant land condominium plan in which the unit boundaries were significantly muddled with terminology more appropriate standard condominium plan. Ensuring that the lawyers and surveyors working on the project are sufficiently versed in the different kinds of condominium plan and the different principles that apply to them is essential.

WHERE ARE THE UNIT BOUNDARIES DEFINED?

In condominiums developed since May 5, 2001, under the Act, unit boundaries are defined in verbal terms in Schedule C to the declaration of the condominium. In earlier condominiums the verbal description of the boundaries might be set out in another schedule or even in the body of the declaration itself.

In addition, the unit boundaries are shown in pictorial form in the “description” – the survey plans that are registered along with the declaration to create the condominium. Part 1 of the description will contain drawings that illustrate where the unit boundaries are located, generally with both “bird’s eye” and “cross-section” illustrations.

The unit boundaries as described in the declaration and in the description both need to be reviewed in order to determine with certainty whether a component of the property is part of the unit or part of the common elements. It is not sufficient to look at only one of these documents if certainty is required.

It needs to be noted that there also may be other provisions scattered throughout the declaration that set out exceptions so that, on the one hand, a portion of the property located in the common elements is in fact part of a unit, or, on the other hand, a portion of the property located within a unit is in fact part of the common elements.

What this really means is that no assumptions about what is or is not part of the unit or common elements should ever be made before carefully reviewing the documentation, or without the assistance of a condominium professional.

It may also serve to resolve some disputes to clarify here that a standard unit definition, generally set out in the by-laws of the condominium, is not relevant to a discussion about unit boundaries. (Although, conversely, knowing the unit boundaries is essential to properly drafting a standard unit definition.)

TYPES OF UNIT BOUNDARY

One of the benefits to developers of the Act is the flexibility it permits in planning condominium developments. Of course, that flexibility is not unlimited, but it is much greater than existed under any prior condominium legislation.

One aspect of this flexibility is the ability to locate unit boundaries virtually anywhere. In general there are three types of unit boundary that are referred to in this memorandum as “traditional”, “whole lot” and “whole building”. These types would appear to illustrate the whole range of unit boundary choices available to developers. That is, it is probable that any forms of unit boundary designed for a condominium are only going to employ some variations on these three generic types.

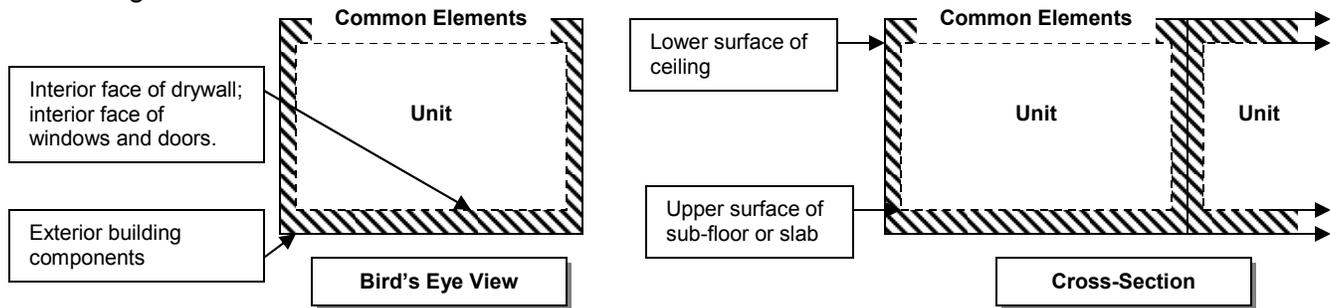
“Traditional” Unit Boundaries

The “traditional” form of unit boundary is so called because it is the kind of boundary both historically and typically associated with condominium developments. That is, where the unit is defined more or less as a “box of air” contained within the walls of a building, while the walls themselves are common elements.

Figure 1 below is an example of stereo-typical “traditional” unit boundaries: the unit is defined by the perimeter walls, floors and ceilings, and interior faces of the doors and

windows. In short, whatever defines the living or working area physically also serves to define the unit legally.

Figure 1:



A common variation on this example is where the drywall on perimeter walls, and in some cases (where applicable) on the ceiling, is included within the unit, so the boundary becomes the exterior surface of the drywall (or the surface and plane of the studs or beams behind the drywall) rather than its interior surface. Still, the majority of the unit is interior air space, and the majority of the building components are common elements.

