



by E. S. Smith, O.L.S.,  
Legal Surveys Branch, Toronto

### EXPANDABLE CONDOMINIUMS UNDER THE VIRGINIA ACT

The recently adopted Condominium Act of the State of Virginia contains provisions for the expansion of a registered condominium to incorporate additional units and land. Probably attributable to seemingly insurmountable problems, many condominium statutes of other jurisdictions, including Ontario, do not provide for expansion. The writer will consider this aspect of condominium law and particularly its development in the new Virginia Act.

The land available and the density allowed by planning authorities, the location and size of facilities or services to be used by the members of the condominium corporation whether they be recreational or industrial, and what the project draftsmen, lending institutions or planning authorities consider socially or administratively desirable under one condominium regime, are considerations which influence the number of units in a condominium project and are considerations which are concerned with the future viability of the condominium community. However, where the condominium statute does not provide for expansion and does not permit the registration of a project before the buildings have been constructed, the number of units and size and distribution of amenities may be dictated by the financial ability of the developer or his faith in future markets, i.e., the unavailability of financing or the uncertainty of future markets may preclude an investment commitment on a whole project at one time. The result may be that a project would not be developed as a whole, but would be comprised of individual condominium corporations, possibly physically integrated and sharing the use of facilities, or with separate facilities of a different level of sophistication than could be provided under a design encompassing the whole development.

Sharing the use of facilities without the benefit of condominium, whether the parties are private individuals, firms or condominium corporations involves, in addition to easements, the use of agreements to provide for the management and maintenance of the

facility. Agreements to contribute to the expenses of maintaining a facility may be a source of contention especially if the costs are on the increase or one party to the agreement is benefiting less than another. There are also common law precedents that would indicate that a contractual obligation to contribute to the expenses of maintaining a facility, for example, may be difficult to enforce against a subsequent owner.

The necessity to share the use of facilities may be the primary reason for the condominium. Therefore, from the standpoint of planning considerations, and to facilitate the use of the condominium concept to protect the interdependency associated with the management and maintenance of a common amenity or service, expansionary flexibility may afford important advantages in condominium law.

Some of the more obvious problems to overcome in providing for expansion in a condominium statute relate to the protection of the unit owners' interests acquired before expansion. Where the initial offering contains representations of amenities to be included in a later phase, what prior condition can protect the unit purchaser's interest in the amenities against the developer becoming insolvent before they are completed? Depending on the proximity of the expansion, the living conditions may be adversely affected by the type of development in a later phase or the structures erected may not be architecturally compatible with the existing buildings. Possibly the most formidable problem is arriving at a formula or establishing guidelines that will equitably distribute the percentages of contribution to the common expenses or the percentages of common interest in the common elements when expansion occurs.

The operation of the new percentages should prevent occurrence of a unit purchaser from being subjected to unexpected higher common expense payments as a consequence of higher maintenance costs in a later phase, or as a consequence of a disproportionate share of the expenses.

The Virginia Condominium Act attempts to provide a solution to the problems relating to phased registration. Under the Virginia code a condominium may be recorded as an "expandable" condominium or as a condominium with "convertible" land.

(Both terms refer to an expansion in the number of units and may be considered as expandable condominiums). If it is an expandable condominium, the developer has the option after the initial submission to the Act to expand the condominium to include additional land, units, or other improvements. The declaration shall contain the following statements: (not inclusive)

— The explicit reservation of an option to expand,

— a statement as to whether the consent of any unit owners shall be required,

— a time limit not exceeding seven years upon which the option to expand shall expire,

— a legal description of all land that may be added to the condominium,

— a statement of the maximum number of units that may be created on the additional land and if portions are to be added at different times, the maximum number per portion,

— a statement as to any limitations as to the location of any improvements or to the extent to which any structures erected on any portion of the additional land will be compatible with structures on the submitted land in terms of quality of construction and architectural style, or a statement that there are no such assurances,

— a statement of the maximum percentage of the units that may be created on the additional land that are not restricted to residential use.

Convertible land is a portion of the common elements in which the developer may create additional units after the initial submission to the Act. The plans of survey of the submitted land show the location and dimension of the convertible land and it is considered a part of the common elements until converted. The declaration contains similar statements as are required for an expandable condominium.

