

## **“So It Shall Be Written, So It Shall Be Done”**

One of the most common questions I am asked by property managers and condominium owners alike is “How do we go about amending the declaration, bylaws and/or rules? The *Condominium Act, 1998* (the “**Act**”) is very specific with respect to what it takes to amend each of these documents. There are different requirements for amending each one and the level of difficulty for amending each varies on the importance of each document. Therefore, it is important to understand this hierarchy before you start on your journey to amend them.

### **The Declaration**

The Declaration is the constitution of your condominium corporation. It is the bible. It is the starting point for any examination of your condominium corporation and the basis upon which your corporation is created. It sets out the framework and is the “operating manual”. To fully understand the nature of your corporation, one need only to review the Declaration from start to finish, and you will fully understand your corporation. It describes in detail, the units, the common elements, the common element percentages, obligations for maintenance, repair and replacement of the units and common elements, permitted uses of the units, how to alter the units, etc. Because of the importance of the Declaration and the role it plays in the operation of the corporation, the Act makes it very difficult to amend the Declaration.

There are two avenues to amend the Declaration under the Act. The first avenue is by way of a Court Order. An application has to be made to the court to seek an order to amend the declaration. However, the Act is clear that the only grounds for which a court order can be sought is if there is an error or inconsistency in the Declaration. In other words, one would have to prove to the court that when drafting the Declaration, the declarant made an error whereby they meant to say one thing and it turned out that something entirely different ended up in the final draft. These types of errors can range anywhere from a missed page number, error in the description of the boundaries of the unit to simple typos. Therefore, as part of the application

materials an affidavit is necessary to prove to the court that this was indeed an error. It is important to note, that there must be an error or inconsistency in the declaration to utilize this option. Inequity or unfairness is not an error and the court will not hear that argument.

For example, many times I am asked how can one change the common element percentages set out in Schedule "D" of the Declaration. Schedule "D" sets out your common element percentages which forms the basis for the amount of your monthly common expenses. Once the corporation sets its budget and determines that this is the forecasted amount of money that it will take to operate the corporation for the coming year, your specific percentage of that global amount is what your maintenance expense will be. Many argue that their percentage does not accurately reflect the square footage of their unit and therefore that's not fair. The important thing to keep in mind here is that the only legal requirement on the declarant when creating the Schedule "D" is that the numbers must add up to 100%. There is absolutely no requirement whatsoever that it accurately reflects the square footage of the units. So, for many of you that question why certain units have certain percentages which do not accurately correspond to the size of the unit, the answer is it does not have to.

It is not enough to say to the court that there is something unfair or inequitable in the Declaration and therefore that is an error. The purpose and intent of a court ordered amendment is to correct an error or inconsistency and not an inequity or unfairness.

If you do not have an error, the only other way to amend the Declaration is to obtain the consent of the unit owners in the corporation. Depending on the nature of the amendment, you will either require 80% or 90% consent of all the unit owners in the condominium corporation. The Act is specific as to when 90% consent is required. For example, if you wanted to change the common expense percentages that will require 90% consent of all of the unit owners. For various other changes, 80% consent is required. Section 109 sets out specifically the types of amendments where 90% consent is required and when 80% is required. Obtaining that level of consent is a difficult hurdle to overcome. It is purposely made that high to ensure that the declaration will not be easily changed. The drafters of the Act wanted to make sure that because

of the importance of the Declaration, 80% or 90% of the owners are in favour of this amendment. Under the old act, 100% consent was required, making it virtually impossible to amend the Declaration.

### **Bylaws**

The next level in the condominium hierarchy is by-laws. Section 56 of the Act sets out the subject matters within which the board can pass by-laws. Generally speaking, by-laws deal with the management and governance of the corporation. They deal with issues, such as the make-up of the board, number of directors, standard unit descriptions and borrowing of monies. Since by-laws deal with the management and governance of the Corporation and does not go to the fundamental basis of the existence of the condominium corporation, bylaws are easier to create, amend or repeal than the Declaration. The first step to create, amend or repeal a by-law is for the board of directors to pass a resolution that such a bylaw is required to be created, amended or repealed. Once the resolution has been passed by the board, there must be a unit owners meeting held and 50% of the unit owners in the condominium corporation are required to vote in favour of the bylaw. Achieving 50% consent is a far easier task than obtaining the consent required for a declaration amendment. Once the bylaw has been passed, it is not effective unless and until it is registered on title.

### **Rules**

Finally, there are the rules of the condominium corporation. Rules are put in place to promote the safety and security of the owners and of the property of the corporation. In addition, they are put in place to prevent unreasonable interference with the use and enjoyment of the common elements and units. There are specific rules as to what you can do in your unit and common elements and how you can conduct yourself in the condominium corporation. Rules are created, amended or repealed simply by a resolution of the board of directors. The rule is then mailed to all the unit owners in the corporation. Upon receipt of the notice of the rule, a unit owner who objects must requisition a meeting within 30 days of receiving the notice. If no requisition is

received, the Rule is automatically effective. If a requisition is received, then a meeting would be called and a simple majority of those in attendance at the meeting is required to pass the rule, as opposed to a majority of the unit owners of the condominium corporation in the case of a by-law.

While it may seem easy to say that if you disagree with something you can simply amend the declaration, keep in mind that it will not take much to derail a declaration amendment. A small minority of unit owners will be able to block any such declaration amendment. Most would consider this a good thing as it maintains the integrity of the Declaration and nature of your condominium corporation. It would not be beneficial to be able to easily amend the Declaration. Since the corporation will likely be around well after many of you have sold your units, It is important that there be consistency in the Declaration and that it is equally effective against current and future unit owners who will be able to rely on the Declaration when they are thinking of purchasing a unit, knowing that it cannot be easily changed. The last thing you want to be able to do is that suddenly you buy into a condominium corporation and then there is a movement to change portions of the Declaration that provided you comfort when you were making your decision to buy.

The most important thing to realize is when amending the declaration, rules or bylaws; it will involve the participation of the unit owners in the condominium corporation. As you can tell from many of your meetings, you will notice that there is not always the greatest of attendance at these meetings. So, if you are one that is for or pro a bylaw change, or a declaration amendment, it will behoove you to make your best efforts to compel the owners to attend these meetings and state their opinion with respect to these types of changes. After all, this is your home, your investment and you want to do your best to ensure that owners are making educated decisions when it comes to amending these important documents that govern your lifestyle at your community.