



BEFORE AND AFTER TURNOVER

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Getting the Keys

If registration of a declaration and description is the birth of a condominium, then turnover is like getting the keys to the family car. A condominium's turnover meeting and ensuing events can be a tumultuous period in its history. *The Condominium Act, 1998* (the "Act") contains numerous provisions affecting turnover issues, i.e., [s. 43].

BEFORE TURNOVER

A Vulnerable Stage

A Condominium Corporation can be most vulnerable during the period before and after its turnover meeting, when the first owner-appointed directors are elected to form a new board. Before turnover, the Corporation is controlled by a declarant-appointed first board of directors. While many mainstream declarants have good reputations and refrain from taking advantage of their control, some other single-purpose shell company declarants have been known to rip off Condominium Corporations and their owners. The declarant's team is often focussed on completing the sale of units and sometimes that can lead to conflicts, especially during periods between interim occupancy and final closings if the developer's unit sales are slow and a financial crunch occurs.

Steering Committee

Some Condominium Corporations establish an owners' Steering Committee who may convey the concerns of new unit owners to the declarant-appointed board of directors. Often, Steering Committee members have a chance to learn about the operations of the Corporation and are provided with the opportunity to prove themselves as potential directors.

Procedural Advice

Should conflicts arise, the declarant-appointed board commands the power and access to the Corporation's financial resources, property manager, solicitor, accountant and engineer, while owners are often unable to muster the wherewithal to retain professional services. However, owners should seek advice for the appropriate procedural techniques applicable before and at the turnover meeting. Often that can be accomplished by contacting a property manager or lawyer who can provide some start-up advice with respect to turnovers (check the Professional Directories published by the Canadian Condominium Institute ((416) 491-6216) or the Association of Condominium Managers of Ontario, ((905) 826-6890).

Proxy

If it appears that the declarant-appointed directors will run for re-election at the turnover meeting, owners may decide to embark upon a proxy solicitation to elect owners to form the new board. If you do not use the form of proxy provided with the notice and agenda of the meeting, then arrange for a professional to approve your form of proxy. For instance, you may wish to type in the names of your candidates as named candidates for election as directors. Ask each proxy grantor to initial each such candidate's name or else print the candidates' names into the blank lines provided. A proxy is only valid for election of a director if the proxy grantor has approved the choice. The proxy must be signed and dated by one of the owners of the unit (not by a tenant or another resident). It has become usual practice for the proxy to be turned in at the time of registration to the Registrar who will issue one or more coloured voting ballots to the proxy holder, but no separate voting ballot to elect directors, since the proxy itself will be placed into the ballot box by the Registrar to enable the proxy grantor's choice of directors to automatically be tabulated. Unfortunately, owners who grant proxies give up their right to vote for other candidates who only announce their candidacy from the floor. Prepare a one page profile sheet for each of the owner candidates and circulate them to other owners before commencement of the turnover meeting [s.52]. Dish out your hand-outs by standing just inside the meeting room, past the registration desk. In a contentious scenario, access the Corporation's records to obtain a list of owners' names and addresses, as follows. Point out the reasons why it would be in owners' interests to appoint you as a director.

Access Records

Owners may obtain relevant information by making a written request to examine the records of the Corporation [s. 55 (3)]. Legal cases such as *McKay v Waterloo North Condominium Corporation No. 23* and *Rohoman v. York Condominium Corporation No. 141* confirm that the Corporation's records are an open book. Owners may photocopy most records at a reasonable cost upon reasonable notice, subject to some confidential records which are not accessible (such as legal opinions, insurance disputes and records specific to owners and units) [s. 55 (4) and (6)]. However, such records may only be examined and used for purposes reasonably related to the purposes of the Act.

Meeting Procedures

Before the meeting, become familiar with the Corporation's general by-law (usually By-law No. 1) which deals with many issues, as detailed in my text book for managers and lawyers, ***The Condominium Act, 1998 - A Practical Guide*** (Canada Law Book tel. (905) 841-6472). The meeting is not valid unless proper notice has been given in writing at least 15 clear days before the date of the meeting (i.e., 17 days) to each owner and mortgagee of record as of the date 20 days before the date of the meeting. The notice can be served personally, by pre-paid mail addressed at the owner's address for service that appears in the Corporation's record, by fax or e-mail if the owner agrees in writing with that method of delivery, or delivered at the owner's unit or mailbox for the unit, unless the owner has refuted that method of delivery. The notice must specify the place, date and hour of the meeting and the nature of the business to be presented, accompanied by proposed changes to the declaration, by-laws, rules or agreements or any requisition. Votes other than routine procedures are permitted only for matter clearly disclosed in the notice or

agenda for the meeting [s. 47]. Owners whose common expenses are in arrears for 30 days or more lose their right to vote. A quorum is normally those owners who own at least 25% of the Corporation's units (although the quorum can be increased up to 33 1/3% by a by-law provision). If it is expected that the turnover meeting will be contentious, owners are well-advised to retain the services of an experienced condominium lawyer to advise the owners on various tactics and to speak at the turnover meeting on their behalf.

