Issues to Consider When Buying a New or Used Commercial Condominium Unit

by
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(with assistance from Debra Eveleigh)

SUMMARY

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I. Introduction

The *Condominium Act 1998,* S.O. 1998, c. 19, as amended (hereinafter referred to as the "**Act**") has, by and large, eliminated the distinction between residential and non-residential condominiums that had existed under the former condominium legislation, and correspondingly provides purchasers of commercial units with the same statutory safeguards that had benefitted purchasers of residential units. For example, the declarant's sale of condominium units, regardless of their intended use or type, is universally governed by the mandatory disclosure provisions of section 72 of the Act, and the corresponding 10-day rescission period (or cooling off period) detailed in section 73 of the Act. In addition, the obligations under section 81 of the Act to hold the unit purchaser's deposit monies in trust, pending the registration of the condominium and the declarant's tender of a transfer of title to the unit purchaser (or alternatively pending the receipt of prescribed security) apply to residential and non-residential condominiums alike. Moreover, the regulations to the Act no longer categorize non-residential condominiums into separate classes of units, such as "industrial", "business and personal services" or "mercantile", as was the case under the predecessor condominium legislation. Rather, all of these former categories of non-residential condominiums have now been replaced with the term "commercial", which is the term that is used throughout this paper.

This paper is intended to examine, from the unit purchaser's perspective, some of the special concerns and key considerations involving the acquisition of a commercial condominium unit from

the declarant. The following analysis will include those condominiums in which all units (on all levels) in the project are designed and utilized for commercial purposes, as well as additional considerations arising in the context of a mixed-use condominium that typically comprises ground floor commercial/retail units with multiple floors of residential units thereover.

II. **The Size of the Unit**

Generally, the purchase price of a commercial unit is predicated on a certain quoted dollar price per square foot or metre, multiplied by the gross floor area of the unit [being the total number of square feet or metres contained within the boundaries of the unit, inclusive of all mechanical areas (if any) situate therein, and regardless of whether any portion of the unit is not useable for the purchaser's intended business]. Accordingly, the purchaser should insist that the final gross floor area of the completed unit, when registered as a condominium, be certified by a duly qualified surveyor, and that the purchase price be adjusted to reflect any variance from the original intended size of the unit, as depicted on the vendor's initial floor plans. Some declarants will insist on a threshold variance level of at least 2 to 3% of the original intended size of the unit, before being prepared to grant the purchaser a proportionate abatement in the purchase price.

In addition to ensuring that the size of the proposed unit will be sufficient to meet his or her present and future business needs, the purchaser should also bear in mind that in some municipalities, the applicable zoning by-laws may stipulate that the use of the premises (in terms of the type of business being operated therefrom) will dictate the minimum size of the premises. For example, an M-1 zoning designation, which permits light industrial and warehouse uses within the unit, also limits the permitted accessory retail or service-shop uses within such premises, to a

maximum of 10% of the total gross floor area (on the ground floor) of the unit. In addition, within this M-1 zoning designation, an office use that is incidental and ancillary to the main industrial or primary warehouse use of the unit, is generally permitted, provided that the office component does not exceed 49% of the total gross floor area (on the ground floor) of the unit. Therefore, in order to comply with the applicable zoning by-law, a purchaser of an industrial unit in an M-1 zoning area who wants to use up to 100 square feet of the proposed commercial unit for ancillary retail purposes, must ensure that the total gross floor area of the unit (on the ground floor) is not less than 1,000 square feet.

Finally, the purchaser of the commercial unit should be certain as to how the square footage or gross floor area of the unit is measured. In today's commercial condominium marketplace, it is customary to calculate the gross floor area of the unit from the outside face of exterior walls, to the centre line of any demising wall dividing units (or to the vertical plane legally dividing units, as more particularly described and illustrated in the condominium's description plan), with such gross floor area generally including all interior partition walls and columns.

III. **The Boundaries of the Unit**

The ultimate delineation and monumentation of a commercial unit's boundaries is often determined by the following three factors:

1. the desire to separate those building structures and components that are intended to be maintained and repaired by the condominium corporation (and whose uniformity or compatibility of appearance is intended to be regulated by the condominium corporation and budgeted accordingly), from those areas intended to be used exclusively or predominantly

by the proposed unit owner, and to be maintained and repaired by the unit owner at his or her sole cost and expense;

2. the degree of flexibility that the declarant is prepared to grant to the purchaser, versus the extent of control that the declarant wants to retain (on its own behalf, and on behalf of the future condominium corporation) over the implementation of the purchaser's design, servicing and finishing plans for the interior of the unit (ie. with respect to the location of all interior partitions, the type and quality of floor and wall coverings, and the type and style of fixtures, etc., intended to suit the purchaser's own business needs). This is subject, however, to the requirement for compliance with all applicable zoning and building by-laws, and the maximum tolerance levels for floor loads (and for weight-bearing objects intended to be affixed from, upon or within the unit), as established or determined by the declarant's consulting engineer; and

3. subsection 6(2) of Regulation 48/01 of the Act, which expressly provides that in respect of units intended for "non-residential purposes" (and that are not ancillary to units intended for residential purposes), interior partitions, walls between units, or walls between units and common elements, wall or ceiling coverings, and floor assemblies at grade on the lowermost floor (if referenced to a geodetic datum) do not have to be constructed, nor completed, in order for the condominium project to be registered.

The culmination of the foregoing factors has sometimes resulted in the registration of commercial condominiums that contain few (if any) physically-constructed perimeter or demising walls, and condominium declarations that impose the ultimate responsibility for the future installation of such demising walls (as well as the erection of all desired interior partition walls) onto

the affected unit owners. In other words, the horizontal limits of the commercial unit may constitute vertical planes, defined or designated through the extrapolation of a hypothetical line from some existing physical structure (i.e. the centre line of concrete columns or steel beams).

This method of monumenting the commercial unit affords the purchaser the flexibility of acquiring one or more units from the declarant, and partitioning them in a manner that allows the purchaser to utilize a portion of the acquired premises for his or her own business operations, while leasing out the remainder of the space to one or more tenants. In this way, when the purchaser's spatial requirements expand, the purchaser can extend his or her business operations into the remaining space within the unit(s) that he or she already owns, subject to whatever outstanding leasehold obligations may exist in favour of the purchaser's tenant(s) (see Paul Neubauer's "Specialty Condominium Developments", *Insight Lecture Series*, February 25, 1987, c. 2, p. 21). Accordingly, the purchaser should get the declarant to confirm the extent (and the anticipated state of construction completion) in respect of the unit boundaries. If the responsibility for the installation of the demising walls is intended to be left to the unit owner, or is to be shared amongst adjacent unit owners, then the purchaser will clearly have to take that future cost of construction into consideration, when negotiating the final purchase price of the unit.

To allow the purchaser the greatest flexibility in subsequently servicing, finishing, fixturing, altering and/or refurbishing the unit, the boundaries of the unit should be as wide-ranging or as extensive as possible, with the vertical limits in such circumstances generally constituting the underside of the concrete ceiling or the overhead steel joists (with rights to affix or hook into same), and the upper surface of the concrete floor slab, while the horizontal limits would generally comprise the centre line of the concrete walls or other permanent structures dividing the units. If the

installation of non-load-bearing demising walls ("perimeter walls" or "party walls" which divide the units) is ultimately to be the responsibility of one or more unit owners, then the relevant unit boundary will generally be fixed and located at the centre line of the requisite demising wall, when constructed. If the wall has not been installed as at the date of registration, then the unit boundary will accordingly constitute a vertical plane, along which the centre line of the demising wall will eventually be constructed, and this location will be certified by a duly qualified surveyor. Monumenting the unit in this manner eliminates any part of the demising wall as a constituent part of the common elements. To do otherwise might cause the unit owner to encroach upon (or interfere with) the common elements, or to inadvertently alter the common elements, in the course of completing his or her servicing, finishing, fixturing and/ or refurbishing work with respect to the unit.

The foregoing becomes relevant in light of sections 97 and 98 of the Act. The exact location and extent of the unit's boundaries can be critical, especially if the purchaser's proposed work within the unit is intended to be made without altering or affecting any portion of the common elements, and thereby obviate the procurement of any required consents under section 98 of the Act ... otherwise, any proposed servicing, finishing, fixturing and/ or refurbishing work involving the purchaser's commercial unit which correspondingly entails or constitutes an addition, alteration or improvement to the common elements, may negatively impact the purchaser (in terms of inconvenience, delays and increased costs), by having to procure the condominium corporation's approval thereto in accordance with the provisions of section 98 of the Act (with the possibility of having notice of such proposed changes to the common elements delivered to all unit owners, and then having to wait and see if a meeting has been requisitioned to formally object to same).

Fortunately, the problems associated with alterations to the common elements that existed under the former condominium legislation are significantly lessened by the provisions of sections 97 and 98 of the Act. There is now specific authority for the board of directors to approve many changes to the common elements that formerly required unit owner approval, and currently a meeting of unit owners is only required where same is specifically requisitioned by the owners pursuant to a notice issued under section 97(3) of the Act, or where the change or impact to the common elements qualifies as substantial, within the meaning of section 97(6) of the Act.

