



Sections 97 and 98

Alterations to the Common Elements and Assets

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Section 97

- Deals with changes made by the Corporation to the common elements, assets and/or services that it manages and provides to unit owners
- Categories of changes are described in terms of cost and may require a level of unit owner approval
- Remember you cannot just add or take away assets or services. There is a process!

Section 98

- Deals with changes made to the common elements by, and usually for the benefit of, a particular unit owner.

Ways to figure it out:

- Look at the Reserve Fund
- Look at the Unit Boundaries (Everything outside of the unit boundaries is a common element)
- Read Schedule “C” of the Declaration
- Read the Legal Description

- Is it an asset that the Condominium has authority to own?
- Is it a service the Corporation has to provide?

Changes to the Common Elements

- i. Any changes made by the Corporation that are covered by the reserve fund
- ii. Changes can be made either by the Corporation or by the unit owners
- iii. Changes to the Corporation can be to:
 - a) The common elements (exclusive and non-exclusive);
 - b) The assets of the Corporation; or
 - c) A service provided by the Corporation.



Why do changes to the common elements occur?

- Repair and maintenance
- Capital asset replacement
- Additions to space such as decks, car charging stations, hot tubs, gazebos, tiled stairways, interlocking walkways, and sheds.

Change vs. Maintenance

- The Board must first ensure that what they are considering is truly a “change” and not simply a repair and maintenance item
- Subsection 97(1) provides that where the Corporation:
 - has a duty to repair the common elements and/or units after damage or to maintain them;
 - uses materials reasonable close in quality to the original in accordance with current construction standards; then
 - The work is deemed NOT to be a change to the common elements or assets for the purposes of Section 97.
 - *All other changes, alterations, additions or improvements to the common elements, changes in the assets of the Corporation or changes to services that the Corporation provides to unit owners are changes to which Section 97 applies.*

What is a change?

- A change is a “modification” to the common elements and assets

What constitutes a *Modification*?

- Subject to Sections 93, 94 and 95 (Reserve Fund, Reserve Fund Study and Use Of)...
 - An addition, alteration or improvement to the common elements (not Section 97);
 - A change in the assets of the Corporation;
 - A change in services that the Corporation provides;
 - Any combination or series of the above (as determined by the Regulations); or
 - As prescribed by the Regulations
 - Addition of Assets

Section 97 allows for changes to the assets/common elements by the Corporation

The Board must ensure it complies with Section 97 of the Act. If not, they could end up attracting legal risk by ignoring the requirements of the Act and making alterations, without authority, to the Corporation's common elements, assets or services.

There is a new standard that Boards will have to care about once in force: Does the change have a prejudicial or other negative impact on the unit owners and/or the value of the property?

Three Categories of Changes Contemplated

1. Capital Asset Replacement (No Unit Owner participation and base or Reserve Fund.)
2. Without notice to owners (i.e. Board discretion)
3. With notice
4. Substantial change

1. WITHOUT Notice

- The Board, by resolution, may make a modification without notice if:
 - a) necessary to comply with an agreement for mutual use or cost-sharing of facilities or services to which the condominium is a party;
 - b) necessary to comply with any requirement imposed by any general or special Act or Regulation;
 - For example, a fire code retrofit or automatic door openers to accommodate the physically challenged
 - c) necessary (in the opinion of the Board) for the safety or security of persons using the property or assets of the Corporation or to prevent imminent damage to the property or assets; or
 - For example, extra lighting and/or security cameras
 - d) the estimated cost, in any given month or prescribed period, is no more than the greater of \$1,000 and 1% of the annual budgeted common expenses for the current fiscal year.

THINK AHEAD TIP: IF THE ISSUE MAY LEAD TO CONFLICT – HOLD A MEETING!

2. WITH Notice

- This is for changes that do not fall under Subsection 97(2) and for which there is a cost.
- The Corporation may make a modification if:
 - a) the Corporation has sent a notice to the owners that meets the prescribed components; and
 - b) one of the following conditions has been met:
 - i. The owners have not requisitioned a meeting in accordance with Section 46; or
 - ii. The owners have requisitioned a meeting, but have not voted against the proposed change.
- The threshold at the requisition meeting is a simple majority of votes cast.

3. Substantial Change

- The Corporation cannot make a substantial change in the assets of the Corporation or a service that the Corporation provides unless the owners who own at least 66 and 2/3 per cent of the units vote in favour of approving it.
- A substantial change is:
 - a change where the total estimated cost is greater than 10% of the annual budgeted common expenses for the current fiscal year; or
 - a change that the Board elects to treat as substantial (*this is less common*).
- A meeting must be called and the Notice must include sufficient information describing the proposed change and how the Corporation intends to pay for it.

Section 98 allows for changes to be made to the common elements by unit owners

Such changes will be permitted only if:

1. The unit owner(s) receive Board approval via resolution;
2. The unit owner(s) and the corporation have entered into an agreement (commonly referred to as a “Section 98 Agreement”), which does the following:
 - i. Allocates costs;
 - ii. Sets out duties; and
 - iii. Is registered on title
3. The requirements of Section 97 have been met;
 - This means, where the change is to the non-exclusive common elements, Section 97 compliance must be examined.
 - The Corporation will need to go through the tests of without notice, with notice, or substantial change to determine if the change shall be subject to a vote if one is requisitioned or it is deemed a substantial change.
4. Notice has been provided to the owners; and
5. The “Section 98 Agreement” is registered on title.

Section 98 Agreements

- Any owner who obtained necessary approval to make a change to the common elements is required to enter into a “Section 98 Agreement” with the Corporation.
- A Section 98 Agreement must be registered on title.
- The purpose of the Section 98 Agreement is to protect the Corporation and all other unit owners from any related costs, responsibility, duties, and risks associated with the proposed change.
- A Section 98 Agreement should be drafted by the Corporation’s legal counsel to manage legal risks.
- Once registered on title, the Section 98 Agreement binds the owner’s unit and is enforceable against the owner’s successors and assigns (i.e. future owners).
- In some circumstances, a unit owner may wish to make several changes and/or multiple unit owners may wish to make similar changes. In this case, a **bulk Section 98 Agreement** should be registered on title to all units at the Corporation. This allows unit owners to collectively share the costs of preparing and registering it on title to their units and therefore provides significant savings to each owner.

Dangers of not complying with Section 98:

- Potential court action
- Section 98 changes are binding on future owners
- Status Certificate – once registered on title, the Section 98 Agreement must be referred to in the Status Certificate of the unit
- Removal of modification at unit owner's sole cost

Dangers of not enforcing Section 98:

- Courts!

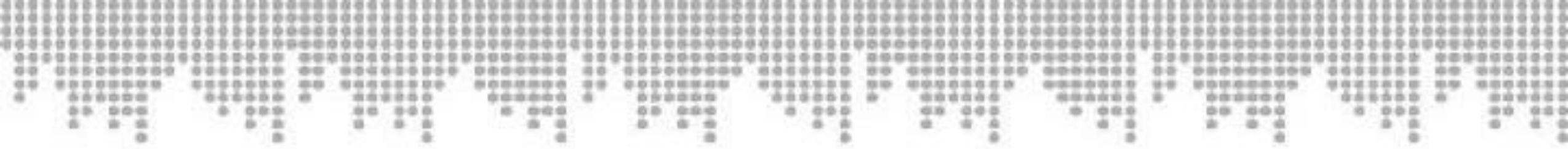


Types of changes that are often dealt with under Section 98:

- ✓ Electric parking stations
- ✓ Decks
- ✓ Vents in roofs
- ✓ New windows



Don't forget to register your Section 98
Agreements!



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