

Legislative Brief

Recommendations for Changes to the Condominium Act, 1998

Submitted May 27th, 2011

Submitted By the Joint Legislative Committee of:

Association of Condominium
Managers of Ontario

Canadian Condominium Institute
Toronto & Area Chapter



Canadian Condominium Institute (Toronto)
&
Association of Condominium Managers of Ontario

JOINT LEGISLATIVE COMMITTEE

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Canadian Condominium Institute (Toronto)
&
Association of Condominium Managers of Ontario

JOINT LEGISLATIVE COMMITTEE

Date Submitted: May 27, 2011

The Condominium Act, 1998 (the “Act”)

PART I
DEFINITIONS AND INTERPRETATION

Section 1 – Definitions and Interpretation

1(1) In this Act,

Common Amenity Unit

“common amenity unit” means a unit owned by the corporation used for the benefit of the property, all owners or the corporation;

Common expenses

"**common expenses**" means the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act, a declaration or a by-law of the corporation; (depenses communes”)

Reasoning: Although s. 56(n) allows a by-law to be passed to specify duties of the corporation in addition to the duties set out in the Act and Declaration, it would be best to clarify that common expenses can also be defined in a by-law of the corporation.

Declarant

"**declarant**" means a person who owns the freehold or leasehold estate in the land described in the description and who registers a declaration and description under this Act, and includes a mortgagee in possession, receiver or trustee who acts as a declarant and a successor or assignee of that person but does not include a purchaser in good faith of a unit who pays fair market value or any successor, assignee or mortgagee in possession of the purchaser; (“declarant”)

Reasoning: Under the current regime, it is confusing as to whether a mortgagee in possession, receiver or trustee who acts as a declarant of the declarant's project constitutes a "declarant".

That should be made clear since it is essential that in cases where the declarant has defaulted on a project, a mortgagee in possession, receiver or trustee who acts as a declarant, should fulfil the declarant's obligations if a condominium corporation is to be appropriately built, governed and marketed, particularly in view of the fact that a mortgagee in possession is included in the definition of an "owner" in s. 1(1).

Owner (Common Elements Corporation)

"owner" means,

- (c) in relation to a common elements condominium corporation, a person, including the declarant, who owns a common interest in the common elements and a freehold interest in the parcel of land to which the common interest is attached as described in the declaration, and who is shown as the owner of a common interest in the records of the land registry office in which the description of the corporation is registered, and includes a mortgagee in possession; ("propriétaire").

Reasoning: The Committee cannot see any reason to exclude a mortgagee in possession as an owner of a common interest in the case of a common elements condominium.

Property

"property" means the land, including the buildings, structures and fixtures, if any, on the land, and interests appurtenant to the land, as the land and interests are described in the description and includes all land and interests appurtenant to land that are added to the common elements; ("propriete")

Reasoning: The implications applicable to "buildings" on the land are equally applicable to "structures and fixtures" for the purposes of the definition of "property". A number of sections in the Act refer to "land and interests appurtenant to the land", when really they refer to "property". The word "property" describes what the Act governs more comprehensively than the words "land and the interests appurtenant to the land". This revised definition for "property" should then accord with the definitions of a "unit" and "common elements" set out in Section 1(1).

Purchaser

"purchaser of a unit", in relation to a leasehold condominium corporation, means the purchaser of an owner's leasehold interest in a unit and the appurtenant common interest; ("acquéreur d'une partie privative")

Reasoning: The words "purchaser of a unit" would normally apply to a wide range of condominium units. This definition confuses the general application of those words by relating them "in relation to a leasehold condominium corporation". We believe that it would be preferable to delete this definition and in PART XIII (dealing with leasehold condominium) corporations refer to the "purchaser of a leasehold unit" because the phrase "purchaser of a unit", as a commonly used concept, should be confused.

Alternatively, if it is intended to maintain this definition in s. 1(1), the word "leasehold" should

be inserted to define the nature of the owner's interest in a unit and the appurtenant common interest.

Unit

“unit” means a part of the property designated as a unit by the description and includes the space enclosed by its boundaries and all of the land, buildings, structures and fixtures within this space in accordance with the declaration and description. (“partie privative”)

Reasoning: The definition for “property” is defined in s. 1(1) to mean “the land including the buildings on it; ...” The word “unit” defined in s. 1(1) does not currently include a reference to a building, although “freehold units” (so called) do include buildings within the unit. Although a “structure” may include a “building”, some consistency is appropriate for the definitions of “property” and “unit”.

Alternatively, replace the words “land, structures and fixtures” by the word “property”.

Missing Definitions

The Committee notes that s. 1(1) includes a definition of a “leasehold condominium corporation” and a “freehold condominium corporation”, but there is no definition of a “common elements condominium corporation”, “vacant land condominium corporation” or “phased condominium corporation” which would help in understanding their individual concepts which are referred to throughout the Act but which can only be understood, after some analysis, by reading the respective PARTS in the Act.

PART II REGISTRATION AND CREATION

Section 2 – Registration

2(2) Restriction

“2(2)

Add new subsection (b)

(b) A declaration and description for a leasehold condominium corporation shall not be registered by or on behalf of a person who does not own the leasehold or freehold estate in the property.”

Reasoning: Subsection 2(2) prohibits registration of a declaration and description for a freehold condominium corporation other than by a person who owns the freehold estate. No similar provision prevents registration of a declaration and description for a leasehold condominium corporation by a person who does not own the leasehold estate in the land. It does not make sense to allow a person other than the owner of the leasehold or freehold estate in the property to register a declaration and description for a leasehold condominium corporation.

Alternatively, it would appear that subsection 2(2), which prohibits a person other than the owner of the freehold estate in the land from registering a declaration and description for a freehold condominium corporation, is redundant because subsection 2(1) provides a restrictive authority allowing registration of a declaration and description by or on behalf of the person who owns the freehold or leasehold estate in the land.

2(3) Effect of registration

- “2(3) Upon registration of a declaration and description,
- (a) this Act governs the property land and the interests appurtenant to the land, as the land and the interests are described in the description; and assets owned by the corporation;
 - (b) the property land described in the description is divided into units and common elements in accordance with the description; and”

Reasoning: See the “Reasoning” pertaining to land, buildings, structure and property set out under the definition of “Property” in s. 1(1) above. As the Act also regulates the assets owned by the corporation then for clarity this should be in 2(3).

Section 4 – Real Property Acts

4(2) Rights of tenants

- “(2) The registration of a declaration and description shall not terminate or otherwise affect the rights under the Residential Tenancies Act, 2006 Tenant Protection Act, 1997 of a person who, at the time of the registration, is a tenant of the property or of a part of the property; provided that any purchaser or tenant of a unit or a proposed unit shall have the rights and benefits and shall be subject to the superseding restrictions and obligations set out in the declaration, by-laws and rules of the corporation except as set out in this Act.”

Reasoning: It would be preferred that the Ministry insert the relevant sections of the *Residential Tenancies Act, 2006* applicable to this section. As written, s. 4(2) may allow a tenant to act contrary to the declaration, as suggested by a recent decision of the Landlord Tenant Board. The purchaser of a proposed unit will often be a tenant pursuant to an interim occupancy agreement, but will have agreed to comply with the declaration, by-laws and rules. It is suggested that adding the word “superseding” may resolve this issue.

Section 7 – Requirements for Declaration

7(2) Contents

- “(2) A declaration shall contain,
- (a) a statement that this Act governs the property ~~land and interests appurtenant to the land, as the land and the interests are described in the description;~~
 - (b) the consent of every person then having a registered mortgage against all or any portion of the property ~~the land and interests appurtenant to the land, as the land and the interests are described in the description;”~~

Reasoning: Not only the “land”, but the “property” should be governed. See the “Reasoning” pertaining to “Property” set out in s. 1(1) above.

7(2)(h): Re-number existing (h) as (i) and add new (h) to read as follows:

- “(h) A statement by the declarant that all buildings, structures, fixtures, assets, facilities, common elements and units of the condominium corporation have been provided in accordance with all federal, provincial and municipal laws, regulations and by-laws, and the legal requirements of any public authority or which are essential to the proper functioning of the property or the corporation, without charge to the condominium corporation, owners or their invitees except as a component of the purchase price referred to in each owner's Agreement of Purchase and Sale.”

Reasoning: Declarants should be obligated to provide facilities such as visitor parking, a garbage recycling system, a chiller, boiler, HVAC and all other systems which both the declarant and the corporation are obligated by municipal by-law to provide, or which are essential to the proper functioning of the property and the corporation. The declarant should not be entitled to charge either the corporation, its owners or invitees the costs of such facilities either as a lump sum or on an ongoing basis; otherwise, some declarants will continue to shift the burden of paying for these items to owners when they have historically been, and should continue to be, provided by the declarant as part of the building and included in the purchase price. This is contrary to the normal consumer protection expectations of purchasers and results in unfair additional profits to declarants at the expense of owners.

7(4) Additional contents

- “(4) In addition to the material mentioned in subsection (2) and in any other section in this Act, a declaration may contain,
- (b) provisions, conditions or restrictions with respect to the occupation and use of the units or common elements;

- (c) provisions, conditions or restrictions with respect to gifts, leases and sales of the units and common interests;”

Reasoning: Previously, the Committee proposed the use of the word “provisions” as in subsection 3(3) of the previous *Condominium Act* as being preferable to the words “conditions or restrictions” with respect to both sub-paragraph (b) and (c). The declaration should be able to contain "provisions" in addition to "conditions" or "restrictions".

- “(d) ~~a list of~~ the responsibilities of the corporation consistent with its objects and duties; and”

Reasoning: The responsibilities and duties should not only be listed, they should be fully delineated to the extent to which they are put into the declaration.

Section 8 – Requirements for Description

8(1) Requirements for description

- “(1) Subject to the regulations made under this Act, a description shall contain,
- (a) a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings, structures and fixtures;
- (e) where the Ontario Building Code requires the opinion or certificate of an architect or engineer with respect to the construction of specified types of buildings, structures or fixtures, a certificate of an architect that all buildings, structures and fixtures and their structural components, have been constructed and located in accordance with the regulations and the current Ontario Building Code, and if there are structural plans, a certificate of an engineer that all buildings, structures and fixtures and their structural components have been constructed in accordance with the regulations and the Ontario Building Code; provided that if the Ontario Building Code does not require the opinion or certificate of an architect or engineer, or in the event of conversion of a building, structure and fixtures to a condominium, an architect, or engineer or surveyor may shall provide an opinion that the architectural plans and any structural plans that reasonably reflect the as-built conditions on site;”

Reasoning: All buildings, structures and fixtures should be regulated by subsections 8(1) (a) and (e). Although clause (d) of subsection 8(1) requires diagrams showing the shape and dimensions of each unit, and the approximate location of each unit in relation to the other units of the buildings, it is important that the architectural and structural plans referred to in clause (e) require that all buildings and their structural components have been constructed and located substantially in accordance with the architectural plans.

A problem arises in projects involving apartment or commercial buildings converted to condominiums where the original plans are not available. Such conversions often give rise to substantial hidden construction defects, which must subsequently be rectified at the owners' expense. In addition, apparently the Ontario Building Code (the "Code") does not require either an architect or engineer to be involved in the construction of some types of buildings such as residential town houses or detached homes.

We recommend that an architect's or engineer's certificate or opinion must be required in all cases, together with as-built architectural and structural plans certified by the applicable architect or engineer, even if the Code does not require involvement of an architect or engineer, the Act should require same. Since Tarion's ONHWP warranty is currently not applicable to conversion properties, purchasers do not have the benefit of either an ONHWP warranty or an engineer's Bulletin 19 inspection audit or a performance audit under s. 44 of the Act. Thus they are essentially totally unprotected for construction warranty claims. Lacking those protections, few informed purchasers would be so foolish as to buy a unit in a conversion building, yet many uninformed unit purchasers buy conversion units, much to their surprise as the building deficiencies eventually reveal themselves.

8(3) Common elements, units in buildings

“(3) A description shall not be registered unless,

- (b) each unit ~~for residential purposes~~ includes all or a portion of one or more buildings or is included in a building provided that a unit in a common elements condominium corporation or a vacant land condominium corporation need not include a building.”

Reasoning: A linked townhouse unit in which the backyard and front yard are part of the unit will not be entirely in a building and may not include an entire building.

We presume that commercial, industrial or other units should meet the same criteria of being included in a building, but exceptions apply to vacant land condominiums and common elements condominiums in the sections of the Act which relate specifically to those condominium types.

Section 9 - Subdivision Control

9 (1) (b) Subdivision control

“(b) easements transferred by, or to, or reserved to the corporation.”

Reasoning: If after the first corporation of a phased condominium project has been registered, the developer/declarant realizes that it needs to give the first phase corporation an easement over

the third phase, and if it could not reserve it in the declaration of phase two, the declarants would like to be able to register a transfer of the easement(s) without having to go to the Committee of Adjustment.

In a previous draft of the Act in the 1990s, the government was going to allow easements between the declarant and the corporation or between corporations without violating the Planning Act. In situations where the declarant owns one parcel of land and another company owns another parcel of land, declarants would like to be able to create easements between everybody so that they do not have to go to the Committee of Adjustment if.

In a draft plan condition, one can give an easement over the condo lands in favour of the third party that is not the declarant. Declarants would like to be able to go the other way as well and have the draft plan condition set up so that one can have an easement from the third party going the other way over the condominium corporation's lands.

9(4) Conversion of rented residential premises

- “(4) If an applicant makes an application for approval in respect of a property that includes a building or related group of buildings containing one or more premises that is used as a rented residential, commercial or industrial premises or that has been used as a ~~rented residential premises~~ for such purposes and is vacant, the approval authority shall ~~may~~, after consulting with the council of the local municipality in which the property is located if the approval authority is not that municipality, require the applicant to have a person who holds a certificate of authorization within the meaning for the *Professional Engineers Act* or a certificate of practice within the meaning of the *Architects Act* or another qualified person inspect the property and report to the approval authority all matters that the approval authority considers may be of concern.”

Reasoning: Conversion of rented premises and the requirement for the inspection by an architect or engineer should not be limited to rental premises. Rather it should include commercial and industrial rented premises.

9(5) Additional conditions

- “(5) In addition to the conditions that it may impose under subsection 51(25) of the *Planning Act*, the approval authority that receives an application described in subsection (4) may impose the conditions that it considers are reasonable in light of the report mentioned in subsection (4) and shall, without restriction, require completion of as-built architectural and structural engineering plans, a performance audit and a reserve fund study on all units, the Property and the assets of the corporation, as required pursuant to this Act and its Regulations, rectification of all building deficiencies identified in the inspection report referred to in subsection (4) or in the performance audit and funding of the reserve fund to

the extent certified to be adequate by a person authorized to conduct a reserve fund study.”

Reasoning: An initial technical audit study, a post-construction performance audit and a reserve fund study should each be mandatory rather than at the discretion of the applicable approval authority, and the declarant should be obligated to pay the cost of repairing all identified building deficiencies and funding the reserve fund to the extent certified to be adequate by a person authorized to conduct reserve fund studies. This should bring the purchasers of converted units to the same standard as for purchasers in a new building. This is particularly important since Tarion (the ONHWP) does not apply to provide either warranty protection or a Bulletin 19 engineer’s inspection audit in the case of conversions.

9(6) Application for exemption (subdivision control)

“(6) Before making an application under subsection 51(16) of the *Planning Act*, the owner of a property or a person authorized in writing by the owner of the property, or in the case of an amalgamation, the corporations seeking to amalgamate, may apply to the approval authority to have the description or any part of the description exempted from those provisions of sections 51 and 51.1 of the *Planning Act* that would normally apply to it under subsection (2).”

Reasoning: It appears that the requirement in subsection 9(6) of the Act that “*the owner of a property or a person authorized in writing by the owner of the property*” make the application is intended to mirror the requirement in subsection 51(16) of the *Planning Act* that the application for approval be made by “*an owner of land or the owner’s agent duly authorized in writing*”.

While this generally may be suitable for new condominiums, then in the case of an application with respect to an amalgamation of condominium corporations, who makes this application? On a reading of the section, it would appear that 100% of all the owners must sign the application or authorization for the application. This would mean that even though only 90% of the owners of each corporation are required to approve the amalgamation, 100% must apply for the approval or exemption under section 51 of the *Planning Act*. If this is the case then it is opening the door to a disgruntled owner to try to upset or slow down an amalgamation.

It should also be made clear in the Act that an application for an amalgamation involves making application for approval or exemption under section 9. In addition, it is the Committee’s view that there should be a statutory presumption that an amalgamation is to be approved. Condominium corporations which have previously received planning approval which subsequently seek to amalgamate should not be required to undergo the planning process on a repeated basis.

**PART III
OWNERSHIP**

Section 11 - Ownership of Property

11(1) Ownership of property

“(1) Subject to this Act, the declaration, ~~and~~ the by-laws and the rules, each owner is entitled to exclusive ownership and use of the owner’s unit.”

Reasoning: S. 58(1) of the Act can, in certain circumstances, make use of the owner’s unit subject to any rules. Therefore, rules should be added to 11(1).

Section 12 - Easements

12(1) Easements

“(1) The following easements are appurtenant to each unit and shall be for the benefit of the owner of the unit and the corporation:

1. An easement for the provision of any shared service through the common elements or any other unit subject to board approval which shall not be unreasonably withheld.”

Reasoning: Owners should be entitled to the benefit of an easement for a service through the common elements or another unit, whether before or after registration of the declaration, as long as the board approves it, acting reasonably. For example, such an easement might be deemed to apply to a gas service that did not exist beforehand at that corporation.

- “3. If a building, structure or fixture, if any, or a part thereof moves after registration of the declaration and description or after having been damaged and repaired but has not been restored to the position occupied at the time of registration of the declaration and description, an easement for exclusive use and occupation over the space of the other units and common elements that would be space included in the unit if the boundaries of the unit were determined by the position of the buildings from time to time after registration of the description and not at the time of registration.”

Reasoning: See comments regarding the phrase “building, structure and fixture” in s. 1(1) above.

- “4. If a corporation is entitled to use a service or facility in common with another corporation, an easement for access to and for the installation and maintenance of

the service or facility over the property of the other corporation, described in accordance with the regulations made under this Act.”

Reasoning: A corporation may have an easement through a building, structure or fixture of another corporation, such as a pedestrian right of way to recreational facilities or for shared utilities and services. The proposed definition of “property” set out in s. 1(1) above includes a reference to land, buildings, structures or fixtures.

Section 13 - Effect on Encumbrances

13 Effect on encumbrances

“~~After~~ ~~Upon~~ the registration of the declaration and description, an encumbrance against the common elements, whether arising before or after the registration of the declaration and description, is not enforceable against the common elements but is enforceable against all the units and common interests.”

Reasoning: This provision should apply whether the encumbrance arises before or after registration of the declaration and description.

Section 14 - Ownership of Property

14(1) Discharge of encumbrances

“(1) If an encumbrance ~~registered before the registration of the declaration and description~~ is, by virtue of section 13, enforceable against all the units of a corporation and their common interests, an owner may discharge the portion of the encumbrance that is applicable to the owner's unit and common interest by paying to the encumbrancer the portion of the amount owing on account of principal and interest under the encumbrance that is attributable to the owner's responsibility to contribute to common expenses ~~interest~~ as specified in the declaration.”

Reasoning: These sections should apply to encumbrances arising before and after registration of the declaration and description.

The required amount to discharge the encumbrance from a particular unit should be based upon the proportions for contributions to the common expenses, rather than the proportions of the common interests.

Section 15 - Assessment

Assessment

15(3) Exception (assessment)

“(3) ~~A part of the common elements of a corporation that is not a common elements condominium corporation constitutes a separate parcel for the purpose of municipal assessments and taxation if it is leased for business purposes under section 21, the lessee carries on a undertaking for gain on it and it is in the commercial property class prescribed under the *Assessment Act*.~~

Reasoning: In light of the *Assessment Act*, business assessment has not existed in Ontario for many years and revenues for business assessment purposes are included as an addition to the municipal realty taxes for commercial properties. Those taxes are payable by the owner of the land who must remit to the municipality the realty tax amounts which includes business taxes in a commercial property class. As drafted, this section will impose new administrative duties upon an entity such as a condominium corporation which previously was not obligated to assess municipal realty taxes against its commercial tenants and remit such amounts to the municipality.

ALTERNATIVE SOLUTION

If it is decided to retain this provision, the amount of municipal assessment and taxation should be limited to the equivalent of the previously-existing business tax component, excluding the municipal realty tax component, which has already been included as part of the common interests appurtenant to each of the units, so that a detrimental new tax impact is avoided. In any event, condominium corporations should be exempted from the administrative obligation to collect and remit taxes to the municipality. Below is suggested amended wording for 15(3).

15(3) Exception (assessment)

“(3) A part of the common elements of a corporation that is not a common elements condominium corporation constitutes a separate parcel for the purpose of municipal assessment and taxation if it is leased for business purposes under section 21, the lessee carries on an undertaking for gain on it and it is in the commercial property class prescribed under the *Assessment Act*; provided that:

- (a) only an amount equivalent to the ~~business tax portion~~ difference between municipal assessment and taxation of the parcel used for business purposes and the municipal assessment and taxation of that parcel assessed and taxed for the residential purposes shall ~~of municipal realty taxes need~~ be remitted directly by the lessee to the municipality and the corporation shall not be obligated to do so;
- (b) the amount to be remitted shall exclude the portion of municipal realty taxes not applicable to business taxes.”

NEW SUBSECTION 15(5): Condominium owned units

“(5) The corporation may own and use one or more units as common amenity units as facilities or for purposes incidental to the management and administration of the corporation or the property, or for the shared benefit of all owners, which common amenity unit shall be treated, for the purpose of municipal assessment and taxation, as if it were part of the common elements for residential use.”

Reasoning: Units owned and used by the condominium corporation should be free of municipal taxation in the same manner as common elements. For example, a recreational unit, on-site management office, gatehouse, superintendent’s unit, guest unit or mechanical unit owned by the corporation are common amenities, facilities and administrative units and are for the benefit of all owners or the property. The unit owners have already paid municipal tax on these common amenity units because the assessed value of their units includes a value resulting from the owners’ proportionate common interest ownership of these amenities and units. Therefore, ~~imposition of~~ realty assessment upon common amenity units results in double taxation upon the owners who have paid municipal tax upon the common interests appurtenant to their units (pertaining to the assessed value of the common elements, assets and common amenity units owned by the corporation), which is replicated by owners having to pay common expenses to fund municipal taxes payable by the corporation with respect to the common amenity unit assets of the corporation.

