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Real Property Law: Creative Development with Condominiums

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Most people, including some attorneys who do not practice in the area, envision a condominium as the traditional apartment-style or townhouse-style condominium, in which a structure is divided into units defined by walls, floors, and ceilings.

However, that is just one type of condominium that may be created under the New Hampshire Condominium Act (RSA 365-B), adopted in 1977. The Condominium Act may also be used as a tool for the development of commercial property and mixed-use properties, solving development problems and encouraging economic development through greater creativity and flexibility.

This creativity and flexibility may be used to facilitate investment, overcome site-restrictive issues, and permit orderly phasing of a commercial or residential development in an era of economic downturn. There are opportunities for phasing and creation of sub-condominiums to facilitate construction and overcome traditional regulatory hurdles. Condominiums may be used under existing zoning ordinances and regulations, or with minor changes in their interpretation.

Condos: An Overview

State law dictates that a condominium is created by recording condominium instruments submitting real property, pursuant to the condominium form of ownership, after receipt of any municipal approvals needed.

The condominium instruments include a declaration, bylaws, site plans and floor plans. Upon submission, the property is divided into units to be held in fee (or, if the land submitted is leased, in leasehold) interest by an individual owner. All portions of the land and buildings that are not designated as "units" are common areas, and are owned by all of the unit owners as tenants in common, with some restrictions as to use by designation of "limited common area" (see below). Although the contents of the declaration and bylaws are proscribed by law (see RSA 356-B:16, 35), the Condominium Act allows for wide discretion as to the form, size and number of the units and common areas.

In the traditional townhouse-style condominium, each owner owns the interior portions, along with an undivided interest in the common areas, which typically include all structural and common portions (e.g. halls, driveways, and parking) of the condominium. Common areas generally are maintained by a single condominium association.

The Condominium Act also permits development of units as standalone buildings. Each owner owns a building in its entirety, including the structural and exterior portions. The common area may then be composed of the shared infrastructure, such as private access ways, parking, and recreational facilities. In addition to the potential marketing value of offering a standalone building unit, this approach provides an alternative in cases where frontage, setback or other dimensional requirements might prevent a standard subdivision.

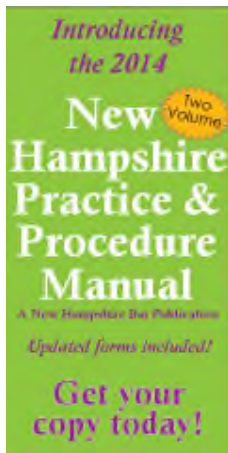
Practitioners should note that although the Condominium Act prohibits municipalities from discriminating against condominiums simply by reason of their form of ownership (see RSA 356-B:5), they may and often do regulate condominium developments pursuant to applicable municipal regulations.

Air and Ground Units

A condominium may be composed entirely of undeveloped units, such as an air space or ground space condominium, as directed by a municipality's zoning ordinances and regulations. For example, Keene permits air space units but not ground units. Manchester permits ground space units.

Additionally, depending upon the flexibility of the ordinances and regulations, and the understanding of condominiums by municipal planners, a condominium, where permitted, may be a "lot" of land extending beyond a building footprint. In addition to facilitating marketability, an advantage to the municipality is that the internal infrastructure in the condominium (such as roads and utilities) is maintained by the condominium association or the unit owners, as described in the declaration.

With air space units, such as in Keene, the unit extends from the outermost portion of the area shown on the approved plan, up to the atmosphere, but the lowermost portion of the unit begins directly above the ground



surface. The air space unit is transformed (under the terms of the approvals and the condominium declaration) to the building upon construction of the building. Any underground supports are limited common area assigned to that specific unit. In addition, there is generally limited common area that is dedicated to the sole use of each unit for parking.

In a ground space condominium, the units consist of the "dirt," without any associated structure. Thus, the boundaries of the unit extend horizontally to the outward extent shown on the plan, vertically up into the atmosphere and downwardly as needed (such as 10 feet below the lower building foundations), to account for the underground supports or basement for any building later constructed on the unit. With either an air space unit or a ground unit, each unit may be created and conveyed before a structure is completed, in contrast to apartment, townhouse or building unit condominiums, where the units cannot be defined or conveyed until substantially completed. Both allow the unit owners to construct and own the entirety of the building.

Creative Solutions

Each of these forms may be used separately or as part of a mix of several condo styles. In addition, the Condominium Act allows for subdivision of individual units or the creation of separate sub-condominiums within those units. Each sub-condominium will have its own sub-declaration, bylaws and separate unit owners association to maintain separate and specifically targeted regulations and budgets. The benefits of a sub-condominium include the creation of a separate ownership of spaces within the building condominium unit. In addition, sub-condominium associations permit separate decision-making with regard to issues that vary in units constructed over time, such as the need for maintenance at various times. It is important to note that the registration requirements of the Condominium Act may apply to a mixed-use condominium, even if it is primarily commercial. Any condominium with more than 10 residential units must either register or file for exemption from registration with the NH Attorney General Consumer Protection Bureau. RSA 356-B:49. So, think outside the "condominium box" to the various creative condominiums to solve development, financing and operational issues and challenges.

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