

CONDO OFFICE DEVELOPMENTS

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I. Overview of Commercial, Office and Industrial Condominium Law.

A. What is a Condominium?

The importance of condominium developments for millions of Americans cannot be understated for it has provided a multitude of real property ownership opportunities not otherwise available.

But what is a condominium? You can't tell one by look, touch, smell or even use. It might be a duplex, a single family home development, attached row, ranch or town homes, an apartment building or complex, an industrial park, a commercial office building, or even an entire community. It might be residential housing, a shopping center, a high-rise, or even individual space. You can't tell what a condominium is from its Latin meaning, roughly "joint dominion."

Technically, but very simply, a condominium is real property that has been subjected to a state's condominium enabling statutes. However, even this is not very helpful until we find out what these statutes provide. In this article, we hope to shed a little light. Condominium statutes vary from state to state, but essentially, as in Ohio, they enable a piece of real property to be lawfully divided into separate parcels of space, each having all of the essential legal attributes of any other separate parcel of real property, including being able to be separately owned, conveyed, taxed, mortgaged, liened, bequeathed and inherited.

In order for a condominium to be created and exist, a specific statutory authorization must be in existence. In Ohio, the statutory authorization for

condominiums is embodied in Chapter 5311 of the Ohio Revised Code (the “Condominium Act”). The Condominium Act was initially adopted in 1963, substantially amended in 1978, and most recently substantially amended by Am. Sub. H.B. No. 135 (effective July 20, 2004). Am. Sub. H.B. No. 135 modified and expanded the rights, duties and obligations of developers, associations, and owners. Ohio’s Condominium Act permits the owner of property (or a lessee in the case of a 99-year lease, renewable forever) to convert space into separate parcels of real property called “Units.” In effect, the act of creating a condominium in Ohio is the act of subdividing real property into separate parcels and creating an association of the owners of those separate parcels.

Basically, the condominium is created by the preparation and recording of a declaration of condominium with bylaws for the association attached, and a set of condominium “drawings”, specifically subjecting a piece of real property to the provisions of the Condominium Act.

The Condominium Act specifically sets forth the information that must be included in the declaration of condominium (O.R.C. §5311.05) and the requirements for the condominium “drawings” (O.R.C. §5311.07). Once these documents are completed and executed in accordance with the provisions of the Condominium Act, copies of the documents are first provided to the Auditor for the County in which the condominium is located, and then recorded with the Recorder of that County. Upon the recording of the documents, new parcels of real property called “Units” are created.

Generally speaking, a condominium is comprised of two parts – units and common elements. A unit in a condominium may be a residential unit, a water slip unit, or a commercial unit. These units generally consist of a cubicle of space along with various other items as provided for in the Condominium Act or in the declaration of condominium.

Common elements, on the other hand, include all parts of a condominium other than those defined as being part of a unit. In the typical condominium, the common elements generally include items such as the land, streets, amenity facilities, and the structural and exterior portions of the buildings in which the units are located. Common elements are owned by all of the unit owners in the condominium as tenants-in-common. Thus, when an owner purchases a unit in a condominium the owner owns the unit together with an undivided interest in the common elements.

Because the common elements are collectively owned by all of the unit owners, the Condominium Act mandates that a unit owners' association be established and that each and every person who owns a unit in the condominium must be a mandatory member of the unit owners' association. Although not required by the Condominium Act, most condominium unit owners' associations in Central Ohio are incorporated as non-profit corporations for a variety of reasons. Two of the primary purposes of the unit owners' association are to oversee the maintenance and repairs of the common elements and to regulate their use. In order to satisfy those purposes, the condominium association, among other things, has the ability to levy and collect assessments from the unit owners to cover the costs of the maintenance and repair of common elements and to

regulate their use, as well as the authority to adopt rules governing various aspects of condominium operation and uses.

In today's real estate world, it is extremely difficult to simply drive through a development and identify property as a condominium without actually reviewing documents for the development. Today, there are true attached product condominium communities, there are platted lot-attached product communities, there are condominium communities that contain detached units that look like single-family homes and are maintained in a similar manner, there are single-family home communities that have condominium-like services provided, and there are office buildings, strip centers and high-rises containing commercial units and, in some instances, residential units.

