

# About Condo

## “INDEMNITY AGREEMENTS” AND UNIT OWNERS’ CHANGES TO THE COMMON ELEMENTS

Section 98 of the *Condominium Act, 1998*, (the “Act”) requires that for a unit owner to make any addition, alteration or improvement (generally referred to in this memo as “improvements”) to the common elements, the improvement must be:

- a. approved by the board of directors of the condominium;
- b. consistent with the provisions of the Act and the declaration of the condominium;  
and
- c. the subject of an agreement entered into by the condominium corporation and the unit owner and the agreement must be registered on title to the owner’s unit.

These are not optional conditions. The failure to comply with any one of them renders the unit owner’s improvement to the common elements illegal.

### AGREEMENT

Most condominium unit owners have little difficulty understanding that their changes to the common elements must be approved by the board and consistent with the Act and declaration. The aspect of the process that seems to be the most troublesome to them is the agreement, which is commonly called an “indemnity agreement”.

The term, “indemnity agreement,” is not found in the Act. In fact, it is not even essential that such an agreement contain any indemnity clauses, although they almost always should and generally do contain them.

The Act sets out three minimum requirements for an agreement entered into under section 98, as follows:

1. the agreement must allocate the cost of the proposed improvement, as between the unit owner and the condominium corporation;
2. it must set out and allocate the respective duties of the unit owner and condominium corporation with respect to the repair after damage, maintenance and insurance of the improvement; and
3. it must specify who will have the ownership of the proposed improvement.

Ordinarily, a unit owner will only seek to enter into an indemnity agreement once he or she has decided upon an improvement the owner wants to make to the common elements and has sought approval from the condominium board.

However, you should note that it is not necessary that permission from the board be obtained *before* the agreement is entered into and registered on title.

Provided that both the unit owner and condominium board are willing to do so, an indemnity agreement can be completed and registered on title to a condominium unit *in anticipation* of an improvement being approved sometime in the future. Then, once the approval is given, the agreement aspect of the process is already completed.

*(Note that such an agreement should expressly state that board permission for the improvement, as well as satisfaction of all other applicable requirements of the Act, is still required before the improvement can be made.)*

Ordinarily, this would not be done because of the expense involved in preparing, executing and registering the indemnity agreement. A unit owner should be unwilling to go to that expense if it is not certain that the board approves the proposed improvement.

However, advance registration of an indemnity agreement does make sense in most cases where the agreement covers:

- a. multiple proposed improvements to the common elements; and/or
- b. multiple units within the condominium.

### **AGREEMENTS COVERING MULTIPLE IMPROVEMENTS**

It is possible that a unit owner could conceive of several improvements he or she would like to make to the common elements.

These could be part of an overall property improvement plan (such as a landscaping project involving deck and patio enhancements, outdoor lighting, various plantings and fencing) or simply a variety of unrelated changes to the common elements that are desirable to the owner.

It could become quite costly if the owner has to enter into and register one agreement per improvement. It is more cost efficient for the owner to include all of the imagined improvements under one agreement. This could be done in advance of all approvals, or once at least one of the proposed improvements is approved.

Since the agreement is binding on all future owners as well the owner who enters into the agreement, a subsequent owner of a unit in respect of which such an agreement is registered can rely upon the agreement when making improvements covered by the agreement even if the owner who signed the agreement did not make them. (This should be considered as something which can add to the marketability of the unit.)

Again, the agreement should clearly indicate that the agreement itself does not constitute approval for the proposed improvements and that approval for an improvement must be obtained before it can be made.

It should also be noted that there are two ways that future improvements could be covered by the agreement. One option is to specify all of the proposed improvements that the agreement is intended to cover. Another that we have recently considered reasonable is to draft the agreement so that it generally covers all possible improvements without specifically naming or describing any of them.

The latter option, which might be called a “blanket indemnity agreement,” has, to our knowledge, not previously been either considered or tried, but it is an option we have started recommending to some of our clients where it seems appropriate to do.

