

THE *CONDOMINIUM ACT* REVIEW:

A Discussion Paper

FALL, 2012

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The *Condominium Act* Review: A Discussion Paper

EXECUTIVE SUMMARY

The Government of Yukon is committed to modernizing the *Condominium Act* and wants your input on the best way to do it.

This paper provides basic information and focuses upon four critical areas.

- A. The nature of a condominium and how it is created.
- B. The governance structure of condominiums, requirements in respect of decision making and the rights of owners to participate in decision making.
- C. Issues related to the information available to consumers and to marketability.
- D. The means by which a condominium corporation can assure purchasers and unit owners that it is able to meet the requirements and expenses of operating a condominium.

A. What Is a Condominium?

In a condominium, the owners have agreed to share ownership and maintenance of common areas, while keeping individual ownership of their own units. Although all of the units in a condominium are on a single surveyed parcel of land, a separate title is issued in the Land Titles Office for each unit. The boundaries of the unit and an owner's share of the common elements are specified in the condominium corporation's governing documents which are filed in the Land Titles Office. An owner's share in the condominium corporation is generally calculated as a proportion of the value that each unit has in relation to the total value of all of the units in the corporation. This percentage share will also be used to calculate the monthly fees that the owner must pay.

The declaration for the condominium corporation filed in the Land Titles Office describes the corporation structure, including voting rights, election of members of the board of directors, occupation and use, restrictions, duties and responsibilities, any reserve fund and other essential elements. It may also set out additional provisions. In the current *Condominium Act*, the requirements for the condominium declaration are relatively few and any amendment to the declaration requires the written consent of all unit owners and all persons who have registered encumbrances against the units and common interests.

The Government of Yukon is committed to modernizing the *Condominium Act* and wants your input on the best way to do it.



B. How Is a Condominium Created?

A condominium corporation comes into existence under the provisions of the *Condominium Act* when a developer registers the declaration and a plan which includes a certified survey in the Land Titles Office. The Registrar of Land Titles then issues titles for each unit in the condominium. The members of the corporation are the owners of the units. Initially, the developer is the only member of the corporation, and as such appoints a board of directors to operate and manage the condominium. However, once half of the units are sold, the unit owners become the majority of members of the corporation, and the corporation is turned over to the owners, who elect a board of directors in accordance with the declaration and the *Condominium Act*.

There are a number of different types of condominium developments that are permitted in most Canadian jurisdictions, but are not permitted or not sufficiently defined under the present *Condominium Act*. The paper asks for input regarding requirements for:

- Phased condominiums,
- Common elements condominiums,
- Bare land condominiums, and
- Duplex condominiums.

C. Governance:

The board is responsible for performing the duties and exercising the powers of the corporation in accordance with the Act and the corporation's declaration and bylaws. It can establish bylaws and rules, and enforce them. Without clear enforcement powers, the board has only court action for enforcement, which is expensive, time-consuming and acrimonious. Other jurisdictions provide for fines or for mediation or arbitration to resolve disputes. The paper asks for input on providing other enforcement options.

The Act provides that only unit owners can be elected to sit on the board. The paper asks whether Yukon should consider other options for election to the board, such as allowing designates, family members, or tenants on the board.

Currently, the provisions for keeping corporate records are quite minimal, and member access to records is unclear. Disputes over access to corporate records can result in litigation. The paper asks whether Yukon should consider new information requirements to owners, purchasers, and mortgagees, such as requiring financial statements, account balances, budgets, or copies of the declaration.

The duty of care required of directors, their duties regarding any conflict of interest, and their liability and indemnification for their decisions need to be addressed in new legislation.

In many condominium developments in Yukon, control has been turned over to unit owners before the development is completed. This creates problems for effectively enforcing development requirements. A board of directors made up of unit owners may not be competent to deal with completing a condominium building and common elements. The paper asks whether special provisions are needed to govern the turnover of the condominium corporation to the unit owners.

Unit owners have voting rights in the proportions described in the declaration. Unless otherwise provided for, decisions are determined by a majority of the voting rights held by unit owners. Some jurisdictions allow the suspension of voting rights if the common expense fund fees or reserve fund fees are unpaid.

Currently, if an owner fails to pay his or her contribution to the common expenses or reserve fund, the condominium corporation has a lien against the owner's unit and share of the common interests. However under the current Act, the lien may rank lower in priority than claims of other creditors such as mortgages. The paper asks whether the condominium corporation's lien should have the first, or a higher than the current, priority.

When a new condominium project is in development, the developer often sells units to the public before those units are completed. Some jurisdictions require a cooling-off period, in which condominium buyers can change their minds about buying the unit without incurring a penalty, and also require a disclosure statement for prospective buyers containing specific information about the unit and the project. The paper asks for input regarding whether Yukon should adopt such requirements.