The purchaser of a commercial unit and his or her solicitor should be prepared to live with provisions in the agreement of purchase and sale (and possibly provisions contained in the condominium's declaration) that require the submission of all pertinent plans, drawings and specifications relating to the purchaser's proposed servicing, finishing, fixturing and/ or refurbishing work, together with copies of all building permits and/or licences required in connection therewith, to the declarant and/or the condominium corporation for their respective written approval, prior to the purchaser being entitled to commence any interior installations, and/or any servicing, finishing, fixturing or refurbishing work [as well as provisions which require the submission to the condominium corporation of all relevant as-built plans, drawings and specifications pertaining to the purchaser's finishing work, including the installation of any demising wall, accompanied by a surveyor's certificate confirming that the centre line of any such demising wall has been properly located on or along the designated vertical plane]. Such provisions are common, and arguably necessary to ensure that the structural integrity of the building and its component parts is maintained at all times. It also ensures that the cost of re-constructing or rectifying any improperly located party wall(s) or demising wall(s) is directly passed onto the affected unit owner.

Please note that the declaration of the condominium will commonly provide that each commercial unit includes all pipes, wires, cables, conduits, ducts and mechanical or similar apparatus that supply any service (i.e., for utilities, power, heating, air conditioning, refrigeration, etc.) to that particular unit only, and that lie within or beyond the boundaries of the unit (as delineated in the condominium's description plan), and will typically exclude all load-bearing walls and columns located within the unit's boundaries, together with any pipes, wires, cables, etc., that supply any service to more than one unit, or to the common element areas, or that may lie within the boundaries of any particular commercial unit but which do not service that particular unit.

Finally, the purchaser of a commercial unit should bear in mind that if the condominium's declaration allocates the responsibility for the maintenance and repair of the unit onto the unit owner, then any extension of the unit's boundaries (ie. to include expensive exterior building components, such as plate glass windows and expensive doors and hardware) will correspondingly increase the purchaser's ultimate maintenance and repair costs.

IV. **Servicing of the Unit and the Metering/Consumption of Utilities**

Commercial condominiums are generally designed and serviced for the consumption of utilities in either of two ways, or a combination thereof, namely:

1. with each unit in the project having separate and independent meters for all or some of the requisite utility services needed to operate a business (eg. water, electricity, gas, thermal energy and sewage services), in which case the local utility authorities will invoice each of the respective unit owners directly for the amount of services they have actually consumed, based on periodic readings of the meters installed appurtenant to each unit, and with a set of

bulk meters installed to measure and monitor the utilities consumed or utilized in respect of the common element areas (i.e., for the lighting and watering of exterior landscaped areas, etc.); or

2. with one set of bulk meters installed to monitor utility consumption for all units and common element areas, together with a separate or independent system of check or consumption meters appurtenant to each unit, to enable the condominium corporation to separately measure and monitor each unit's respective consumption of utility services, and accordingly determine each unit's proportionate share of the bulk utility bill(s).

The separate metering system outlined in sub-paragraph (1) above is preferable, in terms of eliminating the time and expense required to properly monitor and administer the payment of all utility services consumed on a unit-by-unit basis. However, the cost of physically installing separate meters, and the reluctance of some local utility authorities to undertake individual unit meter readings periodically (and to adopt a separate invoice/billing procedure, on a per unit basis) often necessitates the implementation of the bulk metering system outlined in subparagraph (2) above. This last-mentioned metering regime involves the condominium corporation receiving a bulk invoice for each of the respective utility services consumed or utilized by all of the units and common elements, en bloc, pursuant to readings taken by the local utility authorities on a bulk meter basis. The condominium corporation will correspondingly have to pay the bulk utility bills, on behalf of all unit owners, as and when due, in the first instance. The condominium corporation will then have to issue an invoice to each of the unit owners, reflecting each owner's proportionate share of the bulk utility bills (ie. in respect of the water, electricity, gas and/or thermal energy utilized or consumed by each unit, and by any exclusive use common element areas appurtenant thereto), as

determined by the periodic readings taken of the check or consumption meters appurtenant to each unit. In the case of a bulk-metered project, the condominium's declaration will typically oblige the condominium corporation to retain the services of a third party to act as a designated utility monitor, to read the respective check meters appurtenant to each of the units, and to be responsible for issuing invoices (reflecting the cost of the consumption of the respective utilities, based on such meter readings) to each of the unit owners, and to collect all monies owing pursuant to said invoices. Moreover, the separate check or consumption meters will have to be read by the condominium's utility monitor as frequently as the bulk meters are read by the local utility authorities, and the declaration will typically oblige each commercial unit owner to pay his or her proportionate share of the overall utilities consumed, directly to the condominium corporation or its utility monitor, within a specified time period following the owner's receipt of an invoice from the condominium corporation or its utility monitor (but in no event later than a specified period of time prior to the due date for payment of the bulk utility bill by the condominium corporation). This will ensure that the condominium corporation has sufficient monies to pay the bulk utility bills issued by the local utility authorities. In order to induce recalcitrant or perpetually-delinquent unit owners to pay their fair share of the bulk utility bill(s), the declaration will typically provide that in the event that any unit owner fails to pay his or her proportionate share of the bulk utility bills on or before the due date for payment, then the condominium corporation shall be entitled to charge interest at a specified rate against the defaulting unit owner, calculated and accruing on the amount owing, and to maintain and enforce a lien against the defaulting owner's unit as security for the payment of the outstanding and unpaid share of the bulk utility bills, plus interest, in the same manner (and to the same extent) as a lien for arrears of common expenses.

It's also important to note that section 6 of Regulation 48/01 to the Act requires all installations with respect to the provision of heat to be in place, and operable, prior to the condominium being sufficiently "constructed" to permit its registration. However, installations with respect to the provision of water, electricity, sewage removal and drainage need only be in place, but not necessarily operable, for the condominium to be registered. Accordingly, many commercial condominium developers impose the obligation of connecting the specific unit to the condominium's servicing and utility systems (and to the public or local utility authority's utility and servicing systems) directly onto the unit owner, subject generally to the following provisions, namely that:

1. the commercial unit owner must first submit detailed plans, drawings and specifications showing the intended interior layout and configuration of the unit, and outlining the servicing requirements and necessary outlets for the unit, to the declarant for its prior approval;
2. the declarant's consulting engineer must then certify that the plans and specifications submitted are in conformity with the public or local utility authority's requirements, and in accordance with the engineer's schedule of tolerances (or maximum consumption capacities) for the various utilities provided to the condominium building, in order to ensure that the project's overall water, gas, electricity, thermal energy and/or sanitary sewer consumption or usage does not exceed permitted or acceptable levels (i.e., to avoid power black-outs, water shortages, etc.);
3. the contractor retained by the unit owner to carry out the physical servicing and hook-up work to the building's systems, must first be approved by the declarant's consulting engineer or by the board of directors of the condominium corporation; and

4. the costs of having the unit owner's requisite plans and drawings prepared, reviewed and approved, together with the cost of implementing the physical hook-up work, are to be borne and paid for solely by the affected unit owner, along with the cost of procuring adequate liability insurance to cover any potential claim(s) for loss and/or damage to persons and/or property occasioned by the negligent hook-up or installation of any service(s) to the unit, naming the declarant and the condominium corporation as co-insureds.

If the purchaser is ultimately obliged to attend to the servicing requirements of the unit, then the estimated cost of procuring all requisite consents and permits, and implementing and completing all the necessary work, must be considered when negotiating the final purchase price of the unit. The declarant should be contractually bound to provide the purchaser with copies of all relevant plans, drawings and specifications of the condominium building, including its heating/cooling, lighting, electrical and plumbing systems, etc., in order to enable the purchaser's consultants to determine the safest and most expeditious manner of connecting the unit to them. The declarant should also warrant to the purchaser that there will be no physical impediment regarding access to, and egress from, the unit and all requisite common areas, at all reasonable times, in order to allow the purchaser and its authorized workers, agents or contractors to carry out and complete all the requisite servicing work. The purchaser will not need a formal easement for servicing his or her commercial unit, inasmuch as section 12(1) of the Act specifically provides that every unit has the following appurtenant easements, namely:

1. an easement for the provision of a service through the common elements or any other unit;
2. an easement for support by all buildings and structures necessary for providing support to the unit;

3. if a building or a part thereof moves after registration of the declaration and description (or after being repaired following any damage), but has not been restored to the exact position occupied at the time the condominium corporation was first created, an easement for exclusive use and occupation over the space of the other units and common elements that would be the space included within the unit, if the boundaries of the unit were determined by the position of the building after the registration of the description, and not at the time of registration; and

4. if the condominium corporation is entitled to use a service or facility in common with another condominium, an easement for access to (and for the installation and maintenance of) the service or facility over the land of the other condominium corporation.

Finally, if the purchaser is concerned about the possibility of delays in obtaining the declarant's approval to his or her proposed servicing plans for the unit, then consideration should be given to the insertion of a clause in the agreement of purchase and sale which provides a maximum time period, after the submission of the purchaser's requisite plans and specifications to the declarant's consulting engineer, within which the declarant must formally approve or reject the purchaser's request, in writing, failing which the declarant's approval shall be deemed to have been granted.

