

Loss Control Bulletin

Land Surveyors

Professional Liability Insurance

Condominium Title Issues in British Columbia and Alberta

by Gary Brooke, Founding Partner, Brooke Jackson Downs, Salmon Arm, British Columbia* and Olivia Colic, Partner, Gowling Lafleur Henderson LLP, Calgary, Alberta**

Introduction and Summary
by Stephen J. Black, B.Sc.
Claims Analyst, ENCON Group Inc.

Introduction
Recent claims in Alberta and British Columbia involving condominium plans have identified a significant recurring title issue that requires attention. While there have been occasional claims involving legal boundary determinations, there have been a significant number of claims both in Alberta and British Columbia related to unit entitlement calculation errors. These errors can result in complex claims for compensation due to differences in the unit entitlement. These can be either for excess property taxes and condominium fees or lost property value. A possible root cause for these errors in British Columbia is that there are now major differences in how the unit entitlement can be calculated under the Strata Properties Act as compared to the old Condominium Act. In phased developments which started under the old Condominium Act, this is a concern that must be addressed. A factor for practitioners who practise in both provinces to consider is whether parking stalls are included as part of the unit entitlement. It is important for all practitioners to ensure that the unit entitlement information shown on all condominium plans is accurate.

Gary Brooke, of Brooke Jackson Downs in Salmon Arm, British Columbia, has prepared a review of the issue, which is followed by a summary of the Condominium Plan Amendments in Alberta, prepared by Olivia Colic of Gowling Lafleur Henderson LLP in Calgary, Alberta.

Calculation of Unit Entitlement in Phased Strata Plans in British Columbia

by Gary Brooke

This Bulletin is intended to alert land surveyors in British Columbia to issues and potential claims which might arise in relation to the calculation of unit entitlement in phased strata plans which were commenced when the *Condominium Act* was in force, namely prior to July 1, 2000. In that regard, it is important to keep in mind that Section 17.17 of the Regulations to the *Strata Property Act* requires that strata plans for all phases in a phased strata plan be prepared in accordance with the *Condominium Act* if at least the first phase of the phased strata plan was deposited at the land title office when that statute was in force. This means that strata plans for subsequent phases must include a calculation of unit entitlement using Form 1 rather than the now more familiar Form V. As well, the Form 1 must be approved by the Superintendent of Real Estate (the "Superintendent").

The *Condominium Act* provides scant guidance as to the manner in which unit entitlement is to be calculated. Paragraph 1 (3) allows an owner-developer to choose to make that calculation based on the size of the strata lot relative to the size of all of the strata lots in the strata plan, or based on some alternative calculation. Regardless of the methodology, it is a requirement, as stated in paragraph 1 (2), that the calculation be acceptable to the Superintendent.

To reference our archive of loss prevention materials, claims examples and detailed product information, please go to our website – www.encon.ca.

Program Sponsors

Canadian Council of
Land Surveyors

Jardine Lloyd Thompson
Canada

ENCON Group Inc.

This publication has been prepared for general information use. It should not be relied upon as legal advice or legal opinion with respect to any specific factual circumstances.

Land Surveyors

Condominium Title Issues in British Columbia and Alberta

The Superintendent, as a consequence of this statutory obligation, issued Policy Statement 4 on November 1, 1984, which requires, among other things, that the calculation of unit entitlement reflect “habitable area” and that it does not include such improvements as “patios, balconies, parking stalls or storage areas apart from closet space.” Policy Statement 4 also states that an alternative formula will be considered if it results in a more “equitable” determination of the manner in which common expenses will be shared.

It is noteworthy that Policy Statement 4 refers to “parking stalls” but does not make any reference to “garages.” By contrast, Section 246 of the *Strata Property Act*, which deals with the manner in which unit entitlement is to be calculated, makes reference to “habitable area,” a term which is further defined by Section 14.2 of the Regulation to reference the portion of the strata lot “which can be lived in” but which excludes “patios, balconies, garages, parking stalls or storage areas other than closet space.” It is essential that land surveyors be aware of the distinction between Policy Statement 4 and the *Strata Property Act* on the issue of whether or not garages are to be included in the calculation of unit entitlement.

