

Real Estate

Co-ops, co-ownerships and condos: Crucial differences

By **Ray Mikkola**



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(February 12, 2019, 10:51 AM EST) -- Property managers, laypeople and sometimes even lawyers will confuse co-ops, co-ownerships and condominiums despite the fact that they are very different from each other, particularly once the details are examined.

Co-ownerships are entirely creatures of contract. Typically, co-ownership agreements set out rules regarding the use of real property among the co-owners who hold title to that real property, with co-owners directly appearing on title or perhaps owning a beneficial interest in the property through a trustee listed as the registered owner (typically a bare nominee). The agreements may set out rules for electing a Co-ownership Board, or other similar governing body, which will be entitled or required to collect expenses from the co-owners in proportion to their ownership interests.

The co-ownership interests are held as tenants-in-common, and the Co-Ownership Board pays the ongoing expenses as an agent on behalf of the co-owners. A co-ownership interest may be sold and mortgaged, although more traditional lenders may not be prepared to accept an undivided common interest as security for a mortgage loan. As the co-owners collectively own all of the property as tenants-in-common, the right to exclusively occupy a portion of a building on the property is found in the co-ownership agreement.

The Co-ownership Board is typically given extensive rights to collect common expenses, including by selling a co-owner's ownership interest if the co-owner defaults in his obligation to pay the fees. This is achieved either by charging language in the co-ownership agreement or through an irrevocable power of attorney, neither of which are without complication when it comes to enforcing them.

The problem with positive covenants not running with title is overcome by a novation or similar agreement, whereby a new owner executes an undertaking to be bound by the co-ownership agreement as a party thereto. Sometimes, the obligation of an incoming co-owner to execute the novation as a condition of the transfer is secured by the registration of a restriction pursuant to s. 118 of the *Land Titles Act*.

A standard condominium is created by the registration of a declaration, which can be considered to be the "constitution" of the Condominium Corporation, together with a condominium survey plan (called a description), at the applicable Land Registry Office. Condominium units are created as discrete, surveyed parcels of real property. The units are separately owned, and may be separately conveyed or mortgaged, as with typical fee simple properties. The common elements of the condominium, however, are collectively owned by the unit owners as tenants-in-common in the proportions allocated in the declaration. The Condominium Corporation typically owns no real property at all.

Whereas co-ownerships are creatures of contract, condominiums are creatures of statute that are governed by the provisions of the *Condominium Act, 1998* (the Act). The Act assists in clearing up some of the challenges associated with operating a co-ownership by, for example, granting the Condominium Board statutory liens for common expense arrears on the units in priority to pre-

existing mortgages. This allows for better financial management of the condominium. In addition to setting out the rights, authority and liability of the directors of the Condominium Board, the Act also sets out the rights of unit owners.

These rights, obligations and liabilities may be supported and detailed, but not overruled, by the condominium's declaration, bylaws and rules.

The fundamental difference between a co-ownership and a condominium is that the latter's declaration and description creates a three-dimensional subdivision of the land into separately owned and separately conveyable units, whereas the former's exclusive rights to occupy an apartment in a co-ownership property relies almost entirely on the co-ownership agreement and the common law.

A non-profit housing co-operative (a "co-op") differs most fundamentally from a co-ownership and a condominium by reason of the ownership regime of the land. In a housing co-op, the land is owned by the Co-operative Corporation which is incorporated under the *Co-operative Corporations Act*. Co-op members do not have any ownership interests in the land.

The Co-operative Corporation is a non-share capital corporation which has been created for the purpose of providing housing to its members. It may purchase property, borrow money, mortgage the co-op property and ultimately has the rights of a natural person, unless its authority is limited by its articles or bylaws. The directors are elected by co-op members, each of whom has certain voting rights, and the co-op exists as a separate legal entity from its members.

Co-op members who breach their obligations may be evicted and their memberships may be terminated. A member may not accept compensation when leaving their housing units and may not allow another person to occupy all or any part of the housing units on a for-profit basis.

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