Voting Criteria

Normal business issues are determined by a majority vote (a vote by a majority of the persons present at the meeting in person or by proxy). However, various important issues are decided by one of the extraordinary votes, or written consents of owners (i.e., a by-law can only be enacted by a favourable vote by the owners of a majority of all units. A substantial addition, alteration or improvement to the common elements, or a change in services that the Corporation provides to the owners must be approved at a meeting of owners by a favourable vote of 66 2/3% of the owners of all units. When the declaration is amended, or other significant corporate changes are made, the written consent or a vote of 80% - 90% of all owners is required in specified circumstances). Check out s. 45 - 54 of the Act pertaining to various voting and other meeting issues.

Electing Directors

The agenda for the turnover meeting may list various topics, but must include an election of a new board whereby the unit owners (not tenants) are entitled to elect directors. If all unit owners voted together, they could ensure the election of owner-appointed directors. However, the typical reality of non-resident, uninformed and apathetic unit owners means that a determined declarant can often exercise its votes to control the election if it retains a large block of unsold units. Consumer-oriented declarants will allow owners to take control at this point.

Learn the Basics

Owners who are willing to become directors should familiarize themselves with the provisions set out in the declaration, by-laws, rules, management agreement, reciprocal/cost sharing agreement, leases of common elements, financial statements, budget and insurance policy of the Corporation. Candidates interested in becoming directors would do well to review the provisions of the Act.

CCI Basic and Advanced Courses

Directors can benefit by acquiring a wide range of skills taught at the CCI-Toronto's Basic Course and the Advanced Course. Call CCI at (416) 491-6216 for a brochure and ask your Condominium Corporation to reimburse you for the course fee. CCI (Toronto & Area)'s Basic Course runs for seven Wednesday nights in October - November, or March - April. The Advanced Course runs for four Wednesday nights in January - February.

First Board and First Owner Directors

Within ten days after registration of the Corporation's declaration and description, a declarant must appoint the first board of directors consisting of at least 3 directors which manages the affairs of the Corporation until the turnover meeting [s. 42 (1), (3), (4)]. The

first board must call and hold an owners' meeting by the later of 30 days after the declarant has transferred 20% of the units in the Corporation, or 90 days after the first unit is transferred [s. 42 (6)]. A quorum of 25% of the non-declarant owned units may elect two directors to the first board which is increased accordingly [s. 42 (8) (9)]. The first board need not call the owners' meeting if the declarant has informed the first board in writing that it no longer owns a majority of the units (because then the turnover meeting must be called) [s.42 (7)].

Owner Occupied Director

The right of owners of at least 15% of owner-occupied units to elect an "owner-occupied director" to the board does not come into effect until later on, after the first board is obligated to call a turnover meeting and at annual meetings, each three years thereafter [s. 51].

TURNOVER MEETING

Turnover Notice and Meeting

The declarant-appointed board must give notice of a turnover meeting of owners within 21 days after the declarant ceases to be the registered owner of a majority of the units [s. 43 (1)]. That occurs when more than 50% of the unit transfers are registered. The turnover meeting must be held within 21 days after notice has been given [s. 43 (3)]. If the board fails to call the meeting within the required time, any owner or mortgagee having the right to vote may do so [s. 43 (2)]. The main point of the meeting is to turn over the condominium documents and to give owners the opportunity to elect directors, usually with the result that the declarant-appointed directors are replaced.

Turnover Documents

Once the new board has been elected at the turnover meeting, the declarant must turnover 7 categories of listed documents and items [s. 43 (4)]. Those time-sensitive items are provided immediately at the meeting and the balance of 12 categories of documents is turned over within 30 days [s. 43 (5)]. These categories of items must be provided at the declarant's expense, except for required reserve fund studies and any performance audit which must be prepared at the expense of the Corporation [s. 43 (6)]. If a declarant fails, without reasonable excuse, to deliver the required documents and items, the Ontario Superior Court of Justice may order compliance, payment of damages, a fine of up to \$10,000 and costs [s. 43 (9)].

