



About Condo

AMENDING THE DECLARATION OR DESCRIPTION

The *Condominium Act, 1998*, (the “Act”) allows for amendments to be made to the rules, by-laws, declaration and description of your condominium. The criteria to be met are most stringent for amendments to the declaration and description. This is appropriate since the declaration and description are, in effect, the constitution the condominium corporation.

There are three different procedures for amending the condominium declaration or description:

- by order of the Director of Land Titles;
- by order of the Ontario Superior Court of Justice; or
- by consent of the owners of at least 80% or 90% of the units (depending on the nature of the proposed changes).

It is our experience that the latter process (amendment by consent of the owners) is by far the most commonly tried. This is likely because while such process is available to amend any part of the declaration and description according to the subjective desires of the owners, amendments by the Director of Land Titles or by court order are available only where there are objectively apparent errors or inconsistencies in the documents and only for the purposes of correcting the same.

AMENDMENT BY DIRECTOR OF LAND TITLES

Section 110 of the Act allows amendments to the declaration or description to be made by order of the Director of Land Titles (the “Director”) on application by the condominium corporation in question or by any “*interested person*”.

The only basis on which such an order may be requested is that there is an error or inconsistency to be corrected “*that is apparent on the face*” of the document. In other words, the error or inconsistency must be immediately obvious and not open to interpretation.

The question arises, who is an “*interested person*”? In our view, although the term appears quite broad and probably should be interpreted permissively in most cases, it would be reasonable to define this as any person (whether unit owner or not) who has an actual interest in (i.e., that could be affected by) the error or

inconsistency and/or amendment being made. It is possible that an application by someone, even a unit owner, who is entirely unaffected by the error or inconsistency or its correction, could be challenged and/or rejected as failing to meet the requirements of this section for the application to be brought by an interested person.

Consistent with this view, it should be noted that notice of the application must be sent to the condominium corporation (unless the corporation itself is the applicant) and to every owner and mortgagee (except the applicant him/her/itself) listed in the section 47(2) records of the corporation "*whose interest would be affected by the amendment*".

The Act does not specify the timing for this notice. The form of notice is to be dictated by the Director. Appendix D of Bulletin 2001-1 of the Ministry of Government Services for Land Titles Offices sets out the form of application to be used. It should be presumed that proper notice of the application would include a copy of this form.

As a result of a properly made application (i.e., one that is submitted in proper form, by a proper applicant and concerns only an error or inconsistency that is apparent on the face of the document in question), the Director will be required to make the order amending the document if satisfied that the amendment requested will correct the error or inconsistency cited as the reason for the application.

While this means that the Director technically has no discretion in this regard, the success of the application is nevertheless dependent on the Director *being satisfied* that the amendment will, in fact, make the desired correction. It is important, therefore, for the applicant to ensure that the amendment requested is such that it shall do no more nor any less than efficiently and effectively correct the error or inconsistency cited. It is probable that an application proposing an insufficient amendment or one that seeks to do more than simply correct the obvious error or inconsistency should be rejected.

AMENDMENT BY COURT ORDER

Section 109 of the Act allows amendments of the declaration or description to be made by order of the Ontario Superior Court of Justice. This process is only to be used in circumstances where there are errors or inconsistencies "*that appear*" in the document or that arise "*out of the carrying out of the intent and purpose*" of the document.

Thus, this process is somewhat more broadly available than amendment by the Director of Land Titles. In this case, the errors or inconsistencies subject of an application need not be apparent on the face of the documents, but may be such that only become apparent through the application or interpretation of them. It is likely presumed that the court is better equipped (and more accountable) than the Land Titles Office to consider such interpretations and make a determination as to whether the errors or inconsistencies cited exist and ought to be changed.

Unlike the Director of Land Titles, the court is not required to make the order requested. Subsection 109(3) states the court "*may*" make the order. The court is to do so only

where it is satisfied that the amendment is “*necessary or desirable*” to correct the error or inconsistency cited in the application.

In reviewing the application, the court will be subject to the laws and rules of equity and common law and obliged to make an order it considers just in the circumstances. The onus is on the applicant to prove (a) that there is an error or inconsistency in the documentation and (b) that the nature of the error or inconsistency justifies the requested amendment.

The only parties with standing to bring an application under section 109 are the corporation and any unit owner.

