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RE: GMA'S STANDARD UNIT BY-LAW

Repairs After Damage v. Insurance

Section 89 of the *Condominium Act, 1998* (the "Act") requires an existing corporation to repair after damage improvements made to a unit by the declarant before registration of the declaration and description. Such "Pre-Registration Improvements" to a unit would normally include ceiling and wall drywall, finishes, cupboards, closet doors, bathtubs, sinks, toilets and light fixtures, amongst various other types of improvements to the bare boundary walls of a unit made by the declarant in order to deliver a finished unit to the original purchaser. However, s. 99 of the Act provides that the corporation's obligation to maintain insurance for damage to the units and common elements caused by major perils or other specified perils does not include insurance for damage to improvements made to a unit, unless an existing corporation passes a by-law which defines a Standard Unit in accordance with the Standard Improvements specified to be included in the Standard Unit. In effect, the Standard Unit By-law ("SUB-L") allows a condominium corporation existing prior to May 5, 2001 to obtain insurance proceeds to cover the cost of repairing defined Standard Improvements after damage which the Corporation is obligated to repair, arising from major perils or extended perils.

Need for SUB-L

In effect, s. 89 of the Act requires that an existing corporation must repair a unit after damage, but s. 99 says that no insurance proceeds will be payable to repair improvements unless a SUB-L is passed. For instance, a leak in unit 1202 may cause water damage to the Pre-Registration Improvements located within seven units below costing \$70,000 to repair, or a fire may damage the Pre-Registration Improvements contained within 25% of the building's units, costing \$9,000,000 to repair. If there is no SUB-L passed by a majority of owners and registered on title, the insurer can refuse to pay any insurance proceeds, having regard to the fact that the insurance policy is a contract and s. 176 of the Act provides that the Act applies despite any agreement to the contrary. For that single reason alone, condominium corporations should pass a SUB-L to clarify their entitlement to insure specified Standard Improvements to units which the corporation is obligated to repair after damage.

Standard Improvements

Normally, the original purchaser of a residential unit from the declarant receives more than the bare walls. Usually a schedule attached to the Agreement of Purchase and Sale refers to a number of built-in components provided by the declarant, such as painted drywall, lighting and plumbing fixtures, cupboards, interior doors and various other components. Sometimes these components are referred to as "extras" in the original Agreement of Purchase and Sale, or as "Pre-Registration Improvements", or as "declarant's improvements", or using other terminology. Normally, a board of directors will realize it is in the best interest of the unit owners to designate

almost all of those Pre-Registration Improvements as Standard Improvements in a SUB-L, so that the corporation's insurance can be permitted to reimburse the corporation for its duty to repair them after damage. In most cases, the SUB-L excludes carpet and under-padding or other specified flooring components from the definition of a Standard Improvement, because of the high level of damage and need for replacement of flooring components caused by the unit owners themselves, which would otherwise result in a significant number of minor claims, if they were not specifically excluded as Standard Improvements. GMA's model SUB-L lists a number of excluded situations in order to close various loopholes and avoid abuses.

Owners' Maintenance v. Corporation's Damage Repairs

The unit owner is obligated to maintain those Pre-Registration Improvements in the normal course as they suffer minor damage, or wear out or become out-of-date. However, in the event of a major peril or some other extended peril or other specified event of damage, an existing condominium (existing prior to May 5, 2001) is obligated to repair such Pre-Registration Improvements, whether or not the event of damage was widespread throughout the building. Unit owners' improvements and betterments, as well as their contents and other items would not constitute Standard Improvements insured by the corporation. Owners continue to have their responsibilities to maintain their units, any Pre-Registration Improvements (even if the SUB-L designates them as Standard Improvements), together with the owners' contents, improvements and betterments. It is up to the unit owner to keep them in a good state of maintenance and repair. The corporation only assumes liability to repair specified Standard Improvements when they are damaged as a result of a major peril or extended peril when the corporation's insurance policy permitted by the SUB-L provides coverage and no exclusion is applicable.

Benefits of SUB-L

The SUB-L allows the board to select the Pre-Registration Improvements and other components existing in the units and designate them as Standard Improvements which the condominium corporation will insure and repair after damage. The chosen Standard Improvements, their quality and model specifications can be set out in a Schedule attached to the SUB-L. By specifying the Standard Improvements, each of the corporation, the unit owner who caused damage, unit owners and residents who suffered damage and each of their insurers will know which particular Standard Improvement components should be used to replace the damaged components. Moreover, the quality of the replacement materials will be standardized.

