

# **LEGAL PROBLEMS INVOLVING MIXED-USE CONDOMINIUM IN ONE BUILDING\***

*Jinjutha Techakumphu \*\**

## **ABSTRACT**

Even though Thailand has promulgated the Condominium Act B.E. 2522 and had the latest amendment in B.E. 2551 with a view to manage the living of co-owners in the condominium, the aforementioned Act is somewhat outdated because it was promulgated mainly to serve single purpose condominium and further it creates a loophole in relation to the management of common property in the mixed-use condominium where there are different types of units located in the same building. As a result of the complicated structure of mixed-use condominium which leads to the conflict use of common property among different types of unit in the building, this thesis will focus on the problem of the Condominium Act B.E. 2522 in relation to the management of common property in the mixed-use condominium. This is because a mixed-use condominium triggers a more complex structure for common property than that of the single purpose condominium since the management of common property in the building will not belong to one group of co-owners who has the same interest, but consists of co-owners with various interest who are in the same building.

This thesis finds that the management of common property in the mixed-use condominium according to the current Condominium Act poses many controversies among different types of units, such as; the lack of a clear definition of “condominium” and “common property”, the lack of limitation on the multipurpose area in the condominium, the conflict among the different types of co-owners with regard to the maintenance and management of common property, voting rights on the common property reserved only for the usage of certain types of condominium units and the conflict between the right of certain unit owners and the right of all unit owners in the same condominium.

In order to provide solutions to the management of common property in the mixed-use condominium, this thesis therefore studies the condominium law in two countries: the USA and Singapore, where their condominium laws’ structures contain the measures regarding the management of common property in the mixed-use condominium and also the management corporation and subsidiary management corporation in dealing with various types of units in the same building.

As a result of the study concerning the management of common property in the mixed-use condominium, this thesis proposes that the definitions of “condominium” and “common property” under the Condominium Act B.E. 2522 be amended to accommodate the

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\*\* Graduate student of Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University.

mixed-use condominium. The limitation on multipurpose area should be established. Moreover, the voting rights in connection with the common property for certain co-owners having the same unit purpose should also be separated from the voting rights of the rest of the co-owners in the building so as to prevent the conflict use among different types of units in the mixed-use condominium.

**Keywords:** common property, mixed-use condominium

#### บทคัดย่อ

แม้ว่าประเทศไทยจะมีการออกพระราชบัญญัติอาคารชุด พ.ศ. 2522 และมีการแก้ไขครั้งล่าสุดในปี พ.ศ. 2551 โดยมีวัตถุประสงค์เพื่อจะจัดการการอยู่ร่วมกันของเจ้าของร่วมในอาคารชุด อย่างไรก็ตามพระราชบัญญัติดังกล่าวนั้นมีความล้าหลังเนื่องจากวัตถุประสงค์ในการประกาศใช้นั้นมีเพียงเพื่อวัตถุประสงค์เดียว คือการจัดการอาคารชุดแบบผสม เนื่องจากอาคารชุดแบบผสมนั้นมีห้องชุดที่มีวัตถุประสงค์แตกต่างกันอยู่ในอาคารชุดเดียวกัน ลึบเนื่องจากโครงสร้างที่ซับซ้อนของอาคารชุดแบบผสมซึ่งก่อให้เกิดความขัดแย้งในการใช้ทรัพย์ส่วนกลางท่ามกลางห้องชุดที่มีวัตถุประสงค์แตกต่างกัน ผู้เขียนวิทยานิพนธ์จึงต้องการจะเน้นเรื่องปัญหาของพระราชบัญญัติอาคารชุด พ.ศ. 2522 อันเกี่ยวเนื่องกับการจัดการทรัพย์ส่วนกลางในอาคารชุดแบบผสม เนื่องจากอาคารชุดแบบผสมนั้น ก่อให้เกิดโภคภาระซับซ้อนสำหรับทรัพย์ส่วนกลางมากกว่าอาคารชุดที่มีวัตถุประสงค์เดียว เพราะการจัดการทรัพย์ส่วนกลางในอาคารชุดจะมิได้เป็นของกุ่มเจ้าของร่วมเพียงกุ่มเดียวที่จะมีผลประโยชน์เดียวกัน หากแต่เป็นเจ้าของร่วมที่มีผลประโยชน์ที่หลากหลายอาศัยอาศัยอยู่ในอาคารเดียวกัน

