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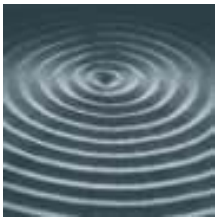


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"RECONSTRUCTING" A STRATA CORPORATION: COURT APPLICATIONS THAT AFFECT TITLE

By Mari A. Worfolk

JUNE 3, 2004

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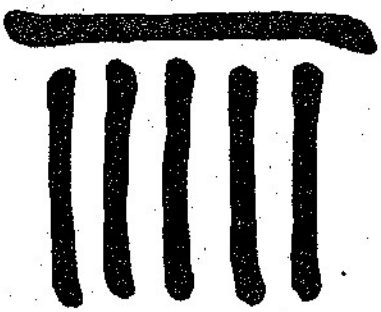

Strata Property—2004 Update

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STRATA PROPERTY—2004 UPDATE

"RECONSTRUCTING" A STRATA CORPORATION: COURT APPLICATIONS THAT AFFECT TITLE

These materials were prepared by Mari A. Worfolk of Miller Thomson LLP, Vancouver, B.C. for Continuing Legal Education, June 2004.

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"RECONSTRUCTING" A STRATA CORPORATION: COURT APPLICATIONS THAT AFFECT TITLE

A strata corporation is generally created by a developer. The developer is constrained by the provisions of the *Strata Property Act*, but this still leaves much scope for creativity for the developer seeking to create a project that is of interest to many different purchasers.

Sometimes the owners don't like what was set up, or the neighbourhood changes, or the market changes. Depending on the feature the owners or developer want to change, there are different procedures that may be followed.

This paper will review some of these procedures, focusing on those that require applications to court: easements/restrictive covenants; unanimous resolution applications; winding up; changing unit entitlement and Form P amendments.[1] Since reasons for judgment are rare in such cases, it can be difficult to foresee what issues may arise.

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1 See Table A at the end of this paper for a list of the pertinent statutory references for each of these areas. References throughout are to the *Strata Property Act*, S.B.L. 1998, c.43 as am.

I. Removal or Modification of Easements and Other Registrable Interests

An easement is "a right in the owner of a dominant tenement over the property of another" (the "servient tenement).[2] It is a registrable interest in land that passes with the titles to both the dominant and servient tenements.

Easements are very important components of a strata corporation title. A strata plan works in part because of the easements that are imposed automatically by s. 69 of the Act. Those easements cannot be modified or removed so long as the strata corporation exists.

Strata corporations may also grant easements and take the benefit of easements (see s. 78(3) of the Act). These easements can take many forms. Where a strata corporation is physically integrated with other strata corporations or properties such as air space parcels, a variety of easements will be necessary.

An example might be a resort complex with a hotel consisting of three different towers (one containing a private club, hotel rooms and residential strata lots), a recreation complex, parking garage, a time share townhouse area, and commercial space. Possibilities range from a single strata corporation with different types of strata lots, sections, extensive common property and a hotel management agreement, to half a dozen separate strata corporations, some consisting of air space parcels, all with a common hotel and property management agreement. The latter scenario is more likely to occur where the development occurred over a period of years.

In the first example relatively few easements, if any, will be required. In the second example there are likely to be many easements, which might include the following general types:

(a) access;

(b) construction, maintenance and repair;

(c) parking;

(d) access to and use of "public" hotel spaces such as lobby areas or reception desk;

(e) utilities;

(f) use of facilities such as recreational amenities, meeting space, loading zones in parking areas;

(g) emergency vehicle access; or

(h) party wall easements.

Granting an easement and accepting the benefit of an easement are fairly straightforward procedures involving the passing of ¾ vote resolutions by the strata corporation. However, modifying or removing an easement is another issue. The Land Title Office policy is that while a strata corporation can agree to accept the benefit of an easement, the strata corporation cannot be the dominant tenement. Therefore, the easement cannot be registered against the common property, but instead is registered as an easement in favour of each strata lot.[3]

As a result, removing an easement where a strata corporation is involved is a difficult matter. Because of the Land Title Office policy referred to above, which was introduced in 1995, the Land Title Office takes the position that each and every owner of a strata lot is a separate dominant tenement of an easement and requires the consent of each one in registrable form to release the easement. If it is not

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2 *B.C. Real Estate Law Guide*, para. 3655. This discussion focuses on easements but much of the discussion is also applicable to the other registrable interests listed in s. 35(1) of the *Property Law Act*.

3 *Land Title Practice Manual*, 2d ed. vol. 3, Tab 61 (Continuing Legal Education Society of British Columbia, 2000).

feasible to obtain the consent of every owner and mortgagee, then a court application under s. 35 of the *Property Law Act*[4] must be made.

Thus, easements should be very carefully drafted and thought given to how the project or site might evolve over the years. A developer or strata corporation must consider carefully the implications of the easement and how it might actually work before it agrees to accept the benefits of easement.

Section 35 of the *Property Law Act* provides:

> 35(1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
>
> (a) an easement;
> (b) a land use contract;
> (c) a statutory right of way;
> (d) a statutory building or statutory letting scheme;
> (e) a restrictive or other covenant burdening the land or the owner;
> (f) a right to take the produce of or part of the soil;
> (g) an instrument by which minerals or timber or minerals and timber, being part of the land, are granted, transferred, reserved or excepted.
>
> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
> (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
> (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
> (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
> (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.
>
> (3) The court may make the order subject to payment by the applicant of compensation to a person suffering damage in consequence of it but compensation is not payable solely for an advantage accruing by the order to the owner of the land burdened by the registered instrument.
>
> (4) The court must, as it believes advisable and before making an order under subsection (2), direct
>
> (a) inquiries to a municipality or other public authority, and
> (b) notices, by way of advertisement or otherwise, to the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled.
>
> (5) An order binds all persons, whether or not parties to the proceedings or served with notice.
>
> (6) The registrar, on application and the production of an order made or a certified copy of it must amend the registrar's records accordingly.

