

Are New Marina Condominiums Prohibited in Wisconsin?

Yes. A new law prohibits the creation of marina condominiums after May 31, 2007.¹ If a marina condominium declaration is recorded after that date, the project is not a condominium and the owners are tenants in common instead. The new law is Wis.Stats. § 30.1335. The same legislative act amended existing § 30.133 to dovetail with the new law.

However, the law also grandfathers marina condominiums created by declarations recorded before June 1, 2007. Existing marina condominiums do not lose the grandfathering effect of the law due to later amendments to the declaration. The law provides that pier permits for grandfathered projects may not be rescinded or modified based on the fact that the marina is subject to a condominium regime.

It is very important to structure a new condominium correctly in order to avoid having it fall under the prohibition law. We encourage you to seek knowledgeable legal counsel for the drafting of documents involving condominiums that include boat slips.

A marina condominium is a condominium that has boat slips but no residential units at all, *or* at least one boat slip that is not attached to a residential unit. A project does not fall under the marina condominium prohibition if it includes boat slips that are all attached to residential units.

The most obvious example of a marina condominium is the project in which there are no residences and boat slips are units. A less obvious example that is still prohibited by the law would be the project in which there are residential units having boat slips as limited common elements, but there are also boat slips which are common elements or units. All such condominiums are now prohibited, and declarations for such condominiums will instead create tenancies in common between the owners.

The law is a compromise that resolves issues created by a controversial Supreme Court decision, *ABKA Limited Partnership v. DNR*, 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854. That case involved a request for a marina permit for a condominium in which the units were lock boxes on shore and boat slips were limited common elements. The Supreme Court ruled that the condominium declaration was

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invalid. It also suggested that the court was critical of the general principle, essential to condominium ownership, that a person could buy and sell possession of a particular slip, rather than rent it.

The new law balanced the Wisconsin Department of Natural Resources' (WDNR) view that marina condominiums should not proliferate with the vested property rights of the owners of the many such projects which have already been created in this state. The law was not intended to affect residential condominium projects.

This law is unique to Wisconsin. No other state prohibits marina condominiums. The public policy concern expressed by WDNR is frankly baffling to us. Reinhart filed a friend-of-the-court brief to the Supreme Court in the *ABKA* case which presented many examples from other states showing that marina condominiums have increased the tax base and spurred the redevelopment of downtown areas.

If you have questions or would like clarification about the effect of this law, please contact our real estate department. Shareholder Bush Nielsen, of our Waukesha office, was a legislative consultant in the drafting of the law and amicus counsel in the *ABKA* case. Eric M. Berman of the firm's Milwaukee real estate department contributed to this Reinhart Weekly Real Estate Report.

¹Some helpful definitions for this article: (1) a tenancy in common is a type of ownership in which two or more owners each have a shared undivided interest in the whole property for the duration of the ownership; (2) a condominium declaration is the legal instrument that establishes and creates the condominium; (3) a declarant is the owner or developer who subjects his or her property to a condominium declaration; (4) a unit is the part of the condominium that is intended for any type of independent use; (5) the common elements are all the condominium except its units and limited common elements; (6) the limited common elements are specified common elements reserved exclusively for the use of a particular unit owner; and (7) a boat docking facility is a pier, wharf, boat slip, or multi-boat slip facility.

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