



Condominiums: Development, Declarant's Rights and Associations



By
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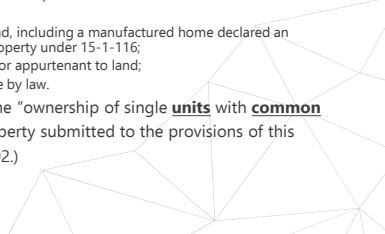
Outline

1. What is a Condominium?
2. Creating Condominiums in Montana
3. Underwriting Guidelines
4. Issues with Declarant's Rights – case studies
5. Condominium Association Liens
6. Conclude – Q&A

What is a Condominium?

1. A Statutorily-Created Ownership Estate in Real Property.
 - "Real Property" (MCA 70-1-106):
 1. land;
 2. that which affixed to land, including a manufactured home declared an improvement to real property under 15-1-116;
 3. that which is incidental or appurtenant to land;
 4. that which is immovable by law.
 - "Condominium" means the "ownership of single **units** with **common elements** located on property submitted to the provisions of this chapter." (MCA 70-23-102.)

What is a Condominium?

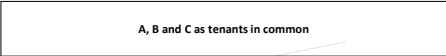
- Two types of "Common Elements"
 1. General Common Elements:
 - Land on which building is located;
 - Foundations, columns, girders, beams, main walls;
 - Roofs, halls, lobbies, stairs, fire escapes;
 - Central services, such as power, light, gas, water, HVAC;
 - Basements, yards, gardens, pathways, parking, private roads.
 2. Limited Common Elements:
 - Common elements designated in the declaration as reserved for the use of a certain unit or units, to the exclusion of other units
 - Typically parking stalls, storage spaces.
- A condominium is NOT a townhome or a townhouse.
 - "Townhouse": arrangement where persons own their own units and hold separate title to the land beneath their units, but under which they may jointly own the common areas.



What is a Condominium?

Contrast - Shared ownership at common law:

- Tenants in Common:

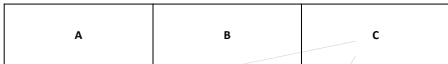


- Each own "Undivided Interests," meaning none has the right to exclude any other owner from a particular portion of the property.
- They can record a tenants in common agreement to allocate time of use, but generally all share in rents and profits according to their % interest.
- Review: Contrast Joint Tenancy
 - Distinguishing factor - right of survivorship
 - All joint tenants must acquire at the same time and hold equal percentage interests



What is a Condominium?

- Solution - subdivide under subdivision ordinances:

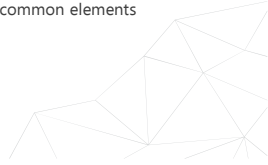


- Subdivision ordinance not always the solution, for example:
 - Three people own a single office building as tenants in common, there would be no way for them to have separate ownership of different parts of the building
 - Three cottages built on a single city lot - while A, B and C might each agree to live in certain cottages, they cannot have separate ownership of each cottage.



What is a Condominium?

- The Condominium Act combine two types of common law estates:
 Separate interest in a Unit
 +
 Undivided interest in the common elements
 =
 Condominium



What is a Condominium?

2. History - Not a new creation!

- First Wave - 6th Century BC Rome.
 - Faced with a shortage of land, and a housing dilemma, the Senate passed a law to permit citizens to own individual units in multifamily structures, to encourage their construction.
 - Senate combined the latin terms:
 con (joint) and dominium (sovereignty)
- Second Wave – Middle ages western Europe
 - Living in walled cities became important for safety.
 - Again, growing population and shortage of land, made multiple ownership of single buildings important.



What is a Condominium?

2. History - Not a new creation!

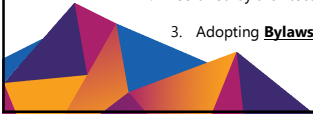
- Third Wave in 1960's and 1970's.
 - Land again became scarce in cities of Western Europe and Latin America.
 - Puerto Rico passed condominium laws in 1950's
 - 1961: Section 234 of National Housing Act
 - Enabled developers of condominiums to obtain FHA loan insurance.
 - This became the model for State acts.
 - 1965: Montana "Unit Ownership Act"



Creating Condominiums

In Montana, condominiums are established under the "Unit Ownership Act" (MCA 70-23-101 et seq.). A condominium regime is created by:

1. Recording a **Declaration**:
 - i. Local government certification re: exemption or approval under subdivision ordinance
 - ii. Department of Revenue approval
2. Recording a **Floor Plan**:
 - i. Certified by architect, engineer or surveyor
3. Adopting **Bylaws**.



