

The Tennessee Horizontal Property Regime

A Guide to the Key Parts of
Title 66, Chapter 27 “Horizontal Property Act”
for Residential Real Estate Investors and Developers

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Introduction

Enjoying its position as an “It City,” Nashville continues its meteoric growth. With the local economy in full swing, more and more businesses and people are calling Music City home. In fact, [The Tennessean](#) recently reported that according to the [U.S. Census Bureau](#)’s latest estimates, the Nashville metro statistical area added 36,337 people during a one-year period ending on July 1, 2016.

That translates to an average of 100 people joining the region every single day!

In the article, Nicholas J. Lindeman, economic and systems data analyst with [Nashville Area Metropolitan Planning Organization](#) noted that if Nashville maintains this pace, the region would approach a population of around 2 million by the next census in 2020. “The story for me, looking at the numbers,” said Lindeman, “is that the region is doing really, really well.”

Nowhere is the city’s impressive growth more evident than in its many residential neighborhoods. From 12 South to Germantown to East Nashville, urban areas that were once considered blighted are now highly sought neighborhoods for Millennials, families, and retirees alike.

With these changes in population density, socioeconomic status, and neighborhood dynamics, many legal real estate issues are being forced to the surface. One such issue is the horizontal property regime (HPR). If you need some background information, visit our blog and read our recent post, [How to Turn One Home Into Two Home With an HPR](#).

This guide will take a closer look at the Tennessee state laws that govern the creation and operation of the horizontal property regime, with specific attention focused upon what many of us in Nashville have witnessed appearing and growing rapidly in our community: the creature known by some as “tall and skinnies” and that I like to simply call the “two homes on one lot” HPR.

I hope you enjoy reading and learning about Tennessee HPRs. If you have any questions related to HPRs or real estate law, I hope you’ll reach out to us. We’d love to work with you.

Sincerely,
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“Duets” Set the Stage for Horizontal Property Regimes

The Story of the Duet

It's only appropriate that we spend a moment talking about duets. We're not talking about Kenny Rogers and Dolly Parton though, we're talking about residential duets.

In case the construction cranes dotting the downtown skyline aren't enough of an indication of Nashville's booming commercial real estate scene, a tour of the city's bustling neighborhoods tells a supporting residential success story.

In many of the city's oldest neighborhoods, where modest (and often neglected) single dwellings once stood, now two separate, modern, and highly efficient homes can be found standing tall. In many instances, existing zoning permits allow for two separate dwellings and the term “duet” is used to describe a property that falls into this category. These zoning policies were likely put into place to encourage the construction of duplexes; however, in today's Nashville, it's far more common to see two distinct houses occupying a single lot.

How it Works

In order to build a subdivision, or a “duet,” you will probably need to record a “plat.” In the world of real estate development, plats are essentially maps of properties, usually drawn as construction-oriented blueprints. In order to legally record your plat, your licensed land surveyor will need to petition the local zoning authority to allow the land to be subdivided. At this point, a public hearing typically has to be held -- and this is where things can become a little complicated for real estate entrepreneurs.

These public hearing allow you the opportunity to present your vision for the property and the benefits your plat will offer to the community and to the city. On the other hand, a public hearing also allows neighbors the opportunity to express apprehensions and voice suggestions. You and your team should be prepared to address concerns about your subdivision blocking views, decreasing property values, and impacting quality of life for the existing residents. This is the point at which the process for building a subdivision can become time-consuming and cumbersome.

And this is where a horizontal property regime can help.

What's a Horizontal Property Regime?

A horizontal property regime is an effective legal way to bypass the potentially problematic public hearing that subdividing a property requires. Traditionally, horizontal property regimes only allow for the development of condos, in which units are stacked on top of one another, but Tennessee state law has a slightly different approach. In the state of Tennessee, horizontal property regimes are defined in such a way that allows property owners to build two new houses on a piece of land that originally only had one house.

Although it's a tidy solution to the plat problem, the legal infrastructure supporting horizontal property regimes can be quite complicated.

How it Works

If you want to establish a horizontal property regime, your first step is to find a good real estate lawyer. This is something that you absolutely cannot do alone. That lawyer will draft a master deed to establish the HPR.

In Nashville, it has become popular to enact "zero lot line" HPRs. In these cases, the real estate attorney who drafts the master deed must attach a certification confirming that it adheres to all relevant Tennessee state statutes. In HPRs, homes in the project have a tax bill that is apportioned between them, so it is very important that boundaries are clearly established within the property. To that end, the real estate attorney will also need to attach a diagram of the property that clearly outlines all of the following:

- The parts of the property that are shared by the two proposed homes. This would normally include things like sidewalks.
- The elements of the property that are limited common, such as yards.
- The part of the property that are private elements.

