Property Insurance
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Who Owns Common Elements

There are terms which we use every day as residents of condominium or multi-family units, often without complete knowledge of the definitions. For example, what is a common element and how is it distinguished from a limited common element? How do we determine who is responsible to pay for these “common” areas if we cannot even define them? This article will review the meaning behind these terms and the impact they have on condominium residents and multi-unit dwellings.

Definition of Terms

Illinois recognizes the Condominium Property Act, 765 ILCS 605/1, et seq., which specifically defines both common elements and limited common elements. “‘Common elements’ are all portions of the property except the units, including limited common elements unless otherwise specified.” 765 ILCS 605/2(e).

“‘Limited common elements’ means a portion of the common elements so designated in the declaration as being reserved for the use of certain unit or units to the exclusion of other units, including but not limited to balconies, terraces, patios, and parking spaces or facilities.” 765 ILCS 605/2(f) (emphasis added). Common elements, as used in the Condominium Property Act, include each and every portion of the property subject to declarations of common areas with the exception of individual units themselves. The fact that a subject parcel may be unilaterally characterized by different terminology in condominium declarations or provided separate legal descriptions and tax index numbers cannot change this determination, since the declaration of ownership cannot supersede the Act; it can only supplement it. Cambridge on the Lake Homeowners Association v. Hines, 116 Ill. App. 3d 63, 452 N.E.2d 37 (1st Dist. 1983). Common elements may also include fixtures located within the unfinished interior surfaces of the perimeter walls, floors and ceilings of the individual units initially installed by the developer. Generally, however, common elements exclude interior unit floor, wall, and ceiling coverings. See 765 ILCS 605/12(b).

The Basis for the Distinction

It is well-settled that an enclosure which gives to one unit-owner exclusive use and prevents all the other unit-owners from using common elements to which they previously had access diminishes the ownership interest of the others. 765 ILCS 605/4(e) expressly provides that once the percentage of ownership interest in the common elements has been determined and stated in the condominium declaration, that percentage remains constant absent a formal agreement by all unit-owners and amendment to the declaration as stated therein. See Huskey v. Board of Managers of Condominiums of Edelweiss, Inc., 297 Ill. App. 3d 292, 696 N.E.2d 753 (1998). The legislature deemed consent of all unit-owners necessary when changes are made in the percentage of common interest ownership in order to avoid unfairness to minority owners. Huskey, 297 Ill. App. 3d at 295. Common interest ownership goes to the essence of an owner’s property interest in the condominium. The
percentage of common interest ownership impacts the unit owner’s property taxes, the amount of annual and special assessments as well as the resale price of the unit. *Id.* at 295-96.

A condominium generally contains language granting each condominium unit-owner an undivided interest in the common elements and sets forth the express percentage therein. This ownership in common areas is generally held as tenant-in-common with the other unit-owners. Thus, the declaration sets forth the area owned by each unit and then uses that percentage to determine how much interest each unit owner then possesses “in common” with the others.

By definition, limited common elements are a subset of the common elements. Limited common elements are those portions of the common elements, such as patios and decks that are reserved for the exclusive use of the unit-owner whose property adjoins such elements. See *Lake Barrington Shore Condominium Ten Homeowners Assn. v. May*, 196 Ill. App. 3d 280, 553 N.E.2d 814 (2d Dist. 1990). By definition, a limited common area is not possessed by any one owner, but is an additional area for which they and only they have access. In effect, every limited common element is an encroachment on the common elements because it is reserved for the exclusive use of an individual. Designating areas as limited common elements for exclusive use of a single condominium unit diminishes the common elements and therefore diminishes the ownership interest of the alternate owners. To adopt any portion of a common area as a limited common area often requires an amendment to the declarations or such a designation may be deemed improper. Because the limited use of a once common area is made into a limited common area, the unit owners are no longer receiving their declared right to the ownership. Upon such a taking of common area and converting it into a limited common area, the law requires that the “new” limited user pay the additional expense for the use of this property whether through an additional tax payment or reimbursement to the other owners for the loss of use of the formerly common area.

An individual unit-owner’s undivided interest is deemed diminished if a use or easement is exclusive and as a result, the unit-owner was precluded from using a portion of the common elements to which he had previously had access. *Schaumburg State Bank v. Bank of Wheaton*, 197 Ill. App. 3d 713, 721, 555 N.E.2d 48 (1990). The exclusive use of common elements which were formerly designated as non-exclusive use portions diminished other owners’ interests in the common elements. In order to act in such a manner, a declaration must be amended to incorporate same. *Sawko v. Dominion Plaza One Condominium Ass’n No. 1-A*, 218 Ill. App. 3d 521, 578 N.E.2d 621 (1991).