A land surveyor who is instructed by an owner-developer to prepare a strata plan in a phased strata development commenced under the *Condominium Act*, should, at the outset, review all of the strata plans previously filed to determine the manner in which unit entitlement was previously calculated and, in particular, whether or not garages were included in that calculation. If the land surveyor determines that garages were included in that calculation in some but not all previous phases, the land surveyor should consider performing an on site inspection to determine if there is any evidence of any change to the buildings shown on the strata plan. For instance, some of the buildings may have included carports rather than garages, in which case the area of the carports would not have been used to calculate unit entitlement. However, the owners of those units may, subsequent to the filing of the strata plan, have closed in those carports and converted them to garages or to some other use, which would have meant that the area would have been part of the calculation of unit entitlement had the improvement been made when the strata plan was originally prepared. In this event, it

is highly unlikely that these owners are paying strata fees based on the area which has been altered. It is not the duty of the land surveyor to address this situation directly. However, the land surveyor should be aware of any such circumstance in case it becomes an issue with respect to subsequent dealings between the owner-developer and the owners of existing units.

If units constructed in previous phases include garages, and if those garages were included in the calculation of unit entitlement, it is appropriate that the land surveyor set out a similar calculation in any new strata plan. This may seem counter-intuitive to a land surveyor who has prepared strata plans under the *Strata Property Act*, and who will be comfortable with the concept that garages are not to be included as habitable area. Proceeding in this fashion is, however, consistent with the requirements of the *Condominium Act*, and will ensure an equitable division of common expenses, thereby meeting the stated objective of Policy Statement 4. More importantly, from the point of view of the land surveyor, proceeding in this manner should ensure that there are no contentious issues between the owner-developer and the existing owners with respect to the calculation of unit entitlement.

The land surveyor may face challenges in a circumstance in which the owner-developer, for whatever reason, does not have a good working relationship with the existing owners. This will be particularly true if the owner-developer was not the owner-developer with respect to previous phases, or if the owner-developer wishes to construct units which are substantially different from those in previous phases. For instance, the owner-developer may wish to construct larger units and may instruct the land surveyor not to include the area of garages in the calculation of unit entitlement, either because the owner-developer thinks that it is appropriate to exclude garages from that calculation or because the owner-developer wishes to keep strata fees as low as possible. The land surveyor, in this instance, must ensure that the owner-developer is aware of the manner in which unit entitlement has been calculated in previous phases. The land surveyor must also ensure that the owner-developer is made aware of the potential for conflict with existing owners if there is any departure from the manner in which unit entitlement is calculated.

It is also important that the land surveyor advise the owner-developer if there have been any alterations to buildings constructed in previous phases without a corresponding amendment to the strata plan. This is not to suggest that the owner-developer is necessarily responsible for this circumstance. However, the owner-developer needs to be made aware that there may not have been any informal reallocation of payment of common expenses to reflect these alterations. Thus, if the calculation of unit entitlement becomes an issue between the owner-developer and the existing owners, there is a real likelihood that the issue will be complicated by potential disputes among the existing strata owners which may make it all the more difficult to address issues which relate to the calculation of unit entitlement in the upcoming strata plan.

Any potential for conflict between the owner-developer and the existing owners – with respect to issues relating to the calculation of unit entitlement – should be identified as soon as possible by the land surveyor. The land surveyor should encourage the owner-developer to deal directly with the existing owners with a view to having such issues resolved in a manner which is cost-effective and satisfactory to both parties. The land surveyor will be able to assist in this process by providing accurate information and guidance as to the technical requirements involved in the calculation of unit entitlement.

It is important, from the point of view of the land surveyor, that discussions be initiated as soon as possible. If a dispute does arise and if it is not quickly resolved, there is every likelihood that it will be alleged that the land surveyor, as the professional who prepared the strata plan, has made an error which is the cause of the dispute. This will particularly be the case if either the owner-developer or the existing owners have incurred expenses related to addressing the issues at hand. The aggrieved party may feel, rightly or wrongly, that such expenses would not have been incurred had it not been for the alleged error on the part of the land surveyor and it is possible that a claim may be advanced against the land surveyor in that regard. In such circumstances, it will be difficult if not impossible, for the land surveyor to assist with any resolution of the dispute at hand.

The land surveyor who is instructed to prepare a strata plan in circumstances in which the Condominium Act applies must be properly informed

at the outset as to the manner in which unit entitlement is to be calculated. The land surveyor must also be familiar with the manner in which unit entitlement was calculated in survey plans which were previously filed and must make reasonable efforts to identify any potential discrepancies in the manner in which common expenses have been apportioned among existing owners. In these circumstances, the land surveyor will be in a position to provide suitable advice and recommendations to the owner-developer which should greatly reduce, if not eliminate, the potential for conflict between the owner-developer and the existing owners and, as a result, the potential for any claim against the land surveyor.