Benefit to Owners

It is much less expensive for the condominium corporation to absorb the cost of insurance for damage to the Standard Improvements than it would be for each individual unit owner to take out insurance for that purpose. Owners in a condominium which has a SUB-L can rest assured that in the event some major peril arises, their units and the Standard Improvements are insured by the condominium corporation (unless one of the obvious exclusions applies). The SUB-L also contains a provision urging owners to take out their own comprehensive condominium owner's insurance policy, listing a number of types of preferred insurance coverages. Moreover, an insurance deductible clause protects other owners from having to pay the insurance deductible amount applicable to damage to an owner's unit, other units, their Standard Improvements and the common elements caused by another owner or his/her unit occupants or visitors.

Stripped-Down Unit

Some corporations might consider enacting a “stripped-down” SUB-L which excludes all Pre-Registration Improvements. In that event, a stripped-down standard unit would be defined with reference only to its bare-wall unit boundaries, without including the usual Standard Improvements. We strongly recommend against using a “stripped-down” SUB-L, because boards who do so can expect to be confronted by angry owners who will be required to pay increased insurance costs on an individual basis which otherwise could be absorbed by the Corporation at a much lower common expense cost. In addition, many owners (often more than a majority) will fail to insure the Standard Improvements if required to do so personally.

Classes of Standard Units

There is no use to establish more than one Class of Standard Unit unless the board feels it is appropriate to repair after damage and insure some types of Standard Improvements for one class of units, while establishing a different group of Standard Improvements for one or more other classes of units. Separate classes of units should be determined by reference to the differences in their Pre-Registration Improvements or exclusions, rather than by reference to different unit designs, shapes, unit boundaries or zoning uses. For instance, some penthouse or other units may have been built as luxury units, or may have been started-up by the declarant during a slow market, and their owners may expect to have their different or higher quality marble tile or fireplace Pre-Registration Improvements defined as Standard Improvements which will be repaired after damage and insured by the corporation, especially since their unit purchase prices were higher than normal and they pay a higher proportion of monthly common expenses than might normally be the case.

Decide Which Improvements Included/Excluded

To keep costs down, it would be best for your by-laws committee to review the featured components installed by the declarant within the unit boundaries as referred to in several representative Agreements of Purchase and Sale. The directors will have to decide what types of Standard Improvements will continue to be insured and repaired after damage by the Corporation. The types of Standard Improvements may vary significantly, depending upon whether a condominium is a townhouse complex or high rise, a penthouse or typical residential unit and the quality of their materials and finishes. You may need to add additional Standard Improvements to those listed in our SUB-L, if appropriate. The board is not obligated to ascertain and include every Pre-Registration Improvement and in fact, the board is even entitled to designate some improvements made by owners which have been standardized throughout the complex.

Specifications

We recommend that either the Corporation’s By-law Committee or the Corporation’s contractor should check at random at least three to five units of each Class of Standard Units, using either our own list of Standard Improvements Specifications set out on Schedule “C” attached to the SUB-L as a starting point, or such other list as your Board may wish to adopt in order to enumerate each component which will constitute an Standard Improvement. The Contractor should specify the manufacturer, model and specifications, when applicable, together with such other information as may be deemed appropriate, so that any other contractor could purchase exactly the correct replacement component to the appropriate quality standard. Some insurance

adjusters tend to simply allocate insurance proceeds based upon categorizing the damages items as low, medium or high quality. If your Corporation's components are of good quality, it is recommended that the Corporation should insist that the insurer reimburse it for the cost of replacing the specified item to a similar high quality. The Contractor should revise any items on the list of Standard Improvements set out in Article 3(b) of the model SUB-L which should be added, deleted or amended. You should provide a copy of this letter for the Contractor's consideration. Under s. 37 (3) of the new Act, the directors can protect themselves from liability with respect to their standard of care if they obtain a report from a professional or another person whose expertise lends credibility to the report. That is an important protection to keep in mind when complex or expensive situations are at issue. Some corporations may decide to take a more simplistic approach, but will then likely encounter difficulties when attempting to resolve specific disputes, keeping in mind that it will be harder to select an equivalent Standard Improvement replacement 70 years from now.

Updated Materials

If the Contractor notes any particular Standard Improvement which cannot currently be replaced, then the Contractor should designate substitute materials which the board can adopt either now or at future dates as a Standard Improvement. The board should pass a resolution designating those substitute materials to be used as the substituted Standard Improvement, and Schedule "C" should confirm that the particular Standard Improvement is a substitute by adding the words "(substitute materials)".

Photographs

We recommend that the Contractor photograph each type of Standard Improvement. The Contractor should take notes with reference to each numbered negative frame as each picture is taken, delineating the nature of each Standard Improvement and any particular comments which would tie them into the Standard Improvement Specifications. It might be helpful to use a camera that can indicate the date. Each photograph should denote the number of the Unit and Level where the photograph was taken, the direction toward which the camera was pointed, the specific Standard Improvement, the name of the photographer and the date. The Contractor should provide to the Corporation the photographs, the original negatives, any notes and the completed Standard Improvement Specifications.