NEW PROPERTY CLASS FOR RESIDENTIAL CONDO UNITS FOR MUNICIPAL ASSESSMENT AND TAXATION

A new property class or classification for residential condominium units for municipal assessment and taxation should be established to recognize and reflect the unequal delivery of services by a municipality to corporations and condominium units when compared to non-condominium freehold residences. Governments provide significantly less services and at a substantial cost savings to them for many services provided to condominium units than they would for other forms of homes. There are numerous examples related to facilities and services provided by condominiums to their owners which otherwise would have been provided by the municipality (e.g. street lighting, road maintenance, sidewalk maintenance, sewer maintenance and garbage pick-up). For instance, there would be only one garbage pickup for a condominium building containing 200 homes, yet if these 200 homes were houses on a street then the government would make 200 stops. Numerous municipalities refuse to pick up garbage at townhouse condominiums which are otherwise allowed to have narrow streets. Despite this inequity, the government assesses the units for municipal property taxes as if they were receiving individual services. This is not fair or equitable to condominium owners.

Therefore, the Committee recommends that the *Assessment Act* be amended to recognize high-rise condominiums and townhouse condominiums as two distinct and different categories of property from individual homes, for assessment purposes. Condominiums homeowner taxpayers have been clambering to rectify this inequity for years.

PART IV CORPORATION

Section 17 - Objects

17(3) Ensuring compliance

- “(3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of the units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.”

NEW SUBSECTION 17(4)

- (4) ~~the Declaration may provide that the~~ corporation shall be entitled to recover all its reasonable costs in fulfilling its duties under the Act in ensuring such compliance, and where the non-compliance is by an owner, ~~their~~ tenant, occupant, guest or anyone else for whom the owner is in law responsible such reasonable costs shall be added to the common expenses of the unit and the corporation may specify a time for payment by the owner of the unit

Reasoning: The Act is not clear and is deficient in the ability of the corporation to collect its reasonable costs of enforcement against the offending owner. As long as the costs are reasonable, the defaulting/non-compliant owner should pay for these costs as it would not be fair to have the rest of the owners pay for it. The committee understand that the Nova Scotia condominium Act provides for this.

Section 19 – Right of Entry

19. Right of entry

The Committee recommends that section 6 (4) of the previous Act be carried forward, as follows:

- (4) The corporation or any person authorized by the corporation may enter any unit at any reasonable time to perform the objects and duties of the corporation.

Reasoning: Giving notice is a good idea, but the corporation should not be required to give notice to an owner when it is carrying out its duties on the exclusive use common elements other than a storage locker or balcony. For instance, the corporation should not have to give an owner notice when it is cutting the lawn in an exclusive use backyard or painting open balcony railings. In an emergency, the corporation should not be required to give notice, other than the types of

immediate emergency notice contemplated in declarations. All declarations contain detailed entry requirements requiring notice in non-emergency situations in any event; those declaration provisions should not be superseded by the notice requirement.

ALTERNATIVE SOLUTION

In the alternative, amend section 19 as follows:

- “19. ~~On giving reasonable notice, the corporation or a person authorized by the corporation may~~ The corporation or a person authorized by the corporation may, upon giving reasonable notice, enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation; provided that the corporation need not give notice of entry in the case of an emergency or when entering exclusive use portions of the common elements, other than a storage locker, an enclosed portion of a building or structure or a balcony.”

Section 20 – Easements Described in Declaration or Phase

20. Easements described in declaration or phase

20(2) Application

- “(2) Subsection (1) applies to an easement that,
- (a) imposes a benefit or a burden on land, buildings, structures or fixtures, if any, owned by the declarant, or any other party, other than the property; or”

Reasoning: The land, other than the property, owned by the declarant may include buildings, structures or fixtures.

With respect to the addition of the words “or any other party”, see the “Reasoning” pertaining to “Subdivision Control” set out in s. 9 (1)(b) above.

20(4) Validity of easement

- “(4) An easement that is created under subsection (1) is valid even though the declarant owns the land, building, structure or fixture, if any, to be benefited or burdened by the easement in addition to owning the land relating to the easement that is described in the description.”

Reasoning: Same as subsection 20(2)(a) above.

Section 21 - Easements and Lease of Common Elements

Easements and lease of common elements

“21(1) The corporation may by by-law’

- (a) lease a part of the common elements, except a part that the declaration specifies to be used only by the owners of one or more designated units and not by all the owners; or
- (b) grant or transfer an easement or licence through the common elements.
- (c) release an easement that is part of the common elements.”

NEW SUBSECTIONS 21(2) AND (3)

(2) Notwithstanding subsection 21 (1), the corporation shall be entitled to grant and release an easement or a license through and appurtenant to the common elements which provides a service to the common elements or to one or more units, by a resolution of the board upon notice to the owners that describes the service and property affected.

(3) Subsections 97 (3), (4), (5), and (6) apply to a service easement described in (2) as if it were a change in a service that a corporation provides to the owners.

NO BY-LAW REQUIRED FOR SERVICE AGREEMENTS AND EASEMENTS

Reasoning: By-laws are very difficult to pass as they require 50% plus one of all units in the corporation to vote in favour (and not just a simple majority of those voting at a meeting). Certain other easements do not require the passing of a by-law (such as a telecommunication easement in 22(5), etc.). Section 12 (2) provides that an easement for the provision of a service through a unit or through part of the common elements of which an owner has exclusive use is appurtenant to the common elements, but even in that restricted case, the Act does not clarify whether a s. 21 by-law must be enacted to implement that concept. Therefore, for service agreements that require some form of easement or access through and across the common elements, the corporation should not have to pass a by-law and it is recommended that these can be passed by a resolution of the board of directors. Subject to notice given to the owners on the same basis as is required by s. 97(3), using the same wording as appears in s. 22 (3):

Section 22 - Telecommunications Agreement

22(2) (a)

- “(a) Enter into, amend or repeal a telecommunications agreement or a utility service or administration agreement that services the units of the corporation;”

Reasoning: A “network upgrade” is susceptible to ambiguous interpretations. Some argue that a “network upgrade” means an improved wiring system, or more channels, or a different provider or better telecommunications agreement provisions. It is difficult and confrontational to obtain adequate owner-participation to enact a by-law. Many residential corporations require telecommunications agreements, but are unable or unwilling to comply with s. 21 of the Act – resulting in breach of the Act by a significant proportion of corporations. The Committee believes that it would be better to apply the s. 97 notice criteria as currently stated in s. 22 (3).

Delete existing s. 22(4) and substitute with:

“(4) The cost of the telecommunication or utility services may be charged to the owners as follows:

- (a) the cost of telecommunications services that are invoiced directly to the unit owners under clause (2) (c) shall not form part of the common expenses, despite anything in the declaration;
- (b) the cost of bulk telecommunications services that are invoiced directly to the corporation shall form part of the common expenses and the board may by resolution provide for a levy against all units of an assessment for such telecommunications services based upon the proportionate shares of common expenses allocated to each unit as set out in the declaration, or based upon the annualized per unit cost expressed in the telecommunications agreement, or based upon an equal cost for each telecommunications system installed in each residential unit, each of which shall constitute a common expense of the corporation enforceable as such notwithstanding any provision contained in the declaration or a by-law of the corporation.
- (c) The board may by resolution provide for a levy against all units of an assessment for any utility service based upon the proportionate share of common expenses applicable to each unit as set out in the declaration, or based upon an individual meter, smart meter, sub-meter or smart sub-meter utility charge with respect to utilities delivered to the unit, which utility charge shall include all components of such charges as the board, acting equitably among the owners, may determine to be appropriate, as a common expense of the corporation enforceable as such, notwithstanding any provision contained in the declaration or a by-law of the corporation”

Reasoning: Under Section 22, a corporation may make an agreement for the supply of telecommunications services direct to unit owners. Omitted from Section 22 and Section 85 is a fair billing mechanism based on unit cost for pass-through of service as opposed to "proportionate share" billing. Current provision of cable service from third party suppliers, such as Rogers or Bell, have pricing based on service subscription, irrespective of a unit's proportionate share of the common expenses. Without the suggested amendment, an unfair and unequal cost of service would be borne by unit owners dependent on the "proportionate share" percentage provided for in each condominium corporation's declaration. Both cable and telephone services are priced on an equal basis to all users (adjusted by higher charges for greater services) and not on the basis of a "proportionate share" of the common expenses or adjusted percentage designation in a condominium's declaration.

In addition, Section 22 or Section 85 does not deal with the issue of lien rights against units for failure to contribute to the assessed telecommunication levy by a condominium corporation. Lien rights should be granted in order to give the corporation adequate collection powers.

Several types of telecommunication charges can be applicable. Basic bulk services may best be charged based upon the number of TV sets in each unit, rather than based upon proportionate common expenses set out in the corporation's declaration, or based upon other fair factors, while discretionary additional packages of television programming should be paid individually by the unit owners.

22(5) Telecommunications Easement

- “(5) A corporation and a party, if any, that has entered into a telecommunications agreement with the corporation shall have a non-exclusive easement over the part of the property described in clause (b) for the purpose of installing and using a telecommunications system if,
- (a) ~~the corporation was created on or after the day the section comes into force and~~ includes one or more units for residential purposes;”

22(11) Personal property

- “(11) If, under subsection (9), a corporation terminates a telecommunications agreement, a party to the agreement may, on giving reasonable notice to the corporation, and shall upon 30 days notice given by the corporation prior to termination, remove personal property that it owns and that is located on the property that was subject to the agreement within 30 days after the termination of the agreement.”

Reasoning: CRTC Regulations and agreed provisions should not be superseded by this section. The corporation should not become stuck with obsolete or defective property owned by a telecommunications provider when the telecommunications agreement has come to an end. The corporation should be entitled to require the telecommunications provider to remove its personal

property, saving the corporation from incurring the expense of doing so, since upgraded cables and other telecommunications facilities will often be installed by a new provider.

FURTHER SOLUTION:

Change this section to say “any termination”, not just the subsection (9) termination.

Reasoning: A corporation is entitled in the circumstances stipulated in subsection (9) to terminate a telecommunications agreement after ten years. The telecommunications provider, pursuant to sub-paragraph (11), is entitled following such termination to remove its telecommunications system within 30 days following termination of the agreement. Subsection (13) states that the telecommunications provider will be deemed to have abandoned the system if it is not removed within the 30-day period.

The abandonment only exists if the telecommunications agreement has been terminated in accordance with subsection (9). It does not exist if the agreement is terminated in accordance with its terms at the end of ten years or at any other time. That deficiency seriously detracts from the protection which was apparently intended to be afforded to corporations.

22(12) Duties on removal

“(12) A party removing personal property under subsection (11) shall,

- (a) carry out the removal in a manner that avoids unnecessary disruption of telecommunications services and facilitates the installation of other similar personal property for the purposes of telecommunications; and”

Reasoning: As currently written, subsection 22(11) contemplates termination of a telecommunications agreement, which would normally mean that telecommunications services would terminate at that point, even though the telecommunications provider’s facilities remain installed for a thirty day period, which may impede a new provider of telecommunications services.

NEW SUBSECTION 22(12)(c)

“(c) continue to provide telecommunications services to the corporation until alternate telecommunication services may be provided by another party during the thirty day removal period referred to in subsection (11).”

Reasoning: Same as for subsection 22(11).

Section 23 - Action by Corporation

23 (1) Action by corporation

“(1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner.

- (a) commence, maintain, respond to or settle an action or proceeding for damages or any other relief and costs in respect of any cause of action, loss or damage to the corporation, its common elements or assets or to individual units; and
- (b) commence, maintain, respond to or settle an action, application or proceeding with respect to a contract involving the corporation, its common elements or assets or a unit, even though the corporation was not a party to the contract in respect of which the action, application or proceeding is brought.”

Reasoning: Corporations need the right to take legal proceedings on their own behalf and on behalf of owners of units for matters other than those referred to in subsection 23(1)(a) and (b), as referred to above. The Committee believes that the wording should not be too restrictive. For example, the corporation may wish to sue for loss to the common elements and assets, negligent misstatement, nuisance, trespass, libel, breach of another statute or other rights or remedies which should be accorded to the corporation.

23(2) Notice to owners

“(2) Before commencing an action, application or proceeding mentioned in subsection (1), the corporation shall give written notice of the general nature of the action, application or proceeding to all persons whose names are in the record of the corporation maintained under subsection 47(2), except if ~~(a)~~ the action is to enforce a lien of the corporation under section 85 or to fulfil its duty under subsection 17(3) ~~or (b) the action is commenced in the Small Claims Court;~~ provided that this subsection shall not apply to any action, application or proceeding in the Small Claims Court, Provincial Court or to any action, application or proceeding which the corporation is authorized to commence under any other section of this Act.”

Reasoning: This is simply a clarification of the exceptions. Other provisions in the Act such as s.130, 131, 133, 134 and 135 are exercised by means of an application rather than an action. Matters enforceable by an application do not fall within the purview of an “action” as referred to in subsection 23(1). However, s.137 is unclear as to whether or not the offences listed therein are to be enforced by an action. In the event an owner or the mortgagee of a unit fails to pay amounts required to discharge a lien, enforcement of the lien is by power of sale, but an action for possession would then normally be required. A duty is enforced by application pursuant to s.134 (subject to mediation and arbitration, if applicable). Therefore, the wording should clarify that this sub subsection does not apply to other actions, applications or proceedings referred to in

the Act, nor should this subsection apply to proceedings in the Provincial Court (Small Claims Court).

23(6) Judgment against corporation

“(6) A judgment for the payment of money against the corporation is also a judgment against each owner at the time of judgment for a portion of the judgment determined by the proportions specified in the declaration for sharing the common ~~interests~~ expenses.”

Reasoning: Administratively, it is much easier to use existing systems to allocate common expenses than it is to create a new system for allocating costs according to common interests, since they sometimes differ.

Section 25 – Notices under the Planning Act

25. Notices under the Planning Act

“25. A corporation that serves or is served with a notice under the *Planning Act* shall, within 10 days of being served, notify all persons whose names are in the record of the corporation maintained under subsection 47(2) that it has served or has been served with a notice under that Act and shall make a copy of the notice available for examination by them.”

Reasoning: Only extremely short time periods are allowed under the *Planning Act* (usually just 20 days) for appealing various decisions and actions of the Ontario Municipal Board (e.g. appealing: adoption of Official Plan by municipality; passage of land use control by-law; refusal by OMB to provide a consent, etc.)

If it is intended that the corporation shall notify its owners in time for each to be able to file their own appeals, then 15 days notice by the corporation to its owners is too short a time frame.

Section 26 – Occupier’s Liability

26(1) Occupier’s liability

“(1) For the purposes of determining liability resulting from breach of the duties of an occupier of land, the corporation shall be deemed to be the occupier of the common elements and the owners shall be deemed not to be occupiers of the common elements.

NEW SUBSECTION 26(2):

- (2) notwithstanding subsection 26 (1),
- (a) the corporation and an owner may determine their rights and obligations pertaining to an occupier of land in accordance with an agreement entered into pursuant to s. 98 (1)(b);
- (b) the owner of a unit which receives the benefit of exclusive use common elements shall be deemed to be the occupier thereof and the corporation shall be deemed not to be the occupier thereof, except with regard to a breach by the corporation of its obligation, if any, to maintain or repair the exclusive use common elements.

NEW SUBSECTION 26(3):

- (3) if an owner, tenant, resident or guest of an owner's unit through an act or omission causes a loss for which the owner is responsible under subsection (2), the amount that is the lesser of the payment required to satisfy an occupier's liability claim with respect thereto and the deductible limit of the insurance policy obtained by the corporation shall be added to the common expenses payable for the owner's unit."

Reasoning: The general concept applicable to occupier's liability in s. 26 should be amended to allow the corporation and an owner to delineate occupier's liability with respect to a s. 98 (1)(b) agreement (common elements alteration agreement). Owners should assume the responsibility of an occupier of exclusive use common elements on behalf of a tenant, resident or guest of the owner's unit, except to the extent the corporation has responsibility to maintain or repair them.

Any applicable insurance deductible should be paid by an owner who is responsible for an insured loss, and the amount should be collectible on the same basis as common expenses (e.g. the right to lien if not paid). This owner's responsibility for the insurance deductible is compatible with s. 105(2).

Section 28 - Election of Directors

28(2) Notice of candidates – DELETE/REMOVE

- ~~“(2) The notice of a meeting to elect one or more directors shall include the name and address of each individual who has notified the board in writing of the intention to be a candidate in the election as of the fourth day before the notice is sent.”~~

Reasoning: The system of notifying owners of candidates who have notified the corporation in writing of their intention to be a candidate for election would be a good concept if all potential candidates were aware that an annual general meeting was being called in time to provide his or

her name and address as of the fourth day before the notice is sent. However, the system would benefit incumbent directors who would be aware that a notice was about to be sent for an annual general meeting. Some residents might guess but many others would not and therefore are at a disadvantage. It is too cumbersome for the board to give notice to all owners advising them they should notify the corporation if they want their name and address added to the notice of meeting as candidates.

This section seeks to cure a problem which does not really exist, and if it does exist, it is, was and would be overcome by candidates' opportunity to circulate their own information, or hand out the information at the beginning of the meeting or speak on their own behalf at the nominations portion of the meeting. We recommend subsection 28(2) be deleted to allow all candidates the same chance at exposure.

IF 28(2) NOT REMOVED

In the event subsection 28(2) is not removed, we recommend:

- (i) that the Corporation be required to post the notice in a public place on the common elements, that persons who wish to be candidates in an election of directors should notify the corporation, although this would also be cumbersome. An alternative would be to require the Corporation to circulate to all owners some form of call for candidates such as a "Directors Call Notice" well in advance of the cut-off date (e.g. a minimum of 30 days prior to the date the notice of meeting is to be sent to the owners).
- (ii) that the word "board" be replaced by the word "corporation" because the board has no address for notice whereas the corporation does. From the wording of the subsection it is not clear whether an individual would be obligated to notify every member of the "board" or whether serving a single director would be sufficient, or if notification to the property manager would be sufficient. Notification to the "board" may be problematic and therefore, notice to the corporation would be best.
- (iii) a longer lead-time than "the fourth day before the notice is sent". Some notice packages for annual general meetings are extensive and there could be many unit owners and mortgagees which then would require a large number of copies being made and this takes time, often many days before the notice is sent, taking into account printing arrangements, availability of office staff and other competing time pressures that usually are dramatically greater around annual general meeting time. The Committee therefore recommends a minimum of ten (10) days.

28(3) Notice of owner-occupant position – DELETE/REMOVE SUBSECTION

Reasoning: We recommend that the owner-occupant position on the board be eliminated and thus subsection 28(3) be deleted. See the reasons as set out with respect to subsections 51(5) -

(8) detailed below.

In the event subsection 28(3) is not removed, we recommend that:

- (i) it be modified for the same reasons as set out with respect to subsection 28(2) above.
- (ii) in any event, subsection (3) (b) should eliminate the words “as of the day before the notice is sent” and substitute the words “at least 10 days before the notice is sent”.
- (iii) “Resident owner” is the well-understood term in the industry. It would be preferable to refer to “resident owners” and “the resident director” rather than to refer to that director as “the individual who fills the position on the board reserved for voting by owners of owner-occupied units”. That resident director will have to be referred to often; the phrase “owner-occupied director” does not quite fit.

Section 29 - Qualifications

REQUIREMENT OF CONDOMINIUM EDUCATION FOR DIRECTORS

NEW SUBSECTION 29(3)

29(3) Each newly-elected director of a corporation shall attend an introductory directors’ condominium course which provides basic knowledge with respect to the expectations and responsibilities of their position within two years after the date of election of such director.at the cost of the corporation.

Reasoning: Given the very large responsibility borne by directors (often dealing with assets worth many millions of dollars) and that most often they are volunteers without a specific skill set for governance of a condominium corporation, we recommend that there be a statutory provision included under 29(3), that all new directors, regardless of their educational and professional background, attend an introductory directors’ condominium course to ensure basic knowledge of the expectations and responsibilities of their position.

Section 31 - Term

31(1) Term

- “(1) ~~Except in the case of directors appointed to the first board of directors under subsection 42(1) as otherwise provided in this Act,~~ a director is elected for a term of three years or such lesser period as the by-laws may provide.”

Reasoning: There is more than one exception to subsection 31(1). Replacement directors elected in accordance with subsection 33(2) or appointed in accordance with subsection 34(2) also constitute exceptions to section 31.

31(2) Same

“Despite subsection (1), a director may continue to act until a successor is elected or appointed.”

Reasoning: Directors may be appointed by a remaining majority of the board pursuant to subsection 34(2), in which case the appointed term expires at the next annual general meeting. However, like an elected director whose term has expired, an appointed director should continue to act until a successor is elected or appointed.

Section 35 – Meeting of Directors

35(1) Meetings of directors

“In addition to any person entitled to call a meetings of the directors ~~required by~~ pursuant to the by-laws of the corporation, a quorum of the directors may, at any time, call a meeting for the transaction of any business.”

Reasoning: The existing wording lacks a precise meaning, and the suggested wording will clarify this.

35(2) Notice

“(2) Any ~~The~~ person calling a meeting of directors shall give a written notice of the meeting to every director of the corporation,

(a) at least 10 days before the day of the meeting, unless the by-laws specify otherwise; and”

Reasoning: The words, “The person”, have been changed to “Any person” to allow reference to a situation where a quorum of the directors may call a meeting.

“(b) by delivering it to the director personally or by sending it by prepaid mail, courier, delivery or electronic communication addressed to the director at the latest address as shown on the records of the corporation, unless the by-laws specify otherwise.”

Reasoning: This was probably merely a clerical error in typing the Act, but a comma should be inserted after the word “courier”, otherwise delivery is restricted to courier when other means of delivery (i.e., by a manager or a director) may more likely be appropriate.

35(3) Content of notice

“(3) Unless the by-laws specify otherwise, the notice shall state the time and place of the meeting and the general nature of the business to be discussed at the meeting.”

