

# The Kentucky Condominium Act (Part II)

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## II. KENTUCKY CONDOMINIUM ACT: CONDOMINIUM ASSOCIATIONS

THE Kentucky Condominium Act<sup>2</sup> includes numerous provisions regulating condominium associations. As an initial matter, the Act provides that, unless otherwise stated in the declaration, a unit owner's association shall be organized no later than the date the first unit in the condominium is conveyed.<sup>3</sup> The membership of the association must at all times consist exclusively of all of the unit owners.<sup>4</sup> The association may be organized as a for-profit or nonprofit corporation or as an unincorporated association.<sup>5</sup> The KCA sets forth the default powers of the association, which powers may be varied by the declaration.<sup>6</sup> The enumerated powers of the association are very broad and inclusive. As noted above, the declaration may alter the statutory powers of an association, but the Act specifically provides that the declaration 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 KCA also empowers an association to impose an emergency assessment against a unit for the specific reasons set forth in the Act, subject to approval of the emergency assessment 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 Act provides that, "except as provided in the declaration, the bylaws, or subsection (2) of KRS 381.9169, the executive board of the association may act in all instances on behalf of the association."<sup>7</sup> The officers and

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<sup>2</sup> Referred to herein as the "Act" or "KCA."

<sup>3</sup> KY. REV. STAT. ANN. § 381.9165 (2010 Ky. Acts 1666).

<sup>4</sup> *Id.* Following a condominium's termination the association is made up of the former owners or their respective heirs and assigns. *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> KY. REV. STAT. ANN. § 381.9167 (2010 Ky. Acts 1666–1667).

<sup>7</sup> KY. REV. STAT. ANN. § 381.9169 (2010 Ky. Acts 1667–1668).

members of the executive board are held to a standard of “ordinary and reasonable care” in the performance of their duties.<sup>8</sup> One of the most, if not the most, important duty of an executive board is to adopt an annual budget for the condominium. Once a common expense assessment has been made by the association, assessments must be made at least annually and be based upon a budget adopted at least annually by the association.<sup>9</sup>

If the executive board adopts a proposed budget, the executive board must “provide a summary of the budget to all unit owners within thirty days of adoption” and must schedule a meeting of unit owners to consider ratification of the budget upon not less than fourteen days and not more than thirty days after the summary has been provided.<sup>10</sup> However, in the interest of ensuring that budgets are formulated for condominiums, the Act provides that 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 a majority of all of the unit owners, or any larger vote specified in the declaration, reject the budget.<sup>11</sup> If the proposed budget is rejected, the last budget “ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.”<sup>12</sup>

The declaration may provide for a period of declarant control of the association, but the period of declarant control must terminate no later than the earlier of:

- (a) Sixty days after conveyance to non-declarant unit owners of seventy-five percent of the units which may be created;
- (b) Two years after all declarants have ceased to offer units for sale in the ordinary course of business;
- (c) Two years after any development right to add new units was last exercised; or
- (d) Seven years after the first unit was conveyed to a unit owner other than a declarant.<sup>13</sup>

In addition, “a declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination” of control subject to the right to retain approval rights over the actions of the executive board for the duration of the period of declarant control.<sup>14</sup> Unit owners have the right to elect members of the executive board during the period of declarant control. Specifically, not later than

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8 KY. REV. STAT. ANN. § 381.9169(1) (2010 Ky. Acts 1667–1668).

9 KY. REV. STAT. ANN. § 381.9191 (2010 Ky. Acts 1673–1674).

10 KY. REV. STAT. ANN. § 381.9169(3) (2010 Ky. Acts 1668).

11 *Id.*

12 *Id.*

13 KY. REV. STAT. ANN. § 381.9169(4) (2010 Ky. Acts 1668).

14 *Id.*

sixty days after twenty-five percent of the units have been conveyed by the declarant, at least one and not less than twenty-five percent of the members of the executive board shall be elected by the unit owners other than the declarant.<sup>15</sup> Further, not later than sixty days after fifty percent of the units have been conveyed by the declarant, the required number of members of the executive board elected by the unit owners increases to not less than one-third of the members of the executive board.<sup>16</sup> Finally, “not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, a majority of whom shall be equity owners or owners of equity interests in units.”<sup>17</sup>

The executive board elects the officers of the association. 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.”<sup>18</sup> Given that a quorum can exist at a meeting of the association if persons entitled to cast twenty percent of the votes which may be cast for election of the executive board are present at the meeting either in person or by proxy,<sup>19</sup> the Act creates a very low threshold for the removal of any member of the executive board elected by the members.