V. **Fixturing, Finishing and/or Altering the Unit (and any Exclusive Use Common Element Areas)**

In most commercial condominiums, the responsibility for installing all requisite fixtures and finishing installations (including without limitation, wall and floor coverings, light fixtures, special refrigeration and/or air conditioning systems, built-in shelving and similar installations), lies with

the unit owner. Accordingly, the estimated cost of all labour, materials and equipment needed to complete this work must be taken into account when negotiating the final purchase price for the unit.

Typically the agreement of purchase and sale requires the declarant to approve and monitor all proposed servicing, finishing, fixturing and/or refurbishing work intended to be undertaken within the unit, prior to the final closing date. This vigilance will avoid undue delays in the registration of the condominium. The condominium's description is comprised of both the surveyor's plans and the architectural and engineering drawings, which must reflect the "as-built" condition of the project, incorporating all changes made to the units and common elements up to the date of registration. Accordingly, these plans and drawings must be amended and updated to illustrate all interior partitions and servicing installations, such as special electrical facilities, washrooms, etc., made to the interior of the unit after the possession date and prior to the final registration of the condominium. Monitoring and recording the unit owner's improvements and installations will ultimately assist the condominium corporation in ensuring that it is not over-insuring the condominium's property by including unit owners' improvements under its master insurance coverage. In the event that the condominium's declaration obliges the condominium corporation to repair both the units and the common elements, then the condominium corporation will be better able to ascertain the extent of its repair responsibilities, since section 89(2) of the Act provides that the condominium corporation's obligation to repair, after damage, specifically excludes all improvements made to a unit [determined by the standard unit definition outlined in a by-law enacted pursuant to section 56(1)(h) of the Act, if applicable, or outlined in a schedule delivered by the declarant to the board of directors at the turnover meeting, in the absence of the aforementioned by-law].

With respect to the implementation of any intended servicing, finishing, fixturing and/or refurbishing work, the agreement of purchase and sale will typically provide for the following, with parallel provisions outlined in the proposed declaration (save and except that references will be made to the condominium corporation, instead of the declarant, regarding the party or entity whose approval is required), namely that:

1. the purchaser shall obtain the declarant's prior written consent to any alterations or improvements intended to be made to the unit, and shall provide the declarant with all requisite plans, drawings, blueprints and/or sketches prepared by a duly qualified architect or engineer, illustrating all proposed alterations or improvements to the unit, in sufficient detail, copies of which shall be retained by the declarant and ultimately turned over to the condominium corporation for its own records, after registration;
2. the purchaser shall procure, at his or her sole cost and expense, all requisite building permits and/or licences with respect to the intended alteration work or improvements, as may be required by all governmental authorities or agencies having jurisdiction over the development of the project, as well as adequate public liability and property damage insurance [ie. providing coverage against any loss or damage to persons and/or property occasioned by (or in connection with) any work undertaken to service, finish, fixture or refurbish the commercial unit, in an amount not less than $2 million dollars per occurrence (or the minimum threshold amount otherwise stipulated by the declarant), noting the interests of both the declarant and the condominium corporation as co-insureds, and containing a cross liability and a severability of interest clause (protecting the declarant and the condominium corporation against any claims for personal injury and/or property damage, as if they were

each separately insured), as well as a waiver of subrogation in favour of the declarant and the condominium corporation (and for those for whom the declarant and/or the condominium corporation may be vicariously liable, at law or in equity), and expressly confirming that no material change adverse to the declarant and/or the condominium corporation can (or will) be made to said insurance coverage (and that the policy will not lapse or be cancelled) without not less than 30 days prior written notice to the declarant and the condominium corporation of any such cancellation or material change to the insurance coverage];

3. under no circumstances shall any alterations or improvements be carried out in a manner or fashion that may likely affect (or interfere with) the structural integrity of the building, and/or the structural components of any unit or any portion of the common elements;

4. the purchaser shall promptly pay all outstanding accounts for labour, materials and equipment with respect to any such servicing, finishing, fixturing and/or refurbishing work, including without limitation, the account of any person who would be entitled to claim a construction lien against the unit and/or any part of the common elements, in respect of any work performed and/or materials supplied in connection therewith, with the registration of any such lien constituting a breach or default by the purchaser under the agreement of purchase and sale;

5. the purchaser shall forthwith pay and/or reimburse the declarant for all fees and disbursements charged by the declarant's architect and surveyor in connection with updating the as-built architectural plans and survey drawings for the project, in order to reflect all alterations or improvements made to the unit; and

6. the proposed alterations or improvements to the unit shall fully comply with all applicable zoning and building by-laws and regulations (including all fire, health and safety codes of the local municipality), and that the building's power and other services are not unduly disturbed or interrupted during the course of the work, and that adequate measures are taken to minimize, as far as reasonably possible, any noise, vibration, dust, debris or interference caused to any other unit owner(s), including without limitation, disruption of pedestrian access to (and egress from) any of the other units and/or common areas arising from (or in connection with) such work.

Moreover, if the implementation of any desired alteration work or improvements to the commercial unit will necessitate encroaching upon (or interfering with) any common areas, with the potential for such work constituting an addition or alteration to (or an improvement of) the common elements (which can only be authorized pursuant to sections 97 or 98 of the Act), then the purchaser should consider obtaining the contractual commitment of the declarant to cause the requisite procedures to be followed as soon as reasonably possible following the registration of the condominium, and prior to the declarant's conveyance of title to any unit in the project, and where necessary, to exercise its voting rights (in the declarant's capacity as owner of all units on all levels) to approve of the purchaser's intended alterations or improvements to the commercial unit.

Finally, the purchaser should carefully scrutinize the proposed condominium declaration to determine the extent of the approvals needed to be sought or obtained from the board of directors of the condominium, after registration, in those circumstances where any future alterations or improvements to the unit are needed or anticipated. At the very least, the purchaser should be prepared to submit to the board of directors (or the condominium’s property manager) the details of

any alterations or improvements undertaken with respect to the unit (accompanied by copies of all required permits so obtained, and all relevant plans reflecting the as-built condition) forthwith following the completion of the work.

VI. **Restrictions on the Use of the Unit**

In order to be assured that the purchaser's intended use of the proposed or existing commercial unit will be lawfully permitted, the purchaser must have regard to the relevant zoning bylaw of the local municipality that is applicable to the project, as well as any relevant provisions contained in the declaration that might further restrict or regulate any uses that would otherwise be allowed under the applicable zoning by-law. Subsection 7(4)(b) of the Act provides the mechanism by which the declarant may, through appropriate provisions inserted in the declaration, regulate the occupation and use of the units and common areas. Therefore, undesirable retail businesses or commercial operations, or potentially dangerous, noxious or pernicious unit uses within the condominium that would significantly interfere with (or inconvenience) the residents of the condominium, or depress the market value of the project, or place an inordinate burden on the condominium's services, facilities and/or common areas, can be regulated, restricted or wholly prohibited. For example, a restaurant use would likely attract excessive vehicular and pedestrian traffic, compared to other business uses, and would require sufficient parking to be allocated to the unit owner wanting to carry on that business, in order to enable the owner to comply with the applicable zoning by-law. Depending on the hours of operation and the type of clientele attracted thereto, this type of use might create potential noise, traffic, parking, garbage storage and/or security problems. To ensure a proper mix of business uses, the declarant might limit the number of units in

a condominium project that can carry on the same type of establishment or business operation. Moreover, the declarant might endeavour to reduce the excessive effects of certain commercial operations on the project's overall services, facilities and common areas, by limiting the number of parking units available to a particular unit owner, or by restricting the size of that owner's unit (particularly in a municipality where, in accordance with the applicable zoning by-law, the size of the unit and/or the number of parking spaces available to the unit owner will dictate the permitted uses that may be lawfully operated from the commercial unit). Therefore, if the purchaser wants maximum flexibility with respect to future changes to the use of his or her unit, then the purchaser should ensure, to the extent possible, that the applicable zoning by-law and the condominium's declaration do not contain provisions which require a higher parking ratio to be met consequent upon any future change of use, without also having the ability to acquire the additional parking units from the declarant (or additional parking spaces allocated by the condominium corporation), at a later point in time.

Finally, depending on one's bargaining position in the prevailing marketplace, the purchaser might wish to consider getting the declarant to agree to insert a provision in the declaration before the condominium has been registered (or alternatively to register a restrictive covenant against the title to one or more units in the project, after registration of the condominium, but prior to the declarant's transfer of title to the respective units), restricting the ability of the respective owners of the other commercial units from carrying on a business or activity that will compete with the business operations intended to be conducted by the purchaser from his or her unit.

VII. **Rights of First Refusal**

The purchaser of a commercial unit who is eager to make contingency plans for the future expansion of his or her business operations, might wish to consider getting the declarant to agree to impose a binding obligation on all future adjacent unit owners (preferably registered against the title to their respective units, in order to give notice of same to all successors-in-title) to provide the purchaser with a right of first refusal to acquire or lease the adjacent commercial units, before they can be marketed to any third-party purchasers or lessees. Alternatively, the purchaser's solicitor might wish to consider negotiating a contractual right of first refusal directly with the declarant, with respect to any unsold adjacent units still retained by the declarant.

