Time for an Overhaul of Michigan's Condominium Act?

By Hon. Rudy Nichols

Michigan's Condominium Act[1] is one of the most interesting statutes you'll ever encounter. If you are engaged in litigation, you will no doubt find it to be frustrating, incomprehensible, or both. There is an explanation for this, I think, but you'll have to wait for that conclusion later in this article.

"Condominium" comes from a Latin word meaning common ownership or control. The distinguishing feature is the difference between *exclusive* and *common* ownership. Exclusive ownership usually refers to a unit owner's possession of all the space within or inside a structure, while common connotes a joint interest with all other proprietors of various structures and lands. Among these common forms of ownership there are often *limited* common elements (those confined to use by the unit owner) and *general* common elements (the rest of the common properties such as roads, recreation facilities, clubhouses, etc.) The legal documents for a condominium and the diagrams attached to those documents, particularly the master deed and condominium subdivision plan, must be read carefully to understand what is limited and what is general.

It is believed that some type of communal living analogous to condominiums existed even in Roman times. However, the first formal outline of condominium ownership was in the Code Napoleon of 1804, Article 664,[2] which formally addressed issues of separate and common elements now so inherent in this type of real property ownership. The first American statute was adopted in 1958 in Puerto Rico, and most state statutes have been said to be patterned either after that or the 1962 Federal Housing Administration Model Condominium Statute.[3]

While it is possible for neighboring property owners to do so, most condominiums are created by developers. Together with their execution and recordation of various covenants and declarations, often expressed in governing documents referred to as the master deed and bylaws, developers create the foundation for the governing rules and regulations that bind every owner upon the purchase of a unit. These are provided—indeed mandated in Michigan—by the Condominium Act,[4] a statute going back to 1978 and comprising approximately 40 unannotated pages of statutes and subsections, including more than 200 provisions. All governing documents—the act, the master deed, and the bylaws—are

important in terms of the development, governance, and administration of a condominium association.[5]

Analyzing the act

A look at the act can be daunting. The act begins with a series of definitions and then identifies the types of condominiums and projects (*expandable*, *contractible*, *leasehold*, etc.); defines the nature of an owner's interest;[6] establishes the creation or development of easements, restrictions, and improvements and an advisory committee of nondevelopers;[7] establishes certain mandatory bylaw provisions;[8] provides for the sharing of common expenses;[9] and otherwise establishes scores upon scores of rules and regulations pertaining to conveying, amending, enforcing, assessing, selling, voting, terminating, and financing the condominium association and its units.

The use of "scores" in the previous paragraph—in the sense of grouping a number of items—is an appropriate one. Unlike the Uniform Condominium Act[10] and the Uniform Commercial Code,[11] which are each neatly divided into a series of articles, Michigan's Condominium Act as amended is a hodgepodge of rules and regulations, each affecting in some way the creation, maintenance, and termination of condominium interests. The act is neither clearly written nor organized.

The Uniform Condominium Act, for example, has five key articles: General Provisions; Creation, Alteration, and Termination of Condominiums; Management of Condominium; Protection of Condominium Purchasers; and Administration and Registration of Condominiums. In contrast, Michigan's Condominium Act has no breakdown by article and fails to reflect any meaningful or comprehensible plan throughout its meandering sections.

Another example would be remedies that exist under the act. The Uniform Commercial Code in Article 2, Sales, adopts a Remedies section in Part 7 that attempts to clearly set out the rights and obligations of the key parties in a sales transaction.[12] These include, specifically, seller's remedies, buyer's remedies, various damage provisions, and remedies for fraud and statutes of limitations topics. The National Conference of Commissioners on Uniform State Laws worked for more than a decade to make Article 2 a comprehensive and comprehensible collection of legal provisions governing the basic rights of the seller and buyer.

FAST FACTS

The Michigan Condominium Act is a 35-year-old statute regulating in vast detail most aspects of condominium living. It is in serious need of reform as compared to various uniform acts passed in recent decades.

The Condominium Act, in contrast, has scant and sporadic provisions, many of which literally dump the issues into a court of law with the act itself providing three broad "solutions": costs, damages, and injunctions. For example, a person adversely affected by a violation of the act may "bring an action in a court of competent jurisdiction."[13] Often costs are recoverable except in some sections where damages may be awarded for selling a condominium without complying with certain requirements of the act or in actions by co-owners.[14] There are other remedies, some administrative in nature, but many appear to apply as between purchasers, co-owners, developers, and the association. These include, for example, foreclosure of liens, fines, increasing costs for late payments, occupational code violations, and more. Injunctive relief is also provided in the act, no doubt because of the subject matter involved—real property, a unique subject matter often providing reason for equity jurisdiction to be invoked. This is somewhat peculiar because the rest of the act attempts to provide administrative, regulatory, and rulemaking solutions, and thus an otherwise adequate remedy at law that would dispense with an equitable basis for injunctive relief.