Confirm Appropriate Documents

The new directors should not sign a comprehensive release for items received, but should obtain professional advice to carefully check each required item against the mandatory list and acknowledge in writing only what has actually been delivered. Ask your property manager or lawyer to confirm in writing that all appropriate items have been received. In particular, obtain the Corporation's engineer's advice as to whether all architectural, structural, engineering, mechanical, electrical and plumbing plans have been documented as "as-built" plans.

AFTER TURNOVER

Audited Turnover Financials

Within 60 days after the turnover meeting, the declarant must provide the new board audited financial statements (at the Corporation's expense) prepared by the auditor as of the last day of the month in which the turnover meeting is held [s. 43(7)].

Turnover Offence

It is an offence for a declarant to fail to provide the turnover documents, audited financial statements or any of the Corporation's trust funds. A declarant-appointed first board would also be held accountable for failure to hold a turnover meeting and to keep the records listed in s. 55 [s. 137].

New Directors' Meeting

The new owner-elected directors should promptly call and hold a directors' meeting after the turnover meeting. Directors should elect a President from among themselves and appoint or elect a Secretary, together with any other officer such as a Vice-President or Treasurer. It is important to review the officers' responsibilities under By-law No. 1 and to establish appropriate committees involving interested Steering Committee members and other owners and tenants, where possible.

Professionals

The newly elected Board should interview experienced lawyers, auditors and engineers familiar with the particular issues that confront Condominium Corporations. Property managers should be active members of ACMO and should have a Registered Condominium Manager (R.C.M.) on staff. Other professionals should preferably be active members of CCI, having an A.C.C.I. designation, and may be involved in lecturing or writing about condominium issues.

Auditors

After turn-over, Corporations having fewer than 25 units need not appoint auditors if all owners consent in writing until the next annual meeting. It is a bad idea to hire an auditor who is not a condominium specialist and capable of ensuring compliance with s. 60 - 69, 115 of the Act and who is qualified to advise the Corporation and its owners of various financial issues and safeguards, in addition to preparing the usual financial statements.

Financial Review

The newly-elected directors should promptly take charge of the Corporation's finances. The new board must determine whether the year-to-date financial performance is on track in relation to the current-year budget. Is the current budget realistic or are adjustments required? The board must also ensure that any recalcitrant owners are lienied for common expense arrears within 90 days of when they fell due [s. 85].

Status Certificate

Review the Status Certificate. Is the current budget accurate? Have appropriate amounts been contributed by the declarant to the Corporation's reserve fund to date? Make sure required information about the current budget and reserve fund contained in the Status Certificate is accurate. Does the Corporation have any knowledge of any circumstances that may result in an increase in common expenses or a special assessment (such as potential construction deficiencies)? The Status Certificate must also state the number of units leased during the prior fiscal year. Update the directors' names and addresses. Is the Corporation a party to a legal action or is any judgement outstanding? Has an inspector or administrator been appointed by the Court? Is the Corporation amending its declaration or description? Is it considering any substantial alteration to the common elements or a substantial change in assets or services which the board has proposed but not yet implemented? Are all the appropriate agreements listed and being complied with? Check with the Corporation's solicitor to confirm that appropriate terminology is being used and to avoid potential claims by purchasers who relied upon misinformation or failure by the Corporation to address any of the 18 criteria applicable to a Status Certificate as listed in the Act. Status Certificates must be delivered by the Corporation to purchasers within 10 days of receiving a request and payment of the \$100 fee (inclusive of HST) [s. 76 (3) & Form 13].

Warranties and Maintenance

Arrange for the property manager to check out all existing warranties and guarantees for all equipment, fixtures and chattels so that written warranty claims deadlines can be diarized and any claims can be submitted to manufacturers or suppliers before their expiry date [s. 96]. The manager should review the table provided by the declarant depicting the maintenance responsibilities and ensure that all appropriate maintenance and repairs are carried out on time [s. 43]. The manager, lawyer or insurance agent should review the schedule defining a standard unit for each class of unit to determine the Corporation's responsibilities for making repairs to improvements after damage and to confirm that the Corporation's insurance policy provides corresponding protection [s. 56 (1 (h)) [s. 89] [s. 99]. Appropriate measures must be taken to mitigate damage in the case of worsening building deficiencies. Any safety or security concerns should be given top priority.

Terminate First Year Agreements?