ผู้เขียนพบว่า การจัดการทรัพย์ส่วนกลางในอาคารชุดแบบผสมภายใต้พระราชบัญญัติอาคารชุดฉบับปัจจุบันนั้นก่อให้เกิดปัญหาหลายประการระหว่างห้องชุดที่มีวัตถุประสงค์แตกต่างกัน อาทิเช่น การไม่มีคำนิยามที่ชัดเจนของ “อาคารชุด” และ “ทรัพย์ส่วนกลาง” การไม่กำหนดพื้นที่เฉพาะสำหรับพื้นที่สำหรับวัตถุประสงค์ต่างๆในอาคารชุด ความขัดแย้งของเจ้าของร่วมที่มีวัตถุประสงค์ต่างกันสำหรับการบำรุงรักษาและการจัดการทรัพย์ส่วนกลาง สิทธิในการออกเสียงในทรัพย์ส่วนกลางซึ่งกำหนดให้ใช้เฉพาะบ้านห้องชุด และความขัดแย้งระหว่างสิทธิของเจ้าของห้องชุดบ้านห้องกับเจ้าของห้องชุดทุกห้องในอาคารชุด

เพื่อหาทางแก้ไขการจัดการทรัพย์ส่วนกลางในอาคารชุดแบบผสม ผู้เขียนจึงได้ศึกษากฎหมายอาคารชุดของสองประเทศ คือ สหราชอาณาจักรและสิงคโปร์ ซึ่งโครงสร้างกฎหมายอาคารชุดของทั้งสองประเทศมีมาตรการในการจัดการทรัพย์ส่วนกลางในอาคารชุด และยังมีหน่วยงานจัดการหลักและหน่วยงานจัดการย่อยในการจัดการห้องชุดที่มีวัตถุประสงค์ต่างกันในอาคารเดียวกัน

ผลจากการศึกษาในวิทยานิพนธ์นี้ในเรื่องการจัดการทรัพย์ส่วนกลางในอาคารชุดแบบผสม ผู้เขียนจึงได้เสนอแนวทางแก้ไขปัญหา โดยให้มีการแก้ไขคำนิยามของ “อาคารชุด” และ “ทรัพย์ส่วนกลาง” ภายใต้พระราชบัญญัติอาคารชุด พ.ศ. 2522 เพื่อรองรับการจัดตั้งอาคารชุดแบบผสมอย่างชัดเจน ตลอดจนเสนอแนะให้มีการกำหนดพื้นที่สำหรับวัตถุประสงค์ต่างๆ ในอาคารชุดนอกจากนี้ สิทธิในการออกเสียงในเรื่องทรัพย์ส่วนกลางสำหรับห้องชุดที่มีวัตถุประสงค์การใช้เหมือนกัน ควรจะถูกแยกออกจากสิทธิในการออกเสียงของทุกห้องชุดในอาคารชุดเพื่อจะป้องกันความขัดแย้งระหว่างห้องชุดที่มีวัตถุประสงค์ต่างกันที่อยู่ในอาคารชุดแบบผสม

**คำสำคัญ:** ทรัพย์ส่วนกลาง อาคารชุดแบบผสม

## Introduction

The statistics of the registration of condominium from the Real Estate Business Promotion Bureau in 2001 showed 21 registered condominium in Bangkok, while in 2013, the number rose significantly to 227.<sup>1</sup> Based on the aforementioned statistics, the writer is of the opinion that condominium plays an important role in our life since more and more people prefer to avoid tiresome traffic congestion and reside in the center of the city where they can do all activities in the same place.

In order to serve people's need in relation to dwelling, Thailand launched the Condominium Act B.E. 2522 (the "CA"). The latter was also intended to solve the problem of ownership of real estate under the Civil and Commercial Code which does not accommodate separate ownership of condominium units. The CA also established a maintenance system for condominiums so as to assure the condominium unit purchasers.<sup>2</sup>

As time passed by, people not only use condominiums for residential purpose, but preferred to "live, work and play" in a single place; that was when the mixed-use condominium was introduced. A mixed-use condominium is a condominium that consists of an integration of different groups of units, for example; retail units, and residential units, etc., located in one building. The integration of home, office and recreation sections of a mixed-use condominium is the solution to modern living and also helps to optimize land usage.

Although Thailand has the CA to control people living together in a condominium, it does not serve the need of an increasing number of mixed-use condominiums. This is because the CA does not provide suitable provisions for the management of common property in a mixed-use condominium. Consequently, without clear provisions to govern the management of common property thereunder, it can lead to conflict among owners of different types of units. To make matters even more complicated, there are some areas in the building which are dedicated for use only by particular types of units; therefore, the management of common property, including the payment for maintenance fees, needs to be clearly defined so as to prevent conflict among owners of different types of units.

