*ASK THE PROS*

## Provisions for Amalgamation and Non smoker's Rights

*A panel of experts answers questions of interest to property managers and condominium boards of directors. The following are two questions submitted and the responses provided.*

Q. *Our condo development was built in two phases with resulting two condominium corporations even though completion of both phases was without undue delay. Why would such developments not have a provision for amalgamation without excessive resurvey and legal costs involved to amalgamate? Should not a developer be required to provide for such eventual amalgamation without these unnecessary duplicate costs?*

A. It is not possible to effect the amalgamation of condominium corporations without the costs of a new description (survey) and declaration and of fulfilling the other requirements set out in the Condominium Act, 1998 (the "Act"). Therefore, the only way a developer could cause the unit owners to avoid these costs is by freely agreeing to pay them which, in general, is unlikely.

In principle, a declarant is entitled to create its condominiums in any fashion it likes and that the relevant approval authority will permit. There is nothing in the Act or any other law of which I am aware that imposes a requirement on a declarant of condominiums that are similar in size, style, location or facilities to have them amalgamated at the declarant's cost after registration.

Having said this, I am sympathetic to the questioner's complaint. It may well be that the declarant simply did not have sufficient foresight (or concern) to recognize (or care) that amalgamating the condominiums could be better (i.e., more cost effective and efficient) for the unit owners in the future. If that is the case, it is unfortunate and frustrating, certainly, but I do not believe that in usual cases it could give rise to a valid claim against the declarant.

It is also possible that the declarant had entirely valid and reasonable grounds for its decision; but, in any event, this is impossible to determine in the abstract.

To know whether the declarant was reasonable or not in failing to provide for the amalgamation of the condominiums, it would be necessary to know the project's and the declarant's circumstances at the time. However, I am not recommending that the questioner bother looking into this, since, in my view, it is highly unlikely that a successful legal argument could be made that would oblige the declarant to pay the costs of the amalgamation of the condominiums even if the declarant's failure to provide for the same is shown to be entirely unreasonable.

It is also relevant to consider when the condominiums were registered.

If the condominiums were registered prior to the coming into force of the Act (May 5, 2001), then the inquiry as to the declarant's reasons comes to a screeching halt since the declarant could not have considered amalgamation at that time since amalgamation was not permitted under the prior legislation.

In addition, the prior legislation did not permit the creation of "Phased Condominiums" in the current sense of that term.

Previously, some declarants would create a number of smaller condominiums as stages in a single, larger development project. Such "phased" condominiums would then typically be subject to various easements and agreements to permit the owners of each condominium to share in the use of lands, services, facilities or other amenities of the other condominium(s) within the development. This is not the same as the Phased Condominium concept now permitted under the Act.

A Phased Condominium under Part XI of the Act is one where, once the declaration and description creating the initial stage of the condominium are registered, the declarant can add more units and/or common elements to the condominium as they are built by the registration of amendments to the declaration and description. Each such additional registration constitutes a new phase of the condominium. In effect, there is just one condominium that keeps getting bigger and bigger as each phase is added until the proposed project is completed.

Therefore, if the condominiums were made after the Act came into force, then the declarant would have had at least the following three options in respect of these condominium plans (two of which did not exist under the prior legislation):

1. To create them as individual condominiums, as has apparently been done, and if necessary to provide easements and/or mutual use and cost sharing agreements for any shared lands, facilities or services, as with other pre-Act "phased" condominium developments;

2. To create them as individual condominiums and thereafter amalgamate them to become one larger condominium; or

3. To create them as stages in a Phased Condominium under Part XI of the Act, which means that although registered in two stages there would have been only one condominium at the end of the day.

I can think of no fundamental reason that the declarant would not have been entitled to choose any one of these options and to make its decision freely based on any grounds the declarant considered reasonable at the time. One can also presume that whatever reasons the declarant had for not phasing the condominiums (if they were registered under the

Act) are likely also its reasons for not providing for their amalgamation, since the outcome of either process is the same.

Also, if the condominiums were registered under the Act, then pursuant to section 72(3)(o) of the Act, the Disclosure Statement provided to each purchaser of a unit from the declarant would not only have included details about the project (which might have highlighted some of the similarities or relationships between the condominiums), but it also would have had to include a statement indicating whether or not amalgamation of the condominiums was being considered by the declarant at the time.

The failure to include such a statement might have given rise to a right of a purchaser against the declarant prior to closing, but once the deal was closed I do not believe there is any remedy available based on such a failure.

If the statement was included, it would be difficult for the unit owners to now complain that they did not know in advance that the costs of amalgamation would be theirs to bear if they later chose to do it. (Amalgamation is optional – the unit owners are not required to do it.)

For the foregoing reasons, I seriously doubt that the unit owners in question can legitimately claim compensation from the declarant for their costs of the proposed amalgamation of these condominiums. However, I have no detailed knowledge of the facts of this case. Therefore, these comments are of a general nature and are not a legal opinion. The questioner may wish to retain a solicitor to obtain a formal opinion if he or she believes that (notwithstanding these comments) there are special circumstances that might give rise to an obligation of the declarant to pay.

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Q. *My neighbours smoke in their basement and the smoke crosses our common basement wall. We are in a townhouse and both sides of my walls are insulated and have finishing plywood. Holes are invisible. Despite repeated requests through the property manager and me, the neighbours do not stop. What are my rights and can I resolve this issue?*

A. Unit owners have the right to occupy and use their units as they see fit, subject to any restrictions set out in the Condominium Act, 1998 (the “Act”), and the condominium corporation’s declaration, bylaws and rules. Every condominium corporation declaration contains restrictions on the use an owner may make of his or her unit. One such restriction prohibits owners from occupying and using their units in such a manner as to

unreasonably interfere with the use and enjoyment by others of their units and the common elements. The declaration of the particular owner should be reviewed for such a provision. A common interference complained of in condominiums is excessive noise caused by neighbouring unit owners. The concerns of this unit owner are not any different, since the smoking is disrupting the normal use of the unit.

The unit owner experiencing the interference has the right, pursuant to section 119(3) of the Act, to require the unit owners whose smoking is creating the interference to comply with the Act, and the corporation's declaration, bylaws and rules, by requiring them to take steps, at their own expense, to rectify the interference.

If the requests made by this unit owner and the corporation's property manager have been ignored, then the unit owner has recourse to the mediation and arbitration provisions in section 132 of the Act, to enforce the unit owners' compliance with the restrictions in the declaration. Section 132 of the Act permits unit owners to submit a disagreement with respect to the condominium corporation's declaration, bylaws and rules to mediation. The mediator only has authority to attempt to bring about a settlement to the disagreement. The mediator cannot decide the disagreement between the parties. If the unit owners cannot resolve the disagreement and reach a settlement through mediation, then the unit owner experiencing the interference may submit the disagreement to arbitration where an arbitrator will make a final and binding determination on the issue based on the evidence. If the unit owner complaining of the smoking can show, with evidence, that the smoke is entering the unit, then an arbitrator will likely determine that the smoking constitutes unreasonable interference and will require the neighbouring unit owners to take steps to rectify it or to stop smoking. The arbitrator's decision will depend upon the particular facts of the case.

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