D. Reserve Fund and Reserve Fund Studies:

The current Act does not require condominiums to maintain a reserve fund to be used to pay for major repairs. If there is no reserve fund, or it is not large enough to cover major repairs as they become necessary, unit owners will, at some point, face large, unexpected costs which they may be unable to pay. Other jurisdictions commonly require both reserve funds and reserve fund studies. A reserve fund study is an assessment of how long the major parts of a building will last before they will need to be replaced, the estimated cost of those replacements, what contributions are needed each year to raise the funds needed, and the ideal balance for the reserve fund each year. This information assists buyers of condominium units to make informed decisions.

Other Questions

The paper also asks for input on other questions regarding the possible amalgamation of adjacent condominium properties, the subdivision or consolidation of units, approvals to add or remove land for an existing condominium, for additional common elements, and whether there should be provisions that regulate the conversion of existing rental buildings into condominiums or the protection of tenants in that situation.

Any other comments or questions about the modernization of condominium legislation in Yukon are also invited.

A List of Questions Posed in the Discussion Paper

1. What type of information do you think should be required in the declaration?
2. Should the threshold to approve a change to the declaration be reduced from the consent of all owners and persons who have registered encumbrances?
3. If you think the threshold should be reduced, what would be a reasonable level for approval, for example, 80 percent of owners?
4. Should the condominium corporation be able to change the plan or certain aspects of the plan more easily, such as with the consent of 80 percent of owners?
5. Should the unanimous consent of encumbrance holders be required in order to make a change to the plan of survey?
6. Should there be a maximum period of time, such as 10 years, for the phasing in of condominium developments?
7. Should there be a restriction on changing the use of land in a phased development?
8. Should a new Act make more specific provisions and requirements for bare land condominiums, including requirements that insurance and registration of easements for infrastructure are mandatory?
9. Should the survey requirements for bare land condominiums be different than for other condominiums? For example, should reference to building locations be allowed where it would better define the boundaries?
10. Should new legislation specifically recognize shared mechanical, electrical and plumbing elements in bare land condominiums as “common elements”?
11. Should a new Act eliminate condominiums of two to three units from the operation of the Act, or eliminate the applicability of most requirements?
12. Should only the types of condominiums specifically addressed in the legislation be allowed, or should the legislation generally allow any type of condominium development unless specifically disallowed?
13. Should some matters currently included in a condominium corporation’s declaration be dealt with in the bylaws?
14. Are there other rules that the board should be able to make?
15. Should a new Act ensure that the board has the power to levy fines for unpaid common expense or reserve fund levies?
16. Should a new Act allow for or require dispute settlement mechanisms that include mediation and arbitration? If so, how should these be funded?

17. Should a new Act include any requirements to provide information to owners, prospective buyers or mortgagees, such as: all financial statements, account balances and budgets; a copy of the declaration, plan and bylaws; details of any lawsuits or other claims against the corporation; details of any management agreement; a copy of the most recent reserve fund study; a copy of the minutes of meetings; or a copy of any agreement for the use of the common property?
18. Should a new Act require that common elements be completed before units are transferred, so that on turnover, the board does not have to complete a development that has not been completely constructed?
19. On turnover, should there be a requirement to provide information about the development to the new board? If so, what basic financial, construction, and other information should be provided?
20. On turnover, should a minimum initial financial reserve and operating fund be required?
21. After turn-over of control to the unit-owners, should the Act allow termination of agreements made by the developer after a period of notice? How much notice would be reasonable?
22. Should an owner be able to designate another person to sit on the board of directors?
23. Should there be limitations as to whom the owner can designate?
24. Should tenants be allowed to sit on the board?
25. If a condominium corporation has a right to a lien against an owner for unpaid remittances, should that owner be allowed to sit on the board until outstanding moneys are paid?
26. Should a new Act set out requirements for directors to act in good faith, with care, diligence and skill, and to declare conflicts of interest?
27. Should directors or officers who rely in good faith on a professional's opinion in carrying out their duties be liable for a breach of duty of care?
28. Should a condominium corporation be required to indemnify its directors and officers, as long as the directors or officers were not acting in breach of their duties?
29. What kind of decisions do you think should be made by the board alone and what should require the approval of condominium corporation members?
30. What do you think would be an appropriate percentage for approval of specified matters?
31. Should the budget require approval by unit owners or should this be a function of the board?
32. Should unit owners lose their right to vote if their contributions to the common expenses are in arrears for 30 days or more?

33. Do you think that a new Act should include additional remedies? Are there other types of remedies or dispute resolution you would also like to see?
34. Should a condominium corporation's lien for unpaid payments to the common expense fund or reserve fund be given priority over other registered and unregistered encumbrances including those that existed before the lien arose?
35. Should Yukon require a disclosure statement to prospective buyers with this minimum information?
36. Should Yukon require a cooling-off period?
37. Should Yukon have additional requirements for disclosure statements to prospective buyers?
38. Should there be a consequence for a developer if there is a significant shortfall between the estimates and the actual revenue and expenditures for the first year after unit owners begin paying common expenses?
39. Should condominium corporations be required to maintain a reserve fund?
40. Should condominium corporations be required to have a reserve fund study done within a specified time period, and updated periodically, especially for conversions of existing buildings?
41. Should condominium corporations be required to accumulate the balance recommended in the study in the reserve fund?
42. Should two condominium corporations on adjacent properties be permitted to amalgamate?
43. Should units be able to subdivide or consolidate? If so, what are appropriate provisions?
44. Should new legislation make provisions for approvals to add or remove land for an existing condominium to use for additional common elements?
45. Should there be specific provisions for converting existing rental buildings into condominiums? Is there a need to protect tenants in conversions?

