

Innovative Development Opportunities Abound in Commercial Land Condominiums

By Kevin Levy and Krystal Bordoni-Cowley

Condominium development has been around since the 1960s and has ramped up in recent years. Within larger parcels where multiple structures or different uses are planned, developers in the greater Philadelphia area are increasingly turning toward a newer form of joint ownership of property to develop large projects: the horizontal, or land, condominium. While the appetite for building new vertical residential condominium buildings in Philadelphia has slowed since the onset of the pandemic, many commercial developers are now considering early on whether applying a land condominium regime makes sense for integrated development projects.

The basic condominium concept is that a person or a company owns their individual unit within the condominium, and together with their fee ownership of their individual unit, the owner has a proportionate undivided interest in the entirety of the common elements of the condominium. Collectively, all of the owners in the condominium own 100% of the common elements of the condominium. Think, for example, of a vertical residential condominium tower: a person owns their own unit within the building, and all of the owners together own the common parts of the building such as hallways, the elevator bays, and the reception areas on the ground floor. Instead of paying rent to a landlord, the owner of the unit pays their own mortgage and pays condominium fees to a unit owners association established for the maintenance of the common elements of the building.

Land condominiums work similarly to their vertical and residential condominium counterparts. However, instead of spreading the condominium up into the air with units stacked atop one another (as is typical of vertical condominiums), the land condominium tends to spread horizontally with units standing apart from each other. To the average onlooker, a land condominium may appear similar to an office park or a shopping center with various owners.

However, many office parks and shopping centers tend to be governed by a series of overlapping reciprocal easement agreements (REAs) or conditions, covenants and restrictions (CCRs) which regulate land use and call for assessments for joint maintenance across different portions of privately owned land. Contrast, then, with a condominium, where an access road, parking facilities, or other sorts of shared space like greenery or trash collection areas are jointly owned by all of the owners of the condominium (as common elements) with joint responsibility for stewardship and common participation in management and maintenance decisions with respect to the condominium as a whole.

One benefit of condominiums is that declarants or developers need not allocate common element interests in exact proportion to the square footage of each unit, but may attribute

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percentage interests based on use or other equitable formulas such as dividing common element allocations evenly among all unit owners of the condominium.

Another benefit of structuring joint development of a property as a land condominium is that the law governing condominiums requires each unit of the condominium be separately assessed for tax purposes, with the unit owner's proportional interest in the common elements of the condominium being included within the individual unit's assessment for improvements and land. This could work to a developer's benefit by allocating costs for the development of common area spaces more evenly across a development project that might have separate financiers or equity backers. As a result of this co-ownership of common elements, the value of the common elements is built into the condominium unit assessments, rather than as a stand-alone tax parcel subject to separate taxation.

The life cycle of a condominium begins with a declaration. The Declaration of Condominium must conform to the requirements of the Pennsylvania Uniform Condominium Act, codified at 68 P.S. Section 3101, et seq. The declaration must, among other things, legally describe the pre-condominium land on which the condominium will be built, identify the units which will be created within the condominium, generally describe the common elements of the condominium, and identify restrictions on the use of the condominium units. The exact specifications are detailed further in Section 3205 of the Pennsylvania Uniform Condominium Act.

Another key prerequisite to validly forming the condominium is to prepare condominium plats and plans. These plats and plans designate the location of the units within the condominium in a similar fashion to a subdivision. The plats and plans importantly identify elements of the property which will serve as common elements of the condominium such as shared access drives, plazas, parking spaces or utility facilities.

It is vital that developers also work closely with the local taxing authority to ensure a seamless transition from pre-condominium property to a post-condominium combination of units because each unit within the condominium must be allocated its own tax parcel number. That number and other parcel identifying information is included on deeds, mortgages, and other finance documents. Thinking forward, the unique identifying number will also be used to assess and collect taxes relative to that specific condominium unit.

Finally, as with residential condominium acquisitions, lenders on commercial land condominiums may require additional comfort when working to close a loan that will be secured by a mortgage on a condominium unit. Especially if a developer is working to secure financing in advance of recording the declaration, the developer must work collaboratively with a lender to ameliorate any lender concerns about its participation in condominium unit owners association boards, provide adequate protection to the security and priority of the mortgage

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lien, and provide important consent or affirmative approval rights in connection with future amendments to the declaration, among other things.

Condominiums are a relatively unique beast that combine many of the best attributes of common or joint ownership of property: having joint standards in development or building, promoting cohesion among neighboring property owners, sharing obligations and benefits from common areas used by all owners within the condominium, and maintaining certain assurances with respect to the maintenance of areas key to normal business functions throughout the condominium. Developers should be mindful that the condominium documents are carefully drafted so as to avoid any unintended benefits conferred from one unit owner to another.

Creating, managing, and maintaining condominiums requires close attention to the Pennsylvania Uniform Condominium Act and other corporate formalities (with respect to the bylaws of the condominium unit owners association and boards of directors, for example). A collaborative approach to the local assessor's office goes a long way toward a seamless transition to condominium-hood, and the successful creation of a land condominium can lead to strong and cooperative development of a larger parcel with separate intended users or use.

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