## Definition of Mixed-Use Condominium

From the writer's research of mixed-use condominiums in Thailand, the Eight Thonglor Residences can be used as an example of a mixed-use condominium.

Based on clause 5 of the Eight Thonglor Residences' bylaws, the unit types are divided into 3 categories as follows:

1. Retail units which are intended for use as retail outlets, e.g. restaurants, offices, clinics, spas, financial institutions, entertainment spots, tutoring institutions, product showrooms and for other commercial purposes with parking spaces, etc.

2. Residential units which are divided into 2 types:

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<sup>1</sup>Statistics on Bangkok Metropolitan Real Estate Project, available at <http://homewithdream.com/2013/12/09/statistics-real-estate/> (Last visited Dec 6, 2014).

<sup>2</sup>Remarks of the Condominium Act B.E. 2522.

2.1 Residential units section 1 which stipulates that they shall be used solely for residential purposes only;

2.2 Residential unit section 2 which serves as a serviced apartment

3. Office units

Using the aforementioned characteristics of the Eight Thonglor Residences as a case study, and for the purpose of this thesis, the term “mixed-use condominium” can be defined as a condominium consisting of multi-purpose units in the same building, e.g. for use as residences, offices, and other commercial purposes, so long as such uses do not violate the laws.

### **Provisions in relation to the Management of Common Property in the Mixed-Use Condominium in Thailand**

In the writer’s opinion, there are only two main provisions under the CA that can be applied to the common property management in the mixed-use condominium, namely:

#### **Section 17/1 of the Condominium Act: Limitation on Commercial Area**

**Section 17/1 of the CA** stipulates that *“in the case where a space in the condominium is set aside as a place to carry on business, access to and from such area shall be specifically established in order to prevent disturbance or the peaceful enjoyment of the joint owners.”*

*No person shall be permitted to engage in any trade activity in the condominium, except it is a trade activity conducted in the area of the condominium designated in accordance with paragraph one.”*

Section 17/1 is added into the CA by the Condominium Act (No. 4) B.E. 2551 because the CA has been long enforced and it appears that the principles and many details thereof are not practical and also insufficient to protect buyers or the prospective buyers who purchase the condominium for residential purpose, therefore it is essential that the Condominium Act (No. 4) B.E. 2551 be introduced to solve the enforcement issue and to protect the buyers.<sup>3</sup>

In the writer’s opinion, Section 17/1 is a good example to illustrate how the condominium structure has changed in Thailand and how the government responded to such change by enacting this Section. Moreover, this Section also proves that at the present time, the condominium trend is changing from single purpose to multipurpose condominium since there are also retail units for business in the condominium, therefore the condominium should have regulation to control the business being carried out in the condominium.

According to Section 32(6) of the CA, condominium regulation shall contain the substantive terms with regard to management of common property. Therefore, the condominium regulation must contain details in relation to the management of personal property and common property, for example, it must be stated whether condominium is for

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<sup>3</sup> Remark of the Condominium Act (No. 4) B.E. 2551

residence or for commercial purpose. This is because Section 17/1 limits the usage of unit as commercial area, unless there is a proper entrance and exit system.<sup>4</sup>

The purpose of Section 17/1 is to protect the owners residing in other units in the same building and it also prevents other owners from conducting business which can disturb the peacefulness of the joint owners. Section 65 also subjects those in violation of Section 17/1 to a fine not exceeding fifty thousand Baht and an additional fine not exceeding five thousand Baht per day throughout the period of such violation. However it should be noted that Sections 17/1 and 65 will not apply to condominiums registered as condominiums containing units used in carrying on trading business previously, or prior to 6 July 2008, according to Section 32 of the Condominium Act (No. 4) B.E. 2551.

#### **Section 46 of the Condominium Act: the Right of Specific Unit Owners**

**Section 46 of the CA** stipulates that “*Where the Bylaws require some co-owners to pay costs for a particular purpose, only those co-owners shall have the right to vote for the resolution pertaining to the costs for that particular purpose and each person has a number of votes pursuant to the ratio as stipulated in the provision of Section 18 Paragraph One.*”

Section 46 states of the right of specific unit owners regarding the matter involving only those unit owners which can be regarded as the exception under the CA. This is because normally the co-owner of each unit shall have equal voting right at the meeting, except in the case of Section 46. In other words, should the Bylaws state that certain co-owners are obliged to pay specific expense for a specific matter, for instance, the expense solely for the condominium swimming pool membership, then other co-owners who are not swimming pool members shall have no right to cast vote regarding the expenses for swimming pool maintenance. The law further provides that in casting such specific vote, the said owners shall have voting right equal to the ownership ratio as provided in Section 18.

