

# Changes to Common Elements

## Indemnity Agreement Requirements

By: Lisa Breault, RCM; Angela Del Giudice, RCM; and Pamela Smuts, RCM



### Approval for Changes to the Common Elements

In the late winter we all begin to prep for the spring rush of service calls and



bookings that need to be done, and owners are throwing open their blinds and realizing how they too need to freshen up their space and get ready for summer. It is a flurry of activity here as we send out maintenance forms and receive emails, phone calls and have face-to-face interactions with owners all asking if they can add to, change or install features into their exclusive-use areas. Not to mention potential owners, their lawyers and real estate agents all asking in advance what the rules and regulations are for new owners who may want to perform renovations before they move in. It can be quite chaotic at times and having a system that can track and keep things in order is a must.

So, it was advantageous to discover that one of our clients had gone through the process and created an alteration application that helps to do just that.

This townhouse complex had gone through a legal process to create a multipurpose agreement Schedule B to their Bylaw #1 that replaces the single use Schedule A provided, and registers in advance a preset list of alterations to the unit that is determined to apply to that unit by a subsequent application process. The Schedule B outlines that board-approved alterations are allowed to be installed to the unit, the rules and regulations that surround these installations and the indemnities that go with it. The board diligently reviewed what they thought was an acceptable list of changes that offered owners individual choices while providing direction to protect the aesthetic appearance for all resident owners as well as for the functionality of the common exterior of the buildings. The Schedule B attachment they call the Schedule B-1, defines the alterations that are approved by the corporation in detail so that it is clear to owners the boundaries and definitions of what is acceptable and preapproved.

They have identified 11 areas that cover what an owner may want to change about their unit. This list of what is acceptable and preapproved is kept along with recommendations of preapproved service providers who can install features in a binder that is shared with the owners who are interested in proceeding with an alteration. The Schedule B-1 list and the application are handed out in the status certificate and as needed by request. They are also sent out with the newsletter with reminders that fit the season, for interior renovations in the fall and winter or exterior renovations in the spring and summer. Once an owner has requested an application they are to submit it to the board for review. Once reviewed by the board and property management it would be signed with approval or denial communicated back to them and held on file in the alteration binder.

There are instances where more information is needed, or the board may approve an alteration with conditions or minor variances. This is all recorded on the application with a signature by

As condominium property managers we deal with many different owner requests and it is important to understand the process to follow when dealing with requests for changes to the common elements. Below we will cover three different scenarios and review when a request can be granted by approval of the board, if a Section 98 is required and when the board should consider proceeding with a Bulk Indemnity Agreement for their owners.



the owner as a reminder that they are responsible for the repair and maintenance of the alteration despite it being on the exclusive use common elements that may otherwise be handled by the corporation. For example, the corporation is responsible for the repair and maintenance of the exclusive use decks; however, Schedule B-1 allows them to install privacy lattice. This lattice is then clearly defined as the responsibility of the owner. If an owner has installed a screen door or handrail that is above the standard unit we can easily reference the binder to determine responsibility to repair.

The predetermined list of what is allowed has saved us so much time in the approval process I cannot begin to describe its value. We do not have to remember what policies or principles were previously followed to allow for fairness and are far less cumbersome than having to hash it out if denials are challenged on that basis.

I look forward to being able to take this example and applying where it is not already in place.

### When the Change Requires a Section 98 – What Is Involved?

In the situation where an owner would like to add, alter or improve common elements and there is no bylaw (bulk indemnity), the owner would be required to register the addition, alteration or improvement to the common elements (including exclusive-use common elements) under Section 98 of the *Condominium Act*, 1998, “Changes made by owners”.

A change can be defined as an “addition” joining or connecting something to a structure, an “alteration” changing the structure, or “improvement” betterment or enhancement of the property. A Section 98 Agreement allows unit owners to modify the common areas while protecting the interests of the condominium corporation and other unit owners.

Section 98 of the *Condominium Act* allows an owner may make an addition, alteration or improvement to the common elements that is not contrary

to the Act or the corporation’s governing documents provided that:

a) The proposed addition, alteration or improvement will not detract from the appearance of buildings on the property or have an adverse effect on units owned by others or cause an increase in expenses to the corporation, and

b) The proposed addition, alteration or improvement does not affect the structural integrity of buildings or be in breach of the condominium corporation’s declaration, bylaws or rules.

Once these conditions are met and the board, by resolution, has approved the proposed change, the owner and the corporation are required to enter into a Section 98, “indemnity”, or “alteration” agreement setting out the ownership, respective duties and responsibilities of the modification. This includes the cost of repair after damage, maintenance and insurance of the proposed change. It is recommended that drawings and/or specifications form part of the agreement to help clearly define the change and all of the owners’ obligations resulting from it.





