



# About Condo

## AN OUTLINE OF AMALGAMATION

Prior to the coming into force of the *Condominium Act, 1998*, (the “Act”) in May of 2001, the amalgamation of condominium corporations was not possible. Although still only rarely employed,<sup>1</sup> the usefulness of the option cannot be understated.

Amalgamation is the process whereby a new condominium is created by combining two or more existing condominiums. Although the various contractual rights and obligations of the existing condominiums will continue and apply to the new entity, the process requires a new declaration, description, by-laws and rules. The old governing documents will be repealed. Thus the input of a lawyer and surveyor are essential, as well as approval by the municipal approval authority and the applicable land registry office. For certain parts of the process, the condominiums’ accountants and engineers may also need to be involved. *Accomplishing amalgamation necessitates a group effort by the boards and professionals serving the subject condominiums, supported by the unit owners.*

This memorandum provides a brief overview of the purposes, benefits, requirements and procedures relating to amalgamation of condominium corporations under the Act.

### AMALGAMATION AND OLD PHASED CONDOMINIUMS

One reason the amalgamation option is so useful is due to the creation prior to coming into force of the Act of many staged condominium developments involving the creation of multiple corporations sharing common roadways and other services or facilities without the benefit of another feature introduced only upon the coming into force of the Act: phasing.

Unlike phasing as it is under the Act, in which a single condominium increases in size by registration of multiple amendments to its original creating documents, “old phasing”, as the previous staging of such developments is sometimes called, required the registration of multiple separate condominium corporations and plans and complex relationships supported by agreements, trusts and easements between them. Often this required the imposition of at least two layers of organizational authority, including a condominium board (as required by statute) and a committee made up of representatives of each condominium tied into the project.

In our experience we have seen such arrangements for groups of corporations including as few as two to as many as twenty condominiums. Imagine the unwieldy nature of their combined annual general meetings where there would be twenty audits and elections of

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<sup>1</sup> In speaking with other lawyers recently it appears that those of us with the most experience in the field have collectively completed fewer than about a dozen or so amalgamations.

boards of directors as well as some manner of electing or appointing the members of the "Shared Facilities Committee". Although it works, somehow, the logistics of such affairs can often be brutal for already overworked property managers and largely inexperienced volunteer boards.

In addition, often due to the requirements of their agreements every amendment to a declaration, by-law or rule, required every corporation to undertake the same steps and register the same document multiple times. Even "group" section 98 agreements would have to be registered separately for each corporation.

For such condominium projects, the opportunity to amalgamate, to reduce the administration to one board that covers the whole combined property, and to reduce or eliminate multiple registration requirements, offers potential savings of both time, energy and irritation.

### **AMALGAMATION IN ANY CASE?**

Amalgamation can also be useful in other circumstances. In fact, any set of condominiums that share any sort of relationship can consider amalgamation as a means of potentially reducing costs and bureaucracy, and increasing contracting power and fiscal ability, or even simply for the sake of unifying their communities.

Having said this, amalgamation is not to be willy-nilly recommended to every willing condominium group. Amalgamation is not an inexpensive prospect, and it is appropriate for each group to consider whether the rewards ultimately outweigh the costs.<sup>2</sup> For old phased condominiums, they likely almost always do, but for many other groups of condominiums this might not be the case.

In our view, the ideal circumstances for considering amalgamation, other than old phased condominium groups, are those in which there is a number of small condominiums with similar unit types that are situated in close proximity with one another (ideally on adjacent lands). Although amalgamation might bring benefits in other circumstances, in these cases it is more likely to bring the greatest measure of the benefits noted earlier.

### **STATUTORY REQUIREMENTS FOR AMALGAMATION**

Before launching ahead with amalgamation plans based on any of the foregoing reasons, it is important to understand the statutory criteria and requirements for amalgamation that are set out in the Act.

Primary amongst them is that each of the amalgamating condominium corporations must be of the same type. I.e., a standard condominium corporation can only amalgamate with other standard condominium corporations. Also, if one of them is a phased condominium, it can only amalgamate once all phases have been registered (or if 10 years have passed since the initial registration of the declaration and description of the phased condominium).

At present, it is also a requirement that only standard condominium corporations can be amalgamated. Although there would seem to be no good reason for it, the legislature

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<sup>2</sup> In our experience, it appears that it generally takes a number of years for the amalgamation cost benefits to begin to be realized, but this in and of itself is not a reason to reject the idea. It simply requires some patience and forward-thinking about the condominium by both the unit owners and the board.

has not yet seen fit to extend this benefit to vacant land, leasehold or common element condominium corporations.