Pursuant to section 7(4)(c) of the Act, the declaration may contain provisions restricting the sale and/or leasing of units, and their appurtenant common interests. Accordingly, there may be provisions in the declaration which purport to give the condominium corporation a right of first refusal to purchase a commercial unit, before same is marketed and sold to any third-party. While this type of provision is intended to allow the condominium corporation, in an indirect way, to "keep out" undesirable business entities that would otherwise conform with the applicable zoning by-law(s), such a provision may nevertheless be an impractical one, since its implementation may ultimately require the expenditure of considerable sums of money by or on behalf of the condominium corporation, and thereby possibly give rise to a potential special assessment, in order to fund the acquisition triggered by the right of first refusal. If the condominium's exercise of the right of first refusal to acquire any commercial unit would result in the condominium corporation expending 10% or more of its annual budgeted common expenses in connection therewith, then the acquisition of the unit will be considered a substantial change in the assets of the condominium, thereby requiring a meeting of unit owners at which those owners owning at least 66 2/3% of the

units must vote in favour of approving the acquisition, pursuant to the provisions of section 97(4) of the Act.

VIII. **Parking Considerations**

Given the wide range of business uses that a purchaser of a commercial unit may wish to pursue within the confines of the unit, the purchaser and his or her lawyer should pay special attention to the parking units or spaces which are available to the unit owner, and to the owner's employees and customers, as this may be a significant (if not a paramount) consideration impacting the purchaser's ability to operate his or her intended business within the unit.

Parking spaces in a condominium are usually allocated in one of the following two ways:

1. the parking spaces are "unitized" and sold as individual units within the condominium, and accordingly have common interests and common expenses specifically allocated to each of them, in accordance with the percentages outlined in Schedule "D" to the declaration; or
2. the parking spaces form part of the common elements of the condominium, and comprise either:
   (a) non-exclusive use common element areas (that may or may not be allocated or assigned from time to time by the board of directors amongst the respective units, or alternatively leased to one or more unit owners pursuant to a by-law enacted under section 21 of the Act); or alternatively
   (b) constitute exclusive use common element areas that are permanently allocated to specific units, all as more particularly outlined in Schedule "F" to the declaration.

The purchaser of a commercial unit should bear in mind that the number of parking spaces or parking units that will have to be acquired or assigned to it must be sufficient for the intended use of the commercial unit, as dictated by the applicable zoning by-law. For example, zoning by-laws in the City of Toronto sometimes mandate a minimum number of parking spaces to be allocated to a restaurant establishment, depending on the location of the restaurant. Accordingly, the purchaser needs to be aware of the parking requirements outlined by the applicable zoning by-law, and should ensure that there is sufficient parking available within the condominium project to meet or satisfy the applicable parking requirements that are attributable to the purchaser's intended use of the unit.

Naturally, the number of parking units required to be purchased will ultimately have an impact on the aggregate amount of money that the purchaser needs to budget for, with respect to future real property taxes and common expenses, inasmuch as each parking unit may attract a separate MPAC assessment for realty tax purposes, and will definitely attract a separate assessment for monthly common expenses.

Where the parking spaces form a part of the common elements, it is important for the purchaser of the commercial unit to know whether or not there are any specific parking spaces assigned to its unit, as exclusive-use common elements. If such is the case, then the purchaser's lawyer should ensure that the particular parking spaces are, in fact, allocated or assigned to the unit in Schedule "F" to the declaration. Also, the purchaser should confirm where those parking spaces or parking units are physically situated (i.e. near the parking garage's elevator, or adjacent to an air shaft, etc.), and whether such location meets the needs or demands of the intended use of the commercial unit.

In the context of a retail plaza condominium, the outdoor parking spaces are frequently not designated as exclusive-use common element areas, and are correspondingly not assigned to any particular commercial units in the declaration. Rather, the parking spaces comprise part of the general common element areas, and are accessed and used on a "free-for-all" (and first-come, first-served) basis, for each of the commercial unit owners and their respective employees and customers collectively. In this scenario, the purchaser should confirm that the declarant has created or secured (on a long term basis) sufficient parking spaces within the confines of the condominium (and possibly within adjacent or nearby properties, if so permitted by the applicable zoning by-law) that will satisfy the parking requirements for the entire project, in light of the intended use of each of the commercial units within the condominium project, by all present and prospective unit owners.

Furthermore, the declaration, by-laws and rules must be examined carefully to determine whether or not there are any restrictions regarding access to and/or use of the available parking spaces or parking units. For example, there may be restrictions governing the times when the parking areas may be accessed or used, and the length of time that any parking space may be physically occupied, as well as provisions governing where the unit owners and their respective employees, clients and/or customers are allowed to park. There may also be restrictions on the number of parking spaces which may be used by any commercial unit owner and its employees, so as to ensure that a minimum number of parking spaces are always available to prospective customers, which is an important consideration for any business which has a large number of employees.

In addition, there may be restrictions on the type and size of vehicles that are permitted to be parked within the confines of any parking space or parking unit. In the context of a mixed-use

condominium (namely a condominium that has both a residential component and a commercial/retail or commercial/office component), it is not uncommon to find restrictions in the declaration which stipulate that no commercial vehicles, trucks, or trailers, nor any private passenger motor vehicle exceeding 1.9 metres in height, can be parked within the condominium's underground parking garage. Depending on the intended use of the commercial unit, such parking restrictions may impair the purchaser's ability to operate its future or intended business therefrom. Section 72(4) of the Act expressly requires the declarant to include, within the disclosure statement, a statement regarding any restrictions on parking. Needless to say, the purchaser's lawyer should carefully review the disclosure statement, and the declaration, in order to ensure that there are no restrictions which will hinder or unduly restrict the purchaser's intended use of the commercial unit.

IX. **Internal & External Signage**

Condominiums containing commercial units will typically include some type of internal and/or external signage for the purpose of assisting the patrons, clients and/or customers of the commercial unit owners (or their respective tenants) to identify the name or type of establishment that is carrying on business within each of the respective commercial units. External signage, depending on its size, design and location, may also be an important consideration for attracting new clients or customers. In order to maintain a uniform appearance that is compatible with the architectural design of the project, the external signage involving commercial condominiums is often configured within a sign band or canopy (which would most likely comprise part of the common elements of the condominium), installed by the declarant along the exterior face of the wall immediately outside of (and above) each of the commercial units, or alternatively situate within a

designated sign unit affixed to the exterior of the condominium building (or within a pylon sign box) that may be separately owned by each commercial unit owner.

The declaration of the condominium may impose restrictions on the type, size, design and/or location of any permitted exterior signage, and possibly restrictions on any internal signage placed or erected within the confines of any commercial unit that is visible from the exterior of the building. In those instances where the external signage is intended to be installed within a designated sign band or canopy, the declaration will typically contain provisions that are similar to the following, namely:

1. Any exterior signage and/or advertising material so desired to be installed within (or affixed to) the sign band/canopy (in terms of the size, design, lettering, text, font, graphics, colours, materials, finish and composition thereof), as well as the manner of affixation, shall be approved by the declarant or the condominium corporation in writing, and shall otherwise comply in all respects with the provisions of the applicable zoning by-law [including all guidelines, policies, directives and/or requirements imposed by all governmental authorities having jurisdiction over the development or use of the condominium property, with respect to the erection and/or maintenance of any exterior signage and/or other advertising material];
2. In order to obtain the approval of the declarant or the condominium corporation to any proposed exterior signage or advertising material, the commercial unit owner desiring to install or affix same shall submit all drawings, plans and specifications of its desired signage or advertising material to the declarant or the condominium corporation, which shall clearly indicate the size, design, lettering, text, font, graphics, colours, materials, finish and composition thereof, as well as the proposed manner of affixation. In addition, each owner

of a commercial unit desiring to erect or install any exterior sign or advertising material shall be obliged to obtain a sign permit from the building department of the local municipality, if so required, at such owner's sole cost and expense, before the installation or affixation of any sign or advertising material within the sign band/canopy occurs; and

3. The condominium corporation shall maintain, and repair after damage, the sign band/canopy (and keep the sign band/canopy in a good, clean and proper condition at all times), and shall ensure that the sign band/canopy does not cause any interference with any pedestrian passage or vehicular traffic adjacent to the condominium.

In the event that the declaration provides for the external signage to be contained within the confines of a designated sign unit, the declaration will typically contain provisions that are similar to the following, namely:

1. No commercial unit owner shall make any change or alteration to an installation within a sign unit (or upon a sign unit), nor any change or alteration to any structural portion of the sign unit, without obtaining the prior written approval of the condominium corporation, and where applicable, without having entered into an agreement with the condominium corporation in accordance with the provisions of section 98 of the Act;

2. Only an owner of a commercial unit shall be permitted to acquire and own a sign unit, and any transfer or conveyance of a commercial unit must be accompanied by a corresponding transfer and conveyance of any sign unit which such commercial unit owner may own. Any lease or license involving a sign unit shall only be made to a tenant in actual possession of a commercial unit, and shall endure only for as long as the tenancy of the commercial unit is outstanding; and

3. Each owner of a sign unit shall maintain, and repair after damage, the sign unit (and keep the sign unit in a good, clean and proper condition at all times), and shall ensure that the sign unit does not cause any interference with any pedestrian passage or vehicular traffic adjacent to the condominium.

