

TITLE ISSUES

GROUND CONVEYANCE TOWNHOUSES

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Attached dwellings are currently a very popular type of construction appealing both to first time buyers, single and married, for economic reasons and to empty nesters. This is the townhouse form of construction. A townhouse is a single dwelling that constitutes only part of a building that includes at least two dwellings separated by party walls, each dwelling with its own outside entrance. Townhouses may be constructed as parts of duplexes, row houses or quad buildings (clusters of four attached homes, two on each side).

When a developer uses the townhouse form of construction for a project, it must choose an appropriate legal framework with which to organize and govern the rights and responsibilities of owners within the project. The developer may draft a Declaration of Condominium Ownership and organize and govern the development within the statutory framework provided by the Illinois Condominium Property Law. On the other hand, the developer may choose a more traditional form of legal organization for the project. In this context, "more traditional" means 1) that the developer will convey fee title to specified land to each buyer and not just certain air space within certain walls, floors and ceilings; the conveyance will include the townhouse structure, bordered by party walls, and all the unlimited vertical attributes of any other land conveyance; and 2) that access rights, party wall rights, and maintenance responsibilities will be governed by a Declaration of Covenants and Restrictions rather than by a statutory condominium declaration. In this article, this "more traditional" form of legal organization will be referred to as a ground conveyance townhouse.

Since they are identical in appearance, what is the difference between a condominium townhouse and a ground conveyance townhouse? In a townhouse condominium, the owner owns the dwelling unit, and everything outside the windows is common elements owned in common with all the other owners who make up the condominium association. In contrast, the owner of a ground conveyance townhouse owns the dwelling unit, the ground below it, the outside walls, and the roof and basement of his or her part of the building. Outside the unit's windows, the owner may own a portion of the yard and driveway. Or, the entire common area may be owned by the homeowners association. In any event, the owner's rights to use portions of the project outside the dwelling unit's windows that he or she may own is circumscribed by the terms and provisions of the Declaration. Thus, even exclusive ownership of these

areas may be subject to the rights of neighbors to object to or enjoin certain uses.

The difference between a condominium townhouse and a ground conveyance townhouse may be technical ownership rights and technical legal descriptions.¹ Yet, more than one developer insists there is a marketing advantage in selling ground conveyance townhouses. The general public is very familiar with the concept of condominium units in a high rise apartment building but may not grasp the concept of the condominium form of ownership for a townhouse. In any event, the ground conveyance townhouse will continue to be a popular form of ownership and title insurers can assist a developer in structuring the Declaration and initial conveyances.

From a title insurance perspective, the ground conveyance townhouse presents more issues at the onset than a condominium townhouse. These issues all relate to the description of the individual ownership interests. In condominium projects, a statutory condominium plat of survey renders any site, subdivided or unsubdivided, into two categories: common elements and units. The recording of that survey places those distinctions on the record. Each conveyance of a unit also includes a conveyance of a percentage interest in the common elements. When all the units have been conveyed, all of the common elements have also been conveyed. This is not true for the ground conveyance townhouse. There are no statutory guidelines for legal descriptions for ground conveyance townhouses and common areas which are not part of a condominium project. So the developer and its attorney have to develop the project from scratch. Since the Plat Act² will not allow small divisions of large unsubdivided tracts, a subdivision plat may be needed. The issue then becomes how can the land be platted in a subdivision to most effectively account for the eventual conveyances of the townhouses and later the common area.

A. DESCRIPTION AND ACCESS:

The most basic problem of ground conveyance townhouses is dividing the project area into what is to be conveyed to individual homeowners and what is to be conveyed at the end of the project to the association. The ultimate decision must satisfy marketing needs, the municipality, the county³ and the Title Insurance Company. The second problem is how to create easements which provide insurable access across the common area and to the individually owned townhouses.⁴ A good surveyor and continued communication between the surveyor,

the developer and the attorney is vital. A good declaration really cannot be drafted until the decision has been made as to how the townhouses will be described, what will constitute the common area and, if necessary, how the easements will be described to cross the common area.

