

What is a Condominium?

The condominium landscape in Ontario has changed drastically since the first Condominium Act was enacted in 1967. While the former legislation restricted the types of condominiums that could be created, the *Condominium Act, 1998* has greatly expanded the options available for condominium developers and municipalities. While many of the provisions applicable to standard condominiums apply to all types, there are several distinguishing features of non-standard condominiums that every board of directors, property manager, and professional servicing condominiums should be aware of when working with them. The purpose of this article is to identify some of the distinguishing features of each type.

Leasehold Condominiums

Leasehold condominiums are governed by Part XIII of the Act. A leasehold condominium is one where the units are subject to leasehold interests. The unit owners have a right to occupy the units under a lease, but not own them. For simplicity, they are still referred to as “owners” under the Act.

While leasehold condominiums are very rare, representing less than 1% of all condominiums in Ontario, there are a few items worth noting. First, the *Residential Tenancies Act* does not apply to the lease between the owner of the land and the unit owner. Second, the declaration must contain details on the lease, such as the term, rent amount, and formula for calculating increases in the rent. The entire lease may be included within the declaration. Third, an amendment to the declaration or description requires the consent of the owner of the lands if the amendment would affect the leasehold interests. Fourth, a leasehold condominium may be terminated in three ways: 1) by consent; 2) by the owner of the lands with a court order if the condominium corporation fails to pay the rent or comply with a court order; or 3) upon expiration of the term of the lease.

Freehold Condominiums

The term “freehold” is often used as a marketing gimmick to suggest purchasers are getting more than they would ordinarily receive when buying a unit, such as a front or back yard. However, a more accurate term for these types of condominiums would be a “whole lot” or “lot-line” condominium where the owner’s unit includes more than just the building, but also some of the land surrounding it. The legal definition of a freehold condominium applies to all condominiums that are not leasehold condominiums (representing over 99% of condominiums in Ontario). In a freehold condominium, the units and common interests are owned by the unit owners in “fee simple”. This means every owner obtains title to the units when they purchase them from the declarant or previous owners. There are four subtypes of freehold condominiums in Ontario: Standard, Phased, Vacant Land and Common Elements.

Standard Condominiums

A standard condominium may be a townhouse, high-rise, low-rise, or single-detached. It may be residential, industrial, commercial, or mixed-use. The declaration, by-laws and rules of a one standard condominium may vary significantly from those of another. The phrase “standard” simply means that it is not one of the other types of condominiums permitted by the Act. Any condominium created prior to May 5th, 2001 when the current legislation came into force is a standard condominium for the purposes of the Act.

Phased Condominiums

A phased condominium corporation is a condominium corporation in which additional units and common elements may be added to the condominium corporation after the registration of the original declaration and description creating it. At this time, only standard condominium

corporations may be phased. A phased condominium is useful for developers that are concerned about the cash flow constraints associated with larger projects or uncertainty in the market.

The declarant may add units and common elements to the condominium corporation by registering amendments to the declaration and description within 10 years from the date the condominium corporation was created. Unlike most amendments, the consent of the unit owners is not required for amendments creating a phase. However, at least 60 days prior to registering the proposed amendments, the declarant must provide copies of the proposed amendments, the most recent disclosure statement provided to a purchaser of a unit, and a statement identifying certain differences between the proposed documents and the disclosure statement. The 60 day period provides the condominium corporation time to review the proposed documents. If a change is proposed that would be material and would detrimentally affect the condominium corporation or the use and enjoyment of the property by the owners, the condominium corporation may apply to the Superior Court of Justice for an injunction to prevent the declarant from registering the amendments. The purchasers of the units may also be entitled to recover damages from the declarant if there are material differences.

Once the amendments have been registered, the declarant must deliver copies of the amended documents to the condominium corporation and owners within 15 days. A copy of the most recent disclosure statement must also be provided to the condominium corporation. Upon registration of the amendments the declarant must also provide all records identified in section 43 (turn-over meeting) that have not been provided previously to the condominium corporation relating to the phase.

The declarant has additional obligations with respect to disclosure statements and status certificates for phased condominiums. For instance, the disclosure statement must include information on the number of proposed phases, projected year of registration for each phase, and details on each phase, such as the number of units, location of buildings and structures, shared facilities, and proportions of ownership and contribution toward the common expenses.