The Virginia Act provides that the declaration may allocate to each unit an undivided interest in the common elements proportionate to the size or market value of each unit or shall allocate each unit an equal undivided interest in the common elements. If a condominium contains convertible land or is an expandable condominium, the interests in the common elements shall not be determined on the basis of market value unless the units to be created are substantially identical to the units submitted to the Act, or unless a description of the



type of units to be created is included, together with values that shall be assigned to them. This provision is probably to ensure that the relative values assigned to the units are not influenced by changing real estate prices.

With the recording of plans of the convertible or additional land, the plans containing a certificate by a surveyor, and or architect or engineer that all the units depicted thereon have been substantially completed, the declarant shall execute and record an amendment to the declaration re-allocating undivided interests in the common elements using the same basis, (e.g., value, size,) as was used for the initial submission to the Act. Common expenses shall be assessed against the condominium units in proportion to voting rights. The voting rights of each unit would be either equal or proportionate to the undivided interest in the common elements. The by-laws shall either allocate to each unit an equal number of votes in the unit owners' association or a number of votes proportionate to the undivided interest in the common elements appurtenant to each unit.

The Virginia Condominium Act is administered by the Virginia Real Estate Commission (agency), and their powers and responsibilities under the Act are extensive.

The Act provides that upon receipt of an application for registration the agency shall determine that: (not inclusive)

- the declarant (i.e., the developer) can convey the units,
- there is a reasonable assurance that all proposed improvements will be completed as represented,
- the general promotional plan is not false or misleading and affords full and fair disclosure,
- the declarant has not been convicted of a crime involving condominium unit dispositions or any aspect of the land sales business,
- the public offering statement requirements of the Act have been satisfied.

The Act provides that the public offering statement shall disclose fully and accurately the characteristics of the condominium and shall specifically include the following: (not inclusive)

- a general description of the condominium stating the total number of units in the offering; the total number of units planned to be sold or rented; the total number of units by reason of future expansion,

- copies of the declaration and by-laws including information on declarant control, projected common expense assessments for each unit for the first year and any restraints on alienation,

- copies of any management contract, lease of recreational areas with a statement of the effect upon the purchaser

- the significant terms of any encumbrances, easements or liens affecting the condominium,

- a statement that the purchaser may cancel the disposition within ten days' delivery of the public offering statement.

The agency may require the declarant to revise the public offering statement in order to assure full and fair disclosure. The agency may bring an action in the circuit court of the city or county to enforce compliance with the chapter or may intervene in any suit involving the declarant. In the course of an investigation the agency is empowered by the Act to subpoena witnesses and hold hearings and where there is a determination of unlawful practice, for example, intentional misrepresentations, it may revoke a registration. Fines of one-thousand to fifty-thousand dollars or imprisonment for not more than six months are the penalties for violations of the Act.

It is interesting to note that the application for registration submitted to the agency shall be accompanied by a fee of from five-hundred to one-thousand dollars depending on the number of units. Taking into account the protection afforded the unit purchasers and the assistance available to the project draftsmen, the fee is nominal and yet may cover the agency's costs.

In summary, the essential features of the Act conducive to expansion would appear to be:

- full and accurate disclosure,
- comprehensive procedural provisions,
- appropriate penalties for violations of the Act,
- the designation of an administrative agency (government) with extensive powers and responsibilities.

The responsibilities of the agency include:

- supervision of the disclosure,
- investigation into the background and financial stability of the declarant,

- enforcement of compliance with the Act.

The underlying philosophy reflected in the statute appears to have been to allow the legitimate developer unlimited latitude in the design and application of the condominium concept, in balance with effective government administration to protect the public from the marginal people of the development industry. In conjunction with the detailed procedural provisions, undoubtedly the broad powers and responsibilities conferred to the agency are essential towards combating the vulnerability of a unit purchaser to representations and to the occurrence of expansion to a registered condominium. Only through experience will it be revealed if a socially acceptable level of public protection has been provided.

Other jurisdictions, recognizing that expansionary flexibility may enable the concept to realize its full potential, will benefit from the Virginia experience with expandable condominiums.

E.S. Smith, O.L.S.  
Submission Analyst  
Special Service Section

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