B. Distinction from Residential Condominium and Effect.

The provisions of Chapter 5311 of the Ohio Revised Code provide for three basic types of condominium units: residential units, water slip units, and commercial units. O.R.C. §5311.01(BB) defines each of the basic unit types. A residential unit is defined in O.R.C. §5311.01(BB)(1) as the “designated part of the condominium property . . . devoted in whole or in part to use as a residential dwelling consisting of one or more rooms on one or more floors of a building.” A commercial unit, on the other hand, is defined in O.R.C. §5311.01(BB)(3) as being the condominium property “designated for separate ownership or occupancy solely for commercial purposes, industrial purposes, or other nonresidential or nonwater slip use.”

The classification of the types of units in a condominium is obviously important for a variety of reasons. One of the primary reasons is that a number of

provisions contained in Chapter 5311 of the Ohio Revised Code apply only to “condominium developments”. O.R.C. §5311.01(L) defines a condominium development as a condominium property in which two or more individual residential or water slip units are offered for sale pursuant to a common promotional plan. Therefore, a condominium without residential or water slip units is not a condominium development.

A couple of examples of sections of Chapter 5311 of the Ohio Revised Code that apply to “condominium developments” but do not apply to purely commercial, office or industrial condominiums are the provisions relating to the timing of the turnover of control of the condominium association to the unit owners found in O.R.C. §5311.08 (C) and (D) and the condominium development/disclosure statement requirements found in O.R.C. §5311.26.

In addition, O.R.C. §5311.24 (A) (1) specifically exempts sales of units solely for commercial or industrial purposes or uses from the application of O.R.C. §§5311.25, 5311.26 and 5311.27. The exclusion of commercial and industrial condominiums from these provisions is very significant.

For instance, the provisions of O.R.C. §5311.25 govern, among other things (i) deposits and the use and disposition thereof, (ii) limitations on the developer’s retention of property interests in the condominium, (iii) the requirements for assumption of control of the condominium association by the unit owners (but see O.R.C. §5311.08, which does apply); (iv) limitations on the lengths of contracts entered into on behalf of the condominium association; (v) statutory condominium warranty requirements; (vi) timing of the obligation to pay assessments on unsold units (but see O.R.C.

§5311.081(A)); (vii) the obligation to provide tenant options and notices in the case of a conversion; and (viii) statement of requirements of O.R.C. §§5311.26 and 5311.27. Since these provisions do not apply to condominiums consisting of purely commercial, office or industrial uses, the developer has much more flexibility in structuring and organizing aspects of the development including sales, marketing, creation and operations.

II. Creation and Organization.

A. Organizational Documents; Differences Between Office and Industrial Condominiums and Residential Condominiums.

As mentioned, a condominium is created by the preparation and recording of a declaration of condominium with bylaws for the association attached, and a set of condominium “drawings”, specifically subjecting a piece of real property to the provisions of the Condominium Act.

The first document, the “Declaration of Condominium”, is the legal instrument that sets forth the formal legal for the condominium and submits the property to the provisions of Chapter 5311. This instrument sets forth the rights, duties and responsibilities of the unit owners, the condominium association, and in some instances, the condominium developer. Although a developer has some flexibility as to the provisions that are contained in the declaration, O.R.C. §5311.05 sets certain information that must be included or otherwise addressed in the declaration of condominium.

Specifically, O.R.C. §5311.05 states that the declaration shall contain the following:

O.R.C. §5311.05(B) Contents

- (1) Legal description of the property submitted
- (2) Name of the condominium
- (3) Purposes of the condominium property, including the units and any restrictions on use
- (4) Building descriptions including principal construction materials and the number of units
- (5) Unit designations and descriptions
- (6) Common element descriptions and undivided interest allocations
- (7) Association membership
- (8) Agent; service of process
- (9) Outside organizations
- (10) Amendments
- (11) Discretionary provisions

O.R.C. §5311.05(C) Declarations for expandable condominium must also include:

- (1) Reservation of option to expand
- (2) Limitations on rights
- (3) Time limits
 - (a) 7 years
 - (b) Extend for Additional 7 years with vote of owners
 - (c) Termination of Option
- (4) Legal description of property that may be made part of the condominium by future expansion
- (5) Options on expansions
 - (a) Whether mandatory
 - (b) If not mandatory whether specific property shall be added
 - (c) Limitations
- (6) Timing
- (7) Improvement limitations
- (8) Maximum number of units
- (9) Non-residential units → If the first phase of the condominium contained any residential units, the declaration must state the maximum percentages of land area and aggregate floor that may be commercial units
- (10) Compatibility

