

**OPINION NO. 71-031****Syllabus:**

Property cannot be qualified as a condominium under Chapter 5311, Revised Code, where it consists of a group of lots, where each lot is intended for private ownership, to the exclusion of any interest therein by owners in the general project and where the "common areas" consist primarily of the roads and similar special types of commonly used property.

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**To: Robert E. Mohler, Summit County Pros. Atty., Akron, Ohio**  
**By: William J. Brown, Attorney General, June 10, 1971**

Your request for my opinion reads as follows:

"May a property qualify as a condominium under chapter 5311, Ohio Revised Code, if it consists of a group of lots intended for single family residences, ownership of each lot being private property with the community property consisting of the roads and other joint use property for common use, or to qualify under this chapter must the private property be only individual units in multi-unit buildings with exterior walls and grounds as the community property?"

The question is whether a group of lots occupied by single family dwellings, both the lots and the houses being privately owned, can qualify as a condominium under Chapter 5311, Revised Code, while the roads and other jointly used property are owned by the community.

Condominium and other terms are defined in Section 5311.01, Revised Code, as follows:

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"(A) 'Condominium property' means and includes the land, together with all buildings, improvements, and structures thereon, all easements, rights, and appurtenances belonging thereto, and all articles of personal property which have been submitted to the provisions of Chapter 5311. of the Revised Code.

"(B) 'Common areas and facilities' means and includes, unless otherwise provided in the declaration the following parts of the condominium property:

"(1) The land described in the declaration;

"(2) All other areas, facilities, places, and structures which are not part of a unit, including, but not limited to:

"(a) The foundations, columns, girders, beams, supports, supporting walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, entrances, and exits of the building or buildings;

"(b) The basement, yards, gardens, parking areas, garages, and storage spaces;

"(c) The premises for the lodging of janitors or persons in charge of the property;

"(d) Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning, and incinerating;

"(e) The elevators, tanks, pumps, motors, fans, compressors, ducts, and, in general, all apparatus and installations existing for common use;

"(f) Such community and commercial facilities as may be provided for in the declaration;

"(g) All other parts of the condominium property necessary or convenient to its existence, maintenance, and safety, or normally in common use, or which have been designated as common areas and facilities in the declaration or drawings.

"(C) 'Declaration' means the instrument by which property is submitted to the provisions of Chapter 5311. of the Revised Code and any and all amendments thereto.

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"(G) 'Unit' means a part of the condominium property consisting of one or more rooms on one or more floors of a building or buildings and designated as a unit in the declaration and delineated on the drawings provided for in section 5311.07 of the Revised Code.

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Units are described in Section 5311.03, Revised Code, in pertinent part, as follows:

"(B) Each unit owner is entitled to the exclusive ownership and possession of his unit and to ownership of an undivided interest in the common areas and facilities in such percentage as is expressed in the declaration.

"(D) Unless otherwise provided in the declaration or drawings, the boundaries of a unit shall be the interior surface of its perimeter walls, floors, and ceilings;

windows and doors in the perimeter walls, floors, or ceilings of a unit shall be part of the unit; and supporting walls, fixtures, and other parts of the building which are within the boundaries of a unit but which are necessary for the existence, support, maintenance, safety, or comfort of any other part of the condominium property shall not be part of the unit."

Pertinent characteristics of the common area ownership are provided for in Section 5311.04 (A) and (C), Revised Code, which are, in part, as follows:

"(A) The common areas and facilities shall be owned by the unit owners as tenants in common, and ownership thereof shall remain undivided.\* \* \*

"(C) \* \* \* The undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the deed, mortgage, lease, or other instrument of conveyance of encumbrance."

A problem arises respecting the apparently broad authorization (contained in Division (B) of Section 5311.01, supra, and Division (D) of Section 5311.03, supra, i.e., "unless otherwise provided in the declaration") to include provisions in the declaration that could create a project substantially different than the customary type, which is described in some detail in the Chapter.

Those descriptions reflect the customary understanding of the term "condominium" as discussed by numerous commentators. See, e.g., the definition in Berger, Condominium: Shelter on a Statutory Foundation, 63 Col. L. Rev. 987, 989 (1963):

"The most common modern instance of condominium is a multi-unit dwelling each of whose residents enjoys exclusive ownership of his individual apartment. With 'title' to an apartment goes a co-tenant's undivided interest in the common facilities-the land, the hallways, the heating plant, etc."

