Amending a Registered Declaration by Court Order Under
Section 109(3) of *the Condominium Act 1998*- - - A Comment on the Decision in
Caras & Callini Group Ltd. v. Peel Standard Condominium Corporation No. 837
by
Harry Herskowitz of DelZotto, Zorzi LLP *

SUMMARY

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1. INTRODUCTION

For as long as condominiums have been registered in Ontario, the applicable legislation governing them has always provided the means or ability to legally amend the registered declaration of a condominium and/or any of the survey plans delineating the boundaries of the common elements and the respective units which collectively comprise the description, by either procuring the requisite threshold level of unit owner approval thereto, or alternatively by court order. Section 109(1) of the *Condominium Act 1998, S.O. 1998 as amended* (hereinafter referred to as the "**Act**") expressly stipulates that the condominium corporation, or any unit owner, may apply to the Ontario Superior Court of Justice for an order to amend the declaration or description, and section 109(3) of the Act (which will be discussed hereafter in greater detail) establishes the underlying purpose and rational for any such judicial intervention.

In most of the cases involving a court-ordered amendment to the registered declaration or description, the declarant or the declarant's surveyor and/or solicitor have typically provided evidence in support of the application, inasmuch as the declarant's admission that the declaration contains an unintended erroneous provision, such as an incorrect percentage or unit number reference (either in the body of the declaration itself or in any schedule thereto), will often prevail to convince the court of the propriety or legitimacy of the amendment being sought. There have also been instances where condominium corporations have successfully sought an amendment to the registered declaration without the participation or assistance of the declarant or its consultants, under the guise

of correcting an obvious or patent error in the declaration, or to resolve unintended ambiguities or inconsistent provisions therein. The envelope of potential amendments under section 109(3) is now expanding ... for example, in the unreported decision/order of Justice Echlin rendered on June 3rd, 2010 in the case of *M.T.C.C. No. 675 v. The Unit Owners and Mortgagees of M.T.C.C. No. 675* (see court file number CV-10-00398979-0000), the condominium corporation was successful in amending its registered declaration and description to convert a common element superintendent suite into a dwelling unit, so that such unit could thereafter be sold by the condominium corporation to raise needed funds for ultimate infusion into the condominium's deficient reserve fund. One can only speculate as to why or how Justice Echlin was satisfied that the original designation of the superintendent suite as a common element area constituted an error or inconsistency with respect to the declaration or description, or the carrying out of the intent and purpose thereof. The decision of Justice Perell in the recent case of *Caras & Callini Group Ltd. v. P.S.C.C. No. 837 (2011) 15 R.P.R. (5th) 118* (hereinafter referred to as the "**Caras Case**") is a further example of where the Court, in my view, has pushed the envelope of potential amendments sought under section 109(3) of the Act even more, by allowing a change to the specified use and designation of a particular unit set forth in the registered declaration, in order to more properly align the use of such unit with the as-built design, size and location thereof, and to accord with the registered owner's desired use of such unit, regardless of the wishes of the condominium corporation and its corresponding opposition to the amendment being sought, and irrespective of the intentions of the declarant at the time of its execution and registration of the condominium's declaration.

The purpose of this paper is to review and analyze the decision of the court in the Caras Case, and specifically the key or relevant point in time (throughout the entire condominium development and registration process or continuum) which the court should consider and look to, when evaluating

and determining the true intent and purpose of the declarant and the registered declaration and description.

2. THE FACTS OF THE CASE

In the mid 2000's, Soltice One Limited (the "**Declarant**") developed a mixed-use commercial/residential condominium project in Mississauga, with the commercial units in the project being situate on the ground floor level (namely level 1) and on the mezzanine level (namely level 3), and with all of the dwelling units being situate above same. In addition, the condominium contained storage units which were ancillary to the commercial units, and all of the storage units were situate on level 1, save and except for the storage unit designated as unit 12 on level 3 (hereinafter referred to as "**Unit 12**"), which was the subject of the litigation in the Caras Case.