Reasoning: Often a corporation’s by-laws allow for the directors’ meetings to be held on a regular basis without notice, at which times normal business may be conducted which does not have to be described in the notice. The nature of discussion may evolve on an *ad hoc* basis as the directors meet to consider the issues in their corporation, and in this case a requirement that a notice must state the general nature of the business to be discussed at the meeting would not make sense and could be misleading. In addition, it is important to note that often items of business arise after the notice period for the directors’ meeting, sometimes the day before, or even the day of a directors’ meeting. However, in the case of a directors’ meeting called at an irregular time, or for other reasons as may be set out in a corporation’s by-law, more specific notice of particular issues would be appropriate.

If subsection 35(3) is amended as suggested, the existing practice of many corporations of organizing a non-binding agenda for directors’ meetings could continue.

Subsection 35(3) as written attempts to solve a problem which does not generally exist and could lead to disputes relating to the validity of decisions made by directors, since an invalid notice can often invalidate decisions made at a meeting.

Section 36 - Officers

36(1) Officers

“A corporation shall have a president, treasurer and a secretary and may have such other officers that are provided for by by-law or by resolution of the directors.”

Reasoning: The treasurer is an important officer in a condominium corporation and that office should be required to be filled. With respect to other officers as provided by the by-laws, their appointment should be permissive and not mandatory.

Section 37 – Standard of Care

37(2) Validity of acts

“(2) The acts of a director or officer are valid despite any defect that may afterwards be discovered in the person’s election, appointment or qualifications.”

Move subsection 37(2) from section 37 and insert it as a new subsection 29(3) only with respect to directors and insert it into subsection 36 as a new 36(4) only with respect to officers.

Reasoning: Subsections 37(1) and (3) deal with directors' and officers' duties, whereas subsection 37(2) validates acts despite defects in a person's election, appointment or qualifications. That topic is more compatible with subsections 28, 29(2) and 36, whose subject matter deals with election and disqualification of a director and officers.

37(3) Liability of directors and officers

- “(3) A director or officer shall not be found liable for a breach of a duty mentioned in subsection (1) if the breach arises as a result of the director's or officer's relying in good faith upon,
- (a) financial statements of the corporation that the auditor in a written report,~~an officer of the corporation~~ or a manager under an agreement for the management of the property represents to the director or officer as presenting fairly the financial position of the corporation in accordance with generally accepted accounting principles; or”

Reasoning: Officers are held to the same standard of care as directors in s. 37(1) and should be exempted from liability on the same basis as directors. Directors and officers are invariably the same person(s).

With respect to deleting the right of directors to be able to rely on financial statements from officers, it is our view that they should not be able to do so but rather they should do their own due diligence.

- “(b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion who is a member in good standing of a recognized professional body and is retained by the corporation.”

Reasoning: Clarify that a “person whose professional lends credibility to the report or opinion” means a person in good standing of a recognized professional body who has been retained by the corporation.

Section 38 - Indemnification

38(1) Indemnification

- “(1) Subject to subsection (2), the by-laws of a corporation may provide that every director, ~~and every officer~~ and every representative appointed by the board to a committee of the corporation or a committee appointed pursuant to a mutual use

agreement, and the person's heirs, ~~executors, administrators,~~ and other legal personal representatives may from time to time be indemnified and saved harmless by the corporation from and against,..."

Reasoning: Often persons who are not directors or officers sit on committees of the corporation or of a shared facility. They may make limited decisions which nonetheless may subject themselves to potential liability. If they have been validly appointed by the Board to a committee, such persons should be protected and indemnified to the same degree as directors.

38(2) Not for breach of duty

“(2) No director, officer or committee member of a corporation shall be indemnified by the corporation in respect of any liability, costs, charges or expenses that the person sustains or incurs in or about an action, suit or other proceeding as a result of which the person is adjudged by an arbitrator, judge or statutory tribunal to be in breach of the duty to act honestly and in good faith or in a conflict of interest where such director, officer or committee member has failed to comply with section 40.”

Reasoning: The word “adjudged” indicates a judicial decision in judicial proceedings, but as subsection 134(2) indicates, arbitration proceedings pursuant to section 132 are mandatory if available before applying to the Superior Court of Justice.

The corporation should not have to indemnify a director, officer or committee member who has failed to comply with the conflict of interest requirements of the Act.

Section 39 - Insurance

39. Insurance

“If the insurance is reasonably available, a corporation shall purchase and maintain insurance for the benefit of a director, officer or committee member against the matters described in clauses 38(1)(a) and (b) except insurance against a liability, cost, charge or expense of the director or officer incurred as a result of a breach of the duty to act honestly and in good faith or a breach of the duty to avoid a conflict of interest.”

Reasoning: If reasonably available, insurance should be obtained to cover committee members. A director, officer or committee member who fails to comply with the conflict of interest requirements of the Act should not be protected by directors' and officers' liability insurance.

The insurance industry has been changing and we are finding that some insurers are becoming more and more reluctant to provide or sell a D&O policy. Therefore, thought and direction is needed as to what happens if insurance is not reasonably available through the normal channels. Directors, officers and committee members are already providing a very important volunteer

service, so there is no need to place more risk on them and without the insurance, many good potential volunteers will not stand for election or appointment, which would be a sad loss to the corporation.

Section 40 – Disclosure by Director of Interest

40(1) Disclosure by director of interest

“(1) A director, officer or committee member of a corporation who has, directly or indirectly, an interest in a contract or transaction to which the corporation is a party or a proposed contract or transaction to which the corporation will be a party, shall disclose in writing to the corporation the nature and extent of the interest and any defect or disadvantage to the corporation of the contract or transaction then known to the director.”

Reasoning: Disclosure of conflicts of interest should be enlarged to be required from officers and committee members. A director, officer and committee member in a conflict of interest and thus in a disclosure situation should reveal any known material defect or disadvantage to the corporation of the contract or transaction. A non-material defect or disadvantage need not be disclosed, as required by subsection 40(2).

40(3) Purchase of property

“If the contract or transaction or the proposed contract or transaction to which subsection (1) applies involves the purchase ~~or sale~~ of real or personal property by the corporation that the seller acquired within five years before the date of the contract or transaction or the proposed transaction, the director, officer or committee member shall disclose the cost of the property to the seller, to the extent to which that information is within ~~the~~ such person’s knowledge or control.”

Reasoning: We do not understand how this provision would apply to require disclosure where the condominium corporation is “selling”, for example, a guest or superintendent suite which is a legal unit in the corporation. Subsections 40(1) and (2) apply regardless of subsection 40(3) with respect to disclosure. For example, if a director, officer or committee member were a real estate agent who had the listing, subsections 40(1) and (2) would apply and require that person to disclose that the unit is listed. If the person was an officer of a company or business that was purchasing an asset from the corporation, or even if he/she was purchasing it for himself or herself, they would probably not be able to “disclose the cost of the property to the seller”, unless he or she were a long-term director or officer of the corporation or checked out the corporation’s records, but that information is also within the knowledge of the other directors in any event.

In addition, subsection 40(3) would make more sense by deleting the words “or sale”, and disclosure is not required in that case in any event, since the words “or sale” are related to the words “by the corporation”.

40(4) Time of disclosure

“The disclosure required by this section shall be made,

NEW SUBSECTION 40(4)(e)

“(e) written disclosure to the corporation shall be provided within 7 days after the director became interested in or aware of the contract or transaction or the proposed contract or transaction.”

Reasoning: The requirement in subsection 40(1) of disclosure “in writing” appears to be inconsistent with subsection (4), which requires disclosure at the meeting of the board at which the contract or transaction is first considered. That meeting may be the first time that the director became aware that a conflict existed, in which case the director would not have had sufficient time to make the disclosure in writing at that meeting. We recommend adding subsection (e) to allow time to provide written notice.

40(5) Minutes

“(5) The board shall enter in reasonable detail the disclosure made by a director under this section in the minutes of the meeting of the board at which the disclosure was made.”

Reasoning: The disclosure should not be a passing reference but should be an appropriate explanation in reasonable detail.

40(6) Right to vote

“(6) The director shall upon request by a majority of the other directors at the meeting not be present during the discussion or vote at a meeting, and shall not vote or be counted in the quorum on a vote with respect to a contract or transaction or a proposed contract or transaction to which subsection (1) applies unless the director’s interest in it, “...”

Reasoning: Although for the vote, the director who has the conflict of interest should not be present, often in order to be able to have an informed consideration and deliberation on the issue the best source of information is the director who has the conflict. In many cases, a board will want to have detailed on the spot information and response to questions by other directors and it would be in the best interests of the corporation to have this. If some directors are concerned there would not be a free and open discussion while the director in question is present, then a majority of other directors could request the person to temporarily remove themselves from the meeting during the balance of discussion and vote on the topic. If the director must be absent the entire time, then potentially the most important information will not be available or considered.

NEW SUBSECTION 40(9)

“(9) A director, officer or committee member who has failed to comply with the requirements of this section or who was not acting honestly and in good faith at the time the contract or transaction was entered into or at any meeting of directors or owners with respect thereto, may, in the discretion of any judge having jurisdiction, be held accountable to the corporation or to its owners for any damages suffered by the corporation, any profit or gain realized from the contract or transaction, and the contract or transaction may be held voidable.”

Reasoning: S. 40 does not contain a clear provision holding a director, officer or committee member accountable who breaches its provisions. Although subsection 40(7) indemnifies a director from any claim for profit or gain and upholds the contract or transaction if the director has complied with the requirements of s. 40 and acted honestly and in good faith, in order for conflict of interest to be a meaningful concept, statutory provisions should be added that set out the consequences of liability for a breach of the conflict of interest requirements. Otherwise, the conflict provisions potentially become meaningless.

Section 41 – Disclosure by Officer of Interest

41(3) Application of section 40

“(3) Subsections 40(2), (3), (5), (7), (8) and (9) apply to an officer and committee member of a corporation who is not a director as if all references to a director in those subsections were references to an officer.”

Reasoning: Reference to subsection 40(9) that was added above should be added and committee member should be added.

Section 42 - First Board of Directors

42(6) Owners’ Meeting

“(6) Subject to subsection (7), the first board shall call and hold a meeting of owners ~~of owners by the later of,~~

~~(a) — the 30th day after the day by which the declarant has transferred 20 per cent of the units in the corporation; and~~

~~(b) — the 90th day to no later than 180 days after the declarant transfers the first unit in the corporation.”~~

42(7) Exception

“The first board is not required to call or hold the meeting mentioned in subsection (6) if, by the ~~day set for the meeting~~ 120th day after registration of the declaration and description, the declarant ~~no longer owns a majority of the units and advises the first board in writing of that fact~~ has called the meeting referred to in subsection 43(1).”

Reasoning: The main reason for adding two owner-elected directors to the first board under subsection (8) is to allow the purchasers/owners to have representation in the decision-making during the critical first year, which is very important because their focus and interest is the future welfare of the corporation, whereas the focus and interest of the developer and developer controlled board is quite different (although in theory it should not be).

As written, subsection (6) would allow the first board to control the corporation for several years before a turnover meeting has to be called pursuant to subsection (7) and section 43. During that time many of the most critical decisions affecting the future of the corporation are made behind closed doors at a time when: (i) the corporation is most vulnerable; (ii) the declarant is under greater financial pressure than normal; and (iii) the declarant alone is making uncontrolled decisions for its own advantage often to avoid responsibilities such as for construction deficiencies and expenditures (e.g. maintenance and repairs) which usually increase the first year budget. Since most corporations sell out immediately, 120 days gives ample time to complete the transfer of a majority of the units in most, if not practically all, cases.

Section 43 “Turn-over Meeting”

43(1) Turn-over meeting

“(1) The board elected or appointed at a time when the declarant owns a majority of the units shall, not more than ~~21~~ 35 days after the declarant ceases to be the registered owner of the majority of the units, call a meeting of owners to elect a new board, of whom not less than a majority shall be directors elected by owners other than the declarant.”

Reasoning: In light of the time frames set out in the Act, it is our view that 21 days is not sufficient for calling the meeting and will potentially disenfranchise a significant number of owners from voting for the new board. To avoid inevitable but unnecessary breaches of the Act, we recommend 35 days. Once the declarant ceases to control a majority of the units, the owners should be entitled to elect a majority of directors.

The realities are that most closings in new condominiums start about 30-60 days following condominium registration (registration of the declaration) and then they occur in bulk and thus the situation can be extremely busy for the declarant. At the point at which the declarant has closed more than half the units generally comes in the middle of that period. Therefore, it is

generally during the balance of this most busy period that preparations need to be made for the turnover meeting.

Additionally, at this time (title to a majority of units has been transferred), there may still be many units to be closed in the next few weeks thereafter. Therefore, due to the application of subsection 47(5) unfortunately those units that have not closed are not entitled to notice of the meeting nor to be on the condominium record for notice of meeting unless they have closed within twenty days before the date of the meeting.. These owners and their mortgagees should be given an opportunity to submit their information for the subsection 47(2) record to ensure they are entitled to notice of the meeting. This is not likely to occur for some time after the closings, if at all.

Declarants otherwise can take advantage of new owners' lack of organization and familiarity and can control election of directors with a block vote, despite the fact the declarant owns less than a majority of the units. The turn-over period is often a crucial time for the corporation to preserve its remedies and organize its affairs in the best interests of the owners.

43(4) Things to turn over

NEW SUBSECTIONS (h), (i) and (j):

“(h) a current status certificate and/or any notice received by the corporation;

“(i) any agreements or documents and information pertinent to any matters arising under subsections 23(1), 132 and 134;

“(j) 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 until the date of the turn over meeting; including but not limited to banking records, deposit books and cheques.”

Reasoning: The above are very important for the daily operation and management of the corporation and should be turned over immediately. Other financial records can be delivered within 30 days under section 43(5). See below for reasoning for moving paragraph 43(5) (i) to subsection 43(4)

43(5) Same, after meeting

“(b) the ~~as-built~~ architectural, structural, engineering, mechanical, electrical and plumbing plans of record and change orders indicating all substantive changes from the original plans;”

Reasoning: Plans should accurately show the nature of any and all changes from the original plans. This will become important later over the life of the corporation when maintenance, repairs, replacements or causes of damage become necessary to determine, for example,

significant costs and injury to contractor(s) have resulted because changes in electrical wiring were not disclosed. In order to have a more practical meaning, we recommend that the words "as built" be updated to the term "plans of record", which has more practical meaning to the industry.

- “(d) all existing plans and changes thereto for underground site services, site grading, drainage and landscaping, television, radio or other communications services and studies, plans or documents related to soil, geology, hydrology, noise, wind, environmental or vibration conditions on the property of the corporation or required by any municipal or governmental authority;”

Reasoning: These additional studies, plans and documents are very important and will significantly affect and impact the corporation and thus should be required. Over the past number of years the absence of these types of plans and studies has caused litigation and significant settlements for corporations.

- (g) ~~a table setting out the responsibilities for repair after damage and maintenance and indicating whether the corporation or the owners are responsible;~~

Reasoning: Responsibilities for repair after damage and maintenance are legally determined only in accordance with the corporation’s declaration including its Schedule “C” and Description. Although having such a table would be helpful, and some corporations are preparing their own, unless we could be sure that the table is legally accurate, it would be confusing and might not be legally accurate, which would then cause confusion and lawsuits.

- “(i) 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 until the date of the turn over meeting;”

Reasoning: It is important that a fixed date be established and thus we have recommended that the date be the turnover meeting. Therefore, subsection 43(5)(i) should be moved to subsection 43(4) as paragraph 43(4)(i).

43 (7) Audited financial statements

- “(7) The declarant shall deliver to the board within 60 days of the last day of the month in which the meeting is held ~~after the meeting~~ audited financial statements of the corporation prepared by the auditor, on behalf of the owners and at the expense of the corporation, as of the last day of the month in which the meeting is held.”

Reasoning: The Act does not allow enough time to have the statements prepared when the turnover meeting happens on say the 2nd of the month. In this case the Act would allow only 30 days to have them complete, which is next to impossible. The 60 day time frame should run from end of the month in which the meeting is held.

****Alternate wording if Corporation to obtain audited financial statements;****

“43(7) The corporation shall cause audited financial statements to be prepared by the corporation’s auditor within 90 days after the meeting, on behalf of the owners and at the expense of the corporation, as of the last day of the month in which the meeting is held.”

To save costs consideration should be given to a further amendment to the effect that should the turnover meeting be held within 4 months of the fiscal year end that the period for the turnover audit and the fiscal year end audit be the same.

Section 44 - Performance Audit

44(1) Performance audit

“(1) If the property of the corporation includes one or more ~~units for residential purposes or if the corporation is a common elements condominium corporation~~ buildings or structures, the board shall retain a person who holds a certificate of authorization within the meaning of the *Professional Engineers Act* or a certificate of practice within the meaning of the *Architects Act* to conduct a performance audit of the common elements described in the description on behalf of the corporation and the assets of the corporation.”

Reasoning: New owners in industrial, commercial and other condominium corporations should have the same protection that residential unit owners have for construction deficiencies, since commercial and industrial unit purchasers are typically small business owners, would not be permitted by the corporation to conduct an engineered investigation of the common elements and even if they were so permitted, they most likely could not afford the time delays or the expense to conduct one.

In addition, a performance audit is critical for non-residential owners because TARION does not apply and the legal remedies for these owners are restricted to negligence or breach of the Building Code. Failure to provide these owners the protection of a post-construction performance audit has and will continue to result in sub-standard units, causing the owners to incur unnecessary repairs and maintenance expenses, and inadequate construction materials will continue to be used.

44 (2) Time for audit

“(2) A performance audit shall be conducted (~~no earlier than six months, and no later than 10 months~~) within one year following the registration of the declaration and description.”

Reasoning: Tarion provides a one year warranty and boards should have the same amount of time. Anything less than one year significantly reduces available warranty coverage.

44(4) Purpose

- “(4) The person who conducts the performance audit shall determine whether there are any deficiencies in the construction or performance of the common elements described in the description or assets of the corporation after construction has been completed on them that,
- (a) may give rise to a claim for payment out of the guarantee fund under section 14 of the *Ontario New Home Warranties Plan Act* to the corporation; or
 - (b) subject to the regulations made under this Act, would give rise to a claim described in clause (a) if the property of the corporation were subject to that Act;

NEW SUBSECTION 44(4)(c)

“(c) constitutes the basis for a claim for damages caused by negligence in the construction or performance of the corporation’s common elements or assets.”

Reasoning: The word “performance” is open to interpretation, so in order to avoid debate we recommend that performance audits include deficiencies in the common elements and assets of the corporation.

The corporation may own assets such as a quest suite, mechanical room, superintendent’s unit, parking and storage units along with other facilities or assets, which are not units. The growing trend by declarants is to “unitize” many physical parts of the building that traditionally was/were common elements, and then obligate the corporation to purchase them, or at least transfer them to the corporation as an asset (e.g. mechanical or switching rooms). Historically these would have been common elements and thus included in the performance audit. By unitizing them and then having the corporation own them as an asset, they arguably do not have to be included the performance audit. These and all other building assets owned by the corporation should be included in the performance audit.

The words “described in the description” are redundant in view of the definition of “common elements” which is defined to mean “all the property except the units”.

Declarant technical performance audits only provide limited protection to the extent of TARION requirements. A corporation should complete one comprehensive post-construction audit which includes the TARION requirements, other warranty claims, negligence claims, and other measures which allow the corporation the ability to identify safety issues, mitigation efforts that may be required to prevent further deteriorations and maintenance as distinguished from deficiency issues. If two post-construction audits are required, or if directors are misled by this section and fail to obtain a comprehensive performance audit, the corporation and its owners may subsequently incur substantial unnecessary expenses.

The most important part of a performance audit relates to its value for litigation purposes, since TARION remedies are very restrictive and inadequate compared to the remedies at common law for negligence. To avoid wasted expense and duplication, the performance audit should fulfil a complete mandate to help preserve the corporation's remedies for negotiation or litigation of building deficiencies.

44(5) Duties

“(5) In making the determination, the person who conducts the performance audit shall,

- (a) inspect ~~the major~~ a reasonable sampling of all components of the ~~buildings~~ common elements on the property and any units or other assets owned by the corporation which, subject to the regulations made under this Act, include, without restriction, the foundation, parking garage, wall construction, air, sound and vapour barriers, windows, doors, interior finishes, fittings, furniture and equipment, elevating devices, roofing, mechanical system, plumbing system, electrical system, fire protection system, waste disposal system and all other components or systems that are prescribed;”

Reasoning: A restrictive definition applicable to “major components” excludes other components. A reasonable sampling of all components should be considered as is currently the common practice. It would be wasteful for a corporation to have to complete a second performance audit of non-major components in order to preserve the corporation's legal rights in addition to those restricted remedies provided by TARION.

In addition to buildings, construction deficiencies may affect the structures, fixtures and other common elements and other assets of the corporation, such as a recreation centre unit, superintendent's suite, guest suite, gatehouse and visitor parking units, mechanical or switching rooms, among others.

Some systems that form an integral part of the common elements were not listed in the original act or regulations. These should be added to ensure a consistent approach to the performance audit.

ALTERNATIVE SUGGESTION

As an alternative, if the above recommendation is not accepted then the word “shall” at the beginning of subsection 44(5) should be changed to “may”, so that 44(5) would read:

“(5) In making the determination, the person who conducts the performance audit may, “

44(5) Duties

- “(d) conduct a survey of the owners, residents, directors and property manager of the corporation as to what evidence, if any, they have seen of,
- (i) damage to the units, common elements or assets of the corporation that may have been caused by defects in the common elements, and
 - (ii) defects in the common elements that may cause damage to the units, common elements or assets of the corporation.”

Reasoning: Information provided by the directors, residents and property manager are usually at least as informative as the information provided by owners and often owners do not and have not lived in their unit and thus would not know of defects.

Owners should also be entitled to provide evidence of defects in the common elements that may cause damage to common elements or assets of the corporation, an owner or resident (i.e. underground garage lime deposits on vehicles, cracks in walls, etc.).

The intent of the amendment is to clearly delineate owner responsibility to deal with TARION. The ONHWP requires that unit deficiencies be reported by the unit owner; the reporting of such deficiencies is not the responsibility of the corporation.

