



THE NECESSITY OF A CLEAR CONDOMINIUM DECLARATION: Unbuilt Condominium Units in Wisconsin

Chapter 703 of the Wisconsin Statutes, or Wisconsin’s Condominium Ownership Act (the “Act”) is, for the most part, a fairly clear statute that is relatively easy to follow. However, the Act’s definition of a condominium “unit” (which is what a condominium owner actually owns when it purchases an interest in a condominium), as well as Wisconsin courts’ interpretation of a “unit” has led to much confusion.

Wisconsin Statute § 703.02(15) defines a “unit” as being: *a part of a condominium intended for any type of independent use, including one or more cubicles of air at one or more levels of space or one or more rooms or enclosed spaces located on one or more floors, or parts thereof, in a building. A unit may include 2 or more noncontiguous areas.*

As you can see, the statutory definition is not exactly clear: does the “cubicle of air” language mean that a unit includes an unbuilt portion of a condominium included on a condominium’s plat map, or must a unit only be “in a building”? This statutory definition has led to several cases that attempt to determine whether or not unbuilt condominium property should (or must) be included as a “unit” for purposes of common expense assessments, taxation, and voting rights. Recent Wisconsin court decisions have attempted to answer these questions.

COMMON EXPENSES: In 1995, the Wisconsin Court of Appeals attempted to clarify things when it determined that condominium property on which no construction has taken place may be a considered a “unit” subject to assessment for common expenses by the condominium owner’s association. In that case, the owner of undeveloped condominium property brought action against the owner’s association, seeking to restrain the association from filing claims against the owner for condominium maintenance liens resulting from the owner’s nonpayment of condominium assessments that were assessed against the owner’s unbuilt unit. In its analysis, the Court turned to Wis. Stat. § 703.16(2), the Act’s assessment provision, which requires unit owners to pay for common expenses “in proportion to their percentage interests in the common elements or as otherwise provided in the Declaration.” Ultimately, the Court determined that even though the vacant land constituted a “unit”, the condominium’s declaration, which is the document that subjects property to the Act, provided that unit owners were not subject to assessment until there was construction of dwelling units on their properties. Therefore, as recently reaffirmed by the Court of Appeals in 2013, common expenses may be allocated to unbuilt condominium units in Wisconsin, unless the declaration provides otherwise.

VOTING RIGHTS: When it comes to voting rights, it appears that not all units are equal. In 2013, the Court of Appeals was asked to determine how voting rights should be allocated for unbuilt units.

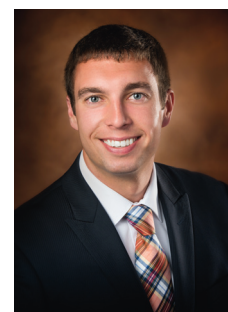
The issue in the case was whether a unit owner was entitled to one vote for each of its sixty-three unbuilt units at meetings of the condominium owner’s association. The declaration stated that only owners of structural units were entitled to vote. The owner argued that because Wisconsin courts had previously determined that a “unit” includes unbuilt units, the declaration’s definition of “unit” was too narrow and violated Wis. Stat. § 703.02(15).

Ultimately, the Court of Appeals determined that there was no conflict between the declaration and the Act, because the Act defers to the declaration to determine voting rights in an association. Citing Wis. Stat. § 703.15(4)(d)1, the Court held that at meetings of the association, every unit owner is entitled to cast the number of votes appurtenant to his or her unit, as established in the declaration under § 703.09(1)(f) [which requires the declaration to specify the number of votes at meetings of the association of unit owners appurtenant to each unit]. Therefore, like common expense assessments, the Court found that the definition of unit in the declaration controls as to how unbuilt units are to be allocated voting rights.

TAXATION: However, the declaration does not always control. The Court of Appeals, in the same case, went on to discuss issues relating to taxation of unit owners. Citing a 2010 Court of Appeals case, the Court reaffirmed that the statutory definition of unit (which contemplates units to include unbuilt spaces) applies when it comes to taxation. In other words, for taxation purposes under the Act, what is taxable as a “unit” is set by statute and not the declaration. The

Court based its reasoning on the fact that the Act’s separate taxation did not provide the flexibility that is provided in the Act’s assessment provision. Therefore, although a party may be relieved of assessments for common expenses for unbuilt units if the declaration provides that fees and assessments are only chargeable to constructed units, the declaration’s definition of a unit may not relieve an owner of unbuilt unit(s) from taxation.

In summary, the Act’s provisions relating to “units” control unless the Act specifically defers to the declaration. The Act specifically defers to the Declaration when it comes to determining common assessments and voting rights for unbuilt units, but requires separate taxation for each unit, whether built or unbuilt. Therefore, particular care needs to be taken when drafting or amending condominium documents to allow the declarant, or condominium owner’s association, to achieve the desired result.



**Attorney Paul Mirr,
Ruder Ware, L.L.S.C.**