

# PUBLICATION

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## The Tennessee Condominium Act Of 2008

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**Summary:** *Tennessee has updated its laws on condominiums with the passage of the Tennessee Condominium Act of 2008. The statute provides comprehensive provisions dealing with condominiums created after January 1, 2009 and also may apply, in certain instances, to existing condominiums.*

On April 21, 2008 Governor Bredesen signed into law the Tennessee Condominium Act of 2008 (the New Act). The New Act is the first revision to the Tennessee Horizontal Property Act (the Old Act) since 1963. The Old Act is quite disjointed and vague in its approach and uses terminology that is somewhat archaic, such as "council of co-owners" to refer to the board of directors or "apartment" to refer to a condominium.

The Old Act consists of 23 sections which are unrelated while the New Act contains four parts designated as Parts 2-5 of the Tennessee Code, which when read together present a unified approach from the development and management of condominium projects to the protection of purchasers of condominium units. The four parts are divided as follows:

1. *General Provisions*, setting out definitions for the New Act and identifying which projects will be subject to the New Act
2. *Creation, Alteration and Termination of Condominiums*
3. *Management*
4. *Protection of Purchasers*

The New Act differentiates between residential and commercial projects. As a protection for consumers, the New Act cannot be varied and the provisions thereof waived, nor may any device be used to evade or avoid the requirements of the New Act. (T.C.A. Section 66-27-204) There is an exception for commercial condominiums.

The New Act does not create any regulatory agency or scheme to oversee condominiums. The New Act does not require prior local government approval in order to create a condominium. The New Act does not require a public offering and disclosure statement to create market and sell condominiums.

The New Act applies to all condominiums created after January 1, 2009. Existing condominiums may opt in to the New Act by amendment and restatement of its master deed or declaration. Notwithstanding the effective date of the New Act and the right of existing condominiums to opt into the New Act, certain provisions of the New Act apply to all condominiums, existing condominiums and those created after January 1, 2009. The "universal" provisions provide (i) an existing master deed or declaration may not be amended in such a way as not to conform to the New Act (T.C.A. Section 66-27-202(a)); (ii) provisions for eminent domain (T.C.A. Section 66-27-207); (iii) for the authority of the association (T.C.A. Section 66-27- 402(a)(1)); (iv) for tort liability and breach of contract actions against the association and not individual unit owners (T.C.A. Section 66-27-411); (v) for the ability of the association to make interim assessments (T.C.A. Section 66-27-414(g)); (vi) for the priority of association liens for unpaid assessments (T.C.A. Section 66-27- 415); (vii) association recordkeeping (T.C.A. Section 66-27-417); and (viii) disclosure requirements for residential units (T.C.A. Section 66-27-501 et seq.).

As a point of clarification, if one has distributed a master deed/declaration under the Old Act for the purpose of soliciting sales, one should record the master deed/declaration prior to January 1, 2009, lest the master deed/declaration will need to be revised to conform to the New Act which might give buyers who have contracted to purchase units an argument that they need not close their purchases due to changed circumstances.

Under the New Act, a condominium is created by the recording of a declaration. The use of the term "declaration" replaces the term "master deed" used in the Old Act, and brings our state in line with other progressive states which have adopted more comprehensive condominium statutes as the proliferation of condominiums and the acceptance of condominium living as a desirable lifestyle has increased. In addition, the information required to be included in the declaration under the New Act is much more extensive than that required under the master deed provided for in the Old Act, thereby allowing prospective purchasers to be more informed than they might have been under the Old Act. (T.C.A. Section 66-27-305)

The New Act introduces the concepts of "development rights" and "special declarant rights." These concepts are intended to provide increased flexibility to developers in creating condominium communities, while protecting consumers from unscrupulous developers who would attempt to have purchasers of condominiums bear the cost of maintaining the property subject to such rights. There are no corresponding provisions in the Old Act.

"Development rights" means any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a condominium; (ii) to create units, common elements, or limited common elements within a condominium; (iii) to subdivide units or convert units into common elements; or (iv) to withdraw real estate from a condominium. (T.C.A. Section 66-27-203 (12) The declarant alone is responsible for all expenses related to property subject to development rights, and protective provisions governing the exercise of such rights are included in the New Act. (T.C.A. Section 66-27-310)

"Special declarant rights" means rights reserved for the benefit of a declarant to (i) complete improvements indicated on plats and plans filed with the declaration; (ii) to exercise any development right; (iii) to maintain sales offices, management offices, signs advertising the condominium, and models; (iv) to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium; (v) to make the condominium part of a larger condominium or a planned community; (vi) to make the condominium subject to a master association (Section 66-27-203-17); (vii) or to appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control. (T.C.A. Section 66-27-203 (22) All special declarant rights are required to be described in the declaration (T.C.A. Section 66-27-305), and the transfer of such rights is subject to specified conditions. (T.C.A. Section 66-27-404) The Old Act contains no corresponding provision.