It is almost imperative that apartment style condominium projects utilize “traditional” unit boundaries. We say “almost” because, in fact, it is not a necessity, but it will generally be impractical to do otherwise. In town-home complexes and many other projects, it is not only not necessary to use “traditional” boundaries, it is often more desirable to opt for some other form of boundary.

Nevertheless, the “traditional” unit boundary remains popular for all kinds of condominiums. The reasons for this are many (habit and tradition being amongst them), but primary is likely the sense of “carefree” ownership that buyers of such condominium units obtain. This is, of course, the traditional attraction of condominium lifestyle: the owner gets the benefits of ownership (such as equity, a measure of control, etc.) without many of its burdens (e.g., the obligations to repair, maintain and insure much of the property; no grass cutting; no snow-shovelling, etc.).

Of course, the truth is that the actual benefits and burdens experienced by owners varies from condominium to condominium to some extent regardless of the unit boundaries (that is to say, there are many other relevant factors), but it is nevertheless a fact that “traditional” unit boundaries more readily and typically lend themselves to condominium projects designed with this sort of carefree living in mind.

“Whole Lot” Unit Boundaries

The opposite extreme from the “traditional” unit boundary, is the form of unit boundary we call “whole lot”. This is also sometimes called a “lot line” boundary and, erroneously, “freehold” (or as some commentators have noted, “freedominium”).² It is a condominium in which the unit – the portion of the condominium property owned by the individual unit

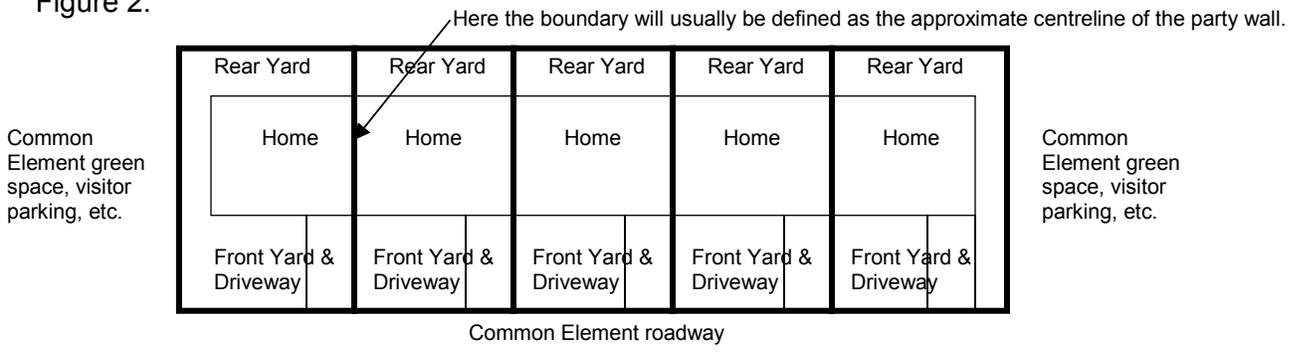
² The use of “freehold” in this context is erroneous because, in fact, a standard condominium unit is a freehold property regardless of where the unit boundary is located. The only type of condominium unit that is not freehold is a unit in a leasehold condominium plan. All other condominium units are freehold properties. The term “freehold” refers to the manner in which title to the property is held, not to any aspect of its physical or legal description. This fact does not appear to prevent real estate marketers from liberally using the term “freehold” in an erroneous manner.

owner – is not limited to the air-space within a building, but includes both the exterior of the building *and* a portion of the land surrounding it. Accordingly, the terms “whole lot” or “lot line” are used because the unit, when drawn on the description plan creating the condominium, will look for all intents and purposes the same as any lot in a regular plan of subdivision.

In a residential development, this means that the unit could include the entire home and its front, side and rear yards, and driveway. In a commercial development, the office, store or warehouse may be owned along with a sizeable part of the parking or other exterior facilities.

Figure 2 below shows typical “whole lot” unit boundaries from a bird’s eye view for a single 5-unit block in a residential townhome project. Bold lines indicate unit boundaries (the areas within the bold lines are all part of the unit), while slim lines illustrate buildings and structures located within the units or common elements.

Figure 2:



The main reasons for utilizing “whole lot” unit boundaries are two:

- (1) To reduce common expenses.