Creating Condominiums - Declaration

The **Declaration**, shall contain:

- 1) Legal description of land upon which building(s) will be located;
- 2) Name and general description of building (number of stories and basements, number of units, basic materials of which it will be constructed);
- 3) Units designation, location, approximate area;
- 4) Description of general common elements and **percentage share of each unit**;
- 5) Description of limited common elements, identifying units to which reserved
- 6) Statement of use of building and each unit;
- 7) Registered agent; and
- 8) Attachments.....



Creating Condominiums - Declaration

Declaration - Exhibits and Attachments (mandatory):

- 1) Certification of exemption from, or approval under, Montana Subdivision and Platting Act (MCA 76-3-101, et seq).
- 2) Approval of Department of Revenue.
- 3) Floor Plans..."**shall be recorded simultaneously** with the declaration."
 - 1) Layout of each unit; unit designation; location and dimensions of each unit, and the common areas to which each has access.
 - 2) Certificate 1 - statement of architect [or engineer or surveyor], certifying that the plans are an accurate copy of the plans filed with and approved by officers having authority to issue building permits;
 - 3) Certificate 2 - "as built" certificate of architect - that plans accurately depict the layout as built (within 30 days of completion).



Creating Condominiums - Bylaws

The **Bylaws**, must provide for:

- 1) Election of a Board from among the Unit owners – terms of at least one-third of the directors must expire annually, whether the Board may engage a Manager;
- 2) Method of calling meetings;
- 3) Presiding officer, secretary and treasurer;
- 4) The maintenance and repair of common elements and payment for services;
- 5) The employment of personnel necessary for maintenance;
- 6) Manner of collecting assessments for common expenses;
- 7) Method for administrative rules for operation and use of common elements;
- 8) Restrictions designed to prevent unreasonable interference use of common elements; and
- 9) Method for amending bylaws.



Condominiums – Underwriting Guidelines

- Deed or Lease of Unit (MCA 70-23-601), legal description minimum requirements:
 1. Description of the land,
 2. Name of property,
 3. Declaration - recording date and index no.
 4. Unit Designation (number, letter or combination of numbers and letters).
 5. Use for which unit is intended.
 6. % interest in common elements.
- Additional details permitted.



Condominiums – Underwriting Guidelines

- Sample Legal Description:

Unit 301 of 2420 Tschache Lane, of Centre Park Flats Condominiums, located on Lot 9 of Stoneridge Square Subdivision, City of Bozeman, Gallatin County, Montana, according to the official plat thereof on file and of record in the office of the County Clerk and Recorder, Gallatin County, Montana (Plat J-446).

TOGETHER WITH an undivided 1/36th interest in the general common elements appertaining to said unit, as set out, established and defined in the Declaration and Bylaws recorded May 15, 2020 as Document No. 2681768, and as subsequently amended, records of Gallatin County, Montana. The use of said unit is intended for residential purposes only.



Condominiums – Underwriting Guidelines

Attachment of Liens and Encumbrances

- 1) Partial Release from Development/Construction Loan. (MCA 70-23-602)
 - Upon first conveyance of lease of each Unit, every mortgage affecting such Unit "shall be paid and satisfied of record"...or the Unit shall be released therefrom by partial release duly recorded.
- 2) After Declaration is recorded – ONLY UNITS (MCA 70-23-603)
 - Liens or encumbrances "shall arise or be created only against" each Unit
 - "no lien shall arise or be effective against the property."
- 3) Mechanics Liens – only permitted against Unit of owner(s) requesting service.
- 4) Liens against multiple units – dischargeable pro rata.



