

What's Wrong With "Group" Section 98 Agreements?

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The short answer to the question set out as the title to this article is, "nothing". Yet it appears that some boards, managers and lawyers for condominium corporations are avoiding them.

To that end, this article has a purely biased bend: to promote and extol what I believe are the benefits of a "group" section 98 agreement, in the hope of persuading others that it should be considered and probably done more often. (Of course, this doesn't amount to legal advice for any particular situation, and boards should rely on their own legal counsel before deciding what, if anything, should be done on the basis of what I have written herein.)

I also discuss a couple of ideas that are not yet common practice, but in my view should be, that make these forms of agreement even more beneficial than they have been to date.

Section 98 Agreements

First things first: what is a section 98 agreement?

Section 98 of the *Condominium Act, 1998*, (the "Act") requires that for a unit owner to make any addition, alteration or improvement (hereafter, an "improvement") 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.

Therefore, the first things to know about section 98 agreements are that where an owner makes any change to the common elements, such agreement *must* be in place and *must* be registered on title to the owner's unit.

So, what does the agreement do?

A section 98 agreement regulates the relationship between the unit owner and the condominium corporation with respect to the unit owner's improvement to the common elements. Once the agreement is registered on title to the owner's unit, it becomes binding not only on the current unit owner but on all future owners of the unit. Any costs of default of such an agreement by the unit owner may become common expenses

owed to the condominium corporation (and therefore could become subject of a lien under section 85 of the Act if unpaid).

While the Act does not dictate the specific contents of such an agreement, there are a few subjects it must cover as set out in the Act and the regulations made under the Act (the “Regulations”). These are that the agreement must:

1. allocate the cost of the improvement between the condominium corporation and the unit owner;
2. set out the respective duties of the condominium corporation and unit owners for the costs of:
 - a. repair after damage of the improvement;
 - b. maintenance of the improvement;
 - c. insuring the improvement; and
3. specify who owns the improvement.

The Act and Regulations are silent about *how* each of the above listed matters should be dealt with. Therefore, either the condominium corporation or the unit owner may be responsible to maintain, insure, repair, own and/or pay the costs of the improvement. Provided the agreement includes some statements about these matters, the Act and Regulations are satisfied. They are also otherwise silent as to any other terms that may be set out in such an agreement. These facts provide significant flexibility to unit owners and condominium corporations to negotiate and determine the terms of such agreements.

Such flexibility, however, does not make it either impossible or inappropriate to have a “group” section 98 agreement.

Group Agreements

A “group” section 98 agreement is an agreement that covers improvements made by the owners of more than one of the units. Ideally, it includes all of the units (and all of the improvements – but more on this later in this article), but for practical purposes “group” agreements sometimes cover only a range of the units.

Thus, instead of separate agreements by the owner of Unit 1 and the corporation, and the owner of Unit 2 and the corporation, and the owner of Unit 3 and the corporation, and so on, there may be one agreement of which all of the owners of all of the units (1, 2, 3, etc.) are parties.

The primary motivation for doing this is cost.

Preparing, executing and registering a section 98 agreement can be expensive. We have seen agreements that cost at least \$500 and some well over \$1000 for just an individual unit owner’s single improvement to the common elements. We know that some lawyers charge about \$1500 as their basic rate for handling such agreements. Others may charge more. Usually the unit owner pays this cost (or will in any event bear

it in part through contributions to the common expenses). 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 corporation cannot knowingly ignore the requirement of the Act to have a section 98 agreement registered on title in connection with the owner's proposed (or already made) change(s) to the common elements.

A "group" agreement is one way to help alleviate the cost burden.

Of course, actual costs will vary law firm to law firm and case-by-case, but in our experience so far "group" section 98 agreements rarely cost much more than two or three times what an individual agreement costs. Therefore, depending on the number of units within a condominium, the cost savings on a per unit basis can be significant.

Using examples in real numbers could be misleading, but anyone should be able to do the math using figures with which they are familiar. If an agreement for an individual unit costs "X" and a "group" agreement costs three times "X", then provided more than three units participate in the "group" agreement it is immediately obvious that the per unit cost is less for the "group" agreement.

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

Again, using real numbers could be misleading (particularly if fees have changed between the times that I write and you read this article), but the facts are these: currently (at least in the areas where I work) the cost of registering a section 98 agreement against title to one unit *is the same* as the cost of registering a single "group" agreement against all of the units. It is again immediately obvious that a "group" section 98 agreement can help to reduce the per unit cost of meeting the requirements of section 98 of the Act.

Amongst the other benefits of doing a "group" agreement are the potentials for more consistency in the treatment of unit owners and both increased efficiency and reduced complexity associated with handling section 98 agreements for the condominium board and management. These benefits include that, in typical situations, the likelihood that one or another unit or improvement is not covered by an agreement is reduced, and directors and managers are not required to be familiar with the terms, which might differ, of numerous forms of agreement prepared by a variety of lawyers.