Prior to the actual construction of the condominium, the applicant Caras & Callini had purchased a number of commercial units and storage units from the Declarant, pursuant to one omnibus agreement of purchase and sale, including Unit 12, but in the agreement of purchase and sale itself, Unit 12 was described as a commercial unit, and approximately $173,000 of the $3 million dollar total purchase price was allocated to Unit 12 as a commercial unit. However, when the declaration was ultimately registered in September 2008, Unit 12 was expressly defined and designated therein as a storage unit, and was also expressly categorized as a storage unit in both Schedule "C" (outlining the unit boundaries) and Schedule "D" (outlining the percentage contributions to the common expenses and the proportionate interests in the common elements). The declaration also expressly provided that each storage unit shall only be used for the storage of non-hazardous and non-combustible materials, and that a storage unit may be sold, transferred or conveyed only to the Declarant or to any owner of a commercial unit. The condominium description plan also

clearly delineated Unit 12 as an "office storage room", with dimensions of 4.97 metres by 14.68 metres. In contrast, all of the other storage units typically had dimensions of only 1.0 metres by 1.83 metres, and were constructed without any utilities. For example, the adjacent commercial unit, namely unit 8 on level 3, had dimensions of 5.19 metres by 10.41 metres, and was therefore quite similar in size to Unit 12. Unit 12 was physically constructed and completed as a commercial unit on the mezzanine level, with the usual plumbing and electrical services for typical commercial operations, and contained a hot water heater. Apart from Unit 12, there were no designated storage units on level 3.

Apparently, the original plan or intention of the applicant in the Caras Case was to use Unit 12 as its head office. However, under the applicable zoning by-law governing the development of this condominium project, the use of Unit 12 for commercial retail or office uses was not permitted, due to an inadequate number of public parking spaces available within the confines of the condominium. Approximately a year and a half after having closed on its purchase of Unit 12, the applicant endeavoured to resolve this zoning problem by applying for (and ultimately obtaining) a minor variance from the Committee of Adjustment for the City of Mississauga, to permit the use of Unit 12 for commercial business purposes, and thereafter the applicant obtained a building permit to permit the installation of fixtures within Unit 12, in order to re-design and finish same for commercial office purposes. Ultimately, the interior space of Unit 12 was partitioned into a reception area and five offices, and the applicant then proceeded to lease Unit 12 to a tenant who utilized the premises for medical spa services, as an extension of the tenant's existing medical practice being operated within one of the commercial units situate on the ground floor of the condominium. When the condominium corporation's solicitor wrote to the applicant's lawyer demanding that Unit 12 be restored to its original condition as a storage unit, the applicant sought an order to amend the

registered declaration by deleting all references to Unit 12 as a "storage unit", and substituting in its place the description "commercial unit", in order to be lawfully entitled to maintain the medical spa services being operated therefrom. The applicant was fully prepared to have its share of the common expenses adjusted retroactively and prospectively, so that Unit 12's allocation would accord with (or be comparable to) that of all other commercial units in the project.

3. THE POSITION OF THE RESPECTIVE PARTIES

The applicant argued that the designation of Unit 12 as a storage unit was made in error, or constituted an error, because Unit 12 had the physical attributes (namely the dimensions, the location and the servicing utilities) of a commercial unit, and that its designation as a storage unit was therefore inconsistent and anomalous with the architectural scheme of the building.

The condominium corporation was concerned that if the application were to be granted, such that Unit 12 could thereafter be used for commercial business purposes, then there would be greater competition for the limited number of designated commercial visitor parking spaces situate within the confines of the condominium, as well as an increase in the pedestrian and vehicular traffic coming into and out of the condominium, thereby causing greater wear and tear on the common elements, at a cost to all of the unit owners in the project. The condominium corporation argued that for the purposes of section 109(3) of the Act, an "error" should be construed as "an act incorrectly done through ignorance or inadvertence", and since the Declarant advertently and intentionally designated Unit 12 as a storage unit, a court-ordered amendment pursuant to section 109(3) of the Act should therefore not be available in the circumstances of this case. In addition, the condominium corporation submitted that there's a strong presumption that the declaration, as registered, is valid, and that all unit owners and prospective unit owners should correspondingly be entitled to confidently

rely upon the provisions of the registered declaration in governing their respective rights and obligations, vis-a-vis the use and ownership of the units and common elements within the condominium.