The creation, exercise, transfer, and termination of special declarant rights are addressed.<sup>20</sup> Special declarant rights are defined as rights reserved for the benefit of a declarant to:

- (a) Complete improvements indicated on plats and plans filed with the declaration;
- (b) Exercise any development rights;
- (c) Maintain sales offices, management offices, signs advertising the condominium, and models;
- (d) Use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium;
- (e) Make the condominium part of a larger condominium or a planned community;
- (f) Make the condominium subject to a master association; or
- (g) Appoint or remove any officer of the association, master association, or any executive board member during any period of declarant control.<sup>21</sup>

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

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<sup>15</sup> *Id.*

<sup>16</sup> KY. REV. STAT. ANN. § 381.9169(5) (2010 Ky. Acts 1668).

<sup>17</sup> KY. REV. STAT. ANN. § 381.9169(6) (2010 Ky. Acts 1668).

<sup>18</sup> KY. REV. STAT. ANN. § 381.9169(7) (2010 Ky. Acts 1668).

<sup>19</sup> KY. REV. STAT. ANN. § 381.9179(1) (2010 Ky. Acts 1670–1671).

<sup>20</sup> KY. REV. STAT. ANN. § 381.9171 (2010 Ky. Acts 1668–1670).

<sup>21</sup> KY. REV. STAT. ANN. § 381.9105 (2010 Ky. Acts 1656).

declarant has created special declarant rights.

The Act details certain matters that must be addressed in the bylaws, namely:

- (a) The number of members of the executive board and the titles of the officers of the association;<sup>22</sup>
- (b) Election by the executive board of a president, treasurer, secretary, and any other officers of the association the bylaws specify;
- (c) The qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;
- (d) Which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;
- (e) Which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and
- (f) The method of amending the bylaws.<sup>23</sup>

With certain enumerated exceptions, “the association 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.”<sup>24</sup>

A meeting of the members of the association must be held at least once a year; the statute specifies the manner in which the annual or any special meeting of the members shall be called.<sup>25</sup> There is defined what will be a quorum of the association and the executive board,<sup>26</sup> and there is specified the manner in which the vote appurtenant to each unit is to be cast including through the use of a proxy.<sup>27</sup>

“Neither the association nor any unit owner except the declarant shall be liable for that declarant’s torts in connection with any part of the condominium which that declarant has the responsibility to maintain.”<sup>28</sup> Further, the KCA provides that “an action alleging a wrong done by the

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22 Irrespective of whether the association is organized as a corporation, an LLC or otherwise, it must designate a “president,” a “treasurer” and a “secretary.” KY. REV. STAT. ANN. § 381.9173(1)(b) (2010 Ky. Acts 1670). If the association is organized as a business or nonprofit corporation, the president and the treasurer need to be listed on the annual report as “other principal officers.” *See* KY. REV. STAT. ANN. § 14A.6-010(1)(d)(i) (West 2010).

23 KY. REV. STAT. ANN. § 381.9173(1)(a)–(f) (2010 Ky. Acts 1670).

24 KY. REV. STAT. ANN. § 381.9175 (2010 Ky. Acts 1670).

25 KY. REV. STAT. ANN. § 381.9177 (2010 Ky. Acts 1670). An annual or a special meeting requires ten days notice; *accord* KY. REV. STAT. ANN. § 271B.7-050(1) (West 2010). All meeting notices must provide information as to the topics to be addressed. *Contra* KY. REV. STAT. ANN. § 271B.7-050(2) (West 2010) (no notice of the topics to be addressed required for annual meeting of the shareholders). If the association is organized as a corporation, the Act’s requirement of a notice of the topics to be addressed at the annual meeting will control.