The best solution appears to be a plat of subdivision which anticipates as much of the divisions as possible. Public or private streets will be depicted on the plat of subdivision which lead to large lot(s) in which smaller lots are located. The smaller lots are the locations in which each of the townhouse cluster buildings will be built. At the very least, the smaller lots are the footprint of the structure comprising a cluster of townhouses. Usually, however, those lots are slightly larger than the footprint of the structure; a rectangle which surrounds an irregularly shaped building. (fig. 1), or, each separate townhouse could be depicted as a separate lot. (fig. 2) Such a detailed plat of subdivision, however, has the disadvantage of requiring certainty of the location of the walls at the platting stage. If the wall between Lots 1-1 and 1-2 when built is located substantially east or west of the platted dividing line between said lots, then the legal descriptions for the townhouses in figure 2 become complex. For example if the wall is 5 feet West of that line, the West townhouse would have to be described as the West 25 Feet of Lot 1-1 and the middle townhouse as Lot 1-1 (except the West 25 Feet thereof) and Lot 1-2 in XYZ Subdivision, etc. Also, a subdivision such as in figure 2 which depicts the final location of the party walls leaves less leeway for changes in the building as construction commences, especially where various models are available. If the lot will not be divided until the structure is built, then the dimensions of the townhouse conveyances will depend entirely on the final location of the shared or party walls. Keeping the division of the lot simple will make the legal descriptions easier to prepare and avoid the likelihood of legal description overlaps or gaps. Metes and bounds descriptions around the structures or lots may also be used. For example in fig. 1, the legal descriptions would be fairly simple; one way to describe them would be the East 30 feet of Lot 1; the West 30 feet of Lot 1 and Lot 1 (except the East 30 feet and except the West 30 feet).

When title insurance commitments are ordered, the title insurer must compare the legal description of each of the townhouses within the cluster and make sure that they do not overlap onto each other or leave gaps. Obviously to facilitate that analysis, once enough of the building is completed to locate party walls and the legal descriptions are prepared, the legal descriptions in any cluster should all be submitted at once (even if only one or two are currently ready for sale).

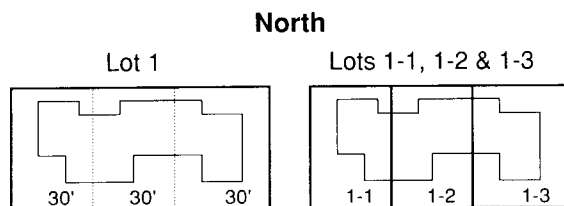


Figure 1

Figure 2

As discussed above, the west townhouse in figure 1 could be described as The West 30 feet of Lot 1. That townhouse may also be depicted on the developer's site plan as Unit 1 in Building 1 which will be located on Lot 1. It cannot be

described that way on a deed, however, as no recorded document exists which both labels it such and gives sufficient detail to constitute an insurable legal description. If unit designation helps the developer and its sales and marketing employees to keep the project organized, it can be placed below the legal description in a commonly known as clause.

Unless each townhouse legal description is contiguous to a public or private street, it will be necessary to: 1) create easements of access in the declaration; 2) include an easement parcel on the deeds; and 3) include an easement parcel on the title insurance commitments and policies in order to insure access to and from said streets. This is most obvious when a common area lot surrounds the lots which include the townhouses. In most cases, the driveways may be entirely or mostly within the larger lot in which the townhouse lots float. (fig. 3) That common area lot will eventually be owned by the Association at the end of the project. Therefore an easement grant and parcel over the common area lot must be included in the deed to insure the access rights of the individual townhouse homeowner over the land of the Association.

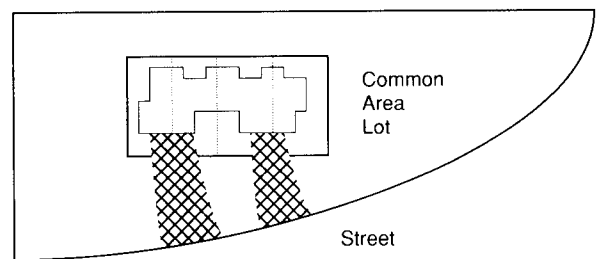


Figure 3

Note that in figure 3, the driveways, which are depicted as cross hatched areas, are actually not completely within the common area lot. A portion of each of the two driveways is on each of the four townhouse lots. An easement over the common area lot may not be enough to grant rights over all the area needed by each individual townhouse owner. One could develop a very complex easement section in the declaration with specifically described easement areas in portions of each townhouse lot in addition to the common area lot. Alternatively, the common area can be defined generally in the declaration to also include those portions of any driveway which cross a townhouse lot and which are part of a ground conveyance to individual owners. Obviously, the drafter of the declaration cannot make this common area definition as broad or as narrow as it needs to be without a full understanding of the site plan of the project including locations of proposed driveways. Once the common area is defined to include all possible locations of access ways then the easement included on the deed and insured in the title insurance policies is a simple grant over the common area as defined in the declaration.