Condominiums – Underwriting Guidelines

Other statutory characteristics on Unit ownership:

- 1) Interest in common elements cannot be separated from Unit.
 - Even if omitted from encumbrance or conveyance.
- 2) Certain works by Unit Owner prohibited.
 - Unit owner may not perform repair or alteration that would jeopardize safety or soundness; reduce the value; or impair any easement.
 - Unless 100% of unit owners first consent.
- 3) Maintenance of common elements.
 - Association shall have access to Units as necessary for maintenance and repair of common elements.



Condominiums – Declarant’s Rights

What are "Declarant’s Rights"?

28. "Special Declarant Rights" shall mean rights reserved for the benefit of the Declarant to: (a) Complete improvements indicated on the Survey Map and Plans filed with this Declaration; (b) exercise any development rights as defined hereinabove; (c) maintain sales offices, management offices, signs advertising Units in the Condominium for sale and model units; (d) use easements through the Common Areas for the purpose of making improvements within the Condominium, including those additions to the Condominium as may be constructed, as specified under Article XIX; and (e) appoint or remove any officer of the Association or any member of the Board of Directors during the period of Declarant control, as specified in Article XI.

15. "Development Rights" shall mean any right or combination of rights hereinafter reserved by the Declarant to (a) add real property or improvements to the Condominium; (b) create Units, Common Areas and/or Limited Common Areas within the Real Property or within real property added to the Condominium; and (c) subdivide Units or convert Units into Common Areas.



Condominiums – Declarant’s Rights

Issues with “Declarant’s Rights”?

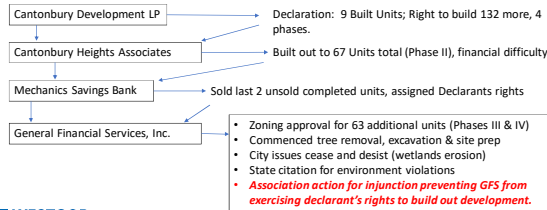
- Independent insurable interest?
- Separable from the property or the Units?
- Can they be conveyed by quitclaim deed?
- Can they be pledged by deed of trust?
- Expiration? Waiver?
- Unit owners objection to exercise of Declarant’s Rights?

No easy answers – let’s look at real life examples...



Declarant’s Rights – Cantonbury Heights Condominium Ass’n, Inc. v. Local Land Development, LLC

Facts:



Declarant’s Rights – Cantonbury Heights Condominium Ass’n, Inc. v. Local Land Development, LLC

Declaration:
Article VIII. DEVELOPMENT RIGHTS AND OTHER SPECIAL DECLARANT’S RIGHTS.

Section 8.1: Declarant reserves “the right to add Units and Limited Common Elements in the location shown as ‘Development Rights Reserved in this Area’ on the Survey and Plans.”

Limitations:

- a) not more than 21 years after recording the Declaration;
- b) Declarant obligated under any warranty or obligation;
- c) not more than 132 Units;
- d) consent under Section 18.5 (consent of mortgagees).



**Declarant's Rights – Cantonbury Heights Condominium Ass'n, Inc.
v. Local Land Development, LLC**

Plaintiff's theory 1:
Declarant's rights, including development rights as to Phases III & IV,
have expired because Declarant owes no obligation to owners.

Declaration Article VIII, Section 8.9:
"Special declarant rights may be exercised by Declarant so long as the
Declarant is obligated under any warranty or obligation, owns any
units or any Security Interest on any Units, or for 21 years after
recording the Declaration, whichever is sooner.



**Declarant's Rights – Cantonbury Heights Condominium Ass'n, Inc.
v. Local Land Development, LLC**

Trial Court:
Parties agreed no Declarant had no outstanding warranties.
Declarant had no security interests in any Units.
Question – Is Declarant "obligated under any obligation"?

Held – Defendant, as successor to special declarant's rights, continued to
be bound by the condominium act, particularly:
Obligation to pay taxes and expenses on those portions of the common elements
for which development rights had been reserved.



**Declarant's Rights – Cantonbury Heights Condominium Ass'n, Inc.
v. Local Land Development, LLC**

Plaintiff's theory 2: Another basis for expiration of declarant's rights:
• Declaration Article XVIII, Section 18.5 – requires consent of 51% of
mortgagees of Units for Declarant's Rights to be exercised after 7 years.

Result:
• Court gave Developer time to round up consents – which it did!
• Second motion for injunction denied.