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4 R.S.B.C. 1996, c. 377 (NW1837).

The case of *The Owners, Strata Plan NW1837 v. The Owners, Strata Plan NW2794*, 2003 BCSC 1037 ("NW1837") is a good example of the difficulties that an easement that was clearly crafted for the benefit of both strata corporations can cause. The two strata corporations were located beside each other. The easement area was 9.5 metres on each side of the property line. The mutual easement was for access to each strata corporation. Parking was not permitted on the easement area by the easement agreement. The two strata corporations are commercial and subject to fairly strict local government parking requirements.

One of the strata corporations was allowing parking on the easement area. This was causing problems for owners within the other strata corporation who used the easement area as a loading area for large trucks. These trucks in turn blocked access to parking areas wholly within the first strata corporation.

Justice Burnyeat considered whether the easement should be modified, and ultimately concluded that it should, under ss. 35(2)(a)-(d) of the *Property Law Act*.

A. Notice

Section 35(4) requires that notice be given to "the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled." Adequate notice is a precondition to an order for cancellation or modification of the easement or other charge. Where a large strata corporation, or several strata corporations, are involved notice can become complex and expensive. While not strictly necessary, it is advisable to obtain a court order setting out the form the notice must take before seeking the order cancelling or modifying the easement itself, particularly if the proposed form of notice might be considered novel or incomplete in some way. In *Rideout v. Fliss*, (1998 Carswell B.C. 675 (B.C.S.C.) at paras. 20-22), the Court refused to make an order modifying a Statutory Building Scheme because:

(a) it was not clear a letter sent to owners had in fact been sent to all owners;

(b) the Municipality had not been given notice; and

(c) the letter did not describe precisely the variation sought.

In one case, the Court refused to make the order removing the easement because it was not clear from the affidavit evidence that sufficient time had been given for those interested to take part (*Re Beach Grove Realty Ltd.* (1980), 22 B.C.L.R. 168, [1980] B.C.J. No. 82, at para. 6-9 (S.C.)).

A number of cases have considered what might constitute adequate notice. Obviously, personal service is ideal. When talking about potentially hundreds of people and mortgagees who might have to receive notice, personal service is impractical or too expensive. Some options include:

(a) newspaper advertisement. Your affidavits should identify the newspapers (which likely should be local rather than national in readership), the text of the notice, the size, cost and how many times you propose to run it, as well as the length of time between publication and the hearing on the merits (see *Mountain Development Corp. v. McCrodan* (1995) 15 B.C.L.R. (3d) 309 (S.C.), 50 R.P.R. (2d) 9, 1995 Carswell B.C. 1034, at para. 26) where an advertisement placed in two separate Whistler papers on three different dates in total was approved along with delivery by mail/hand to the registered owners of the 80 lots comprising the dominant tenements);

(b) mail out. If you are in a position to obtain the mailing addresses of all of the strata lot owners, then a mail out may be a viable option. Your material should again include the text of the notice and the timeframes (i.e., date by which mail out will occur and earliest date for hearing of application) and identify any enclosures to be sent with the mail out (*Mountainview, ibid.*);

(c) e-mail or website. If the property manager is co-operative, has created a website for the strata corporation and has e-mail addresses for all owners, an e-mail to the owners together with a posting on that website, or on a website created specifically for the purpose, may be a viable option. This is more likely to be permitted where the owners are widely scattered, as may be the

case in a time share strata or a resort/investment strata. Your material should include details about the website, what will be on it, and how individuals will be notified about the website (i.e., by e-mail or mail or in strata minutes or notices left at strata lots) (*WWNT1 et al. v. Owners, Strata Plan VR2126 et al.*, ("WWNT1") Vancouver Registry No. L040303, Order of Cohen J., Feb 6/04);

(d) hand delivery to each strata lot. This may be a viable option if the strata corporation is co-operative and you have evidence that most strata lot owners are residents.

Depending on the particular circumstances, other options or a combination of the above options might be appropriate. The key is to design a form of reasonably effective notice.

Because the final order will remove rights attached to land, the courts take seriously the need to give effective notice to interested parties. It is important to demonstrate that the proposed notice will be effective. A court is unlikely to dispense completely with notice.

Section 35(4) also requires inquiries to be made of pertinent local government entities. It is preferable to have made such inquiries well before going to court. If you have evidence of discussions with the local government entity and their requirements, if any, you can seek an order declaring that you have complied with s. 35(4)(a) and that further inquiries are not necessary. If the easement is of a type that does not involve any local government issues, that information should be included in your affidavit material.

B. The Application to Cancel or Modify the Easement

An application under s. 35 is brought by way of petition. The affidavit material in support of the application should include the following:

(a) evidence to establish that you have complied with the notice directions given by the court;

(b) the easement or other change that is to be modified or cancelled;

(c) if it is being modified or replaced, the new easement;

(d) the history of the easement;

(e) why the easement is being modified or cancelled;

(f) if there are other parties who have consented to the modification or cancellation, evidence to that effect;

(g) evidence to establish that the application is not premature (s. 35(2)); and

(h) evidence to bring the application within one of the criteria for cancelling or modifying an easement (s. 35(2)(a) to (e)).

1. Is the Application Premature

Section 35(2) requires the court to determine that the application is not premature before granting the order removing or modifying the easement.