44(5) Duties

NEW SUBSECTION 44(5)(e):

- “(e) conduct the performance audit in good faith and in an independent and professional manner, to a high quality standard, subject to regulations made under this Act, and in the best interests of the corporation.”

Reasoning: There can be significant variation in the quality of a performance audit. Often a declarant-appointed board will be retaining the performance auditor and will not encourage the performance auditor to act independently or in the best interests of the corporation, or to a high quality standard. If necessary, these issues may be dealt with by regulation.

NEW SUBSECTION 44(5)(f) [MOVED FROM 44(6)(c)]:

- “(f) make all physical examinations, tests, analysis or enquiries that may on reasonable grounds be relevant to the audit.”

Reasoning: We have moved subsection 44(6)(c) to become section 44(5)(f) so that the obligation to inspect is mandatory as a quality standard which cannot be manipulated, given the fact that section 44(6) used the permissive word “may” while section 44(5) uses the mandatory word “shall”. If necessary, these matters may be dealt with by regulation.

44(6) Powers for audit

- “(6) The person who conducts a performance audit may, for the purpose of the audit,
- (a) enter onto the property at any reasonable time upon reasonable notice either alone or accompanied with any expert that the person considers necessary for the audit subject to compliance with entry requirements set out in section 19 and in the declaration of the corporation.”

Reasoning: Owners’ rights with respect to entry should be protected.

44(6) Powers for audit

NEW SUBSECTION 44(6)(d):

- “(d) hold monthly status meetings with the corporation and declarant throughout the duration of the audit with written status reports being registered with TARION.”

Reasoning: The Act needs to give the performance auditor the power to be able to compel declarants to do things in response to the delivery of an audit to TARION according to the ONHWP. As it is now, the declarant receives a standard form letter from TARION stating that the declarant must send a written response to the corporation by a stipulated date if there are any matters needing immediate attention. Sometimes the declarant delays unnecessarily and tries to out-wait the Board. If the performance auditor has the power to compel monthly status meetings, with mandatory written updates to be delivered to TARION by both parties, then we believe that more would be done earlier with less apathy regarding the system.

44 (9) Submission of report

- “(9) ~~Before the end of the 11th month~~ No later than 364 days following the registration of the declaration and description, the person who conducts a performance audit shall,
- (a) submit the report to the board; and
 - (b) file the report with the Corporation within the meaning of the Ontario New Home Warranties Plan Act if the property is subject to that Act.”

Reasoning: Tarion provides a one year warranty and boards should have the same time period.

Section 46 – Requisition for Meeting

46(1) Requisition for Meeting

- “(1) A requisition for ~~a meeting of owners~~ an owner’s meeting concerning only matters within the voting jurisdiction of owners to vote, may be made by those owners who at the time the board receives the requisition, own at least 15 per cent of the units, are listed in the record maintained by the corporation under subsection 47(2) and are entitled to vote.”

Reasoning: The Act is clear that there are only certain matters upon which the owners may vote. Other matters or issues are solely for the Board to decide. Despite this statutory division of jurisdiction, a frequent misunderstanding by owners (and source of frustration for them) is that at any owners meeting they can force a vote on any matter they raise (whether or not it was in the agenda or in the notice calling the meeting) and that the vote would bind the board. Another misconception is that if they cannot raise and vote on matters at an owners meeting called for other purposes, that they can requisition a meeting on any issue, vote on it and that vote would bind the board. A requisitioned owner’s meeting can only deal with those matters that the Act allows the owners to vote on.

This provision as presently written may confuse the issue and therefore, it should be amended to clearly state that at such a meeting owners can only vote on those matters that fall within their voting jurisdiction under the Act.

46(3) Same, Removal of Directors

- “(3) If the nature of the business to be presented at the meeting includes the removal of one or more of the directors, the requisition shall state, for each director who is proposed to be removed, the name of the director, the reasons for the removal in sufficient detail so that owners may have some understanding of the reasons why the removal is sought, and whether the director occupies a position on the board that under subsection 51 (6) is reserved for voting by owners of owner-occupied units.”

Reasoning: Frequently when a group of owners requisition a meeting to remove some or all of the directors they state reasons such as “lack of confidence”, “bad board members”, “not acting in best interests of the corporation”, “incompetent”, etc. without any details to justify their reason. Owners and the board members should have at least some basic or essential details to understand what the general issues are and why the group of owners want to remove a director(s).

46(4) Duty of Board

- “(4) Upon receiving a requisition mentioned in subsection (1), the board shall,

(b) ~~otherwise~~ call and hold a meeting of owners within 35 days.”

Reasoning: The Board should have the right to chose whether to call the meeting immediately (within 35 days) or to hold off until the next AGM (for example the AGM would have been called within about 50 days). Leaving the word “otherwise” in this subsection opens the door to owners to force the Board’s decision by making it mandatory for the Board to hold off the meeting until the next AGM (which could be many months away) because of the mandatory word “shall” at the beginning of section 46(4)(b).

Some requisitionists also take the position that during the time from the delivery of the requisition to the actual holding of the meeting the board should not undertake any business of the corporation, nor sign contracts or cheques (other than those necessary to protect the corporation, e.g. paying utility bills, etc.). Therefore, as presently worded, there is the possibility that the requisitionists could stop the corporation from carrying on its business for a long time (until the next AGM), which clearly is not in the best interests of the corporation. The Board should not be forced to put off calling the meeting.

46(5) Non-compliance

“(5) If the board does not comply with subsection (4), a requisitionist may call a meeting of owners which shall be held within 45 days ~~of the day on which the meeting is called~~ after the date referred to in subsection (4)(b).”

Reasoning: The existing wording does not limit when the requisition meeting must be called, it simply provides for 45 days notice after the requisitionist decides to call the meeting. This is too uncertain. It could allow a requisitionist to wait any period of time, even years, and then call the requisition meeting. The wording should be clarified to set a 45 day limit after the board’s 35 day period has passed. If the requisitionist does not call and hold the requisition meeting within that 45-day period, then the requisitioned request or right should automatically terminate.

46(6) Reimbursement of cost

“(6) Upon request, the corporation shall reimburse a requisitionist who calls a meeting under subsection (5) for the reasonable costs incurred in calling and holding the meeting.”

Reasoning: Assuming that the requisition is valid then the requisitionists should be entitled to be reimbursed for their costs of not only calling the meeting but also of holding it, so long as the costs are reasonable and necessary for the meeting (perhaps for such costs as for an independent Chair, security, professional minute taker, etc.). Otherwise the reasonable costs of holding the meeting could be prohibitively expensive and thus the requisitionists could not afford to hold it. This would defeat the purpose and intent of subsection (5). The risk of this amendment is that numerous and frivolous meetings could be validity requisitioned and thus the expenses could be considerable to an otherwise cash strapped corporation. Thus the criteria of reasonableness are necessary.

Section 47 - Notice to Owners

47 Notice to owners

- “(1) A notice that is required to be given to owners shall,
- (c) be given to,
- (i) each owner who has notified the corporation in writing of the owner's name and address for service, failing which to the municipal address of the unit. and

47(2) Record of owners and mortgagees

- “(2) A corporation shall maintain a record of the names and addresses for service that it receives under subsection (1) and under clause 47(8)(c), failing which the municipal address of the unit shall apply.”

Reasoning: The contents and correctness of the record required to be kept under subsection 47(2), and which is relied upon extensively by the corporation for notices required under the Act, are entirely dependent on whether or not owners send in their information in the appropriate manner. The corporation is not permitted by this wording to rely on or use a record of owners and mortgagees and their addresses received from other sources.

This is a significant problem caused by the very restrictive wording in subsections 47(1) and (2).

Despite efforts by the corporation and property management, many owners don't bother to provide the corporation with their names and their address particulars. In our view the corporation should, in the absence of being presented with a notice from the owner, be entitled to provide notice to owners at the unit they own and to the persons that the Registry Office records show to be the owner. Owners should only be disentitled to notice of a meeting, being able to count towards quorum and vote if they have failed to provide the condominium with name and address particulars despite being requested in writing to do so. There needs to be some penalty for failing to provide the information. Few owners provide the information and some bitterly resent being asked. However, to disallow them from being counted for quorum or voting can frustrate the ability of the corporation to operate.

In addition, to ensure that the corporation maintains all contact information it may receive from owners and mortgagees as part of the corporation's record under section 47 (and not just name and address for service), the words “and under subsections 47(7)(c) and (8)(c)” should be added in subsection 47(2).

47(1) Notice to owners

- “(1) A notice that is required to be given to owners shall,

- (c) be given to,
 - (i) each owner who has notified the corporation in writing of the owner's name and address for service, and
 - (ii) each mortgagee of a unit who has notified the corporation in writing of the right and the mortgagee's name and address for service.
 - ~~(A) under the terms of the mortgage, has the right to vote at a meeting of owners in place of the unit owner or to consent in writing in place of the unit owner~~
 - ~~(B) has notified the corporation in writing of the right and the mortgagee's name and address for service."~~

Reasoning: The corporation is required to give notices to mortgagees who, under the terms of their mortgage, have the right to vote in place of the owner and who have notified the corporation in writing of that right. 47 (1) (ii) (A) is conjunctive with (B) and thus in order for the corporation to determine if it must give notice to a mortgagee it would appear that it is not sufficient that the mortgagee merely notifies the corporation of its right to vote. Rather, it would be necessary for the corporation to obtain a copy of the registered mortgage, review it and ascertain whether the mortgage contains that right. This is unnecessary administrative work for the corporation. The onus should be on the mortgagee to determine if it has the right under the mortgage and then to notify the corporation. The corporation would then be able to take the notification as proof of the right of the mortgagee. Thus, 47(1)(c)(ii)(A) and (B) should be deleted.

47(3) Use of record

- “(3) ~~A corporation shall use the record~~ The records shall be used for the purposes of this Act, and no other purpose.”

Reasoning: We believe this makes the sentence more accurate as it should cover not only the corporation but also anyone who obtains copies of the corporation's records.

47(9) Content of notice of meeting

- “(9) A notice of meeting of owners shall,
 - (b) be accompanied by,
 - (i) a copy of all proposed changes to the declaration, by-laws, rules or agreements that are included in the notice of the meeting to be discussed at the meeting, and”

Reasoning: A copy of any such proposed changes should only be required to be provided if they are formally intended to be discussed at the meeting, as indicated in the notice of the meeting.

Section 49 - Loss of Owner's Right to Vote

49(2) Payment of arrears

“(2) An owner who is not entitled to vote under subsection (1) may vote if the corporation ~~receives~~ has received payment ~~of the arrears~~ in full of all amounts due and payable with respect to the owner's unit before the meeting is held”

Reasoning: Sometimes owners pay but only the arrears and not proper interest, legal and collection costs, but corporations should receive payment in full before the unit regains its right to vote. Often the payments are not made by the owners but by a mortgagee.

49(3) Parking or storage unit

“(3) No owner shall consent to, requisition or cast a vote in respect of a unit that is intended for parking or storage purposes or ~~for the purpose of housing that~~ contains services, facilities or mechanical installations unless all the units in the corporation are used for one or more of those purposes.”

Reasoning: As written, subsection 49(3) is awkward because the words “housing services” can be misinterpreted. In addition, no right of requisitioning meetings or other rights should attach to these types of units.

NEW SUBSECTION 49(4):

“(4) Unless specifically stated otherwise in this Act, “unit” shall not include units that are not entitled to vote under section 49(3).”

Reasoning: Under the present wording of the Act there are circumstances where the word “unit” is used when referring to consent or a vote (e.g. subsection 107(2) - consent of 80% or 90% of units to amend the declaration). There is no limitation to only those units that have the right to vote at an owners meeting and therefore, this would mean that parking and storage units would have the right to consent or vote and would have to be counted. This places an extremely difficult and costly burden on corporations as they would have to search title to every parking and storage unit to determine who the owner(s) is/are and then ensure that they receive notice of the issue and can vote (or consent).

This does not make sense when, in accordance with 49(3) above, these types of units would not have the right to vote. Therefore, the Act should be clear that these types of units do not have the right to vote or consent.

Section 50 - Quorum

50(2) Determination of quorum

“(2) To count towards the quorum, an owner must have been entitled to receive notice of the meeting, ~~must be entitled to vote at a meeting,~~ and shall be present at the meeting or represented by proxy, but no owner of a unit referred to in subsection (3) of section 49 shall be included in the quorum.”

Reasoning: Since it is often difficult to achieve quorum, a person who is not entitled to vote (because the person is in arrears of common expenses for more than 30 days) should still be entitled to attend the meeting and discuss matters. They should also be entitled to help form the quorum, to avoid the additional effort and expense of calling another meeting.

Owners of units intended for parking or storage purposes or that contain services, facilities or mechanical installations should not be included in the quorum. This specific reference should be inserted in the event the words “must be entitled to vote at a meeting” are deleted from subsection 50(2) as we have requested above. See also “Reasoning” in 49(4) above.

Section 51 - Voting

51(2) One vote per unit

“(2) All voting, consents and requisitions by owners shall be on the basis of one vote or signature per unit.”

Reasoning: The Act should be clear that the one vote per unit applies equally to consents and the signing of requisitions for the calling of owners meetings (e.g. amending the declaration which requires the consent of units).

51(6) Reserved position

“(6) ~~If at least 15 per cent of the units of the corporation are owner-occupied units on or after the time at which the board is required to call a turn-over meeting under section 43, no persons other than the owners of owner-occupied units may elect a person to or remove a person from one of the positions on the board.~~”

Solution: Delete all references in subsections 51(5) – (9) and otherwise in the Act to an “owner-occupied unit”.

Reasoning: The owner/occupied election requirement serves no purpose and adds an

unnecessary complication to owners' meetings. It would be extremely rare that a board of directors would not have at least one resident owner director. This provision is causing no end of headaches, unnecessary practical complexity at the time of holding elections and additional administrative work and cost to create the applicable entries on the corporation's record and in preparation of two different ballot forms. At every meeting where this position is up for election two separate votes are required and many owners get very confused over the process and thus errors often occur.

It would be a highly unusual situation where resident owners did not ensure that a majority of the directors were resident owners. Property managers, directors and professionals have to work hard enough as it is to protect the rights of tenants and non-resident owners, without this unfairness against non-resident owners. Although at the time this was well intended, it has turned out to be unnecessary and this provision has opened the door to other relevant situations where conflicts between resident owners, non-resident owners and tenants occur.

Recommendations if Owner-Occupied Position Not Eliminated

If it is decided not to remove this requirement (but we strongly recommend deleting it) then we would request an amendment which would eliminate the need to hold two elections in a corporation which is 99 percent owner/occupied. The words "at least 15 percent" might be replaced by "less than 70 percent". This would eliminate the need for an owner/occupied election at most annual meetings but would require an owner/occupied election if a declarant, holding 30 percent of the units, uses that concentrated voting power to retain control of the board.

51(5) Definition

"(5) In subsections (6), (7) and (8),

"owner-occupied unit" means a unit of an owner who is entitled to vote in respect of the unit at a meeting to elect or to remove a director where the unit is used for residential purposes ~~and the owner has not leased the unit within 60 days before notice is given for the meeting~~ and where, at the time of the notice, the unit is either vacant or is occupied by at least one of the registered owners, the owner's spouse or a parent, child, or grandchild thereof and the owner has not leased the unit within the 60 days before notice is given for the meeting, as shown by the record that the corporation is required to maintain under subsection 83(3)."

Reasoning: As mentioned above, sections 51(5) – (9) pertaining to owner-occupied unit-elected directors should be deleted. If sections 51(5) – (9) are retained, section 51(5) should be amended as indicated. The concept of an owner-occupied unit was probably intended to mean that the owner (or close family members) reside in the unit. In addition, the owner-occupied elected position provision should not be limited to residential units but also apply to commercial and industrial condominium corporations.

Section 52 - Method of Voting

52(1) Method of voting

- “(1) On a show of hands or ~~on a recorded vote~~ a ballot, votes may be cast either personally or by proxy.
- (2) At a meeting of owners, a person entitled to vote at the meeting may request that a ~~recorded vote~~ ballot be held on any item scheduled for a vote either before or promptly after the vote.”

Reasoning: Although it is customary for significant matters such as the election of directors to be voted by way of ballot, which is secret, as presently drafted the Act technically does not allow for a ballot. In addition, a recorded vote is not secret and given that it is community members and neighbours who are voting – and have to live together afterwards – recorded votes should not be allowed.

Section 52 (5) - Method of Voting

52 (5) Proxy for voting for directors

- “(5) ~~An instrument appointing a proxy for the election or removal of a director at a meeting of owners shall state the name of the directors for and against whom the proxy is to vote.~~”

Reasoning: This subsection was included in the Act to attempt to solve the problem of boards re-electing themselves through collection of proxy instruments, by requiring those instruments to specify the directors for whom the proxy is to vote. While the attempted solution appeared reasonable, experience has shown that it has been pretty much ineffective. The effect of the wording is that the proxies cannot be used to vote for any person who was nominated at the meeting (nominated from the floor) to be a director because they were not named in the proxy instrument and thus these candidates will be at a disadvantage because the proxy holder cannot vote for them.

Section 55 - Records

55(1) Records

- “(1) The corporation shall keep adequate records, including the following records:
- “3. A copy of the declaration, by-laws, rules and issued status certificates.”

Reasoning: The existing and past status certificates are important for the respective unit's records.

55(3) Examination of Records

“(3) Upon receiving a written request and reasonable notice, the corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine the records of the corporation, except those records described in subsection (4), at a reasonable time and upon payment of a reasonable fee for retrieval, organization and monitoring for all purposes reasonably related to the purposes of this Act.”

Reasoning: A lot of labour is required to retrieve, organize and monitor the documents and the person requesting this should pay for these reasonable costs, including a reasonable fee for the person's time in retrieving, organizing and copying the documents (which is not covered by or part of property management's contract). Frequently, people request a considerable number of documents, or documents over a significant period of time which could take hours and hours of someone's time (e.g. request for copies of Board Minutes for the last 25 years, etc.). Although it is assumed that corporations can charge such a fee, the wording of the subsection is not clear and should be clarified. The corporation should not have to bear the costs of this.

55(4) Exception

- “(4) The right to examine records under subsection (3) and receive copies under subsection (6) does not apply to,
- (b) records relating to actual or pending litigation, confidential matters, the disclosure of which could prejudice the corporation, its employees, owners and residents or insurance investigations involving the corporation; or

Reasoning: Certain documents should be deemed to be confidential if they deal with sensitive issues.

- (c) subject to subsection (5), records relating to specific units or owners, except for the names and address for service that the corporation has in its records

Reasoning: Since the right to copies is not included in subsection (3), then it could be argued that as presently worded a person could be prohibited from examining exempted documents but the corporation would have to provide copies of them. This does not make sense and thus should be corrected.

It is important that unit owner's records be kept confidential, however, there are situations where owners should have this information and some corporations have refused to give it out due to the wording of this section. Given that some owners do not live in their unit then it would be almost

impossible for someone seeking proxies to know who and where they are. For example, in a proxy fight to remove directors from the Board, owners that cannot have access to this limited information will be at a considerable disadvantage because they would not know to whom and where to solicit proxies for those units, while the corporation and the Board would have this information and could solicit proxies. The disclosure should only be this information (and not phone numbers, etc.) and only that which the corporation presently has in its records. The corporation should not be obligated to obtain the information. No other unit information should be given out.

Additionally, consideration should be given to the words “pending litigation”. What does it mean? Is it imminent or in the process of being commenced? Sometimes boards have acted improperly by refusing to allow examination of certain records, or provide copies, when those documents are not subject to any form of solicitor client privilege or confidentiality, and would be properly producible in litigation (e.g. in the corporation’s affidavit of documents) yet the board attempts to thwart the owner’s proper investigation by using this wording as a reason.

Assuming that the request of the owner meets the requirements of the Act (i.e. for the purposes of the Act), then a proper balance must be found between the rogue owner who is merely going on a fishing expedition against the corporation or board members personally versus proper requests and investigations by owners for proper purposes.

55(8) Penalty for non-compliance

~~”(8) A corporation that without reasonable excuse does not permit an owner or an agent of an owner to examine records or to copy them under this section shall pay the sum of \$500 to the owner on receiving a written request for payment from the owner.”~~

Reasoning We strongly recommend that section 55(8) be deleted since subsection 55(10) provides a remedy in Small Claims Court and section 135 a remedy in the Superior Court.

There is already the availability of mediation and arbitration for dispute resolution. This provision, as written, unnecessarily penalizes the corporation (i.e., the unit owners) and the corporation should not be held responsible for wrongdoing by a property manager. The wording also leaves it open to abuse by one or more owners who may see it as a method of affecting revenge on the corporation.

In the event that this subsection is retained, it should be improved. Various persons such as a purchaser or mortgagee may be entitled to review records in addition to an owner. In the case of a status certificate, any person can review records. A reasonable time limit should be set. “Shall” should become “may” so the judge has more discretion as is the case with respect to a declarant who fails to complete turn over in accordance with section 43.

55(9) Recovery of sum

“(9) ~~The owner may recover the sum from the corporation by an action in the Small Claims Court.~~”

Reasoning: We recommend that this provision be deleted since subsection 55(10) provides a remedy in Small Claims Court.

Section 56 – By-Laws

56(1) By-laws

“(i) to extend the circumstances described in subsection 105 (2) under which an amount shall be added to the common expenses payable for an owner’s unit ~~for the purposes of subsection 105(3).~~”

Reasoning: One of the most significant issues/problems with the Act arises with the interaction of this subsection and subsections 105(2) & (3). As presently worded there is a legal argument that condominium corporations cannot collect the insurance deductible from the owner who causes damage to other units or the common elements. Subsection 105(3) applies where the owner causes damage only to his/her own unit and arguably 56(1)(i) and 105(2) do not allow for a by-law that would make the owner responsible for the insurance deductible in this case.

See “Reasoning” for 105(2) & (3).

We recommend that 105(3) be deleted as it is redundant and not necessary. If 105(3) is deleted then reference to it is no longer required and will assist in solving the insurance deductible issue.

“(j) to govern the maintenance and repair of the units and common elements;”

Reasoning: Section 90 of the Act deals with both “maintenance” and “repair” while para (j) above only mentions “maintenance”. Does maintenance include repair? Therefore, for consistency, repair should be added to (j).