Horizontal property regimes require the creation of a homeowner's association, because the residents of the two respective structures will become joint-owners of the same property. The homeowner's association will define the legal obligations and rights of each party. Additionally, it will give legal recourse to each respective party in the event that the other party fails to live up to their end of the bargain.

If incorporated, the annual state-filing fee in Tennessee is \$100. It is very important that this fee is paid each year! If homeowners forget to pay, their homeowner's association is legally dissolved. If this occurs, and one of the owners decides to sell their home, then the association will have to be reincorporated.

In certain circumstances, it is possible (but almost never advisable) to set up a homeowner's association without incorporating. The advantage of not incorporating is that you will not need to pay the \$100 annual filing fee to the Tennessee Secretary of State. The disadvantage, however, is that your subdivision will have to be set up as a "condominium" rather than a "planned unit development" (PUD). "Condominium" introduces additional layers of legal complications that are often confusing down in the long run. Homeowners who chose this route often run into financial problems with lenders and appraisers, making it well worth the annual \$100 fee to become an PUD.

Tennessee Law: Breaking it Down

For the full text of the Tennessee Horizontal Property Act, [visit our website](#). For our analysis of key segments of the law, read on.

66-27-101-103: An Analysis of Definitions and Planned Unit Development

If a developer or sole owner owns a property without a building or other structure, that person may create a horizontal property regime as permitted by this chapter. To avoid any concern in a multiple ownership scenario, the owners can always transfer the property to an LLC or partnership or other entity that can be created prior to filing the declaration.

TIP: Developers can form an LLC to avoid concerns about multiple owners.

According to the definitions section, a “Developer” is defined as a person who undertakes to develop a real estate condominium project. Again, this definition seems to contemplate a traditional “condominium.” What if a developer wants to build two homes, however? Well, the statute defines “Condominium project” as “a real estate condominium project; a plan or project whereby two (2) or more apartments, rooms, office spaces, or other units in existing or proposed building or buildings or structure or structures are offered or proposed to be offered for sale.”

As you can see, this specific definition permits a plan or project whereby two (2) or more buildings are proposed to be offered for sale. In that scenario, the statute seems to indicate that these new structures are considered “condominiums.” This definition presents potential complications since the Tennessee Code has a different set of provisions for setting up a condominium regime that is outside the scope of this publication. Arguably, the Tennessee legislature has a different set of definitions for “condominiums” depending upon which chapter of the Code is being considered.

The statute only requires “substantial compliance” as it pertains to “private elements,” which are defined as “the lot area upon which an apartment is located and the improvements located thereon, as described in the declaration, and for which fee simple ownership and exclusive use is reserved to that apartment only. Private elements shall exist only where each apartment in the project has a ground floor and there are no apartments located above or below the private element except the one (1) apartment located thereon. Limited common elements located upon private elements are also private elements.”

That means that attorneys who draft HPRs do not have to be as careful when it comes to complying with the provisions related to “General common elements” and “limited common elements.” “General common elements include the land, whether leased or in fee simple, on which the building stands; the foundations, main walls, roofs, halls, lobbies, stairways, and entrances and exits or communication ways; the basements, flat roofs, yards, and gardens, except as otherwise provided or stipulated; the premises for the lodging of janitors or persons in charge of the building, except as otherwise provided or stipulated; the compartments or installations of central services, such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like; the elevators, garbage incinerators and, in general, all devices or installations existing for common use; and all other elements of the building rationally of common use or necessary to its existence, upkeep and safety; but where private elements are created, private elements shall not be considered to be general common elements.”

TIP: When working with a real estate attorney to form an HPR, make sure they have prior experience with Tennessee Horizontal Property Act Law.

The statute then goes on to state that “if an appropriate legal opinion is obtained from an attorney licensed to practice law in this state to the effect that all legal documents required in this part for the creation of a planned unit development are attached and therefore a planned unit development is created under this part, then a planned unit development shall be deemed to have been properly organized and constituted under state law.”

TIP: Make sure you attach a signed attorney certification to your HPR.

When drafting HPRs, make sure that your attorney includes an attached signed attorney certification. If your lawyer fails to do so, then closing delays may occur while the seller obtains the missing certification. If this occurs, the master deed must then be amended and the amendment must be recorded to resolve the error. To be clear, the statute requires the certification, and the HPR is considered not to be formed unless it is attached.

This statute contemplates that PUDs may be created despite “existing land use regulations.” Because Tennessee state law trumps the laws of the various city ordinances, it appears that PUDs in Tennessee must be permitted by local zoning authorities and legislative bodies whether they like it or not.

