



# About Condo

## ORGANIZATION & TURN-OVER OF A CONDOMINIUM CORPORATION

One of the key differences for developers creating a condominium rather than any other form of subdivision is that the responsibility of the developer for the project does not end upon registration and the sale of units. We do not refer solely to Tarion Warranties, or even the developer's liability for the accuracy of the first-year budget of the condominium, but to those provisions of the Ontario *Condominium Act, 1998* (the "Act") that require developers to be involved in ensuring the effective on-going operation of the condominium after title to units has been transferred to home-owners.

### ORGANIZATION

Amongst the developer's post-registration obligations is the responsibility to organize the condominium corporation – the independent corporate entity that is established by virtue of the registration of the condominium declaration and description.

Accomplishing this requires the developer to do various things, usually (and advisably) with the assistance of capable legal counsel or other competent professionals, including the following:

- (1) appoint a first board of directors of the condominium corporation; (*This must be done within 10 days of registering the declaration and description creating the condominium.*)
- (2) appoint an auditor for the condominium corporation;
- (3) open at least two bank accounts for the condominium corporation, one of which is designated for the reserve fund;
- (4) collect common expenses, including reserve fund contributions, on account of each unit (including every unsold unit – which means that the developer must also pay the same as the owner of such units);
- (5) obtain and maintain insurance policies for the condominium corporation as required by the Act;
- (6) prepare the record of unit owners required under section 47 of the Act and other records as required by various provisions of the Act;
- (7) ratify and register the proposed by-law(s) of the corporation;
- (8) ratify the proposed rules; and

- (9) ratify and enter into various key agreements (such as a property management agreement, telecommunications services agreement, waste collection agreement, etc.), if any.

Several of these steps are formalized, in part at least, by the creation of a set of organizational “minutes” of the corporation – resolutions and records of meetings that are consistent with the Act and form part of the initial minute book of the corporation. Associated with these are several other typical corporate records that the developer (or developer’s solicitor) should prepare in their initial form and maintain for the condominium corporation until management of the condominium is turned over to the unit owners’ elected board of directors. It is not until such election that the developer truly begins to be relieved of its primary responsibility for the condominium.

## **TURN-OVER**

The point at which the unit owners begin to have true control of the condominium corporation is typically called “turn-over”. This is due to the requirement in the Act that, at a certain point, the developer’s appointed board of directors is disbanded and replaced with an owner-elected board, and the developer must *turn over* all key documents, records, warranties, agreements, the corporate seal and other information to a board of directors elected by the condominium unit owners. This process is to be completed shortly after the time that the developer ceases to own a majority of the units.

There are potentially four steps involved in effecting such turn over. The first does not always occur, as it is only a transitional step imposed by the Act for those circumstances where sales are slow and the developer retains a majority interest in the condominium for a longer than usual period.

### **Step 1**

This first stage in the turn-over process will occur if, on the later of:

- (a) the 30<sup>th</sup> day after the developer has transferred title to 20% of the units, and
- (b) the 90<sup>th</sup> day after the developer has first transferred title to a unit of the corporation,

the developer has not, by then, conveyed to bona fide third party purchasers its title to a majority of the units.

If such condition is met, then, at the specified time, the board of directors that was appointed by the developer upon registration of the condominium must hold a meeting of unit owners (however many there might be at the time) at which such owners are entitled to elect two additional members to the board of directors. Such additional directors, if elected, will serve along with the developer’s appointed board members until Step 2 of the turn-over is completed.

Note that this meeting must occur by the date specified above. This means that the developer’s appointed board must carefully observe the progress of sales and have the means of determining with reasonable accuracy whether such meeting will be required

and when it must be called. Notice of such meeting to the unit owners must be sent out at least 15 days prior to the date of the meeting, pursuant to section 47 of the Act.

Also note that quorum at such meeting is the owners of 25% of the sold units whose owners were entitled to notice of the meeting. This means, amongst other things, that they must have been owners at least 20 days prior to the date of the meeting and not be in arrears of common expenses.