In *Murrayfield Development Ltd. v. Brandon*, Justice Fraser provided the following interpretation of "premature":

> 18 What 'premature' seems to mean is that anticipated circumstances have not yet materialized or that there are existing reasons to defer the application
>
> ([1995] B.C.J. No. 1491 (S.C.) citing *Newco Invt. Corp. v. B.C. Transit* (1987), 14 B.C.L.R. (2d) 212, at 222-3 (C.A.))

In *District of Mission Development Corp. v. 334128 British Columbia Ltd.*, Justice Hogarth rejected the argument that "premature" meant that all relevant parties had not received notice:

> The argument of the Petitioner is difficult to accept when consideration is given to the provisions of Subsections (4) and (5) which specifically deal with other parties and the effect of an order whether notice is given or not. I cannot see how it can be said that the application is 'premature' if notice has not been effectively given to all parties on the one hand, but the Court has the discretion as to whether it should or should not be given on the other, and in any event, any order made is binding on those that did not get notice in the first place.
>
> I have come to the conclusion that the phrase 'premature' in the circumstances covers any and all situations where the happening of a future event has a material bearing on the question as to whether any charge should be removed. If for instance, an application to remove an unqualified drainage easement on a piece of property were to reveal that it was inoffensively being used to accommodate a drainage ditch for surface water, but by the wording of its provisions could be used as an open sewer, the application, if based upon the proposition that someday it could be used to drain sewage, would be premature unless some evidence existed that the offensive use was contemplated.
>
> ([1991] B.C.J. No. 3033 (S.C) at para 5)

Thus it is important to assess whether there are any future events that could have a material effect on whether the charge should be removed or modified, and to explain why a delay until those events have occurred is not justified or necessary.

2. Cancellation of Charge Pursuant to s. 35(2) of the Property Law Act

Section 35(2) provides that in order to be granted an order for cancellation or modification of an easement, the petitioners must demonstrate that one or more of the situations in subsections (a) through (e) applies in the circumstances. s. 35(2) is read disjunctively (*Barclay v. Denault*, [1994] B.C.J. No. 1138 (S.C.), aff'd [1995] B.C.J. No. 2875 (C.A.) at para. 14–15 (S.C.), *Knight v. Stapleton* 63 B.C.L.R. 395, [1985] B.C.J. No. 2134 (C.A.) at para. 5).

a. Section 35(2)(a) of the Property Law Act

Section 35(2)(a) provides that an easement may be modified or cancelled when because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete.

The leading cases on whether an easement or other charge under s. 35 is obsolete are *TDL Group Ltd. v. Harvey*, 2002 BCCA 258, 212 D.L.R. (4th) 278, 48 R.P.R. (3d) 223, 6 B.C.L.R. (4th) 54 and *Strata Plan LMS1191 v. Portrait Homes Ltd.*, 2002 BCCA 257, 212 D.L.R. (4th) 295, 3 R.P.R. (4th) 157, 6 B.C.L.R. (4th) 41 (C.A.). In the *TDL* case the easement was found to be obsolete; in the *Portrait Homes* case it was not.

The essential principles that can be distilled from these two decisions are as follows:

1. The word obsolete must be given its ordinary meaning: that which is no longer practiced or used; discarded; out of date (*Portrait Homes* at para. 23, citing *Collinson v. LaPlante* (1992), 73 B.C.L.R. (2d) 257 (C.A.) per Madam Justice Southin at para. 19).
2. In deciding whether an easement is obsolete, the court does not balance the interests of the parties (*Portrait Homes* at para. 24).

3. The intended use of the property is a factor to be considered in determining whether an easement is obsolete (*Portrait Homes* at para. 25, *Gray v. Doyle* (1998), 50 B.C.L.R. (3d) 97 (C.A.)).

The *Portrait Homes* case involved a fairly typical strata situation. It involved a development in White Rock that was intended to be developed in two phases. Phase I was constructed and then the developer went bankrupt. Portrait purchased the property that was to comprise Phase II about four years after the time for electing whether or not to proceed with Phase II had expired.[5] The easement that was in dispute had two components. The first was a general access agreement that would enable the owners of Phase II to access their part of the parking garage through Phase I. There was also a construction easement allowing access through the parking garage for the purpose of constructing Phase II.

The strata corporation argued that, because Portrait was not going to proceed with Phase II but rather was going to build a separate strata corporation, the easement was obsolete.

The Court of Appeal held that, by virtue of the language of the easement agreement, the purpose of the easement was broader than simply enabling Phase II to be constructed and added to the strata corporation. The Court pointed to language in two parts of the easement agreement. The first was clause 7.1 of the agreement, which provided that the strata corporation had the ability to make reasonable rules and regulations governing, restricting or affecting the manner in which the easement area could be used or enjoyed. This meant that even if the two properties remained separate, the strata corporation would not have to bear all the costs of maintenance and repair while the other property had the benefit of the easement. The Court also referred to clause 12.2 of the agreement, which provided that "the parties may subdivide 'by strata plan or otherwise' and that if subdivision occurs, the easements will continue and 'this agreement will remain in full force and effect'."

Further, the Court also noted that the Form E itself contemplated that Phase II might never be constructed (*Portrait Homes* at para. 32). To determine if an easement is obsolete, the Court will, therefore, look very closely at the language of the easement agreement as well as at the factual matrix.

b. Section 35(2)(b) of the Property Law Act

Section 35(2)(b) provides:

> 35(2) The court may make an order under subsection (1) on being satisfied that ...
>
> (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,

In *Matthews v. Howse*, [1994] B.C.J. No. 1518 (S.C.), Justice Bouck, referring to the Court of Appeal decision in *Knight v. Stapleton*, set out the test for an order under s. 35(2)(b):

> 28 While it is not crystal clear how this subsection (s. 35(2)(b)) applies to the issues in this matter, it seems to say that:
>
> a) if there is no practical benefit to others by leaving the restrictive covenant in place, and
>
> b) the reasonable use of the property by the applicant will be impeded if it is not cancelled, then
>
> c) the covenant may be modified or cancelled.

