



THE CONDOMINIUM SUBDIVISION AND BEYOND

By Wendell A. Smith, Esq.

Most attorneys are well aware of the fact that the condominium form of ownership contemplates a combination of independent three dimensional units¹ and common elements, such as the land, site improvements and recreational amenities.² It is also generally understood that the condominium concept is conventionally utilized for apartment and townhouse complexes. However, unique and different applications of the condominium scheme have become more prevalent, and need to be better understood by lawyers who do not specialize in condominium law.

The Single-Family Condominium

Perhaps the most common non-traditional use of the condominium format is for single-family detached housing developments where legal or political considerations make individual building lots unfeasible under the local zoning scheme. Typically, the condominium approach might be appropriate for an existing development built upon a single unsubdivided tract of land that is subject to a ground lease, where the dwellings do not conform to the current bulk zoning requirements governing minimum setbacks and yard areas.³ Common examples of this situation are certain cottage communities in northern New Jersey lake resorts and bungalow colonies at the Jersey Shore.

On the other hand, condominium ownership of new single-family residential projects may be mandated by local zoning ordinances or land use approvals. This may be true even though such requirements may be legally suspect because of statutory prohibitions against discrimination between different forms of ownership in planning and zoning standards.⁴ New Jersey case law is also consistent with this principle.⁵

In all of these scenarios, as well as certain others, the common thread is the fact that because of non-compliance with current bulk zoning requirements, a traditional land subdivision, pursuant to the Municipal Land Use Law (MLUL),⁶ is not obtainable without extensive bulk zoning variances, which may be of questionable validity. Therefore, the so-called "condominium subdivision" technique may be employed as an alternative. A comparison between this approach and the traditional subdivision is instructive.

Specifically, a conventional subdivision of land, as contemplated by the MLUL,⁷ envisions the division of a parcel of land into two or more individual lots, with the side perimeter boundaries extending from the center of the earth to an infinitesimal distance in the sky. There are no upper or lower limits to the lot because it is a two-dimensional concept.

On the other hand, a condominium subdivision, which is accomplished by the recording of a master deed pursuant to the New Jersey Condominium Act,⁸ does establish boundaries and horizontal limits on the top and bottom of the units created. By employing this three-dimensional technique instead of creating lots that extend upward and downward to infinity, there is no conventional subdivision of the land, and approval is not required under MLUL.

As the number of single-family detached condominiums increases, more and more lawyers will be called upon to close title and loan transactions involving condominium subdivision units established by the recording of a master deed. A description of a "condominium lot or unit" in a residential condominium subdivision is attached to this article as Exhibit A, and an isometric drawing showing the boundaries of such a unit is set forth as Exhibit B*.

It should be noted that the side boundaries of a "condominium lot" may vary. The example cited in Exhibit A and Exhibit B* includes the entire yard area over which the unit owner will have exclusive ownership and dominion. This is the most common approach. However, there are circumstances where the sides may only encompass the building envelop or the space within the foundation perimeter, while the yard area is designated as a common element to satisfy the open space requirements of a local ordinance. In the latter case, the use of the yard area would normally be restricted to the appurtenant unit as a "limited common element",⁹ or through an exclusive easement.

The Non-Residential Condominium Subdivision

While condominium subdivisions arise more frequently in a residential context, the use of this technique is not restricted to housing complexes. In fact, it has been utilized in a commercial setting on numerous occasions where, even though there was site plan approval for a business or industrial complex, compliance with the yard and set-back requirements of the local zoning ordinances made subdivision approval unfeasible.

Mixed use projects containing office buildings, a hotel, and parking garages have also been structured using this technique, with the bottom and the top of each unit being designated as horizontal planes at a fixed distance below and above any structural elements, and the sides being generally coincident with the exterior portions of the individual buildings. In addition, office and industrial parks and mixed use projects containing residential units have been established in a similar manner, where the "condominium lots" or "units" consisted of defined envelopes of three dimensional space within which entire buildings were constructed. Of course, cross-easements must be provided between these units or discrete components of the units, either in the condominium master deed or by separate instrument.