INTRODUCTION

Yukon's *Condominium Act* contains provisions related to registering a condominium in the Land Titles Office, and provisions that deal with condominium development, governance, and legal organization. The Act came into force in 1977 and is extremely dated. Its provisions reflect the development models of that time but do not allow for development outside of that limited scope. The requirements regarding condominium plans and common area interests have been identified as inadequate by developers. There are no provisions for phased condominium development, and provisions for bare land condominiums are inadequate. The provisions relating to condominium governance and the need to ensure sufficient funds to protect owners' interests are not up to the standards adopted in other Canadian jurisdictions.

The Government of Yukon is committed to modernizing the *Condominium Act* and wants your input on the best way to do it.

Purpose of Discussion Paper

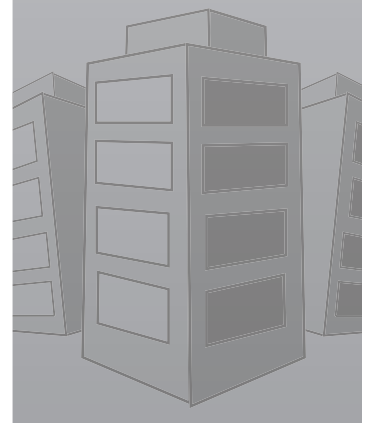
This paper provides basic information on the legal structure of condominiums and the issues that have been identified in the present Act, and poses questions which might help to focus responses.

As you read this paper you will see that it focuses upon four areas.

- A. The nature of a condominium and how it is created;
- B. The governance structure of condominiums, requirements in respect of decision making and the rights of owners to participate in decision making;
- C. Issues related to the information available to consumers and to marketability; and
- D. The means by which a condominium corporation can assure purchasers and unit owners that it is able to meet the requirements and expenses of operating a condominium.

Basic information about condominiums will be presented and questions will be posed throughout the document. It is hoped that those questions will spark discussions about the issues related to condominium development and regulation that you think are important.

This paper provides basic information on the legal structure of condominiums and the issues that have been identified in the present Act, and poses questions which might help to focus responses.



A) WHAT IS A CONDOMINIUM?

What is a Condominium?

A condominium – known as a strata title in some jurisdictions – is a form of ownership of real property in which the owner typically has title to a defined area, known as a “unit”, within a specific parcel of land, plus a common interest in shared areas of the land and/or buildings (usually referred to as common elements). In a condominium, the owners have agreed to share ownership and maintenance of common areas, while keeping individual ownership of their own units. Although all of the units in a condominium are on a single surveyed parcel of land, a separate title is issued in the Land Titles Office for each unit.

Condominiums are often thought of as multi-story residential buildings, but this form of ownership can also apply to townhouse complexes, duplexes, individual houses within a particular development, low-rise or high-rise residential buildings, retirement homes and dormitories as well as non-residential property such as offices, hotel rooms, retail shops, or storage.

What Do I Own When I Buy a Condominium?

When the condominium is part of a multi-unit building, the unit owner usually owns the internal space occupied by their unit and a shared interest in the common elements. The common elements normally include the exterior of the building, the roof, lobbies, hallways, elevators, recreational facilities, walkways, gardens and grounds, etc. Common elements may also include structural elements and mechanical, plumbing and electrical services. The cost of the operation, maintenance and ongoing replacement of the common elements is shared among the individual unit owners through the mechanism of a condominium corporation.

Some condominiums known as bare land condominiums may consist of units of land within a single surveyed parcel, and the owner of each unit is able to construct an individual residence on their unit. In Yukon, the bare land provisions in the existing *Condominium Act* are also used for interconnected buildings such as row housing. In bare land condominiums, the common elements are likely to include roads, walkways, grounds, mechanical, electrical, plumbing or other infrastructure, as well as possibly a clubhouse, recreation facilities and other shared amenities. Although each unit may have a separate residence constructed on it, the owners of the units of land will be the members of the condominium corporation.

Condominiums are often thought of as multi-story residential buildings, but this form of ownership can also apply to townhouse complexes, duplexes, individual houses within a particular development, low-rise or high-rise residential buildings, retirement homes and dormitories as well as non-residential property such as offices, hotel rooms, retail shops, or storage.



Similarly, when a duplex or triplex is a condominium, each dwelling is the “unit” and the common elements are often the roof and the electrical, mechanical, plumbing or other infrastructure. The owners of the units are the members of the condominium corporation which manages and controls the common elements.