26 KY. REV. STAT. ANN. § 381.9179 (2010 Ky. Acts 1670–1671).

27 KY. REV. STAT. ANN. § 381.9181 (2010 Ky. Acts 1671).

28 KY. REV. STAT. ANN. § 381.9183(1) (2010 Ky. Acts 1671).

association [must] be brought against the association and not against [the] unit owner.”<sup>29</sup> In addition, “any statute of limitation affecting the association’s right of action ... is tolled until the period of declarant control terminates.”<sup>30</sup>

The Act 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.<sup>31</sup> 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.<sup>32</sup>

#### A. Insurance

An association is required to maintain, to the extent reasonably available, property insurance on the common elements and liability insurance.<sup>33</sup> If such insurance is not reasonably available, the association is obligated to immediately inform the unit owners of such fact. All insurance obtained by the association shall provide that:

- (a) Each unit owner is an insured person under the policy with respect to liability arising out of his or her interest in the common elements or membership in the association;
- (b) The insurer waives its right to subrogation under the policy against any unit owner or member of his or her household;
- (c) No act or omission by any unit owner, unless acting within the scope of his or her authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and
- (d) If, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association’s policy provides primary insurance.<sup>34</sup>

The association is obligated to use any insurance proceeds received with respect to a casualty loss to repair or replace the portion of the condominium that has been damaged or destroyed unless:

- (a) The condominium is terminated;
- (b) Repair or replacement of the condominium would be illegal under any state statute or local health or safety ordinance; or

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<sup>29</sup> KY. REV. STAT. ANN. § 381.9183(2) (2010 Ky. Acts 1671).

<sup>30</sup> KY. REV. STAT. ANN. § 381.9183(5) (2010 Ky. Acts 1671).

<sup>31</sup> KY. REV. STAT. ANN. § 381.9185 (2010 Ky. Acts 1671–1672).

<sup>32</sup> For residential projects the required threshold is eighty percent while for nonresidential it is the percentage (which may be less than eighty percent) set forth in the declaration. *See id.*

<sup>33</sup> KY. REV. STAT. ANN. § 381.9187 (2010 Ky. Acts 1672–1673).

<sup>34</sup> KY. REV. STAT. ANN. § 381.9187(3) (2010 Ky. Acts 1672).

(c) Eighty percent of the unit owners, including every owner of a unit or assigned limited common element which will not be rebuilt, vote not to rebuild.<sup>35</sup>

Section 44 includes other important provisions governing insurers which issue insurance policies subject to the provisions of the Kentucky Condominium Act 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 non-renewal 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 know addresses.<sup>36</sup>

### *B. Assessments*

The KCA continues existing law by permitting the association to make common expense assessments against the unit owners.<sup>37</sup> First, “until the association makes a common expense assessment, the declarant [must] pay all common expenses.”<sup>38</sup> Second, “after any assessment has been made by the association, assessments shall be made at least annually and based on a budget adopted at least annually by the association.”<sup>39</sup> Third, except for certain specific exceptions noted below, “common expenses shall be assessed against all the units in accordance with the allocation[]” of the undivided interests in the common elements and in the common expenses of the association as set forth in the declaration.<sup>40</sup> Fourth, the association has the right to charge interest on delinquent assessments at a rate “not exceeding eighteen percent per year.”<sup>41</sup> Fifth, to the extent required by the declaration, “[a]ny common expense associated with the maintenance, repair, or replacement of a limited common element shall be assessed against the units to which that limited common element is assigned, equally or in any other proportion” provided in the declaration; “any common expense or portion thereof benefiting fewer than all of the units shall be assessed exclusively against the units benefited;” and “the costs of insurance shall be assessed in proportion to risk and the costs of utilities shall be assessed in proportion to usage.”<sup>42</sup> Sixth, “[a]ssessments may be made to pay a judgment against the association and, if made, shall only be

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35 KY. REV. STAT. ANN. § 381.9187(7)(a) (2010 Ky. Acts 1673).