Much like its sign band/canopy counterpart, the sign unit scenario will most likely be accompanied by similar restrictions in the declaration regarding the advertisement of the name and/or type of business involving the commercial unit, with the declarant and the condominium corporation having the right to approve of the size, design, lettering, text, graphics, colours, materials, finish and composition of any external signage intended to be installed within (or otherwise affixed to) the sign unit.

The purchaser of a commercial unit may also wish to affix signage, lettering, a logo or other material on the exterior portion of the entrance door leading into the purchaser's unit. However, the exterior portion of the entrance door leading into the commercial unit from a common corridor will generally comprise part of the common elements, and accordingly, the purchaser will be faced with restrictions regarding its ability to alter such portion of the common elements, and will likely not be entitled to affix anything to the exterior door without obtaining the prior written approval of the condominium corporation, and where applicable, without having entered into an agreement with the condominium corporation in accordance with section 98 of the Act.

Sometimes a purchaser of a commercial unit will want permission to install its own custom-made door (along with custom lettering, logos or other insignia) sometime after closing (and correspondingly transpiring after the registration of the condominium), and the declarant/vendor may well agree to same. However, despite the declarant's approval to any post-condominium registration

alteration of a common element component, it is important to note that the Ontario Court of Appeal in *Marafioti v. Metropolitan Toronto Condominium Corp. No. 775* (1997), 10 R.P.R. (3rd) 109 confirmed that a declarant cannot make any private arrangement (or special deal) with any unit purchaser, either before or after registration of the condominium, regarding any portion of the common elements, which would interfere with the common ownership and correspondingly contravene the provisions of the registered declaration, by-laws or rules of the condominium. Simply put, such "private deals" between a purchaser and the declarant are not enforceable by the purchaser against the condominium corporation. Accordingly, if it is the purchaser's intention to make any changes or alterations to the common elements as described above, then the purchaser will have to enter into a section 98 agreement with the condominium corporation upon becoming the registered owner of the unit, provided such an agreement is approved by resolution of the board of directors.

X. **Required Access to Certain Common Areas**

It is vital for a purchaser of a commercial unit to confirm whether there are any restrictions on access to, egress from, and/or use of any portion of the common elements, and if so, to determine whether such restrictions will impair the use and enjoyment of the commercial unit by the purchaser, and its employees and customers. In a mixed-use condominium project, it is typical to find provisions in the declaration which restrict access to and/or use of any recreational amenities or facilities, to only the respective owners of the dwelling units in the project, and their respective residents, tenants and guests, and expressly prohibiting any of the commercial unit owners (and their

respective agents, representatives, tenants, employees, customers and licensees) to access or use any such facilities or amenities.

At a minimum, the purchaser of a commercial unit should ensure that the declaration entitles each of the owners and tenants of the respective commercial units, and their authorized agents, representatives, employees and contractors, to full and complete unimpeded pedestrian access and egress over, across and upon all outdoor and indoor walkways, corridors, stairwells and/or ramps within the condominium project (including any elevator accessible from and within any commercial lobby or corridor, if applicable) which lead to:

a) the commercial units, and any designated lobby or corridor servicing the commercial units (ie. through or across which the delivery of goods to the respective commercial units may be transported), and any common washroom facilities that are intended for the use of the commercial unit owners, and their respective employees and customers/clients;

b) any designated commercial garbage holding room, and any exterior commercial garbage pad, to which the garbage emanating from the commercial units will be transported and ultimately removed off-site;

c) all fire exit stairwells and corridors (wheresoever situate) for emergency egress purposes;

d) all commercial service areas (usually located on the ground floor level or within the underground parking garage), upon or across which the commercial unit owners, and their respective contractors and service personnel, may traverse to undertake any servicing, maintenance or repair work, on any equipment, fixtures, installations or systems servicing any of the commercial units;

e) any heating and/or cooling units or systems (together with all equipment, fixtures and/or installations appurtenant thereto) which provide heating and/or cooling services to any of the commercial units;

f) those common element areas which contain or house any water, electricity, gas and/or thermal energy meters or check meters appurtenant to each of the commercial units, as well as any switch gears and breaker panels, and/or any electrical, mechanical, plumbing, security and/or other servicing equipment and facilities utilized in connection with the operation or servicing of the commercial units; and

g) the condominium's mechanical, electrical and/or telephone or telecom room(s), utilized in connection with the operation or servicing of the commercial units (or any portion thereof);

subject however to such reasonable and customary restrictions on access thereto as may be implemented by any security personnel retained by or on behalf of the condominium

Conversely, in a mixed-use project, the declaration should provide that none of the owners, residents and/or tenants of any of the dwelling units, nor any of their respective agents, representatives, contractors, invitees or licensees, shall have any right of access to (nor any use of) any heating, cooling and/or refrigeration equipment, fixtures, installations and/or systems servicing any of the commercial units, wheresoever located within the confines of the condominium, nor to the condominium's mechanical, electrical and/or telephone or telecom room(s) utilized in connection with the operation of the commercial units, nor to any designated commercial corridor or lobby, commercial garbage storage room and/or washroom intended to service the commercial units exclusively.

In the event that the purchaser's commercial unit is serviced by any sewage pipe, sump pump or similar installation that must be periodically emptied or cleaned by the unit owner (rather than by the condominium corporation) in order to function properly, then if the clean-out valve or terminus of such pipe or sump pump is located elsewhere within the confines of the condominium (ie. usually in a designated location beneath the commercial unit, somewhere within the underground parking garage), then the purchaser's lawyer should ensure that his or her client's authorized employees and/or contractors are entitled to access through the underground parking garage (and specifically all drivelanes, walkways and stairwells within the underground parking garage) which lead directly to and from the sump pump, in order to enable or facilitate such periodic cleaning work. Moreover, in the context of a mixed-use project with dwelling units situate above the ground floor retail component, it is common for the sewage pipes which service the dwelling units to run vertically down through the building, with the clean-out valve or terminus of such pipes to be situate somewhere within the confines of the commercial units. If such is the case, then the purchaser of a commercial unit should be aware of provisions in the declaration which typically allow the condominium's authorized workmen, agents, representatives and/or contractors to gain reasonable access to (and through) any or all of the commercial units which are situate directly beneath the residential component of the condominium [including any access door or panel located within any wall(s), floor(s) or ceiling(s) of any commercial unit(s)] during those hours of any day when such commercial unit is not ordinarily open for business to the general public, on at least 48 hours prior written notice to the intended or affected commercial unit owner(s) [with no such notice being required in the case of an emergency], for the purposes of enabling or facilitating the condominium corporation's maintenance, repair, relocation, replacement and/or servicing of any clean-out

valve(s), plumbing stack(s), shut-off valve(s), electrical and/or mechanical switching mechanism(s), and all other utility, mechanical, electrical, plumbing and/or sewage equipment, installations and/or systems which are situate within any of the commercial units, but which service or benefit any of the dwelling units or common element areas of the condominium. In turn, the condominium corporation should be obliged by the declaration to forthwith reimburse (and correspondingly indemnify and save harmless) each owner of a commercial unit who has suffered or incurred any loss or damage to his or her unit (and/or to any goods, chattels, fixtures or equipment situate therein) as a result of the condominium's exercise of the foregoing right of entry, or incurred as a result of the failure by the condominium corporation to properly or adequately maintain, repair, relocate, replace and/or service any such equipment, installations and/or systems (including without limitation, any loss of revenue occasioned by the interruption of any business operated from any such commercial unit).

Finally, it is important for the purchaser of a commercial unit to know whether there are any restrictions on access to the unit after normal business hours, or on weekends. This is particularly important where a security concierge service has been retained by or on behalf of the condominium on a part time basis (i.e 12 hour service instead of a 24 hour service), especially where a commercial unit owner intends to work late (after hours) on a regular basis, and wishes to see clients or customers when the security concierge is no longer on duty. In such circumstances, the commercial unit owner may have to personally escort every client or customer into the building, and through designated portions of the common elements, in order to gain access to the unit for the purposes of conducting his or her business. Needless to say, this personal escorting exercise might become extremely tedious, inconvenient and time-consuming. Therefore, the purchaser should find out

whether or not there is an intercom or buzzer system which will allow the unit owner to provide its customers with easier entry or access after-hours. The extent of security provided by the condominium corporation may also be an important consideration for the purchaser of a commercial unit, especially if the purchaser intends to store or maintain valuable personal property within the confines of the unit. Accordingly, the purchaser will want to know what security systems are in place, and their corresponding impact on the on-going operating expenses of the condominium corporation.