The boundaries of the unit and an owner’s share of the common elements are specified in the condominium corporation’s governing documents, which are filed in the Land Titles Office. An owner’s share in the condominium corporation will generally be calculated as a proportion of the value that each unit has in relation to the total value of all of the units in the corporation. This percentage share will also be used to calculate the monthly fees that the owner must pay towards the regular upkeep and repairs to the common elements. The monthly fees also pay for common services, such as grounds keeping and snow removal.

What Does a Condominium Corporation Do and Who Manages It?

The primary purpose of the condominium corporation is to control and manage the common elements on behalf of the unit owners. The members of the corporation are the owners of the units and they elect a board of directors to manage the corporation’s affairs. The duties of the condominium corporation typically include maintaining and repairing the common elements, paying common expenses, preparing the annual budget, collecting and investing owners’ fees, insuring the common elements and the units of the condominium, and holding meetings of the owners.

Who is on the Board of Directors?

Membership on the board is defined in the condominium declaration or its bylaws, and is governed by the *Condominium Act*. Unit owners are usually entitled to one vote for each position on the board of directors on the basis of one vote for each unit. Members of a condominium corporation (the unit owners) typically volunteer to serve on the board of directors and may attend to the duties of the corporation themselves, or they may hire employees or private contractors to provide management services.

The Common Expense Fund

The condominium corporation must establish a fund for the payment of the common expenses, to which all unit owners contribute in proportion to their unit ownership. The unit owners’ monthly condominium fees go into this common expense fund, and the amount of those fees needs to be sufficient to pay the common expenses.

Common expenses include both regular operating costs, such as electricity, janitorial services, snow clearing, lawn mowing, regular repairs and maintenance, and extra-ordinary expenses, such as replacing roofs, heating systems, paving and other capital components that wear out over the life of the development.

It is the duty of the board of directors to plan for both kinds of common expenses, and it is common practice to establish separate funds for each kind. An operating fund is used to pay the regular, recurring expenses, and a reserve fund is established to ensure that there will be sufficient funds available to replace major capital items when the time comes. The amount to be accumulated in a reserve fund usually takes into account the condition and life expectancy of all of the common elements in the development and the estimated cost to replace them over the life of the building.

B) HOW IS A CONDOMINIUM CREATED?

A condominium corporation is created by the registration in the Land Titles Office of a declaration and a plan which includes a certified survey. Once these documents are registered, the corporation comes into existence, and the Registrar of Land Titles issues titles for each unit in the condominium.

The Declaration

The declaration has to be executed by the owner of the condominium property. It contains fundamental information about the condominium development. The present *Condominium Act* requires that it include:

- the legal description of the land;
- a statement of intention that the property will be governed by the *Condominium Act*;
- the consent of everyone who has a registered interest against the land;
- a statement of the percentage shares that owners have in the common interest; and
- a requirement that unit owners contribute to the common expenses.

The declaration also frequently describes the corporation structure, including voting rights, election of members of the board of directors, occupation and use, restrictions, duties and responsibilities, any reserve fund and other essential elements. Although less frequent, it may also set out provisions relating to:

- the common expenses and portion payable by the owner of each unit;
- the ownership share of the common elements allocated to each unit;
- the share allocated to each unit of the voting rights in the condominium corporation (Developers decide how to allocate voting rights. Sometimes larger or more expensive units have a greater share of votes than smaller or less expensive units.);

A condominium corporation is created by the registration in the Land Titles Office of a declaration and a plan which includes a certified survey.



- for phased developments, specific information about what will be included in subsequent phases;
- for bare land developments, specific information about how unit values will be determined if the property ceases to be governed by the Act, and any restrictions that will apply to buildings constructed after registration;
- whether the property contains rental units subject to a residential tenancy agreement;
- the proportions that unit owners are to contribute to the reserve fund; and
- provisions restricting gifts, leases and sales of units.

In the current *Condominium Act*, the requirements for the condominium declaration are relatively few and any amendment to the declaration requires the written consent of all unit owners and all persons having registered encumbrances against the units and common interests. That means that changes that might be considered desirable by almost all members of the corporation, including adding provisions to the declaration, can be blocked by a single member.

- 1. What type of information do you think should be required in the declaration?**
- 2. Should the threshold to approve a change to the declaration be reduced from the consent of all owners and persons who have registered encumbrances?**
- 3. If you think the threshold should be reduced, what would be a reasonable level for approval, for example, 80 percent of owners?**

The Plan

The purpose of the condominium plan is to show:

- the location and dimensions of each unit;
- the common elements; and
- other aspects of the buildings and land.

The *Condominium Act* currently requires the plan to include:

- plans of survey, as certified by a surveyor; and
- diagrams showing the shape, dimensions and location of each unit in the building, structural plans, and certification by an architect that the diagrams of the units, as built, are substantially accurate in relation to the buildings.

As is the case with the declaration, the current *Condominium Act* states that the plan can be changed

only with the written consent of all unit owners and all persons who have registered encumbrances against the units or common interests.