The Tennessee statute permitting the formation of HPRs in compliance with the provisions of this chapter is the very reason so many HPRs are being formed. Tennessee law rather than local zoning laws require it. Despite this state mandate, a property owner or developer must obtain a building permit from the local zoning or codes enforcement authorities.

TIP: Meet with Planning Commission before hiring an attorney.

Property owners and developers should meet with the local zoning authority prior to meeting with a real estate attorney. Bring all relevant documentation, a copy of the layout of the lot, and the footprint of the structure(s) to be built -- it’s helpful to let your attorney review this documentation first. If you’re unable to obtain a building permit, or if the local zoning authority will not allow the structure to be built because of setback, density, or other building code requirements, then it’s a waste of time and money to hire an attorney.

Although state law trumps local ordinances, some Nashville neighborhoods, such as parts of Belle Meade, are attempting to stop residential HPR development by “downzoning.” Look for these restrictions to be challenged in the courts at some point in the future.

66-27-104: Ownership -- Building code compliance

Keeping it Simple: The law allows separate units to be individually owned, sold, and conveyed.

This is one of the most important provisions in the statute! It allows the separate units to be individually owned, sold, and conveyed, and the property interests in the forms of deeds and other documents may be recorded with the local Register of Deeds offices to provide notice to the world regarding who owns the properties.

Keeping it Simple: All HPRs are subject to approval by local authorities.

This provision is the reason all HPRs are subject to approval by local authorities prior to the issuance of building permits. As mentioned previously, if the local building code is not satisfied, a building permit will not be issued.

TIP: Visit the Metro Planning Commission for permits. Arrive early in the morning to avoid the lines!

Interestingly, the statute indicates that the local planning authority seems only to have influence over “codes” issues. Typically, building codes are concerned with the safety and structural integrity of the project, making sure that the foundations are sound, framing is secure, plumbing is up to par, radon is mediated, and the electrical systems are safely installed. Generally, building codes do not normally concern themselves with density or setbacks. However, in Nashville, the Metro Planning Commission must reach a level of satisfaction that density and setback requirements have been satisfied prior to permitting the issuance of a building permit.

66-27-105: Joint ownership.

Keeping it Simple: This form of property can be owned in the same manner as other properties in Tennessee.

66-27-106: Owner’s rights -- Exclusive and common.

Is it a condo or a PUD? That is the question -- and the answer can be found in the Master Deed. Sometimes the language is more cryptic than we would like so we may need to look for “evidence of ownership.” For example, who pays the hazard insurance? If the Association pays for the hazard insurance, and then separately bills for their pro rata portion to the various property owners, for all of the property upon which all of the units rest, then more than likely, the unit owners do not own the land. On the other hand, if the unit owners individually obtain and pay for their own hazard insurance policies, then more than likely the unit owners own the dirt under which their units rest.

Keeping it Simple: To determine if a property is a condo or a PUD, figure out who pays what to whom.

We are not as interested in who has exclusive use or control of that property, or who that portion of the property benefits. Instead, we want to know who has fee simple title to the property upon which the unit sits. Interesting fact: to the surprise of many buyers, some of the new “two homes on one lot” properties we see in Nashville are condos.

TIP: You can convert an HPR from a condo to a PUD.

Many master deeds give the developer the authority to amend the master deed as long as the developer owns one of the properties in the HPR so that the developer can make changes in order to complete the construction. However, once the developer has moved on, changes sometimes require the unanimous consent of the unit owners. Converting an HPR from a condo to a PUD is tricky business, so look for an experienced real estate attorney.

66-27-107. Recordation and contents of master deed, lease or declaration.

This paragraph of the law outlines the only required provisions to be included in a Master Deed- (1) the property description; (2) identification of the units; (3) a description of the common elements, limited common elements and private elements; and (4) bylaws.

As you can see, the statute has very few requirements for a master deed. Then the question may be asked, why are Master Deeds often between thirty and seventy pages long? The length is dictated by what the attorney who drafts the Master Deed deems it important to include.

TIP: One benefit to setting up a condominium rather than a PUD is that the homeowner's associations of condos need not be incorporated.

One of the biggest snags involving the Planned Unit Development HPR is the fact that the Association must be incorporated and the homeowners must maintain the existence of the corporation by paying an annual \$100 fee to the state.

A description of the "apartment," often referred to as "Units" in Master Deeds, is usually described by a drawing with the footprint of the two new structures to be built upon the single lot. The drawing will always identify the private elements, shaded with a key to identify their location. Sometimes the private elements encompass solely the structures. Other times, private elements include the yards to serve exclusively for the owners of the respective units.