Maintenance/Repair Obligations

It is often difficult to ascertain whether the corporation or a unit owner is obligated to maintain or repair after damage facilities serving a unit, Pre-Registration Improvements, owners' improvements or betterments to the unit, the common elements, exclusive-use common elements and an owner's installation on or alterations to the common elements (which are subject to maintenance and repair obligations in accordance with an Owner's Alteration Agreement). Normally, the corporation must maintain the common elements and repair after damage the units, Pre-Registration Improvements and common elements, while each owner must maintain the owner's unit. However those obligations are often altered by a declaration provision. The obligation to maintain includes the obligation to repair and replace after normal wear and tear, but does not include the obligation to repair after damage. Maintenance may also apply to require replacement of structural components. For instance, many declarations contain a provision requiring owners to maintain their exclusive use balconies. Unit owners may find

themselves responsible to replace all of the structural steel and concrete when a balcony deteriorates after 30 years of wear and tear. Depending upon the wording in your declaration, it may be possible to alleviate that burden upon individual unit owners by defining the obligation to “maintain” with respect to such exclusive use common elements by inserting a by-law provision worded in a manner consistent with owners’ expectations that they are only required to maintain the surface of those exclusive use common elements. If your condominium’s declaration requires owners to maintain their exclusive use balconies, you should discuss this issue with us and instruct us whether to insert a provision into the SUB-L so as to confirm the definition of “maintenance” to mean only the surface areas and not the internal structures of the balcony. The case law on the topic of maintenance and repairs is extensive, giving rise to different interpretations. Your corporation may wish for us to provide a letter to owners explaining the nature of their maintenance and repair obligations with respect to various types of unit and common element components, as well as their obligations with respect to damage caused to the common elements and other units, in addition to the implications with respect to the insurance deductible.

Insurance Deductible

Our SUB-L precedent also contains a provision extending the circumstances when an owner becomes responsible to bear the insurance deductible amount when persons for whom the owner is responsible are deemed to have caused damage to the owner’s unit, the common elements, other units and any Standard Improvements. The unit owner’s responsibility can only be extended pursuant to such a by-law provision as permitted by s. 105 (3) of the Act. Let us know if you want us to reduce any of the extended circumstances in any aspect. In our opinion, if a court decided to cut down that extended circumstance, our model SUB-L contains a provision which recognizes that only the specific unenforceable aspect of a provision should be severed to the minimal extent and that the remaining portion of the provision as may be enforceable would continue in full force and effect. The insurance deductible clause protects other owners from having to pay the insurance deductible amount applicable to damage caused by another owner or those for whom the owner is responsible. Such responsible owner can obtain insurance deductible coverage as part of his or her own comprehensive condominium owner’s insurance policy.

Owners’ Insurance

It is important that the Corporation notify owners of any alteration in their obligations to repair any Pre-Registration Improvements after damage. The Corporation should also advise owners of the different insurance implications that may arise if the board elects to do nothing, or if the Corporation’s SUB-L consists simply of a stripped-down standard unit with no Pre-Registration Improvements. The Corporation should promptly notify unit owners to arrange their own separate insurance coverage for any excluded Pre-Registration Improvements (i.e., carpet, kitchen countertops, etc.), for owners’ own improvements and betterments to the unit, and for contents and other personal property. Owners should obtain public liability insurance protection from claims for bodily injury or property damage and insurance coverage for the amount of the Corporation’s insurance deductible amount. Owners should be encouraged to take out a comprehensive unit owner’s insurance package which provides many other additional types of coverage, as we have recommended to unit owners in more detail in Article 7 of our SUB-L. It is also recommended that owners require their tenants to purchase their own contents and

liability insurance protection when signing a lease. Damages caused by the tenant's negligence could cause the Corporation's insurer and other unit owners to sue the tenant for damages, since the Corporation's insurance does not normally protect tenants by containing a waiver of subrogation clause (which only protects unit owners and the Corporation from claims which otherwise could have been made by each against the other).