In the writer’s opinion, the developer can apply Section 46 which is the closest Section regarding the solution to the mixed-use condominium management concerning the collection of the different expenses for various unit types; for example in case of a mixed-use condominium consisting of commercial, office and residential units, and the residential units possess specific common property reserved only for the residential units usage, then the developer can apply Section 46 to collect special expense in order to maintain the said specific common property from only the residential unit owners and the residential unit owners have the right to bar other units i.e. the commercial and office units from exercising their votes on this specific common property. Nonetheless, Section 46 is not the specific provision to regulate the mixed-use condominium since it does not set the standard for the management of limited common property; Section 46 rather applies on a case-by-case basis in dealing with the right of specific unit owners in specific matters. Therefore, there is uncertainty in applying Section 46 to deal with common property reserved only for certain units.

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<sup>4</sup>วิชัย ตันติกุลานันท์. คำอธิบายกฎหมายเกี่ยวกับอาคารชุดกฎหมายคอนโดมิเนียม 52, พิมพ์ครั้งที่ 8: ห้างหุ้นส่วนจำกัดพิมพ์อักษร, 2556, [Wichai Tuntikulanan, **Law in relation to Condominium**, 52, PimAksorn Limited Partnership, 8<sup>th</sup> ed., 2013]

## **Problems regarding the Management of Common Property in Mixed-Use Condominium under the Condominium Act B.E. 2522**

### **The Unclear Definition of “Condominium” under the Condominium Act**

Section 4 of the CA provides the definition of condominium as “*the building that can be separated into units for individual ownership which includes personal and common properties.*”

Based on the aforementioned definition, it can be concluded that the CA allows the separation of ownership in the building which is the basic concept of “condominium”. The important factor is that the CA stipulates that the ownership in the condominium consists of 2 parts: personal property and common property. Furthermore, to be listed as condominium in Thailand, such building must be registered with relevant authority under the CA.

It can be seen that the CA does not mention the type of condominium to be registered. As a result, when the developer would like to establish a mixed-use structure for the condominium, there is uncertainty as to whether or not the developer can register such mixed-use building as the condominium under the CA. Moreover, the footnote to the enactment of the CA 1979 states: “*the CA was enacted due to the rising problems and conflict of residing in urban areas and the ownership right in the immovable property regime under the Civil and Commercial Code does not accommodate the need of the residents in the same building having separate titles to the units. This Condominium Act sets up the ownership system in the condominium to govern all common residents in the same condominium while allowing individual ownership of the units. At the same time, it enables fair sharing of expenses. In addition, the establishment of many condominiums now can be organized and administered under the rules developed to ensure confidence of the buyers of condominium units.*” From such note, it can be implied that the CA was established solely for the residential purpose of the condominium purchaser. As a result, when the developer conducting the mixed-use condominium, there are loopholes regarding the registration of condominium, the management of common property since not all unit owners have the same objective in purchasing the mixed-use condominium.

### **The Unclear Definition of “Common Property” under the Condominium Act**

Since the CA divides the definition of the property into only 2 categories: personal property and common property. Section 4 of the CA defines “*common property*” as “*part of the building that is not the unit such as land on which the building is constructed or other property provided for common use*”.

In respect of the common property, there is the controversy as to whether or not the common property needs to be used for all co-owners in the condominium or only certain co-owners are allowed to use certain common property. In this regards, a scholar views that the common property under the CA needs not be reserved for the benefit of all co-owners, he rather opines that some common property can be reserved only for the benefit of certain group of co-owners, in other words it depends on the purpose of the establishing of

condominium or the agreement of the co-owners in such condominium.<sup>5</sup> Another scholar<sup>6</sup> further supports the aforementioned idea by stating that the purpose of French Condominium law, the root of the Thai CA, stipulates that the common property means part of building and land (including other property determined by the law) for the usage or for the benefit of all co-owners or certain co-owners among all co-owners. He further states that French law applies broader definition of common property than that of the CA. Moreover, if people interpret that there is no limited common property when there exists certain property that is only for the benefit of certain group of co-owners then it shall be unfair to the rest of the co-owners who do not utilize such property but have to pay for the maintenance fee thereof.

According to the writer's perspective, strictly speaking, the common property under the definition provided in the current CA should mean the property for the common use of all co-owners in the condominium, based on the following grounds:

Firstly, the definition of "common property" under the CA does not stipulate that it is provided for common use of certain units in the condominium, on the other hand it simply states that it is for the common use of the co-owners in the building.