---

5 It should be noted that the implications of the phasing provisions of the *Condominium Act* or *Strata Property Act* were not argued in the *Portrait* case.

Thus, there is a balancing of the benefit to the dominant tenement and the reasonableness of the use of the property proposed by the party seeking to remove the easement. In *Matthews*, which involved a restrictive covenant that prohibited duplexes, Justice Bouck considered the municipal zoning for the property and the general area (which allowed duplexes), whether other duplexes had been built in the area and the effect on traffic and noise, if any.

In *NW1837*, Justice Burnyeat noted that "the 'practical' benefit which will be 'lost' would be the benefit of using the Easement Area in a way not contemplated by the Easement."[6] Since the strata corporation was using the easement area in a way not contemplated by the easement, and that use was making it difficult for the servient tenement to use the easement area in a way that was contemplated, the latter easily outweighed the former. Again, it can be seen that in balancing the interests of the parties, it is important to consider the terms of the easement agreement and what activities are permitted or prohibited as well as the factual situation.

c. Section 35(2)(c) of the Property Law Act

Section 35(2)(c) provides:

> 35(2)(c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,

In *NW1837*, Justice Burnyeat found:

> [50] There is a long history of the express and implied modification of this Easement. The planters within Plan NW2794 and within the Easement Area have existed for some time. The parking within Plan NW2794 has also existed for a considerable period of time with only recent protest by Plan NW1837. In those circumstances, I find that Plan NW1837 has impliedly agreed to modify the Easement by allowing parking and by allowing planters within the Easement Area. As well, by Plan NW1837 allowing parking within that part of the Easement Area which is within Plan NW1837, I am satisfied that Plan NW1837 should be estopped from denying that it has not expressly or impliedly agreed to the Easement being modified so as to allow parking within the Easement Area whether that parking is taking place within Plan NW1837 or within Plan NW2794.
>
> [51] Accordingly, I am satisfied in the circumstances that the modification suggested by Plan NW2794 should be made.

In considering the consent issue, Justice Burnyeat looked at it from the point of view of the strata corporation as a whole, and not as requiring the active consent of every strata lot owner. If the Court considers it necessary to look at whether each strata lot owner has consented, it is difficult to see how s. 35(2)(c) could be used.

d. Section 35(2)(d) of the Property Law Act

Section 35(2)(d) allows modification or cancellation if the modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest.

In *Collinson v. Laplante*, Madam Justice Southin stated that in regard to s. 35(2)(d), "injure" means to "cause harm" to the party entitled to the benefit of the charge:

> To say that modification or cancellation will not injure the person entitled is to misunderstand what 'injure' means in the section. It means 'to cause harm to.' To cancel this easement will injure the appellants by depriving them of the use of the driveway. The fact that they have alternate, and, in the learned judge's opinion,

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6 At para. 47.

> preferable, access is not the point. (*Collinson v. Laplante* (1992), 73 B.C.L.R. (2d) 257 (C.A.) at para. 24)

This sets a fairly high standard for cancellation of an easement since it is almost inevitable that cancellation will involve the dominant tenement giving something up. It may be easier to justify removal of a restrictive covenant under this subsection. In *Knight v. Stapleton*, Justice Hutcheon reversed the trial judge's decision preventing the modification of a restrictive covenant that limited the number of family homes in a residential area on the basis that the proposed modification to the restrictive covenant would not injure the defendant (*Knight v. Stapleton*, [1985] B.C.J. No. 2134 (C.A.)). Hutcheon J.A. stated at para. 11:

> 11 That original object of a residential area of family homes will not be defeated by the addition of one single family home on Mrs. Knight's lot. There is no evidence that the modification of the covenants will injure Mrs. Stapleton. With respect to the possibility of the modification opening the way to similar applications, I agree with the view expressed in the decisions of the Land Tribunal in *Re Ling's Application* (1956), 7 P. & C.R. 233 at page 236 and *Re Chapman's Application* (1981), 42 P. & C. R. 114 at page 116 that future applications for modification are to be dealt with on their merits. What is described in the latter case as 'the thin edge of the wedge argument' is no reason to withhold approval of the application in the present case.

"Injury" is obviously a question of fact. However, to prove a negative fact—that the modification or cancellation will not cause injury—may be very difficult. Certainly it is not enough to show that there are alternatives. Ironically, it may be almost more difficult where the application is not opposed, since there is no way to obtain positive evidence from the holders of the dominant tenements to establish a lack of harm. One possible way to show a lack of injury may be to demonstrate the actual benefits the dominant tenement will gain by removal of the easement. For example, if the benefit of the easement carries with it some reciprocal obligations, it may be possible to establish that removing those obligations outweighs any "injury" caused by the removal of the easement.

e. Section 35(2)(e) of the Property Law Act

Section 35(2)(e) provides that an easement or other interest in land may be modified or cancelled if "the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled." In *Prinsen v. Wickland*, Justice Vickers analyzed the provisions of an agreement that purported to be an easement to determine whether each provision in fact met the test of an easement (*Prinsen v. Wickland* (2003 Carswell B.C. 2984, 2003 (B.C.S.C.) 1795 (B.C.S.C.)). He concluded that "the right in question detracts so substantially from the rights of the servient owner ... that it must be something other than an easement." He applied the following four characteristics of an easement:

(1) there must be a dominant and servient tenement;

(2) an easement must accommodate the dominant tenement;

(3) dominant and servient tenement owners must be different persons; and

(4) a right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant. (*Prinsen, ibid.* at para. 12, citing *Re Ellenborough Park*, [1956] 1 Ch. 131 at 163).

