

# Navigating Ohio

## Condominium Issues



By William J. Mitchell

**W**hether the following script from *Seinfeld* is solely comedy or contains an element of truth, you will have to judge for yourself:

**Helen/Jerry's Mom** – Jerry, it was so nice of you to come down here on your father's birthday. You've helped take his mind off the condo elections.

**Jerry:** Oh, right. You can't run for condo president because you were impeached at the other condo.

**Morty/Jerry's Dad:** I was never impeached! I resigned!

**Helen:** Even so, the press would bury him!

**Jerry:** What press?

**Helen:** The condo newsletter, the Boca Breeze.

**Morty:** Pinko Commie rag.

**Elaine (talking to Jerry on the phone):** Hey, so Kramer's running for president of the condo?

**Jerry:** Yeah, it's all my father's doing.

**Jerry:** He wants to install Kramer in a puppet regime and then wield power from behind the scenes. Preferably from the sauna in the clubhouse.

**Elaine:** Who are they running against?

**Jerry:** Common sense and a guy in a wheelchair.

**Kramer (looking at the newsletter):** Hey, look at that. Picture of me, huh? (reading out loud) Candidate Cosmo Kramer caught barefoot in clubhouse.

**Morty:** Barefoot in the clubhouse? Don't you realize this is against the rules?

**Kramer:** Well, I couldn't find my shoes.

**Jerry:** Kramer, these people work and wait their whole lives to move down here, sit in the heat, pretend it's not hot, and enforce these rules.<sup>1</sup>

Condominium law presents a wide range of legal issues that extend beyond simply enforcing rules. The board of directors (typically through a management company), often working with its attorney, must navigate through issues involving bankruptcy, assessments, liens, foreclosures, leasing, maintenance, and amendments to the governing documents.

When it comes to rules violations and other disputes between the unit owner and the condominium association, Ohio law generally favors the association.<sup>2</sup> "The benefits of condominium living contemplate cooperation among unit owners. Restrictions adopted with the blessing of RC 5311.05 require an owner to surrender certain personal choices in the interest of the common purpose. Accordingly, an owner who unilaterally disrupts the general plan because he wants a change defeats the idea and purpose of condominium living."<sup>3</sup>

Courts are quick to point out that when the condominium owner purchases the property, he does so subject to the governing documents of the association.

The Ohio condominium statute specifically provides that all owners and occupants of condominium property

shall comply, not only with deed restrictions and restrictions found in the declaration and bylaws, but also with administrative rules and regulations. No owner should purchase a unit without realizing that he gives up some of his independence to the perceived need for conformity in a condominium development, and that the 'perception' of how much conformity is enough will be determined by someone else.<sup>4</sup>

### All In the Declaration

Most rights, duties, and obligations of the unit owner and the association are found in the recorded declaration. RC 5311.05 lays out the minimum contents of what the declaration must contain. It includes a legal description of the land and buildings, the name of the property, a description of the common elements, and the method of amendment. Should the declaration be silent, or ambiguous on an issue, the Ohio Revised Code has many specific sections contained in Chapter 5311 to fill in the gaps.<sup>5</sup>

All condominium property shall be administered by a unit owners association, through its board of directors.<sup>6</sup> The unit owners association shall be governed through bylaws.<sup>7</sup> The bylaws shall provide for the election of the board of directors, the time and place for holding meetings, the common expenses for which assessments may be made, and the procedure by which administrative rules governing the operation and use of the condominium property may be adopted.<sup>8</sup>

The code also establishes the powers and duties of the unit owners associa-



tion. The statute is clear that unless the declaration or bylaws state otherwise, the board of directors *shall* do the following:

1. Adopt and amend budgets, including reserves (the reserves shall be at least ten percent of the budget for that year); and
2. Collect assessments for common expenses.