Secondly, without a clear definition of "common property", there will be a loophole when it comes to the separation of properties which are commonly used only among certain groups of owners and are not for the benefit of all unit owners in the building. This is because the developer and the unit owners will face the problem concerning the management of such common property, that is to say, initially, the developer or the condominium juristic person ("CJP") may draft the condominium bylaws to prohibit certain units from using such common property since only specific unit owners are required to pay for the maintenance of such common property. Nonetheless, due to the unclear definition of common property, the voting on the management of such property falls under Section 48 of the CA which requires not less than half of the total votes of the joint owners in the condominium to be effective. As a result, other co-owners who have not paid for the maintenance of that common property, will have the right to vote in matters involving that common property. This is because such common property is regarded as common property which is for the benefit of all co-owners in the condominium under Section 4 of the CA.

### **The Limitation of the Multipurpose Area only Limits to the Commercial Area**

The fourth amendment which is the latest amendment to the CA on 27 February 2008 added one new Section regarding the limitation on commercial area in the condominium as follows:

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<sup>5</sup> วิกรณ์ รักษ์ปวิชณ์, กรรมสิทธิ์ในอาคารชุด 151, วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ (2528) สำนักงานของ วิวัฒน์ รุจติกังพร, อาคารชุด 7, วารสารฉบับพิเศษ 10 ปี แห่งการสถาปนาการเคหะแห่งชาติ [Vikorn Rakpuangchon, Condominium Ownership 151(1985) citing Viwat Rujtikangporn, Condominium 7, special journal 10 years of the establishing of National Housing Authority (unpublished Master of Laws thesis, Thammasat University)(on file with the Thammasat University Library)]

<sup>6</sup> *Id.* at 151-152.

*“In the case where a space in the condominium is set aside as a place to carry on business, access to and from such area shall be specifically established in order to prevent disturbance or the peaceful enjoyment of the joint owners.*

*No person shall be permitted to engage in any trade activity in the condominium, except it is a trade activity conducted in the area of the condominium designated in accordance with paragraph one.”*

It can be seen that the new Section 17/1 only states that the co-owners wishing to conduct business in the condominium must provide a separate entrance and exit to such area so as not to disturb other co-owners in the building. Nonetheless, it should be noted that under the mixed-use condominium structure, the purpose of the units may not be limited to retail shops only, but may include other purposes not prohibited by law. Therefore, should the new Section 17/1 deal only with retail shops, there could be a problem when the need to use an area for other purposes arises, for example, for use as office units. In this connection, stipulating only limitation on retail shops could result in creating loophole for other unit's purposes in the mixed-use condominium seeing that the CA does not state that for other purposes except for retail shops, those co-owners are required to provide the system on entering and exiting such area in order to prevent the disturbance on the peaceful enjoyment of the joint owners.

### **Voting Right on the Common Property Reserved only for Usage of Certain Types of Condominium Units**

In a mixed-use condominium the number of each unit type is unequal, in other words, there will be one section that possess more bargaining power as they control the main voting rights; for instance, Condominium A consists of 3 sections: the first consists of 55 commercial units; the second comprises 80 office units and the last section consisting of 200residential units. As a result, the residential units will have control over the management of common property because they have more voting power. **Section 48** of the CA provides that *“the resolution on the following matters must have the votes of not less than a half of total votes of the joint owners in the condominium.*

- (1) *A purchase of a real estate or acceptance as a gift of a real estate with the encumbered charge being the common property,*
- (2) *A disposition of common property being the real estate,*
- (3) *A permission to a joint owner to build, decorate, make a change in, alteration on or addition to his own unit at his own expenses which adversely affect the common property or the external features of the condominium,*
- (4) *An alteration on or a change in bylaws relating to the use or management of the common property,*
- (5) *An alteration on or a change in the ratio of common expenses in the bylaws defined under Section 32(8),*

(6) *A construction deemed to be a change in, addition to or modification on the common property,*

(7) *An arrangement for the exploitation from the common property.*

*In case where the joint owners attending a meeting does not constitute the number set forth under paragraph one, a new meeting shall be summoned within fifteen days from the date of summoning the preceded meeting and that a resolution relating to the matter provided under paragraph one in this new meeting must receive the votes of not less than one third of the joint owners' total votes."*

Consequently, if the residential units consisting of 200 units exercise their rights to make the minority units (the commercial and office units) to pay for more maintenance fee and at the same time prohibiting those minority units from the enjoyment of certain common facilities, they can do so by mobilizing half of the total voting right by virtue of Section 48. It can be said that Section 48 creates a loophole which leaves the minority units vulnerable to unfair treatment from the majority units in the mixed-use condominium.

