Modifications: What do you have? What do you want? What have you Got? What do you Need?

When does repair or maintenance of the common elements cross the line into the realm of modification? This question is an important one, because the answer determines the degree of owner involvement required.

Take, for example, a lobby renovation or upgrades to the common party room or guest suites. Consider the purchase of lobby furnishings in a brand new building that previously had no such furnishings. Consider a window, balcony railing or siding replacement program in an older development where new materials will necessarily be substituted for old.

Owners inevitably hold differing views regarding the direction that the corporation should take, both in the area of financial expenditure and in the choice of colors, materials and features of the new component or design.

We have some condos in Ontario that are now 40 years old. We have many buildings where components, though still functioning, have outlived their anticipated useful life. These buildings, though once "high end" may have difficulty competing in the marketplace with newer buildings with similar location and features.

We see new buildings where the owners feel that the common areas have not been finished to the level required for a building of the particular "station" in the marketplace. Owners in newer buildings are approving common area upgrades in order to provide the amenities and comforts that they consider appropriate or "standard" to their building. Upgrades include the purchase or rental of artwork, the purchase of lobby furnishings, the purchase of additional fitness equipment, upgrading of common rooms and kitchen and washroom facilities, and improved lighting and finishing in common element corridors.

The common elements are an extension of the home. An increasing number of owners appear to support the view that the position of the building in the marketplace demands some degree of periodic "upgrade" in order to ensure that the position of the building is maintained. Common element modifications are governed by section 97 of the Condominium Act. Section 97 of the Act allows the corporation to make an addition, alteration or improvement to the common elements by resolution of the board, and without notice to the owners, if:

- it is necessary in order to comply with an agreement or the requirements
imposed by any general or special Act or regulations;

- in the opinion of the board, it is necessary to make the addition, alteration, improvement or change to ensure 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

- the estimated cost, in any given month or other prescribed period is no more than the greater of $1,000.00 and one per cent of the annual budgeted common expenses for the current fiscal years.

Section 97(1) confirms that 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 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.

Where owner involvement is required, the degree of involvement varies depending upon whether or not the modification is substantial. A substantial modification requires a formal meeting of the owners and an ordinary vote to determine the issue. A substantial modification is one where the estimated total cost of the modification exceeds 10 percent of the annual budgeted common expenses for the current year.

All other modifications may be undertaken on notice to the owners. Owners have the opportunity to request a meeting of the owners to consider and vote on the issue, but the board is only compelled to call such a meeting where the request has the support of 15% of the owners under section 46 of the Act.

In most cases involving non-substantial changes approval is obtained through ordinary communication and notice to the owners. Where owners are informed and supportive, a meeting of owners under section 97 may not be needed and the whole undertaking may proceed without incident.

Where communication between the board and the owners is lacking, or where the expenditure or change is significant in relation past design and/or funds available, the owners may become more actively involved and may requisition a meeting to consider a non-substantial change.

In the recent case of Briggs v. Winnipeg Condominium Corporation No. 30 the court dealt with the need for owner involvement where elements of an original component were changing in the course of an acknowledged repair program. The court confirmed that windows, though perhaps continuing to function, were ancient and obsolete. There was no question that replacement was required and there was no need to vote on this issue.

However, the court then proceeded to identify certain components of the project that crossed the line between maintenance or repair and improvement. Tinting or low e glass, a change in the size of some window openings, and a switch from slider to awning sash were all characterized as improvements. The court also considered a switch from single to dual pane glass to be an improvement, in spite of the fact that standards in the current industry would no doubt dictate against replacement with single pane windows, if indeed single pane windows are still available.

The case is interesting in that the provisions of the Manitoba Act are very similar to our section 97. The court ordered a vote of the owners, without distinguishing those elements that were truly maintenance or repair from those which were found to be an improvement.

A true repair must of course proceed either way, and owners should not, in our view, be led to believe that a vote on the issue is the end of the matter. It is suggested that corporations should be careful to distinguish between those components of the project falling within the duty of the board, and those which are optional and
should be submitted to a vote. As a practical matter, the opinion on where the line must be drawn will vary from one building to the next. Finding the line requires good communication and discussion as much as it does legal analysis.

Debbie Bellinger  
613-231-8309  
debbie.bellinger@nelligan.ca

Our Condo Law Practice Group

Lawyers

James Davidson  John Peart  Debbie Bellinger

Nancy Houle  Merredith MacLennan  Tim Kennedy

Christy Allen  Deborah O'Connor

Law Clerks

Elaine Richard (liens)  Jennifer Gagné (condo clerk)

CONDO LAW NEWSLETTER

Condo Law is published quarterly, and is free of charge to our clients. Others can arrange to receive Condo Law, for a modest cost, by contacting Carol Slack at carol.slack@nelligan.ca or at 613-231-8342.

We have been publishing Condo Law now for over 21 years. Our first issue of Condo Law was published in January of 1987. We have now published over 70 quarterly issues.

Let us know if you would like to purchase a full set of our Condo newsletters from 1987 through to the present. We sell the full set for $60.00.

Nelligan O'Brien Payne is a multi-service law firm with offices in Ottawa, Kingston, Vankleek Hill and Alexandria. We currently have over 40 talented lawyers and consultants.

Our Condominium Law Group is among the largest in Canada. We have the knowledge and experience to tackle virtually any problem which may confront condominium corporations, directors, owners, developers, managers or insurers.

Copies of extracts from this newsletter are also posted on our Web site: www.nelligan.ca.

Editor: James Davidson

Questions and comments concerning materials in this newsletter are welcomed.

©Copyright 2008 by Nelligan O'Brien Payne LLP

Condo Law should not be relied upon as legal advice, which we cannot give without specific facts and an opportunity to review applicable documents including the Declaration and By-Laws, as well as any changes in the relevant law.