- (11) Improvement disclosure statement
 - (a) Mandatory improvements
 - (b) Limits on improvements
- (12) Unit disclosure statement
 - (a) Identical
 - (b) Type limits
- (13) Limited Common Element reserved rights
- (14) Drawings
- (15) Successor developer rights

O.R.C. §5311.05(E) Right of the Board to amend declaration

- (1) Board may amend without owner's vote
 - (a) Institutional lenders
 - (b) Underwriters
 - (c) Compliance
 - (d) Correct errors
 - (e) Change of agent
- (2) Applicable to units created before and after effective date
- (3) Unit owner right to file declaratory action

The second major document is the condominium association "Bylaws". Procedures with respect to the governance for the condominium association and the conduct of the association's affairs are set forth in the bylaws. O.R.C. §5311.08 mandates that the unit owners association be governed by bylaws and, pursuant to O.R.C. §5311.06(A)(1), a "true copy of the bylaws" must be recorded along with the declaration of condominium.

As with the declaration, Chapter 5311 sets forth certain items that must be included in the bylaws. Specifically, O.R.C. §5311.08(B) sets forth the items that must be included in the bylaws unless otherwise provided in the declaration. These items include provisions for (i) for the election of the directors together with their powers, terms, etc.; (ii) provisions governing meetings and the quorum requirements; (iii) repairs; (iv) common expenses; (v) common profits; and (vi) rules.

In addition, unless otherwise provided in the declaration or bylaws, the Board has the ability to:

- (1) Hire and fire
- (2) Commence, defend, and settle legal actions
- (3) Enter into contracts
- (4) Regulate condominium property
- (5) Adopt rules
- (6) Make improvements to common elements
- (7) Purchase and convey real property
- (8) Transfer personal property
- (9) Hold property in the name of the association
- (10) Grant easement, leases, licenses, and concessions
- (11) Impose charges for use, operation of common element or for services provided to unit owners
- (12) Impose fees, for interest, late charges and enforcement assessments
- (13) Adopt rules to collect delinquent assessments
- (14) Terminate utilities (Commercial Unit Only)
- (15) Impose charges for preparing, recording, copying amendments
- (16) Right to enter unit for health, safety, welfare
- (17) Assign rights to assessments and income as security for loan
- (18) Suspend voting rights and use of facilities
- (19) Purchase insurance and fidelity bonds
- (20) Invest excess funds
- (21) Exercise powers
 - (a) Conferred by declaration, bylaws, board of directors
 - (b) Necessary to incorporate not-for-profit status
 - (c) Permitted by non-profit corporation
 - (d) Necessary and proper

The third document required to create a condominium is a set of condominium drawings. These drawings must show graphically the “boundaries, location, designation, length, width, and height of each unit, the boundaries, location, designation, and dimensions of the common elements and the limited common elements and exclusive use areas, and the location and dimensions of all appurtenant easements or encroachments. (See O.R.C. §5311.07).

Of particular interest are the provisions of O.R.C. §5311.07 which state that “the drawings for commercial units that do not have wall surfaces shall show the monumental perimeter boundaries of those units. Thus, Chapter 5311 expressly contemplates that it is not necessary of a commercial condominium unit to have perimeter walls. As a result, a commercial unit may consist of air-space only.

The condominium drawings are required to include the certified statement of a registered architect or registered professional engineer that the drawing accurately shows each building as built or constructed and the certified statement of a registered professional surveyor that the drawing accurately reflects the location of improvements and recorded easements. The following are examples of the certification language that should appear on the drawings:

Architect’s or Engineer’s Certification:

“I certify that this drawing, consisting of ____ sheets, accurately shows each building of _____ Condominium, as constructed, and is made for the sole purpose of complying with the provisions of O.R.C. §5311.07.”

Registered Architect or
Registered Professional Engineer
Signature

Surveyor’s Certification:

“I certify that this drawing, consisting of ____ sheets, accurately reflects the location of improvements and recorded easements of _____ Condominium, and is made for the sole purpose of complying with the provisions of O.R.C. §5311.07.”

