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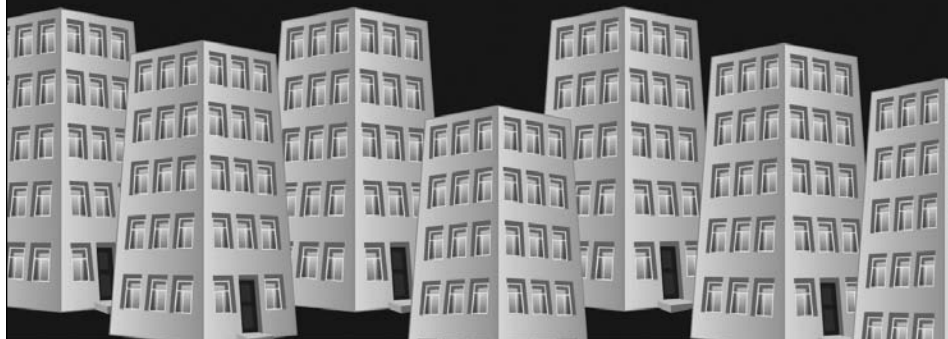
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The Kentucky Condominium Act



By Scott W. Brinkman

When the Kentucky Horizontal Property Law was enacted by the Kentucky General Assembly,¹ John F. Kennedy was President, the Cuban missile crisis had not yet occurred, the Beatles were an obscure musical group playing in nightclubs in Liverpool, England, and the form of condominium ownership was rare in Kentucky. This rather basic law established the parameters of the condominium form of real property ownership.

The Kentucky Condominium Act (KCA),² signed into law by Governor Beshear on April 8, 2010, broadly rewrites Kentucky condominium law to create more certainty and clarity with respect to the rights, duties and obligations of developers, unit owners, associations owning common elements and members and officers of the executive board charged with enforcing the rights and discharging the duties of the association. Although modeled after the Uniform Condominium Act, the Kentucky Condominium Act is less sweeping than the Uniform Condominium Act.³

The KCA applies to all condominiums created within Kentucky on or after January 1, 2011.⁴ In addition, several provisions of the Act apply to all condominiums created before this effective date, but only to the extent of events or circumstances occurring after the effective date, and these sections of the KCA do not invalidate existing provisions of the declaration, bylaws, plats or plans of those condominiums.⁵

Any amendment to the declaration, bylaws, plats or plans of any condominium created before January 1, 2011, must conform to the Act.⁶ The Rule Against Perpetuities shall not be applied to defeat any provision of a condominium's declaration, bylaws, rules or regulations.⁷ Further, to the extent of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with the provisions of the KCA.⁸

With a unanimous vote of the owners, the KCA will apply to a condominium created before January 1, 2011, and in that event the condominium's declaration, bylaws, plats and plans will need to be amended to be consistent with the KCA.⁹ It has limited application even absent that election.¹⁰

Unless specifically permitted by its terms, the requirements of and rights granted by the Act may not be waived.¹¹ The Act does not supersede the zoning, subdivision, building code or other real estate use laws¹² of jurisdiction, but these laws may not prohibit the condominium form or impose any requirement upon a condominium that the laws would not impose upon a physically identical development with a different form of ownership.

The KCA is intended to be flexible in allowing many different types of projects to qualify as a condominium; the key definitions are "condominium" and "real estate."¹³ A condominium is a "single unit in a single-unit or a multiple-unit structure or structures, portions of which are designated for

separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions."¹⁴ Importantly, there is a "condominium" only if the undivided interests in the common elements are vested in the unit owners. "Real estate" is defined as "any fee simple interest, leasehold estate, or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests by which custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance."¹⁵ A condominium can be created only by recording a declaration executed in the same manner as a deed in every county in which a portion of the condominium is located. A "declaration" is defined as any instrument, including a master deed, that creates a condominium.¹⁶ While there is flexibility as to how a condominium is created, the preference appears to be the use of master deeds.

The KCA clarifies the relationship between condominiums, including condominiums in various stages of development, and ad valorem taxation. It also clarifies the effect of eminent domain on a condominium including the manner in which condemnation awards are to be allocated between the units and the common elements.