4. **Should the condominium corporation be able to change the plan or certain aspects of the plan more easily, such as with the consent of 80 percent of owners?**
5. **Should the unanimous consent of encumbrance holders be required in order to make a change to the plan of survey?**

Types of Condominiums

There are a number of different types of condominium developments that are permitted in most Canadian jurisdictions. Many are either not permitted or not sufficiently defined under Yukon's *Condominium Act*, including:

Phased condominiums:

In a phased condominium, units and additional common elements can be added in stages, over a maximum period of time, often as long as 10 years, and still be part of one condominium corporation. Phased condominiums eliminate the need to create a new condominium corporation when new units, buildings or common elements are added in later years. They also eliminate any need to establish extensive easement and cost-sharing agreements that would otherwise be needed to:

- allow new unit owners to have the benefit of the use and enjoyment of the already established shared facilities and services, and
- ensure that each new development bears its proportionate share of responsibilities imposed by these agreements.

Phased condominiums give rise to a possibility that all the phases will not be completed due to market or other considerations. In other jurisdictions, this possibility is usually required to be disclosed to prospective purchasers, as is the possibility that land identified by the developer for future condominium phases can be sold by the developer for any other allowed use. In some jurisdictions, a purchaser can recover damages for the difference between the proposed and the actual phased development, as long as that difference is material and detrimentally affects the purchaser's use and enjoyment of his/her unit.

6. **Should there be a maximum period of time, such as 10 years, for the phasing in of condominium developments?**
7. **Should there be a restriction on changing the use of land in a proposed phased development?**

Common elements:

Common elements condominium corporations consist only of common interests. They are condominium corporations that have no units. For example, homeowners may reside alongside and own shares in a condominium corporation which offers facilities such as a golf course or recreational centre.

Bare land condominiums, also known as vacant land condominiums:

The current Act does recognise bare land condominiums but the provisions are inadequate. A bare land condominium consists of land which is essentially vacant but contains an identified common element. In Yukon, the bare land provisions in the existing *Condominium Act* are sometimes used for interconnected buildings such as row housing. Yukon's legislation is clear that a common element is required but does not set out criteria as to what constitutes a common element.

The developer of a bare land condominium can determine what he or she wants to build upon the land, which to a certain degree will define the size and sometimes the nature of the condominium corporation.

A bare land condominium allows a developer to sell land as units in a condominium corporation rather than as parcels of land as would be the case in a subdivision. This permits the developer to create a development where the purchasers can build their own homes or buildings on the units but the costs for the roads, facilities and other subsequently added common elements will be the responsibility of the condominium corporation. Such an arrangement can, in some situations, be more economical for both the developer and the unit owner than subdivision and sale of individual lots.

Because of the stand-alone nature of the units in some bare land condominiums and the fact that units are privately titled, owners are sometimes not aware of the fact that they are part of a condominium corporation and that the corporation has some decision making authority over their unit.

- 8. Should a new Act make more specific provisions and requirements for bare land condominiums, including requirements that insurance and registration of easements for infrastructure are mandatory?**
- 9. Should the survey requirements for bare land condominiums be different than for other condominiums? For example, should reference to building locations be allowed where it would better define the boundaries?**
- 10. Should new legislation specifically recognize shared mechanical, electrical and plumbing elements in bare land condominiums as “common elements”?**

Duplex condominiums:

Yukon has a number of side-by-side duplexes registered as condominiums, despite the fact that most requirements for condominiums under the *Condominium Act* may not be appropriate for these residences. Most of the regulatory requirements for condominium developments are not necessary for only two units and, as a result, most requirements, such the requirements to have a board of directors, hold meetings and so on, are often ignored. What side-by-side duplexes do require is an agreement between the parties regarding any common elements such as a common wall, common utilities, driveway or other features.

- 11. Should a new Act eliminate condominiums of two to three units from the operation of the Act, or eliminate the applicability of most requirements?**
- 12. Should only the types of condominiums specifically addressed in the legislation be allowed, or should the legislation generally allow any type of condominium development unless specifically disallowed?**

C) GOVERNANCE

As mentioned above, a condominium is managed by the corporation through a board of directors elected by the unit owners. The board is responsible for performing the duties and exercising the powers of the corporation in accordance with the Act and the corporation's mandate, declaration and bylaws. In managing the complex, the board can establish bylaws and rules, and enforce them.

Bylaws

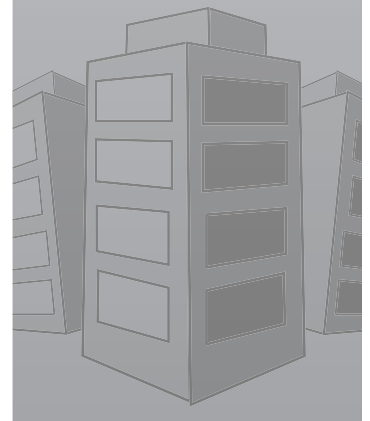
Under the current Act, bylaws must be consistent with the Act and the condominium corporation's declaration. A bylaw that is made, amended or repealed, by the board is not effective until it is both:

- A. approved by members owning two-thirds of the common elements, or a greater percentage as provided for in the declaration, and
- B. registered at the Land Titles Office.

