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BARRISTERS & SOLICITORS

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RE: S. 98 OWNER'S ALTERATION AGREEMENTS

Owner's Alteration Agreements

We are forwarding this letter in order to explain various criteria applicable to a:

- (a) Multi-Purpose Agreement
- (b) Single-Purpose Corporation-Wide Agreement
- (c) Individual Owner's Alteration Agreement
- (d) Community Standards Declaration Amendment

A package of ancillary documents accompanies each of those different types of Owner's Alteration Agreements.

Instructions

If you wish to instruct Gardiner Miller Arnold LLP (GMA) to prepare any of those forms of Owner's Alteration Agreements for your Corporation, please complete the attached Instructions form and forward it to the attention of J. Robert Gardiner.

Common Elements Rights and Restrictions

Pursuant to ss. 11 (2) and (3) of the *Condominium Act, 1998* (the "Act") each unit owner has an undivided appurtenant common interest in all of the common elements and assets of the corporation as a tenant in common with all other unit owners. However, it is the condominium corporation that has the duty to control, manage and administer the corporation's common elements and assets [the Act at ss. 17 (1) and (2)]. An owner is entitled to make reasonable use of the common elements, subject to the Act, declaration, by-laws and rules [Act, s.116]. In effect, individual unit owners have the right to make reasonable use of the common elements they own, but the board of directors generally has the power and duty to manage the affairs of the corporation [Act s. 27]. Most declarations contain a provision to the effect that an owner must not alter the common elements (or any installation thereon) without the prior written consent of the board of directors. The rationale behind this provision is that it is inappropriate for an individual unit owner to make any addition, alteration, improvement or change (an "Alteration") to the common elements or an installation thereon (including any exclusive use common elements), particularly Alterations affecting any utilities, penetration of walls, addition of structures, additional maintenance requirements or other troublesome Alterations which the board would normally want to be undertaken by the Corporation's qualified contractors.

Obligation to Maintain and Repair

The board of directors is obligated to maintain and repair the common elements (Act s. 89 and 90) and has the sole right to do so without interference from the owners. Normally, the board has contractual control and

supervision over the contractors and their work and should decide which maintenance and repairs to undertake or not, when to do so, the choice of contractor and the scope and method of repair.

Alterations Prior to s. 98

Prior to May 5, 2001 (the date upon which the *Condominium Act, 1998* was proclaimed into force) when unit owners wished to make an Alteration to the common elements, they could only do so subject to the restriction contained in the declaration requiring the board's prior written consent. Some boards did not bother to insist upon owners obtaining the board's prior written consent. The result was that the boards lost control of their ability to prohibit or regulate various types of Alterations, because of the legal defences of waiver, acquiescence, laches (delay), estoppel, detrimental reliance and administrative discrimination. These legal defences were used by owners to avoid compliance when boards have, at first, failed to enforce declaration or rule provisions and wish to do so at a later date. The Court of Appeal decided, in the case of *MTCC 949 v. Staib* (2006) that boards had to rigorously police the Corporation's declaration, by-law and rule provisions, failing which those waiver defences could preclude the Corporation from enforcing those provisions.

Problems Caused by Non-Compliance

In some cases, a simple written consent was provided by the board without any consideration of:

- the specifications;
- choice of contractor;
- choice of materials;
- method of installation; and
- approximately 30 other controlling and risk-elimination provisions that would preclude various problems arising from alterations to the common elements.

Years later, problems often arose as to who had to maintain and repair the alteration, or remove it at the end of its lifetime. These problems were especially difficult if a new owner of the unit claimed no responsibility, or if the board of directors wished to exercise the corporation's right to require the owner to remove the Alteration.

Corporation's vs. Owner's Alterations

Two sections of the Act govern changes to the common elements. If the board decides to undertake a change using the Corporation's operating funds, then s. 97 of the Act establishes various criteria. If an owner wishes to undertake an Alteration to the common elements, s. 98 applies. First, consider the s. 97 criteria applicable to changes implemented by the Corporation using its operating fund.