**A Recent Decision**

On October 28, 2011, the Illinois appellate court, in the case *Picerno v. 1400 Museum Park Condominium Association*, 2011 Ill. App. (1st) 103505, weighed in on these issues. In that case, an owner of two corner condominium units at the end of a common element hallway brought a declaratory action asking the court to determine whether the owner has a right to incorporate eight feet of hallway into their units as a private foyer.

Specifically, the appellate court in *Picerno* found that the Illinois Condominium Property Act, 765 ILCS 605/4(e), mandates that once the percentage of ownership interest in the common elements has been determined and stated in the condominium declaration, that percentage remains constant absent agreement of all the unit owners. Thus, it was beyond the purview of the corner unit owners to change that declaration and take eight feet of common elements away from the other association members. The basis of the holding is that any changes made in the percentage of common interest of ownership may result in unfairness to minority owners, which is expressly prohibited by the Condominium Act. The *Picerno* court found that interpretation of the relevant condominium declaration in conjunction with the Illinois Condominium Act did not permit one owner to limit accessibility of a common element such as the hallway in question solely to themselves. Reviewing the corner unit owner’s intent to actually seal off or limit access to the condominium common elements including eight feet of hallway would, in effect, impact the ownership interest of the other tenants in the common elements and thus, was strictly prohibited. *Picerno*, 2011 Ill. App. (1st), ¶ 14.
The language of the 1400 Museum Park declaration stated “each owner shall own an undivided interest in the common elements as a tenant in common with all the other owners of the property. . . .” Id. Because all unit owners are bound to the terms of the condominium declaration, any attempt by a unit owner to convert an area of a common element to a limited common element without also amending the condominium declaration to legally provide for this new limited common element is improper. This would result in each of the other unit owners owning an undivided interest but having no access or right to control the newly formed limited common element. Thus, a correction to the condominium declaration is required to legally provide for the limited as opposed to the common use. Citing to Stuwe v. Lauletta, 93 Ill. App. 3d 1029, 1032, 418 N.E.2d 138, 141 (1981), the Picerno court noted “it is axiomatic that equity follows the law and cannot be invoked to destroy or supplant a legal right. It therefore follows that where the declaration establishes the rights inherent in unit ownership and provides for the procedures in order to effect an amendment to it, equity cannot aid in effecting what ought to have been done in contravention of the declaration particularly when other unit owners’ rights are involved.” Id. A condominium board or a member is without authority to grant exclusive use to one unit owner over and above what was previously a common element to which all unit owners previously had had access. Sawko v. Dominium Plaza One Condominium Ass’n No. 1-A, 218 Ill. App. 3d 521, 529, 578 N.E.2d 621, 627 (1991). There, the Sawko court held that “excluding the plaintiff from certain parking spaces was improper because it diminished his interest in the common elements and the declaration did not permit this to occur without the unanimous consent of all the condominium association members.” Sawko, 218 Ill. App. 3d at 530, 578 N.E.2d at 627, as relied upon by Picerno, 2011 Ill. App. (1st), ¶ 17.

Conclusion

For those who live in multi-unit buildings or condominium associations, the first thing any unit owner must do is obtain and review a copy of the condominium declaration. Only from these declarations can an owner make a determination as to what improvements they may be permitted to make upon their units. Further, the declarations, when read strictly in conjunction with the Illinois Condominium Act, must be followed in order to effectuate the required change. That there is “agreement” or the board has “voted” to make a change without following the letter of the law incorporating both the Illinois Condominium Act and the rules of the declarations may invalidate any use of property even if it is deemed equitable. Equity cannot amend either the Illinois Condominium Act or the condominium declarations. Only the law, followed strictly, can allow such amendments. To the extent that common elements have been transformed into limited common elements outside the declarations or the Act, there is potential for a revocation of that use and the damages which other unit owners may have suffered from their loss to the use of these elements in their capacity as joint tenants.

About the Author

Tracy E. Stevenson is a partner in the Chicago firm of Robbins, Salomon & Patt, Ltd., where she concentrates her practice in medical malpractice defense and insurance defense. She has defended cases on behalf of physicians and hospitals and represented various major insurance companies in claims involving fraud. Ms. Stevenson also represents corporations in litigation matters including TRO’s and shareholder actions. She is licensed in Michigan as well as Illinois and speaks at various seminars around the country.

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