A future Act might specify that the board has authority to make, amend or repeal bylaws on a broader range of matters, including:

- governance of the corporation, and the conduct of its affairs;
- duties of the corporation;
- required record-keeping;
- the number of directors;
- qualifications, nomination, election, resignation and removal of directors, their terms of office and their remuneration (if any);
- calling and conduct of meetings by the board;
- holding of votes;
- appointment, revocation and resignation of officers and agents of the corporation and their duties, and functions;
- remuneration, duties and functions of employees;
- reimbursement of the expenses of directors, officers, agents and employees;
- authorization for borrowing money by the corporation;

A condominium is managed by the corporation through a board of directors elected by the unit owners. The board is responsible for performing the duties and exercising the powers of the corporation in accordance with the Act and the corporation's mandate, declaration and bylaws.



- objecting to property assessments or leasing a part of the common elements;
- authorization for granting, transferring or surrendering an easement or licence through the common elements;
- use and management of the common assets, and management of the property;
- how contributions to the common expenses are assessed and collected;
- establishing the reserve fund, and how contributions are assessed and collected;
- maintenance of the units and common elements;
- deciding how people, other than owners and occupants, may use and enjoy the common elements and common assets;
- activities relating to the sale and lease of units;
- the amount of interest payable on unpaid common expense and reserve fund;
- levies for leasing out units (if any); and
- allowing the board to make and enforce rules that apply to the units and common areas.

It is easier to make changes to the bylaws than the declaration, because approval is required by a lower percentage of the voting rights in the corporation.

13. Should some matters currently included in a condominium corporation's declaration be dealt with in bylaws?

Rules

Currently Yukon's legislation allows the bylaws to permit the board to make rules that are consistent with the Act, the declaration and the bylaws. The rules must be for the purpose of preventing unreasonable interference with the use and enjoyment of units and common areas. Commonly, rules address matters such as pets, whether renting is permitted and issues of external appearance such as clotheslines or barbeques.

14. Are there other rules that the board should be able to make?

Reasonable types of rules might include rules that:

- promote the safety, security or welfare of the unit owners;
- promote the security of the common elements; and
- prevent unreasonable interference with the corporation's assets.

Enforcement of Bylaws and Rules

The current Act is unclear about what powers the board of directors has for enforcing its bylaws and rules. In the absence of any clear powers, the board is left to resort to court action, which is expensive, time-consuming and acrimonious. Some jurisdictions are considering mechanisms for levying and collecting fines, or for dispute-settlement including mediation, conciliation and mandatory arbitration.

- 15. Should a new Act ensure that the board has the power to levy fines for unpaid common expense or reserve fund levies?**
- 16. Should a new Act allow for or require dispute settlement mechanisms that include mediation and arbitration? If so, how should these be funded?**

This discussion paper addresses other types of remedies and the issue of the corporation's enforcement of liens against unit owners on page 21.

Corporate Records and Information to Owners

Currently, the provisions for keeping corporate records are quite minimal, and member access to records is unclear. Disputes over access to corporate records have resulted in litigation in other jurisdictions which are now requiring or considering requiring that condominium corporations provide the following information to owners, purchasers, and mortgagees:

- all financial statements, account balances and budgets;
- a copy of the declaration, plan and bylaws;
- details of any lawsuits or other claims against the corporation;
- details of any management agreement;
- a copy of the most recent reserve fund study;
- a copy of the minutes of meetings; and
- a copy of any agreement for the use of the common property.

- 17. Should a new Act include any or all of these requirements?**

Turn Over of Corporation from the Developer to an Elected Board

A condominium corporation comes into being under the provisions of the *Condominium Act* when the developer registers the declaration and the plan in the Land Titles Office. The declarant (the developer) appoints a board of directors to carry out the corporation's duties and responsibilities while the units are under construction. However, the condominium corporation is turned over to a board made up of elected unit owners once the majority of units are sold. In many condominium developments in Yukon, control has been turned over to unit owners before the development is completed. This creates problems

for effectively enforcing development requirements. A board of directors made up of unit owners may not be competent to deal with completing a condominium building and accompanying common elements that have not been constructed.

18. Should a new Act require that common elements be completed before units are transferred, so that on turnover, the board does not have to complete a development that has not been completely constructed?

19. On turnover, should there be there be a requirement to provide information about the development to the new board? If so, what basic financial, construction, and other information should be provided?

20. On turnover, should a minimum initial financial reserve and operating fund be required?

Condominium boards elected after turn-over of control by the developer might not be satisfied with agreements entered into by the declarant's board. These agreements might include:

- a property management agreement;
- an agreement to provide goods and services on a continuing basis;
- an agreement to provide facilities to the condominium corporation on a for-profit basis; and
- a lease of all or part of the common elements for commercial purposes.

21. Should the Act allow termination of such agreements after a given period of notice? How much notice do you think would be reasonable?

Eligibility to be a Director

Currently, the Act provides that the members of the condominium corporation are the unit owners and the directors are elected from amongst the members. This means that the board members are volunteers. Some condominium corporations in Yukon have had difficulty recruiting board members who have the ability to manage the responsibilities of running the corporation. Under the present Act, tenants, although they may have a direct interest in the decisions of the board of directors, are not permitted to serve as directors as they are not owners. In some cases, owners may not wish to sit as board members themselves but may wish to designate someone, for example a family member or a tenant, to sit on the board on their behalf.