Alternatively, the term “maintenance” should be defined in the Act to include “repair”, including repair after normal wear and tear, but excluding repair after damage.

56(2) Remuneration of directors

“(2) A by-law relating to the remuneration of directors shall fix the remuneration and the period not exceeding three years for which it is to be paid, which remuneration shall be subject to change upon a majority vote of owners from time

to time. Remuneration shall include all direct and indirect payments or benefits provided to directors but shall not include reimbursement for meal, travel and other reasonable out-of-pocket costs related to their duties as a director.”

Reasoning: Remuneration of directors is quite rare and a corporation should not have to pass and register a by-law every 3 years after an initial remuneration by-law has been registered on title. Rather, directors’ remuneration should only have to be reviewed each three years and approved or amended upon a majority vote of owners from time to time once the original by-law has been established.

There is some uncertainty about what constitutes remuneration; for instance, are sandwiches and soft drinks at a directors meeting or an annual appreciation dinner that includes the directors spouses’ remuneration? Clarification would remove a source of irritation.

56(10) When by-law effective

“(10) A by-law, amendment to, or repeal thereof, is not effective until”

Reasoning: It should be made clear that amendments or the repeal of by-laws also require registration.

“(a) the owners of ~~a majority of~~ more than 50 percent of all of the units of the corporation vote in favour of confirming it, with or without amendment; and”

Reasoning: Under the previous Act, the courts had to wrestle with the meaning of “majority”. 56(10(a) goes a long way to resolving the issue, however, to be absolutely clear and avoid any possible future interpretation issues we recommend that reference to “a majority” be deleted to avoid confusion with the “majority voting” provision set out in section 53.

Section 57 – Occupancy Standards By-Law

57(3) Prohibition

“(3) a by-law passed under subsection (1) may prohibit persons from occupying units of the corporation that do not comply with the standards set out in the by-law, and such a by-law will not solely by being in compliance with the Act be in breach of the *Human Rights Code* of Ontario;

Reasoning: So long as the occupancy standards by-law complies with 57 then there should be a statutory exemption from applicability of the Ontario *Human Rights Code*, similar in concept to the allowed exemptions from the *Residential Tenancies Act, 2006*

Section 58 - Rules

58(1) Rules

- “(1) The board may make, amend or repeal rules respecting the use of common elements, ~~and units, assets and services provided by the corporation~~ to,
- (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
 - (b) prevent unreasonable interference with the use and enjoyment of the common elements, and management of the units or the assets of the corporation.”

Reasoning: The scope of rules should be increased to cover a corporation’s services and prevent unreasonable interference with management.

58(7) When rule effective

- “(7) Subject to subsection (8), 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.”~~ the owners have requisitioned a meeting in accordance with section 46 within 30 days of the Board having given notice under clause (a) but have not voted against the proposed rule at the meeting or if quorum was not achieved at the meeting.”

Reasoning: This section should indicate what would happen if a meeting was requisitioned but there was no quorum at it. Would the rule be effective or fail? Was the requisition nullified? As written 58(7)(b) arguably could mean that a small minority could block an otherwise acceptable rule by ensuring that no quorum is achieved at a meeting they requisitioned.

The same problem arises in subsections 59(8) (joint rules) and 97(3) “Changes made on notice” (changes made to common elements by corporation), if no amendment is made.

58(10) Compliance

- “(10) All persons bound by the rules shall comply with them and the rules may be enforced ~~in the same manner as the by-laws~~ as provided for under this Act.”

Reasoning: There is no provision for enforcement of by-laws under the Act that differs from

enforcement of a declaration or rules. This revision is consistent with subsection 17(3) and section 134. Alternatively, this whole subsection can be deleted in light of sections 119, 132 and 134.

Section 59 - Joint By-Laws and Rules

59(1) Joint by-laws and rules

“(1) The boards of two or more corporations may make, amend, enforce or repeal joint by-laws or rules governing the use, ~~and~~ maintenance, governance, management, operation and repairs of shared facilities, common elements, assets and services.”

Reasoning: By-laws and rules for shared facilities should go beyond merely the use and maintenance of the shared facilities. Since joint committees are established to deal with the shared facilities then the by-laws and rules should also cover the governance, management and repairs of the shared facilities and services.

In addition, by-laws for many joint committees allow for management and repairs of shared facilities, common elements, assets and services. Most corporations delegate various powers to the joint committee, often including the power to enforce joint by-laws and rules. In certain cases, it is preferable if the residents of all corporations sharing facilities can be governed by joint rules on common elements beyond the shared facilities. For example, each corporation’s rules only govern their own residents on their own common elements, but in shared situations, each of the boards would like to be able to prohibit or restrict the residents from the other corporations from walking their dogs on that particular corporation’s property except in designated exercise areas. By this amendment, each corporation would be able to protect their own common elements in excess of the shared facilities by passing joint rules.

REPLACEMENT SUBSECTION 59(8):

~~(8) Subject to subsection (10), if the board of any of the corporations 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 a meeting of owners of each corporation.~~

“(8) Subject to subsection (9), 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) the owners have requisitioned a meeting in accordance with section 46 within 30 days of the Board having given notice under clause (a) but have not voted against the proposed rule or if quorum was not achieved at the meeting.”

Reasoning: Same “Reasoning” as for 58(7)(b), Consider the following scenario:

1. A Notice of Meeting is sent
2. A Meeting is requisitioned by unit owners
3. Board sends out a Notice of Meeting.
4. Quorum is not achieved (whether intentionally or not) and therefore the meeting does not proceed.

A strict reading of the present wording under these circumstances would mean that it is possible for a joint rule to end up in limbo (the same for a rule for one of the corporations in light of wording in 57(7)(b)).

Section 60 – Appointment of Auditor

60(5) Exception

- "(5) The owners of a corporation need ~~shall~~ not appoint auditors under subsection (2) at an annual general meeting if,
- (c) as of the date of the meeting, ~~all the owners consent in writing~~ vote to dispense with the audit mentioned in subsection 67(1) until the next annual general meeting.”

Reasoning: The owners of a corporation of less than 25 units may wish to appoint an auditor even though they do not have to. Therefore the words "need not" gives the owners the option as opposed to a prohibition. Except for corporations with only about 4 to 6 units, it would be exceedingly difficult to obtain unanimous written consent each year. We recommend the decision be made by a majority vote of owners and not by written consent or unanimous consent.

Section 61 – Qualifications

61(a) Qualifications

"No person shall act as auditor of a corporation if the person,

- (a) is an owner, mortgagee or a director, officer, or employee of the corporation."

Reasoning: If an owner or a mortgagee acts as an auditor, it could be a conflict of interest. Given the critical role of the auditor in protecting the financial health and well being of the corporation, it is important that there be no conflict of interest, or even a perceived one.

Section 66 – Financial Statements

66 (2) Contents

"(2) The financial statements shall include all those required under generally accepted accounting principles, and in addition shall include,

~~(a) — a balance sheet~~

~~(b) — a statement of general operations;~~

~~(c) — a statement of changes in financial position;~~

~~(d) — a statement of reserve fund operations.~~

(a) a statement of reserve fund operations

~~(b), (c) and (d), being the previous (e), (f) and (g) unchanged~~

Reasoning: The documents listed in subsection 66(2) are already required under generally accepted accounting principles but are not in accord with current accounting and auditing terminology.

Given the importance of the financial statements, in addition to those documents that the Act mandates must be included in the financial statement, corporations and auditors should be obligated to include any other accounting documents that are normally produced when following generally accepted accounting principles.

Section 69 – Delivery of Statements

NEW SUBSECTION 69(3)

“69(3) If the board of directors has not held an annual general meeting as required by subsection 45(2) or has not complied with the provisions of section 69, the auditor shall request and the corporation shall supply to the auditor, the current owners list and the auditor shall, within a reasonable time, deliver to owners a copy of the financial statements and other information required by Section 66(2) and the report required by Section 67(1) and the corporation shall pay the auditor’s reasonable expenses to do so.”

Reasoning: Boards that are dysfunctional may not hold annual general meetings, sometimes for years even though clearly in breach of the Act and in breach of their statutory duty. In addition, they may not issue audited financial statements to owners. This provision would stop this abuse.

Section 70 – Right to Attend Meeting

70(1) Right to attend meeting

“(1) The Auditor is entitled to attend a any meeting of the owners and to be heard on any part of the business of the meeting that concerns the office of the auditor.”

Reasoning: It is not clear that auditors have a right to attend all owners meetings. For instance, it is not clear that auditors have a right to attend a meeting under section 63 where it is proposed that they be replaced. Auditors are typically replaced when there is a dispute over some action that the directors have taken and with which the auditor disagrees. As many owners are not financially sophisticated it is important that the auditor be able to attend any meeting of owners to present his or her position.

70(3) Attendance Required

“(3) The corporation ~~or an owner~~ may require that an auditor or a former auditor attend a meeting of owners for the purpose of answering inquiries described in subsection (6) by giving written notice to the person whose attendance is required, at least five days before the meeting, that the person's presence is required.”

Reasoning: 70(3) should be deleted because the auditor can decide subject to section 70(1), whether to attend but should not be required to do so by one owner.

70(4) Notice to Corporation

~~“(4) An owner who gives written notice to an auditor or former auditor under subsection (3) shall give a copy of the notice to the corporation.”~~

Reasoning: Eliminate this section if new subsection 46(6) is complied with.

70(5) Remuneration for Attendance – DELETE/REMOVE

Reasoning: Eliminate this section if new subsection 46(6) is complied with. This provision, if not deleted, adds additional costs and burden to owners.

Section 71 – Amendments of Statements

71(5) Same, by auditor

“(5) If the board does not mail or deliver a copy of the amended financial statements and amended report to the owners within a reasonable time, the auditor shall request and the corporation supply to the auditor, the current owners list and the

auditor shall, within a reasonable time, deliver to the owners a copy of the amended financial statements and report and the corporation shall pay the auditor's reasonable expenses to do so, mail or deliver a copy of the amended report to the owners and the corporation shall reimburse the auditor for the reasonable costs incurred in the mailing or the delivery. ."

Reasoning: It is important that owners receive both the amended financial statements as well as the amended audit report

PART V SALE AND LEASE OF UNITS

Section 72 - Disclosure Statement

72(3) Contents

"(3) A disclosure statement shall specify the date on which it is made and shall contain,

NEW SUBSECTION 72(3)(a)

"(a) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination under Sections 110, 111 and 112."

Suggestion: Re-number existing 72(3)(a) as (b) following through to subsection (t).

Reasoning: The wording in clause 52(6)(d) of the previous Act should be retained.

72(3)(g)

Suggestion: Over the years since the drafting of the Act, it has become very apparent that the Act does not adequately deal with the disclosure requirements for condominium conversions. Despite the disclosure that is presently made to owners, which is significantly more than under the previous statute, many purchasers (and their lawyers) do not understand the difference, and thus their legal rights, between a newly constructed building and a conversion. Given that the Act is consumer protection legislation, it should require much greater disclosure.

In addition, given that Tarion does not cover conversions (a substantial problem for many condo owners) and thus there is no warranty protection for owners (which they do not understand on purchasing the unit), developers should be obligated to obtain insurance coverage for condominium conversions in the event of major claims regarding construction deficiencies, similar to that provided by Tarion (or Tarion should change its rules to cover conversions).

The committee would like to see a statement that the developer has obtained appropriate insurance for these conversions similar to that of Tarion, and a statement advising of the construction and repairs completed by the Developer on condominium conversions; the names and addresses of the subcontractors retained to make those repairs; and the applicable warranties associated with those repairs.

Warranties from the Developer should also start to run from the date of purchase from the Developer or clearly communicate to the purchaser when the warranty will lapse.

72(3)(n)

There should be greater details or description of the agreements mentioned in sections 111, 112, 113, 114 and not just brief description of the significant features, because the committee is finding that the descriptions presently being given are too brief and do not give sufficient details to the purchaser to be able to make an informed decision, particularly with respect to the financial impact or implications specifically in years 2 and 3 after registration.

72(3)(q)

“(q) a copy of the budget statement described in subsection (6).”

Reasoning: This paragraph should be reviewed carefully because why should the disclosure statement have to include a copy of the first year budget as well as the current year budget if more than one year has passed since the registration of the declaration and description for the corporation?

It not only appears to be irrelevant (since the purchasers receiving such disclosure package after the first year would have no cause of action based on any shortfall in the first year budget in any event), but it is also potentially confusing for the purchaser to receive two budget statements instead of only the one relating to the year in which the purchaser intends to acquire the property.

72(4)(10) Contents of information statement

"(10) A statement whether any one or more units or proposed units is exempt from a cost attributable to the rest of the units or proposed units."

Reasoning: Clarify that several units could be affected.

NEW SUBSECTION 72(4)(13):

“(13) A statement whether the corporation has a duty to enter into an agreement to purchase, lease or otherwise deal with any unit or asset owned or controlled by the declarant or any third party.”

Reasoning: This is an important recommendation because despite disclosure to a limited degree, some declarants have been very creative in charging to owners, or downloading to the corporation some leases and other financial obligations that historically were never charged. The disclosure statement should clearly highlight certain key or critical charges or expenses.

Purchasers should at least know up front when they will have to pay hidden amounts to purchase or lease superintendent's suites, guest suites, visitor parking and other amenities which would normally form free parts of the common elements. This will help stop some of the schemes developers use to force the corporations to buy what should be, and historically were, its own property.

Re-number old 72(4)(13) to 72(4)(14)

72(6) Budget Statement

72(6)(a)

“(a) a statement of the common expenses of the corporation that includes all common expenses required to maintain the property and amenities described in subsection 72(3)(d) and to provide all services described in 72(6)(c), including all mortgages or lease agreements that are or will be entered into by the declarant on behalf of the corporation either before registration of the declaration and description or before the meeting required by section 43(1) or that purchasers will cause the corporation to assume on or after closing purchase of their unit, whether or not the corporation will be required to pay these expenses in the year after registration of the declaration and description.”

Reasoning: Unfortunately, some declarants often artificially depress first year common expenses by absorbing costs such as extra security or paying elevator and mechanical maintenance contracts or deferring payment of mortgages on guest suites until after the first year. They also include provisions in the small print of the purchase agreement that requires purchasers to cause the corporation to assume leases or other liabilities for such things as heating and air conditioning equipment in the units or mechanical equipment and building automation systems.

This practice can mislead or misinform purchasers as to the true cost of condominium living and these practices results in large increases in common expenses in the second year which causes financial stress and discontent. Given that the Act is consumer protection legislation, this practice can be manipulative and unfair and should be clearly prohibited or restricted to protect purchasers from those declarants that follow this practice.

72(6)(h) Budget statement

“(h) a statement of all services not included in the budget ~~that the declarant provides,~~

~~or expenses that the declarant pays and~~ that might reasonably be expected to or will become, at any subsequent time, a common expense and the projected common expense attributable to each of those services or expenses for each type of unit.”

Reasoning: This is important for corporations to be able to prepare more accurate second year budgets, particularly since in some cases an expense does not start until the second year and it is an expense the developer or declarant did not have to pay (and thus, under the present wording would not have to be disclosed). The word “contribution” is not necessary.

NEW SUBSECTION 72(6)(i)

- (i) a description of all mortgages or lease agreements, including all expenses associated therewith, that are or will be entered into by the declarant on behalf of the corporation either before registration of the declaration and description or before the meeting required by subsection 43(1) or that purchasers will cause the corporation to assume on or after closing purchase of their unit

NEW SUBSECTION 72(6)(k) (or (l) if new (i) above is accepted)

- “(k) all other realistic and reasonable expenses for normal operation are included, even if not listed;”

Reasoning: A proper budget should not be limited to just that which is listed in it, if there are other reasonable and normal expenses required for the operation of the corporation. Under section 75, the declarant should be responsible for a budget deficit including these expenses.

Section 73 – Rescission of Agreement

73(3) Refund upon rescission

- "(3) If a declarant or the declarant's solicitor receives a notice of rescission from a purchaser under this section, the declarant shall promptly refund, without penalty or charge, to the purchaser, all money received from the purchaser under the agreement and credited towards the purchase price, together with interest on the money calculated at the prescribed rate from the date that the declarant received the money until the date the declarant refunds it provided that no interest shall be payable if the agreement is rescinded within the period specified in subsection 73(2) and the declarant has reimbursed the purchaser forthwith."

Reasoning: In most cases, the declarant does not cash the purchaser's cheque during the rescission period. The cost of calculating interest would not be reasonable or fair, and a purchaser should not get interest during the portion of the rescission period limited by subsection 73(2), but should receive interest thereafter if the declarant does not reimburse the purchaser promptly.

Section 74 – Material Changes in Disclosure Statements

74(2) Material changes in disclosure statement; definition

"(2) In this section,

"material change" means a change or a series of changes that a reasonable purchaser, ~~on an objective basis,~~ would have regarded ~~collectively~~ as sufficiently important to the decision to purchase a unit or proposed unit in the corporation that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the right to rescind such an agreement of purchase and sale under section 74, if the disclosure statement had contained the change or series of changes.

Reasoning: The wording of this section could be interpreted that all other changes are material. Subsections (a), (b) and (c) should not be excluded as material changes and therefore these subsections should be deleted.

The words “on an objective basis” should be deleted because they raise the standard even higher against purchasers than that set by case law which already imposes an objective burden upon a purchaser by referring to “a reasonable purchaser”. The word “collectively” should be deleted because it further raises the standard against each purchaser whose rights are limited by what all other purchasers would have regarded as sufficiently important. For example, a pet lover confronted by a material change to a no-pets clause in the declaration would be devastated while other purchasers may not be affected.

Section 75 “Accountability for Budget Statement”

75(2) Common expenses

“(2) The declarant shall pay to the corporation the amount by which the total actual amount of common expenses incurred for the period covered by the budget statement, except for those attributable to the termination of an agreement under section 111 or 112, exceeds the total budgeted amount.”

Issue: The protection provided by this provision has been watered down by developers substituting new first year budgets long after the agreement of purchase and sale has been entered into. Alternatively, developers stipulate that the budget statement amounts will be increased by a stipulated percentage if occupancy occurs after a certain date. Developers should not be entitled to produce documentation showing an artificially low monthly common expense for each unit at the time of marketing their units and then to use various devices to increase the

first year's budget without incurring the refund obligation specified in 75(2), unless the delays were due to causes outside their reasonable control (e.g. strikes, government authorities, etc.)

An alternative would be to allow increases after a designated time, for example if occupancy is delayed more than three of four years.

Solution: Once the condominium corporation is established, the requirement for a first year budget should no longer be disclosed but rather the condominium corporation board's budget should be. Also, new subsection under 72(6) should be enacted which would provide owners with some additional protection.

75(6) Time for payment

NEW SUBSECTIONS 75 (7) AND (8) – Default in payment

“75 (7) If payment required by this section is not made within 30 days of receiving the notice set out in subsection (5), interest shall be paid by the declarant at the prime rate of the Bank of Canada plus 10 per cent compounded monthly starting from the 31st day.”

Reasoning: Again unfortunately, many, if not nearly most, declarants do not pay the first year deficit within the statutory 30 days. Many drag out payment for at least a year, often several years and offer substantially less knowing that it is costly to litigate and that even if successful the corporation will not recover all its legal costs. In addition, some declarants try to join this payment with the construction deficiency negotiations that are ongoing (and often take years to conclude). New corporations are always strapped for money, which is known to declarants. These measures would level the playing field, giving the condominium corporation leverage to obtain payment without having to wait years or resort to litigation.

Section 76 - Status Certificate

76(1) Status certificate

"(b) a statement of the increase, if any, in the common expenses for the unit that the board has declared since the date of the budget of the corporation or knows or anticipates will be declared for the current or next following fiscal year and the reason for the increase;"

Reasoning: A board might know of an increase but intentionally not declare it until a later date. Purchasers and mortgagees deserve to be informed of known or reasonably anticipated increases to be declared, but this time frame cannot be unlimited or unreasonable, so the current and next fiscal year would be long enough.

"(c) a statement of the assessments, if any, that the board has levied against the unit since the date of the budget of the corporation or knows or anticipates will be

levied for the current and next following fiscal year to increase the contribution to the reserve fund and the reason for the assessments;"

Reasoning: Same reasoning as for (b) above.

"(h) a statement of all outstanding judgments against the corporation and the status of all legal actions to which the corporation is a party, excluding enforcement and small claims court matters;"

Reasoning: These items are insignificant and could interfere with conveyancing practices.

The term “legal actions” in this subsection is different than that used in clause 19 of the prescribed Form 13 (for status certificates) which uses the terms “legal proceedings before a court of law, an arbitrator or and administrative tribunal”. Clause 19 is broader than subsection 76(1)(h) and is the preferred wording to use.

In addition, is it important to disclose every action in which the corporation is a party? What about “Applications” which technically are not actions but could be costly to the corporation? Should status certificates only have to disclose actions or legal proceedings where the corporation is being sued (the defendant) because of the possibility of a special assessment to pay for a judgment should the corporation lose? What if the corporation is the plaintiff or applicant? Is there a concern other than for legal costs?

“(j) a list of all current agreements of the types mentioned in section 111, 112 or 113 and all current agreements between the corporation and another corporation or between the corporation and the owner of the unit;”

"(m) a statement with respect to,

(i) the most recent reserve fund study and updates to it,

(ii) the amount in the reserve fund ~~no earlier than~~ at the end of a month ~~within~~ that is no longer than 90 days prior to the date of this status certificate, and"

Reasoning: The audited financial statements already include the reserve fund amount, so as presently worded it is redundant. This change gives a current update.

“(o) a statement of the number of units for which the corporation has received notice under section 83 that the unit was leased during the fiscal year preceding the date of the status certificate;”

Reasoning: The information is difficult to obtain and generally beyond the control of the corporation. Therefore, it may not be accurate and thus misleading.

"(p) a certificate or memorandum of insurance for each of the current insurance policies and the amount of any deductibles applying thereto;"

Reasoning: There are many other sections in the Act which adds items to common expenses, such as the insurance deductible for damage caused to an owner's unit by the owner's act or omission. Therefore, the amount of the deductible should be disclosed in the certificate.

NEW SUBSECTION 76(1)(t):

"(t) such other information that the corporation in its sole and exclusive discretion considers relevant with respect to the units, common elements or assets, or the corporation's services."