XI. **Allocation of Maintenance and Repair Obligations**

Since commercial unit owners often have diverse and disparate unit uses, with correspondingly different impacts on the condominium's overall amenities, facilities and service systems, the purchaser's solicitor should carefully examine the condominium's declaration to determine whether the declaration treats all unit owners in an reasonably equitable fashion, by requiring that each individual unit owner bear as much of the cost of maintaining and repairing the amenities, services and facilities that are predominantly or exclusively utilized by such owner (or whose use of such amenities and facilities would be considered extensive and excessive, when compared to that of other unit owners). The purchaser and its solicitor should also appreciate the fact that the declarant will also endeavour to balance the impulse of passing as much of the maintenance and repair responsibilities for the project as possible onto the affected unit owner(s), with the important capability of the condominium corporation to ultimately regulate and control all requisite common areas, for purposes of maintaining uniformity or compatibility of design and appearance, as well as quality standards of maintenance and repair. Section 91 of the Act expressly allows the

declaration to require that each owner shall repair his or her own unit after damage, and to maintain and repair those parts of the common elements over which the owner has exclusive use. In turn, section 92 of the Act confirms that if an owner fails to carry out the obligations imposed by the declaration to maintain his or her unit and/or to repair same (and any exclusive use common element areas appurtenant thereto) after damage, then the condominium corporation shall undertake:

a) all required maintenance work, if the failure to maintain presents a potential risk of damage to the condominium property or the assets of the condominium, or a potential risk of personal injury to persons on the condominium property; and

b) all required repair work;

and the cost of such work shall be added to the owner's contribution to the common expenses, and may correspondingly give rise to a common expense arrears lien if same remains unpaid. Each unit owner is deemed to have consented to the maintenance or repair work so undertaken by the condominium corporation, pursuant to section 92 of the Act.

XII. **Commercial Garbage Storage and Removal**

The purchaser of a commercial unit should determine how and where the garbage emanating from the business operations of the commercial unit will be temporarily stored, possibly recycled, and ultimately removed from the condominium's premises. In a mixed-use project, the condominium's garbage holding room will either be shared by both the residential and commercial components of the project, or alternatively each component will have its own separate garbage holding room. If the condominium is designed so that the commercial component has the benefit of its own separate garbage holding room, then the declaration will typically provide that access to

the commercial garbage holding room will be restricted to the respective owners and tenants of each of the commercial units, and their respective authorized agents, employees or representatives.

In the Greater Toronto Area, there is ordinarily no municipal garbage pick-up service for garbage emanating from any commercial units, and accordingly each of the commercial unit owners will invariably be responsible for retaining one or more private garbage pick-up firms to provide all required garbage collection and removal services, for the garbage and refuse emanating from their respective commercial units. Moreover, each commercial unit owner will also typically be obliged to co-ordinate the scheduling of all garbage pick-up and removal services from such owner's commercial unit, with the condominium's property manager and building superintendent, including the timing and frequency of the transportation of such commercial unit owner's garbage from the commercial garbage holding room to the designated exterior commercial garbage pad. In turn, the condominium corporation will typically be required to arrange for a trained person to be present at all times during the pick-up and removal of the commercial garbage from the condominium's premises, in order to properly manoeuver the commercial garbage containers to the exterior concrete pad, and onto the garbage collection vehicles, and to act as a flagperson when such vehicles are reversing. Each commercial unit owner will generally be obliged to pay (and be solely responsible for) the cost of collecting, recycling and/or disposing of the garbage emanating from his or her commercial unit, including the cost of acquiring or leasing all required garbage containers or bins transportable on rollers, and the cost of retaining one or more private garbage pick-up firms to provide all required garbage collection and removal services for such unit owner's garbage and refuse, based on the type and amount of such garbage, and the required frequency of the collection/removal service, in addition to the common expenses attributable to such owner's

commercial unit. Finally, the declaration may contain restrictions or prohibitions on the type or kind of waste that may be temporarily stored within the confines of the condominium's garbage holding room (such as a prohibition against any hazardous or toxic substances, such as bio-chemical or bio-medical waste), and accordingly the purchaser's lawyer should carefully review any such restrictions to ensure that same are not inimical to the purchaser's intended business use of the commercial unit.

XIII. **Allocation of Common Expenses and Common Interests**

While subsection 7(2)(d) of the Act provides that the declaration must contain a statement, expressed in percentages allocated to each unit, of the proportions in which the unit owners are required to contribute towards the common expenses, the Act provides no specific guideline as to how the percentage contributions towards the common expenses are to be determined or allocated, nor is there any statutory requirement that such percentages must have a direct correlation with the actual cost of operating, maintaining and repairing the common elements attributable to each of the respective units within the condominium. In the case of *York Region Condominium Corporation No. 771 v. Year Full Investment Inc. (1992) 26 R.P.R. (2d) 164* [affirmed on appeal in (1993) 30 R.P.R. (2d) 296], Justice Rosenberg confirmed that the general expenses of operating and administering the condominium should be shared in the proportions specified in the declaration, even though this may not be the precise proportions in which the respective unit owners utilized or benefit from such expenses. In particular, Justice Rosenberg recognized that different commercial units will often have different requirements for various services or facilities within the condominium, but it is not until there is a flagrant excessive use of the condominium's services or facilities (such as the excessive consumption of bulk-metered water by the owner of a restaurant business operating

within one of the commercial/retail units in the Year Full case) that the court may intervene to adjust the common expenses to reflect a more equitable result, notwithstanding the provisions of the registered declaration to the contrary.

Accordingly, in the context of commercial condominiums where there is often a great variation in the type of unit uses, and corresponding differences in the extent or degree to which the various common facilities, amenities, services and/or areas are utilized by the respective unit owners, it is important for the purchaser of a commercial unit to thoroughly review the proposed budget statement, and the overall common expenses attributable to the project, in order to ensure that the percentage allocation of common expenses to the acquired unit properly and reasonably reflects, as equitably as possible, such unit's proportionate share of the overall common facilities, amenities, services and/or areas that will actually be utilized. For example, if a special facility or service has a very significant cost associated with its operation or maintenance, but is intended to be accessed and utilized only by a limited number of unit owners that excludes the commercial unit being purchased, then the percentage of the common expenses allocated to the purchaser's unit should conceivably be proportionately reduced, to reflect such lack of use. Alternatively, consideration should be given to insisting upon the declarant's creation of a separate additional Schedule "D" to the declaration, that focuses exclusively on that special facility or service that has a hefty price tag to operate and maintain, and then allocate the percentages of all costs related thereto amongst all of the units in the condominium, but ensuring that the allocation to the purchaser's commercial unit is nominal. The use and implementation of an additional Schedule "D" to the declaration frequently occurs in a commercial office or retail condominium project that has a food court, so that the costs of operating and maintaining the food court facility can be isolated from all the other common area

costs, and then a higher percentage of the common expenses relating exclusively to the food court operations can be allocated or assigned to each of those units operating directly within (and correspondingly benefitting the most from) the food court area..

With respect to utility services that are provided to condominiums containing commercial units (such as water, electricity, gas and/or thermal energy), the relative differences in consumption of utilities amongst commercial units having different business uses and consumption requirements, can be easily and equitably addressed by the separate metering or sub-metering of each of the commercial units in the project, and ensuring that the declaration requires each commercial unit owner to pay for the utilities consumed by his or her unit (and any exclusive use common element areas appurtenant thereto), pursuant to the periodic invoices issued by the condominium corporation or its designated utility monitor (or directly by the local utility provider) reflecting the actual cost of consumption, based on the periodic reading of the meters or check meters appurtenant to each unit.

Moreover, in those circumstance where a commercial unit benefits from a facility or service that is accessed and utilized exclusively by such unit, then where feasible, consideration should be given to altering the proposed monumentation of such unit (before the condominium is registered) to expressly include said facility or service within the confines of such unit's boundaries. For example, one could include the entire loading dock or platform as part of the commercial unit, if such a facility is utilized exclusively by such unit, to ensure that the entire cost of maintaining and repairing same is borne by the affected unit owner. Alternatively, if the loading dock continues to comprise part of the common elements, whether exclusive use or otherwise, then in accordance with section 91(b) or (c) of the Act, the declaration should expressly provide that the affected unit owner shall be obliged to maintain and repair the loading dock, at his or her sole cost and expense. In a

project where adjacent commercial units exclusively share the benefits of a common facility or amenity, such as a common vestibule area, then the declaration could obligate those affected unit owners to be primarily responsible for maintaining and repairing that area, and for providing heat, lighting and other requisite utility services thereto … this sharing arrangement could be manifested by creating a separate additional Schedule "D" to the declaration that isolates (and exclusively addresses) the costs of operating and maintaining the vestibule area, and which purports to allocate such costs amongst all units, but attributes the lion's share of such costs to only those units who primarily benefit from the vestibule area, or alternatively by creating a separate cost-sharing agreement that is ultimately entered into by the owners of those units who primarily benefit from the vestibule area (and correspondingly ensuring that all respective successors-in-title to those affected units formerly assume their proportionate share of the overall cost-sharing obligations, in order to overcome the fact that positive covenants do not run with the land to bind successors-in-title, notwithstanding actual notice of such covenants, as confirmed by the Ontario Court of Appeal in *Amberwood Investments Ltd. v. Durham Condominium Corporation No. 123 (2002) 50RPR(3d)1).*

In contrast with residential condominiums, where an allocation of common expenses predicated on relative floor size or comparative area measurements may be appropriate (because the services utilized by all residential units are substantially the same), the allocation of common expenses based on relative square footage amongst commercial units with disparate uses may be inappropriate. This is particularly so where there is an extreme variance in the common expenses, facilities, services and/or areas utilized by certain units, which are not consumed or utilized by other units to the same degree or extent. However, it should also be noted that many small-scale industrial condominium projects can suitably adopt the square-foot allocation basis (for determining the

common expense percentages) that is utilized in residential condominiums, because generally most services provided to industrial units are separately metered, and there are likely to be no significant costs or common expense items which the condominium corporation would be responsible for paying that would be significantly or meaningfully disproportionate to any of the units in the project.