22. Should an owner be able to designate another person to sit on the board of directors?

23. Should there be limitations as to whom the owner can designate?

24. Should tenants be allowed to sit on the board?

- 25. If a condominium corporation has a right of lien against an owner for unpaid remittances, should that owner be allowed to sit on the board until outstanding moneys are paid?**

Duty of Care and Conflict of Interest

The duty of care is the duty imposed on a person to exercise reasonable care when making a decision which could foreseeably have a negative impact upon another person. The current *Condominium Act* does not specify the nature of the duty of care that directors owe to their fellow owners in performing the duties and exercising the powers of the corporation. While case law gives some content to this duty, a new *Condominium Act* could set out those duties more clearly.

As well, the Act does not specifically address the steps to be taken when a conflict arises between a person's duty as a director of the condominium corporation and their personal interest in a transaction involving the corporation.

Condominium legislation could specifically require directors to:

- act honestly, in good faith and in the best interest of the condominium corporation;
- exercise the care, diligence and skill that a reasonable and prudent person would exercise in comparable circumstances; and
- declare conflicts of interest and refrain from making decisions in respect of them.

- 26. Do you think these requirements should be set out in legislation?**

Liability and Indemnification

Condominium corporation directors frequently need to rely on the advice of professionals. Without any specific provisions in the legislation to the contrary it is possible that directors who rely on incorrect information from a professional, such as an accountant's financial statements or the opinions of a lawyer, accountant, engineer or other professional, would be liable to the owners for loss arising from decisions made in reliance on that incorrect information.

- 27. Should directors or officers who rely in good faith on a professional's opinion in carrying out their duties be liable for a breach of duty of care?**
- 28. Should a condominium corporation be required to indemnify its directors and officers for any liability and costs incurred as a result of an action or proceeding respecting anything the director or officer did, omitted doing, or permitted, in carrying out his or her duties or functions, as long as the directors or officers were not acting in breach of their duties?**

Rights of Unit Owners to Participate in Decision Making

An important part of condominium legislation covers a unit owner's right to participate in significant decisions affecting the condominium corporation and the remedies available to them if they disagree with the board's actions.

Voting Rights

Unit owners are given voting rights in the condominium corporation in the proportions described in the declaration. Unless otherwise provided for in the Act, the declaration, or the bylaws, a matter raised at a meeting of unit owners would be determined by a majority of the voting rights held by unit owners.

Some jurisdictions require, in addition to the support of the board, the consent of unit owners holding 80 percent of the voting rights for major issues like:

- a change in the declaration or plan, including certain types of phasing amendments;
- withdrawal of the property from the governance of the Act, ending its status as a condominium;
- a substantial change in the common elements, common assets or a service the condominium corporation provides;
- a decision about whether to repair substantial damage to the property;
- a change in the bylaws;
- dispensing with the audit required by the Act;
- authorization of court action by the condominium corporation against a unit owner or on behalf of a unit owner;
- confirmation of a contract or transaction that was voidable due to a director's failure to disclose his or her interest in it; and
- a decision not to repair or replace property after non-substantial damage.

29. What kind of decisions do you think should be made by the board alone and what should require the approval of condominium corporation members?

30. What do you think would be an appropriate percentage for approval of specified matters?

31. Should the budget require approval by unit owners or should this be a function of the board?

32. Should unit owners lose their right to vote if their contributions to the common expenses are in arrears for 30 days or more?

Remedies

The potential for unit owners, either individually or as a group, to disagree with the decisions of the condominium corporation board will always exist. The present *Condominium Act* does not provide much guidance as to the steps an owner might take if they are aggrieved. In some jurisdictions, the condominium legislation provides for remedies such as:

- the requirement that the board hold a special general meeting of unit owners on the request of 25 percent of unit owners (other than the declarant);
- the right of either the board or a unit owner to apply to the court for an order enforcing compliance with a provision of the Act, declaration, bylaws or rules; and
- the right of a unit owner to apply to the court for an order to rectify an oppressive or unfairly prejudicial decision or behaviour of the board.

33. Do you think that a new Act should include such remedies? Are there any other types of remedies or dispute resolution you would also like to see?

Liens

A lien is a right to take possession of someone else’s property until a debt is paid. The condominium corporation is responsible for ensuring that unit owners, tenants, lessees of the common elements, and the corporation’s employees and agents comply with the Act, declaration, bylaws and rules. If an owner fails to pay his or her contribution to the common expenses or reserve fund, the condominium corporation has a lien against the owner’s unit and share of the common interests. However, under the current Act, the lien may rank lower in priority than claims of other creditors such as mortgagees.