Reasoning: Since the use of the prescribed form for status certificates is mandatory (From 13), there is an argument that only information of the types listed in the prescribed form can be included in a certificate, and nothing more. However, often there is additional information that a corporation may feel is important that purchasers and mortgagees should know and thus should be included in a certificate. Therefore, to eliminate any uncertainty, new (t) should be added.

NEW SUBSECTION 76(1)(u):

"(u) the renewal of any leases in accordance with Section 170."

Reasoning: Leasehold condominium leases should be disclosed.

Section 78 – Implied Covenants SALE OF UNITS

78(1) Implied covenants

"(1) Every agreement of purchase and sale of a proposed unit entered into by a declarant before the registration of the declaration and description that creates the unit shall be deemed to contain the following covenants by the declarant:

1. ~~if the proposed unit is for residential purposes,~~ a covenant to take all reasonable steps to sell the other ~~residential~~ units included in the property without delay, except for the units that the declarant intends to lease."

Reasoning: There are mixed use condominiums with residential and commercial units and the implied covenants should apply equally to both.

Section 80(3) – Interim Occupancy

80(3) Right to pay in full

“(3) Despite any provision to the contrary in the agreement of purchase and sale, before the expiry of the time period mentioned in subsection 73(2) for rescinding the agreement, a purchaser may elect to pay in full, on assuming interim occupancy of the proposed unit, the balance of the purchase price remaining after deducting the amounts paid under the agreement before assuming interim occupancy.”

Issue: Why is the election to pay in full limited to the 10 day rescission period? Often the lawyer does not get involved in the deal until long after the 10 day period has expired. Purchasers are still subjected to the occupancy fee when they could have paid in full on interim occupancy.

Solution: Purchasers should be given a longer period to time to pay in full. There are many alternatives, such as 120 days from interim occupancy; 60 days or 6 months before occupancy; 30 days before notice of interim occupancy, 90 days prior to confirmed occupancy date.

80(4) Occupancy fee

“(4) If the purchaser assumes interim occupancy of a proposed unit or is required to do so under the agreement of purchase and sale, the declarant may charge the purchaser a monthly occupancy fee which shall not be greater than the total of the following amounts:

1. Where applicable, interest calculated on a monthly basis on the unpaid balance of the purchase price at the prescribed rate.
2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the unit.
3. The projected monthly common expense contribution for the unit.”

Issue: There have been situations where some developers collected the occupancy fee and used it all for cash flow during the project. Then the developers went bankrupt or out of business and the purchasers were required to pay the taxes – effectively a second time.

Suggested Solution: There should be a requirement that there be disclosure of the tax component of the occupancy fee and that it be held in trust by the declarant’s lawyer for successive owners. In addition, we suggest requiring that those monies only be paid toward taxes for that specific unit which are incurred during the interim occupancy period.

80(5) Reserve fund contribution

“(5) If the declarant charges the purchaser a monthly occupancy fee for interim occupancy of a proposed unit for residential purposes for longer than six months and the monthly occupancy fee includes a projected contribution to the reserve fund of the corporation, then, with respect to the occupancy fee for each month ~~after the sixth month~~ the declarant shall hold in trust and remit to the corporation upon registering the declaration and description the portion of the monthly occupancy fee that was collected for interim occupancy and that was paid into trust and that represents the projected contribution to the reserve fund.”

Reasoning: If section 80(4) changes, this section must also change.

Section 81 – Money Held in Trust

81(7) Duration of trust

"(7) Despite the registration of a declaration and description, the person who holds money in trust under subsection (1) shall hold it in trust until,

(a) the person holding the money in trust disposes of it to the person entitled to it, where the disposal is done in accordance with this Act ~~and an agreement that the person who paid the money has entered into with respect to the proposed unit;~~ or"

Reasoning: Monies should be transferred in accordance with the Act only, and not by side agreements.

Section 83 – Lease of Units

83 Notification by owner

Issue: Assuming that the government does not accept the committee’s suggestion to eliminate the “owner-occupied unit” concept under section 51, then given the present wording of this section 83, an issue exists if a relative of a unit owner resides in the unit and the unit owner does not reside there, in this case would the unit is considered to be *owner-occupied*?

A unit can be considered to be owner-occupied even if the owner does not reside in the unit and the unit is occupied by a tenant, a licensee or is, in fact, vacant.

In accordance with subsection 51(5), in order to qualify as an owner-occupied unit, the unit must not have been leased within the 60 days before the notice of meeting is delivered ***as shown on the record that is kept under section 83(3)***. If the unit is not shown as leased on the section 83(3) record, it is an owner-occupied unit (subject to the 60-day qualification).

It is important to note that the section 83(3) record is only of the notices the condominium has received. It is **not** a record of those units that the corporation may know are leased. If there is no notice given to the condominium of a leased unit there can be no entry of the unit on the subsection 83(3) record. By its very wording subsection 83(3) it is *a record of the notices received* under Section 83(1). If no notice is given, no record can be made. Therefore even if a unit is leased 60 days before the notice of meeting it will still qualify as an owner-occupied unit if the owner fails to give the notice required by Section 83(1).

In addition, units can be subject to rights of occupation other than by lease. A person can reside in a unit by license or permission. For example, a parent may simply let his or her child reside in such owner's unit. The occupation could be by way of formal lease. It could also be a permission that is capable of being revoked at will that does not qualify as a lease.

Therefore, an owner-occupied unit might include:

- Units that are actually occupied by their owners provided the unit was not leased 60 days before the notice of meeting is given as shown on the section 83(3) record. If in fact the unit was shown on the record as leased 60 days before the delivery of the notice of meeting, the unit might fail to qualify as an owner-occupied unit even if the owners went into occupation 59 days before the delivery of the notice of meeting.
- Units that are leased but where the owner has not delivered the section 83(1) notice to the corporation.
- Units that are subject to a right of possession such as a license or permission that does not qualify as a lease.
- Units that are vacant. A vacant unit that is not leased would not give rise to an obligation or right of the owner to deliver a section 83(1) notice and consequently would not be shown on the section 83(3) record.

It is assumed that the above was not the intent of the government in drafting section 83 and with the concept of the "owner-occupied unit".

Suggested Solution: If a unit is not occupied by one of the registered owners, this section should require that the owner provide the corporation with a section 83 notice within sixty (60) days, if not, the corporation should be able to take the registered owner immediately to court without first going through mediation or arbitration. All costs related to this should be added to the common expenses of the unit and lienable.

There should also be a corresponding duty on the corporation to send a notice yearly to inform owners of their obligation to inform the corporation if they are not personally occupying the unit and if leased or rented then to provide the corporation with the information stipulated under the Act.

PART VI OPERATION

Section 84 - Contribution of Owners

84(1) Contribution of owners

- "(1) ~~Subject to the other provisions of this Act~~ Except as otherwise provided in this Act or the regulations hereunder, the owners shall contribute to the common expenses in the proportions specified in the declaration as set out in the corporation's annual budget approved by the Board. The corporation's annual budget is to be sent to all owners of record before implementation and if the budget provides for borrowing any sums that do not require the passing of a borrowing by-law in accordance with this Act, the corporation must give 35 days notice to owners before implementation."

Reasoning: The contribution of owners as provided in Section 84(1) makes no provision for payment by owners of amounts other than those set out in subsection 57(4). For example, Section 105(2) deals with deductibles and Section 134(5) deals with damage awards and costs. . We recommend an amendment to Section 84(1) to clarify the unit owner's obligation to contribute to common expenses, other than any proportion specified in the Declaration, as may be provided for in various sections of the Act.

In addition, it is important that owners receive the budget before implementation so that they will have a better understanding of the fees that are required for the ensuing year.

84(2) Common Surplus

- "(2) An accumulated common surplus in a corporation in excess of 25% of the annual budget for common expenses for the current fiscal year shall be applied either against future common expenses or paid into the reserve fund, and except on termination, shall not be distributed to the owners or mortgagees of the units."

Reasoning: Not all expenses are made monthly, for instance insurance and other deposits; and corporations need an amount of permanent surplus to be financially stable in the same way that well funded for-profit organizations need retained earnings to be financially stable.

Section 85 "Lien Upon Default"

85(4) and (5)

- "(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien in a prescribed form prescribed by the Minister to the owner in accordance with section 47 whose unit is affected by the lien.

- (5) ~~The corporation shall give the notice by personal service or by sending it by prepaid mail addressed to the owner at the address for service that appears in the record of the corporation maintained under subsection 47(2) in accordance with section 47 and if there is no section 47 record, notice must shall be given to the unit's municipal address.~~"

Reasoning: There is no guidance in the Act about:

- (a) how to effect service if in fact the owner has not given notice of his or her address pursuant to section 47. It would appear the only alternative is personal service. What if that cannot be done because the owner's address is unknown or he or she simply makes himself/herself difficult to serve?
- (b) when service is deemed to have occurred if mailed. It would be helpful if the Act said the ten day period started from the date the notice was mailed.
- (c) whether service can be effected by mail to the address for service shown on the transfer/deed in favour of the owner(s) if the owner (s) fail to provide an address for service under section 47.
- (d) whether all owners of a unit must be served if there are multiple owners. It may be difficult to serve one owner not to mention all owners if personal service must be used.

It would also be beneficial if the Act said the notice is effective if sent by mail even if not received by the owner.

The section should reference the prescribed Form 14 of Regulation 48/01 or any other form prescribed by the Minister (as with the certificate of lien).

Section 90 - Maintenance

90(1) Maintenance

Issue: This provision may constitute the most serious deficiency in the Act. Subsection 90(1) states that the obligation to maintain includes the obligation to repair after normal wear and tear. A declaration may provide that the corporation will repair balconies but that they will be maintained by the unit owners. When the balconies deteriorate as the result of normal wear and tear repairs, such as concrete work and even rebar (steel) replacement, will now be the obligation of the unit owner and not the corporation. In addition, the reserve fund, although it includes amounts collected in contemplation of such repairs, will not be available. A court has recently given this interpretation to "maintenance", which interpretation is, in the Committee's respectful view, not reasonable.

Unit owners may have the obligation to maintain windows. When the window seals deteriorate and the windows must be replaced it will be the unit owner's obligation, even though the windows are common elements and the reserve fund contains amounts collected for such repairs.

The reserve fund is only available for major repairs and replacements. If the exterior wall of a high-rise building must be re-caulked due to the caulking deteriorating over a period of time (which is a normal deterioration), s. 90(2) appears to prevent the corporation from using the reserve fund for that purpose.

Suggested Solution: The term "maintenance" must be defined. For instance, does "maintenance" include "replacement". At what point does it become "repair after damage". Maintenance should not mean or include "repair" and particularly repair after normal wear and tear.

This section should say something along the following lines:

If an item has failed (with no useful life left, or where the costs of repairing are greater than replacing it) then whoever has the obligation to "repair" that item must "replace" it. (This is to ensure that these things are not always the obligation of the corporation).

It is recommended that the Act allow corporations to clarify the obligations in a by-law with respect to certain listed items (e.g. balconies, equipment, etc.) so that it would be clear that "maintenance" does not include any form of repair and that the obligation is truly that of "repair after damage".

In addition, a specific provision should be included in s. 90 which clarifies that a requirement for a unit owner to maintain a portion of the common elements refers only to maintenance of the surface thereof, and not any below-surface components. That way, unit owners who have exclusive use balconies do not have to hire a contractor to erect a swing stage and spend thousands of dollars to drill through their concrete and replace rebar, or provide other structural repairs to exclusive use balconies and other exclusive use items (i.e., windows, doors). Therefore, we would recommend that the following new subsection 90 (3) be inserted:

NEW SUBSECTION 90(3)

"(3) Where an owner has the obligation to maintain the common elements, the obligation to maintain does not include the obligation to repair after normal wear and tear."

Section 92 – Work Done for Owner

92(1) Work done for owner

- "(1) If the Act or declaration provides that the owner has an obligation to repair the common elements, a unit, or any part of them after damage and the owner fails to carry out the obligation within a reasonable time after damage occurs, the corporation ~~may~~ shall perform the work necessary to carry out the obligation.
- (2) If the Act or declaration provides that the owner has an obligation to maintain the common elements, a unit, or any part of them and the owner fails to carry out the obligation within a reasonable time, the corporation ~~may~~ shall perform the work necessary to carry out the obligation."

Reasoning: It is best to refer to the Act and to "the common elements, a unit or any part of them" in both cases for clarity.

Section 93 – Reserve Fund

93(2) Purpose of fund

Change (2) to 2(a)

"(2)(a) A reserve fund shall be used solely for the purpose of replacement or major repair of the common elements and assets of the corporation."

OR

"(2)(a) Reserve funds shall be used solely to replace or to conduct major repairs of the common elements and assets of the corporation."

Reasoning: It is not clear if the word "major" is intended to modify both "repair" and "replacement" or just "repair". "Major" should only relate to repair and not include replacement. If a common element or asset must be replaced for whatever reason, i.e. whether worn out due to wear and tear or otherwise, it should not be limited to "major" items. The reserve fund should cover all replacements of common elements and assets regardless of how small. However, reserve fund "repairs" should be restricted to "major" repairs in order to distinguish them from the normal, ongoing maintenance and repair obligations of a corporation for its common elements as contemplated by s. 90 and by the corporation's annual operating budget. Switching the order of the words provides clarity.

Add new subsection 93(2)(b)

“2(b) For the purpose of subsection 93(2), major repairs are those that cost more than the greater of \$1,000 or 1.0 per cent to a maximum of \$10,000 or such other amount as may be set out in the regulations from time to time of the annual budgeted common expenses for the current fiscal year, but exclude routine maintenance activities.”

Reasoning: The Act does not define the term “major” and thus corporations improperly charge routine maintenance costs and minor repairs to the reserve fund. These minor costs are not contemplated in the preparation of the corporation’s reserve fund study and these funds have not typically been allocated in the funding analysis and a shortfall results.

93(5) Amount of Contribution

“Unless the regulations made under this Act specify otherwise, until the corporation conducts a first reserve fund study and implements a proposed plan under section 94, the total amount of the contributions to the reserve fund shall be at least 20 percent of the budgeted amount required for the first year contributions to the common expenses exclusive of the reserve fund. ~~the greater of the amount specified in subsection (6) and 10 per cent of the budgeted amount required for contributions to the common expenses exclusive of the reserve fund.~~”

Reasoning: This is one of the most serious deficiencies in the Act. Declarants, almost universally, interpret this provision to mean that only 10% is required to be contributed to the reserve fund in the first year budget and it is clear that this is never sufficient and falsely represents the cost of condominium living. This practice puts undue financial stress on new purchasers and engenders discontent in the condominium community when fees do rise in subsequent years to properly fund the reserve fund. It is extremely important that this be corrected.

Alternate suggestion: In order to plan for possible change in this percentage in the future, consideration should be given to whether the percentage should be stated in the legislation or rather by Regulation, which can be amended more easily, or if a reserve fund study based on the drawings should be mandatory by the builder.

Sections 93(5) and 93(6) together form a confusing loop. (5) references “until the corporation conducts a first study and implements a proposed plan”... contributions...shall be greater of amount specified in subsection (6) and 10 per cent of the budgeted amount. (6) references “after the time period specified in subsection (5) (which would mean after the study is completed). The amount specified in subsection (6) is not known until the study has been completed, at which time it is impossible for the time to be before the study is completed.

In addition, the percentage of the operating budget that should be transferred into the reserve fund is a moving target because the nature of operating budgets is changing. For example, in-

suite utilities are generally billed directly to the unit owner in new buildings. This reduces the operating budget accordingly and thus reduces the amount to be transferred to the reserve fund, and therefore, 20% might not be sufficient in this new regime.

Solution: Delete the reference to “the greater of subsection (6)” in subsection (5).

93(6) Amount of contributions, after first reserve fund study

“(6) The total amount of the contributions to the reserve fund after the time period specified in subsection (5) shall be the amount that is reasonably expected to provide ~~sufficient~~ adequate funds for the ~~major repair and replacement and major repair~~ of the common elements and assets of the corporation, calculated on the basis of the expected repair and replacement costs and the life expectancy of the common elements and assets of the corporation.”

Issue: As presently worded, this subsection does not provide clear guidance for the calculation of the amount of contributions to be made to the reserve fund following the completion of the first reserve fund study. There is considerable uncertainty in the condominium industry as to what “sufficient” or “adequate” mean as there is no definition in the Act or the Regulations.

This section uses the word “sufficient funds” and then in section 94 the wording is, “amount of money in the reserve fund and the amount of contributions collected by the corporation are adequate...” and there is confusion whether “sufficient” and “adequate” have the same meaning.

See section 94 below for further discussion.

GOVERNMENT ORDERED CHANGES AND ENVIRONMENTAL AND ENERGY CONSERVATION REPAIRS OR REPLACEMENTS

Add new subsection 93(8)

93(8) Notwithstanding section 97. additions, alterations or improvements to the common elements and assets of the corporation that are required by legislation, regulation, rule or other law, or those that are made to reduce the environmental impact and energy consumption of the corporation may be considered major repair or replacement for the purposes of subsection (2) and may be charged to the corporation’s reserve fund.

Reasoning: The Act currently lacks clarity as to whether or not legislated or government ordered changes or those that are of an environmental or energy consumption nature fall within the definition of “major repair or replacement” and can be paid from the reserve fund. The owners should not be out of pocket for the entire costs of these government ordered changes in one year (which would happen if it could not be paid out of the reserve fund). Clarity is needed.

As discussed under s. 97, it is important that corporations be able to take steps to reduce the environmental impact and energy consumption of their building. As presently worded, the Act makes it difficult for Boards to take these steps without triggering s. 97 obligations. So long as the primary reason for the repair or replacement is to materially reduce the environmental impact, carbon footprint or the energy consumption, then the Board should be able to pay for such changes from the reserve fund

INTERACTION WITH SECTION 97

Add new subsection 93(9)

“93(9) For all other changes, additions, alterations or improvements proposed to be made under section 97, only those which are as reasonably close in quality to the original as is appropriate in accordance with current technology and construction standards can be paid from the reserve fund.”

Reasoning: The Act is not clear if certain items proposed by the corporation to undertake under section 97 can be paid from the reserve fund. A board could conceivably deplete an entire reserve fund on a discretionary but approved change, draining funds set aside by previous owners, and requiring future owners to contribute significantly more.

This suggested new subsection mirrors wording proposed for subsection 97(1). In addition, introduction of the word “technology” provides further clarity to the determination of what is a major repair and replacement and what is an addition, alteration or improvement.

Section 94 – Reserve Fund Study

94(1) Reserve fund study

"(1) The corporation shall conduct periodic studies to determine whether the amount of money in the reserve fund and the amount of contributions to be collected by the corporation ~~are~~ will be adequate to provide for the ~~expected~~ estimated costs of ~~major repair and~~ replacement and major repair of the common elements and assets of the corporation."

Reasoning: Clarifies meaning of section and also brings language in line with suggested amendment in subsection 93(2)(a).

94(8) Plan for future funding

"(8) Within 120 days of receiving a reserve fund study, the board shall review it and propose a plan for the future funding of the reserve fund that the board determines will ensure that, within a prescribed period of time and in accordance with the

prescribed requirements, the fund will be adequate for the purpose for which it was established. For the purposes of this subsection, adequate means that the year-over-year per cent change in the contribution for each year of the term of the study is no greater than the assumed inflation rate used in the study, except in the first three years where an increase greater than inflation is permitted, and that the closing balance in any year of the term of the study shall not be less than zero.”

ISSUE #1: As presently worded, this subsection does not provide sufficient guidance for the determination of whether the amount of money in the reserve fund and the amount of contributions to be collected by the corporation over the term of the reserve fund study are, or will be, sufficient or adequate.

Due to this vagueness, three different approaches currently exist in the industry on the calculation of reserve fund contributions:

1. **Inflation-matched:** The first believes that fairness, should be pursued with each owner contributing in each year their share towards future reserve fund expenditures. This implies that reserve fund contributions should be calculated so that increases equal the assumed rate of inflation except in the case where expenditures deviate from the plan, or new expenditures come into the plan as the 30-45 year window moves forward, in which case the revised contribution level calculated in the next update would be implemented in one step in the next fiscal year. This approach would typically require a greater-than-inflation increase every three years, at the time of the updates.
2. **No deficit:** The second approach defines or translates “adequately” more literally, suggesting that adequate funding simply means that in any given year there is enough money to avoid a negative balance after the obligations have been met. In this situation, at the extreme, the annual contributions can simply match the expenditures in the same year or can provide some smoothing but without a matching of inflation. This would result in wildly fluctuating contribution levels and gives the Board the ability to defer contributions to future owners. Some see this as acceptable because Form 15 discloses the plan, so the varying contributions over the 30-45 year term are disclosed and can be reflected in the purchase price for a unit. Some argue that this is not the intent of Act.
3. **Balanced:** The third approach that some reserve fund study providers use is to balance a reasonable amount of deferral of increased contributions (or phasing-in) so that a large increase is not implemented without due notice, but also so that excessive deferral to future owners does not occur.

Solution: The Act should clearly define the meaning of “adequacy” so that it is uniformly applied to all corporations and should allow a defined “phase-in” period. Care must be taken not to create a definition that is rigid or unrealistic.

The Committee has recommended getting to inflation-matched contributions within 3 years.

While this means that a corporation can exist in a perpetual state of phase-in (with a new 6 year term starting at the beginning of each 3 year reserve fund study cycle), contribution levels will rapidly approach inflation-matched levels while providing existing owners reasonable notice of significant increases.

The Committee is also mindful that components of the building may not follow inflation in their costs (consider petroleum dependant roofs, or copper pipes) and the cost of other items may change for reasons of technology and safety. Therefore, part of the definition of adequate should allow for these non standard changes in costs. In accordance with the Act and regulations, a reserve fund study includes a site visit every six years and conditions will be considered at that time, and unusual deterioration or costing will be brought into consideration. Nearly every plan will change by a number not in any way related to inflation at that time.

In lieu of changing the wording in this section, a definition of “adequate funding” could be added to the definition section and italics added as appropriate to this section.

In addition to this subsection, Section 29 of Ontario Regulation 48/01 must also be amended to define “adequate”.

ISSUE #2: There is some confusion with the wording in subsections (8). Does “within 120 days of receiving a reserve fund study” refer to the receipt by the board of a *final* form of reserve fund study, or is the provision intended to mean the receipt by the board of a *draft* form of such study?