36 KY. REV. STAT. ANN. § 381.9187(6) (2010 Ky. Acts 1673).

37 KY. REV. STAT. ANN. § 381.9191 (2010 Ky. Acts 1673–1674).

38 KY. REV. STAT. ANN. § 381.9191(1) (2010 Ky. Acts 1673–1674).

39 *Id.*

40 KY. REV. STAT. ANN. § 381.9191(2) (2010 Ky. Acts 1673–1674).

41 *Id.*

42 KY. REV. STAT. ANN. § 381.9191(3)(a)-(c) (2010 Ky. Acts 1673–1674).

made against the units in the condominium at the time the judgment was entered, in proportion to their common expense liabilities.”<sup>43</sup> Seventh, “if any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his or her unit.”<sup>44</sup>

“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.”<sup>45</sup> The lien “may be foreclosed in [the same] manner as mortgages on real estate.”<sup>46</sup> The lien shall take priority over all other liens and encumbrances on a unit other than:

- (a) Liens and encumbrances recorded before the recordation of the declaration;
- (b) Any mortgage on the unit recorded before the date on which the assessment secured by the lien became delinquent; and
- (c) Liens for real estate taxes and other governmental assessments or charges against the unit.<sup>47</sup>

Clearly, the lien for assessments does not have priority over existing liens or governmental liens. However, the legislation makes clear that the recordation of the declaration constitutes record notice and perfection of the lien, and “no further recordation of any claim of lien for assessment shall be required.”<sup>48</sup> 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,”<sup>49</sup> and a judgment or decree in any action to enforce the lien “shall include costs and reasonable attorneys’ fees for the prevailing party.”<sup>50</sup> The lien is recourse to the unit owner, given that the KCA does not prohibit the association from bringing an action or suit against the unit owner to recover the amounts secured by the lien. The association is also 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 ten 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.<sup>51</sup>

The KCA includes provisions dealing with money judgments against a condominium. Specifically, the Act provides that, except in subsection (2)

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43 KY. REV. STAT. ANN. § 381.9191(4) (2010 Ky. Acts 1673–1674).

44 KY. REV. STAT. ANN. § 381.9191(5) (2010 Ky. Acts 1673–1674).

45 KY. REV. STAT. ANN. § 381.9193 (2010 Ky. Acts 1674–1675).

46 KY. REV. STAT. ANN. § 381.9193(1) (2010 Ky. Acts 1674).

47 KY. REV. STAT. ANN. § 381.9193(2) (2010 Ky. Acts 1674).

48 KY. REV. STAT. ANN. § 381.9193(4) (2010 Ky. Acts 1674).

49 KY. REV. STAT. ANN. § 381.9193(5) (2010 Ky. Acts 1673–1674).

50 KY. REV. STAT. ANN. § 381.9193(7) (2010 Ky. Acts 1674).

51 KY. REV. STAT. ANN. § 381.9193(8) (2010 Ky. Acts 1674–1675).

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 in the condominium at the time the judgment was entered.”<sup>52</sup> The exception is that, “[i]f the association has granted a lien or security interest in the common elements to a [judgment] creditor of the association, . . . the holder of that lien or security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.”<sup>53</sup> Section 48 also clarifies that a unit owner of 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.<sup>54</sup>

### C. *Financial Records and Disclosure to Purchasers*

The KCA provides that the association must keep financial records sufficiently detailed to enable the association and its unit holders to comply with the provisions of Section 52 of the Act.<sup>55</sup> All financial and other records of the association must be made reasonably available for examination by any unit owner or his or her authorized agent.<sup>56</sup>

Within ten 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.<sup>57</sup> 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” the following information:

- (a) A statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit;
- (b) A statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently

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52 KY. REV. STAT. ANN. § 381.9195 (2010 Ky. Acts 1675).

53 KY. REV. STAT. ANN. § 381.9195(2) (2010 Ky. Acts 1675).

54 KY. REV. STAT. ANN. § 381.9195 (3) (2010 Ky. Acts 1675).

55 KY. REV. STAT. ANN. § 381.9195(2) (2010 Ky. Acts 1675).

56 KY. REV. STAT. ANN. § 381.9197 (2010 Ky. Acts 1675). It is intended that the right of inspection, in accordance with the common law, be understood to include a right to copy. *See, e.g.*, 18A AM. JUR. 2D *Corporations* § 338; 5A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2241 (“The right of a shareholder to make copies, abstracts and memoranda of documents, books and papers is an incident to the right of inspection, being recognized at common law.” (citations omitted)); *Mickman v. Am. Int’l Processing, L.L.C.*, No.3869-VCP, 2009 WL 2244608 (Del. Ch. July 28, 2009); *Delaware ex rel. Brumley v. Jessup & Moore Paper Co.*, 77 A. 16, 19–20 (Del. 1910); *Kaufman v. The Bryn Mawr Trust Co.*, 1981 WL 394, at \*4 (Pa. Ct. Com. Pl. Sept. 30, 1981).