It is this administrative detail I alluded to previously that causes a sense of frustration and incomprehensibility for anyone attempting to understand this piece of legislation, especially someone contemplating litigation.

In all fairness, this haphazard pattern is most likely due to the number of people, entities, and topics discussed in the act. A condominium project involves a whole host of people, including banks, local units of government, individual unit owners, real estate brokers, attorneys, individual purchasers, the association, an advisory committee, property managers, and more. The failure of the act to begin with that analysis partially explains the bewilderment one may experience when attempting to analyze it. *The actors and subject matters simply are not clearly delineated.*

Voting strength of units and unit owners can be another murky area for the unwary practitioner. When buyers take ownership or title to their units, they automatically become co-owners literally yoked with other co-owners in ways they may not fully appreciate. The most significant of these is the financing of and repairs to the common elements. How these are maintained becomes a matter of governance by the association, which becomes official on completion of a certain number of units within the condominium project or the passage of time.[15] The developer eventually prepares an assignment of rights to the association itself. Until then, the association is governed by a board of directors appointed by the developer until the first annual meeting. At that meeting, co-owners elect members to be directors and the condominium association is underway.

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Confusion sometimes occurs because of the failure to distinguish between "percentages of ownership" and governance of the condominium association. By statute, the master deed can provide for the percentage of ownership or value for each unit in the association.[16] This represents the percentage of value allocated to each condominium unit. The master deed may also allocate the percentage of value for each unit in the common elements, which collectively constitutes their undivided interest in those elements.

The act further provides, however, that votes of the co-owners in an association may be according to a *co-owner's percentage of value or an equal number of votes in the association of co-owners*.[17] In other words, it appears that percentage of value or "one unit, one vote" can apply, depending on what the bylaws specify. Knowing whether voting is based on percentage of ownership or number of units can become important because that percentage can be used as the basis for determining a co-owner's obligation to pay fees, assessments for repairs, and maintenance of the common elements as well as voting strength at a meeting of the association.[18]

Conclusion

There can be many dangers and pitfalls for the practitioner unfamiliar with the act. The Uniform Condominium Act constructively notes inappropriate terminologies, numerous details, differing (and potentially conflicting) bundles of rights of lenders and co-owners upon foreclosure, and insurance coverage as dangers and pitfalls in many state acts.[19] Some of those criticisms clearly apply to Michigan's Condominium Act. But among the most critical are overlapping provisions and the failure to accurately distinguish between the characters and themes involved in a condominium or condominium project. Well-drafted legislation would not only be concise, but well-organized (such as the Uniform Commercial Code's Article 2, Sales, referenced previously), and would identify with precision the characters and parts of the statute. Michigan's Condominium Act does not do this. That explains why the Uniform Condominium Act would be a good first step in reforming this area of the law—an area the legislature has addressed thus far in piecemeal fashion. ■

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ENDNOTES

1. MCL 559.101 *et seq.*
2. Levin, *Condo developers and fiduciary duties: An unlikely pairing?*, 22 Loyola Consumer L R 199 (2001).
3. *Id.* at 199–200.
4. 1978 PA 59; MCL 559.101–559.276.
5. See MCL 559.165.
6. See MCL 559.136; MCL 559.137; MCL 559.161; MCL 559.162; and MCL 559.163.
7. See MCL 559.135; MCL 559.146; MCL 559.147; and MCL 559.152.
8. MCL 559.154.
9. MCL 559.169.
10. Uniform Condominium Act, as drafted by the National Conference of Commissioners on Uniform State Laws (1980), available at <http://www.bhcspgh.com/babbpropertypro/uca80.pdf> (accessed June 22, 2014).
11. MCL 440.2101 *et seq.*
12. See MCL 440.2701–440.2725.
13. MCL 559.215(1).
14. See damage sections MCL 559.206(a) and MCL 559.215(2); and see cost sections MCL 559.207 and MCL 559.215(1).
15. MCL 559.152.
16. MCL 559.137.
17. MCL 559.154(7).
18. See MCL 559.154(7); MCL 559.163; and MCL 559.169(3).
19. Uniform Condominium Act, n 10 *supra* at 1.