Changes to Condominium Governing Documents.

The *Condominium Act, 1998* (the "Act") provides mechanisms to change a condominium's declaration, description, by-laws and rules. The mechanism and requirements for change vary depending on the document being changed and, in some cases, the nature of change itself.

Changes to Declaration[1]

Section 107 of the Act sets out the process for a condominium corporation to amend its declaration.

This process requires:

1. the condominium's board of directors (the "Board") must approve the amendment by resolution;

2. there must be an owners' meeting to discuss the proposed amendment[2] (The amendment is **not voted** on by the meeting. Approval is obtained by written consent.);

3. if the amendment relates to a change in the common interests or expenses allocated to units, changes in exclusive use areas or reallocates the obligations to maintain or repair the units, the owners of at least 90 per cent of the units at the time the Board approved the proposed amendment must consent in writing;

4. for any other changes to the declaration, the owners of at least 80 per cent of the units at the time the Board approved the proposed amendment must consent to it in writing; and

5. the condominium must send a notice of the proposed amendment to all mortgagees whose names are in the Section 47(2) record as at the time the board approved the proposed amendment.

Once the foregoing have been accomplished, an approved amendment must be registered in the Registry Office where the original declaration is registered, but not until 30 days after the notice to mortgagees has been given. One assumes this is to allow a court action if something offends the lenders. No consent is required from lenders and lenders have no right to appeal an amendment pursuant to the Act. It is

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[1] The condominium declarant must consent to a proposed amendment in writing if the declarant has not transferred all of the units and it is less than three years since the later of the date of condominium registration and the date of the first agreement of purchase and sale for a unit.

[2] A copy of the proposed amendment must accompany the notice of meeting.

assumed that if a change was prejudicial to a lender the lender could make application for an injunction pursuant to the oppression remedy of the Act (Section 135).

To register the amendment, a certificate must be executed by the signing officers for the corporation confirming that the requirements of section 107 have been met with respect to the amendment. The form of certificate is provided as Form 1 of Ont. Reg. 49/01 under the Act.

Amendments to the Description

The description of the condominium is basically the survey plans that show the location and layout of the units, common elements and exclusive use areas of the common elements.

The description is amended under section 107 of the Act in the same way that the declaration is amended.

If the condominium wants, for example, to change the unit boundaries or add or delete exclusive use common element areas, the description plans would need to be amended.

In most cases the proposed amendment to the description plans should be reviewed with and approved by the "approval authority"[3]. The approval authority has to approve the original condominium plans and so should be approached to approve changes to those plans. It is likely the Registry Office will not allow an amendment to the description plans without the consent of the approval authority.

A Form 1 certificate must also be registered with respect to any change to an amendment. This form is found in the regulations to the Act.

A Consideration Before Amending the Declaration or Description

Before starting the formal process to amend the condominium's declaration or description, the Board should try to find out if there is support from the owners that will be sufficient to pass the amendment.

There is no point in having a lawyer (or surveyor, in the case of a change to a description) draft an amendment, calling and holding a meeting and spending time and money seeking the consent of owners if in fact there is clear lack of support right from the outset.

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[3] The "approval authority" is usually the City or Regional government where the condominium is located. You should be aware that municipalities may charge a fee for this approval and the fees may vary widely between municipalities and projects.

Orders Requiring Changes to Declaration or Description

It is also possible for the declaration or description to be amended by court order or by an order issued by the Director of Titles (Ministry of Consumer and Business Services).

Amendment by Court Order

Section 109 of the Act provides that either a condominium corporation or a unit owner may make an application to the Superior Court of Justice for an order to amend the declaration or description of the condominium. It does not appear that any other person, regardless of interest in the property, would have standing to bring such an application.

At least 15 days prior to the date that the application will be made the applicant must send notice to the corporation (unless the corporation is the applicant), all unit owners (other than the applicant, if the applicant is a unit owner) and all mortgagees whose names are listed in the Section 47(2) record of the corporation on the 30th day before the application is made.