57 KY. REV. STAT. ANN. § 381.9203(2) (2010 Ky. Acts 1676).



- due and payable from the selling unit owner;
- (c) A statement of any other fees payable by unit owners;
- (d) A statement of any capital expenditures anticipated by the association for the current and, if known, the next 2 fiscal years;
- (e) A statement of the amount of any reserves for capital expenditures, if any, and of any portions of those reserves designated by the association for any specified projects;
- (f) The most recent regularly prepared balance sheet and income and expense statement, if any, of the association;
- (g) The current operating budget of the association;
- (h) A statement of any unsatisfied judgments against the association and the status of any pending suits in which the association is a defendant;
- (i) A statement describing any insurance coverage provided for the benefit of unit owners; and
- (j) If any portion of the condominium is situated upon a leasehold estate, a statement of the remaining term of any leasehold estate affecting the condominium and the provisions governing any extension or renewal thereof.<sup>58</sup>

A unit owner providing the foregoing certificate to a purchaser shall not be liable to the purchaser for any erroneous information provided by the association and included in the certificate. 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.<sup>59</sup>

The certificate must also be prepared or delivered in the case of:

- (a) A gratuitous disposition of a unit;
- (b) A disposition pursuant to a court order;
- (c) A disposition by a government or governmental agency;
- (d) A disposition by foreclosure or deed in lieu of foreclosure;
- (e) A disposition to a person in the business of selling real estate who intends to offer those units to purchasers; or
- (f) A disposition that may be canceled at any time and for any reason by the purchaser without penalty.<sup>60</sup>

This provision is an example of a departure from the Uniform Condominium Act. Under it, no disclosure document is required in the circumstances recited in KRS § 381.9203.<sup>61</sup>

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<sup>58</sup> KY. REV. STAT. ANN. § 381.9203(1) (2010 Ky. Acts 1676).

<sup>59</sup> KY. REV. STAT. ANN. § 381.9203(3) (2010 Ky. Acts 1676).

<sup>60</sup> *See* KY. REV. STAT. ANN. §§ 381.9201(2)(a)–(f) (2010 Ky. Acts 1675–1676). Under the Uniform Condominium Act, the disclosure statement is not required in the event of the transfers listed in KRS §§ 381.9201(a)–(f). *See* UNIF. CONDO. ACT § 4-101(b), 7 U.L.A. 485 (1980).

<sup>61</sup> *See* UNIF. CONDO. ACT § 4-101(b), 7 U.L.A. 485 (1980).

*D. Release of Declarant Conveyed Property*

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.”<sup>62</sup>

*E. Audit or Review of Association Records*

KRS 381.865 was also amended pursuant to the Kentucky Condominium Act.<sup>63</sup> KRS 381.865 previously provided that the books and records required to be maintained by the administrator, board of administration, or other appointed person of an existing condominium must be kept in accordance with good accounting procedures and must be audited at least once a year by an auditor outside of the organization. As amended, KRS 381.865 now provides that such books and records shall be audited or reviewed at least once a year by an independent accountant outside of the organization. Audits can be expensive; by amending KRS 381.865, associations and executive boards will now have the option to have the books and records either audited or reviewed by an independent accountant. In either an audit or a review, the accountant must be independent.

CONCLUSION

The Kentucky Condominium Act 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, if already created, 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 real property ownership. Time will tell whether the appropriate balance was achieved.

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<sup>62</sup> KY. REV. STAT. ANN. § 381.9205 (2010 Ky. Acts 1676).

<sup>63</sup> KY. REV. STAT. ANN. § 381.865 (2010 Ky. Acts 1676–1677).