However, unless otherwise provided in the declaration, the association, through the board of directors, *may* do the following:

1. Hire and fire managing agents and other professionals and contractors;
2. Commence, defend, intervene in, settle, or compromise legal proceedings;
3. Enter into contracts and incur liabilities relating to the condominium property;
4. Regulate the use and maintenance of the condominium property;
5. Adopt rules that regulate the use or occupancy of the units, the maintenance, repair, replacement, modification, and appearance of units and common elements;
6. Impose and collect fees for the use or rental of the common elements;
7. Impose interest and late charges for the late payment of assessments;
8. Adopt and amend rules that regulate the collection of delinquent assessments;
9. Enter a unit for bona fide purposes when conditions exist that involve an imminent risk of damage or harm to common elements, another unit, or to the health or safety of the occupants of that unit or another unit; and
10. Suspend the voting privileges and use of recreational facilities of a unit owner who is delinquent in the payment of assessments for more than thirty days.<sup>9</sup>

### Sticky Issues

One complication for associations involves the filing of bankruptcy by the unit owner. Although a chapter 13 filer will often remain liable for pre-bankruptcy condominium assessments (through the Chapter 13 Plan), most chapter 7 filers will be discharged from them. However, post-bankruptcy condominium assessments remain the obligation of most bankruptcy filers

should the unit owner not abandon the property. If the unit owner or trustee of the bankruptcy estate has an interest in the unit, then the condominium assessments will have to be paid. Specifically, under 11 U.S.C. §523 (a)(16), a discharge under chapter 7 or a chapter 13 does not discharge an individual debtor from any debt “for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor’s interest in a unit that has condominium ownership. . . for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit”.<sup>10</sup>

Maintenance issues can be another sticky issue. Defining who is responsible for maintenance isn’t often clear cut. If you ask most people, they will say the unit owner’s obligation is “paint in.” Finding the answer depends on determining if the item is part of the unit or common elements. Typically, the declaration will contain guidance on this issue. The definition of a unit will commonly be defined as being the undecorated interior surfaces of the perimeter walls and the unfinished surface of the lower floor and the unfinished interior surface of the ceiling of the upper floor all projected, if necessary by reason of structural divisions such as interior walls and partitions, to constitute a complete enclosure of space, and all improvements within that space.<sup>11</sup>

Unfortunately, Ohio law does not define what constitutes a unit. Thus, the parties must rely on the declarations, which can vary considerably when it comes to such definitions. As with most condominium issues, it is always best to review the relevant portion of the declaration in detail to assist in determining where the unit ends and the Common Elements begin.

For those unit owners that are frustrated with a portion of the declaration,

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they will sometimes attempt to amend the declaration. This is typically a daunting task. Generally, amendments must be approved by the affirmative vote of those owners exercising at least 75% of the voting power.<sup>12</sup> Attempts at amendments are more common place in homeowner associations because there are more exterior issues involved, such as pools, sheds and fences.

A typical amendment in recent years has been to restrict rentals. Those amendments typically “grandfather” any current leases, but prohibit new leases in the future. At least one Ohio court has ruled that such an amendment to the declaration was not, per se, unreasonable.<sup>13</sup>

### What About Foreclosure?

The inescapable issue for all condominium associations is dealing with unit owners that don’t pay their monthly assessments. As with mortgage delinquencies, there has been a steady increase in condominium owners falling behind in the payment of their monthly dues. Although fees vary widely, an average range in greater Cincinnati is somewhere between \$130 to \$200 per month. Because the condominium assessments are almost always due monthly, the association cannot afford to sit idly by and do nothing as the delinquent account continues to increase each month.

As such, the association has to act quickly. The first step typically involves sending the unit owner a notice of delinquency according to the association's collection policy. Second, the unit owner will normally receive a notice that the matter will be turned over to the association's attorney for placement of a lien. Should these notices prove unsuccessful, the association will typically file the lien.<sup>14</sup>


This is where the situation may become tricky. Oftentimes, the unit owner is also delinquent in the payment of their mortgage, which results in a foreclosure Complaint being filed by the lender. In this case, the association will be included in the foreclosure and can simply file a cross-claim, and allow the lender to do the heavy lifting.