Thus, sub-paragraph (e) will most frequently be used when there is a technical defect with the agreement or it can be established that the nature of the agreement takes it outside of the definition of an easement.

f. Conclusion

The removal of an easement thus poses special challenges where a strata corporation is involved as the holder of the dominant tenement. A developer should give very careful thought to the terms of easements granted in favour of strata corporations since, if circumstances do change, it may be very difficult and expensive to remove or change an easement or other charge on the land.

Indeed, since many easements in strata situations are placed on the property before construction begins, it would be helpful for developers to consider, after construction but before any strata lots have been conveyed, whether modification or release of easements is necessary. While the developer is still the owner of all the strata lots, such changes could be made much more easily.

II. Application to Make a Not Quite Unanimous Vote Unanimous

Many of the changes that can be made to a strata corporation's physical or legal configuration require a unanimous resolution. A list of all the sections relating to unanimous vote resolutions is found in Table A at the end of this paper. The policy behind this requirement is fairly obvious; where the titles of individual owners may be affected by such a decision, it is important to ensure that all owners agree to the change and that no owners are opposed.

It is very difficult to get a unanimous resolution to pass, especially in a larger strata corporation or one which is held by investors, such as a time share strata. Recognizing this problem, s. 52 allows a strata corporation that cannot quite pass the necessary resolutions unanimously to apply to court for an order.

> 52(1) This section applies only to strata corporations comprised of 10 or more strata lots.
>
> (2) If a resolution required to be passed by a unanimous vote under the Act or the regulations is supported by all of the strata corporation's votes except for
>
> (a) the vote in respect of one strata lot, in a strata corporation comprised of at least 10 strata lots, or
>
> (b) the votes in respect of more than one strata lot, if those votes together represent less than 5% of the strata corporation's votes,
>
> the strata corporation may, by a resolution passed by a 3/4 vote at an annual or special general meeting, apply to the Supreme Court for an order under subsection (3).
>
> (3) On application under subsection (2), the court may, if satisfied that the passage of the resolution is in the best interests of the strata corporation and would not unfairly prejudice the dissenting voter or voters, make an order providing that the vote proceed as if the dissenting voter or voters had no vote.
>
> (4) In making an order under subsection (3), the court may make any other order it considers just, including an order that the strata corporation offer to purchase a strata lot owned by a dissenting voter at its fair market value or that the strata corporation otherwise compensate a dissenting voter.

Section 52 differs significantly from s. 48 of the *Condominium Act*, which had provided that if all of the owners did not attend the meeting, the meeting could be adjourned for at least one week. At the adjourned meeting, the vote would be considered unanimous if everyone in attendance at the adjourned meeting voted in favour. There is obviously some potential for abuse in this, and the change to allow a court application is likely to better protect minority owners in this situation.

A related pertinent section is s. 58(3) of the *Strata Property Act*. s. 58 allows the Supreme Court to appoint the Public Guardian and Trustee or another person to vote in respect of a strata lot where there is no person to vote in respect of that strata lot. This is ordinarily a discretionary order. However, s. 58(3) provides that, if the application concerns a matter that requires a unanimous vote, there is no discretion and the court must make an order appointing a person to vote.

The technical requirements for a court application include:

(1) The meeting seeking the unanimous vote was properly called and notice was given properly;

(2) The resolution was dealt with appropriately at the meeting;

(3) The owners passed a ¾ vote resolution authorizing the s. 52 application;

(4) The rationale or reasons for the proposed change, and other evidence to establish that it is in the best interests of the owners;

(5) Does the proposed change affect any of the strata corporation owners that have not voted in favour, and evidence generally to establish that the resolution would not unfairly prejudice the dissenting or non-voting owners;

(6) Attempts to contact the owners that did not vote to get their proxies or an explanation as to why they did not participate.

It is noteworthy that, in considering the position of those owners who either voted against the unanimous resolution or did not vote at all, s. 52(3) uses the language "unfairly prejudice" which is the same language used in s. 42(b) of the *Condominium Act* with respect to actions of the strata corporation that were unfairly prejudicial to one or more owners. Thus, the cases under s. 42(b) of the *Condominium Act* will be relevant to a determination of whether the s. 52 declaration should be made.

The courts defined "unfairly prejudicial" as "conduct that is unjust or inequitable" (*Esteem Investments Ltd. v. Strata Plan VR1513* (1988), 32 B.C.L.R. (3d) 324 C.A. reversing 21 B.C.L.R. (2d) 352 S.C.). As there are no reasons for judgment issued in cases dealing with applications under s. 52, it is difficult to predict how a court will interpret the phrase "unfairly prejudicial" in the context of that application. It will depend significantly on the nature of the resolution that is at issue.

The writer is aware of two applications under s. 52 that were successful in deeming almost unanimous votes unanimous. In neither case was there opposition to the resolution and in both cases the people who did not vote simply did not show up without any explanation.

If there was active opposition to the application, the court might well invoke s. 52(4) and require the strata corporation to offer to purchase the strata lots of the dissenters, or it has a broad discretion to impose other terms to ensure all parties are treated fairly in the particular circumstances.

III. Changing Unit Entitlement

Unit entitlement is a key concept under the Act. It governs a strata lot owner's voting rights within the strata corporation, the proportion of maintenance fees and special assessments to be paid by the strata lot, and the interest on destruction of the strata lot (*Kranz v. Owners, Strata Plan VR29*, 2004 BCCA 108 at para. 1).