The court is not required to make the order that is requested.

Subsection 109(3) states the court "may" make the order, provided it is satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or description or that arises out of the carrying out of the intent and purpose of the declaration or description.

The applicant has onus of proving that there is an error or inconsistency that justifies the requested amendment. Issues arising solely as a result of differences of interpretation may not signify an error or inconsistency justifying the order. Also, not all variations or apparent inequities are erroneous, but may be permitted by or consistent with the Act.

For example, it is possible that units that are identical in all other respects could be required by the declaration to pay different percentages of the common expenses. While this might seem inequitable to the unit owner who is required to pay the greater amount, it is not necessarily an error or inconsistency that would justify an order amending the declaration.

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 the Director of Titles

Section 110 of the Act provides that the corporation or any interested person can apply to the Director of Titles for an order amending a declaration or description to

correct an error or inconsistency that is apparent on the face of the document.

In this case, the error or inconsistency must be of the kind that is immediately obvious and not open to interpretation. Also, provided the amendment requested will correct the error or inconsistency, the Director of Titles must make the order amending the document. There is no discretion to refuse to make the order if the requested amendment will correct the error.

Subsection 110(2) states that the applicant is to send notice to the corporation, all unit owners and all mortgagees whose names are listed in the Section 47(2) record of the corporation and whose interests would be affected by the amendment. However, the Act does not specify when this notice is to be sent. The notice is to be sent out in the form and manner that the Director of Titles requires. The applicant is not required to send such notice to him/her/itself.

An amendment pursuant to Section 110 of the Act comes into effect only once a certified copy of the order has been registered.

Amendment to By-laws

The Act does not provide a lot of guidance about amending by-laws.

The opening part of Section 56 of the Act states:

> *56. (1) The board may, by resolution, make, amend or repeal by-laws, not contrary to this Act or to the declaration,*

It would seem therefore a by-law can be amended or repealed. However, the procedures set out in the legislation seem to address only "by-laws," not amendments to by-laws.

The Act sets out that a by-law is not effective until the owners of a majority of the units of the corporation vote in favour of the by-law and the by-law is registered in the Registry Office. The Act does not say that amendments to a by-law need to be approved by the owners or registered.

Regardless, the usual practice is to require amendments to be approved by owners representing a majority of the condominium's units and that the amendment be registered, in the same manner as a new by-law would be approved and registered.

In fact, amendments to by-laws are almost always brought forward as new by-laws that may add new provisions and/or amend or repeal provisions in existing by-laws. There is no document that is addressed as being an "amendment to a by-law". Therefore, the established practice of effecting amendments and repeal of by-laws by a new by-law makes the provisions of the Act that apply to by-laws equally applicable

to repeals and amendments of by-laws.

Those provisions required first that a by-law (or amendment to a by-law) must be approved by the Board. There must then be a meeting of owners held to approve the by-law (or amendment) with or without variation. This allows the meeting to make changes to the by-law that was approved by the Board. A copy of the proposed by-law or amendment must accompany the notice of meeting.

To be validly passed, the new by-law must be approved by the owners of at least 51% of the units. Then, to become in effect the by-law is to be registered at the Land Registry Office with a certificate executed by the signing officers of the condominium corporation confirming that the by-law was passed in accordance with the Act. The form of certificate is Form 11 in Ont. Reg. 48/01 under the Act.

Amendment to Rules

Section 58 states in part:

> *58. (1) The board may make, amend or repeal rules respecting the use of common elements and units to,*
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> *(a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or*
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> *(b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation. 1998, c. 19, s. 58 (1).*

Amendments to rules must pass the tests set out above in Subsection 58(1) as well as being reasonable and consistent with the Act, the declaration and the by-laws (as required by Subsection 58(2)).

Subsection 58(5) of the Act permits the owners to amend or repeal a rule at a meeting of owners duly called for that purpose. This can be done without the approval or support of the Board.