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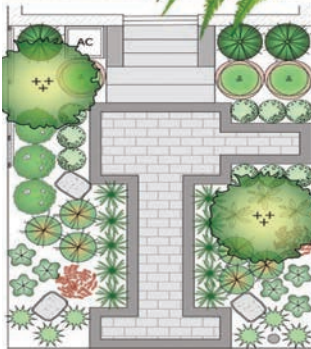
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The agreement must then be registered on title to the owner's unit and once this is done, the agreement becomes binding not only on the current unit owner but on all future owners of the unit.

There are, of course, circumstances in which an owner would like to modify components within the boundaries of the unit. In these instances, the owner may still require board approval to make changes to his or her unit if the declaration requires it, but whether Section 98 will apply will depend on the type of change and the limits of the unit boundaries described in the corporation's governing documents. As an example, when an owner installs a new furnace, hot water tank or air conditioner, the majority of the changes are within the unit boundaries but if the venting for these components requires changes to the exterior wall/foundation, which in many instances forms part of a common element, a Section 98 agreement is required.

In the case where an owner has proceeded with an addition, alteration or improvement to the common elements without board approval or registering a Section 98 agreement, the board can mandate the alterations be returned to the original state.

In the end, it is best to check your condominium documentation and inquire with your property manager and/or board of directors prior to commencing a project.

### **Bulk Indemnity Agreement – What Is Involved?**

A "bulk" indemnity agreement is an agreement that covers improvements made by owners of more than one of the units, ideally, the corporation would try to encourage all unit owners to take part in the bulk agreement. The primary motivation for doing this is cost.

Preparing, executing and registering a Section 98 agreement can be expensive for a unit owner to have to incur, and the unit owner is not always happy that they must pay to have the change registered on title and a lot of times do not understand why this needs to be done.

Naturally, this can cause dissatisfaction. However, despite sympathizing with an owner's concerns about costs,

a condominium corporation cannot ignore the requirement of the Act to have a Section 98 agreement registered on title in connection with the owner's change to the common element.

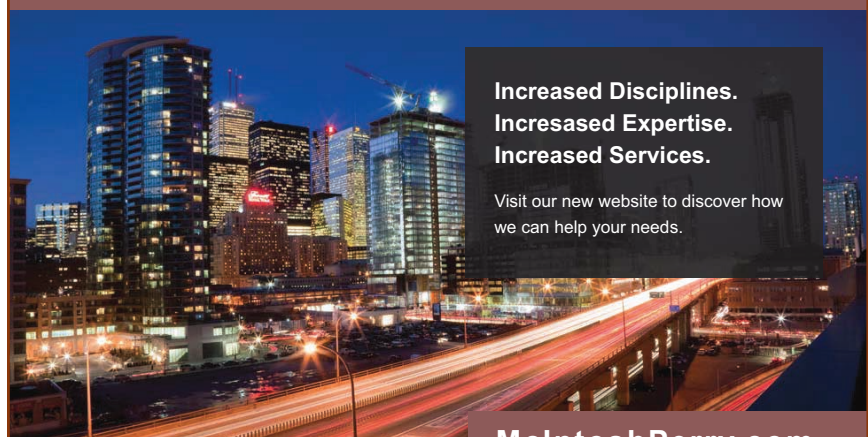
If the corporation offers unit owners the opportunity to sign on with a "Bulk" indemnity agreement it would reduce costs significantly and the corporation could even arrange to cover the costs of the agreement for the owners. Therefore, it is possible to enter into a Section 98 agreement

that contemplates future possible improvements that the current owner or a future owner of the unit might want to complete or that the board of directors might want to approve. It is not even necessary that the improvements get made.

As a result, the typical practice where "bulk" agreements are in place, has been for the board of directors, sometimes with consultation with unit owners, to come up with a list of acceptable possible improvements, as

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well as actual existing improvements, to ensure the agreement covers both so that every unit owner's needs and plans are accommodated.

There have been some variations on this and some corporations are no longer including a list of changes they will allow and have instead added an "approval" section which outlines the approval.

A sample of working that is in the "approval" section of the agreement:

1. The unit owners shall first seek the written consent of the board of directors for the proposed improvement, which consent shall be at the sole discretion of the board of directors to grant, include conditionally, or deny.

2. The unit owner shall comply with any and all conditions of installation and completion of the improvements imposed by the board of directors and complete the improvements in an expeditious and workmanlike manner.

These are just two small examples of what can be added to the Bulk Indemnity Agreement and it is at the discretion of the board of directors. Boards should obtain legal advice on wording for their corporation.

In conclusion, what we have learned is that all condominium corporations deal with owner requests for changes to the common elements differently, and it is important that the property manager keeps the board of directors advised when a change requires a Section 98 to be registered on title for the unit owner.

It is important to enforce Section 98 and boards must consistently and diligently enforce Section 98 of the Act and require all owners to comply. Section 98 is not optional. If one or more owners are allowed to make an unauthorized change to the common elements, this may encourage other owners to make the same or similar change without obtaining the board's prior approval. The board of directors, and we as property managers, will have a serious problem that will not be easy to correct. ■

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Report as of September 7, 2018

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