The Board is entitled to terminate specified agreements upon at least 60 days written notice within 1 year after the turnover meeting. Such agreements include contracts entered into by the first board for the provision of goods or services on a continuing basis, business leases of all or part of the common elements or agreements providing facilities to the Corporation for profit. First year agreements with telecommunications providers or other condominiums may not be terminated by the turnover board [s. 112]. Check the property management agreement in general. A management agreement entered into by the first board may be terminated by the turnover board without cause by giving at least 60 days written notice to the manager. Many property managers appointed by declarants provide first class quality services on an ongoing basis; unfortunately, some don't [s. 111]. Often the Corporation's solicitor can re-negotiate improved provisions in various first year contracts. Any party to an agreement for mutual sharing of facilities or services entered

into before the turn-over meeting may, within 12 months following the election of the new board, apply to court to amend or terminate the agreement or any of its provisions if the disclosure statement did not clearly disclose its provisions and if the agreement or any of its provisions produces a result that is oppressive or unconscionably prejudicial to the Corporation or to any of the owners [s. 113].

Execution of Agreements

Make sure that any agreement entered into on behalf of the Corporation is carefully prepared and reviewed to contain all appropriate protective provisions. CCDC II or IV Construction Agreements may be prepared by the Corporation's engineer for major construction projects. Ask GMA for our Standard Condominium Contract Conditions, which can protect your condominium from many standard scenarios by simply attaching the Standard Condominium Contract Conditions to a contractor's quote or your work order in order to supersede any conflicting Terms and Conditions attached to the contractor's quote. The Corporation's lawyer can often significantly improve the standard form of contract submitted to the Corporation by a contractor or service provider; for instance, GMA's standard form of Rogers' Telecommunications Agreement or Bell ExpressVu Telecommunications Agreement contain 30 – 50 protections not normally negotiated by condominium boards. Ensure that any agreement executed on behalf of the Corporation is in accordance with the execution provision contained at the end of the Corporation's General By-law. The agreement should be approved by a resolution at a meeting of the board of directors duly called and held. If it is intended that the agreement will be signed by a single person (other than two directors as normally designated in the Corporation's by-law), the right of the single person to do so should be stated in the directors' resolution. Ensure that the agreement is signed in the name of your condominium corporation by the duly authorized signing officer under the Corporation's seal. (Do not substitute the words "I have authority to bind the corporation", because those words are inapplicable in the case of a condominium corporation.)

Performance Audit

An engineer or architect must conduct a post-construction performance audit to determine deficiencies in some "major components" of the common elements for possible Tarion Warranty Corporation ("Tarion") warranty claims to the limited extent they are protected under the *Ontario New Home Warranties Plan Act*. The performance audit must be conducted 6 - 10 months following registration of the declaration and description at the Corporation's cost as part of its first year budget. The performance auditor must examine the buildings, landscaped areas, Tarion inspection reports and other major components. Owners must be consulted about actual or potential damage to units arising from defects in the common elements. The performance auditor has power to require entry to units, obtain information or hire experts. No person may obstruct or provide false information to the performance auditor. The performance auditor's report must be filed with the board and Tarion before the end of the 11th month after registration, whereupon it is deemed to become a Tarion notice of claim [s. 44].

Tarion Warranty Claim

Diarize the Tarion warranty dates and ensure that the performance audit and any other

warranty claim is delivered to the vendor, builder and Tarion within the limitation deadlines. Involve your engineer and lawyer promptly after registration of the Condominium Corporation. In addition to the performance audit, condominium directors would be wise to obtain a more extensive Technical Audit Report completed by an engineer independent from the engineer who undertook the Bulletin 19R or 38 Tarion Technical Audit. Warn unit owners to file their own Tarion warranty claims for deficiencies in their units within their limitation deadlines (particularly within the first year after receiving their Certificate of Possession when taking interim occupancy of the unit). Keep in mind the various Tarion restrictions which will often prevent the Corporation from recovering much more than 40% of its actual construction deficiency expenses, as compared to the higher net dollar recovery which can often be expected by involving an experienced condominium litigator early in the construction deficiency process. Ask for GMA's articles pertaining to ONWHP claims and building deficiency claims. The board should make sure that it protects unit owners by imposing the obligations and expenses of rectifying building deficiencies upon the applicable construction companies, builder and declarant.

Reserve Fund Study

If the turnover meeting is held more than 9 months after registration of the Corporation, the declarant must deliver a reserve fund study at the Corporation's expense to determine the adequacy of the Corporation's reserve fund for major repairs and replacement of common elements and assets of the Corporation [s. 43 (5) (j) and (6)]. In any event, new Corporations must acquire a reserve fund study within the first year after registration. That study provides the engineer's guesstimate of the amount of owners' contributions to the reserve fund which would reasonably be expected to provide sufficient funds for major repair and replacement of the common elements and assets of the Corporation, calculated on the basis of expected repair and replacement costs and the life expectancy of the common elements and assets components [s. 94].