Condominium Plan Amendments in Alberta

by Olivia Colic

The authority to amend a condominium plan is set out under section 18 of the *Condominium Act*, R.S.A. 2000, c. C-22 (the “Act”) which states that a condominium plan may be amended in accordance with the regulations. The Condominium Property Regulation (168/2000) (the “Regulations”) sets out the process for amending condominium plans in Part 8. With respect to errors on plans, Part 8 deals with all amendments except where the owners of a condominium corporation wish to re-divide the units or consolidate 2 or more units. In this event, the provisions of Part 5 of the Regulations apply.

Section 71(1) under Part 8 of the Regulations provides a condominium corporation may register an amendment to a condominium plan if the following requirements have been met:

- (a) A special resolution has been passed by the corporation.
- (b) In the case of an amendment that relates to any alteration of the boundaries of the entire condominium parcel, the amendment must be accompanied by a certificate of a land surveyor confirming the boundaries have been properly established and there are no encroachments from adjoining properties (or if there are encroachments, then confirmation that easements have been obtained).

- (c) In the case of an amendment that relates to a change to the location of the building, or any portion of the building, the amendment must be accompanied by a certificate of a land surveyor stating that the building on the amended plan is within the external boundaries of the parcel and if there are any encroachments into adjoining lands, an easement has been obtained.
- (d) In the case of an amendment that relates to a change in the units, the amendment must be accompanied by a certificate of an architect, engineer or land surveyor stating that the change to the units has in fact taken place or will become effective upon the registration of the amendment.
- (e) In the case of an amendment that relates to a change in the common property, the amendment must be accompanied by a certificate of an architect, engineer or land surveyor stating the change to the common property has in fact taken place or will become effective on the registration of the amendment.
- (f) In the case of an amendment that relates to a matter that needs municipal approval, the amendment is accompanied by a certificate of the municipal authority stating that approval has been given.
- (g) The Court has approved the amendment and any conditions imposed by the Court have been complied with.

Where the condominium corporation has applied to the Court for an order approving an amendment, the corporation must give notice of the application to the unit owners and to each holder of a registered encumbrance. The Court may waive this requirement for notice, and may also waive the requirement for a certificate referred to in (b) to (f) above. The Court may approve the amendment where the Court is satisfied that unit owners and holders of registered encumbrances will not be unfairly prejudiced by the amendment. The Court may also impose conditions as it considers appropriate in the circumstances.

Please note that in Alberta entitlement to parking for unit owners can be addressed in two ways. The parking facility can be part of the common property, in which case, the condominium corporation grants licenses to the unit owners to park their vehicles in the common property. Alternatively, separate units (with separate titles) for parking stalls can be created in the condominium plan, in which case title to one or more parking units will also be held by each unit owner. The bylaws would typically set out rules with respect to transferring parking units to ensure they are transferred only in connection with a transfer of the unit.

Summary

The process for determining unit entitlements when either completing or amending condominium plans is very complex in both Alberta and British Columbia. The replacement of the *Condominium Act* with the *Strata Properties Act* in British Columbia has created challenges for land surveyors completing phased condominium plans. In order to avoid possible errors, the land surveyor should review all previous plans to determine the manner in which unit entitlement was previously calculated. This may require the land surveyor to advise the owner-developer as to the process in order to try to avoid claims from the existing owners. The amendment process in Alberta is also quite complex and parking entitlement can be determined by either including the parking within the common elements or by creating separate titles. It is vital that land surveyors clearly understand the regulatory process in either province prior to undertaking condominium surveys in order to avoid claims.

*** Gary Brooke, Founding Partner, Brooke Jackson Downs**

Gary is a founding partner of the firm and practises as a solicitor with an emphasis on real estate and estate matters. Gary has had extensive experience in real estate conveyancing and mortgage work, and in real estate development including conventional and strata property subdivisions.

**** Olivia Colic, Partner, Gowling Lafleur Henderson LLP**

Olivia Colic is a partner in the Calgary office, practising in the area of commercial real estate with an emphasis on all issues related to the management and operation of commercial properties, including sale, purchase, development, finance and leasing.



ENCON Group Inc.
 Telephone 613-786-2000
 Facsimile 613-786-2001
 Toll Free 800-267-6684
 www.encon.ca