### **The Conflict between Sections 46 and 48 of the Condominium Act B.E. 2522**

Section 46 of the CA stipulates that "*When there is Bylaws requiring that only some co-owners have to pay for costs for a particular purpose, only those co-owners shall have the right to vote for the resolution pertaining to the costs for that purpose and each person has a number of votes pursuant to the ratio as stipulated in the provision of Section 18 Paragraph One."*

Section 48 of the CA provides that "*the resolution on the following matters must have the votes of not less than a half of total votes of the joint owners in the condominium:*

(4) *An alteration on or a change in Bylaws relating to the use or management of the common property,*

(6) *A construction deemed to be a change in, addition to or modification on the common property,*

(7) *An arrangement for the exploitation from the common property.*

*In case where the joint owners attending a meeting does not constitute the number set forth under paragraph one, a new meeting shall be summoned within fifteen days from the date of summoning the preceded meeting and that a resolution relating to the matter provided under paragraph one in this new meeting must receive the votes of not less than one third of the joint owners' total votes."*

Section 46 of the CA stipulates that certain co-owners have the right to vote for the resolution pertaining to the cost of a particular purpose and that only they pay for the costs thereof and each person has a number of votes pursuant to the ratio stipulated under Section 18. In my point of view, Section 46 only provides that the aforementioned co-owners have the right to vote solely on the cost of a particular purpose, Section 46 however is silent on whether or not the management of such particular purpose is the absolute right of those co-owners. Consequently, there is an uncertainty when it comes to the management of the specific common property for some unit owners. This is because under Section 48 (4), the amendment to the bylaws in relation to the use or management of common property and (6) a

construction deemed to alter or modify the common property requires the resolution of not less than half of the total voting rights of all co-owners in the condominium.

The conflict between these 2 Sections will take place when the co-owners under Section 46 would like to exercise their voting rights in other aspects besides the cost of such particular purpose. For example, the residential units would like to redesign the swimming pool for which only they have paid the maintenance fee and the bylaws provides that the swimming pool is for the exclusive use of this group. Based on Sections 46 and 48(6), the residential units cannot modify the swimming pool if their total voting rights do not amount to the equivalent of half of the total voting rights of the entire co-owners which shall include other types of unit owners residing in the same building. This is owing to the fact that Section 48(6) requires that the modification of the common property can only be made when receiving the resolution of half of the total voting rights of all unit owners.

In my opinion, the CA does not provide the concrete solution to the management of common property that is only for the common use of certain units as the CA only mentions about the voting on the expense thereof. The concept of common property only for the common use of certain units should be that those who pay for the property should not have the sole right to vote on the expense thereof, but they should also have the absolute right in managing such property without the interference from other types of units that do not pay for the maintenance of such property.

Moreover, in case the developer or the CJP stipulates the management of common property in the bylaws to be inconsistent with the provision provided in the CA, such bylaws shall be invalid.<sup>7</sup>

### **Problems in relation to the Application of Bylaws in Mixed-Use Condominium and the Condominium Act B.E. 2522**

Under Clause 25.4 of the bylaws of Eight Thonglor Residences divides the common property into 5 categories:(1) the common property for retail units, (2) the common property for residential units lot 1, (3) the common property for residential units lot 2, (4) the common property for retail units and residential units lot 1 and (5)the common property for all types of units. Clause 30 of such bylaws also stipulates that each type of units entitled to the usage of each type of common property. Furthermore, the maintenance and operational fee in each type of units is also varied.

It can be seen that mixed-use condominiums' bylaws provide for the management of limited common property which is not dealt with in the CA. From its bylaws, the unit owners shall pay different rate for the maintenance of common property, that is to say, besides the maintenance fee of the common property which the bylaws states that all unit owners have the right to use such common property, each type of unit is required to pay a different rate for the common property reserved for the exclusive use of a particular group of units.

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<sup>7</sup>Supreme Court Decisions nos. 7874/2549 and 13225/2553

It should be noted that Eight Thonglor Residences' bylaws adapt Section 46 to its bylaws' provision, this means that those certain types of unit that have paid for the maintenance and the management fee of specific common property is entitled to vote only on the resolution regarding the expense of those specific common property. The bylaws do not state that those specific co-owners have the right to vote on the management of the said common property. Moreover, Clause 51 of its bylaws applies the same wording as Section 48 of the CA, therefore, the resolution for the management or amendment of common property requires the vote at least half of the total votes of the co-owners in the condominium.

