

Section 98 Agreements (Indemnity or Alteration Agreements)

What is it?

Section 98 of the *Condominium Act, 1998* (the "Act") requires an owner to satisfy prerequisites prior to making any addition, alteration or improvement ("change") to the common elements. The owner enters into an agreement with the condominium that:

1. allocates the cost of the proposed change between the condominium and owner;
2. sets out the respective duties of the condominium and owner for the change, including the cost of repair after damage, maintenance and insurance; and
3. other matters that the regulations require.

Currently, the regulations only require that the agreement specify who will have the ownership of the proposed change.

Section 98 agreements typically shift the duties for maintenance, repair and insurance to the owner. In exchange for approval from the board of directors the owners assume responsibility for the additional costs associated with the change made. In addition, the agreements usually cover all changes made, whether in the past or in the future, as long as the owner obtains approval from the board of directors.

What about board approval?

No change may be made to the common elements by an owner without the prior approval of the board.

In reviewing a request for approval, the board must consider whether notice must be provided to the owners as if the change was a made by the condominium under section 97 of the Act. For changes to the exclusive use common elements, the board does not need to comply with section 97 of the Act if it is satisfied that the change:

- (a) will not have an adverse effect on units owned by other owners;
- (b) will not give rise to any expense to the condominium;
- (c) will not detract from the appearance of buildings on the property;
- (d) will not affect the structural integrity of buildings according to an engineer if there is a change to the structure;
- (e) will not contravene the declaration, by-laws or rules; and
- (f) will not have an adverse effect on the rest of the common elements.

What are the options?

A single unit owner may enter into an agreement with the condominium to cover any approved change to the common elements. The main advantage of single owner agreements is that they can be tailored to the circumstances. With significant changes, such as an in-ground pool or elevator, it might be appropriate to attach sketches or specifications from the contractor or engineer to clearly identify the changes being made by the owner. This can help reduce disputes later over what is covered by the agreement.

A "bulk" or "group" agreement allows multiple owners to enter into one agreement with the condominium. Sometimes it is a handful of owners; other times it is all of the owners. The main advantage of these agreements is that they allow a group of owners to share the costs of preparing and registering the agreements so the cost per unit is normally much less than a single unit agreement.

What is involved?

The process for preparing the agreements depends upon the type of agreement, the number of participants, and the work already completed by the manager or board.

In general, the process begins with drafting the agreement. Sometimes the agreements will contain a list of changes that are covered by the agreement. Any change that is not listed would require another agreement. Sometimes the agreements cover any change approved by the board of directors.

Once the board is satisfied with the agreement it is sent to the owners. Any owner wishing to participate will sign the agreement or a signature page. The board will sign for the condominium.

Once all of the parties have signed the agreement it will be registered on title to all of the participating units. A copy is then sent to all parties. It is worth noting that the agreement is not binding upon future owners of the unit until it is registered on title to the unit in the local Land Registry Office.

Enforcement

Like other types of agreements, the parties must voluntarily enter into the agreement. As such, the condominium cannot force an owner to enter into an agreement if the owner has made changes in the past. Where an owner refuses to enter into an agreement and they have made changes to the common elements the condominium could commence an application to the Superior Court of Justice for an order requiring the owner to remove the change. Where an agreement exists between the condominium and an owner, a court application may be appropriate, but mediation/arbitration may be required by section 132 of the Act. A legal opinion should be sought from the condominium's lawyer to determine the most appropriate route.

For more information or to obtain an estimate of the costs involved, please contact Michelle Kelly at michelle@sutherlandkelly.com.

Related provisions: Section 98 of the Act.