According to the statute, the land on which the home rests is both a "general common element" and a "private element." It is also a "private element" if it is designated as such in the Master Deed. This means that the property in an HPR is described in the statute as a general common element which becomes a private element by virtue of the master deed.

66-27-111. Administrative bylaws recorded.

66-27-112. Contents of bylaws -- Modification.

This provision requires that by-laws be enacted to govern the HPR, and requires those bylaws to be attached to the recorded master deed. The point here is to make sure that everyone who owns a property in an HPR be notified as to the rules that govern the HPR.

The bylaws always discuss voting and must also address the upkeep of a building, the administration, and limited and general common elements.

TIP: For more information on Tennessee Partition Law, read [How to Divorce Your Co-Tenant](#).

This may be as good a time as any to discuss “limited common elements.” Limited common elements” are defined as those common elements which are agreed upon by all of the co-owners to be reserved for the use of a certain number of apartments to the exclusion of the other apartments, such as special corridors, stairways and elevators, sanitary services common to the apartments of a particular floor, and the like.

Typically, when two homes are built on a single lot, there are no shared corridors, stairways, or elevators. Sometimes the homes are attached, so a common wall might be considered a limited common element. Also, often the yards serving each respective unit are frequently designated as limited common elements. The reason is that sometimes there are utility lines, water lines and other such items that serve both units.

By designating the yards as limited common elements, the yards themselves can still be used to reserve for the owners of the respective units so the unit owners can feel free to plant flowers, shrubbery, and other landscaping, or perhaps simply to feel free to throw the ball with a child, free of any objections from the other unit’s owner.

As “limited common elements”, it is understood that those yards are still to be used in some cases as elements necessary to the existence, upkeep, and safety of both unit owners. Interestingly, the statute seems to contemplate that limited common elements are for only a limited number of the unit owners to the exclusion of other property owners.

66-27-108. Recordation and conveyance of apartments.

Here, the legislature is making it clear that property interests in “apartments” established by virtue of the HPR statute are no different than any other property rights involving real property. Notice to the world regarding an interest in real property is provided by filing the document with the local Register of Deeds office. Not so with respect to personal property. Those who desire to provide notice of liens on personal property must resort to their remedies under the Uniform Commercial Code by filing UCC liens with the Tennessee Secretary of State and sometimes with the local Register of Deeds (in those instances where the personal property is attached to the real property and this is considered part and parcel of the real property). Interests in apartments created pursuant to the Tennessee HPR statute are interests in real property by virtue of this Tennessee state legislative statute.

Keeping it Simple: When someone purchases an “apartment” or “unit,” they are automatically purchasing an “undivided interest” in the common elements.

66-27-120. Identification of estates for taxation, residential ground rent purposes.

This provision requires the local tax assessor to issue and send the tax bills to the individual “apartment” owners even though the property was originally a single tax parcel. The statute indicates that “the general and common elements shall be assessed proportionally among the co-owners.” In situations where there are no “common elements,” and they are taxed as \$0, there is nothing to proportionally assess. In situations where there are “common elements” like perhaps a shared driveway, the concern arises -- what if the taxes go unpaid on that property? Does that mean that the homes can be foreclosed on and sold for delinquent property taxes?

Keeping it Simple: Homes cannot be foreclosed on and sold for delinquent property taxes.

Despite the fact that tax sales cannot divest the individual apartment owners, those who live in an HPR will want to be careful to make sure that the property taxes on the common elements are paid to avoid the risk that the shared driveway or other common elements are sold at a tax sale. Also, those who purchase properties in HPRs also will want to be sure that the common elements are insured for adequate amounts in the unusual event that someone is injured and files a lawsuit against the property owner.

66-27-121. Supplemental rules and regulations.

This provision allows the local planning and zoning authorities permission to issue “supplemental rules” governing the HPR statute- it does not permit the local authorities from abolishing HPRs.

66-27-122. Construction with other laws.

Keeping it Simple: HPRs are the law of the land.

By virtue of this provision, the Tennessee legislature demonstrated its resolve in making HPRs the law of the land. The legislature tried to contemplate various objections and disputes that may arise as this law is implemented. To the extent the legislature failed to consider every scenario, this provision clearly reveals the goal that the HPR regime be considered valid and enforceable under Tennessee law.

As you can see, the Tennessee Horizontal Property Act, first penned in 1963 and amended several times since then, is an incredibly complex -- and in some places, dated -- legal document. Interpreting the law correctly in 2017 requires an experienced legal hand to drive the process.

Interested in learning even more about HPRs? For an unabridged and full analysis of the law, please visit us at www.rochfordlawyers.com

To schedule a free consultation, please **contact us**.

We'll help your residential development get off the ground!