## **Step 2**

As noted above, in many cases, Step 1 of the turn-over process does not occur. The Act provides that such meeting and the election of two additional directors by the unit owners is not required if the circumstances triggering Step 2 arise by the date set for the meeting under Step 1. Such circumstances are that the developer ceases to be owner of a majority of the units.

Note: this is not the same as transferring title to a majority of the units. If that were the case, then Step 2 would not arise until at least 51% of the units were sold. Rather, Step 2 arises at the time that the developer owns no more than 50% of the units.

Under Step 2, the developer-appointed board of directors of the corporation (including any directors added by election under Step 1), must call a meeting within 21 days of the date on which the developer ceases to own a majority of the units. Such meeting must be held within 21 days of being called. If the board fails to call the meeting, a unit owner or mortgagee having a right to vote in the place of an owner may call the meeting.

This meeting is typically called "the turn-over meeting". It is at this meeting that the developer's appointed board of directors is disbanded, along with the directors elected under Step 1, and an entirely new board of directors is to be elected by the unit owners.

At the meeting, the developer is required to give to the new board all of the following (each of which is to be prepared at the developer's expense):

1. the seal of the corporation;
2. the minute book of the corporation;
3. copies of all agreements entered into by the corporation or developer for the corporation;
4. copies of all policies of insurance and related certificates, memos and insurance trust agreements;
5. bills of sale or transfers for all items that are assets of the corporation but not part of the property;
6. the records of the corporation maintained under sections 47(2) and 83(3); and
7. records relating to employees of the corporation.

The turn-over meeting is a good opportunity to help bring together the owners of the condominium to begin building a sense of community. However, it can also become a negative experience if unit owners are allowed to use the meeting as an opportunity to

raise and discuss their complaints about the project or construction of the units. Although listening politely is usually appropriate, the meeting generally should not be allowed to devolve into a complaints session.

You should seek to keep the meeting short and straightforward. It is not uncommon that the developer's solicitor chairs this meeting and helps to keep control of it. The solicitor can use this opportunity to provide some helpful direction to the unit owners and board members as to how to effectively run and enjoy their new community. The newly elected board should be encouraged to stay behind briefly after the meeting to organize their first meeting to appoint officers and get any direction, if available, specifically for them (such as reminders about reserve fund studies, performance audits and changing bank signing authority).

### **Step 3**

Within 30 days of the turn-over meeting, the developer is required to deliver a fairly long list of documents to the condominium's board of directors. These are:

1. the existing warranties and guarantees for all the equipment, fixtures and chattels included in the sale of either the units or common elements that are not protected by warranties and guarantees given directly to a unit purchaser;
2. the as-built architectural, structural, engineering, mechanical, electrical and plumbing plans;
3. the as-built specifications, indicating all substantive changes, if any, from the original specifications;
4. all existing plans for underground site services, site grading, drainage and landscaping, and television, radio or other communications services;
5. all other existing plans and information not mentioned in paragraphs 2, 3 and 4 of this list that are relevant to the repair or maintenance of the property;
6. if the property of the corporation is subject to the *Ontario New Home Warranties Plan Act*,
  - a. proof, in the form, if any, prescribed by the Minister, (*currently, Form 3 under Ont. Reg. 49/01*) that the units and common elements have been enrolled in the Plan within the meaning of that Act in accordance with the regulations made under that Act, and
  - b. a copy of all final reports on inspections that the Corporation within the meaning of that Act requires be carried out on the common elements;
7. a table setting out the responsibilities for repair after damage and maintenance and indicating whether the corporation or the owners are responsible;
8. a schedule setting out what constitutes a standard unit for each class of unit that the declarant specifies for the purpose of determining the responsibility for repairing improvements after damage and insuring them; (*unless this has already been provided as part of the by-laws of the corporation, which, in our view, is preferable*)