S. 97 Alterations by the Corporation

Section 97 of the Act provides that if an addition, alteration or improvement to the common elements, or a change in the assets of the corporation or a change in a service that the corporation provides to the owners (an "**Alteration**") is "substantial" (i.e., costing more than 10% of the corporation's annual budget) then a vote by 66 2/3% of the owners of all units is required to approve a substantial alteration at a meeting of owners [Act, s. 97 (4)-(6)]. If the Alteration is not substantial, then it can be made by a resolution of the board of directors without notice to the owners, in four scenarios specified in s. 97 (1) and (2) (a), (b) and (c) if:

- (i) if the corporation uses materials that are as reasonably close in quality to the original as is appropriate in accordance with current construction standards, or
- (ii) it is necessary to do so to comply with a reciprocal agreement, the requirements of any act, regulations or by-law, or
- (iii) in the opinion of the board it is necessary to do so to ensure the safety and security of persons or imminent damage to the property and assets, or
- (iv) the estimated cost in every given month is no more than the greater of \$1,000 and 1% of the corporation's current annual budget for common expenses.

If the nature of the Alteration is not "substantial", but exceeds the criteria which can be governed by the board, then notice of the Alteration must be sent to the owners describing the Alteration, estimating its cost and source of funding, and informing owners that they have the right, within 30 days, to requisition a meeting of owners to vote upon the topic. A copy of s. 46 (the requisition section) and s. 97 must be forwarded to the owners [Act, s. 97 (3)].

Owners Dispute Board's Rights

Owners often mistakenly believe the board should have forwarded a notice of the Alteration to the owners, informing them of their right to requisition a meeting of owners to dispute the Alteration. In reality, often the board was entitled to make the decision acting alone without notice to the owners, either because the situation was more properly characterized as preventative maintenance, maintenance or a repair, a repair after damage or a directors' Alteration permitted by s. 97 (1) or (2) (a), (b), (c). Moreover, disputes often arise as to whether the board was entitled to use the corporation's reserve funds in the case of a "major repair and replacement", or whether the corporation's operating funds should have been used to fund the cost of any of the types of Alterations. Boards and property managers are wise to exceed experienced legal advice to assess the implications and intricate aspects of particular circumstances to ascertain which set of procedures should best be followed in each case.

Section 98 – Owners' Alterations

As of May 5, 2001, s. 98 of the Act required a unit owner who wished to alter the common elements to enter into an Owner's Alteration Agreement (or an "**Agreement**") approved by the board of directors and registered on title to the unit. The Owner's Alteration Agreement imposes many obligations upon such a unit owner. The Agreement must allocate the cost of the Alteration, set out the respective duties and responsibilities (including the cost of repair after damage, maintenance and insurance) and confirm who owns the Alteration. Usually, the unit owner agrees to assume responsibility for the acquisition, installation, plans and specifications and building permit. The Agreement may also deal with many other potential issues, like mediation/arbitration in the event of a dispute and the authority to lien an owner's unit to secure any amounts owing by the owner to corporation pursuant to the Agreement's terms. Normally, it would be expected that each individual unit owner should bear all of the risks and costs applicable to his/her Alteration, and that the owner indemnifies the corporation recognizing the corporation's contractual right to require removal of the Alteration at the owner's expense in the event of the owner's failure to properly maintain and repair the alteration, or for any other breach of the Agreement by the owner.

Contractors' Covenants

Boards of directors should also require any contractor hired by the unit owner to sign a Contractor's Covenant. The Contractor's Covenant will protect the condominium corporation in various ways and ensure that the contractor's work on that condominium's common elements is undertaken to a high quality standard. This Contractor's Covenant should be subject both to a reasonable warranty and to the provisions

contained in the Owner's Alteration Agreement applicable to performance of the Work pursuant to any plans and specifications.

Board's Prior Consent

Boards can no longer be lackadaisical about requiring owners to obtain the board's prior written consent; the usual declaration provision continues to apply, but s. 98 imposes more rigorous criteria. Consent must be obtained even for minor common elements Alterations undertaken by an owner wishing to install a street number or seasonal decorations upon the common elements exterior of a townhouse, or a mailbox upon the common elements.

Board Resolution and Notice to Owners

The board must pass a resolution to approve the proposed alteration. The corporation is obligated to forward a notice to the owners including a copy of the Owner's Alteration Agreement, according to the same criteria as are set out in s. 97 (3) of the Act.