The condominium corporation relied heavily on the decision of Justice Taliano in the case of *YCC No. 344 v. Lorgate Enterprises Ltd. (1984) 27 A.C.W.S. (2d) 484*, affirmed on appeal at *(1985) 32 A.C.W.S. (2d) 41* (the "**Lorgate Case**"). The Lorgate Case also involved a mixed-use condominium, where purchasers of the residential units were advised that each dwelling unit would ultimately have one parking space, while each of the commercial units would ultimately have two parking spaces. However, when the declaration in the Lorgate Case was subsequently registered, 73 parking spaces were allocated by the declarant to one of the commercial units which was ultimately conveyed to a company associated with the declarant. The condominium corporation pursued an application to have the declaration amended, in order to separate and divest the 73 parking spaces from that particular commercial unit, but Justice Taliano dismissed the application, because he maintained that the definition of an "error", in the context of correcting an error or inconsistency in the declaration pursuant to subsection 3(8) of the former condominium legislation, is "something done through ignorance or inadvertence", and he found insufficient evidence to confirm that the declarant had, through ignorance or inadvertence, made an error in the declaration by assigning such parking spaces to that particular commercial unit. Justice Taliano also alluded, in obiter, to the fact that any provision in the declaration which is arguably unfair or unjust, does not thereby constitute an error that would then justify an amendment to the registered declaration

4. THE COURT'S RULING AND ANALYSIS

The essence of the Caras Case revolves around the wording and intent of section 109(3) of the Act, which expressly provides that:

Grounds for order

(3) The court may make an order to amend the declaration or description if satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or description or that arises out of the carrying out of the intent and purpose of the declaration or description.

At the outset, Justice Perell noted that the forgoing section of the Act is driven by the facts of the particular case under consideration, and in looking at the facts in the Caras Case, Justice Perell adopted a wider definition of the word "error" in the context of section 109(3) of the Act, by confirming that an "error" means a flaw, mistake or malformation, or constitutes something that goes astray, or is wrong in judgment or opinion, or simply incorrect, without invoking the elements of ignorance or inadvertence on the part of the declarant that Justice Taliano had embraced in the Lorgate Case. Justice Perell concluded that the Declarant in the Caras Case originally intended that Unit 12 would be a commercial unit, and not only sold it as a commercial unit, but also constructed and completed same as a commercial unit. The surveyed dimensions and location of Unit 12 supported the conclusion that same was a commercial unit, and the inclusion of servicing utilities within Unit 12 was consistent only with it being a commercial unit, and not a storage unit. Justice Perell also pointed out that had the Declarant not acted unlawfully to avoid the hassle of obtaining a minor variance, it would have (and should have) designated Unit 12 as a commercial unit in the registered declaration. The Court ultimately affirmed that the designation of Unit 12 as a storage unit in the registered declaration constituted "a flaw, malformation and miscarriage, and a departure from what was intended to be the plan for the condominium, and from what was in fact constructed". In these circumstances, Justice Perell was satisfied that in accordance with section 109(3) of the Act, the amendment to the declaration being sought was necessary or desirable to correct an error or inconsistency that arises out of the carrying out of the intent and purpose of the declaration or description.

Justice Perell believed that it was desirable to have the condominium's declaration accord with how the condominium building was actually built and sold, and was of the view that there would be no prejudice to the condominium corporation as a consequence of the amendment being granted, inasmuch as:

a) the applicant was prepared to pay (both retroactively and prospectively) its appropriate share of the common expenses attributable to Unit 12 being designated as a commercial unit; and

b) there would likely be no significant increase in the pedestrian and vehicular traffic generated by Unit 12 being utilized as a commercial unit, given that the patients using Unit 12 for medical spa services were already patients of the tenant who was operating as a family physician in one of the ground floor commercial units of the condominium.

Justice Perell also determined that the denial of the amendment sought would significantly prejudice the applicant, inasmuch as it paid $177,000 for a storage unit that would essentially be of no use to it, and that could not be conveyed except in conjunction with another commercial unit. Since all of the commercial units in the condominium had already been sold by the Declarant, Justice Perell concluded that Unit 12 would effectively be orphaned, and economically unviable, in the absence of the court-ordered amendment to the declaration being sought.

Finally, Justice Perell affirmed that the statutory procedures to amend the declaration, either with the approval of the unit owners pursuant to section 107 of the Act [ie. by attaining the approval of the owners of at least 80% of the units, or 90% of the units, depending on the nature of the amendment proposed], or by court order pursuant to section 109 of the Act, are mutually exclusive. In this regard, Justice Perell referred, with approval, to the case of *Carlton Condominium Corporation No. 26 v. Negur [2009] O.J. No. 1831,* wherein the Court confirmed that an unsuccessful attempt to amend the declaration or description by procuring the requisite threshold level of unit owner approval thereto, in accordance with the requirements of section 107 of the Act,

would not constitute a bar to a subsequent application made pursuant to section 109 of the Act for a court-ordered amendment to the declaration or description.