As a result, the problem will occur when the retail units would like to amend their specific common property because even though the residential units do not pay for the maintenance and management fee thereof, but according to Clause 51 of the bylaws and Section 48 of the CA, those specific common property is considered as the common property which is for the benefit of all co-owners in the building, therefore it requires half of the total votes from all unit owners not only half of the total vote from the co-owners whom the bylaws provides that only themselves are entitled to use such specific common property.

### **Foreign measures in relation to the management of common property in the mixed-use condominium**

The foreign countries chosen for the study on the management of common property in the mixed-use condominium are USA and Singapore. In USA, the relevant law is the Uniform Condominium Act ("UCA") while in Singapore, it is the Building Maintenance and Strata Management Act ("BMSMA")

The provisions under the UCA and BMSMA contain similar measures concerning the management of common property in the mixed-use condominium as follows:

<b>UCA of USA</b>	<b>BMSMA of Singapore</b>
<b>1. Limited Common Elements ("LCE")</b> means a portion of the common elements allocated by the declaration or by the operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of units.	<b>1. Limited Common Property ("LCP")</b> means such part of the common property for the exclusive benefit of the subsidiary proprietors of 2 or more (but not all) lots in that strata title plan, but does not include — (i) the foundations, columns, beams, supports, walls, roofs of, and any window installed in any external wall of, any building within that parcel; and (ii) any chute, pipe, wire, cable, duct and other facility for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, not

<b>UCA of USA</b>	<b>BMSMA of Singapore</b>
	comprised in any lot or proposed lot and necessary for the common use of the occupiers of all lots or proposed lots in that parcel
<b>2. Class voting</b> The declaration may provide: (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class.	<b>2. Subsidiary Management Corporation (“Sub-MC”) for LCP</b> The Sub-MC is introduced to govern LCP. The Sub-MC shall have the same power and duties as the management corporation but its power is limited to only matters relating to LCP
<b>3. Assessment for common expense</b> The UCA clearly separates the assessment of common expense, that is to say the assessment for the maintenance, repair, replace of the LCE shall be assessed only against the units which LCE is assigned to.	<b>3. Separation of the expenses of subsidiary management corporation</b> The maintenance fee and the expense in managing LCP is separated from the main corporation and shall be collected only from subsidiary proprietors who are entitled to the exclusive use of LCP.

### **Various structures for mixed-use condominium**

According to John B. Lundquist, the president of the real property section in the Hennepin County Bar, mixed-use condominium can be divided into 3 main categories as follows:<sup>8</sup>

#### **1. Single Condominium- Single Association**

This approach can be seen as the traditional one in which the condominium is created and is operated by one association. The single condominium approach is suitable for projects containing various groups of units with roughly equal voting strength in the association.<sup>9</sup> In this approach, the power of all groups is normally equal. There are many advantages in establishing mixed-use under single condominium. Firstly, it provides the unity for the management of the project since all units shall be under one association. Secondly, it is economical because the procedure for contract can be done in one time. However, it should be noted that single condominium and single association might not be appropriate for a condominium containing substantial variation other than building type, for example in a mixed-use condominium consisting of both residential and retail units, single association will cause trouble in managing the common expense, for there are many differences of allocation of expenses between two types of units.

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<sup>8</sup> John B. Lundquist, “Mixed Use Condominiums under the Minnesota Uniform Condominium Act”, 10 Wm. Mitchell L. Rev. 97, 101 (1984).

<sup>9</sup>Id.

## **2. Two-Tier Condominium**

Under the two-tier condominium structure, even though the condominium consists of various types of units, it still retains a continuity of management through the use of master condominium association. Besides the master association, there exists separate association to deal with specific type of the units within the master condominium. It can be said that the two-tier condominium is suitable for projects with different types of units, in other words, a mixed of residential, hotel and commercial project.

A two-tier condominium consists of a master condominium that is a single condominium covering the entire project area. In the master condominium, areas are designated for particular uses which consist of the real estate of the second-tier condominiums.

## **3. Related But Separate Condominiums**

The related but separate condominium might be suitable for large projects containing distinctly different types of units where coordinated management and maintenance are not essential on an ongoing basis.<sup>10</sup> The pro for this structure is convenience since each association is responsible only for the operation of its condominium however there exists the con thereof because of the independence of each association; there is a lack for communication as to which direction all groups' owners should focus on.