Finally, the board of directors for a phased condominium has a few time-sensitive obligations upon registration of the amendments creating a phase. Specifically, the board of directors must ensure the following are completed upon registration of each phase: 1) a performance audit of the common elements included within the phase is conducted within six to ten months; 2) audited financial statements are prepared within 90 days; and, 3) a reserve fund study is conducted within 1 year. Lastly, the board of directors must be cognizant of the timeframe for terminating various contracts and agreements entered into as part of the phase. For instance, the board of directors may terminate an agreement for goods or services (i.e. a landscaper) entered into by the declarant prior to the creation of the phase. The agreement may only be terminated for the property included within the phase and the board of directors must do so within 12 months following the election of directors. The agreements may only be terminated upon providing 60 days' notice. After the 12 month period expires, the board of directors may not terminate the agreement unless the contract allows for early termination or some other concept in law would allow it.

Vacant Land Condominiums

A vacant land condominium is a condominium corporation that has at least one unit without a structure or building on it; one unit is a vacant lot. Prior to registration of the declaration and description, the units may not contain buildings connected to other units and they may not be located above one another. After registration of the declaration and description, a building may

be built that spans across several units. The main advantage of a vacant land condominium is that the condominium corporation may be created, and units may be sold, prior to construction of the buildings. This allows the developer to reduce the cash flow constraints associated with larger standard condominiums where all of the buildings on the units must be constructed before the condominium is registered or the units transferred to the owners.

In addition to the normal provisions, a declaration for a vacant land condominium corporation often includes restrictions with respect to the buildings or structures that may be built after registration of the declaration, such as the size, location, quality of materials, and appearance of the buildings. The restrictions ensure a consistent and uniform appearance throughout the condominium. A vacant land condominium may also have a by-law that sets out minimum maintenance requirements for a unit or building located on a unit.

Lastly, the obligations for maintaining, repairing, and insuring the units are altered. A vacant land condominium corporation shall maintain and repair the common elements after damage. The owners shall maintain and repair after damage the units. The owner also assumes the obligation to insure the unit. As such, there is no need for a standard unit by-law in a vacant land condominium corporation.

Common Elements Condominiums

A common elements condominium is the only type of condominium in Ontario that does not contain units. Instead, the owners of the common interests in the condominium corporation are those persons that own a parcel of tied land (referred to as a "POTL") that does not form part of the condominium property. The POTLs are typically adjacent to the condominium property, but do not need to be. Common elements condominiums are typically used in subdivisions or other developments where the municipality wants to transfer ownership (and therefore maintenance obligations and liability) to the owners of the nearby land. A common elements condominium typically includes streets, walkways, street lighting, landscaping and decorative items.

A common elements condominium is the most unique type of condominium in Ontario. Consequently, several provisions of the Act do not apply or must be modified to fit the unique circumstances of common elements condominiums. For instance, the condominium corporation's ability to restrict the occupancy and use of the POTLs is much more restricted than a standard condominium because the POTLs do not form part of the condominium property and are therefore not governed by the Act. It should be noted that the POTLs may be governed by agreements registered on title that contain some restrictions, but often these agreements contain covenants that are not enforceable in law.

The obligations for maintenance, repair, and insurance of the property are also modified. Since there is no unit, there is no obligation on the condominium corporation to insure the unit up to the standard unit definition. As such, there is no standard unit by-law for a common elements condominium. The obligations for maintenance and repair of the common elements typically falls to the condominium corporation, but the declaration may alter these obligations. In addition, unlike standard condominiums, there is no Tarion coverage for the common elements of a common elements condominium.

Finally, if an owner defaults in his or her obligation to contribute toward the common expenses, the condominium corporation may register a lien against the POTL. However, the lien only takes priority over a mortgage registered against the POTL prior to registration of the declaration and description if the mortgagee consents. The lien will take priority over any mortgage registered after the registration of the declaration and description.

Conclusion

While the current Act affords developers much more flexibility when developing condominiums than the previous legislation, every director, property manager and professional working with condominiums must be aware of the differences that exist between the various types. With the increased use of these non-standard condominiums, it is no longer acceptable to assume that the standard provisions will apply to every condominium. Each type has its own obligations, powers and duties.

Michelle Kelly, B.Comm., LL.B., is a lawyer at SmithValerioté Law Firm LLP in Guelph. Michelle practices exclusively in the area of condominium law, including management and litigation. She is an active member of SmithValerioté's condominium practice group. She can be reached at mkelly@smithvalerioté.com.