The purchaser of a commercial unit may, to a lesser extent, also be concerned about the proper allocation of common interests amongst all of the units, as required by subsection 7(2)(c) of the Act. All unit owners in the project are tenants-in-common of the common elements, and pursuant to subsection 11(2) of the Act, an undivided interest in the common elements is appurtenant to each unit. The proportions of the common interests are those expressed in the declaration, and by virtue of subsection 18(2) of the Act, the unit owners are entitled to share the assets of the condominium corporation in the same proportions as their relative common interests. Accordingly, in the rare event that the condominium corporation is terminated pursuant to either sections 122, 123 or 128 of the Act, then the unit owners will become tenants-in-common with respect to the property and assets of the condominium, in the same proportions as their percentage interests in the common elements so allocated in the declaration, and the property and assets of the condominium would then be distributed amongst the unit owners in the very same proportions. In addition, section 124 of the Act provides that unit owners are entitled to share the proceeds of the sale of any condominium property (or any part of the common elements) in the same proportions as their respective common interests. Therefore, the purchaser of a commercial unit should attempt to ensure that the declarant's allocation of common interests is predicated only upon each unit's relative value, in comparison to each other unit in the project.

XIV. **The Potential For "Tyranny of the Majority" in a Mixed-Use Condominium**

Commercial units are often part of a mixed-use condominium project that has a ground floor commercial/retail component, with a number of upper levels containing only dwelling units. Despite the inherent differences in unit uses, a well-designed building that properly integrates the commercial component with the residential component of the condominium project, can result in both components complimenting each other, and operating effectively and efficiently in a compatible and symbiotic relationship.

Successful mixed-use projects are designed to ensure that, to the extent possible:

a) there are separate entries, corridors for access, garbage storage, parking and loading/unloading facilities for each of the commercial and residential components of the project, so that the potential for causing noise, fumes, interference or inconvenience to the residents of the condominium, by or from the ongoing business operations within the respective commercial units, is minimized;

b) the exterior signage or advertising material for the commercial component (including any signage affixed to the interior of any commercial units which may be visible from the exterior of the building) is carefully regulated, with a view to ensuring that a professional, uniform and compatible appearance is always maintained by the condominium corporation, and will not detract from the overall design and aesthetic quality of the residential component;

c) the business uses that are permitted to operate from the commercial component are carefully regulated, to ensure that same will be compatible with (and complimentary to) the adjacent residential component, and will not generate undue traffic, noise, vibrations, dust and/or

garbage that may detract from the quiet enjoyment of the residents or deleteriously impact the appearance or maintenance of the common elements, or that will accelerate the customary rate of wear and tear on the common areas, facilities or services of the condominium, to the detriment of the residential component;

d) the use and enjoyment of the recreational facilities and amenities within the condominium are carefully regulated and monitored, such that same may only be accessed, used and enjoyed by the owners of the dwelling units (and their respective residents, tenants or invitees), and may not be used by the commercial unit owners, or by their respective employees or customers, thereby providing the desired security controls on access and use that the residents of the condominium want or expect, and concomitantly ensuring that such facilities are not overused by the employees or customers of the respective businesses operating within the confines of the project (who may not take the same level of care or concern over the manner in which such facilities are used or maintained);

e) the commercial units are separately metered or sub-metered for all required utility services so consumed, to ensure that the residential component need not bear the cost of excessive consumption of any utility services; and

f) the percentages of the common expenses so allocated or attributable to each of the commercial units reflect their limited or restricted use of the common areas, facilities and services (and their respective responsibility for payment of the check metered utilities so consumed, over and above their respective portions of the common expenses).

However, not all mixed-use projects are designed in a way which endeavours to avoid, at the outset of the development, the incompatibilities between (and interferences arising from) each

of the respective components, and disputes over the use of shared areas, facilities or services (such as a common underground parking garage), or over the costs of maintaining and repairing same, as well as disputes over the level, frequency or quality of the maintenance or repair work, may nevertheless arise. Ordinarily, the decisions involving the ongoing operation, maintenance and repair of the condominium project (and specifically the common areas, facilities and/or services that are shared by both the residential and commercial components of the project) are governed by the board of directors, who are answerable to (and correspondingly elected by) the unit owners within the condominium, on the basis of one vote per dwelling unit or commercial unit. Typically, there are far fewer commercial units within the commercial component of a mixed-use project, than there are dwelling units within the residential component, thereby creating a significant voting imbalance (and a consequential imbalance of power or influence) between the residential and commercial components of the project, with the corresponding potential for the tyranny of the majority of the dwelling unit owners, over (and to the detriment or prejudice of) the commercial unit owners. Such was the case in *Walia Properties Ltd. v. York Condominium Corporation No. 478 (2007) 60 R.P.R. (4th) 203,* and affirmed on appeal at *(2008) 67 R.P.R. (4th) 161,* where the residential component of a mixed-use condominium controlled the board of directors, and the common expenses of the commercial unit owners doubled when the owner of the residential units (which comprised the overwhelming majority of all units) made improvements to the common elements which only benefitted the residential component, and the commercial unit owners applied to the court for relief from the oppression of the majority. In this case, the Ontario Court of Appeal ordered an amendment to the condominium's by-law governing the constitution of (and qualification for) the board of directors, to provide for a board of 5 directors, comprised of 2 residential unit owners, 2

commercial unit owners and 1 director with no ties or ownership interest in either component, and with each of the directors being elected by the majority vote of all unit owners.

Accordingly, in those instances where there is a power imbalance between the two components of a mixed-use condominium project, a commercial unit owner who intends on making any addition, alteration or improvement to the common elements (ie. in the course of finishing and/or fixturing his or her unit, or to facilitate, improve or expand the business being operated therefrom) may find that he or she is unable to satisfy the statutory requirements under section 98 of the Act to implement same, simply because the owner does not have the requisite support from the dwelling unit owners, and specifically from their majority representative members on the board of directors. Simply put, this "tyranny of the majority" may conceivably prevail to restrict or prevent any commercial unit owners from successfully implementing lawful changes to the common elements which only (or primarily) benefit the commercial units, regardless of how reasonable or desirable the proposed changes may be, and despite the fact that the cost of implementing the changes (as well as the cost of maintaining, repairing and insuring same) will be borne only by the affected commercial unit owner, and will be governed by an agreement entered into between the unit owner and the condominium corporation pursuant to section 98(1)(b) of the Act. This tyranny of the majority can also conceivably be employed to authorize the condominium's expenditure of monies earmarked for improvements to the common elements that only benefit the residential component, such as upgrades to the recreational facilities or amenities, in respect of which all unit owners (including the owners of the commercial units who will not be entitled to use or enjoy any such facilities or amenities, and will therefore derive no benefit therefrom) must nevertheless contribute

towards the cost of same, in accordance with their respective proportionate shares of the common expenses.

A commercial unit owner that is faced with such a situation will then have to pursue judicial relief under section 135 of the Act, and will correspondingly have the burden of satisfying the Court that the conduct of the condominium corporation was unfairly prejudicial to such owner, or unfairly disregarded the interests of such owner, sufficient to warrant the Court's intervention. Needless to say, such recourse to the courts can be time-consuming and expensive, and hopefully such disputes can be avoided by the board acting reasonably, thoughtfully, and on the advice of experienced condominium counsel and property managers, or alternatively resolved through mediation or arbitration. The dearth of reported cases regarding the foregoing would seem to indicate that most mixed-use condominiums have somehow managed to overcome or resolve these types of problems, presumably because such projects have, to a great extent, been designed and constructed to avoid having the residents' use and enjoyment of the condominium's facilities, services and common areas unduly interfered with by the operations of the commercial units, and also because most boards of directors endeavour to act in the best interests of all condominium owners collectively.