Variations in Agreements

A fireplace installation agreement is quite distinct from a balcony enclosure agreement, a satellite dish installation agreement or a deck installation agreement. Fence agreements can alter significantly depending upon whether they deal with privacy fences enclosing an exclusive use common area, or side boundary fences, or fences which extend into the common elements, or lot line condominium fence situations. A typical Agreement would cover 35 - 60 points in 10 - 20 paragraphs on 8 - 12 pages. Our past experience with numerous Owner's Alteration Agreements indicates that they will usually have to be further customized to suit the unique circumstances of each corporation. While the standardized forms provide an excellent starting point, the devil is in the details and directors and managers should ensure they avoid liability by having a condominium lawyer address the appropriate provisions to make the Agreement fit the situation. We have a number of precedent specifications for particular types of Alterations. However we still have to rely upon the board and manager to ensure that the wording of our standard form Owner's Alteration Agreement is suitable, having regard to the particular circumstances at the corporation's property.

Where we do not have a suitable precedent set of specifications, or if our specifications require revisions, it is up to the corporation to provide us with an appropriate set of specifications that are suitable for the particular Alteration.

Alterations to Exclusive Use Common Elements

Special considerations must be taken into account in the event the owner wishes to alter his or her own exclusive use common elements (i.e., a balcony or patio area). The board must be satisfied that the Alteration will not have an adverse effect on the units of other owners and that it will not give rise to any expense to the corporation. The Alteration must not detract from the appearance of any buildings on the property. An engineer must provide a certificate that the alteration will not affect a building's structural integrity, if the proposed Alteration involves a change to the structure of the building. The board must also be satisfied that the Alteration will not contravene the declaration or any prescribed requirements. In the case of an owner's Alteration to his/her exclusive use common elements, there is no need to give a s. 97 (3) notice to the owners.

Four Types of Owner's Alteration Agreements

- (a) **Multi-Purpose Agreements.** In the past, Owner's Alteration Agreements have always focused on a single purpose (i.e. a deck, fence or balcony enclosure, etc.). We have now designed a more flexible alternative in the form of a Multi-Purpose Agreement which allows the Board to pre-

establish detailed specifications for a number of different kinds of Permitted Alterations listed in Schedule "A" attached to the Multi-Purpose Agreement. Each Permitted Alteration would be subject to detailed criteria set out in its applicable Specification Schedule attached to the Agreement. For instance, some townhouse corporations may list 10 – 18 types of Permitted Alterations governing installation of mailboxes, street numbers, air conditioners, decks, fences, satellite dishes, garden sheds, etc. If the board adopts a form of Multi-Purpose Agreement as an automatic, corporate-wide precedent, a streamlined system is created which allows all owners to know what kinds of Permitted Alterations they can undertake and the applicable criteria. Once a unit owner signs the Multi-Purpose Agreement for the first time, it is registered on title to the owner's unit and then it is not necessary to register any other Owner's Alteration Agreement on title to the unit thereafter (as would be the case where individual single-purpose Owner's Alteration Agreements are used). The owner can simply sign a provision agreeing to install a particular Permitted Alteration in accordance with the applicable Specifications each time the owner wishes to make that type of alteration to the common elements. Our fee to provide and process the Multi-Purpose Agreement package of documents is \$1,485 (including disbursements and GST), based upon the assumption that the board and manager will provide any applicable specifications in addition to our existing sets of Specifications. We will charge at our standard hourly rate for time spent in excess of two hours for substantial revisions or attending any board or owners' meeting.