In some jurisdictions, the condominium lien is given priority over most other registered and unregistered encumbrances, even those that existed before the lien arose. The lien covers the unpaid amount plus interest and the costs of any collection attempts, but there are usually strict rules in respect of the registration of the lien. For example, it has to be registered at the Land Titles Office within three months after the original default. Such a requirement prevents the build-up of a large unregistered debt that could reduce the security of other creditors without their knowledge. A registered lien usually covers the amount of any defaults in the unit owner’s contributions that occur after registration.

34. Should a condominium corporation’s lien for unpaid payments to the common expense fund or reserve fund be given priority over other registered and unregistered encumbrances including those that existed before the lien arose?

Disclosure of Information and Cooling-off Period

When a new condominium project is in development, the developer often sells units to the public before those units are completed. Therefore, it’s important that buyers receive all relevant information about the condominium development and their specific units. Other jurisdictions require a cooling-off period in which condominium buyers can change their minds about buying the condominium without incurring a penalty.

Currently Yukon’s Act requires the condominium corporation to keep “adequate” records, and provides that any member of the corporation may inspect records “at any reasonable time on reasonable notice.” However, the Act does not specify what records must be kept, and it is unclear what is “reasonable time” and “reasonable notice.”

In other jurisdictions, a disclosure statement is required for prospective buyers, and must contain, at minimum, specific information concerning the unit and project including:

- a general description of the property;
- the number of units the developer intends to sell and/or lease;
- the estimated completion date for the construction of amenities;
- a copy of the proposed declaration and by-laws; and
- costs reported in a reserve fund study.

35. Should Yukon require a disclosure statement to prospective buyers with this minimum information?

36. Should Yukon require a cooling-off period?

Some proposals for additional information to be disclosed on the sale of a unit include:

- a statement provided by the corporation with information that could be set out in the regulations, such as parking arrangements and common expenses;
- for existing units, the condominium corporation's latest budget and financial statements including an auditor's report if the statements were audited;
- the current or proposed declaration and the current or proposed bylaws and rules;
- the current or proposed agreement for management of the property, if any;
- information about any cooling-off period and any buyer's right to cancel;
- for proposed units, a provision requiring the declarant to estimate what the revenues and expenses will be during the first year after the unit owners begin paying common expenses.

37. Should Yukon adopt any or all of these additional requirements for disclosure statements to prospective buyers?

Buyers rely on accurate financial information and estimates about the cost of major future repairs and replacements as they decide whether to purchase a condominium unit.

38. Should there be a consequence for a developer if there is a significant shortfall between the estimates and the actual revenue and expenditures for the first year after unit owners begin paying common expenses?

D) RESERVE FUND AND RESERVE FUND STUDY

The current Act does not require condominium corporations to maintain a reserve fund to be used to fund major repairs. If there is no reserve fund, or a reserve fund doesn't contain enough money to pay for major repairs as they become necessary, unit owners will, at some point, face large, unexpected costs that might pose financial hardships. Unit owners sometimes disagree about the amount that should be accumulated in a reserve fund. Some believe accumulation is prudent and avoids the hardship of an unexpected special assessment. Others think major repairs should be paid for by those who own the units when the repairs are needed.

Other jurisdictions commonly require both reserve funds and reserve fund studies. A reserve fund study is an assessment of:

- how long the major parts of a building, such as the roof, heating system, windows, plumbing and electrical, will last before they need to be replaced;
- the estimated cost of replacing the parts;
- the contributions that should be made each year to the reserve fund; and
- the ideal balance for the reserve fund each year, to meet current and future repair and replacement costs.

This information assists buyers of existing properties to make informed decisions.

In Nova Scotia, the *Condominium Act* requires new condominium developments to have a reserve fund study completed by the developer and filed with the declaration. It also requires that this study be updated after five years and a new reserve fund study completed after 10 years. This requirement is limited to condominium developments with 10 units or more. Nova Scotia also requires a developer who is converting an existing building into a condominium complex to complete a reserve fund study and that this study is available to potential buyers. Existing condominiums are given a transition period of two years to complete a reserve fund study.

The current Act does not require condominium corporations to maintain a reserve fund to be used to fund major repairs.



39. Should condominium corporations be required to maintain a reserve fund?

40. Should developers and condominium corporations be required to have a reserve fund study done within a specified time period, and updated periodically , especially for conversions of existing buildings?

41. Should condominium corporations be required to accumulate the balance recommended in the study in the reserve fund?

OTHER QUESTIONS OR COMMENTS

42. Should two condominium corporations on adjacent properties be permitted to amalgamate?

43. Should units be able to subdivide or consolidate? If so, what are appropriate provisions?

44. Should new legislation make provisions for approvals to add or remove land for an existing condominium to use for additional common elements?

45. Should there be specific provisions for converting existing rental buildings into condominiums? Is there a need to protect tenants in conversions?

Do you have any other comments about the modernization of condominium legislation in Yukon or any questions for us? We would be pleased to hear and consider whatever you want to share with us.

Comments can be made directly to the email address: condoactreview@gov.yk.ca

or through our website at
http://www.justice.gov.yk.ca/land_titles_modernization.html

Or by contacting:
Susan Ellis
Policy and Communications Branch
Department of Justice
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