XV. **Special Insurance Considerations**

Section 99 of the Act obliges the condominium corporation to obtain and maintain insurance on its own behalf, and on behalf of the unit owners with respect to the units and common element areas, covering losses resulting from major perils (or any other perils that the declaration or by-laws may specify) up to the replacement cost thereof, but expressly excluding coverage for any and all improvements made to the units. The question of what constitutes an improvement to a unit will

be determined by reference to a standard unit defined or described in a by-law enacted by the condominium corporation pursuant to section 56(1)(h) of the Act, or if no such by-law exists, by reference to the standard unit definition outlined in a schedule delivered by the declarant to the condominium corporation at its turnover meeting. In light of the fact that the acquisition of a commercial unit often entails the expenditure of substantial sums of money to fixture, finish and/or refurbish the unit, it is absolutely imperative that the purchaser understands the need to procure and maintain his or her own insurance coverage to adequately protect against loss or damage to all improvements and/or installations that are made to the unit (and which don't not form part of the unit, as at the date of registration of the condominium), in addition to the purchaser's chattels, equipment, fixtures, inventory or stock-in-trade, and personal belongings.

The typical insurance coverage maintained by an owner of a commercial unit is generally either an "all-risk" or "comprehensive" form of policy, or alternatively a "named-perils" policy. The latter policy lists the specific perils or causes of damage for which the resulting loss would be insured, with the most basic perils comprising damage occasioned by fire, lightning, explosion, smoke, falling objects, impact by aircraft or automobiles, riot or vandalism, water escape, rupture or freezing of pipes, theft, windstorm and hail. Additional named perils should be considered, depending on the proposed use of the unit and the type of casualties that are reasonably foreseeable as a result of the intended use (i.e. if the proposed business use involves the refrigeration of products, then consideration should be given to insuring against damage to goods resulting from changes in temperature, etc.). The comprehensive or all-risk policy generally covers the unit owner for direct physical loss or damage resulting from all causes or sources that are not specifically excluded by the policy, and correspondingly covers all matters or items that are not specifically excluded from

coverage. Naturally, the breadth and depth of insurance protection is directly proportionate to the amount of insurance premiums that the unit owner is willing and able to pay. Each owner should nevertheless fully appreciate the potential for loss or injury, and the consequences of risking the viability of his or her business operations as a result of inadequate or ill-advised insurance protection.

If the business conducted by the unit owner is dependant upon the operation of special equipment or machinery (i.e., pressure vessels, boilers, vacuum systems, etc.), then the equipment should be specifically insured, as well as the resulting loss of profits in the event the equipment becomes inoperative beyond a certain minimal period of time, or if any other property or goods are directly or indirectly damaged as a result of any mechanical breakdown. Moreover, prudence dictates that an owner of a commercial unit should procure "business interruption insurance," in the event that his or her unit and/or the common element areas are damaged to an extent that the continued operation of the business is severely restricted or inhibited. If the unit is being rented to a third-party tenant, then “rental loss insurance” coverage should be procured to compensate the unit owner as landlord, for any loss of rental revenue arising because of damage that has been occasioned to the unit and/or the common element areas.

In addition to the foregoing insurance coverage, the purchaser of a commercial unit should consider obtaining a "contingent insurance endorsement" to the condominium unit policy, in the event that the condominium corporation's master policy fails to cover a specific loss or cause of damage, or the unit owner is responsible for the corporation's insurance deductible. Moreover, if the condominium corporation's insurance is insufficient to cover the full cost of rectifying any damage, then the corporation will have to make up the deficiency by levying a special assessment against all unit owners. To avoid this sudden outlay or expenditure, the purchaser of a commercial unit would

be well-advised to procure "loss assessment coverage", which would defray (in whole or in part) the unit owner's proportionate share of any special assessment levied as a result of inadequate or insufficient insurance coverage on the part of the condominium corporation. The likelihood of insufficient insurance coverage is not as remote a possibility as one might suspect, particularly when one considers that the replacement cost insurance coverage procured by the condominium corporation is generally only updated (or re-appraised) on an intermittent basis, and may therefore not reflect the additional cost of repairing and/or replacing the damaged portion of the condominium arising from increased construction costs, particularly those additional costs which are incurred because of new building code and/or fire department requirements (i.e. increased costs of construction occasioned by recently enacted municipal regulations requiring fire doors, heat-sensitive sprinklers and smoke/carbon monoxide detectors, etc., throughout the project).

Finally, because of the inherent risks involved in operating a commercial enterprise from the confines of the unit, the owner of the commercial unit should always obtain and maintain his or her own "comprehensive public liability insurance" coverage to protect such owner from any loss or damage occasioned to persons and/or property as a result of such owner's negligence, or the negligence of those for whom such owner may be vicariously liable at law or in equity (including such owner's employees, agents, tenants, invitees and/or licensees).

XVI. **Special Concerns Raised by the Status Certificate**

A status certificate that is issued by the condominium corporation in connection with the purchase of a new condominium unit from the declarant (especially if the transaction is completed prior to turnover), will generally reveal little information that will be of much assistance to the

purchaser, since there is not a lot of information to be revealed about the general status of the condominium at such an embryonic stage in its existence. For example, there will not be any information about the sufficiency of the reserve fund, or whether common expenses have increased, or whether any special assessments have been levied.

However, in the context of a re-sale commercial unit, the status certificate is of great importance and assistance to the unit purchaser, inasmuch as it will reveal a lot of relevant information about the status of the condominium project, in terms of its physical and financial condition, and any outstanding claims that have embroiled the condominium in formal litigation. Accordingly, the purchaser of a commercial unit in the context of a re-sale transaction should always insist on making the agreement of purchaser and sale conditional on the purchaser's solicitor's review of a currently-dated status certificate (and all related condominium documents that must accompany the certificate pursuant to O.Reg 48.01), so that the following important information can be ascertained and considered, namely:

1. what the common expenses are for the unit, and whether they are in default;
2. whether the common expenses for the unit have increased since the date of the budget for the current fiscal year, and whether the condominium corporation has any knowledge of any circumstances that may result in an increase in the common expenses for the unit (with particulars or reasons for any such increase);
3. what units are owned by (or attributable to) the vendor, as disclosed in the status certificate (for example, some commercial units have ancillary sign units, mechanical units and/or compressor units which service the commercial unit exclusively). In this regard, the units set out in the status certificate should be cross-referenced with the units set out in the purchase

and sale agreement, to ensure that the purchaser is acquiring all required units from the vendor;

4. whether there are any outstanding judgements against the condominium corporation, and the status of any outstanding or ongoing legal proceedings involving the condominium corporation;

5. whether the last audited financial statements (including the auditor's report on the financial statements) reveals any outstanding matters or issues of concern, from a financial operations perspective;

6. whether any outstanding servicing contracts entered into by the condominium corporation are of questionable value or benefit to the condominium;

7. whether or not the commercial unit is subject to an agreement under section 98(1)(b) of the Act, entered into between the owner (or prior owner) of the unit and the condominium corporation [involving the owner's addition, alteration or improvement to the common elements], and whether such agreement has been complied with;

8. whether the condominium's most recent reserve fund study, and any update to it, reveals any special concerns or unfunded liabilities, as well as the details of the condominium's plans to increase the reserve fund, if applicable;

9. whether there are any substantial changes to the common elements, assets or services that the condominium corporation is proposing to initiate, but has not yet implemented, together with a statement of the purpose of all such changes; and

10. whether any special assessment is intended to be levied by the condominium corporation to increase the contributions to the reserve fund, or the condominium's operating fund, or for any other purpose.

(Note: for a complete list of what is to be included or incorporated in the status certificate, please see subsection 76(1) of the Act, and Form 13 of O.Reg 48.01).

In addition to the foregoing relevant information, the status certificate is required to be accompanied by a copy of the current declaration, by-laws and rules. In some cases, the status certificate may contain a statement to the effect that the condominium corporation anticipates a special assessment to be levied for work that will be undertaken in the future, the cost of which has not been ascertained at the time of the issuance of the status certificate. If such is the case, then the purchaser or the purchaser's lawyer should make inquires of the property manager to determine the nature and extent of the work involved, the duration of the work, and an estimate of how much it will cost. This information may be extremely relevant, and may impact the purchaser's ability to afford the unit and/or to conduct its intended business operations therefrom. Special assessments (resulting from an underfunded reserve fund, or to supplement the condominium's operating fund, or to repair outstanding common element deficiencies, etc.) become even more critical in the context of:

a) a condominium project that contains a small number of units, because the economies of scale are insufficient to keep the special assessment attributable to each commercial unit owner manageable and affordable; and

b) a mixed-use condominium, where the condominium corporation may levy a special assessment for a component or a feature that only benefits the owners of the dwelling units

> in the condominium project, to the exclusion of the commercial component ... for example, repairs or improvements to the recreational facilities or amenities which are generally inaccessible and unuseable by the commercial unit owners and/or their respective tenants, employees and customers.

The duration of any required contributions towards an outstanding special assessment is also relevant, since a prospective commercial unit owner may not have any serious objection to contributing to a special assessment if it is collected over a short period of time, provided it constitutes a manageable and affordable financial burden, even if the monetary expenditure funded by the special assessment does not directly benefit the commercial unit owner. Conversely, if the required contributions needed to satisfy the special assessment are estimated to endure over a period of several months or years, then this fact alone might induce the purchaser of the commercial unit to resile from the transaction, unless the vendor is willing to provide an abatement in the purchase price equivalent to the aggregate of the special assessments that will be levied in connection with the particular matter noted in the status certificate.

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