

**A PRIMER ON
ALABAMA CONDOMINIUM LAW
-by-
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“Condominium” is a derivative of a Latin word meaning joint dominion or sovereignty. This presentation is addressed to the “condominium” form of ownership or estate in real property, which in Alabama is largely a creature of statute. *But see*, Ala. Code § 35-8A-102 (d) (1975) (1991 Act only applies to condo with four units or less if provided by declaration). According to the legislative history notes for Title 35, Chapter 8 of the Code of Alabama, the “Condominium Ownership Act,” which was Alabama’s first legislation on the subject dates to 1964.

Why talk about this now? It is no secret that the Alabama condo market hit the wall several years ago. In the past decade, a primary method of financing commercial real estate was through commercial mortgage-backed securities. In 2007 about \$230 billion of these securities were issued nationwide; that number was only \$12 billion in 2008. (Commercial Mortgage Alert, September, 2009). Condominium prices began their descent in the Gulf Shores market in 2006. Gulf Shores issued 1,807 multi-family building permits in 2005 and 1,733 multi-family permits in 2006. No multi-family permits were issued in 2009. Condominium unit resale prices between 2007 and 2009 declined an average of 62%, when compared to original sale prices.

Due to catastrophic hurricanes, the cost of maintaining and insuring beach properties has become almost untenable in many instances.

With all of the above being compounded by the recent economic crisis, lower Alabama has gone through a firestorm of developers unable to complete projects, contracted purchasers refusing to close, unit owners frozen by upside-down financing, and foreclosing lenders. Hard times have also put the spot-light on a fair amount of civil and criminal mortgage fraud, along with other species of cheating and stealing. While not universally the case, many of these disputes and issues spin into title and closing claims, as well as litigation against settlement agents.

A lot of us are older and wiser from hard experience. We now understand that many of the “condo experts” in good times were hardly that, and others who promised things (not backed up by documents) could not deliver. Nevertheless, there are thousands of condos on the market, and issuing and settlement agents will have to deal with these transactions.

What you are asked to insure.

Mississippi Valley is using a form of the ALTA 4.1—06 Condominium Endorsement to insure an estate or interest in a condominium. This endorsement insures against “loss or damage sustained by reason of”:

(1) The failure of the unit and its common elements to be part of a condominium as defined by statute.

(2) Statutory noncompliance of the condo documents, to the extent such failure affects the title to the unit and its common elements.

(3) Existing violations of restrictive covenants contained in the condo documents that restrict the use of the unit and its common elements, or which provide for a reversion of title.

(4) Due and unpaid condo charges and assessments.

(5) Failure of the unit and its common elements to be a separate tax parcel.

(6) Any obligation to remove improvements because of encroachments between units, or between a unit and the common elements.

(7) Failure of title because of an existing right of first refusal.

Alabama's statutory scheme for condominiums – 1964 and 1991.

It is first important to recognize that Alabama has two condominium acts. The “Condominium Ownership Act” has been in place since 1964, and may still apply to a condominium created before 1991. Ala. Code § 35-8A-102 (1975) (discussing applicability of 1991 Act).

If you are dealing with an older condominium, you should be aware that the 1964 Act will have application to any amendment of the declaration, bylaws, plats or plans. *Id.* Another trap for the unwary is that the termination provisions of the 1964 Act (which may require universal consent) are not identical to those in the 1991 Act. *See*, Ala. Code. § 35-8-20 (1975). There are other differences between the two acts, including how mortgages and other liens work.

Unless the developer opts in, the 1991 Act does not apply to a condominium with four units or less, without reserved development rights. Ala. Code § 35-8A-102 (1975).

The Alabama Uniform Condominium Act of 1991.

The 1991 Act is broken down into four sections: general provisions; creation, alteration and termination of condos; condo management; and, purchaser protection.

Again, if you are evaluating the title of a condo that was created before January 1, 1991, please look at Section 35-8A-102 to figure out which parts, of which act, apply.

Here is a brief synopsis of the 1991 Act:

Except as expressly provided by the 1991 Act, its provisions may not be varied by agreement. Ala. Code. § 35-8A-104 (1975).

After title to any unit passes from the declarant, each unit and its common elements is a separate parcel of real estate as well as a separate tax parcel. Ala. Code § 35-8A-105 (1975).

The 1991 Act displaces existing general principles of law only to the extent they are inconsistent with statutory provisions. Ala. Code. § 35-8A-108 (1975).