Some reserve fund consultants believe that the 120 days should start to run from the receipt of a draft of the study and not the final version because many boards take several months to finalize the study and yet they have a good idea of the status of the fund, whether already in a shortfall or not, and thus for political reasons they could delay implementing the study to delay increasing the reserve fund contribution (which would mean increasing the common element fees to owners) to the detriment of the corporation as a whole.

The other issue is that a board might start a study to get a preliminary sense of budgeting and then not want the 120 days to commence until closer to their fiscal year end so that they can properly budget for an increased contribution in their next fiscal year and not part way through the current year, again potentially to the detriment of the corporation.

In addition, the 120 days to approve and develop a funding plan is fine for condominium Boards that meet every month. However, smaller corporations may meet every three months. The 120 days would only give them one chance to review the plan. Care must be taken to ensure that all forms and types of condominium corporations are considered in any proposed solution.

A different way of looking at this is to require the plan to be completed by no later than 36 months from the date of the previous plan. This would make the Board work backwards from the due date, and then they could get the study done when they need it, to allow for their meeting schedules. This approach would also be in line with the every three years concept for reserve funds.

Amendments will have to be made to Regulation 48/01 to reflect these and other suggested changes.

94(9) Copy of plan

"(9) Within 15 days of proposing a plan, the board shall,

~~(b) send to the auditor a copy of the study, a copy of the proposed plan and a copy of the notice sent to the owners under clause (a)."~~

Reasoning: Sending the plan to the auditor is an unnecessary requirement. He/she will review it when the audit is done but strictly limited to ensuring that proper contributions have been made to the reserve fund in accordance with the funding plan. It is the duty of the board, rather than the auditor, to propose an alternate funding plan. The auditor's participation should not complicate the process at the initial stages.

94(10) Implementation of proposed plan

"(10) The board shall implement the proposed plan ~~after the expiration of 30 days following day on which the board complies with subsection (9)~~ not later than the commencement of the corporation's next fiscal year."

Reasoning: The implied intention of the 30-day time frame seems to be to anticipate a requisitioned meeting of the owners. This is redundant as they always have that right. If implemented before the next fiscal year, the corporation might have to levy a special assessment which would be detrimental to the owners. Implementing the plan not later than the commencement of the next fiscal year would allow the board to budget properly for it.

Section 95 – Use of Reserve Fund

95(1) Use of Reserve Fund

"(1) No part of a reserve fund shall be used except for the purposes mentioned in ~~subsection 93(2).~~"

Reasoning: Changes to reflect amendments made to section 93 (see above).

Section 97 – Changes Made by Corporation

97(1) Changes made by corporation

- "(1) If the corporation has an obligation to repair the units or common elements after damage or to maintain them and the corporation carries out the obligation using materials that are as reasonably close in quality to the original as is appropriate in accordance with current construction, technology, health, safety and energy, environmental and energy consumption standards, the work shall be deemed not to be an addition, alteration or improvement to the common elements or a change in the assets of the corporation for the purpose of this section."

Reasoning: The added words broaden the ability of the directors to make changes without triggering this section for important and necessary matters for which they should not have to go to the owners. Also, they give further clarity to the determination of what is a major repair and replacement versus what is an addition, alteration or improvement.

97(2) Changes made without notice

- "(2) A corporation may, by resolution of the board and without notice to the owners, make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,
- (b) in the opinion of the board, it is necessary to make the addition, alteration, improvement or change to ensure the health, safety, human rights or security of persons using the property or assets of the corporation or to prevent imminent damage to the property or assets; or
- (c) subject to the regulations made under this Act, the estimated cost, or cost savings, if any, during the current fiscal period or other prescribed period, in any given month or prescribed period if any, of making the addition, alteration, improvement or change is no more than the greater of, \$1,000 and 1-3 per cent of the annual budgeted common expenses for the current fiscal year in any given month to a maximum of \$15,000 or such other prescribed amount."

Reasoning: Section 97(2)(c) allows the board to make minor changes arising in the normal course of its maintenance and repair obligations. A corporation should not have to give notice to owners when it is buying, for example, office equipment costing \$10,000 for its administrative purposes. It is more realistic to allow the board to make expenditures up to a prescribed percentage of that corporation's annual budget, amount such as \$15,000 per year.

Clarification is required because "in any given month" has been used to avoid notice to and/or votes of the owners by breaking expenditures that total more than 1 per cent of the annual budget into a series of payments that are less than 1% in any given month or by having the addition, alteration, improvement or change made in more than one fiscal year.

Any calculation that includes both a percentage of budget and an alternative dollar amount is prone to error. This approach does not consider the size of a condominium and can be skewed in both the very small and the very large condominium corporations. One suggestion is to settle on a percentage of the budget alone, as this will be “relative” to all condominiums. Therefore, an alternative solution would be only the 3% criteria and not the \$15,000, however, in very large corporations the amount could easily exceed \$100,000.

In order to keep everything relative, all calculations for changes should be made on the same basis, total cost, and purpose. Although closing a pool does not have a cost, and actually may result in a significant savings to the corporation, it will have a major impact on the lifestyle of the owners and residents. Therefore, the test or calculation should be on the “change” to the budget cost. This could incorporate both expenses and savings. Items with large savings will likely have lifestyle implications. This is discussed in greater detail in subsection 97(6) below.

An alternative solution is to use a definition that caps the amount at the lesser of 1% of the budget and \$10,000; i.e. no more than the lesser of \$10,000 and 1% of the budget. This would also be consistent with other sections.

97(3) Changes made with notice

"(3)(b) 2. The owners have requisitioned a meeting in accordance with section 46 within 30 days of ~~receiving a notice~~ the Board having given notice under clause (a) but have not voted against the proposed addition, alteration, improvement or change, at the meeting or if quorum was not achieved at the meeting."

Reasoning: This section should indicate what would happen if a meeting was requisitioned but there was no quorum. Would the change be allowed? Was the requisition nullified? As presently written it arguably could mean that a small minority could indefinitely block an otherwise acceptable change by ensuring that no quorum is achieved at a meeting they requisitioned and thus no vote held.

The same problem arises in subsections 59(8) (joint rules) and 97(3) “Changes made on notice” (changes made to common elements by corporation), if no amendment is made.

97(6) Meaning of substantial change

~~"(6) For the purposes of subsection (4), an addition, alteration, improvement or change is substantial if,~~

~~(a) its estimated cost, based on its total cost, regardless of whether part of the cost is incurred before or after the current fiscal year, exceeds the lesser of,~~

~~(i) 10 per cent of the annual budgeted common expenses for the current fiscal year, and~~

~~(ii) the prescribed amount, if any; or~~

~~(b) the board elects to treat it as substantial."~~

Reasoning: The Committee believes that the meaning of “substantial change” is not appropriate, and the definition should be deleted altogether, and the determination of whether the addition, alteration, improvement or change is “substantial” be made by a vote of a majority of the owners (50% +1). The definition of “substantial change” fails to take into consideration many of the factors including:

- (a) the physical impact on the building and/or the unit owners (example: it does not cost much to demolish a recreation centre or other recreational amenity, but this would have a substantial impact upon a large number of owners);
- (b) while the cost of making some alterations may be significant, such costs can often be recaptured over time through savings generated by the corporation for reduced energy costs, reduced maintenance and repair expenses and lower insurance rates (example: conversion of an electrically heated building to gas heat may cost a significant amount of money initially, but those costs are often recaptured within a few years);
- (c) whether or not the alterations have a positive effect on the marketability of the units, thus increasing their value (example: a 25 year old condominium that replaces its old stucco siding with new vinyl siding to update the look thus making the units far more marketable);
- (d) whether or not the alteration may have a substantial, detrimental effect on one or more units (example: the construction of a new amenity or other structure that blocks the view of one or more units);
- (e) a change in use or discontinuing a service previously provided (examples: closing a pool or reducing security).

Reasoning: Not all changes have costs. A number of the examples given above would result in a *savings* to the corporation of an amount that, if such amount was a *cost*, would require notice to and/or voting by owners on the grounds that such amount would exceed the “substantial change” threshold. It is not reasonable to impose the substantial change requirements when dealing with costs accrued by the corporation but not when dealing with savings gained.

If the meaning of “substantial change” is not deleted altogether as discussed above then the Committee recommends that section 97(6) be revised as follows:

ALTERNATE SUGGESTED WORDING

97(6) Meaning of substantial change

- "(6) For the purposes of subsection (4), an addition, alteration, improvement or change is substantial if,
- (a) its estimated total savings or total cost, based on its total cost, regardless of whether part of the cost is incurred before or after the current fiscal year for the 12 month period following the date that the Board made its decision, exceeds the lesser of,
 - (i) 10 per cent of the annual budgeted common expenses for the current fiscal year, and
 - (ii) the prescribed amount, if any; or
 - (b) the board elects to treat it as substantial."

Section 98 - "Changes made by owners"

98 (1) Changes made by owners

- "(1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
- (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
 - (b) the owner and the corporation have entered into an agreement that,

- (i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
 - (ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage or wear and tear, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and
 - (iii) sets out any other matters that the regulations made under this Act require;
- (c) subject to subsection (2), the requirements of section 97 have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation; and
 - (d) the corporation has included a copy of the agreement described in clause (b) in the notice that the corporation is required to send to the owners.

No notice or approval

- (2) Clauses (1) (c) and (d) do not apply if the proposed addition, alteration, improvement or change relates to a part of the common elements of which the owner has exclusive use and if the board is satisfied on the evidence that it may require that the proposed addition, alteration or improvement,
 - (a) will not have an adverse effect on units owned by other owners;
 - (b) will not give rise to any expense to the corporation;
 - (c) will not detract from the appearance of buildings on the property;
 - (d) will not affect the structural integrity of buildings on the property according to a certificate of an engineer if the proposed addition, alteration, improvement or change involves a change to the structure of the buildings; and
 - (e) will not contravene the declaration or any prescribed requirements.

Lien for default under agreement

- (4) The corporation may add the costs, charges, interest and expenses including all reasonable legal costs, resulting from an owner's failure to comply with this section 98 or with an agreement under this section to the common expenses payable for the owner's unit and may specify a time for payment by the owner.

Issue, Solution and Reasoning: In general, this section does not address minor or insignificant changes made by the owner either to the common elements or to the owner's exclusive use common elements. Typically these may not warrant the costs associated with

complying with section 98, which for a standard agreement with no serious negotiations can cost in the range of \$1,000, inclusive of registration costs. For example, installing a light switch outside on the common element wall outside the unit door on the balcony could cost very little and thus does not warrant s. 98 costs of \$1,000. This is driving owners “underground” by making the minor alterations without advising the Board.

The Act should allow a by-law with a generic or “blanket” or standard s. 98 agreement in it. The by-law would then be registered on title and everyone would be covered (and new purchasers would know of it because it would be included in every Status Certificate issued and revealed in every sub search of title. In the agreement there could be a definition of a “standard common element” and/or “standard exclusive common element” (similar in concept to the standard unit definition). Then the Board should have the power to add or subtract from the list.

Subsection 98 (4) as drafted allows the corporation to add to the common expenses of the unit, the costs, charges, interest and expenses resulting from an owner’s failure to comply with a registered s. 98 agreement. But what if the owner has not complied with s. 98 at all, i.e. made an alteration without notifying the corporation or without entering into a s. 98 agreement. This is happening more and more frequently, but since no agreement has been signed the corporation appears to be forced to seek a compliance order under the Act. If before a court order is obtained the owners complies and signs an agreement, then the corporation should not be prevented from collecting all its costs and being able to collect in the same manner for all arrears (i.e. the right to a lien against the unit).

Given a recent decision of the Superior Court of Ontario, this section should also include wording to the effect that changes to Units by owners that affect, or may reasonably be expected to affect, common elements also require notice from the owner to the corporation to determine whether an agreement is appropriate.

INSURANCE

Section 99 – Property Insurance

99(5) Determination of improvements

"(5) For the purpose of this section, the question of what constitutes an improvement to a unit shall be determined by reference to a standard unit if determined pursuant to sub-paragraph (6) for the class of unit to which the unit belongs."

99(6) Standard unit

"(6) A standard unit for the class of unit to which the unit belongs shall be,

(a) the standard unit described in a by-law made under clause 56(1)(h), if the board has made a by-law under that clause;

- (b) the standard unit described in the schedule mentioned in clause 43(5)(h), if the board has not made a by-law under clause 56(1)(h); or

NEW SUBSECTION 99(6)(c):

- (c) if the board has not made a by-law under clause 56(1)(h) and the schedule mentioned in clause 43(5)(h) does not contain a description of a standard unit, then notwithstanding the provisions of subsection (4), the corporation shall be responsible for insurance with respect to damage to improvements made to a unit."

Reasoning: It is not clear if the Act currently provides coverage for the circumstance where no by-law has been passed under clause 56(1)(h) and there is no description of a standard unit in the schedule mentioned in clause 43(5)(h). This has caused confusion and disputes. Therefore, the amendment clarifies that in such circumstance, the corporation shall be responsible for insuring improvements made to a unit.

Section 100 – Proceeds

100(3) Payment from Ontario New Home Warranties Plan

- "(3) A corporation that receives a payment out of the guarantee fund under subsection 14(3) or (4) of the *Ontario New Home Warranties Plan Act* for remedial work to the common elements shall promptly use the payment for ~~the~~ remedial work to the extent necessary, unless,
- (a) the owners have voted to terminate because of substantial damage in accordance with section 123; or
- (b) the corporation has already completed and paid for the remedial work."

Reasoning: Present wording does not deal with a situation in which remedial work is partially completed and paid for or where remedial work can be carried out for less than the amount awarded.

Section 105 – Deductible

105(2) Owner's responsibility

- "(2) If an owner, ~~or a lessee of an owner or a person residing in the owner's unit with the permission or knowledge of the owner~~ or other resident, occupant or guest of an owner's unit, through an act or omission causes damage to the ~~owner's unit~~ property, the amount that is the lesser of the cost of repairing the damage and the

deductible limit of the insurance policy obtained by the corporation shall be added to the common expenses payable for the owner's unit."

Reasoning: This is an important issue and a major gap in the Act. As presently worded, the corporation's right to collect the deductible from an owner is limited to situations where damage is limited to that owner's unit and not damages to the common elements or to other units. For example, when water damage occurs in one unit, several units below that are also usually damaged. Therefore, if the damage is caused by an act or omission (as opposed to an Act of God), the corporation should be allowed to collect the deductible from the offending owner. Also, residents and guests often damage the common elements or other units as well. It is not clear from the wording of subsection 105(4) if a by-law can deal with this issue, therefore clarification is needed.

NEW SUBSECTION 105(3) Responsibility to repair

"(3) Notwithstanding the owner's obligation to repair, to the extent that a loss is required to be insured by the corporation under this Act, the repair will be carried out by the corporation including repairs for which the cost or part of the cost is within a deductible under the insurance policy."

Reasoning: It is necessary to clarify not only that repair costs within the deductible are a common expense payable by the responsible owner, but that the repairs are to be carried out by the corporation.

Re-number the existing subsection 105(3) as subsection 105(4).

Section 107 – Amendments with Owners' Consent

107(2) Conditions

- "(2) The corporation may amend the declaration or the description if,
- (b) the declarant has consented to the proposed amendment in writing if,
 - (i) at the time the board approved the proposed amendment, the declarant had ~~not~~ transferred less than 95% of all of the units except for the part of the property described in subsections 22(5) or 49(3) and
 - (ii) less than ~~three~~ two years have elapsed from the later of the date of registration of the declaration and description and the date that the declarant first entered into an agreement of purchase and sale for a unit in the corporation;"

Reasoning: A declarant owning one unit should not be able to block a declaration amendment for three years, particularly since a declarant owning 11% of the units, without any supporting

votes, can block a declaration amendment requiring 90% approval of the unit owners. The present provision enables a declarant owning a parking or locker unit to block a declaration amendment; therefore, we have added subsection 49(3) as an exception.

Section 109 – Court Order

109(3) Grounds for order

"(3) The court may make an order to amend the declaration or description if satisfied that the amendment is necessary or desirable to correct an error, ~~or~~ inconsistency or significant inequity 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."

Reasoning: The court should be entitled to amend the declaration or description arising from significant inequity that appears therein or that arises out of the carrying out of its intent and purpose.

Section 112 – Other Agreements

NEW SUBSECTION 112(6) Termination provisions in agreement

"(5) Notwithstanding the terms of an agreement mentioned in subsection (2), the costs payable by the corporation upon the termination of an agreement pursuant to this section 112 shall be limited to the amount of the capital costs of the provision of the goods, services or facilities provided to the corporation pursuant to the agreement by the person with whom the corporation entered into the agreement."

Reasoning: Recent court cases have brought into question the very purpose of s. 112. Since the Act is consumer protection legislation, s. 112 was intended as a protection mechanism for new corporations where the declarant has saddled it with an overly onerous or even imprudent agreement. However, some parties have been inserting in their agreements extremely onerous termination clauses that result in the Board effectively being unable to terminate it.

In addition, sometimes the declarant does not give sufficient or adequate disclosure of the terms of the agreement either in the original disclosure statement or in the declaration. However, there appears to be a tendency of the courts to override the consumer protection nature of the Act and not allow the termination of the agreement or underlying obligation if it has been disclosed in the declaration, even if only to a limited degree.

Consequently, s. 112 has, to a certain degree, been made obsolete. This is an important consumer right that should be protected.

Section 113 – Mutual Use Agreements

113(3) Court order

- "(3) The court may make an order amending or terminating the agreement or any of its provisions or may make any other order that the court deems necessary if it is satisfied that,
- (a) the disclosure statement did not clearly and adequately disclose the provisions of the agreement; ~~and~~ or
 - (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."

Reasoning: The court should be permitted to make an order if it determines that either of the situations specified in sub-paragraph (a) or sub-paragraph (b) exist and not both.

Section 115 – Corporation's Money

115(5) Definition, 115(6) Investment, 115(7) Same, reserve fund accounts

The term "eligible security" or "eligible securities" should be changed throughout to "eligible investment instrument" or "eligible investment instruments" respectively.

Reasoning: The term "securities" has a restrictive meaning which is not consistent with the investments permitted by these provisions.

Section 119 – Compliance with Act

119(2) Responsibility for occupier

- "(2) An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules. Compliance with this subsection by an owner shall not prevent a court from making an order against an owner pursuant to subsection 134(3)."

Reasoning: An owner must be responsible for all defaults and breaches by his/her tenants, residents and guests, and efforts by the owner to seek compliance should not be a defence to the corporation seeking compliance by the owner. The corporation must be able to recoup its costs in enforcing compliance.

**PART VII
AMALGAMATION**

Section 120 – Amalgamation

120(1) Amalgamation

- "(1) Subject to the regulations made under this Act, two or more leasehold condominium corporations or two or more freehold condominium corporations ~~of the same type~~ may amalgamate by registering a declaration and description amalgamating the corporation if,

Reasoning: The phrase "of the same type" should be deleted as it creates difficulty with interpreting and applying this section. There are many phased developments which include a mix of styles of development (example: low-rise and townhouses). There should be no reason why such "mixed" developments cannot amalgamate if they choose to do so. There are also phased developments that include non-residential condominiums, such as condominiums comprised of an underground parking garage containing parking units that are used by both an adjoining residential and commercial condominium development.

- "(a) the board of each amalgamating corporation has ~~held a meeting~~ passed a by-law authorizing the amalgamation, subject to section 56, in accordance with subsections (2) and (3);
- (b) the owners of at least 90 per cent of the units, as of the date of the meeting held in accordance with subsections (2) and (3), of each corporation ~~as of the date of that corporation's meeting~~ have, within ~~90 days~~ one year of the meeting, consented in writing to the registration of the declaration and description; and"

120(2) Meeting of owners

- "(2) The board of each amalgamating corporation shall call a meeting of owners for the purpose of considering a declaration and description amalgamating the corporations and approving the by-law authorizing the amalgamation in accordance with section 56.

120(3) Notice of meeting

- "(3) The board shall give the owners a notice of the meeting which shall include,
- (a) a copy of the proposed by-law authorizing the amalgamation, a copy of the proposed declaration and description of the amalgamated corporation and a copy of the proposed budget for the corporation's first year of operation;"

NEW SUBSECTION 120(3)(f):

"(f) a statement as to the status of any outstanding construction deficiency claims against the declarant or any person, or under the *Ontario New Home Warranties Plan Act* for each corporation."

Reasoning: Imposing a requirement to obtain the written consent of owners within 90 days of the meeting of the owners of each corporation is impractical. It can often take months if not longer to accumulate all of the written consents from owners, especially in a large corporation where there are hundreds of units with multiple owners and absentee owners. These problems are multiplied when dealing with many phased condominiums that wish to amalgamate. The owners from whom consent must be obtained should be those who were owners at the time the vote was held in order to avoid the necessity of chasing new owners throughout the following year.

Purchasers or mortgagees who acquire an interest in the corporation subsequent to the decision to amalgamate should be protected by requiring the corporations to pass a by-law authorizing the amalgamation. Notice would then be effected by both registration of the by-law on title and its inclusion in the status certificate required under section 76.

The corporations and the owners should be made aware of any current construction deficiencies that may exist as the newly amalgamated corporation might become responsible for rectifying them.

NEW SUBSECTION 120(4) Amendments:

"(4) The owners of each amalgamating corporation may, during the meeting, amend the proposed declaration, description, by-laws or rules of the amalgamated corporation."

Reasoning: There is no process by which the proposed declaration, description, by-laws or rules of the amalgamated corporation as presented at the meeting can be amended. This poses a problem if amendments are proposed that would satisfy the concerns of the owners but which currently are not possible without starting the process over.

NEW SUBSECTION 120(5) Registration of by-laws:

"(5) The proposed by-laws mentioned in clause 120(3)(b), as such by-laws may be amended pursuant to subsection 120(4), shall be registered following the registration of the declaration and description of the amalgamated corporation, provided that such by-laws are confirmed by the owners of a majority of the units of each amalgamating corporation, with or without amendment;"

Reasoning: The bylaws should be registered as part of the registration process of the amalgamation at the same time that the declaration and description for the amalgamated corporation are registered.