Unit entitlement can be calculated when a residential strata corporation is created in different ways:

(a) habitable area;

(b) a whole number that is the same for all of the residential strata lots;

(c) a number approved by the Superintendent that allocates a fair portion of common expenses to the strata lot (*Quayle v. Strata Plan NW1378*, [1985] B.C.J. No. 787 (S.C.) is an example of such a situation).

The Act only allows for unit entitlement to be changed for residential strata lots whose unit entitlement is based on habitable area.

s. 261 sets out the procedure for amending the Schedule of Unit Entitlement by agreement. It requires a unanimous resolution to be passed, followed by an application to the Registrar of Land Titles. This section applies if there is a need to change the unit entitlement of a strata lot where the unit entitlements are based on habitable area. Habitable area is calculated in accordance with s. 246(3)(a)(i):

> The unit entitlement of a strata lot, other than a strata lot in a bare land strata plan, must be calculated as follows:
>
> (a) if the strata lot is a residential strata lot, the unit entitlement is either
>
> (i) the habitable area, in square meters, of the strata lot, as determined by a British Columbia land surveyor, rounded to the nearest whole number, ...

and Regulation 14.2:

> 14.2 For the purposes of s. 246 of the Act, "habitable area" means the area of a residential strata lot which can be lived in, but does not include patios, balconies, garages, parking stalls or storage areas other than closet space.

It is also possible to change a unit entitlement by applying to the Supreme Court for an order under s. 246(8). This option is only available if:

(a) unit entitlement is based on habitable area; and

(b) the actual habitable area is not accurately reflected in the unit entitlement allocation.

There is no mechanism in the Act to change the unit entitlement for a non-residential strata lot, a bare land strata lot or a residential strata lot whose unit entitlement is based on something other than habitable area.

Because a change in the unit entitlement of one strata lot affects the financial obligations of all other strata lot owners, it is important, if possible, to have the strata corporation and other individual owners at least in agreement that the unit entitlement should be changed, if not on what the new unit entitlement should be.

In *Kranz v. Owners, Strata Plan VR29*, an owner of a strata lot applied to reduce the unit entitlement of the strata lot pursuant to s. 246 of the Act. He argued that the habitable area was more than 10% less than it should be based on the assigned unit entitlement.

Section 246(7) and (8) provide as follows:

> 246(7) Subject to the regulations, an owner or the strata corporation may apply to the Supreme Court for an order under subsection (8) if
>
> (a) the unit entitlement of a residential strata lot is calculated on the basis of habitable area in accordance with subsection (3) (a) (i) or on the basis of square footage in accordance with s. 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, and
>
> (b) the actual habitable area or square footage is not accurately reflected in the unit entitlement of the strata lot as shown on the Schedule of Unit Entitlement.
>
> (8) On application under subsection (7) and after consideration of the matters set out in the regulations, the Supreme Court may
>
> (a) order that a Schedule of Unit Entitlement be amended, in accordance with the regulations, to accurately reflect the habitable area or square footage of a strata lot, and
>
> (b) make any other orders it considers necessary to give effect to an order under this subsection.

Regulation 14.2 provides

> 14.2 For the purposes of s. 246 of the Act, "habitable area" means the area of a residential strata lot which can be lived in, but does not include patios, balconies, garages, parking stalls or storage areas other than closet space.

Thus, the question of what is to be included in the "habitable area" is the key issue on an application.

Mr. Kranz owned an unusually configured strata lot. It had originally been two strata lots that were consolidated:

> [3] Originally, Mr. Kranz owned two strata lots, 1 and 6. In 1978, these were consolidated as strata lot A. The former lot 6 is a living space of approximately 660 square feet plus a balcony. It is much the same as the other residential strata lots in the building. The former lot 1 is located on the parkade level of the building and is separated into east and west sections by the common lobby area of the complex. The western section of the former lot 1 consists of a bedroom, a bathroom and garage composed of five enclosed parking stalls. The eastern section of the former lot 1 consists of two bedrooms, a bathroom, and what are described by Mr. Kranz as a family room and a recreational or storage room.[7]

Mr. Kranz and the strata corporation had a lengthy history of disputes about the strata lot, its unit entitlement and his ability to rent portions of it out separately that apparently went back to approximately 1980.[8]

Mr. Kranz argued that because he could not rent part of the strata lot out separately because of the strata corporation's bylaws and the strata corporation was preventing him from connecting the two portions of his strata lot by a staircase, it was not "habitable." That argument was rejected.[9] Also rejected was the argument that the "recreational or storage room" should not be included in the calculation of habitable space.[10] Interestingly, while the Regulation defines "habitable space" as excluding balconies, because the habitable space of the other strata lots was calculated as including the balconies Mr. Kranz's strata lot was as well. The five parking stalls were excluded. Even when this was done the calculation did not meet the arithmetical test set out in the Regulation and the application was, therefore, dismissed.

In bringing a petition to change the unit entitlement it will be necessary to have a survey done to determine whether the difference between the habitable area and the unit entitlement allocation fits within the test. Since there may be some dispute about what components of the strata lot are habitable under the Regulation, it would be prudent to have detailed figures for each possible component rather than a single overall calculation. The *Kranz* decision does make clear that habitable means "theoretically habitable" not "inhabited."

IV. Form P Amendments

Part 13 of the *Strata Property Act* allows developers to defer construction of part of a strata corporation by dividing it into phases. The basic scheme created by Part 13 is as follows. A developer must obtain approval of the phased approach. There are a number of provisions dealing with common facilities that differ, depending on whether the common facilities are to be built in the first phase or in

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7 *Kranz* at para. 3.