A condominium (to which the act applies) may be created only by filing a declaration with the judge of probate. Ala. Code § 35-8A-201 (1975).

A declaration or amendment “may not be recorded unless all structural components and mechanical systems of all buildings containing or comprising any

units thereby created are substantially completed ... as evidenced by a recorded certificate of completion.” Ala. Code § 35-8A-201 (d) (1975). (I can think of one “documented” project in Gulf Shores that is an aggregation of separate two-unit condos, with limited pre-sale construction despite recorded “as-built” drawings. Some of the “units” are still only dirt, while others have improvements that look nothing like the condo documents). Note on the other hand that a “subdivision” condominium of unimproved lots may be created, where the purchaser is free to build what he or she chooses. *Id.* at n.11.

“Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this chapter.” Ala. Code § 35-8A-203 (1975) (whether “substantial” failure impairs marketability is determined by applicable state law).

Section 35-8A-205 sets out what the declaration for a condominium must contain. There are 15 line items, so I will not list them here but will attach a copy of the code section. The declaration is a very important muniment of title to a condo unit.

The declaration must allocate to each unit a fraction of the undivided interests in the common elements, as well as provide for voting rights in the association. The common elements of a condominium are not subject to partition, and no portion of common elements may be transferred apart from the unit to which that portion is allocated. Ala. Code § 35-8A-207 (1975).

The declaration must also set out how each “limited common element” is allocated. Ala. Code. § 35-8A-208 (1975). A “limited common element” is for “the exclusive use of one or more but fewer than all of the units.” Ala. Code § 36-81-103(16) (1975).

Plats and plans are also part of the declaration, and may be combined in one document. Ala. Code § 35-8A-209 (1975). This section is also lengthy, so I will attach a copy instead of repeating all of the requirements.

The declaration must set out any development rights reserved by the declarant, and the exercise of development rights requires that the declarant record an amended declaration. Ala. Code § 35-8A-210 (1975).

The existing physical boundaries of a unit constitute the boundaries of the unit rather than the metes and bounds description expressed in a deed, plat or plan. Ala. Code § 35-8A-214 (1975).

Section 35-8A-217 sets out how declarations may be amended, and who may effect an amendment. Some amendments may be accomplished by the declarant or the association, while other amendments require a two-thirds or larger majority vote by the unit owners of their “association” voting rights. Note that all unit owners will not necessarily have the same voting rights, as voting rights are specified in the declaration. The specifics of how votes are cast (as in the case of multiple unit owners, etc.) are defined in Section 35-8A-310.

A condominium may be terminated by at least an 80 percent majority vote by the unit owners of their “association” voting rights. Ala. Code § 35-8A-218

(1975). This section sets out in detail how title is vested after termination, as well as how a sale can be effected.

Subparts (j) and (k) of Section 35-8A-218 deal with the consequences of foreclosure of liens or encumbrances against all or part of a condominium. The priority of pre-existing liens is preserved, and upon foreclosure, a non-consenting lienholder may exclude the foreclosed real estate from the condominium.

The powers of the unit owners' association are set out in Section 35-8A-302. These include the power to make and enforce assessments relating to the common elements and services provided to the unit owners. Upkeep expenses are also addressed in Section 35-8A-307.

Section 35-8A-306 deals with bylaws of the association, but bylaws are not title documents and need not be recorded.

The association is permitted to convey or mortgage portions of the common elements, upon the required percentage of affirmative votes in the association. Any agreement of the association must be ratified, in the same manner as a deed, by the requisite number of unit owners; the association is then empowered to execute the conveyance or encumbrance. Ala. Code. § 35-8A-312 (1975).

Section 35-8A-316 deals with the priority and enforcement of association liens. First mortgages on units generally have priority over assessments older than six months. Proceedings to enforce a lien must be commenced within three years. A purchaser or mortgagee may obtain a statement of what assessments are past due.

Section 35-8A-317 deals with judgment liens against an association, as well as mechanic's liens.

Before a declarant offers units for sale to the public, an offering statement must be prepared. Ala. Code §§ 35-8A-402 and -403 (1975). A purchaser who does not receive an offering statement may rescind the conveyance within seven days after first receiving the offering statement. Ala. Code § 35-8A-408 (1975). When a unit is resold, a purchaser may request from the selling unit owner a copy of the declaration, and the bylaws, rules or regulations of the association, along with a certificate from the association about assessments, fees, etc. Ala. Code § 35-8A-409 (1975). A (resale) purchaser may cancel within five days after receipt of the certificate, but not after closing.