Registered Professional Surveyor’s
Signature

A final condominium organizational document that has not been discussed is the articles of incorporation for the condominium association. Most condominium associations are incorporated as nonprofit corporations pursuant to the provisions of Chapter 1702 of the Ohio Revised Code. Although not legally required to be incorporated, there are numerous advantages to being incorporated including but not limited to providing the association with structure and providing for the indemnification of directors. Chapter 5311 of the Ohio Revised Code contains a number of provisions relating to the operation of condominium association which apply to every condominium association whether incorporated or not.

An association is incorporated by the preparation and filing of Articles of Incorporation with the Ohio Secretary of State. O.R.C. 1702.04 provides, in part, that the Articles of Incorporation shall set forth the following:

- 1) the name of the corporation;
- 2) the place in this state where the principal office of the corporation is to be located; and
- 3) the purpose or purposes for which the corporation is formed.

In addition, O.R.C. 1702.04 also permits the Articles of Incorporation to also provide for:

- 1) the names of individuals who are to serve as the initial directors;
- 2) the names of any persons or the designation of any group of persons who are to be the initial members;
- 3) any qualification of membership and the classification of members;
- 4) a provision to the effect that the corporation shall be subordinate to and subject to the authority of any head or national association, lodge, order, beneficial association, fraternal or beneficial society, foundation, federation, or any other nonprofit corporation, society, organization, or association;

- 5) any lawful provision for the purpose of defining, limiting, or regulating the exercise of the authority of the corporation, the incorporators, the directors, the officers, the members, or any class of members, or creating or defining rights and privileges of the members among themselves or in the property of the corporation, or governing the distribution of assets on dissolution;
- 6) any provision that may be set forth in the regulations;
- 7) a provision specifying the period of existence of the corporation if it is to be otherwise than perpetual; and
- 8) any additional provision permitted by Chapter 1702.

The Articles of Incorporation must be accompanied by a written appointment of a statutory agent. In the past, condominium associations were required to have an agent in the County in which the property was located. O.R.C. §5311.05 now provides that the person designated to receive service of process for the association need only have a residence or place of business in the State of Ohio.

B. Consumer Protection Differences.

As previously discussed, Chapter 5311 of the Ohio Revised Code contains a number of consumer protections provisions that apply only to residential condominium developments. These provisions are not applicable to purely commercial, office or industrial condominiums. For instance, unlike residential condominium developments, a developer of a commercial or office condominium is not required to provide prospective purchasers with a condominium development/disclosure statement disclosing all material facts relating to the condominium as required by O.R.C. §5311.26. Although developers will likely need to disclose certain information and explain how the condominium is intended to operate, there is no condominium statutory obligation to provide the information and therefore there are no condominium statutory remedies for

the failure to provide such information. The transaction is truly a matter of contract between the parties. Nevertheless, many developers like to provide prospective purchasers with a “mini-disclosure” or some other document outlining certain information relating to the condominium. A sample is included in these materials for your reference.

A developer of a commercial/office/industrial condominium also has the ability to negotiate as part of the sales contract, the terms for handling any deposits made in connection with the sale. Furthermore, there are no statutory condominium warranty requirements for strictly a commercial/office/industrial condominium. Thus, any warranties provided are negotiated by the parties.

Once again, since these provisions do not apply to condominiums consisting of purely commercial, office or industrial uses, the developer has much more flexibility in structuring and organizing aspects of the development including sales, marketing, creation and operations.

C. Benefits of Using the Condominium Device in the Business and Industrial Park Setting.

If utilized correctly, the condominium device can provide a substantial amount of flexibility for both the developer of a new business and industrial park and for the owner of an existing business or industrial park.

Some of the benefits include:

- (1) a common scheme or plan for the development allowing for separate ownership of the various portions;
- (2) ability to subdivide and combine units;
- (3) convertible units;
- (4) statutory support for the enforcement of use restrictions;

- (5) ability to create and sell units consisting of air-space only;
- (6) flexibility with respect to subdivision regulations;
- (7) in the case of an existing business or industrial park, an exit strategy for selling the property (i.e. selling all or portions of the property over a period of time and/or to multiple buyers).