5. MY CRITIQUE OF THE DECISION

In arriving at his decision to judicially amend the declaration so as to convert Unit 12 from a storage unit to a commercial unit, Justice Perell clearly held a dim view of the Declarant, as is evident by the following critical or disparaging comments that were made about the Declarant, *in obiter*, namely that:

a) if the Declarant had not acted unlawfully to avoid the hassle of obtaining a minor variance, it would have (and ought to have) designated Unit 12 as a commercial unit;

b) the minor variance for Unit 12's commercial use would have been available had the Declarant applied for it, and that the Declarant's misconduct, which included registering an erroneous description, turned out to have been unnecessary; and

c) the Court did not approve of the "it's better to ask forgiveness than to ask permission" tactics of the Declarant, and confirmed that neither the applicant nor the respondent condominium corporation were the perpetrators of that misconduct ... rather, they were both the victims of the Declarant's misconduct, and of the two innocent parties, the one least harmed by amending the declaration was the condominium corporation.

I personally have the greatest respect for Justice Perell's keen intellect and legal acumen, and in my view, he is (without a doubt) one of the brightest legal luminaries in our judicial system, particularly in the area of real property law and commercial transactions, on which he has written extensively and with the utmost clarity and insight. However, I respectfully take issue with each of the foregoing comments or points, for the following reasons:

Firstly, there could be several legitimate reasons why the Declarant did not pursue the procurement of a minor variance, prior to the registration of the condominium, so as to permit Unit 12 to be used as a commercial unit, including the risk of unfavourable, expensive and/or time-consuming conditions being imposed by the Committee of Adjustment as a prerequisite to its grant of approval, including conditions which might have required the alteration or re-alignment of some other aspect of the project (including the possible requirement of providing additional indoor or underground commercial visitor parking spaces within the confines of the condominium, and correspondingly reducing the residential parking areas in exchange for same), and/or conditions which could have significantly delayed the overall registration of the condominium project and potentially put the Declarant in default of its repayment obligations with the project's construction lender.

Secondly, the applicant, in its capacity as the purchaser of Unit 12, would have been legally entitled to requisition that the registered declaration must expressly affirm the use and designation of Unit 12 as a commercial unit, in order to accord with the provisions of the agreement of purchase and sale and the reasonable expectations of the parties thereto, failing which the purchaser would be within its legal rights to resile from the purchase of Unit 12, with impunity, and to correspondingly obtain an abatement in the total purchase price equivalent to the $177,000 allocated to Unit 12. Nevertheless, the applicant completed the purchase of Unit 12, despite the fact that the registered declaration clearly designated Unit 12 as a storage unit and concomitantly imposed a severe restriction on its use (by being limited to storage uses only), and on its future leasing and sale opportunities (inasmuch as the storage unit could only be leased or sold to an owner of a commercial unit, and could not be retained by such owner after he or she has sold or conveyed title to said commercial unit). The Declarant would clearly have been obliged, at law, to bring this significant

change regarding the proposed use of Unit 12 to the attention of the applicant or its solicitor prior to the final closing of the purchase and sale transaction, and on the presumption that the applicant was, at all times, dealing with the Declarant at arms' length, I respectfully submit that it would have been commercially unreasonable, if not bizzare, for the applicant to have completed the purchase of Unit 12 (and take title thereto) in the face of the registered declaration, in the absence of the applicant receiving (or being promised) some form of significant abatement, compensation or other consideration from the Declarant for completing the transaction despite the storage use designation of Unit 12. Under these circumstances, it would be reasonable to assume that the applicant had expressly or implicitly waived the requirement for the Declarant to pursue and obtain a minor variance prior to the final closing of the purchase and sale transaction, thereby rendering the Declarant's actions totally lawful and appropriate. The fact that the applicant only commenced the application to amend the declaration on May 13th, 2011, nearly 32 months after the declaration and description had been registered (ie. on September 11th, 2008), speaks volumes about the applicant's lack of concern or objection to the Declarant's designation of Unit 12 as a storage unit in the registered declaration and description of the condominium.

Thirdly, just because the applicant was successful in obtaining the minor variance to permit the commercial use of Unit 12, does not necessarily mean that the variance would have been granted several years earlier, had the Declarant initiated and pursued same ... this part of Justice Perell's decision is clearly speculative. In fact, the Committee of Adjustment may have treated the applicant more favourably and sympathetically than it would have treated the Declarant, inasmuch as the latter had dominion or control over the entire design and layout of the project, and with respect to the specification of the units and common elements, and ought to have known about the visitor/customer parking requirements for commercial units, and the capacity of the condominium project to accommodate same, and should have designated the units accordingly. For all we know from the

reported facts of the case, the Declarant may have already endeavoured to obtain the aforementioned minor variance, but was ultimately denied same, or was advised that the Committee's approval thereof would not be forthcoming.