Before selling a unit where the delivery of an offering statement is required, the seller must record required lien releases. Ala. Code. § 35-8A-411 (1975).

Except for improvements labeled "NEED NOT BE BUILT" the declarant shall complete all improvements depicted on any site plan, or the plats and plans. Ala. Code. § 35-8A-416 (1975). The sale of a unit where delivery of an offering statement is required may not close until the unit is substantially completed, as evidenced by a recorded certificate of substantial completion or by issuance of a certificate of occupancy. Ala. Code. § 35-8A-417 (1975).

Evaluating condominium titles.

Because there is little ongoing condominium development and construction, most of the title problems for existing projects have hopefully had

time to come to the surface. But as you can see, making a determination that all of the requirements to issue an ALTA 4.1 – 06 Endorsement have been cleared is not a simple matter. Insuring condominium units can involve relatively large policy amounts, while insuring developers and construction lenders has required multi-million dollar policies. Here are some of the problems that have come to light:

- Unpaid property acquisition debt resulting in unsatisfied vendor's liens and mortgages.

- Unreleased accommodation mortgages.

- Grantor and developer title and identity issues.

- Signature authenticity and authority issues.

- Survey issues.

- Issues relating to termination of existing condominiums for redevelopment.

- Mechanic's liens.

- Attempts to impose real estate broker liens.

- Incomplete and shoddily drafted condo documents.

- Projects that were never built as documented.

- Fraudulent gap liens.

- Bank and consumer fraud of all kinds.

- Rescission and other litigation by unhappy purchasers.

- Developer bankruptcies.

- Escrow and trust defalcations.

If there was a way for something to go wrong over the past five years, it has at least once. My hat is off to the diligent agents who have successfully navigated the rocks and shoals of condominium policy underwriting. But condominiums have been a trap for the unwary. In too many past instances, an issuing agent has not done enough to independently evaluate the title issues, but has banked on assurances from an “expert” involved in the transaction. Of course the “expert” was not there to help address problems after the transaction closed and the consequences have been painful.

In addition to all of the standard title issues, when insuring a condominium the issuing agent must determine that the declaration, plats and plans are in good order. Although not necessarily a title document, the association bylaws should exist. There should be evidence that the condo unit actually exists in most instances, and that liens are paid current. It may be helpful to prepare a condo underwriting checklist – Mississippi Valley has not published one at this time, but forms are available on the internet that can be adapted.

There is not a great volume of Alabama case law on condominiums, but the few cases that are reported point out areas where disputes can arise.

Alabama condo case law.

Reynolds v. Four Seasons Condominium Ass’n, Inc., 462 So. 2d 738 (Ala. 1984): Unit owners enclosed a patio that was part of the common elements. The doctrine of estoppel prevented the Association from requiring that the enclosure be

removed. The Association had purported to give permission in writing, and did nothing while construction was in progress.

Lee-Davis v. Dauphin Surf Club Ass'n, Inc., 581 So. 2d 1110 (Ala. 1991): Minerals were part of the common elements; title to minerals was in the association and the association had the right to lease.

Jubilee Landing Condominium Owners Ass'n, Inc. v. Jubilee Landing, Inc., 621 So. 2d 974 (Ala. 1993): The 1964 Act does not prohibit a developer from exempting itself from payment of expenses for the common elements, although the 1991 Act provides otherwise. The 1964 Act applied to this older condominium.

Dewitt Apparel, Inc. v. Four Seasons of Romar Beach Condominium Owners' Ass'n, 678 So. 2d 740 (Ala. 1996): In this case decided under the 1964 Act, foreclosure of a pre-declaration mortgage eliminated the foreclosed property from the condominium.

Robinson v. Evans, 959 So. 2d 634 (Ala. 2006): This case involves a dispute between unit owners over whether a condominium had been terminated. The 1964 Act applied and despite significant storm damage, the condominium could not be terminated without unanimous consent.

Mahoney v. Loma Alta Property Owners Ass'n, Inc., 4 So. 3d 1130 (Ala. 2008): The ex-spouse of the owner remained in possession of a condo unit. An Association can only collect assessments from a unit owner, and there is no implied contract for payment by a resident.

Holiday Isle, LLC v. Adkins, 12 So. 3d 1173 (Ala. 2008): Condominium purchasers sued for rescission of purchase agreements and to prevent the developer from drawing on letters of credit. The trial court ordered arbitration and issued a preliminary injunction. The Supreme Court reversed the preliminary injunction order based on the independence principle that applies to letters of credit.