The basic principle is this: the fewer the common elements, the fewer the costs to the corporation. Of course, this is not true in all cases (the actual determination of costs depends on many factors relating to the documentation, design and management of the project), but there is an increased capacity to reduce the condominium’s obligations and costs (and, for the most part, cause them to be borne by individual unit owners in respect of their own units) with a “whole lot” type of standard condominium than with any other kind of unit boundary. At the very least, it removes all the appurtenant space around the unit from the purview of the condominium’s reserve fund obligations and also, unless the same are made part of its “standard unit”, from its insurance obligations.

- (2) To attract buyers who are more interested in the “freehold” market.³

The pitch in this case appears to be that the buyers get to legitimately enjoy the sense of possessing independent title to their whole property, as in a regular subdivision, along with the benefits of shared control of certain

³ This is a reference to the erroneous use of the term “freehold” in real estate marketing. See footnote 2.

common features (typically: roadways, visitor parking and perhaps some amenity green spaces or recreational facilities).⁴

A typical variation on “whole lot” unit boundaries in a town-home condominium project is to have the roof structure (or at least the shingles, and likely also downspouts and eaves) included in the common elements. The rationale behind this is that it is preferable to have collective control of the condition and appearance of the roof, as all owners benefit from it, and also to avoid having individual owners climbing up onto the building to do patch-work repairs at increased personal risk and detriment to the look and value of the community.

“Whole Building” Unit Boundaries

The last category of unit boundary discussed in this memorandum represents a kind of mid-way point between “whole lot” and “traditional” unit boundaries. An alternative name for this might be a “building envelope” unit boundary, since essentially what this type of unit boundary entails is making the exterior surface of the building the boundary such that the building envelope – its doors, windows, brick cladding, eaves, etc. – part of the unit.

As with the “whole lot” unit boundary, a typical variation on the “whole building” boundary could be to exclude the roof, so that it remains part of the common elements. However, all other external components of the building would be part of the unit.

The reasoning for using this type of boundary also falls mid-way between the respective reasons for going with the “traditional” or “whole lot” types of unit boundary: on the one hand, the costs of the condominium are reduced somewhat by the inclusion of all building components as part of the unit (and thus at the very least not being included in the reserve fund obligations of the condominium); but on the other hand, the control of and obligations pertaining to the lands surrounding the units remain more fully shared (thus permitting carefree living options to be more readily enjoyed, or simply the benefit of more easily controlling the exterior look – curb appeal – of the lands appurtenant to every unit).

EXCLUSIVE USE COMMON ELEMENTS

What is not dealt with in any of the foregoing is the role of exclusive use common elements in relation to decisions about where to place unit boundaries.

The Act permits developers to designate certain parts of the common elements as being for the exclusive use of the occupants of one or more of the units of the condominium. The result is a shift in the potential obligations of the unit owners and the condominium corporation.

For example, in a standard condominium the corporation has the sole obligation to repair the common elements when they are damaged. This obligation cannot be imposed on the unit owners (despite what some older declarations may say). However, this situation

⁴ This is also a driving reasoning behind a number of common element condominium plans associated with street-fronting town-home developments. The added benefit, from a condominium management perspective, with “whole lot” standard condominiums is that the condominium can have greater control over what happens to or within the individual units than is possible with a common element condominium plan (where the POTLs are truly independent from the condominium other than with respect to common expense obligations), which is often preferable when homeowners are forced to live in very close quarters.

may change when the common elements are designated for the exclusive use of the owner in accordance with the Act. Such designation (which requires specific provisions to be included in the declaration and description of the condominium) gives rise to the option of the developer to impose repair obligations (in the declaration) in respect of such common elements on the owner of the unit to which they are assigned.

The option of designating some of the common elements for the exclusive use of specific unit occupants increases the options and flexibility available to developers when designing condominiums.

For example, a developer who wants to ensure the building envelope is common element in order to be covered by the condominium's reserve fund (not possible with either "whole lot" or "whole building" unit boundaries), but who also wants to make the unit owner solely responsible for the repair and maintenance of the property immediately surrounding the unit (not possible with "traditional" or "whole building" unit boundaries), would find this can be done by designating the external appurtenant lands as exclusive use common elements along with "traditional" unit boundaries.

As stated earlier in this memorandum, all the foregoing really does not cover every option available to developers; it illustrates only the range of choices available and some of the reasons relating to them. The foregoing also helps to illustrate the fact that, once the condominium is made, nothing should be taken for granted by any owner, director or manager (or insurer or engineer) when dealing with questions of what is or is not within a unit and who is or is not responsible for it. In all cases, reference to the governing documents and description is essential, since with respect to unit boundaries in condominiums made under the Act, almost anything goes.

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