Nonexclusive easement for ingress and egress for the benefit of Parcel 1 over the common area as defined in Declaration of Covenants and Restrictions recorded as document no. 1.

Also, the inclusion of an overall grant and reservation paragraph in the 'subject to' portion of each and every deed maintains the rights of the developer to continue to grant rights over conveyed land to future buyers. Like the grant of easement, the grant and reservation paragraph in the 'subject to' portion of the deed also ties itself to the declaration. An example of how such a clause would read follows:

Subject to the Declaration of Covenants and Restrictions recorded as document no. 1, which is incorporated herein by reference thereto. Grantor grants to the grantees, as easements appurtenant to the premises hereby conveyed the easements created by said Declaration for the benefit of the owners of the premises hereby conveyed. Grantor reserves to itself, its successors and assigns the easements thereby created for the benefit of itself, its successors and assigns and the remaining land subject to said Declaration.

Why is an easement parcel necessary for the ground conveyance townhouse and not for the condominium townhouse? Each unit owner in a condominium also takes title to a percentage interest in the common elements. So, if figure three was a four unit condo, each unit owner would also own an undivided 1/4 interest in the common area lot and the lot wherein the building is located. Each owner of an undivided interest in any parcel of land has access rights thereto. In the ground conveyance townhouse, however, the homeowner only owns the 1/4 division of the townhouse lot. Everything else in the picture in figure 3 is owned by the association or by a neighbor. Thus, the ground conveyance townhouse owner needs an easement for access rights over land owned by others.

B. PARTY WALLS AND ASSESSMENTS

Once the locations of the townhouse parcels and common area parcels are established, the Declaration must address a few remaining issues bearing on title insurance. They are party wall provisions, assessment provisions and the sections which allow issuance of the PUD or Planned Unit Development Endorsement on the mortgage title insurance policy. Note that there are other entities which are very interested in the remainder of the Declaration, namely those entities which regulate and underwrite federally insured mortgages, especially Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation. (FHLMC)⁶ Fannie Mae issues what it calls its SELLING GUIDE, Part VII of which discusses its requirements for lending on condominiums and planned unit developments. Also, the Veterans' Administration has certain requirements. The developer should always allow for amendment powers in the developer especially for changes that are discovered to be needed to meet the requirements of lenders subject to FNMA, FHLMC or VA requirements. Finally, the homeowners will eventually be vitally interested. The declaration is the constitution for the government of the project. It is tempting to copy the declaration from the last project, but that declaration may need tailoring to fit the current project. Some restrictions or easements may prove irrelevant and some may be needed for the first time.

Party walls should always be defined in the ground conveyance townhouse declaration. Whether or not the declaration sets forth these rights, they will be deemed to exist in common law. It is obviously advisable to set forth covenants

relating to those rights. Maintenance, replacement and easements for utilities within those walls are the typical subject matter of such provisions.

Most townhouse projects have common area which will require coordinated maintenance. As a result, assessments are needed to pay for that maintenance and are created by most declarations. Often such provisions are taken verbatim from assessment sections of a condominium declaration. The condominium statute provides that assessments are liens when delinquent, even before they are recorded.⁶ Since there is no such statute for homeowners associations which are not condominiums, assessments for ground townhouse projects have no special priority and are not liens until recorded. The homeowners agree to those assessments as part of joining the project, but third parties are not statutorily pre-empted by any delinquent assessments until a lien is recorded prior to the recording of third parties' lien rights.