Subsection 58(6) of the Act requires when a rule is made, amendment or repealed notice of this must be given to the owners by the Board. It appears this is only applicable to Board instituted rules, amendments or repeals, not to amendments or repeal of rules made pursuant to Subsection 58(5).

It does not appear that the owners can actually make a <u>new</u> rule under Subsection 58(5), merely repeal or amend a rule. The concept of amendment may be wide enough to support a new rule if there is any connection between the rule being "amended" and the eventual "amendment".

Subsection 58(6) of the Act provides that once the Board makes or amends a rule its notice to the owners must include copy of the rule as made, amended or repealed, as the case may be. The notice must also set out when the rule will become effective and advise the owners that they have the right to requisition a meeting under Section 46 of the Act with respect to the rule that has been amended, repealed or passed by the Board.

Subsection 58(7) of the Act provides a rule is not effective until:

a. the owners approve it at a meeting of owners, if the board receives a requisition for the meeting under section 46 within 30 days after the board has given notice of the rule to the owners; or

b. 30 days after the board has given notice of the rule to the owners, if the board does not receive a requisition for the meeting under section 46 within those 30 days.

Although Subsection 58(7) only states that it applies to rules (as opposed to amendments to or repeal of rules) it is prudent to consider that subsection to be applicable to amendments or repealed rules as well despite the failure of the Act to say so.

Note that a rule or an amendment to a rule that has substantially the same purpose or effect as a rule that the owners have previously amended or repealed within the preceding two years is not effective until the owners approve it, with or without amendment, at a meeting duly called for that purpose. (See Subsection 58 (8) of the Act.)

Section 59 of the Act permits joint rules between or amongst condominium corporations to govern the use and maintenance of shared facilities and services.

A joint rule can only be amended or repealed if the owners of each corporation vote in favour of the amendment or repeal at a joint meeting of owners of the corporations or at meetings of owners of each of the respective corporations if such meetings have been duly called for that purpose.

If a joint rule is amended or repealed the board of each corporation shall give a notice of the joint rule (or amendment or repeal) to its owners including a copy of the rule, advising when it is to be effective and noting the owners have the right to requisition a meeting under section 46.

If the Board of any of the respective corporations involved in a joint rule receives a requisition for a meeting under section 46 within 30 days after it gives notice of the joint rule to its owners, the joint rule is not effective until the owners approve it at a joint meeting of owners of the corporations or at meetings of the owners of each respective corporation.

If no meeting is requisitioned the joint rule is effective 30 days after the board of each corporation has given notice of the joint rule to its owners.

A joint rule or an amendment to a joint rule that has substantially the same purpose or effect as a joint rule that the owners have previously amended or repealed within the preceding two years is not effective until the owners of each corporation approve it, with or without amendment, at a joint meeting of owners of the corporations or at meetings of the owners of the respective corporations duly called for that purpose.

Amendment to Shared Facilities Agreements

Shared Facilities Agreement, Cost Sharing Agreements or Mutual Use Agreements (which can all be the same kind of agreement under these or other names) are not really covered by the legislation.

These are subject to the usual law and rules of contract, and may be amended with the consent of all the parties to the agreement.

However, it should be noted that Section 113 of the Act provides that where such an agreement has been entered into prior to election of a new board at the turnover meeting, any party to the agreement may, within 12 months following election of an owner-elected board of directors, apply to the Superior Court of Justice for an order amending or terminating the agreement or any of its provisions.

The court may make such order, or any other order it deems necessary, provided that:

a. the disclosure statement provided by the declarant to purchasers of new or proposed units did not clearly and adequately disclose the provisions of the agreement; and

b. the agreement or any of its provisions produces a result that is oppressive or unconscionably prejudicial to the corporation or any of the owners.

There is no similar provision in the Act dealing with such agreements that the corporation enters into after turnover.

Craig Robson and Michael Clifton

McCarter Grespan Robson Beynon Thompson LLP.