9. all financial records of the corporation and of the declarant relating to the operation of the corporation from the date of registration of the declaration and the description;
10. if the meeting is held after nine months following the registration of the declaration and description, the reserve fund study that is required within the year following the registration of the declaration and description;
11. all reserve fund studies that have been completed or are required to have been completed at the time the meeting is held, other than the reserve fund study that is required within the year following the registration of the declaration and description;
12. a copy of the most current disclosure statement delivered to a purchaser of a unit in the corporation under section 72 of the Act before the meeting; and
13. all other material that the regulations made under this Act require to be given to the board. *(There are no additional requirements at this time.)*

If the condominium corporation is a phased condominium, then the developer must also provide a copy of the “phasing statements” that are to have been included in the disclosure statement for the unit sales pursuant to section 147(1) of the Act.

All such documents are to be prepared at the developer’s expense, except for the reserve fund studies mentioned as items 10 and 11 above.

#### **Step 4**

Although well and truly the turn-over of control to the unit owners of the condominium is accomplished by the time the foregoing steps are all completed, the turn-over process requires one more step, which is completion and delivery of audited financial statements of the condominium corporation to the newly elected board within 60 days of the date of the turn-over meeting.

These audited financial statements are to be prepared on behalf of the unit owners and must cover the period running from the date on which the declaration and description creating the condominium are registered up to the last day of the month in which the turn-over meeting (Step 2) occurs. The cost of preparation of these statements is to be borne by the condominium corporation.

#### **CONSEQUENCES OF NON-COMPLIANCE**

The Act is “consumer protection” legislation. Therefore, in all cases of non-compliance by a developer, the developer runs the risk of harming its reputation or good will within the home-buyer market. Non-compliance with turn-over requirements can give rise to increased suspicion of the developer amongst unit owners and the condominium board, which could make future dealings, if there are any, (such as with respect to the developer’s liability for the first-year budget) less amicable.

Over and above such consequences, failure to comply with the requirements set out in Steps 2, 3 and 4 pertaining to the turning over of documentation, records, reports, plans, etc., can result in an application by the condominium corporation to the court that produces:

- (a) an order requiring the developer to comply;
- (b) an order requiring the developer to pay any damages arising on account of non-compliance;
- (c) an order requiring the developer to pay the condominium's costs of bringing the application; and/or
- (d) an order that the developer pay an additional amount up to a maximum of \$10,000.

It generally is more reasonable and responsible, less costly, better for your reputation and bears less risk for a developer to seek to comply with the turn-over requirements of the Act.

### PROVISIONS RELATING TO PHASED CONDOMINIUMS

We are frequently asked whether there are new turn-over requirements each time a phase in a phased condominium is registered. While there are "turn-over" obligations relating to registered phases under Part XI of the Act, it is not required for all of the turn-over steps set out above to be repeated.

What is required is that upon registration of the amendments to the declaration and description creating the phase, the developer is to provide the condominium's board of directors with:

- a. all the same materials listed under Step 2 above, and
- b. all of the materials listed under Step 3 above as items 1 to 8, inclusive, and items 12 and 13

*that pertain to the phase and were not previously delivered to the board.*

It is also a requirement for the developer to provide the board with a copy of its most recent disclosure statement that was used for sales of the units included in a phase, within 15 days after registering the amendments creating the phase.

The Act also contemplates the possibility that once a phase is registered, once again the developer will be the owner of a majority of the units in the condominium. For example, if 10 units were registered in the initial registration, and turn-over occurred once 5 were sold, it is possible there would be no further sales before the developer registers the first phase containing, say, an additional 10 units. Upon such registration, the developer would own 15 of the units and only 5 would have been sold.

If such circumstances persist for at least 30 days after registration of the amendments creating the phase, the Act permits the declarant to require the owner-elected board of directors to call a meeting to elect a new board. At this election, it would appear the developer is entitled to use its majority voting power to put in place a board of its choosing.

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