- (b) **Single-Purpose Corporation-Wide Agreement.** Often a high rise condo board may be interested in only one type of Alteration on a corporate-wide basis (such as installation of balcony enclosures on a high rise building, or installation of a fence or deck at a townhouse condo). In such a case, a single-purpose, corporation-wide Agreement and all associated documents can be pre-approved by the board. The Agreement can be prepared at the corporation's expense, but individual participating unit owners would have to pay the registration fees applicable to their units. Our fee to provide a Single-Purpose, Corporation-Wide Agreement package of documents with respect to a single Alteration, together with all associated documents will be in the range of \$795 - \$1,280 (including disbursements and GST) for each type of Single-Purpose Agreement you wish to select, depending upon the complexity of the situation and the types of choices made. We will charge at our standard hourly rate for time spent in excess of two hours for substantial revisions or attending any board or owners' meeting. For instance, if the board decides that neighbouring owners have the right to receive prior notice and to make a presentation to the board, or if a fence is installed outside the owner's exclusive use common elements area, or if the corporation does not provide a good set of specifications to us, those types of situations can involve additional provisions, procedures and time spent.
- (c) **Individual Owner's Alteration Agreement.** Sometimes an individual unit owner wishes to make a specific type of Alteration (installation of a fireplace, combining two units or renovations affecting utilities or where walls are moved) which is of unique significance to the initiating unit owner, but which the board does not perceive to be a corporation-wide project. In that case, a single-purpose Owner's Alteration Agreement and its associated documents can be prepared, all at the individual unit owner's expense. We often find that individual unit owners cause us to spend more drafting and negotiating time and often do not provide good plans and specifications, so that the overall cost is higher than when an experienced property manager is guiding a board undertaking a Multi-Purpose Agreement or a Corporation-Wide Agreement. In the case of an

Individual Owner's Alteration Agreement, we charge based upon time spent at our standard hourly rates, subject to payment of an up-front retainer in the amount of \$2,000. Actual fees and disbursements can range from \$950 - \$1,600, depending upon the type of Alteration and negotiations involved, plus the cost of preparation of the Document General and Certificate, execution thereof and registration of the Agreement on title.

- (d) **Community Standards Declaration Amendment.** In cases where a townhouse condo board wishes to allow a number of Permitted Alterations, and believes that over 80% of the unit owners would agree to amend the corporation's declaration, a set of Community Standards, consisting of the Permitted Alterations and other provisions, can be inserted into the Amended Declaration and registered on title. These Community Standards will serve as a corporation-wide, multi-purpose set of Permitted Alterations which preclude the need to register a Multi-Purpose Agreement on title to each unit. This approach also avoids the need to engage in processing subsequent Permitted Alterations. This optional Community Standards system makes sense when a townhouse condo board wishes to make other declaration amendments and expects owners' support. Normally, we can suggest 10 – 30 updates and improvements to a condominium corporation's declaration, which by their own merit deserve amendment to the corporation's declaration. The Declaration Amendment package is charged on a time-spent basis involving a package of 14 documents at a cost normally in the range of \$2,500, plus registration fees, disbursements and GST, when no changes to the maintenance and repair obligations, common interests and common expenses or unit boundary, exclusive use common elements or survey issues are involved. The optional Community Standards package is charged an additional time-spent basis, typically in the range of \$1,850 (including disbursements and GST), based upon the corporation providing any unique specifications for which we do not already have precedents.

Additional Services

Legal fees applicable to the Multi-Purpose Agreement and the Single-Purpose Corporation-Wide Agreement include a pre-set allocation of three hours of processing time. We carefully docket our time spent on each legal project. Necessary time spent beyond those usual streamlined processing times are charged at a rate of \$250 per hour. In the event the board asks us to attend a meeting of the directors or owners, or to draft unique provisions or specifications which do not already form part of our precedent packages, we charge for docketed time spent at our standard rates.

Owner's Registration Costs

Owner's Alteration Agreements must be registered on title in the case of Multi-Purpose Agreements, Single-Purpose Corporation-Wide Agreements or an Individual Owner's Alteration Agreement. Unit owners who wish to alter the common elements should individually bear the cost for us to register each of their Owner's Alteration Agreement, Document General and Certificate on title to their units. We will prepare the Document General and Certificate, arrange for the execution of those documents by the unit owner and corporation, register them on title and report back to both parties at a cost of \$345 (including \$95 for registration, disbursements, searches and GST), as long as the corporation and unit owner carefully execute the documents under seal in accordance with our Procedures and print their names exactly as they show on the Transfer pertaining to their unit. If documents are not carefully executed in accordance with the technicalities, the owner must reimburse us for the additional time to rectify execution formalities, at our clerk's hourly rate of \$100/hour.