8 Other Kranz cases include *Kranz v Owners Strata Plan VR29* (19 June 1992), Vancouver Registry No. CA013456; *Kranz v. The Owners, Strata Plan VR29*, 2002 BCSC 1241.

9 *Kranz* at para 10-13.

10 *Kranz* at para. 7-9.

subsequent phases. Various provisions deal with such matters as security deposits for common facilities to be built in later phases and the owner/developer's contribution to expenses for such common facilities built in earlier phases. The disclosure statement must accurately describe the developer's intentions with respect to the later phases. The Form P which is registered against the title of both the Phase I property and the later phases of the proposed development must include the following information:

(a) the number of phases, the order in which they will be deposited and any common facilities to be constructed;

(b) a sketch plan showing the boundaries of each phases and the approximate location of the common facilities;

(c) a schedule setting out the estimated date for the beginning of construction and completion of construction of each phase;

(d) a statement of unit entitlement of each phase;

(e) a statement of the maximum number of units and general type of residence or other structure to be built in each phase; and

(f) when the developer will elect to proceed with each phase.[11]

Sections 231 and 232 provide:

> 231. On the date contained in the Phased Strata Plan Declaration for the election to proceed with a phase, the owner developer is conclusively deemed to have elected to proceed with that phase as set out in the declaration unless
>
> (a) an amendment to the declaration has been approved in accordance with s. 232 or 233, or
>
> (b) an election not to proceed has been made and filed under s. 235.
>
> 232(1) An owner developer who wishes to amend a Phased Strata Plan Declaration to extend the time for making an election to proceed with the next phase must apply to an approving officer for an amendment extending the time in which to make the election.
>
> (2) The approving officer must not allow a declaration to be amended to extend the time for the election
>
> (a) more than once, or
>
> (b) for more than one year from the date stated in the declaration,
>
> except in accordance with a court order under subsection (3).
>
> (3) On application of an owner developer, the Supreme Court may order an approving officer to grant the extension of time requested.

Thus, the first extension of one year, and other substantive amendments to the Form P, can be made by the Approving Officer. Additional extensions of the deadline for electing whether to proceed must be approved by the Court. The Supreme Court also has jurisdiction under s. 233 to hear applications by the strata corporation relating to substantive changes to the Form P. The test set out in s. 233(5) is whether the amendment is "unfair to the strata corporation." Presumably this is a lesser standard than the s. 164 "significantly unfair" test.

Various provisions provide protection to both parties. The owners have a number of mechanisms to protect them from developers who promise major common facilities to be built in Phase II, and then never build Phase II.

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11 Form P, *Strata Property Act*.

If the developer does not want or is not able to proceed with the later phase(s) within the time set out in the Form P, the developer or its successor in title must make an application to extend the time for electing whether to proceed.

A. Required Elements for Form P Amendment

While the statute sets out an apparently straightforward procedure, implementing it usually works a little differently. For example, the Act calls for notice to be given to the strata corporation and the approving officer of the pertinent local government.

It is important to discuss the proposed extension well in advance with both the strata corporation and the approving officer. Formal notice setting out what the developer will ask the court to do may come after extensive negotiations. Both the strata corporation and the approving officer may have an interest in terms of the extension and the length of the extension in particular. If there are common facilities that either have already been built in Phase 1 or that are to be built in the later phase, the strata corporation may want to negotiate other terms in connection with those facilities. Such terms might include contributions to maintenance expenses or performing maintenance or upgrading work on the facility, or perhaps doing work on the Phase II property such as minor landscaping to improve the look of the vacant property.

If the common facility has been constructed already, and is one that is expensive to maintain (such as a swimming pool), and the developer has not been contributing to the maintenance of the common facility, the strata corporation should consider asking the developer to contribute as a condition of agreeing to the extension.

If the facility has not been constructed yet, and it is one that is very important for the strata corporation, it may be possible to use that fact to negotiate a shorter extension.

B. Length of Extension

The longest extension I have obtained is five years; the shortest was three days. Both related to the same strata corporation and were by consent. The length of the extension will be influenced considerably by the relationship between the strata corporation and the developer, and by external market forces. For example, where the market is clearly weak, the owners may well recognize that the timing is not right and agree readily to a lengthy extension.

C. Other Terms

On one building where a number of short extensions had been granted, Justice Burnyeat included a term that no further extensions would be granted. This was at a stage where the relations between the strata corporation and the developer were at an all-time low, and the strata corporation was opposing further extensions.

In the face of opposition to the granting of any extensions, the developer made submissions that made it clear that a three-month extension would enable the developer to decide, after consultation with the City, whether it made more economic sense to elect not to proceed and create a separate project or to continue with Phase II either as originally planned or with modifications approved by the municipality. By the end of the three-month extension, relations between the strata corporation and the developer had improved to the point where the strata was willing to agree to another longer extension.

The previous order of Judge Burnyeat had to be dealt with. After explaining the reason for the original term and why the situation had changed, the term was modified to provide that no further extensions would be granted without the express consent of the strata corporation.

D. Why Do Developers Want an Extension

The main reason to seek an extension is that the market has changed and if the new phase is built immediately the developer will lose money on it. It is important for the developer to put forward sufficient evidence to justify the extension, particularly if the strata corporation is opposing. It is also important that the problem be temporary. If Phase II will never work, the developer might as well elect not to proceed now.

Why the next phase is not currently financially viable can vary widely. In one case, half of Phase I was still unsold when the deadline for Phase II drew near. The extension saved the developer from probable bankruptcy.