See also Smith, Hybrid Housing in Ohio: Condominiums, 15 West Res. L. Rev. 597, 598-500 (1964); Condominiums - Massachusetts Passes Condominium Enabling Legislation, 77 Harv. L. Rev. 777 (1963-1964); Kreider, The Ohio Condominium Act, 33 Cin. L. Rev. 463, 464 (1964). The commentators point out that a condominium could well exist at common law, but that a specific statute is advisable in order to clarify its status as nearly as possible. See Smith, supra, at pages 599-601; Berger, supra, at pages 1001-1004; Kreider, supra, at page 464.

It should be noted that the general understanding of the term "condominium:", contemplates that the land will be held in common ownership and the "units" will consist of the interior walls and air space. The project involved in your questions is not limited in this customary manner but contemplates ownership by an individual of a part of the condominium land, to the exclusion of other unit owners to such part. This brings into question the relationship of Chapter 5311, supra, and Chapter 711, Revised Code, the latter covering the platting of subdivisions.

Chapter 711, supra, requires approvals by various authorities

for the platting of a subdivision and Section 711.001 (B)(1), Revised Code, defines a subdivision as follows:

"(B) 'Subdivision' means:

"(1) The division of any parcel of land shown as a unit or as contiguous units on the last preceding tax roll, into two or more parcels, sites, or lots, any one of which is less than five acres for the purpose, whether immediate or future, of transfer of ownership, provided, however, that the division or partition of land into parcels of more than five acres not involving any new streets or easements of access, and the sale or exchange of parcels between adjoining lot owners, where such sale or exchange does not create additional building sites, shall be exempted; or

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Under those provisions, the division of the condominium land into individually owned lots, to the exclusion of any interest of other unit owners in such lots, would constitute a subdivision and would require approval of the plat. Yet Section 5311.02, Revised Code, appears to exempt declarations of condominium from the operation of Chapter 711, supra. In pertinent part, that Section reads as follows:

"\* \* \* Neither the submission of property to the provisions of Chapter 5311. of the Revised Code, nor the conveyance or transfer of ownership of a unit shall constitute a subdivision within the meaning of or be subject to Chapter 711. of the Revised Code."

Thus, Chapter 5311, supra, conceivably may be read in one of two different ways, either as consonant with Chapter 711, supra, or as creating a device for avoidance of its requirements as to subdivision of land.

Resolution of that problem rests on further analysis of the provisions of Chapter 5311, supra, particularly the definition of "unit" and its characteristics.

"Unit" is defined restrictively as "rooms" (Section 5311.01 (G), Revised Code). The conveyance of a "unit" does not constitute a "subdivision" under Chapter 711 (Section 5311.02, supra). It follows that the conveyance of more than a unit (together with its appurtenant undivided interest in the common areas and facilities) would be subject to Chapter 711, supra. Units are the parts of a condominium property that may be conveyed and made the subject of separate or individual ownership (as contrasted with ownership as tenant in common of the common areas and facilities, Section 5311.04 (A), supra), not the land of the condominium property, or any part thereof, or any other part of the common areas and facilities. A unit, together with its undivided interest in the common areas and facilities, is transferrable and taxable as real estate (Sections 5311.03 (A), 5311.10 and 5311.11, Revised Code).

In short, there is no express authorization in Chapter 5311, supra, for a unit owner to hold a separate interest in a part of the land of the condominium, to the exclusion of any interest therein by other unit owners. The authorization in Section 5311.01 (B), supra, for the land to be "otherwise provided" for in the declaration,

therefore, cannot be read to permit such type individual ownership of a part of the condominium land. The same is true of Section 5311.03 (D), supra, i.e., the "boundaries of a unit" cannot be set in the declaration as coextensive or analogous to fee ownership, inhering in an individual unit owner, to a part of the condominium land.

This analysis, it should be pointed out, permits Chapters 5311 and 711, supra, to be read together consistently and without opening the way to circumvention of the requirements of the latter.

In specific answer to your question, it is my opinion that property cannot be qualified as a condominium under Chapter 5311, Revised Code, where it consists of a group of lots, where each lot is intended for private ownership, to the exclusion of any interest therein by owners in the general project and where the "common areas" consist primarily of the roads and similar special types of commonly used property.