Limited Liability Condominium Subdivisions

The increasing number of construction defect and warranty claims by condominium associations against developers has led to an interesting use of the condominium subdivision concept in other states, including California and Maryland. This use, intended to limit or eliminate such suits, establishes boundaries between the units and the common elements in order to maximize the structural components of the units and minimize the improvements that constitute the common elements.

This technique is dictated by the fact that a condominium association has primary legal standing to bring a suit for common element defects.¹⁰ Therefore, by confirming the description of the common elements in the master deed to non-structural portions of a condominium regime, and including the structural elements as part of the individual units, claims for defective construction must be pursued by individual unit owners, as opposed to the condominium association. Furthermore, by incorporating most of the land within each unit, the unit owners may be better protected against joint and several common law liability if the association does not have adequate insurance.¹¹ They will also be better shielded for any clean-up costs for hazardous waste within the condominium lands under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).¹²

Conclusion

The condominium subdivision is a concept that has been recognized for many years by real estate professionals, title companies, lenders, governmental agencies and attorneys specializing in the field. Its future use will increase as it becomes more familiar. Indeed, several other developing techniques utilizing the condominium subdivision concept are beyond the scope of this article.

The general practitioner should recognize that the condominium subdivision is a useful and flexible tool to address both bulk zoning and liability issues that may arise in the development of real estate projects.

ENDNOTES

1. N.J.S.A. 46:8B-3(o).

2. N.J.S.A. 46:8B-3(d).

3. N.J.S.A. 40:55-D-65b.

4. N.J.S.A. 46:8B-29 and N.J.S.A. 40:55D-58.

5. *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super. 219 (App. Div. 1971); *Maplewood Vil. Ten. Assn. v. Maplewood Vil.*, 116 N.J. Super. 372 (Ch. Div. 1971); *Upper Tp. v. Oak Ridge Corp.*, 188 N.J. Super. 367 (Ch. Div. 1988).
6. N.J.S.A. 40:55D-38b(1).
7. N.J.S.A. 40:55D-7.
8. N.J.S.A. 46:8B-8.
9. N.J.S.A. 46:8B-3(k).
10. *Siller v. Hartz Mountain Assoc.*, 93 N.J. 370 (1983). N.J.S.A. 46:8B-15(A).
11. *Ruoff v. Harbor Creek Community Association*, 13th Cal Rptr. 2d 755 (1992).
12. 42 U.S.C. § 9601 et seq.

EXHIBIT A

Description of Estate Units.

Each particular estate unit is intended to contain all space, including but not limited to the land, residential dwelling (if any) and other improvement within the lands bounded as follows:

- 1) **Bottom** – The bottom is an imaginary horizontal plane through an underground point located 50 feet below the highest elevation of ground within the area of land shown for the estate unit on the final site plan for the condominium. It extends, in every direction, to the point where it closes with the vertical projections of the front, rear and side boundaries of the estate unit.
- 2) **Top** – The top of the estate unit is an imaginary horizontal plane intersecting the vertical projections of the front, rear and side boundaries of the estate unit, at a point 100 feet above and parallel to the bottom of the estate unit and extending in every direction to the point where it closes with such boundary projections of the estate unit.
- 3) **Sides** – The sides of the estate unit consist of imaginary vertical planes perpendicular to the top and bottom of the rear estate unit, along and coincident with the front, rear and side boundaries of the estate unit, as graphically shown on Appendix B. Each side extends upwards and downwards, so as to close the area in the estate unit bounded by the bottom and top thereof. An estate unit is intended to comprise the entire volume of space within the area bounded by the bottom, sides, and top of the estate unit.

Items Included in Estate Unit.

Each estate unit shall also include one residential dwelling, if any, constructed therein, and all other improvements which are located within the boundaries of the estate unit as described above, or which are exclusively appurtenant to an estate unit, although all or part of the improvement may not be located within the boundaries of the estate unit as set forth above. The volume of space above the top and below the bottom of the estate unit is a common element.

*For a copy of Exhibit B, please contact Wendell A. Smith, Esq., at wsmith@greenbaumlaw.com or 732-549-5600