What Improvements Are Included?

A question arises as to what improvements the "group" section 98 agreement should cover.

It needs to be considered that there is nothing in the Act that prevents a section 98 agreement from being *prospective* as well as, or rather than, *retrospective*: that is, the agreement can deal with improvements that have not yet been made or even approved by the board.

Therefore, it is possible to enter into a section 98 agreement that contemplates future, *possible* improvements that the current or a future owner of the unit *might* want to install or that the board of directors *might* want to approve. It is not even necessary that the improvements ever actually get made (although one would hope that there is a very clear record in the unit file to ensure it is known whether or not this occurs) or even approved by the board. (A section 98 agreement, whether for a group of owners or individual, should never provide permission for improvements that are covered prospectively.)

As a result, the typical practice, where “group” agreements are in place, has been for the board of directors, sometimes in consultation with unit owners, to come up with a list of acceptable possible improvements, as well as actually existing improvements, to ensure the agreement covers both so that, hopefully, every unit owner’s needs and plans are accommodated.

The trouble with this – which is perhaps the only serious problem with prospective “group” section 98 agreements – is that we cannot see the future perfectly. We can only be prospective to a point: that point being the limit of our ability to imagine future technologies and ideas for improving the common elements.

During the last year that I worked on agreements of the sort described, our list of standard improvements increased from about 20 to 39 items. Condominiums that registered “group” agreements later got the benefit of improved imagination; those who had registered agreements earlier had to live with the more limited list.

Corporations that wanted to update their lists – and those where an owner desired to make an improvement that was not on the list – were subjected to the requirement of amending their agreements, which is almost as big a job, and costly, as making and registering the original agreement, or entering into an individual agreement with that owner, which really defeated the purpose of having the “group” agreement in the first place.

After considering that problem last year it occurred to me that this entire exercise is largely unnecessary. That is, it occurred to me that it would be better if a “group” section 98 agreement includes *no list of improvements at all*, but is drafted so as to cover every possible kind of improvement, even those not yet imagined. As a result, we developed a form of section 98 agreement that allows for no specific improvement to be listed or described within the agreement itself.

In my view, this approach seems to solve what I suppose to be the only real problem with traditional, prospective “group” section 98 agreements once and for all. Once registered, this unlimited “group” agreement covers all possible improvements for participating units for all time (subject only to future relevant changes to the legislation, if there are any).

Developer’s Agreements

Having said already that the unlimited form of agreement solves “the only real problem” with section 98 “group” agreements, I am perhaps too readily ignoring one other typical problem: the problem of process.

For the cost saving reasons noted earlier, and for other reasons of efficiency and consistency, I believe that “group” section 98 agreements are great; however many a board and property manager, believing likewise, have nevertheless found the process of getting all of the unit owners to participate in and complete their part of the agreement somewhat arduous.

It has sometimes taken many months between the time that we provide the agreement ready for execution and the time it is returned to us executed and ready for registration. This is particularly frustrating if, by the time the agreement reaches us, units have changed hands such that a re-approach must be made to the new owners (who probably thought the old owners had taken care of all this already) or a unit must, for this reason, be excluded from the agreement when the intention of the previous owner had been to include it.

We have found that the ideal solution to this problem is to have the developer register the section 98 agreement at the time of organization of the condominium corporation prior to turnover.

We have an advantage in this regard, practicing condominium law for both condominium corporations and condominium developers. We have found that most developers do not consider it onerous to include, as one more document to sign and one more agreement to register, a “group” section 98 agreement (particularly in the unlimited form) that ultimately benefits all of the units and unit owners.

In fact, not only have we considered this to be good practice on the part of developers, it can also become a necessity. Where a developer offers purchasers of new condominium units options or upgrades that alter the standard design or content of the proposed common elements, it is simply more sensible to treat at least some of these upgrades as improvements that are subject to section 98.

This can benefit both the corporation (if, as is typical, the owner is made responsible to pay and care for the improved common element in question) and the unit owner (whose purchased upgrade is protected against decisions of the board pursuant to section 97 to change that part of the common elements or its failure to repair or maintain the improvement to the owner’s preferred standard), as well as become a basis for good will toward the insightful developer who puts the agreement in place.

Of course, this innovation (which was originated by Craig Robson a few years ago) is of no assistance to condominium corporations that are already registered.

For them, we have noted that the efficiency with which a “group” agreement gets completed depends largely on three factors: the organizational efficiency of the property manager; the willing and active involvement of the board of directors; and the understanding and engagement of the unit owners. Nevertheless, despite the burdens that a lack of any one of these components might create, it is my view that the benefits of a “group” section 98 agreement ultimately outweigh them.