## **Conclusion and Recommendations**

In light of the establishing of mixed-use condominium in Thailand, the developer would likely face a large numbers of obstacles in structuring the condominium. Due to the outdated condominium law under which its structure is not suitable for multi-purpose building, that is to say many provisions under the CA cannot solve the problem of the management of specific common property.

In the writer's opinion, the CA needs a revision to provide specific provisions in relation to the management of the common property which in mixed-use condominium shall be for the common use of all co-owners in the building or for the common use solely for certain co-owners.

In this regard, Thailand should consider adopting the condominium law of both USA and Singapore that have the specific provision in managing the common property which are only for the benefit of some unit group and the common property for the common use of all co-owners in mixed-use condominium, for example the definition of condominium and common property in the CA should be amended so as to separate the management thereof from the management of common property which belong to all co-owners in the condominium. Moreover, the voting right should be separated for each type of unit owners so that other types of unit owners shall not be involved in the management of certain common property in the type of units that they do not have interest in.

From the uncertainty of the common property management in mixed-use condominium in Thailand, I suggest that the CA should be amended as follows:

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<sup>10</sup> *Id.* at 106.

## **Definition of “condominium” in Section 4 of the Condominium Act should be amended**

Owing to the fact that at the present time, the definition of condominium under that CA is silent on whether or not the developer can establish the multipurpose condominium, therefore the developer wishing to establish mixed-use condominium is likely to encounter the uncertainty in developing his project which shall include the management of common property that is provided only for the benefit of certain unit owners in the building. In order for the clarification that the CA supports the establishment of mixed-use condominium, I would recommend that the definition of condominium be revised as follows:

### *“Section 4 of this Act*

*Condominium means the building in which a person can divide ownership into several portions for the residential purpose, commercial purpose and/or any other purposes and each portion consists of ownership in personal property and co-ownership in common property”.*

## **Definition of “common property” in Section 4 of the Condominium Act should be amended**

In this regard, the CA should consider applying the concept from the UCA of USA and BMSMA of Singapore that allow the common property to be use for all co-owners and only for certain co-owners in the building.

Based on the aforementioned concept of common property in USA and LCP in Singapore, the common property stipulated in Section 4 of the CA therefore should be revised to the following term so that it will support the common property in two types. The first type is the common property for the common use of all co-owners in the condominium and the other type is the common property for the common use of only certain units in the condominium.

### *“Section 4 of this Act*

*“Common Property” means part of a condominium that are not the condominium units, the land on which the condominium is situated, and the land or other properties available for use or for common interest of all co-owners in the condominium or for use or for common interest of the co-owners having the same unit purpose in such common property.”*

## **Limitation on multipurpose area should be amended in Section 17/1 of the Condominium Act**

Even though Section 17/1 has been added to the CA so that the commercial area be specifically separated the entrance and exit thereof with a view not to disturb other types of co-owners in the same building, such amendment only mentions of the separation of commercial area which might not sufficient for the mixed-use condominium structure considering that there will be other purpose besides commercial purpose in the condominium.

For the clarification and suitable of mixed-use condominium structure, it is therefore recommended that Section 17/1 be amended as follows:

*“In the case where a space in the condominium is set aside as a place to carry out the business or for any other purposes, the system on entering and exiting such area shall be specifically set up in order to prevent the disturbance on the peaceful enjoyment of the joint owners.*

*No person shall be permitted to engage in any trade transactions or in any other purposes in the condominium except it is a trade transaction or any other purposes in the area of the condominium designated in accordance with paragraph one.”*

### **Separation of voting right on common property**

Since Section 48 of the CA provides the right to resolution regarding the common property of the unit that have half of the total vote of the joint owners can regulate the common property of the building which can result in the unfairness for the minority unit types in the same building because their voices cannot be heard and their hands are tied to whatever the majority units cast their votes.

Besides revision of the term “condominium” and “common property” in the CA, there should be the separation of voting right in relation to the common property in order to set the clear boundary for the management of common property which is for the use of all co-owners and that of certain co-owners having the same unit purpose in the condominium. I therefore recommend that Section 48/1 of the CA shall be inserted as follows;

*“Section 48/1 Resolutions on the matters under Section 48 (1)-(7) for common property which are for use or for common interest of the co-owners having the same unit purpose in such common property must be passed by not less than half of the total number of votes from such the co-owners.*

*In case that the co-owners attending a meeting has insufficient votes as provided under paragraph one, a new meeting shall be convened within fifteen days from the date of convening of the previous meeting. At this new meeting, the resolutions concerning the matters as provided under paragraph one shall be passed by not less than one-third of the total number of votes from such co-owners.”*

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