At least 15 days prior to the date that the application is to be made, the applicant must send notice to the corporation and to all unit owners and mortgagees whose names are listed in the section 47(2) record of the corporation on the 30th day before the application is made, with the only exception being the applicant him/her/itself.

A certified copy of the court order making the amendment must be registered on title in order for the amendment to be effective.

AMENDMENT BY UNIT OWNERS’ CONSENT

The third, and most broadly available, method for amending the declaration or description is that provided under section 107 of the Act, which requires only consent of the unit owners without application to the courts or the Director of Land Titles.

However, it should be noted that where amendments to the description are proposed, it may be necessary to obtain approval from the municipal authority that originally approved the condominium plan when it was created (or that would be required to approve such plan if it were being newly created at the time the amendment is proposed). Such approval is not required where the only changes are to the body of the declaration and do not affect the registered description of the condominium.

The basic process for an amendment pursuant to section 107 of the Act consists of the following six steps:

- (1) The board of directors of the condominium decides upon an amendment or amendments and resolves to present the same to the unit owners at a meeting called for that purpose.
- (2) Notice of the meeting (sent within the ordinary time frames set out in the Act) includes a complete copy of the proposed amendments (a summary is not sufficient) and is sent to all unit owners. (Section 107 does not specifically state that notice of the meeting is to be sent to mortgagees listed in the section 47(2) record of the corporation, but it would be required in any event pursuant to section 47. Section 107 does require such mortgagees to receive notice of the proposed amendments. See step 6 below.)

- (3) The meeting is duly held and the amendments are discussed at the meeting. *Note that no vote is required to be held at the meeting to approve the amendments.*
- (4) The requisite number of written consents is received from the unit owners. (See further comments below.)
- (5) If necessary, consent is also obtained from the declarant of the condominium. Such consent is required only if:
 - At the time the board approved the amendments, the declarant still owns at least one unit (other than a telecommunications control room); and
 - Less than three years have passed since the *later* of:
 - i. The date of registration of the declaration and description; and
 - ii. The date on which the first agreement of purchase and sale for a unit was entered into.
- (6) The board of directors completes and executes a Form 1 certificate with respect to the amendment, and the same is registered along with a copy of the complete amendments on title to every unit. Such registration cannot take place until 30 days after notice of the proposed amendments has been given to the mortgagees listed in the section 47(2) record of the corporation.

The amendments are effective as of the date of registration.

Note Re Unit Owners' Consent

As noted above, no vote on the proposed amendment is to be taken at the owners meeting called in respect of it. If a vote is taken, it is not effective to approve the amendment.

Rather, the Act requires that the corporation must obtain the written consent of the owners of either 80% or 90% of the units, depending on the nature of the amendment. Note that the Act states such consents must be obtained from the owners who own such percentage of units "*at the time the board approved the proposed amendment.*" Thus, the board would unwise to wait too long to hold the meeting and seek to collect such consents.

Written consent from the owners of 80% of the units is required in the majority of cases. 90% approval is required in only the following four cases, where the proposed amendment changes:

- (i) the proportion of any unit owner's common interest;
- (ii) the proportion of any unit owner's contribution to the common expenses;

- (iii) the designation of exclusive use common element areas; and/or
- (iv) the allocation of obligations to maintain the units and common elements and to repair them after damage.

An unusual omission from this list is an amendment that would alter the unit boundaries (i.e., adding parts of the units to the common elements, or absorbing some common elements as part of the units) where none of the foregoing four matters are affected (usually one or more will be, but it is not necessarily the case that any are). Nevertheless, some lawyers will advise the corporation to obtain the approval of the owners of 90% of the units in any event where this kind of significant change is made. However, while this could be appropriately cautious, it is to be noted it is not, at this time, a requirement of the Act.

CHANGING ADDRESS FOR SERVICE/MAILING ADDRESS

In addition to the foregoing methods for changing the declaration and description, there is, in fact, a fourth process available under the Act for amending a portion of the declaration; however, the only provision it affects is a change to the condominium corporation's address for service or mailing address.

Under section 7 of the Act, the address for service or mailing address of the corporation are to be included in the registered declaration of the condominium. Under section 108 of the Act, these may be changed by the board of directors by registration of the required form (Form 2 under Ont. Reg. 49/01) without any other formal procedures being followed.

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