The Act should prove helpful in clarifying the portions of a condominium unit that constitute part of the unit versus a common element or limited common element.¹⁷ Many questions have arisen over the years as to the appropriate distinction between property owned by the unit owner and property that constitutes either a common element or a limited common element, distinctions important to insurance, ad valorem real property taxation, and eminent domain questions.

The KCA makes distinctions between common elements, limited common elements, and units with respect to the property commonly associated with a condominium unit.¹⁸ The Act allows the owners of units to which a limited common element is appurtenant to re-allocate the limited common element

among such units by amendment to the declaration unless the declaration otherwise provides. Unit owners should insist upon having the flexibility to allocate limited common elements among the units in such proportion as is acceptable to such unit owners.

The KCA also specifies the information that must be contained in a declaration in order for the declaration to effectively create a condominium, including a legally sufficient description of the real estate on which the condominium is located, the maximum number of units which the developer may create and the description of the boundaries of each such unit, and the limited common elements including any real estate that may be allocated subsequently as limited common elements.¹⁹ It must also include a description of any development rights and other special declarant rights reserved by the declarant, including a statement clarifying the order in which development rights may be exercised as to different parcels of real estate, if any. These clarifying statements should help prospective purchasers and lenders in analyzing the manner in which a partially developed condominium is to be developed.

When a condominium is developed under a ground or other long-term lease, a memorandum of lease must be recorded with respect to any lease the expiration or termination of which may terminate the condominium or reduce its size.²⁰ Although leasehold condominiums are fairly rare in Kentucky, the legislation creates more certainty with respect to the rights of unit owners subject to leasehold condominiums and the manner in which leasehold condominiums must be described.

The declaration must allocate a fraction of undivided interests in the common elements and common expenses of the association, and a portion of the votes in the association, to each unit and to state the formulas used to establish those allocations.²¹ The declaration must also state the formulas to be used to reallocate the allocated interests among units in a condominium after any units are added or withdrawn. A declaration may provide for different allocations of votes to the units on par-

ticular matters specified in the declaration and for class voting on specified issues affecting the class if necessary to protect the valid interests of the class. However, the declaration may not permit cumulative voting, including cumulative voting for the purpose of electing members of the executive board.²² The sum of the undivided interests in the common elements and common expense liabilities allocated at any time to all of the units must equal 100%. Importantly, the common elements of a condominium are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.

Plats and plans are part of the declaration.²³ Upon exercising any development right, the declarant must record either new plats and plans necessary to conform to the requirements of the legislation or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of the legislation. In the latter instance, the certification of a plat or plan must be made by a professional land surveyor, licensed architect or professional engineer.²⁴

The KCA creates a variety of new

sections governing the exercise of declarant development rights.²⁵ In order to exercise any development right as to specific real estate, the declarant must record an amendment to the declaration, which must assign an identifying number to each new unit created through the exercise of the development rights, must reallocate the allocated interests among all units, and must describe any common elements and any limited common elements created through the exercise of the development rights. A declaration must be amended in the event a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements or both.

The Act provides guidance as to the right of unit owners to make improvements to their units, to change the exterior appearance of the condominium, to remove or alter intervening partitions or create apertures between adjoining units, to relocate boundaries between adjoining units, and to subdivide units.²⁶ The declarant is permitted to establish specific provisions governing these matters in the declaration, but if the declaration is silent on the matter, the KCA provides default rules.

The Act provides guidance regarding the extent to which easements are cre-

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ated within units or the common elements. To the extent any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists, although the easement does not relieve a unit owner of liability in case of willful misconduct or relieve any person of liability for failure to adhere to plats and plans.²⁷ Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging a declarant's obligations or exercising special declarant rights.²⁸

With certain specific exceptions stated elsewhere in the Act, a declaration may be amended only by vote or agreement of unit owners of units to which at least 67% of the votes in the association are allocated or any larger majority specified in the declaration.²⁹ However, the declaration may specify a smaller number if all of the units are restricted exclusively to nonresidential use. This is one of the several examples in the KCA in which a distinction is drawn between residential and nonresidential use of a condominium. Any action to challenge the validity of an amendment adopted pursuant to this section must be brought within a year after the amendment is recorded.³⁰ Finally, except to the extent expressly permitted or required by other provisions, no amendment to a declaration that creates or increases special declarant rights, increases the number of units, changes the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted shall be effective unless unanimously approved by the unit owners.³¹