The New Act provides greater detail descriptions for plats and plans to be attached to the declaration. (T.C.A. Section 66- 27-309(b)) All improvements must be shown and any improvements shown must be built or otherwise labeled "NEED NOT BE BUILT." (T.C.A. Section 66-27-309(c))

Unlike the Old Act, the New Act permits termination of the condominium by a vote of eighty percent (80%) of the owners and their lenders, (T.C.A. Section 66-27-318) while under the Old Act, such a vote required unanimous consent of the owners unless otherwise provided in the master deed/declaration.

Owners associations must be organized and in existence not later than the date of sale of the first condominium and such association must be a for-profit or nonprofit corporation or limited liability company unless there are four or fewer units. (T.C.A. Section 66-27-401)

Class voting is permissible but a declarant cannot constitute a class. (T.C.A. Section 66-27-307(e)). Allocation of common expenses, ownership of common elements and voting rights may not discriminate in favor of units owned by the declarant. (T.C.A. Section 66-27-307(a))

Under the New Act, common elements (such as parking or recreational facilities) that may be licensed by the declarant must be described in the declaration, and the declaration must provide a method of allocating the common expenses applicable thereto to the declarant. The association has a lien to secure payment of such expenses. (T.C.A. Section 66-27-307(f)) There is no corresponding provision under the Old Act.

Under the New Act, the exercise of any development right requires an amendment to the declaration, and a reallocation of interests in the common elements and liability for the common, expenses. (T.C.A. Section 66-27-310) There is no corresponding provision under the Old Act.

The New Act allows owners to relocate boundaries between units, subject however to the provisions of the declaration. (T.C.A. Section 66-27-312) There is no corresponding provision under the Old Act.

Under the New Act, the association must be organized as a corporation, unless it has four or fewer units. (T.C.A. Section 66-27-401) There is no corresponding provision under the Old Act.

The New Act provides for the standard of care required of the directors and officers: (1) if appointed by the declarant, the directors and officers have a duty to exercise the care required of a fiduciary, and (2) if elected by the unit owners, they have a duty to exercise ordinary and reasonable care. (T.C.A. Section 66-27-403(a)). There is no corresponding provision under the Old Act.

Under the New Act, the period of declarant control of the association must terminate no later than the earlier of (1) no later than 120 days after sale of 75% of the units; (2) 5 years after the conveyance of the first unit to a purchaser other than the declarant, or, if the project consists of more than 100 units, then 7 years after such first conveyance. (T.C.A. Section 66-27-403(c)) There is no corresponding provision under the Old Act.

Under the New Act, not later than 120 days after conveyance of 25 percent of the units in the condominium project, at least one member of the Board must be elected by the unit owners other than the declarant. (T.C.A. Section 66-27-403(d)) There is no corresponding provision under the Old Act.

Under the New Act, the liability of a unit owner in an unincorporated association for a judgment against the association is limited to the percentage of the judgment equal to the undivided percentage ownership of the unit owner in the common elements. (T.C.A. Section 66-27-416(a)) This saves each unit owner from having to bear not only his but also his neighbor's share of a judgment. There is no corresponding provision under the Old Act.

Under the New Act, if a lien other than a deed of trust or mortgage becomes effective against two or more units, a unit owner may pay his pro rata share of the judgment and is then entitled to a release of the lien against his unit. (T.C.A. Section 66-27-416(c)) There is no corresponding provision under the Old Act.

Under Part 5 of the New Act, a prospective purchaser, prospective lender, or owner is entitled to receive a great deal of information upon request from the association. The information to be provided is detailed in the act. Penalties are provided for failure to supply the information. (T.C.A. Section 66-27-503) The association is entitled to charge a reasonable fee for providing the information. This provision assures a prospective purchaser or lender of the ability to be fully informed regarding the affairs of the condominium before making a decision whether to buy or lend. This concept of full disclosure is the alternative to setting up a regulatory scheme to oversee the development and sale of condominiums, which follows the belief that such a scheme

was not necessary and would create an undue burden, without a corresponding benefit, on developers and managers of Tennessee condominiums.

The foregoing is an overview of many, but not all, of the changes set out in the New Act. The New Act codifies the most modern concepts and practices for the development of condominiums.