Reserve Fund Summary and Funding Plan

The Corporation must conduct an initial comprehensive reserve fund study and subsequent alternate off-site and on-site updates each three years thereafter, performed by a qualified reserve fund analyst (preferably an experienced condo engineer) in accordance with standards applicable to particular classes of studies. The cost of conducting the study is a common expense which the board may charge to the reserve fund [s. 94 (7)]. Within 120 days of receiving the reserve fund study, the board must propose a funding plan to ensure that any shortfall will be topped up within a prescribed period (one year in the case of a new Corporation) [s. 94 (8)]. Within 15 days thereafter, the board must forward to the owners and to the auditor a notice containing a summary of the reserve fund study, a summary of the funding plan and a statement indicating the differences, if any, between the funding plan and the reserve fund study [s. 94 (9) & Form 14]. The board implements the funding plan 30 days later [s. 94 (10)].

First Year Budget

During the first year after registration of the Corporation's declaration and description and immediately after receipt of the audited year-end financial statements, check the Corporation's first year budget provided by the declarant as part of the disclosure

statement. Analyze whether the Corporation's actual financial performance during the first year resulted in either excess expenditures or decreased revenues, in which case the declarant is responsible to reimburse the Corporation for any such aggregate budget deficiency (except if the deficiency is caused by the turnover board's termination of specified agreements) [s. 75]. Note the first year budget criteria set out in s. 72 (6). Involve the Corporation's auditor, manager and lawyer in this review; often they can identify hidden expenses for which the declarant should be held responsible.

Budget Deficiency Deadline

Watch out! The turnover board only has 30 days after reviewing the first year audited financial statements to notify the declarant of any budget short-fall. The declarant must pay in 30 days.

Title Search

It is recommended that the board instruct the Corporation's lawyer to undertake a title search of the Corporation's property to report upon the implications of various registered documents, such as development agreements and other contracts, encumbrances or easements binding the property. As the lawyer's articling student or real estate clerk to identify each of the easements referred to in Schedule A attached to the Corporation's declaration in different colours on the Corporation's Description Plans.

Indemnification

Ask your lawyer to confirm that the indemnification provisions set out in By-law No. 1 appropriately protect directors and officers from most liabilities. In many cases, indemnification provisions should be amended in view of case law which absolved an insurer from paying out on an errors and omission claim because the court held the condominium was liable to do so under the standard wording of its by-law indemnity clause [s. 38]. The indemnification By-law clause will not protect directors or officers from any liability or expense incurred with regard to any action or proceedings where he or she is adjudged to be in breach of his or her duty of honesty and good faith [s. 37]. Ensure that the Corporation has purchased the obligatory errors and omissions insurance [s. 39.]

Being a Good Director

It is essential that volunteer directors learn how to become a good condominium director. See GMA's article entitled BEING A GOOD DIRECTOR, dealing with election, qualification, disqualification and operating criteria applicable to directors. That article also deals with methods to respond to various political tactics, how to effectively chair a directors' meeting, dealing with bad apple directors, directors' duties and a number of tips to help directors act effectively. GMA's article entitled DIRECTORS' POWERS, DUTIES AND STANDARD OF CARE addresses the scope of directors' powers and duties, a hierarchy of decision-making and governance powers, as well as specific duties to disclose a conflict of interest, the duty of honesty and good faith, and the duty of care, diligence and skill. That article also points out a number of owners' powers, requisition rights and enforcement remedies, while reminding directors that they are indemnified and protected by an indemnification provision contained in the Corporation's general by-law and by the Corporation's directors' and officers' errors and omission insurance. Attached to that article are GMA's complimentary

Directors' Code of Ethics and Owners' Code of Ethics and schedules pertaining to owners' majority votes, owners' extraordinary votes and owners' written consent as a handy reference to ascertain when owners have governance powers which supersede the board's usual general rights to govern the affairs of the Corporation.

List of Articles

GMA has an extensive system of precedents on a wide range of condominium issues, including over 2,000 precedent condominium legal opinions. See GMA's List of Condominium Articles as a handy reference for various GMA textbooks and specific articles on topics of interest to your Corporation.

Conclusion

The first several years of a Condominium's life might keep directors hopping, but an experienced property manager and professionals can solve many of the above concerns to keep the Corporation on an even keel.

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