A condominium may be terminated by agreement of unit owners to which at least 80% of the votes in the association are allocated.³² A declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.³³ Although terminations of condominiums occur infrequently, the legislation includes specific provisions regarding the rights, duties and obligations of unit owners, the association and mortgagees in the event of a proposal to terminate a condominium as well as

upon the termination of a condominium.

The KCA recognizes the existence of professional organizations that manage multiple condominiums, and provides that the provisions applicable to any unit owners' association apply equally to any such professional management organizations except as otherwise provided in the legislation.³⁴

The KCA also creates a statutory framework for the merger of two or more condominiums into a single condominium.³⁵

The KCA includes numerous provisions regulating condominium associations. As an initial matter, unless otherwise stated in the declaration, a unit owners' association shall be organized no later than the date the first unit is conveyed.³⁶ The membership of the association must at all times consist exclusively of all of the unit owners.³⁷ The association may be organized as a for-profit or nonprofit corporation or as an unincorporated association.³⁸ Section 34 includes the specific powers of the association. The declaration may alter the statutory powers of an association, but it may not impose limitations on the power of the association to deal with the declarant that are more restrictive than the limitations imposed on the power of the association to deal with other persons. The legislation empowers an association to impose an emergency assessment against a unit for the specific reasons set forth in the legislation, subject to approval by a simple majority of unit owners present at a special meeting of unit owners called for the purpose of approving the emergency assessment.

The legislation provides that, except as provided in the declaration, the bylaws or subsection (2) of Section 35, the executive board of the association may act in all instances on behalf of the association.³⁹ The officers and members of the executive board are held to a standard of ordinary and reasonable care in the performance of their duties.⁴⁰ One of the most important duties of an executive board is to adopt an annual budget for the condominium. Section 46 requires that once a common expense assessment has been made by the association, assessments must be made at

least annually based upon the budget. The executive board must provide a summary of the proposed budget to all unit owners within 30 days of adoption and must schedule a meeting of unit owners to consider its ratification upon not less than 14 days and not more than 30 days after the summary is circulated.⁴¹ In the interest of ensuring that budgets are formulated for condominiums, a budget formulated by an executive board shall be deemed ratified at a meeting of unit owners, whether or not a quorum is present, unless at the meeting at least a majority of the unit owners reject the budget. If rejected, the last budget ratified by the unit owners shall be continued until such time as the unit owners ratify a new budget.

The declaration may provide for a period of declarant control of the association, which must terminate no later than the earlier of any of four defined events.⁴² Unit owners have the right to elect members of the executive board during the period of declarant control.⁴³ The executive board shall elect association officers. Any member of the executive board elected by the unit owners may be removed by the unit owners, with or without cause, by a two-thirds vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present.⁴⁴ Given that a quorum can exist at a meeting of the association if persons entitled to cast 20% of the votes which may be cast for election of the executive board are present at the meeting either in person or by proxy,⁴⁵ the legislation creates a very low threshold for the removal of any member of the executive board elected by the members.

Section 36 of the KCA sets forth provisions governing the creation, exercise, transfer and termination of special declarant rights, which are defined in this section.⁴⁶ These provisions are very detailed and should provide a great deal of guidance to all parties having an interest in a condominium in which the declarant has created special declarant rights.