Note that a blanket indemnity agreement would be inappropriate where the agreement (a) is also intended to provide approval for an improvement and/or (b) should contain provisions that apply specifically to particular improvements. However, in our view it could be appropriate in all other cases.

Where a blanket indemnity agreement is tried it will be necessary for the condominium and unit owner to keep clear records of the improvements that are made for each unit and the corporation must be able (and, in our view, required) to provide the same to persons requesting status certificates.

### **AGREEMENTS COVERING MULTIPLE OWNERS**

As noted above, preparing, executing and registering an indemnity agreement can be expensive. We have seen agreements that are at least \$400 and sometimes well over \$1000 for just an individual unit owner. In some cases, the expense of the agreement actually can exceed the cost of the improvement it covers.

Naturally, this can cause dissatisfaction. However, despite sympathizing with an owner's concerns about costs, a condominium cannot knowingly ignore the requirement of the Act to have an indemnity agreement registered on title in connection with the owner's proposed (or already made) change to the common elements.

One way that a condominium may be able to help alleviate the cost burden of the agreement (which is usually borne directly by the unit owner entering into the agreement) is to permit several unit owners to become parties with the condominium to a single indemnity agreement.

Not only can this potentially reduce the costs associated with preparing the agreement by sharing them amongst many owners, but it also will reduce the registration costs.

Land Registry Offices currently charge a fee of about \$70.00 to register an indemnity agreement against a single unit (this fee could change or be different in some areas or where electronic registration is not available). However, where a single agreement is to be registered against title to several units at the same time, instead of about \$70.00 per unit the cost is still just \$70.00 for the one agreement to be registered against title to them all. Thus, in effect, if two units are parties to the agreement the cost of registration would be about \$35 per unit; if three units, about \$23.33, etc.<sup>1</sup>

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<sup>1</sup> It is our understanding that the practice of registering a single indemnity agreement against multiple units was initiated some years ago by Craig Robson, a well known Kitchener area condominium lawyer, and some of his colleagues. It is now a wide spread practice throughout the province.

## BOARD APPROVAL FOR IMPROVEMENTS

It is worth saying a few things about board approval for changes to the common elements by unit owners.

First, as noted above, the Board is not required to approve any improvement simply because an indemnity agreement relating to the improvement is registered on title. Board approval and registration of the agreement are two distinct requirements under the Act, each of which must be satisfied to validate any change to the common elements that is made by a unit owner.

Secondly, the board should usually require an owner, or the proposed change itself, to meet certain conditions, criteria or specifications established by the board.

These may include such things as the payment of a security deposit, the provision of engineer's (or other applicable professionals') certificates, detailed plans and specifications for the proposed improvement or a requirement to meet the board's own specifications (such as those relating to the size, colour, location or materials of the proposed improvement).

## OTHER CRITERIA FOR IMPROVEMENTS

The Act also sets out additional criteria that must be satisfied in respect of certain proposed improvements to the common elements by unit owners.

Not all these criteria apply in all cases but are triggered by specific circumstances.

For example, notice to other unit owners of the proposed change is required where the cost of the change exceeds the greater of \$1000 and one per cent of the condominium's annual budgeted common expenses for the current fiscal year.

Also, if the improvement is one that would qualify as a "substantial change" to the common elements as defined by section 97(6) of the Act, then a meeting of unit owners is required and the owners of at least 2/3 of the units in the condominium must approve the proposed improvement before it can be made.

It should be noted that where an improvement is proposed to a part of the common elements that is designated for the exclusive use of the owner wanting to make the change, neither notice nor meeting requirements will be imposed if the board (in its sole discretion) determines that the proposed change will not adversely affect other owners' units, will not give rise to any expense of the corporation, will not detract from the appearance or affect the structural integrity of the buildings on the property and will not contravene the declaration or any other requirements prescribed by the Act.

Nevertheless, approval by the board and the execution and registration on title of the indemnity agreement are required in any circumstance where a unit owner desires to make any change to the common elements of the condominium.

Michael H. Clifton (February 2007)