Other key requirements before amalgamation can be completed are as follows:

1. each of the participating condominium corporations must have had its turn-over meeting pursuant to section 43 of the Act and have received all requisite documentation and materials from the declarant;
2. each of the corporations must have conducted a comprehensive reserve fund study (or an update based on site inspection) within the year prior to the board sending out notice of the owners meeting required under section 120(3) of the Act (explained below under "Process of Amalgamation"); and
3. each of the corporations must have entered into an interim agreement dealing with a variety of matters that are set out in the regulations made under the Act that govern the conduct and management of the corporations during the period running from date that the said notice of meeting is delivered until either amalgamation occurs or it is determined it will not proceed.

In addition, the owners of 90% of the units in *each* condominium corporation must consent in writing to the amalgamation within 90 days of the aforementioned meeting.

## PROCESS OF AMALGAMATION

The initial stages in the amalgamation are implied by the foregoing comments; their purpose may be summarized as "getting everybody on board":

- (1) **Talk amongst the boards.** Get advice. Figure out if your condominiums meet the basic criteria set out above (or what has to be done to meet them) and whether amalgamation will work for your community of condominiums. Without this initial activity, there is a greater risk of spending a fair amount of money with no positive return. Each board, at least, must really believe that amalgamation is good for its condominium, and the boards collectively must believe it will be good overall, or else there is little or no point in presenting the option to the unit owners.
- (2) **Talk to the unit owners.** This can be accomplished through a meeting of owners, but this meeting is not the meeting that is required by the Act for amalgamation to be accomplished. It is simply an information meeting, and perhaps a "rally" to generate support for the amalgamation. Ideally, what occurs at this stage is a presentation to the owners of what amalgamation entails, and what its benefits are to be. The more comprehensive and precise the presentation, the more likely the owners are to consider the plan seriously and support the board. (This might include investing in some draft documents from the lawyer and surveyor, or their presence at the meeting to explain and answer questions, but it is ideal if costs can be kept to a minimum at this stage.) However, the board must be careful not to do or say anything that misleads unit owners as to their right to refuse amalgamation. The best 'sell' is likely the one that clearly and forthrightly shows the burdens and the benefits and that the latter do ultimately outweigh the former.

Once the boards are reasonably certain they have the support and commitment of the unit owners for amalgamation, then the following steps can be followed with confidence, and with the assistance of various professional advisers:

- (3) The condominium corporations **enter into the interim agreement** in accordance with the regulations under the Act mentioned earlier in this memorandum. This agreement will regulate matters relating to the conduct of the corporations until amalgamation and should include provisions relating to the accomplishment of any incomplete requirements, such as appropriate reserve fund studies being performed at a suitable time, or completion of turn-over meetings if applicable.
- (4) **Engage the lawyer and surveyor** to prepare the revised declaration, description, by-laws and rules<sup>3</sup> for the proposed amalgamated condominium.<sup>4</sup>
- (5) Ensure the appropriate **reserve fund study** has been performed for each condominium corporation. Engage the corporation's engineer if necessary to do this.
- (6) Engage the corporation's auditor to prepare the last **annual financial statements** for each amalgamating corporation.
- (7) **Determine a date for the meeting of owners** of each corporation.
- (8) **Prepare amalgamation status certificates** for each condominium corporation. *(These are not the usual status certificates. They are a different specific form included in the regulations under the Act. Use of the usual form of status certificate will be insufficient to satisfy this part of the process.)*
- (9) **Issue the notice of the meeting** at least 15 days prior to the meeting date. Copies of the following must be included with each notice of meeting:
  - a. Copies of the proposed documents prepared by the lawyer and surveyor;
  - b. Copies of the status certificates for each of the amalgamating condominium corporations;
  - c. Copies of the auditor's report for each of the condominium corporations;
  - d. A copy of the requisite reserve fund study for the corporation;

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<sup>3</sup> It is our usual recommendation that minimal (i.e., only necessary) changes be made to the original documents in order to prepare these new documents. Although some changes might be desirable, if there is likely to be any controversy or conflict that will muddy the path to amalgamation or delay it and increase its costs, it could be better to leave those issues to be dealt with after amalgamation is accomplished.

<sup>4</sup> The Act requires these documents to be presented to the owners at an owners meeting prior to obtaining owners' written consents to the amalgamation and they are needed in order to apply for municipal approval of the amalgamation. Therefore, there is little choice but to incur these costs prior to confirmation that amalgamation will succeed (i.e., that sufficient consents will be required and that municipal approval will be issued). However, there might be some cost saving measures that can be employed. In particular, it is possible that at this stage the surveyor's new description plan that is presented at the owners' meeting could simply be a draft based on the existing description plans, rather than one based on new site visits and measurements taken on the properties. That work – requisite for finalizing the plans – and its appurtenant cost could be left for later in the process.