The Act details certain matters that must be addressed in the bylaws.⁴⁷

With certain exceptions, the associa-

tion is responsible for the maintenance, repair and replacement of the common elements, and each unit owner is responsible for the maintenance, repair and replacement of his or her unit.⁴⁸

A meeting of the members of the association must be held at least once a year, and the Act specifies the manner in which the annual or any special meeting of the members shall be called.⁴⁹ The KCA defines quorum of the association and the executive board⁵⁰ and specifies the manner in which the vote appurtenant to each unit is to be cast including through the use of a proxy.⁵¹

Neither the association nor any unit



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owner except the declarant shall be liable for the declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain.⁵² Further, the legislation provides that an action alleging a wrong done by the association must be brought against the association and not against the unit owner.⁵³ In addition, any statute of limitation affecting the association's right of action is tolled until the period of declarant control terminates.⁵⁴

The legislation sets forth the circumstances in which the common elements of a condominium may be conveyed or subjected to a lien or security interest by the association.⁵⁵ Again, a distinction is drawn between residential and nonresidential condominiums in terms of the percentage of unit owner approval required in order for an association to validly convey or encumber common elements.

An association is required to maintain property insurance on the common elements and liability insurance.⁵⁶ If any such insurance is not reasonably available, the association is obligated to immediately inform the unit owners of such fact. The Act lists the requirements for insurance obtained by the association. With certain exceptions, the association is obligated to use any insurance proceeds received due to casualty loss to repair or replace the portion of the condominium that has been damaged or destroyed.⁵⁷ Section 44 includes other important provisions governing insurers which issue insurance policies subject to the provisions of the KCA and the disposition of insurance proceeds including a provision that prohibits an insurer from canceling or refusing to renew an issued insurance policy until 30 days after notice of the proposed cancellation or nonrenewal has been mailed to the association, each unit owner, and each mortgagee to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

The KCA continues existing law by permitting the association to make common expense assessments against the unit owners.⁵⁸ The association shall have a lien on a unit for any assessment levied against that unit or fines imposed

against its unit owner from the time the assessment or fine becomes due.⁵⁹ The lien may be foreclosed in the same manner as mortgages on real estate. The lien for assessments does not have priority over existing liens or governmental liens. However, the recordation of the declaration constitutes record notice and perfection of the lien, and no further recordation of any claim of lien for an assessment shall be required.⁶⁰ The lien will be extinguished unless proceedings to enforce the lien are instituted within five years after the full amount of the assessments becomes due, and a judgment or decree in any action to enforce the lien shall include costs and reasonable attorneys' fees for the prevailing party. The association is not precluded from taking a deed to the unit in lieu of foreclosure to recover the amounts secured by the lien. An association is obligated to provide a unit owner within 10 days after request a recordable statement setting forth the amount of unpaid assessments against his or her unit, which statement shall be binding upon the association, the executive board and every unit owner.⁶¹

The KCA includes provisions dealing with money judgments against a condominium. Specifically, except as provided in subsection (2) of Section 48, a judgment for money against the association, if recorded, shall not be a lien on the common elements but shall be a lien in favor of the judgment lienholder against all of the units at the time the judgment is entered.⁶² The exception is that, if the association has granted a lien or security interest in the common elements to a judgment creditor of the association, the holder of the lien or security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced. Section 48 also clarifies that a unit owner of a unit subject to a judgment lien that encumbers other units may obtain a release of his or her unit from the judgment lien by paying the proportionate amount secured by the judgment lien.

The KCA provides that the association must keep financial records sufficiently detailed to enable the association and its unit holders to comply

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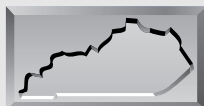
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with the provisions of Section 52 of the Act.⁶³ All financial and other records of the association must be made reasonably available for examination by any unit owner or his or her authorized agents.⁶⁴

Within 10 days after request by a unit owner, an association must furnish a certificate to the unit owner containing the information needed by the unit owner to comply with subsection (1) of Section 52.⁶⁵ The seller of a unit is obligated to furnish to the purchaser of the unit upon request and before the execution of any contract for sale of the unit a copy of the declaration, other than the plats and plans, and a copy of the bylaws, the rules or regulations of the association, and a certificate containing certain information including condominium expenses and financial information.⁶⁶

A unit owner providing the certificate to a purchaser shall not be liable to the purchaser for any erroneous information provided by the association. Also, a unit owner shall not be liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the sales contract is voidable by the purchaser until the certificate has been provided and for five days thereafter or until the conveyance, whichever first occurs. The certificate must also be prepared or delivered in other circumstances set forth in the Act. A declarant is obligated to have any real estate being conveyed to an association released from all liens that, upon foreclosure, would deprive unit owners of any right of access to or easement of support for their units.⁶⁷

KRS 381.865 was amended to provide that the association's books and records shall be audited or reviewed at least once a year by an independent accountant.