A title insurer may approve the Planned Unit Development or "PUD" Endorsement based on an analysis of the elements of the endorsement (SEE ATTACHED) as they relate to a particular declaration. The issuance of this endorsement does not mean that the project meets FNMA requirements in full. Most townhouse declarations easily meet all the requirements of the endorsement. These requirements are simply that no reverter exists in the declaration, that the lenders have priority over assessment liens and that there are easements for encroachments caused by settlement of the structure. The easement section of the declaration therefore should include the provisions for automatic easements for encroachments caused by minor shifting after initial construction. (Such a section might well go on to provide for automatic easements for slight encroachments of auxiliary parts of the initial construction onto the common area.) Finally, the endorsement insures that any right of refusal requirements have been met.

In conclusion, the developer and its attorney face more challenges when creating the ground conveyance townhouse project than a condominium townhouse project due to the lack of statutory guidelines. The resulting flexibility can be overwhelming. The project's design must include insurable townhouse legal descriptions, access easements and in most cases, a common area. The common area which is not conveyed to the townhouse owners individually, must be capable of being described in the eventual deed to the association and at the same time there must be a more elastic definition of the common area in the declaration to allow for necessary access easements. The declaration needs to address all the pertinent easement, maintenance, assessments and restriction issues that the site demands. Finally, the developer should submit the first deeds to the title insurer so that the title insurer may review legal descriptions created for each cluster and to verify that all the necessary easements and recitals are included.

NOTES

1. One way to distinguish the ground conveyance townhouse from the condominium townhouse, traditionally, has been the terminology. A condominium is a unit and a ground conveyance townhouse is a parcel or lot or a part of a lot.
2. 65 ILCS 205/0.01 et. seq.
3. 35 ILCS 200/9-55. The County Assessor may require tax division petitions with surveys attached for divisions of lots.

4. Some counties and municipalities may have plat recording requirements for ground conveyance townhouse projects. e.g. Cook County. Real Property Service Illinois Chapter 49 Planned Unit Development 1989.

5. 4 - FEB Prob. & Prop. 25.

6. 765 ILCS 605/9

ENDORSEMENT

ATTACHED TO AND FORMING A PART OF POLICY NUMBER

ISSUED BY

CHICAGO TITLE INSURANCE COMPANY

“PUD” ENDORSEMENT

THE COMPANY HEREBY INSURES THE INSURED AGAINST LOSS OR DAMAGE BY REASON OF:

1. PRESENT VIOLATIONS OF ANY RESTRICTIVE COVENANT REFERRED TO IN SCHEDULE B WHICH RESTRICT THE USE OF THE LAND;
2. THE PRIORITY OF ANY LIEN FOR CHARGES AND ASSESSMENTS IN FAVOR OF ANY ASSOCIATION OF HOMEOWNERS WHICH ARE PROVIDED FOR IN ANY DOCUMENT REFERRED TO IN SCHEDULE B OVER THE LIEN OF ANY INSURED MORTGAGE IDENTIFIED IN SCHEDULE A;
3. THE ENFORCED REMOVAL OF ANY EXISTING STRUCTURE ON THE LAND (OTHER THAN A BOUNDARY WALL OR FENCE) BECAUSE IT ENCROACHES ONTO ADJOINING LAND OR ONTO ANY EASEMENTS; AND
4. THE FAILURE OF TITLE BY REASON OF A RIGHT OF FIRST REFUSAL TO PURCHASE THE LAND WHICH WAS EXERCISED OR COULD HAVE BEEN EXERCISED AT DATE OF POLICY.

THIS ENDORSEMENT IS MADE A PART OF THE POLICY AND IS SUBJECT TO ALL OF THE TERMS AND PROVISIONS THEREOF AND OF ANY PRIOR ENDORSEMENTS THERETO. EXCEPT TO THE EXTENT EXPRESSLY STATED, IT NEITHER MODIFIES ANY OF THE TERMS AND PROVISIONS OF THE POLICY AND ANY PRIOR ENDORSEMENTS, NOR DOES IT EXTEND THE EFFECTIVE DATE OF THE POLICY AND ANY PRIOR ENDORSEMENTS, NOR DOES IT INCREASE THE FACE AMOUNT THEREOF.

CHICAGO TITLE INSURANCE COMPANY

BY _____
AUTHORIZED SIGNATORY

NOTE: THIS ENDORSEMENT SHALL NOT BE VALID OR BINDING UNTIL COUNTERSIGNED BY AN AUTHORIZED SIGNATORY.