Phase I being a leaky condo is also a good reason to apply to extend, particularly if repairs are underway and the end is in sight. Otherwise, the prospect of selling new strata lots that may have to pay for a portion of future repairs to a different building is a daunting one.

E. What is in it for the Strata Corporation

Depending on market forces, the owners may well recognize that constructing the next phase now will negatively affect their strata lots' value and "sellability." Also, a decision not to proceed, which means that the developer must start again in terms of local government approvals, may lead to a very different type of development being built next door than was contemplated originally. The *Portrait Homes* case, discussed above under Easements, is an example of the type of issue that can arise when the developer elects not to proceed.

Where the later phases share facilities such as underground parking garages that may already have been constructed, as was the case in *Portrait Homes*, discussed above, other problems, such as the easement issues in that case, also arise.

V. Winding Up a Strata Corporation

Part 16 of the *Strata Property Act* sets out three ways to wind up a strata corporation: voluntary without a liquidator; voluntary with a liquidator; and by court order. As far as the author is aware, no strata corporations have been wound up by court order or court approved liquidator to date. However, because the Supreme Court has recently approved the sale of the land comprising a strata corporation in Burnaby to a developer who plans to redevelop the site, a winding-up application may be made in the near future.

The first method of winding up a strata corporation does not require a court order, but does require a unanimous resolution. If all of the owners agree on how to conduct the liquidation and will vote in favour of it, this is the fastest and cheapest way to proceed.

The second method requires both a unanimous resolution to appoint a liquidator and an application to court to approve it. Pursuant to s. 277, the resolution must:

(1) give the name and address of the liquidator and approve all of the following:

- (a) the cancellation of the strata plan;
- (b) the dissolution of the strata corporation;
- (c) the surrender to the liquidator of each owner's interest in
  - (i) land shown on the strata plan,
  - (ii) land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, and

(iii) personal property held by or on behalf of the strata corporation;

(d) an estimate of the costs of winding up;

(e) the interest schedule referred to in s. 278.

Once the liquidator has been appointed, he or she must apply to the Supreme Court for an order that:

(a) confirms the appointment of the liquidator;

(b) vests in the liquidator the land shown on the strata plan and any other land or personal property owned by the strata corporation (s. 279).

Before making the Order, the court must be satisfied that the requirements of s. 277 are met and that the liquidator was properly appointed. The liquidator then files the vesting order with the Registrar of Land Titles and the strata corporation no longer exists.

The third method is to seek court approval. Under s. 284 an owner, a mortgagee of a strata lot or "any other person the Supreme Court considers appropriate" may apply for the order. Given the difficulty in obtaining a unanimous resolution at the best of times, and the amount of discord amongst the owners that would likely accompany a winding up, court ordered winding up is likely to be the most frequently used of the three options.

The court may appoint a liquidator if to do so would be "in the best interests of the owners, registered charge holders and other creditors."

In considering what is in the best interests of the owners, s. 284 of the Act directs the court to consider:

(a) the scheme and intent of this Act,

(b) the probability of unfairness to one or more owners, registered charge holders or other creditors, if winding up is not ordered, and

(c) the probability of confusion and uncertainty in the affairs of the strata corporation or the owners if winding up is not ordered.

The writer can envisage two general types of situations where winding up might be considered. The first might involve an older strata corporation with aging buildings needing significant work and a site that is, under current zoning, under-developed. If the cost of the repairs that are needed to the various buildings approaches the cost of tearing them down and starting over, selling the entire property to a developer and starting over might make the most sense. Since a new development would have considerably higher density in a completely different configuration of buildings, to amend the strata plan given the limits imposed by the Act would likely not be feasible in any event.

The second general type of situation where winding up might be considered would be with respect to a very small strata corporation (2-3 strata lots) where relations between the owners have deteriorated to the point that they cannot agree on necessary maintenance or repairs. Since the Act does not provide special rules for very small strata corporations, passing a budget could be impossible for a two strata lot strata corporation. A ¾ vote resolution might be impossible for a 3 strata lot corporation. If the situation deteriorated sufficiently, winding up might be the only answer.

Since there are no cases to date under s. 284, decisions under s. 271 of the former *Company Act*, R.S.B.C. 1996, c. 62 may be somewhat helpful although not authoritative. The language of the two sections differs. The test set out in the *Company Act* is whether it is just and equitable to wind up the company. This would appear to allow for greater scope to consider the interests of non-owners than does the language of s. 284. For example, the interests of creditors may be taken into account in a corporate setting. Many of the winding up cases deal with small, closely held companies involving family or partnership-like relationships (i.e., *Dia-Kas Inc. v. Virani*, [1997] B.C.J. No. 608, 88B.C.A.C. 26; *Talwerdi v. Infonet Technology Corp.*, 2001 BCSC 1304, [2001] B.C.J. No. 1888 (S.C.)).

The *Company Act* cases might be pertinent for a small strata corporation like a duplex or triplex, where the parties have become deadlocked and are unable to do anything by agreement. For a larger strata corporation, winding up will probably involve different issues and considerations for the court.

VI. Table A

No.	Section	Strata Property Act Sections
1.	Easements	78(3), 252, 80, 262, 69
2.	Unanimous resolutions	10, 11, 52(2), 53(2), 58(3), 59(3)(h) & (i), 70(4), 100(1-3), 108(26), 127(1), 127(3)(a) & (4)(a), 214(3)(a), 257(a), 259(3)(a), 261(1)(a), 262(3)(b), 263(2)(a), 272(1), 277(1), Reg. 17.20(2)(b), 17.20(3), 17.22
3.	Winding up	272-289
4.	Changing unit entitlement	261, 164, 246, Reg. 14
5.	Form P Amendments	217-238