- e. A copy of the interim agreement amongst the amalgamating corporations;
- f. An estimate of the costs of amalgamation for each amalgamating corporation; and
- g. A statement that indicates whether there are any provisions in the proposed declaration, description, by-laws or rules of the amalgamated corporation that differ significantly from those in the corporation's original documents, and, if there are any, describes what they are.

It is also advisable to enclose a proxy for the meeting to help ensure there will be quorum, but note that the proxy should not provide for the proxy holder to consent to the amalgamation on behalf of the unit owner. A proxy holder cannot be authorized to do so. If the owner will be unavailable to provide his or her consent at or after the meeting, a person appointed by a power of attorney may be entitled to do so, if the power of attorney is sufficiently broad or specifically permits it.

- (10) **Hold the owners meeting.** It is advisable to have consent forms prepared for the date of the meeting and available at the meeting.<sup>5</sup>
- (11) **Collect consent forms.** Consents must be submitted within 90 days of the date of the meeting. The owners of at least 90% of the units must consent to the amalgamation. If these two criteria are not met, the amalgamation has failed and the process must commence again if the board is determined to accomplish it.
- (12) Commencement of an **application for approval** of the amalgamated condominium corporation by the municipal approval authority can be started at an earlier stage, but generally the municipality will want to know whether the unit owners are in favour of the plan before approval will be granted, so it is identified at this point in the process. The approval process is identical to the process for approving a new condominium plan. However, having said this, in most cases an application for approval is not actually necessary: what is generally done instead is submission to the municipality (by the corporations' solicitor) of a request for **exemption from the approval process** pursuant to subsection 9(7) of the Act.<sup>6</sup> There generally will be a fee payable to the municipality, and the municipality will still be required to sign off on the amalgamation description plans in order for them to be registered; however, the time and potential costs associated with full-blown approval process, including circulation of the proposed plans to various agencies for comment, will be avoided.
- (13) The final approval that is required is **submission of the proposed**

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<sup>5</sup> In our experience, it is best if the consent forms are prepared in advance with each unit's correct legal description indicated. If title can be searched beforehand, the correct names of the owners can be inserted. In any event, it is best to take steps to avoid the risks that someone executes the wrong consent form, or that the consent form is not signed by all of the owners of the unit.

<sup>6</sup> Exemption is appropriate in virtually all cases, since the Act and its regulations do not permit any substantial, physical changes to be made as part of the amalgamation process. Therefore, the amalgamation should give rise to no genuine planning issues that would be of any concern to the municipality or agencies normally circulated for comment on proposed condominium plan applications.

**declaration and description to the applicable land registry office** (where they are ultimately to be registered) for approval. The land registrar will review the same for technical errors and instruct the lawyer and surveyor as to any requisite changes.

(14) Once:

- a. Requisite consents have been collected;
- b. Municipal approval or exemption is obtained;
- c. Registry office approval is obtained;

then the proposed declaration and description can be put in final form, executed by the signing officers of each of the amalgamating condominium corporations, and **submitted again to the land registry office with the appropriate fee for registration.**

### **BUT WAIT, THERE'S MORE...**

Once the process is completed (the documents are registered) there is reason for celebration, but no time for rest. There is still somewhat more to do:

1. All the directors of the amalgamating corporations become (instantly) the directors of the new amalgamated corporation;
2. they meet immediately after registration and appoint an auditor for the new corporation;
3. they call and hold an owners meeting within 60 days of the date of amalgamation;
4. at the owners meeting a new board of directors is elected and the auditor appointed at step 2 above is confirmed or another auditor is appointed.

It is also advisable to take steps at this time to formalize the rules and by-laws that were put in place through the amalgamation process, just as is usually done upon the registration of a newly constructed condominium corporation. In particular, the new by-law ought to be registered. Otherwise, it will be in the odd position of being an in-force by-law that does not appear on title, which will likely cause somebody significant confusion (and consternation) at some point in the not too distant future thereafter.

### **CONCLUDING COMMENTS**

As the foregoing illustrates, amalgamation is not for the faint of heart. It is a complex, somewhat costly and somewhat lengthy process requiring good communication and cooperation by various parties. Its rewards for the amalgamating corporations can be significant, but any corporation seeking to undertake the process must be prepared to wade through it with both persistence and patience to reach that goal.

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