Fourthly, as between the two allegedly innocent parties (namely the applicant on the one hand, and the condominium corporation on the other), one must seriously question why Justice Perell gave the edge or benefit to the applicant, and did not dismiss the application as requested by the condominium corporation, inasmuch as the applicant was clearly guilty of the very tactic that Justice Perell had disapproved of (namely asking for forgiveness afterwards, rather than seeking permission in the first place) ... after all, it was the applicant who completed the transaction in the face of the registered declaration, and knew (or ought to have known) that Unit 12 could thereafter only be lawfully used for the limited purposes of storage, but nevertheless proceeded to subsequently renovate Unit 12 for office purposes, and enter into a lease of same with a tenant, all without having first obtained the approval of the board of directors thereto, and specifically without attaining the board's commitment to support an application to amend the declaration pursuant to section 109 of the Act, and without procuring the concurrence or assistance of the Declarant in connection therewith. While the Court didn't feel that the condominium corporation was prejudiced in any significant way by allowing Unit 12 to be used for commercial purposes, it appears that the Court came to that conclusion primarily because the ultimate users of the medical spa services to be provided within the confines of Unit 12 were arguably the same patients who would be visiting the tenant in her medical practice on the ground floor of the condominium, and would thereby not give rise to any material increase in the pedestrian and vehicular traffic coming into and out of the condominium premises. However, I personally believe that the Court viewed and evaluated the potential prejudice to the condominium corporation from an unduly narrow or myopic lense, because

after the term of the lease of Unit 12 has expired, the owner of Unit 12 can thereafter sell or lease same to anyone, for any lawful business or commercial purpose, unrelated to any of the existing ground floor uses or businesses, and possibly for a use or business that would entail or involve many employees and/or attract many patrons or customers (for example, it could be used for a driver's license renewal centre, or a training/skills centre). Any such proposed use of Unit 12, in contrast to the existing limited storage use of same, would therefore increase the wear and tear on the common elements, and potentially give rise to parking concerns and traffic congestion within the condominium's outdoor parking area, especially in light of the acknowledged insufficiency of outdoor commercial visitor parking spaces situate within the confines of the condominium, both of which concerns are legitimate and reasonably foreseeable, and could clearly affect the condominium in a potentially detrimental or deleterious way. In light of all of the foregoing, the characterization of the applicant as an innocent party, who stands on equal or better footing than the condominium corporation itself, is totally unfounded and unwarranted. The registered declaration, which was clear and unambiguous in its classification of Unit 12 as a storage unit, speaks volumes in dispelling any equities that might have otherwise existed in favour of the applicant over the condominium corporation. Parenthetically, there is a well known rule in baseball that the tie at first base, between the runner and the first baseman, always go the runner ... similarly, in the condominium arena, I respectfully submit that the tie between a unit owner and the condominium corporation should generally go to the condominium corporation who is running and managing the condominium property on behalf of all of the unit owners collectively. Finally, with respect to the ratio of the Court's decision in the Caras Case, it is important to keep in mind that it was not the Declarant, nor the condominium corporation, who initiated the application to amend the declaration, but rather the owner of the affected unit, and the latter successfully persuaded the Court to change

the permitted use provisions applicable to Unit 12 (namely from that of a storage unit to a commercial unit) despite the condominium corporation's outright opposition to the application, and without the support, input or approval of the Declarant thereto. In the absence of a clear, obvious and patent error or inconsistency that appears in the declaration or description (or an error or inconsistency that arises out of the carrying out of the intent or purpose of the declaration), how does one marshal the evidence needed to satisfy the burden or onus on the applicant, in an application made pursuant to section 109(3) of the Act, without involving the Declarant (or the Declarant's solicitor or surveyor), in order to prove that the restricted use of the unit for storage purposes was not really intended by the declaration, or by the Declarant who drafted same? Should the location, size and finishing of the unit prevail over the clear wording of the declaration, particularly in light of the applicable zoning restrictions at the time of condominium registration? After all, section 109(3) does not empower the Court to make whatever amendments to the declaration it deems fair or equitable under the circumstances [akin to section 134(3) of the Act], nor does section 109(3) expressly authorize any amendments to the declaration or description deemed necessary or desirable in order to align same with the as-built condition of the condominium property. Rather, section 109(3) of the Act requires the Court to first find an error or inconsistency that is needed or desired to be judicially corrected, which in turn requires the Court to examine the intention of the Declarant with respect to the impugned provisions of the declaration under consideration. Justice Perell did, in fact, examine the intent of the Declarant with respect to the declaration, but did so by looking at the initial marketing/sale stage of the project (by reviewing the provisions of the agreement of purchase and sale involving Unit 12, entered into prior to the commencement of the construction of the condominium project), and at the post-construction/finishing stage of the project (by judicially noting the location, finishing and servicing of Unit 12, in comparison to other storage units and the