Summary Judgment: Following these two rulings, Developer moved for, and
was granted, summary judgment on all claims. The Association appealed....



Declarant's Rights – Cantonbury Heights Condominium Ass'n, Inc. v. Local Land Development, LLC

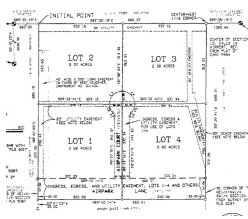
Supreme Court Analysis:

- 1) A Declaration is a contract. Important "rule of construction" (interpretation) of contracts:
 - 1) Unambiguous provisions of a contract will be given effect according to their ordinary meaning.
 - 2) Where language is ambiguous, terms must be construed against the drafter.
 - If language is susceptible to more than one reasonable interpretation, it is ambiguous.
 - 3) General Rule: For Condo Declarations, any ambiguity must be construed against the developer who authored the Declaration.
- 2) Ambiguity in Section 8.9 re: "obligations."
 - Association – "obligations" must be owed to the Unit owners.
 - Developer – "obligations" can be any obligations, such as those attributable to developer under the Condo Act or revenue code.
 - Court – Both plausible - we must construe "obligations" against the drafter and find that the obligations must be owed to the Unit owners.
 - Result: No such obligations – Declarant's Rights have automatically expired.



Declarant's Rights – Case Study 2

Short Plat:

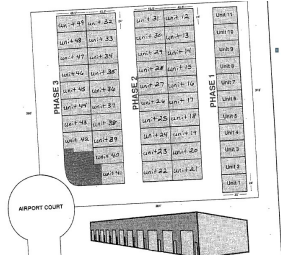


Aerial:



Declarants Rights – Case Study 2

Declaration Exhibit A:



Declarant's Rights – Case Study 2

Legal Description in Deed:

the following described premises, County of Bonner, State of Idaho to-wit:

Lot 3 of a Short Plat of Warehouse Park, according to the plat thereof, recorded in Book 6 of Plats, Page 136, Bonner County Records.

EXCEPT

Units 1 through 11, Graj Mahal Condominiums (Phase 1), according to the Condominium record of survey recorded September 13, 2007, Instrument No. 737093 and the Declaration of Graj Mahal recorded August 28, 2007, Instrument No. 735976 and amendment thereto recorded as Instrument No. 737170, all in Official Records, Bonner County, Idaho.

AND EXCEPT an undivided percent interest in the common area as defined and set forth in said declaration and amendments thereto appurtenant to said Phase 1 Graj Mahal Condo Units.



Declarants Rights – Case Study 2

Buyer's counsel:

- Each of the 11 units included a 2% interest in the common area when sold.
- Seller holds only a 78% interest in Lot 3, as T-I-C with unit owners.
- Initial developer filed second amended declaration eliminating Phases 2 and 3, with the intention of reserving flexibility in build out.
- May be difficult to build out without consent of the 11 Unit owners, and their mortgagees.

Seller claim: I thought I had 100% interest in Lot 3, less the 11 units.



Condominium Association Liens

- **Association Lien** for "reasonable value of common expenses" – priority over all other liens *except*:
 - 1) taxes and assessments; and
 - 2) first mortgages of record.
- **Perfection** of Association Lien. Record Claim of Lien stating:
 - Statement of account due;
 - Name of Unit owner and Unit number; and
 - Description of property where services were provided.
- **Expiration** in accordance with construction lien law – 2-year statute of limitation.
 - May pursue monetary judgment without foreclosing the lien.
- **Clearance:** Acknowledgement of payment in full from the Association, or with approval of UW.
- **Foreclosure of Trust Deed:** Purchaser at foreclosure *not* liable for pre-foreclosure common expenses.
 - Unpaid share is a liability of all Unit owners.



Condominium Association – Amended Restrictions

- MCA 70-17-901. Homeowner’s association restrictions – real property rights (SB300, 2019)
 - An association may not enforce a restriction in a manner that imposes more onerous restrictions than those that existed at acquisition
 - Unless owner consents in writing to the amendment or adoption of the restriction.
 - Otherwise, the amendment becomes enforceable upon the owner’s sale of the Unit.



Thank You!

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