# THE COMMON ELEMENTS CONDOMINIUM – Rodney Ikeda

## INTRODUCTION

### 1. Why is the Common Elements Condominium becoming more Mainstream?

A new form of condominium is finding increasing favour with developers, purchasers and municipalities – the Common Elements Condominium. Described in Sections 138 – 144 of the **Condominium Act, 1998**, (the "Act"). This new condominium makes it easier for owners of freehold land

(a) to own and use recreational and other amenities, and
(b) to financially share in their upkeep.

It creates common elements without the corresponding condominium units.

## THE BASICS

### 2. What are the differences between freehold ownership, standard condominium ownership, and Common Elements Condominium ownership?

(a) **Freehold ownership** is the most common form of ownership of real property. A transfer registered in the Land Titles Office is proof to the world of ownership of land. There is a ready market. You can transfer it, and mortgage it. You, as the owner, are responsible for all repairs and maintenance and do all the work – cutting grass, shoveling snow, etc. You as owner make all of the decisions, bear all of the responsibilities, and pay all of the costs.

(b) **Standard condominium ownership** is a hybrid between freehold ownership and community ownership. There are three components to a standard condominium – the Unit, the common elements, and the Condominium Corporation. The Unit is composed of everything within the unit boundary (walls, floor, ceiling) as defined in the condominium declaration and depicted on the condominium plan. The common elements comprise everything described in the condominium plan that is not a Unit. This would include the grounds, walkways, driveways, hallways, recreational facilities, and anything else that is shared among all of the units. Overseeing all of this is the Condominium Corporation. The Condominium Corporation is responsible to maintain, repair, and replace the Common Elements. This form of ownership is governed by the Condominium Act, 1998.

(c) **Common Elements Condominium ownership** is a form of condominium ownership. The Common Elements Condominium consists of land comprising the common elements as property of the condominium. The owners of the Common Elements Condominium are the owners of freehold parcels of land to which a common interest in the Common Elements Condominium is attached. For example, where the common elements are comprised of the streets, it is like owning a house together with a share of the streets. The owner of the POTL is responsible for the maintenance and repair of the POTL, and would be responsible for a portion of the costs incurred by the Common Elements Condominium Corporation for the maintenance and repair of the common elements, which cost would be shared amongst all of the POTLs.


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**3. What is a "parcel of tied land" or "POTL"?**

The freehold parcel is called a "parcel of tied land" or "POTL". The owner of a POTL also owns the common elements in common with the other owners of other POTLs. The declaration of the Common Elements Condominium identifies each POTL, and sets forth the proportionate common interest and the percentage contribution to common expenses allocated to each POTL. The costs associated with maintaining and repairing the common elements, including contributions to a statutory reserve fund, are included in the budget for the condominium corporation.

**4. How does a Common Elements Condominium purchase differ from a Freehold purchase or a standard condominium purchase?**

(a) A transfer of a POTL conveys the proportionate interest in the Common Elements Condominium. A POTL cannot be sold separately from its common interest. In essence, POTLs take the place of condominium units. The main difference, however, is that generally, restrictions that govern condominium units do not apply to POTLs.

(b) The agreement of purchase and sale to be used is more closely akin to the form for the sale of freehold homes, not the form for condominium units. A separate schedule will be attached to the agreement, describing the POTL's interest in the Common Elements Condominium.

(c) Certain of the consumer protection provisions of the Act also apply to the purchase of a POTL. As a result, there are more consumer oriented protections that apply to purchases of POTLs than would otherwise be the case for the purchase of a freehold house. For example, a disclosure statement must be delivered to the purchaser, and will include the proposed declaration, bylaws, budgets, rules, and certain types of agreements. It is important that a purchaser review all of these documents.

(d) The same 10 day rescission period that applies to the purchase of a new condominium unit also applies to the purchase of a new POTL. The rescission period starts on the date that the purchaser receives a fully executed agreement of purchase and sale, together with all of the disclosure documents that are required to be delivered under the Act.

(e) Deposits do not receive the deposit protection or the interest earning provisions of the Act unless the deposits are expressed to be a deposit applied to the purchase of the interest in the Common Elements Condominium. Most agreements therefore specify that all deposits apply to the purchase of the POTL only. As a result, these monies are not trust monies that are required to the paid to and held by a trustee of a prescribed class under the Act.

(f) The TARION Warranty Program does cover a newly constructed residential home built on a POTL. Accordingly, deposits are covered to a maximum of $40,000. This will increase if you signed the agreement of purchase and sale after January 1, 2018. The amount of the deposit protection is up to $60,000 for homes with a sale price of $600,000 or less, and 10% of the purchase price for homes over $600,000, to a maximum deposit coverage of $100,000. The TARION Warranty Program does not cover the Common Elements Condominium. There is therefore generally no warranty protection for the Common Elements Condominium except as may be set forth in the Agreement of Purchase and Sale.

(g) A specific Tarion Statement of Critical Dates and Addendum Form is used for the purchase of a POTL in a Common Elements Condominium.

(h) Before any building permit is issued for the construction of POTLs, municipalities generally require that draft plan approval, as opposed to registration, of the Common Elements Condominium be obtained. Note that registration of the Common Elements Condominium requires the consent of every owner and chargee of a POTL. POTLs, therefore, will not be conveyed until the Common Elements Condominium has been registered.

(i) In most cases, there is no need for an “occupancy closing” normally associated with the closing of standard condominium units. If there is a delay, the delayed closing provisions of the Ontario New Home Warranties Plan Act that deal with freehold construction will apply.

(j) The condominium corporation is responsible for maintenance and repair of the common elements and related services, and POTL owners are responsible for the maintenance and repair of everything located on the POTLs. Thus, snow removal and grass cutting on the POTLs remain each POTL owner’s responsibility, while clearing a common road would be the responsibility of the condominium corporation.

(k) Each owner of a POTL will pay common expenses monthly to cover the costs and expenses incurred by the Common Elements Condominium Corporation. The cost of running the Common Elements Condominium Corporation will be found in the budget that forms part of the disclosure documents.

(l) The Common Elements Condominium Corporation has a lien right over each POTL for unpaid common expenses, which lien, when registered, receives a statutory priority over all mortgages and other encumbrances registered against the POTL.

(m) Since a POTL is freehold land, an owner must arrange for fire insurance on the structure in the same manner as for a freehold house, not a condominium unit.

## CONCLUSION

The Common Elements Condominium is here to stay. It has the potential of allowing for more creative and flexible real estate projects that more closely reflect the ever changing needs and desires of purchasers.


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