Additional Documents and Procedures

We provide a number of related documents in addition to the Owner's Alteration Agreement in order to deliver a complete package of documents to you:

- (a) **The Agreement** – The applicable standard form of Owner's Alteration Agreement;
- (b) **Contractor's Covenant** – A Contractor's Covenant agreeing to comply with the criteria set out in the Owner's Alteration Agreement and Schedules. In the event the corporation wishes to permit the owner or the owner's contractor to undertake any construction on the corporation's common elements, the owner, contractor and corporation should sign the Contractor's Covenant.
- (c) **Board Resolution** – A one-time Resolution approving the form of the Agreement and providing its consent to alterations which comply with the criteria set out in the Agreement. The board can appoint the property manager or a director to approve the finalized Agreement in each case and to execute it on behalf of the corporation, if the corporation's by-law execution provisions permit signature by a single Authorized Signing Officer. The corporation's seal must be affixed beside the corporation's signature;
- (d) **Notice** – A notice that must be sent to all unit owners, including a copy of the Agreement when an Alteration affects common elements which are not exclusive use common elements;
- (e) **Application** – A form of Application to be completed and forwarded by the owner to the manager;
- (f) **Procedures** – A set of Procedures which enable owners and the Board to follow a streamlined process;
- (g) **Consent Form** – A standard form that can be used for granting the Board's Consent with respect to each requested alteration;
- (h) **Rule** – Occasionally a Rule delineating governing criteria may be appropriate.

Procedures

The Owner's Alteration Agreement will have to be registered on title to each participating owner's unit in order to bind future owners of that unit and to ensure that the Board may enforce compliance with all the requirements of the Owner's Alteration Agreement and such conditions as may be imposed by the Board in order to obtain its consent. Since an Alteration should not be undertaken until the Agreement is registered on title to the unit, the manager should warn the owner not to commence any work until:

- (a) the form of Owner's Alteration Agreement and applicable Schedules have been prepared and approved at a meeting of the board of directors;
- (b) if applicable, the board has passed a Rule or has established such conditions as may be required in order to obtain the board's automatic consent;
- (c) a one-time notice has been given to all owners where the Alteration affects common elements that are not exclusive use common elements and 30 days has passed;
- (d) the owner has obtained and filed with the manager the corporation's form of Application;
- (e) the contractor, owner and corporation have signed the Contractor's Covenant;
- (f) the Agreement has been executed by the unit owner and the corporation's designated representative and the owner has forwarded a cheque for the registration fees and disbursements payable to the lawyer;
- (g) the executed Agreement and cheque have been forwarded to the lawyer, the Agreement has been registered on title and the lawyer has reported to the manager and owner; and
- (h) the corporation has given the go-ahead to the owner to undertake the Alteration.

Copyright

You will appreciate that in view of the fact these documents have taken a substantial amount of time and effort to create, GMA retains its copyrights and other rights with respect to those documents. Upon payment of GMA's fee by each participating condominium corporation or unit owner, it or him/her is thereby licensed to use those documents only for its/his/her own purposes. Directors, managers and owners should refrain from misappropriating those documents for use by any other condominium corporation without GMA's prior written consent.

Other Issues

A wide range of sophisticated and challenging issues confront directors, managers and condominium lawyers. GMA provides a wide range of condominium legal services, including legal opinions, litigation, mediation, arbitration, corporate governance and preparation of a range of condominium agreements, by-laws, rules and other legal services. GMA is committed to solving your condominium legal problems in a practical and cost-effective manner to a high quality standard.

GMA Condo Documents Upgrade Packages

If you are interested, please ask for GMA's complementary introductory letter explaining any particular topic of interest referred to on GMA's Condo Documents Upgrade Packages list attached to this letter.

Instructions to GMA

Once you have reviewed GMA's complimentary introductory letter pertaining to any of GMA's Condo Documents Upgrade Packages, if your board wishes to instruct GMA to undertake the project referred to in this letter or any of the topics listed on GMA's Condo Documents Upgrade Packages list, you may instruct us to proceed with the chosen project(s) by filling out and returning to GMA our enclosed Condominium Project Instructions.

Conclusion

Please do not hesitate to call if we can be of assistance to you or if you wish to discuss any aspect in greater detail.

Yours truly

GARDINER MILLER ARNOLD LLP

Per: J. Robert Gardiner

JRG:it:ajs

Encl. s. 98

Instructions

GMA's Condo Documents Upgrade Packages

Condominium Project Instructions