commercial units). However, in my respectful opinion, the only relevant time to examine and determine the Declarant's intentions, insofar as the declaration of the condominium is concerned, is at the precise time that the declaration has been executed and submitted for registration, because throughout the very lengthy condominium development and registration process or continuum (which can generally endure anywhere between 3 to 6 years), a myriad of changes may take place (and be implemented with respect to the condominium) between the initial marketing launch of the condominium project, and the ultimate date of registration. These changes to the project (both with respect to the design and configuration thereof, and to the unit count or unit designations, as well as to the servicing thereof) are often triggered or instigated due to onsite conditions, changing market conditions and/or as part of the lengthy development approval process, including changes to the project that are required to comply with any municipal site plan agreement and/or section 37 density bonus/development agreement (which are invariably entered into by the declarant well after the project has gone to market).

In the Caras Case, the project did not have sufficient commercial visitor parking within the confines of the condominium in order to lawfully create more than 13 commercial units in the aggregate, and accordingly the Declarant intentionally and advertently designated Unit 12 as a storage unit, in order for the condominium project to comply with the applicable zoning by-laws, without having to incur the potential risk, expense and delays engendered by a minor variance application. Leaving aside the contractual obligations of the Declarant to the applicant insofar as Unit 12 was concerned (which obligations were somehow waived or compromised, as evidenced by the applicant completing the purchase of Unit 12 in the face of the registered declaration), there is nothing that would oblige or compel the Declarant to pursue a minor variance prior to the registration of the condominium, in lieu of simply revising the declaration before condominium registration so

as to designate Unit 12 as a storage unit ... the Declarant clearly took the path of least resistance, and with the least exposure to potential problems and attendant costs and delays. At the end of the day, the only way the Court could legitimately provide relief to the aggrieved applicant by making Unit 12 commercially viable, within the narrow parameters of section 109(3) of the Act, was to find that the designation of Unit 12 as a storage unit constituted an error or flaw in the declaration itself, or an error or inconsistency that arose out of the carrying out of the intent and purpose of the declaration and description. In my view, the Court did so based primarily, if not exclusively, on the as-built design, size, servicing and location of Unit 12, irrespective of the clear and unambiguous designation of Unit 12 as a storage unit in both the registered declaration and the description. However, when reviewing the declaration in the context of an application under section 109(3) of the Act, it is respectfully submitted that the Court's emphasis and review should not be focused primarily or exclusively on how the project (or the unit in question) was originally conceived, nor for that matter on how the project (or the unit in question) was ultimately constructed and completed. Rather, it is respectfully submitted that the paramount consideration for determining the existence of an error or inconsistency in the declaration or description (or an error or inconsistency that arises out of the carrying out of the intent and purpose of the declaration and description), should be predicated on what the declarant intended at the time of condominium registration, in order to: (a) make the project viable and compliant with all applicable requirements; (b) conform and accord with the declarant's disclosure statement (and any corrigenda thereto) issued by the declarant pursuant to section 72 of the Act; and (c) enable and facilitate the proper functioning and administration of the overall condominium property.

Most importantly, the provisions in a registered declaration should be viewed with great judicial deference, inasmuch as same are registered on title for the whole world to see, and to provide

actual notice of its contents, and such provisions are clearly intended to be binding on all present and prospective unit owners, and upon all residents and occupants within the confines of the condominium property. Simply put, the provisions in a declaration are akin to covenants running with the land, and there is clearly an element of certainty and reliance with respect to same, both of which are important for the successful operation of any condominium project. Leaving aside any patent or obvious error or inconsistency in the declaration itself, it is my opinion that in the context of an application to amend the declaration initiated under section 109(3) of the Act, in the absence of the declarant's assistance or support of such an application, the Court should invariably require compelling evidence or proof to substantiate the alleged error, as a prerequisite to overriding or amending any provisions of the registered declaration .... both unit owners and residents of condominium communities should desire, and require, nothing less.

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