However, this isn't always the case. Even in those situations where the lender files the foreclosure, it will sometimes modify its mortgage or place the foreclosure on hold for other reasons. Sometimes there is no mortgage, and the unit owner's only delinquency is to the association. Should the lender not proceed with the foreclosure, or never file a foreclosure in the first place, the association is put into a tough spot. The association certainly has the right to foreclose on its lien. However, this can be an expensive proposition.

The foreclosure proceedings are fairly regimented and time-consuming. Although the association may be awarded its attorney fees, in addition to the delinquent amount, the judgment is often not collectible. Of course the unit can be sold at Sheriff's sale, but will almost always be sold subject to the first mortgage.<sup>15</sup> Because the property normally has little or no equity, and will sell for much less than its true value, there are rarely any funds left from the Sheriff's sale to satisfy the judgment.

The upside of foreclosure is that it often provides the motivation necessary for the unit owner to satisfy the balance, or to at least enter into a satisfactory payment plan. Another advantage is that once the property is sold at Sheriff's sale, the association now has a new owner to pay monthly assessments moving forward. Finally, there are occasions where the lender will take the reins of the

foreclosure process once it is filed by the association.

Although there are many issues associated with condominium law, this brief overview should provide you some insight into the many complicated issues that arise when dealing with community associations. 

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1 *Seinfeld*. Dir. Andy Ackerman. NBC. Season 9, episode 15. February 26, 1998.

2 The association also has the authority to enforce these rules against tenants, through eviction proceedings. RC 5311.19(B)(1).

3 *Sprunk v. Creekwood Condominium Unit Owners' Ass'n.*, 60 Ohio App. 3d 52, 573 N.E.2d 197 (1<sup>st</sup> Dist. Hamilton County 1989).

4 Kenton L. Kuehnle with Charles T. Williams, Ohio Condominium Law 249 (2010).

5 Although this article is focused on Ohio condominium law, similar issues arise in traditional single-family homeowner associations. The Ohio legislature recently passed the "Ohio Planned Community Law", which became effective September 10, 2010. Prior to that, courts had to rely solely on the governing documents of the homeowners association to interpret legal issues, which often created gray areas in the non-condominium sphere. See RC 5312.

6 RC 5311.08(A)(1).

7 RC 5311.08(B).

8 RC 5311.08(B).

9 RC 5311.081(B). The list provided is not verbatim from the code, or all inclusive. There are other relevant sections that have not been listed.

10 In *Brambleton Community Ass'n v. Than* (2009), 2009 Va. Cir. LEXIS 118, 6, the court held that the 2005 Amendment to 11 U.S.C. §523(a)(16) stated that a HOA fee cannot be discharged "as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, . . . or such lot". In applying the amended code, the court set forth three requirements a homeowners' association must meet to be awarded post-petition HOA dues. They are: (1) the dues must constitute HOA or condominium dues, (2) the dues must become due or payable after the order for relief, and (3) the dues must accrue while the defendant holds a legal, equitable, or possessory ownership interest.

11 Kenton L. Kuehnle with Charles T. Williams, Ohio Condominium Law 21 (2010).

12 RC 5311.05(B)(10). However, RC 5311.05(E)(1) allows the board of directors to amend the declaration for certain purposes, such as to meet the requirements of mortgagees and insurance underwriters.

13 *Worthinglen Condominium Unit Owners' Ass'n v. Brown*, 57 Ohio App. 3d 73, 566 N.E.2d 1275 (10<sup>th</sup> Dist. Franklin County 1989).

14 RC 5311.18 discusses the association's lien upon the estate or interest of the owner in any unit, including interest, administrative fees, collection costs, and attorney fees.

15 Unsuccessful efforts have been made to pass a "super lien" law in Ohio that would give priority to the condominium for six months' worth of assessments. Similar laws exist in a handful of states.