Re-number the existing subsections 120(4) and 120(5) as subsections 120(6) and 120(7), respectively.

Section 121 – Effect of Registration

121(1) Effect of registration

- "(1) On registration of a declaration and description for an amalgamated corporation,
- (e) The directors of the amalgamating president, secretary and treasurer (or in the absence of a treasurer, the vice-president) of each of the amalgamating corporations constitute the first directors of the amalgamated corporation."

Reasoning: The interim board (see subsection (3)) should not include all directors of each corporation as this could result in an unworkable number of board members.

PART VIII TERMINATION

Section 124 – Termination Upon Sale of Property

124(4) Proceeds

- "(4) Subject to subsection (5), the owners at the time of the registration of the transfer transferring all of the property shall share the net proceeds of the sale in the same proportions as their common interests. Subject to subsection (5), the net proceeds of the sale of part of the property shall become an asset of the corporation."

Reasoning: If only a part of the common elements is transferred, which is more likely to take place, the sale proceeds, if any, should remain an asset of the corporation so that it can be reinvested in the corporate reserves and/or used for other corporate purposes. This would reduce the possibility of owners attempting to sell parts of the common elements for personal gain as opposed to a sale which is for the benefit of the corporation as a whole.

Section 125 – Right of Dissenters

125(1) - (7) Rights of Dissenters

~~"126(1) A corporation that has made a sale under section 125 and every owner in the corporation shall be deemed to have made an agreement that an owner who has dissented on the vote authorizing the sale may, within 30 days of the vote, submit to mediation a dispute over the fair market value of the property or the part of the common elements that~~

has been sold, determined as of the time of the sale.

- (2) — ~~If an owner submits a dispute to mediation, section 133 applies to the dispute with necessary modifications as if it were a disagreement under that section.~~
- (3) — ~~An owner who submits a dispute to mediation shall give the corporation notice of intention within 10 days after the vote authorizing the sale.~~
- (4) — ~~An owner who serves a notice of intention is entitled to receive from the proceeds of the sale the amount the owner would have received if the sale price had been the fair market value as determined by the arbitration.~~
- (5) — ~~The corporation shall pay to each of the owners who served a notice of intention, the deficiency in the amount to which the owner is entitled if the proceeds of the sale are inadequate to pay the amount.~~
- (6) — ~~The owners other than those who dissented on the vote authorizing the sale are liable for the amount of the deficiency payments determined by the proportions of their common interests.~~
- (7) — ~~The corporation shall add the amount of the liability of each of the owners who voted in favour of the sale to the common expenses appurtenant to the units of those owners and may specify a time for payment by each of those owners."~~

Reasoning: It is the Committee's view that this section should be deleted. See our notes above concerning the sale of part of the property or part of the common elements, requiring that such proceeds are to become an asset of the corporation. If an owner is directly affected because he or she may lose part of the common elements designated for his/her exclusive use, if the individual owner feels that the sale is imprudent, he or she may employ the oppression remedy under the Act. In any event, if part of the common elements are sold, this requires consent to the severance under the *Planning Act*. In practical terms, mediation and arbitration are not a free service, and a disputed issue with an individual unit owner could result in thousands of dollars in costs to the corporation which may in fact exceed the value of that portion of the property or the common elements being sold.

Section 126 – Expropriation

126(2) Proceeds

- "(2) Subject to subsection (3), if part of the common elements is expropriated under the *Expropriations Act*, ~~the owners shall share the proceeds in the same proportions as their common interest~~ the proceeds shall be an asset of the corporation."

Reasoning: If only a part of the common elements is transferred, which is the more likely event,

the proceeds from the expropriation, if any, should remain an asset of the corporation so that they can be reinvested in the corporate reserves and/or used for other corporate purposes. Please see our notes above respecting sale of the property.

Section 127 – Effect of Registration

127(1) Effect of registration

- "(1) Upon registration of a notice of termination under section 122 or 123,
- (b) The owners are tenants in common of the land and interests appurtenant to the land described in the description in the same proportions as their common interests; Such owners shall retain the right to reside within their unit and shall continue to be responsible for contributing their proportionate share for the upkeep and maintenance of the common areas in the same proportion as their former common interest."

Reasoning: Upon termination of the corporation pursuant to s. 122 of the Act, confusion and difficulties would arise as to what rights unit owners would have to continue to reside in their unit. Furthermore, there would be no legal obligation existing at termination to continue to contribute for the utilities and the upkeep of the common areas including internal road, recreational facilities, landscaped areas and other amenities. In the event of termination by reason of sale of all or part of the property, the owners would no longer have any interest or obligation to maintain it. The same would apply for termination by reason of expropriation. Termination by court order allows the judge to be able to impose such conditions as he/she feels are necessary which, hopefully, would deal with the continuing obligations for occupancy and maintenance of common areas.

- “(e) all other claims or agreements against the property or the corporation that were created upon or after the registration of the declaration and description except for registered easements or rights of way that are for the benefit of persons other than the owners or the corporation unless such persons agree to surrender them, and any encumbrance registered against any unit or the property that made this Act applicable to the property are extinguished."

Reasoning: There may be easements, rights of way or obligations contained in the declaration that should survive termination, such as easements for access to adjoining properties, or financial obligations for shared facilities within a phased development, unless the other parties to the agreements agree to surrender them. Any agreements that are entered into by the corporation should also terminate at the time of termination of the corporation, such as agreements for the provision of telecommunication services. The mortgagees of individual units should retain their charge against the land until paid out.

127(2) Same, sale or expropriation

- "(2) Upon the registration of a ~~deed~~ transfer and a certificate under section 124 or upon expropriation under section 126,
- (c) claims or agreements against the property or the corporation being sold or expropriated, as the case may be, that were created upon or after the registration of the declaration and description except for registered easements or rights of way that are for the benefit of persons other than the owners of the corporation unless such persons agree to surrender them and any encumbrance registered against any unit or the property that made this Act applicable to that property, are extinguished."

Reasoning: Same reasoning as for 127(1)(e), see above.

PART IX ENFORCEMENT

Section 130 – Inspector

NEW SUBSECTION 130(6):

- "(6) The judge who issued the order appointing the inspector may, upon the request of the applicant for the order, make a further order directing the declarant, the corporation or a person mentioned in subsection 130(1) to correct any deficiencies revealed in the inspector's report and impose any other terms and conditions that the court considers just."

Reasoning: If the inspector's report indicates deficiencies (for example, in the way that Trust funds are being held or invested) the applicant for the order should be able to require that those deficiencies be corrected and, if necessary, that they be corrected by an order from the judge who originally granted the order appointing the inspector. This will avoid the necessity of starting yet another application to enforce compliance.

Section 131 – Administrator

131(2) Grounds for order

- "(2) The court may make the order if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interests of the owners or the corporation and that there may be significant harm done to the owners or the corporation if such an order is not made."

Reasoning: As the courts to date have decided, this remedy should be available only in the most extreme circumstances since it does, in effect, remove all or most of the authority that the board of directors is given under this Act to administer the affairs of the corporation which is a fundamental component of the structure of a corporation (i.e. takes away owners' democratic right to govern themselves). Accordingly, a judge should only be permitted to exercise this remedy where the judge is satisfied that some real damage will occur to the owners or the corporation if the order is not made; for example, where members of a declarant board of directors are failing to collect common expenses in respect of unsold units.

Section 132 – Mediation and Arbitration

132(4) Disagreements between corporation and owners

"(4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the Act, declaration, by-laws or rules, or joint by-laws or joint rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively, except with respect to enforcing compliance pursuant to Section 134."

Reasoning: Mediation should apply to compliance with provisions in the Act as well as joint by-laws and rules.

The condominium industry has now had 13 years to work with the compliance and alternative dispute resolution mechanism set out in the Act. While it is a big improvement over the previous statute (which was silent on ADR), the present mediation and arbitration mechanisms are not working as intended, particularly in cases of clear and unambiguous breaches (e.g. a restriction in the declaration that no dogs over 25 lbs are allowed, yet a resident has a 80 lb dog). Even though the breach is clear, some owners have successfully argued that the corporation must use the mediation and arbitration process even though a direct court application for compliance would be faster and less costly.

The Committee feels very strongly that the ability of a party in default to (effectively) prevent the other party from proceeding summarily to obtain an order enforcing compliance by the party pursuant to section 134, would be counterproductive and has been used in cases to delay or prevent appropriate enforcement of such party's obligations under the Act, declaration, by-law or rules. There are many instances where immediate action must be taken to enforce compliance in order to stop ongoing damage to the property or assets of the corporation or the unit owners, put an end to unconscionable behaviour, or remove a danger or hazard to the residents, yet based on the present wording in the section, and the courts strict interpretation of it, the parties become obligated to go via mediation and arbitration.

132(5) Duty of mediator

"(5) A mediator appointed under clause (1) (a) shall confer with the parties and endeavour to ~~obtain a settlement~~ assist them in reaching a settlement with respect to the disagreement submitted to mediation."

Reasoning: A mediator, by definition, does not determine or obtain a settlement in the course of mediation. The mediator's role is to facilitate a settlement being reached between the parties. It is the parties themselves who make the settlement.

132(7) Record of settlement

"(7) ~~Upon obtaining a settlement between the parties~~ the parties reaching a settlement with respect to the disagreement submitted to mediation, ~~the mediator shall make a written record of the settlement which shall form part of the agreement or matter that was the subject of the mediation,~~ a written copy of the terms of the settlement shall be made and executed by the parties. Each party shall be entitled to an original copy of the settlement agreement."

Reasoning: It is not the responsibility of the mediator to draft the settlement agreement between the parties. This is normally done either between the parties themselves or by their solicitors. Each party should be entitled to keep an original signed copy of the settlement agreement so that if the agreement is breached, steps can be taken to enforce it through the courts.

Section 133 – False, Misleading Statements

133(2) Right to damages

"(2) A corporation or an owner may make an application to the ~~Ontario Court (General Division)~~ Superior Court of Justice to recover damages and obtain such other relief as the court may determine is appropriate in the circumstances, from a declarant for any loss sustained as a result of relying on a statement or on information that the declarant is required to provide under this Act if the statement or information,"

Reasoning: Monetary damages may not be the only relief that is suitable to compensate a corporation or an owner for a loss suffered as a result of a declarant's failure to abide by the Act; for example, an order directing the declarant to complete or provide an amenity that was promised but not provided.

Section 134 – Compliance Order

134(1) Compliance order

"(1) ~~Subject to subsection (2), an~~ An owner, an occupier of a proposed unit, a corporation or person subject to a joint by-law or joint rule, a declarant, a lesser of a leasehold condominium corporation or a mortgagee of a unit may make an application to the ~~Ontario Court (General Division)~~ Superior Court of Justice for

an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement."

Reasoning: Please see our notes above re: 132(4) and re: 134(2) below. The Committee feels strongly that after 13 years of the Act being in place, that the pre-condition for mediation and arbitration should be removed.

Where corporations have entered into a joint by-law or a joint rule, either corporation (or owners of these corporations) should be entitled to apply for an order of compliance in respect of a breach of those joint by-laws or rules to avoid the possibility that enforcement may be avoided by reason of one corporation's reluctance or refusal to enforce compliance.

134(2) Precondition for application

~~"(2) — If the mediation and arbitration processes described in section 133 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes."~~

Reasoning: The Committee strongly recommends that this provision be deleted. The corporation or any other person who has a right to apply for a compliance order must be given the opportunity to make an immediate application when it is warranted. Please see our notes above regarding 132(4) above.

NEW SUBSECTION 134(4)(c): Order terminating lease

"(4)

(c) the court is satisfied that the lessee is carrying on in or upon the property, or unit, an illegal act, trade, business, occupancy or calling, or that the safety or other lawful right, privilege or interest of any other occupant of the property or the corporation is, or has been, seriously impaired, threatened or thwarted by an act or omission of the lessee or a person permitted onto the property or unit by the lessee where such act or omission occurs on the property or unit."

Reasoning: Under the *Residential Tenancies Act*, 2006, a landlord has the right to terminate a tenancy early on the basis of the foregoing grounds. Under the Act, an owner's right to continue to reside within a unit could be terminated under the general relief available in subsection 131(3)(c) (there have been several recorded instances of this occurring in Ontario.) A judge would be precluded from ordering the termination of a tenancy upon a first application pursuant to the terms of subsection 4(a). This could result in further injury or violence occurring before a judge would be in a position to order the termination of the tenancy. The government should have faith in its judicial system that it would exercise this right sparingly and only where the circumstance clearly warrants it.

134(5) Addition to common expenses

"(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining and enforcing the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of a unit."

Reasoning: Additional costs are often incurred by the corporation to enforce the order once it has been obtained and should, therefore, be recoverable by the corporation and not borne by the innocent owners. There have been many cases where the defaulting owner argued that enforcement or collection costs were not covered by this subsection.

In addition and very importantly, consideration should be given to an amendment that will allow a corporation to collect all its reasonable legal costs of enforcing the Act, declaration and rules even if a court order is ultimately not obtained. For example, if an owner is in breach of the quiet enjoyment provision of the declaration and the corporation commences the appropriate court application for compliance and subsequently the owner voluntarily complies, then the court application becomes academic. But even though the application was necessary and properly commenced, since no court order was obtained then arguably the corporation cannot collect all its reasonable costs and thus, the innocent owners have to pay for the wrongful acts of the defaulting owner. This is not fair to these innocent owners.

Section 135 – Oppression Remedy

NEW SUBSECTION 135(4) Oppression remedy

"(4) This remedy is not available where the conduct complained of is the same or substantially similar to a matter that has already been determined, or is the process of being determined pursuant to s.132 or s.134"

Reasoning: To avoid a duplicity of actions and legal proceedings, the oppression remedy should not be made available to persons where the problem complained of, or a problem of substantially the same nature, has already been determined pursuant to section 132 or section 134.

Section 137 – Offences

137(1) Offences

“(1) Every corporation under this Act or any other Act and every other person who knowingly contravenes subsection 43 (1), (3), (4), (5), (7), 55 (1) ~~or~~ 72 (1) or 79 (1), section 81, subsection 115 (1), (2), (3), (4) or (9), section 118, subsection 133 (1), section 143, subsection 147 (1), (3), ~~(5)~~, 152 (1), (2) or 161 (2) or section 169 is guilty of an offence and on conviction is liable to a fine of,”

Reasoning: Subsections 79(1) and 147(5) should be added.

**PART X
COMMON ELEMENTS CONDOMINIUM CORPORATIONS**

Section 138 – Creation

138(3) Requirements for registration

"(3) A declaration and description for a common elements condominium corporation shall not be registered unless the registration would create a freehold condominium corporation ~~that is not a vacant land condominium corporation, or except as provided in the regulations made under this Act, a phased condominium corporation.~~"

Reasoning: The Committee does not see any reason why a common elements condominium corporation might not become an integral part of a vacant land condominium corporation in a phased project. For example, in the case of open park space and environmentally sensitive areas. In the same manner, for example, in a phased condominium corporation project, it may not be prudent both for the declarant and for the unit owners in, say, 3 of the 9 proposed phases, to construct the recreation/community centre until at least 6 of the nine phases have been completed in order to support its ongoing operations, and the disclosure statement for each phase would make provision for this eventuality. The question then, is why should a common elements condominium corporation consisting of the recreation/community centre (lands) not be permitted to be created as a common elements condominium corporation within (and adjacent to) an overall phased condominium corporation project? This would ensure, for example, from an ONHWP perspective, that the recreation/community centre forms part of the common elements of a phased condominium project rather than remaining a separate parcel of real property that may not be entitled to ONHWP coverage. This same rationale applies to a vacant land condominium corporation. Accordingly, the existing provision appears unduly restrictive, as presently drafted.

Section 139 – Owners' Land

139(7) Priority of lien

~~"(7) Despite section 86, the lien does not have priority over an encumbrance registered against an owner's parcel of land before the common interest of the owner attached to it unless the encumbrancer agrees in writing otherwise."~~

Reasoning: It is recommended that this subsection be removed in its entirety as we believe that it is confusing and unnecessary. Liens should always take priority.

Section 144 – Repair After Damage and Insurance

144(3) Insurance

Recommendation: The Committee believes that it is important that common elements corporations must be responsible for obtaining appropriate insurance coverage and thus should not be exempted from sections 99 to 105 of the Act.

Reasoning: As presently drafted, this subsection implies that sections 99 to 105, which deal, generally, with insurance for damage to the units and common elements, are deemed not to apply to a common elements condominium corporation. Although this subsection refers to that portion of the foregoing sections of the Act that apply to a “unit”, it is difficult and confusing for the reader to separate insurance requirements for the unit and for the common elements when same are not dealt with separately in Sections 99 to 106.

Accordingly, we believe it is a mistake not to make the common elements condominium corporation directly responsible for obtaining appropriate insurance coverage for buildings and structures within the common elements, and s.144(3) should be re-written to ensure that sections 99 to 105 of the Act, with appropriate modifications, apply to common element condominium corporations.

PART XI PHASED CONDOMINIUM CORPORATIONS

Section 147 – Disclosure Statement

147(1)(c) Disclosure Statement

- “(c) a statement that sets out the projected year of registration of the amendments to the declaration and description required for creating each phase that the declarant intends to create after the creation of the unit or proposed unit;”

This provision requiring a disclosure statement for a proposed unit in a phased condominium corporation to contain a statement that sets out the projected year of registration of the amendments to the declaration and description required for creating each subsequent phase is impractical. The restrictive nature of this provision simply underscores its complete lack of utility for the development community who to date are not using this Part of the Act, and are continuing to create phased condominium corporations employing reciprocal easement and cost sharing agreements.

Section 148 – Status Certificate

148 Status Certificate

The requirement of providing a copy of the disclosure statement in a status certificate in a phased condominium corporation appears to continue indefinitely. Accordingly, once all of the phases have been included, and the declarant does not own any unsold units in the condominium plan, there is no reason for continuing to provide an outdated disclosure statement, and this section should be amended to take this into account.

Section 149 – Corporation’s Remedy

149(1) Corporation's remedy

"(1) The declarant shall not register the amendments to the declaration and description required for creating a phase until at least ~~60 days~~ 30 days after delivery to the corporation,"

Reasoning: In the context of registering a subsequent phase, the declarant should not have to wait a full 2 months in order to register the phase, particularly in circumstances where a recent sale has occurred with a purchaser in the previous phase. A 60 day delay, given other provisions in the Act that are intended to accelerate the ability of the declarant to organize a newly registered condominium corporation and to complete unit sales quickly (which is in the interests of both the declarant and the purchasers), delays registration of the second phase which is costly to the declarant, and of no material benefit to owners in an existing phase or to a purchaser of a unit in the subsequent phase. Accordingly, the time frame for review by the (first phase) corporation should be reduced to a maximum of not more than 30 days.

149(5) Restriction on declarant

"(5) If the corporation makes an application for an injunction under subsection (2), the declarant is not entitled to register a declaration and description to create a corporation on the land to be included in the phase, instead of registering the amendments required for creating the phase, unless ~~120~~ 30 days have passed after the court has made the final disposition of the application for the injunction."

Reasoning: Again, the time frame for review is too long. The corporation need only apply to the court for injunctive relief if it has reason to believe that the proposed amendment to the declaration and description “detrimentally affects the corporation”. In the context of registering a subsequent phase, given that the declarant cannot proceed to register amendments to the declaration and description until 120 days have passed after the court has disposed of the corporation’s application for the injunction, and irrespective of whether or not the corporation succeeds, it is the Committee’s view that no knowledgeable developer will willingly subject itself to such an uncertain regime.

**PART XII
VACANT LAND CONDOMINIUM CORPORATIONS**

Section 155 – Creation

155(3) Requirements for registration

This section appears to be unduly restrictive. Why, for example, in a retirement (mobile) home setting, should the declarant be restricted from creating a vacant land condominium corporation on leasehold land? The Committee suggests that these two concepts of legal tenure should not be mutually exclusive.

**PART XIII
LEASEHOLD CONDOMINIUM CORPORATIONS**

Section 165 – Leasehold Interest of Owners

165(3) Term before renewal

~~"(3) The term of the leasehold interests before a renewal under section 174 shall be not less than 40 years less a day and not more than 99 years as specified in the declaration."~~

Reasoning: The Committee recommends removal of this subsection but, if retained, to eliminate the references to “40 years less a day” and to “99 years” since renewal can be done for any term. We do not understand why the Ministry would specify a 99 year maximum term of the ground lease. The Harbour Commission Lands, for example, are currently held under a 999 year ground lease, as is the original Hazelton Lanes project. If retained, we suggested the following amendments:

~~"(3) The term of the leasehold interests before a renewal under section 174 shall be not less than 40 years less a day and not more than 99 years as specified in the declaration."~~

Section 170 – Status Certificates

170 Status certificate

Refer to s. 76 of the Act which, in the context of leasehold condominium corporations, should include a copy of the lease renewal in a status certificate.

Section 174 – Expiration of Leasehold Interests

174(1) Expiration of leasehold interests

"(1) At least ~~five~~ three years before the end of the term of the leasehold interest in the units in a leasehold condominium corporation, the lesser shall give the corporation."

Reasoning: The Committee is of the view that a notice period of 5 years prior to the end of the original term of the lease will, generally, be too early for the lesser to deal with, and that 3 years is a more suitable notice period.

174(4) Failure to give notice

"(4) If the lesser does not give the required notice, the lesser shall be deemed to have given the notice required to renew the leasehold interest for ~~40~~ 5 years subject to the same provisions that govern the leasehold interests before the renewal and the corporation shall send a notice of that fact to the owners."

Reasoning: 10 years is too long a period of time to saddle the lesser with the level of rental income set forth in the original lease unless, of course, there happens to be a provision in the original lease for a new rent formula. 5 years is more acceptable and provides to both parties an incentive to negotiate and settle upon the terms of the renewal lease.

174(6) Notice of termination

"(6) The corporation shall give at least twelve months' notice to the lesser if, under subsection (5), the owners vote against the renewal."

Reasoning: There should be a time period required by the corporation to give reasonable notice to the lesser that the owners have voted against the renewal.

Section 175 – Effect of Termination or Expiration

175(1) Notice of termination or expiration

The Committee recommends that the leasehold interest should not terminate upon the date of registration of the notice but rather at the end of the term of the leasehold interest as stipulated in the declaration.

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