The KCA represents a significant enlargement of the statutory framework governing condominiums, especially condominiums created after the effective date of the Act. To comply with the Act, it will be incumbent upon declarants and unit owners to create or resuscitate associations that will be proactive in the management of the condominium through its executive board. The legislation was drafted with the

intent and purpose of ensuring that condominiums in Kentucky are well-managed by informed unit owners, acting through the association and the executive board, but without imposing unreasonable and unnecessary requirements and restrictions that will deter this type of ownership. Time will tell whether the appropriate balance was achieved. ①

ENDNOTES

1. The Kentucky Horizontal Property Law (1962 Acts, ch. 205) is codified in KRS §§ 381.805-381.910. *See generally* John K. Skaggs, Jr. and Charles H. Erwin, *The Horizontal Property Law of Kentucky*, 51 Ky. L.J. 46 (Fall 1962).
2. 2010 Acts, ch. 97, sometimes the "Act" or "KCA".
3. In addition to wording changes that are typical in the adoption of a uniform act, a significant number of provisions in the uniform act were not included in the Act, including: 1-112; 1-114; 2-115; 3-105; 4-102 through -107; 4-110; 4-112 through -118; 4-120 and all of article 5.
4. KRS§381.9103(1), From January 1, 2011, the Kentucky Horizontal Property Law will not apply to newly created condominiums.
5. KRS§381.9103(2).
6. KRS§381.9103(3).
7. KRS§381.9129(2). The 2010 General Assembly generally repealed the Rule Against Perpetuities. *See* 2010 Acts, ch. 21, § 14;
8. KRS§381.9129(3).
9. KRS§381.9103(4).
10. KRS§381.9103(6).
11. KRS§381.9107.
12. KRS§381.9111.
13. KRS§§381.9105(7), (19).
14. KRS§381.9105(7).
15. KRS§381.9105(19).
16. KRS§381.9105(9).
17. KRS§381.9127.
18. KRS§381.9127(6).
19. KRS§381.9133.
20. KRS§381.9135.
21. KRS§381.9137.
22. KRS§381.9137(3)(b). While an association may be organized as a business corporation (§381.9165) and a business corporation may

elect to use cumulative voting for its directors (*see* KRS§271B.7-280), this prohibition on cumulative voting in the context of an association is intended to control.

23. KRS§§381.9141(1), (3).
24. KRS§381.9141(4).
25. KRS§381.9143.
26. KRS§§381.9145-381.9149.
27. KRS§381.9151.
28. KRS§381.9153.
29. KRS§381.9155.
30. KRS§381.9155(2).
31. KRS§381.9155(4).
32. KRS§381.9157. While the declaration of a residential condominium association may provide a voting threshold higher than 80%, it may not set one lower.
33. KRS§381.9157(1).
34. KRS§381.9161.
35. KRS§381.9163.
36. KRS§381.9165.
37. *Id.* Following a condominium's termination the association is made up of the former owners or their respective heirs and assigns. *Id.*
38. *Id.*
39. KRS§381.9169.
40. KRS§381.9169(1).
41. KRS§381.9169(3).
42. KRS§381.9169(4).
43. KRS§381.9169(6).
44. KRS§381.9169(7).
45. KRS§381.9179(1).
46. KRS§381.9171.
47. KRS§381.9173.
48. KRS§381.9175.
49. KRS§381.9177.
50. KRS§381.9179.
51. KRS§381.9181.
52. KRS§381.9183(1).
53. KRS§381.9183(2).
54. KRS§381.9183(5).
55. KRS§381.9185.
56. *Id.*
57. KRS§381.9187.
58. KRS§381.9191.
59. KRS§381.9193.
60. KRS§381.9193(4).
61. KRS§381.9193(8).
62. KRS§381.9195.
63. *Id.*
64. KRS§381.9197.
65. KRS§381.9203(2).
66. KRS§381.9203(1).
67. KRS§381.9205.