Instructions and Procedures – SUB-L

Attached to this letter is GMA's form of Instructions - SUB-L. Please check the appropriate checkbox(es) and complete and fax or mail the Instructions form to us. We will then draft the SUB-L and review the unit boundaries, as well as any maintenance and repair obligations set out in the declaration. We will draft Schedules "A" and "B" clarifying those unit boundaries and obligations to repair after damage. We will subsearch title to confirm the appropriate next by-law number for the SUB-L. We will also provide a form of Processing Procedures – SUB-L setting out the steps we will each take to complete our respective inputs. Upon receipt of the board's revisions, we will finalize the SUB-L and forward it to your board together with the form of resolution for the board to pass the SUB-L (subject to enactment by the owners). We will also provide a form of notice to owners explaining the SUB-L, together with a suggested form of proxy adapted for this purpose. Upon request, we will be pleased to make a persuasive presentation promoting the benefits of the SUB-L at an owners' meeting, answer questions and stick-handle any proposed amendments. If a substantial majority of owners are not present at the original meeting, we can propose a Motion to Adjourn Meeting for a Specific Purpose, so that absent unit owners can vote in favour of the SUB-L by proxies which can be tabulated at a subsequent table-top meeting. Once you advise us that the owners have enacted the by-law, we will prepare the legal-sized SUB-L, Document General and Certificate in quadruplicate for execution under seal and return to us, in accordance with our covering letter explaining the execution criteria. Upon receipt of those documents in triplicate, we will register them on title and we will forward our subsequent registration report and the duplicate registered by-law for your records and attachment to subsequent status certificates. You should then deliver a copy of the registered SUB-L to your insurer.

Fees for SUB-L

Our basic fee for processing an appropriate SUB-L for your Corporation amounts to \$1,850 plus disbursements (of approximately \$45.00 and GST). Any time spent in excess of three hours to insert customized special provisions which require additional drafting time on our part, or to deviate from the processing procedures will be charged at our standard hourly rate. If you wish us to attend or chair a board meeting, by-law committee meeting or meeting of owners to sell them on the SUB-L, lead them through a discussion about the repair and insurance implications and deal with any questions or amendments that may arise, we will charge an additional fee at our standard hourly rate. Our services to prepare and arrange for execution and registration of the legal-sized by-law, Document General and Certificate and reporting to you amounts to an additional \$345, including fees, disbursements (approximately \$100), including GST.

Timing

We are receiving a large volume of requests to finalize our SUB-L and Comprehensive General By-law. We are prioritizing requests on a first-come, first-served basis in order to give equal preferential treatment to our clients. Once we receive written instructions to proceed, you should

expect to receive our basic form of SUB-L promptly thereafter. Plan on four weeks turnaround time for GMA to finalize any revisions made by the board (so that we can fit this project into our other workload priorities). Boards should expect an overall processing time of approximately three - five months before the board will be in a position to approve the finalized version. It is preferable to provide your instructions to GMA six months before your next AGM. The SUB-L should be ready for circulation to owners attached to an agenda for a meeting of owners to vote to approve the SUB-L, with or without amendments, and the by-law will become effective once it has obtained approval by the owners of a majority of units and the by-law has been registered on title.

Adjourned Meeting for By-law Enactment

If there is less than a substantial majority of owners in attendance at an owners' meeting for the purpose of deciding of whether or not to enact a proposed By-law, the owners can be asked to pass a detailed Motion to Adjourn Meeting Re: By-law Vote, in order to adjourn only the portion of the owners' initial meeting pertaining to the By-law to be dealt with at an adjourned meeting to be held within 120 days. That allows the Corporation to provide a chance for absent owners to vote by proxy in favour of or opposed to such a by-law at an adjourned meeting where only the Chair, Registrar and Scrutineers need be in attendance. Normally, a high percentage of owners absent from the original meeting will regard the proposed by-law favourably and will complete the proxy form accordingly. We will provide a copy of the Motion to Adjourn Meeting once the board is ready to forward the finalized by-laws in the Notice of Meeting to Owners, so that the Chair of the meeting can have it on hand in case it is necessary to invoke it. We have arranged for many by-laws which otherwise would have failed due to low attendance at an owners' meeting to in fact be enacted at the adjourned table-top meeting on that basis. If in fact it is necessary to pass the Motion to Adjourn Meeting, we will then forward our Manager's Instructions Letter, together with a package of Adjournment Procedures, notices, letters, Agenda, Proxy and Ballot which will enable the Manager to send out the appropriate notices and to arrange for the Adjourned Meeting to be properly conducted (fee \$275 plus GST).

Send Copy to Insurance Broker

Once the SUB-L has been enacted by the owners and registered on title, you should provide a copy of the SUB-L to your insurance broker, in order to make sure that all Standard Improvements are insured. Keep in mind that most or all of the Standard Improvements were previously insured as Pre-Registration Improvements under the Corporation's insurance policy, and as a result, there should be no additional liability exposure to the insurance company. In fact, the insurance risk will be substantially reduced if your Corporation decides to exclude carpets. You might hope that will give rise to an insurance premium reduction - but likely not. Several major brokers have pointed out how insurance premiums are rising generally. They have also indicated they are not willing to make recommendations or to review the contents of any SUB-L. They will accept whatever SUB-L the corporation wants to deliver to them - it is not the broker's or insurer's problem, although they appreciate clarification of who is responsible to repair and insure damaged components.

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

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