

COMMERCIAL CONDOMINIUM PROJECTS

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July 10, 2015

Generally, when speaking about condominiums, we think of residential condominiums. However, the condominium form of ownership is a popular structure used for the ownership of industrial, commercial and other business properties (a "Business Condominium"). A Business Condominium has certain advantages that are attractive to developers as well as prospective owners. Rights and obligations of the developer and owners should be clearly set forth in various governing documents and a Business Condominium must comply with the New Jersey Condominium Act. N.J.S.A. 46:8B-1 et seq. (the "Act").

WHAT IS A BUSINESS CONDOMINIUM?

A Business Condominium, like a residential condominium, consists of a separate legal Association that is responsible for the administration and management of the condominium property. The condominium consists of units that are separately owned by individuals or entities, as well as common elements or common areas. Typically, a unit consists of the interior portions of the particular unit and includes fixtures. The common elements consist of certain items that all owners benefit from such as landscaping, lighting and parking areas and, in many cases, roofs, siding, common plumbing and common electrical systems. Unit owners are generally responsible to repair, replace and maintain those items within their unit. By contrast, the Association is responsible to repair, replace and maintain the common elements. That said, it is important to note that expenses related to these common elements are allocated to the unit owners through the imposition of monthly dues or assessments. Unit owners own a proportionate undivided interest in the common elements, which means that they have the right to use the common elements as part of their ownership interest, but they cannot separately sell their respective interest (the interest can only be conveyed as part of a transfer of the unit). The delineation between what the unit owner is responsible for and what the Association is responsible for can often be clouded if the documents governing the Association are not carefully drafted in detail.

ADVANTAGES OF BUSINESS CONDOMINIUMS

These types of non-residential projects can include industrial, retail and office condominiums. Each type of condominium has unique circumstances that need to be carefully analyzed so that the governing documents can be adequately drafted. Nonetheless, some of the common advantages of the condominium form of ownership are:

- ▶ Broadens the pool of potential buyers, as the buyer may only be interested in one unit as opposed to an entire building, and the buyer does not want to rent.
- ▶ Unit owners take greater care in maintaining the unit than renters.
- ▶ Unit owners have greater input in operations as they are voting members of the Association and may seek to become a Member of the Board of Trustees.
- ▶ Similar to commercial leases, the Association can pass through operating expenses to the owners.

FORMATION OF A BUSINESS CONDOMINIUM

The Association should be a separate legal entity that will govern the condominium. The Act covers the creation of a condominium, its administration, assessments, taxes and liens, damage or destruction and condemnation, termination of a condominium and miscellaneous provisions. An Association is governed by various documents that are commonly referred to as the "governing documents". Governing documents generally consist of the following:

- ▶ Master Deed - This is a recorded document which sets forth certain information about the Association such as a description of

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the land, identification of the units and common elements, who is responsible to repair, replace and maintain the units and the common elements, allocation of expenses related to common elements voting rights of the owners, the sale, transfer or lease of units, restrictions related to the use of units and insurance requirements.

- ▶ **Bylaws** - This document relates to the administration and management of the condominium property and actions of the Association. The Bylaws typically include selection and removal procedures with respect to Members of the Board Trustees and officers, powers and duties of the Members of the Board of Trustees and officers, fiscal management, meetings of members of the Association and the Board of Trustees, the manner of collecting common expenses and other monies owed from unit owners, the formation of various committees to assist the Board of Trustees in carrying out their duties (such as an architectural control committee or an alternative dispute resolution committee) and provisions with respect to the enforcement of the Bylaws.
- ▶ **Rules and Regulations** - This document is adopted by the Board of Trustees and may include provisions regarding the use of common elements, such as where to park, sign requirements, operating hours, disposal of trash and how to report complaints.

Many residential associations are subject to the Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21 et seq. ("PREDFDA"). PREDFDA requires registration with the State of New Jersey and certain disclosures with respect to condominiums. However, PREDFDA does not apply to condominiums "for industrial, commercial, or other nonresidential purposes". N.J.S.A. 45:22A-25(2).

DRAFTING CONSIDERATIONS

Attention to detail is important in drafting the governing documents to avoid ambiguities and disputes between unit owners and the owners and the Association. The following are examples of provisions requiring attention:

- ▶ **Use restrictions** - A particular business may be offensive to or competitive with an owner. The developer may think it important to provide exclusive use rights. For example, an orthodontist may not want another orthodontist in the building.
- ▶ **Ramifications for delinquencies** - Governing documents may suspend a unit owner's privileges during period of payment delinquencies.
- ▶ **Formation of various committees** - The Association may have an architectural control committee in place to consider any applications for modifications to a unit. Other common committees include an alternative dispute resolution committee (responsible for addressing any alleged violations that are disputed by unit owners) and a finance committee.
- ▶ **Sign restrictions**
- ▶ **Right of first refusal** - Whether an existing unit owner has the right of first refusal to purchase other space that becomes available.
- ▶ **Parking** - Whether there will be assigned parking spaces for unit owners, tenants and invitees.
- ▶ **Insurance** - Requirements should be in place for minimum limits for insurance to cover property damage, liability and use of the particular unit. Consideration must also be given as to the application of insurance proceeds in the event of a covered occurrence.

TRANSITION

Generally speaking, the developer controls the Association by selecting a majority of the Members who sit on the Board of Trustees. When a certain percentage of units are sold by the developer, commonly 75%, control of the Board of Trustees shifts to the unit owners. This commences what is generally known as "transition". However, transition is a process, not merely one event. When control of the Board of Trustees shifts, the unit owner controlled Board of Trustees generally will hire an engineering

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company or other expert to inspect the construction and identify any defects or deviations from the plans and specifications. If there are defects or deficiencies, they should be brought to the attention of the developer and a request made that the developer correct them. If the developer refuses to correct them, litigation is often inevitable. Also, the transition process includes the developer turning over certain assets and materials to the unit-owner-controlled Board of Trustees. Such assets and materials include the Master Deed, Articles of Incorporation, Bylaws, and all amendments thereto, the minute books, the rules and regulations, an accounting of all Association funds, all Association funds, all tangible property and copies of the plans and specifications utilized in the construction, insurance policies, permits, written warranties, a roster of unit owners and contact information, leases to which Association is a party and contracts to which the Association is a party such as employment contracts, management contracts, maintenance contracts, etc. The transition process can be lengthy depending on the number of units and size of the condominium property.

CONCLUSION

There are many advantages to a Business Condominium. Nevertheless, as you can see, thoughtful consideration must be given to the particular use of the condominium and the effects of such use on the governing documents as well as rights and obligations of the developer, the unit owners and the Association.

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